EXCLUSIONARY RULE IN CRIMINAL TRIALS

OVERSIGHT HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1985

CONTENTS

HEARINGS HELD

EXCLUSIONARY RULE

THURSDAY, MARCH 10, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2247, Rayburn House Office Building, Hon. Howard Berman presiding.

Present: Representatives Conyers, Berman, and Gekas.

Staff present: Thomas W. Hutchison, counsel; Michael Ward, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. BERMAN. The Subcommittee on Criminal Justice will come to order.

In the absence of the chairman I will preside.

This is the commencement of oversight hearings on the operation of the exclusionary rule as an enforcement mechanism for the fourth amendment protection against unreasonable searches and seizures.

The chairman has a prepared opening statement, which will be incorporated into the record of the hearing.

[The statement of Mr. Conyers follows:]

OPENING STATEMENT
BY
REPRESENTATIVE JOHN CONYERS, JR.
MARCH 10, 1983

TODAY WE COMMENCE OVERSIGHT HEARINGS ON THE OPERATION OF THE EXCLUSIONARY RULE AS AN ENFORCEMENT MECHANISM FOR THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZES. THE EXCLUSIONARY RULE, WHICH PROHIBITS THE USE AGAINST A CRIMINAL DEFENDANT OF EVIDENCE THAT WAS OBTAINED IN VIOLATION OF THE DEFENDANT'S RIGHTS, WAS FASHIONED BY THE SUPREME COURT IN 1914 IN WEEKS V. UNITED STATES. IN 1961, IN MAPP V. OHIO, THE SUPREME COURT HELD THAT THE REQUIREMENTS OF THE EXCLUSIONARY RULE WERE APPLICABLE TO THE STATES BY VIRTUE OF THE FOURTEENTH AMENDMENT.

IN THE YEARS SINCE THE MAPP CASE, THE EXCLUSIONARY RULE HAS BEEN THE SUBJECT OF CONSIDERABLE CRITICISM. IT IS ALLEGED THAT THE RULE ALLOWS LARGE NUMBERS OF CRIMINAL DEFENDANTS TO GO FREE, DESPITE EVIDENCE OF GUILT, AND THAT IT IS AN INEFFECTIVE DETERRENT TO POLICE MISCONDUCT. THE PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME AND THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME HAVE RECOMMENDED MODIFICATION OF THE EXCLUSIONARY RULE. ONE CIRCUIT COURT HAS INDICATED, IN WHAT MIGHT BE CALLED DICTUM, THAT THE RULE SHOULD NOT APPLY IN CASES WHERE A POLICE OFFICER HAS ACTED IN REASONABLE GOOD FAITH. RECENTLY, THE ADMINISTRATION HAS RECOMMENDED MEASURES TO ATTEMPT TO ACHIEVE THAT RESULT LEGISLATIVELY. IT IS BECAUSE OF CONCERNS SUCH AS THESE THAT WE COMMENCE THESE HEARINGS.

THE VALUE OF THESE HEARINGS IS INCREASED, NOT DIMINISHED, BY THE RECENT REARGUMENT OF ILLINOIS V. GATES BEFORE THE SUPREME COURT, SPECIFICALLY ADDRESSING THE ISSUE OF A GOOD FAITH EXCEPTION. SHOULD THE COURT REJECT SUCH AN EXCEPTION, THE CONCERNS WHICH PROMPTED THESE HEARINGS WILL REMAIN. SHOULD THE COURT ADOPT THE EXCEPTION, HOWEVER, IT WILL BECOME THE TASK OF CONGRESS, AND OF THIS SUBCOMMITTEE IN PARTICULAR, TO MAKE OUR OWN DETERMINATION WHETHER THE GOOD FAITH EXCEPTION SUFFICIENTLY PROTECTS THE RIGHTS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS, OR WHETHER WE, AS LEGISLATORS, SHOULD UNDERTAKE TO ENSURE APPROPRIATE GUARANTEES.

DURING THE COURSE OF THESE HEARINGS, WE HOPE TO FIND THE ANSWERS TO A NUMBER OF QUESTIONS. FIRST WE MUST ASSESS THE COSTS TO SOCIETY OF THE RULE. IS THE EXISTENCE OF THE EXCLUSIONARY RULE A SERIOUS IMPEDIMENT TO LAW ENFORCEMENT? HOW FREQUENTLY ARE CASES NOT BROUGHT BECAUSE OF POLICE MISCONDUCT? HOW OFTEN DO SUPPRESSION MOTIONS LEAD TO THE DISMISSAL OF CASES AGAINST GUILTY DEFENDANTS? WHAT IS THE NATURE OF THE CASES IN WHICH THE EXCLUSIONARY RULE BECOMES AN ISSUE?

SECONDLY, WE MUST EXAMINE THE BENEFITS DERIVED FROM THE EXCLUSIONARY RULE. IS IT A DETERRENT TO POLICE MISCONDUCT? HAS IT PROMOTED GREATER CONCERN BY THE POLICE FOR THE CONSTITUTIONAL RIGHTS OF CITIZENS? ARE THERE OTHER PURPOSES SERVED BY THE RULE?

THIRD, WE MUST EXAMINE ALTERNATIVE METHODS OF ENFORCING FOURTH AMENDMENT RIGHTS. HOW EFFECTIVE WOULD THEY BE? WHAT WOULD BE THE IMPACT UPON THE COURTS, AND UPON CRIMINAL TRIALS IN PARTICULAR, OF ALTERNATIVE ENFORCEMENT MECHANISMS?

FINALLY, WE MUST EXAMINE THE QUESTION OF WHETHER THE EXCLUSIONARY RULE IS A PROPER SUBJECT FOR LEGISLATION, OR WHETHER IT IS RATHER A CONSTITUTIONALLY MANDATED RULE, TO BE CHANGED ONLY BY THE COURTS OR CONSTITUTIONAL AMENDMENT.

I MUST ADMIT THAT TESTIMONY IN THE PREVIOUS CONGRESS HAS LEFT ME QUITE SKEPTICAL OF EFFORTS TO SIGNIFICANTLY MODIFY THE OPERATION OF THE EXCLUSIONARY RULE. CRITICS SUGGEST THE NEED TO ALLOW FOR GOOD FAITH REASONABLE MISTAKES OF LAW AND FACT, YET THE RULE ALREADY EXAMINES SEARCHES ACCORDING TO THE FACTS AS THE OFFICER REASONABLY PERCEIVES THEM TO BE, AND RARELY APPLIES FOURTH AMENDMENT LAW RETROSPECTIVELY. I AM CONCERNED THAT THESE CRITICS ARE NOT ATTACKING THE EXCLUSIONARY RULE, BUT RATHER THE FOURTH AMENDMENT ITSELF -- AS LONG AS WE PROHIBIT CERTAIN INVASIONS OF PRIVACY, CERTAIN CRIMINAL ACTIVITY WILL REMAIN UNDETECTED AND UNPUNISHED. YET THIS MUST BE TRUE OF ANY FREE SOCIETY. WE MUST THUS BE EXTREMELY CAREFUL IN EXAMINING PROPOSED CHANGES. WE MUST AVOID ANTI-CRIME REHETORIC, AND DEBATE THIS ISSUE WITH CAREFUL AND REASONED ARGUMENT AND DELIBERATION. I HOPE THESE HEARINGS WILL BE A PART OF SUCH AN APPROACH, WHAT WE LEARN NOW MAY BE VERY IMPORTANT TO OUR ACTIONS IN THIS, AND FUTURE CONGRESSES.

TESTIMONY OF PROF. LEON FRIEDMAN, HOFSTRA UNIVERSITY LAW SCHOOL, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

Mr. BERMAN. Our first witness is Prof. Leon Friedman, Hofstra University Law School, representing the American Civil Liberties Union.

Professor Friedman.

Professor FRIEDMAN. Thank you very much.

My name is Leon Friedman. I welcome the opportunity to appear before the committee and to talk generally about the enforcement provisions of the exclusionary rule and the desirability of limiting the exclusionary rule in any way.

I have a prepared statement, which I would like to submit for the record. I will briefly summarize some of the high points in the statement, with the permission of the chairman.

Mr. BERMAN. We will accept your statement into the record, without objection.

Perhaps you may want to summarize some of your points.

Professor FRIEDMAN. Basically, the position of the American Civil Liberties Union is that the exclusionary rule works. It is sound in theory and its operation in principle is a desirable one. What I would like to do is summarize what I say in the statement to support that position.

The Justice Department in prior statements to Congress has analyzed the exclusionary rule in cost-benefit terms: that is to say, what does it cost to have a rule of this kind and what are the benefits of such a rule? I would like to follow that format, except that I come out the opposite side of what the Justice Department does.

First off, what does the exclusionary rule cost: that is to say, in terms of society, what are the evils associated with the exclusionary rule? I suppose the chief cost that everybody cites is how many guilty criminals go free because we have the exclusionary rule on the books.

Focusing in from that point of view, and focusing in particularly on its cost at the Federal level, which is what we are talking about—the only bills I have seen seriously considered are bills that would eliminate the exclusionary rule in terms of Federal criminal prosecutions, that is to say, its operation on the FBI, the DEA, the Secret Service, I suppose, and other Federal law enforcement officers.

In terms of what does it cost the Federal criminal justice system to have the exclusionary rule and to exclude material evidence seized in violation of the fourth amendment, the cost is minimal: that is to say, the number of suppression motions that are made, the number of successful suppression motions that are granted, and thereafter the number of guilty defendants, guilty in some larger sense—that is to say, people that we look at and say well, you are really guilty of the crime even though a court must release you—the numbers are minuscule.

The most comprehensive study of Federal criminal proceedings, a study made by the Comptroller General of the United States in April 1979, illustrates that in only 16 percent of the 2,400 cases was a suppression motion made. In only 1.3 percent was any evidence

excluded. In only half of those, about 0.65 percent, were the charges dismissed against that defendant.

Let me just say a little bit more about that. I cite some cases in my testimony where a defendant may have been found with both cocaine in the trunk of the car and burglar's tools or a concealed weapon in the front of the car and a court—like it did in the *Russell*[1] case, which I cite in my testimony—may have decided that the cocaine in the back of the car had to be suppressed. Therefore, the narcotics charge had to be thrown out. But they affirmed the conviction of the weapons charge.

That defendant didn't walk out of court scot-free. One of the multiple charges against him may have been dismissed, and in the GAO study, that would show up as a dismissal of one of the charges pending against that defendant. But that defendant still went to jail as a result of evidence seized on some other search or in some other part of the search.

It is very typical that evidence may be seized against a defendant in the back of the car, other evidence is in the front of the car, other evidence is on the body of the defendant, and some of the evidence may be suppressed, it is true, and some of the charges may be dismissed, that is true, but that particular defendant still goes to jail as to an aspect of the search which the court had upheld.

Even in the GAO study, which talks about 0.65 percent of the charges being dismissed, that defendant may still go to jail.

Even on a State level, what studies there are—the INSLAW study, the National Institute of Justice study released in December 1982—all of them indicate that in State charges, which is not before Congress at this point, by the way, there may be a slightly higher incidence, in the area of 1 or 2 percent.

The National Institute of Justice study talks about 4.8 percent of felony cases being declined for prosecution in California over a 3-year period because of some search and seizure problem. But even examining that one, California had a very generous standing requirement. Anyone could raise a fourth amendment issue because of any search and seizure anywhere else, whereas the Federal rule, of course, is much narrower.

After the *Rakas*[2] case, most State jurisdictions have a much narrower rule, so that the incidence of criminal defendants walking out of the courtroom scot-free because of a successful suppression motion has to be in a very limited area, has to be in the 1- or 2-percent area.

Even there, as I say, it may very well be that other charges are pressed against the defendant because of some other search and as a result of that he may still go to jail.

So, even if you take the State cases, we are dealing with a very small number of cases, very small, in which a defendant walks out of court scot-free because a successful suppression motion has been made.

If we examine those cases, the types of cases, they are almost all narcotics cases or concealed weapons cases. In the INSLAW study—I think they had 7,000 or 8,000 studies—they found one

[1] EDITOR'S NOTE.—*United States* v. *Russell*, 655 F. 2d 1261 (D.C. Cir. 1981).
[2] EDITOR'S NOTE.—*Rakas* v. *Illinois*, 439 U.S. 128 (1978).

murder prosecution that was declined because of a search and seizure issue, and no rape cases at all.

So, the problem comes up in narcotics cases, in concealed weapons cases, in gambling cases. That is the problem, if we call it that; that is to say, the number of successful suppression motions that lead to a defendant walking out of court scot-free are, No. 1, minuscule, very small and, No. 2, primarily in the narcotics area.

Why does that cost have to be made; that is to say, who are we blaming because a successful suppression motion was made? Let me give you an example out of a reported case, which I had some personal involvement in. I would like to describe that case, if I can. It is a case that came out of the first circuit called *United States* v. *Adams*.[3] It involved the FBI.

In the *Adams* case, the FBI had information that an escaped murderer was hiding out in a house in Revere, MA. This was a woman, by the way, a contract killer for the Mafia. It just happened to be a woman, she was very successful at her business and apparently had killed three or four people, was in a Federal penitentiary in Alderson, WV when she escaped.

She made her way up to Massachusetts because one of her former cellmates lived in Massachusetts. She was hiding out in this house in Revere, MA.

As it happened, there was a social worker that visited the house and found out that this woman was there and was very concerned about it because there were small children in the house. She reported this to her supervisor, who turned out to be my twin sister, so as I say, I found out a little bit about this.

My sister called me and said, "What should we do? We are worried about a shootout in the house." I told my sister, "Call the FBI. They know what to do about this." She called the FBI on a Wednesday afternoon and said, "There is an escaped murderer in this house in Revere. We know about it because my social worker told me about it." This was 3 o'clock on a Wednesday afternoon. The FBI agent said, "Well, we suspected she might be coming up there. Thank you very much." My sister left it at that.

The next morning, 10 o'clock in the morning, she gets another call from the FBI and the FBI says, "Is that woman still there? Is that escaped murderer still in the house?" Nothing had been done for some 15 hours. My sister called the social worker, the social worker reported back, "Yes, that woman is still there. The escaped murderer is still in that house."

At that point, 11 o'clock in the morning, the FBI went to the home—there were seven FBI agents and a number of Revere, MA police—they broke into the home, without a warrant, and got that murderer back, the fugitive, returning her to Alderson, WV. The U.S. attorney then prosecuted the woman for harboring a fugitive.

Let me just stop there. The exclusionary rule—and I don't want to act professorial about this—does not operate to suppress the body of any defendant. You can't say I was illegally arrested and therefore I should be released.

[3] EDITOR'S NOTE.—621 F. 2d 41 (1st Cir. 1980).

For 100 years, since the Supreme Court decided *Ker* and *Frisbie*[4] back in the later part of the 19th century, the exclusionary rule never operates to exclude the person of the defendant, so that if a person is illegally arrested but later brought into court, the charges against that person are still going to be brought. It is only physical evidence secured as the result of an illegal search that gets suppressed, but never the body of the person.

So, even in the case that I described, the escaped murderer, she is going to be sent back to West Virginia. What is suppressed is evidence relating to another person. In this case, Ms. Adams, who was the person who allegedly harbored the fugitive, could take advantage of the exclusionary rule.

What the first circuit said in the *Adams* case—I give you the citation on page 6 of my testimony (621 F. 2d. 41)—was that the evidence against Ms. Adams has to be suppressed because there was no emergency. You had to get a warrant to go into the house, and there was no emergency.

How do we know there was no emergency? Well, the FBI didn't treat it as an emergency. They had from 3 o'clock on Wednesday afternoon until 11 o'clock on Thursday morning to do something, to go to a magistrate, to go to a Federal judge and get a warrant and then enter the home.

They certainly had probable case at that point. Whatever their suspicion was, it was certainly confirmed by evidence from a social worker who was in the house and testified that the escaped murderer was there.

So, what the court of appeals did—and certiorari was denied in that case—Ms. Adams was not prosecuted for harboring a fugitive. She went free. She was one of those rare cases where she went free on the charge of harboring a fugitive because evidence against her was secured in violation of the fourth amendment: namely, no warrant was secured for entering her home in order to find the escaped murderer.

Who do you blame for that? Do you blame the Federal courts because they applied the fourth amendment? Do you blame the exclusionary rule because it didn't allow them to prosecute Ms. Adams? How about blaming the FBI for not doing what the fourth amendment required them to do?

When we talk about the exclusionary rule and we say there is something wrong, someone has done something wrong, who has done what wrong? Have the courts done something wrong because they applied the exclusionary rule? Has the Supreme Court done something wrong because they say the fourth amendment means something? How about putting the blame where it belongs, on law enforcement officials who don't follow what the Supreme Court said they should follow?

Mr. GEKAS. Of course, Ms. Adams did something wrong.

Professor FRIEDMAN. She did something wrong, too. That is true. But where do we allocate all of this blame? I don't see people pointing a finger at Ms. Adams. Everybody is pointing a finger at the

[4] EDITOR'S NOTE.—*Ker* v. *Illinois*, 119 U.S. 436 (1886); *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

Supreme Court for thinking the fourth amendment means something, and to the Federal courts for applying the rule in this case.

Does anyone point a finger at the FBI, saying, "You didn't do something that you should have done. You should have called up a magistrate." They could have done it by telephone, by the way. This is the FBI. Rule 41(c) of the Federal Rules of Criminal Procedure allows them to call up on the telephone.

In allocating blame, somehow no one ever points a finger at the law enforcement official who didn't do what he is supposed to do. The exclusionary rule is that point of the finger. If we say, "Well, you got the fugitive, that is fine, we will pat you on the back," then you are giving a message to law enforcement officials that you don't have to worry about the fourth amendment.

It seems to me that when we talk about the exclusionary rule as a deterrent, as a bar to effective law enforcement, it is really a bar to ineffective law enforcement: that is to say, law enforcement that doesn't follow what the Supreme Court has said the fourth amendment requires.

We are really throwing stones at the fourth amendment when we say the exclusionary rule shouldn't be applied under these circumstances.

If I could point to what law enforcement officials have done. In the Senate testimony last year Stephen Sachs, the Attorney General of Maryland, says "As far as I am concerned, the exclusionary rule works. It does what it is supposed to do."

He cites numerous instances when he was a law enforcement official when an FBI agent would call him up and say, "Can I break into this car? We suspect the car of being this, that, and the other." The prosecutor tells the FBI, "You better get a better make on the car, you better check it out and make sure the car coincides with the car that was described as the place where the criminal evidence was."

He cites numerous instances in which law enforcement officers would call up a prosecutor to find out what they could do or what they couldn't do. What Stephen Sachs, the Attorney General of Maryland, says, is the exclusionary rule is working when a law enforcement officer calls up a prosecutor to find out what he can do and what he can't do.

The prosecutor, who follows the Supreme Court decision, will tell him you better do A, B, or C before you break in, you better get a warrant in this case or, in some circumstances, it is OK not to get a warrant, if the Supreme Court rules do not require it.

That is the benefit of the exclusionary rule. The real purpose of the exclusionary rule is, as Stephen Sachs, the chief law enforcement officer of Maryland says, to allow prosecutors and high police officials to educate their law enforcement officers on what the exclusionary rule means.

Without the exclusionary rule or with a good faith exception to the exclusionary rule, we are not going to be able to educate law enforcement officers on what the fourth amendment means.

That is for the benefit not of a few criminal defendants that may walk out, but for the privacy rights of everybody. If there aren't clear guidelines to law enforcement officers on what they are sup-

posed to do or not supposed to do, then the private rights not of a few criminal defendants are at stake, but of millions of Americans.

If we didn't have a clear rule, there would be dragnet arrests; there would be the stopping of cars on the basis of skin color, which was a problem we had in roving border patrols before the Supreme Court's decision in *Almeida-Sanchez* [5] and a series of other cases about 10 years ago; we would have stop and frisk of everybody based on no suspicion; we would have——

Mr. BERMAN. Why does the exclusionary rule prevent that?

Professor FRIEDMAN. The exclusionary rule prevents that because when the Supreme Court says you can't have a roving patrol—and let me just focus in on that one, since I mentioned it.

The Supreme Court decided a case called *Almeida-Sanchez* about 1969–70, which says that you can't have a roving patrol within 100 miles of the border if you don't have founded suspicion or you don't have any reason to suspect anything.

Before that time, the U.S. Border Patrol said that they had the right to stop every car within 100 miles of the U.S. border because we consider everything within 100 miles the functional equivalent of the border, and we are looking for illegal aliens.

As a result of that, they would stop all Mexican-Americans, who were theoretically possibly illegal aliens, within 100 miles of the border. They put up a checkpoint between San Diego and Los Angeles, which was within 100 miles of the border, and they would simply stop every car—not every car, but any car they wanted—that had a Mexican-American and search the car and make everyone there prove that they were U.S. citizens. There were thousands of such stops.

What the Supreme Court said is you can't do that. If you do that and you find an illegal alien, you are not going to be able to prosecute the person taking that alien in for harboring an illegal alien. The incentive for the border patrol to do that immediately stopped. There was no point to it.

Mr. BERMAN. Could they have still deported the person?

Professor FRIEDMAN. They could have deported the person but they couldn't prosecute the person who was taking him in. That was the incentive. U.S. attorneys were prosecuting people for harboring an illegal alien or transporting an illegal alien. They lost that incentive for doing that because in *Almeida-Sanchez* the Supreme Court said this violated the fourth amendment.

Who are the beneficiaries of that? The beneficiaries were the tens of thousands of Mexican-Americans legally in this country who were stopped on an indiscriminate basis by the border patrol just because they were Mexican-Americans. The Supreme Court said you couldn't do it, and the border patrol stopped doing it.

That is what I mean by the beneficiaries are not the few criminals that may walk out. It is the thousands of law-abiding Americans who are not criminals and whose privacy rights are going to be invaded if we don't have a clear rule laid down by the Supreme Court as to what the exclusionary rule means.

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[5] EDITOR'S NOTE.—*Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973).

Mr. GEKAS. Do you think that the good faith exception would allow this same type of rousting of Mexican-Americans in your example?

Professor FRIEDMAN. I hope not.

Mr. GEKAS. I would think not. I think that that would be even outside the parameters of the good faith.

Professor FRIEDMAN. I agree there. *Almeida-Sanchez* is very clear, and I wouldn't think that that would happen. However, every law enforcement jurisdiction then has an incentive not to tell its police what the Supreme Court rule means because if you don't give them proper instruction and you don't tell them what these fourth amendment cases mean and they don't call up on the telephone, then they are going to be able to argue later on, "I didn't know about *Almeida-Sanchez*, I didn't know about what happened," and we are going to have a big fight in the courts about whether the training was proper and whether they really knew what they were supposed to know and whether an individual police officer had proper instruction.

I can just imagine this dialog between two policemen. "Shall we break into this car?" "Well, I don't know. Shall we call up the prosecutor and find out?" "Don't call up the prosecutor because if we don't know it is wrong, then we will be able to seize this evidence."

Mr. GEKAS. Don't you think that Mr. Sachs in Maryland would add to his points of discussion with the inquiring officer the element of good faith and saying well, if you really believe this, and so forth, then you can take a chance on it and instruct him also in the good faith exception, once that would become lodged, if it does?

