

ALPHA STAFFS
COMMUNITY CENTER
909

3067A (FILE 18)
SSA (FILE 2)
8672

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

I dissent.



INWOOD LABORATORIES, INC., et al.,

v.

IVES LABORATORIES, INC.

DARBY DRUG CO., INC., et al.

v.

IVES LABORATORIES, INC.

Nos. 80-2182, 81-11.

Argued Feb. 22, 1982.

Decided June 1, 1982.

Suit was brought, *inter alia*, for an alleged trademark violation. Denial of plaintiff's motion for a preliminary injunction, 455 F.Supp. 939, was affirmed on appeal, 601 F.2d 631, and case was remanded. On remand, the United States District Court for the Eastern District of New York, 488 F.Supp. 394, found for defendants, and plaintiff appealed. The Court of Appeals

14. The Court purports to restrict its rule to areas that the police have probable cause to search, as "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ante*, at 2172. I agree, of course, that the probable cause component of the automobile exception must be strictly construed. I fear, however, that the restriction that the Court emphasizes may have little practical value. See *United States v. Ross*, 655 F.2d 1159, 1168, n. 21

for the Second Circuit, 638 F.2d 538, reversed and defendants petitioned for writ of certiorari. The Supreme Court, Justice O'Connor, held that findings underlying district court's determination that manufacturers of generic drug, which was designed to duplicate appearance of a similar drug marketed by a competitor under a registered trademark, could not be held vicariously liable under Lanham Act for infringement of that trademark by pharmacists who mislabeled generic drugs with competitor's registered trademark were not clearly erroneous.

Reversed and remanded.

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

Justice Rehnquist filed separate opinion concurring in the result.

1. Trade Regulation ⇌ 374

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

2. Trade Regulation ⇌ 374

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

3. Trade Regulation ⇌ 374

If a manufacturer or distributor intentionally induces another to infringe a trademark, or has reason to know is engaged in trademark infringement, manufacturer or

(CADC 1981) (en banc). If police open a container within a car and find contraband, they may acquire probable cause to believe that other portions of the car, and other containers within it, will contain contraband. In practice, the Court's rule may amount to a wholesale authorization for police to search any car from top to bottom when they have suspicion, whether localized or general, that it contains contraband.

distributor is contributor for any harm done as res Lanham Trade-Mark Act, 15 U.S.C.A. § 1114.

4. Trade Regulation ⇌ 41

Pharmacists who mislabeled drugs with manufacturer's mark violated Lanham Act, § 32 as amended 15 U.S.C.A. § 1114.

5. Federal Courts ⇌ 850

In reviewing factual findings of court, Court of Appeals "clearly erroneous" standard. Civ.Proc. Rule 52(a), 28 U.S.C.A.

6. Federal Courts ⇌ 853

Because of deference to trial court unless an appellate court finds error, a conviction must be affirmed if not clearly erroneous. Fed.Rules Civ.P. 52(a), 28 U.S.C.A.

7. Trade Regulation ⇌ 5

Findings underlying determination that manufacturer of generic drug, which was designed to duplicate appearance of a similar drug marketed by a competitor under a registered trademark, could not be held vicariously liable under Lanham Act for infringement of that trademark by pharmacists who mislabeled generic drugs with competitor's registered trademark were not clearly erroneous. Lanham Trade-Mark Act, § 32 as amended 15 U.S.C.A. § 1114; Fed.Rules Civ.P. 52(a), 28 U.S.C.A.

8. Federal Courts ⇌ 841

An appellate court can reverse a conviction if its interpretation of the evidence is clearly erroneous. Trial court simply because of error. Appellate court might give facts and circumstances more sinister cast to activity if trial court apparently deemed

* The syllabus constitutes no part of the Court's opinion but has been prepared by the Reporter of Decisions for

SEARCH AND SEIZURE

A TREATISE ON THE FOURTH AMENDMENT

CHAPTER ONE

THE EXCLUSIONARY RULE AND OTHER REMEDIES

§ 1.2 The Exclusionary Rule Under Attack

Table of New or Retitled Subsections

Subsec.

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

1. Kamisar, A Defense of the Exclusionary Rule, 15 Crim.L.Bull. 5 (1970); Loewenthal, Evaluating the Exclusionary Rule in Search and Seizure, 40 U.Mo.K.C.L.Rev. 24 (1950); Sunderland, Liberals, Conservatives and the Exclusionary Rule, 71 J.Crim.L. & Crim. 343 (1980). See also the debate carried on in the following series of articles, listed in the order of their appearance: Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment, 62 Judicature 66 (1978); Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214 (1978); Kamisar, The Exclusionary Rule in Historical Perspective, 62 Judicature 337 (1970); Wilkey, A Call for Alternatives to the Exclusionary Rule, 62 Judicature 357 (1970); Canon, The Exclusionary Rule: Have Critics Proven That it Doesn't Deter Police?, 62 Judicature 398 (1970); Schlesinger, The Exclusionary Rule: Have Proponents Proven That it is a Deterrent to Police?, 62 Judicature 404 (1970); Canon & Schlesinger, A Postscript on Empirical Studies and the Exclusionary Rule, 62 Judicature 455 (1970).
9. Moreover, there is reason to believe that the "cost" of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed. In Impact of the Exclusionary Rule on Federal Criminal Prosecutions (Report of the Comptroller General, April 19, 1970), an empirical study of cases handled in 38 U.S. Attorneys' offices from July 1-August 31, 1978, it was found that of 2,804 charged defendants only 30% involved a search or seizure and only 11% filed a motion to suppress on Fourth Amendment grounds. These motions were denied in the "overwhelming majority" of cases, so that in only 1.3% of the 2,804 defendant cases was evidence excluded as a result of a Fourth Amendment suppression motion. Moreover, over half of the defendants whose motions were granted in total or in part were convicted nonetheless. As for the cases during the sample period which the U.S. Attorneys declined to prosecute, in only 0.4% of them was a search and seizure problem the primary reason.

Similarly, in Brosi, A Cross-City Comparison of Felony Case Processing 18-20 (1970), an LEAA-sponsored

(New text on page 55, before last paragraph)

At least one court, in *United States v. Williams*,^{71.1} has utilized this approach.

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

47. See also Loewenthal, Evaluating the Exclusionary Rule in Search and Seizure, 40 U.Mo.K.C.L.Rev. 24 (1950), concluding from interviews with police that they would conclude the Fourth Amendment had no meaning if the exclusionary rule were withdrawn.

71.1 622 F.2d 830 (5th Cir. 1980), cert. den., 449 U.S. 1127, 101 S.Ct. 946, 67 L.Ed.2d 114. Ms. Williams, convicted of heroin possession and released pending appeal on the condition she remain in Ohio, was arrested at the Atlanta airport by DEA agent Markonni for violating that travel restriction, resulting in discovery of heroin in her possession. Her motion to suppress that heroin was granted by the district court on the ground that she had been illegally arrested, and that ruling was affirmed by the court of appeals, 503 F.2d 88, but the decision was reversed upon rehearing en banc before 24 circuit judges. Sixteen judges, in an opinion by Politz, J., concluded Williams had been lawfully arrested for breach of court-imposed travel restrictions even absent any initiating request by the court. Thirteen judges, in an opinion by Gee and Vance, JJ., held "that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." They reasoned that "any slight deterrent effect of excluding fruits of good-faith arrests is even less than the small deterrence" which the Supreme Court, in such cases as *Stone v. Powell*, supra note 71, and *United States v. Peltier*, infra note 74, concluded "does not justify the societal harm incurred by suppressing rele-

vant and incriminating evidence." They characterized *Michigan v. DeFillippo*, infra note 74.1, as "closely analogous" to the instant case in that both involved "technical violations," there an arrest "made in good-faith reliance on a statute that is later declared unconstitutional" and here "a reasonable interpretation of a statute that is later construed differently." Thus, even if Agent Markonni was wrong in either his assumption that violation of a travel restriction was an offense ("a reasonable factual error about an element of the crime") or his assumption that he could arrest without any prior order from the court that released Ms. Williams ("a good-faith 'technical violation,' an action under a reasonable interpretation of the arrest power"), the heroin should be admissible. Because "neither Markonni's good faith nor its reasonableness are questioned here," they left "to another day" the issue of "the proper allocation of the burden of proof" on those matters.

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

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

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

(New

I
Fourt
sion o
sumpt
Beacu
ing of
thoug
across
But tl
was n
There
except
incons
ing th
suppre
statute
author
a valid

A
Johnso

to
tio
wo
ha
clu
ma
is
ovi
the
cis
the
cou
tra
wo
tat

ception
J.Crim.

74.1 443
Ed.2d
detail h

74.2 Bre
and Ste

"The
cusing
resting
were en
of the
dispute
the

sponden
for the

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

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

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

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

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

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

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

"The Court errs, in my view, in focusing on the good faith of the arresting officers and on whether they were entitled to rely upon the validity of the Detroit ordinance. For the dispute in this case is not between the arresting officers and respondent. * * * The dispute is between respondent and the State of Michigan. * * * Since the State is responsible for the actions of its legislative bodies

as well as for the actions of its police, the State can hardly defend against this charge of unconstitutional conduct by arguing that the constitutional defect was the product of legislative action and that the police were merely executing the laws in good faith."

74.3 E. g., Torres v. Puerto Rico, 442 U.S. 465, 99 S.Ct. 2423, 61 L.Ed.2d 1 (1979); Almeida-Sanchez v. United States, 413 U.S. 296, 93 S.Ct. 2335, 37 L.Ed.2d 596 (1973); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 617 (1968).

74.4 P. Johnson, New Approaches to Enforcing the Fourth Amendment 3-9 (Working Paper, Sept. 1978).

utilized this

g evidence." Michigan v. De- l, as "closely t case in that d violations." in good-faith it is later de- and here "a i of a statute differently." Markonni was sumption that striction was de factual er- of the crime") e could arrest ler from the Williams ("a lation," an ac- le interpreta-"), the heroin Because "uel- faith nor its ationed here," ay" the issue n of the bur- matters.

a concurring ected that the B was unnee- ority of the he arrest was court had al- do and that a e Court had qualification; upon the mis- deterrence is exclusionary "raises many ether it will et or both er- of law"; and reasoning of "It appears olice officer's lso be objec- "a policeman bjective good to ask him- 2?"

en critical of n.L.Rev. 487 d.L.Rev. 213 amonwealth, 01 (1980), the us approach, the part of pt it.

l the Fourth sonable" Ex-

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

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

(New text on page 39, before § 1.3)

(g) Limiting the exclusionary rule by disregarding "the underlying intent or motivation of the officers involved." Yet another question which may be appropriately asked at this point, though in some of its manifestations it concerns not the scope of the exclusionary remedy but rather the extent of the Fourth Amendment right itself, is whether a "bad" intent or motivation by the searching or seizing police officer should be ignored so as to bring about the admissibility of evidence which otherwise might be deemed subject to suppression. Some aspects of this problem are dealt with at later points in this Book,⁸² but the general subject is appropriately under-

74.5 *Id.* at 11.

74.6 *Id.* at 10.

74.7 See § 1.1(f).

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

74.9 *Id.* at 204.

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

87. Comment, 72 *Nw.U.L.Rev.* 505 (1977).

92. See, e. g., §§ 3.2(b) (on whether probable cause both subjective and objective test), § 11(e) (subterfuge

taken here because of the rationale and because it is now focused

In *Scott*, federal agents conducted a wiretap on a woman and distributed the tapes to other persons. The search was conducted in a public place and the communications not protected by the Fourth Amendment, which certainly is not a surveillance agent of conversations per *Rehnquist*, *J.* The calls were reasonable in circumstances known that the call was not that left unresolved that suppression of the faith efforts to control the government's right not make otherwise to this, Justice Rehnquist

We think the basis for the approach is a requirement of a great exception in the Court's opinion that an officer's action is known to him

We have the state which provides not invalidate the viewed object Appeals which generally follow searches under

searches by executive (warrant), § 1(e) (significant including officer de offense other than probable cause act (pretext arrests to § 6.7(d) (subterfuge without warrant), vehicles and pretext impoundment or (significance of police take as to whether stop called for), § 4 frisk context), 10.6)

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

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

We think the Government's position, which also served as the basis for decision in the Court of Appeals, embodies the proper approach for evaluating compliance with the minimization requirement. Although we have not examined this exact question at great length in any of our prior opinions, almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him. . . .

We have since held that the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. . . . The Courts of Appeals which have considered the matter have likewise generally followed these principles, first examining the challenged searches under a standard of objective reasonableness without

searches by execution of search warrant), 5.1(e) (significance of booking, including officer declaring arrest for offense other than that for which probable cause actually exists), 5.2(e) (pretext arrests to search the person), 6.7(d) (subterfuge entry of premises without warrant), 7.5(e) (search of vehicles and pretext arrest, detention, impoundment or inventory), 9.2(e) (significance of police officer's mistake as to whether arrest or only a stop called for), 9.4(f) (subterfuge in frisk context), 10.6(h) (subterfuge in

airport searches), 10.8(b) (subterfuge in vehicle use regulation), 10.10(e) (police purpose and search of parolees and probationers).

93. 430 U.S. 128, 98 S.Ct. 1717, 50 L. Ed.2d 169 (1978), reh. den., 438 U.S. 108, 98 S.Ct. 3127, 57 L.Ed.2d 1150.

94. 18 U.S.C.A. § 2518(5).

95. *Berger v. New York*, 398 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), conformed to, 20 N.Y.2d 801, 294 N.Y.S.2d 450, 231 N.E.2d 132.

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

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

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

be upheld on the permissible on the for a different purpose¹⁰² concerning that case can have all circumstances resolved without the officers involved follows is that there certain other device necessary to ensure that

One kind of "porting the arrest the police had pr without such facts coming. Illustrat vant facts were as

Two police of mitted felonie had committe Their motive, whether or n that would m was not comr door was led Told no more spondent ask a paper bag o The officers c doing that ar drop, walked where he fou rested responc ment incident

The court of appo transpired *after* th at the time of the although they ha

101. *Jones v. United States*, 438 U.S. 1253 (1958), discussed in *infra*.

102. *Burkoff, The Court and the Fourth Amendment: An Inconsistent Doctrine*, 58 *Ore.L.Rev.*

103. 368 F.2d 142 (1st

104. As summarized when the case reached Court, 389 U.S. 500 L.Ed.2d 770 (1968).

96. The Court cited at this point *United States v. Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973), cert. den., 414 U.S. 1130, 94 S.Ct. 881, 38 L.Ed.2d 762; *Dodd v. Reno*, 435 F.2d 868 (5th Cir. 1970), cert. den., 404 U.S. 845, 92 S.Ct. 145, 30 L.Ed.2d 81; *Kilgler v. United States*, 409 F.2d 209 (3rd Cir. 1969), cert. den., 396 U.S. 859, 90 S.Ct. 127, 24 L.Ed.2d 110; *Green v. United States*, 386 F.2d 933 (10th Cir. 1967), appeal after remand, 411 F.2d 588; *Sirimaroo v. United States*, 315 F.2d 699 (10th Cir. 1963), cert. den., 374 U.S. 807, 83 S.Ct. 1696, 10 L.Ed.2d 1032, and then cautioned: "As is our usual custom, we do not

in citing these or other cases intend to approve any particular language or holding in them."

97. 302 U.S. 1, 88 S.Ct. 1808, 20 L.Ed.2d 880 (1968).

98. 414 U.S. 218, 94 S.Ct. 407, 38 L.Ed.2d 427 (1973).

99. See § 5.2.

100. *South Dakota v. Opperman*, 428 U.S. 304, 98 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), on remand, S.D., 247 N.W.2d 673 (Inventory of Impounded vehicle), noting this was also the case in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

be upheld on the ground that the same intrusion would have been permissible on the facts in the hands of the police had they only acted for a different purpose.¹⁰¹ Thus, while the alarm which has been sounded¹⁰² concerning the quoted language from *Scott* is understandable, that case can hardly be read as a definitive analysis settling that in all circumstances Fourth Amendment suppression issues are to be resolved without assaying "the underlying intent or motivation of the officers involved." However, the thesis of the discussion which follows is that this is precisely what the rule ought to be and that certain other developments in Fourth Amendment doctrine are necessary to ensure that the *Scott* rule persists in such unqualified form.

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

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

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

101. *Jones v. United States*, 357 U.S. 403, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958), discussed in text at note 121 *infra*.

102. *Burkoff*, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 *Ore.L.Rev.* 151, 181-90 (1970).

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

104. As summarized by Justice White when the case reached the Supreme Court, 380 U.S. 500, 88 S.Ct. 600, 10 L.Ed.2d 770 (1968).

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

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

Though the Supreme Court dismissed the writ as improvidently granted,¹⁰⁶ this appropriate action does not detract from¹⁰⁷ the force of the three dissenters' ¹⁰⁸ analysis concerning the relevance of a "bad" intent in a case of this kind:

The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way contaminates all of his later behavior. In the case before us the syllogism must be that although the policeman's words requested entry for the purpose of asking respondent questions; and the policeman—on being allowed to enter—did nothing to respondent but ask questions, the "fruits" of the policeman's otherwise lawful request to enter and question—the bag tossed out the window and into a place where it could be seen from the street—should not be usable by the State. This is because the policeman was willing, had his lawful conduct not developed probable cause justifying respondent's arrest, to search respondent's apartment unlawfully in the hope of finding evidence of a crime.

That such a rule makes no sense is apparent when one sees it in the context of an abstruse application of the exclusionary rule, imposed on the States as the only available way to encourage compliance by state police officers with the commands of the Fourth Amendment. * * * Because we wish to deter policemen from searching without a warrant, we would bar admission of evidence Officer McNamara discovered by ransacking respondent's apartment without a warrant or a basis for warrantless search. The expanded exclusionary rule applied in the opinions below would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan—the attitude of mind—of going further and acting unlawfully if the lawful conduct produces insufficient results. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce grave and fruitless misallocation of judicial resources.

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

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

106. 380 U.S. 500, 88 S.Ct. 600, 10 L.Ed. 2d 770 (1965).

107. Fortas, J., concurring, while agreeing with dismissal "because the record is not adequate for disposition of the

case in terms of its constitutional problems," stressed he did not "disagree with the position stated in the dissent."

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

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

If "impure plots of the exclusionary officer *does* act on gages in Fourth Amendment he is lacking the United States v. Ro to arrest the defendant Pecarro later "test Pecarro he did not rant." In this situation poses of deterrence will impress upon when he believes possible if he so believes, of did not go this route that the police officers facts than of their courts."¹¹¹ This is it in *Painten*, the —entirely in accordance the desired command have grounds to arrested at best if the exclusion of evidence actions speak loudly did order his men of what he then per

searching it, after a Juana seen in car, held, evidence admitted that the agents were time they stopped it in any event—general search held unconstitutional *de-Sanchez v. United States* does not render the by independent proof valid"); *Jones v. State*, 400 N.E.2d 125 thrown out window or police knocked possible, for "whatever may have been in the proper or unlawful was committed"); 5 Md.App. 248, 246 (police officer knocked tel room, when door officer could smell marijuana cigarette held, "the mere fact Lieutenant Mitchell ed to make an arrest on the door of appeal does not without an officer a trespasser

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

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

right of a citizen, constitutional or otherwise, which immunizes him from having a policeman knock on his door during reasonable evening hours").

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

111. See cases collected in § 3.2(b).

It is not clear that a different result is called for when the justification under scrutiny is not probable cause of crime but probable cause that a person is in need of medical assistance. But in *State v. Prober*, 98 N.W.2d 345, 207 N.W.2d 1 (1980), the court held that in such circumstances *Scott* was inapplicable and that "the emergency doctrine requires a two-step analysis. First, the search is invalid unless the searching officer is actually motivated by a perceived need to render aid or assistance. Second, even though the requisite motivation is found to exist, until it can be found that a reasonable person under the circumstances would have thought an emergency existed, the search is invalid. Both the subjective and objective tests must be met."

framed comments elicited from him later concerning his understanding of the legal significance¹¹² of the information on which he acted.

