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Flowing from the *Mapp* case is the issue of defining probable cause to constitute a lawful arrest and subsequent search and seizure.[70]

Doesn't this issue flow from the Fourth Amendment itself? Isn't that what the Fourth Amendment is all about?

The police reaction to *Mapp* demonstrates the unsoundness of the underlying premise of *Defore*. Otherwise why, at a post-Mapp training session on the law of search and seizure, would Leonard Reisman, then the New York City Deputy Police Commissioner in charge of legal matters, comment:

The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a

70. *Id.* at 943. For similar reaction to Mapp by other law enforcement officials, *see* Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 440–43 (1964).

More recently, an American political scientist furnished examples of "zealous legislative oversight" of the police of Scotland, Sweden, West Germany and France, indicating that it is still "good politics" in many European countries to observe civil liberties.[8] It was noted, too, that "[c]ivilians do not just oversee but actually run most European police departments";[9] that several European countries reserve hundreds of positions for lawyers who are recruited directly into the upper ranks[10]; that "European police departments place much more emphasis on education"[11]; and that some European countries actually encourage complaints against police and, not infrequently, sustain them.[12]

Canada's differences

How do other countries control their police without the exclusionary rule? At least with respect to Canada, Professor Oaks offers explicit answers,[13] but his answers do not demonstrate the "irrationality" of the rule in the American setting. Rather, they indicate why Canada may not need an exclusionary rule, but why the United States still does.

First, "police discipline is relatively common . . . Second, police officers are occasionally prosecuted for criminal misconduct occurring in the course of their official duties." Oaks considers a third factor perhaps most important of all: ". . . an aggrieved person's tort cause of action against an offending police officer is a real rather than just a theoretical remedy . . ."

But he suggests that the difference is more than simply the remedies. "[P]olice are greatly concerned about obeying the rules and very sensitive to and quick to be influenced by judicial criticism of their conduct," he writes. And Canadian prosecutors play a different role from that of American prosecutors. A prosecutor there "will sometimes exercise what he considers to be his teaching function with the police by refusing to introduce evidence that he considers to have been improperly obtained." Moreover, "Canadian prosecutors are part of the Ministry of Justice, which has . . . command authority over most of the police organizations . . ." and channels by which to correct offensive practices. —*Y.K.*

8. Berkley, *Europe and America: How the Police Work*, THE NEW REPUBLIC, Aug. 2, 1969, in A. Niederhoffer & A. Blumberg, eds., THE AMBIVALENT FORCE: PERSPECTIVES ON THE POLICE 51, Hindale, Ill: Dryden Press 2d ed. 1976.

9. *Id.* at 50.

10. *Id.* at 49.

11. *Id.*

12. "German police departments set up special booths at public events, asking visitors to make complaints. The number of complaints against policemen in such cities as London and Berlin far exceeds the number filed against policemen in New York City. And a much higher ratio of complaints is sustained, nearly 20 per cent in West Berlin." *Id.* at 51.

13. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 702–03, 705–06 (1970). Canada, of course, "has no written law comparable to the fourth amendment prohibition against unreasonable searches and seizures." *Id.* at 704.

warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?[71]

No incentive for change

As I have already indicated, critics of the exclusionary rule have often made proposals for effectuating the Fourth Amendment by means other than the exclusionary rule—but almost always as a *quid pro quo* for rejecting or repealing the rule. Who has ever heard of a police-prosecution spokesman urging—or a law enforcement group supporting—an effective "direct remedy" for illegal searches and seizures in a jurisdiction which *admitted* illegally seized evidence?[72] Abandoning the exclusionary rule without waiting for a meaningful alternative (as Judge Wilkey and Chief Justice Burger would have us do) will not furnish an incentive for devising an alternative, but *relieve* whatever pressure there now exists for doing so.

I spoke in my earlier article of the great symbolic value of the exclusionary rule (pages 69-72, 83-84). Abolition of the exclusionary rule, after the long, bitter struggle to attain it, would be even more important as a symbol.

During the 12-year reign of *Wolf*, some state judges

> remained mindful of the cogent reasons for the admission of illegally obtained evidence and clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule.[73]

Their hope proved to be in vain. *Wolf* established the "underlying constitutional doctrine" that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers"[74] (though it did not require exclusion of the resulting evidence); *Irvine* warned that if the states "defaulted and there were no demonstrably effective deterrents to unreasonable searches and seizures in lieu of the exclusionary rule, the Supreme Court might yet decide that they had not complied with 'minimal standards' of due process."[75] But neither *Wolf* nor *Irvine* stimulated a single state legislature or a single law enforcement agency to demonstrate that the problem could be handled in other ways.

The disappointing 12 years between *Wolf* and *Mapp* give added weight to Francis Allen's thoughtful commentary on the *Wolf* case at the time it was handed down:

> This deference to local authority revealed in the *Wolf* case stands in marked contrast to the position of the court in other cases arising within the last decade involving rights 'basic to a free society.' It seems safe to assert that in no other area of civil liberties litigation is there evidence that the court has construed the obligations of federalism to require so high a degree of judicial self-abnegation.
>
> . . . [I]n no other area in the civil liberties has the court felt justified in trusting to public protest for protection of basic personal rights. Indeed, since the rights of privacy are usually asserted by those charged with crime and since the demands of efficient law enforcement are so insistent, it would seem that reliance on public opinion in these cases can be less justified than in almost any other . . . [76]

Now Judge Wilkey asks us to believe that the resurrection of *Wolf* (and evidently the overruling of the 65-year-old *Weeks* case as well) will permit "the laboratories of our 51 jurisdictions" to produce meaningful alternatives to the exclusionary rule. (Again, see text following note 48). His ideological ally, Chief Justice Burger, is even more optimistic. He asks us to believe that a return to the pre-exclusionary rule days "would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistakes or misconduct."[77]

And to think that Judge Wilkey (on page 232) accuses *defenders* of the exclusionary rule of being "stubbornly blind to 65 years of experience"! □

71. N.Y. Times, April 26, 1965, p. 50.
72. Before the *Cahan* decision "[l]aw enforcement groups preferred the ambiguity of seldom-litigated rules and had no real incentive to take the risks involved in seeking legislative action. And there was little evidence that other groups would take the initiative to force the police to come before the legislature." Barrett, *supra* n. 56, at 592-595.
73. Traynor, *supra* n. 2, at 324.
74. Elkins v. United States, 364 U.S. 206, 213 (1960) (the Court, per Stewart, J., describing *Wolf*).
75. Traynor, *supra* n. 2, at 324.
76. Allen, *supra* n. 47 at 11, 12-13.
77. Stone v. Powell, 428 U.S. 465, 496, 501 (1976) (dissenting).

A call for alternatives to the exclusionary rule: let Congress and the trial courts speak

by Malcolm Richard Wilkey

In comparison with Professor Kamisar's response to my criticisms of the exclusionary rule, my comments will be brief. Essentially, I am content to rest on the affirmative case for reform stated in my original article.

It is obvious, although he does not specifically say so, that Professor Kamisar chooses to defend his position on the second of the two grounds which I posited as his inevitable choices. Thus, he does not claim that the Fourth Amendment necessarily mandates the exclusionary rule; he says only that, under the Constitution, we have a choice of methods to enforce the ban against unreasonable searches and seizures and that the exclusionary rule is the best choice.

If there is to be a choice, however, there must be grounds for a choice. Indisputably valid and convincing evidence cannot be excluded on whim, fancy, or unproven theory. The burden of proof is on those like Professor Kamisar, who would exclude such evidence. No one, not even Professor Kamisar, has come forward with such proof.

Oaks' conclusion of 1970 is still uncontradicted:

> [T]oday, more than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed upon the state courts, there is still no convincing evidence to verify the actual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness.[1]

At the same time, however, Oaks did refute Professor Kamisar:

> Kamisar is merely saying what the Supreme Court and a considerable number of scholars have said over and over again, that in the absence of any better alternative, we are willing to take the deterrent effect of the exclusionary rule solely on the basis of assumption.
>
> In sum, the rhetoric concerning the factual basis for the exclusionary rule amounts to no more than 'fig-leaf phrases used to cover naked ignorance.'[2]

I submit that whatever the merits of his second article in emphasizing the complexities of the problem, Kamisar has not made a case for deliberately choosing the exclusionary rule over the available alternatives.

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1. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 672 (1970).
2. *Id.* at 678.

Moving toward alternatives

It is the downplaying of available alternatives that I find most distressing in Professor Kamisar's position. He argues that "*for many decades* a majority of the states had no exclusionary rule but *none of them* developed any meaningful alternative" (page 346). He even dredges up an ancient dilemma—the policeman is liable but financially irresponsible while the state or municipality has financial responsibility but no liability. This ignores the great erosion in the law of sovereign immunity which has occurred, and the capacity of Congress to speak effectively about it.

I do not really know whether any "meaningful" alternative to the exclusionary rule emerged in any of the states prior to *Mapp*, but I do suggest that, wherever we have been and wherever we want to go, we start from where we are now. I propose Congressional action to provide meaningful alternatives to the exclusionary rule. Congress could directly provide federal remedies, and indirectly permit and encourage the states to provide the same or alternative remedies. In other words, the exclusionary rule could be abolished now, conditioned on the enactment of acceptable alternatives.

I would prefer to see the exclusionary rule abolished conditionally with alternatives provided simultaneously, but I urge abolition in any case. I do so because the rule is pernicious in its present form, and I am confident that more attractive alternatives would speedily emerge.

At the outset of my original article (pages 217-218), I discussed the question of who should act first, the Supreme Court or Congress. If Congress seizes the initiative, it could simultaneously provide a federal alternative and condition abolition of the rule in the states on their providing an equal remedy. If the Supreme Court acted first, I believe Congress would act speedily to fill the gap with a federal remedy.

Therefore, I respectfully suggest to Professor Kamisar that he has not met the issue squarely: he has given us some history; quotations from almost everyone of prominence who has endorsed the rule; and some crime statistics whose current or past relevance is not immediately apparent.[3] But he has not analyzed the practical working of the present exclusionary rule as compared to the excellent possibilities for logical reform inherent in the proposals I made.

The multiple causes of crime and the empirical data

In his discussions of the crime rate and the exclusionary rule and guns and the exclusionary rule, Professor Kamisar generally indicates that I attribute all crime, or all crime with handguns, or all crime rate differences, to the presence or absence of the exclusionary rule. Such a position appears easy to refute by statistics, which necessarily embrace the effect of many factors.

Congress could provide alternatives to the exclusionary rule and encourage the states to do the same.

For example, it is no surprise to me that crime did not decrease in Michigan from 1963 to 1970—a period in which the state, in effect, abolished the exclusionary rule. The fact is that crime increased *everywhere* during the turbulent 60s, and no one could expect that abolishing the rule would give Michigan immunity from the nationwide epidemic.

Actually, as Professor Kamisar quoted but failed to recognize, I referred to the "huge social cost . . . of street crimes . . . which flourish *in no small degree* simply because of the exclusionary rule . . ." (page 215). I

3. On the pitfalls of statistics in this field, see Oaks, *supra* n. 1, at 687-89, 712-16.

did not rule out other factors here, as I did not rule out other factors in the comparison of the United States and other countries. It may well be, as Chief Justice Burger has suggested, that the effect of the exclusionary rule is not readily susceptiable to empirical proof.[4] But I submit that logically we all recognize that the effects of the exclusionary rule, by its presence or absence, must be there in some degree in the various ways that I have described them. The available empirical data tends strongly to support this idea,[5] but obviously selective opposing arguments can be made.

Even if abolishing the rule resulted in minimal effect on the number of illegal searches, and even if the presence or absence of the rule has no discernible effect on the overall crime rate, is this an argument in support of an irrational system of freeing criminals from punishment? This is the most visible, undeniable effect of the exclusionary rule, and one which brings the entire system of justice into disrepute.

Unreasonable searches— the level of probable cause

Whether Professor Kamisar's question—"Are we talking about the impact of the exclusionary rule or the impact of the Fourth Amendment itself?"—reflects confusion in my mind or his, I leave to the reader. But by all means, let us try to set the matter straight. Professor Kamisar asserts, "Abolishing the rule would not confer a right on our police to search 'on the slightest suspicion'—or affect lawful police practices in any way. Only a change in the substantive laws of search and seizure can do that." And, earlier, he maintains that I have made "really an attack on the constitutional guaranty itself, not the exclusionary rule."

I thought I had made it perfectly clear (page 224, note 2) in "How the exclusionary rule hampers gun control" that there were two separate issues: (1) the exclusionary rule as an enforcement tool for the Fourth Amendment, and (2) the standard of probable cause for a valid search and seizure. As I said in that footnote,

> I am not suggesting that abolishing the rule will result in a wholesale abandonment of any standard of probable cause for a valid search. Not at all. The standard of probable cause required is a totally different issue, one that I do not specifically address in this article.

I went on to explain why, even without a change in the standard of probable cause, but after the abolition of the exclusionary rule, we may expect fewer illegal searches but more successful prosecutions.

But since Professor Kamisar has raised the second issue by implying that I included it in the one which I addressed, I must ask: what is the "constitutional guaranty itself"? (which I have not attacked, but rather, seek to implement more effectively). That guaranty is "the right of the people to be secure . . . against unreasonable searches and seizures." What makes a search unreasonable is the absence of sufficient probable cause to justify the search. Therefore, the level of probable cause required determines the permissible conduct of the police.

I made and make no effort to cite literally hundreds of cases in which the standard of probable cause required by the courts, particularly the appellate courts, was so high and unreasonable as to appear absurd, silly, and fatuous to layman and lawyer alike. I do not make that effort because I am firmly

4. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). *Cf.* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 667 (1970) (available data inconclusive on proposition that exclusionary rule discourages illegal searches and seizures).

5. My position is congruent with that set forth in Oaks' article, *supra* n. 4 at 755-56. Recognizing the limitations of the available empirical data, he labelled his final section "Postscript" (not "Conclusion") and carefully stated:

"This postscript draws upon that evidence, but it brushes past the uncertainties identified in the discussion of the data and makes some assertions that are not fully supported by it. What follows is an argument, not a conclusion. The exclusionary rule should be abolished, but not quite yet. [It fails in] deterring illegal searches and seizures by the police. . . [It] imposes excessive costs on the criminal justice system . . .

"Despite these weaknesses and disadvantages, the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. [It] should be replaced by an effective tort remedy against the offending officer or his employer. . . ."

(Two political scientists—Bradley Canon and Steven Schlesinger—will discuss empirical studies on the effects of the exclusionary rule in *Judicature* next month.)

convinced that, whatever standard of probable cause is employed, the exclusionary rule is both an ineffective and pernicious remedy for any violation of the constitutional right, no matter how defined.

The need for a new standard

Having taken the time to make this dichotomy of issues clear, I want to emphasize that the definition of "unreasonable searches and seizures" is nowhere found in the Constitution. It has been a matter for the courts to decide, and it could be a matter for Congress. I go back to former Solicitor General Griswold's principle on seeking certiorari: "If the police officer acted decently, and if he did what you would expect a good, careful, conscientious police officer to do under the circumstances, then he should be supported."[6]

Dean Griswold did not assert, and neither do I, that this would be sufficient for a judicial standard, but it surely is not beyond the realm of possibility for Congress to define a standard of reasonable search and seizure, i.e., the level of probable cause required, in terms which would meet more common sense standards than what we find in many appellate decisions. Such a definition by Congress of what is a reasonable and an unreasonable search and seizure might be buttressed in the legislative history by a recital of some representative cases which

6. Erwin N. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT (1975). I cited Griswold in my first article at 219 n. 9.

Comparisons with other countries

Why is everyone out of step except my Uncle Sam?

In his effort to validate the unique American rule by the uniqueness of America, Professor Kamisar inadvertently gives the reforms I advocate a strong push forward. Far from parting company with Professors Schlesinger and Oaks, I can certainly agree "that there may be no comparable need for the exclusionary rule in Canada and Western European countries." The fundamental question is why.

I would say that any "need" for the exclusionary rule arises because of our failure intelligently and vigorously to pursue other methods of enforcing the Fourth Amendment to protect the privacy of individuals and to control the police. That "need" arises in the same way the need for sleeping pills frequently arises—the neglect of proper exercise, a moderate diet, and regular hours of work, eating, and sleeping—and the rule is about as ineffective and habit-forming as those pills.

In regard to Canada, Kamisar repeats Oaks' answer to my question: "How do other countries manage to control their police without relying on the exclusionary rule?". Oaks' answer—which Kamisar quotes in his article and which I discuss below—reinforces the very points I made in my article. Kamisar underlines "the American setting" as being different. He is right. But why is it different? One vital reason is that Canada never went the route of the exclusionary rule. It has relied on other methods of controlling police and protecting the privacy of individuals—precisely the methods I advocated in my article.

- Canada pursues police discipline seriously, as Kamisar says. Police discipline will never be pursued seriously in the United States so long as disciplining officers for infractions will inevitably prove the Fourth Amendment violation and bar the use of the evidence in a prosecution. (See pages 226-227 of my first article).
- Canada prosecutes police officers for criminal misconduct, as Kamisar notes. This is exactly what I propose should happen, not

have required utterly absurd levels of probable cause and which no longer could be considered as governing precedent in light of the new statutory standard. In determining such a statutory standard of "reasonableness," which is always Congress's prerogative, Congress might look at our own experience and mores as well as the standards of probable cause for search and seizure used in other civilized nations with cultures similar to our own.

As the Court said only a few years ago, "It is clear, of course, that no Act of Congress can authorize a violation of the Constitution.[7] It is equally apparent that Congress may, in the first instance, describe for purposes of law enforcement such things as what may give rise to "probable cause" and when a warrant may be dispensed with.[8] Statutory characterizations of constitutional provisions will be subject to judicial review, of course, to assure harmony with the judicial understanding of the constitutional requirements, but a prior legislative determination might appropriately inform the content of such open-ended language as "unreasonable" and "probable cause."[9]

Let me emphasize, though, that this review of the standard of reasonableness, i.e., the requisite level of probable cause, should not be made, if at all, until after we have abolished the exclusionary rule and gained some experience with alternative methods of protecting the privacy of individuals and controlling the police. What is "reasonable" is always a function of past experience applied to present time, place, and circumstances. We need to see how the police operate under a new dispensation and how the courts construe "probable cause" without the overhanging distortion of the exclusionary rule threatening to free undeniably guilty criminals. Only then can we, if need be, evaluate the standard of reasonableness and probable cause.

Making hypocrites of judges

The suggestion for a possible later examination of the level of probable cause to constitute a reasonable search and seizure is, as I have painfully tried to make clear, an issue separate and distinct from retaining or abolishing the exclusionary rule itself. But, while adding to thoughts for reform previously expressed, I should convey the first reaction I received to my original article. A state court judge whom I have never met called to say that, although he agreed completely with me, I had overlooked one most salient vice of the exclusionary rule—that not only the police but also the judges are

7. Almeida Sanchez v. United States, 413 U.S. 266, 272 (1973).

8. *See* 18 U.S.C. §2518(7) (authorizing warrantless wiretaps in specific circumstances).

9. *Cf.* Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483, 4486 (U.S. 23 May 1978) (probable cause to conduct an administrative search may be based on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].").

occasionally but every time, with the punishment meted out to equate with the seriousness of the offense (pages 230–32).

- Canada makes an aggrieved person's tort cause of action a real remedy, not a theoretical one, as Kamisar writes. This is exactly what I advocate (page 231).
- Canadian prosecutors are part of the Ministry of Justice, which exercises direct command authority over most of the police organizations, as Kamisar tells us. Again, as I pointed out before (page 220), this illustrates the total illogic of an exclusionary rule in the United States where the "punishment" of excluding the evidence really affects the prosecutor, not the police officer or his own separate command organization. Obviously, it would be more logical to employ the exclusionary rule in Canada, where the exclusion of evidence theoretically might have an impact on the command organization which controls both the prosecutor and the police.

All in all, while granting whatever historical and ethnic differences there are between Canada (and the other British Commonwealth countries) and the United States, the differences in this area of law enforcement basically result from our having chosen methods of enforcement different from Canada and the rest of the civilized world. □

—M.R.W.

corrupted by the exclusionary rule. Another state court trial judge made this same point in a letter.

Time and time again, we are told, trial judges are blatantly hypocritical in construing the Fourth Amendment's definition of an unreasonable search and seizure because they know full well that the illogical penalty of total exclusion of evidence is damaging to the cause of justice. If the evidence were to be admitted anyway, the trial judge would not hesitate to point out the errors of the police, and if penalties were authorized, to impose such penalties on the erring officer. But he does not do it because, conscious of the safety and welfare of the community, and sharing a very righteous indignation against a proven law violator, the trial judge thinks the criminal should not escape unpunished.

