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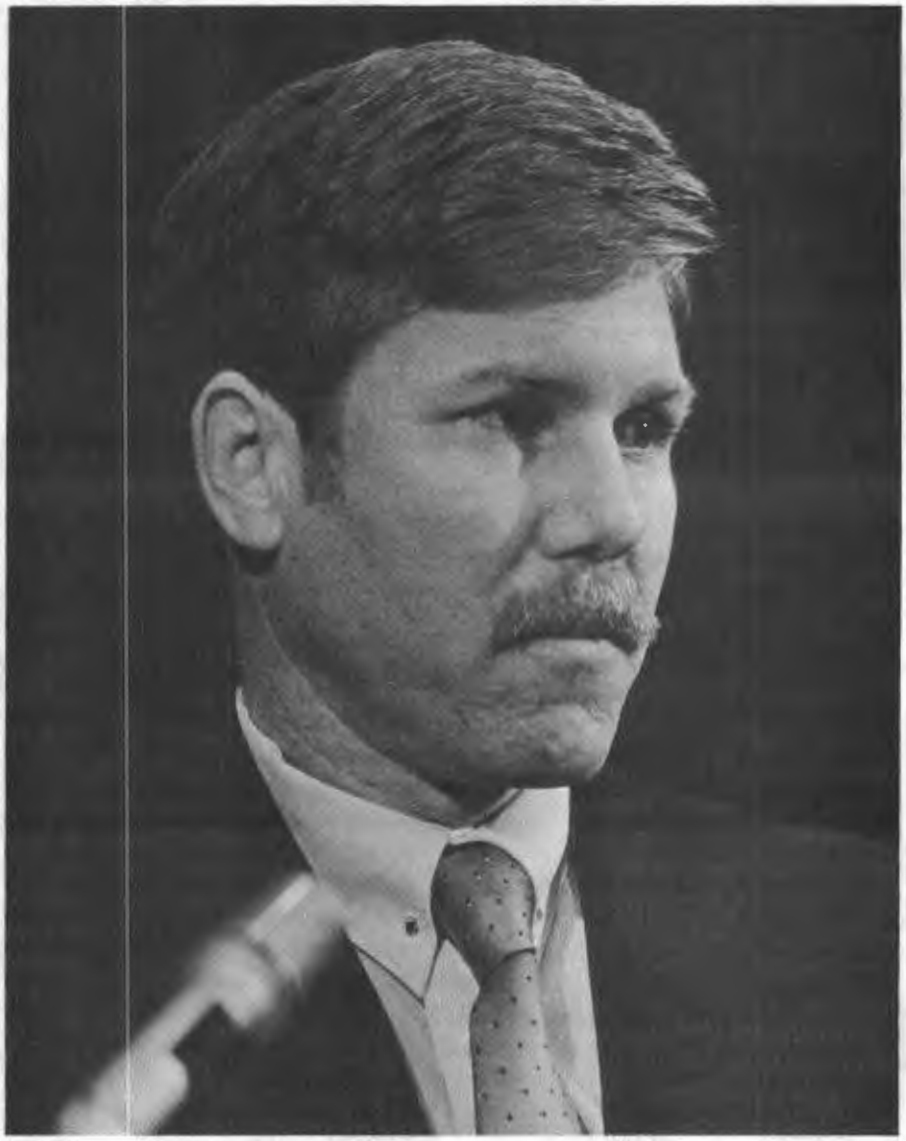

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LEGISLATING A REMEDY FOR THE FOURTH AMENDMENT

RANDALL R. RADER

INTRODUCTION

"The right of the people to be secure . . . against unreasonable searches and seizures" was established by ratification of the Bill of Rights in 1789. Selecting and implementing an efficacious means to enforce this fundamental guarantee has spawned much complex litigation and voluminous legal commentary over the last several decades.[1] This enormous societal and judicial debate began in 1914 when the United States Supreme Court first enunciated the exclusionary rule or the supression doctrine.[2] This means of enforcing the fourth amendment bars from a judicial proceeding any evidence determined to have been seized as a result of a search that violated the constitutional reasonable standard.

From its inception, the suppression doctrine has been the focal point of controversy. In addition to the countless close court decisions, legal writings, and verbal debates in Congress and elsewhere the magnitude of this controversy is also manifested by the numerous legislative proposals to limit the rule or replace it with an alternative enforcement device for the fourth amendment. In the current 97th Congress, twelve bills have been proposed with this objective.[3] Even as recently as September 13, 1982, the President of the United States explained his reasons for proposing a bill to "reform the exclusionary rule to prevent suppression of evidence . . . . Although the argument for retaining the exclusionary rule in any form is, at best, tenuous, this proposal eliminates applications of the

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1. At the outset of recent hearings on proposals to alter or replace the exclusionary rule, Chairman Charles McC. Mathias, Jr., noted that "the exclusionary rule has aroused great controversy from the very beginning." *Hearings on S. 101, S. 751, and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st and 2nd Sess. 1 (1981, 1982) [hereinafter cited as *Hearings*]. Justice Blackmun, speaking for the Supreme Court, in United States v. Janis, 428 U.S. 433, 446 (1976), characterized the debate over the rule as "a warm one." Professor Wayne LaFave's treatise on the fourth amendment, itself a testament to the amount of controversy, notes that the fourth amendment has probably been litigated more than any other provision in the Bill of Rights. 1 W. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT, at v, (1978). Professor Yale Kamisar, testifying before the Crime Subcommittee, alluded to Justice Douglas's remark in Mapp v. Ohio, 367 U.S. 643, 670 (1961), that the rule had created a "storm of constitutional controversy" to make the point that the storm has "not only intensified—but engulfed the *Fourth Amendment* exclusionary rule itself." *Hearings, supra* at 465.

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

3. *See infra* notes 130-158 and accompanying text.

rule in those cases in which it most clearly has no deterrent effect."[4]

This nationwide debate that has now spanned several decades features many commentators who contend that the suppression doctrine has its "origin in the Constitution." For this reason, they contend that Congress could not by a majority vote of each house amend or abolish the rule, but would be required to comply with the terms of article V of our nation's founding document to effect any alteration in the exclusionary rule.[5] Even some of the rule's foremost critics hesitate to replace it "as long as it remains a constitutional requirement."[6] To the contrary, other notable commentators consider it well established that the exclusionary rule is a judge-made "choice of remedies"[7] subject clearly to a different choice by Congress. This controversy over the origins of the suppression doctrine is the central issue that colors nearly every other aspect of the debate over the merits of the doctrine or proposed alterations or alternatives.

Before proceeding to address the various pending bills, this analysis will examine the authority of Congress to choose a different remedy for a violation of the fourth amendment. Following that discussion, this analysis will set forth criteria to weigh the relative merits of the bills to amend or abolish the suppression doctrine and will apply those criteria to the legislation presently before Congress.

THE EXPRESS LANGUAGE OF THE FOURTH AMENDMENT

The wording of the fourth amendment alone does not suggest any particular way of punishing those who conduct an illegal search or repair-

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4. 128 CONG. REC. S.11338 (daily ed. Sept. 13, 1982).

5. *Hearings, supra* note 1, at 20 (Mr. Stephen H. Sachs, Attorney General of Maryland, maintains the rule is "of constitutional dimension."), at 79 (Professor William Greenhalgh, representing the American Bar Association, claims the rule is "constitutional in origin."), at 159 (Professor Leon Friedman, representing the American Civil Liberties Union, argued that only an amendment to the Constitution could change the remedy), at 326 (Professor Wayne R. LaFave endorses the constitutional constructions given the rule by Sachs and Greenhalgh), at 465 (Professor Yale Kamisar passionately defends the notion that the rule is required by the fourth amendment).

6. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 753 (1970) [hereinafter cited as Oaks].

7. *Hearings, supra* note 1 at 3 (Mr. Lowell Jensen, Assistant Attorney General of the United States, contends the rule is a "judicially declared rule of law"), at 54 (Professor Steven Schlesinger notes that the rule is grounded in policy, not the constitution), at 119 (Mr. Frank Carrington, Executive Director of Crime Victims Legal Advisory Institute, comments on malleability of rule), at 124 (Mr. George Nicholson, Senior Assistant Attorney General, California Department of Justice, notes that the constitution creates no exclusionary rule), at 214 (Mr. Jim Smith, Attorney General of Florida, urges the Committee to adopt legislation to change this "procedural safeguard"), at 326 (Professor Robert Blakey finds no reason to believe the rule mandated by the constitution), at 748 (Judge Malcolm R. Wilkey maintains that the exclusionary rule is not required by the constitution and no supreme court has ever said so).

ing damage done to the victims of the search. The fifty-eight words of the amendment quite obviously state no rule of evidence requiring suppression of improperly seized evidence. In fact, the exclusionary rule was not applied as a tenet of federal criminal procedure until 123 years after the fourth amendment was ratified.[8] Another forty-seven years transpired before the policy was declared mandatory in state courts as a requirement of the fourteenth amendment.[9] This does not mean, however, that the authors of the fourth amendment gave no thought to devices to make the prohibition against "unreasonable searches" effective. The fourth amendment's relatively lengthy discussion of an appropriate warrant procedure suggests that the prohibition against "unreasonable searches" was to be primarily carried out by a strict advance clearance procedure involving the judiciary.

The fourth amendment expressly creates a "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The amendment, by its terms, does not guarantee a universal security of privacy right, rather it protects against "unreasonable searches and seizures." Therefore the amendment is primarily directed against improper law enforcement conduct and becomes operative following a "search" or "seizure," typically in a criminal case, which is challenged as "unreasonable." The only express constitutional guidance concerning a means to "make live" the prohibition against "unreasonable searches" is found in the second clause of the amendment: "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."

These two explicit clauses leave little doubt that the First Congress and the ratifying states of 1789 devoted their primary legislative attention to devising a limited and specific warrant procedure. Beyond the limitations on warrants, the authors of the amendment did not state any means to avoid "unreasonable searches and seizures." The intent of the First Congress is particularly clear from the proceedings that developed the fourth amendment's language. Following President Washington's call for a bill of rights in his First Inaugural Address,[10] James Madison prepared nine proposals to serve as a starting point for congressional consideration. His "unreasonable search" provision was largely patterned after the Massachusetts Declaration of Rights. The eighth clause of his fourth proposal stated that the "right of the people to be secured in their persons, their houses, their papers, and their other property from unreasonable searches . . . shall not be violated by warrants issued without probable cause. . . ."[11] Madison's intent in his initial version was to set clear

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8. *Weeks,* 232 U.S. at 383.
9. *Mapp,* 367 U.S. at 643.
10. *Inaugural Addresses of the Presidents* 3 (Washington, 1961).
11. *Annals of Cong.,* 1st Cong. 1st Sess. 452 [hereinafter cited as *Annals*].

limits on search warrants. In the words of Professor Nelson B. Lasson, whose 153-page work is still among the most authoritative expositions of the origins of the fourth amendment, these initial drafts were "a one barrelled affair, directed apparently only to the essentials of a valid warrant."[12]

Madison's proposals were referred to a Committee of Eleven comprised of one representative from each state.[13] This Committee reported to the House a slightly altered version of the proposal that deleted all mention of "unreasonable searches and seizures." This deletion placed even more emphasis on the warrant procedure to prevent arbitrary intrusions by government officials. On August 17, the House considered the forty-eight word version of what was to become the fourth amendment. Three Congressmen participated in that very brief debate.

Mr. Gerry spoke first and noted a "mistake in the wording" that seemed to imply that the people could be "*secured*" in their houses. The Committee of the Whole House immediately changed "secured" to "secure."[14] At that point, Mr. Benson of New York objected to the exclusive emphasis on warrants. He thought the language of the amendment was "good as far as it went, but . . . was not sufficient." Accordingly, he moved to separate the "right of the people to be secure" from the warrant provisions by substituting "and no warrant shall issue" for "by warrants issuing." The Annals report that this lost "by a considerable majority."[15] By this action, the House of Representatives voted unambiguously to thrust warrant procedures as the exclusive constitutional protection against unreasonable searches.

On Saturday, August 22, three members of the House were commissioned to "arrange the amendments" made by the House to the original propositions and report them to the House.[16] Mr. Benson of New York, whose amendment giving life to a "right to be secure" independent of the warrant process had been defeated a week earlier, was one of the three. When Mr. Benson made the report on behalf of the Committee of Three the following Monday, the language severing the right from the warrant procedure was in the report in the very form that Benson had proposed and the House had rejected. The House approved this Benson Committee version.

The records of the First Congress do not indicate whether this alteration was the product of a compromise occuring away from the floor of the House or whether it was simply not noticed as a different proposition

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12. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 103 (1937) [hereinafter cited as LASSON].

13. *Annals, supra* note 11, at 690.

14. *Id.* at 754.

15. *Id.*

16. *Id.* at 778. The three members were Benson of New York, Sherman of Connecticut, and Sedgwick of Massachusetts.

than that approved earlier in debate. It is probably safe to say, however, that Benson, whose defeated House amendment reappeared, and Sedgwick of Massachusetts, (the Massachusetts Declaration of Rights also severed the unreasonable search and warrant provisions)[17] were the two of the committee's three members, who greatly influenced the final version of the report. In any event the Senate approved the proposal in the same altered form that had passed the House, and later the House again approved the language. Finally the amendment was ratified by the states. This interesting tidbit of First Congress history is not offered to show that Congress conclusively intended to link or sever the two clauses of the fourth amendment, but to shed light on the thinking of the authors of the amendment with regard to prevention of "unreasonable searches." As reported by the Committee of Eleven, the amendment mentioned "unreasonable searches" merely to explain the reason for setting specific requirements for the issuance of warrants. Mr. Benson's plea that this was not "sufficient" was defeated by the House. At one time, the House felt that limiting the issuance of warrants was sufficient to protect against improper searches.[18] Although this House vote is not conclusive about the meaning of the final language of the fourth amendment, it does provide insight into the means of deterring unreasonable searches contemplated by the First Congress.

As approved by Congress and the states, however, the fourth amendment clearly contains two clauses which are ambiguously related. The ambiguous conjunction of the "unreasonable searches" and warrant clauses has resulted in considerable litigation, particularly in the instance of warrantless searches. If the two clauses are inextricably linked, then they must be read together to mean that searches are "reasonable" and permitted only when conducted pursuant to the warrant requirements of the second clause. If the two clauses are freestanding and independent, then some searches could be "reasonable" in the absence of a warrant, and conversely, some searches could be "unreasonable" and prohibited even though conducted pursuant to a proper warrant.[19] Under the freestanding alternative, however, any search under warrant would be required to comply with the second clause.

While warrantless searches in conjunction with arrests were undeniably permissible under English and colonial common law, the scope of such

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17. *See infra* note 41 and accompanying text.

18. LASSON, *supra* note 12, at 101-105. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, 41-42 (1966) [hereinafter cited as LANDYNSKI].

19. Although an unusual reading of the fourth amendment, this interpretation of the amendment making some searches under warrant unreasonable has been given effect in some United States Supreme Court cases, although for reasons unrelated to the direct reading of the fourth amendment. Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967), but see page 303 which explicitly reserves the question whether some items of "evidential value" may, by their nature, never be the object of a reasonable search.

searches under the fourth amendment has been hotly contested.[20] The United States Supreme Court has struggled to set a standard for "reasonableness" in these cases. In the last decade, however, the Court has returned to an emphasis upon securing a warrant in advance of a search "whenever practicable."[21]

In conclusion, the express provisions of the fourth amendment provide direct support for only a few conclusions about enforcement of its standards for searches. The only express device for preventing "unreasonable searches" is the warrant clause. Hence, the words of the fourth amendment do not suggest that the suppression doctrine deserves equal status with article I creating the Congress, article III creating the federal judiciary or the Bill of Rights for that matter. Each of these explicit portions of the Constitution can be altered only by the procedure set forth in article V. The language of the fourth amendment simply does not provide support for the notion that the suppression doctrine deserves the same legal status and respect reserved for articles I through VII and the twenty-six amendments of the Constitution. As stated by the language of the fourth amendment and elucidated further by the history of its drafting, the only way of enforcing the policies of the amendment stated by its own terms is the warrant procedure.

HISTORICAL CONTEXT OF AMENDMENT SUPPLIES NO SUPPRESSION DOCTRINE

The historical context and origins of the fourth amendment fail to establish that the authors impliedly intended an evidentiary suppression rule to protect against "unreasonable searches." Most of the provisions of the Bill of Rights were first enunciated as legal principles hundreds of years prior to the Constitution in English jurisprudence and were not born in the colonial strugle for independence.[22] The language of the fourth amendment, on the other hand, grew directly out of the disputes leading to the Declaration of Independence and the Revolutionary War.[23]

Although the legal articulation of the right against unreasonable searches culminated with the fourth amendment, the roots of this principle may be traced back to fundamental tenets of English culture. The famous maxim that "Every man's house is his castle" is cited by Coke and apparently was a recognized principle of early English jurisprudence.[24] Even that concept, however, is rooted in the Magna Carta, and

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20. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION, 39 (1969) (The Framers considered warrantless searches pursuant to arrest "quite normal" and reasonable). Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 359 (1974).

21. Trupiano v. United States, 334 U.S. 699, 705 (1948). *See also* McDonald v. United States, 335 U.S. 451 (1948).

22. LANDYNSKI, *supra* note 18, at 19.

23. LASSON, *supra* note 12, at 13.

24. 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604) Semayne's Case recognized a

Roman and Biblical law.[25] Perhaps the most celebrated articulation of this principle, was uttered by Lord William Pitt in Parliament at the time of the disputes over government intrusions that riled the American colonists:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dare not cross the threshold of the ruined tenement.[26]

These general principles became the subject of bitter legal disputes when, during the oppressive reign of James I, the King's officers began to issue writs of assistance, or general search warrants unlimited as to time, place, or object of the search. King James apparently felt this arbitrary legal device necessary to discover and punish critics of the Crown as well as to prevent smuggling. An example of such a warrant issued by a later King is found in the license given Roger L'Estrange, appointed to the position of Surveyor of the Press in 1663. The King's censoring officer was authorized by the writ to "seize all seditious books and libels and to apprehend the authors, contrivers, printers, publishers, and dispersers of them" and to "search any house, shop, printing room, chamber, warehouse, etc. for seditious, or unlicensed books or papers."[27] This type of writ was later to spark the legal and social controversy which inspired the fourth amendment.

Many years passed before the English judiciary, in a series of celebrated cases, stood up to the King and challenged his general warrant procedure. These cases grew out of a series of violent searches designed to stamp out publications critical of the King. In 1762, Lord Halifax, Secretary of State, issued a general warrant for the arrest of these seditious pamphleteers and seizure of their papers. In the wake of the destructive searches, the printers brought a suit for damages against the King's officers. A jury awarded them three hundred pounds on the basis that "to enter a man's house by virtue of a nameless warrant . . . is worse than the Spanish Inquisition."[28] On appeal Chief Judge Pratt refused to grant

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homeowner's right to resist unlawful entry even by the King's agents, but simultaneously acknowledge the power of the appropriate authorities to break and enter upon notice in order to carry out the King's lawful commands.

25. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 532 (1978). *See also* Stengel, *The Background of the Fourth Amendment to the Constitution of the United States* (pt.1), 3 U. RICH. L. REV. 278, 281 (1968) and LASSON, *supra* note 12, at 13-15, 20-21.

26. *Parliamentary History*, XV, 1401-1403; quoted in THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, 1041 (1973).

27. Quoted in LANDYNSKI, *supra* note 18, at 24.

28. Huckle v. Money, 2 Wilson 205, 207 (1763) (Quoted in LANDYNSKI, *supra* note 18, at 28). In light of Spanish-English relationships in this era, this comment was undoubtedly a most offensive analogy.

a new trial despite the extraordinarily high damages award because the injuries caused by the search were not slight:

> They saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant . . . . These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.[29]

One arrested pamphleteer was John Wilkes, himself a member of Parliament. After this result, John Wilkes ventured to sue the under-secretary in charge of the issuance of the warrant for false imprisonment and was awarded one thousand pounds. Later he recovered further damages against Lord Halifax.[30]

The most renowned case in this series, however, was argued a few years after Judge Pratt's holding. *Entick v. Carrington*,[31] decided in 1765, sprang out of the same violent searches that ransacked Wilkes' premises. Entick, an associate of Wilkes, was encouraged by Wilkes' success in court and accordingly brought a suit against the agents for trespass. The jury awarded him three hundred pounds as well. Judge Pratt, elevated to a higher court as a tribute to his courage in the earlier cases,[32] heard the appeal. He dismissed the appeal with the warning:

> [I]f this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject of this kingdom will be thrown open to search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be an author, printer or publisher of a seditious libel.[33]

In addition to castigating the warrant's general character, the Pratt opinion also faulted it for lacking probable cause.

The United States Supreme Court has lauded the *Entick* case as a "great judgment," "one of the permanent monuments of the British Constitution," and a key to understanding the underpinnings of the fourth amendment.[34] This comment appears in the *Boyd* case which laid the foundation for most subsequent expositions of the fourth amendment in American jurisprudence.

The *Entick* cases were famous in their own time as well. In fact, Parliament reacted to the cases by limiting general warrants to those cases where it was authorized by law, such as to enforce customs laws. This precluded the most abusive use of writs of assistance in England, but in the colonies the exception became the dominant rule. Parliament had im-

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29. *Id.*
30. LASSON, *supra* note 12, at 44-46.
31. 19 Howell's State Trials 1029 (1765).
32. LANDYNSKI, *supra* note 18, at 29.
33. 19 Howell's State Trials 1029, 1063 (1765).
34. *Boyd*, 116 U.S. at 626.

posed on the colonies stringent customs laws to discourage them from trading with nations other than the mother country. To circumvent stringent requirements that were perceived as restrictions on free trade and an affront to English citizens, smuggling became commonplace, even among respectable colonial leaders. At the close of the French and Indian Wars in 1760, the Crown began a concerted campaign to enforce the customs laws. The primary enforcement tool was the writ of assistance which was valid for the life of the King for unlimited searches. The businessmen in Boston, Massachusetts, attempted to challenge the legality of these writs in Superior Court, the highest colonial court, but failed.[35] In anger, the legislature of the Massachusetts colony passed a bill outlawing general warrants; it drew an immediate veto from the English Governor.[36] This chain of events contributed significantly to the powder keg atmosphere that characterized Boston until the outbreak of hostilities a decade later. Throughout this period, huge crowds would gather at the sight of a customs officer to impede the execution of search orders.