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

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

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

113. 408 F.2d 209 (8th Cir. 1969), cert. den., 398 U.S. 859, 90 S.Ct. 127, 24 L. Ed.2d 110.

114. See cases collected in § 5.1(e); and *United States v. Brown*, 635 F.2d 1207 (6th Cir. 1980); *Thomas v. State*, 305 So.2d 280 (Fla.App.1981); *State v. Sanders*, 154 Ga.App. 305, 207 S.E.2d 906 (1980); *People v. Patton*, 90 Ill. App.3d 293, 45 Ill.Dec. 515, 412 N.E.2d 1097 (1980); *Hatcher v. State*, — Ind. —, 410 N.E.2d 1187 (1980).

115. "Any other rule would force police officers to routinely charge every citizen taken into custody with every offense they thought he could be held for in order to increase the chances that at least one charge would survive the test for probable cause." *United*

States v. Atkinson, 450 F.2d 835 (5th Cir. 1971), cert. den., 406 U.S. 923, 92 S.Ct. 1700, 32 L.Ed.2d 123.

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

116. 70 N.J. 25, 397 A.2d 1002 (1970).

arrested in an apartment automobile, parked on a new and subsequent inventory, evidence. Viewed solely as a car search was unlawful because of the available opportunity to make a search of the car,¹¹⁷ and thus the question is upheld on a theory appearing there was probable cause preceding without a search. Answered in the negative, the "inconsistent with the ratio"

It is indisputable that states are bound under the deterrence theory to deter the police from causing other remedies to flow from this that if only a safekeeping interest as a matter of constitutional rationale of deterrence, exclusion of the evidence by the police action on a not deter future unrecorded investigatory entries.

Ercolano, however, at the Circuit has reached the conclusion, that is, where again for the inventory theory of search,¹¹⁸ and other courts intent or motivation of the purpose on which the police acted.¹¹⁹ Supreme Court

117. See § 7.3(c).

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

119. *United States v. Ochs*, 1247 (2d Cir. 1979), cert. den., 955, 100 S.Ct. 435, 62 L.Ed.2d 444, 444 U.S. 1027, 100 S.Ct. Ed.2d 683. Two men were arrested while seated in the car and the car was then lawfully searched and was later found resulting in the discovery of incriminating papers. The court upheld the search as lawful, but the court of appeals that perhaps the examination of papers inside a briefcase could be justified on that basis and affirmed on the ground that

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

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

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

117. See § 7.3(c).

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

119. *United States v. Ochs*, 595 F.2d 1247 (2d Cir. 1970), cert. den., 444 U.S. 955, 100 S.Ct. 435, 62 L.Ed.2d 328, reh. den., 444 U.S. 1027, 100 S.Ct. 695, 62 L.Ed.2d 603. Two men were lawfully arrested while seated in a car, and the car was then lawfully impounded and was later inventoried, resulting in the discovery of certain incriminating papers. The district court upheld the search as an inventory, but the court of appeals feared that perhaps the examination of papers inside a briefcase could not be justified on that basis and thus affirmed on the ground that what had

occurred was a valid *Chambers* search on probable cause. Of significance here is the fact that the court then added: “It is of no importance that the police may have thought their only power was to make an inventory; the test is what could lawfully be done, not what the policemen thought the source of their power to be.”

120. *Silmarco v. United States*, 315 F.2d 609 (10th Cir. 1963), cert. den., 374 U.S. 807, 83 S.Ct. 1800, 70 L.Ed.2d 1032 (some time after state officers arrested defendant for counterfeiting and seized his car, a federal agent searched the car; though he purported to be making a search incident to the state arrest, a theory rejected by this court, the court then concluded the search could be upheld because as a matter of federal statutory law the agent *could have* impounded the car for forfeiture and then conducted a search of the impounded vehicle; as for the fact this

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

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

latter course of action apparently never occurred to the federal agent, the court stated "the legality of his actions are not affected by his subjective beliefs"; *United States v. Capra*, 372 F.Supp. 600 (S.D.N.Y.1973), *aff'd* as to this issue but reversed on other grounds, 501 F.2d 207 (2d Cir. 1974) (court, after finding "little or no support" for search of car on reasons which had been given, namely, that the search was a valid inventory or a search incident to arrest, sustained the search under the *Chambers* rule and added that the officers' "rationale for their right to seize and search the vehicle is not conclusive"); *Orlmes v. State*, — Ind. —, 412 N.E.2d 75 (1980) (though officer had defendant accompany him and surrender gun because he thought defendant consenting to both, action upheld because there were grounds for arrest and search incident, and it "is of no consequence that officer Snow may not have known that he had probable cause to arrest").

121. 357 U.S. 403, 78 S.Ct. 1253, 2 L.Ed. 2d 1514 (1958).

122. The Court may have been influenced to so limit its assessment of the police conduct because, as it acknowledged, discussion of the entry as an arrest entry would "confront us with a grave constitutional question, namely, whether the forceful night time en-

try into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought is, consistent with the Fourth Amendment," an issue which the Court did not resolve until over 20 years later. See § 6.1(b).

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

123. 362 U.S. 40, 88 S.Ct. 1850, 20 L. Ed.2d 917 (1960).

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

only if, absent such assumed police will, know or suspect to later be upheld or unaware. That as exclusion in an *E* for then an erroneous makes his conduct cer would likely h-acterization. In *E* had the officer no *Opperman* invento to consider the pr would have resolve *Chambers* car sea parent that *Ercol* "that policemen a knowledge and act *Ercolano* press the uations that they : of the exclusionar:

There remain: often given the "p of *Scott* on these Thus, Professor B

The resul- tion of what- currently pro- accounts for t- at law the cor- for example, t- individual for : *Terry v. Ohio* unlawfully me- of a remedial- can point to c- the car, such :

to a broader power- porary stop and lim- custodial arrest at- the person). A cou- expected to uphold- tion on the ground t- would have been l- does not explain av- government's conten- by the Court) was- actually made did- which *would* have- agents entered to ar- and had looked for- so that "reverse tw- to be found. See, v. *Vargas*, 633 F.2d

the pur-
that the
ecution,
objects
ly made
he peti-
lear be-
listilling
York,¹²³
pparent
s person
o avoid
limited
charac-
cident

ott rule
doubted
ision in
uppres-
e exists
earches

a person
pon prob-
mitted a
where no
warrant
is, con-
adment,"
I not re-
cer. See

issenting
district
that the
ment of
ot there,
d arrest
directly
at only
: consid-
ewed as
uite dif-
deration
oper for
a search
the trial

9), 20 I.

le dis-
ner case
t was to
a nar-
search
), while
mitted
r power

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

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

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

to a broader power (i. e., from a temporary stop and limited risk to a full custodial arrest and full search of the person). A court could hardly be expected to uphold certain police action on the ground that something less would have been lawful. But that does not explain away *Jones*, for the government's contention (never refuted by the Court) was that the intrusion actually made did not exceed that which would have occurred had the agents entered to arrest the defendant and had looked for him. Consider also that "reverse twists" on *Peters* are to be found. See, e. g., *United States v. Vargas*, 633 F.2d 891 (1st Cir. 1980);

United States v. Blair, 493 F.Supp. 398 (D.Md.1980); *People v. Stevens*, 183 Colo. 309, 517 P.2d 1330 (1974) (officer's intent was to arrest, conduct nonetheless upheld as stop-and-frisk where intrusion did not exceed that permissible under latter theory). See § 0.2(e).

125. *Hull, J.*, in *State v. Romeo*, 43 N.J. 188, 203 A.2d 23 (1966), cert. den., 379 U.S. 970, 85 S.Ct. 668, 13 L.Ed.2d 563.

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

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

Exactly what constitutes a "pretext" under the "long established rule" referred to by Professor Burkoff? The case from which he quotes, *United States v. Lefkowitz*,¹²⁸ turns out upon close inspection to be of no help in answering this question. The warrantless search in *Lefkowitz* of the premises where defendant was arrested was for evidence of the crime for which he was arrested and not for some other purpose, and the Court was actually concerned with the interplay of the since-repudiated¹²⁹ "mere evidence" rule and the pre-*Chimel*¹³⁰ rule which seemed to allow a full warrantless search of defendant's premises merely because of his arrest there.

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

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

127. Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 53 *Ore.L.Rev.* 151, 189-90 (1970).

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

129. See § 2.0(d).

130. See § 6.3(b).

131. 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed. 2d 668 (1960), reh. den., 362 U.S. 984, 80 S.Ct. 1056, 4 L.Ed.2d 1010.

An understanding requires some elaboration. It is a defect that is told to lack sufficient evidence of residence in the country; the FBI; the FBI probe by the INS; INS agent's arrest; FBI agents' arrest was to be made; agents had interviewed; FBI agents were Abel and searched his other after Abel check was very close cooperation "strongest" government was because of his actual his "subterfuge" claim fully supported by the of the district court, is that while the fi [Abel] . . . an unusual happen differed in no real case of an individual known to exist.¹³²

Abel, then, representing intent or motive *Scott* phrase once again assuming that intent particular case, the Fourth the same as would have entirely absent from police arrest X for criminal anticipation or hope person, the latter "un their action illegal."¹³³ expectation of finding was an inventory which search for evidence on event,¹³⁵ again the ev

132. 155 F.Supp. 8 (E.D. Pa. 258 F.2d 485, aff'd, 362 S.Ct. 683, 4 L.Ed.2d 668, U.S. 984, 80 S.Ct. 1056, 4

133. *Crows v. United States*, 1063 (D.C.App.1977), reh. cert. granted, 440 U.S. 1213, 59 L.Ed.2d 454, 445 U.S. 403, 100 S.Ct. 12537; *Diggs v. State*, 3 (Fla.App.1977).

Similarly, where the defendant would have been x-rayed

ule that "[a]n
vidence," since
established by
esting officers.
consideration
stantive fourth
explore police
, an arrest, or

ong established
rom which he
lose inspection
rantless search
rested was for
t for some oth
h the interplay
e pre-Chimel¹³⁰
of defendant's

ed States,¹³¹ is
ica Service of-
or deportation,
to which evi-
press that evi-
he government
se in arresting
r to obtain evi-
Justice Frank-

ould indeed re-
cers. The de-
ive warrant for
ase must meet
ry stages of a
bedience to the
and laws of the
er, not open to
I.N.S. officials
er the I.N.S. in
the discharge of
for the F.B.I. in
er, were issues
cial facts were

S.Ct. 683, 4 L.Ed.
den., 362 U.S. 984,
12d 1010.

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

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

Abel, then, represents yet another situation in which "the underlying intent or motivation of the officers involved"—to utilize the *Scott* phrase once again—does not require suppression: where, even assuming that intent or motivation was the dominant one in the particular case, the Fourth Amendment activity undertaken is precisely the same as would have occurred had that intent or motivation been entirely absent from the case. This means, for example, that if the police arrest *X* for crime *A*, as they would have in any event, in the anticipation or hope of thereby finding evidence of crime *B* on *X*'s person, the latter "underlying intent or motivation" does not make their action illegal.¹³³ Similarly, if *X*'s car is searched in the hope or expectation of finding therein evidence of crime *B*, but that search was an inventory which would have been made in any event¹³⁴ or a search for evidence of crime *A* which would have been made in any event,¹³⁵ again the evidence is admissible. Though some contrary

132. 155 F.Supp. 8 (E.D.N.Y.1957), aff'd, 258 F.2d 485, aff'd, 362 U.S. 217, 80 U.Ct. 683, 4 L.Ed.2d 668, reh. den., 362 U.S. 984, 80 S.Ct. 1056, 4 L.Ed.2d 1010.

133. *Crews v. United States*, 369 A.2. 1003 (D.C.App.1977), reh., 389 A.2d 277, cert. granted, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 Judgment rev., 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537; *Diggs v. State*, 345 So.2d 815 (Fla.App.1977).

Similarly, where the defendant's bag would have been x-rayed during air-

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

134. *In re One 1965 Econoline*, 169 Ariz. 433, 511 P.2d 168 (1973). See other cases in accord in note 64 of § 7.5.

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

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

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

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

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

137. One might argue, of course, that what the police *would* have done absent the "underlying intent or motiva-

tion" is a matter so difficult to prove that it should not be the determining factor. But, the question is whether the answer to that problem is exclusion in a broader range of cases or, instead, as suggested in the later text at note 151 *infra*, the establishment of standard procedures against which to test the conduct of the police in the particular case.

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

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

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

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

"a paramount purpose of arbitrary searches and seizures."¹⁴² In terms of the searches of the kind here of objective reasonableness.

That arbitrary action has been recognized in circumstances. Under *Campanella* the occupant subject to traffic warrants for housing inspection or administrative standards is satisfied with respect to *v. Barlow's Inc.*¹⁴⁴ ordinary inspection "is pursuant to neutral criteria," as the case involves almost unbridled discretion of officers." Absent reasonable roving patrols seeking ill *v. Martinez-Fuerte*¹⁴⁰ fix pose because in such a case the search is unreviewable in the field." And more stopping of vehicles without licenses and vehicle registration under the Fourth Amendment, but for such purposes would stop mobiles on public roads for their travel and privacy of police officers." In a meaningful prohibition of that the enforcement of probable cause focus in that sense, they are different discussion, where that probable cause goes would not ordinarily be minor offenses and the evidence to uncover them in the case hardly matters, for here liberty of every man in the kind of arbitrary action.

142. *Amsterdam, Perspectives on the Fourth Amendment*, 58 *Minn. L. Rev.* 340, 417 (1974).

143. 387 U.S. 523, 87 S.Ct. 1000, 18 Ed.2d 630 (1967).

144. 436 U.S. 307, 98 S.Ct. 1000, 56 Ed.2d 305 (1978).

145. *United States v. Brigance*, 422 U.S. 873, 95 S.Ct. 2374, 45 L.Ed.2d 807 (1975).

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

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

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

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

144. 430 U.S. 307, 98 S.Ct. 1816, 50 L. Ed.2d 305 (1978).

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

146. 428 U.S. 543, 96 S.Ct. 3074, 40 L. Ed.2d 1116 (1976), on remand, 538 F.2d 858 (2d Cir.)

147. 440 U.S. 648, 99 S.Ct. 1391, 50 L. Ed.2d 600 (1979)

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

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

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

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

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

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

150. 308 F.2d 142 (1st Cir. 1960).

151. 428 U.S. 304, 90 S.Ct. 3092, 40 L. Ed.2d 1009 (1970), on remand, S.D., 247 N.W.2d 673.

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

would be no reason for the Court in *Scott*. The Court should examine the police philosophy underlying the decision whether to arrest or not be left entirely to the discretion of the officers could realize

holding that a police officer may make a full-scale search incident to the arrest. The Court delivered in two cases, both the decision to make a 'full custody search' rather than to issue a citation to conduct a full search in connection with a particular vehicle code violation were apparently police regulations. In both decisions were held in discretion of the officer had distinguished the ground, it would, in my view, be made by far the greater to the jurisprudence amendment since Justice Brandeis against the writs of *habeas corpus* and 'the child independence' But it did not. The significance of the issue or the opportunity to fashion a solution to the fourth amendment

§ 1.3 Federal vs. State Jurisdiction

14. See the thoughtful opinion of Lindo, J., in 285 Or. 337, 591 P.2d 1001, holding that states have localities by rule of law search and seizure than they have, given constitutional limits, maintain and, after all, the limits on police authority.

21. Consider also *State v. 205 N.C. 300, 245 S.E.2d 100* (where statute says as a result of violation provisions must be observed not require compliance with statutory list of items seized by consenting to search not obtained as a result of search).

24. See also *United States v. 508 F.2d 545* (9th Cir. 1974).

now under con-
g evidence on
motives of the
principle. But
or motivation of
been prompted
direct fashion
from their usual
into motivation
that issue. For
een motivation
ow why an offi-
t does not show
rior motive the
the usual prac-
is no reason to
rmine in which
sor Amsterdam

the hunt when
ice in this con-
the applicable
to do can be
tion is, in any
ose to search
n accompanied
le officers will
aneous onrush

pressed earlier
inten¹⁵⁰) that
to the minds of
misallocation of

of disregarding
volved" is cor-
ided there are
particular case
bitrary. This
ion of the re-
ota v. Opper-
"was carried
police depart-
at check upon
circumstances
there then

3092, 40 L.
emand, S.D., 247

2 supra, at 415-
s ago, the Su-
down decisions

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

holding that a police officer who arrests a motorist for a traffic violation may make a full-scale body search incident to the arrest. The holdings were delivered in two cases. In the first case, both the decision of the officer to make a 'full custody arrest' rather than to issue a citation and his decision to conduct a full 'field type search' in connection with arrests for the particular vehicle code violation in question were apparently dictated by local police regulations. In the second case, both decisions were left entirely to the discretion of the officer. If the Court had distinguished the two cases on this ground, it would, in my judgment, have made by far the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued against the writs of assistance in 1761 and 'the child Independence was born.' But it did not. Without evident appreciation of the significance of the issue or the opportunity within its grasp to fashion a solution to a wide array of fourth amendment problems that

would otherwise bedevil it forever, the Court kicked the chance away. It thereby held that whether you and I get arrested and subjected to a full-scale body search or are sent upon our respective ways with a pink multi-form and a disapproving cluck when we happen to go for a drive and to leave our operator's licenses on the dressing table depends upon the state of the digestion of any officer who stops us—or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin." See also § 5.2(g).

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

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

14. See the thoughtful concurring opinion of Linde, J., in *State v. Greene*, 285 Or. 337, 501 P.2d 1362 (1979), reasoning that states by legislation and localities by rule should deal with search and seizure questions more than they have, given the fact the constitutional limits are often uncertain and, after all, only set the outer limits on police authority.

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

24. See also *United States v. Soto-Soto*, 593 F.2d 545 (9th Cir. 1979) (evidence

obtained by FBI agent in border search suppressed because statutory authority to conduct such searches limited to certain officials not including FBI agents; court stresses that "important statutory limitations which protect the balance between sovereign power and constitutional rights were violated here," the point being that this special and extraordinary search power should be limited to officials having the special responsibilities which justify that power).

32. See also *United States v. Searp*, 586 F.2d 1117 (6th Cir. 1978), cert. den., 440 U.S. 921, 60 S.Ct. 1247, 59 L.Ed. 2d 474 (where federal agent obtains 1 search warrant from state judge in course of joint federal-state investigation, it is a federal warrant and thus the provisions of Fed.R.Crim.P. 41 concerning obtaining authorization for nighttime entry apply, but, given fact

§ 1.1 Origins and Purposes of The Exclusionary Rule

Analysis

Subsec.

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

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

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

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

1. For a more thorough account, see J. Landynski, *Search and Seizure and the Supreme Court* ch. 1 (1966); N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937).

2. J. Landynski, *supra* note 1, at 19.

3. See F. Siebert, *Freedom of the Press in England: 1476-1776* (1952).

4. *Id.* at 48.

5. *Id.* at 84-85.

6. *Id.* at 173-76.

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

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

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

7. N. Lasson, *supra* note 1, at 38-39.

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

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

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

11. *Id.* at 49-50.

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

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

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

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

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

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

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

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

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

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

19. *Id.* at 783.