It is an illogical penalty to exclude the evidence totally, and it is damaging to the cause of justice.

Not only is this a corruptive influence on trial judges, and an unnecessary burden on the appellate court to correct these errors, but it demonstrates that the number of illegal searches, accurately analyzed, is greater than those recorded in the case books. If the disproportionate penalty of exclusion and bar to prosecution were not the inevitable result of declaring that the police had erred, trial judges would have no motive to call it other than it is, and the police would be criticized—we hope constructively—more than they are now. Abolishing the exclusionary rule as a penalty would make possible a truer measurement of the short-comings of the police, and the proper measures could be taken to correct them.

That trial judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community, I have no doubt. It is regrettable, and we should rid ourselves of this hypocrisy. The only way to do so is to get rid of the exclusionary rule and its baneful influence, and to set up a system which will permit the courts to deal honestly and separately with both the criminal and the police.

Polling the trial judges

My first caller about the original article claimed that "90 per cent of the judges would agree with you, too." I don't know if his estimate is correct—it would appear a polite, if hopeful, exaggeration—but I would expect and hope that a majority of judges would find themselves in general agreement with my views. In any case, I think we should find out—not what judges think about my views, but what judges think about the exclusionary rule.

Reliable empirical data is very hard to come by, and, indeed, final conclusions on empirical data may be logically impossible. Therefore, informed opinion assumes greater importance, and the most reliable opinions as to the efficacy and desirability of the exclusionary rule would be those of state and federal trial judges. The Federal Judicial Center, the National Center for State Courts or some other impartial research body should seek the views of each and every trial judge of general jurisdiction about the exclusionary rule, its impact, its applicability, its merits and demerits, its retention or abolition, and the viable alternatives of enforcing the Fourth Amendment.

While the views of academicians, police commissioners, appellate judges and laymen are entitled to respect, I know of no body of Americans more qualified to define and describe the role of the exclusionary rule in the administration of justice in our country than trial judges. They apply it and live with it day by day. They must know intimately the good and the bad features of the exclusionary rule as it exists in reality, not theory. They should be consulted. □

letters

The rule and judicial integrity

I have several comments to make in reaction to the debate over the exclusionary rule (August, November 1978; February 1979).

Judge Malcolm Wilkey's readiness to link the adoption of the exclusionary rule to the increase in the level of crime in the United States is highly questionable. Research indicates that the increase in crime in the last few decades is a world-wide phenomenon. Although the causes are not clear, the exclusionary rule does not seem to be a significant factor, since countries that never adopted the rule suffer from the same problem.

Another of Judge Wilkey's principal allegations is that the exclusionary rule damages judicial integrity. One wonders, however, what undermines the reputation of the judicial system more—the admission of illegally obtained evidence or its exclusion? What moral stance will the judicial system be taking if Judge Wilkey's solution is adopted? A judge will be condemning a policeman's misconduct, yet in the same legal process he will hear the policeman's testimony and declare admissible the fruits of his illegality.

The judicial process is not, as Judge Wilkey seems to think, *purely* a "truth seeking process" (November, page 222). Limitations on the testimony of relatives, rules against self-incrimination, and others indicate that the process is more accurately defined as a *limited* truth-seeking process. That is particularly true in the adversary system, which imposes most of its restrictions on the prosecution. These restrictions are usually connected with moral principles and human rights, and the adversary system assures their preservation.

The exclusionary rule is a meaningful measure in that context, helping to protect the right of privacy on the one hand, and the purity and morality of the legal system on the other.

Dr. Eliezer Lederman
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Search first, pay later?

In his discussions, "How the exclusionary rule hampers gun control" and "Do people object to airport searches?" (November, 1978), Judge Wilkey's complaint is not with the exclusionary rule, but with the Fourth Amendment.

When he states that the rule prevents the police from engaging in certain tactics which reduce gun violations, he is admitting that the tactics are now held by our courts to be unconstitutional. I hope he is not advocating that the way to deal with the gun problem is to obtain the necessary evidence through unlawful searches and then to recompense the defendant through a civil law suit.

Harris L. Hartz
Albuquerque, New Mexico

A follow-up on the debate over the exclusionary rule

The exclusionary rule does not significantly affect prosecutions in federal criminal cases, according to a new study by the General Accounting Office ("Impact of the Exclusionary Rule on Federal Criminal Prosecutions," GGD-79-45, April 19, 1979).

The project, which covered 42 of the 95 U.S. attorneys offices in the country, analyzed 2,804 cases in which defendants were likely to file motions to suppress evidence. The findings tend to contradict earlier studies, which indicated that courts were granting a high percentage of such motions.

- Evidence was excluded as a result of a Fourth Amendment motion to suppress in only 1.3 per cent of all cases, the new study said.
- Among defendants who go to trial and have a formal suppression hearing, courts deny "the overwhelming majority" of suppression motions (85 per cent in the larger jurisdictions).
- U.S. attorneys dropped prosecution in only 0.4 per cent of the cases because of Fourth Amendment search and seizure problems.
- Suppression motions were filed in 16 per cent of the cases.

The study was conducted by the GAO for Senate Judiciary Committee chairman Edward M. Kennedy (D-Mass.), who is working on a legislative alternative to the rule for some cases.

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

by Bradley Canon

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

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

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

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

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

1. Malcolm Richard Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 JUDICATURE 215 (November 1978).

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

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

The impact of Mapp

Indeed, taking Wilkey's argument to its logical conclusion, one would have to believe that we lived in a rather crime-free society before *Mapp* v. *Ohio* in 1961.[3] This of course is hardly the case. It was in the 1920's and 1930's, not the 1970's that Dillinger, Capone and other gangsters walked the streets carrying violin cases. It was in the 1950's, not the 1970's, when organized crime's involvement in gambling became so notorious that the Kefauver Committee made headlines for months investigating it. I argue not that there is less crime today than there was before *Mapp*, but Judge Wilkey's assertion that the incidence of crime is *related to* the exclusionary rule fails to withstand even the most modest scrutiny.

In this vein, in fact, I find it amazing that Wilkey imputes to criminals a detailed knowledge of the law of search and seizure. ("Criminals," he writes, "know the difficulties of the police in making a valid search which will stand up under challenge at trial."[4] No evidence is offered that criminals are so learned in the law and it seems quite anomalous to assume so, considering that search and seizure law is so confusing or uncertain that the nation's most prominent jurists and legal scholars have described it as a "quagmire,"[5] a "no man's land"[6] and a "course of true law [that] has not run smooth."[7]

Ironically, Chief Justice Burger, a staunch opponent of the exclusionary rule, argues that one of its disadvantages is that *policemen* do not understand the intricacies of search and seizure law and thus often make mistakes in search situations.[8] He may well be right on this point, but if so Judge Wilkey's 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

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

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

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

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

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

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

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

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

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

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

Replicating the Oak's study

Let us take a hard look at the empirical evidence. Wilkey argues that Dallin Oaks' study[10] is the "most comprehensive study ever undertaken"[11] on the subject. But Oaks' own research is devoted chiefly to drawing inferences about police behavior in Cincinnati from arrest records in search and seizure type crimes (largely gambling, narcotics, and weapons offenses) in the five or six years before and after *Mapp*.[12] It is a careful study and there is little doubt that the rule had only minimal impact on police behavior in Cincinnati immediately following *Mapp*. But it can hardly be considered comprehensive.

Few would be so bold as to join Judge Wilkey in claiming that police behavior in one city 15 years ago is representative of police behavior throughout the United States in 1978. Oaks himself freely admits that his study "obviously falls short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."[13] Indeed, Wilkey puts words in Oaks' mouth when he tells us that "Oaks concluded" that the exclusionary rule is a failure.[14] Oaks took pains to note that this assertion "is an argument, not a conclusion."[15]

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

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

Other studies

Schlesinger also briefly discusses Michael Ban's study of the use of search warrants in Cincinnati and Boston[18] and the Columbia Law School study of narcotics arrests in Manhattan following *Mapp*.[19] Ban found the annual use of search warrants rose from virtually zero to over 100 in Cincinnati

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

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

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

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

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

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

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

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

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

19. Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 Col. J.L. & Soc. Probs. 87 (1968); Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhattan Police Practices, 1960-62*, 4 Crim. L. Bull. 549 (1968).

while in Boston it went from about 100 to nearly 1,000.[20] He argued the Cincinnati figures are too low to represent wholehearted compliance with the Fourth Amendment—a conclusion that dovetails well with Oaks' Cincinnati findings. On the other hand, Ban concedes the Boston figures imply considerable if begrudging police compliance.

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

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

A recent survey

In 1973 I sent questionnaires to police departments, prosecutors and public defenders in all American cities with populations of more than 100,000.[22] I asked whether then current search and seizure practices differed from those prevalent in 1967 and, if so, how.

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

- Four-fifths of them reported the use of search warrants was more than 50 per cent greater than the 1967 level and 35 per cent of the cities reported an increase of more than 100 per cent.[23]
- Nearly two-thirds of the departments reported more restrictive policies pertaining to searches accompanying an arrest than they espoused six years earlier;[24] 18 per cent reported a stricter policy regarding searches of automobiles.[25]
- Moreover, while comparison with 1967 figures showed only modest change, 50 per cent of the cities reported that motions to suppress evidence were granted less than 10 per cent of the time[26] and in 63 per cent it was reported that charges were "rarely" dropped because of illegal seizure of the evidence.[27]

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

20. Ban, *supra* n. 18, at 7, Table 1.
21. Wilkey, *supra* n. 1, at 222.
22. The results are reported in Canon, *Is the Exclusionary Rule . . .*, *supra* n. 16.

23. *Id.*, at 712, Table 6.
24. *Id.*, at 715, Table 8.
25. *Id.*, at 719, Table 9.
26. *Id.*, at 722, Table 10.
27. *Id.*, at 724, Table 11.
28. Miranda v. Arizona, 384 U.S. 426 (1966).
29. Wald, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967); Medalie, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).
30. Wasby, SMALL TOWN POLICE AND THE SUPREME COURT, Lexington, Massachusetts: D.C. Heath, 1976, *passim*; Cimino, *Confessions and Right to Counsel: The Impact of Miranda in Missouri*, 17 ST. LOUIS U. L.J. 572 (1973).
31. 387 U.S. 1 (1967).

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

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

Spiotto's study

The only other empirical evidence Judge Wilkey discusses is James Spiotto's study comparing results of a study of motions to suppress in search and seizure crimes in the Chicago Municipal Court in 1950 with those in 1969 and 1971.[35] Wilkey makes much of the findings and quotes Spiotto as follows:

> over a twenty year period in Chicago, the proportional number of motions to suppress evidence [in narcotics and weapons cases] allegedly obtained illegally increased significantly. This is the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct.[36]

This is an amazing conclusion. Spiotto is utterly unaware that Illinois adopted the exclusionary rule in 1924[37]—some 37 years before *Mapp*. (Besides being a legal researcher, Spiotto is an Illinois resident, so it is not easy to explain this monumental error.)[38] Thus the court was governed by the rule in 1951 as well as in 1969 and 1971 and the *Mapp* decision would have no legal impact on its receptivity to motions to suppress.

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

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

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

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

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

35. The data is reported in Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEG. STUDIES 243 (1973); Spiotto also discussed it in *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & ADMIN. 36 (1973). The 1950 study is reported in Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. L. REV. 493 (1952). The 1969 data is discussed in Oaks, *supra* n. 10.

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

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

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

39. I explore this hypothesis in Canon, *Testing the Effectiveness . . .*, *supra* n. 16. The aggregate evidence lends it some support.

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

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

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

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 period[42]—and that this in itself is damning evidence of the rule's ineffectiveness. Chicago, however, is not a very typical city in this respect. As previously noted, in three-fifths of large American cities, 10 per cent or fewer of such motions are granted and in only a handful were over 25 per cent of such motions granted.[43] Indeed, Chicago police are reputed to enforce the vice laws in a manner which insures that motions to suppress will be successful.[44] Thus they have their cake and eat it too by appearing to engage in vigorous enforcement activity and yet refraining from seriously endangering the continued existence of organized vice.

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. □

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

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

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

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

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See the following article for an opposing view.

The exclusionary rule: have proponents proven that it is a deterrent to police?

by Steven R. Schlesinger

One of the many issues that students of the exclusionary rule debate is whether the rule deters police from conducting illegal searches and seizures. Professor Bradley Canon has discussed some of the empirical evidence on that issue in the preceding article. And perhaps he has achieved his very modest goal—to show that, in some situations, studies have not completely disproved the rule's effectiveness in deterring police conduct.

His findings, however, cannot possibly be interpreted as a justification for continuing the rule, if we view the evidence in proper perspective. One must keep in mind, first and foremost, that the burden is on proponents of the exclusionary rule to show that it *is* an effective deterrent. Some 18 years after *Mapp* v. *Ohio*,[1] the available evidence does not even come close to satisfying that requirement.

Why is the burden on the proponents of the rule? First, whatever the original justification for the rule set forth in *Boyd* v. *United States*[2] and *Weeks* v. *United States*,[3] it is

1. 367 U.S. 643 (1961).
2. 116 U.S. 616 (1886).
3. 232 U.S. 383 (1914).

clear that the current Supreme Court considers deterrence to be the primary justification for the rule.[4] If, therefore, the rule is not an effective deterrent, then it is appropriate for the Court to reconsider its position.

Second, it is clear—and the proponents of the rule to some extent concede—that the rule has many costs and disadvantages not related to deterrence. Judge Malcolm Wilkey has discussed some of these costs, but we would do well to list them again:

- the rule releases many otherwise guilty persons, some of whom are dangerous or violent;[5]
- it diminishes public respect for the legal and judicial system;[6]
- it fails to distinguish between more and less serious crimes[7] or between willful, flagrant violations by an officer and "good-faith" errors committed in difficult circumstances;[8]
- it excludes the most credible kinds of evidence;[9]
- it intensifies plea bargaining, since a questionable search may well be one of the bargaining points between prosecution and defense,[10] and
- the rule tends to push the judiciary toward dangerously expanded notions of what is a legal search in order to admit evidence which judges are reluctant to suppress.[11]

The possibility of deterrence, therefore, must be weighed against these costs. Since the proponents of the rule offer deterrence as a justification for it, the burden is on them to show that the advantages of deterrence outweigh these heavy social costs.

The empirical evidence

In the preceding article, Professor Canon describes as a "myth" the claim that empirical studies have shown that the rule is an ineffective deterrent. In fact, the empirical studies, while not conclusive, indicate just that.

In my book, to which Canon repeatedly refers, I reported primarily on the empirical studies of Dallin Oaks, Michael Ban, James Spiotto, and Professor Canon.[12] Let us review briefly the findings from each of those studies.

Oaks' 1970 study of law enforcement in Cincinnati between 1956 and 1967 convinced him that:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelm-

4. As the Court said in Stone v. Powell, 428 U.S. 465, 486 (1976): "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights."

5. Oaks' study of motions to suppress in gambling, narcotics and weapons cases in Chicago indicates that "in every single one of these cases in which a motion to suppress was granted, the charges were then dismissed." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 746 (1970).

6. *See* Stone v. Powell, *supra* n. 4, at 490-91.

7. As to applying the exclusionary rule only in the most serious cases, *see* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046-49 (1974).

8. Both Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L. J. 573, 577-78 (1971) and *Student Comment: The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. OF CRIM. L., C. AND P.S. 256, 2[illegible]-59 (1972) note that the rule fails in any way to take account of the seriousness of the violations committed by the police officer.

See also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 418-19 (Burger, C.J., dissenting) (1971) and Kamisar, *Wolf and Lustig, Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1146-47 (1959).

9. *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 JUDICATURE 215, 223 (1978).

10. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 56, 80-2 (1968).

11. As to the effect of the rule on other, often related, legal matters, Mr. Justice White has recently observed: "If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases." Rakas v. Illinois, 47 U.S.L.W. 4025, 4033 (1978).

For a discussion of the disadvantages of the exclusionary rule not related to deterrence, *see* Steven R. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 60-63 (1977).

12. Schlesinger, *supra* n. 11; Oaks, *supra* n. 5; Ban, "The Impact of Mapp v. Ohio on Police Behavior" (delivered at the annual meeting of the Midwest Political Science Association, Chicago, May, 1973), and "Local Courts v. The Supreme Court: The Impact of Mapp v. Ohio" (delivered at the annual meeting of the American Political Science Association, New Orleans, September, 1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681 (1973-74).

ing majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement directed at prosecution.[13]

Ban's two studies of the impact of the rule in Boston and Cincinnati, conducted in the mid-1960's, also tend to confirm the ineffectiveness of the rule.[14] Ban concludes that the rule showed spotty effectiveness in Boston and almost none in Cincinnati.

Spiotto's study of motions to suppress in Chicago between 1950 and 1971 convinced him that "the deterrent rationale for the rule does not seem to be justified" and that "given the present status of the law and the workings of the exclusionary rule, change is warranted. . . ."[15] Contrary to Professor Canon's claim, I never endorsed Spiotto's work completely.[16]

Canon's findings indicate the rule may have had some impact, but they hardly make a case for a substantial deterrent effect.

While Spiotto's research contains real weaknesses, including a faulty research methodology, his study nonetheless tends to show that in Chicago police misbehavior did not decrease over a 21 year period (1950-1971) during which Illinois had a self-imposed exclusionary rule. Likewise, it did not decrease in the 10 years after the rule was imposed on all the states by the United States Supreme Court. Thus, while Spiotto's research decidedly does not answer the question about how much more police illegality there would be without the rule, Chicago's experience lends little credence to Canon's thesis that the rule deters over time.

Professor Canon has previously admitted that it would be fair to treat these studies of Cincinnati, Boston and Chicago, as well as studies of Washington, D.C. and New York, as an indictment of the rule, if not a conviction.[17] But he now maintains that two of his studies, published in 1974 and 1977, support the notion that the rule deters.

Canon's studies

His 1974 study attempts to update (to 1973) evidence on the rule's deterrent effect.[18] However, it suffers from so many methodological flaws and other difficulties that its findings are not very useful. In fact, Canon now admits that "some errors" appear in the newer article. For example, much of his study was based on questionnaires which he mailed to police, prosecutors, and public defenders in American cities with populations of more than 100,000. But he received returns on only 47.4 per cent of the questionnaires sent to the police, 35.2 per cent of those sent to prosecutors and 40.2 per cent of those sent to public defenders.[19] Thus, the nature and size of his sample simply do not permit valid generalization; it was neither random nor representative. Those cities whose search and seizure practices were least in conformity with current law—those whose practices would have negated Canon's thesis about the effectiveness of the rule—would have been the ones least likely to respond to a mailed questionnaire; they would hardly have been anxious to acknowledge or to announce their own failure to obey the law.

Professor Canon nowhere stated which officials filled out the questionnaires. And, generally speaking, there is simply no way of knowing whether the questionnaires were answered truthfully. Anyone trying to give the police a favorable image might have been less than candid in reporting about police compliance with proper search and seizure procedures.

13. Oaks, *supra* n. 6, at 755.
14. Ban, *supra* n. 12.
15. Spiotto, *supra* n. 12.
16. Schlesinger, *supra* n. 11, at 64-65, n. 9.
17. Canon, *supra* n. 12, at 699.
18. *Id.*
19. *Id.*, at 702, n. 31.

Other difficulties

In addition to the general methodological difficulties in this study, it is important to examine the research methods that Professor Canon used on three of his major topics: numbers of search warrants issued,[20] changes in police search and seizure policies,[21] and successful motions to suppress evidence.[22]

Canon asked both police and prosecutors to estimate the number of search warrants issued annually in their respective cities. He then compared these estimates for the early 1970s with what he admitted were very thin data concerning the number of search warrants issued in the 1950s and 1960s. He concluded, not surprisingly, that there was an increase in the number issued.

Yet the crucial question is *why* there was such an increase; Canon's own findings on causality seriously undercut his argument for the rule's deterrent effect. The respondents said that 55 per cent of the increase could be attributed to an upsurge in narcotics crimes, 24 per cent to judicial rulings (all judicial rulings on search and seizure, not just those on the exclusionary rule), 22 per cent to more police and better training, and 4 per cent to other causes.[23] While these findings indicate that the exclusionary rule may have had some impact, they hardly make a case for a substantial deterrent effect.