What I am saying to you is that I don't see how you can come to the conclusion that the inquiries between the attorney general in the case that you gave and the law enforcement officers would cease. It seems to me that another element would be added to the colloquy between the attorney general and the inquiring officer as to when and how to proceed.

If everything else is excluded by the attorney general saying you can't do that, you can't do that, if you really suspect that then it really comes under the good faith definition, then it is added and the safeguards are there.

Professor FRIEDMAN. People like Stephen Sachs are not going to stop their instruction. I agree with that. I don't think that responsible law enforcement officers at the higher levels are going to say well, we used to have a monthly instruction on what the search and seizure means. We are going to stop that now. I don't think that is going to happen, I agree.

I do believe that there is an incentive for the law enforcement officers at the lower level not to seek out help on cases if they seek out, get the wrong answer and proceed in the face of it. At that point, if there is a good faith exception, they are going to have an incentive not to find out the answers to things.

Mr. GEKAS. What I am saying to you, Professor, is that if a law enforcement officer in Maryland, after the good faith exception goes in, decides not to call the attorney general, not to follow a pattern that has been established in law enforcement in his jurisdiction, then he doesn't qualify under the good faith exception.

Professor FRIEDMAN. I don't know, because the good faith exception was a good faith belief in the legality of what he is doing, not a good faith effort generally.

Mr. GEKAS. I think what I am saying is that if such a pattern exists and such a protocol is available to the law enforcement officer, his failure to exercise it I think militates against his taking advantage of the good faith exception. That is what I think.

Professor FRIEDMAN. I hope this is part of the legislative history.

Mr. GEKAS. Of course, that is why we are discussing it. If you didn't bring out your negatives, I wouldn't have these positives to bring out.

Professor FRIEDMAN. I think the real reason is the need for clear rules. I think everyone will agree that we have to have clear rules so that law enforcement officers know what they can do, so that citizens know what their rights are, so that the courts know how to apply these rights.

That is the highest need as far as law enforcement is concerned, and as far as protection of civil liberties are concerned. The real problem is if you have a good faith exception, here is what the rule is, but here is what a good faith belief in what the rule might be is.

The minute you start fuzzing that line, as numerous commentators have said, the fourth amendment doesn't mean what it means, it means what a police officer thinks it might mean. Then you have very fuzzy lines for everyone to worry about.

I think that is the real problem. I know I have litigated a lot of cases about the good faith defense in 1983, civil rights actions, and the whole good faith notion, which I think is meant to be incorporated here, gets to be fuzzy.

The minute we say the law is not what the law is, which is an objective standard, but what a reasonable police officer might think it is, then suddenly we are at the lowest common denominator, the Constitution no longer means what the courts say it means, the Constitution means what the lowest common denominator law enforcement officer thinks it might mean.

Then we are suddenly in an area where law enforcement officers are violating constitutional rights not of criminal defendants, but of millions of peaceful, law-abiding citizens. There is no redress of any kind because the police officer in good faith thought that the law was contrary to what it was.

You are just going to have a gap between what the law is and what someone thinks it is. That is no defense for a criminal. A criminal says, well, I thought the law meant something other than it was. The courts simply say that is tough, the law is what we say it is, it is an objective standard and you are held to it.

When law enforcement officers do that, we say, well, if you have a good faith belief that the law is something different, we are going to follow your good faith belief on what the law is. It just introduces all kinds of uncertainty and fuzziness and reduces the privacy protections of Americans. There is no gain for it.

A number of times where the Supreme Court splits 5 to 4 on an opinion and we are not sure what the law is—the number of instances, the sort of example that keeps coming up, well, how can a law enforcement officer know what the law is because when the Supreme Court splits 5 to 4 on what it is—those are very rare instances, those are very minuscule numbers of cases where that happens.

By and large, the importance of having probable cause, what probable cause is, what is founded suspicion, when you need a warrant and when you don't, those kinds of large definitional barriers are fairly known to the law enforcement officers and can be conveyed to them. That is really what we are talking about.

Mr. GEKAS. Let's take that case that you described in Massachusetts. You kept saying why doesn't someone blame the FBI.

What if the FBI had a policy that if you are going to go and do something as outrageous and dumb, as with all that notice, not to get the warrant and have a lawful, constitutionally permissible search, you and anybody else involved, the FBI agent or supervisor or whoever directed that arrest are fired?

Why isn't that more blame on the parties who acted improperly than excluding the evidence which allowed the person harboring the escaped convict to be let free?

Professor FRIEDMAN. If there were effective other remedies, I still think you could justify the exclusionary rule on some other basis.

Mr. BERMAN. Wouldn't that deter the FBI from doing that more than the exclusionary rule would ?

Professor FRIEDMAN. I think it would. We have no such mechanism in place. It doesn't work.

Mr. BERMAN. It has never been tried.

Mr. GEKAS. What we are contemplating, if such a statute would go through, would be to attach civil sanctions to the violator of the good faith exception.

Professor FRIEDMAN. That is a desirable thing to do on its own. That is desirable even without the exclusionary rule. It may be if that is in place and it works, it may be possible to rethink some of the problems of the exclusionary rule.

I don't think that that is the whole answer. I still think we have an issue about judicial integrity and the idea of convicting someone on the basis of this kind of tainted evidence, which I still think has some force and validity today.

I think the arguments in favor of the exclusionary rule could be looked at in a slightly different way if there were really effective administrative remedies. But I think you have to put the remedies in place, see how they work and then start worrying about the exclusionary rule.

I think if you put administrative remedies in place and eliminate the exclusionary rule at the same time, and not see how the administrative remedies work, then you are really taking an awful chance. I don't think that is the way to do it. I think the remedies should be put in their for their own sakes.

Mr. BERMAN. The FBI is probably very unlikely to want to fire one of their own for not getting a warrant. The notion that there is going to be the internal discipline to carry out that kind of a sanction in order to——

Professor FRIEDMAN. I will tell you, I have studied the literature an awful lot, and I haven't seen any law enforcement organization anywhere that has the kind of sanction that you are talking about, that really works.

I know from 1983 cases, where you try and bring a civil suit for damages, that the number of defenses available, including the good faith defense, are almost impenetrable. I remember there were hearings on the *Bivens* [6] case on extending the Federal Tort Claims Act against law enforcement officers who violate constitutional rights.

Senator Kennedy's committee on the Senate side did an investigation of 2,000 *Bivens*-type cases which were brought, and there were 3 successful ones, 3 in which there were money damages against the Federal law enforcement officer for something bad that he had done.

To talk about effective sanctions, put the sanctions in, see how they work, and then take another look at the exclusionary rule.

Mr. BERMAN. The Justice Department comes into another subcommittee of Judiciary urging that we immunize those officers from liability for constitutional torts on the grounds that it is hardly ever done, only 3 out of 2,000.

Professor FRIEDMAN. You can't have it both ways. As I say, I think an effective remedy should be put in there, see how it works and then let's take another look at the exclusionary rule.

Mr. BERMAN. Mr. Chairman.

Mr. CONYERS. Good morning. Thank you for your helpfulness here.

One of the problems that our criminal justice system has concerns police misconduct. Some of the great fears of citizens, some of the great complaints that they have, are about the police and how they operate.

I was in a city recently in which the police were operating almost overtly with criminal gangs in connection with an election. In the city of Detroit, another city, there is a great concern in a new part of my district about what should be done to stop crime. The neighborhood is hit with a lot of police criminal activity. They don't want to say the police aren't doing their jobs. The citizens are really very cautious about that. They want to ask a legislator what to do about burglaries going on in their neighborhood.

At a third level, Attorney Friedman, we have got a situation where administrative control of the police is one of the most well-kept military secrets of all time.

I doubt if there are many people in any city—outside the gross figures, which they don't know to begin with—have any idea of how the millions of dollars, hundreds of millions of dollars in large municipalities, are spent on this.

It seems that to deal with these kinds of problems we have to invoke the Constitution, merely to ask a minimum kind of responsibility. Then there is Miami breaking out and rebreaking out. This subcommittee, overloaded in the extreme with individual cases from one end of the country to the other, is asked to come out and investigate. We are legislators; what they are really doing is crying out for relief of a completely different sort than we are even empowered to give.

[6] EDITOR'S NOTE.—*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

So, I keep looking at the larger question of how you deal with educating people to look at far different kinds of questions, rather than hoping that the Supreme Court will finally lay this all to rest in the next few months.

Professor FRIEDMAN. I couldn't agree more with what you are saying. Problems of controlling the police and helping them in what they should be doing are enormous. We see these trials, when a policeman is accused of killing a citizen—down in Houston and New Orleans or the Miami case a few years ago—and juries acquit.

They acquit because the defense attorneys get up there at the very end of the case, regardless of the evidence, and they say to the jury, "Members of the jury, there is a thin blue line between you and anarchy, and if you convict these policemen, what is a policeman going to do the next time he is out there to protect you or your property and he is not clear what is happening? Do you want to give the wrong message to policemen everywhere that they should be hesitant about using their gun in order to do their law enforcement function?" Then the juries acquit.

They may acquit for some other reasons as well, but the number of policemen who are sanctioned by use of the criminal law, if they exceed what they are supposed to do, is insignificant. I can't remember the last time in one of these civil rights cases that a policeman was actually found guilty of any serious charge by a jury.

So, we have the Constitution. The Constitution is like the Bible. It has some very basic principles. You have to keep repeating what those principles mean, one way or the other, so that maybe people will really pay attention to them.

Somehow the exclusionary rule and the fourth amendment, with all its generalized language, is an effort to educate the police, the courts, tell the responsible law enforcement people what they are supposed to do, what it means, and they constantly repeat that again and again as you go down the chain of command to the police, and hopefully the message will get through.

The minute you say, oh, the exclusionary rule doesn't mean that, the Ten Commandments don't mean what they really mean, and if you think this is what the Ten Commandments mean, that is enough, then the whole message is going to get watered down to practically nothing.

We have a difficult enough time now with the exclusionary rule being in force the way it is. Even there the Supreme Court thinks up all kinds of exceptions. The fact is we already have a number of good faith exceptions to the exclusionary rule. The exclusionary rule does not apply to impeach a defendant.

In the *DeFillippo* [7] case the Supreme Court said if they made a good faith arrest on the statute that they thought was constitutional, the evidence doesn't get suppressed. There is the fruit of the tree. If there are all kinds of intervening circumstances, the evidence doesn't get suppressed.

There are all kinds of limiting rules already. To have a great big limiting rule that the Ten Commandments mean what you think they mean is going to increase the problems that you mentioned 20

[7] EDITOR'S NOTE.—*Michigan* v. *DeFillippo*, 443 U.S. 31 (1979).

times, and we are really going to have the problem of dragnet arrests and invasions of privacy.

The fact is that the United States is the only jurisdiction that has an exclusionary rule. The fact is that we have more privacy protection in this country than any other country in the world. That is a good thing rather than a bad thing, if you ask me.

Mr. CONYERS. Thank you.

Mr. BERMAN. Mr. Gekas.

Mr. GEKAS. Just a couple of questions, to follow up on some of your discussion.

The exclusionary rule came into vogue, did it not, with *Mapp* v. *Ohio*? [8]

Professor FRIEDMAN. In *Weeks* v. *New York*—it came in as far as the Federal Government is concerned in *Weeks* v. *United States* [9] in 1914.

Mr. GEKAS. But the State jurisdiction, et cetera, was first introduced in *Mapp* v. *Ohio*?

Professor FRIEDMAN. Right.

Mr. GEKAS. I am wondering where now we are in effect reexamining that whole case. I think it is a reexamination of *Mapp* v. *Ohio* myself, in a way. I think it is, the whole series of cases. What we are trying to do—and I think we have the same goal—is to finally get to a point where police will know what they can or cannot do. Isn't that what we are getting at?

Professor FRIEDMAN. I agree. That is a very important goal.

Mr. GEKAS. If indeed the exclusionary rule does allow this lady to get off scot-free who palpably, according to your facts, violated the law in harboring this murderer——

Professor FRIEDMAN. That is right. No question about that.

Mr. GEKAS [continuing]. And we are able to construct a new pattern which will lay down firm guidelines which are predictable and which are followable by law enforcement, will we not have gained something?

Professor FRIEDMAN. I agree, but let's make sure they work before we fool around with the exclusionary rule. In other words, I think it would be a mistake to set up in one bill a vast administrative enforcement mechanism and to eliminate the exclusionary rule at the same time. I think that that would be a serious planning error because you have to see whether these things work.

Mr. GEKAS. I want to express my preference in having the Congress do nothing on this issue until we learn what the Supreme Court is going to be doing in the case pending.

Professor FRIEDMAN. The Supreme Court has taken Congress' coals out of the fire a lot of times. As I say, they have already made all kinds of exceptions to the exclusionary rule that give law enforcement officers all kinds of scope for operation.

I was talking to a prosecutor a while back about the exclusionary rule and he said, "Look, we already have what we need. When the Supreme Court said that you have to have standing to make a suppression motion and when they also said that we can impeach with evidence that violated the fourth amendment, from a prosecutor's

[8] EDITOR'S NOTE.— 367 U.S. 643 (1961).
[9] EDITOR'S NOTE.—232 U.S. 383 (1914).

point of view we have all kinds of weapons to deal with the situation."

Mr. GEKAS. There is one other thing that I wanted to ask in kind of a generic way.

In your written testimony, which I was able to scan, you begged the question, it seemed to me, by saying it is unconstitutional to worry about this question. It is unconstitutional to exclude the exclusionary rule or to treat it. Of course, as I say, that begs the question.

If in the *Adams* case that you are talking about the certiorari was refused automatically, but now the Supreme Court wanted a second hearing on the case pending before it, what does that imply to you?

Professor FRIEDMAN. It is unconstitutional for Congress to pass a law eliminating the exclusionary rule. That is what I was saying in the testimony. The Supreme Court, if it decides in the *Gates* [10] case that there is a good faith exception—that may be a bad policy thing from our point of view, but the Supreme Court has the last word on what the Constitution means, so if they change their mind, it is not unconstitutional. That is all that I meant to say.

It is unconstitutional if Congress, at a statutory level, tries to change the meaning of the Constitution that the Supreme Court has determined in terms of what the Supreme Court said it means. That is all I was trying to say.

We had this case in school busing, we had it in *Miranda* [11]——

Mr. GEKAS. I don't think Congress can wait always to take a position based on what—it should take constitutionality into consideration.

Professor FRIEDMAN. I agree. I am not arguing to you that you can't do it. I am just saying you shouldn't do it. Maybe one of the reasons you shouldn't do it is that it may be a futile exercise if you try to statutorily eliminate what is really a constitutional protection.

Mr. GEKAS. I personally am in no big hurry on this, even though I feel that we can make a case for the good faith exception to the application of the exclusionary rule. I personally am not in a hurry, as one Congressman, speaking just for myself, to go breakneck speed into the adoption of legislation. But that is only because the Supreme Court I think will be speaking out definitively on it, making our questions moot.

However, with the same breath I say to you that if the Supreme Court does come down and definitively once and for all say that a good faith exception is workable and is constitutional, et cetera, then we still have a task to do with respect to civil sanctions, it seems to me.

Even though there are some bodies of law already on the books that allow for civil suits, I think we have to peg it to the exclusionary rule in new statutory language.

Professor FRIEDMAN. I would certainly agree with that.

Mr. BERMAN. Thank you very much, Professor, for your testimony and your written statement.

[10] EDITOR'S NOTE.—*See Illinois* v. *Gates*, 103 S.Ct. 2317 (1983).
[11] EDITOR'S NOTE.—*Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Professor FRIEDMAN. Thank you.

[The prepared statement of Professor Friedman and material submitted for the record follow:]

STATEMENT

of

PROFESSOR LEON FRIEDMAN
HOFSTRA UNIVERSITY SCHOOL OF LAW

BEFORE

THE SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE HOUSE JUDICIARY COMMITTEE

concerning

S.101 and S.751, 97th Cong. 1st Sess.

on behalf of

AMERICAN CIVIL LIBERTIES UNION

March 10, 1983

My name is Leon Friedman and I welcome the opportunity to testify before this committee on S.101 and S.751 on behalf of the American Civil Liberties Union.

The two bills would limit or eliminate the exclusionary rule in federal criminal proceedings. S.101 would eliminate the exclusionary rule in federal court except where a Fourth Amendment violation was "intentional" or "substantial." We believe that this proposed legislation is unconstitutional. Furthermore it is ambiguous in its reach and uncertain in its application and would create severe problems in the criminal justice process.

S.751 would eliminate the exclusionary rule in federal criminal proceedings entirely and would provide a limited damage remedy against the United States and authorize disciplinary action against those who violate a citizen's Fourth Amendment rights. This bill is, in our view, beyond Congress' power to enact.

Fundamentally we believe that any legislation to eliminate, limit or restrict the exclusionary rule is unconstitutional, unwise and undesireable. The exclusionary rule, though a judicially made remedy, is of constitutional dimension. Furthermore the rule serves the best interests of both law enforcement and the privacy interests of all Americans.

It is our position that there is no need for attempting to change the exclusionary rule at this time. The rule is simply not a serious problem for law enforcement at this time, particularly at the federal level. Put another way, the cost of the exclusionary rule to society is quite low. Furthermore the cost can be lowered by better training and instruction. The exclusionary rule is not a bar to effective law enforcement but ineffective law enforcement. Finally the benefit to society and law enforcement by adhering to the exclusionary rule is considerable. It is sound in theory and it works. I will develop each of these points in my testimony today.

Cost of the Exclusionary Rule

Whatever studies have been made of the exclusionary rule emphasize the relatively low number of instances in which it produces the evil which has prompted the legislation -- setting the criminal free because the constable has blundered. The GAO study, Impact of the Exclusionary Rule on Federal Criminal Prosecution (Report by the Comptroller General of the United States, April 19, 1979) shows how rare suppression motions are made, how rarely they are successful and how seldom they lead to

release of the defendant. In the GAO study it was found that in only 16% of the 2408 cases analyzed was a suppression motion made. All in all in only 1.3% of the 2804 defendant cases (or 36) was evidence excluded. In only 3% of the 16% was the motion granted in total and in only about 9% was the motion granted in part. Typically in the latter situation the defendant will move to suppress some evidence in one place and other evidence in another place. In United States v. Russell, 655 F.2d 1261 (D.C. Cir. 1981) the defendant's car was stopped because it lacked license plate. The police saw a glossine envelope containing a white powder in the glove compartment. They arrested the defendants, found a gun in a paper bag under the seat and also seized a grocery bag with heroin in the hatch-back section of the car. The Court of Appeals affirmed the conviction for the weapons offenses but reversed the conviction for possession of the heroin in the grocery bag. Though he won a suppression motion on the heroin, the defendant did go to jail on the weapons charges.

Even if the motion is granted the GAO study concluded that in half of the cases (about 20 cases) the defendant was convicted nevertheless and in about 20 cases the charges were dismissed. That does not mean that the defendant went free altogether. In many situations the government may try to introduce the evidence on some theory other than the one originally urged. Thus in Mincy v. Arizona, 437 U.S. 385 (1977) certain evidence was ordered suppressed by the Supreme Court. The State had argued that there should be a "murder scene" exception to the

Fourth Amendment and the warrantless search was justified by exigent circumstances. The Supreme Court rejected that argument. The State then retried the defendant, arguing that some evidence was in plain view after Mincy's arrest and other evidence, such as the blood on the floor would have been lost or destroyed if they had to obtain a warrant. The trial court agreed and Mincy was convicted of the homicide charges. Similarly in Brewer v. Williams, 430 U.S. 387 (1976) the famous "Christian burial speech" case certain statements made by the defendant were suppressed because they were made after his lawyer had entered the proceedings and had told him not to talk to the police. Chief Justice Burger in his dissent said that the result of the case

> "ought to be intolerable in any society which purports to call itself an organized society." But Williams was retried and found guilty even after his statements were suppressed. State v. Williams, 285 N.W.2d 248 (1979).

In Franks v. Delaware, 438 U.S. 154 (1977) the Supreme Court held that a warrant could not be upheld based on material misrepresentation contained in it, but on remand the Delaware Supreme Court upheld the search warrant based on other evidence besides that claimed to be erroneous.

In addition the various studies made of the impact of the exclusionary rule indicate that suppression of evidence does not occur in cases involving murder, assault or rape. It occurs primarily in narcotics or gambling cases. A study prepared by the Institute for Law and Social Research confirmed the low incidence of dismissals for due process violations. In less than 1% of the arrests studied was prosecution declined because the police failed to protect the defendant's constitutional rights and thereafter it became a problem at the prosecutorial level in only 2% of the cases. INSLAW, "What Happens After Arrest," May, 1978. In a later study "A Cross-City Comparison of Felony Case Processing," April, 1979, INSLAW concluded that due process reasons had "little impact on the overall flow of criminal cases after arrest." Among the cities studied, Washington, Salt Lake City, Los Angeles, New Orleans, there was only one homicide arrest rejected for due process reasons and no rapes. Drug cases accounted for most of the rejections.

In summary the "cost" to society of the exclusionary rule is quite low: very few defendants walk out of the court-house free of all charges because the constable has blundered. Those few who do may be retried on other charges or theories. And the cases in which successful suppression motions are made rarely involve major index crimes, murder, assault, or rape.

The Reasons for Successful Suppression Motion

More important, the "cost" has to be paid only because a law enforcement officer has not followed the proper procedures. As I said above, the exclusionary rule is a bar to ineffective

law enforcement, that is, it operates only when a blunder has occurred by the police. And in virtually every case in which suppression is required, proper operation by the police would allow admission of the evidence.

Let me offer a few examples. In a recent case in the First Circuit, United States v. Adams, 621 F.2d 41 (1st Cir. 1981) the FBI had obtained information that an escaped murderer might be hiding out in a house in Revere, Mass., where a former cell-mate lived. On a Wednesday afternoon they heard from a social worker who visited the house that the murderer was there. Did they do anything that afternoon? No. The next morning they checked again to find out whether the murderer was still there. At 8:00 A.M. on Thursday they determined from the social worker that she was. At 9:50 A.M. without obtaining a search warrant or an arrest warrant seven FBI agents and local police converged on the house, came into it and arrested the fugitive.

The government then pressed charges against the former cell-mate for harboring the fugitive. (The fugitive could not assert any rights herself since the exclusionary rule has never operated to suppress the person of the arrestee from later charges. Only evidence can be suppressed, not the person arrested). The government argued that there were exigent circumstances justifying a warrantless entry. The court rejected that argument. "There was no reason why either an arrest or search warrant could not have been obtained during the afternoon or evening of October 16. Like the district court, we are incredulous at the magistrate's finding that the agents might reasonably have assumed that a

magistrate or judge would not be available at 8:30 A.M." 621 F.2d at 44-45.

If the agents had acted immediately on Wednesday afternoon -- if they had treated the matter themselves as an emergency -- the search would probably have been upheld. If they had obtained a warrant in the morning, and it is possible to obtain a warrant by telephone under Rule 41(c)(2) of the Federal Rules of Criminal Procedure, the search would have been proper. But the FBI took their time and then failed to get a warrant. The harboring charges against Miss Adams had to be dismissed.