20. *Ibid.*

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

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

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

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority * * *. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures * * * should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

* * * To sanction [unlawful invasion of the sanctity of his home by officers of the law] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

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

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

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

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

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

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

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

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

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

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

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

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. * * *

Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy

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

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

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

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

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

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

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

Noting that 30 states had rejected the *Weeks* rule, while only 17 were in agreement with it, the Court concluded it was not "a departure from basic standards" to leave the victims of illegal state searches "to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford."⁴²

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

42. In this connection, the Court perceived a difference between local and national law enforcement: "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of po-

lice directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

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

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

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

43. 342 U.S. 185, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

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

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

46. Frankfurter, J., joined by Burton, J., maintained that *Rochin* was con-

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

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

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

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

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

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

Nine years later, even though in the meantime the Court had held in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), that the federal exclusionary rule in search and seizure cases was binding on the states, and in *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), that the Fifth Amendment protection against compelled self-incrimination was likewise applicable to the states, the Court still upheld the taking by a physician, at police direction, of a blood sample from an

injured person over his objection. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). A 5-4 majority, per Brennan, J., held: (1) that the practice did not offend that "sense of justice" of which the Court spoke in *Rochin*; (2) that the privilege against self-incrimination had not been violated, for it covers only "evidence of a testimonial or communicative nature"; and (3) that there had been no unreasonable search, as there was probable cause, not time to get a warrant first, and the test "was a reasonable one * * * performed in a reasonable manner."

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

But the author of *Wolf*, Justice Frankfurter, was among the dissenters⁵⁰ in *Elkins*. He deemed it "a complete misconception of the *Wolf* case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a technical lack of a search warrant, thereby making a search unreasonable under the Fourth Amendment, constitutes an 'arbitrary intrusion' of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment."

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

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

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

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

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

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

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

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

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

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

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

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

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

Mapp
Hobby

tea
371
390
tion
ing
inal
ven
the
pre-
front
con-
it of
S.Ct.
iding
nary
there
relief
hood
would
dings.

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

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

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

Justice Black, concurring, declared that he was "still not persuaded that the Fourth Amendment, standing alone, would be enough" to support exclusion, but he concluded "that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." In his concurring opinion, Justice Douglas responded to the objection of the three dissenters⁵⁸ that the instant case was not "an appropriate occasion for re-examining *Wolf*," noting that the Court had said a year earlier that all the arguments pro and con on this issue were well known.

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

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

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

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

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

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

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced

59. 364 U.S. 206, 80 S.Ct. 1437, 4 L. Ed.2d 1667 (1960). 61. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

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

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

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

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

. . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action.

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

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

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

63. See § 11.3.

64. 414 U.S. 338, 94 S.Ct. 613, 38 L. Ed.2d 561 (1974). See Schrock &

Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn.L.Rev. 251 (1974).

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

More recently, the *Calandra* approach was followed in *United States v. Janis*⁶⁶ and *Stone v. Powell*.⁶⁷ In *Janis*, the majority concluded that "the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct,'" and then held that this purpose would not be served by utilizing the exclusionary rule to exclude from federal civil tax proceedings evidence obtained by a state law enforcement officer.⁶⁸ And in *Stone* the Court again declared deterrence to be the "primary justification" for the exclusionary rule, which led to the holding that a state prisoner cannot ordinarily⁶⁹ obtain habeas corpus relief in federal court on Fourth Amendment grounds because the "additional incremental deterrent effect" of exclusion at that stage would be minimal.⁷⁰

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

65. Brennan, Douglas, and Marshall, JJ.

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

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

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

"The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. * * * The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in re-

cent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."

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

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

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

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

§ 1.2 The Exclusionary Rule Under Attack

Analysis

Subsec.

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

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

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

72. Other signals are to be found. See *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), where Justice Blackmun indicated his agreement with the proposition that "the Fourth Amendment supports no exclusionary rule," and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), where Chief Justice Burger stated in dissent: "[T]he Exclusionary Rule does not ineluctably flow from a desire to ensure that government plays the 'game' according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be

thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government." And in *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the Chief Justice ventured "to predict that overruling this judicially contrived doctrine—or limiting its scope to egregious, bad-faith conduct—would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistakes or misconduct."

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

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

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

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

1. For a useful survey of this literature, see Comment, 65 *J.Crim.L. & C.* 373 (1974). More recent commentary includes S. Schlesinger, *Exclusionary Injustice* (1977); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 *Wash.U.L.Q.* 621; Miles, *Decline of the Fourth Amendment: Time to Overrule *Mapp v. Ohio**, 27 *Cath.U.L. Rev.* 9 (1977).
2. 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).
3. 403 U.S. 388, 91 S.Ct. 1999, 29 L. Ed.2d 619 (1971).
4. 403 U.S. 443, 91 S.Ct. 2022, 29 L. Ed.2d 534 (1971).
5. 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed.2d 1067 (1976).
6. *United States v. Acosta*, 501 F.2d 1330 (5th Cir. 1974) (dissenting opinion); *Orricer v. Erickson*, 471 F.2d 1204 (8th Cir. 1973) (concurring opinion).
7. In *California v. Krivda*, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972), where the Court did not reach the merits because of uncertainty as to whether the California Supreme Court had based its decision upon an interpretation of the Fourth Amendment, the State of California and amici curiae (Americans for Effective Law Enforcement, International Association of Chiefs of Police, State of Illinois) argued in favor of abandonment or alteration of the exclusionary rule.

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

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

1

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

Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me properly directed not against the exclusionary rule but against the substantive guarantee itself. The exclusion of the evidence is only the sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

Scope of search

It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. If those rules, defining the scope of the search which may be made without a warrant and the scope of a search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation. If those fundamental rules are open to challenge . . . , the burden is on those

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

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

Faint, illegible text from the reverse side of the page, appearing as bleed-through.

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

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

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

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

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

12. Allen, *supra* note 8, at 24.

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

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

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

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

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

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

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

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

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

Limits of Lawyering, 48 Ind.L.J. 329, 330-31 (1973).

18. Dworkin, Fact Style Adjudication and the Fourth Amendment: The

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

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

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

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

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

LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 *Mo.L.Rev.* 563 (1965).

21. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 *J. Crim.L.C. & P.S.* 255, 256 (1961).

22. 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

23. Oaks, *supra* note 15, at 709.

tion by the Chief Justice of Oaks' conclusion is less than complete; Oaks reached the conclusion that these data "fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule."²⁴ That is, it has not been clearly established that the exclusionary rule does deter, or that it does not.

It is more precise, perhaps, to say that we do not have an "effective quantitative measure of the rule's deterrent efficacy,"²⁵ for there is some evidence available as to when the exclusionary rule does not deter and also some evidence indicating that it sometimes does deter. As to the former, there exists hard evidence, based upon empirical research into police practices,²⁶ which clearly demonstrates the correctness of the observation in *Terry v. Ohio*²⁷ that the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." Illustrative are "arrest or confiscation as a punitive sanction (common in gambling and liquor law violations), arrest for the purpose of controlling prostitutes and transvestites, arrest of an intoxicated person for his own safety, search for the purpose of recovering stolen property, arrest and search and seizure for the purpose of 'keeping the lid on' in a high crime area or of satisfying public outcry for visible enforcement, search for the purpose of removing weapons or contraband such as narcotics from circulation, and search for weapons that might be used against the searching officer."²⁸

The evidence tending to show that the exclusionary rule does deter is, by comparison, of a "softer" variety, but most likely this is inevitably so. As Professor Wright has noted: "With the Exclusionary Rule, as with capital punishment, the occasions on which the deterrent effect has failed are easy to see. It is more difficult to measure the occasions on which the deterrent has been successful."²⁹ That the exclusionary rule has had a deterrent effect upon the police is certainly suggested by such post-exclusionary rule occurrences as the dramatic increase in the use of search warrants where virtually none had been used before,³⁰ stepped-up efforts to educate the police on the law of search and seizure where such training had before been vir-

24. *Ibid.* (Emphasis added.)

25. Allen, *supra* note 8, at 34.

26. W. LaFave, *Arrest* chs. 21-25 (1965); J. Skolnick, *Justice Without Trial* ch. 10 (1966); L. Tiffany, D. McIntyre & D. Rotenberg, *Detection of Crime* ch. 13 (1967); LaFave & Remington *supra* note 20; LaFave, *supra* note 20.

27. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

28. Oaks, *supra* note 15, at 721-22.

29. Wright, *supra* note 19, at 739.

30. See Milner, *Supreme Court Effectiveness and the Police Organization*, 36 *Law & Contemp. Prob.* 467, 475 (1971).

tually nonexistent,³¹ and the creation and development of working relationships between police and prosecutors to ensure the obtaining of evidence by means which would not result in its suppression.³² Moreover, if the assertions of police spokesmen, stated by way of complaint, that the police have been "handcuffed" by the exclusionary rule are taken seriously, they can only be taken as an acknowledgment that the police are deterred by the exclusionary sanction.³³ "There would be little reason to complain of the substantive rules unless the exclusionary rule made them relevant to police action."³⁴

Despite the lack of hard evidence proving deterrence and of a sound quantitative measure of the extent of deterrence, it is not irresponsible to suggest (i) that the hard evidence the rule does not deter under certain circumstances fails to "demonstrate the absence of all deterrent potential"³⁵; and (ii) that a significant amount of deterrence may be assumed from the fact that "conviction of offenders remain obviously an important objective of police activity."³⁶ But the Chief Justice does not concede even this much in *Bivens*. Although lacking empirical evidence on his side of the issue, he finds evidence of nondeterrence in the nature of the exclusionary rule—the fact that it "does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence." And should this evidence not be deemed convincing, it is of no consequence, for in light of the "high price" which the exclusionary rule extracts the burden is on its proponents to make a "clear demonstration" of its efficacy.³⁷

The latter point has been effectively answered by Professor Dworkin:

Obviously, the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained³⁸ is outcome determinative. The Chief Justice's assignment of the burden is merely a way of announcing a predetermined conclusion.
 • • • The deterrent efficacy of the exclusionary rule can be evaluated without resort to the notion of burdens of proof. If all

21. See Kamisar, *supra* note 9, at 179-82.

32. *Ibid.*

33. Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 *Minn.L.Rev.* 1083, 1156-57 (1959).

34. Paulsen, *supra* note 21, at 262.

35. Allen, *supra* note 8, at 39.

36. *Ibid.*

37. To the same effect is Wright, *supra* note 19, at 742.

38. Allen, *supra* note 8, at 34, notes that it is not "an easy matter to devise methods to produce a persuasive empirical demonstration" on this issue. And despite the useful suggestions for empirical research set out in Oaks, *supra* note 15, it is to be doubted whether a truly "quantitative measure" is possible.

laws which are justified wholly or partly on the ground that they deter undesirable conduct had to be justified by showing that they actually do deter, very little of the criminal law, at least, could meet the test. Deterrence is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred * * *.³⁹

Moreover, the Chief Justice's notion that there can be no deterrence absent a "direction sanction to the individual officer" is in error. No one, Professor Amsterdam has noted,

has ever urged that the exclusionary rule is supportable on this principle of "deterrence." It is not supposed to "deter" in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set—a theory of deterrence, by the way, whose lack of empirical justification makes the exclusionary rule look as solid by comparison as the law of gravity.

Rather, the exclusionary rule is designed to operate in the manner of the procedure now being used in some appliance stores with the encouragement of police authorities; branding the social security number of the purchaser into the chassis of new television sets in order to make them less attractive as objects of larceny by diminishing their resale value in the hands of anyone but the true owner. Of course a branded television set may nonetheless be stolen by someone who does not notice it is branded, or who thinks that he can sell it even with the brand, or who simply wants to watch the Superbowl on it. But at least the effort to depreciate its worth makes it less of an incitement than it might be. A criminal court system functioning without an exclusionary rule, on the other hand, is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality.⁴⁰

For these reasons, the argument that the "exclusionary rule should be abandoned"⁴¹ for want of proof of its deterrent efficacy deserves to be rejected. This conclusion is also supported by other considerations. For one thing, the exclusionary rule "assures a great deal of judicial attention"⁴² to questions concerning police practices, which is essential to a comprehensive and clear statement of Fourth Amendment standards. If an appellate court receives but a few cases, "the bits or slices or splinters which are cast up may be too frag-

39. Dworkin, *supra* note 18, at 332-33.

40. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *Minn.L.Rev.* 349, 431-32 (1974).

41. As made in the State of California's brief at p. 42 in the *Krivda* case; see note 7 *supra*.

42. Paulsen, *supra* note 21, at 260.

mentary to yield a proper picture or to allow the shaping and joining of complementary hubs and spokes and rims to form a doctrinal wheel."⁴³ But if the court receives "a related group of cases in a series," then "the court will see more, learn more from the series; the court will begin to see in the round rather than the flat, and to gain some understanding of the whole in action."⁴⁴ Experience has shown that the exclusionary rule has provided an essential stimulus to the judicial elaboration of Fourth Amendment requirements.⁴⁵ This task could not be effectively continued if the exclusionary rule were abandoned.⁴⁶

Finally, it is well to keep in mind Professor Tiffany's caution that in considering the question of whether the exclusionary rule should be abandoned it is

important to distinguish between the functional and symbolic impact of a rule designed to control behavior. From a functional perspective, the *Mapp* rule may be a failure. It need not follow that the rule should be changed if one can find in it sufficient symbolic worth. The question may be put this way: would reversal of the rule place us in a position that is substantially status quo ante? * * * It has been traditional when discussing the exclusionary rule to [ask]: Does the rule work? But at this point that may be the wrong question. Instead, the central question may now be this: how would the police react if the Supreme Court overruled *Mapp v. Ohio*?⁴⁷

The point did not escape Chief Justice Burger, for in his *Bivens* dissent he warned against overruling *Mapp* in the absence of some "meaningful alternative" lest "law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminal' had been declared."⁴⁸

43. K. Llewellyn, *The Common Law Tradition—Deciding Appeals* 263 (1960).

44. *Ibid.*

45. As to the California experience, see Traynor, *supra* note 17, at 323; as to the Illinois experience, see LaFave, *supra* note 20, at 580-81 n. 63.

46. The situation would then be like that which existed prior to *Mapp* in those jurisdictions which had not adopted the exclusionary rule on their own, where appellate courts received arrest and search issues "only when an appeal was taken from a tort action against a police officer.

The many barriers to recovery have severely limited the number of appeals, and the defenses available are such that an explicit statement of arrest and search norms is seldom required. Moreover, the civil suit context of the case may divert the appellate court from the question of whether the police conduct was proper to that of whether it is fair to subject the errant officer to personal liability." LaFave, *supra* note 20, at 581.

47. Tiffany, *Judicial Attempts to Control the Police*, *Current History*, July, 1971, pp. 13, 52.

48. But later, concurring in *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037,

A majority of the Supreme Court has declined to abandon the exclusionary rule on the no-deterrence theory, stating in *Stone v. Powell*⁴⁹:

Despite the absence of supportive empirical evidence,⁵⁰ we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.

We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state court convictions.⁵¹

(c) Replacing the exclusionary rule. Finding a "meaningful alternative" for the exclusionary rule is easier said than done. In *Mapp v. Ohio*,⁵² it will be recalled, the Court concluded that "other remedies have been worthless and futile," and with this part of *Mapp* "there is little quarrel."⁵³ And, while it may be true that the argument that nothing else works is hardly sufficient justification for

49 L.Ed.2d 1067 (1976), the Chief Justice indicated otherwise: "With the passage of time, it now appears that the continued existence of the rule, as presently implemented, inhibits the development of rational alternatives."

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

50. In the immediately preceding case, *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), the Court noted that:

"although scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way appears to be flawed. It would not be appropriate to fault those who have attempted empirical studies for their lack of convincing data. The number of variables is substantial, and many cannot be measured or subjected to effective controls. Record-keeping before *Mapp* was spotty at best, and thus severely hampers before-and-

er studies. Since *Mapp*, of course, all possibility of broad-scale controlled or even semi-controlled comparison studies has been eliminated. 'Response' studies are hampered by the presence of the respondents' interests. And extrapolation studies are rendered highly inconclusive by the changes in legal doctrines and police-citizen relationships that have taken place in the 15 years since *Mapp* was decided."

51. But the Court, holding that Fourth Amendment claims of state prisoners could not ordinarily be reviewed on federal habeas corpus, refused to accept "the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal."

52. 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed.2d 1081 (1961).

53. *Wright*, supra note 19, at 738.

adopting the exclusionary rule,⁵⁴ it is good reason for maintaining a healthy skepticism about any proposal to abandon the exclusionary rule in favor of some other supposed remedy.

Consider, for example, the suggestion made by the Chief Justice in *Bivens* that Congress might enact a statute with the following components: (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties; (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct; (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute; (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment. He added that states would thereafter "develop their own remedial systems on the federal model."⁵⁵

On what basis should one judge this or any other proposed substitute for the exclusionary rule? I find wholly satisfactory the recommendation of Professor Oaks that

the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees.⁵⁶

54. Kaplan, *supra* note 11, at 1032.

55. See also Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 *Judicature* 75 (1974), proposing a "Joint Liability Plan" whereunder the governmental

unit would be liable in tort and the officer would be discharged on proof of an intentional violation or subjected to a monetary penalty on proof of a reckless or grossly negligent violation.

56. Oaks, *supra* note 15, at 756.

Under this test, the proposed statute would hardly be a suitable replacement for the exclusionary rule. This conclusion is supported by the following considerations:

(1) While abrogation of sovereign immunity and creation of a fair tribunal arguably might overcome two of the longstanding impediments to the effectiveness of the tort remedy, in the absence of a prospect of a significant recovery there would be no incentive to undertake proceedings to collective damages for violation of Fourth Amendment rights. As one commentator has noted, the victim of a police violation of Fourth Amendment rights is likely to lack the "aura of respectability" needed to recover a significant amount for injury to feelings and reputation.⁵⁷

(2) For this reason and others, it will be difficult for a potential plaintiff to obtain effective legal representation. Professor Amsterdam properly asks: "Where are the lawyers going to come from to handle these cases for the plaintiffs?"⁵⁸ One of the great virtues of the exclusionary rule is that Fourth Amendment violations are regularly brought to light; the accused "has a motive to challenge the police overreaching" and he "need not resort to another proceeding or hire another lawyer."⁵⁹ But what "would possess a lawyer to file a claim for damages . . . in an ordinary search-and-seizure case?"⁶⁰

(3) Particularly if the Fourth Amendment tort action is pursued infrequently and does not result in substantial recoveries, there is no reason to believe it will act as an effective deterrent. It was noted earlier that the criticism that the exclusionary rule "does not apply any direct sanction to the individual official" takes too narrow a view of deterrence, as suppression of illegally obtained evidence withdraws an incentive to violate the constitution. But if the exclusionary rule is abandoned, so that the inducement to violate is restored, it is to be doubted that this inducement will be overcome by the prospect of recovery from the governmental unit. It has been argued, of course, that "a community which pays the bill will not long tolerate habitual lawlessness."⁶¹ But as yet there has been "no showing that either en-

57. Comment, 63 J.Crim.L.C. & P.S. 256, 263 (1972).

58. Amsterdam, *supra* note 40, at 430.

59. Paulsen, *supra* note 1, at 260.

60. Amsterdam, *supra* note 40, at 430, continuing: "The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the

length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on 'cover' charges? The opportunity to represent his client without fee in these resulting criminal matters?"

61. Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U.Chi.L.Rev. 345, 373 (1936).

larged liability or indemnity has realized the expectation that government agencies exposed to this prospect of liability would take steps to minimize their risk by effectively reducing police misbehavior."⁶² As one commentator has noted, if "the compartmentalized structure of law enforcement machinery prevented the frustrated prosecutor from putting effective pressure on the police to curb their illegal practices, it seems just as likely that the same compartmentalization will prevent the taxing authorities from putting effective pressure on the police."⁶³

(4) The "violate now and pay later"⁶⁴ character of the tort remedy makes it ineffective both as a deterrent and a means of giving credibility to Fourth Amendment rights. As Professor Dellinger has observed:

In essence, by disallowing in all cases the use of the exclusionary rule to suppress evidence gathered in violation of the fourth amendment, the Chief Justice's proposal would permit the government to buy itself out of having to comply with constitutional commands. To abolish the exclusionary rule and replace it with an action for damages against the governmental treasury is to have the law speak with two voices. * * * However one resolves the question of whether a valid contract creates a normative duty or merely presents an option to breach and pay damages, it is inconsistent with a constitutional system to view duties imposed by basic guarantees in the latter way. * * * The fourth amendment does not grant the government the discretion to decide whether the benefits of infringing the public's right to be protected from unreasonable searches and seizures are worth some expenditure of the public's funds; the language of the amendment is an affirmative command. It is therefore doubtful that the substitution of a claim against the government for the exclusionary rule in all cases would provide equally effective vindication of the constitutional interests thus protected, and it is therefore doubtful that such a substitution would be constitutionally valid.⁶⁵

(5) Finally, replacement of the exclusionary rule with a tort remedy to be pursued before a special tribunal would have the unfortunate consequence of effectively withdrawing from the Supreme Court and other appellate courts the important function of spelling out police authority under the Fourth Amendment. One of the virtues of the exclusionary rule, as noted above, is that it provides the higher courts with a sufficiently steady diet of Fourth Amendment

62. *Calks*, supra note 15, at 673-74 n. 37.

63. *Comment*, supra note 57, at 264.

64. *Paulsen*, supra note 21, at 261.

65. *Dellinger*, *Of Rights and Remedies: The Constitution as a Sword*, 85 *Harv.L.Rev.* 1532, 1562-63 (1972).

issues to make possible a meaningful shaping of constitutional standards governing arrest and search. That process of giving content to the Amendment which occupies "a place second to none in the Bill of Rights"⁶⁶ is too important to be shunted off upon a special tribunal in the nature of a court of claims. Moreover, experience has shown that tort litigation is not a meaningful context within which to develop constitutional doctrine on arrest and search.⁶⁷

(d) Limiting the exclusionary rule to "substantial" or "knowing" violations. Yet another objection to the exclusionary rule voiced by the Chief Justice in *Bivens*, which has also been made by other commentators with some frequency,⁶⁸ is that it

has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type⁶⁹ violations of the Fourth Amendment. * * *

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

He cited by way of illustration a provision from the Model Code of Pre-Arrest Procedure which, in its latest form, provides that a motion to suppress is to be granted only if the court finds that violation to be "substantial," to be determined from consideration of all the circumstances, including:

- (a) the extent of deviation from lawful conduct;
- (b) the extent to which the violation was willful;
- (c) the extent to which privacy was invaded;

66. *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947) (Frankfurter, J., dissenting).

67. See note 46 supra. This would be less so if the various common law defenses were not available when the objective is recovery from the government rather than personal liability of the arresting or searching officer, but it is unclear that this is a part of the proposal made by the Chief Justice.

68. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L.Rev. 929, 951-53 (1965); Wingo,

Growing Disillusionment with the Exclusionary Rule, 25 Sw.L.J. 573, 584-85 (1971); Wright, supra note 19, at 743-45; Comment, 46 Fordham L. Rev. 139 (1977)

69. The reference is to *Irvine v. California*, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 (1954), a pre-*Mapp* case in which the Court declined to suppress evidence obtained by repeated illegal entries into petitioner's home, first to install a secret microphone and then to move it into the bedroom, in order to listen to the conversations of the occupants.

(d) the extent to which exclusion will tend to prevent violations of this Code;

(e) whether, but for the violation, the things seized would have been discovered; and

(f) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.⁷⁰

Similarly, Justice White, dissenting in *Stone v. Powell*,⁷¹ expressed the view that the exclusionary rule

should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed. * * *

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.

At first blush, such proposals would seem to have considerable appeal. If the objective is deterrence, would it not be enough "if the police were denied the fruits of activity intentionally or flagrantly illegal"?⁷² And do not the government profit and judicial taint argu-

70. Model Code of Pre-Arrestment Procedure § SS 290.2(4) (Proposed Official Draft, 1975). Another provision, § SS 290.2(2), states that suppression shall also occur "if otherwise required by the Constitution of the United States," which some have read as meaning that the "substantial" violation limitation is not applicable to Fourth Amendment violations; see brief of the American Civil Liberties Union in the *Krivda* case, supra note 7, at 16. But this is not the case, for the commentary to this

section, at p. 565, asserts that "the constitutional issue itself may be affected by the factor of substantiality."

For an explication and defense of the Model Code position, see Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 Ga.L.Rev. 1 (1975).

71. 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed.2d 1067 (1976).

72. Friendly, supra note 68, at 952.

ments likewise lose considerable force when the officer was less culpable? Although these are provocative inquiries, I find Professor Kaplan's brief against this proposal compelling. He says:

There are, however, basic problems with such a modification of the rule. It would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Nor would it suffice further to modify the rule and require that the police error be reasonable as well as inadvertent. While such a standard would motivate a police department to insure that its officers made only reasonable mistakes, it is hard to determine what constitutes a reasonable mistake of law. Moreover, the exclusionary rule is already held inapplicable where a policeman makes a reasonable factual mistake.

There is a more serious problem with exempting searches made through inadvertent errors of law from the exclusionary rule. To do so would add one more factfinding operation, and an especially difficult one to administer, to those already required of a lower judiciary which, to be frank, has hardly been very trustworthy in this area. It is difficult enough to administer the current exclusionary rule, since police perjury can, and often does, prevent accurate findings of fact. So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level. In order to suppress evidence, the trial judge would have to find a deliberate constitutional violation, and evidence of the officer's state of mind would be generally difficult to come by apart from the officer's self-serving and generally uncontradicted testimony. And since the necessary finding requires proof that a policeman actually has engaged in a criminal act, the defendant's burden of proof would be increased, as a psychological or perhaps even as a legal matter.⁷³

73. Kaplan, *supra* note 11, at 1044-45. See also Allen, *supra* note 8, at 36; Dworkin, *supra* note 18, at 332; Note, 61 *Geo. L.J.* 1453, 1459-62 (1973); debate on the ALI proposal in Proceedings of 48th Annual Meeting

376-90 (1971); and debate on a similar proposal in S. 2657, 92d Cong., 1st Sess., before the ABA House of Delegates, summarized in 59 *A.B.A.J.* 387-88 (1973) and 12 *Crim.L.Rptr.* 2429-31 (1973).

As Justice Brennan pointed out in his dissent in *United States v. Peltier*,⁷⁴ the proposal to limit the exclusionary rule to knowing violations

suggests that instead of [a] single inquiry, district judges may also have to probe the subjective knowledge of the official who orders the search, and the inferences from existing law that official should have drawn. The decision whether or not to order suppression would then turn upon whether, based on that expanded inquiry, suppression would comport with either the deterrence rationale of the exclusionary rule or "the imperative of judicial integrity." * * *

Other defects of today's new formulation are also patent. First, this new doctrine could stop dead in its tracks judicial development of Fourth Amendment rights. For if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny an accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts.

(e) **Limiting the exclusionary rule to other than "serious cases."** Professor Kaplan offers two counterproposals, one of which is that the exclusionary rule "not apply in the most serious cases—treason, espionage, murder, armed robbery, and kidnapping by organized groups" except perhaps when "the violation of civil liberties were shocking enough."⁷⁵ This limitation is said to be justified by "the political costs of the rule, the possibility of releasing serious and dangerous offenders into the community, and the disproportion between the magnitude of the policeman's constitutional violation and the crime in which the evidence is to be suppressed."⁷⁶ Moreover, it is claimed that the result would be the development of more meaningful Fourth Amendment limitations with respect to the investigation of other than serious crimes: "Freed of the concern that the fourth amendment doctrine they announce would later result in the release of people guilty of the most serious crimes, judges would be able to interpret more fully and honestly the commands of the fourth amendment in all the remaining cases."⁷⁷

The wisdom of this proposal is to be doubted. It would seem odd, indeed, to withdraw the exclusionary rule from those cases in which, as far as can be determined,⁷⁸ it has the greatest deterrent ef-

74. 422 U.S. 531, 95 S.Ct. 2313, 45 L. Ed 2d 374 (1975).

75. Kaplan, *supra* note 11, at 1046.

76. *Ibid.*

77. *Id.* at 1047.

78. "Since in the policeman's hierarchy of values, arrest and subsequent conviction are more important the 'bigger' the 'pinch,' compliance with the exclusionary rule seems contingent upon this factor." J. Skolnick, *supra* note 26, at 228.

fect. Nor does it appear correct to say, as Professor Kaplan assumes, that in the investigation of serious offenses "remedies other than the exclusionary rule may be effective."⁷⁹ Certainly the restraint of potential adverse public opinion, which generally plays a small part with respect to searches as compared to other forms of police illegality,⁸⁰ is virtually nonexistent when the public believes the police were directing their attention to those suspected of the most serious offenses.⁸¹ Moreover as Kaplan acknowledges, there is the risk that if the police were "freed from the constraints of the rule in the most serious cases" they "might actively encourage violation of the fourth amendment."⁸² This fear is justified by the pre-*Mapp* experience, as reported by Professor Allen:

Some states sought to avoid the heavy costs involved in complete acceptance or rejection of the exclusionary rule by holding the rule applicable only to certain categories of offenses. The consequences were predictable. The police, being of a pragmatic turn, tended to interpret the withdrawal of the rule in given offense categories as a license to proceed in those areas without legal restraint.⁸³

(f) Limiting the exclusionary rule to institutional failures. Professor Kaplan's other proposal is "to hold the exclusionary rule inapplicable to cases where the police department in question has taken seriously its responsibility to adhere to the fourth amendment."⁸⁴ Procedurally, this would mean that if, on a motion to suppress, the judge found a search and seizure unconstitutional, it would then be open to the prosecution "to ask the judge for a further hearing on the police department's regulations, training programs, and disciplinary history."⁸⁵ The prosecution, to escape exclusion of the evidence, would have to show "a set of published regulations giving guidance to police officers as to proper behavior in situations such as the one under litigation, a training program calculated to make violations of fourth amendment rights isolated occurrences, and, perhaps most importantly, a history of taking disciplinary action where such violations are brought to its attention."⁸⁶

79. Kaplan, *supra* note 11, at 1047.

80. This is because "illegal searches are typically less offensive to the dignity of the citizenry and less often characterized by violence and brutality than are illegal interrogatory practices," and thus are "less likely to attract the interest of the press" or "to arouse community opinion." Kamisar, *supra* note 33, at 1098. See also Comment, 47 Nw.U.L.Rev. 493 (1952).

81. Westley, *The Police: A Sociological Study of Law, Custom and Morality* 118 (unpublished Ph.D. thesis, Dept't of Sociology, Univ. of Chicago, 1951).

82. Kaplan, *supra* note 11, at 1047.

83. Allen, *supra* note 8, at 36.

84. Kaplan, *supra* note 11, at 1050.

85. *Id.* at 1051.

86. *Id.* at 1050-51.

This proposal deserves serious attention, for it is directed toward the most desirable objective of prompting law enforcement agencies to engage in careful self-study for the purpose of producing clear and comprehensive rules to govern day-to-day police practices.⁸⁷ The difficult question, it would seem, is whether the proposal could be feasibly implemented. While Kaplan asserts that the additional hearing required "need not be very lengthy,"⁸⁸ his other comments seem to belie this, for each case would present a unique question as to whether there was compliance with respect to the particular practice challenged⁸⁹ at that particular time.⁹⁰ Moreover, it seems likely that the objection Kaplan made to the proposed substantial violation limitation is equally apropos here: "So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to modification at the trial court level."⁹¹

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

Analysis

Subsec.

- (a) Federal vs. state standards.
- (b) Violation of state constitution, state or federal statute, court rule, or administrative regulation.
- (c) The remaining "silver platter".

87. On the desirability of police rule-making, see K. Davis, *Discretionary Justice* 52-161 (1969); K. Davis, *Police Discretion* 98-138 (1975), *ABA Standards on The Urban Police Function* § 4.3 (1973); *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* 18-21 (1967); *Report of National Advisory Comm'n on Civil Disorders* 16-65 (1968); Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 *N.Y.U.L.Rev.* 785 (1970); Kaplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 *Law & Contemp.Prob.* 500 (1971); Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 *Mich.L.Rev.* 1123 (1957); Goldstein, *Trial Judges and the Police*, 14 *Crime & Delinq.* 14 (1968); LaFave & Remington, *supra* note 19; McGowan,

Rule-making and the Police, 70 *Mich.L.Rev.* 659 (1972); Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights*, 52 *J.Urb.L.* 25 (1974).

88. Kaplan, *supra* note 11, at 1051.

89. "For example, the regulations governing on-the-street behavior might be sufficient but not those concerning electronic eavesdropping." *Id.* at 1053.

90. "[A]t least for the foreseeable future, the requirements upon police departments gradually would be growing more stringent. In each trial, therefore, the defense attorney would be spurred by the possibility that his case might become the vehicle for a further tightening of the standards." *Id.* at 1054.

91. *Id.* at 1045.

INTRODUCTION

Two years ago this review published an article which reviewed search and seizure law in Alaska.¹ Because the local bar and bench seem to have found that article to be useful, it appeared worthwhile to put together a similar review of the remainder of Alaska's law of criminal procedure. Like its predecessor, this article will review and analyze the law of criminal procedure in Alaska, isolating those areas in which the Alaska Legislature or the Alaska Supreme Court has departed from the prevailing approach to procedure in criminal cases and predicting probable outcomes to procedural issues still unresolved in Alaska.

A. Sources of Procedural Rights

Procedural rights in Alaska, in addition to those provided by the United States Constitution emanate from four sources. First, Article I of the State Constitution contains various sections which parallel and broaden the provisions of the Bill of Rights found in the United States Constitution. For example, Section 7² of Article I expands the traditional entitlement to due process of law by adding "the right of all persons to fair and just treatment in the course of legislative and executive investigations." Similarly, Sections 11³ and 12⁴ of Article I establish a constitutional right to release on bail,⁵ a matter not addressed in the Federal Constitution.

1. Feldman, *Search and Seizure in Alaska: A Comprehensive Review*, 7 UCLA-ALASKA L. REV. 75 (1977) [hereinafter cited as Feldman].

2. ALASKA CONST. art. I, § 7 provides: "No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of the legislative and executive investigations shall not be infringed."

3. ALASKA CONST. art. I, § 11 provides:

In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve: except that the legislature may provide for a jury of not more than twelve nor less than six in courts of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

4. ALASKA CONST. art. I, § 12 provides: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public."

5. The constitutional right to bail is codified in AS § 12.30.010 et seq; see Part II (B) of this Article *infra*. For other cases in which the Alaska Supreme Court has construed provisions of the Alaska Constitution more broadly than comparable provisions of the Federal Constitution, see *Zehring 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); *RLR v. State*, 487 P.2d 27 (Alaska 1971)

Title 12 of procedural rights freed from court actions to this part regulating misconduct and release on bail.

The Alaska Alaska Supreme rights. As will Rules, as adopted Court, have procedural rights in sex practice⁹ and dis modified by the

In exercising of the three sources substitutes the four highlight and a criminal procedure.

The Alaska protections afforded may be broadened by the federal constitution. The Alaska court interpreted as affording arrest, incarceration in the States Supreme the Federal Court of Fairbanks¹⁴ and

(jury trial in delinquent 1970) (jury trial).

6. See AS § 12.

7. See AS § 12.

8. See AS § 12.

9. See ALASKA

10. See ALASKA

11. *Smith v. State*, 386 (Alaska 1970).

12. 569 P.2d 189

13. ALASKA COM

The right of the papers, and effect

lated. No warrant

affirmation, and

or things to be se

14. 471 P.2d 386

Title 12 of the Alaska Statutes provides a second source of procedural rights. In most instances, these rights have been codified from court decisions involving constitutional issues. Exceptions to this pattern of codification can be found in the provisions regulating misdemeanor arrests,⁶ rights of a detainee after arrest,⁷ and release on bail.⁸

The Alaska Rules of Criminal Procedure, adopted by the Alaska Supreme Court, constitute the third source of procedural rights. As will be discussed later in this article, the Criminal Rules, as adopted, construed, and applied by the Alaska Supreme Court, have provided a broad basis for the expansion of procedural rights in several important areas. For example, grand jury practice⁹ and discovery¹⁰ in criminal cases have been substantially modified by the provisions of Alaska's Criminal Rules.

In exercising its authority as the final arbiter of the meaning of the three sources noted above, the Alaska Supreme Court constitutes the fourth source of procedural rights. This article will highlight and analyze the court's more important decisions in criminal procedure.

The Alaska Supreme Court has noted in several cases that the protections afforded by various provisions of the State Constitution may be broader than those provided by parallel provisions of the federal constitution.¹¹ For example, in *Zehring v. State*¹² the court interpreted Article I, Section 14¹³ of the Alaska Constitution as affording arrestees a greater protection from warrantless preincarceration inventory searches than that provided by the United States Supreme Court in decisions applying parallel provisions of the Federal Constitution. Similarly, the decision in *Baker v. City of Fairbanks*¹⁴ enlarged and broadened the right to a jury trial.

(jury trial in delinquency proceeding); *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970) (jury trial).

6. See AS § 12.25.030.

7. See AS § 12.25.150.

8. See AS § 12.30.010-.020.

9. See ALASKA R. CRIM. P. 6 and Part II (D) of this article, *infra*.

10. See ALASKA R. CRIM. P. 16 and Part II (E) of this article, *infra*.

11. *Smith v. State*, 510 P.2d 793 (Alaska 1973); *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970).

12. 569 P.2d 189 (Alaska 1977).

13. ALASKA CONST. art. I, § 14 provides:

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

14. 471 P.2d 386 (Alaska 1970).

Dismissal of the prosecution constitutes a third possible remedy that can be appropriate in certain instances.²¹ Serious violations of the rules regulating the grand jury process²² require that the indictment be dismissed and the matter submitted again to the grand jury.²³ In certain instances where the trial court fails to correctly remedy procedural violations, the Alaska Supreme Court will reverse judgments of conviction on appeal.²⁴ It should be noted that Rule 47 of the Alaska Rules of Criminal Procedure²⁵ precludes the court from reviewing allegations of error at trial unless an objection was raised and properly preserved by the parties below. "Plain error"—error affecting "substantial rights of the accused"—will be reviewed by the court on appeal even if not raised below.²⁶ Finally, even if properly preserved, errors which are harmless beyond a reasonable doubt will result in the court's affirmation of the conviction on appeal.²⁷

The remainder of this Article catalogs procedural rights in criminal cases at the various stages of the criminal proceeding. Part I discusses rights during investigation and arrest, including an update on search and seizure, identifications, statements, confessions, and entrapment. Part II considers procedural rights during the pretrial stage, subsequent to the initiation of charges. The right to counsel, bail, preliminary hearing, grand jury indictment, discovery, and speedy trial are included among these rights. Part III discusses procedural rights during trial, including the right to a jury trial, procedure on entry of guilty and nolo contendere pleas, severance, presence of the defendant, and sentencing. Part IV completes the discussion with a review of post-trial issues raised by the sentence modification petitions and double jeopardy problems.

I. RIGHTS DURING THE INVESTIGATIVE STAGE

A. Arrests

Authorization for making arrest is set forth in Chapter 25 of

21. *Stevens v. State*, 582 P.2d 1 (Alaska 1978).

22. ALASKA R. CRIM. P. 6, 7.

23. *Adams v. State*, 598 P.2d 503 (Alaska 1979); *Coleman v. State*, 553 P.2d 40 (Alaska 1976).

24. *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Anderson v. State*, 555 P.2d 251 (Alaska 1977).