Professor Canon asked the police in the 1974 questionnaire about the extent to which their search and seizure policies had changed since 1967-68 and, again not surprisingly, they reported that the rule had a substantial impact. Yet the problems with Canon's research strategy here are serious. As he admitted, statements of official "headquarters" policy may not conform to actual police practice in the field.[24] Further, Professor Canon conceded that "such statements were sometimes unduly generalized to conform with sparsely worded questionnaire alternatives."[25]

Professor Canon himself noted that "some policies could be misreported so that they would appear to be in conformity with the law."[26] In fact, for the police to have answered Canon's questions in a manner which conflicted with his thesis would have required them to admit that, as a matter of official policy, they broke the law. To put it mildly, the questions themselves contained strong inducements for the police to answer in a manner which confirmed Canon's thesis. Amazingly, some departments did openly admit to policies which seemed to conflict with rulings of the United States Supreme Court[27]—no splendid testimony to the effectiveness of the exclusionary rule.

Finally, Canon's 1974 study sought to cast doubt on Spiotto's research on successful motions to suppress in Chicago by showing that Chicago was atypical in that it had more successful motions to suppress than the average American city. Though Canon did demonstrate that in this respect Chicago was atypical, he ignored the fundamental question: what effect did imposition of the exclusionary rule have on successful motions to suppress in Chicago and other American cities? What we really need to know is whether the rule reduced police misbehavior, as we would see from evidence of a decrease over time in successful motions to suppress. Neither Spiotto nor Canon has answered this question.

Professor Canon now claims that his more recent study[28] corrects "some errors" in the first, and is more rigorous. In fact, his 1977 study represents one of the most damning pieces of evidence produced so far regarding the rule's ineffectiveness. In his later study, Canon replicated Oaks' 1970 Cincinnati study for 19 other American cities. Summarizing his findings, Canon said the data indicated that the rule "has not always or even *often* worked,"[29] "that *Mapp* had seemingly little or no impact on the majority of cases,"[30] and that the data "do not come close to supporting a claim that the rule

20. *Id.*, at 707-16.
21. *Id.*, at 716-17.
22. *Id.*, at 717-24.
23. *Id.*, at 713.
24. *Id.*, at 716.
25. *Id.*

26. *Id.*
27. *Id.*
28. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. (1977).
29. *Id.*, at 75.
30. *Id.*

wholly or *largely* works"[31] (emphasis supplied). If these are Canon's own conclusions about the deterrent effect of the rule, he is hardly in a position to criticize those who conclude that, according to the available empirical evidence, the rule is not an effective deterrent against police misbehavior.[32]

The burden of proof

It is crucial to return for a moment to the discussion of the burden of proof with which I began this essay. Certainly, Professor Canon has not even come close to satisfying the heavy burden of proving the rule's deterrent effectiveness. Such proof is clearly required when deterrence is the primary justification currently used by the Supreme Court for the rule, and when it entails so many serious costs and disadvantages.

Furthermore, criminal justice literature supplies many reasons for doubting the deterrent effectiveness of the rule. First, the operative scope of the rule is limited—only evidence presented at trial, a narrow stage in the criminal process, is excluded. Thus, the trial affects only a small proportion of police activity.[33] Given the extraordinary amount of plea bargaining in American courts today, the instances in which the rule can be invoked at trial are dramatically reduced.[34]

Second, the impact of the rule falls only indirectly on police—it does not discipline the errant officer; the brunt of the exclusionary rule's effect is actually borne by the prosecution, which generally has little or no power to punish police misconduct.[35] Third, officers whose illegal actions result in loss of convictions may receive the implicit or explicit approval of their superiors.[36] Fourth, trial judges do not often explain to officers why their evidence is excluded; the impact of the rule is limited if the police are not informed of the nature and effect of their wrongdoing.[37]

Fifth, loss of convictions through exclusion of evidence is not as serious a matter for police as might be thought, since police effectiveness usually is judged by the number of "collars" or arrests, not by the number of convictions. Sixth, in jurisdictions where prosecutors decline to prosecute cases with substantial search and seizure problems, there are relatively few instances in which the rule can be invoked.[38] Seventh, there are some strong indications that the rule even encourages certain forms of police misconduct.[39]

31. *Id.* Professor Canon attributes the weakness of these findings to the fact that only a few years elapsed between the *Mapp* decision and 1965, the date of the study; he theorizes that the impact of *Mapp* increased over time. No study in the ensuing 13 years, however, has reliably shown the exclusionary rule to have a deterrent effect.

32. *See, e.g.*, Mr. Justice Powell's majority opinion in *Stone v. Powell* which cites Canon's contrary views but concludes that there is an "absence of supporting empirical evidence" for the proposition that the rule deters police misbehavior. *Id.* at 492; Canon's contrary view is cited in note 22.

33. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE TASK FORCE REPORT: THE POLICE, 91 (1967).

34. *See* Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80, 95-6 (1969).

35. Oaks, *supra* n. 5, at 726, and Wingo, supra n. 8, at 576, note that the real brunt of the rule falls on the prosecutor, not the police.

36. Oaks, *supra* n. 5, at 727.

37. See Lafave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965); *see also* Oaks, *supra* n. 5, at 730-31.

38. Oaks, *supra* n. 5, at 688-89.

39. One study dealing with this problem notes that the same police officers are involved repeatedly in illegally conducted gambling raids which could very easily have been carried out in a legal manner, for example, by obtaining arrest warrants. The study concludes that some gambling raids are intentionally conducted in violation of search and seizure rules ". . . to immunize the gamblers while at the same time satisfying the public that gamblers are being harrassed by police." Dash, *Cracks in the Foundation of Criminal Justice*, 4 ILL. L. REV. 385, 391-2 (1951).

Another study indicates that police allegations as to how evidence was obtained changed after the *Mapp* decision, although actual police practices did not change substantially. The data indicate that police officers often fabricate testimony to avoid the effects of *Mapp*-based motions to suppress illegally seized evidence. *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. AND SOC. PROB. 91-6 (1968).

Also, Oaks notes that the rule creates an incentive for lying by the police and, through interviews with police officials, he documents the most common types of situations in which police fabrication occurs. Oaks, *supra* n. 5, at 739-42.

For a general discussion of the reasons for doubting the deterrent effectiveness of the exclusionary rule, see Schlesinger, *supra* n. 11, at 56-60. A more careful reading of my book would have shown Professor Canon that I did not, as he implies, take the position that the rule totally fails to deter. In fact, I observed: "There can be no doubt that a certain number of illegal acts are deterred by the rule, for many law enforcement officials must be reluctant to gather evidence which will be of no value in court." *Id.* at 56.

Ending the rule's tyranny

Two major rationales for the exclusionary rule, other than deterrence, are that it protects both individual privacy and the integrity of the American judicial system. I have attempted elsewhere to show that both of these justifications are inadequate and unsatisfactory;[40] space does not permit me to address these matters further here.

If, as I have suggested, the rule lacks substantial justification, the most important practical problem is how to move away from the tyranny of the exclusionary rule as the only remedy for any and all police search and seizure misconduct. If the rule were simply abandoned without some substitute, the police might infer, in Chief Justice Burger's phrase, that "open season"[41] had been declared on all criminal suspects—that all constitutional restraints on search and seizure had been removed. I have suggested elsewhere that successful alternatives to the rule probably would involve a combination of: police discipline imposed by an independent review board to which cases of police misconduct would be reported by victims, the general public or judges; and an improved civil remedy for innocent victims of illegal searches and seizures.[42]

The Court should make clear that states which develop acceptable substitutes will no longer be saddled with the exclusionary rule.

What the Court should do is to make it clear that those states which develop acceptable substitutes will no longer be saddled with the exclusionary rule. For their part, state legislatures and Congress should enact alternative schemes along the lines I have suggested and test them in the courts through cases reviewing criminal convictions. The fundamental standard for judging the acceptability of such substitutes would be the promise they offer for accomplishing the two objectives of disciplining police officers who engage in improper searches and seizures and of compensating the innocent victims of police misconduct.

Judicial and legislative actions of this kind would have several substantial benefits. First, no jurisdiction could successfully avoid dealing with police misbehavior. Second, we would discover whether the states, whose public officials (especially the attorneys general) have vehemently criticized the rule for years, are willing to shoulder the burden of formulating and testing alternatives to the rule. Third, diversity of experience among the states and the federal government would provide some real evidence (not speculation) as to how the rule operates in comparison with its alternatives.

We should try such alternatives at the state and federal levels and use the resulting knowledge to guide future attempts at deterring police misconduct. Such efforts may move us closer to an effective law enforcement system and away from the irrational, capricious and sometimes downright dangerous results of the exclusionary rule. The prospect of state and federal alternatives to suppression of evidence renders the future uncertain, but such uncertainty seems to be the only way to move us away from the tyranny of the exclusionary rule. □

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Editor's note: Bradley Canon has prepared a response to Steven Schlesinger's criticisms, but our deadline prevented us from including it in this issue. We will publish Canon's response—and a final reply from Schlesinger—next month.

40. Schlesinger, *supra* n. 11, at 47-50, 86-87.
41. Bivens v. Six Unknown Named Agents, *supra* n. 8, at 121 (Burger, C.J., dissenting).
42. Schlesinger, *supra* n. 11, chapter 4.

letters

A distortion of justice

I was delighted to read Judge Wilkey's article on the exclusionary rule (November, 1978). It states with admirable clarity and beautiful logic the views of a vast majority of the people of this country, including our judges.

The rule of exclusion distorts justice so monstrously that a determined effort must be made to eliminate it. I felt that Professor Kamisar's arguments desperately needed to be answered, but I did not expect such a brilliant answer, one which totally destroys all arguments offered to support the rule.

I would like to see copies of the article made available to the President, the Attorney General, and every member of Congress. Also, I hope that the American Judicature Society, the American Bar Association and every organization involved in the administration of the system of criminal justice will get behind a Bill to eliminate the exclusionary rule and create an acceptable, effective and meaningful alternative.

George M. Scott
Judge
Fifth Judicial District
Spencer, West Virginia

Too liberal construction of the law

To exclude certain evidence because of actions of the law enforcement officer merely serves to frustrate the judicial system and release the criminal and leave the citizenry unprotected. Does permitting a known criminal to go free serve any purpose but that of abstract theory?

The argument that without this safeguard innocent citizens will be accosted is not valid. After all, law enforcement officers are part of the citizenry; the proper procedures and guidelines, enforced by governmental agencies, would protect all of us, while at the same time promoting justice. Although some overzealous officers may occasionally encroach upon certain standards of liberty and privacy, our system as a whole should not be made to suffer by a too liberal construction of the law.

Societies throughout history have experienced crime and ours is no exception. The increase, I believe, is due to factors over which the courts, for the most part, have no control. Some restraint is necessary, but I believe the exclusionary rule and those who support it are creating a destructive and corrosive momentum that will erode the foundations upon which our country is supported. We must move in the opposite direction and find a more reasonable positon.

A. Eric Johnston
Birmingham, Alabama

A clarification from Professor Canon

In my article "The exclusionary rule: have critics proven that it doesn't deter police?" (March, 1979), I drew the conclusion that James Spiotto was unaware that Illinois had adopted the exclusionary rule prior to the *Mapp v. Ohio* decision in 1961.

My conclusion was based upon a statement in Mr. Spiotto's article "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives" published in the 2 *Journal of Legal Studies* 243, 246 (1973) which read as follows: "As pointed out earlier in this study, during the period 1959-1970, in the course of which the exclusionary rule was introduced in Illinois,..."

Mr. Spiotto's article was a condensation of a longer study he conducted which is unpublished but available from the University of Chicago Law Library and the U.S. Department of Justice. In this original study, it is quite clear that he is fully aware of Illinois' earlier adoption of the exclusionary rule.

It is also clear that this study's main contribution is the development of extensive data on Chicago police practices bearing generally on the exclusionary rule and that Mr. Spiotto does not approach these data from a before and after perspective. However, in the process of condensing the study, some of the language was changed which could lead readers to believe it was a before and after study.

I am happy to set the record straight in this matter and I am sorry for any inconvenience caused to Mr. Spiotto.

Bradley Canon

A postscript on empirical studies and the exclusionary rule

by Bradley C. Canon

Editor's note: *Does the exclusionary rule deter police from making illegal searches? That question was a topic of discussion in Judicature last month as part of the Kamisar-Wilkey debate over the exclusionary rule (August 1978, November 1978, February 1979).*

Professor Bradley Canon said that studies so far have not been conclusive; in some cities, the rule appears to work, in other cities, it doesn't. In reply, Professor Steven Schlesinger argued that studies which support the rule's effectiveness contain far more weaknesses than those which question its deterrent value.

Here is the final exchange between the two authors.

Much of what Professor Schlesinger writes does not reply to me at all. Roughly half of his space is devoted to a brief summary of several non-empirical reasons for modifying or abrogating the exclusionary rule and to a sketchy presentation of an alternate mechanism. Insofar as the series of articles in Judicature goes, I have no quarrel with him over this aspect of his response. In fact, in closing my earlier piece, I acknowledged that some reasoned non-empirical arguments could be advanced against the rule (page 403).

But as Schlesinger himself noted, I set a more "modest goal" for my article. I wanted to refute Judge Wilkey's emphatic assertion that the empirical evidence available on the subject conclusively proved the ineffectiveness of the exclusionary rule in deterring police violations of the Fourth Amendment.[1] Given his status as a federal judge and the sweeping nature of his statements, I feared that readers unfamiliar with the empirical studies themselves would accept his assertions uncritically.

Schlesinger allows that I may well have achieved my goal of showing that the evidence does not demonstrate the rule's ineffectiveness, and then adds that my findings cannot be considered a justification for the rule's continuance. But I never argued that the evidence justified retaining the rule. In replying to Judge Wilkey, I was quite explicit in concluding that available evidence is inconclusive at this time and gives no real comfort to either side. My purpose was to counteract a myth that all the available evidence indicates that the rule has failed to work.

While there is no disagreement that my first article achieved its goal, Schlesinger uses his discussion of my position as an opportunity to advance the proposition that the proponents of the exclusionary rule have the burden of proving that the rule is an effective deterrent to illegal police behavior. It is a somewhat surprising argument since it has been the rule's opponents—Oaks,[2] Chief Justice Burger,[3] and now Judge Wilkey—who have initiated the discussion of the empirical findings. Why do they do

1. Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 *Judicature* 215 (1978).

2. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

3. Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

this if the burden of proof is on the other side?[4]

The problems of research

In discussing my investigations into the rule's impact,[5] Schlesinger concludes that my findings are, "not very useful" (page 406). Many of his criticisms amount to little more than the stressing of problems and caveats I acknowledged when writing the articles. A point-by-point counter-discussion would be rather time consuming and repetitive of what I have already said in the articles about these problems. Let me instead offer a brief, general discussion about the nature of empirical research into the impact of the exclusionary rule.

Obviously the best way of obtaining data about the deterrent effect of the exclusionary rule is to observe large numbers of policemen surreptitiously as they perform their duties. But that's logistically and financially impossible (and perhaps ethically impermissible),[6] so social scientists use alternate methods. I have used two basic alternatives in gathering information on the rule's impact upon police behavior: (1) drawing inferences about their behavior from recorded data, such as arrest and search warrant records; and (2) asking law enforcement officials questions about their policies, observations and behavior.

Presumably, Schlesinger does not object to the first alternative; Oaks,[7] Ban,[8] and the Columbia study which he cites favorably[9] also use this method. However, he objects to the second alternative because he thinks my respondents were likely to have falsified their replies—especially the police who he believes are fearful of admitting violations of the Fourth Amendment.

Now perhaps a few did lie. And, on the other hand, perhaps one or two calculating respondents reported violative policies where none existed in order to create the erroneous impression that the rule is not working and thus augment its chances of abolition. But the point is that there is no real reason to believe that police lying is very extensive.

Social scientists frequently ask people questions (promising anonymity, as I did) about their private, embarrassing or even illegal behavior. Only in this manner can we study such phenomena as voting behavior, sexual behavior, drug use, and wife beating. No one seriously contends that such studies are not very useful. Are the police any different?

Researchers such as Skolnick[10] and Wasby[11] have had no difficulty in obtaining from them admissions of illegal acts or unconstitutional policies. Indeed, in the past the police were quite candid about their violations of the Fourth Amendment.[12] As the exclusionary rule pertains to the admissibility of evidence in court and contains no punitive sanction against those transgressing the Fourth Amendment, there is no reason for the police to be less candid now.

4. Because of the difficulties of conducting thorough-going empirical research into the rule's impact and the inconclusive nature of the present evidence, I suspect the "burden" will not be embraced by either side.

5. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681 (1974) and Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977).

6. Moreover, even if such observation could be carried out, it would only inform us about the present day state of police behavior with regard to illegal searches. We would still lack comparative information about such behavior before 1961 when the Court imposed the rule on the states in Mapp v. Ohio, 367 U.S. 643. Of course, there is no way such information could be obtained now.

7. Oaks, *supra* n. 2.

8. Ban, "The Impact of Mapp v. Ohio on Police Behavior" (delivered at the Midwest Political Science Association meeting, Chicago, May, 1973) and "Local Courts v. The Supreme Court: The Impact of Mapp v. Ohio" (delivered at the meeting of the American Political Science Association, New Orleans, September 1973).

9. In his book, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (New York: Dekker, Marcel, Inc., 1977), chap. 3, Schlesinger favorably cites Comment, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COL. J. L. & SOC. PROBS. 86 (1968) which draws inferences from recorded data.

10. Jerome Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY. New York: Wiley, 1967.

11. Stephen Wasby, SMALL TOWN POLICE AND THE SUPREME COURT. Lexington, Mass.: Lexington Books, 1976.

12. Murphy, *The Problems of Compliance by Police Departments*, 44 TEX. L. REV. 939 (1966) and Kamisar, *On the Tactics of Police-Prosecutor Oriented Critics of the Court*, 49 CORNELL L. Q. 436, at 441-43 (1964).

A comprehensive picture

The object of my investigation was to obtain as comprehensive a picture of the impact of the exclusionary rule as my resources would permit. It would have been foolish to ignore the possibility of asking questions of the actual participants in the impact process for fear that a few would lie. The data were collected and reported with proper cautions. Standing alone, they are not as reliable as recorded data, but they do not stand alone. The questionnaire results show basically the same conclusion as the recorded data—that the exclusionary rule has a differential impact as a deterrent. The similarity of results enhances the questionnaire data's reliability.

Since it is so difficult to obtain quality information on the impact of the exclusionary rule,[13] researchers are necessarily going to have to accept data that is not as reliable as they would desire. Even the recorded data contain some reliability problems; inferences drawn from them are based upon assumptions whose accuracy is presumed but is not 100 per cent certain—for example, that a substantial proportion of narcotics arrests result from police search and seizure behavior. Moreover, even Oaks and Ban, whose research methods cause, Schlesinger no problems, sometimes use data based upon interviews with law enforcement officials or judges.[14]

To conclude, Schlesinger may want to aruge that the problem of reliability of data makes studies of the rule's impact "not very useful." But if that is the case, why bring up the empirical question in the first place? If we are going to consider the evidence as a meaningful factor in determining the future of the exclusionary rule, we need to do so as thoroughly and as dispassionately as possible. □

13. Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 Nw. U.L. Rev. 740 (1975).

14. Oaks, *supra* n. 2, at 706, 717, 739-41; Ban, *Local Courts . . .*, *supra* n. 8, *passim*.

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A reply to Professor Canon

by Steven R. Schlesinger

In large measure, Professor Canon's response to my article misstates or evades what I said. He claims, for example, not to understand why the exclusionary rule's proponents must bear the burden of proving its deterrent effectiveness. There are at least two reasons.

First, the Supreme Court has made clear, since 1965, that it regards deterrence of improper police behavior as the primary rationale for the rule. The leading cases on the exclusionary rule in search and seizure make this point explicitly.[1] If the proponents of the rule are unable to show that it is an effective deterrent, then it is time for the Court to reconsider its position.

Canon claims not to understand why Chief Justice Burger,[2] Judge Wilkey[3] and Professor Oaks[4] have initiated a discussion of the empirical findings if the burden of proof rests with the rule's proponents. Clearly, they have done so because the exclusionary rule rests on a proposition for which, as they and I have argued, there is very little empirical support. In short, Burger, Wilkey, Oaks and I believe that Supreme Court decisions should be rational and that irrational decisions should be overturned.