Similarly in United States v. Chadwick, 433 U.S. 1 (1977) DEA agents staked out a railroad station waiting for someone to pick up a footlocker suspected of containing narcotics. Two people picked up the footlocker, carried it to the trunk of the car and then went to the front. They were then arrested, the footlocker was seized, taken to the police station and opened, revealing some marijuana, all without a warrant. The Supreme Court ordered the evidence suppressed.

If the DEA agents had arrested the persons while they were carrying the footlocker and examined it immediately, the search would probably have been upheld as a warrantless search incident to an arrest. If they had sought to obtain a search warrant after seizing the footlocker, they would certainly have obtained one since there was probable cause to believe it contained marijuana. They certainly had the right to seize and hold the footlocker until they went before a magistrate. But the DEA

took the one path out of many alternatives that was later found improper. The charges against Chadwick were dismissed.

In case after case decided by federal courts up to the Supreme Court, the courts tell law enforcement officers that they managed to take the one illegal or unconstitutional path where any other procedure would have been proper. Why does this happen?

While I was preparing this testimony I did some research on the number of search warrants and arrest warrants obtained by federal officers from federal magistrates. I discovered what I consider a startling statistic. In the years from 1972 to 1980 there has been a steady decline in the number of warrants issued by federal magistrates. According to the 1980 Annual Report of the Director of the Administrative Office of the U.S. Courts (at p.140) the warrants issued over the years have gone down:

Warrants issued by federal magistrates

	1972	1976	1977	1978	1979	1980
search warrants	7,338	6,068	5,203	4,491	4,606	4,756
arrest warrants	36,833	19,904	17,716	14,721	11,423	9,721

The Fourth Amendment requires that warrants issue for both arrests and searches, signed by an independent magistrate who has determined that there is probable cause for a search or seizure. Even if the grant of a warrant is now quite perfunctory, warrants serve as an important paper record, requiring law enforcement officers to memorialize the evidence they have obtained before a search or seizure is made. This allows a court to test their

claims and weigh their evidence in a later adversary proceeding. But federal law enforcement officers are seeking warrants less and less.

The federal rules of criminal procedure were changed in 1974 to allow summons to be issued instead of warrants in some cases but since only 1,552 summons were issued in 1980, that cannot explain the difference. More important the rules were changed in 1977 to make it easier to obtain a search warrant, by telephone, yet the number of search warrants have declined by close to 40% since 1972.

Federal officers are simply not seeking or obtaining warrants in cases where the Constitution would require them. And they are doing so in more and more cases while the crime rate has increased. The Constitution has not been amended to eliminate the need for warrants. The Supreme Court held in United States v. Watson, 423 U.S. 411 (1976) that arrest warrants were not necessary to effect an arrest in a public place but they held later in Payton v. New York, 445 U.S. 573 (1980) that they were necessary to invade a private home. The deep drop in arrest warrants cannot be explained as merely a reaction to the Supreme Court decision in Watson.

Thus we still have to ask why federal officers are seeking fewer and fewer warrants. Either they are lazy (it takes time to type up a warrant, seek out a magistrate, etc) or they are afraid to test out their proof of probable cause before a magistrate or even to write it down so it can be challenged in later

court proceedings. Or they are responding to the growing criticism of the exclusionary rule and are assuming that the courts will back them up. This development does not contribute to respect for the law or the courts or to the need to protect the privacy of the American people.

The benefits of the exclusionary rule

It must be remembered that the purpose of the exclusionary rule is not to protect a handful of drug dealers and allow them to go free. Contrary to what White House counselors may say, the ACLU is not part of a criminal lobby trying to get criminals out on the street as fast as we can. The purpose of the exclusionary rule, and the Fourth Amendment is to protect the privacy rights of all Americans, in particular the millions of law abiding Americans who would otherwise be subject to seizure of their persons or invasions of their homes because the police are looking for a criminal. Without the protection of the Fourth Amendment dragnet arrests or seizures and indiscriminate breaking into homes would become a frequent occurrence.

Just to remind the Committee of what could happen, a few years ago there was a search for the so-called Zebra killings in San Francisco. There had been 17 murders of whites in late 1973 and 1974 and two young black males were described as the assailants. The police department issued a directive to stop and pat down all young black males in the city of San Francisco, 20 to 30 years old, 5'8" to 6" tall. A law suit was immediately filed to stop this indiscriminate frisking of tens of thousands

of innocent citizens who merely had some of the same physical characteristics of the suspects. See Williams v. Alioto, 549 F.2d 13b (9th Cir. 1977).

In an earlier case in Baltimore, Langford v. Gelston, ____ F.2d (4th Cir. 1966) the police in Baltimore invaded 300 private homes in the black section of the city looking for suspects in a police killing. They had no warrants to do so and in most cases the searches were based on unverified anonymous tips. They broke into homes at all hours of the day or night without verifying the tips they received. A federal court issued an injunction against any further invasions.

I am afraid that without the full protection of the Fourth Amendment and the exclusionary rule, dragnet arrests or frisks and indiscriminate break-ins of homes could become a far more frequent occurrence.

The importance of the exclusionary rule as the essential remedy to protect the requirements of the Fourth Amendment has been repeated in case after case. See United States v. Calandra, 414 U.S. 338, 348 (1974). In the accompanying memorandum we discuss the various rationales which have been cited to justify the exclusionary rule -- personal rights, judicial integrity, or police deterrence. But at its heart the exclusionary rule is crucial for Fourth Amendment protection for two interrelated reasons: (1) the criminal cases excluding evidence by reason of the exclusionary rule are our chief means of defining the limits and meaning of the Fourth Amendment; (2) the exclusionary rule

22-224 O—83——2

provides the key incentive for making law enforcement officers obey the law.

Definition: The general words of the Fourth Amendment are not self-defining or self-enforcing. "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 persons or things to be seized."

What is probable cause? How is it determined? Are there any exceptions to the warrant requirement? What is the plain view doctrine? How is consent determined? How far may a police officer search incident to arrest? What is a Terry stop? What justifies a pat-down of a suspect?

We have now built up an elaborate body of law answering these and other questions. But it has been done by state and federal courts applying the exclusionary rule in case after case on motions to suppress evidence. Without the exclusionary rule, there would be no occasion to worry about probable cause, plain view, consent, pat-down, Terry stops and so on. It is true that civil suits for damages under 42 U.S. § 1983 require the definition of Fourth Amendment protection. But Fourth Amendment violations rarely produce §1983 cases and successful actions are rarer still. Citizens do not bring civil suits for

damages under §1983 for bad stops, searches, arrests or seizures. Suits for injunctive orders generally require department-wide or jurisdiction-wide problems before relief can be granted, as in the Williams or Langston cases. It is only because of the exclusionary rule that we have built up a basic set of rules of what the Fourth Amendment means. That definitional and educational function has been one of the chief benefits of the Weeks and Wolf rules. In short the law enforcement community have learned what the Fourth Amendment means primarily because of the exclusionary rule.

Enforcement: Once having learned what the rules require, the police must be given an incentive for obeying them. It defies logic to say that the Fourth Amendment means what the courts say it means but the police do not have to pay attention to what the rules are. When we say that the exclusionary rule acts as a deterrent what we mean is that the courts are telling the police that they must obey the law. Otherwise the courts would become accomplices to the violations that occur. For the courts to tell the police that they can disregard the basic tenets of our fundamental charter, that the rules do not mean anything as far as they are concerned, is to ignore the entire meaning of the Bill of Rights. When James Madison introduced the first ten amendments to the Constitution, he relied on the courts as the chief mechanism of enforcement. "If they [the amendments] are incorporated into the Constitution,

independent tribunals of justice will consider them in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." Should we now say that Madison was wrong, the courts should not be a guardian of Fourth Amendment rights, they should not resist encroachment into privacy rights by the police, that they should be a penetrable bulwark when the police invade our homes. To tell the police that they can violate the law is to teach society a terrible lesson, as Justice Brandeis said in his famous dissent in Olmstead v. United States, 277 U.S. 438, 483 (1928). "When the government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of the acts in order to accomplish its own ends, it assumed moral responsibility for the officers crimes.... and if this Court should permit the Government, by means of its officers' crimes, to effect its purposes of punishing the defendants.... the government itself would become a lawbreaker.

..... In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the patent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." As Brandeis said, the

end does not justify the means since the consequences of sanctioning official lawbreaking would bring "terrible ret bution." The police would learn again the advantages of breaking the law, at a terrible cost to the privacy of us all. As Yale Kamisar has written, it was only when the exclusionary rule was applied to the states, that state police officers began to pay attention to the requirements of the Fourth Amendment. Every time a police officer asks his superiors what he is supposed to do, when he can invade a home or stop a car or search a citizen and he is told what the rules are, then the exclusionary rule is working. We cannot retreat into the dark days before Weeks and Wolf.

As Mr. Schlag's memorandum indicates, we believe it is beyond the Constitutional power of Congress to enact S.101 and S.751. Furthermore the specific language of those bills are ambiguous, vague, unenforceable and inconsistent with the purpose of the Fourth Amendment. The good faith exception would introduce a vague, confusing concept into Fourth Amendment jurisprudence. Instead of one bright line definition of what the Fourth Amendment means, are we to have three or four definitions: (1) what the Fourth Amendment requires; (2) what is a substantial violation requiring application of the exclusionary rule; (3) what is an intentional violation; (4) what violation will give rise to a suit for damages. Such a confusing approach should not be written into law. We have one Fourth Amendment. It has worked and we should not allow it to be eroded away if we are concerned about protecting our right to privacy.

MEMORANDUM IN SUPPORT OF ACLU POSITION ON EXCLUSIONARY RULE LEGISLATION

Two bills are pending in the Senate that would limit or eliminate the exclusionary rule in federal criminal proceedings—S. 101 and S. 751. The exclusionary rule holds that papers or things seized or obtained in violation of the Fourth Amendment may not be used as evidence in a criminal proceeding.

S. 101 would eliminate the exclusionary rule in federal criminal proceedings except where a Fourth Amendment violation was "intentional" or "substantial." We submit that this proposed legislation is unconstitutional. Even assuming its constitutionality, S. 101 is ambiguous and uncertain in its reach and would cause severe problems in the criminal justice process.

S. 751 would eliminate the exclusionary rule in federal criminal proceedings entirely and would provide instead a limited damage remedy against the United States and authorize disciplinary action against offending law enforcement personnel. It is our position that this kind of legislation too is beyond Congress' constitutional authority.

A single additional point should be made at the outset. Much of the discussion of eliminating the exclusionary rule takes as a premise that the exclusionary rule has had something to do with the nationwide growth of serious crime. That view was reinforced by the Final Report of the Attorney General's Task Force on Violent Crime (August 17, 1981), which made a modification of the exclusionary rule along the line of what is proposed in S. 101 one of its key recommendations for dealing with the crime problem. To act on the belief that the elimination or modification of the exclusionary rule would give the citizenry reason to feel more secure in their homes or on the streets is to fall victim to a cruel deception.

A study by the General Accounting Office of federal criminal prosecutions revealed that in only 1.3 percent of the 2,084 cases studied was evidence excluded as the result of a Fourth Amendment motion. And exclusionary rule problems were the primary reasons for prosecutorial decisions not to prosecute in only .4 percent of cases analyzed in which a decision was made not to prosecute. Comptroller General of the United States, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (Report No. GGd-79-45) (April 19, 1979).

Elimination or modification of the rule cannot be justified as contributing to more effective law enforcement by reference to these data. No large numbers of guilty men and women are going free as a result of the application of the exclusionary rule. In these circumstances, the only conceivable law enforcement justification for elimination or modification of the rule is a belief that elimination or modification would allow law enforcement officers to be more effective because they would feel less constrained by the substantive inhibitions of the Fourth Amendment. There is indeed evidence that this would be precisely the effect of eliminating or modifying the rule. (Pp. 14-15, *infra.*) But we assume that proponents of S. 101 and S. 751 would not embrace that justification. They do not profess to want to weaken substantive Fourth Amendment safeguards. If they did, the forthright way to go about it would be to propose to amend the Fourth Amendment so as, for example, to delete the probable cause requirement for issuing a warrant. There is little doubt that any such weakening of substantive Fourth Amendment guarantees, if forthrightly presented, would be wholly unacceptable to the American people.

I. THE EXCLUSIONARY RULE IS REQUIRED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Supreme Court has held that the exclusionary rule is constitutionally required and Congress has no power to overrule that determination

The exclusionary rule was foreshadowed in *Boyd* v. *United States,* 116 U.S. 616 (1886), where the Supreme Court analogized the use of illegally obtained evidence against a defendant to compelled self-incrimination prohibited by the Fifth Amendment. In that case the defendant was charged with the illegal importation of goods. During proceedings characterized by the Supreme Court as civil in form but criminal in nature, the Government sought to show the quantity and value of the goods imported by the defendant and relied on a federal statute to obtain a court order requiring the defendant to produce his invoice for the goods. The Supreme Court held that the Fourth Amendment barred the compulsory production of the defendant's private books and papers.

The rule was definitively written into our basic law in the landmark case of *Weeks* v. *United States,* 232 U.S. 383 (1914). The Supreme Court there ordered that evidence obtained in violation of the Fourth Amendment be returned to a defendant charged with using the mails to transport lottery tickets. The Court said that, if materials obtained in violation of the Fourth Amendment could be used against the

defendant, the guarantees of the Fourth Amendment "might as well be stricken from the Constitution." *Id.* at 393. Therefore, the failure of the lower court to return the materials illegally seized in response to the defendant's motion for their return was a violation of the constitutional rights of the accused.

For the next 35 years the rule was applied without question in federal criminal prosecutions. Litigation turned principally not on the existence or desirability of the exclusionary rule but on the scope of the underlying Fourth Amendment guarantees. *See, e.g., Harris* v. *United States,* 331 U.S. 145 (1947); *Olmstead* v. *United States,* 277 U.S. 438 (1928); *cf. Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). On the other hand, those guarantees were not good against state governmental action, and so the question of a federally-dictated exclusionary rule for the states did not arise. In *Wolf* v. *Colorado,* 338 U.S. 25 (1949), however, a majority of the Court ruled that the security of one's privacy against arbitrary intrusion by the police, which is at the core of the Fourth Amendment, was enforceable against the states by virtue of the Fourteenth Amendment. But the Court declined to require that the exclusionary rule—which a concurring Justice characterized as a mere federal rule of evidence, *id.* at 39-40—be applied in state prosecutions. The Court's opinion was premised, in large measure, on the assumption that other devices might be employed by the states that would be as effective as the exclusionary rule in deterring Fourth Amendment violations. *Id.* at 31. The Court even raised but did not purport to answer the question whether Congress has the authority to negate the application of the exclusionary rule in the federal courts or to make it binding upon the states in the exercise of its authority under Section 5 of the Fourteenth Amendment. *Id.,* at 33.

The doctrine of *Wolf* v. *Colorado* was short-lived. In *Mapp* v. *Ohio,* 367 U.S. 643 (1961), the Supreme Court overruled *Wolf* and extended the application of the exclusionary rule to the states. The Court found that there were no effective deterrents to Fourth Amendment violations by police and other state officers, other than the exclusionary rule.

Since *Mapp* v. *Ohio* it has been clear that the exclusionary rule is "an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the states by the Due Porcess Clause . . . ." 367 U.S. at 651. In short, the rule was held to be dictated by the Fourth Amendment itself and therefore applicable to the states by operation of the Fourteenth Amendment. And this remains the law today. The Supreme Court, following *Mapp,* continues to require the exclusion of illegally obtained evidence in state crimial proceedings. Apart from its role as expositor of the Constitution, the Supreme Court has no power to enact evidentiary rules for the states. Accordingly, after *Mapp* v. *Ohio,* the theory advanced in *Wolf* that the exclusionary rule is a mere federal rule of evidence or supervisory rule imposed by the Court is no longer tenable. In plain terms, *Mapp* makes it apparent that the rule is a requirement imposed by the Fourth and Fourteenth Amendments.

Following *Mapp,* the occasions for the Court's considering the scope of the underlying Fourth Amendment guarantees have multiplied. Lines are drawn that are difficult to follow, in part because of a close division of the Court in recent years that has produced shifting majorities. *See, e.g., Jiminez* v. *United States,* No. 80-817; *California* v. *Riegler,* No. 80-1421; *Bible* v. *Louisiana,* No. 80-1080 (all filed July 2, 1981). But there is no doubt that, in a criminal prosecution where the prosecution's effort is to lay before the trier of fact as evidence of the guilt of the defendant something seized or otherwise obtained by the authorities from that defendant, the line between admissibility and exclusibility of the thing follows precisely the wavering line that defines whether the authorities have behaved constitutionally in searching for or seizing the thing.

There are, to be sure, Supreme Court decisions of the last few years in which the Court has declined to extend the rule calling for exclusion of illegally obtained evidence to situations other than the proffer of things illegally obtained as substantive evidence in a criminal trial. Neither the holdings nor the statements of the Court in any of these cases disturb the principle set forth in *Mapp* v. *Ohio* that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . ." 367 U.S. at 657. One remark in one of these cases in particular has been seized upon by those who would eliminate or restrict the exclusionary rule. In *United States* v. *Calandra,* 414 U.S. 338, 348 (1974), Mr. Justice Powell, speaking for the Court, said:

"In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

One court has drawn from this coment the unwarranted conclusion that the exclusionary rule no longer has a constitutional status. *See United States* v. *Williams,*

622 F.2d 830, 841 (5th Cir. 1980). That position cannot be sound. A "judicially created remedy" for a constitutional violation is no less a requirement of the Constitution than the basic constitutional right for which it is a remedy.

If the exclusionary rule is constitutionally required, any attempt by Congress to abridge, restrict or limit it would, of necessity, be beyond the constitutional power of Congress. Congress has no power to alter the commands of the Bill of Rights in their direct application to the federal government. So far as the states are concerned, it has the power, under Section 5 of the Fourteenth Amendment, "to enforce, by appropriate legislation, the provisions of" that amendment. But even there the power is to "enforce" and not to restrict or limit. The leading case is *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), where the Court stated:

"Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants no power to restrict, abrogate or dilute these guarantees." *Id.* at 651, n.10 (emphasis added).

In short, as long as *Mapp* v. *Ohio* stands—as it indisputably still does—Congress may not act to restrict, abrogate or dilute the exclusionary rule.

B. S. 101 and S. 751 are fundamentally inconsistent with the basic rationales upon which the exclusionary rule is based

As just demonstrated, the logic of the course of the decisions of the Supreme Court construing and applying the Fourth Amendment compels the conclusion that the exclusionary rule is a constitutional requirement. The constitutional nature of the rule is confirmed by a consideration of the various rationales for it. Three such rationales are evident from a reading of the cases: (1) a "personal rights" rationale, (2) a "judicial integrity" rationale, and (3) a "deterrence" rationale.

1. Personal rights. We have quoted (p. 4, *supra*) from a passage of *Weeks* v. *United States,* 232 U.S. 383 (1914), that is the first and still the best exposition of the exclusionary rule as necessary to protect personal rights. In full the passage reads:

"If letters and private documents can thus be seized and held and used in evidence against the citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against . . . [unreasonable] searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id.* at 393.

The statement bears paraphrasing for emphasis. The Supreme Court in 1914 thought that to permit introduction of illegally obtained evidence in a criminal proceeding would be tantamount to nullifying the right of the citizen accused of crime to be secure against unreasonable searches and seizures. That theme was, understandably, muted—ignored, indeed—when the Court decided *Wolf* v. *Colorado.* But it emerged again in *Mapp* v. *Ohio.* The Court quoted the passage we have just quoted, adding to it Justice Holmes' remark for the Court in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920), that without the exclusionary rule the Fourth Amendment would be a mere "form of words." 367 U.S. at 648.

The "personal right" rationale has no doubt been clouded by the Supreme Court's opinion in *United States* v. *Calandra,* 414 U.S. 338 (1974), from which we have quoted above (p. 8), and other cases such as *Stone* v. *Powell,* 428 U.S. 465 (1976). It was in explaining the Court's declination to extend the exclusionary rule so far as to forbid the questioning of a grand jury witness on the basis of documents illegally seized from him that the Court in *Calandra* remarked that the exclusionary rule is not "a personal constitutional right of the party aggrieved" but "a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect." *Id.* at 348. The formula has been repeated in other contexts. It seems to mean that there is no constitutional right to have illegally obtained evidence excluded from consideration at all stages of all proceedings in which the victim of the illegal search or seizure is interested. But the right of that victim to have the fruit of such a search or seizure excluded from a criminal proceeding in which he is the defendant has not been affected.

2. Judicial Integrity. In *Weeks* v. *United States,* the Court also sounded the theme of the need to maintain the integrity of the courts by refusing to participate in convicting people on the basis of unlawful seizures.

"The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution

and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U.S. at 392.

The theme was echoed and even amplified in *Mapp* v. *Ohio,* after having been ignored in *Wolf.* 367 U.S. at 648, 659–60. Justice Clark said that the Court's decision gave "to the courts that judicial integrity so necessary in the true administration of justice." *Id.* at 660.

The judicial integrity rationale, like the personal rights rationale, has been denigrated in some recent Supreme Court opinions. *See, e.g., Stone* v. *Powell,* 428 U.S. 465 (1976). It retains at least some of its vitality, however, having been restated in one recent case, *United States* v. *Janis,* 428 U.S. 433, 458–59 n.35 (1976), thus:

"'The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution . . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of the Fourth Amendment rights . . . [T]his inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose." *See also Dunaway* v. *New York,* 442 U.S. 200, 218 (1979) ("integrity of the courts" mentioned along with deterrence as rationale for exclusion).

That is perhaps a grudging acknowledgment but acknowledgment it is of the proposition that "the courts must not commit or encourage violations of the Constitution."

3. Deterrence. As indicated by the quotations from *Janis* and from *Calandra,* the favored modern rationale for the exclusionary rule is that it operates to deter substantive Fourth Amendment violations.

The concept of the exclusionary rule as a deterrent was introduced in *Wolf* v. *Colorado,* where the Court said that, though "the exclusion of evidence may be an effective way of deterring unreasonable searches," it could not conclude that other methods would not be equally as effective. 338 U.S. at 31. The decision in *Mapp* to overrule *Wolf* was seemingly induced in major part by a belief on the part of the Court that "other remedies have been worthless and futile." 367 U.S. at 652. And so deterrence was emphasized as the aim of the rule.

At times the deterrence rationale is stated as if it meant that the denial of a wanted conviction for lack of the fruit of an illegal search or seizure amounted to punishment of the arresting or searching police officer and thus would deter him and his colleagues from further Fourth Amendment violations. Justice Rehnquist seemed to have this view of deterrence in mind when he wrote the Court's opinion in *Michigan* v. *Tucker,* 417 U.S. 433 (1974). He said that by the refusal to admit evidence gained as a result of conduct by particular officers that has deprived a defendant of a Fourth Amendment right "the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused." *Id.* at 447. But a more realistic view is that the purpose of the rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States,* 364 U.S. 206, 217 (1960). Professor Amsterdam has felicitously expanded upon this terse statement of the Court's. He explained that the exclusionary rule "is not supposed to 'deter' in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set" but instead deters in the way branding a television set with the social security number of the owner deters by making the set a less attractive object of larceny because of its decreased resale value in the hands of anyone except the branded owner. A television set may still be stolen, "[b]ut at least the effort to depreciate its worth makes it less of an incitement than it might be. A criminal court system functioning without an exclusionary rule, on the other hand, is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 431–32 (1974).