25. ALASKA R. CRIM. P. 47(a) provides: "Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

26. ALASKA R. CRIM. P. 47(b) provides: "Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." See also *Stork v. State*, 559 P.2d 99 (Alaska 1977).

27. *State v. Hannagan*, 559 P.2d 1059 (Alaska 1977).

Title 12 of the Alaska Statutes.²⁸ Both private persons and peace officers are authorized to make arrests in Alaska. The procedure for arrests without a warrant is different, however, for felonies and misdemeanors. A warrantless arrest for a misdemeanor offense in Alaska may be made only when the crime is committed or attempted in the presence of the person making the arrest.²⁹ Thus, arrests for misdemeanors based upon statements obtained from third parties or other circumstantial evidence may be made only with a properly issued and executed arrest warrant.

With respect to arrests for felonies, Alaska follows federal procedure. A warrantless arrest for a felony offense may be made when a felony has in fact been committed and the person making the arrest has probable cause for believing that the arrestee committed it.³⁰ The probable cause requirement is satisfied where the facts and circumstances within the knowledge of the person making the arrest, which he has reason to believe are trustworthy, are sufficient to warrant a person of prudence and caution to believe that an offense has been or is being committed and that the arrestee committed it.³¹ In *City of Nome v. Ailak*,³² the Alaska Supreme Court held that probable cause cannot be established solely on the basis of a good faith belief on the part of the officer that probable cause to arrest exists. The details of any information obtained from informants and cooperative citizens must be verified before a valid arrest may be made.³³

As will be observed in several instances throughout this article, the Alaska Supreme Court and the Alaska Legislature have carved out exceptions to certain procedural rights where the accused is charged with the offense of operating a motor vehicle while under the influence of intoxicating liquor (OMVI). OMVI is the only misdemeanor offense for which a valid warrantless arrest can be made merely on probable cause, even if not committed in the presence of the arresting officer.³⁴ Thus, if the officer arrives on the scene of a traffic accident and the driver is out of his vehicle, a valid arrest for OMVI may still be made if the officer can establish probable cause from witness statements or other cir-

28. See *Jacobson v. State*, 551 P.2d 935 (Alaska 1976); *Howes v. State*, 503 P.2d 1055 (Alaska 1972).

29. AS § 12.25.030; *Miller v. State*, 462 P.2d 421 (Alaska 1969).

30. Compare *City of Nome v. Ailak*, 570 P.2d 162 (Alaska 1977) with *United States v. Santana*, 427 U.S. 38 (1976) and *United States v. Watson*, 423 U.S. 411 (1976).

31. *Pistro v. State*, 590 P.2d 884 (Alaska 1979); *Richardson v. State*, 563 P.2d 266 (Alaska 1977).

32. 570 P.2d 162 (Alaska 1977).

33. *Id.*

34. See AS § 12.25.033 which authorizes a warrantless arrest for OMVI offenses, even if not committed in the presence of the officer, when the officer has probable cause to believe the offense has been committed less than eight hours prior to the arrest.

cumstant
the office

As c
validity c
mits sear
officer. a
Similarly
any evid
rest.³⁷

B. *Other*

Alas
entions i
States S
State,³⁵ t
than prob
has a rea
recent hai
gatory st
less than
court bec
very close
commissi

Follo
Alaska's t
seriousnes
an investig
sequent d
confirmed
than the r
Terry v. C
vehicle by
driving. I

35. *Feldm*

36. *See, e*
(Alaska 1975).

37. *Zehru*
(Alaska 1971).

38. 553 P

39. The p
should not be
the public in s
barin has rece

40. 577 P

41. 392 U
Street Encum

39 (1979).

cumstantial evidence, even though the vehicle is not operated in the officer's presence.

As discussed in the prior article on search and seizure, the validity of an arrest is of critical importance.³⁵ A valid arrest permits searches, seizures, and other intrusions by law enforcement officers as lawfully incident to the arrest without a warrant.³⁶ Similarly, an unlawful arrest triggers suppression by the court of any evidence seized or statements obtained as a result of the arrest.³⁷

B. Other Detentions

Alaska has adopted a more restrictive view of permissible detentions involving less than probable cause than have the United States Supreme Court and most state courts. In *Coleman v. State*,³⁸ the Alaska court held that a stop and frisk search on less than probable cause can be made in instances where the officer has a reasonable suspicion of imminent public danger or serious recent harm to persons or property. *Coleman* involved an investigatory stop for a recently committed rape-robbery. The stop on less than probable cause in that case was sustained by the Alaska court because of the seriousness of the offense committed and the very close geographical and temporal proximity of the stop to the commission of the offense.³⁹

Following the *Coleman* decision, some confusion existed in Alaska's trial courts concerning the type of public danger or the seriousness of the harm to persons or property which would justify an investigatory stop or frisk. The matter was clarified by the subsequent decision in *Ebona v. State*.⁴⁰ In *Ebona*, the Alaska court confirmed that Alaska's temporary stop rule is more restrictive than the rule articulated by the United States Supreme Court in *Terry v. Ohio*.⁴¹ *Ebona* involved an investigatory stop of a motor vehicle by a police officer who observed erratic and dangerous driving. The court sustained the stop, stating:

35. Feldman, *supra* note 1, at 105.

36. See, e.g., *Chimel v. California*, 395 U.S. 752 (1969); *Schraff v. State*, 544 P.2d 834 (Alaska 1975).

37. *Zehring v. State*, 569 P.2d 189 (Alaska 1977); *McCoy v. State*, 491 P.2d 127 (Alaska 1971).

38. 553 P.2d 40 (Alaska 1976).

39. The majority noted its concern that stops and frisks on less than probable cause should not be extended beyond situations requiring immediate police response to protect the public in serious cases where there is a likelihood of imminent danger or where serious harm has recently been perpetrated to persons or property. 552 P.2d at 45-46 n.17.

40. 577 P.2d 698 (Alaska 1978).

41. 392 U.S. 1 (1968). See also *Sibron v. New York*, 392 U.S. 40 (1968); Lu Fave, *Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39 (1969).

The significant dangers to persons or property that can possibly result when the operator's capacity to control a motor vehicle is impaired are apparent. A vehicle out of control, . . . poses a significant threat to the property or individuals in proximity to the vehicle.⁴²

C. Search and Seizure

Both federal and Alaska decisions have held that the protection against unreasonable searches and seizures applies only to those areas in which a person has a reasonable expectation of privacy.⁴³ In *Smith v. State*,⁴⁴ Alaska adopted a two-pronged test for determining the reasonableness of a person's expectation of privacy. That test requires, first, that the person exhibit an actual, subjective expectation of privacy in the area and, second, that the expectation be one which is recognized as "reasonable" by society.⁴⁵ The expectations of privacy held by parolees and probationers were severely limited in *Roman v. State*⁴⁶ and *Gonzales v. State*.⁴⁷ In those cases, the Alaska Supreme Court held that parolees and probationers have diminished expectations of privacy and are subject to warrantless searches so long as there is a direct relationship between the purpose of the search and the underlying offense.⁴⁸ The court held that conditioning probation or parole upon consent by the probationer or parolee to periodic searches might be permissible in cases involving convictions for sale of narcotic drugs or concealing stolen property. The intrusions were justified by the need to ensure that the prohibited activities did not continue. On the other hand, a person who has been convicted of a felony such as reckless driving or manslaughter should not be subjected to searches and seizures just because he is a parolee. The goals of rehabilitation of the individual and protection of the public do not require that such a parolee be subject to searches in a manner different from any other member of the public.

In justifying the warrantless search in *Roman*, the court stated:

[W]e . . . recognize that conditioning release on some forms of search by correctional authority is both consistent with the goal

42. 577 P.2d at 701.

43. *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Woods and Rhode, Inc. v. State*, 565 P.2d 138 (Alaska 1977); *Smith v. State*, 510 P.2d 793 (Alaska 1973).

44. 510 P.2d 793 (Alaska 1973).

45. For further discussion see Feldman, *supra* note 1, at 86.

46. 510 P.2d 1235 (Alaska 1977).

47. 535 P.2d 178 (Alaska 1978).

48. *But see* *Schneckoich v. Bustamonte*, 412 U.S. 218 (1972); *Bumper v. North Carolina*, 391 U.S. 543 (1968); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975).

of rehabil
parole sy
pectation
volved, a
search pr
muster or
leased off
suant to
harassme

Diminish
tioners exten
Soroka v. St
less entry by
"justifiable v

Inventor
personal effe
vided broad
Zwirang v. S
be made of
rested for a
period of tim
to be followe
clear when th
Reeves v. St
search of the
may not be n
any intrusion
preclude the
prison comm
placed in cust
tec's wallet re
fendant to a r
the arrestee's
which, when
cause the per
be inventoried
both searches
prison.

Two rece
search' excep
cases. In *Am*

49. 570 P.2d

50. 598 P.2d

51. 569 P.2d

52. 599 P.2d

53. 592 P.2d

of rehabilitation and necessary for the proper functioning of the parole system. To this extent, parolees have a diminished expectation of privacy. Depending on the nature of the crime involved, a condition of release granting authorities the right to search premises and persons at reasonable times could stand muster under both the Alaska and federal Constitutions. Released offenders subject to searches and seizures conducted pursuant to such conditions would be protected from undue harassment by the limitations of due process.⁴⁹

Diminished expectations of privacy of parolees and probationers extends to entries into dwellings as well as searches. In *Soroka v. State*,⁵⁰ the Alaska Supreme Court upheld the warrantless entry by a probation officer into a probationer's trailer as a "justifiable visit."

Inventory searches made by prison guards of an arrestee's personal effects is another area where the Alaska court has provided broader privacy protection than have the federal courts. In *Zehring v. State*,⁵¹ the court held that an inventory search cannot be made of an arrestee's personal effects where he has been arrested for a petty offense and may post bail within a reasonable period of time. The *Zehring* court did not define the procedures to be followed where the offense is not "petty" or where it is unclear when the arrestee might post bail. The issue was resolved in *Reeves v. State*.⁵² That court stated that a general, unrestricted search of the personal effects of a person who is to be incarcerated may not be made by law enforcement or prison officials. Rather, any intrusion or search must be limited to the extent necessary to preclude the introduction of weapons and contraband into the prison community. In *Zehring*, where the arrestee had been placed in custody for a minor traffic offense, a search of the arrestee's wallet revealed a stolen credit card ultimately linking the defendant to a rape charge. In *Reeves*, a search by prison officials of the arrestee's personal effects revealed a balloon in a shirt pocket which, when further examined, was found to contain heroin. Because the personal effects of the defendants in both cases were to be inventoried and held by prison officials, the court condemned both searches as unrelated to any reasonable security need of the prison.

Two recent cases have involved application of the "consent search" exception to the warrant requirement in drunk driving cases. In *Anchorage v. Geber*,⁵³ the Alaska Supreme Court held

49. 570 P.2d at 1212 (footnotes omitted).

50. 598 P.2d 69 (Alaska 1979).

51. 569 P.2d 189 (Alaska 1977).

52. 599 P.2d 727 (Alaska 1979).

53. 592 P.2d 1187 (Alaska 1979).

that the State's implied consent statute,⁵⁴ which imposes a ninety-day administrative suspension of a driver's license upon the operator's refusal to submit to a breathalyzer examination, does not permit the forcible extraction of blood samples from a drunk driving suspect. On the other hand, the court in *Wirz v. State*⁵⁵ held that a drunk driving suspect is not entitled to an affirmative warning by police officers of his right to withhold his consent and refuse to submit to a blood or breathalyzer examination. Because of the absence of a specific requirement to advise arrestees of their right to refuse the breathalyzer test, the court concluded that it would be inappropriate for it to engraft such a requirement in the implied consent statute.⁵⁶

The emergency exception to the warrant requirement was the subject of concurrences in *State v. Myers*.⁵⁷ In *Myers*, police officers encountered an unlocked doorway of a Juneau movie theater. Suspecting criminal activity, the police officers entered the theater and arrested the defendant. On appeal, the majority of the Alaska Supreme Court found that as a search, the entrance to the theatre was "reasonable" under the circumstances.⁵⁸ The majority did not attempt to analyze the search in terms of any previously existing exceptions to the warrant requirement or to articulate any specific standards or guidelines limiting future intrusions of similar nature. Rather, the "wild card of general reasonableness"⁵⁹ was used to justify the search. The concurring opinion by Justice Rabinowitz and the dissenting opinion by Justice Boochever sustained the search as within the emergency exception to the warrant requirement.⁶⁰

The decision in *State v. Glass*⁶¹ is the most important addition to Alaska's tapestry of search and seizure cases. In that case, the Alaska Supreme Court held that law enforcement officers could no longer electronically eavesdrop on suspects through a "false friend" without a search warrant or application of one of

54. AS § 28.35.031. See also *Layland v. State*, 535 P.2d 1043 (Alaska 1975).

55. 577 P.2d 227 (Alaska 1978).

56. AS § 28.35.031. Contrast with *State v. Freymuller*, 552 P.2d 867, 868 (Or. App. 1976) and *State v. Annen*, 504 P.2d 140 (Or. App. 1973) (Or. REV. STAT. § 487.505 was construed as granting a right to refuse the breathalyzer test).

57. 601 P.2d 239 (Alaska 1979).

58. The majority opinion seems to suggest reasonableness based on implied consent or, at least, the implied absence of objection on the part of the owner of the theater to entry by law enforcement officers.

59. *Id.* at 245 (Boochever, J., dissenting).

60. Justice Boochever previously considered the emergency exception in his concurring opinion in *Schraff v. State*, 543 P.2d 834, 838 (Alaska 1975).

61. 583 P.2d 872 (Alaska 1978).

the exceptions *Glass* was based on Section 22⁶³ of the Alaska Constitution. Then Chief Justice

[W]e believe that the present use of a paracriminal electronic eavesdropping device has been defined as a violation of the right of personal privacy to what extent it affects others," and the court's interest in preserving

Thus, *Glass* is a departure from the expectation of privacy. The court directed that the search must be obtained by a warrant proper. The court's comment of a warra

D. Identification

Due process in Alaska cases dealing with identifications. The court held that an accusatory pre-arrest identification procedure must follow the federal standards. The court in *Blum* held that a pre-indic

62. The supreme court in *Blum* (1979), that the opinion

63. ALASKA CONSTITUTION, art. II, § 10, which provides that the right of privacy shall not be

See also *State v. Glass*, 583 P.2d 872 (Alaska 1978).

64. *Id.* at 872 (Boochever, J., dissenting); *Woods and Rabinowitz v. State*, 552 P.2d 867, 868 (Or. App. 1976) (Or. REV. STAT. § 487.505 was construed as granting a right to refuse the breathalyzer test).

65. *Id.* at 872 (Boochever, J., dissenting); *Woods and Rabinowitz v. State*, 552 P.2d 867, 868 (Or. App. 1976) (Or. REV. STAT. § 487.505 was construed as granting a right to refuse the breathalyzer test).

66. *Id.* at 872 (Boochever, J., dissenting); *Woods and Rabinowitz v. State*, 552 P.2d 867, 868 (Or. App. 1976) (Or. REV. STAT. § 487.505 was construed as granting a right to refuse the breathalyzer test).

67. *Id.* at 872 (Boochever, J., dissenting); *Woods and Rabinowitz v. State*, 552 P.2d 867, 868 (Or. App. 1976) (Or. REV. STAT. § 487.505 was construed as granting a right to refuse the breathalyzer test).

68. *Id.* at 872 (Boochever, J., dissenting); *Woods and Rabinowitz v. State*, 552 P.2d 867, 868 (Or. App. 1976) (Or. REV. STAT. § 487.505 was construed as granting a right to refuse the breathalyzer test).

69. *Id.* at 872 (Boochever, J., dissenting); *Woods and Rabinowitz v. State*, 552 P.2d 867, 868 (Or. App. 1976) (Or. REV. STAT. § 487.505 was construed as granting a right to refuse the breathalyzer test).

70. *Id.* at 872 (Boochever, J., dissenting); *Woods and Rabinowitz v. State*, 552 P.2d 867, 868 (Or. App. 1976) (Or. REV. STAT. § 487.505 was construed as granting a right to refuse the breathalyzer test).

the exceptions to the warrant requirement.⁶² The decision in *Glass* was based on the right to privacy embodied in Article I, Section 22⁶³ of the State Constitution. In a majority opinion by then Chief Justice Boochever, the court stated:

[W]e believe that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant. . . . The meaning of privacy of necessity must vary depending on the factual context and the often competing interests of society and the individual. The protection has been defined, for example, as the right "to be let alone," the right of persons "to determine for themselves when, how, and to what extent information about them is communicated to others," and the right which protects "the individual's interest in preserving his essential dignity as a human being."⁶⁴

Thus, *Glass* recognized that individuals have a reasonable expectation of privacy in their conversations and personal affairs. The court directed that, with limited exceptions, a search warrant must be obtained before electronic monitoring of conversations is proper. The court declined to comment on whether the requirement of a warrant may be obviated by exigent circumstances.⁶⁵

D. *Identifications*

Due process and right to counsel issues have been raised by Alaska cases discussing the appropriate procedures for suspect identifications. In *Kimble v. State*,⁶⁶ the Alaska Supreme Court held that an accused has no constitutional right to counsel at a pre-accusation photo identification by witnesses, but declined to follow the federal approach on the right to counsel at lineups. The court in *Blue v. State*⁶⁷ recognized an accused's right to counsel at a pre-indictment lineup absent exigent circumstances which

62. The supreme court subsequently decided in *State v. Glass*, 596 P.2d 10 (Alaska 1979), that the opinion in the first *Glass* case would not be applied retroactively.

63. ALASKA CONST. art. I, § 22 provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

See also *State v. Erickson*, 574 P.2d 1 (Alaska 1978) (possession of cocaine for personal use in the home not protected); *Falcon v. Alaska Public Offices Comm'n*, 570 P.2d 469 (Alaska 1977) (certain information communicated to physicians is within zone of privacy); *Woods and Rohde, Inc. v. State*, 565 P.2d 138 (Alaska 1977) (warrantless administrative inspections of private business premises prohibited); *Anderson v. State*, 562 P.2d 351 (Alaska 1977) (state may control sexual conduct of juveniles); *Ravin v. State*, 537 P.2d 424 (Alaska 1975) (possession of marijuana by adults for personal use in the home protected). See also, Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 928-37 (1976).

64. 583 P.2d at 879-80 (citation omitted).

65. *Id.* at 881. Compare Alaska's treatment of electronic eavesdropping with the United States Supreme Court opinion in *On Lee v. United States*, 343 U.S. 747 (1952).

66. 539 P.2d 73 (Alaska 1975).

67. 558 P.2d 626 (Alaska 1977).

precluded the presence of counsel.⁶⁸ The court held that where adequate time and opportunity exists and where there is no compelling immediacy, the right to counsel must be afforded at such lineups.

Both photo and lineup identifications must be fair and not unduly suggestive. Police conduct which tends to isolate or single out the defendant, such as the failure to provide a sufficient number of photographs or persons at a lineup, or the failure to achieve reasonable similarity among the photographs or persons in the array, constitutes a serious due process violation remediable by suppression of any identification made by the witness.⁶⁹ A subsequent in-court identification by the same witness at trial would similarly be suppressed unless the prosecution could establish an independent basis for the identification not tainted by the prior suggestive photo array or lineup.⁷⁰

Although Rule 16 of the Alaska Rules of Criminal Procedure⁷¹ obliges an accused to provide handwriting exemplars or other physical evidence which might be used for identification, the taking of such evidence after an indictment has been returned constitutes a critical stage of the criminal proceedings at which the accused has a right to counsel.⁷²

E. Statements and Confessions

1. *General limitations.* With respect to statements and confessions, Alaska has followed *Miranda*⁷³ principles and federal applications of the fifth amendment,⁷⁴ with certain exceptions. The Alaska Supreme Court severely limited the fifth amendment pro-

tection available at court required an indictment. This holding was based on the fact that the defendant was not subject to perjury and the right to counsel was not subject to the same legal protection.⁷⁶

The question of whether the defendant had been working for the police, the accuracy of the information perceived by the police, and the accuracy of the information perceived by the police.