Second, proponents bear the burden of proving the rule's deterrent effectiveness because the exclusionary rule has many costs and disadvantages, some of which I mentioned in my previous article (pages 404-405). Contrary to Canon's claims, therefore, my discussion of non-empirical aspects of

1. *See* Linkletter v. U.S., 381 U.S. 618, 636-38 (1965); U.S. v. Calandra, 414 U.S. 338, 347 (1974); and Stone v. Powell, 428 U.S. 465, 486 (1976).

2. Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 338, 416 (1971) (Burger, C.J., dissenting).

3. Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 Judicature 215 (1978).

4. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970).

the rule is plainly responsive to him; it is the responsibility of the rule's proponents to show that the advantages of deterrence outweigh these heavy social costs.

Canon distorts my position on the state of evidence when he says that "Schlesinger allows that I may well have achieved my goal of showing that the evidence does not demonstrate the rule's ineffectiveness." In fact, I said that "the empirical studies indicate [that the rule is an ineffective deterrent]" (page 405), although, "*in some situations*, studies have not *completely disproved* the rule's effectiveness in deterring police misconduct." (page 404, emphasis supplied).

As I showed previously, all but one of the seven studies discussed by Canon and me—those of Oaks, Ban, Spiotto, Canon and the Columbia Journal of Law and Social Problems—conclude that the rule does not generally deter.[5] In fact, Canon himself concludes, in his most recent and methodologically sophisticated study, that "the rule has not always or even *often* worked" and that the data "do not come close to supporting a claim that the rule wholly or *largely* works."[6] (Emphasis supplied). Although his earlier study suggests that "many of the findings support a positive inference—that the rule goes far toward fulfilling its purpose," it suffers from so many methodological and other flaws as to be less than useful.[7]

Canon discusses only one of my many criticisms of that 1974 study—and not the most important one. That study used questionnaires to elicit information from the police and others about their search and seizure practices. For the police to have answered Canon's questions in a manner which conflicted with his thesis that the rule deters would have required them to admit that they broke the law. I leave it to the reader to decide how candid the police would be in these circumstances.

By arguing that other researchers have used similar procedures, Canon does not demonstrate the strength of his own study but the weakness of the others. Furthermore, the studies he cites appear to have collected data *directly* from their subjects, whereas his own study depended on two tiers of police responding, each with its own incentive to color the facts.

Canon's response ignores major problems with his 1974 study: the nature and size of his sample (well under 50 per cent) do not permit valid generalization, since the sample was neither random nor representative. Those cities whose search and seizure practices were least in conformity with current law would have been the ones least likely to respond to a mailed questionnaire; they would hardly have been anxious to acknowledge or announce their failure to obey the law.

Canon also ignores a second important problem: responses to the questionnaire involving official headquarters policy "may not conform to actual police practice in the field."[8] That Canon conceded this defect in his 1974 study does not improve the reliability of his conclusions.

What, then, is the bottom line? It is that all of us live under the irrational tyranny of an inflexible rule which releases many dangerous and violent persons *and* which, as Professor Canon himself has admitted, does "not always or even often" have a deterrent effect on police. Perhaps it is fair to say that, as long as we allow the rule to continue, we deserve what we get. □

5. Oaks, *supra* n. 4; Ban, "The Impact of Mapp v. Ohio on Police Behavior" (delivered at the annual meeting of the Midwest Political Science Association, Chicago, May 1973); Ban, "Local Courts v. the Supreme Court: The Impact of *Mapp* v. *Ohio*" (delivered at the annual meeting of the American Political Science Association, New Orleans, 1973); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681 (1973-74); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Local Levels: The Case of the Exclusionary Rule*, 5 AM. POLITICS Q. 57 (1977); and *Effect of Mapp v. Ohio on Police Search and Seizure Practice in Narcotics Cases*, 4 COLUMBIA J. L. & SOC. PROB. 87 (1968).

6. Canon, *Testing . . .*, *supra* n. 5, at 75.

7. Canon, *Is the Exclusionary Rule . . . ?*, *supra* n. 5, at 726.

8. *Id.* at 716.

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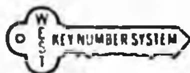
AS 25.30.050(a) are jurisdictional, so that her failure to oppose the motion did not result in waiver of the jurisdictional defect.[7]

[2] In addition to the jurisdictional defect inherent in the August 1977 superior court proceeding, we think it of further significance that the superior court denied Karen's January 1978 modification motion without conducting an evidentiary hearing, although one was requested. Given the jurisdictional flaw underlying the superior court's August 1977 order and its subsequent denial of a hearing to Karen on her motion for change of custody, we have concluded that the matter should be remanded to the superior court for the purpose of conducting a hearing to determine custody and visitat[illegible] [illegible]hts.[8]

Remai[illegible] further proceedings.

BURKE, J., not participating.



STATE of Alaska, Petitioner,

v.

Theodore GLASS, Respondent.

STATE of Alaska, Petitioner,

v.

Michael THORNTON, Respondent.

James W. ALDRIDGE, Appellant,

v.

STATE of Alaska, Appellee.

Thomas Lee COFFEY, Appellant,

v.

STATE of Alaska, Appellee.

Nos. 3565, 3764, 2965 and 3002.

Supreme Court of Alaska.

May 25, 1979.

The Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., granted defendant's motion to suppress evidence obtained by electronic surveillance of alleged narcotics transaction which gave rise to defendant's indictment, and State's petition for review was granted. The Supreme Court, 583 P.2d 872, affirmed. On rehearing, the Supreme Court, Boochever, C. J., held that under circumstances, apart from *Glass, Thornton, Aldridge,* and *Coffey* cases, which were considered by Supreme

7. Even if the superior court has assumed that primary jurisdiction was vested in Alaska, because it was the state of initial jurisdiction and Ronald still lived here, AS 25.30.050(a) still precluded Alaska from assuming jurisdiction until the Oregon court declined jurisdiction. *See* Commissioner's Note to § 6 of the Uniform Child Custody Jurisdiction Act (U.L.A.) (1973): "When the courts of more than one state have jurisdiction under section 3 or 14, priority in time determines which court will proceed with the action . . . ."

8. Although the jurisdictional underpinnings of the superior court's August 1977 order have been voided, it can be persuasively argued that in February 1978 when the superior court denied Karen's motion for change of custody, it did have jurisdiction since the Oregon court in October 1977 had declined to exercise jurisdiction over Karen's modification proceeding. Given the foregoing and the fact that the children have been in Ronald's custody in Alaska since October 1977, we deem it appropriate that the children remain in Ronald's custody pending resolution of the custody issues.

Further, upon remand of the case to the superior court, we think the determination should be based on Ronald's July 1977 motion for change of permanent custody from Karen. Since the superior court lacked jurisdiction to modify the earlier award of custody to Karen at that time, and no subsequent hearing was held prior to the judge's February 1978 affirmance of his order, we think the burden is properly on Ronald to show that permanent custody should be changed form Karen to him. The court's determination, however, should be based on the best interests of the children at the time that that determination is made.

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Respondent.

. Appellant,

Appellee.

. Appellant,

Appellee.

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Alaska.

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Fourth Judicial
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Court as one case, *Glass* decision holding that warrantless electronic monitoring of conversation between police informant and defendant violates defendant's right of privacy and freedom from unreasonable searches and seizures under Alaska Constitution, would apply only prospectively to activity occurring on or after September 15, 1978, date of decision.

Ordered accordingly.

Burke, J., filed concurring opinion.

Rabinowitz, J., dissented and filed opinion in which Connor, J., joined.

1. Courts ⇐100(1)

Apart from *Glass, Thornton, Aldridge* and *Coffey* cases, which were considered by Supreme Court as one case, *Glass* decision holding that warrantless electronic monitoring of conversation between police informant and defendant violates defendant's right of privacy and freedom from unreasonable searches and seizures under Alaska Constitution, would apply only prospectively to activity occurring on or after September 15, 1978, date of decision, where purpose of decision pointed decisively away from retroactive application, reliance by law enforcement officials on *pre-Glass* law was reasonable, and retroactive application would have substantial negative effect on administration of justice.

2. Courts ⇐100(1)

If a decision simply applies an established rule of law, even if in a new factual situation, question of retroactivity does not arise; question of retroactivity arises only when a court announces a new rule of law.

3. Courts ⇐100(1)

Constitution does not require that new rules of law be given retroactive effect, and a court must make an independent decision in each case.

4. Courts ⇐100(1)

When stability of legal norms and continuity in application of such norms are core values to be protected in fashioning a legal rule, general rules of law promoting predictability for those who must rely on rules are favored; in determining retroactivity, however, these policy considerations are not extant; Supreme Court does not want to encourage people to disregard law in expectation that courts will change law and that change will be retroactive, and thus when issue of retroactivity is concerned, case-by-case approach is particularly desirable.

David C. Backstrom, Deputy Public Defender, and Brian Shortell, Public Defender, Anchorage, for respondents Theodore Glass and Michael Thornton.

James H. Cannon, Johnson, Christenson, Shamberg & Glass, Inc., Fairbanks, for appellant James W. Aldridge.

Robert Merle Cowan, Kenai, Walter Share, Asst. Public Defender, Anchorage, for appellant Thomas Lee Coffey.

Dean J. Guaneli, Patrick J. Gullufsen, Asst. Attys. Gen., Daniel W. Hickey, Chief Prosecutor, James L. Hanley, Asst. Dist. Atty. and Avrum M. Gross, Atty. Gen., Juneau, for appellee and petitioner.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION ON REHEARING

BOOCHEVER, Chief Justice.

[1] In *State v. Glass*, 583 P.2d 872 (Alaska 1978), we held that warrantless electronic monitoring of a conversation between a police informant and a defendant violated the defendant's right of privacy and freedom from unreasonable searches and seizures under the Alaska Constitution. On January 15, 1979, after considering supplemental briefs by the parties, we issued an order, with opinion to follow, stating what cases would be governed by *Glass*. *State v. Glass*, 583 P.2d 872 (Alaska 1978), *State v. Thornton*, 583 P.2d 886 (Alaska 1978), *Aldridge v. State*, 584 P.2d 1105 (Alaska 1978), and *Coffey v. State*, 585 P.2d 514 (Alaska 1978), are governed by the new ruling. Apart from those cases, the *Glass* decision will apply prospectively to activity occur-

ring on or after September 15, 1978, the date of the decision.[1]

[2] If a decision simply appl es an established rule of law, ev .. if in a new factual situation, the question of retro tivity does not arise. The question of troactivity arises only when a court annou ices a new rule of law. *Milton v. Wainwright*, 407 U.S. 371, 381 n. 2, 92 S.Ct. 2174, 2180, 33 L.Ed.2d 1, 9 n. 2 (1972) (Stewart, J., dissenting); *Desist v. United States*, 394 U.S. 244, 247–48, 89 S.Ct. 1030, 1032, 22 L.Ed.2d 248, 254, *rehearing denied*, 395 U.S. 931, 89 S.Ct. 1776, 23 L.Ed.2d 251 (1969).

This court had not previously decided, or even discussed, whether a warrant require-.. nt applied to participant monitoring, but most f deral and state decisions, including the pl rality decision by the United States Supreme Court in *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453, *rehearing denied*, 402 U.S. 990, 91 S.Ct. 1643, 29 L.Ed.2d 156 (1971), had not imposed such a requirement.[2] Defendants point to law review articles discussing the increasing independence of state courts, and past decisions of this court interpreting our state constitutional guarantees, specifically the right to privacy, more broadly than federal guarantees. They argue that the law enforcement community should have foreseen that Alaska would adopt a warrant requirement and add that the police should be encouraged to obtain warrants in borderline cases. While we agree with the latter argument as a general proposition, we decline to require police departments and prosecutors to monitor the general trends noticed in law review commentary and to assume, on a question of first impression in this state, that this court will interpret our constitution in a specific manner, in the absence of clear authority so construing a similar constitutional provision. Thus, our holding in *Glass* represents a new rule of law, and we must examine what cases that new rule will govern.

The state acknowledges that defendant Glass should receive the benefit of the new rule. Its brief states:

> It is clear that the benefit of the new rule is given to the defendant in the declaring decision. . . . [L]itigants have no incentive to proceed if they would not receive the benefit of the new rule.

Although *Thornton, Aldridge* and *Coffey* were not formally consolidated with *Glass*, they were under advisement at the same time and were, in effect, considered by the court as one case. All of the decisions, with the exception of *Cof ey*, were announced on the same day as *Glass*. *Coffey* was delayed because it dealt with other issues, in addition to participant monitoring.[3] Thus, the applicability of the *Glass* holding to *Thornton*,[4] *Aldridge* and *Coffey* is simply an ex-

1. In arriving at our decision, we considered the detailed arguments urging retroactive application of *Glass* in *Nix v. State* and *Allen v. State*. In both cases, we granted the petitions for review and affirmed the trial court orders refusing to apply *Glass* retroactively. Our decision was based on the order issued in the instant case. *See Nix v. State*, No. 4286 (Alaska, Jan. 15, 1979), and *Allen v. State*, No. 4395 (Alaska, Jan. 15, 1979).

2. In *Glass*, we noted authority to the contrary, which we believe is better reasoned, and also noted that *White* was far from a clearcut holding by the Supreme Court, 583 P.2d at 876–78.

3. Of all the cases, the briefing in *Coffey* was probably the most influential in our holding regarding participant monitoring. In addition to that issue, we evaluated Coffey's argt nents concerning pre-indictment delay, speedy trial violation, entrapment, denial of cross-examination, error in jury instructions and bias of the trial judge. 585 P.2d at 519–26.

4. We note an alternative ground under which *Thornton* would be covered by the *Glass* holding. In *Thornton*, the *state*, not the defendant, petitioned for review of an order granting a motion to suppress. Judge Blair, who heard the suppression arguments in *Thornton*, suppressed the results of the warrantless participant monitoring anticipating, in effect, our holding in *Glass*. In fact, it was Judge Blair, in a "well-reasoned decision," *State v. Glass*, 583 P.2d at 882, who had initially suppressed the tapes in *Glass*, and our decision affirmed his suppression order. Thus, the law, as applied to *Thornton*, has always been in conformity with the *Glass* decision. In *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), the court gave primarily prospective application to its holding, but noted:

ring on or after September 15, 1978, the date of the decision.[1]

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tension of applicability of the rule to defendant Glass.

Any further line we draw will inevitably be somewhat arbitrary. When the law changes, some get the benefit of the change, others do not. When only the named defendant is covered by the new rule, other defendants whose appeals raised the same issue may feel it was simply the vagaries of the court calendar that prevented their case from being the landmark decision. If all cases on direct review receive the benefit, those on collateral review do not. If the court attempts to increase equity between defendants by increasing the coverage of the new rule, it increases the unfairness to society and law enforcement officials who in good faith relied on the law as it was when they acted. We noted in *Judd v. State*, 482 P.2d 273, 278 (Alaska 1971):

> [O]nce one realizes that any decision will involve an arbitrary classification which is not particularly defensible except in terms of its impact, then one has arrived at a starting point for making the necessary policy decisions.

[3, 4] The constitution does not require that the new rules of law be given retroactive effect, *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601, 608 (1965);[5] *Judd v. State*, 482 P.2d at 276, and a court must make an independent decision in each case.[6] In *Judd v. State*, 482 P.2d at 278 (Alaska 1971),[7] we noted the criteria guiding resolution of the question of retroactivity:

> (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. *Linkletter v. Walker*, 381 U.S. 618, 636–638, 85 S.Ct. 1731, 14 L.Ed.2d 601, 612–613 (1965). [footnote integrated into text]

The purpose of the rule in *Glass* is to protect the privacy of Alaskans and the spontaneity of discourse that marks a free society. The tapes in *Glass* were not excluded because of their potential unreliability:

> We exclude the evidence not because it is unreliable but because the transcendent values preserved by constitutional guarantee are of greater societal moment than the use of that evidence to obtain a criminal conviction.

583 P.2d at 878 (citation omitted).

The purpose criteria points quite decisively away from retroactive application of *Glass*:

> However, it is not our intent to disturb previously ordered suppressions of evidence anticipating our holding today.

413 F.2d at 1117 (citation omitted). *Dickerson* was impliedly overruled on other grounds by the Supreme Court in *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), and expressly overruled on those other grounds on the authority of *Beckwith* in *United States v. Fitzgerald*, 545 F.2d 578, 581 (7th Cir. 1976).

5. *Linkletter's* square holding that nothing in the constitution compels retroactive application of new rules answers the equal protection argument advanced by appellant Aldridge. Moreover, since we apply the holding to *Aldridge*, we do not need to address his alarm that other defendants would be denied equal protection if they do not receive the same protections as him.

6. When stability of legal norms and continuity in the application of such norms are the core values to be protected in fashioning a legal rule, general rules of law promoting predictability for those who must rely on the rules are favored. In determining retroactivity, however, these policy considerations are not extant. We do not want to encourage people to disregard the law in the expectation that courts will change the law and that the change will be retroactive. Thus, when the issue of retroactivity is concerned, the case-by-case approach is particularly desirable. *See Linkletter v. Walker*, 381 U.S. at 629, 85 S.Ct. at 1737, 14 L.Ed.2d at 608 (1965).

7. *Judd* examined the retroactive effect of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, *rehearing denied*, 396 U.S. 869, 90 S.Ct. 36, 24 L.Ed.2d 124 (1969), which limited the scope of warrantless searches incident to an arrest. We held that the rule of *Chimel* "shall apply to all police searches taking place after the date of the *Chimel* opinion of June 23, 1969." 482 P.2d at 279. Earlier, in *Fresneda v. State*, 458 P.2d 134, 143 n. 28 (Alaska 1969), we held that *Chimel* would be applied to cases on direct review in this court at the time *Chimel* was decided.

A review of the decisions of the Supreme Court of the United States dealing with retroactivity questions indicates that the starting point in analysis is the purpose criterion. Where the purpose of the new rule is primarily related to the integrity of the verdict, the application thereof has generally been extended to all cases.

. . .

On the other hand, where the purpose of a new constitutional standard is not to minimize arbitrary or unreliable fact findings, but to serve other ends, retroactive application has generally been denied.

Rutherford v. State, 486 P.2d 946, 952–53 (Alaska 1971) (footnotes omitted).

The exclusion of tape recordings that are the product of warrantless participant monitoring serves two functions. First, it deters the police from monitoring conversations between an informant and a citizen without first obtaining a warrant.[8] This deterrence function cannot be served by applying *Glass* to police conduct occurring before the date of the decision. The second rationale is

> the imperative of judicial integrity which requires that the courts not be made "party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

State v. Sears, 553 P.2d 907, 912 (Alaska 1976) (footnote omitted). The judicial integrity function is not undermined when the police conformed their actions to what was the law when they acted. We stated in *Judd*:

> [P]ractical problems [arise] from the undisputed fact that the police, prosecuting agencies and the public have relied upon the previous statements of the law, and that the great impact of and respect for the law in our society is based on such acceptance by the public generally. A change for the future can be digested but the application of a new interpretation to past conduct which was accepted by previous judicial decisions leads us to confusion and a hesitancy to accept any theory except one of gamesmanship with corresponding disrespect for our whole system of laws.

482 P.2d at 278–79 (footnote omitted).

We turn to the second criterion by noting that the fact of reliance by law enforcement officials on pre-*Glass* law was reasonable. Law enforcement officials could not be expected to foresee our ruling in *Glass*, and thus decisions not to seek warrants for participant monitoring were entirely reasonable and in good faith. The extent of law enforcement reliance intermingles with the third criterion, the effect of retroactive application on the administration of justice.

If the rule in *Glass* were given complete retroactivity so that it would apply to cases already completed, the negative effect on the administration of justice would be substantial. *Desist v. United States*, 394 U.S. 244, 251, 89 S.Ct. 1030, 1034, 22 L.Ed.2d 248, 256, *rehearing denied*, 395 U.S. 931, 89 S.Ct. 1776, 23 L.Ed.2d 251 (1969).[9] The state's brief accurately notes:

8. The defendants argue that both the initial taping and the subsequent use of the tapes in court invade their constitutional rights. We do not perceive the taping and the use as separate constitutional violations. The evil *Glass* addresses is police taping of conversations outside the province of judicial scrutiny:

> If . . . law enforcement officials may lawfully cause participants secretly to record and transcribe private conversations [without a warrant], nothing prevents monitoring of those persons not engaged in illegal activity, who have incurred displeasure, have not conformed or have espoused unpopular causes.

> 583 P.2d at 878. We believe that we sufficiently protect free and open discussion by a prospective application of the warrant requirement.