This general warrant problem was not confined to New England. In other colonies, however, the courts often simply defied the Crown and refused to issue writs.[37] Although undertaken at great personal risk to the judges, this defiance was undoubtedly somewhat responsible for the great trust placed in these colonial judges after the Revolution.[38]

When it became apparent that the colonies were going to gamble on their ability to secure independence, the separate colonies began drafting constitutional documents to guarantee vital rights of self government. For instance, Virginia's Declaration of Rights, prepared a month prior to the Declaration of Independence, decried "grievous and oppressive" general warrants.[39] After Virginia, provisions preventing arbitrary warrant policies appeared in every state's Bill of Rights. Pennsylvania and Vermont banned general warrants outright. North Carolina duplicated the Virginia provision which listed the general warrant as a substantial grievance. Maryland set specific conditions on the issuance of any future warrant.[40] Massachusetts, perhaps inspired by its recent revolutionary struggles, departed from the other states in its manner of addressing the subject.

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35. LANDYNSKI, *supra* note 18, at 35; LASSON, *supra* note 12, at 51-71, quotes extensively from the impassioned arguments made by James Otis in an attempt to invalidate the general warrant procedure.

36. LANDYNSKI, *supra* note 18, at 35.

37. LASSON, *supra* note 12, at 73-76.

38. 3 JONATHAN ELIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 342-325, (2nd ed. 1861). (Patrick Henry, opposing the creation of federal courts in the Virginia ratification debate, expresses deep confidence in state courts) [hereinafter cited as ELIOT].

39. 7 FRANCIS THORPE, THE FEDERAL AND STATE CONSTITUTIONS, 3814 (1909).

40. *Id.* at Vol. V, 3083 (Pennsylvania Declaration of Rights); at Vol. V, 2788 (North Carolina Declaration of Rights); at Vol. VI, 3741 (Vermont Declaration of Rights); at Vol. III, 1688 (Maryland Declaration of Rights).

Rather than focusing solely upon the warrant procedure, Article 14 of the Declaration of Rights in 1780 stated that: "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported . . . ."[41] This article is the first appearance of the term "unreasonable searches and seizures" that later was incorporated into the fourth amendment.

When the states gathered in Philadelphia "for the sole and express purpose of revising the Articles of Confederation,"[42] the delegates gave little consideration to a bill or declaration of rights. The initial Virginia plan presented to the Convention by James Madison contained the basic institutions and scheme of checks on central government authority, but contained no Bill of Rights. The Convention did not even consider attaching such a declaration until September 12, five days before the Constitution was submitted to the states. At that time, Mr. Williamson "observed . . . that no provision was yet made for juries in Civil cases and suggested the necessity of it."[43] Two other delegates spoke, one for and one against such a motion, before George Mason, principal author of the Virginia Declaration of Rights arose. The earlier debate seems to have just struck him with the idea of attaching a bill of rights to the nearly finished constitutional plan. The notes of Madison record:

> Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, and would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.[44]

Mr. Gerry made such a motion; Mason seconded. According to Madison, only two delegates addressed themselves to the motion. Mr. Sherman of South Carolina argued that the "State Declarations of Rights are not repealed by this Constitution" and "may be safely trusted" to protect vital liberties. In rebuttal, Mason observed that "the laws of the U.S. are to be paramount to State Bills of Rights," by which he undoubtedly meant to question Sherman's premise that the state constitutions would suffice to protect individual rights. Without further debate, the states voted, 10-0, to manage without a Bill of Rights. Mason was unable even to secure the vote of his Virginia delegation.[45]

Much of the rest of this chapter of Constitutional history is well known. Mason and Gerry refused, along with Luther Martin, former At-

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41. *Id.* at Vol. III, 1891.
42. SCHUYLER, THE CONSTITUTION OF THE UNITED STATES, 70 (1923).
43. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 587 (1911).
44. *Id.* at 587-88.
45. *Id.*

torney General of Maryland, to sign the document due to the absence of a Bill of Rights. The battle over this issue was carried to the states. Although Hamilton argued passionately that a Bill of Rights was unnecessary (because the central government was already limited by the Constitution's checks and balances) and dangerous (because any rights not specifically mentioned could be considered surrendered), state after state recommended a Bill of Rights in conjunction with ratifying the document.[46]

In the state ratification debates, the absence of a Bill of Rights in general and a prohibition against abusive general warrants in particular sparked some heated exchanges. For instance, the firey Patrick Henry, a noted anti-federalist in Virginia, opposed the Constitution:

> A Bill of Rights is a favorite thing with the Virginians and the people of the other states likewise . . . in the present [Virginia] Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have . . . guarded those indefeasible rights . . . They may, unless the general government be restrained by a Bill of Rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, and wear.[47]

This and numerous comments of a similar character set the stage for President Washington to devote a portion of his first inaugural address to a call for amendments to the Constitution to codify "the characteristic rights of freemen."[48] At that point, James Madison took up the cause of the Bill of Rights which led to the first Congress's approval of the fourth amendment in the manner described earlier.

This general overview of the origins of the fourth amendment prompts several conclusions about the likelihood that the authors of the amendment intended their words to carry the evidentiary rule of exclusion as a means to enforce the prohibition against "unreasonable searches." In the first place, the remedies at common law were well known to the colonists. The celebrated cases that culminated with Entick's court victory took place at nearly the same time (1763-1765) that the merchants of Boston were challenging general warrants in Superior Court (1761) and trying to intimidate customs officers who attempted to conduct a search. Due to the importance of this issue to the colonists and the notoriety of the *Entick* cases and the Parliament's subsequent limits on general warrants, there can be little doubt that the excellent legal talent in the First Congress, including James Madison, understood that ar-

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46. ELIOT, *supra* note 38, at Vol. 3, 659-663 (Virginia); at Vol. 4, 243-252 (North Carolina); Vol. 2, 177-183 (Massachusetts); Vol. 2, 405-414 (New York); Vol. 2, 542-546 (Pennsylvania); and Vol. 2, 549-556 (Maryland).

47. ELIOT, *supra* note 38, at Vol. 3, 448-449.

48. *See supra* note 10.

bitrary searches were adequate grounds for a trespass action and damages, including "exemplary damages."[49] If the debate over the amendment in the First Congress had been prolonged beyond the few moments of attention it actually received in the House and if a Congressman had asked why the amendment was silent about the consequences of an "unreasonable search," the historical context would argue persuasively that the answer would have cited the *Entick* cases for the proposition that the common law provides ample enforcement. As for admissibility of evidence seized by illegal means, the common law counselled the admission of such material based on its reliability.

English courts, though invited to suppress illegally obtained evidence in cases similar to those which gave rise to the exclusionary rule in the United States, have adhered to a reliance on common law remedies and ruled in favor of admissibility of such evidence. The landmark English case is *Kuruma, Son of Kaniu v. R.* in which the court ruled: "In their Lordships' opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."[50] This ruling cited an earlier case from 1861 to show a continuity in the English doctrines on the issue of admissibility stretching back hundreds of years.[51] This also supports the notion that the authors of the Bill of Rights, who borrowed heavily from the English tradition, would not have suggested that their fourth amendment language implied an exclusionary rule contrary to common law. Indeed, this common law rule that a trial court should not question, even under fourth amendment scrutiny, the acquisition or admissibility in court of otherwise competent evidence was also a hallmark of American jurisprudence until well into the twentieth century.[52]

The hypothetical question about fourth amendment enforcement obviously did not arise in the First Congress. Due to the brevity of the debate, little significance can be attached to that fact. After all, many other questions, since often litigated, were not asked, including "what constitutes an 'unreasonable search'?" To the extent that any conclusion can be drawn from the lack of controversy over the phraseology of the amendment, however, it would be that the members of Congress were relatively comfortable with the current state of legal protections pertaining to issues left unaddressed by the amendment. Given the *Entick* cases, that status quo must have been familiar to the members of the First Congress.

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49. *See supra* note 28 and accompanying text.

50. (1955) A. C. 197, 203 (P.C.) (Ken.).

51. 8 Cox's Criminal Law Cases 498, 501 (Q.B. 1861).

52. Adams v. New York, 192 U.S. 585 (1904), not overruled until *Weeks*, 232 U.S. at 383 in 1914, relied heavily on the common-law rule that a trial court should not inquire into the method used to acquire evidence.

Little support, if any, on the other hand, can be mustered for the proposition that the First Congress intended the words they chose for the fourth amendment to carry a suppression doctrine. The language of the fifth amendment suggests that the authors of the Bill of Rights fashioned other policies which impose limitations on the admissibility of certain kinds of evidence, namely evidence obtained by compelling any person "to be a witness against himself." A similar limitation, however, was not stated or implied by the words of the fourth amendment.

The United States Supreme Court summarizes well the historical context of the fourth amendment and serves as well to remind of the importance the First Congress clearly placed upon the warrant clause to prevent abusive searches:

> The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped to speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that "no Warrant shall issue, but upon probable cause," plays a crucial part.[53]

The fourth amendment is silent about the consequences of an "unreasonable search," but the historical record suggests that the amendment's authors likely intended careful warrant procedures to deter violations prospectively and common law tort remedies to deter violations retrospectively.

SUPREME COURT INTERPRETATION

For more than a century following the Convention, the fourth amendment was the subject of very few United States Supreme Court opinions.[54] In 1886, this extended period of constitutional tranquility with relation to the fourth amendment was stirred by *Boyd v. United States*.[55] In that case, the United States Supreme Court held that an order mandating production of an individual's private papers to be used as trial evidence against him violated the fifth amendment. In dicta, the Court mentioned the fourth amendment as alternative grounds for its decision. Although eighteen years after *Boyd* the United States Supreme Court reaffirmed its intention to retain the common law rule that admissibility of reliable evidence in court is not affected by a motion that the evidence was obtained by impermissible means,[56] the *Boyd* opinion laid the foundation for the first enunciation of the exclusionary rule.

In 1914, the United States Supreme Court applied the suppression

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53. Chimel v. California, 395 U.S. 752, 761 (1969).

54. *See, e.g.*, Ex parte Burford, 7 U.S. (3 Cranch) 448 (1806) (Chief Justice John Marshall decides that the fourth amendment applies to arrests) and *In re* Jackson, 96 U.S. 727 (1878) (The post office must have a warrant to open sealed letters).

55. *See supra* note 19 and accompanying text.

56. *Adams*, 192 U.S. at 585.

doctrine to the federal courts in the case of *Weeks v. United States.*[57] The *Weeks* court abandoned the *Boyd* court's misguided emphasis on the character of the evidence[58] and instead initiated the trend toward focusing on the manner by which it was acquired.[59] The Court did not maintain that the exclusion from court of illegally obtained evidence was required by the language of the fourth amendment,[60] but reasoned instead that "if letters and private documents can thus be seized and held and used in evidence against a citizen . . . the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value."[61] Even at the inception of the suppression doctrine, the Court drew a distinction between fourth amendment rights and the particular remedy chosen by the Court to enforce those rights in federal court.

Although the Court carved out some exceptions to its suppression doctrine over the next several years,[62] the next major exclusionary rule case arose in 1949. In *Wolf v. Colorado,*[63] the Court held that the "security of one's privacy against arbitrary intrusion . . . [is] implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[64] The Court declined, however, to impose the exclusionary rule as a mandatory form of enforcement in state courts:

> Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of

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57. *Weeks*, 232 U.S. at 383.

58. *Boyd*, 116 U.S. at 616.

59. Amos v. United States, 255 U.S. 313 (1921), was actually the first case to extend the protection of the fourth amendment beyond private papers. *See also* Katz v. United States, 389 U.S. 347 (1967).

60. Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453, 466 (1976) [hereinafter cited as *In Search of*]. *See also* Elkins v. United States, 364 U.S. 206, 240 (1960) (Frankfurter, J., dissenting with reference to the rule originating "under this Court's peculiarly comprehensive supervisory power."); Wolf v. Colorado, 338 U.S. 25, 39 (1949) (Black, J., concurring on basis that *Weeks* was an exercise of the Supreme Court's supervisory power); Justice Frankfurter's opinion for the majority in *Wolf*, 338 U.S. at 28, strongly suggested that Congress might abrogate the exclusionary rule of evidence. Schroeder, *Deterring Fourth Amendment Violations*, 69 GEO. L. R. 1361, 1370 (1981) [hereinafter cited as Schroeder].

61. *Weeks*, 232 U.S. at 393.

62. Agnello v. United States, 269 U.S. 20 (1925) (evidence seized contrary to the fourth amendment still admissible against parties whose constitutional rights were not infringed by the search because such persons would lack standing to challenge the violation).

63. 338 U.S. 25 (1949).

64. *Id.* at 28.

an alert public opinion, may afford.[65]

Recognizing a serious flaw in the exclusionary rule's application—that it only profits those who could be convicted by the evidence excluded—the Court instead left to the states to select proper means (private actions and internal police discipline) to enforce the constitutional right.

This was the law until 1961 when the Supreme Court decided *Mapp v. Ohio*,[66] the case most often cited for the notion that the suppression doctrine is a constitutional right instead of a remedy preferred at one time by several justices of the Supreme Court. Although noted scholars have struggled to identify the basis for the *Mapp* ruling,[67] it clearly overruled *Wolf*. The four justices represented by the majority opinion noted that more than half of the states which had considered a suppression doctrine in the wake of *Wolf* had wholly or partially embraced it. Moreover, they noted, California's experience that "other remedies have been worthless and futile is buttressed by the experience of other states."[68] Accordingly, these four justices concluded: "It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* court to include the *Weeks* exclusionary rule . . . while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling."[69] With this reasoning, the majority opinion concluded, in essence, that there were no practical alternatives to the suppression doctrine and therefore it should be applied to the states to obtain compliance with the fourth amendment. These four justices were selecting a remedy for the constitutional right.

Although the Court voted 6-3 to reverse the conviction of Miss Mapp, the vote of the justices on the question of whether the fourth amendment requires the exclusionary rule was 4-5 against the proposition. Justice Clark, without tying his rationale to the language of the amendment, had indeed mustered three other votes for his opinion that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments."[70] Justice Harlan, on the other hand, garnered two other votes for his position that "the *Wolf* rule represents sounder Constitutional doctrine than the new rule which replaces it."[71] This left two: Justice Stewart, who voted to acquit on the basis of "free thought and expression" (Miss Mapp was convicted for possession of lewd publica-

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65. *Id.* at 30-31.

66. 367 U.S. 643 (1961).

67. Oaks, *supra* note 6, at 670; Cox, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 SW. L. REV. 68, 71, 77 (1972); *Hearings, supra* note 1, at 348 (Statement of Professor Robert Blakey); Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 418 (1978).

68. *Mapp*, 367 U.S. at 652.

69. *Id.* at 653.

70. *Id.* at 657.

71. *Id.* at 672.

tions), declined to comment on the "constitutional issue,"[72] and later ruled against a constitutional basis for the suppression doctrine;[73] and Justice Black.

Justice Black's position in *Mapp* was that "the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures."[74] He based his decisive vote in favor of reversal on a melding of the fourth amendment with the fifth amendment's ban on self-incrimination. Although Justice Black's approval of the exclusionary policy waned, waxed, then waned again,[75] his firm stand on the insufficiency of the fourth amendment as constitutional justification for the rule never varied. Concurring in the *Wolf* ruling, Black had stated emphatically that the exclusionary rule "is not a command of the Fourth Amendment but . . . a judicially created rule of evidence which Congress might negate."[76] In 1950, he reiterated that the rule was "no more than a question of what is wise judicial policy."[77] In *Mapp*, as noted above, he adhered to his understanding that the fourth amendment supports no exclusionary policy, but found a self-incrimination theory to justify reversal. Six years after *Mapp*, he apparently abandoned even the self-incrimination theory in favor of the conclusion that the "rule [in *Weeks*] rested on the Court's supervisory power over federal courts, not on the Fourth Amendment."[78] A year later, Black attacked the policy of the rule: "For me the importance of bringing guilty criminals to book is a far more crucial consideration than the desirability of giving defendants every possible assistance in their attempts to invoke an evidentiary rule which itself can result in the exclusion of highly relevant evidence."[79] In the same year, Black was ready to discard the rule "where other evidence conclusively demonstrates . . . guilt."[80] Just one year further away from *Mapp*, Justice Black sharply disagreed with the Court's application of the

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72. *Id.* at 672.

73. Justice Stewart joined the majority in Stone v. Powell, 428 U.S. 465 (1976) ("The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment.").

74. *Mapp*, 367 U.S. at 661-662.

75. *In Search of*, *supra* note 60, at 463-479.

76. *Wolf*, 338 U.S. at 39-40.

77. United States v. Rabinowitz, 339 U.S. 56, 67 (1950) (Black, J., dissenting), overruled by Chimel v. California, 395 U.S. 752 (1969).

78. Berger v. New York, 388 U.S. 41, 79 (1967) (Black, J., dissenting). Justice Black's abandonment of the Fifth Amendment underpinnings of the exclusionary doctrine was possibly influenced by two contemporaneous cases that confined constitutional self-incrimination protection to "testimonial" disclosures. Schmerber v. California, 384 U.S. 757, 764 n.8 (1966) and United States v. Wade, 388 U.S. 218, 221-23 (1967).

79. Simmons v. United States, 390 U.S. 377, 397 (1968) (Black, J., concurring and dissenting).

80. Bumper v. North Carolina, 391 U.S. 543, 560 (1968) (Black, J., dissenting).

rule. He reasoned:

> A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.[81]

On this basis, he blazed a path the Court was destined to follow by urging that application of the rule be narrowed to match the parameters of the doctrine's "one primary and overriding purpose, the deterrence of unconstitutional searches and seizures by the police."[82] In another case at nearly the same time, he warned that, without a more reasonable application of the exclusionary rule, "many will rue the day when *Mapp* was decided."[83] The Justice's final prouncement in 1971 on the suppression doctrine was a fitting conclusion. He first noted the "striking contrast" between the fifth amendment's "express, unambiguous" ban on self-incrimination which "in and of itself directly and explicitly commands its own exclusionary rule" and the fourth amendment which "did not when adopted, and does not now contain any constitutional rule barring the admission of illegally seized evidence."[84] He then proceeded to attribute the "thrust of" his concurrence in *Mapp* to an exclusive reliance on the fifth amendment.[85]

Tracing Justice Black's posture on the exclusionary rule is important because he is the only justice outside of the three who joined Justice Clark to find some constitutional basis for the exclusionary rule in *Mapp*. In the face of Justice Black's unwavering disavowal of any fourth amendment foundation for the rule, the plurality opinion in *Mapp* cannot justifiably be cited for that proposition. As discussed earlier, the *Weeks* court made no claim at all to anchoring the rule in the language of the Constitution. While the majority opinion in *Mapp* makes such a claim, its rationale studiously avoids any discussion of the language of the fourth amendment. Thus, the crux of the *Mapp* holding is actually Justice Clark's admision that the "purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[86] The

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81. Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting).

82. *Id.* at 238. Using words reminiscent of Black's discussion of the "primary purpose" of the rule, the Supreme Court limited application of the exclusionary rule to cases where its "remedial objectives are thought most efficaciously served," United States v. Calandra, 414 U.S. 338, 348 (1974), in the cases of United States v. Janis, 428 U.S. 433 (1976) and Stone v. Powell, 428 U.S. 465 (1976).

83. Sibron v. New York, 392 U.S. 40, 82 (1968) (Black, J., concurring and dissenting).

84. Coolidge v. New Hampshire, 403 U.S. 443, 497-98 (1974) (Black, J., concurring and dissenting).

85. *Id.*

86. *Mapp*, 367 U.S. at 656.

four justices in the *Mapp* majority were cloaking policy arguments in rhetoric of constitutional imperative.

The fourth amendment cases immediately following *Mapp* resolved any ambiguity about the objectives and rationale of the *Mapp* decision by abandoning extensive reasoning based on constitutional prerogatives and focusing instead on legal policies that will deter illegal searches. For instance, in *Linkletter v. Walker*,[87] which refrained from applying the exclusionary rule retroactively, Justice Clark—author of *Mapp*—explained that the "purpose [of the *Mapp* decision] was to deter the lawless action of the police." Moreover the Court reasoned that this objective "will not at this late date be served by the wholesale release of the guilty victims."[88] Several other cases decided within a few years of *Mapp* followed the same course of fashioning deterrence policies and avoiding discussions about the requirements of the Constitution.[89]

United States v. Calandra,[90] a refusal to extend the suppression doctrine to grand jury proceedings, cast aside the earlier trend of emphasizing the policy, rather than any constitutional aspects of *Mapp* and concluded forthrightly: "The [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[91] With this premise in place, Justice Powell and five of his colleagues inaugurated a balancing approach to application of the exclusionary rule (foreshadowed by Justice Black's opinion in the *Kaufman* case) that would be certainly suspect if the Court were weighing an absolute constitutional right: "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[92] Justice Brennan, in dissent, correctly apprehended the significance of this shift by articulating an "uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search and seizure cases."[93]

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87. 381 U.S. 618 (1965).

88. Linkletter v. Walker, 381 U.S. 618, 637 (1965). *See also* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 352 (1967).

89. Alderman v. United States, 394 U.S. 165 (1969) (standing only allows the searched parties to contest admissibility of illegally obtained evidence); Lee v. Florida, 392 U.S. 378 (1968) (evidence obtained in violation of Federal Communications Act deemed inadmissible); Terry v. Ohio, 392 U.S. 1 (1968) (limited "frisk" searches constitutional). Each of these cases decided the exclusionary issues with an eye to deterrence as a rationale for the rule, rather than cases on an inflexible fourth amendment mandate.

90. 414 U.S. 338 (1974).

91. *Calandra*, 414 U.S. at 347-48.