A suspect is entitled to the same rights as soon as an indictment is returned and *Hunter v. State*.⁷⁷ A reasonable person would be deemed to be in custody if a "reasonable person" in the same situation would have been deprived of his freedom. This determination is based on the actual interrogation (including the actual interrogation) and the circumstances attendant to the arrest. The actual interrogation (including the actual interrogation) attendant to the arrest came to the attention of the court. The actual interrogation (including the actual interrogation) attendant to the arrest came to the attention of the court.

2. Waiver of the assistance of

an indictment. The Alaska Supreme Court has held that the defendant's waiver of the assistance of an indictment is valid if it is made voluntarily, knowingly, and intelligently. See *People v. Polk*, 63 Cal. 2d 570, 406 P.2d 55 (1967). Contrast with *People v. Polk*, 63 Cal. 2d 570, 406 P.2d 55 (1967).

77. 512 P.2d 923 (Alaska 1974).
78. Whether or not detectives are within the scope of the fifth amendment. See *People v. Polk*, 63 Cal. 2d 570, 406 P.2d 55 (1967).
79. *Tarney v. State*, 599 P.2d 712 (Alaska 1979).
80. 599 P.2d 712 (Alaska 1979).
81. 590 P.2d 888 (Alaska 1979).
82. *Id.* at 895.
83. *Id.* at 895. *But*

68. *Id.* Compare *Blue with Gilbert v. California*, 388 U.S. 263 (1967).

69. *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); Note, *Due Process Consideration in Police Show-up Practices*, 44 N.Y.U. L. Rev. 377 (April 1969).

70. See cases collected in Annot., *Admissibility of Evidence of Photographic Identification as Affected by Allegedly Suggestive Identification Procedures*, 39 A.L.R. 3d 1900 (1971).

71. In accordance with the constitutional guidelines, ALASKA R. CRIM. P. 16(c) requires a defendant to disclose certain non-testimonial identification information, including participation in a lineup, providing voice samples, fingerprints, posing for photographs, trying on articles of clothing, permitting the taking of physical specimens of blood, hair, and other materials of his body, and submission to a reasonable physical or medical inspection of his body.

72. *Roberts v. State*, 458 P.2d 340 (Alaska 1969).

73. *Miranda v. Arizona*, 384 U.S. 436 (1966). See also *Escobedo v. Illinois*, 378 U.S. 478 (1964).

74. The fifth amendment to the United States Constitution is paralleled by ALASKA CONST. art. I, § 8 which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return

tection available to juveniles in *E.L.L. v. State*.⁷⁵ In that case, the court required a juvenile to testify before a grand jury considering an indictment for statutory rape or face a contempt citation. The holding was based on the rationale that, as a juvenile, the witness was not subject to incarceration or criminal penalties for such testimony and therefore could not raise a fifth amendment privilege.⁷⁶

The question of whether or not private persons are required to provide *Miranda* warnings to suspects was considered in *Turnef v. State*.⁷⁷ In *Turnef*, the court found that a private investigator had been working so closely with the police that he was required to provide *Miranda* warnings prior to questioning a suspect. The investigator had promised to turn over any statement he obtained to the police, the police consulted with the investigator to confirm the accuracy of the statement, and the investigator subjectively perceived his position to be part of the official team.⁷⁸

A suspect is entitled to an admonition of his fifth amendment rights as soon as he is placed "in custody."⁷⁹ In *Quick v. State*⁸⁰ and *Hunter v. State*,⁸¹ the Alaska Supreme Court adopted a reasonable person test for determining whether or not a suspect is deemed to be in custody.⁸² The test focuses on whether a "reasonable person" in defendant's position would believe that he had been deprived of his freedom in any significant way. In making this determination, the court examines the manner and scope of the actual interrogation, events which took place before the interrogation (including those which explain how and why the defendant came to the place of questioning), and, where relevant, what happened at the interrogation.⁸³

2. *Waiver*. While the right to remain silent and the right to the assistance of counsel may be waived by a suspect, any such

an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.

75. 572 P.2d 786 (Alaska 1977).

76. Contrast with discussion of right to counsel in juvenile proceedings in Part II (A) *infra*.

77. 312 P.2d 923 (Alaska 1973).

78. Whether or not private persons, private security officers, private police or private detectives are within the prohibitions of *Miranda* depends upon the facts of the given case. See *People v. Polk*, 63 Cal. 2d 443, 406 P.2d 641, 47 Cal. Rptr. 1 (1965); *People v. Price*, 63 Cal. 2d 370, 406 P.2d 55, 45 Cal. Rptr. 775 (1965); *People v. Wright*, 249 Cal. App. 2d 692, 57 Cal. Rptr. 781 (1967); 31 A.L.R. 3d 565, 647-74 (1970); Comment, *Seizure by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967).

79. *Turnef v. State*, 512 P.2d 923 (Alaska 1973).

80. 599 P.2d 712 (Alaska 1979).

81. 599 P.2d 888 (Alaska 1979).

82. *Id.* at 895.

83. *Id.* at 895. But see *Oregon v. Mathiason*, 429 U.S. 492 (1977).

waiver must be made knowingly and intelligently.⁸⁴ In *Ladd v. State*,⁸⁵ the Alaska Supreme Court held that retention of an attorney by an accused does not *per se* invalidate a waiver of *Miranda* rights.⁸⁶ In *R.L.R. v. State*,⁸⁷ the Alaska court declined to adopt a rule that juveniles are inherently incapable of knowingly and intelligently waiving their fifth amendment rights. Instead, the court held that such rights could be waived by the juvenile.⁸⁸ In *Quick v. State*,⁸⁹ however, the court softened the impact of this ruling by holding the state has a heavier burden in proving an intelligent waiver by a juvenile than by an adult.⁹⁰ In fifth amendment waiver cases, whether the suspect be an adult or a juvenile, the Alaska court has adopted a case-by-case approach for testing the integrity of the waiver.

3. *Voluntariness*. Like the federal courts, Alaska looks to the "totality of the circumstances" when deciding whether a confession or statement has been made voluntarily.⁹¹ Voluntariness must be proved by a preponderance of the evidence⁹² and may be negated by evidence of such factors which might have affected the judgment of the suspect as mental condition, age, education, and experience.⁹³

4. *Additional requirements*. *Miranda* warnings must be made with clarity and precision. In *State v. Cassell*,⁹⁴ the Alaska Supreme Court affirmed the suppression of a defendant's statement where the officer had advised the defendant that he "could" have a lawyer. The court found the officer's admonition vague and imprecise and, under the circumstances, insufficient.⁹⁵

Statements made by an accused which are not prompted by interrogation or questioning by law enforcement officers are not suppressed, even in the absence of a *Miranda* warning. In *Esen v. State*,⁹⁶ the court sustained the admission of statements made by the accused during the course of a telephone call to his girlfriend

84. *Peterson v. State*, 562 P.2d 1350 (Alaska 1977); *Tarney v. State*, 512 P.2d 921 (Alaska 1973).

85. 568 P.2d 960 (Alaska 1977).

86. *Id.* at 966-67.

87. 437 P.2d 27 (Alaska 1971).

88. *Id.* at 33.

89. 599 P.2d 712 (Alaska 1979).

90. *Id.* at 720.

91. *Peterson v. State*, 562 P.2d 1350 (Alaska 1977); *Schade v. State*, 512 P.2d 907 (Alaska 1973).

92. *Schade v. State*, 512 P.2d 907, 917 (Alaska 1973).

93. *Peterson v. State*, 562 P.2d 1350, 1363 (Alaska 1977).

94. 602 P.2d 410 (Alaska 1979).

95. *Id.* at 418.

96. 599 P.2d 760 (Alaska 1979).

from the p
which wer

F. Entrapment

Tradit
entrapmen
held that
would hav
the act.⁹⁷
that suffici
fense of en
cials cann
disposition
that offens
the court
must be so
pertained i
articulation
by Justice

I believ
law, be
majorit
concept
that the
the tool

The p
ment doctr
Pascu. Pa.
predisposit

Between
variety of
procedural
Alaska has
procedural

97. 457 P.

98. Under
entrapment by
978 (Alaska 19

99. 577 P.

100. *Id.* at 1
423 (1973)

101. 577 P.

102. AS § 1
with *Martinez v*

from the police station and made to his brother while at the jail which were overheard by police officers.

F. Entrapment

Traditionally, Alaska courts have applied an objective test for entrapment by police officers. In *Grossman v. State*,⁹⁷ the court held that it would examine whether the conduct by the officers would have induced an "average" person into the commission of the act.⁹⁸ This standard was relaxed in *Pascu v. State*.⁹⁹ Finding that sufficient evidence had been presented to establish the defense of entrapment, the majority held that law enforcement officials cannot implant in the mind of an innocent person the disposition to commit an offense and then induce commission of that offense in order to prosecute. Quoting language in *Grossman*, the court stated: "[U]nder standards of civilized justice, there must be some control on the kind of police conduct which can be permitted in the manufacture of crime."¹⁰⁰ An even more forceful articulation of this view was contained in the concurring opinion by Justice Pro Tem Dimond. Justice Dimond wrote:

I believe it is essential to have objective morality and ethics in law, because this is essential to the "civilized justice" that the majority refers to. If I am correct, then it is repugnant to that concept to justify the apprehension of criminals on the basis that the end justifies the means—i.e., that it is proper to utilize the tools of lies and deceit to effect criminal justice.¹⁰¹

The precise limits of police conduct created by the entrapment doctrine are not clearly discernible from either *Grossman* or *Pascu*. *Pascu* does, however, suggest a shift from emphasis on the predisposition of the defendant to the conduct of the officers.

II. PRE-TRIAL RIGHTS

Between the formal initiation of criminal charges and trial, a variety of constitutional, statutory, and rule provisions furnish procedural rights for the accused. As will be discussed below, Alaska has adopted a particularly liberal view regarding pre-trial procedural rights. In defining a defendant's rights to counsel,¹⁰²

97. 457 P.2d 226 (Alaska 1969).

98. Under *Grossman*, the accused must carry the burden of establishing a defense of entrapment by a preponderance of the evidence. See also *Batson v. State*, 568 P.2d 973, 978 (Alaska 1977).

99. 577 P.2d 1064 (Alaska 1978).

100. *Id.* at 1068. Compare with stricter standard in *United States v. Russell*, 411 U.S. 423 (1973).

101. 577 P.2d at 1069.

102. AS § 12.25.150; *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970). Compare with *Martinez v. State*, 423 P.2d 700 (Alaska 1967).

release on bail,¹⁰³ rapid arraignment,¹⁰⁴ fair grand jury proceedings,¹⁰⁵ discovery of the prosecution's case,¹⁰⁶ and a speedy trial,¹⁰⁷ the Alaska Legislature and Supreme Court have broadened the federal rules and protections afforded a criminal defendant. The expansion of pre-trial procedural rights is consistent with the policy articulated by the Alaska courts favoring full and fair disclosure by the prosecution and prompt adjudication as means of removing the prosecution's tactical advantage in criminal proceedings.¹⁰⁸

A. Right to Counsel

The court has broadened the right to counsel during the pre-trial stage following the initiation of criminal charges.

Article I, Section 11¹⁰⁹ of the Alaska Constitution parallels the right to counsel provision contained in the federal constitution.¹¹⁰ Interpreting that state provision, the Alaska Supreme Court has held that an accused has a right to counsel at adversarial proceedings where formal charges are initiated.¹¹¹ It is important to segregate fifth amendment self-incrimination problems from sixth amendment right to counsel issues. An accused may have a right to counsel during interrogations and other evidence-gathering activities, even in the absence of formal charges or an adversarial proceeding, if fifth amendment (self-incrimination) problems are presented.¹¹²

In *Alexander v. City of Anchorage*,¹¹³ the Alaska Supreme Court held that the right to counsel exists in any case where a defendant may lose a valuable license, be incarcerated, or be fined in an amount reflecting criminality.¹¹⁴ Thereafter, the court in

103. AS § 12.30.010-080; *Carman v. State*, 564 P.2d 361 (Alaska 1977); *Gilbert v. State*, 540 P.2d 485 (Alaska 1975); *Martin v. State*, 517 P.2d 1389 (Alaska 1974).

104. AS § 12.25.150; ALASKA R. CRIM. P. 5.

105. *State v. Giffels*, 554 P.2d 460 (Alaska 1976); *Coleman v. State*, 553 P.2d 40 (Alaska 1976).

106. ALASKA R. CRIM. P. 16; *Howe v. State*, 589 P.2d 421 (Alaska 1979); *Stevens v. State*, 582 P.2d 621 (Alaska 1978); *Des Jardins v. State*, 551 P.2d 181 (Alaska 1976).

107. ALASKA R. CRIM. P. 45; *DeMille v. State*, 551 P.2d 675 (Alaska 1978); *Nickels v. State*, 545 P.2d 163 (Alaska 1976).

108. *Peterkin v. State*, 543 P.2d 418 (Alaska 1975).

109. See note 3 *supra*.

110. U.S. CONST., amend. VI.

111. *Eben v. State*, 599 P.2d 700 (Alaska 1979). Compare with *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Beckwith v. United States*, 425 U.S. 361 (1976); and *Orozco v. Texas*, 394 U.S. 324 (1969).

112. *Quick v. State*, 599 P.2d 712 (Alaska 1979); *Tarnel v. State*, 512 P.2d 923, (Alaska 1974).

113. 490 P.2d 910 (Alaska 1971).

114. The extension of the right to counsel in Alaska closely parallels the limit set on the right to a jury trial in *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970).

Alaska Public
right to coun-
fine of \$100.0
trial for any
areas in whi
clude proceed
port,¹¹⁶ prob
hearings.¹¹⁸

In additi
to counsel at
A.A., while r
rule proceedi
E.L.L. v. Stat
tify or face a
mony might
that the juven
cause she wa
criminal pros
criminal natu
extension of t
ble under clo
from formal c
juvenile of a c
nitive nature c
(particularly i
gests in *E.L.L.*

On appea
reversible erre
error" test th
tions.¹²¹ In *G*
counsel even a
hearing) may l
reasonable dou

B. Bail

Alaska's c

115. 584 P.2d 11

116. *Ottom v. Za*

117. *Hoffman v.*

411 U.S. 778 (1973)

118. *McGinnis v*

Donnell, 418 U.S. 5

119. 538 P.2d 108

120. 572 P.2d 78

121. *Merrill v. S*

122. 575 P.2d 78

*Alaska Public Defender Agency v. Superior Court*¹¹⁵ held that the right to counsel does not exist for an offense carrying a maximum fine of \$100.00. Current practice in district court precludes a jury trial for any offense carrying a maximum fine of \$300.00. Other areas in which the court has broadened the right to counsel include proceedings for civil contempt for failure to pay child support,¹¹⁶ probation revocation hearings,¹¹⁷ and prison disciplinary hearings.¹¹⁸

In addition, the court in *A.A. v. State*¹¹⁹ recognized the right to counsel at juvenile disposition proceedings. The holding in *A.A.*, while recognizing the importance of representation at juvenile proceedings, is analytically inconsistent with the reasoning in *E.L.L. v. State*.¹²⁰ In *E.L.L.*, the court required a juvenile to testify or face a contempt citation. Even though the juvenile's testimony might have implicated her in a criminal act, the court held that the juvenile could not raise the fifth amendment privilege because she was subject to delinquency proceedings rather than to criminal prosecution and punishment. The recognition of the criminal nature of delinquency proceedings which supported the extension of the right to counsel by the court in *A.A.* is more durable under close scrutiny. While delinquency proceedings differ from formal criminal prosecutions, the stigma and effect on the juvenile of a declaration of delinquency is considerable. The punitive nature of detention bears greater similarity to incarceration (particularly in instances of serious conduct) than the court suggests in *E.L.L.*

On appeal, right to counsel violations do not *per se* constitute reversible error; instead, they are reviewed under the "harmless error" test that is routinely applied to other procedural violations.¹²¹ In *Gipson v. State*,¹²² the court held that the absence of counsel even at a critical stage of the proceedings (a preliminary hearing) may be harmless if harmlessness is established beyond a reasonable doubt.

B. Bail

Alaska's constitutional right to release on bail is codified in

115. 584 P.2d 1106 (Alaska 1975).

116. *Ottom v. Zaborac*, 525 P.2d 537 (Alaska 1974).

117. *Hoffman v. State*, 404 P.2d 644 (Alaska 1965). Compare with *Cingun v. Scarpelli*, 411 U.S. 778 (1973) and *Merapi v. Ithay*, 389 U.S. 128 (1967).

118. *McGinnis v. Stevens*, 543 P.2d 1221 (Alaska 1975). Compare with *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Johnson v. Avery*, 393 U.S. 483 (1969).

119. 538 P.2d 1064 (Alaska 1975). See also *In re Gault*, 387 U.S. 1 (1967).

120. 572 P.2d 786 (Alaska 1977).

121. *Merrill v. State*, 423 P.2d 686 (Alaska 1967).

122. 575 P.2d 782 (Alaska 1978).

AS § 12.30.020 *et seq.* Bail is a matter of right prior to the trial. Under the statute, the primary factors to be considered by the court in establishing bail are danger to the community and likelihood of flight prior to trial.¹²³ Although bail must be set in a "reasonable sum," in practice it is frequently set so high that it is unattainable by the defendant. Bail, in some amount however, must be set for nearly all offenses.¹²⁴

Except for certain serious felonies,¹²⁵ the bail statute also allows for bail pending appeal or sentencing following conviction. As a matter of practice, local courts have required that a variety of conditions be satisfied prior to release of most defendants on serious offenses. Typically, the courts require that defendant be supervised by a third party, employed while released prior to trial, and regularly contacted by an attorney or other non-custodial person. Because there is not a competitive market for bail bonds in most parts of the state, the trial courts have been amenable to other means of satisfying monetary bail conditions, such as the posting of property bonds, unsecured personal surety bonds, and the deposit of ten percent of the established bail with the clerk of the court to be returned following completion of the case.

C. Arraignment

At arraignment, the accused is brought before the court for formal advisement of the charges which have been filed against him, advisement of his constitutional rights, and entry of a plea. Rule 5 of the Alaska Rules of Criminal Procedure¹²⁶ requires that a person be brought before a judge or magistrate for arraignment within twenty-four hours following his arrest. In *Padgett v. State*,¹²⁷ the Alaska Supreme Court ruled that a Rule 5 arraignment

123. AS § 12.30.020(c) permits the court to take the following factors into consideration: the nature and circumstances of the offense charged; the weight of the evidence against the person; the person's family ties; the person's employment; the person's financial resources; the person's character and mental condition; the length of the person's residence in the community; the person's record of appearance at court proceedings; and the flight of the accused to avoid prosecution or his failure to appear at court proceedings.

124. *Gilbert v. State*, 540 P.2d 485 (Alaska 1975); *Martin v. State*, 517 P.2d 1389 (Alaska 1974). The United States Supreme Court has declined vigorously to monitor bail provisions. See *Schli's v. Kuebel*, 404 U.S. 357 (1971).

125. AS § 12.30.040 permits release on bail following conviction except in instances of convictions for first-degree murder, armed robbery, kidnapping, or rape.

126. ALASKA R. CRIM. P. 5(a)(1) provides:

Except when the person arrested is issued a citation for a misdemeanor and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay. Unnecessary delay within the meaning of this section (a) is defined as a period not to exceed twenty-four hours after arrest, including Sundays and holidays.