Further, the defendants' argument proves too much. Whenever a decision imposes a warrant requirement, defendants could argue that the use of the evidence, apart from its initial gathering, is a separate harm. However, the criteria for retroactivity recognize that admitting evidence gathered according to then-existing law is not always unfair to the defendant, particularly if the evidence is reliable.

9. *Desist* held that *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967),

> Every case in which conviction may have resulted from tape recorded evidence would have to be reopened and examined. In many cases, evidence will have been lost, memories faded and witnesses unavailable.

The defendants implicitly admit these consequences because they only urge retroactive application of *Glass* to cases pending review at the time of the *Glass* decision.[10] Estimates from the state and the defendants indicate that the prosecution of a number of cases currently in the legal system entails conversations monitored without a warrant.[11] We acknowledge that in these cases, the police informant could testify without the tapes. The tapes may, however, bolster the informant's testimony and we believe that if the police had prior knowledge that *Glass* would become the law, they could have sought and, based upon the facts in most of these cases, could have obtained warrants authorizing the monitoring.[12] We decline to penalize the prosecution under those circumstances.

Based on the purpose behind our ruling in *Glass*, we conclude that the decision, with the exceptions of the four cases previously noted, will apply prospectively to activity occurring on or after September 15, 1978.[13]

BURKE, J., concurs.

RABINOWITZ, J., with whom CONNOR, J., joins, dissents.

BURKE, Justice, concurring.

I concur in today's opinion on rehearing but wish to state that I still believe strongly that this case was wrongly decided in the first place, for the reasons expressed in my dissent in *State v. Glass*, 583 P.2d 872 (Alaska 1978). That belief is now further strengthened by the holding of the United States Supreme Court in *United States v. Caceres*, —— U.S. ——, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979).

RABINOWITZ, Justice, dissenting.

In *Fresneda v. State*, 458 P.2d 134, 143 n. 28 (Alaska 1969), we held that the constitutional rule announced in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), was applicable to all cases pending on direct review in this court as of the date of the *Chimel* decision.[1] I am not

which rejected the distinction between trespassory searches and those in which there was no physical penetration of the protected premises, would not be given retroactive application. In *Desist*, the court noted:

> [T]he determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weighty burden on any court.

394 U.S. at 251, 89 S.Ct. at 1035, 22 L.Ed.2d at 256.

10. Only appellant Coffey has requested that this court apply *Glass* "purely retroactively." Coffey asks, in the alternative, that *Glass* be applied to all cases pending appellate review.

11. An affidavit from Daniel W. Hickey, the state's Chief Prosecutor, states that at least forty-eight cases involve "nonconsensual participant monitoring and/or recording of statements made to an individual now known to be a state agent." The affidavit was based on response to a memorandum sent to all district attorneys throughout the state.

The defendants do not offer a general counter-estimate, but the *Nix* petition for review points to one case involving fifteen defendants in Anchorage, fifteen to twenty individual cases in Juneau, and five to seven cases being handled by the Fairbanks Public Defender. That estimate of cases involving participant monitoring may not include cases being handled by private attorneys. The basis for the estimate is not indicated in the brief.

12. *See State v. Glass*, 583 P.2d at 881.

13. We note that the Supreme Court of Michigan has held that the rule of *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 *cert. denied*, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (1975), would not be retroactive. In *People v. Drielick*, 400 Mich. 559, 255 N.W.2d 619, 620 (1977), *cert. denied*, 434 U.S. 1047, 98 S.Ct. 893, 54 L.Ed.2d 798 (1978), the court refused to apply *Beavers*, which prohibited warrantless transmission of a conversation by a participant, to a case on direct review at the time of *Beavers*.

1. In reaching this holding, we relied on *Desist v. United States*, 394 U.S. 244, 255–58, 89 S.Ct. 1030, 1037–38, 22 L.Ed.2d 248, 259–61 (1969) (Harlan, J., dissenting); *Linkletter v. Walker*, 381 U.S. 618, 627, 85 S.Ct. 1731, 14 L.Ed.2d 601, 607 (1965); and H. Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to*

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SHINE, Appellant,

v.

Alaska, Appellee.

No. 4191.

Court of Alaska.

ne 15, 1979.

as convicted in the Superi-
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of sale of marijuana, and
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Saul R. Friedman, Rice, Hoppner, Hedland, Fleischer & Ingraham, Anchorage, for appellant.

Charles William Cohen, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C. J., and CONNOR, BOOCHEVER, BURKE and MATTHEWS, JJ.

OPINION

PER CURIAM.

Appellant was convicted of sale of marijuana in violation of AS 17.12.010.[1] In this appeal he attacks the constitutionality of the statute, arguing that it "is overly broad and violates both the federal and Alaska constitutions because it proscribes conduct which is protected by the right of privacy as well as conduct which can be legitimately regulated by the State." In light of our holding in *Brown v. State*, 565 P.2d 179 (Alaska 1977), this appeal is frivolous. *See also Anderson v. State*, 562 P.2d 351 (Alaska 1977). Accordingly, the judgment of the superior court is AFFIRMED.

an, 35 U.Chi.L.Rev. 719, 762–64

in *Fresneda v. State*, 458 P.2d
Alaska 1969), we observed that
rule we adopted dates back to
Marshall's opinion in *United
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(1801). *See also Lopez v. Bow-*
4, 66 n. 7 (Alaska 1972) ("The
e [*Fresneda*] rule on retrospec-
is that where several cases are
pending on appeal which each present the same issue, the fortuity of which case is first decided should not be determinative of that issue in the other cases.")

1. Appellant participated in the sale of 28 pounds of marijuana to an undercover police officer. The prearranged sale took place in an automobile at Anchorage International Airport. The purchase price was $7,000.

commodation for the remaining woman, such as sharing a room with a matron until the number of women employed came out to an even number. A little creative imagination on the part of the ferry system, which may necessitate some shifting of crew members among the different vessels of the ferry system, certainly would solve the "great problem" the ferry system contends it faces and which it created by its own actions.

[3] All that we need say is that neither the berthing problems nor the other matters we have discussed are of sufficient import to justify the sex discrimination in employment that was practiced by the ferry system at the time the plaintiffs sought employment. The position of a utility person or waiter in the steward's department was not such as to reasonably demand that only males be hired. There was no urgent or overriding necessity that there be a distinction in such employment on the basis of sex.[6] Summary judgment in favor of the ferry system was improvidently granted.

The judgment is reversed. The case is remanded to superior court (a) for the entry of summary judgment in favor of plaintiffs, and (b) for the purpose of resolving issues raised in the plaintiffs' complaints, such as back pay, seniority status, etc.

Reversed and remanded.

STATE of Alaska, Petitioner,

v.

Theodore GLASS, Respondent.

No. 3565.

Supreme Court of Alaska.

Sept. 15, 1978.

The Superior Court, Fourth Judicial District, Fairbanks, James R. Blair, J., granted defendant's motion to suppress evidence obtained by electronic surveillance of alleged narcotics transaction which gave rise to defendant's indictment, and State's petition for review was granted. The Supreme Court, Boochever, C. J., held that where conversation between defendant and informant in defendant's home was electronically recorded by police officers stationed outside defendant's home while monitoring frequency of transmitter worn by informant and where monitoring and recording of conversation was done without benefit of search warrant or other court order, monitoring and recording of conversation violated defendant's rights under State Constitution, and all evidence of tape recording was inadmissible in prosecution for possession and sale of a narcotic drug.

Affirmed.

Burke, J., filed a dissenting opinion.

1. Criminal Law ⟹1024(1)

Where Supreme Court's review of suppression order would materially advance ultimate termination of prosecution for pos-

6. The Federal Civil Rights Act prohibits discrimination in employment on account of religion (42 U.S.C. § 20[illegible]e-2). "Unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). In *Wondzell v. Alaska Wood Products, Inc.*, 583 P.2d 860, Opn.No. 1720 (Alaska, September 15, 1978), we held that because of the similarities between the Federal and Alaska Civil Rights Statutes, there should be read into the Alaska Statute (AS 18.80.220) the "reasonable accommodation" exception in the federal law regarding religious beliefs.

However, in the case at hand, there is no necessity to rely upon federal decisional law to reach the result we have. The reason for this is that (1) we are not dealing with religion, which is not included within the "reasonable demands" exception in the Alaska Statute; and (2) the "reasonable demands" exception to the prohibition against discrimination on account of sex in the Alaska Statute is clear and unambiguous, and does not necessitate resort to federal decisional law for interpretation.

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session and sale of narcotic drug and where question concerning propriety of suppression motion was of sufficient importance to justify immediate attention, State's petition for review of order granting suppression motion would be granted.

2. Courts ⇔97(6)

Federal decisions dealing with Fourth Amendment to the United States Constitution should not be regarded as determinative of scope of Alaska's right to privacy amendment since no such express right is contained in United States Constitution. U.S.C.A.Const. Amend. 4; Const. art. 1, § 22.

3. Telecommunications ⇔491

One who engages in a private conversation is entitled to assume his words will not be broadcast or recorded absent his consent or a warrant. U.S.C.A.Const. Amend. 4; Const. art. 1, §§ 14, 22.

4. Searches and Seizures ⇔7(1)

Where a person exhibits an actual, or subjective, expectation of privacy and where that expectation is one that society is prepared to recognize as reasonable, person is entitled to Fourth Amendment protection. U.S.C.A.Const. Amend. 4.

5. Constitutional Law ⇔18

Supreme Court may construe Alaska's state constitutional provisions as affording rights additional to those provided in United States Constitution.

6. Criminal Law ⇔394.4(1)

Contraband discovered in an illegal entry by police is inadmissible although it is best evidence that contraband was present, as police conduct may not be justified on the basis of the fruits obtained; evidence is excluded not because it is unreliable but because transcendent values preserved by constitutional guarantee are of greater societal moment than use of that evidence to obtain a criminal conviction. U.S.C.A. Const. Amend. 4; Const. art. 1, § 14.

7. Constitutional Law ⇔82(7)

State constitutional amendment providing that right of the people to privacy is recognized and shall not be infringed affords broader protection than penumbral right inferred from other constitutional provisions. Const. art. 1, § 22.

8. Telecommunications ⇔435

Privacy amendment to State Constitution prohibits secret electronic monitoring of conversations upon mere consent of a participant. Const. art. 1, § 22.

9. Telecommunications ⇔491

Expectation that one's conversations will not be secretly recorded or broadcast is reasonable. U.S.C.A.Const. Amend. 4; Const. art. 1, §§ 14, 22.

10. Telecommunications ⇔493

In the absence of a search warrant, participant electronic bugging evidence is illegally acquired. U.S.C.A.Const. Amend. 4; Const. art. 1, §§ 14, 22.

11. Telecommunications ⇔496

Generally, search warrant should be required before permitting electronic monitoring of conversations. Const. art. 1, §§ 14, 22; U.S.C.A.Const. Amend. 4.

12. Constitutional Law ⇔82(7)

Right of privacy is infringed by warrantless participant monitoring of private conversations regardless of locus of police surveillance. Const. art. 1, §§ 14, 22; U.S. C.A.Const. Amend. 4.

13. Criminal Law ⇔394.3

Where conversation between defendant and informant in defendant's home was electronically recorded by police officers standing outside home by monitoring frequency of transmitter worn by informant and where monitoring and recording of conversation were done without benefit of search warrant or other court order, monitoring and recording of conversation violated defendant's privacy rights under State Constitution, and all evidence of tape recording was inadmissible in prosecution for possession and sale of narcotic drug. AS 17.10.010; Const. art. 1, §§ 14, 22; U.S.C.A. Const. Amend. 4.

Digest

Richard J. Ray, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Avrum M. Gross, Atty. Gen., Juneau, for petitioner.

David C. Backstrom, Deputy Public Defender, Fairbanks, and Brian Shortell, Public Defender, Anchorage, for respondent.

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR, BURKE and MATTHEWS, Justices.

OPINION

BOOCHEVER, Chief Justice.

The sole issue presented by this petition for review is whether the superior court erred in granting a motion to suppress evidence obtained by electronic surveillance of the alleged narcotics transaction which gave rise to the respondent's indictment.

The facts, insofar as they are important to our decision of this issue, can be briefly stated. On April 26, 1977, members of the Fairbanks Areawide Narcotics Team, a police unit made up of state and local officers, fitted a police informant, Rondi Baker, with a small radio transmitting device. Baker was then transported to respondent Theodore Glass' home where she believed she could purchase heroin. Baker entered and, while on the premises, allegedly purchased a quantity of heroin from Glass. The conversation surrounding that transaction was electronically recorded by police officers stationed outside the home by monitoring the frequency of the transmitter worn by Baker. The monitoring and recording of that conversation was done without benefit of a search warrant or other order of the court.

[1] As a result of these events, Glass was indicted on two counts—possession of a narcotic drug and sale of a narcotic drug—in violation of AS 17.10.010. Prior to his trial, he moved to suppress all evidence of the tape recording, alleging violation of his rights under the fourth amendment to the Constitution of the United States and art. I, sec. 14 of the Constitution of the State of Alaska, both of which prohibit unreasonable searches and seizures, and under art. I, sec. 22 of the Alaska Constitution, which guarantees Alaska's citizens the right to privacy. The superior court granted Glass' motion, stating in a written opinion:

> No warrant was obtained by the State although the circumstances most certainly provided sufficient time for application therefor to have been presented to an impartial magistrate. The subject broadcasts from within the confines of the defendant's home were searches and were severe invasions into the privacy of the defendant. The Constitution of the State of Alaska mandates suppression of the tape recording of the transaction. The live testimony of the informant is still allowable.

This ruling is now before this court on the state's petition for review.[1]

The issue in this case is of substantially more significance than whether or not Theodore Glass committed the offense charged in the grand jury's indictment. It presents a question of major importance as to the scope of the right to privacy expressly set forth by an amendment to the Alaska Constitution: "The right of the people to privacy is recognized and shall not be infringed. . . ."[2]

[2] In its petition, the state relies primarily upon federal decisions dealing with the fourth amendment to the United States Constitution.[3] The authority is questiona-

1. We granted the petition for review to resolve a controlling question of law as to which there is substantial ground for difference of opinion. Review will materially advance the ultimate termination of the litigation, and the question is of sufficient importance to justify our immediate attention. *See* Appellate Rules 23 and 24.

2. Art. I, sec. 22, Alaska Constitution.

3. The fourth amendment to the United States Constitution specifies:

> *Searches and seizures.* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

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ble, and, in our view, not persuasive as to the construction of Alaska's analogous provision.[4] In any event, those authorities should not be regarded as determinative of the scope of Alaska's right to privacy amendment, since no such express right is contained in the United States Constitution.[5]

Looking first to the federal cases cited by the state, we note that all except *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971), pre-date the major change wrought by *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). At the trial of Katz, the government was permitted to introduce evidence of telephone conversations overheard by F.B.I. agents who had attached a listening and recording device to the outside of a public telephone booth from which Katz had placed his calls. Previously, fourth amendment cases had been considered from a property standpoint—whether a trespass had been committed. In *Katz*, the court held that the "Fourth Amendment governs not only the seizure of tangible items, but extends as well as to the recording of oral statements," 389 U.S. at 353, 88 S.Ct. at 512, 19 L.Ed.2d at 583, independent of trespass considerations. The court indicated that the warrant requirement of the fourth amendment had no fixed locational limitations: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." 389 U.S. at 359, 88 S.Ct. at 515, 19 L.Ed.2d at 586. The court stated that the fourth amendment "protects people, not places." 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582. It thus was immaterial whether the phone booth was a "constitutionally protected" area.[6]

> One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.[7]

[3] We believe that one who engages in a private conversation is similarly entitled to assume that his words will not be broadcast or recorded absent his consent or a warrant.

[4] Justice Harlan, in his concurrence in *Katz*, discussed the protection the fourth amendment affords to people. He set forth a dual requirement—first, that a person have exhibited an actual (subjective) expectation of privacy; and, second, that the expectation be one that society is prepared to recognize as reasonable.[8] We have adopted that rationale for Alaska.[9]

searched, and the persons or things to be seized.

4. Art. I, sec. 14 of Alaska's Constitution provides:

> *Searches and Seizures.* The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5. The United States Supreme Court has inferred a right to privacy as to certain activities from other rights set forth in the first ten amendments. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (individual decision to have an abortion); *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (private possession of obscene materials); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (use of contraceptives by married persons).

6. Similarly, we believe that the dissent's reliance on *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952), and general citation to other authorities predating *Katz* fails to recognize the significance of the demise of a trespass requirement and the subjecting of conversations to search and seizure provisions.

7. 389 U.S. at 352, 88 S.Ct. at 511, 19 L.Ed.2d at 582.

8. 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588.

9. *See Smith v. State*, 510 P.2d 793, 797 (Alaska), *cert. denied*, 414 U.S. 1086, 94 S.Ct. 603, 38 L.Ed.2d 489 (1973), *quoting* Justice Harlan's opinion in *Katz* as a "touchstone." We have repeatedly reaffirmed this test. *Woods & Rohde, Inc. v. State*, 565 P.2d 138, 149 (Alaska 1977); *Anderson v. State*, 555 P.2d 251, 260–61 (Alaska 1976); *Nathanson v. State*, 554 P.2d 456, 458 (Alaska 1976).

Katz did not involve the surreptitious broadcasting or recording of a conversation by a party to the conversation. After the *Katz* decision, there was a division of opinion among the federal courts regarding consensual eavesdropping.[10] The issue was confronted by the United States Supreme Court in *United States v. White, supra.* Government agents were permitted to testify as to conversations between the accused and an informant who carried a concealed radio transmitter. The informant did not appear as a witness. The United States Court of Appeals for the Seventh Circuit reversed the convictions, holding the evidence to be inadmissible under *Katz.*[11]

Speaking for four members of the Supreme Court, Justice White held that there was no violation of the fourth amendment and that, in any event, the case pre-dated *Katz* which was therefore not applicable. Under the decision in *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969), *Katz* was held to apply only to surveillance that occurred subsequent to the date of that decision.

Justice Brennan concurred in the result on the basis of *Desist*; but he agreed with the views of the dissenters, Justices Marshall, Douglas and Harlan, that undisclosed electronic broadcasting or recording of a conversation by a participant violated the fourth amendment in the absence of a warrant. Justice Black concurred in the judgment because of his dissent in *Katz* which expressed the view that conversations can neither be searched nor seized and are, therefore, not subject to fourth amendment protection.

[5] In construing similar provisions of Alaska's Constitution, we, of course, give careful consideration to the holdings of the United States Supreme Court, although we are not bound by them.[12] *White,* however, does not present a clear cut agreement by any majority of the justices, and our decision as to Alaska's Constitution should therefore be influenced solely by the reasoning supporting the differing positions. Moreover, the United States Supreme Court has carefully stated:

> [T]he protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States. (footnote omitted, emphasis in original) [13]

In *Holmes v. Burr,* 486 F.2d 55 (9th Cir.), *cert. denied,* 414 U.S. 1116, 94 S.Ct. 850, 38 L.Ed.2d 744 (1973), the court was confronted with a case in which Marberger, a participant in a telephone conversation with Holmes, permitted government agents to eavesdrop and record the conversation. The tape was admitted at trial. Despite

10. *See* Saunders, "Electronic Eavesdropping and the Right to Privacy," 52 Boston U.L.Rev. 831, 832 (1972). *Compare United States v. Jones,* 292 F.Supp. 1001 (D.D.C.1968), *reversed,* 140 U.S.App.D.C. 70, 433 F.2d 1176 (1970), *with United States v. Devore,* 423 F.2d 1069 (4th Cir. 1970), *cert. denied,* 402 U.S. 950, 91 S.Ct. 1604, 29 L.Ed.2d 119 (1971), *United States v. Polansky,* 418 F.2d 444 (2d Cir. 1969); *United States v. Gardner,* 416 F.2d 879 (6th Cir. 1969); *Koran v. United States,* 408 F.2d 1321 (5th Cir. 1969), *cert. denied,* 402 U.S. 948, 91 S.Ct. 1603, 29 L.Ed.2d 118 (1971); *United States v. Kaufer,* 406 F.2d 550 (2d Cir. 1969), *aff'd,* 394 U.S. 458, 89 S.Ct. 1223, 22 L.Ed.2d 414 (1969), and *Dancy v. United States,* 390 F.2d 370 (5th Cir. 1968). *See also, Doty v. United States,* 416 F.2d 887 (10th Cir. 1968), *vacated and remanded with instructions to dismiss, sub nom., Epps v. United States,* 401 U.S. 1006, 91 S.Ct. 1247, 28 L.Ed.2d 542 (1971).