92. *Id.*

93. *Id.* at 365. *See also* Schrock and Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 254 (1974) which points out that "Brennan does not actually affirm what Powell denies, i.e., that the aggrieved party has a personal right to suppression." Schrock and Welsh then proceed to demonstrate that this

An alternative policy basis posited for the exclusionary rule is the "imperative of judicial integrity."[94] This concept is an outgrowth of Justice Brandeis' eloquent dissent in *Olmstead v. United States.*[95] The *Michigan v. Tucker* case,[96] decided shortly after *Calandra,* however, disposed of this doctrine as an independent justification for the rule: "This [judicial integrity] rationale, however, is really an assimilation of the more specific rationales discussed in the text of this opinion [namely deterrence], and does not in their absence provide an independent basis for excluding challenged evidence."[97] If this doctrine ever figured in the decision of cases,[98] it does so no longer; the deterrence purpose of the rule essentially has absorbed it.[99]

A year after *Calandra,* the United States Supreme Court confirmed its total break from any constitutional right premise for the exclusion policy by admitting evidence seized without a warrant in good-faith reliance on the validity of a statutory construction authorizing such warrantless searches that was later pronounced unconstitutional.[100] Justice Rehnquist writing for the Court made a clear distinction between the fourth amendment and the exclusionary rule: "[N]othing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed."[101] After citing with approval Justice Powell's "judicially created remedy" language from *Calandra,* the Court concluded: "[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.[102] This logic is elegantly simple: since the suppression policy is a remedy fashioned and preferred by judges rather than a command of the Constitution, then judges may opt to use the sanction only when its remedial purposes would be adequately served.

Two years after *Calandra,* the United States Supreme Court again employed the balancing approach based on the character of the exclusionary rule as a "remedial device" rather than a constitutional right to the exclusion of illegally obtained evidence. In *United States v. Janis,* the

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failure may be fatal to any hope Brennan may have of forestalling the judicial repeal of the suppression doctrine. Although the authors attempt to correct Brennan's error, subsequent Supreme Court decisions have rejected their expanded personal constitutional right and judicial integrity concepts. *See infra* notes 100-110 and accompanying text.

94. Elkins v. United States, 364 U.S. 206, 222 (1960).

95. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Justice Brandeis' dissent featured his famous peroration about government as "the potent, the omnipresent teacher" which "breeds contempt for law" among the people if it disobeys the law itself.

96. 417 U.S. 433 (1974).

97. Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974).

98. Stone, 428 U.S. at 485; Oaks, *supra* note 6, at 669.

99. *Janis,* 428 U.S. at 653; United States v. Peltier, 422 U.S. 531, 537 (1976).

100. *Peltier,* 422 U.S. at 531.

101. *Id.* at 542.

102. *Id.* at 538.

Court refused to expand the scope of the rule to encompass civil proceedings.[103] Justice Blackmun's decision dwelt at length on the dearth of empirical evidence that the suppression doctrine actually deters unreasonable searches, but confirmed that deterrence of unlawful searches remains the primary, "if not the sole" purpose of the rule.[104] The Court then clarified that:

> In the past this Court has opted for exclusion in the anticipation that law enforcement officers would be deterred from violating Fourth Amendment rights. . . . In the situation before us, we do not find sufficient justification for the drastic measure of an exclusionary rule. There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches.[105]

The "drastic" exclusionary remedy, an option of the Court for deterrence of fourth amendment violations in the past, was now creating obstacles to effective law enforcement and placing the Judiciary in a supervisory role more appropriately excercised by Congress or the Executive Branch. Justice Brennan was joined by only one other Justice (Marshall) in the view that the exclusionary rule was an "ingredient of the protections of the Fourth Amendment."[106] As noted by Professors Shrock and Welsh, even Brennan's weak protestations concede the underlying principle that the suppression doctrine is not mandated by the fourth amendment.[107]

Stone v. Powell,[108] decided the same day, weighed the utility of the exclusionary rule against the costs of extending it to collateral review in federal court of a conviction in state court. The premises for this holding were the same: "The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment" and, consequently, judges may apply a "pragmatic analysis"[109] to determine whether the costs of the rule outweigh its "utility" in a particular case.[110] The rule is, thus, a utilitarian device with certain costly detriments, subject to use or rejection based on practical considerations—hardly the kind of treatment reserved for doctrines of constitutional derivation.

United States v. Williams,[111] a case decided by the Fifth Circuit and denied a petition for certiorari, represents definitively the current course of court interpretation of the suppression doctrine. In this heroin posses-

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103. *Janis*, 428 U.S. at 433.
104. *Id.* at 446.
105. *Id.* at 459.
106. *Id.* at 460.
107. *See supra* note 93 and accompanying text.
108. *Stone*, 428 U.S. at 465.
109. *Id.* at 487.
110. *Id.* at 489.
111. 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

sion case, the Fifth Circuit, sitting *en banc*, decided not to suppress evidence "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."[112] The Fifth Circuit undertook a careful analysis of all United States Supreme Court precedents in reaching the basis for its decision:

> The exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high—in this instance the release on the public of a recidivist drug smuggler—with few or no offsetting benefits.[113]

With regard to the question of the origins of the rule, the Fifth Circuit is equally succinct: "The exclusionary rule, it is now well settled, is not itself a requirement of the Constitution. Rather it is a judge-made rule crafted to enforce constitutional requirements, justified in the illegal search context only by its deterrence of future police misconduct."[114]

This survey of United States Supreme Court opinions on the subject of the exclusionary rule leads to several conclusions. In the first place, a majority of the justices of the United States Supreme Court has never held that the fourth amendment mandates application of the exclusionary rule as a matter of right.[115] On the other hand, a clear majority of the justices of the United States Supreme Court has made unequivocal statements implying the opposite conclusion. For instance, the *Calandra* statement that the rule is a "judicially created remedy . . . rather than a . . . constitutional right."[116] Even advocates of the exclusionary rule who contend it is of constitutional dimension candidly admit that the United States Supreme Court could "on its own . . . repeal, or at least curtail, the exclusionary rule."[117] This admits too much, for if the United States Supreme Court may "repeal" the suppression doctrine, it is clearly not required by the Constitution. Indeed the United States Supreme Court's undisputable characterization of the doctrine as a "judicially created remedy" is most logically consistent with the Court's opinion, not to mention the language and history of the Constitution itself.

A second conclusion readily deduced from these cases is that the

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112. United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

113. *Id.*

114. *Id.* at 841-842.

115. *Hearings, supra* note 1, at 748 (Statement of Judge Malcolm R. Wilkey); at 348 (Statement of Professor Robert G. Blakey); at 788 (Statement of Wayne W. Schmidt); at 610 (Statement of David L. Armstrong, President, National District Attorneys Association); at 3 (Statement of Lowell Jensen, Assistant Attorney General, U.S. Department of Justice).

116. *Calandra*, 414 U.S. 347-48.

117. *Hearings, supra* note 1, at 778 (Statement by Professor Yale Kamisar).

United States Supreme Court has deliberately and carefully distinguished fourth amendment rights (against unreasonable searches) from remedies. As the Court has reasoned, since the rule is a utilitarian remedy, its applications and indeed its prolongation depends on its utility in securing compliance with the fourth amendment. In other words, the remedy must actually detere violations of the right and must do so better than any alternative remedy with fewer "costs," to employ the term of *Stone v. Powell.*[118] If it does not deter sufficiently to compensate for its harmful side effects, the exclusionary rule may be replaced or restructured without damage to any principle found in the fourth amendment. Indeed the *Mapp* opinion itself opens the door to the reasoning that has dominated recent United States Supreme Court rulings by separating the "Fourth Amendment's right" from the "sanction of exclusion." "Since the Fourth Amendment's right of privacy has been declared enforceable against the states . . . it is enforceable against them by the same sanction as is used against the Federal Government."[119] Moreover, to the degree that *Mapp* rests most reasonably on the deterrence rationale cited by Justice Clark as the purpose of the exclusionary rule, the case that is supposed to have conferred a constitutional right to exclusion of illegally obtained evidence, in fact, leaves later Courts with ample room to reach the conclusions of *Calandra, Janis, Powell, Tucker, DeFillippo,*[120] and *Peltier.*[121] The exclusionary rule of evidence is a sanction chosen by judges and subject to change or rejection based on its success as a remedy.

This leads to the final syllogistic step. If Congress were to provide a superior alternative remedy, which is clearly within its authority pursuant to its power to legislate federal rules of evidence in the absence of any constitutional prohibition, then such a remedy would suffice to supplant or supplement the suppression doctrine. This is the precise recognition of Justice Black ("[The exclusionary rule] is not a command of the Fourth Amendment but . . . a judicially created rule of evidence which Congress might negate")[122] and the precise recommendation of the Chief Justice:

> Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the Suppression Doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective . . . I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials . . . .
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> For example, Congress could enact a statute along the following

118. 428 U.S. 465 (1976).

119. *Mapp*, 367 U.S. at 655.

120. Michigan v. DeFillippo, 417 U.S. 31 (1979) (evidence not suppressed when seized incident to arrest pursuant to a subsequently invalidated statute).

121. *See supra* note 99 and accompanying text.

122. *Wolf*, 338 U.S. at 71-72.

lines:

(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 . . . .

I can only hope now that the Congress will manifest a willingness to view realistically the hard evidence of the half-century history of the suppression doctrine revealing thousands of cases in which the criminal was set free because the constable blundered and virtually no evidence that innocent victims of police error . . . have been afforded meaningful redress.[123]

Finally, the United States Supreme Court itself in *Janis* has declared that the role of supervising police conduct to preclude "unreasonable searches" is "properly the duty of the Executive and Legislative branches."[124] This invitation, indeed this challenge, to Congress to see that the Constitution is enforced was not uttered, and must not be construed, lightly. Congress has authority to legislate a remedy for the fourth amendment and should not shrink from it.

THE BILLS

Before discussing the legislative proposals to replace or restructure the exclusionary rule, Congress' authority to change a rule of evidence should be established. Article III of the Constitution grants Congress considerable authority to structure the federal court system and significantly influence the way courts conduct their adjudicative business. Article III says simply that the judicial power of the United States shall vest "in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." United States Supreme Court decisions have conclusively established that this text grants Congress wide discretion to establish or refrain from establishing lower federal courts and to ordain them with jurisdiction to hear and decide cases or to refrain from ordaining them.[125] In addition to establishing the court system, Congress

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123. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 421-24 (1971) (Burger, C.J., dissenting).

124. *Janis*, 428 U.S. at 459.

125. See Palmore v. United States, 411 U.S. 389, 412 (1973); South Carolina v.

has implemented this authority to adjust the size of quorum required for the conduct of business in both the United States Supreme Court and the lower federal courts.[126] Section 2 of article III also grants the Congress authority to "regulate" the appellate jurisdiction of the United States Supreme Court.[127] Of course, Congress possesses authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,"[128] including the federal judiciary.

A particularly pertinent example of the exercise of this congressional authority occurred when the Chief Justice submitted uniform Federal Rules of Evidence on February 5, 1973. Congress responded with an enactment which deprived the rules of "force or effect" until they were "expressly approved by Act of Congress."[129] Congress subsequently amended the Chief Justice's proposals and authorized the United States Supreme Court also to amend the rules subject to a procedure granting either house of Congress disapproval authority.[130] This particular legislative exercise has not been challenged as unconstitutional apparently because the United States Supreme Court has acquiesced to Congress' authority to so legislate.[131] The uniform rules of evidence thus promulgated have been in use nationwide for several years.

Of particular note with regard to the exclusionary rule is the overt invitation of the Chief Justice to Congress to legislate an alternative remedy for the fourth amendment.[132] Moreover, the United States Supreme Court has by implication reiterated the Chief Justice's call for such legislation.[133]

Pursuant to this authority, twelve bills have been introduced in the 97th Congress—six in the Senate and six in the House of Representatives. In the Senate, the bills have been introduced by Senator Strom Thur-

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Katzenback, 383 U.S. 301, 331 (1966); Lockerty v. Phillips, 319 U.S. 182 (1943); Lauf v. Shinner, 303 U.S. 315 (1938); Kline v. Burke Construction Company 260 U.S. 226, 233 (1922); Kentucky v. Powers, 201 U.S. 1 (1906); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Cary v. Curtis, 44 U.S. (3 How.) 236-37 (1845); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799).

126. 28 U.S.C. § 1 (1976) (Supreme Court quorum), 28 U.S.C. § 46 (1976) (Courts of Appeals quorum).

127. See *Ex parte* McCardle, 74 (7 Wall.) 506, 514-15 (1869); *Hearings on Constitutional Restraints on the Judiciary Before the Subcommittee on the Constitution of the Senate Judiciary Committee*, 97th Cong., 1st Sess. (1981).

128. U.S. CONST. art. 1, § 8.

129. 87 Stat. 9, P.L. 93-12.

130. 88 Stat. 1926, P.L. 93-595.

131. *See* Trammel v. United States, 445 U.S. 40 (1980) The Chief Justice writing for eight members of the court discussed the congressional purpose of enactment of a particular rule of evidence.

132. *See supra* note 123 and accompanying text.

133. *See, supra* note 124 and accompanying text.

mond (R., South Carolina),[134] Chairman of the Senate Judiciary Committee, Senator Orrin Hatch (R., Utah),[135] Chairman of the Subcommittee on the Constitution, Senator Robert Dole (R., Kansas),[136] Chairman of the Subcommittee Courts, and Senator Dessnis DeConcini (D., Arizona),[137] Ranking Minority Member of the Subcommittee on the Constitution. In the House, the bills have been introduced by Congressman Robin Beard (R., Tennessee),[138] member of the Select Committee on Narcotics Abuse and Control, Congressman Bobbi Fiedler (R., California),[139] member of the Budget Committee, Congressman James Collins (R., Texas),[140] member of the Energy Committee, Congressman Harold Sawyer (R., Michigan),[141] Ranking Minority Member of the House Judiciary Committee's Subcommittee on Crime, and Congressman Dan Lungren (R., California),[142] member of the Judiciary Committee.

These bills fall into basically three categories. The first category, the good faith bills, is best represented by Senator Strom Thurmond's bill, S. 2231, which he introduced along with Senator DeConcini at the request of the Justice Department. This is the position advocated by President Reagan. S. 2231 states that any search or seizure evidence shall be admissible in a federal court "if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment to the Constitution."[143] The Justice Department letter which accompanied S. 2231 to Capitol Hill described the bill as "eliminating the application of the exclusionary rule in situations where the rule's deterrent purpose is not served because evidence was obtained pursuant to a search or seizure undertaken by law enforcement officers in the reasonable and good faith belief that their actions were lawful."[144] This is essentially an exception to the exclusionary rule, which will continue to operate unless the searches and seizures were conducted in good faith. The Justice Department letter also credited the most likely sources of this legislation:

> The proposal . . . is very simlar to that already adopted by the Fifth Circuit *en banc* in *United States v. Williams*, . . . and basically follows the Recommendation of the Attorney General's Task Force on Violent Crime which conducted hearings on the issue around the country and received the opinions of distinguished citizens and jurists of all points of

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134. S. 2231 and S. 2903, 97th Cong., 2nd Sess. (1982).
135. S. 751, 97th Cong., 1st Sess. (1981).
136. S. 1995, 97th Cong., 1st Sess. (1981).
137. S. 101 and S. 2304, 97th Cong. 1st and 2nd Sess. (1981-82).
138. H.R. 4259, 97th Cong., 1st Sess. (1981).
139. H.R. 4422, 97th cong., 1st Sess. (1981).
140. H.R. 4606, 97th Cong., 1st sess. (1981).
141. H.R. 4898, 97th Cong., 1st Sess. (1981); H.R. 5971, 97th Cong., 2nd Sess. (1982).
142. H.R. 6049, 97th Cong., 2nd Sess. (1982).
143. *See supra* note 134.
144. 128 Cong. Rec. S. 2417 (daily ed. March 18, 1982).

view.[145]

The Attorney General's Task Force on Violent Crime reported that "application of the rule has been carried to the point where it is applied to situations where police officers make reasonable, good faith efforts to comply with the law, but unwittingly fail to do so. In such circumstances, the rule necessarily fails in its deterrent purpose."[146] As the United States Supreme Court has observed, the deterrence purpose of the rule presumes that law enforcement officers have engaged in willful or at least negligent activities, and accordingly, that it would have hardly any force when the police have acted in good faith.[147]

Several other bills adopt the basic good faith alteration of the suppression doctrine, but have some varying provisions. For instance, H.R. 4606 does not contain the second sentence of S. 2231 which establishes that any search conducted pursuant to and within the scope of a warrant automatically falls within the good faith exception. H.R. 4898 omits the safe harbor for warrants and also reverses the burden of proof to require the Government to show "by a preponderance of the evidence" that it acted in good faith. Of most interest amongst these corollaries to S. 2231, however, is S. 2304, a bill authored by Senator DeConcini which garnered the support of Senators Thurmond and Hatch. S. 2304 is identical to S. 2231 up to the point that it supplements the good faith exception with an additional excusing condition: "or if to exclude such evidence would constitute a grave miscarriage of justice." The breadth of this language is apparently an attempt to grant courts the latitude to implement remedies enjoyed by the Scottish Courts. The case of *Lawrie v. Muier* exemplifies the case-by-case approach employed by Scotland:

> Whether any given irregularity ought to be excused depends on the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions.[148]

S. 2304 seems to invoke the same breadth of discretion for American courts.

The second category, the substantiality test bills, is best represented by S. 101. S. 101 would add a section to Title 18 of the United States Code prohibiting the exclusion of evidence "solely because that evidence was obtained in violation of the Fourth Amendment unless the court

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145. *Id.* at S. 2418.

146. UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT, 55-56, August 17, 1981 [hereinafter cited as VIOLENT CRIME, FINAL REPORT].

147. United States v. Peltier, 422 U.S. 531, 539 (1975) (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)).

148. (1950) Scots Sess. Cas. 19, 27 (H.C.J. 1949).

finds as a matter of law"[149] an intentional or substantial violation of the Constitution. In determining whether a violation is "substantial" the court would consider all circumstances of the case including the extent to which: 1) the violation was reckless, 2) privacy was invaded, 3) exclusion will tend to prevent such violations, and 4) things seized would have been discovered in the absence of the violation. The author of this approach, Senator DeConcini, defends his approach as:

> clearly delineating the dimensions of the exlcusionary rule . . . . By removing the application of the exclusionary rule in cases of unintentional or insubtantial fourth amendment violations, S. 101 would reduce judicial efforts now expended in such cases frequently at the expense of the scope of fourth amendment protections . . . . In novel factual situations, the court would make a determination whether the specific facts constituted a violation, and then whether the violation was intentional or substantial.[150]

S. 101 traces its roots to the Model Code Pre-Arraignment Procedure adopted by the American Law Institute in 1975.[151] The ALI model also requires a court finding that a violation was substantial as a precondition to operation of the exclusionary rule. The criteria for determination of "substantiality" in S. 101 are nearly identical to those in the ALI proposal. One certain legal effect of the criteria used to evaluate substantiality in the DeConcini bill would be to codify the current trend in United States Supreme Court cases which weigh heavily the deterrent effects of exclusion in any particular case.[152] Senator DeConcini as well recognizes that this aspect of his "substantiality" test is likely to be the key to disposition of cases under his bill: "The heart of S. 101 is the elimination of the exclusionary rule where it has no deterrent effect."[153] S. 101 forbids exclusion unless the court finds an intentional violation or a substantial violation of the Constitution.

The other bill adopting a "substantiality" test modifies the exclusionary rule far more comprehensively than S. 101. S. 1995, authored by Senator Dole, forbids operation of the exclusionary rule unless the court as a matter of law satisfies each prong of a three-prong test. In order to apply the suppression doctrine, the court would have to find: 1) a constitutional violation resulting in actual prejudice to the defendant, and 2) that the evidence was obtained as a result of intentional or grossly negligent misconduct by the Government agents, and 3) that the evidence was not, and would not have been, known to those agents but for the constitutional violation. Prejudice to the defendant is to be determined based on the totality of the circumstances, including the extent to which: 1) the

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149. *See supra* note 137.
150. 127 Cong. Rec. S. 152-54 (daily ed. January 15, 1981).
151. *A Model Code of Pre-Arraignment Procedure* (1975), A.L.I.
152. *See supra* notes 120-21.
153. *Supra* note 150 at 154.

violation was willful or reckless, 2) privacy was invaded, and 3) exclusion will tend to prevent such violations. This three-prong test would unquestionably foreclose application of the exclusionary rule except in the case of glaring constitutional infractions. To provide an added measure of deterrence, S. 1995 also authorizes a civil suit for actual and punitive damages against the United States for any harm resulting from tortious acts of its agents during an unconstitutional search or seizure, provided, however, that the violation was willful or grossly negligent. In other respects, the tort remedy granted by S. 1995 is similar to the legal cause of action conferred by S. 751.

The final category of bills is best characterized by S. 751, authored by Senator Orrin Hatch. Senator Hatch's legislation is a three-step plan. In the first place, S. 751 would eliminate the exclusionary rule and effect a return to the common law principle that evidence "shall not be excluded on the grounds that such evidence was obtained in violation of the fourth amendment."[154]

Next, Title 28, United States Code, would be amended by the addition of a new chapter providing for tort claims against the United States for damages resulting from a search violating the fourth amendment by officers of the United States acting within the scope of their office. Actual and punitive damages could be awarded by the court based on consideration of all the circumstances of the case including the extent to which: 1) the officer's conduct deviated from permissible standards, 2) the violation was willful, reckless or grossly negligent, 3) the aggrieved party's privacy was invaded, 4) the aggrieved party was injured physically or mentally, 5) property was damaged, and 6) any tort award might prevent future violations of the fourth amendment. Recoveries of any person convicted of any offense on the basis of "unreasonably seized" evidence would be limited to actual personal injury and actual property damages. Although S. 751 would not preclude a lawsuit against an offending officer pursuant to the United States Supreme Court's ruling in *Bivens*,[155] the S. 751 tort remedy would be the exclusive civil remedy against the United States for violation of the fourth amendment and would be limited to a maximum of $25,000. The prevailing claimant could, in the discretion of the court, be awarded reasonable attorney's fees.

The final phase of the Hatch approach would subject officers of the United States who conduct an "unreasonable search" without a good faith belief that their action was constitutional to appropriate discipline at the hands of the Federal agency employing the officer. Senator Hatch explains his bill:

> My bill . . . would eliminate the exclusionary rule, thus permitting evidence not be held inadmissible, when obtained in violation of fourth

154. *See supra* note 135.
155. *Bivens*, 403 U.S. at 388.