When the deterrent rationale is so understood, it is clear that law enforcement officers would not have the same incentive to observe the requirements of the Fourth Amendment were there no such rule. To put the case in the terms used by the Court in *Janis,* where the Court equated judicial integrity with deterrence, to admit the illegally seized evidence would encourage Fourth Amendment violations. Evidence of the truth of this proposition—which seems nearly self-evident—is found in Professor Kamisar's account of reaction to *Mapp.*

"The heads of several police departments . . . reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure had just been written." Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?,* 62 Judicature 66 (1978).

He found that one of the most common complaints of the law enforcement officials after *Mapp* was that the application of the exclusionary rule would require the

police to change their policies with respect to searches and seizures—in short, to observe for the first time the requirements of the Fourth Amendment.

To the extent that the exclusionary rule is regarded as a personal constitutional right of a criminal defendant to have items illegally taken from him suppressed when they are offered in evidence and returned to him, it of course is not subject to abridgment by Congess. And to the extent that the rule is grounded in the judiciary's refusal to be a party to or to encourage a constitutional violation, Congress has no power to overrule the judicial decision not to be such a party. And even if these two bases for the rule are thought to have atrophied as a result of the Supreme Court's decisions of the last several years, the remaining deterrence rationale for the rule, properly understood, is equally inconsistent with congressional action to eliminate or restrict the rule. For that rationale holds nothing less than that the exclusionary rule alone gives law enforcement officials the incentive to abide by the limitations that the Fourth Amendment places on their conduct. Only if there is such an incentive will the Fourth Amendment be honored. Professor Kamisar's police officials who equated the exclusionary rule with the substantive constitutional proscriptions lend the most eloquent support to that proposition. If there is no exclusionary remedy, the constitutional right will not be observed and for practical purposes there is no such right.

II. THE STANDARDS PRESCRIBED BY S. 101 WOULD IMPERMISSIBLY CURTAIL THE EXCLUSIONARY RULE

S. 101 contemplates limiting the exclusionary rule in federal proceedings to cases in which there have been "intentional" or "substantial" violations of the Fourth Amendment. In the same vein, a special federal task force on violent crime named by the Attorney General has very recently recommended that the rule not be applicable if a police officer has acted in the reasonable good faith belief that his action conformed to the Fourth Amendment. Final Report of the Attorney General's Task Force on Violent Crime, Recommendation 40 (August 17, 1981). While individual expressions of some Justices suggest a receptivity to consideration of some such limitation of the exclusionary rule, *see, e.g., United States* v. *Ceccolini,* 435 U.S. 268, 281 (1978) (Burger, J. concurring), nothing in those expressions suggests that Congress rather than the Court itself is free to effect the limitation. And the Court as a whole has not even indicated its own inclination to alter constitutional doctrines, much less a willingness to let Congress define constitutional remedies for its benefit.

The cases that a proponent of S. 101 would cite in support of the constitutional validity of such legislation do not support it. In one line of cases, the Court has refused to apply the exclusionary rule retroactively to law enforcement conduct that occurred before the Court expanded substantive constitutional rights. *See, e.g., Michigan* v. *DeFillippo,* 443 U.S. 31 (1979); *United States* v. *Peltier,* 422 U.S. 531 (1975); *Michigan* v. *Tucker,* 417 U.S. 433 (1974). The rationale of the cases is that the deterrent function of the exclusionary rule is not furthered by application to a case in which a law enforcement officer acted properly—not just reaosnably or in good faith but nevertheless illegally—on the state of the law as it was when he acted.

In another set of cases, to which we have already adverted, the current Court has tailored the exclusionary rule to its deterrent function by holding that the rule is inapplicable in certain proceedings subsidiary or unrelated to federal or state criminal proceedings. *See United States* v. *Calandra,* 414 U.S. 338 (1974) (a witness testifying before a grand jury may not refuse to answer questions on the grounds that they are based upon illegally obtained evidence); *United States* v. *Janis,* 428 U.S. 433 (1976) (illegally seized evidence need not be suppressed in civil proceedings concerning taxes). In these cases, the Court determined simply that the exclusionary rule need not be applied to proceedings such as the grand jury's deliberations or federal civil proceedings in order to "remove the incentive to disregard" the strictures of the Fourth Amendment. The refusal to accept the evidence in a criminal trial accomplishes the removal.

Finally, in another line of cases the Supreme Court has declined to apply the exclusionary rule where the use made of evidence in a criminal proceeding is, on the Court's view, too remote to provide an incentive for disregarding the underlying substantive rules. *See, e.g., United States* v. *Havens,* 446 U.S. (1980) (illegally seized evidence may be used to impeach cross-examined testimony growing out of defendant's direct testimony); *United States* v. *Ceccolini,* 435 U.S. 268 (1978) (causal connection between police misconduct and introduction of live witness testimony too attenuated to require exclusion of live witness testimony). In these cases also, the Supreme Court has made the judgment that the deterrence of police misconduct would not be increased by application of the exclusionary rule.[1]

These three lines of cases—(1) refusal to give retroactive effect to the exclusionary rule where substantive constitutional rights change, (2) refusal to extend the exclusionary rule to forums of marginal deterrent value, and (3) refusal to apply the exclusionary rule where the violation is too remote from the use to be made of the evidence—do not support the drastic curtailment of the exclusionary rule contemplated by S. 101. They indicate rather that the Court has tailored the exclusionary rule to those circumstances where a deterrent function will be served. S. 101, by contrast, would curtail the exclusionary rule without regard to the deterrent function of the rule.

Even if one assumes that the Supreme Court would be inclined to adopt standards for the application of the exclusionary rule such as those contained in S. 101, Congress lacks the authority to do so. The Supreme Court has not adopted the standards set forth in S. 101.[2] The Court has not invited Congress to change existing Supreme Court doctrine along the lines of S. 101. Enactment of S. 101 would thus constitute an attempt by Congress to restrict a remedy that the Supreme Court has held to be required by the Constitution. S. 101 would also dilute this remedy by allowing the federal district courts to engage in an amorphous balancing act to determine when this remedy is to be available. In the absence of a declaration by the Supreme Court that Congress has the power, we are aware of no Constitutional authority that would allow Congress to restrict directly judicially created remedies mandated by the Constitution. We submit that enactment of S. 101 would constitute a particularly serious challenge to the separation of powers extending far beyond the perimeters of the Fourth Amendment. As previously noted, even under Section 5 of the Fourteenth Amendment, which does give the Congress power to legislate concerning remedies for violations of constitutional rights, the Court has stated that "Congress' power under §5 is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants Congress no power *to restrict, abrogate, or dilute these guarantees.*" *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 n. 10 (1966) (italic added).

When S. 101 was introduced, the sponsor invoked several constitutional provisions as sources of authority for congressional action.

"The Constitution vests Congress with the power to ordain and establish inferior courts, U.S. Constitution, article III, section 1; to make regulations and establish exceptions with respect to the appellate jurisdiction of the Supreme Court, U.S. Constitution, article III, section 2; and to make all laws necessary and proper for carrying into execution the powers granted the Federal Government by the Constitution, including those granted the courts, U.S. Constitution, article I, section 8. It is generally conceded that Congress has the power to establish rules for the admissibility of evidence in Federal courts. [Citations omitted]. Congress has recently exercised this authority by passage of the Federal Rules of Evidence, 88 Stat. 1929 (1975)." 127 Cong. Rec. S. 153 (daily ed. Jan. 15, 1981).

The specific constitutional provisions that are cited seem, on their face, off the point. As for the congressional power to prescribe rules of evidence, a power that one may fairly concede through no constitutional text can be cited for it, it is enough to say, at the risk of banality, that such a power, like any other congressional power, is exercised in subordination to specific constitutional limitations, including in particular those of the Bill of Rights. That Congress may prescribe rules of evidence does not mean, for example, that it is free to make a criminal defendant a compellable witness in his own trial.

III. S. 751 IS UNCONSTITUTIONAL BECAUSE IT ELIMINATES THE EXCLUSIONARY RULE AND FAILS TO PROVIDE ANY EFFECTIVE ALTERNATIVE REMEDY

S. 751 would eliminate the exclusionary rule entirely and would instead provide a limited damages remedy against the United States and authorize disciplinary action against offending law enforcement personnel. It thus tries to take advantage of the

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[1] We do not discuss the recent Supreme Court cases on the standing requirements of the Fourth Amendment as these do not bear upon when the exlusionary rule may be applied but rather who may ask to have the rule applied. *See, e.g.,* Rakas v. *Illinois,* 439 U.S. 128 (1978).

[2] This much at least is transparently evident: if S. 101 were current Supreme Court law, enactment of the legislation would be entirely superfluous. It is thus entirely clear that the purpose of S. 101 is to curtail the Supreme Court's application of the exclusionary rule. Senator DeConcini said as much in the introduction of his bill: "It [S. 101] would define and *limit* application of the exclusionary rule in Federal Courts." 127 Cong. Rec. S. 152 (daily ed. Jan. 15, 1981) (italic added).

currently popular deterrent rationale for the exclusionary rule—and what that rationale may be taken to imply, *i.e.*, that some other remedy might be substituted that would be as good a deterrent. The effort is plausible, but it fails. It fails for several reasons.

First, it ignores the fact that considerations other than deterrence have been thought and, to some extent at least, are still thought to underlie the exclusionary rule. Even if the Supreme Court has so far denigrated the idea that a defendant in a criminal case has a constitutional right not to suffer the admission of evidence illegally seized from him that it may be disregarded—a proposition that is by no means apparent from the cases—the Court clearly has not abrogated the doctrine that it and the lower federal courts will not be made parties to constitutional violations by allowing unconstitutionally seized evidence to be introduced into criminal trials. (Pp. 11–12, *supra.*) The explicit provision of a damages remedy does not affect either the personal rights or the judicial integrity reasons for excluding illegally seized items from criminal trials.

Second, the damages remedy (and the remedy of discipline for misbehaving police officers) are surely the most obvious of the remedies the Court recognized as "worthless and futile" in *Mapp* v. *Ohio,* 367 U.S. 643, 652 (1961). The Court there recited the experience of California, whose highest court had found that "other remedies have completely failed to secure compliance with the constitutional provisions" and therefore adopted the exclusionary rule, *id.,* at 651, and then went on:

"The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf." Id.* at 652.

The Court might conceivably be persuaded some day that the majority in *Mapp* was wrong when they spoke of the "obvious futility" of relying on any remedy other than exclusion. The mere explicit provision by Congress of remedies of the very sort that were thus found wanting 20 years ago is not persuasive by itself that the court should or would reconsider the rule of constitutional law to which it was led, in very considerable part, by its finding that it was futile to depend on such remedies.

Third, any damages remedy is in fact demonstrably inadequate as a deterrent of violations of the Fourth Amendment and, as limited by S. 101, the damages remedy would not approach being adequate. The authorization of disciplinary action adds little or nothing to what we assume is already the law and so cannot conceivably be regarded as an adequate substitute for the exclusionary rule. We expand on this third point below.

A. The inadequacy of the S. 751 damage remedy

We first discuss the problems intrinsic to any damage remedy for Fourth Amendment violations and then highlight those aspects of the S. 751 damage remedy that make it particularly inadequate.

Any damages remedy for Fourth Amendment violations is bound to be ineffective because of the difficulty of valuing the impairment of the interests the Fourth Amendment is designed to protect. The actual damages that could must easily be calculated are those for physical injuries to person and property flowing from a Fourth Amendment violation. But many searches and seizures clearly prohibited by the Fourth Amendment do not result in bodily injury or destruction of or damage to property. What are the damages to be awarded where a police officer without probable cause, very politely and courteously, proceeds to scrutinize the contents of a briefcase or purse and finds nothing compromising? Absent reasonable or probable cause, such conduct by the law enforcement officer would be in violation of the Fourth Amendment, yet it is hard to conceive of any practical way to calculate damages for such invasions of the right of privacy. How is a jury supposed to put a dollar figure on such an intangible as invasion of privacy? Perhaps the answer is clear: where the police officer has conducted himself so politely and courteously, no damage is suffered. But if this is the case, then in most cases involving violations of the Fourth Amendment, no damages will be awarded simply because police officers only rarely injure people or damage or destroy property wantonly in the execution of their duties.

The Fourth Amendment does not limit its protection to security from physical invasion of body and property by law enforcement officers or even principally concern itself with such physical harms. On the contrary, the Fouth Amendment speaks of the right of the people to be secure in their persons, houses, papers and effects." It is quite clear that this emphasis on "the right of the people to be *secure*" defines a right of privacy that is substantially broader than the bare right to have one's person and possessions left intact. The fact that it is hard to put a dollar figure on

what privacy is worth does not mean that privacy is worth nothing. And a damages remedy that does not compensate for invasions of privacy apart from physicial injury to body or property will be ineffective in deterring police misconduct that impinges upon the interest in privacy.

Thus, in the absence of extreme police misconduct there is good reason to suppose that the damage awards in most cases would be minimal and, thus, of minimal deterrent value. And, of course, because damage awards would be small, the incentive to sue would also be minimal, thus further reducing the deterrent value of the damages remedy.

There are other reasons why few damage actions are likely to be brought. Many of those who would be most likely to bring such actions live, at best, in uneasy accommodation with the enforcement officers whom they would be accusing of wrongdoing in any such action. Moreover, if convicted and imprisoned, the prospective Fourth Amendment plaintiff would be in the hands of the authorities—if not those who violated his rights, then, certainly in the view of the convict, their close colleagues. There is bound to be fear of reprisal. *See* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives,* [1975] Wash. U. L. Q. 621, 692 (1975). Additionally it seems likely that many claimants would be subject to pressures to waive their right to damages in the plea bargaining process.

Professor Amsterdam has described the institutional disincentives for an accursed party to pursue a damage remedy against law enforcement officers:

"Where are the lawyers going to come from to handle these cases for the plaintiffs? *Gideon* v. *Wainwright* and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personnal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on 'cover' charges? The opportunity to represent his client without fee in these resulting criminal matters?" Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 430 (1974).

The institutional obstacles to suit under a damage remedy such as S. 751 are not limited to those accused of crimes. Some of the more severe disincentives to sue for violations of the Fourth Amendment are common to both suspects and wholly innocent citizens. Thus, a jury is very unlikely to make a significant damage award to police misconduct victims who are in fact (or by virtue of their position as plaintiffs merely appear to be) criminal suspects. The sympathies of the jury will most likely lie with the law enforcement officers, who were after all engaged in doing their job.

"A defendant policeman in a section 1983 action may benefit from the image of authority and respectability evoked by his office . . . On the other hand, the plaintiff's reputation, if not already sullied by a criminal recorded, may be called into question simply because the case arises from a confrontation with the police. Finally, juries may be prejudiced against some plaintiffs because of their race or unconventional lifestyles." Project, *Suing the Police in Federal Court,* 88 Yale L. J. 781, 783–84 (1979).

There is no doubt that in this type of litigation, the defendant would seek to introduce evidence of the crimes on account of which the plaintiff was searched and his property seized. No doubt the defendant would seek to introduce evidence of suspicious or unorthodox behavior by the plaintiff. And, indeed, under a damage remedy these would be legitimate issues, as they are relevant to the issue of whether the law enforcement officers had probable cause to conduct the search or seizure. The jury would thus most likely conclude that the plaintiff is a rather unsympathetic sort seeking to harass those charged with crime control.[3] And, as noted by Professor

[3] As stated by one commentator:

"The reasons why the victim of the unconstitutional search and seizure so often loses his suit while the defendant-policeman prevails are numerous. The first and most important reason is that the claimant who has been charged with or convicted of crimes is not likely to evoke the jury's sympathy, particularly after the defendant-policeman explains that he was only trying to protect society. Even if the claimant has not been criminally charged, he will not be a sympathetic figure to the average jury if, as most victims of police illegality, he is part of America's lower class. Second, the jury bias in favor of a policeman often allows the policeman successfully to lie his way to victory by fabricating a story of adherence to constitutional requirements during the search and seizure." Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives,* [1975] Wash. U.L.Q. 621, 692–93 (1975).

Amsterdam and others, the plaintiff would be up against a team of professional investigators and testifiers, making the practical obstacles to recovery all but insuperable.[4]

The specific damages provisions of S. 751 exacerbate these inherent difficulties with the damages remedy. Most egregiously, the damages that may be recovered are limited to those for "actual physical personal and . . . actual property damage." Thus, by its very terms S. 751 precludes damage awards for impairment of the principal interest protected by the Fourth Amendment—the interest in privacy.

Given this limitation on the type of damages that may be recovered, indeed, S. 751 scarcely expands existing rights of citizens to be compensated by the United States for abusive practices of its law enforcement officers. Under the Federal Tort Claims Act, one can already sue the United States for assault, battery, false imprisonment, false arrest, and other common law torts resulting in injury to body or property. *See* 28 U.S.C. §§ 2674 and 2680; *Norton* v. *United States,* 581 F.2d 390 (4th Cir.), *cert. denied,* 439 U.S. 1003 (1978). The only expansion in the availability of damage awards provided by S. 751 is to that segment of cases in which serious injury has been inflicted on a person's body or property in violation of the Fourth Amendment but in a manner that did not involve any recognized intentional or negligent tort of a law enforcement officer. There may be such cases, but it is not easy to hypothesize their facts.

S. 751 exacerbates the problems that are inherent in any damages remedy by capping the permissible award at $25,000 for actual and punitive damages combined. The $25,000 ceiling would deter suit. Twenty-five thousand dollars is not a lot of money for which to gamble the kind of costs (and attorney fees unless the case were taken on a contingent basis) that are associated with suits against the United States in federal court and that would presumably be borne by the plaintiff if he lost.

While S. 751 permits the court to award claimants attorney's fees, and thus superficially appears to provide incentives for lawyers to represent claimants, these incentives are negligible. Under 28 U.S.C. § 2678, which is expressly applicable to damage claims under S. 751, an attorney may not charge his or her client more than 25 percent of any judgment rendered or more than 20 percent of any settlement. This percentage limit on attorney's fees means that the absolute maximum an attorney may charge is $6,250 in a judgment and $5,000 in a settlement. As damage awards under S. 751 in the vast majority of cases are likely to be below the $27,000 ceiling,[5] it is clear that many claimants (who are likely to be poor) would have grave difficulties securing the services of able counsel.

B. The disciplinary remedy

S. 751 contains a section that provides:

"An investigative or law enforcement officer who conducts a search or seizure in violation of the United States Constitution shall be subject to appropriate discipline in the discretion of the Federal agency employing such officer, if that agency determines, after notice and hearing, that the officer conducted such search or seizure lacking a good faith belief that such search or seizure was constitutional."

This provision in effect vests discretion in the federal agencies to discipline personnel who commit violations of the Fourth Amendment. To our knowledge, the federal agencies already have such discretion and thus this provision authorizing disciplinary measures adds nothing new.

IV. THE STANDARDS PRESCRIBED BY S. 101 ARE INEQUITABLE, UNADMINISTRABLE AND WOULD UNDERMINE THE DETERRENT FUNCTION OF THE RULE

When the inadequacy of the proffered substitute remedies of S. 751 is laid bare, all that need be said has been said, both as a matter of constitutional law and as a matter of policy. The inadequacy of the S. 751 remedies demonstrates that the bill

[4] In Professor Amsterdam's words:

"Police cases are an unadulterated investigative and litigative nightmare. Taking on the police in any tribunal involves a commitment to the most frustrating and thankless legal work I know. And the idea that an unrepresented, inarticulate, prosecution-vulnerable citizen can make a case against a team of professional investigators and tesifiers in any tribunal beggars belief. Even in a tribunal having recognized responsibilities and some resources to conduct independent investigation, a plaintiff without assiduous counsel devoted to developing his side of the case would be utterly outmastered by the police. No, I think we shall have airings of police searches and seizures on suppression motions or not at all." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 430 (1974).

[5] One study indicates that the average award in Fourth Amendment suits brought under 42 U.S.C. § 1983 was $5,723. Project, *Suing the Police in Federal Court,* 88 Yale L. J. 781, 789 (1979).

does not pass constitutional muster and that, in addition, there are the soundest of policy reasons for not enacting it.

Concerning S. 101 a few additional words are appropriate. For even if the question of its constitutionality were closer than it is, there would be independent reasons for not enacting it.

Adoption of the standard set forth in S. 101—*i.e.,* the requirement that there be a "substantial" or "intentional" violation of the Fourth Amendment if the exclusionary rule is to be applied—would preclude application of the rule to cases where the invasion of Fourth Amendment rights, although not intentional, was reckless, grossly negligent, or negligent unless it was "substantial." [6] As "intentional" and "substantial" violations of the Fourth Amendment are alternative thresholds for application of the rule under S. 101, we shall first address the two standards separately.

A. The intentional and substantial standards of S. 101 are not calculated to further the purpose of preventing Fourth Amendment violations

Proponents of S. 101 probably mean to reserve the term of "intentional violation" for those cases where law enforcement officers intend to conduct a search and seizure in violation of the Fourth Amendment or where the search and seizure is based on erroneous and unreasonable factual premises. This meaning of the term "intentional violation" would, under S. 101, severely curtail the exclusionary rule and (not surprisingly) finds no support in the decisions of the Supreme Court.

Restriction of the exclusionary rule to those violations that are a product of a conscious desire to ignore the Fourth Amendment would seriously undermine the deterrent function of the rule. It would remove the incentive of law enforcement officers to educate themselves in Fourth Amendment jurisprudence. It would encourage them to make warrantless searches where they believed that a warrant might be required but were not sure.

There is no doubt that negligent, grossly negligent and reckless violations of the Fourth Amendment can be deterred and that the exclusionary rule can serve its deterrent function in these cases as well as in cases of intentional violations. Faulty though his comprehension of the nature of the deterrent function of the rule may be (p. 13, *supra*), Justice Rehnquist understood this much when he wrote in *Michigan* v. *Tucker,* 417 U.S. 433, 447 (1974), that "the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."

To preclude application of the exclusionary rule where the violation is not intentional is to place a premium on a law enforcement officer's ignorance of the Constitution. In effect, then, S. 101 would reward a law enforcement officer's ignorance of the Constitution by precluding application of the exclusionary rule where a nonsubstantial violation is not intentional.[7] S. 101 would implicitly encourage negligent and reckless police conduct in arrest, search and seizure.

Like the "intentional" standard, S. 751's alternative threshold of "substantial" violation is also seriously deficient in its protection of Fourth Amendment rights. S. 101 states:

"In determining whether a violation is substantial for the purposes of this section, the court shall consider all of the circumstances, including: (1) the extent to which the violation was reckless; (2) the extent to which privacy was invaded; (3) the extent to which exclusion will tend to prevent such violations; and (4) whether, but

[6] A "substantial" violation is further defined in S. 101 by a four-prong test that includes consideration of whether the violation was "reckless." Recklessness is generally considered in criminal and tort law a lower threshold of intentionality than "intentional." Because "recklessness" is but one prong of a four prong test defining substantial, it is evident that some "reckless" violations of the Fourth Amendment may ultimately be deemed not "substantial" and therefore in those cases S. 101 will preclude application of the exclusionary rule.