127. 590 P.2d 432 (Alaska 1979). Compare with *Walton v. Arkansas*, 371 U.S. 26 (1962).

ment proceed-
the accused
arraignment
counsel at t
Rule 2
a defendant
his case. T
State,¹²⁹ he
does not ex
long as the
not interfer
discretionar

D. Prelim.

Because
jury indict
may be init
8¹³¹ of the
part,¹³² ma
grand jury

I. Pre
felony charg
which time
strict court j
ten days fo
twenty days
hearing is a
has a right

128. ALASKA
case in Superior
a matter of right

129. 552 P.2.

130. AS § 22
court action or a

131. See not

132. U.S. Co

No person s
on a present
or naval for
danger; nor
jeopardy of
ness against
process of l
compensatio

133. ALASKA

ment proceeding is not a critical stage of the proceedings at which the accused is entitled to counsel. While a request for counsel at arraignment must be recognized by the court, failure to provide counsel at the arraignment is not, *per se*, reversible error.

Rule 25 of the Alaska Rules of Criminal Procedure¹²⁸ allows a defendant a single peremptory challenge to the judge assigned to his case. The Alaska Supreme Court limited the rule in *Gieffels v. State*,¹²⁹ holding that the right to challenge a judge peremptorily does not exist at ministerial proceedings such as arraignments so long as the substantive rights conferred by AS § 22.20.022¹³⁰ are not interfered with and the judge is not called upon to exercise a discretionary function.

D. Preliminary Hearings and Grand Jury

Because there is no statutory or constitutional right to a grand jury indictment or a preliminary hearing, misdemeanor charges may be initiated by complaint or information. Article I, Section 8¹³¹ of the Alaska Constitution, however, like its federal counterpart,¹³² mandates that felony charges be initiated by way of a grand jury indictment.

1. *Preliminary hearing.* After arrest and arraignment on a felony charge, an accused has a right to a preliminary hearing, at which time the State must establish probable cause before a district court judge or magistrate. The hearing must be held within ten days following arrest if the accused is in custody or within twenty days if he is not in custody.¹³³ Although a preliminary hearing is a critical stage of the proceedings at which an accused has a right to counsel, the absence of counsel may be harmless

128. ALASKA R. CRIM. P. 25(d)(1) states, in pertinent part, as follows: "In any criminal case in Superior or District Court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge."

129. 552 P.2d 661 (Alaska 1976).

130. AS § 22.20.022 provides for peremptory disqualification of a judge in a district court action or a superior court action.

131. See note 74 *supra*.

132. U.S. CONST., amend. V, provides:

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

133. ALASKA R. CRIM. P. 5.

error if harmlessness is established beyond a reasonable doubt.¹³⁴

2. *Grand jury.* While establishment of probable cause at a preliminary hearing is sufficient to hold the defendant for trial, unless the constitutional and statutory right to indictment by a grand jury is waived by the accused, an indictment is still required for felony charges. Although the prosecution need only establish probable cause at a preliminary hearing,¹³⁵ the burden of proof before the grand jury is heavier. An indictment by the grand jury may be returned only if the evidence presented, if not contradicted or explained, would warrant a conviction at trial.¹³⁶

Rule 6 of the Alaska Rules of Criminal Procedure¹³⁷ sets out a variety of regulations concerning the presentation of evidence before the grand jury. Hearsay evidence, for example, may not be presented to the grand jury without a "compelling justification."¹³⁸ In *State v. Gieffels*,¹³⁹ the court held that the cost of transporting witnesses, even from out of state, does not constitute a compelling justification for the use of hearsay testimony. In *Metler v. State*,¹⁴⁰ the court similarly rejected a claim of inconvenience to justify hearsay testimony. The admission of hearsay evidence, however, does not automatically invalidate an indictment. The Alaska court has adopted a "subtraction test": the indictment will not be dismissed if there is sufficient evidence to support the return of the indictment.¹⁴¹

An accused has a right to a fair grand jury proceeding consistent with due process and without improper influence over the grand jury by the prosecutor. To prevent the grand jury from becoming a tool or rubber stamp of the prosecutor, the trial courts have been directed to monitor the prosecutor's instructions of law and arguments to the grand jury and to identify instances of undue influence or unfairness.¹⁴² Following the return of an indictment, the defendant is entitled to a transcript of the evidence presented to the grand jury.¹⁴³

134. *Martinez v. State*, 423 P.2d 700 (Alaska 1967); *Merrill v. State*, 423 P.2d 686 (Alaska 1967).

135. ALASKA R. CRIM. P. 5(e).

136. ALASKA R. CRIM. P. 6(q).

137. See, in particular, ALASKA R. CRIM. P. 6(j), (m), (q) and (r).

138. ALASKA R. CRIM. P. 6(r); *Webb v. State*, 589 P.2d 295 (Alaska 1978); *State v. Taylor*, 566 P.2d 1016 (Alaska 1977); *Galauska v. State*, 527 P.2d 459 (Alaska 1974).

139. 554 P.2d 460 (Alaska 1976).

140. 581 P.2d 669 (Alaska 1978).

141. *State v. Gieffels*, 554 P.2d 460 (Alaska 1976); *Coleman v. State*, 553 P.2d 40 (Alaska 1976).

142. *Coleman v. State*, 553 P.2d 40 (Alaska 1976).

143. *Burkholder v. State*, 491 P.2d 754 (Alaska 1971); ALASKA R. CRIM. P. 6(m).

E. *Discov.*

1. *Di.*
 fendants br
 of Criminal
 the rule ag
 nesses, poli
 must be dis
 Maryland,¹
 tory eviden
 Court held
 duces the tes
 nations in c
 testing and

As in i
 Alaska Sup
 and weighin
 tion.¹⁴⁷ In
 served that
 discovery vi
 future cases
 this area, an
 defendant b
 however, the
 failure to ma
 information
 Alaska Supr
 tion failed to
 to disclose a
 lations, how
 covery viola
 by granting

Althoug
 covery, the c

144. 373 U.S.
States v. Agurs.

145. ALASKA
 defense counsel a
 negate the guilt o
 therefore."

146. 548 P.2d

147. *Braham*
 (Alaska 1977).

148. 551 P.2d

149. *Id.* at 18

150. 561 P.2d

151. 582 P.2d

E. Discovery

1. *Discovery from the prosecution.* While Alaska affords defendants broad rights of discovery in Rule 16 of the Alaska Rules of Criminal Procedure, the supreme court has declined to enforce the rule aggressively. Pursuant to Rule 16, statements of witnesses, police reports, reports of convictions, and other materials must be disclosed to the accused. Like the federal rule in *Brady v. Maryland*,¹⁴⁴ a prosecutor must disclose all potentially exculpatory evidence.¹⁴⁵ In *Lauderdale v. State*,¹⁴⁶ the Alaska Supreme Court held that the prosecution is required to preserve and produce the test ampules used in connection with breathalyzer examinations in drunk driving cases because such evidence may, upon testing and examination, prove exculpatory.

As in instances of violations of other procedural rights, the Alaska Supreme Court applies the harmless error test in assessing and weighing the effect of discovery violations by the prosecution.¹⁴⁷ In *Des Jardins v. State*,¹⁴⁸ the Alaska Supreme Court observed that the lack of prejudice resulting from the prosecution's discovery violation was purely fortuitous. The court stated: "In future cases we will continue to scrutinize prosecutorial conduct in this area, and will not hesitate to reverse where it appears that the defendant has been prejudiced by such action."¹⁴⁹ Thereafter, however, the court in *Scharver v. State*¹⁵⁰ held that dismissals for failure to make discovery are frowned upon, especially where the information withheld is cumulative. In *Stevens v. State*,¹⁵¹ the Alaska Supreme Court reversed a conviction because the prosecution failed to permit discovery. In that case, the prosecution failed to disclose a critical police report. In most cases of discovery violations, however, the courts have declined to severely sanction discovery violations by granting dismissals or reversals on appeal or by granting lesser sanctions such as continuances or fines.

Although the defendant has been granted broad rights of discovery, the courts have deprived Rule 16 of any significant bite.

144. 373 U.S. 83 (1963); see also *Weatherford v. Bursey*, 429 U.S. 545 (1977); *United States v. Agurs*, 427 U.S. 97 (1976); and *Moore v. Illinois*, 408 U.S. 986 (1972).

145. ALASKA R. CRIM. P. 16(b)(3) provides: "The prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense or would tend to reduce his punishment therefore."

146. 548 P.2d 376 (Alaska 1976).

147. *Braham v. State*, 571 P.2d 631 (Alaska 1977); *Scharver v. State*, 561 P.2d 360 (Alaska 1977).

148. 551 P.2d 181 (Alaska 1976).

149. *Id.* at 186.

150. 561 P.2d 300 (Alaska 1977).

151. 582 P.2d 621 (Alaska 1978).

Curiously, violations of procedural rights by police officers sometimes result in more serious sanctions than violations by prosecutors. Applying the exclusionary rule, police violations frequently result in suppression of critical evidence which sometimes leads to acquittal. In contrast, violations of procedural rights by prosecutors (who presumably have better training and knowledge of their obligations) seem to be sanctioned, wherever possible, with trial continuances and monetary fines.

Frequently, however, discovery violations cannot be adequately remedied by the granting of a continuance or other intermediate sanctions. Like justice delayed, late discovery often denies a defendant an important opportunity to examine, analyze, and meet the prosecution's evidence. Disclosure of important information on the eve or in the middle of trial frequently has a devastating effect on the presentation and defense of a criminal case. In the final analysis, the existing approach to the application and enforcement of the discovery provisions does not adequately protect the rights of the defendant.

2. *Discovery from accused.* Rule 16 also grants the prosecution certain discovery rights, including the rights to have a defendant appear in a lineup, provide other physical, nontestimonial evidence (hair, fingernail clippings, etc.), and provide reports of experts who will testify at trial.¹⁵² Although notice of intent to rely upon a defense of alibi or insanity must be provided to the prosecution,¹⁵³ the Alaska Supreme Court in *Scott v. State*¹⁵⁴ held that an accused need not disclose a list of potential alibi witnesses.

F. *Speedy Trial*

Article I, Section 7¹⁵⁵ of the Alaska Constitution ensures the right to a speedy trial for persons charged with criminal offenses. The constitutional guarantee has been codified in Rule 45, Alaska Rules of Criminal Procedure.¹⁵⁶ That provision requires that an accused be brought to trial within 120 days of his arrest or the initiation of charges.

Referred to as the "four-month rule," Rule 45 requires that the prosecution bring an accused to trial within 120 days following

152. ALASKA R. CRIM. P. 16(c).

153. ALASKA R. CRIM. P. 16(c)(3).

154. 519 P.2d 774 (Alaska 1974). Compare with *Wardius v. Oregon*, 412 U.S. 470 (1973); *Williams v. Florida*, 399 U.S. 78 (1970); and *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

155. See note 2 *supra*.

156. ALASKA R. CRIM. P. 45(b) provides: "A defendant charged with either a felony or a misdemeanor shall be tried within 120 days from the time set forth in Section (c)."

his arrest c
held that a
Dismissal
court for
certain pe
caused by
calculating

While
mand a sp
may const
State,¹⁶⁰ th
by counsel
a trial settl
lier decisio
the purpos
isted it was
demand a

Until
mandatory
Rule 53 of
v. State,¹⁶⁴
cide charge
court held t
tain instanc
cause the c
short, the c
to the defen

When
pared to me
within the 1
it clear in *F*
als within th

157. 543 P.2

158. ALASKA

159. ALASKA

160. 581 P.2

161. 543 P.2

162. 562 P.2

163. ALASKA

and advance just
it shall be man

164. 562 P.2

165. *Id.* at 1

166. 543 P.2

similar to Rule 4
violations and 4
(1972).

rs some-
prosecu-
equently
lead to
prosecu-
of their
with trial

be ade-
inter-
ry often
analyze,
ortant in-
dy has a
riminal
plication
equately

prosecu-
a defend-
stimonial
eports of
intent to
ed to the
te¹⁵⁴ held
witnesses.

asures the
l offenses.
5, Alaska
es that an
est or the

quires that
following

412 U.S. 470
58 Cal. 2d 56.

er a felony or
tion (c)."

his arrest or initiation of charges. In *Peterkin v. State*,¹⁵⁷ the court held that a period of 140 days following arrest violated that rule. Dismissal of the charges is the only remedy recognized by the court for Rule 45 violations. In computing the 120-day period, certain periods of delay resulting from defense motions¹⁵⁸ or caused by the unavailability of the defendant¹⁵⁹ are excluded in calculating the time for trial.

While an accused is under no affirmative obligation to demand a speedy trial, the defendant's silence in setting a trial date may constitute an acquiescence to any delay. In *DeMille v. State*,¹⁶⁰ the court held that the defendant, who was represented by counsel at the time of the trial setting, impliedly acquiesced to a trial setting beyond the 120-day rule. *DeMille* tempered the earlier decision in *Peterkin v. State*¹⁶¹ where the court stated that for the purposes of determining whether a speedy trial violation existed it was not relevant that the defendant failed to affirmatively demand a trial.

Until *Peterson v. State*,¹⁶² it was unclear whether the mandatory requirements of Rule 45 could be relaxed pursuant to Rule 53 of the Alaska Rules of Criminal Procedure.¹⁶³ In *Peterson v. State*,¹⁶⁴ the defendant was brought to trial on a multiple homicide charge 136 days after initiation of the case. On appeal, the court held that the requirements of Rule 45 can be relaxed in certain instances and that the relaxation in *Peterson* was justified because the case was brought in the Alaska bush, the delay was short, the crime was serious, and there was no apparent prejudice to the defendant.¹⁶⁵

When Rule 45 was adopted, the trial courts were not prepared to monitor criminal cases and ensure that they come to trial within the 120-day period. After the Alaska Supreme Court made it clear in *Peterkin v. State*¹⁶⁶ that the responsibility of setting trials within the 120-day period rests with the courts, adequate pro-

157. 543 P.2d 418 (Alaska 1975).

158. ALASKA R. CRIM. P. 45(d)(1).

159. ALASKA R. CRIM. P. 45(d)(4).

160. 581 P.2d 673 (Alaska 1976).

161. 543 P.2d 418 (Alaska 1975).

162. 562 P.2d 1350 (Alaska 1977).

163. ALASKA R. CRIM. P. 53, provides: "These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice."

164. 562 P.2d 1350 (Alaska 1977).

165. *Id.* at 1360.

166. 543 P.2d 418 (Alaska 1975). Although Congress has adopted a speedy trial act similar to Rule 45, the Supreme Court has declined to adopt a set standard for speedy trial violations and has reviewed each case individually. See *Barker v. Wingo*, 407 U.S. 514 (1972).

cedures were developed. Now, at the time of arraignment in felony cases, the defense and the prosecution are asked to stipulate to or argue the date when the 120-day period is deemed to have commenced in the case. Similar procedures have been developed in the district courts. As a result, dismissals for speedy trial violations have significantly decreased.

III. RIGHTS DURING TRIAL

Unlike the liberal approach to various pre-trial rights, Alaska has followed the mainstream in adopting and enforcing procedural rights at the trial stage.

A. *Right to Jury Trial*

Rule 23 of the Alaska Rules of Criminal Procedure¹⁶⁷ provides that a jury trial shall be provided in instances where the accused is constitutionally entitled to one unless the right has been clearly waived by the defendant. The jury trial right is embodied in Article I, Section 11¹⁶⁸ of the Alaska Constitution. In construing the constitutional limits to the right to a jury trial, the Alaska Supreme Court has applied the same test that is used in determining the right to counsel. The court in *Baker v. City of Fairbanks*¹⁶⁹ held that a jury trial is afforded whenever the accused is subject to incarceration, loss of a valuable license, or a fine in an amount denoting criminality. In *Johansen v. State*,¹⁷⁰ the court held that a defendant in a civil contempt action for failure to pay child support is entitled to a jury trial because of the possibility of incarceration.

While the right to a jury trial, like other procedural rights, may be waived by the defendant,¹⁷¹ the court is required to address the defendant personally and inquire whether the waiver is made knowingly and voluntarily.¹⁷² An inquiry directed to the defendant's attorney will not suffice. The court in *Walker v. State*¹⁷³ held that the failure of the trial court to address the de-

167. ALASKA R. CRIM. P. 23(a) provides: "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State."

Rule 23 merely parrots the constitutional authorization for a jury trial. See *Walker v. State*, 578 P.2d 1388 (Alaska 1978).

168. See note 3 *supra*.

169. 471 P.2d 386 (Alaska 1970). Compare with *Baldwin v. New York*, 399 U.S. 66 (1970); *Massa v. Illinois*, 391 U.S. 194 (1968); and *Duncan v. Louisiana*, 391 U.S. 145 (1968).

170. 491 P.2d 759 (Alaska 1971).

171. *Walker v. State*, 578 P.2d 1388 (Alaska 1978).

172. *Id.*

173. *Id.*

defendant person

The defective cross section 24 of the Alaska Code of Procedure challenges and cases each part

The Alaska in which the v The practices judges permit nire; other judges admitting limited written question

B. *Nolo Contendere*

Rule 11 of the Alaska Rules of Criminal Procedure provides that a defendant may enter a nolo contendere plea of guilty and consent to conviction following a subsequent civil action charged in the an admission of civil liability.

In *Lowell v. State*,¹⁷⁴ the court held that a conviction sup- porting the off- and meets the Rules of Criminal Procedure

174. See ALASKA R. CRIM. P. 11 (1971).

175. ALASKA R. CRIM. P. 11 provides that a defendant may enter a nolo contendere plea and permit them to

176. ALASKA R. CRIM. P. 11 provides that a defendant may enter a nolo contendere plea and permit them to

177. See ALASKA R. CRIM. P. 11 (1971).

178. See *Lowell v. State*, 578 P.2d 1388 (Alaska 1978).

179. *Id.*

180. ALASKA R. CRIM. P. 11 (1971).

(1) *General Rule*

defendant personally constitutes error *per se*.

The defendant is entitled to a jury comprised of a representative cross section of the community.¹⁷⁴ To achieve this goal, Rule 24 of the Alaska Rules of Criminal Procedure¹⁷⁵ authorizes voir dire of prospective jurors and affords the state six peremptory challenges and the defendant ten in felony cases. In misdemeanor cases each party is permitted three peremptory challenges.

The Alaska Supreme Court has never considered the manner in which the voir dire of prospective jurors should be conducted. The practices in the trial courts vary throughout the state. Some judges permit an open-ended and unrestricted voir dire of the venire; other judges conduct most of the voir dire themselves, permitting limited questioning by counsel either directly or by written questions read by the trial judge.

B. *Nolo Contendere Pleas*

Rule 11 of the Alaska Rules of Criminal Procedure¹⁷⁶ authorizes the entry of guilty, not guilty, and nolo contendere pleas. The nolo plea has much the same effect as a guilty plea and, like a plea of guilty or a finding of guilty by the jury,¹⁷⁷ results in a judgment and conviction. Still, the plea has some special utility. A conviction following a plea of nolo contendere may not be used in subsequent civil proceedings involving the same conduct as that charged in the criminal case.¹⁷⁸ The nolo plea does not constitute an admission of civil liability and may not be used to establish civil liability.

In *Lowell v. State*,¹⁷⁹ the Alaska Supreme Court held that a conviction supported by a plea of nolo contendere may be used to impeach a defendant's testimony at a subsequent proceeding, assuming the offense is one involving dishonesty or false statement and meets the other criteria set forth in Rule 26 of the Alaska Rules of Criminal Procedure.¹⁸⁰

174. See ALASKA R. CRIM. P. 24.1; see also *Alvarado v. State*, 486 P.2d 891 (Alaska 1971).

175. ALASKA R. CRIM. P. 23(d) provides for the exercise of peremptory challenges following the completion of all challenges for cause of prospective jurors. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

176. ALASKA R. CRIM. P. 11(a) provides: "A defendant may plead not guilty, guilty or nolo contendere. If a defendant refuses to plead, stands mute, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

177. See ALASKA R. CRIM. P. 11(c); *Oveson v. Municipality of Anchorage*, 574 P.2d 801 (Alaska 1978); *Cooksey v. State*, 524 P.2d 1251 (Alaska 1974).