> amendment rights by Federal law enforcement officials. . . . Also my bill would allow . . . redress for innocent victims of fourth amendment violations. Federal law enforcement officials who violate fourth amendment rights will not be afforded protection by this bill, but will be required to answer for their actions.[156]

S. 751 responds directly to Chief Justice Burger's invitation for Congress to create a cause of action for damages caused by violations of the fourth amendment based on the venerable doctrine of *respondeat superior*. With such an alternative in place, the Chief Justice saw "no insuperable obstacle to the elimination of the suppression doctrine."[157] The criteria for determining damages are based on the ALI model.

H.R. 4259 differs from S. 751 only in scope. It would eliminate the exclusionary rule in all federal criminal proceedings, while S. 751 is limited to fourth amendment cases. H.R. 5971 is identical to S. 751. H.R. 4422 eliminates the exclusionary rule in state criminal cases and supplants it with a tort remedy against the state officer who violated the fourth amendment. Since 42 U.S.C. § 1983 already authorizes tort actions against state authorities who violate constitutional rights, the primary effect of this legislation would be to remove states from coverage under the exclusionary rule.

In a recent article on the subject of alternatives to the exclusionary rule, William A. Schroeder compiled a very comprehensive list of ways to supplant or supplement the rule.[158] To give an overview and summary of the alternatives and modifications that have stirred sufficient congressional interest to reach bill form, Schroeder's list is hereafter replicated with an indication of whether each form of alternative is addressed by Legislation:

ALTERNATIVE TO EXCLUSIONARY RULE	BILL (S)
Civil Damage Suit	S. 751, H.R. 4259, H.R. 4422 H.R. 5971, S. 1995
Criminal Penalties	Many state statutes Federal law: 18 U.S.C. § 242, 241 (1976)
Non-Judicial External Controls (independent review boards)	No bills
Internal Controls	S. 751

156. 127 Cong. Rec. S. 2399, S. 2400 (daily ed. March 18, 1981).
157. *Bivens*, 403 U.S. at 388.
158. Schroeder, *supra* note 60, at 1386-1424.

Injunctions	Court remedy, but must show absence of remedy at law and imminent harm.
Warrants	Encouragement for warrants in S. 2231, S. 2903, H.R. 6049, S. 2304
MODIFICATIONS TO EXCLUSIONARY RULE	BILL (S)
Good Faith	S. 2231, S. 2903, S. 2304, H.R. 4606, H.R. 4898
Seriousness of the Offense	No Bills (S. 1995)
ALI "Substantiality" Test	S. 101, S. 1995
Adequacy of Departmental Training	No Bill (S. 751)

CRITERIA TO ACCESS THE LEGISLATION

Assessing the merits of these twelve bills requires a standard for analysis. The United States Supreme Court has suggested such a standard in *Stone v. Powell* where it weighed the "utility of the exclusionary rule against the costs of extending it."[159] While it is impossible to predict the benefits and costs of each unenacted policy, a comparison to the present policy of exclusion provides some basis to evaluate alternatives. Thus, without replicating volumes of credible study on the subject, this analysis will briefly recount some benefits and costs of the exclusionary rule as a point of reference for assessing the legislation to replace or revamp it.

a. Deterrence

As stated by the United States Supreme Court, the primary, "if not the sole," purpose and benefit of the rule is deterrence of fourth amendment violations.[160] For all of the reasons explored by Justice Blackmun in *Janis,* empirical studies have not yet and are not likely in the future to "determine whether the exclusionary rule in fact does have any any deterrent effect."[161] Justice Blackmun's investigation confirms the conclu-

159. *See supra* note 110 and accompanying text.

160. *See supra* note 104 and accompanying text.

161. *Janis,* 428 U.S. at 449 n.22. Justice Blackmun cites at length the various empirical studies which have attempted to determine the effect of the exclusionary rule. The Justice cites with approval Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra,* 69 Nw. U.L. Rev. 740 (1974) which states:

> A review of Spiotto's research and that conducted by other does not demonstrate the ineffectiveness of the exclusionary rule. Rather, it tends to illustrate the obsta-

sion reached by Professor Dallin Oaks more than a decade ago:

> [M]ore than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed upon the state courts, there is still no convincing evidence to verify the factual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness.[162]

Justice Blackmun weighed this lack of conclusive evidence of deterrence against the other costs of the rule in refusing to extend it to federal civil proceedings.

While the factual commentaries are, when construed in a light most favorable to the exclusionary rule, still inconclusive, legal commentaries have supplied many reasons to doubt the deterrent effectiveness of the rule. If legislative proposals can alleviate these difficulties, their case for better deterrence than the exclusionary rule would be strengthened even in the absence of empirical proof. First, the suppression doctrine is limited as a deterrent device because its penal impact only operates on evidence presented in trial. Therefore, any police conduct outside the rather narrow function of gathering evidence for court is outside the purview of the rule. This, authorities suggest, is the bulk of police activity.[163] Whenever law enforcement officers search and seize for reasons other than to acquire convictions (merely keeping order or frustrating prostitution or gambling activities or detaining a drunk for his own safety or recovering stolen property), the rule has no effect. This point was made by Chief Justice Earl Warren in *Terry v. Ohio.*

> Regardless of how effective the rule may be when obtaining conviction is an important objective of the police, it is powerless to deter invasion of constitutionally guaranteed rights when the police either have no interest in prosecuting or willing to forego successful prosecution in the interest of serving some other goal.[164]

> cles that stand in the way of any sound, empirical evaluation of the rule. When all factors are considered, there is virtually no likelihood that the Court is going to receive any "relevant statistics" which objectively measure the "practical efficacy" of the exclusionary rule. *Id.* at 763-64.

Justice Blackmun then concludes his lengthy recitation of studies with this conclusion: "No empirical researcher has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." Most interesting about this footnote are the different conclusions reached by the proponents of the rule (represented by the Northwestern University Law Review) and the opponents of the rule (Justice Blackmun) from the same lack of data. Justice Blackmun, writing for the Court, seems to adopt the viewpoint of Professor Steven Schlesinger, *Have Proponents Proven that It Is a Deterrent to Police?* 62 JUDICATURE 404 (March 1979) [hereinafter cited as Schlesinger], that the burden is on advocates of the rule to show that it accomplishes its purpose.

162. Oaks, *supra* note 6, at 672.

163. See *President's Commission on Law Enforcement and the Administration Of Justice Task Force Report: The Police,* 91 (1967) [hereinafter cited as *Task Force Report].*

164. *Terry,* 392 U.S. at 14. See also SKOLNICK, JUSTICE WITHOUT TRIAL 219-235 (2d ed. 1975).

Of more importance, however, is the common police understanding that most defendants never come to trial. Plea bargaining or guilty pleas dispose of most cases before a court ever comes into the picture.[165] This might even create an incentive to violate the fourth amendment in order to apprehend as many criminals as possible with the understanding that most of them will plead guilty and be off of the streets, if only on a reduced sentence, while those freed have at least received a warning. In any event, the rule can never deter if the case never comes to trial, as most do not.

A second question about the deterrent scheme of the rule is that it does not punish the errant policeman, but the prosecutor.[166] The prosecutor does not supervise police search behavior and has little or no formal means to correct and punish erring policemen.

The third problem with the rule's deterrent effect is a corollary of the second. Loss of convictions is not a serious problem for policemen. Law enforcement officers are generally evaluated and commended by their superiors based on their success in apprehending criminals, not based on the number of convictions. This is particularly true if the officer's conduct was undertaken in conformity with customary police techniques and was not a flagrant violation of constitutional rights.[167]

The fourth major question raised by critics of the rule's deterrent capacity is that police rarely, if ever, receive clear and comprehendable guidance while the incident is still fresh in their mind about the nature of their violation and appropriate corrective measures for similar situations in the future.[168] In conjunction with his bill, President Reagan sent to Capitol Hill an explanation which graphically makes this point:

> The rule was applied in precisely this type of case by the Supreme Court in *Robbins v. California*, 453 U.S. 420 (1981). In *Robbins*, the Court excluded evidence of a substantial quantity of marihuana found in a car trunk in a decision based largely on two previous cases, *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979), neither of which had been decided at the time of the search in *Robbins* in 1975. Then, less than one year later the Court overruled *Robbins* in *United States v. Ross*, NO. 80-2209, 50 U.S.L.W. 4580 (June 1, 1982). *Ross* dealt with the same type of automobile searches as *Robbins* and the Court held that evidence seized during such a search was admissible. In the view of the Administration, these cases illustrate why it is totally unrealistic to think that the exclusionary rule can motivate

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165. Burns, *Mapp v. Ohio: An All American Mistake*, 19 DEPAUL L. REV. 80, 95-96 (1969); *Task Force Report*, *supra* note 163, at 186-87; Oaks, *supra* note 6, at 720.

166. Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573, 576 (1971); Oaks, *supra* note 6, at 726.

167. Oaks, *supra* note 6, at 727; Schlesinger, *supra* note 161, at 408.

168. LaFave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1967); Oaks, *supra* note 6, at 731-32.

> even the most conscientious law enforcement officer to apply flawlessly the teaching of a body of law that the courts are still developing and debating.[169]

These four criticisms are not the only question raised about the deterrence function of the rule,[170] but outline some of the most prominent objections. Perhaps Justice Jackson's commentary is a fitting summary:

> That the rule of exclusion and reversal results in the escape of a guilty person is more capable of demonstration than that it deters invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best.[171]

Any of the alternatives or modifications of the rule proposed in the 97th Congress that respond to these frequent criticisms of the rule's capacity as a deterrent will present a persuasive argument for its ability to serve as a better deterrent.

Some of the nation's top jurists have extensively studied the costs imposed on the criminal justice system by the exclusionary rule. Dallin Oaks, for instance, concluded that:

> The use of the exclusionary rule imposed excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police.[172]

Professor Oaks found at least six other untoward consequences of the rule. Circuit Judge Malcolm J. Wilkey draws upon his experience on the bench in identifying twelve costs.[173] The United States Supreme Court has its list of costs as well:

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169. *Statement of Major Purposes* (Document sent to Capitol Hill in conjunction with President's Message conveying S. 2903 to Congressional leaders, *see supra* note 4 and accompanying text); virtually the same language was conveyed to the Congress in conjunction with S. 2231, *see* note 145.

170. *See* Oaks, *supra* note 6 (noting that jurisdictions which refuse to prosecute cases with search and seizure problems leave few cases for application of the exclusionary rule and that rule creates incentives for extra-judicial misbehavior by police to punish perceived wrong-doers).

171. Irvine v. California, 347 U.S. 128, 135 (1954).

172. Oaks, *supra* note 6, at 755.

173. *Hearings*, *supra* note 1, at 419-464.

> The Costs of . . . the exclusionary rule . . . are well known:
> (1) the focus of the trial . . . [is] diverted from the ultimate question of guilt or innocence . . . (2) the physicial evidence sought to be excluded is typically reliable and often the most probative information . . . (3) the rule . . . often frees the guilty . . . (4) the rule is contrary to the idea of proportionality that is essential to the concept of justice . . . (5) it may well have the . . . effect of generating disrespect for the law and the administration of justice.[174]

In light of the volume of authoritative work on the costs of the rule,[175] this analysis will venture with brevity to comment on some of these costs in order to facilitate an assessment of the means employed by legislation to redress these problems.

b. "Frees the Guilty"

The most memorable presentation of this concept is Justice (then Judge) Cardozo's pithy statement at the time that New York rejected the suppression doctrine: "The criminal is to go free because the constable has blundered."[176] Of no less clarity is Dean Wigmore's famous hypothetical:

> Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime and Flavius for contempt. But no! We shall not punish Flavius directly, but shall do so by reversing Titus's conviction. This is

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174. *Stone*, 428 U.S. at 489-491.

175. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE, 60-63 (1977); *Hearings, see supra* text accompanying note 7 in *Janis*, 428 U.S. at 449 n.21, Justice Blackmun supplies a comprehensive list of articles exploring the flaws of the rule and proposing alternatives.

176. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied* 270 U.S. 657 (1926). Justice (then Chief Judge) Cardozo further noted as an illustration: "A room is searched against the law, and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the murderer goes free." *Id.* at 23-24.

This well-known quote stimulated some of the most interesting colloquies of the exclusionary rule hearings, *see Hearings, supra* note 1. At one point, Professor Kamisar noted that "If you mean by blunder that the police officer did not have probable cause to make an arrest . . ., then the criminal goes free because he would have gone free if the constable had not blundered." *Id.* at 366. Senator Specter listened to this a few moments and then questioned: "Well, your analysis on the constable blundering is that when the constable blunders, does not have probable cause . . . then he had no reason to do what he has done. But there is another situation where he had probable cause but [the warrant was technically flawed]." *Id.* at 369. Professor Kamisar responded: "There are two different kinds of blunder. You are raising a different kind of blunder." *Id.* Even Senator Specter's insightful question misses the larger issue, however. Even if the officer has acted without probable cause, a constitutional violation, or pursuant to a flawed warrant, is society served by releasing a dangerous criminal simply because the arresting officer made willful or inadvertant errors? What justification is there in punishing society or permitting a criminal to go free to seek other victims on the basis that the police misbehaved? This returns the debate to its proper perspective: is this the best way to deter police misconduct?

> our way of teaching people like Flavius to behave, and incidently of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.[177]

In short, because it is "now used almost exclusively to exclude from evidence articles which are unlawful to be possessed or tools and instruments of crime,"[178] the rule often operates to deprive a prosecutor of a vital piece of evidence without which "Titus" is released, or, as Senator Hatch has emphatically expressed, the "child molester [is] . . . back in society among children."[179] The Chief Justice notes that the rule has "now been carried to the point of potentially excluding from evidence the traditional corpus delicti in a murder or kidnapping case."[180]

c. "No Recompense for the Innocent"

Justice Jackson expressed this problem succinctly: "It [the exclusionary rule] protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are victims of illegal but fruitless searches."[181] Noted constitutional scholar Charles A. Wright stated the same fault thusly: "If the police conduct the most outrageous and unjustified search of my house but find nothing, the Exclusionary Rule never comes into play. Nonexistent evidence cannot be excluded."[182] Remembering for a moment that the fourth amendment protects against "unreasonable searches," the most concededly "unreasonable search" would occur if an arrogant officer intent upon persecuting religious or political views variant from his own would force his way into, assault the occupants of, and ransack the home of an unsuspecting and law-abiding citizen without any hint of probable cause. How strange that the means chosen to enforce the sacred values of the fourth amendment ignore and apparently tolerate this most "unreasonable" of all possible searches while releasing a dangerous criminal "if there is any investigative error, however unintended or trivial!"[183] Ironically, judges have had to scramble to create causes of action to compensate for this failure of the judicially-created exclusionary remedy.[184] State legislatures and Congress as well have attempted to fill this inexplicable vacuum in the exclusionary rule

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177. 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE, at § 2184, at 31.

178. *Stone*, 428 U.S. at 498 (Burger, C.J., concurring).

179. *See supra* note 156.

180. *Stone*, 428 U.S. at 502.

181. *Irvine*, 347 U.S. at 128.

182. Wright, *Must the Criminal Go Free if the Constable Blunders?* 50 TEX. L. REV. 736, 737 (1972).

183. *See* VIOLENT CRIME, FINAL REPORT, *supra* note 146.

184. *Bivens*, 403 U.S. at 388.

scheme.[185]

d. "The Focus of the Trial is Diverted"

Monrad Paulsen explains this cost of the suppression doctrine:

> The rule attempts to redress a violation of law without the time-honored method of direct complaint and trial on a carefully defined issue. The procedure looking toward exclusion of evidence interrupts, delays and confuses the main issue at hand—the trial of the accused. The principal proceeding may be turned into a trial of the police rather than of the defendant.[186]

This shift of focus problem sweeps within its parameters several other problems of equal magnitude. For instance, as a result of diverting attention away from the defendant's conduct to the conduct of the police, the rule "tends to lessen the accuracy of the evidence presented in court because it encourages the police to lie in order to avoid suppression of evidence.[187] Judge Malcolm R. Wilkey examines that phenomenon from a slightly different vantage point:

> The necessity of deciding the exclusionary issue makes hypocrites out of judges. With a conflict in evidence, the judge will be inclined to "believe" the officer, even if he well knows from all the surrounding circumstances the officer is lying . . . . "True" justice will be done, i.e., the guilty will be punished, even if the verdict is based on falsehood.[188]

In short, incongruity is perhaps a mild adjective to apply to a process which Chief Justice Burger has concisely characterized as "suppression of truth in the search for truth."[189]

e. "Contrary to the Ideal of Proportionality"

In response to the suppression doctrine, evidence is either admitted or excluded during trial. There is no middle ground. The slightest inadvertant technical violation of the fourth amendment under the intense pressure of apprehending a fleeing murderer brings the same result as the deliberate and vengeful violation of a private home in the middle of the night which uncovers evidence of illegal firearm possession. Chief Justice

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185. The Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1976); *see also* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcer's Misconduct*, 87 YALE L.J. 447, 450 n.11 (1978).

186. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 257 (1961).

187. *Janis*, 428 U.S. at 447 n.18 (the footnote also lists the leading articles on the subject which need not be repeated).

188. *Hearings, supra* note 1, at 437-38.

189. Burger, *Who Will Watch the Watchman?* 14 AM. U.L. REV. 1, 23 (1964) [hereinafter cited as *Watchman*].

Burger again must be credited with the most unforgettable statement of this anomaly: "The doctrine represents a mechanically inflexible response to widely varying degrees of police error . . . . Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way."[190]

f. Consumption of Judicial Resources

Although always difficult to untangle the various threads of empirical evidence about the exclusionary rule, motions to suppress unquestionably consume valuable judicial resources. James E. Spiotto concluded that "In Chicago the amount of court time spent on motions to suppress in courts dealing with possessory crimes is substantial."[191] Judge Malcolm Wilkey referred to a General Accounting Office study[192] for his conclusion that: "As far as a sitting judge is concerned, the pertinent statistic is how often a Fourth Amendment suppression motion arises in a case going to trial. On that critical point the GAO stated, "Thirty-three percent of the defendants who went to trial file Fourth Amendment suppression motions."[193] Judge Wilkey's own survey of the District of Columbia Circuit revealed that: "in the three years 1979-81, we wrote opinions in 95 criminal cases, in 21 of which, or 22.1%, the question of excluding the evidence . . . required analysis and decision."[194] While the degree of the burden placed on courts might be debated,[195] the exclusionary rule clearly consumes valuable judicial resources.

g. "Generates Disrespect for the Law"

This comment of the *Stone* court is basically an assessment of public perception. Those most sensitive to the will of the public are the public's representatives. Thus, the comments of elected officials can probably explain better than most any other source the reasons for this public reaction. Senator Orrin Hatch succinctly states: "In short, the rule rewards the law-breaker, punishes society, and ignores the infringer of the Constitution."[196] Congressman Robin Beard maintains: "It punishes the victim [of crime] . . . who suffers by watching his tormentor go free . . . for the misdeeds of the police . . . . The exclusionary rule only helps criminals

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190. *Bivens*, 403 at 418-19; *see also* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046-49 (1974) [hereinafter cited as Kaplan] and Comment: *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. CRIM. L.C. & P.S. 256, 258-9 (1972).

191. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243, 249 (1973).

192. *Hearings*, *supra* note 1, at 383.

193. *Id.* at 433-35.

194. *Id.*

195. *Id.* at 382 (Statement of Professor Yale Kamisar).

196. *See supra* note 156.

. . . because if the person [searched] were innocent, there would be no evidence of crime to seize."[197] Senator DeConcini adds that because the rule "diminishes public respect for the legal and judicial system . . . the time has come to rid ourselves of a judge-made rule that has ill served us for many years."[198] Finally President Reagan, when proposing recently a three-part legislative package to combat crime (insanity defense and habeas corpus reform in addition to exclusionarry rule reform), gave a statistic which is highly relevant to the question of public perception: "By 1981, according to one survey, nearly eight of ten Americans did not believe that our system of law enforcement discouraged people from committing crimes—a fifty percent increase in just the last fifteen years."[199] Perhaps this explains why Chief Justice Burger, speaking before he ascended to the nation's highest judicial office, regretted that "the operation of the Suppression Doctrine unhappily brings to the public gaze a spectacle repugnant to all decent people—the frustration of justice."[200]

ASSESSING THE LEGISLATION

With criteria outlined in the form of a discussion of the problems with the practice the bills would replace or reconstruct, the pending legislation may be assessed according to an identical standard.

a. The Good Faith Bills

The good faith bills would enact an exception to the exclusionary rule preventing its application whenever an officer seizes evidence in the reasonable good faith belief that his actions fully comply with the law. The application of the exclusionary rule would in many instances depend on an assessment of the state of mind of the investigating officer.

1. Deterrence

By choosing to modify existing practice and suggesting no alternative means of deterring "unreasonable searches and seizures," the good faith bills basically adopt the assumption that the exclusionary rule effectively discourages fourth amendment violations. Only to a slight degree would the good faith modification alone improve the four factors that undercut the deterrent capacity of the rule. On the other hand, it might produce an additional obstacle to deterrence. The new good faith exclusionary rule would still only operate on evidence presented in trial and would have no effect whatsoever on police activities outside the purview of police evidence-gathering. The modified rule would still punish the prosecutor, not

197. 127 Cong. Rec. E3705 (July 24, 1981).
198. *See supra* note 150.
199. *See supra* note 4.
200. *Watchman, supra* note 189, at 12.

the errant policeman. Thus, the good faith alteration would make no appreciable improvements in the first two factors undercutting the deterrent effect of the exclusionary rule. The third factor involves the professional and peer group approval systems for policemen. Whenever law enforcement officers performed a search in harmony with established police techniques, their illegal conduct would most likely be undertaken in "the good faith belief that it was in conformity with the fourth amendment."[201] Therefore, searches failing to meet the good faith test would be more easily identified as flagrant violations. Supervising officers would be less likely to excuse the breach. Although officers may still be primarily evaluated on their success in obtaining arrests, the admissibility of evidence seized during good-faith violations of the fourth amendment would focus more corrective attention on the remaining "bad faith" breaches. Thus the third factor inhibiting the deterrent effect of the rule is somewhat attenuated by the good faith test.