[7] As noted by Professor Kaplan (who is by no means a friend of the exclusionary rule) in connection with a proposed "inadvertence" exception to the exclusionary rule:

"There are, however, basic problems with such a modification of the rule. It would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Nor would it suffice further to modify the rule and require that the police error be reasonable as well as inadvertent. While such a standard would motivate a police department to insure that its officers made only reasonable mistakes, it is hard to determine what constitutes a reasonable mistake of law. Moreover, the exclusionary rule is already held inapplicable where a policeman makes a reasonable factual mistake." Kaplan, *The Limits of the Exclusionary Rule,* 26 Stan. L. Rev. 1027, 1044 (1974).

for the violation, the things seized would have been discovered; or whether the relationship between the things discovered and the violation is attenuated."

Presumably, this four-part test requires the court to balance each of the four factors in determining whether the violation is substantial and thus whether the exclusionary rule ought to apply. The most striking feature of the "substantial violation" standard (and perhaps its most radical departure from existing Supreme Court doctrine) lies in the fact that it would delegate a whole series of highly speculative factual inquiries to the lower federal courts.[8] Deciding whether a violation was reckless, deciding to what extent privacy has been invaded, deciding to what extent exclusion would prevent such violations and deciding whether "but for" the violation the things seized would have been discovered each is a highly speculative metaphysical inquiry. Quite apart from the fact that the Supreme Court has not adopted the standards set forth in S. 101, it has neither delegated authority to nor required the lower federal courts to make such fact-oriented inquiries, and we doubt that it would ever do so. The "substantial violation" standard of S. 101 vests almost complete discretion in the lower federal courts to make factual decisions on each of the four factors. The "substantial" violation standard even fails to specify the thresholds for each of the four considerations. For instance, in ruling upon the admissibility of evidence does a substantial invasion of privacy counsel exclusion? A direct invasion of privacy? A serious invasion of privacy? A perceptible invasion of privacy? One can ask the same questions about the degree of recklessness required to counsel exclusion under S. 101.

In addition, S. 101 fails to establish who has the burden of proving the (indeterminate) levels for each of the four factors. Moreover, the substantial violation standard vests almost complete discretion in each federal district judge to decide what weights to assign to each of the four prongs. In addition, as the four considerations are hardly fungible, it is not readily apparent how a court should perform the balancing of all four considerations. How does one balance an indeterminate level of recklessness against an undefined degree of invasion of privacy? In its broad grant of authority to the lower federal courts, the "substantial" violation standard leaves each federal district judge free to consider "all of the circumstances." We submit that enactment of the "substantial" violation standard would result in a broad spectrum of differing views on the scope of the exclusionary rule; it certainly would not result in anything close to a recognizable rule of law.

B. S. 101 would impair the efficient administration of justice

Quite apart from the fact that the "intentional" and "substantial" violations standard of S. 101 is unintelligible and incapable of being applied in any manner that would even remotely resemble a rule of law, S. 101 would have harmful effects upon the efficient administration of justice. S. 101 would require complicated factual inquiries at suppression hearings. It would require an investigation of the officer's state of mind to determine whether a violation was intentional or reckless. It would require a factual inquiry into the extent to which privacy was invaded. Indeed, S. 101 offers the worst of all possible worlds in terms of judicial administration. First, it would require the courts to disregard 80 years of precedent on the exclusionary rule and to start defining the scope of the rule from scratch. The imponderable factual inquiries required by S. 101 would compound congestion and delay problems in the courts. Massive litigation would result as defense attorneys sought to exclude evidence under S. 101. Ironically, the appellate courts would not be able to provide much guidance to the lower courts because S. 101 prescribes an extremely fact-oriented standard, and the authority of the appellate courts extends only to declaring decisions to admit evidence clearly erroneous as a matter of law. The inability of the appellate courts to give guidance to the lower federal courts on the interpretation of S. 101 would increase litigation simply because the uncertainties contained in S. 101 will not be dispelled for many years.

Futhermore, S. 101 would direct judicial inquiry away from the substantive requirements of the Fourth Amendment, away from adjudication of the guilt or innocence of the suspect and towards an investigation of the law enforcement officer's state of mind. As a result, the courts would be burdened with yet another fact-finding duty. And the difficulties that the courts would face in resolving the relevant factual issue would be imposing, if not insuperable.[9] For example, there is no doubt that S. 101 would increase fabrication by law enforcement officers seeking to secure the admission of evidence. What law enforcement officer is likely to give testimony indicating that his invasion of an individual's Fourth Amendment rights was intentional or reckless?

[8] The high incidence of uncertainty and speculation in the standards set forth in S. 101 is no accident. S. 881, 93d Cong., 1st Sess. (1973), which was a precursor to S. 101 and which contained a similar "substantial" violation threshold for application of the exclusionary rule, was explicitly designed to give the courts greater latitude in decisions on admissibility of evidence.

CONCLUSION

Over the years, the excusionary rule has been subject to criticism by law enforcement officers and by some judges and commentators. S. 101 and S. 751 represent attempts to repair some of the asserted shortcomings of the rule. If enacted, however, neither would repair any such shortcoming, but instead both would strip the exclusionary rule of the value it now has as deterrent and as guardian of constitutional rights and judicial integrity. The exclusionary rule as it stands now is a fairly simple rule to apply. It is readily understandable to police officers and judges. Many of the criticisms leveled at the exclusionary rule concern not the rule but the substantive commands of the Fourth Amendment as these have been interpreted by the Supreme Court.

"As Senator Robert Wagner pointed out in the 1938 New York State Constitution Convention 'All the agruments [that the exclusionary rule will handicap law enforcement] seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making 'no challenge to the fundamental rules to which the police are required to conform.' " Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 Judicature 67, 73 (1978).

There are those who claim that the exclusionary rule prevents the courts from bringing criminals to justice. Factually, that seems not to be the case in any significant sense. (Pp. 1–3, *supra.*) Moreover, it is not the exclusionary rule that creates whatever obstcles there are to full enforcement of the criminal law; it is the Fourth Amendment itself—a constitutional provision that quite consciously makes the work of law enforcement officers more difficult in order that all of us may be free from unreasonable searches and seizures.

TESTIMONY OF PROF. WILLIAM GREENHALGH, GEORGETOWN UNIVERSITY LAW CENTER, ON BEHALF OF THE AMERICAN BAR ASSOCIATION, ACCOMPANIED BY LAURIE ROBINSON, DIRECTOR, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION

Mr. BERMAN. Our next witness is Prof. William Greenhalgh. Professor Greenhalgh is testifying on behalf of the American Bar Association.

He is currently a professor of clinical law at Georgetown University Law Center, director of the E. Barrett Prettyman fellowship program, and chairperson of the ABA's Criminal Justice Section. He is a former prosecutor and a former Assistant U.S. Attorney for

[9] As stated by Professor Kaplan: "There is a more serious problem with exempting searches made through inadvertent errors of law from the exclusionary rule. To do so would add one more factfinding operation, and an especially difficult one to administer, to those already required of a lower judiciary which, to be frank, has hardly been very trustworthy in this area. It is difficult enough to administer the current exclusionary rule, since police perjury can, and often does, prevent accurate findings of fact. So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level. In order to suppress evidence, the trial judge would have to find evidence of the officer's state of mind which would be generally difficult to come by apart from the officer's self-serving and generally uncontradicted testimony. And since the necessary finding requires proof that a policeman actually has engaged in a criminal act, the defendant's burden of proof would be increased, as a psychological or perhaps even as a legal matter." Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1045 (1974).

the District of Columbia. He is accompanied by Ms. Laurie Robinson, director of the ABA Criminal Justice Section.

Professor Greenhalgh, we will incorporate your written statement into our record. Why don't you share your thoughts with us?

Professor GREENHALGH. First of all, we would also like to enter into the record the brief that the American Bar Association filed as amicus curiae in *Illinois* v. *Gates,*[1] dealing with our opposition to the good faith exception.

Mr. BERMAN. The ABA has filed an amicus brief in this case?

Professor GREENHALGH. Yes; the first time ever dealing with this subject matter.

Mr. BERMAN. Interesting. Congratulations.

Professor GREENHALGH. As an aside, before I start, I don't know if members of the subcommittee know that your chairman has received a very prestigious award as the recipient this year for the American Horsemen's Protective Association last December.

What relevance that has to criminal justice in some of these matters seems to escape us, but it was one of those delightful evenings where the chairman and I were reminiscing about some other battles that have been fought before this subcommittee over in the Senate side.

Mr. Chairman, I would like to talk generally about the issue concerning oversight on the exclusionary rules.

First of all, there are seven exclusionary rules, the enforcement of which is the avowed and singular duty of the Supreme Court of the United States. Four of those are constitutionally predicated.

They are the 4th amendment, which is at issue here today, as far as *Mapp v. Ohio,*[2] which through the operation of the 14th amendment and the due process clause made it the law of the land.

The fifth amendment in two categories: *Miranda,*[3] in 1966, and the due process clause, starting with *Brown* v. *Mississippi*[4] in 1936.

There is one other constitutionally predicated exclusionary rule; that is, the invocation of the sixth amendment assistance of counsel clause, which the Supreme Court found in 1964 under its Federal supervisory power in *Massiah,*[5] and then made it the law of the land a year later in *McLeod* v. *Ohio*[6] and has reaffirmed that in *Brewer* v. *Williams*[7] in 1977.

Incidentally, the eighth circuit reversed Tony Williams' conviction for the second time, and if I were a betting person, which is illegal in the District of Columbia, I am sure the State of Iowa will seek a writ of certiorari and I am sure *Brewer* v. *Williams* will be argued sometime next fall.

The three statutory rules of exclusion are based on congressional rulemaking and legislative authority. One is the interpretation given by the Supreme Court of rule 5 of the Federal Rules of

[1] EDITOR'S NOTE.—*See* 103 S.Ct. 2317 (1983).
[2] EDITOR'S NOTE.—367 U.S. 343 (1961).
[3] EDITOR'S NOTE.—*Miranda* v. *Arizona*, 384 U.S. 436 (1966).
[4] EDITOR'S NOTE.—297 U.S. 298 (1936).
[5] *Massiah* v. *United States* 377 U.S. 201 (1964).
[6] EDITOR'S NOTE.—381 U.S. 356 (1965).
[7] EDITOR'S NOTE.—430 U.S. 387 (1977).

Criminal Procedure dealing with the *McNabb-Upshaw-Mallory*[8] rule concerning prompt presentment without unnecessary delay.

The second one is an interpretation by the Supreme Court under title 18, U.S.C. section 3109, in *Miller* v. *United States*[9] in 1958, which deals with the announcement of authority and purpose before breaking and entering in the execution of warrants.

Last but not least is the one dealing with the National Wiretapping Act, which Congress recodified as part of the old Federal Communication Act in 1968, which is title III of the Omnibus Crime and Control Act of 1968, commonly known as title 18, U.S.C. section 2510, and those that follow.

Seven rules of exclusion: four constitutionally predicated; three statutorily or rule predicated. Along with that there are seven exceptions to the warrant clause in the fourth amendment. This was previously alluded to by the speaker just before me.

Interestingly enough, from a professorial point of view, one of the easiest ways to teach that is to follow Justice Potter Stewart's decision in the *Charles Katz*[10] case in 1967; to wit, all searches and seizures without judicial process are per se unreasonable except for seven carefully defined exceptions.

They are as follows: a search incident to a valid arrest; plain view; after plain view you have the automobile exception; then the inventory search; exigent circumstances; border searches; and last, consent.

One that the Justice Department has been reaching for is this particular one which is somewhat offensive; that is, good faith exception. I will devote some time to that in just a few minutes.

It might be interesting for the subcommittee to know that the Supreme Court of the United States, since 1914 in *Weeks* v. *United States,*[11] has interpreted the fourth amendment 188 times. I can break that down as follows:

Between *Weeks* and *Wolf* v. *Colorado,*[12] that is between 1914 and 1949, when the Supreme Court said it is now part of the due process but did not impose the exclusionary rule on the States in order to give them more opportunity to work within its framework, there were 37 cases decided, 19 of which were decided in favor of the individual as opposed to the prosecution.

From *Wolf* until *Mapp,*[13] from 1949 until 1961, there were 27 cases decided, and 12 of those were decided in favor of the individual. When *Mapp* became the law of the land through the due-process clause, there have been 124 cases adjudicated by the Supreme Court, either adjudicating and deciding as to its review of State criminal procedures, as well as Federal.

On the State side, there have been 77 cases decided by the Court. It is of some significance to realize that the Court has reversed in favor of the individual 58 out of 77 times since 1961. Thus a legitimate inference can be drawn that the States have an awful lot to

[8] EDITOR'S NOTE.—*McNabb* v. *United States*, 318 U.S. 322 (1943); *Upshaw* v. *United States*, 335 U.S. 410 (1948); *Mallory* v. *United States*, 354 U.S. 449 (1957).
[9] EDITOR'S NOTE.—357 U.S. 301 (1958).
[10] EDITOR'S NOTE.—*Katz* v. *United States*, 389 U.S. 347 (1967).
[11] 232 U.S. 383 (1914).
[12] EDITOR'S NOTE.—338 U.S. 25 (1949).
[13] EDITOR'S NOTE.—*Mapp* v. *Ohio*, 367 U.S. 643 (1961).

do with regard to what Chairman Conyers said concerning upgrading public education concerning implementation of the fourth amendment of the Constitution.

On the Federal side there have only been 47 cases decided. Interestingly enough, only 14, roughly one-third, have been decided in favor of the individual.

Mr. BERMAN. That is by the Supreme Court?

Professor GREENHALGH. By the Supreme Court of the United States interpreting the fourth amendment either in State criminal trial proceedings or in Federal criminal trial proceedings; 77 State, 47 Federal.

Mr. BERMAN. It doesn't speak to circuit courts or trial courts?

Professor GREENHALGH. No; I am having a difficult enough time remembering 188 cases. For me to get down into the 12 Federal appellate courts, I think it might be close to hopeless.

As to the good-faith exception, which was ordered on November 29, 1982, by the Court on its own motion for reargument in *Illinois* v. *Gates,* one of the things that we tried to impress on amicus curiae, as far as the American Bar Association is concerned, is the rejection of the good faith concept by the Supreme Court of the United States for 105 years. They have consistently rejected over this period of time.

It started in a civil case called *Stacey* v. *Emery* in 1878,[14] which was a suit for damages for seizure by a tax collector. After that the next case where they rejected it was *Director General of the Railroads of the United States* v. *Kastenbaum* in 1923.[15]

At that time the court was very definitive with regard to the question of not whether he, the officer, thought the facts constituted probable cause but whether the court did. That case absolutely said good faith is not enough to constitute probable cause.

What you are talking about in the good-faith exception dealing at least in the *Gates* case was a direct attack on the warrant clause itself, not as an eighth exception, which will probably come up, unfortunately, Mr. Chairman, in a case which will be argued next fall which we will have to look at, which is *Michigan* v. *Clifford.*[16]

The main case defining probable cause was the automobile exception case, *Carroll* v. *United States* in 1925.[17] Since that time we have had *Henry* in 1959,[18] *Beck* v. *Ohio* in 1964,[19] the last term in June; a very heavy emphasis by six Justices, including Rehnquist and O'Connor, agree with Justice Stevens in *United States* v. *Ross* [20] in part 2; and then a total rejection of the Department of Justice's pitch to the court rejecting *Peltier* [21] in *Johnson* [22] part 4, written by Mr. Justice Blackmun.

What I am suggesting to you is 105 years of constitutional law that the good-faith exception is not a substitute for the warrant

[14] EDITOR'S NOTE.—97 U.S. 642 (1878).
[15] EDITOR'S NOTE.—*Director General of Railroads* v. *Kastenbaum,* 263 U.S. 25 (1923).
[16] EDITOR'S NOTE.—*See* 104 S.Ct. 641 (1984).
[17] EDITOR'S NOTE.—267 U.S. 132 (1925).
[18] EDITOR'S NOTE.—*Henry* v. *United States,* 361 U.S. 98 (1959).
[19] EDITOR'S NOTE.—379 U.S. 89 (1964).
[20] EDITOR'S NOTE.—456 U.S. 798 (1982).
[21] EDITOR'S NOTE.—*United States* v. *Peltier,* 422 U.S. 531 (1975).
[22] EDITOR'S NOTE.—*United States* v. *Johnson,* 357 U.S. 537 (1982).

clause; that is, no warrant shall issue but upon probable clause. We have tried to educate in some small way the Court on this point.

The other thing I think is lost—again I think Chairman Conyers has put his finger on it—is the public's perception of all these criminals going free because a constable has blundered.

What the public doesn't understand is why we went to war 200 years ago against the Tories, because of this particular problem. It was because of the very strongly developed antagonism to what we call the writs of assistance by the tax collectors in the colonies, as well as general warrants being declared unconstitutional in Great Britain, and even the French had an influence in the lettres de cachet, the blank warrants which stashed people without any judicial review, before their revolution in 1789.

The fourth amendment was designed by the framers to protect vast majorities of future Americans, the innocent, the law-abiding, the guiltless, just as much as when *Weeks* was declared in 1914 to protect the guilty because of a violation of the constitutional rights.

The *Weeks* case at page 392, the *Gouled* case at 307, the *Agnello* case at page 32, the *Byars* case at page 29, the *Marron* case at page 196, *Go-Bart* at 357, *Lefkowitz* at 464, *Grau* at 128, *Sgro* at 210, *DiRe* at 595, *Johnson* at 14, *Trupiano* at 709, *McDonald* at 453, and *Wolf* itself—those are 13 cases where the Supreme Court from 1914 to 1949 made it absolutely clear the fourth amendment was designed to protect the innocent as well as the guilty.[23]

We lose that perception. We are losing it every day, not only in the Halls of Congress but in court arguments. It was raised again a week ago last Tuesday in oral argument in the Supreme Court of the United States.

In fact, the Chief Justice reminded counsel for the respondent that the dope was found in his car and in his house. As a result, of course, he was guilty. Unfortunately, we have to remind the Chief Justice of the United States the search was not made legal by what at the time turns up and that, of course, as the law has been written several years by previous Justices of the Supreme Court of the United States.

I think one of the things that we are very much concerned with not only is the public perception, but also the attitude of the Department of Justice reaching for what we call extreme and dubious legal exceptions to the exclusionary rule.

I would like to suggest to this subcommittee that if you had not had the fourth amendment exclusionary rule as part of the due process clause after *Mapp* v. *Ohio,* the following flagrant, egregious violations of fourth amendment rights would never have been decided in favor of the individual.

It protects those from being rounded up in a dragnet arrest situation, such as in *Davis* v. *Mississippi.*[24] It protects an individual,

[23] EDITOR'S NOTE.—*Weeks* v. *United States,* 232 U.S. 383 (1914); *Gouled* v. *United States,* 255 U.S. 298 (1921); *Agnello* v. *United States,* 269 U.S. 20 (1925); *Byars* v. *United States,* 273 U.S. 28 (1927); *Marron* v. *United States,* 275 U.S. 192 (1927); *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931); *Lefkowitz* v. *United States,* 285 U.S. 452 (1932); *Grau* v. *United States,* 287 U.S. 124 (1932); *Sgro* v. *United States,* 287 U.S. 206 (1932); *United States* v. *DiRe,* 332 U.S. 581 (1948); *Johnson* v. *United States,* 333 U.S. 10 (1948); *Trupiano* v. *United States,* 334 U.S. 699 (1948); *McDonald* v. *United States,* 335 U.S. 451 (1948); *Wolf* v. *Colorado,* 338 U.S. 25 (1949).
[24] EDITOR'S NOTE.—394 U.S. 721 (1969).

that he cannot be arrested because he has a prior criminal record, in *Beck* v. *Ohio.*[25] There must be more probable cause.

He cannot be arrested for investigation but only on probable cause, in *Brown* v. *Illinois.*[26] He must be protected again from a police officer's instruction to a subordinate, "go out and pick him up", in *Dunaway* v. *New York.*[27] He must be protected from an unreasonable stop and frisk in *Sibron* v. *New York.*[28]

As has already been mentioned with regard to one of the border search cases by the previous speaker, that the color of a person's skin is not to be decided as a matter of probable cause, it takes more than that, in *Brignoni-Ponce.*[29] Also, public highways, there can be no random stops, there must be either probable cause or suspicion for those who drive at least through the State of Delaware.

Other cases, there can be no stop and identify on less than probable cause by statute, such as *Brown* v. *Texas.*[30] More recently, if you wish to go into a person's home, you have to have a piece of paper absent exigent circumstances or consent, either in *Payton-Riddick* [31] and now even third-party searches require a search warrant, as in the *Gary Steagald* [32] case.

Who will ever forget *Bumper* v. *North Carolina,*[33] where you had four white deputy sheriffs knocking on the door of a 66-year-old widowed grandma on a country road in North Carolina saying they had a search warrant, when they knew that they didn't, and asked for consent to search the house.

All those examples, from 1968 forward, what would have been the protection of citizens of this country, black, white, Hispanic, or otherwise, had not there been the imposition of the exclusionary rule through the due process clause, starting with *Wolf,* and then second the final imposition of the exclusionary rule in *Mapp* v. *Ohio.*

For us to say that it is not there only to protect the guilty, it would seem to me, based on those egregious, flagrant violations of one's individual rights that have been brought by the Supreme Court, that I wonder what the protections would be if it was abolished.

I might mention this—and I think the speaker behind me will talk about this—as to alternatives. The subcommittee is well aware of what the Supreme Court did on Monday concerning a case called *Briscoe,*[34] where they said Congress did not intend to abrogate the common law witness immunity of police officers in 1983 [35] proceedings if they committed perjury. Therefore, there is no damage remedy under 1983.

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[25] EDITOR'S NOTE.—379 U.S. 89 (1964).
[26] EDITOR'S NOTE.—422 U.S. 590 (1975).
[27] EDITOR'S NOTE.—442 U.S. 200 (1979).
[28] EDITOR'S NOTE.—392 U.S. 40 (1968).
[29] EDITOR'S NOTE.—*United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975).
[30] EDITOR'S NOTE.—443 U.S. 47 (1979).
[31] EDITOR'S NOTE.—*Payton* v. *New York,* 445 U.S. 573 (1980); *Riddick* v. *New York,* 445 U.S. 573 (1980).
[32] EDITOR'S NOTE.—*Steagald* v. *United States,* 421 U.S. 204. 101.
[33] EDITOR'S NOTE.—391 U.S. 543 (1968).
[34] EDITOR'S NOTE.—*Briscoe* v. *Lahve,* 51 U.S.L.W. 4247 (U.S., Mar. 7, 1983).
[35] EDITOR'S NOTE.—18 U.S.C. 1983.

I might suggest to you can there ever be an alternative to the exclusionary rule based on this *Briscoe* case. Everybody will say perjury, but it seems to me you are really going to have to investigate. If you are talking about Federal tort claims amendments and things like that, I think this *Briscoe* case certainly is lending a credence that alternatives are just not going to work.

Mr. CONYERS. Can we rewrite the law to help correct that?

Professor GREENHALGH. As long as you hold your hearings and have what Congress intends, I am sure, because it went out purely on statutory construction. Justice Stevens wrote it, it was 6 to 3, and there is no question it was purely statutory construction. You know what you can do with statutory construction. That is up to you.

Mr. BERMAN. So we could provide alternatives?