178. See *Lowell v. State*, 574 P.2d 1281 (Alaska 1973).

179. *Id.*

180. ALASKA R. CRIM. P. 26(f)(1), (2) provide:

(1) *General Rule.* For the purpose of attacking the credibility of a witness, evi-

ent in
ipulate
o have
eloped
l viola-

Alaska
procedu-

197 pro-
the ac-
as been
bodied
onstru-
Alaska
termin-
marks¹⁶⁹
bject to
amount
d that a
ild sup-
ncarcer-

l rights,
d to ad-
vaiver is
d to the
Walker v.
the de-

ary shall be
of the court

e Walker v.

199 U.S. 66

1 U.S. 145

Pleas of nolo contendere may be conditioned upon the preservation of the defendant's right to appeal certain issues. The *Cooksey* rule (named for *Cooksey v. State*,¹⁸¹ which established the procedure by which issues could be reserved for appeal upon pleas of nolo contendere) was subsequently modified and limited in *Oveson v. Municipality of Anchorage*.¹⁸² In that case, the Alaska Supreme Court held that an appeal may be taken following a plea of nolo contendere only in instances where the prosecution stipulates that resolution of the issue would be dispositive of the entire case. The *Oveson* gloss to the *Cooksey* rule was a product of the Supreme Court's frustration with hearing and deciding appeals involving issues not dispositive of the underlying case. An appeal following a plea of nolo contendere conditioned upon the right to appeal non-dispositive issues was viewed as a means of circumventing the standards for interlocutory review set out in Rules 23 and 24, Alaska Rules of Appellate Procedure.

C. Guilty Pleas

Rule 11 of the Alaska Rules of Criminal Procedure contains the guidelines for entering a guilty plea. The court is required to address the defendant personally and inquire as to whether the plea is made knowingly, intelligently, and voluntarily.¹⁸³ The court must advise the defendant of the various rights (right to confront witnesses, right to trial by jury, presumption of innocence, etc.) which he is waiving by entering his plea.¹⁸⁴ A court's failure to make a sufficient inquiry is not reversible error unless it affects important rights of the accused.¹⁸⁵

In *Morgan v. State*,¹⁸⁶ the Alaska Supreme Court repudiated the rule of *Sieling v. Eyeman*.¹⁸⁷ The court in *Sieling* held that an accused need be "more competent" to waive trial rights than he

180. Evidence that he has been convicted of a crime is admissible but only if the crime involved dishonesty or false statement.

(2) *Time Limit*. Evidence of a conviction under this Rule is inadmissible if a period of more than five years has elapsed since the date of the conviction of the witness.

See also *Richardson v. State*, 579 P.2d 1372 (Alaska 1978); *Lowell v. State*, 574 P.2d 1281 (Alaska 1976); *Smith v. Beavers*, 554 P.2d 1157 (Alaska 1976).

181. 524 P.2d 1251 (Alaska 1974).

182. 574 P.2d 801 (Alaska 1978).

183. See *Joe v. State*, 565 P.2d 508 (Alaska 1977); *Else v. State*, 555 P.2d 1210 (Alaska 1976); *Gregory v. State*, 550 P.2d 374 (Alaska 1976); *Barrett v. State*, 544 P.2d 830 (Alaska 1975); *McKinnon v. State*, 526 P.2d 16 (Alaska 1974); *Ingram v. State*, 450 P.2d 161 (Alaska 1969); *Thompson v. State*, 426 P.2d 995 (Alaska 1967); *State v. Pete*, 410 P.2d 338 (Alaska 1966).

184. *Id.*

185. *Gregory v. State*, 550 P.2d 374 (Alaska 1976).

186. 582 P.2d 1017 (Alaska 1978).

187. 478 F.2d 211 (9th Cir. 1973).

does to stand approved the (unsupported entered his guilt

Alaska's plea bargain 1975 by the A *Buckalew*,¹⁸⁹ could not part prior to entry imposed upon

D. Severance

1. *Severance*
Alaska Rules being prosecuted the joinder is propriety of severance appeal, reversal establish both the trial judge.

In *Larson* joinder of two where one was charged in where the provisions into evidence

188. 582 P.2d at 1111. *United States v. Massi*; *McKinney v. State*, 500 P.2d 1017 (Alaska 1973); *Fajeriak v. State*, 520 P.2d 1017 (Alaska 1975).

189. 561 P.2d 285 (Alaska 1977). CRIM. P. 11(e) requires that the terms and conditions of a nolo contendere plea be imposed or otherwise stated.

190. ALASKA R. CRIM. P. 11(e) requires that the terms and conditions of a nolo contendere plea be imposed or otherwise stated.

191. *Carlett v. State*, 544 P.2d 830 (Alaska 1975); *Selmau v. State*, 566 P.2d 1019 (Alaska 1978).

193. *The Britton*, 478 F.2d 211 (9th Cir. 1973).

does to stand trial. The Alaska court, noting that few courts have approved the *Stieling* approach, denied the defendant's assertion (unsupported by the record) that he was incompetent when he entered his guilty plea.¹⁸⁸

Alaska's criminal rules do not specifically address the issue of plea bargaining. Plea bargaining in most cases was abolished in 1975 by the Attorney General of the State of Alaska. In *State v. Buckalew*,¹⁸⁹ the Alaska Supreme Court held that trial judges could not participate in plea or sentence bargaining by indicating, prior to entry of the plea, the nature of the sentence that would be imposed upon the defendant by a plea.

D. Severance

1. *Severance of defendants.* Pursuant to Rule 14 of the Alaska Rules of Criminal Procedure,¹⁹⁰ any co-defendant who is being prosecuted in a joint proceeding can move for severance if the joinder is prejudicial. Unlike other procedural rights, the propriety of severance is left to the trial judge's discretion and on appeal, reversible error will not be found unless the defendant can establish both prejudice and an abuse of discretion on the part of the trial judge.¹⁹¹

In *Larson v. State*,¹⁹² the Alaska Supreme Court held that the joinder of two brothers in a single proceeding was not prejudicial where one was charged with assault at a gas station and the other was charged in connection with a shooting at the same gas station. Where the prosecution seeks to introduce statements or confessions into evidence, joinder of co-defendants may pose *Bruton*¹⁹³

188. 592 P.2d at 1021. See also Note, *Competence to Plead and the Retarded Defendant: United States v. Masthurs*, 339 F.2d 721 (1976), 9 CONN. L. REV. 176, 185 (1976). See also McKinney v. State, 566 P.2d 653, 660, *opinion on rehearing*, 570 P.2d 733 (Alaska 1977); Fjernek v. State, 520 P.2d 795, P02-03 (Alaska 1974).

189. 561 P.2d 289 (Alaska 1977). Prior to the ban on plea bargaining, ALASKA R. CRIM. P. 11(e) required that counsel for the state and the defendant disclose to the court the terms and conditions of plea agreements and bargains whereby pleas of guilty and nolo contendere were entered by the defendant in the expectation that a specific sentence would be imposed or other charges before the court would be dismissed.

190. ALASKA R. CRIM. P. 14 provides:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on the motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at the trial.

191. *Catlett v. State*, 585 P.2d 553 (Alaska 1978); *Richards v. State*, 451 P.2d 359 (Alaska 1969); *Seltran v. State*, 406 P.2d 181 (Alaska 1965).

192. 566 P.2d 1919 (Alaska 1977).

193. The *Bruton* rule is derived from *Bruton v. United States*, 391 U.S. 123 (1968); see

problems. As recognized in *Bruton v. United States*,¹⁹⁴ the joinder of co-defendants for trial may violate the right to confrontation where one co-defendant makes a statement or confession implicating the other. The confrontation problem arises when the statement or confession is admitted in the prosecution's case and the co-defendant making the statement declines to testify pursuant to his constitutional right to remain silent. In this situation, the implicated defendant is deprived the opportunity to confront the witness (his co-defendant) testifying against him.

Although some restriction of the *Bruton* rule can be detected in recent federal decisions,¹⁹⁵ the rule is still adhered to in Alaska. In *Mead v. State*,¹⁹⁶ the Alaska Supreme Court held that the admission of three confessions at trial violated the defendant's right to confrontation. Similarly, the court in *Benefield v. State*¹⁹⁷ held that the testimony of a police officer which summarized the confession of a co-defendant deprived the defendant of his right to confrontation and was therefore improperly admitted by the trial court.

2. *Severance of charges.* Rule 14 also permits the severance of multiple charges alleged against a single defendant. There are several ways in which prejudice results from the consolidation of multiple charges in a single proceeding. The first occurs where a defendant wishes to testify on one of the charges, but not on the other.¹⁹⁸ The nature and effect of this type of prejudice was concisely summarized by the United States Court of Appeals for the District of Columbia in *Cross v. United States*.¹⁹⁹ In that case, the court stated:

If he [the defendant] testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus, he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the

also *Dutton v. Evans*, 400 U.S. 74 (1970); *Frazier v. Cupp*, 394 U.S. 731 (1969), *Douglas v. Alabama*, 380 U.S. 415 (1965).

194. 391 U.S. 123 (1968).

195. See, e.g., *Parker v. Randolph*, 442 U.S. 62 (1979); *Schneble v. Florida*, 405 U.S. 427 (1972); *Nelson v. O'Neil*, 402 U.S. 622 (1971).

196. 504 P.2d 855 (Alaska 1971).

197. 559 P.2d 91 (Alaska 1977).

198. See *Gregory v. United States*, 369 F.2d 185, 189 (2d Cir. 1966); *Draw v. United States*, 331 F.2d 85, 88, n.15 (D.C. Cir. 1964); 1 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 222, at 437 (1969 & Supp. 1979).

199. 335 F.2d 987 (D.C. Cir. 1964).

meaning
The *Cross v.*
Alaska Sup

The po
ence about
has been re
caused by c
come partic
count is stro
to convict a
proof suppo

The thir
sibility that th
used to convi
guilt for the f
rate trial.²⁰³

ognized the p
jointly tried
similar offens
one-third of t
such joinder c

In *Steven*
[W]e think
cism which
permits the
We think t
that in the
senses of th
the accused

Thus, while th
severance issue
provided a stro
whenever the a
same position t
ation in its Sta

200. *Id.* at 989 (1

201. 538 P.2d 106

202. *Drew v. Uni*

203. *Robinson v.*

401 F.2d 958 (D.C. C

F.2d 987 (D.C. Cir. 1

204. 582 P.2d 621

205. See A.B.A. S

J. MOORE, FEDERAL I

(Ga. 1955). Among o

(OR. REV. STAT. § 13

and Illinois (ILL. REV

206. 582 P.2d at 6

meaning of Rule 14.²⁰⁰

The *Cross* analysis of the severance problem was adopted by the Alaska Supreme Court in *Cleveland v. State*.²⁰¹

The possibility that the jury will draw an unfavorable inference about the defendant and cumulate the evidence against him has been recognized as the second type of possible prejudice caused by consolidation of charges.²⁰² This inference may become particularly prejudicial in cases where the proof of one count is stronger than that of the other. The jury may be induced to convict a defendant on a weaker count because it is swayed by proof supporting the stronger count.

The third type of prejudice posed by consolidation is the possibility that the proof of the defendant's guilt of one crime may be used to convict him of another, even though the evidence proving guilt for the former crime would have been inadmissible in a separate trial.²⁰³ In *Stevens v. State*,²⁰⁴ the Alaska Supreme Court recognized the possibility of serious prejudice where a defendant is jointly tried for several similar offenses. Criticism of joinder of similar offenses has been extensive; only the federal courts and one-third of the states currently allow it; all other states prohibit such joinder entirely or upon the defendant's objection.²⁰⁵

In *Stevens*, the court stated:

[W]e think it appropriate to note our agreement with the criticism which has been directed against a procedural rule which permits the joinder of offenses of the same or similar character. We think that in general such joinders are to be avoided and that in those instances where the prosecution has joined offenses of the same or similar character the court, on motion by the accused, should grant a severance of such charges.²⁰⁶

Thus, while the Alaska Supreme Court has left the disposition of severance issues to the trial court's discretion, the court in *Stevens* provided a strong statement favoring severance of similar charges whenever the accused objects to their joinder. This position is the same position that has been adopted by the American Bar Association in its Standards Relating to Joinder and Severance.

200. *Id.* at 989 (footnotes omitted).

201. 518 P.2d 1606 (Alaska 1975).

202. *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964).

203. *Robinson v. United States*, 459 F.2d 607 (D.C. Cir. 1972); *Baker v. United States*, 401 F.2d 958 (D.C. Cir. 1968), cert. denied, 400 U.S. 965 (1970); *Cross v. United States*, 335 F.2d 937 (D.C. Cir. 1964).

204. 582 P.2d 621 (Alaska 1978).

205. See A.B.A. STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.2; see also 8 J. MOORE, FEDERAL PRACTICE § 8.02[1], n 3 (2d ed. 1976); *Dingler v. State*, 211 S.E.2d 772 (Ga. 1955). Among the states prohibiting similar character joinder by statute are, Oregon (OR. REV. STAT. § 132.560 (1970)), Louisiana (LA. REV. STAT. ANN. § 226 (West 1951)), and Illinois (ILL. REV. STAT. ch. 38, §§ 111-14 (1970)).

206. 582 P.2d at 629 (footnotes and citations omitted).

E. Presence of the Defendant

It is well-recognized that a defendant has a right to be present during the proceedings against him. Still, the Alaska Supreme Court has been called upon to review several situations in which proceedings transpired in the defendant's absence.

1. *Playbacks.* In Alaska, trial testimony is electronically recorded. During the course of deliberations, juries frequently request playbacks of various portions of the testimony to assist them in rendering a verdict. In *State v. Hannagan*,²⁰⁷ the Alaska Supreme Court construed Rule 38(a) of the Alaska Rules of Criminal Procedure,²⁰⁸ which requires a defendant's presence at "every stage of the trial," to include playbacks of testimony. Furthermore, the court held that the defendant's right to be present while testimony is replayed may not be waived by his counsel, but that the violation of Rule 38 was harmless.

2. *Other situations.* Several cases have posed questions concerning the right of a defendant to be present during other stages in the criminal proceedings. In *Cox v. State*,²⁰⁹ the Alaska Supreme Court held that communications by the court to the jury, out of the presence of the defendant and his attorney, was reversible error because there was no way of proving that the error was harmless beyond a reasonable doubt. Similarly, the court in *Kimoktoak v. State*²¹⁰ found error where the trial court, in the absence of the defendant, heard arguments of counsel on the jury's request for a playback on the issue of sequestration of the jury. Finally, in *Johnson v. State*²¹¹ the court found error where the trial court, in violation of Rule 31 of the Alaska Rules of Criminal Procedure, ordered a sealed verdict without the defendant's consent.

207. 559 P.2d 1059 (Alaska 1977).

208. ALASKA R. CRIM. P. 38(a) provides:

The defendant shall be present at the arraignment, at the preliminary hearing, at the time of plea, at the omnibus hearing, and at every stage of the trial, including the impaneling of the jury and return of the verdict, and at the imposition of sentence, except as otherwise provided in this rule.

209. 575 P.2d 297 (Alaska 1978). See also *Kochler v. State*, 519 P.2d 442 (Alaska 1974); *Gafford v. State*, 440 P.2d 405 (Alaska 1968); *Egelak v. State*, 438 P.2d 712 (Alaska 1968); *Kugzruk v. State*, 436 P.2d 962 (Alaska 1968); and *Nollke v. State*, 422 P.2d 102 (Alaska 1967).

210. 578 P.2d 594 (Alaska 1978).

211. 577 P.2d 1063 (Alaska 1978). Rule 31 has since been changed to permit authorization of a sealed verdict without the defendant's consent. See ALASKA R. CRIM. P. 31(f).

F. Confrontation

In 1977, the Alaska Supreme Court in *State v. Evidenc* held that because of the importance of the right to confront witnesses in criminal cases, some cases. Although the violation of this rule may be

In *Davis v. State*, the Alaska Supreme Court held that the defendant's right to confront witnesses is a fundamental right. The court stated that the defendant's right to confront witnesses is a fundamental right and that the state has a duty to protect this right. The court held that the state's failure to protect this right was reversible error.

The Alaska Supreme Court in *State v. Evidenc* held that the defendant's right to confront witnesses is a fundamental right and that the state has a duty to protect this right. The court held that the state's failure to protect this right was reversible error.

When, as in *State v. Evidenc*, the state's failure to protect the defendant's right to confront witnesses is reversible error, the defendant is entitled to a new trial.

Thus, the defendant's right to confront witnesses is a fundamental right and the state has a duty to protect this right.

212. 499 P.2d

213. 415 U.S.

214. 559 P.2d

215. *Id.* at 79.

F. *Confrontation*

In 1979, the Alaska Supreme Court adopted the Alaska Rules of Evidence. The Rules apply to both civil and criminal cases. Because of the constitutional right to confront witnesses, criminal cases sometimes pose evidentiary problems not present in civil cases. Although confrontation problems are frequently confused with the prohibition against introducing hearsay evidence, it is important to recognize that the right to confront witnesses may be violated in criminal cases even where exceptions to the hearsay rule may render out-of-court statements admissible.

In *Davis v. State*,²¹² the defendant sought to invade the statutory protection afforded juvenile delinquency proceedings in order to confront and cross-examine his juvenile accuser in an effort to establish bias and interest on the part of the witness. Although the Alaska Supreme Court rejected the defendant's confrontation claim, the United States Supreme Court reversed on appeal. In *Davis v. Alaska*,²¹³ the United States Supreme Court held that the secrecy of juvenile proceedings provided by statute must give way to the right of an accused to confront the witnesses against him. The Court ordered disclosure of the prior juvenile record of the prosecution's witness.

The Alaska Supreme Court faced a similar issue in *Salazar v. State*.²¹⁴ In that case, the defendant sought to limit the marital communications privilege in order fully to cross-examine and confront the prosecution witness concerning an inconsistent statement and bias. On appeal, the Alaska Supreme Court reversed the conviction and held that the privilege provided by Rule 26 of the Alaska Rules of Criminal Procedure would have to give way to the constitutional right of confrontation. The court in *Salazar* stated:

When, as in *Davis* and this case, the defendant's right to confront effectively the witnesses against him by exploring their possible bias or prejudice is balanced against a rule based solely on policy grounds, the defendant's constitutional rights must prevail. . . . We thus hold that when conflict is found between the constitutional right of confrontation and the exercise of a privilege based on public policy, the constitutional right must control.²¹⁵

Thus *Davis* and *Salazar*, taken together, firmly establish that neither statutory nor rule privileges of non-disclosure may obstruct the right of an accused to fully confront the witnesses

212. 499 P.2d 1025 (Alaska 1972).

213. 415 U.S. 308 (1974).

214. 559 P.2d 56 (Alaska 1976).

215. *Id.* at 79.

be present
Supreme
in which

inically re-
quently re-
assist them
he Alaska
s of Citate
e at "every
. Further-
esent while
ei, but that

estions con-
other stages
the Alaska
to the jury,
was reverse-
ie error was
he court in
ourt, in the
nset on the
ation of the
error where
ka Rules of
the defend-

ry hearing, at
al, including
imposition of

P.2d 442 (Alaska
& P.2d 712 (Alaska
ate, 422 P.2d 102

permit authoriza-
R. CRIM. P. 31(f).