The fourth factor is the lack of clearly communicated standards for application of the exclusionary rule to which police officers can readily learn to conform their behavior. This entails education about legal requirements. Yet the good faith exception to the exclusionary rule, resting as it does upon the state of mind and level of understanding of the investigating officer, could create a disincentive to adequate police department education programs. A department would presumably want its officers to remain uneducated about legal requirements to increase chances that any violations of search and seizure law would be inadvertant. Professor Kaplan surmises that a good faith test "would put a premium on the ignorance of the police officer."[202] At the same time, logic would argue against the notion that a good faith exception would make the search and seizure law any easier to understand or implement. To the contrary, existing fourth amendment requirements of reasonableness, probable cause and proper warrants would be unaltered; complex good faith distinctions would only further ensnarl an already hopelessly tangled legal knot.[203]

On its own, the good faith modification can hardly be said to improve the prospects for deterrence beyond current policies. In fact, to the degree that focusing more corrective attention on "bad faith" violations is outweighed by the "premium on ignorance" and more confusing interpretations of fourth amendment law, achieving an improving record of deterrence may be complicated by the good faith exception standing alone. The good faith exception would not, however, be standing alone. Unlike the situation in 1914 (*Weeks*) or 1961 (*Mapp*), other legal devices are available to supplement the penal effects of the exclusionary rule. Federal law enforcement officers face the prospect of personal liability, including

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201. S. 2231, *supra* note 134.

202. Kaplan, *supra* note 190, at 1044.

203. *See* Schroeder, *supra* note 60, at 1416-19, for discussion of some legal complexities of good faith.

punitive damages, in a civil action of the nature created by *Bivens*[204] if they engage in violations of the fourth amendment. Moreover state officers are liable under Section 1983 of the Civil Rights Act of 1871 for constitutional violations.[205] In addition, many states have statutes providing civil redress against state authorities for constitutional violations. As mentioned earlier, it would be difficult to ascertain if the total deterrent effect of these existing remedies would decline under a good faith exception because empirical studies cannot measure the level of deterrent responsibility currently attributable to these different penal devices. Altering the exclusionary rule, however, would not leave the fourth amendment without independent deterrent capacity. Perhaps in anticipation of objections about deterrence, most of the good faith bills employ the fourth amendment's own deterrence device by providing an incentive to conduct searches pursuant to warrants. The bills apply the good faith exception automatically to any search within the scope of a warrant.[206] This would clearly encourage advance judicial approval of searches and further reduce the chances of a constitutionally offensive search.

2. *"Frees the Guilty"*

The good faith exception will unquestionably improve this unfortunate result of the exclusionary rule. The "inadvertent" and "unintended" violations discussed in the Attorney General's Task Force on Violent Crime would no longer operate to benefit the defendant likely to be incriminated by the seized evidence.[207] Ameliorating even further this detrimental aspect of the exclusionary rule is clearly the intent of the additional exception to the rule for "grave miscarriages of justice" embodied in S. 2304. This language would grant federal judges considerable discretion to admit evidence seized in an "unreasonable search" even in the absence of good faith on the part of the investigating officers. The type of case most likely to invoke such a judicial response would present the spectre of releasing a dangerous defendant unless the illegally seized evidence were admitted. This additional exception in S. 2304, therefore, should further reduce usage of the rule for serious offenses.

3. *"No Recompense for the Innocent"*

Since the good faith bills merely modify the current suppression doc-

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204. *Bivens*, 403 U.S. at 388.

205. 42 U.S.C. § 1983 (1976 & Supp. III 1979); see also Monroe v. Pape, 356 U.S. 167 (1961) which eliminated a prominent defense used by state officers to avoid liability under this law.

206. The standard used in these warrant provisions is derived from Franks v. Delware, 438 U.S. 154 (1978) which discussed presumption of validity of affidavit offered in support of a warrant.

207. VIOLENT CRIME, FINAL REPORT, *supra* note 146, at 455.

trine, they provide no remedy to protect innocent persons who are victims of "unreasonable searches," no matter how outrageous or "unreasonable" the search and seizure may be. This conclusion must also be qualified by the recognition that *Bivens* suits are available for federal violations and 42 U.S.C. § 1983 suits are available for state violations of constitutional rights. Moreover, the Federal Tort Claims Act was expanded in 1974 to authorize suits against the United States for certain forms of misconduct by federal officers. This includes assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.[208] The Federal Tort Claims Act was not intended to supplant the exclusionary rule and consequently waives sovereign immunity to allow civil damges only with respect to claims arising out of these intentional torts and not any unconstitutional search. Although the good faith bills do nothing to provide redress for innocent victims, legal developments over the past decade independent of the exclusionary rule have not left an innocent victim wholly without recourse.

4. "The Focus of the Trial is Diverted"

This problem will not be improved by the good faith modification, but could be compounded. Additional complications could result from the court's examination of the officer's covert state of mind in addition to his overt conduct. Given the stigma that may naturally attach to any "bad faith" violations of the fourth amendment, officers would have an incentive to commit perjury which even eclipses preventing the escape of the guilty. Moreover with implicit thoughts and knowledge at issue, perjury may be easier to commit. In any event, the good faith exception is not likely to reduce the chance that the officer, rather than the defendant, is actually on trial.

5. "Contrary to the Idea of Proportionality"

The good faith bills ought to improve this flaw in the application of the suppression doctrine. To employ the Chief Justice's metaphor, releasing a mouse (inadvertent or technical errors of good faith) in a schoolroom would not evoke the same response as releasing a tiger (deliberate, bad faith breaches). This still raises the question of where the good faith line of demarcation will be drawn. Will releasing a toothless terrier in the classroom be acceptable? How about a passive poodle, or a careful collie, or a playful doberman? To make this allusion clear, no matter what the boundaries of the good faith exception, the markedly different treatment of behavior that lies just within the exception as opposed to conduct just outside will hardly be justifiable. The dimensions of the disproportionality will be reduced—releasing tigers is no longer treated as releasing

208. *See supra* note 185.

mice—but the distinctions between turning loose a toothless terrier or a passive poodle may hardly warrant the vastly different penalty.

6. Consumption of Judicial Resources

This consequence of the exclusionary rule is not likely to be significantly altered by a good faith exception. A future decline in the number of motions to suppress because the police conduct is obviously within the parameters of the exception is not likely because the defendant has everything to gain and nothing to lose by urging application of the exclusionary rule. As long as there is the slightest chance that a court might interpret the officer's state of mind as "bad faith," always a possibility given the nebulous character of state of mind evidence, motions to suppress are practically inevitable.

7. "Generates Disrespect for the Law"

To the extent that freeing fewer guilty criminals and reducing the dimensions of the proportionality problem will inspire public confidence, the good faith modification should reduce disrespect for the administration of justice. The observations of the Justice Department upon introduction of S. 2231 are warranted:

> When the rule is applied in the case of a trivial violation or mistake by the police . . . and result[s] in the acquittal of a criminal guilty of a serious crime . . . the lack of proportionality of the sanction applied to the officer's mistake is so great that the confidence of the public in our system of justice cannot help but be eroded.[209]

In conclusion, the good faith modification to the exclusionary rule would make improvements according to three of the criteria for measurement, "frees the guilty," lack of proportionality, and enhanced respect for the administration of justice. It *may*, assessed independently, further complicate deterrence, but should leave the other criteria for assessment unchanged.

b. Substantiality Bills

S. 101 and S. 1995 adopt a comprehensive scheme for modifying the exclusionary rule. Instead of making an exception in the rule, these bills reverse the burden of exclusion by requiring admission of illegally obtained evidence unless the court finds as a matter of law that the violation of the fourth amendment was particularly egregious. In the case of S. 101, the violation must be "substantial" according to criteria that stress the likelihood that exclusion will prevent future grievous violations. In the case of S. 1995, the violation must be intentional (or grossly negli-

209. *See supra* note 144.

gent) *and* cause actual prejudice to the defendant according to criteria that stress the likelihood of deterrence *and* produce evidence the officers would not have otherwise acquired.

1. Deterrence

Both S. 101 and S. 1995 retain the exclusionary device as a deterrent for particularly serious violations of the fourth amendment. The exclusionary rule would not operate under S. 101 unless the violation were "substantial" and under S. 1995 unless the three conditions were met. Assessed independent of all other factors, this suggests that deterrence of fourth amendment violations would be dissipated even more than under the good faith exception bills. Such a conclusion, however, would have the flaw of considering the exclusionary rule the only existing deterrent to such breaches. As mentioned under the discussion of good faith bills, state and federal laws, judicial and statutory, currently authorize several forms of overlapping relief to guarantee that constitutional violations do not go unrelieved and offending officers do not go unpunished. S. 101 and S. 1995 place trust in these existing forms of deterrence. No empirical evidence exists to substantiate an assertion that such reliance is ill-founded.[210] In addition, S. 1995 further discourages constitutional infractions by placing the United States under the threat of civil tort liability for damages caused by an illegal search.

2. "Frees the Guilty"

Short of abolishing the exlusionary rule, these approaches probably address this problem as completely as possible. S. 1995 would probably release even fewer guilty defendants than would S. 101 because a fourth amendment violation would have to meet all three tests, only one of which—prejudice to the defendant—is assessed by criteria similar to the determination of "substantiality" under S. 101. Despite this apparent difference, neither bill is likely to authorize the application of the exclusionary rule to exclude evidence that will incriminate a dangerous offender of a violent crime. These bills are accordingly far superior to the good faith exception approach in solving this suppression doctrine dilemma.

3. "No Recompense for the Innocent"

In this respect, S. 101 does not differ from the good faith bills. S. 1995, on the other hand, authorizes a civil suit against the United States to supplement existing remedies for the innocent.

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210. *See supra* note 161.

4. "The Focus of the Trial is Diverted"

Much of the discussion of this factor relative to the good faith bills applies here as well. The defendant will still have every incentive to make a suppression motion even if the chances of success are almost nil; he has nothing to lose. Because the application of the exclusionary rule will not depend upon the state of mind of the investigating officer under these bills, however, the focus of the trial is not likely to swing to police misconduct except in the case of flagrant fourth amendment violations. Thus, only rare instances of egregious police misbehavior are liable to side-track the court for a lengthy examination of the merits of a motion to suppress. The bulk of the motions should be disposed of routinely after an initial period of judicial clarification of the "substantiality" and "prejudice to the defendant" concepts. As stated before, S. 1995 would solve this problem even more completely than S. 101 because the court could immediately refuse to apply the exclusionary rule to any violation that is not intentional or grossly negligent or any violation that produces evidence that the officers would have discovered even in the absence of the fourth amendment breach. This exclusionary rule side-effect should also be substantially dispelled by these bills.

5. "Contrary to the Idea of Proportionality"

Unlike the good faith bills, S. 101 and S. 1995 should come close to a complete resolution of this problem. After all, a violation must be of "tiger" magnitude before consideration is even given to operation of the exclusionary rule. Only a single reservation prevents the judgment that these bills solve the problem completely. As the courts provide judicial clarification of the terms "substantially" and "prejudice to the defendant," some distinctions may develop between vicious tigers and frightened tigers which will invoke wholly disparate responses. This unproportional operation should be so infrequent and so inconsequential in comparison with the gravity of the initial violation (releasing a tiger) that this problem can be said to be effectively dispelled by these bills. Once again, S. 1995 would leave considerably less room for potential disparity than S. 101.

6. Consumption of Judicial Resources

Both bills grant courts broad discretion to weigh all the circumstances in determining "substantiality" or "prejudice to the defendant." Consequently both bills would elicit a period of judicial clarification during which the courts would enunciate standards for these terms. This clarification burden would be far less for S. 1995 because as mentioned before, the prejudice test is only one prong of a three-prong test, any prong of which would preclude operation of the suppression doctrine. After this initial definition period, however, courts would only be required

to grapple with motions to suppress when grevious fourth amendment violations are alleged. In sum, both bills, but particularly S. 1995, would probably do much to reduce the current judicial burden.

7. "Generates Disrespect for the Law"

For all the reasons mentioned in the discussion of the good faith bills, these bills would certainly restore confidence in the criminal justice system. In one respect, these bills would probably be even better. The good faith exception carries a latent defect in the possibility that a notorious criminal might one day win release due to the exclusionary rule and trigger a public backlash against the law that was supposed to have been changed to preclude such injustices. S. 101 reduces, and S. 1995 reduces even further, that possibility.

In conclusion, S. 101 improves or removes each of the dilemmas created by the exclusionary rule; S. 1995 does so even more certainly and effectively. Both bills, evaluated independent of other remedies, are subject to questions about their ability to deter future fourth amendment violations. By dealing with the clear costs of the exclusionary rule conclusively, however, and retaining adequate deterrence, these bills seem far superior to the good faith bills.

c. Replacements for the Exclusionary Rule

S. 751 and its offshoots forthrightly replace the nonconstitutional exclusionary rule with the common law rule that reliable and relevant evidence is admissible in court regardless of the legality of the means by which it was acquired. Criminal cases would be decided on the basis of all the evidence. To provide deterrence in the absence of the suppression doctrine, S. 751 authorizes a cause of action against the United States and directs federal agencies to take internal disciplinary actions against officers who violated the fourth amendment lacking a good faith belief that the search was constitutional.

1. Deterrence

S. 751 takes note of the dearth of empirical evidence that the exclusionary rule has demonstrated any deterrent effect. Instead it supplements existing deterrent devices other than the exclusionary rule with the creation of a new cause of action against the United States for the victims of an unconstitutional search. To ensure that such causes of action would be brought to redress violations, S. 751 provides reasonable attorney's fees for the prevailing plaintiff. This should ensure that aggrieved parties do not forego a lawsuit due to a lack of capacity to pay the often considerable costs of litigation. In this respect, S. 751 differs from most of the other bills in this category. In addition to actual damages, which could be slight in the case of a brief interruption of privacy, the court would be

authorized to award punitive damages as an additional deterrent. Finally, S. 751 directs the federal agency in charge of the offending officer to take disciplinary actions directly against the offender. Under the scrutiny of congressional oversight, this statutory obligation could be implemented by rule-making and other means to ensure the benefits of internal discipline discussed by Professor William Schroeder.[211] These deterrent devices, supplemented by the existing remedies discussed in the good faith analysis, would be effective for many of the reasons that the preventive efficacy of the exclusionary rule is doubted. The penal effect would be felt directly by the officer subject to civil liability and departmental discipline from his superiors and peers, rather than by the prosecutor. These deterrents would encompass all police search and seizure activities, not just those directed at evidence acquisition. The intradepartmental pressures would be channeled toward compliance with, rather than ignorance of, constitutional requirements. Moreover, each investigating officer would have a personal stake in knowing and obeying the law.

2. *The Costs of the Exclusionary Rule*

Each of the specific costs of the exclusionary rule would be erased. No guilty criminals would escape responsibility for their crimes due to the exclusion of probative evidence. No innocent victims would be without a legal recourse for redress of a completely wrongful search. No criminal trials would judge the actions of the arresting authorities more than the allegedly criminal conduct of the arrested defendant. No mousey constitutional violations would be placed in the same cage with the tigers. No honest commentator could blame implementation of fourth amendment remedies for a disrespect for the administration of justice. Given the probability that most civil liability suits would be settled outside of court, no likely outcome suggests that the replacement remedies would consume as many valuable court resources as resolution of complex suppression motions.

Of the three categories of legislative proposals, these replacement bills hold the most promise of eliminating all the costs of the exclusionary rule while also providing adequate safeguards that the fourth amendment will be scrupulously obeyed.

PROSPECTS FOR ENACTMENT IN THE 97TH CONGRESS

Although a full discussion of the myriad and complex congressional procedures and politics that have prevented exclusionary rule reform to date in the 97th Congress could probably command as much attention with as little consensus as discussion about the rule itself, the primary factor is apparent from a cursory examination of those legislators who

211. Schroeder, *supra* note 60, at 1402-07.

have introduced bills to alter or eliminate the rule. In the Senate, the chairmen of the powerful Judiciary, Labor, and Finance Committees as well as ranking minority member of the Judicairy Committee are the leading proponents of reform. In the House, not a single chairman, subcommittee chairman, or even member of the majority party has taken the first step of proposing changes for the rule. The six House bills have been introduced by members of the minority party.

The reticence of the leading party in the House of Representatives to propose exclusionary rule of evidence is mandated by the Constitution and beyond alteration by statute and that the rule provides the only means of preventing egregious police misconduct. As the message of numerous Supreme Court decisions since *Mapp* and the intent of the Framers of the Constitution comes to be better understood, the first misconception should dissipate. As the liabilities of the suppression doctrine mount in proportion to its marginal benefits, the second misconception should also begin to disappear in the face of an honest search for alternatives that promise better enforcement of the fourth amendment at less cost. Then Congress will reform or replace the exclusionary rule.

reform springs primarily from
two misconceptions: that the
exclusionary rule of evidence....

Judge Marvin O. Teague

MARVIN O. TEAGUE is currently a judge on the Texas Court of Criminal Appeals. Previously, Judge Teague had been City Attorney for Spring Valley, Senior Administrative Assistant to the Texas Court of Criminal Appeals and in private practice. Judge Teague received his undergraduate and graduate degrees in education from Southwest Texas State College. He earned his law degree from the University of Houston in 1961, passing the Texas bar that same year. Judge Teague has been an active member and leader of various professional organizations including past Chairman of the Criminal Law Section of the Houston bar, former Director of the Texas Criminal Defense Lawyers Association and past President of the Harris County Criminal Lawyers Association. In recognition of Judge Teague's expertise in the field of criminal law, he is Editorial Consultant for Matthew-Bender's Texas Criminal Practice Guide.

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IN THE NATION

Attack On the Fourth

By Tom Wicker

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.

In 1914, the Supreme Court unanimously decided that evidence seized in violation of the Fourth Amendment was inadmissible in Federal criminal prosecutions. In 1961 (having ruled in 1949 that the Fourth Amendment applied to the states), the Court extended to state courts the doctrine that unconstitutionally seized evidence was inadmissible in criminal trials.

In this 47-year process, however, successive Courts narrowed the meaning of this so-called "exclusionary rule"; originally seen as an integral, inevitable requirement of the Fourth Amendment, guaranteeing a citizen's right not to be prosecuted with the aid of unconstitutionally obtained evidence, in recent years the rule has been viewed primarily as a judicial device to "deter" police misconduct.

In 1981, the Fifth Circuit Court of Appeals proclaimed a sweeping "good faith" exception that would admit evidence illegally gathered if the police action that seized it, though "mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper." President Reagan's Task Force on Violent Crime recommended that Congress legislate a similar exception; Congress not only is considering such legislation but also the outright abolition of the exclusionary rule.

On the Supreme Court itself, Chief Justice Burger and Justice Rehnquist apparently are ready to throw out the exclusionary rule altogether, and at least three other justices — making a majority of five — appear to favor "good faith" or some other modification. Thus, a drastic diminution of Fourth Amendment protections against improper searches and seizures may be imminent.

Just this week, at the Court's specific invitation, attorneys in an Illinois drug case re-argued it with specific emphasis on whether the exclusionary rule should be modified — particularly by establishment of a "good faith" exception. The response of Paul Biebel Jr., First Assistant Attorney General of Illinois, was instructive and dismaying:

"The price the exclusionary rule exacts is simply too high," he said. "We have people who are undoubtedly drug couriers, but the evidence has been suppressed."

But the crux of the Illinois case is not the exclusionary rule; it is whether the warrant on which the police acted was valid under the Fourth Amendment. The warrant was issued on the basis of an anonymous letter — not "upon probable cause, supported by oath or affidavit" — and the Illinois courts ruled that it was unconstitutional, hence invalid.

Only if the Supreme Court upholds that decision can the exclusionary rule suppress evidence. As William J. Mertens and Silas Wasserstrom, the authors of an exhaustive study of the matter, concluded in the December 1981 issue of the Georgetown (University) Law Journal:

"The exclusionary rule has done nothing to change the powers of the police or the rights of the citizenry. The Fourth Amendment set these standards. The exclusionary rule simply declares that evidence obtained in violation of these rights is not admissible at trial."

If, as Mr. Biebel apparently would, the Court agrees that the Illinois warrant was invalid yet permits the evidence thus seized unconstitutionally to be admitted against the defendants, on grounds that the police acted in good faith, what happens to the standards of the Fourth Amendment? Mr. Mertens and Mr. Wasserstrom quote one court decision:

"If subjective good faith alone were the test, the protections of the Fourth Amendement would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police."

The exclusionary rule, even narrowly defined as a deterrent to police misconduct, is a necessary means of protecting Fourth Amendment rights — yours and mine. Those rights, of course, have to be balanced against society's need to punish criminals; and, in fact, the exclusionary rule already had been significantly whittled down. But the "good faith" exception, if legislated or imposed by the Supreme Court, would tip the balance heavily toward expanded latitude for law enforcement.

Nothing demands such an expansion but a distaste for what now constrains police behavior — the Fourth Amendment, *not* the exclusionary rule. Another article will discuss this in more detail.

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The New York Times

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IN THE NATION

Attack on the Fourth

By Tom Wicker

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A Proven Loophole for Criminals That Needs to Be Narrowed

To the Editor:

Tom Wicker's two-part column on the exclusionary rule (March 4 and 8) makes three very basic mistakes: It assumes that the rule deters illegal conduct by the police; it argues that, in any event, it does not prevent criminals from going to jail, and it confuses a subjective good-faith exception to the rule with an objective one.

Together, these errors make Mr. Wicker's impassioned defense of the Fourth Amendment irrelevant.

The exclusionary rule requires that any evidence, no matter how relevant, for any crime, no matter how heinous, must be disregarded in the prosecution of the person from whom it was seized if the seizure is later found to have been illegal — no matter how innocently and reasonably it was made.

The rule's sole reason for being now relied on by the Supreme Court is that it somehow deters police officers from violating the Fourth Amendment. But the Court has itself candidly recognized in recent years that the costs of the rule often exceed whatever benefits it may have.

There is in fact, no evidence of such deterrence value. (No other country has an exclusionary rule; moreover, at least three countries with advanced legal systems similar to our own — Great Britain, Canada and Israel — have studied the rule and concluded they would not adopt it.)