Professor GREENHALGH. Sure. You can always do it, but now I am just saying that the alternatives, as the previous speaker has said, where have they worked at all? I think what we have been talking about is maybe we ought to keep the exclusionary rule in place and work with alternatives and see whether or not there can be substitutes later on. I disagree with that emphatically, obviously.

Mr. BERMAN. Why?

Professor GREENHALGH. Because of what the Court has done in 188 cases and the requirements for the Constitution of the United States that a rule of practice must never prevail for any technical reason over a constitutional right. That is the reason the fourth amendment is there.

Mr. BERMAN. Didn't the Court say in *Mapp,* and maybe in *Wolf* as well, that the reason we are drafting on this exclusionary rule——

Professor GREENHALGH. We are imposing it on the States.

Mr. BERMAN [continuing]. Imposing it on the States, and before that on the Federal courts, is because it seems to be the only way to provide any sanction on these unlawful searches of people's homes?

Professor GREENHALGH. A violation of the fourth amendment right.

Mr. BERMAN. It obviously hasn't deterred a lot of unlawful searches, or else we wouldn't have had any cases since the rule was laid down.

If we could develop meaningful and perhaps more effective alternatives, what would be wrong with that? Why wouldn't that be a good tradeoff?

Professor GREENHALGH. The ABA is opposed to any abolition or modification of Supreme Court decisions. That is the policy of the House of Delegates as espoused in Cleveland, Ohio in February 1973.

Mr. BERMAN. On this issue?

Professor GREENHALGH. On this issue. We are opposed to it. Mr. Berman, we will be vocal in our opposition because we feel that the exclusionary rule has worked and will continue to work.

It might interest the subcommittee to know that Mr. Gekas was saying that you are in probably no big particular hurry with regard to this legislation.

Does the subcommittee know how many cases will have been argued between October 1982 and probably December 1983 concerning the fourth amendment of the Constitution of the United States?

Presently pending, arguments, briefs, writs granted, there are now 15 out of 31 criminal law and procedure cases dealing with the fourth amendment. That is the most in the 25 years that I have either been teaching or following the fourth amendment, as a matter of professional responsibility.

There is a tremendous amount of activity across the street. How all that is going to turn out we certainly won't know.

Mr. BERMAN. I am nervous.

Professor GREENHALGH. You are?

Mr. BERMAN. I recall the Chief Justice in a lot of dissents and in a lot of opinions communicating, as you implied in your quote from him in some decision he made recently, that there is at least some sentiment in that court for undoing or weakening the exclusionary rule.

Professor GREENHALGH. I think he has gone so far not to overrule. We have him on the record—I forget the name of the case right now—it was in the respondent's brief. Mr. Reilly picked that up very well, and of course that is always something to come back and haunt the Chief Justice as such.

There is no question there is a thrust for restriction. In the meantime, the Court is doing its own work on it. Ever since 1974 they have decided six cases which have gradually eroded the application of the exclusionary rule, starting with *Calandra,*[36] grand jury witnesses, things like that, and then finishing up in 1980 with the standing cases, in *Salvucci,*[37] the *Havens*[38] case on impeachment, *Stone* v. *Powell*[39] dealing with no Federal habeas corpus review, if there has been a fair and full hearing down below in State criminal trial proceedings. There have been those types of cases coming about, so they have been policing themselves concerning the application of the rule.

Goodness knows what will happen between now and next year. Ten of these cases will have been decided by July 1. We will certainly know better by that time.

Most everything I have said is incorporated somewhat by reference in our statement. Also, our brief, where we were very much opposed to—that is the reason we filed for the first time ever because this was a direct attack on the warrant clause itself and the criminal justice section of the ABA was so concerned about that.

For what it is worth, the board of governors, which is not exactly one of the most liberal organizations of the American Bar Association, unanimously approved the filing of that brief.

Even more interestingly enough, the executive committee, in an emergency session in New Orleans last month, authorized me to argue for the first time ever in the history of the American Bar

[36] EDITOR'S NOTE.—*United States* v. *Calandra,* 414 U.S. 338 (1974).
[37] EDITOR'S NOTE.—*United States* v. *Salvucci,* 448 U.S. 83 (1980).
[38] EDITOR'S NOTE.—*United States* v. *Havens,* 446 U.S. 620 (1980).
[39] EDITOR'S NOTE.—428 U.S. 465 (1976).

Association for 10 minutes, if the court would grant us that permission, having been ceded 10 minutes by respondent's lawyer.

Interestingly enough our motion was denied. Justices Stevens and Brennan would grant the motion. So, we lost out that time. What we will do in *Michigan* v. *Clifford,*[40] which is the next good faith case, coming up next fall, remains to be seen. I am pretty sure that we will at least get authority to file. Whether or not we will ask them again for permission to argue remains to be seen.

I will be happy to answer any questions.

Mr. CONYERS. What is the *Michigan* case about?

Professor GREENHALGH. That is about something like this. A case previously decided in the late 1970's was *Michigan* v. *Tyler.*[41] It was an arson case. As Justice White said, you don't need to stop at the courthouse on the way to the fire, but you have to stop at the courthouse to get a warrant after the fire.

What this case involves, Mr. Chairman, is the issue of an arson investigator making a warrantless sanctuary seizure after the fire and recovering evidence indicating arson and whether or not that seizure was reasonable.

Question 2 presented by the court is as follows: Even if it was unreasonable, was not that investigation made in good faith.

In our judgment, that is more dangerous than taking on the warrant clause itself because it really looks to an eighth exception, or adding one more to the seven exceptions to the warrant clause. For that reason that bears a much more close watch concerning how that case is going to come out in probably *Gates.*

Gates may go the way of all flesh because of the independent State ground. Again, if I were a betting person in the District of Columbia, I think when they voted last Friday on that, they may have given it a little time before they dismiss that writ as improvidently granted.

I could be wrong because it was so strong that the Illinois Supreme Court and the intermediate appellate court have decided the issue on their own constitution based on case law and a statute and their own constitution, that it became painfully clear that the court really didn't have jurisdiction. They can always find that, but it looks like it might be washed out on that basis. The *Clifford* case is the next war that has to be fought.

Mr. CONYERS. As sort of the John Kenneth Galbraith of the criminal justice organization in the United States, is there some larger way, as you have looked over all of these different ways the law has been shaped and stretched—what comes out of this enormous amount of analysis that you have put in this, Professor? Is there something that we are not doing in the public domain that might resolve this?

I frequently get the impression that the politics of criminal justice have become so deeply ingrained in the body politic that we don't really think seriously. It is sort of like an advanced adult game about crime and police and people getting beat up. As a Nation we are at once serious about it and then we are really not.

[40] EDITOR'S NOTE.—*See* 104 S.Ct. 641 (1984).
[41] EDITOR'S NOTE.—436 U.S. 499 (1978).

It comes up high on the polls. It is always the first or second thing bugging the hell out of everybody, if you were to believe what we would tell the pollsters, but in the end nobody could really believe what we offer up at the local and Federal levels as lawmakers: Stiffer sentences, more police on the streets, getting tough with criminals, cutting out clubhouses that are really masquerading as prisons.

We have been serving that up for so long that most people are probably honestly immunized against all of this and yet we seem to be caught in it. There aren't an awful lot of people—even the judiciary sometimes is startlingly lackadaisical about this whole approach.

It seems to me difficult for us to get a serious handle on the phenomenon of criminal justice in America—among our members of the bar, our lawmakers, who may well bear even more responsibility since we shape this in some respects even more than the court.

I sometimes can understand how members of the bench began to write all of these arcane things. It sometimes seems like an advanced video game, where there are thousands of alternatives and nobody ever sat down in a robe and said I am going to write something in between all of these 1,000 other decided cases just to keep everybody on their toes.

It seems to be at a great expense of something in our national approach to governing that this is occurring. The exclusionary rule seems to highlight that we have to keep coming back in and rereading our decisions and our laws and trying to keep everybody—as you point out, we are probably in a very dangerous time with these kinds of decisions, some of them getting trickier and trickier.

I just wondered if you had any larger views on this subject.

Professor GREENHALGH. We are in the decade of the bicentennial of the creation of the Bill of Rights. It is only 6 years away. In fact, I think you have before you a bicentennial commission with regard to the Constitution, which is only 4 years away.

It is not too early to gear up as much work as was done on the bicentennial of the Declaration of Independence and the Revolutionary War, and it seems to me that this is a splendid opportunity to hear from those Americans who are innocent, who are guiltless, who are law abiding, and the purposes for which the Bill of Rights was passed.

As we all know, deals were cut by the Colonies in the ratification process, that of especially Virginia, which was critical—for the 2 or 3 weeks they were debating down in Richmond the ratification process, would only go for it if their elected representative introduces a bill of rights, which he did in June 1789.

In the other instance, I think the bar—and I would like to defer to Laurie Robinson right now because I think that we are very much interested in the educational process as far as the elementary and secondary schools are concerned with regard to enforcement of constitutional rights.

The other is that I think the courts must speak. Madison, on the floor of the House of Representatives for the first time it was in session in New York City in June 1789, laid it right to the independent, life-tenured judges of the Federal judiciary that they must be forceful and independent in order to interpret the laws.

I think the national legislature has a responsibility in that, too. I think the unfortunate thing is we are not getting an awful lot of support out of the executive branch right now, but that is politics. We understand that.

It would appear to me that somewhere leadership should be commenced with regard to a reaffirmation of all those principles of the introduction of the Bill of Rights of 1789. We are 6 years away. We are trying to get something organized. Six years, as you know, time flies. But I think that is part of the leadership role the bench, the bar, the legislature, everybody should be very much interested in and not be turned away by the polls that crime is one of the biggest issues.

As long as we have that piece of paper, Mr. Chairman, down there in the Archives, the price of a civilized society is just that. We should be reminded of that every day, as to the 10 amendments and then, of course, the court's decision and its implementation of that. The American public should understand that.

Laurie, do you want to talk about that?

Ms. ROBINSON. I would just add that the ABA has had for over a decade a fairly well-developed, law-related education program aimed primarily at primary and secondary education kids, but now being developed on a broader scale through an ABA commission on public understanding about the law.

As Professor Greenhalgh indicated, with the bicentennial of the Constitution upcoming and that of the Bill of Rights, those groups are working with a number of other entities within the association, including our section, in what specific kinds of things can be done to try to educate the public better about the rights in the Constitution and in the Bill of Rights.

Mr. CONYERS. Great idea. What about the street law courses that some law schools have been engaging in?

Professor GREENHALGH. We are the bellwether at Georgetown. We house the National Street Law Institute, and that has been picked up in many other law schools on a national basis. That, of course, goes back to fundamental concepts with regard to criminal law and procedure, as well as other aspects of civil law and administrative law.

Mr. CONYERS. I would like to meet with you out of committee session on these three great ideas you have put on us because I think that we have to go beyond these hearings. I always wonder how many people ever read these, brilliant though they may be, in some people's view.

Is it your view that this document that governs us is the pinnacle of a civilized way of governing, the best that has ever occurred?

Professor GREENHALGH. I think Gladstone said that, the greatest document ever struck by the hand of man. Interestingly enough, Laurie and I are trying to interest a small group, dealing with the London extension of the annual convention of the American Bar Association in Washington in 1985, to have a joint program with our English counterparts.

The title of that program would be "Anglo-American Antecedents of the Bill of Rights—Then and Now," because of the tremendous influence the British had for us to go to war because of the things they were doing to us and to bring that back into focus.

Interestingly enough, the British are reexamining confessions in English jurisprudence because they have a stronger rule than *Miranda*. If you focus on an individual, as to a suspect, he must be warned. It is called the Judge's Rule, that anything he says may be used against him. In *Miranda* you must be in custody.

Apparently this is creating a great deal of concern about the advice of your so-called judge's rule rights, this again being our counterpart of the privilege against self-incrimination. So, it should be a fairly interesting program to try to do that. Whether we can sell this little group in Chicago on something like that remains to be seen.

The reason I am a little knowledgeable in this field, I am writing a book called "The History and Development of the Fourth Amendment Exclusionary Rule." As one of my wag colleagues said, well, as a result of certain votes in the big court, it might be called "The History and Demise of the Fourth Amendment Exclusionary Rule."

I took a sabbatical last year. I devoted an awful lot of time on colonial revolutionary and preconstitutional history on this, and it is just fascinating how all these things came about and the tremendous amount of work done by some awfully important people throughout the entire Colonies.

I think the gratifying thing, Mr. Chairman, is the 13 Colonies pulling together on certain key issues. For example, the feeling on freedom of religion, the prohibition against general warrants, the privilege against self-incrimination.

One of the amusing things, though, is they didn't like lawyers. At that time they wanted to be free of lawyers, which came out in Justice Potter Stewart's opinion in *Faretta* v. *California* [42] about representing yourself, which incidentally I thought was going to make all the law schools go out of business.

Anyway, I think it is worth reexamining. We only have 6 years' time in which to get going on it. I think something ought to be done about it.

Mr. CONYERS. I think it is a great idea. Many of the civil rights organizations I think could get interested. Thankfully it is far enough away for them to begin looking at this as not a matter for lawyers and members of the bar exclusively, but to get into it. I think that is a great idea.

Now that I find out where you have been putting a lot of your research effort, it has been suggested that many of the things that caused people to come to the United States in the first place, to found it, the prohibitions that they sought to escape, they rather easily reinstituted them, excluding themselves, especially in religion.

When you look at the early laws, witchcraft trials were held by Harvard lawyers. We were very intolerant about religious beliefs that were considered unorthodox, which was one of the main reasons——

Professor GREENHALGH. That is why we have the first amendment. You know there are five clauses in the first amendment that have gone under constitutional interpretation by the Supreme

[42] EDITOR'S NOTE.—422 U.S. 806 (1975).

Court. The fourth amendment, one. That shows distinct and separate treatment by the Founding Fathers.

Mr. CONYERS. As I remember this New York Review article, what they were suggesting generally is that despite the intolerance that they could not abide, many of our colonialist Founding Fathers were quick to impose a number of rules, notwithstanding the Bill of Rights. They made it pretty tough to be unorthodox in a lot of areas, the whole Puritan ethic.

Professor GREENHALGH. As you well recall, the Bill of Rights was a control on the Federal Government, and it wasn't until the 14th amendment was passed in 1867 that they began to feel the due process clause and slowly but surely bring—I think the first incorporation was back in the twenties.

For example, they never woke up to the assistance of counsel clause until 1932. They didn't even know it existed until that awful case, the Scottsboro case, in *Powell* v. *Alabama*.[43] In *Brown* v. *Mississippi* [44] they didn't wake up until—absolutely depraved activity with regard to the courts—until 1936.

They had Federal supervisory power concerning confessions since 1884, but not until they started interpreting the due process clause. In the Warren years they had this huge incorporation doctrine of the 14th amendment in that regard.

Mr. CONYERS. The whole question of discrimination based on race was rather lately discovered.

Professor GREENHALGH. It certainly was.

Mr. CONYERS. I hope you include these notions that I am throwing out at least in the first draft.

Professor GREENHALGH. They are very relevant, no question about it. I just think we need important people on a national basis to go back to where we came from and the reasons we came from.

I think it is terribly important because we have to get over—that is why I ticked off—had I been able to argue last week, I was going to look them in the eye and tick off those 13 cases because that is the purpose of the fourth amendment, to protect the innocent, the guiltless, the law abiding, as well as the guilty.

The courts have to understand that because time after time advocates get up there and say no, all these hoods are running free, and it is because the constable blundered. That is not the purpose of it. We have to remind them of that, and we have to remind our fellow Americans the same way.

Mr. CONYERS. It is so good to have you.

Mr. BERMAN. Thank you very much.

I would like to say that this is the first time I have heard the ABA testify. If I were a betting man, as you said, I would never assume that they would have testified on this kind of an issue as coolly and directly as you did.

I congratulate you. If it happens one more time, I might even join.

Professor GREENHALGH. We have appeared before you—you had other commitments a couple of weeks ago, and I was a walking case of pneumonia when Representative Kastenmeier was having

[43] EDITOR'S NOTE.—287 U.S. 45 (1932).
[44] 397 U.S. 278 (1936).

oversight hearings on prison conditions. You and your friend from New Haven slipped out the back door. It was just as well because I could hardly talk.

Thank you.

[The prepared statement and the additional material submitted by Professor Greenhalgh follow:]

AMERICAN BAR ASSOCIATION

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STATEMENT OF

PROFESSOR WILLIAM W. GREENHALGH, CHAIRPERSON
CRIMINAL JUSTICE SECTION

ON BEHALF OF
THE
AMERICAN BAR ASSOCIATION

CONCERNING
FOURTH AMENDMENT
EXCLUSIONARY RULE LEGISLATION

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

March 10, 1983

Mr. Chairman and Members of the Subcommittee:

The American Bar Association is pleased to appear before you to express our views on the subject of the Fourth Amendment exclusionary rule. As Chairperson of the ABA Criminal Justice Section, I have been designated by ABA President Morris Harrell to represent the Association before you today.

My own background in the criminal justice area has included both prosecution and defense experience. I am presently a clinical professor of law at Georgetown University Law Center and have been Director of the E. Barrett Prettyman Program (L.L.M. in Trial Advocacy) since 1963. That program has represented over 2,000 indigents charged with felony offenses in the various courts of the District of Columbia. It has produced, among others, a book entitled, "Law and Tactics in Exclusionary Hearings" (Coiner Publications, 1969).

Before going to Georgetown, I worked as a staff attorney with the Justice Department's Internal Security Division, and served in the U.S. Attorney's Office in Washington, ending my tenure as Chief Assistant U.S. Attorney for the District of Columbia, General Sessions Division. I am presently writing a treatise on "The History and Development of the IVth Amendment Exclusionary Rule."

Just as the American Bar Association is, of course, reflective of the legal profession as a whole, so, I should note, is the Section of Criminal Justice representative of all segments of the criminal justice system. The Section is neither the voice of the defense bar nor the prosecution. Our members include prosecutors, criminal defense lawyers, public defenders, judges, law professors and law enforcement officials. We try to reflect that balanced view in policy positions which we adopt.

ABA POSITION SUPPORTS EXCLUSIONARY RULE

The American Bar Association has long supported retention of the Fourth Amendment exclusionary rule in state and federal criminal proceedings. We continue to do so, and urge this Subcommittee and the 98th Congress to approach this issue cautiously -- and reject proposals to modify or eliminate the rule

in criminal trial proceedings. Despite the rhetoric prevalent today, its abolition will not stem the tide of crime in our country -- but tampering with it will destroy a portion of the cherished constitutional fabric of which our system is constructed.

The American Bar Association's strong views in support of the Fourth Amendment exclusionary rule were recently expressed in another forum, as well as the Congressional. Last month, after obtaining unanimous approval of the ABA's Board of Governors, we filed an amicus curiae brief in the U.S. Supreme Court in the case of State of Illinois v. Lance and Susan Gates, in support of respondents Gates -- opposing the application of a "good faith" exception to the exclusionary rule. I am submitting a copy of the brief to you, Mr. Chairman, and asking that it be made a part of the record of your hearings.

The scholarly debate on the subject of the exclusionary rule has been extended and inconclusive. See, Oaks, Studying the Exclusionary Rule in Search and Seizure, 27 U. Chi. L. Rev. 665 (1970); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Stud. 243 (1973); Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 63 Ky. L.J. 681 (1974); Comment, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 NW. U.L. Rev. 740 (1974). United States v. Ross, No. 79-1624, Wilkey, J., dissenting op. at 48-63 (D.C. Cir. March 31, 1981). Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 Judicature 337 (1978); Wilkey, A Call for Alternatives to the Exclusionary Rule: Let the Congress and the Trial Courts Speak, 62 Judicature 351 (1978).

22-224 O—83——3

For that reason, we believe it is most fruitful to focus on two aspects of this issue: What does the Constitution require, as reflected in the development of case law in this area? And what does the empirical evidence suggest as to the impact the exclusionary rule has had in case disposition? As to the first, we believe that pending legislation to modify or abolish the rule in federal criminal proceedings is unconstitutional, based on an analysis of relevant cases. As to the second, available statistics reveal that the rule has had little impact on case dispositions in the nation's courts. The data do not support the contention by many that hordes of criminals go free because of such "technicalities." Further, violent offenses account for only a tiny percentage of federal and state cases dropped because of the exclusionary rule.

From the Association's extensive criminal justice work, we recognize that there are no easy answers to crime -- something of which each member of your Subcommittee is well aware. In the midst of the current emotional climate, we must avoid adoption of apparently simple solutions to crime which not only pose constitutional problems, but also offer false promises. We do not believe that elimination or modification of the exclusionary rule is an effective tool for solving the crime problem in America.

Let us turn now to the first prong of our analysis -- an examination of what the Constitution requires, as interpreted by the United States Supreme Court.

AN EXAMINATION OF CASE LAW SHOWS THAT THE RULE IS CONSTITUTIONALLY MANDATED

We believe it useful to couch our discussion in terms of the approaches which have been taken in legislation in this Congress and the last to abolish or modify the exclusionary rule. Some of these bills would nullify any constitutionally mandated exclusionary rule in federal criminal proceedings. Others would substantially modify the Fourth Amendment by allowing admission

of evidence obtained in violation of the Fourth Amendment unless the violation was intentional or substantial. Still others embody various ways to create a "good faith" exception to the exclusionary rule.

Since February of 1973, the American Bar Association has been firmly and publicly opposed to legislative efforts to limit the exclusionary rule. That policy was taken in reaction to S. 2647 (92nd Congress), introduced by Senator Bentsen in 1973, legislation substantially similar to a number of the bills now proposed.

OUTRIGHT NULLIFICATION

Bluntly put, the legislation seeking outright abolition of the rule is intended to nullify the federal Fourth Amendment rule of evidence, as well as the Fifth (privilege against self-incrimination) and Sixth (assistance of counsel) Amendments. We do not believe Congress has the constitutional authority to abolish the exclusionary rule. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. Gouled v. United States, 255 U.S. 298, 313 (1921). What was once a mere federal rule of evidence in 1914 became a cloth scotchguarded with the impregnability of constitutional enforcement in 1961.

As Mr. Justice Day historically declared in Weeks v. United States, 232 U.S. 383 (1914) at 391 and 392:

> In the Boyd case, supra, after citing Lord Camden's judgment in Entick v. Carrington, 19 Howell's State Trial, 1029, Mr. Justice Bradley said (630):
>
> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is

> the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.
>
> It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. (emphasis added)
>
> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

The legislative approach,which is destructive of Fourth Amendment rights, similarly should find no sanction in Congressional enactment.

When the Supreme Court of the United States held in Mapp v. Ohio, 367 U.S. 643 (1961), that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments, it constitutionally proscribed the Congress from revoking or rescinding the exclusionary rule in the administration of the American criminal justice system.

It is clear, of course, that no Act of Congress can authorize a violation of the Constitution. Almeida-Sanchez v. United States, 413 U.S. 266, 372

(1973). Only the Supreme Court has the authority to remove or reduce the application of the exclusionary rule. United States v. Calandra, 414 U.S. 338 (1974) (federal grand jury proceedings); United States v. Janis, 428 U.S. 433 (1976) (federal civil proceedings); Stone v. Powell, 428 U.S. 465 (1976)(federal habeas corpus relief); United States v. Ceccolini, 435 U.S. 268 (1978)(attenuation); United States v. Crews, 445 U.S. 463 (1980)(in-court identification); United States v. Havens, 446 U.S. 620 (1980)(impeachment); United States v. Salvucci, 448 U.S. 83 (1980)(standing). This legislative approach is, therefore, patently unconstitutional in our view.