11. 405 F.2d 840 (7th Cir.), *aff'd en banc,* 405 F.2d 838 (1969).

12. We may construe Alaska's constitutional provisions as affording additional rights. *See, e. g., Zehrung v. State,* 569 P.2d 189 (Alaska 1977), *opinion on rehearing,* 573 P.2d 858 (Alaska 1978) (search and seizure); *Woods & Rohde Inc. v. State,* 565 P.2d 138 (Alaska 1977) (search and seizure); *Blue v. State,* 558 P.2d 636 (Alaska 1977) (right to counsel at pre-indictment line-up); *Isakson v. Rickey,* 550 P.2d 359 (Alaska 1976) (equal protection); *Yarbor v. State,* 546 P.2d 564 (Alaska 1976) (speedy trial); *Scott v. State,* 519 P.2d 774 (Alaska 1974) (self-incrimination); *R. L. R. v. State,* 487 P.2d 27 (Alaska 1971) (jury trial in delinquency proceeding); *Baker v. City of Fairbanks,* 471 P.2d 386 (Alaska 1970) (jury trial).

13. *Katz v. United States,* 389 U.S. at 350-51, 88 S.Ct. at 510-11, 19 L.Ed.2d at 581.

White, Judge Hufstedler dissented from a holding affirming the conviction. The rapid expansion of governmental surveillance by wiretapping and bugging is reviewed in that dissent. Judge Hufstedler states that participant monitoring and electronic surveillance are much more widespread, running into tens of thousands of instances per year. *Id.* at 65. She states:

> In a pluralistic society dedicated to liberal democratic traditions, confidential communication serves as a lubricant for the smooth functioning of social and political institutions. Without "uninhibited, robust, and wide-open" public and private expression on the great issues of our day, as well as private discussion about the mundane, the trivial, and the banal, a once free society will soon become a nation of "hagridden and furtive" people.
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> The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording of their conversation. Extensive police-instigated and clandestine participant recordings, coupled with their use as evidence of any self-incriminating remarks of the speaker, pose "a grave danger of chilling all private, free, and unconstrained communication. . . . In a free society, people ought not to have to watch their every word so carefully." *Lopez v. United States*, . . . 373 U.S. at 452, 83 S.Ct. at 1395 (Brennan, J., dissenting).[14]

The dissent points out that to say that Marburger's consent is Holmes' consent is a fiction that has been expressly rejected by the Supreme Court in the context of warrantless searches and seizures.[15] The evidence therefore is inadmissible on any consent theory.[16]

The principal distinction between the risk that one's confidant may be a gossip and the risk that the conversation is being broadcast or recorded is explained:

> Repetition of conversations thought to be confidential is a known risk. However, the risk that one's trusted friend may be a gossip is of an entirely different order than a risk that the friend may be transmitting and recording every syllable. The latter risk is not yet rooted in common American experience, and it should not be thrust upon us: the differences between talking to a person enswathed in electronic equipment and one who is not are very real, and they cannot be reduced to insignificance by verbal legerdemain. All of us discuss topics and use expressions with one person that we would not undertake with another and that we would never broadcast to a crowd. Few of us would ever speak freely if we knew that all our words were being captured by machines for later release before an unknown and potentially hostile audience. No one talks to a recorder as he talks to a person.[17]

In the case at bar, the state argues that there is no difference between talking to a friend who repeats what is told in confidence and talking to one with a transmitter or recorder. All one needs do to refute that statement is to ask the question of oneself; would it make a substantial difference to the speaker to assume the risk, not only that one's confidence will be betrayed by oral recollections, but also the risk that one's remarks will be secretly recorded or broadcast? Certainly, many of the casual, the caustic, the irreverent remarks would

14. 486 F.2d at 65–66.

15. *Id.* at 71.

16. *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (hotel manager cannot consent on behalf of guest to search of guest's room); *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) (landlord cannot consent to search of tenant's quarters). *See also*, *Robinson v. State*, 578 P.2d 141 (Alaska 1978).

17. 486 F.2d at 72.

be inhibited, as would criticism of individuals and policies. The employee could not with impunity point to shortcomings in his superiors or in the functions of his office. Families could not freely discuss the foibles of others. Clever prodding may elicit thoughtless comments about sex, religion, politics, acquaintances, personal finances and even one's innermost thoughts. One takes the risk that his friend may repeat what has been said. One shouldn't be required to take the additional risk of an entirely different character—that his conversation is being surreptitiously transcribed or broadcast.

A confidence repeated by a false friend is received by third parties with the attendant circumstances of the "friend's" credibility and memory. One's ill-considered remarks are not thereby preserved for posterity on the reels of magnetic tape nor insulated from the faded memories inherent in the passage of time. Faced with the choice of silence or the risk that comments will be "etched in stone," a speaker may choose the former alternative, to the manifest diminution of the spontaneity which marks our daily discourse.[18]

[6] To argue that the monitored conversation is admissible because it is merely a more reliable version of the informant's testimony is to respond to an irrelevant question. Contraband discovered in an illegal entry by police is inadmissible although it is the best evidence that contraband was present. We exclude the evidence not because it is unreliable but because the transcendent values preserved by constitutional guarantee are of greater societal moment than the use of that evidence to obtain a criminal conviction. *See Holmes v. Burr*, 486 F.2d at 74 (Hufstedler, J., dissenting). It is axiomatic that police conduct may not be justified on the basis of the fruits obtained. *Schraff v. State*, 544 P.2d 834 (Alaska 1975).

It is, of course, easy to say that one engaged in an illegal activity has no right to complain if his conversations are broadcast or recorded. If, however, law enforcement officials may lawfully cause participants secretly to record and transcribe private conversations, nothing prevents monitoring of those persons not engaged in illegal activity, who have incurred displeasure, have not conformed or have espoused unpopular causes.

Six of the seven justices of the Michigan Supreme Court held, recently, in the absence of a specific privacy provision such as that contained in Alaska's Constitution, that the defendant was denied the right under the Michigan Constitution to freedom from an unreasonable search and seizure when a police officer testified to a conversation between the defendant and an informant equipped with a concealed transmitter which relayed the conversation to the officer without the defendant's knowledge. *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511, 516, *cert. denied*, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (1975).

An even more compelling reason for such a ruling is presented by Alaska's specific constitutional provision recognizing a right to privacy which shall not be infringed. The Montana Supreme Court has recently held in *State v. Brackman*, 582 P.2d 1216 (Mont.1978), that its constitutional right to privacy provision which states in part that the right to privacy "shall not be infringed without the showing of a compelling state interest" prohibited surreptitious broadcasting to the police of a conversation by a party to the conversation. Two justices dissented on the basis that there was no expectation of privacy since the conversation occurred in the public parking lot of a shopping center.

[7] Although there is no recorded legislative history of Alaska's right to privacy

18. In this context, seizure of a conversation and the ideas expressed therein may implicate rights of free speech guaranteed by the first amendment to the United States Constitution and art. I, sec. 5 of the Alaska Constitution. Knowledge that the courts will permit warrantless monitoring of innocent conversations could chill the conversations themselves. *See Burkhart v. Saxbe*, 448 F.Supp. 588, 603 (E.D. Pa.1978).

provision,[19] it is clear that it affords broader protection than the penumbral right inferred from other constitutional provisions.[20] Were that not the case, there would have been no need to amend the constitution.

Federal courts have recognized the power of the states to regulate rights to privacy in a manner broader than the federal protections.[21] California has specifically included surveillance and data collecting activities within the aegis of its right to privacy amendment. *White v. Davis*, 13 Cal.3d 757, 120 Cal.Rptr. 94, 105, 533 P.2d 222, 233 (1975).

Assistance in ascertaining some purposes behind Alaska's privacy amendment may be obtained, despite the lack of a recorded history, from analogy to similar provisions recently enacted by other states.

Hawaii, which became a state immediately after Alaska, similarly had no express right to privacy in its original constitution. In 1968, its constitution was amended to add the phrase "invasions of privacy" to the provisions on search and seizure. The amended section reads:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated.[22]

In *State v. Roy*, 54 Haw. 513, 510 P.2d 1066, 1068–69 (1973), the Hawaii Supreme Court explained the purpose of that amendment. In a case where a police informant, without the assistance of electronic devices, testified about purchasing marijuana, the court held the evidence admissible. The Hawaii privacy amendment was held not to prevent a person's repeating a conversation. Its purpose was described as follows:

> A careful review of Report No. 55 of the 1968 Constitutional Convention, in which the amendment was proposed, and of the debates in the Committee of the Whole regarding that amendment, has led us to conclude that the delegates to the constitutional convention added to article I, § 5 the words "invasion of privacy" out of a concern to protect against extensive governmental use of electronic surveillance techniques, and not out of any desire to curb the activities of secret government agents.[23]

As noted previously, California has also recently approved an amendment to its constitution, including the right to privacy among the inalienable rights of all people. In *White v. Davis*, 13 Cal.3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 (1975), a case which illustrates that the dire, Orwellian *1984* predictions by those opposing the warrantless use of electronic devices are not figments of imagination, the California right to privacy provision was applied. Police officers posed as students and covertly recorded discussions in university classes and in public and private meetings. In holding such surveillance activities to be in violation of California's privacy amendment, the court stated:

> Although the full contours of the new constitutional provision have as yet not even tentatively been sketched, we have concluded that the surveillance and data gathering activities challenged in this case do fall within the aegis of that provision.[24]

[8] Similarly, we believe that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant. Like California's provision, the contours of Alaska's right to privacy are not yet firmly established.[25] The meaning of privacy of

19. *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974).

20. *Woods & Rohde, Inc. v. State*, 565 P.2d 138, 149 (Alaska 1977).

21. *See Katz v. United States, supra* 389 U.S. at 350–51, 88 S.Ct. at 510–511, 19 L.Ed.2d at 581; and *Dietemann v. Time, Inc.*, 449 F.2d 245, 251 (9th Cir. 1971), and cases cited therein.

22. Art. I, sec. 5, Hawaii Constitution.

23. *Id.* at 1068–69.

24. 120 Cal.Rptr. at 105, 533 P.2d at 233.

25. Among the cases applying the Alaska constitutional provision are: *State v. Erickson*, 574 P.2d 1 (Alaska 1978) (possession of cocaine for personal use in the home not protected). *Fal-*

necessity must vary depending on the factual context and the often competing interests of society and the individual.[26] The protection has been defined,[27] for example, as the right "to be let alone," [28] the right of persons "to determine for themselves when, how, and to what extent information about them is communicated to others," [29] and the right which protects "the individual's interest in preserving his essential dignity as a human being." [30] Our conclusion is consistent with these concepts and with the test of privacy articulated by Justice Harlan in *Katz, supra*, and adopted by this court.

Applying Justice Harlan's two-pronged test, we believe that one communicating private matters to another exhibits an actual (subjective) expectation of privacy whether or not the listener is equipped with electronic devices. The key question is whether that expectation of privacy is one that society is prepared to recognize as reasonable.

[9] In the context of law enforcement, it is true that the use of informers is a highly necessary tool in fighting crime. In combating illegal sale of drugs, as involved in this case, because of the clandestine nature of the transactions, testimony by police informers or others trusted by the criminal is one of the few methods by which convictions may be obtained.[31] Society is not willing to accept as reasonable the subjective expectation of one engaged in a conversation that it will not be repeated. For generations, while not condoning the gossip or false friend, society has countenanced the repetition of private conversations. The use of surreptitious electronic devices to broadcast or record conversations, however, is a development of recent vintage. We conclude that the expectation that one's conversations will not be secretly recorded or broadcast should be recognized as reasonable.

Even prior to California's enactment of its privacy amendment, the United States Court of Appeals for the Ninth Circuit held, in a diversity case, that a California common law cause of action for invasion of privacy was established when employees of Time, Inc., gained entrance to the office portion of the plaintiff's home with his consent and then secretly photographed him and electronically recorded and transmitted his conversation to third persons without his consent. The activity occurred in cooperation with the police in cracking down on medical quackery. Expressing the view of many jurisdictions that such electronic surveillance violated privacy rights, the court stated:

> In jurisdictions other than California in which a common law tort for invasion of privacy is recognized, it has been consistently held that surreptitious electronic recording of a plaintiff's conversation causing him emotional distress is actionable. Despite some variations in the description and the labels applied to the tort, there is agreement that publication is not a necessary element of the tort, that the existence of a technical trespass is immaterial, and that proof of special

con v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska 1977) (certain information communicated to physicians is within zone of privacy); *Woods & Rohde, Inc. v. State*, 565 P.2d 138 (Alaska 1977) (warrantless administrative inspections of private business premises prohibited); *Anderson v. State*, 562 P.2d 351 (Alaska 1977) (state may control sexual conduct of juveniles); *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (possession of marijuana by adults for personal use in the home protected). *See also*, Howard, "State Courts and Constitutional Rights in the Day of the Burger Court," 62 Va.L.Rev. 873, 928–37 (1976)

26. *See State v. Erickson*, 574 P.2d 1, 22 n. 144 (Alaska 1978)

27. *See generally*, Hodges, "Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?" 3 Hastings Const.L.Q. 261, 262–63 (1976).

28. Warren and Brandeis, "The Right to Privacy," 4 Harv.L.Rev. 193, 205 (1890).

29. Westin, *Privacy and Freedom* 7 (1967).

30. Hufstedler, "The Directions and Misdirections of a Constitutional Right of Privacy," 26 Record of N.Y.C.B.A. 546, 550 (1971).

31. *Pascu v. State*, 577 P.2d 1064, 1068 (Alaska 1978).

damages is not required. (*E. g., Nader v. General Motors Corp.* (1970) 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (applying District of Columbia law); *Hamberger v. Eastman* (1964) 106 N.H. 107, 206 A.2d 239; *Roach v. Harper* (1958) 143 W.Va. 869, 105 S.E.2d 564; *McDaniel v. Atlanta Coca-Cola Bottling Co.* (1939) 60 Ga.App. 92, 2 S.E.2d 810; *cf. Pearson v. Dodd*, 133 U.S.App.D.C. 279, 410 F.2d 701, cert. denied (1969) 395 U.S. 947, 89 S.Ct. 2021, 23 L.Ed.2d 465).[32]

[10] If for the purposes of civil litigation, participant electronic bugging constitutes an invasion of a common law right to privacy, such conduct obviously violates an expressed constitutional declaration of the right. In the absence of a search warrant, evidence so obtained should be held to be illegally acquired.

[11] It seems only just that conduct of those engaged in criminal activity be revealed. Legitimate interests of law enforcement authorities, however, may generally be met in the same manner as in other searches and seizures. In the absence of limited exceptions, a search warrant should be obtained from an impartial magistrate, based on probable cause to believe that criminal activity will be discovered,[33] before electronic monitoring of conversations should be allowed. It may be that, as in other search and seizure contexts, the requirement of a warrant may be obviated under exigent circumstances. We withhold passing on that issue until presented with a specific case. Generally, however, a search warrant should be required before permitting electronic monitoring of conversations.

[12, 13] We believe that this requirement will not unreasonably impinge on legitimate law enforcement efforts.[34] In *United States v. White, supra*, there was testimony about eight separate conversations that were monitored. 401 U.S. 745, 747, 91 S.Ct. 1122, 1123, 28 L.Ed.2d 453, 456. Certainly, based on an affidavit of the informant as to earlier non-monitored conversations, a warrant was obtainable. In Glass' case, it appears that Ms. Baker believed she could purchase heroin at Glass' home.[35] If there were probable cause for the belief, a warrant could have been secured.[36] Just as the warrant requirement protects against unreasonable search and seizures, it can prevent improper invasions of privacy by electronic monitori[illegible]. Alaska's Constitution mandates that [illegible] people be free from invasions of privacy by means of surreptitious monitoring of conversations.

32. 449 F.2d at 247–48.

33. *See, e. g., Keller v. State*, 543 P.2d 1211, 1215 (Alaska 1975); *State v. Spietz*, 531 P.2d 521, 523 (Alaska 1975)

34. One argument advanced is that bugging aids in safeguarding informants. This may be questionable since the presence of electronic devices on the informant may add to his risk, because sophisticated "anti-bugging" technology may disclose the presence of the device or it may otherwise be discovered. In any event, New Hampshire has met that contention by holding that a statute which permits participant monitoring does not permit the introduction at trial of a tape recording of a conversation transmitted by such a device. The court held that the purpose of the statute's exception was to allow police officers to protect the undercover officer and that monitoring for purposes of rescue was not equivalent to monitoring for purposes of introduction of the conversation at trial. *State v. Ayres*, 383 A.2d 87, 88 (N.H.1978).

35. We have previously recognized the high degree of protection surrounding the home. *See, e. g., Anderson v. State*, 562 P.2d 351, 358 (Alaska 1977); *Ravin v. State*, 537 P.2d 494, 503–04 (Alaska 1975). We decline to base our holding on this particularized protection, however, since we have concluded that the right of privacy is infringed by warrantless participant monitoring of private conversations regardless of the locus of the police surveillance.

36. The dissent cites Justice Coleman's prediction in her dissent in *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511, 522 *cert. denied*, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (1975), that the technical requirements for specificity in the issuance of a warrant could frustrate legitimate searches and seizures of conversations incident to criminal activity. We do not agree. Conversations, of course, may occur in a variety of places and on a variety of subjects. What is required is a description of the person and subject which is reasonable under the circumstances, and we shall leave further refinement of requirements to future cases.

We hold that Judge Blair's well-reasoned decision suppressing the evidence obtained by electronic surveillance correctly applied the precepts guaranteed by art. I, secs. 14 and 22 of the Alaska Constitution.[37]

AFFIRMED.

BURKE, J., dissents.

BURKE, Justice, dissenting.

The Supreme Court of the United States has consistently held that the Fourth Amendment does not prevent the use, as evidence, of statements electronically monitored or recorded under circumstances similar to those present in the case at bar. *See, e. g., Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *On Lee v. United States*, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). *See also United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971). Other federal courts and a multitude of state courts interpreting similar provisions found in their own state constitutions have expressed the same view. *See Annot.*, 97 A.L.R.2d 1283 (1964). Thus, the overwhelming weight of authority holds that evidence secured by means of a mechanical or electronic monitoring device is admissible, where it appears that one of the parties to the conversation consented to or cooperated in its interception. *Id.*

In *On Lee v. United States, supra*, a narcotics agent overheard a conversation by means of a microphone and radio transmitter carried by an informant with whom the defendant spoke. The agent's testimony relating what he had heard was held properly admitted against the defendant in his trial for selling opium. Rejecting the defendant's argument that such conduct was analogous to illegal wiretapping, the Supreme Court of the United States held that there was no violation of his Fourth Amendment rights, saying:

> The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties impro-

37. Although it has not been raised by the parties, we note the existence of AS 11.60.290 which provides:

> *Eavesdropping.* It is unlawful for a person to
>
> (1) use an eavesdropping device to hear or record all or any part of an oral conversation without the consent of a party to the conversation;
>
> (2) use or divulge any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device for his own or another's benefit;
>
> (3) publish the existence, contents, substance, purport, effect or meaning of any conversation he has heard through the illegal use of an eavesdropping device;
>
> (4) divulge, or publish the existence, contents, substance, purpose, effect or meaning of any conversation he has become acquainted with after he knows or reasonably should know that the conversation and the information contained in the conversation was obtained through the illegal use of an eavesdropping device.

Conduct prohibited by AS 11.60.290 is punishable by fine or imprisonment or both pursuant to AS 11.60.310. Our holding is unaffected by this statute, however, since we are interpreting constitutional provisions. Moreover, we do not construe AS 11.60.290 as positively sanctioning conduct not declared unlawful therein. The report of the House Judiciary Committee accompanying the original bill, enacted prior to the adoption of the right to privacy amendment, stated:

> In regard to evidence obtained by wiretap or other eavesdropping devices being used in court proceedings the bill does not in any way change the existing law of Alaska. The admittance or rejection of such evidence is left to case law and the rules governing the admissibility of evidence as interpreted by the court.