Creating a good-faith exception to the rule would ensure that it would not be invoked in those instances where it could not possibly act as a deterrent, e.g., when the police officer did not know that his search was illegal or when another court had approved the search beforehand.

Nor is it just a "myth," as Mr. Wicker argues, that many criminals escape jail by invoking the rule.

A recent report from the National Institute of Justice found "a major impact" of the rule on state prosecutions in California. In its sampling, about one in three felony drug arrests were not prosecuted because of the rule. Still more chilling, the report found that "to a substantial degree, individuals released because of search and seizure problems were those with serious criminal records who appeared to continue to be involved in crime after their release."

Thus, the benefits of the rule are nebulous at best, and its costs are very real: the guilty go free, the courts are kept from the truth while being burdened with arcane legal technicalities, the police are discouraged from apprehending criminals and the public loses respect for the law.

The Department of Justice, therefore, has advocated a good-faith exception to the exclusionary rule.

Mr. Wicker assumes that proponents of a good-faith exception want courts to look only at the subjective belief of the police officer of whether his search was legal or not. This is not the case.

Our proposal would limit the exception to those cases where the belief was *objectively* reasonable. Therefore, Mr. Wicker's fears — that the Fourth Amendment would no longer be relevant to a court's inquiry, that police forces would no longer have an incentive to properly train and instruct their officers and that defendants would have an insurmountable burden of proof — are unfounded.

And to his remark that "fear of crime has become epidemic in America," I would add: With good reason. There is too much crime in America, and too many criminals are not going to jail. The objective good-faith exception to the exclusionary rule advocated by the Department of Justice is a good way to help correct both problems.

D. LOWELL JENSEN
Assistant Attorney General
Criminal Division, Dept. of Justice
Washington, March 10, 1983

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The New York Times

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"Exclude truth"

Excluding Justice

By Martin Garbus

President Reagan is moving quickly before the United States Supreme Court and the Congress to overturn the exclusionary rule, which prohibits prosecutors from using illegally seized evidence to try to convict a defendant. By virtue of Supreme Court decisions interpreting the Constitution that date to 1914, illegally obtained evidence cannot be used against a defendant. If the Administration's position succeeds, the Constitution will be undermined.

The Administration is now seeking, in a case before the Court and in a bill introduced in Congress, a "good-faith" exception to this constitutional rule. This exception would permit the judge and jury to use the evidence if they concluded that a law-enforcement officer had acted in good faith — although he had acted illegally and in violation of the Constitution — in seizing the evidence.

If the Administration's position is accepted, it will create one set of laws for those in power and another for those not in power. It will give permission for one class of citizens to violate the Constitution and be rewarded while others who break the law are to be punished.

A few examples show the danger of the Administration's position.

Under the Reagan approach, all that a law-enforcement officer need say in order to get illegally seized evidence used to obtain a conviction is that he did not know that the law required that counsel be present when the incriminating statement was made; that he failed to give the constitutionally required Fifth Amendment warning against self-incrimination either because he forgot or did not know he had to; that he broke down the door because he thought — it turns out he was wrong — that the defendant was destroying the evidence.

President Reagan claims that the public is losing faith in a legal system that is not stopping crime. He rejects the decision of the Framers of our Constitution, who concluded that constitutional protections are not too costly a price to pay for a democratic society, even if there are rare unprosecuted crimes. Morality, President Reagan believes, is on the side of the good-faith exception. This is myopic.

On the contrary, the good-faith exception encourages violations of the law. Under the good-faith exception, a court, at the very time that it declared that an officer had acted in an unconstitutional manner, would nonetheless deprive its own declaration of any practical meaning by approving the use of the wrongfully seized evidence. It would thereby give law enforcement immense uncontrolled power.

But excluding unlawfully obtained evidence encourages lawful activity, discourages unlawful activity and reinforces the central role of courts in declaring and enforcing the Constitution.

The good-faith exception places a premium on ignorance and encourages lying. Under the good-faith exception, the courts would become participants in illegal acquisition of evidence for use at trial — activity that ultimately becomes institutionalized. Of all things, ignorance of the law would constitute a defense on the part of a police officer who claims that evidence should be admitted! There would be deterioration both in police training and police sensitivity to constitutional protections, thereby encouraging wholesale violations. The number of illegal searches of homes and other invasions of privacy would increase dramatically. There would be no deterrent against them.

The good-faith exception would encourage prosecutors and police officers, who know better, to say that they did not understand the law or that somehow they got their facts wrong. Police officers, professionally committed to stopping crime, would often shade the truth to insure convictions. Not so many years ago, police officers believed that they could stop and frisk a suspect to see if he was carrying any narcotics. When the law was changed and the officer first had to have probable cause to believe that the individual had narcotics, the practice of stopping and frisking did not change. Only the police officers' testimony changed. They began to testify that from 20 feet away they saw the defendant take narcotics out of his pocket and drop them on the floor. A New York City judge, who had seen dozens of cases in which each police officer testified in an identical way, remarked that if all the police testimony concerning all the dropping of narcotics were true, there would be a white cloud constantly blanketing Manhattan.

Law is what law does. It is impossible to ask the people of this country to abide by the Constitution when the courts and the prosecutors are given unlimited license to ignore that Constitution. Our society does not require and should not permit convictions based on illegally obtained evidence.

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Rosemary Hart
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The New York Times

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The Trouble With 'Good Faith'

The Supreme Court is tinkering with the Constitution by calling for arguments over the so-called exclusionary rule, which bars illegally seized evidence from criminal trials. Since 1914 the rule has enforced the Fourth Amendment's prohibition against unreasonable searches and seizures. If judges condone the illegal practices, a unanimous Court said then, the Fourth Amendment "might as well be stricken from the Constitution."

The Court will now consider whether to let in evidence obtained "in the reasonable belief" that the seizure was proper — the so-called "good faith exception" supported by the Reagan Administration. Even that small step could dangerously diminish Bill of Rights safeguards and might prove costly to effective law enforcement.

The Fourth Amendment requires that the police arrest and search only with probable cause — a factual basis for believing a person has committed a crime or that evidence of crime will be found. The facts must persuade a judge to issue a warrant or justify a search or seizure later at a trial.

The proposed exception would permit use of evidence obtained by an officer who *believed* his conduct was legal, regardless of the facts. It might well impede the criminal justice process by creating a whole new area of litigation: mini-trials in which the police officer would try to show that he thought his conduct was legal.

It might also reverse years of progress in which the police have become relatively sophisticated about citizens' rights and their powers to search. As Judge Malcolm Wilkey of Washington, D.C., a bitter critic of the basic rule, wrote recently, the good faith exception would encourage perjury and put "a premium on ignorance and lack of training in law enforcement agencies."

•

The case under consideration, *Illinois v. Gates*, is in fact an excellent illustration of that point. It began with a tip to the police that a man and his wife were shuttling marijuana from Florida to their home in Bloomingdale, Ill. Instead of simply raiding the home, the police checked out the tip, monitored the couple's travels and got warrants to search their car and house, where they found more than 350 pounds of pot.

The conviction, under challenge because of questions about the technical validity of the warrant, could thus be upheld on its own merits without resort to "good faith." As important, the Bloomingdale police didn't learn such good procedures by studying how to persuade judges of their noble intentions. They learned them in the knowledge that their cases would hold up in court only if they follow legal rules that assure respect for the rights of all persons, guilty or innocent.

If those rules survive this round of constitutional tinkering, so will the nation's safety and liberty.

file Exclusionary Rule

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Letters

The Proper Limit to Curbing Criminal Evidence

To the Editor:

Your Dec. 6 editorial "The Trouble With 'Good Faith' " is itself troubling because it draws conclusions from incorrect facts and assumptions.

The much-needed reform of the exclusionary rule that the Administration strongly supports, both in the Congress and before the courts, is grounded in the principle that the rule should remain as a deterrent to illegal police conduct. However, it can only deter police officers who believe that they are acting illegally; those who consider their conduct lawful cannot be deterred by the knowledge that evidence illegally obtained will be excluded from trial.

The use of the exclusionary rule as a deterrent to illegal police conduct results in depriving the jury of valuable evidence of a defendant's guilt. As a consequence, a certain number of clearly guilty people are set free to continue to plunder the innocent citizenry. This extraordinary price that society must pay for deterring illegal police conduct should be no higher than absolutely necessary.

The Administration's proposal simply identifies situations in which the exclusionary rule cannot act as a deterrent, is therefore of no use in controlling police behavior and gratuitously bestows a benefit on a criminal.

There are basically two situations in which this occurs:

- A police officer applies to a judge for a search warrant, which is granted. However, because the judge made a legal error in issuing the warrant (or is later second-guessed by a higher court), the evidence is excluded from the trial.

This will not deter illegal police conduct: the police officer has done precisely what the law encourages, namely, present all the facts to a judge, who then decides if the officer is entitled to a warrant.

- A police officer acts with a reasonable good-faith belief that his conduct is lawful.

You are wrong when you say that this would put a "premium on ignorance and lack of training in law enforcement agencies." A police officer's good-faith belief that he is acting lawfully is not enough. In order to avoid the application of the exclusionary rule, he must have a "reasonable" good-faith belief that his conduct is lawful.

To be reasonable, such a belief must be weighed after taking into account the special legal knowledge and training law enforcement officers have. This formulation assumes expertise on the part of police officers; in no way does it place a premium on ignorance.

And your argument that this sensible proposal would create a "whole new area of litigation" is frivolous: in each and every case where the defendant asks the court to exclude evidence there is already litigation. Our proposal would simply change the test the court would apply in deciding the defendant's motion. It would not create an impediment to the judicial process.

Finally, you suggest that the Supreme Court's consideration of this issue is "constitutional tinkering" that threatens the nation's safety and liberty. You fail to point out that the "reasonable good faith" test is already law in two Federal judicial circuits, covering six states. This is apparently one reason the Supreme Court agreed to hear the case.

For The Times to characterize the Court's interpreting the Constitution as "constitutional tinkering" while supporting much more far-reaching forays into what some have characterized as "judicial legislating" makes it difficult to divine the principle you follow in deciding when it is proper for the Court to act.

EDWARD C. SCHMULTS
Deputy Attorney General
Washington, Dec. 6, 1982

THE WINNER OF THE SECOND ANNUAL AJS ESSAY

Henry Lueders Henderson was named the winner of the second annual AJS Essay Contest for his essay, "Justice in the eighties: the exclusionary rule and the principle of judicial integrity." Henderson, a third-year law student at Washington University School of Law, was presented with a $1000 prize and membership in the Society at the AJS Midyear Meeting in Chicago, January 23.

Henderson, 29, has an A.B. in comparative religion from Kenyon College, a B.A./M.A. in theology from Trinity College, Oxford University, England, and an A.M. in theology from the University of Chicago. He is a native of Granite City, Illinois.

Judges for the essay contest were members of the Communications subcommittee of the AJS Programs Committee: William F. Ahlstrom, Vice President, Pharmaceutical Manufacturers Association, Washington, D.C.; Marshall R. Cassedy, an attorney from Tallahassee, Florida; Professor George F. Cole, Department of Political Science, University of Connecticut; and Norman Davis, Area Vice President, WPLG-TV, Miami, Florida. □

Justice in the eighties: the exclusionary rule

by Henry Lueders Henderson

The claim of allegiance that the law makes upon the citizen relies on the notion that the law itself serves the claims of justice and that the public can perceive the integrity of the judicial process. Current debate over the future of the exclusionary rule, which bars the introduction of evidence into trial if it was obtained in violation of the defendant's constitutional rights, demands the attention of those concerned with the future of justice in America and the principle of judicial integrity on which this future rests.

The exclusionary rule originated in a concern for judicial integrity. The critics of the rule ignore this, and advance their arguments solely on pragmatic grounds. This essay argues that only a transformation of the rule that recognizes its historical concern with judicial integrity can meet the pragmatic goals of the critics without sacrificing the claims of justice.

Pragmatism and judicial integrity

Human associations and institutions provide the context for justice. Their particular manifestations of justice in turn define the nature and virtue of those social arrangements. There is an essential reciprocity in the relation of society to justice.[1] Crime, in undermining the human relations that social life depends on, threatens in turn the existence of justice. Thus, the crime

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e and the principle of judicial integrity

wave that has swept through American society since the early 1960s, has profound implications for the future of justice in this nation.[2]

The judicial system attempts to protect justice by providing a pragmatic and a principled response to crime. The pragmatic response consists of particularized judgments on the specific crimes of specific individuals. The principled response is the development of public rules and concepts that give voice to general values and facilitates their application to specific acts.[3]

Critics contend that the courts have failed to deal effectively with crime and in fact contribute to it by formulating due process requirements that favor criminals and hamper law enforcement efforts.[4] A central focus of such criticism is the exclusionary rule. A growing critical consensus calls for either the restriction or total elimination of the rule,[5] almost exclusively for pragmatic reasons. The critics object to what the rule does (exclude highly probative evidence of guilt, allowing criminals to go free)[6] and they object to what, in their opinion, it does not do (deter police illegality).[7]

In reducing the rule to pragmatic dimensions, critics ignore the original basis for the rule: the principle of judicial integrity, which demands that the courts be isolated from contagious contact with unconstitutional activity.[8] A criticism that ignores this basis for the rule hampers the reformulation of the rule in a manner consistent with both the pragmatic and

1. *See* Arkes, THE PHILOSOPHER IN THE CITY: THE MORAL DIMENSIONS OF URBAN POLITICS, 3-20 (Princeton, N.J.: Princeton University Press, 1981). *See also* MacIntyre, AFTER VIRTUE 190-209 (Notre Dame, Ind. University of Notre Dame Press, 1981).

2. Silberman, CRIMINAL VIOLENCE, CRIMINAL JUSTICE, 3-26 (New York: Random House, 1978). *See generally* Remy et Voye, VILLE, ORDRE ET VIOLENCE (Paris: P.U.F., 1981). Radzinowicz and King, THE GROWTH OF CRIME (New York: Basic Books, 1977).

3. *See generally* Dworkin, TAKING RIGHTS SERIOUSLY, 22-31, 81-90 (Cambridge, Mass.: Harvard University Press, 1977).

4. *See, e.g.*, Wilson, THINKING ABOUT CRIME (New York: Basic Books, 1975); van den Haag, PUNISHING CRIMINALS (New York: Basic Books, 1975); Kamisar, *On the Tactics of Police—Prosecution Oriented Critics of the Court*, 49 CORNELL L. Q. 436. (1964).

5. The consensus includes scholars, legislators, judges, and, since the national election of 1980, members of the executive branch. *See, e.g.*, THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT, Recommendation 40 (1981); Geller, *Is the Evidence In On the Exclusionary Rule?* 67 A.B.A.J. 1642 (1981). *See generally* LaFave, I SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 1-39 (St. Paul, Minn.: West Publishing Co., 1978).

6. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 484 (1976).

7. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

8. "Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law..." Olmstead v. U.S., 277 U.S. 438, 485 (1927) (Brandeis, J., dissenting).

principled aspects of the rule and the judicial process itself. An examination of the historical development of the exclusionary rule will clarify the legal principles and pragmatic concerns involved and provide the context in which proposals to reform the rule can be best evaluated.

Evolution of the exclusionary rule

In the first clear[9] articulation of the exclusionary rule, *Weeks v. United States*,[10] the U.S. Supreme Court reviewed a conviction based on evidence obtained in two warrantless searches of the defendant's home. The Court focused on the fact that the evidence was obtained unconstitutionally, and overturned the conviction, holding that use of the illegal evidence was prejudicial error. The Court reasoned that to accept the evidence "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution."[11] The principle of judicial integrity[12] demanded that the Court not act as an accomplice to the violation of the Constitution.

The logical implications of the principle enunciated in *Weeks* were developed in *Silverthorne Lumber Co. v. United States*.[13] At trial, the government used information acquired in an illegal search of the defendant's place of business to frame an indictment and to subpoena incriminating documents. In holding the use of the results of an illegal search unconstitutional, Justice Holmes, for the Court, wrote that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[14] The illegality at the root of the discovery attached to the uses of the discovery.

Development of the *Weeks* exclusionary principle culminated in the doctrine of the "Fruit of the Poisonous Tree," enunciated in *Nardone v. United States*.[15] This doctrine holds that information acquired by unconstitutional means cannot be used to develop evidence admissible in a criminal prosecution because the taint of illegality attaches to evidence derived from an illegal source. The doctrine of the Fruit of the Poisonous Tree is the clearest conceptualization of the principle that judicial integrity requires the exclusionary rule lest courts become accomplices in the violation of the Constitution they are sworn to uphold.

One interpretation says judicial integrity requires the exclusionary rule lest the courts become accomplices in violating the Constitution.

Though the Court saw the exclusionary rule as mandated by principle and developed the rule according to the logic of principle, pragmatic considerations tempered its application and made it responsive to concrete circumstances. For instance, *Nardone* advanced a common-sense "Attenuation Doctrine" as a protection against ravages of overly rigorous logic.[16] The doctrine states that strict causal analysis may prove a connection between certain evidence and a distant violation of the Fourth Amendment, but that the connection may "as a matter of good sense... have become so attenuated as to dissipate the taint."[17] The admission of such attenuated evidence into court would not compromise judicial integrity. This is an example of what Ronald Dwor-

9. The first indication that exclusion of illegally obtained evidence was a proper reply to unconstitutional search and seizure was *Boyd v. United States*, 116 U.S. 616 (1886). *Boyd* focused on the fact that the evidence in question consisted of the defendant's private papers. The Court held that the Fourth and Fifth amendments joined to bar any compelled production of a defendant's private papers because of the sanctity of such material. This position was abandoned in subsequent search and seizure cases, and *Boyd* was not developed.

10. 232 U.S. 383 (1914).

11. *Id.* at 392.

12. The *Weeks* principle was first termed "judicial integrity" in *Elkins v. U.S.*, 364 U.S. 206 (1960).

13. 251 U.S. 385 (1919).

14. *Id.* at 392.

15. 308 U.S. 338 (1939). This was the second time *Nardone* was before the Supreme Court. *Nardone v. U.S.*, 302 U.S. 379 (1937) was the first.

16. 308 U.S., at 341. The attenuation doctrine was fully worked out in *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

17. 307 U.S. at 341.

kin has called a rule generated by principle and qualified by pragmatic policy.[18]

The language of the *Weeks*, *Silverthorne* and *Nardone* decisions strongly implied that the exclusionary rule was constitutionally required. As Justice Holmes wrote in *Silverthorne*, without the exclusionary rule, the Fourth Amendment becomes a mere form of words.[19] However, the Court advanced the rule in terms of its supervisory power over the federal court system, and did not explicitly decide whether the rule was a necessary requirement of the Fourth Amendment.

The rule rejected

In *Wolf v. Colorado*,[20] the Supreme Court extended the Fourth Amendment to state proceedings via the Fourteenth Amendment. In so doing, it confronted squarely the issue of the constitutional status of the exclusionary rule and, over vigorous dissent, held that the Fourth Amendment did not require the rule.[21] The majority characterized the rule as a "matter of judicial implication"[22] and only one of many possible remedies to Fourth Amendment violations.

Although its central holding that the rule was not required by the Fourth Amendment was eventually reversed, *Wolf* introduced a notion that has dominated subsequent consideration of the exclusionary rule—the notion that the rule operates to deter police illegality.[23] The immediate impact of this notion was to strengthen the pragmatic rationale for implementing the rule.

Concern with police illegality was intense in the years following *Wolf*.[24] Justice Traynor, commenting on his opinion in *People v. Cahan*,[25] which adopted the exclusionary rule for California, emphasized the role of widespread police illegality as the motive for adopting the rule.[26] The notion that the rule could deter such illegality was a strong recommendation for adopting it. The U.S. Supreme Court itself, in *Rochin v. California*,[27] cut back on the *Wolf* holding in light of police practices that "shock the conscience," and it extended the rule to exclude evidence obtained by state violence against persons.[28]

This process of cutting back on *Wolf* culminated in the landmark decision of *Mapp v. Ohio*,[29] (partially) overruling *Wolf* by holding the exclusionary rule applicable in all cases, state and federal. Pragmatic considerations certainly influenced the *Mapp* decision. The Court considered at length the experiences of the states (such as California) that had found the exclusionary rule the only effective means of deterring police misconduct. The desire to adopt an effective deterrent for these violations was clearly evident in the Court's decision to extend the exclusionary rule to the states.[30]

The motivating factor in *Mapp*, however, was a concern for judicial integrity.[31] With *Weeks* firmly in mind, the Court argued that to sanction violations of the Constitution by allowing fruits of such violations into court would force the judicial process to "disregard ...the charter of its own existence"[32] and would destroy "that judicial integrity so necessary in the true administration of justice...."[33] Thus *Mapp* declared the exclusionary rule was compelled by constitutional principle and supported by pragmatism.

The eclipse of principle

While the notion that the rule could deter police misconduct gave strong support to extending the rule to the states, the Warren Court was reluctant to apply the rule where it would have absolutely no chance of deterring police misconduct.[34] The deterrent rationale thus functioned, much like the attenuation doctrine, to qualify the principled application of the rule with a pragmatic concern for the actual impact of the rule.