SUBSTANTIAL VIOLATION SUBSTITUTE

A less radical proposal which has been proposed is calculated to retain the federal exclusionary rule only in cases where there is an "intentional or substantial" violation of the Fourth Amendment. The criteria enumerated in the bill as to a determination of substantiality -- recklessness, privacy invasion, deterrence, inevitable discovery, or attenuation -- would, in fact, provide a federal court with a basis for allowing admission of virtually all illegally seized evidence.

By even attempting to limit the application of the federal exclusionary rule -- which is now a matter of due process -- such legislation purports to permit what the Fourth Amendment prohibits. It is thus facially violative. Torres v. Puerto Rico, 442 U.S. 465 (1979); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Berger v. New York, 388 U.S. 41 (1967); cf. Camara v. Municipal Court, 387 U.S. 523 (1967); Sibron v. New York, 392 U.S. 40 (1968); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Marshall v. Barlow's Inc., 436 U.S. 307 (1978); Brown v. Texas, 443 U.S. 47 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979). It plainly violates constitutionally mandated guarantees.

This legislation is facially void for another reason. It abolishes the standard of reasonableness. As Mr. Justice Clark, speaking for eight members of the Court, said in Ker v. California, 374 U.S. 23 at 33-34 (1963):

> We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. See, e.g., Spano v. New York, 360 U.S. 315, 316 (1959); Thomas v. Arizona, 356 U.S. 390, 393 (1958); Pierre v. Louisiana, 306 U.S. 354, 358 (1939). While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the records so that it can determine for itself whether in the decision as to reasonableness the fundamental — i.e., constitutional — criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. (emphasis added)

Thus, this legislative approach contemplates the substitution of a "substantial violation" test, which has never been followed by a majority of the Supreme Court.

In fact, Mr. Justice Frankfurter, in an internal memorandum to the majority in the Silver Platter cases dated April 13, 1960 suggested that "a searching inquiry by the Committee [Committee on Criminal Rules] may lead it to propose a qualified rather than an absolute exclusionary rule, restricted to clear and flagrant cases and not to the infrequent instances

where 'the constable has blundered.'" The majority in Elkins v. United States, 364 U.S. 206 (1960) flatly rejected this proposal, since the opinion written by Mr. Justice Stewart reflects no such language.

"GOOD FAITH" EXCEPTION

A third, and perhaps more venturesome, proposal to limit the application of the exclusionary rule may be found in the U.S. Department of Justice recommendation to the Congress that evidence obtained in the course of a reasonable, good faith search should not be excluded from federal criminal trials.

The American Bar Association strenuously opposes these recommendations. Our reasons are several. First, for over 100 years a majority of the Supreme Court of the United States has consistently rejected the so-called "good faith" test. Stacey v. Emery, 97 U.S. 642 (1878); Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28 (1923); Carroll v. United States, 267 U.S. 132, 162 (1925); Henry v. United States, 361 U.S. 98, 102 (1959). Objectivity, not subjectivity, is the rule of law.

Also, it is interesting to note that over 20 years ago the Justice Department raised the "good faith" exception. They argued in their brief at p. 68 in the Elkins case that "evidence should not be barred which was obtained by state officers acting in good faith but mistakenly failing to comply with all the legal requirements. Only that evidence would be barred which was obtained by intentional or clear violation of constitutional rights." Counsel for petitioner in his reply brief at p. 18 put it this way:

> We have no doubt that the Court will reject this all too obviously last-ditch alternative. A search is either valid or invalid; there is no middle ground. Close cases will of course arise in the future, as indeed they have in the past; but however difficult it may be to draw the line, a line must somewhere be drawn. An illegal search can no more be saved from condemnation by the apologetic comment that it is only slightly unconstitutional than an egg can be classed as edible simply because it is only slightly rotten.

Congress should find the proposal equally difficult to swallow.

Perhaps it was best said by Mr. Justice Stewart in Beck v. Ohio, 379 U.S. 89 (1964) at 97:

> We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officer is not enough." Henry v. United States, 361 U.S. 98, 102...if subjective good faith alone was the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. [emphasis added].

To say that the proposed "good faith" exception is "a workable rule governing arrests, searches and seizures" is to stand the Fourth Amendment on its head.

Second, in 67 years, federal trial judges have been interpreting a standard of reasonableness predicated on the accumulated wisdom of precedent and experience in every evidentiary hearing in which they have presided pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure (or its equivalent prior to 1946). At all times, an objective standard has been the test by which they have scrutinized the admissibility of evidence.

In Delaware v. Prouse, 440 U.S. 648 (1979) at 653-654, Mr. Justice White put it rather simply:

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law-enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions." (citations omitted) Thus, the permissibility of a particular law-enforcement practice is judged by balancing its instructions on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause, or a less stringent test. (footnotes omitted)

In the same term, the Court reiterated its stress on objectively reasonable standards in Dunaway v. New York, 442 U.S. 200, 209 N. 11 (1979). Prouse was decided by 8-1 and Dunaway by 6-2 (with Justice Powell not sitting).

Assuming arguendo that Congress should enact the subjective "good faith" test to supplant the objective standard of reasonableness and the Supreme Court determines it to be constitutional, the effect in Rule 12(b)(3) evidentiary hearings in the 94 United States District Courts would be devastating. Federal law enforcement officers would undoubtedly be permitted to testify not only as to their state of mind regarding "good faith," but probably to give opinion testimony as well. With the burden of proof on the prosecution at the lowest rung of the evidentiary ladder — mere preponderance of the evidence to establish the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with the Fourth Amendment — the Sixth Amendment adversary factfinding process in Federal courts would become a farce and mockery of justice.

Further, we contend that interpretation by the courts of a new "good faith" exception will engender years of litigation, excerbating the problems already facing busy federal trial courts. It also will promote federal law enforcement carelessness, as well as suffer ignorance of the law.

To illustrate our position more fully, the rather cogent concluding paragraph in Hoopes, "The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the §1983 Good Faith Defense: Problems and Prospects," 20 Ariz. L. Rev. 915, (1979) states at 951:

> If the more salient problems of burdens of proof and workable standards for the determination of when the officer's intent may be judged culpable can be resolved, a properly defined and focused good faith test for exclusion could well provide a rational and effective means of protecting those rights provided for in the fourth amendment. Nevertheless, although

> the good faith test would appear to make no substantive changes in exclusionary rule analysis, if the Supreme Court draws heavily on the civil history of the good faith standard, the result may be an analysis that focuses disproportionately on the officer's assessment of the facts. This result seems inconsistent with the overriding policy of the fourth amendment that the determination of the propriety of a search and seizure is ideally removed from the discretion of the officer. (emphasis added)

Only retention of the objective standard of reasonableness can secure Fourth Amendment rights.

Third, we offer a further observation. If the Congress should enact the "good faith" test in the Fourth Amendment context, would not, as Senator Mathias asked in a hearing on October 5, 1981, there be a movement to consider legislation to condone "good faith" violations of First Amendment rights? Taking it two additional steps further, would this lead to proposals to eliminate the Fifth Amendment privilege against self-incrimination by supplanting the totality of circumstances test of confessional voluntariness -- or the Sixth Amendment prohibition against the use of statements taken from an accused in the absence of counsel? As Mr. Justice Bradley warned almost 100 years ago, in Boyd v. United States, 116 U.S. 616 (1886) at 635:

> Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.

So should Congress be as vigilant in the protection of the rights of the individual.

DUE PROCESS SUBSTITUTE

Another approach is perhaps the most troublesome. Such legislation is apparently an attempt to enforce the Fourteenth Amendment in the states by substituting a tort remedy for the existing exclusionary rule. The effect of this legislation would be to negate the Mapp decision. This Congress cannot do. The Supreme Court has spoken and has declared Mapp the law of the land. This is not legislation under §5 of the Fourteenth Amendment to enforce the rights therein guaranteed. It provides for just the opposite. Mr. Justice Frankfurter in Wolf v. Colorado, 335 U.S. 25, 33 (1949) neatly disposed of this proposition. Abolition is tantamount to negation and therefore is unconstitutional.

SUPREME COURT'S CAUTIOUS COURSE

Before Congress rushes into this constitutional thicket, one should reflect that the Supreme Court did not act hastily in imposing the federal exclusionary rule of evidence as a constitutional requirement binding on the states. During the 47 years between Weeks and Mapp, the Court construed some 60 Fourth Amendment cases, ruling for the government in over half of them. It is significant that the Court, after announcing its decision in Wolf v. Colorado, 338 U.S. 25 (1949), as to future enforceability of the federal constitutional rule on the states, waited another 12 years for decisional imposition. During this period, the Court permitted the states to experiment as "laboratories" with alternative remedies to the exclusionary rule.

Five years after Wolf, in a vigorously contested 5-4 decision, the Court in Irvine v. California, 347 U.S. 128 (1954), was again presented with the opportunity to impose Weeks on the states. Even though the facts were egregious -- breaking and entering a home, secreting an eavesdropping device, and listening to conversations of the occupants for over a month -- the Court declined to

overrule Wolf. As Mr. Justice Jackson said at 134:

> Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the Wolf doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.

The majority was patient, the minority perturbed.

More significant, perhaps, was the statement of the ultimate author of Mapp, Justice Clark, in his concurring opinion in Irvine at 138-139:

> Had I been here in 1949 when Wolf was decided, I would have applied the doctrine of Weeks v. United States, 232 U.S. 383 (1914), to the states. But the Court refused to do so then, and it still refuses today. Thus Wolf remains the law and, as such, is entitled to the respect of this court's membership.
>
> Of course, we could sterilize the rule announced in Wolf by adopting a case-by-case approach to due process, in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell — other than by guesswork — just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. Rochin bears witness to this. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of

> local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions. I do not believe that the extension of such a vacillating course beyond the clear cases of physical coercion and brutality, such as Rochin, would serve a useful purpose.
>
> In light of the "incredible" activity of the police here, it is with great reluctance that I follow Wolf. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance. (emphasis added)

Justices Black at 139-142, Frankfurter joined by Burton at 142-149, and Douglas at 149-152 were far less respectful of the Court's membership.

In any event, during the last five years before the Court decided in Mapp that the Fourth was enforceable through the Fourteenth Amendment, they were busily rehearsing for redintegration. They were formulating fundamental criteria in the federal arena. Giordenello v. United States, 357 U.S. 480 (1958)(sufficiency of probable cause for federal arrest warrants); Draper v. United States, 358 U.S. 307 (1959)(sufficiency of probable cause for federal warrantless arrests); Henry v. United States, 361 U.S. 98 (1959)(federal point of arrest); and Jones v. United States, 362 U.S. 257 (1960)(sufficiency of probable cause for federal search warrants). Uniformity awaited inevitability.

At the same time, the Court was tightening the noose of federal exclusion by drastically limiting the use of illegally seized federal evidence in state criminal proceedings. Rea v. United States, 350 U.S. 214 (1956)(federal injunction against transferring to state authorities illegally seized federal evidence); Benanti v. United States, 355 U.S. 96 (1957)(state wiretap evidence violative of federal wiretap statute inadmissible in federal court).

Finally, the silver platter doctrine -- allowing federal courts to admit evidence illegally seized by state officers — came under scrutiny once again. The flame that had kindled the fire that forged the doctrine was extinguished in

Elkins v. United States, 364 U.S. 206 (1960), overruling Lustig v. United States, 338 U.S. 74 (1949), which was decided on the same day as Wolf. It was now but a question of time before Justice Clark would constitute the majority in overruling Wolf. He emphatically did so in less than a year when, in Mapp, he made the federal exclusionary rule binding upon the states. The last paragraph of his constitutionally mandated decision perhaps says it best:

> The ignoble shortcut to conviction left open to the state tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the states, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. (emphasis added)

Thus, Weeks, through the Due Process Clause, became the law of the land.

THE EXCLUSIONARY RULE EXTENDS TO THE INNOCENT AND GUILTY ALIKE

It is important to recognize that the right to be secure guaranteed by the Fourth Amendment is not a right provided only to those who break the law. It is a right constitutionally guaranteed to all the people. It protects everyone -- those suspected or known to be offenders -- as well as the innocent. Weeks v. United States, 232 U.S. 383, 392 (1914); Gouled v. United States, 255 U.S. 298, 307 (1921); Agnello v. United States, 209 U.S. 20, 32 (1925); Byars v. United States, 273 U.S. 28, 29 (1927); Merron v. United States, 275 U.S. 192, 196 (1927); Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Grau v. United States, 287 U.S. 124, 128

(1932); Sgro v. United States, 287 U.S. 206, 210 (1932); United States v. DiRe, 332 U.S. 581, 595 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948); Trupiano v. United States, 334 U.S. 699, 709 (1948); McDonald v. United States, 335 U.S. 451, 453 (1948); Brinegar v. United States, 338 U.S. 160, 176 (1949).

It is the innocent victim of an illegal search and seizure upon whom we should focus constitutional protection. But we do this by retaining the exclusionary rule.

The exclusionary rule safeguards us in many ways: It protects our "persons," while walking, talking or traveling. United States v. DiRe, 332 U.S. 581 (1948); Rochin v. California, 342 U.S. 165 (1952); Giordenello v. United States, 357 U.S. 480 (1958); Henry v. United States, 361 U.S. 98 (1959); Elkins v. United States, 364 U.S. 206 (1960); Wong Sun v. United States, 371 U.S. 471 (1963); Beck v. Ohio, 379 U.S. 89 (1964); Katz v. United States, 389 U.S. 347 (1967); Simmons/Garrett v. United States, 390 U.S. 377 (1968); Sibron v. New York, 392 U.S. 40 (1968); Davis v. Mississippi, 394 U.S. 721 (1969); Whiteley v. Warden, 401 U.S. 560 (1971); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Brignoni-Ponce, 422 U.S. 872 (1975); Delaware v. Prouse, 440 U.S. 648 (1979); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Texas, 443 U.S. 47 (1979); Reid v. Georgia, 448 U.S. 438 (1980); Taylor v. Alabama, 102 S.Ct. 2664 (1982).

It secures our sanctuaries, whether they be "houses," Weeks v. United States, 232 U.S. 383 (1914); Agnello v. United States, 269 U.S. 20 (1925); Byars v. United States, 273 U.S. 28 (1927); United States v. Berkeness, 275 U.S. 149 (1927); Taylor v. United States, 286 U.S. 1 (1932); Nathanson v. United States, 290 U.S. 41 (1933); Trupiano v. United States, 334 U.S. 699 (1948); Kremen v. United States, 353 U.S. 346 (1957); Jones v. United States, 357 U.S. 493 (1958); Silverman v. United States, 365 U.S. 505 (1961); Mapp v. Ohio, 367 U.S. 643 (1961); Fahy v. Connecticut, 375 U.S. 85 (1963); Clinton v. Virginia, 377 U.S. 158 (1964); Aguilar v. Texas, 378 U.S. 108 (1964);

Stanford v. Texas, 379 U.S. 476 (1965); James v. Louisiana, 382 U.S. 36 (1965); Camara v. Municipal Court, 387 U.S. 523 (1967); Bumper v. North Carolina, 391 U.S. 543 (1968); Recznik v. City of Lorain, 393 U.S. 166 (1968); Stanley v. Georgia, 394 U.S. 557 (1969); Chimel v. California, 395 U.S. 752 (1969); Von Cleef v. New Jersey, 395 U.S. 814 (1969); Shipley v. California, 395 U.S. 818 (1969); Vale V. Louisiana, 399 U.S. 30 (1970); Connally v. Georgia, 429 U.S. 245 (1977); Riddick v. New York, 445 U.S. 573 (1980); Steagald v. United States, 101 S.Ct. 1642 (1981); United States v. Johnson, 102 S.Ct. 2579 (1982).

Or apartments, McDonald v. United States, 335 U.S. 451 (1948); Chapman v. United States, 365 U.S. 610 (1961); Riggan v. Virginia, 384 U.S. 152 (1966); Spinelli v. United States, 393 U.S. 410 (1969); Mincey v. Arizona, 437 U.S. 385 (1978); Franks v. Delaware, 438 U.S. 158 (1978); Payton v. New York, 445 U.S. 573 (1980).

Or hotel rooms, Johnson v. United States, 333 U.S. 10 (1948); Lustig v. United States, 338 U.S. 74 (1949); United States v. Jeffers, 342 U.S. 48 (1951); Stoner v. California, 376 U.S. 483 (1964).

Or places of business, Silverthorne Lumber Co. v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Go-Bart Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932); Sgro v. United States, 287 U.S. 206 (1932); Marcus v. Search Warrant, 367 U.S. 717 (1961); See v. City of Seattle, 387 U.S. 541 (1967); Berger v. New York, 388 U.S. 41 (1967); Mancusi v. DeForte, 392 U.S. 364 (1968); Colonnade Catering Co. v. United States, 397 U.S. 72 (1970); G.M. Leasing Co. v. United States, 429 U.S. 338 (1977); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Tyler v. Michigan, 436 U.S. 499 (1978); Lo-Ji Sales Co. v. New York, 442 U.S. 319 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979). Absent exigent circumstances or consent, the threshold may not be reasonably crossed without a warrant.

The rule also protects our "effects." Gambino v. United States, 275 U.S. 310 (1927); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965);

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Chadwick, 433 U.S. 1 (1977); Torres v. Puerto Rico, 442 U.S. 465 (1979); Arkansas v. Sanders, 422 U.S. 753 (1979). America is a mobile society, and while we are obedient to the law, the Constitution guarantees us this.

PUBLIC POLICY MILITATES AGAINST ANY LESSER STANDARD

Besides the constitutional argument that Congress does not possess the authority to nullify the federal exclusionary rule, public policy alone militates against consideration of the proposed legislation. Bluntly, it would exhume the silver platter doctrine, quietly laid to rest in Elkins, and thereby destroy any semblance of uniformity of Fourth Amendment decisional law in all criminal proceedings, whether federal or state. State prosecutors, having cause to believe that they cannot meet the Mapp/Ker standard of reasonableness, could hand over to the Justice Department illegally seized evidence for use in federal prosecutions. Federal prosecutors, in turn, could persuade a federal court, under any lesser standard, to admit the unconstitutionally seized evidence in the federal prosecution.

Conversely, under any lesser standard, having persuaded a federal court to admit such evidence, the federal prosecutor could hand evidence over to a state prosecutor, since it had been admissible in a federal court; state prosecutors could then try to persuade state courts that, if it were admissible in federal court, it should likewise be admissible in a state court. Chaos would result.

The following analysis by Justice Douglas, joined in by Chief Justice Warren and Justice Brennan in dissenting in Wilson v. Schnettler, 365 U.S. 381, 397-398, is pertinent:

> When we forsake Rea v. United States and tell the federal courts to keep hands off, we wink at a new form of official lawlessness. Federal

> officials are now free to violate the Federal Rules that were designed to protect the individual's privacy, provided they turn the evidence unlawfully obtained over to the States for prosecution. This is an evasion of federal law that has consequences so serious that I must dissent. This case may be inconsequential in the tides of legal history. But the rule we fashion is an open invitation of federal officials to "flout" about the search warrants required by the Fourth Amendment, to break into homes willy-nilly, and then to repair state courts. Their evidence, unlawfully obtained by the standards that govern federal officials, may be used against the victim. A few states have exclusionary rules as strict as those commanded by the Fourth Amendment. Many permit the use in state prosecutions of evidence which would be barred if tendered in federal prosecutions. The tender regard which is expressed for federal-state relations will in ultimate effect be a tender regard for federal officials who flout federal law. Today we lower federal law enforcement standards by giving federal agents carte blanche to break down doors, ransack homes, search and seize to their heart's content -- so long as they stay away from federal courts and do not try to use the evidence there. This is an invitation to lawlessness which I cannot join. (footnotes omitted)

If one were merely to substitute the words "federal courts" for either "federal officials" or "agents" -- which would be the result of any proposed lesser standard -- one can readily see the invitation to lawlessness, the future of which Justice Douglas correctly portended. It also forbodes ill for decisional uniformity among the 50 states.

An additional public policy argument against these proposals arises in another context: the interpretation by the 94 U.S. District Courts and 12 U.S. Courts of Appeals of Fourth Amendment cases predicated on a less-than-reasonableness standard. In other words, should federal courts prospectively admit evidence seized in such egregiously abusive circumstances as the Supreme Court has decisionally forbidden?

- °arrests at will of anyone with only a previous criminal record (Beck);
- °dragnet arrests (Davis);
- °arrests for investigation (Brown v. Illinois);
- °"pick up and bring in" arrests (Dunaway);

- °unreasonable stop and frisks (Sibron);
- °stops based on skin color alone (Brignoni-Ponce);
- °random auto stops (Prouse);
- °unreasonable stop and identify cases (Brown v. Texas);
- °warrantless sanctuary seizures (Payton/Riddick/Steagald);
- °coercive consent searches (Bumper).

The answer should be no, since all these cases were decided post-Mapp.

Twenty years have passed since the U.S. Supreme Court constitutionally mandated the federal exclusionary rule in Mapp. During this period of time, the Court has decided 45 federal cases touching on the rule, holding for the government in 32. On the other hand, with regard to enforcing Fourth Amendment rights through the Fourteenth Amendment in state criminal proceedings, out of 77 cases, it only held for the prosecution 20 times. Federal law enforcement has come a long way toward living and working within the framework of the rule.

ABOLITION OF THE RULE WOULD NOT ENSNARE MANY CRIMINALS NOW GOING FREE

To say that the federal exclusionary rule has not worked is to ignore human experience. It has contributed to substantial law reform by federal authorities. It has increased the professionalism of federal law enforcement officers. It has vastly enhanced the integrity of the federal judicial process.

But perhaps most importantly, most of the empirical evidence reveals that the operation of the rule has not greatly affected case disposition. The overwhelming percentage of guilty pleas and convictions in federal courts provides ample proof that the rule has not stultified either federal law enforcement or the judiciary.

Opponents of the exclusionary rule and many citizens believe the rule results in legions of criminals going free on "technicalities." Evidence from a General Accounting Office report strongly suggests otherwise. See Comptroller General of the United States, Impact of the Exclusionary rule on Federal Criminal Prosecutions, Rep. No. GGD-79-45 (19 April 1979). The report outlines evidence obtained from a survey conducted between July 1 and August 31, 1978 in 38 U.S. Attorneys' Offices. Some 2,804 cases were evaluated. Sixteen

percent of defendants whose cases were accepted for prosecution filed some type of suppression motion; 55% of these motions cited the Fourth Amendment. The overwhelming majority of motions for suppression in which hearings were held were denied. Overall, in only 1.3% of the 2,804 cases was evidence excluded as a result of filing a Fourth Amendment motion.

But were many cases dropped by the prosecutor because of search and seizure problems? The answer is no. Only 4/10 of 1% of the declined defendants' cases were turned down due to Fourth Amendment search and seizure problems, the GAO study reported.