1966 H.J. at 525-29. *See also, Roberts v. State*, 453 P.2d 898, 900-02 (Alaska 1969).

vised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment. . . . [1]

In *Lopez v. United States, supra*, the Supreme Court gave its approval to use of a wire recording of a conversation between the defendant and an Internal Revenue agent in which the defendant offered the agent a bribe. During a visit to the defendant's office the agent recorded the conversation on a small recording device carried in his pocket. Noting, as did the superior court in this case, that the agent himself could testify about the conversation, the Court said:

> Once it is plain that [agent] Davis could properly testify about his conversation with Lopez, the constitutional claim relating to the recording of that conversation emerges in proper perspective. The Court has in the past sustained instances of "electronic eavesdropping" against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. *See, e. g., Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 [66 A.L.R. 376]; *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman v. United States* [365 U.S. 505, 81 S.Ct. 679], 5 L.Ed.2d 734, supra. The validity of these decisions is not in question here. Indeed this case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it would not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself.[2]

More recently, in *United States v. White, supra*, the Supreme Court reversed a decision of the United States Court of Appeals for the Seventh Circuit which held that it was error to admit the testimony of a government agent relating a conversation between the defendant and an informant overheard by monitoring transmissions from a radio transmitter concealed upon the person of the informant. Four members of the Court saw no necessity for a warrant. In a plurality opinion, Mr. Justice White stated:

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa v. United States*, 385 U.S. [293] at 300-303, 87 S.Ct. 408 at 412-414 [17 L.Ed.2d 374 at 381, 382]. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez v. United States*, supra; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee v. United States*, supra. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the

1. 343 U.S. at 753-54, 72 S.Ct. at 972.

2. 373 U.S. at 438-39, 83 S.Ct. at 1387-88.

same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.[3]

The view reflected by the foregoing authorities has been incorporated in § 4.1 of the American Bar Association's Standards Relating to Electronic Surveillance (Approved Draft, 1971). The standard provides:

The use of electronic surveillance techniques by law enforcement officers for the overhearing or recording of wire or oral communications with the consent of one of the parties should be permitted.[4]

3. 401 U.S. at 751, 91 S.Ct. at 1125. Mr. Justice Black concurred in the judgment of the Court for the reasons set forth in his dissent in *Katz v. United States*, 389 U.S. 347, 364, 88 S.Ct. 507, 516, 19 L.Ed.2d 576, 589 (1967), namely: that eavesdropping carried out by electronic means involves no "search" or "seizure." In *Katz* the Court held that there was a Fourth Amendment violation where government agents attached a listening device to the outside of a telephone booth and recorded the defendant's end of a telephone conversation. Unlike the facts in this case, no party to that conversation had consented to its being monitored and recorded by the police. Mr. Justice Brennan concurred in the result in *White*, stating that reversal was required by *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). In *Desist* the Court held that *Katz*, *supra*, would apply prospectively, *i. e.*, only to those electronic surveillances occurring after the date of that decision in 1969. (The surveillance in *White v. United States* occurred in 1965.) However, Mr. Justice Brennan further expressed the belief that the Fourth Amendment imposes a warrant requirement both where an informant secretly records a conversation with the accused and where he transmits that conversation as was done in the case at bar.

4. The commentary to § 4.1 states:

Ultimately, the standard rests on the proposition that the "function of a trial is to seek out and determine the truth or falsity of the charges brought against the defendant." *Lopez v. United States*, 373 U.S. 427, 440 [83 S.Ct. 1381, 10 L.Ed.2d 462] (1963). To that end, the law must always seek to obtain the best and most reliable evidence. Traditionally, that evidence has consisted mainly of the testimony of witnesses who saw or heard what they later reveal in court. No man knows better, however, the fallibility of human testimony than that man who is trained in the law. The prospect that science through electronic surveillance techniques can provide us with evidence not subject to the frailties of human nature ought, therefore, to be applauded. The use of such techniques in this area, in short, should be encouraged, not discouraged, and they should not be encumbered with administrative procedure. Where trained investigators are conducting routine interviews, reliance may properly be placed in the agents' memories aided by notes taken contemporaneously. See *Campbell v. United States*, 373 U.S. 487 [83 S.Ct. 1356, 10 L.Ed.2d 501] (1963). But where informants, whose credibility may be suspect, are used, see, *e. g.*, *Osborn v. United States*, 385 U.S. 323 [87 S.Ct. 429, 17 L.Ed.2d 394] (1966), where victims of crimes are engaged in key conversations with the perpetrators themselves, see, *e. g.*, *Rathbun v. United States*, 355 U.S. 107 [78 S.Ct. 161, 2 L.Ed.2d 134] (1957), or where the investigators as such are individually involved and their credibility will be a significant factor in the subsequent trial, see, *e. g.*, *Lopez v. United States*, 373 U.S. 427 [83 S.Ct. 1381, 10 L.Ed.2d 462] (1963), every effort should be made to record the conversations through the best available means. For a recording will reproduce the very words spoken with all the added significance that comes from inflection, emphasis and the other aspects of oral speech. See *State v. Reyes*, 209 Ore. [Or.] 595, 308 P.2d 182 (1957). The goal of finding the truth in the criminal trial demands no less. The defendant, too, has a stake in the best evidence being presented to the court and jury. Thus, recording as such "involves no 'eavesdropping' whatever in any proper sense of that term." *Lopez v. United States*, 373 U.S. 427, 439 [83 S.Ct. 1381, 10 L.Ed.2d 462]. It should not be unthinkingly placed in the same category with wiretapping or bugging. Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 Minn.L.Rev. 855, 866 (1960); Schwartz, *On Current Proposals To Legalize Wiretapping*, 103 U.Pa.L.Rev. 157, 166-67 (1954). Overhearing too, is not eavesdropping. "When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. * * * It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording or transmitting to another." *Katz v. United States*, 389 U.S. 347, 363 n* [88 S.Ct. 507, 19 L.Ed.2d 576] (1967) (White, J. concurring)

The crucial issue in any overhearing or recording situation is instead the right of the

One of the two decisions called to our attention holding directly to the contrary is from the Supreme Court of Michigan, *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975), *cert. denied*, 423 U.S. 878, 96 S.Ct. 152, 46 L.Ed.2d 111 (1975). In that case the court held that in the absence of a search warrant, electronic monitoring of a defendant's conversation with an informant constituted an unreasonable search and seizure, under a provision of the Michigan Constitution similar to our own art. I, § 14. However, the Michigan court held, as did the superior court in the case at bar:

> The admissibility of the informant's testimony is in no way affected by ruling inadmissible the testimony of the two police officers [who monitored the conversation]. The warrantless monitoring and subsequent testimony of these two witnesses renders tainted the *transmitted* account of the conversation, but does not in any way prevent the informant from testifying as to the statement spoken to him *directly*.[5]

In a well-reasoned dissent, Justice Coleman of the Michigan court, criticized the position taken by her colleagues, stating:

> By federal standards and, I assume, by the standards of the majority of this Court, a record from a device taped to [the informant's] body would be admissible in evidence as would be testimony by people listening from a closet or at an open window or viewing the premises with binoculars. Conversations can be written down or related to third parties. As a practical matter, monitoring the same consensual conversation through a "walkie-talkie" provides no greater degree of "intrusion."
>
> It serves to encourage defendant's honesty and to protect the life of the agent or informant. He plays a deadly game and the microphone allows him speedy access to help.
>
> More importantly, it provides a means to protect the courtroom against degrading and flagrant use of perjury.
>
> Further, the very nature of the narcotics trade renders it subject to need for quick action. Otherwise, the "bird will have flown," the opportunity to listen to a "buy" will have been lost. The requirement that the officer first find a magistrate and then try to describe the conversation to be "seized" and the place (under *Katz*, it could be anyplace, including some sidewalk) where it is to be "seized" and then to go with the warrant (if any) to the scene is designed for self-defeat.[6]

Like Justice Coleman I believe the better view is that favored by the great weight of authority. Accordingly, in the case at bar, I would hold that the recording of respondent Glass' conversations with the informant Baker was not a violation of any right guaranteed to Glass by art. I, § 14 of the Constitution of the State of Alaska, and that the superior court erred in suppressing evidence of that tape recording on the grounds stated.

Similar reasoning leads me to the further conclusion that there was no violation of Glass' rights under art. I, § 22 of the State Constitution. That section provides:

> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

witness himself to testify. Where he is entitled to testify, there can be no valid objection to the use of an overhearing or recording device, and the introduction of its product at trial. No one should have the right to exclude the testimony of a third party or a recording and "rely on possible flaws in the [witness's] . . . memory, or to challenge [his] . . . credibility without being beset by corroborating evidence that is not susceptible of impeachment." *Lopez v. United States*, 373 U.S. at 439 [83 S.Ct. 1381]. Overhearing, too, may be necessary for the protection of an informant. Only the most serious reasons grounded in the most fundamental policy considerations should warrant the failure to use or the suppression of relevant and reliable evidence. *Nardone v. United States*, 308 U.S. 338, 340 [60 S.Ct. 266, 84 L.Ed. 307] (1939). Overhearing or recording involves none of those reasons or considerations.

A.B.A. Standards Relating to Electronic Surveillance (Approved Draft, 1971) at 126-27.

5. 227 N.W.2d at 516. (Emphasis in original.)

6. *Id.* at 522.

Unquestionably, as recognized by the superior court, and even respondent, Baker would be entitled to testify concerning her own dealings with Glass and to relate the conversations surrounding those dealings to the best of her recollection. Therefore, the electronic recording of those conversations was not an invasion of respondent's privacy. The electronic recording simply provided an accurate record of the incriminating statements made to Baker and it is undisputed that Baker could testify personally as to these statements. As stated in *Lopez v. United States, supra*:

> Stripped to its essentials [respondent's] argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.[7]

I consider that argument to be without merit. Like the Supreme Court of the United States in *Lopez*, I think that the risk respondent took in dealing with Baker included the risk that the words spoken "would be accurately reproduced in court, whether by faultless memory or mechanical recording."[8] *See also State v. Roy*, 54 Haw. 513, 510 P.2d 1066 (1973).

The majority's reliance on *White v. Davis*, 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P.2d 222 (1975), is, I believe, completely unwarranted. I see little similarity between the surveillance done in the case at bar and that done in *White*, where police officers engaged in wholesale secret recording of university class discussions in order to compile dossiers on those present, rather than as part of an investigation of specific criminal activity. Central to the California Supreme Court's condemnation of the surveillance in that case was the obvious threat posed to First Amendment freedoms, and its recognition that, "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" 120 Cal.Rptr. at 101, 533 P.2d at 229, quoting the Supreme Court of the United States in *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960). In short, any governmental interest that might have been furthered by the type of surveillance carried on in that case was held to be outweighed by a free society's interest in having the university classroom remain a forum for the free exchange of ideas. I certainly applaud the decision in *White*, but what that all has to do with the situation in the case at bar is beyond my ken.

I would reverse the superior court's suppression order.

STATE of Alaska, Petitioner,

v.

Michael THORNTON, Respondent.

No. 3764.

Supreme Court of Alaska.

Sept. 15, 1978.

The Superior Court, Fourth Judicial District, Fairbanks, Jay Hodges, J., entered order suppressing evidence consisting of tape recordings of conversations between defendant and police informant and State's petition for review was granted. The Supreme Court, Boochever, C. J. held that recording of conversations violated defendant's rights under State Constitution.

Affirmed.

Burke, J., filed a dissenting statement.

7. 373 U.S. at 439, 83 S.Ct. at 1388.

8. *Id.*

exclusionary rule's critics

By Ronald K.L. Collins
and Robert C. Welsh

Eugene, Ore.
Current attempts to modify the exclusionary rule in law call to mind Woody Allen's sage observation that the lion and the lamb shall lie down together, but the lamb won't get much sleep.

At issue is whether the U.S. Supreme Court should adhere to its nearly 70-year-old rule that evidence obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures may not be used in a criminal trial.

In the case of Illinois vs. Gates, opponents of the rule have succeeded in persuading the court to consider whether illegally seized evidence may nonetheless be introduced in a trial when the police acted on the basis of a "good faith" belief that their actions were constitutional.

Some arguments for adopting this position have great surface appeal. Why should prosecutors be prohibited from using reliable evidence of the defendant's guilt when the police believe that their actions were legal? This rationale seems forceful in the context of the Gates case, where police officers relied upon a court search warrant that later was declared invalid.

Proponents of the good-faith rationale are not likely to limit their arguments to the circumstances in the Gates case. Presumably, they would allow admission of most improperly gathered evidence whenever the police believed they were obeying the law.

The argument for a good-faith exception fails on no fewer than three counts.

First, as a statement of constitutional law, it breeds governmental disrespect for constitutional restraints. As a search-and-seizure expert, Prof. Wayne LaFave of the University of Illinois, recently observed, adoption of the good-faith exception would entail a "revision of the old quip that 'close only counts in horseshoes and grenades.'" Nor is there is no reason to assume that the good-faith rationale, if let loose in the Gates case, would not move to other constitutional fronts. Would courts embrace the proposition that "'close' counts" when a municipality bans certain forms of constitutional expression, or when a judge denies the news media access to criminal proceedings?

Second, the alleged benefits to be derived from the good-faith exception are not worth the compromise that our society would have to strike with fundamental constitutional rights. There is no reliable evidence that the exclusionary rule significantly interferes with our ability to apprehend and convict criminals. As a 1978 study by the U.S. comptroller general concluded, only four-tenths of 1 percent of all federal prosecutions from July to August of that year were jeopardized by the exclusion of evidence.

Third, adoption of the good-faith exception would undo many advances that have occurred as a result of the exclusionary rule. Since the supreme court extended the rule to the states in 1961, many police departments have developed ongoing instruction programs in search-and-seizure law. The use of search warrants has increased dramatically.

The good-faith exception would jeopardize these accomplishments because it places a premium not on an officer's knowledge of the law but on his ignorance. Why should police departments adopt and enforce internal guidelines confining police discretion if ignorance is the standard? Notably, it remains a mystery whether the police in the Gates case had or followed departmental guidelines.

If a supreme court majority is determined to retreat in this area, it is better that it take a different approach. Instead of sanctioning unconstitutional police conduct by admitting illegally obtained evidence, the court should shift the good-faith debate directly into the Fourth Amendment arena in order to determine whether such actions are compatible with the amendment's expressed command of reasonableness. This tactic at least would place the good-faith exception within added constitutional boundaries and would not therefore permit exceptions to otherwise protected rights.

Defending the exclusionary rule does not mean that society is powerless to protect itself. But American society cannot call itself free if it fights crime by imprisoning the Fourth Amendement.

Robert C. Welsh is assistant professor of political science at the University of California at Los Angeles. Ronald K.L. Collins teaches constitutional law at Willamette University in Salem, Ore.

Exclusionary rule aids public, not criminals

Not long after President Reagan's Task Force on Violent Crime recommended in 1981 that Congress legislate a "good-faith exception" to the so-called "exclusionary rule," a Task Force member told me privately that the rule did not really prevent many criminals from going to jail.

But, he said, people thought it did. In his view, something therefore had to be done about the exclusionary rule, so that people would believe something was being done about crime.

The rule, promulgated for federal criminal prosecutions in 1914 and extended to state courts in 1961, provides that evidence seized in violation of Fourth Amendment prohibitions against unreasonable and improperly warranted searches and seizures is inadmissible in criminal trials.

As fear of crime has become epidemic in America, the myth has spread that streams of criminals are going free because the exclusionary rule prevents the evidence against them from being used in court. The Fifth Circuit Court of Appeals has responded with an exception to the rule, providing that unconstitutionally seized evidence is admissible if the police had a reasonable, good-faith belief that they were acting properly.

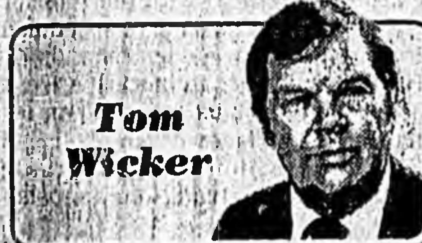
Last week the Supreme Court heard arguments on whether it too should adopt a "good-faith exception," presumably for courts at all levels. Five justices already have indicated some willingness to modify or abolish the rule.

In an article in the December 1981 issue of the Georgetown Law Journal, William J. Mertens and Silas Wasserstrom, both experienced public defenders, argue compellingly that for the Supreme Court to take such a step would significantly widen police latitude and water down Fourth Amendment protections.

Their article is too long and detailed to be easily condensed, but several of their points can be summarized:

1. Deterrence of police misconduct will be diminished under a good-faith exception rule because the exception inevitably will substitute for the specific standards of the Fourth Amendment a test of the "general reasonableness" of police searches and seizures.

But a police officer "cannot be de-



Views expressed here do not necessarily represent those of the Daily News-Miner

terred from violating the Constitution unless he knows that his actions are in fact unconstitutional"; and the danger of the good-faith exception is that courts would test the "reasonableness" rather than the constitutionality of an officer's action. Not only would that often condone the action; but also, if it did the court would not need to decide whether or how the Constitution might have been violated. Officers would be "left in welcome ignorance, free to make such 'reasonable' mistakes in 'good faith' forever."

2. The good-faith exception also would undermine what the authors call "systemic deterrence." At their own discretion, for example, District of Columbia police used to stop autos for routine license and registration checks. But in 1979 the Supreme Court held such checks unconstitutional, unless the officer stopping the car had "articulable suspicion" of criminal activity. The decision brought an immediate cessation of routine checks in the District and other jurisdictions.

If the court had taken a "good-faith" approach, or had applied a test of "reasonableness" rather than the standards of the Fourth Amendment, routine stop-and-check procedures probably would still be common in many jurisdictions; and in future that could happen on far more serious constitutional questions.

3. In deciding upon the good faith and reasonableness of an officer's action, what standards would the courts apply? Who would bear the burden of proof? What evidence on the question of good faith would be admissible? If a criminal defendant, for example, had to prove bad faith or unreasonableness on an officer's part, the defendant's rights might be doubly endangered, for such proof could be difficult to establish.

Or suppose the defense contends that an officer was well-trained and should have known better than to violate a defendant's rights, hence could not have been acting mistakenly but in good faith. The prosecution might have to argue that the officer was not well trained: poor training might actually become a police aid in making unconstitutional searches and seizures stand up in court.

4. If, to protect constitutional rights under a good-faith exception, officers were made personally liable in civil and criminal law for Fourth Amendment violations, the authors argue that law enforcement might actually suffer. Policemen in ambiguous situations, fearing personal liability for wrongful action, might refuse to act at all—possibly permitting more criminals to escape justice than the exclusionary rule does.

The argument, of which these points are but a sample, is complex but the logic is persuasive: a good faith exception will weaken not just the exclusionary rule but the Fourth Amendment itself.

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Few Criminals Appeal, Says Survey, and Fewer Succeed

LA TIMES 2/5/81

By PHILIP HAGER, *Times Staff Writer*

SAN FRANCISCO—Of the few criminal defendants who exercise their right to appeal, very few win reversals of their convictions, according to a new study of the California Court of Appeal.

The study, based on an analysis of court data here and interviews with justices, concludes that critics' claims that appellate courts overturn too many convictions is a "red herring."

The 104-page document, an unusually detailed look at a state appellate court, was published last week by the American Bar Foundation, a legal research organization supported by the American Bar Assn. It was prepared by Thomas Y. Davies, a research attorney for the foundation. In all, he studied 544 criminal appeals that came before the court here during the mid-1970s and found that only 26 (or less than 5%) resulted in reversals.

"The notion that (legal) loopholes allow large numbers of criminals to escape their just deserts is a recurring theme in our public dialogue on criminal justice," Davies said. "But this study and other research suggest that this theme is seriously flawed."

Among other things, the study, found that:

—Nine of 10 defendants convicted had pleaded guilty without going to trial, thus virtually foreclosing appeal. Of those convicted by a jury, about half appeal. Overall, only about one in 20 convictions is appealed.

—Most appeals offer little indication that the defendant is innocent, and the courts therefore are reluctant to reverse convictions, particularly in serious crimes. Unless a

Please see REVERSALS, Page 21

Los Angeles Times R ★

REVERSALS: Criminal Appeals Tally Checked

Continued from First Page

legal error has affected the verdict, the court will find the error to be "harmless" and allow convictions to stand. Of the cases studied, 204 legal errors were found by the court but only 26 led to reversals.

One unnamed justice interviewed in the study was quoted as saying, "I will confess that I sometimes get really irritated when I get (an appeal) that seems to boast that 'I'm guilty all right but the cops didn't follow the rules when I was convicted, so turn me loose.'"

The fact that the court found few appeals convincing confirmed a view held by many legal authorities.

Jesse H. Choper, dean of law at the University of California, Berkeley, asked to comment on the study, observed: "The criminal appellant has everything to gain and nothing to lose. There's always hope. And filing an appeal may even have therapeutic value. But as a result, many appeals just don't have much substance to them."