Critics of the rule depart radically from this

18. Dworkin, *supra* n. 3, at 83.
19. 201 U.S. at 392.
20. 338 U.S. 25 (1949).
21. *Id.* at 32.
22. *Id.* at 28.
23. *Id.* at 31 and 44.
24. *See, e.g.*, Brinegar v. U.S., 338 U.S. 160, 181 (1949); Rochin v. California, 342 U.S. 165 (1952); Irving v. People, 347 U.S. 128 (1954).
25. 44 Cal.2d 434, 282 P.2d 905 (1955).
26. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 322 (1962).
27. 342 U.S. 165 (1952).
28. *See* LaFave, *supra* n. 5, at 12.
29. 367 U.S. 643 (1961).
30. *Id.* at 650-656.
31. *Id.* at 665-667.
32. *Id.* at 659.
33. *Id.* at 660.
34. *See* Linkletter v. Walker, 381 U.S. 618 (1965) (*Mapp* not applicable to pre-*Mapp* state court convictions because retroactive application would have no deterrent effect on police illegality).

process of qualifying principle with pragmatism. In their writings the pragmatic concern with deterrence completely replaces the principle of judicial integrity as the basis of the rule. Their proposals share a common assumption that the sole justification for the rule is deterrence of police misconduct.[35] The groundwork for this understanding was laid by the Burger Court, which has spearheaded the attack on the rule.[36]

The dissent of Chief Justice Burger in *Bivens v. Six Unknown Named Agents*[37] is a turning point in judicial attitude toward the exclusionary rule. In his dissent, the chief justice made it clear that he considered the rule to rest solely on a deterrence rationale. He insisted that this provided no justification at all for the rule, that there existed "no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials."[38] He called for replacement of the rule with an effective deterrent that would not exclude evidence from trial and allow the guilty to escape punishment.[39]

Subsequent opinions from the Burger Court repeat the assertion that the purpose of the rule is deterrence.[40] Justice Powell, writing for the Court in *United States v. Calandra*,[41] concluded: "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[42] The deterrence rationale of the rule thus overtook and eclipsed the principle of judicial integrity.

The proposals advanced by critics to restrict or eliminate the exclusionary rule fall into two categories: (1) proposals to restrict the rule by creating a "reasonable belief" exception; and (2) proposals to replace the rule with a tort remedy. A "reasonable belief" exception to the exclusionary rule would allow the fruits of an illegal search to be introduced into court if the officer who conducted the search reasonably believed that his action was legal.[43] The Fifth Circuit recently endorsed such an exception to the exclusionary rule when it ruled in *United States v. Williams*,[44] that evidence seized in conjunction with an unlawful arrest was admissible into court because the agent making the arrest acted in good faith with the reasonable (though mistaken) belief that he was authorized to make the arrest. The court reasoned against suppressing the evidence because it is not desirable to deter actions undertaken with a good faith belief that they are required by duty.[45]

In January 1981, Senator Dennis DeConcini, introduced a bill, S.101,[46] to limit the effect of the exclusionary rule in federal courts along the lines of the "reasonable belief" exception. The bill would exclude illegally obtained evidence only when, as a matter of law, the violation of the Fourth Amendment was intentional or substantial. Determination of "substantiality" would turn on the recklessness of the violation and whether exclusion would tend to deter similar violations.[47] DeConcini also proposed an amendment to the Department of Justice appropriations bill, S.951,[48] that would enact the same "reasonable belief" exception to the exclusionary rule without the delay and discussion that committee hearings on S.101 would entail.

The *Final Report* of the Attorney General's Task Force on Violent Crime called for legislation restricting the exclusionary rule because "evidence obtained in the course of a reasonable, good faith search should not be excluded from criminal trials."[49]

The second category of proposals seeks to eliminate the rule entirely and replace it with a tort remedy for damages from an illegal search and seizure. The dissent of Chief Justice Burger in *Bivens* suggested that a legislatively created tort remedy to Fourth Amendment violations would obviate the need for the exclusionary

35. S.101, 97th Cong. 1st Sess.; S.951, amend. 93, 97th Cong., 1st Sess.

36. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); U.S. v. Calandra, 414 U.S. 338 (1974); U.S. v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976). *See generally*, Salizburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEORGETOWN L. J. 151 (1980).

37. 403 U.S. 388, 411 (1971).

38. *Id.* at 416.

39. *Id.* at 421.

40. U.S. v. Calandra, 414 U.S. 338, 347, 354 (1975); Stone v. Powell, 428 U.S. 465,486 (1976); U.S. v. Janis, 428 U.S. 433, 446 (1976); U.S. v. Ceccolini, 435 U.S. 268, 275 (1978); Michigan v. DeFillippo, 443 U.S. 31, 38 at n.3 (1979).

41. 414 U.S. 338 (1975).

42. *Id.* at 354.

43. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31 (1979).

44. 622 F.2d 830 (1980).

45. *Id.* at 842.

46. S.101, 97th Cong., 1st Sess.

47. *Id.* at §3505 (b) (1) and (2).

48. S.951, amend. 93, 97th Cong., 1st Sess.

49. *Task Force, Final Report, supra* n. 5.

The "reasonable belief" exception to the exclusionary rule would reward ignorance of the Constitution.

rule.[50] The Chief Justice enthusiastically called for such legislation, and even provided an outline for a statute that would pass constitutional muster.[51]

In accord with this suggestion is the proposal of Senators Thurmond and Hatch, S.751.[52] Their bill would eliminate the exclusionary rule as it applies to the Fourth Amendment[53] and would provide a tort remedy whereby the aggrieved party could receive damages from the U.S. government, plus attorney fees.[54] The individual law officer who conducted the illegal procedure would be liable to discipline by his agency.[55] Significantly, these remedies are all conditioned on the extent to which their application would tend to deter future violations of the Fourth Amendment.[56] There is no mention in this proposal, nor in the "reasonable belief" proposals, of the concern for judicial integrity.

50. 403 U.S. 388, 421 (1971).
51. *Id.* at 422, 423.
52. S.751, 97th Cong., 1st Sess.
53. *Id.* at §2692 (e).
54. *Id.* at §2695.
55. *Id.* at §2693.
56. *Id.* at §2692 (c) (b).
57. This is a major concern of the *Task Force*. *See Final Report*, Recommendation 10, *supra* n. 5.
58. Justice Brandeis wrote in *Olmsted v. United States*, 277 U.S. 438, 471 (1928): "Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example." If the Court allows mistaken ideas of the requirements of the Constitution to pass muster, it will teach ignorance of the Constitution. *See* Kamisar, *Is the exclusionary rule an "illogical" or "unnatural" interpretation of the Fourth Amendment?*, 62 JUDICATURE 83, 84 (1978).
59. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 12 (1959).

Drawbacks to rule revisions

These proposals spring from important concerns about the effects of the exclusionary rule. Deterrence of police misconduct is unquestionably limited by the rule's indirect focus on the trial stage of a criminal prosecution rather than on the individual agent whose actions violated the Constitution. A tort remedy would strengthen deterrence. Also, the fact that some demonstrably guilty individuals do escape punishment by virtue of the exclusionary rule is an onerous consequence, both in terms of the effectiveness of the criminal justice system and the appearance of justice.[57] Preventing acquittal of the guilty is a valid concern of these proposals.

These proposals have very serious drawbacks, however. For instance, the "reasonable belief" exception rewards ignorance of the Constitution, undercutting the role of the judicial system as teacher of justice.[58] The exclusionary rule has served the interests of justice by motivating reform of the method and substance of police training, acquainting law enforcement agents more fully with the requirements of the Constitution they are supposed to protect.

More serious is the proposals' failure to provide for, and the critics' refusal to acknowledge, the principle of judicial integrity behind the exclusionary rule. This failure cuts at the very heart of the public law, which requires that legal discourse be attentive to neutral principles. Consider the seminal observations of Professor Wechsler on the necessity of principled adjudication:

> I say that this type of *ad hoc* evaluation is, as it has always been, the deepest problem of our constitutionalism, not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics.... I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.[59]

The opponents of the exclusionary rule, by forsaking the principle of judicial integrity, perform just the harm Professor Wechsler

speaks of, supplanting principle with *ad hoc* proposals.

This essay suggested earlier that the corrosive effect of crime on human associations provided a major reason for concern with the future of the exclusionary rule, because opponents of the rule tout their proposals as steps to the elimination of crime. However, justice is not served by proposals that eschew principled discourse.[60] In fact, justice is itself a concept of human association governed by principles. The proposals to eliminate the exclusionary rule, by refusing to engage the principle of judicial integrity at the heart of the rule, constitute a threat to justice themselves. They bend the requirements of the law to policy considerations, and attempt to restrict public discussion of the law to pragmatic results. The interests of justice demand that future discussion of the exclusionary rule attend to the principle of judicial integrity.

A modest proposal

The critics of the rule advance two major objections to the rule: 1) that it allows demonstrably guilty criminals to go free because highly probative evidence of guilt is excluded from trial; 2) that it fails to effectively deter police misconduct.[61] To eliminate these problems the critics are willing to deny the demands of judicial integrity. But judicial integrity must not be sacrificed, and, indeed, need not be sacrificed to meet the critics' concerns.

The criticism that the rule does not deter police misconduct can be satisfied by adopting a tort remedy by which victims of police illegality could act directly against the officials and agencies that violate their constitutional rights. This would greatly supplement the deterrent effect of the exclusionary rule by increasing the cost of misconduct for the perpetrator. It would also give a statutory remedy to victims of illegal searches in which no evidence of crime is turned up and who now have very little recourse against their tormentors.[62]

The most serious criticism of the exclusionary rule is that it allows many criminals to escape conviction and punishment.[63] Though there is little evidence to support this contention,[64] it is a valid concern, because the perception that criminals escape punishment encourages crime and undermines the legitimacy of the judicial system by creating the appearance of injustice.[65] Examination of the threshold requirements for successfully invoking the exclusionary rule, and of the type of cases where such motions are usually made suggests a way to reformulate the rule to significantly reduce the number of successful suppression motions without sacrificing judicial integrity.

To raise a successful objection to the introduction of evidence at trial, the defendant must demonstrate a reasonable expectation of privacy in the object seized or in the area searched.[66] To do this, he must show that the public recognizes the validity of his expectation. Objects and places in which there is no such public

60. *See* White, *The Fourth Amendment As A Way of Talking About People*, 1974 S. Ct. Rev. 165 (1974).

61. *See* pages 357-359.

62. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure* 37 U. Chi. L. Rev. 665, 709 (1970): "the exclusionary rule will not affect police practices where the police have no desire to arrest." *See also* Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955).

63. *See* Geller, *supra* n. 5, at 1644. He writes that this criticism is premised on "at least two factual assumptions: (1) that the motions to suppress evidence of those charged with serious violent offenses are often granted; and (2) that the granting of a suppression motion results in the release of the defendant." In testimony before the Senate Subcommittee on Criminal Law of the Committee on the Judiciary of the Senate, Assistant Attorney General D. Lowell Jensen voiced these two concerns, but said that even if the assumptions are not valid, any time even one obviously guilty person escapes punishment through exclusionary rule technicalities the price is too high and requires a major revision of the rule. Jensen, *Statement* Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, On the Fourth Amendment Exclusionary Rule, October 5, 1981, n. 2, at 10.

64. *See* Comptroller General of the United States, The Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. GGD-79-45 (April 19, 1979) reporting findings of a survey of 38 U.S. Attorneys' Offices between July 1 and August 31, 1978. Nearly 3,000 cases were examined during this period. The report found that only 1.3 per cent of the cases had evidence suppressed because of Fourth Amendment violations and that only 0.4 per cent of the cases that were screened by the offices were screened because of Fourth Amendment complications. Further, more than half of the defendants who had successful motions to suppress were convicted anyway. Similar data indicating the negligible impact of the exclusionary rule in terms of freeing defendants appear in other studies. *See* Frost, Lucianovic, and Cox, What Happens After Arrest? (Washington, D.C.: Institute for Law and Social Research, August, 1977) (In studying screening patterns in Washington, D.C., the study showed that less than one per cent of all arrests were refused because of due process problems such as unlawful search and seizure.) *See also* Brosi, A Cross-City Comparison of Felony Case Processing (Washington, D.C.: Institute for Law and Social Research, April, 1979).

65. U.S. v. Payner, 447 U.S. 727, 734 (1980); Stone v. Powell, 428 U.S. 465, 490-491 (1976).

66. Rakas v. Illinois, 439 U.S. 128 148 (1978).

recognition are not protected by the Fourth Amendment, and thus not subject to the exclusionary rule.

The vast majority of successful motions to suppress evidence under the exclusionary rule involve possessionary offenses (e.g., stolen property, drugs, illegal weapons).[67] These involve objects in which, by definition, the defendant cannot demonstrate a reasonable expectation of privacy. The motions turn not upon the legal status of the objects seized, but upon the place in which they were found and the legality of the search that turned them up.[68] Thus, the seizure is analyzed entirely in terms of the attendant search. This is in accord with the doctrine of the Fruit of the Poisonous Tree as currently applied.

However, there is no logical necessity for identifying seizure with search. A search can be conducted without any resulting seizure; a seizure is a further action beyond and distinct from a search. As a distinct action, it can be evaluated separately.

The concern linking search and seizure at present is twofold: 1) to prevent an illegal search from going unremedied, and 2) to prevent the courts from being contaminated by accepting evidence seized in violation of the Fourth Amendment. In the first instance, treating the search via the seizure is clumsy and indirect. An effective tort remedy directly addressing the illegal search would eliminate the need for treating the seizure as a surrogate search.

In regard to the second concern, seizure can be reasonable or unreasonable under the Fourth Amendment. The Fourth Amendment does not protect illegally held objects, such as heroin or sawed-off shotguns. Only if the defendant can demonstrate a Fourth Amendment interest in the object seized should it be proper to analyze whether the seizure of the object offended the Amendment; only then should the doctrine of the Fruit of the Poisonous Tree come into the analysis. Without a demonstrable privacy right in the object, the defendant should have no right to invoke this doctrine, proper only to Fourth Amendment guarantees.

Instead of beginning and ending analysis with the search, as it is currently done, analysis should begin with the seizure, and progress to the search only when a Fourth Amendment right is at issue. If the defendant has no Fourth Amendment right to the object seized in the first place, he would receive no Fourth Amendment protection against its seizure.[69]

Such a reformulation of the applicability of the exclusionary rule would meet the concerns of the critics without offending judicial integrity. A more direct and effective deterrent to police misconduct would be created. In addition, a significant percentage of suppression motions under the exclusionary rule would be eliminated with the removal of possessory offenses from the lineup of cases where suppression can be obtained.

Most importantly, judicial integrity would not be compromised by the adoption of this proposal. Unlike the proposals for a "reasonable belief" exception or the total elimination of the rule, no objects seized in violation of the Constitution would be admitted into trial, and the courts would not become accomplices to the violation of their own charter. The important constitutional doctrine of the Fruit of the Poisonous Tree would continue to protect the Fourth Amendment interests of citizens, and prevent introduction of illegally seized evidence into it.

The change contemplated would open the courts to highly probative evidence of crime. This would increase conviction rates, and work to eliminate the impression that criminals escape punishment by operation of law, which creates the appearance of injustice in the public's mind.

Justice would be served by greater deterrence of police misconduct, a higher conviction rate, and the maintenance of judicial integrity. □

67. In a study of D.C., Cobb County, Salt Lake, Los Angeles, and New Orleans prosecution patterns, it was found that "only one homicide arrest was rejected for due process reasons, and no rapes were rejected for these reasons. Most of the due process related rejections were concentrated in drug cases, as might be expected, because drug offenses are possessional crimes and due process violations usually relate to search and seizure." *See* Brosi, *supra* n. 64. In the 1977 INSLAW study of Wahington, D.C. prosecution patterns, it was found that 77 per cent of the cases screened because of due process problems were victimless crimes, primarily involving narcotics. *See* Frost et al., *supra* n. 64. *See generally* Comptroller General of the United States, *supra* n. 64.

68. *See, e.g.* Steagald v. U.S. ___ U.S. ___, 101 S. Ct. 1642 (1981).

69. This recalls in part the analysis of search and seizure suggested in Boyd v. United States, *supra* n. 9, which began its discussion of the seizure in question by considering the nature of the object seized.

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Steve Schlesinger

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The Exclusionary Rule

The exclusionary rule renders inadmissible in criminal proceedings evidence[43] that is obtained illegally or improperly by law enforcement officials. The United States Supreme Court has imposed the rule on federal courts since 1886 and on state courts since 1961.[44] The rule continues in effect although the public policy justifications advanced for it cannot be sustained, and although it has many serious social costs and disadvantages. Moreover, there are alternatives to the exclusionary rule that would accomplish its purposes and eliminate its drawbacks. For these reasons, the rule should be abolished.

Since 1886, the two primary public policy justifications offered for the rule by the High Court and by legal scholars have been deterrence of illegal activity by law enforcement officials and protection of individual privacy.[45] The Supreme Court has made clear in its most recent cases on the subject[46] that it currently regards deterrence of improper searches and seizures as the primary rationale for the rule. Yet six of the seven empirical studies of the effectiveness of the rule conclude that it does not generally deter;[47] the author of the seventh study comes to no definitive conclusion on the question.[48] Indeed, the staunchest defender of the rule in the social science community has recently admitted that "the rule has not always or even often worked [to deter police misconduct]."[49]

There are many reasons to doubt the deterrent effectiveness of the rule. First, the impact of the rule falls only indirectly on police. It does not discipline the errant officer; the brunt of the exclusionary rule's effect is actually borne by the prosecution, which generally has little or no power to punish police misconduct.[50] Second, officers whose illegal actions result in loss of convictions may receive the implicit or explicit approval of their superiors.[51] Third, trial judges do not often explain to officers why their evidence is excluded; clearly the impact of the rule is limited if the police are

not informed of the nature and effect of their wrongdoing.[52] Fourth, the loss of convictions through exclusion of evidence is not as serious a matter for police as might be thought, since police effectiveness usually is judged by number of "collars" or arrests, not by the number of convictions. Fifth, there are strong indications that the rule even encourages certain forms of police misconduct for public relations reasons such as perjury or illegal searches and seizures.[53] Sixth, the operating scope of the rule is limited only to evidence presented at trial. The trial constitutes a narrow stage in the criminal process. As one Presidential Commission pointed out, "a great majority of the situations in which policemen intervene are not . . . criminal situations in the sense that they call for arrest, with its possible consequences of prosecution, trial, and punishment.[54] Because the rule is trial-oriented, it provides little or no remedy for police practices aimed at harassment or seizure of contraband rather than at prosecution and conviction.

In the past, the Court has portrayed the rule as a partial protection of the privacy of victims of illegal searches and seizures: the rule is said to guarantee that, should the state invade the privacy of individuals during the course of a search and seizure, the fruits of that invasion will prove useless to the state in its prosecution, i.e., cannot be used to convict the person from whom they were taken.[55] But this justification cannot be sustained. Since criminal activity is predominantly a public concern, it should follow that a location is not private if activities of great public interest--crimes--are committed or concealed there; when the police find evidence of such activity--by whatever means--it is not an invasion of the individual's privacy to use this evidence in a criminal proceeding. A policeman who discovers evidence of a murder, robbery, assault, or drug factory should not be said to have happened upon private matters; the legitimate public concern for criminal activity and, in short, the public nature

of the contraband, renders the search for and the seizure of the contraband (but that only) a necessary and justifiable police activity on behalf of the public.[56] One can state the argument against the privacy justification a bit differently: a person who uses his home to store dead bodies or a drug factory forfeits what would ordinarily be his right to privacy. This argument for the admissability of criminal evidence does not, of course, extend to the fruits of police action that are unrelated to search and seizure.

The social costs of maintaining the rule are extremely high, as the following brief catalogue of its disadvantages makes clear:

1. A substantial number of otherwise convictable persons escape prosecution or conviction becuase of the operation of the rule. By using data developed by INSLAW concerning the disposition of felony and serious misdemeanor cases in seven representative communities during one year (1977-78), we can estimate that in the nation as a whole, forty-five to fifty-five thousand felony and serious misdemeanor cases were dropped by prosecutors during this period because of exclusionary rule problems.[58] In any case, if the exclusionary rule is midguided, then the release of even one convictable person is one release too many.

Another problem with the rule is that it often excludes the most credible, probative kinds of evidence--fingerprints, guns, narcotics, or dead bodies-- and thereby impedes the truth-finding function of our courts.

3. The exclusionary rule benefits only the guilty; it offers nothing--no help, remedy, or protection, and no compensation--to the innocent. A fundamental purpose of criminal law is to help the innocent. As Judge Wilkey says, "The exclusionary remedy flunks the basic test of protecting society."[59]

4. The rule undermines public respect for the legal and judicial system. One complaint about the legal system is that too many truly guilty suspects are released on technicalities. In fact, this complaint most often refers to the

operation of the exclusionary rule.

5. Both the suppression hearings and the appellate litigation made necessary by the rule are a significant drain on the limited resources of the courts. The 1979 General Accounting Office (GAO) study of the "Impact of the Exclusionary Rule on General Criminal Prosecution," which covered 42 of the 95 U.S. Attorneys offices in the country, stated that "thirty-three percent of the defendants who went to trial filed Fourth Amendment suppression motions."[60] According to that report, exclusion was the most important single issue arising most frequently in federal criminal trials.[61] At the appellate level in the years 1979-81, 22.1 percent of the criminal cases reaching the U.S. Court of Appeals of the District of Columbia required analysis of a suppression question and a decision as to whether evidence should be excluded.[62]

6. Judge Wilkey has written eloquently about the way in which the rule deprives the innocent of adequate due process:

> The American standard of "due process" elevates the demand on whatever system is financed. The result has been plea bargaining, ostensibly the only way to keep the whole system from bogging down. Many innocent defendants who might well have been vindicated at trial are coerced into settling for a conviction on a lesser charge . . . It is against this background that we must measure the diversion of energy, talent and dollars from the central task of fairly determining the guilt or innocence of defendants into adjudicating whether the police have blundered . . . The exclusionary rule thus literally buys what little Fourth Amendment protections it affords at the cost of fewer and less adequate trials for criminal defendants. Even if the rule did a good job of promoting Fourth Amendment values, this would at best be a questionable bargain.[63]

7. The rule encourages judges to condone dubious or illegal searches and seizures in order to admit evidence they are loath to exclude. Because judges think that they must interpret probable cause expansively in order to admit crucial evidence, the rule may have the perverse and unintended effect of limiting

the scope of privacy contemplated by the Fourth Amendment.[64]

8. The rule does not distinguish between more and less serious crimes;[65] the same rule releases both the pickpocket and the murderer.

9. The rule makes no distinction between willful, flagrant violations by an officer and "good faith" errors committed in difficult circumstances.[66]

10. Internal disciplinary efforts by law enforcement authorities are sabotaged by the rule. Law enforcement agencies will be discouraged from meting out internal discipline if their findings are used to suppress evidence at trial. Conversely, law enforcement agencies will lack incentive to discipline internally if a judge has already ruled that a search was proper.[67]

11. The rule intensifies plea bargaining because prosecutors who fear suppression of important evidence at trial may be willing to negotiate regarding the seriousness of the charge or sentencing recommendations rather than risk dismissal.[68] To the extent that the rule is misguided, it gives defense attorneys an illegitimate and often powerful bargaining chip in their negotiations with prosecutors.

Alternatives to the Exclusionary Rule

Discussion of alternatives to the rule must begin with the primary objectives to keep in mind. These are effective deterrence of police misbehavior, compensation of the victims of illegal searches and seizures, and conviction of the guilty. The first two goals require separate proceedings, a disciplinary proceeding against the offending police officer to achieve deterrence and a separate action to award compensatory damages. With such mechanisms in place, improperly obtained evidence could be admitted at trial and the third goal, conviction of the guilty, could be achieved.

As to discipline of the offending officer, a hearing should be held (separately

from the criminal trial of the victim of the search and seizure) before an independent review board that would investigate the nature and severity of the officer's misconduct. The board would assess an appropriate punishment ranging from a fine to permanent severance from the police force. It could take into account the record of the offending official. Furthermore, evidence that the officer acted in "good faith" (i.e. without knowledge of wrongdoing) or that he used reasonable force would be considered.

How would such a hearing be initiated? If a trial judge believed that there were evidence of illegal official behavior (regardless of the outcome of the trial), he could order such a hearing to be held. Under such a system, it would be the judge's responsibility to identify possible illegal police behavior, since defense counsel would not have the incentive of a suppression motion to point it out. In addition to judicial referral of possible misconduct, a citizen who is an innocent victim of illegal search and seizure, but who is never brought to trial involving this search, would be able to report his complaint directly to the review board for investigation. Some jurisdictions might even wish to allow suspects, whether convicted or acquitted, to bring their own complaints directly to the board, although (because of anger at the police) this could lead to the filing of substantial numbers of less than meritorious complaints.

The functions set out above could well be accomplished by an independent review board made up of citizens, judges, law officers, and any other groups whose representation may be desirable.

With regard to the civil remedy, we suggest a statutory civil action against the law officer's jurisdiction with provision for the award of monetary compensation, the amount depending on the gravity of the misbehavior (but with a minimum sum to be awarded in the event that any violation is found). Such an action would allow innocent victims to recover a basic compensatory amount plus counsel's fees without

any showing of specific damage to the victim or flagrant violation by the officer. This civil action should not be available to the guilty--those who are discovered by the police with incriminating evidence on the basis of which they are found guilty at trial--because, as argued previously, their privacy has not been invaded. The only proof necessary in this civil action would be a showing that the victim's Fourth Amendment rights had been violated; the greater the invasion of Fourth Amendment rights, the higher the compensation. The seriousness of the invasion, and thus the amount of compensation, would be measured by the amount of mental or physical suffering and inconvenience that was caused, as well as the degree to which an officer violated clear rules governing proper searches and seizures. There are now in existence state common law causes of action under which victims may recover damages, but civil actions are rarely instituted (and even more rarely won) because it is necessary to show either substantial harm to the victim (for compensatory damages) or outrageous official misconduct (for punitive damages). Winning the proposed civil suit would be easier because no such showing would be necessary. In addition to creating a means for compensation, this plan would provide an economic incentive for victims and for lawyers to bring cases of official misconduct to public attention.

There may be difficulties with this proposal. Like any system, it would not deal properly with all violations, but it is superior to the exclusionary rule because direct discipline of law enforcement officers seems to be a much more effective deterrent than the weak and indirect deterrence of the exclusionary rule, and because the civil tort remedy provides compensation for the victims of illegal searches and seizures--a result conspicuously lacking under the exclusionary rule. Last but not least, all probative evidence would be admitted, regardless of the means used to obtain it.

One alternative to the rule in its current form has been suggested by the 1981

Attorney General's Task Force on Violent Crime:[70] the rule should be applied only when the officer acted in bad faith, that is, when he knew that his search and seizure was in violation of the law. This "good faith" approach to the exclusionary rule reform is incorporated in President Reagan's most recent proposal to Congress on the subject of crime, the Criminal Justice Reform Act of 1982. However, the idea of abolishing the rule, while creating an independent review board and a civil tort remedy, seems much better for four reasons:

1. Each of the 11 costs of the rule (except #9) will be maintained, although to a smaller degree, if the "good faith" approach is adopted.

2. The Task Force recommendation provides little or no deterrence for violations deemed by the courts to be in good faith, which might encourage police to see what can be gotten away with before the courts draw the line on what is an intentional violation.

3. The Task Force recommendation virtually guarantees years of trial and appellate litigation on what constitutes "good faith" and "bad faith" violations.

4. The Task Force Report puts a substantial premium on the ignorance of law enforcement officers. In order to render legitimate a search or seizure under the Task Force's proposal, the officer need only convice the judge that he did not know or fully understand the applicable legal requirements.

Before concluding the discussion of the exclusionary rule, we should note a justification for the rule given some, although not primary, attention by the Supreme Court and legal scholars: it is said to protect the integrity of courts. The theory seems to be that, were the courts to admit illegally obtained evidence, they would be condoning the methods used to obtain it and would consequently lose the respect of the public.[71] Yet, does a court not lose the respect of citizens when it frees dangerous, violent offenders? In addition, while the courts surely have a duty to support Fourth Amendment rights, due process, and fair play,

they also have a duty to pursue the truth--to free the innocent and convict the guilty. Under the exclusionary rule, they fulfill only the former. Under the plan described aboce, the courts to a large extent fulfill both: they express their commitment to the Fourth Amendment by turning over cases of possible police misconduct to the independent review board, and they express their committment to pursuing the truth by judging evidence solely on the basis of its reliability.

In short, the proponents of the rule tell us that we must tolerate the manifold costs of the exclusionary rule because of what it accomplishes for us. But we have shown that the public policy justifications for the rule cannot be sustained. What, then, does the rule accomplish for us? In any case, there are a number of alternatives that are clearly superior to the exclusion remedy.

Before we turn to habeas corpus, we should note that space limitations prevent us from discussing an extremely desirable reform of courtroom criminal procedure: reversal of the Supreme Court's decision in Griffin v. California,[72] which prosecribes prosecutorial and judicial comment on the silence of the accused at his trial. Prosecutorial and judicial comment, along with defense rebuttal, aids significantly in the search for truth and guides the jury in administering justice. This matter has been discussed in detail elsewhere.[73]

Habeas Corpus Petitions

Habeas corpus procedures provide a means for convicted persons to attack the legal validity of their convictions after their appeals have been unsuccessful. Article III of the Constitution extends "the privelege of the writ of habeas corpus" to general prisoners and the Judiciary Act of 1789 gives the courts of the United States the power to issue habeas corpus writs for federal prisoners. Congress extended habeas corpus relief to state prisoners in 1867. Many states have habeas corpus provisions in their constitutions or have provided for collateral attacks[74] by statute.

which has cast doubt on the fairness of federal release practices" and recommends consideration of dangerousness as "a more honest way of dealing with this issue."

[37] M. Gary Holten and Melvin E. Jones, The System of Criminal Justice (Boston: Little, Brown & Co., 1982), p. 288.

[38] See Bail Reform Act of 1981, supra note 24, at note 110.

[39] Note, Preventive Detention: An Empirical Analysis, supra note 21, at 324.

[40] A study in Charlotte, North Carolina by Steven H. Clarke, Jean L. Freeman and Gary G. Koch, The Effectiveness of Bail Systems: An Analysis of the Failure to Appear in Court and Rearrest While on Bail, Institute of Government, University of North Carolina at Chapel Hill (1976) reports that the chance of avoiding rearrest drops 5% for every two weeks the defendant remains on pretrial release.

[41] The American Bar Association Project on Standards for Criminal Justice, Standards Relating to Pretrial Release, Draft 1968, strongly favors the issuance of citations for minor offenses.

[42] Richard D. Hongisto and Carol Levine , Workable Alternatives to the Present Bail System, California State Journal, Nov.-Dec. 1972, p. 580, claim that defendants released in 10% cash bond programs are no more likely to fail to appear or to commit new crimes than those released on conventional bail.

[43] The Fourth Amendment exclusionary rule applies to non-testimonial, physical evidence.

In writing this part of the chapter, I have adapted and quoted from passages in my Exclusionary Injustice: The Problem of Illegally Obtained Evidence (New York: Marcel Dekker, Inc., 1975) 47-49, 56-63, 71-73, 77, 86, by courtesy of Marcel Dekker, Inc., and It Is Time to Abolish the Exclusionary Rule, Wall Street Journal, September 10, 1981, at 24.

[44] The relevant cases are Weeks v. U.S., 232 U.S. 383 (1914) and Mapp v. Ohio, 367 U.S. 643 (1961).

[45] See Steven R. Schlesinger and Bradford Wilson, Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale, 18 Duquesne L. Rev. 225 (1980).

[46] See, for example, Stone v. Powell, 428 U.S. 465, 486 (1976).

[47] The seven studies are: Dallin Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970); Michael Ban, The Impact of Mapp v. Ohio on Police Behavior (delivered at the annual meeting of the Midwest Political Science Association, Chicago, May 1973); Ban, Local Courts v. the Supreme Court: The Impact of Mapp v. Ohio (delivered at the annual meeting of the American Polical Science Association, New Orleans, 1973); James Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives, 2 J. Legal Studies 243 (1973); Bradley Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L. J. 681 (1973-74); Canon, Testing the Effectiveness of Civil Liberties Policies at the State and Local Levels: The Case of the Exclusionary Rule, 5 Am. Politics Q. 57 (1977); and Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases, 4 Columbia J.L. & Soc. Prob. 87 (1968).

Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, supra note 47.

[49] Canon, Testing the Effectiveness of Civil Liberties Policies at the State and Local Levels, supra note 47, at 75.

[50] See Oaks, supra note 47, at 726; and Harvey Wingo, Growing Disillusionment with the Exclusionary Rule, 25 Sw. L. J. 573, 576 (1971).

[51] Oaks, supra note 47, at 727.

[52] See Wayne Lafave and Frank Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987, 1005 (1965); see also Oaks, supra note 47, at 730-31.

[53] See Samuel Dash, Cracks in the Foundation of Criminal Justice, 4 Ill. L. Rev. 385, 391-92 (1951).

[54] President's Commission on Law Enforcement and the Administration of Justice, p. 91 (1967).

[55] See Mapp v. Ohio, supra note 44, at 660 (1961).

[56] For a similar argument, see Edward Barrett, Exclusion of Evidence Obtained by Illegal Searches--A Comment on People v. Cahan, 43 Calif. L. Rev. 565, 580-81 (1955).

[57]Oaks, supra note 47, at 476.

[58]Summary Report: Arrest. Convictability as a Measure of Police Performance, Table 1 at 7 (1981). As Forst's chapter notes, approximately 10,000 arrests, which is less than 1% of felony arrests made in the United States during 1977-78, were rejected by prosecutors because of exclusionary rule violations. In addition, Summary Report, id. suggests that an additional thirty-five to forty-five thousand serious misdemeanor arrests were rejected because of exclusionary rule violations. Serious misdemeanors include assault, petty larceny and drug violations (the serious misdemeanors that are drug-related include a substantial number of arrests for marijuana sale or possession). The crucial point here is that, particularly from the point of view of potential crime victims, it is striking that forty-five to fifty five thousand persons, many of them convictable or dangerous or both, escape prosecution entirely because of the exclusionary rule and are, therefore, free to commit crimes.

[59]Malcolm Richard Wilkey, Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule (Washington, D.C.: The National Legal Center for the Public Interest, 1982), p. 13.

[60]Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. CDG-79-45 (19 April 1979), p. 1.

[61]Id. at 8.

[62]Wilkey, supra note 59, at 15-16.

[63]Id., at 17-18.

[64]See Edward Barrett, Personal Rights, Property Rights and the Fourth Amendment, 1960 Sup. Ct. Rev. 46, 55; Edmund Kitch, The Supreme Court's Possessive Code of Criminal Procedure, 1969 Sup. Ct. Rev. 157-72.

[65]As to applying the exclusionary rule only in the most serious cases, see John Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1046-49 (1974).

[66]See Wingo, supra note 50, at 577-78, and Student Comment: The Tort Alternative to the Exclusionary Rule in Search and Seizure, 63 Journal of Crim. L., C. and P. S. 256, 258-59 (1972).

[67]See Wilkey, supra note 59, at 13-14.

[68]Albert Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 56, 80-82 (1968).

[69]For this civil tort remedy to be successful, states and localities would have to forego the protection of sovereign immunity, i.e., voluntarily assume liability for police torts related to the Fourth Amendment. Both the federal government and the states have moved in the direction of assuming liability for the misconduct of their officials. See Schlesinger, supra note 43, at 78-79.

[70]Attorney General's Task Force on Violent Crime, supra note 36, at 55-56.

[71]See Monrad Paulsen. The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L., C. and P. S. 255, 258-59 (1961); see also Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting); Weeks v. United States, 232 U.S. 388, 394 (1914); Burdeau v. McDowell, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting); United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

[72]380 U.S. 609 (1965).

[73]Steven R. Schlesinger and Deborah Large, Chilling Effects in Criminal Trial Procedure: A Balancing Approach, 10 Cumb. L. Rev. 1 (1979).

[74]Collateral attack questions the legal validity of a conviction after all legal appeals have been exhausted.

[75]Henry M. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970).

[76]Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973).

[77]James Duke Cameron, Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals--A State Judge's Solution to a Continuing Problem, Brigham Young U. L. Rev. 545, 555 (1981).

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

April 12, 1983

FOR: T. KENNETH CRIBB

FROM: WILLIAM P. BARR

SUBJECT: Op-Ed Piece for Mr. Meese on Exclusionary Rule

Attached is my draft of a proposed response to the Garbus op-ed piece in the New York Times last week.

I have given a copy of the draft to Kevin Hopkins for his comments.

cc: Edwin L. Harper

DOCUMENT NO. 12556 4 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 4/5/83 ACTION/CONCURRENCE/COMMENT DUE BY: open

SUBJECT: "Excluding Justice" from New York Times

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
✓ BARR	X	☐	D. LEONARD	☐	☐
BLEDSOE	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	HOPKINS	☐	☐
BRADLEY	☐	☐	PROPERTY REVIEW BOARD	☐	☐
CARLESON	☐	☐	OTHER		
DENEND	☐	☐	_____	☐	☐
FAIRBANKS	☐	☐	_____	☐	☐
FERRARA	☐	☐	_____	☐	☐
GALEBACH	☐	☐	_____	☐	☐
GARFINKEL	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
LI	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
ROCK	☐	☐	_____	☐	☐
ROPER	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
✓ UHLMANN	X	☐	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

REMARKS:

Please return this tracking sheet with your response

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

Excluding Justice

By Martin Garbus

President Reagan is moving quickly before the United States Supreme Court and the Congress to overturn the exclusionary rule, which prohibits prosecutors from using illegally seized evidence to try to convict a defendant. By virtue of Supreme Court decisions interpreting the Constitution that date to 1914, illegally obtained evidence cannot be used against a defendant. If the Administration's position succeeds, the Constitution will be undermined.

The Administration is now seeking, in a case before the Court and in a bill introduced in Congress, a "good-faith" exception to this constitutional rule. This exception would permit the judge and jury to use the evidence if they concluded that a law-enforcement officer had acted in good faith — although he had acted illegally and in violation of the Constitution — in seizing the evidence.

If the Administration's position is accepted, it will create one set of laws for those in power and another for those not in power. It will give permission for one class of citizens to violate the Constitution and be rewarded while others who break the law are to be punished.

A few examples show the danger of the Administration's position.

Under the Reagan approach, all that a law-enforcement officer need say in order to get illegally seized evidence used to obtain a conviction is that he did not know that the law required that counsel be present when the incriminating statement was made; that he failed to give the constitutionally required Fifth Amendment warning against self-incrimination either because he forgot or did not know he had to; that he broke down the door because he thought — it turns out he was wrong — that the defendant was destroying the evidence.

President Reagan claims that the public is losing faith in a legal system that is not stopping crime. He rejects the decision of the Framers of our Constitution, who concluded that constitutional protections are not too costly a price to pay for a democratic society, even if there are rare unprosecuted crimes. Morality, President Reagan believes, is on the side of the good-faith exception. This is myopic.

On the contrary, the good-faith exception encourages violations of the law. Under the good-faith exception, a court, at the very time that it declared that an officer had acted in an unconstitutional manner, would nonetheless deprive its own declaration of any practical meaning by approving the use of the wrongfully seized evidence. It would thereby give law enforcement immense uncontrolled power.

But excluding unlawfully obtained evidence encourages lawful activity, discourages unlawful activity and reinforces the central role of courts in declaring and enforcing the Constitution.

The good-faith exception places a premium on ignorance and encourages lying. Under the good-faith exception, the courts would become participants in illegal acquisition of evidence for use at trial — activity that ultimately becomes institutionalized. Of all things, ignorance of the law would constitute a defense on the part of a police officer who claims that evidence should be admitted! There would be deterioration both in police training and police sensitivity to constitutional protections, thereby encouraging wholesale violations. The number of illegal searches of homes and other invasions of privacy would increase dramatically. There would be no deterrent against them.

The good-faith exception would encourage prosecutors and police officers, who know better, to say that they did not understand the law or that somehow they got their facts wrong. Police officers, professionally committed to stopping crime, would often shade the truth to insure convictions. Not so many years ago, police officers believed that they could stop and frisk a suspect to see if he was carrying any narcotics. When the law was changed and the officer first had to have probable cause to believe that the individual had narcotics, the practice of stopping and frisking did not change. Only the police officers' testimony changed. They began to testify that from 20 feet away they saw the defendant take narcotics out of his pocket and drop them on the floor. A New York City judge, who had seen dozens of cases in which each police officer testified in an identical way, remarked that if all the police testimony concerning all the dropping of narcotics were true, there would be a white cloud constantly blanketing Manhattan.

Law is what law does. It is impossible to ask the people of this country to abide by the Constitution when the courts and the prosecutors are given unlimited license to ignore that Constitution. Our society does not require and should not permit convictions based on illegally obtained evidence.

Martin Garbus, formerly associate director of the American Civil Liberties Union, and author of "Ready for the Defense," is a trial lawyer.

Suppose inspectors found that a nuclear power plant was emitting radiation and was a threat to the community, but, in their investigation, the inspectors had technically breached the legal rights of the plant's owners. What would the American people think of a suggestion that, to deter such future breaches, the inspectors' findings should be suppressed and the plant be permitted to operate regardless of its impact on the public safety? Such a suggestion would be considered perverse.

Yet this is the approach the Supreme Court is following in the criminal law area under the "exclusionary rule", the rule that prohibits the use in a criminal trial of any evidence seized by police in a manner later found to be illegal -- no matter how incriminating the evidence, how heinous the crime, or how reasonably the police acted. This rule is not mandated by the Constitution. Adopted by the Court in 1911 and imposed on all the states in 1961, it reflects a policy judgment by a majority of the Court that suppressing improperly seized evidence is a good way of deterring police misconduct.

The rule is a form of judicial <u>hostage-taking</u>. In essence, judges law-abiding citizens as hostages to ensure the good behavior of the police. If the police misbehave, judges do not punish the police -- they punish society by releasing criminals.

Decades of experience cast doubt on the rule's efficacy as a deterrent. Of the seven empirical studies that have been done, six have concluded that the rule is not an effective deterrent; the seventh is inconclusive. This should come as no surprise, since the rule does nothing to discipline the errant officer. The only one actually punished is society.

The social costs of maintaining the rule are extremely high:

o Criminals are permitted to go free. One recent study estimates that in one year up to 55,000 serious criminal cases were dropped nationwide because of the rule. Chillingly, a recent National Institute of Justice study finds: "[T]o a substantial degree, individuals released . . . were those with serious criminal records who appeared to continue to be involved in crime after their releases."

o The limited resources of the criminal justice system are diverted from the central task of determining a defendant's guilt or innocence into adjudicating whether the police blundered. A 1979 GAO study showed that about one-third of criminal defendants in federal cases try to suppress evidence.

o The rule distorts the truth-finding function of the courts and undermines public respect for the legal and judicial system.

The most fundamental flaw of the rule is that it has been expanded into cases where it has no possible deterrent effect. Deterrence works only where a police officer knows or should know that what he is doing is wrong. Yet, the exclusionary rule has been applied like a meat ax -- making no distinction between a case where the officer is culpable and one where he is acting in a reasonable, good faith manner.

Thus, the rule has been unthinkingly applied where police have scrupulously followed procedures and obtained a search warrant, only to have a judge later decide that the warrant on which they relied was defective. Applying the rule in these cases makes no sense. How does throwing out evidence deter police misconduct when the police honestly thought they were going by the book.

Nor does it make sense to apply the rule where the police have acted reasonably in an admitted gray zone. In some areas, search law is ill-defined, and it is not uncommon for closely-divided judicial panels to spend years dissecting a single case with scholastic rigor -- debating such fine points as whether a paper bag should have the same protection as a suitcase. When a policeman believes he is acting lawfully, having made a reasonable, split-second decision on a close question in an uncertain area of law, no deterrent purpose is served by releasing a criminal because the officer is later found to have been mistaken.

While many legal scholars have called for abolition of the exclusionary rule, the Administration has proposed a more modest step -- restricting the rule only to those cases where it could act as a deterrent. Under this proposal, the rule could not be invoked where police have obtained evidence in the reasonable, good faith belief that their acts were lawful.

On April 4, the Times ran an op-ed piece by Martin Garbus of the ACLU criticizing the Administration's proposal. Unfortunately, Mr. Garbus' article is based entirely on a false premise.

Mr. Garbus argues that the good faith exception would allow evidence to be admitted so long as the police officer simply says that he thought he was acting legally. This is wrong. Under our approach, the availability of a suppression remedy would depend upon an objective assessment of whether a well-trained, reasonable officer should have known under the circumstances that his action was prohibited. Ignorance of the law would be no excuse. This approach will leave intact the incentives for the police to learn about and honor Fourth Amendment rights. But when a policeman acts in an objectively reasonably fashion, the evidence obtained from the search will be admissible. Two federal circuits have already adopted this good faith exception, and the police have acquired no "unlimited license to ignore the Constitution" in those areas. Mr. Garbus' parade of horribles exists only in his imagination.