But Choper agrees that even a single reversal can have broad impact on the criminal justice system when it involves a key legal question, such as the admissibility of confessions or the rules of search and seizure. "It can affect the way police conduct investigations; it can affect the way prosecutors conduct cases," he said.

Davies, in an interview, acknowledged that reversals in some cases can have effects well beyond their numbers. But he stressed that it is more often the state's Supreme Court, rather than the intermediate appellate courts, that issue landmark rulings. The appeal courts may implement new rules but rarely do they create them, he said.

'Applying. . . Standards'

"The judges of the Court of Appeal don't see themselves as having the same responsibility for articulating legal standards as does the Supreme Court," he said. "They see themselves as simply applying those standards to specific cases."

The state Court of Appeal includes 77 justices sitting in six districts throughout the state. By law, the appellate court must formally review all appeals from criminal trial judgments. In fiscal 1981, the appellate courts issued 3,891 opinions on criminal appeals. The state Supreme Court, exercising discretionary review of appellate decisions, issued 19 such opinions during the same period.

The foundation study focused on a group of cases before the Court of Appeal here from 1974 to 1976. That court's reversal rate of 5% at that time compares with the 10% rate among cases being handled by the state Supreme Court and throughout the Court of Appeal. Most reversals permit retrials, but in some cases retrials are not possible, such as when key evidence may not be used or when witnesses are no longer available.

Most of the appeals filed here raised claims of prejudicial evidence, illegally obtained evidence, erroneous jury instructions, insufficient evidence of guilt, improper comments by the prosecutor, inadequate representation by defense counsel and improperly obtained confessions.

Davies' analysis concluded that the court is reluctant to reverse convictions unless there were "egregious errors" during the trial. Most of the cases, he said, "involve serious crimes and little if any basis for doubt about factual guilt."

'Punish the Prosecutor'

One of the justices interviewed for the study noted that the clear showing of guilt frequently led the court to find that any procedural errors that occurred were "harmless" and could not have affected the trial outcome. This justice, citing an ethically dubious tactic by a prosecutor in a case, remarked, "Sometimes you'd like to reverse a case to punish the prosecutor in a case like this, but he isn't the one who gets punished if you reverse (the conviction)."

The study also found that the more serious the crime, the less likely a conviction will be reversed. Convictions for murder and robbery, for example, were reversed less than 2% of the time. By contrast, the rate was about 17% for fraud, forgery and bribery convictions.

The data "tend to refute" the notion that the court is "eager or even willing" to reverse serious convictions on the basis of procedural technicalities, the study concluded.

It quoted a justice as saying, "The difficulty is that some of the rules aren't really related to the ascertainment of truth in the case and they get bogged down in procedural questions that may be pretty peripheral."

Prison study aims to unlock truth about cost of incarceration

By Leonard Inskip
Associate editor

Minneapolis Tribune

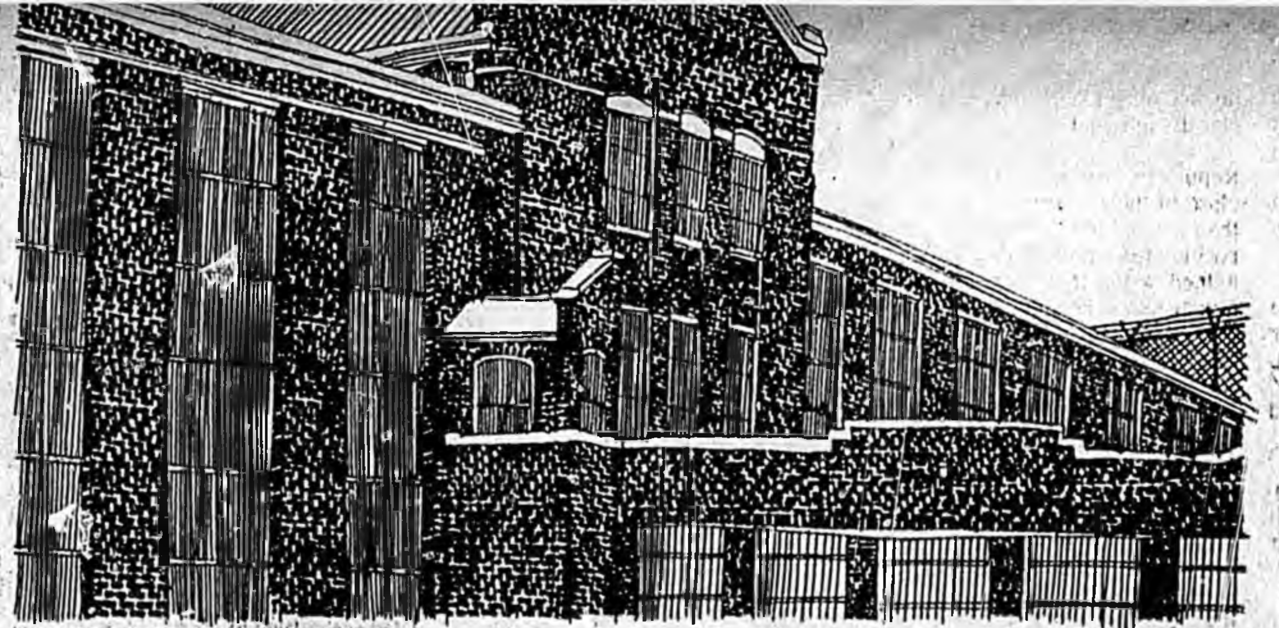

Illustration by Craig MacIntosh

"Lock more of 'em up," is a popular response to crime. "Stop the growth of government, cut taxes," is a popular response to high taxes and budget deficits. But you can't have it both ways.

Minnesota built one of the most secure men's prisons in the country, the new Oak Park Heights facility, but hasn't had enough money to open it fully. Meanwhile, there's talk of building a new women's prison to replace the old one at Shakopee. Hennepin County, despite cuts in many programs, is expanding its juve[illegible]ention facilities.

Not en[illegible]gh people make the connection between getting tough and spending tax money, or between spending more here and less there. One group does. It's the influential Minnesota Citizens Council on Crime and Justice (formerly called Correctional Service of Minnesota).

The council is studying whether Minnesota needs the capacity of all its prisons, whether spending can be reduced, whether institutions can be closed or shrunk, whether lower-cost or more-effective alternatives can be found. At a minimum, the council wants to learn the cost of incarceration and make sure the public knows it.

It's up against the kind of get-tougher attitudes expressed by the attorney general candidates last fall. Republican Elliot Rothenberg urged tougher sentencing guidelines. Democrat Hubert Humphrey III, the winner, defended the guidelines in general but [illegible]posed "mandatory minimum in[illegible]ration" for residential burglar-ies. Both proposals would result in more people in prison. Neither candidate's literature mentioned what their proposals might cost or where the money would come from.

Gov. Rudy Perpich wants public spending reexamined to get leaner government, and he's said he welcomes ideas from people outside government. The council on crime and justice can provide an informed perspective. And, though it is still assembling data and has not reached any final conclusions, the council will make recommendations to the governor, Legislature and Department of Corrections, says Richard Ericson, executive director.

The council, with help from the Northwest Area Foundation, set up a 12-member prison committee, headed by Martha Atwater of Wayzata. Among its members are a former corrections commissioner, two railroad presidents (one retired), a minister of a prominent Minneapolis church, two corporation presidents. This week the committee will hear from Orville Pung, commissioner of corrections, and Frank Wood, Oak Park warden.

The committee's function, Ericson says, is to ask tough questions — questions that might not be asked elsewhere.

Example: Minnesota has an old prison for women. Something better is needed. But must the state spend up to $15 million for a new prison, as some propose? Or could a place like Rochester state hospital, closed last year, be converted to a women's prison? There's talk of closing colleges. Could one of them be used? What about the Oak Park prison, built at a cost of $31 million but only half-filled? That prison, opened in 1982, has eight totally segregated sections, each for about 80 prisoners. Could part of Oak Park be used for women?

Example: The old Stillwater prison, built around the turn of the century. When nearby Oak Park prison (406 beds) was built, a tradeoff was that Stillwater (1,152 beds) would be modernized and reduced to a more manageable size, perhaps half the present size or less. Stillwater is still open and nearly full. Should that policy continue?

Example: 107 Wisconsin prisoners (perhaps more later), as well as some federal prisoners, are housed in Minnesota prisons for $55 a day per prisoner. That policy was adopted to help get Oak Park open. But does that $55 cover the true cost of Minnesota's prison program? (The council suspects it doesn't.) Might the policy encourage Minnesota to create a prison staff bigger than Minnesota's long-term needs? (It might.) Could the policy make it easier to promote get-tough sentencing, regardless of cost, need for such sentencing, or diversion of resources from other programs? (The council fears it might.)

Governments have a tendency to focus on initial costs (bonding, for example), rather than long-range operating costs to be funded by future legislatures and county boards. University of Minnesota criminologist David Ward gave the prison-study committee one estimate: "Over a 30-year period capital outlay cost for a prison is only going to represent 8 percent of the cost. Ninety-two percent is going to be accounted for largely by staff salaries followed by food and other expenses." If a way is not found to reduce Stillwater's operating budget, then the budget for Oak Park, when fully funded at close to $10 million a year, will simply be on top of what the state previously spent for prisons.

Meanwhile, says Ericson, crime rates are stabilizing or even falling. One reason is that the population of young adults, a crime-prone group, is headed downward. Parallels exist in the closing of schools and in the drop in highway deaths.

There's also a matter of priorities. Prisons compete for public funds with community programs related to crime: probation, diversion, halfway houses, community service, aid for crime victims. Many such programs have suffered budget cuts, a trend that worries Ericson.

Partially with state funds, the council operates crime-victim centers in the Twin Cities that have served 15,000 people. On the average, the victims "are not demanding long, long sentences," says Ericson. What they want, he says, is accountability, which can mean restitution or repairs. The feedback from victims is not consistent with demands for longer sentences, he says.

The council has been around since 1957. Supported by the United Way, foundations and corporations, the council has a budget of $500,000, including the state money, and a staff of 15.

"We're a small voice at a time when most everyone is willing to dish out longer sentences," says Ericson. "But it's our job to stimulate thinking about alternatives," to say to legislators and the public, "Go slow, folks. Insist you have good answers."

The flush years of the 1970s made it relatively easy for Minnesota to undertake things like a new zoo and and a new prison, while continuing to support an old zoo and old prisons. Today, as Perpich has said, it's time to reexamine. The state is fortunate to have a long-established, respected organiz[illegible]ion like the Citizens Council on Crime and Justice to help in that reexamin[illegible]ion.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M — January 23, 1984

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

TO: Senator Vic Fischer
Chairman, Senate State Affairs Committee

FROM: Edward H. Hein
Legislative Counsel

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

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

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

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

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

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

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

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

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STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

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Amsterdam, Tony
Stanford

ACLU – Amicus brief on
what is in US S. Court.
Craig Cornisch (ACLU)
Recent Back-up
– Denver

Dons
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Good faith exception
U.S. Supreme Court

Cases
Glass

58 Min L.R. Amsterdam

Waring Sept. 9.
State Supreme Court.

Sears,
– See O'Connor's dissent
①
② Police / Police
[illegible] Integrity of Court System.
③ Constitutional Right of Privacy

Con

Can achieve deterrent effect
suing civilly.

evidence is a result of misconduct by police.

Deterring Police.

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

b) + Rich will get off.
& unpopular "clients" will

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

What do they do in Canada about "exclusionary Rule".

→ What was catalyst for "exclusionary rule"!

Brian Porter
+ Death Penalty
+

No. 81-430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ILLINOIS,

Petitioner,

—v.—

LANCE and SUSAN GATES,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

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

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Counsel for Amici Curiae

February, 1983

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.................iv

INTEREST OF AMICI CURIAE.................1

SUMMARY OF ARGUMENT.....................4

INTRODUCTORY STATEMENT..................9

I. THE FOURTH AMENDMENT'S PROBABLE CAUSE STANDARD ALREADY AFFORDS LAW ENFORCEMENT OFFICERS THE SCOPE FOR OBJECTIVELY REASONABLE ERRORS WHICH COULD CONSTITUTIONALLY BE PROVIDED BY A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.................13

A. The Fourth Amendment Requires Only Probable Cause, Not Certainty, And Is Not Defeated By Reasonable Errors Of Fact Or Of Law.............................15

B. In Ruling On A Suppression Motion Challenging Search Pursuant To A Warrant As Lacking Probable Cause, The Question Which Proponents Of An Objective Good Faith Exception To The Exclusionary Rule Would Make Determinative -- Did The Magistrate Reasonably Assess The Existence Of Probable Cause -- Is Precisely The Same As Asking Whether Probable Cause Existed....................17

Page

C. If A Good Faith Exception Would Afford Any Broader Scope For Error Than Probable Cause, It Would Violate The Fourth Amendment By Systematically Failing To Deter And Indeed Inducing Searches On Warrants Absent Probable Cause.......... 24

II. ILLEGALLY SEIZED EVIDENCE IS INADMISSIBLE AT TRIAL EVEN WHEN THE ILLEGAL SEIZURE WAS EFFECTED IN GOOD FAITH BECAUSE (A) THE FOURTH AMENDMENT FORBIDS IT; (B) THE USE OF SUCH EVIDENCE WOULD ENCOURAGE UNLAWFUL ACTIVITY; AND (C) RECOGNITION OF A DEFENSE BASED ON IGNORANCE OF THE LAW WOULD DISCOURAGE EFFECTIVE POLICE TRAINING.................. 34

A. The Use At Trial Of Evidence Obtained On Less Than Probable Cause Violates The Fourth Amendment........... 3[illegible]

B. The Use of Illegally Seized Evidence, Even If Obtained In Good Faith, Would Encourage The Commission of Unlawful Acts.......................... 4

Page

C. Maintenance Of The Present Scope Of The Fourth Amendment Would Be Impermissible Under A Good Faith Exception. The Fourth Amendment Would Shrink To Reasonableness In Every Case, Without The Specific And Reasonablly Bright-Line Rules The Court Has Relied On To Cabin Police Investigation Within Constitutional Limits......50

D. The Remaining Arguments Supporting A Good Faith Exception Are Insufficient to Warrant, and Additional Considerations Militate Against, Its Acceptance..55

1. Cost..........................56

2. Premium on Ignorance...........63

CONCLUSION..............................64

APPENDIX................................1a

TABLE OF AUTHORITIES

Cases: Page

Aguilar v. Texas, 378 U.S. 110 (1964)....passim

Almeida-Sanchez v. United States, 413 U.S. 916 (1975)....29, 46

Beck v. Ohio, 379 U.S. 89 (1964)....51

Bowen v. United States, 422 U.S. 916 (1975)....5, 29, 48

Bradley v. Fisher, 13 Wall. (80 U.S.) 335 (1872)....31

Brewer v. Williams, 430 U.S. 387 (1976)....61

Brinegar v. United States, 338 U.S. 160 (1948)....passi

Brown v. Illinois, 422 U.S. 610 (1976).2

Bumper v. North Carolina, 391 U.S. 543 (1968)....6

Carroll v. United States, 267 U.S. 132 (1925)....11, 20, 3

Chambers v. Maroney, 399 U.S. 42 (1970)....2

Chimel v. California, 395 U.S. 725 (1969)....48,

City of Los Angeles v. Lyons, No. 81-1064....

Coolidge v. New Hampshire, 403 U.S. 443 (1971)....15, 28,

Page

Davis v. Mississippi, 394 U.S. 721 (1964) 61

Davis v. Passman, 442 U.S. (1979) 24

DeFunis v. Odegaard, 416 U.S. 312 (1974) 5, 29

Delaware v. Prouse, 440 U.S. 648 (1979) 22, 45, 62

Draper v. United States, 358 U.S. 307 (1959) 16, 19

Dunaway v. New York, 442 U.S. 200 (1979) 22

Elkins v. United States, 364 U.S. 206 (1960) 3, 25

Franks v. Delaware, 438 U.S. 168 (1978) .... passim

Hill v. California, 401 U.S. 797 (1971) 16

Hutto v. Davis, 70 L.Ed.2d 556 (1982) 63

Lambert v. California, 355 U.S. 225 (1957) 34

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

Michigan v. DeFillippo, 443 U.S. 31 (1979) 4, 17

Mincey v. Arizona, 437 U.S. 385 (1978) 6, 61

Page

Nathanson v. United States, 290 U.S. 41 (1933)................22, 25, 31, 3

New York v. Adams, 443 N.E.2d 537, 439 N.Y.2d 877 (1981)................1

New York v. Belton, 453 U.S. 454 (1981)...........................5

Olmstead v. United States, 277 U.S. 438 (1978)...............37 39, 4

O'Shea v. Littleton, 414 U.S. 488 (1974)..............................4

Owen v. City of Independence, 445 U.S. 622 (1980)..................32, 3

Payton v. New York, 445 U.S. 573 (1980)..........................49, 6

People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955)..............25, 3

Pierson v. Ray, 386 U.S. 547 (1967)....4

Procunier v. Navarette, 434 U.S. 555 (1978)..........................2

Rizzo v. Goode, 423 U.S. 362 (1976)..........................28, 4

Rose v. Mitchell, 443 U.S. 545 (1979)..............................

Rummel v. Estelle, 445 U.S. 263 (1980)..............................

Scott v. United States, 436 U.S. 128 (1978)..........................

Page

Shadwick v. City of Tampa, 407
U.S. 395 (1972) 32

Steagald v. United States, 451
U.S. 204 (1981) 49

Stone v. Powell, 428 U.S. 465
(1976) 39, 41

Stovall v. Denno, 388 U.S. 298
(1967) 29

Stump v. Sparkman, 435 U.S. 349
(1978) 28, 30, 31

Terry v. Ohio, 392 U.S. 1 (1968) 33

Torres v. Puerto Rico, 442 U.S.
465 (1979) 7, 22, 53

United States v. Calandia, 414 U.S.
338 (1973) 39

United States v. Janis, 428 U.S. 433
(1976) 41

United States v. Johnson, 73 L.Ed.
2d 202 (1982) 32

United States v. Jones, 362 U.S.
257 (1960) 20

United States v. Katz, 389 U.S.
347 (1967) 49

United States v. Matlock, 415
U.S. 164 (1974) 16

United States v. Rabinowitz, 339
U.S. 56 (1950) ....passim

Page

United States v. Robinson, 414 U.S. 218 (1973)........................4, 16

United States v. Ross, 72 L.Ed.2d 572 (1982).............28, 34, 51, 65

United States v. United States District Court, 407 U.S. 316 (1972)......................15, 50, 52

United States v. Ventresca, 380 U.S. 108 (1965)..................16, 19, 20

Weeks v. United States, 232 U.S. 391 (1914)......................passim

Whitely v. Warden, 401 U.S. 560 (1971)..........................15, 2

Wolf v. Colorado, 338 U.S. 25 (1948).. ....3, 36, 41, 4

Ybarra v. Illinois, 444 U.S. 85 (1980)....................7, 22, 5

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Page

Davies, Do Criminals Due Process Principles Make A Difference?, 1982 Am. Bar Assn. Res.J. 247........62

Holmes, The Common Law 48 (1881).......44

Kamisar, Is The Exclusionary Rule an "Illegal" or "Unnatural" Interpretation of the Fourth Amendment?", 62 Jud. 66 (1978).......26

Kamisar, On The Tactics of Police-Prosecutor Oriented Critics of the Court, 49 Cornell L.Q. 436 (1964)..................................53

Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing", 62 Jud. 337 (1979)..................................27

Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027 (1974)..........................64

LaFave, The Fourth Amendment in an Imperfect World: On Drawing Bright Lines and Good Faith, 43 U.Pitt.L.Rev. 307 (1982)..........32

LaFave, Search and Seizure § 1 n.9 (1981 Supp.).....................58

Lasson, History and Development of the Fourth Amendment to the United States Constitution, (1937)...28

Page

Meters & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365 (1981)........................passi

Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447 (1978).................................1

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INTEREST OF AMICI CURIAE[1]

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

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

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

shape and life to the Fourth Amendment's guarantee. Indeed, the ACLU filed the onl brief before the Court in Mapp v. Ohio urging application of the exclusionary rule to the states, and was invited by the Court to raise the point at oral argument. 367 U.S. 643, 646 n.3 (1961). We appear here *amici curiae* because, in light of th order requesting reargument, this case nc appears to present the most serious risk faced by Americans in recent years to the preservation of the Fourth Amendment as a real barrier to unconstitutional searche and seizures.

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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its greatest effect.

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

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

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

INTRODUCTORY STATEMENT

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

In a perfect world, all officials

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

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

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

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

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

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

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