Further evidence can be found in two studies of state cases from the prestigious Institute for Law and Social Research. In a May, 1978 study, "What Happens after Arrest?", INSLAW researchers reported "a low rate of rejections at screening due to improper police conduct. Less than 1% of all arrests were refused by the prosecutor with an indication that the police failed to protect the arrestee's right to due process (e.g., no probable cause for making the arrest, unlawful search for and seizure of evidence...)." And of the 8,766 arrests examined in the INSLAW study that were dismissed by the prosecutor after initial acceptance, due process problems constituted but a small part -- 2%.

A second INSLAW study is also revealing. Issued in April, 1979, it is entitled, "A Cross-City Comparison of Felony Case Processing." While noting that the exclusionary rule and other related issues have stirred much debate among both scholars and criminal justice practitioners, and acknowledging that the rule may legitimately be the subject of extended debate over legal philosophies, the study found that due process reasons appeared to have "little impact on the overall flow of criminal cases after arrest."

Due process reasons were responsible for only a tiny portion of the

rejections of cases at screening in most jurisdictions — 1% in Washington, D.C., 2% in Salt Lake City, 4% in Los Angeles, 9% in New Orleans. The study goes on to point out that the data "seem to counter the conventional wisdom that Supreme Court decisions cause many arrests to fail because of technicalities. In fact, in the jurisdictions [studied], only one homicide arrest was rejected for due process reasons, and no rapes were rejected for these reasons." Drug cases accounted, not unexpectedly, for most of the due process-related rejections. In non-felony cases, less than 2% of the rejections in each city stemmed from due process violations.

A study from a third source, the National Institute of Justice, also requires examination. Released in December, 1982, the NIJ-sponsored research, entitled, "The Effects of the Exclusionary Rule: A Study in California," said that 4.8 percent of all felony arrests declined for prosecution in California from 1976 through 1979 were rejected because of search and seizure problems, with the greatest impact not in violent crimes but in drug cases. Surprisingly, the NIJ study failed to mention the fact that the California courts have recognized a broad vicarious standing rule, under which many persons not personally aggrieved by an illegal search or seizure can nonetheless gain the benefit of exclusion. See People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). Under the federal exclusionary rule, of course — and the rules of virtually every other State in the Union — only the actual victim of the illegality may seek suppression. See e.g., Rakas v. Illinois, 439 U.S. 128, 133-138 (1978). Of course evidence will be lost if the exclusionary rule is applied as it ought to be, just as evidence will be lost if the police refrain from searching when the Constitution forbids them.

Another recent study notes that the number of cases in which the legality of a search and seizure was truly debatable, and in which the court ultimately

ruled in favor the defendant, was miniscule. See Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal." When other types of appellate cases were also counted, the total number of cases in which the appellate court ruled in favor of the defense on a search and seizure issue rose to only eleven. Id. at 635 n. 286.

Under these circumstances, is the effort to nullify or severely limit the exclusionary rule necessary? Would its abolition result in many more cases being pursued? The data do not suggest so.

Discontent with the outcome of a few well-publicized cases in which suppressed evidence has resulted in a criminal going free -- and one can always come up with these "horror stories" -- is no reason to tamper with constitutionally guaranteed rights.

CONCLUSION

Despite the rhetoric, there is no demonstrated connection between the increase in crime and the existence of the exclusionary rule. Lawbreakers do not read the Supreme Court advance sheets; and the empirical evidence does not support the thesis that numerous cases are either lost or dropped because of search and seizure problems.

Efforts to abolish or narrow the exclusionary rule are unconstitutional, unwarranted and unnecessary.

The American Bar Association joins with members of this Administration and the Congress in recognizing the need to undertake concerted and effective measures to reduce crime in America. We have joined in endorsing a number of the Administration's proposed measures to achieve that end. The exclusionary rule, however, provides an easy target for many who are -- understandably -- fed up with the crime problem today. But Congressional changes in the Rule will

undercut law enforcement professionalism, engender decades of litigation over various new tests, and result in very few additional criminals ending up behind bars.

And, in the bargain, we will -- perhaps forever -- have casually tossed aside a valued constitutional protection on which this country was founded.

# # # #

No. 81-430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ILLINOIS,
Petitioner

v.

LANCE and SUSAN GATES,
Respondents

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES: Page

TABLE OF AUTHORITIES—Continued

Page

STATE CASES:

MISCELLANEOUS:

TABLE OF AUTHORITIES—Continued

INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter ABA] is a voluntary, national membership organization of the legal profession. Its nearly 300,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the ABA has taken an active interest in the improvement of the administration of justice.

In 1973, the ABA adopted a resolution supporting retention of the Fourth Amendment exclusionary rule in state and federal criminal proceedings. In the decade since, it has firmly opposed all efforts to modify or abolish the rule and allow the use of illegally seized evidence in criminal trials. Recent examples of such activity include ABA testimony submitted to the Attorney General's Task Force on Violent Crime in June, 1981, and testimony before the Senate Subcommittee on Criminal Law in November, 1981 and before the House of Representatives Subcommittee on Criminal Justice in June, 1982. In addition, during the 97th Congress the ABA frequently articulated its opposition to pending exclusionary rule legislation in communications to individual members. It has called for state and local bar association opposition to such legislation, participated in debate forums with other professional organizations, and prepared articles on the subject for publication.

The legal profession which the ABA represents has no more vital role in society than protecting constitutional freedoms. At issue in this case is a fundamental constitutional guarantee. The Fourth Amendment itself is at stake, not just a rule of evidence.

The ABA of course supports reasonable efforts to improve law enforcement. Crime is a major concern in

CONTINUED

1 OF 3

America today. Modification of the exclusionary rule is popularly (and politically) advocated as a panacea for this enormous societal problem. The ABA has long believed, however, that modification of the exclusionary rule as a means of dealing with crime is overly simplistic and is in fact likely to have minimal effect on either the crime rate or conviction rate nationally. The constitutional price to be paid for these marginal gains is, however, enormous. The price is the erosion of every American citizen's cherished constitutional right to privacy. It cannot be overemphasized that the issue here is not retention of a rule; it is the retention of the Fourth Amendment.

SUMMARY OF ARGUMENT

A "good faith, reasonable mistake" exception to the Fourth Amendment exclusionary rule would inevitably diminish police respect for constitutional standards and their compliance with them. It would increase the number of Fourth Amendment violations because it would appreciably increase both the opportunity and the incentive for the police to commit them. Fear that a violation of the Fourth Amendment would undermine a prosecution will be reserved for extreme constitutional violations.

Although the Court has been reluctant to expand the scope of the Fourth Amendment exclusionary rule, it has never taken the step that is now urged. It has never allowed the prosecution in a criminal trial to build its case-in-chief upon evidence that the police had seized in violation of the defendant's rights under then-prevailing Fourth Amendment law. The Court's decisions simply do not support creation of an exclusionary rule exception for so-called "reasonable" violations of the Fourth Amendment or for violations that may be deemed to have been committed in "good faith." In every instance in which the Court has concluded that expansion of the exclusionary rule would yield insignificant incremental deterrrence to police misconduct, it did so only on the assumption that tainted evidence would be excluded from the prosecution's

case-in-chief. If that assumption is eroded by a "reasonable mistake" or "good faith" exception to the exclusionary rule, the additional incentive for illegal conduct that comes from other permissible uses of the evidence will also increase, and quantities of deterrence that could once be dismissed as insubstantial will have to be remeasured. Cases such as *United States v. Calandra*, 414 U.S. 338 (1974), *United States v. Janis*, 428 U.S. 433 (1976), and *United States v. Havens*, 446 U.S. 620 (1980), could be decided differently.

Further, a "good faith" or "reasonable mistake" exception would clash with the principles governing the retroactivity of Fourth Amendment decisions, developed last term in *United States v. Johnson*, 102 S.Ct. 2579 (1982). There the Court rejected a "good faith" exception to retroactive application of Fourth Amendment decisions because such an exception would erode police respect for the Fourth Amendment itself.

The most grievous consequence of proposals to cut into the exclusionary rule woud be to undermine, perhaps irreparably, the moral authority of the Fourth Amendment. Weakening the exclusionary rule would inevitably communicate the message that the cost of Fourth Amendment compliance is too heavy for society to bear, however unintended that message might be. If the cost of doing without the fruits of illegal searches and seizures is too great, what of the cost we willingly pay whenever the Fourth Amendment deters police intrusions? Many would conclude that this too, is an unnecessary expense. Diminishing the exclusionary rule inevitably would diminish the protections against unwarranted governmental intrusions that the Fourth Amendment now extends to everyone's person, place of business, and home.[1]

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[1] The United States counts as a cost of suppression the fact that some officers, uncertain where the line between legal and illegal conduct lies, will fail to conduct searches that the Fourth Amendment in fact allows. *See* Brief for the United States at 52. This phenomenon is but the unavoidable consequence of the fact that a line must be drawn somewhere. If the police—whatever their

4

ARGUMENT

I. A "GOOD FAITH, REASONABLE MISTAKE" EXCEPTION TO THE EXCLUSIONARY RULE WILL NECESSARILY INCREASE THE INCIDENCE OF FOURTH AMENDMENT VIOLATIONS. THIS EXCEPTION WILL DIMINISH THE INCENTIVE OF THE POLICE TO HONOR THE LIMITATIONS THAT THE FOURTH AMENDMENT PLACES UPON THEM AND IT WILL DENY COURTS THE OPPORTUNITY TO ARTICULATE OR DEVELOP WORKABLE AND ENFORCEABLE STANDARDS FOR POLICE CONDUCT.

When in 1914 this Court in *Weeks v. United States*, 232 U.S. 383 (1914), ruled that evidence seized in violation of the Fourth Amendment would not be admitted in federal criminal trials, the Court did not base its decision upon the hope that future police misconduct might thereby be discouraged. Instead, Justice Day's opinion for a unanimous Court whose membership included such illustrious names as Justices Hughes and Holmes, stated a different rationale:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental right. (232 U.S. at 392.)

In their famous dissents in *Olmstead v. United States*, 277 U.S. 438 (1928), Justices Holmes and Brandeis elaborated on these ideas. Justice Holmes wrote:

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motivations—seek conscientiously to refrain from searching when the Fourth Amendment forbids it but to search when a search would be legal, some mistakes will inevitably be made on both sides of the line. Any effective Fourth Amendment remedy would produce the same results. What the government seeks, in reality, is a lowering of the line. It would tolerate a greater number of illegal searches so that the police would make fewer "erroneous" decisions not to search. The Fourth Amendment places too great a value on individual privacy to permit or desire this result.

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> We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.
>
> For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. *Id.* at 470 (Holmes, J., dissenting).

In a more expansive opinion, Justice Brandeis said:

> When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker. *Id.* at 483 (Brandeis, J., dissenting) (citations omitted).

These and similar justifications for the exclusionary rule, which have been labeled the "judicial integrity" rationale, no longer seem to enjoy any independent existence. As interpreted in later decisions, all such considerations now appear to be subsumed within the narrower question of whether the admission of illegally obtained evidence will encourage additional law-breaking by the police. As the Court explained in *United States v. Janis*, 428 U.S. 433 (1976):

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the viola-

22-224 O—83——4

> tion is complete by the the time the evidence is presented to the court. The focus therefore must be on the question whether the admission of the evidence encourages violation of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose. *Id.* at 458-59 n. 35 (citations omitted).

Yet the need to discourage Fourth Amendment violations, whether it goes under the name of an imperative of "judicial integrity" or of "deterrence," is constitutionally based. The Fourth Amendment broadly guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . ." The force of its mandate is not limited to any one branch of the government to the exclusion of the others. Any governmental action that reduces the security of which the Fourth Amendment speaks is forbidden. And this security would be diminished as surely by a judicial policy admitting evidence that encourages agents of the executive branch to commit unreasonable searches and seizures as it would be by the conduct of those agents themselves. Because a "good faith, reasonable mistake" exception to the exclusionary rule would weaken the people's security by encouraging the commission of a greater number of violations of the Fourth Amendment, it must be rejected.

As this Court has said, "convincing empirical data" on the efficacy of the exclusionary rule as a prophylactic device are unlikely to be obtained. *United States v. Janis*, 428 U.S. 433, 449-53 (1976). The rule's impact must, therefore, be assessed by other means, such as by using common sense or by examining anecdotal information from knowledgeable sources.[2] Among recent information

[2] Other judgments of equal or greater importance must frequently be made despite a similar lack of empirical proof. For example, in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), the Court noted that studies assessing the impact of the death penalty have yielded "no convincing empirical evidence either supporting or refuting" the position that the threat of execution produces no significant additional discouragement of would-be killers. *Id.* at 185. Nonetheless, the Court relied upon common sense to conclude that for many persons, "the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act." *Id.* at 185-86.

As one social scientist, who has himself conducted ultimately inconclusive studies of the exclusionary rule, recently wrote:

> Certainly we do not generally require proof of deterrent capacity as a prerequisite to adopting or retaining our public policies. There is virtually no evidence that capital punishment deters murder, but three-quarters of our states have such laws. It is painfully obvious that our laws against the use of narcotics have limited deterrent capacity. If all our court decisions had to be proven 90% effective—or 75%, or even 50%—in order to remain viable, large numbers of them would fail the test. Public policies are adopted on faith, hope and the belief that certain conduct ought to be deterred, not on the certainty that it will. Social science research is simply not advanced enough to come to very precise conclusions about the impact of most public policies—not just the exclusionary rule. Canon, "Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention," 23 S. Tex. L.J. 558, 564-65 (1982).

of this latter sort is the testimony presented to the Criminal Law Subcommittee of the Senate Judiciary Committee by Maryland Attorney General Stephen H. Sachs. Sachs, who also served as a federal prosecutor for six years—three of them as United States Attorney for Maryland—stated that in his experience the threat of the exclusion of evidence impelled the police to learn and follow the limits established by the Fourth Amendment:

> I cannot offer statistical studies on the deterrent effect of the rule, but what I can offer is my testimony that I have watched the rule deter routinely throughout my years as a prosecutor.
>
> When an assistant U.S. attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better make on the car, or that he has a

staleness problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girl-friend's apartment, or that he should apply for a search warrant form a magistrate and not rely on the consent of the suspect's kid sister to search his home—in all those circumstances, Mr. Chairman, the rule is working.

The principal, perhaps the only, reasons those conversations occur is that the assistant and the agent want the search to stand up in court. . . .

Exclusion from evidence is almost, certainly in my judgment, the only deterrent in the vast majority of unconstitutional instrusions. *The Exclusionary Rule Bills, 1981-82: 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 2d Sess. 19-48, 21-22 (1981-82).

If, as the Court has consistently assumed, the exclusionary rule functions in ways similar to this description, then adoption of a "good faith" exception would undermine it. Police and prosecutors, who now are encouraged to make careful assessments of what the Fourth Amendment permits and what it forbids, would be motivated whenever there was doubt to construe the law generously in favor of the right to search and seize.[3] And

[3] The state of Illinois appears to argue for only a comparatively modest change in the exclusionary rule, by which the court at a suppression motion would give greater deference to the determination of a magistrate who issued a warrant and would not upset the decision, even if erroneous, so long as it was "reasonable". *See* Petitioner's Brief on Reargument at 11. As Illinois appears to acknowledge, however, its real quarrel is not with the exclusionary rule itself but rather with recent decisions that it says, have reached a "hypertechnical interpretation" of the probable cause standard. *Id.* at 16. Thus Illinois suggests that this Court undertake "another, perhaps simpler, way to reach the same result" as a modification of the exclusionary rule in this case, and address the probable cause issue directly. *Id.* If Illinois is correct in its claims that more recent decisions such as *Spinelli v. United States*, 393 U.S. 410 (1969), mark an unjustified departure from an earlier and more sensible view of probable cause, then its suggestion is surely well taken; the probable cause issue should be confronted directly and the exclusionary rule left alone. This is all the ABA asks in this case.

In comparison, the United States, as *amicus curiae*, urges creation of a "good faith" exception in which the offending officer's "good faith" (or "bad faith") would in fact play little or no role. Most of the time, the only question asked would be the objective question "whether a reasonably well-trained officer should have known, in light of the extant principles of law, that his conduct was prohibited." Brief for the United States at 7. Yet except to say that under this standard the evidence in this case should come in (as well as in virtually every other case where the police have acted under a warrant), the United States is remarkably reticent about how its standard would work. Its standard is an objective one, but the United States has declined to offer any description of its actual content. *Id.* at 25 n.7.

Some general observations nonetheless seem to be in order. First, to the extent that the government's standard focuses solely on the individual offending officer it ignores the fact that, as the Court recognized in *United States v. Johnson*, 102 S. Ct. 2593 (1982), the exclusionary rule must also be aimed at those who set police department policy. Second, the government's standard, open-ended as it is, assumes that "a reasonably well-trained officer," should *not* be expected to obey the Fourth Amendment. This dangerous notion ought to be rejected, and it comes at an especially inappropriate time, when the Court is adopting a more rule-oriented view of the Fourth Amendment so that search and seizure standards will be easier for the police to follow. *See United States v. Ross*, 102 S. Ct. 2157 (1982); *New York v. Belton*, 453 U.S. 454 (1981).

the occasions when "doubt" could be found would surely increase as its benefits became apparent. For reasons similar to these, the Court has recognized the inadequacy of "good faith" as a standard of assessing police conduct. In *Beck v. Ohio*, 379 U.S. 89, 97 (1964), the Court said:

> We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officer is not enough." *Henry v. United States*, 361 U.S. 98, 102 [1959] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.

Coupling a "good faith" standard with the further requirement that the officer's conduct be "reasonable" would not avoid this dire prediction. And the same can be said of the proposal of the United States to employ a wholly objective "reasonableness" test. A "reasonableness" requirement either would be meaningless—since a search or seizure that is unreasonable violates the express terms of the Fourth Amendment whether the officer's faith is good or bad—or it would substitute *ad hoc* assessments of "general reasonableness" for the more exacting inquiries that the Fourth Amendment reasonableness requirement is now thought to produce. As Justice Frankfurter observed over thirty years ago in *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (dissenting opinion), a "general reasonableness" test uninformed by specific standards against which a police officer's conduct can be measured is worth very little:

> To say that the reach must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that a "unreasonable search" is forbidden—that the search must be unreasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response. *Id.*

More recently, one commentator made a similar point, writing that an approach to the Fourth Amendment that required *ad hoc* judgments of the "reasonableness" in the raw of police actions would:

> . . . [convert] the fourth amendment into one immense Rorschach blot . . . What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may or may not do, courts are seldom going to say that what he did was unreasonable. Amsterdam, "Perspectives on the Fourth

> Amendment," 58 Minn. L. Rev. 349, 393-94 (1974) (footnote omitted).

As these general points suggest, creation of a "good faith" exception would spawn new incentives for the police to overstep the bounds that the Fourth Amendment sets while at the same time crippling the courts' ability to identify and enforce those limits. An examination of how a "good faith" exception would likely operate in some recurring situations reinforces these conclusions.[4]

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[4] In support of its position that the exclusionary rule is prohibitively costly, the United States quotes extensively from a recent study of the Department of Justice's National Institute of Justice titled "The Effects of the Exclusionary Rule: A Study in California" (Dec. 1982) [hereinafter "N.I.J. study"]. *See* Brief for the United States, at 47-49. Of course evidence will be lost if the exclusionary rule is applied as it ought to be, just as evidence will be lost if the police refrain from searching when the Constitution forbids them. The paramountcy of the right to privacy requires this result. Protection of the individual often hampers "effective" law enforcement, but if the escape of some guilty persons from the net becomes too high a price to pay, then very few individual protections could survive. To mention one, the rule that no one may be convicted of a crime except on proof beyond a reasonable doubt of all elements of the offense, *see In re Winship*, 397 U.S. 358 (1970), necessarily frees some undetermined but surely large number of guilty defendants in order to minimize conviction of the innocent.

In all probability, the new N.I.J. study vastly overstated the number of guilty persons who could not be convicted unless a "good faith" exception were adopted. Most obviously, the N.I.J. study overlooked the fact that the California courts have recognized a broad vicarious standing rule under which many persons not personally aggrieved by an illegal search or seizure can nonetheless gain the benefit of exclusion. *See People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955). Under the federal exclusionary rule, of course, only the actual victim of the illegality may seek suppression. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 133-38 (1978).

Another recent study suggests that the number of cases in which the legality of a search and seizure was truly debatable, and in which the court ultimately ruled in favor of the defendant, was miniscule. *See* Davies, "Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal." 1982 A.B. Found. Res. J. 543, 613 n. 230, 616. When other types of

The instant case, in which the police executed a search warrant that is now said to have been issued without probable cause, presents one such situation. The need to regulate the conduct of the officers executing the arrest is not the only reason for retaining the exclusionary rule. A magistrate who issues a defective search warrant violates a citizen's constitutional rights as surely as the police officer who executes it. Suppression is essential to insure that police, prosecutors and magistrates do not violate the Fourth Amendment. This Court has frequently focused its attention on the conduct of the magistrate in issuing the warrant rather than on the police officer in preparing it. *See, e.g,, United States v. Berkeness*, 275 U.S. 149 (1927); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Grau v. United States*, 287 U.S. 124 (1932); *Sgro v. United States*, 287 U.S. 206 (1932); *Nathanson v. United States*, 290 U.S. 41 (1933); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Stanford v. Texas*, 379 U.S. 476 (1965).

The view that magistrates' decisions need not be reviewed to guarantee Fourth Amendment compliance is untenable. While magistrates and other warrant-issuing authorities in both the federal system and in many state systems no doubt possess the utmost integrity and are well-trained in the law, the potential for mistakes of judgment in issuing warrants is not eliminated, particularly in close cases. A "good faith" exception would surely encourage magistrate shopping. Some police already seek out the most sympathetic magistrates for presentation of their warrant applications. *See* L. Tiffany, D. McIntyre & D. Rotenberg, *Detection of Crime* 120 (1967). Now, regardless of the deference the magistrate's finding of probable cause may command, *see United States v. Ventresca*, 380 U.S. 102 (1965), that determination will nonetheless be reviewed on a motion to suppress, and the advantage that the police gain by finding a lenient magistrate is therefore limited. A "good faith" exception will render this advantage decisive, if, as the United States urges, the magistrate's decision to issue a warrant becomes final and assures the admissibility of any evidence seized.

appellate cases were also counted, the total number of cases in which the appellate court ruled in favor of the defense on a search and seizure issue rose to only eleven. *Id.* at 635 n. 286.

The numbers that the N.I.J. found must be compared to the General Accounting Office's finding that in thirty-eight federal prosecutors' offices, only 0.4 percent of all cases were not prosecuted due to illegal search or seizure reasons. *See* Comptroller General, U.S. GAO, Rep. No. GGD-79-45, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions" 14 (1979).

Further, there is also evidence that the warrant requirement may best protect Fourth Amendment values by forcing the police themselves (sometimes with the assistance of the prosecutors) to review the strength of their evidence before presenting their applications to the magistrate. Attorney General Sachs referred to this process. Determined to secure evidence that will survive a suppression motion, they take care to obtain probable cause before conducting their searches even if they are confident that a lesser quantum of evidence would pass a magistrate's sometimes perfunctory review. A "good faith" exception would destroy any incentive to continue this important internal review process. The police would no longer fear suppression of evidence as long as the evidence was obtained under a warrant, however erroneously issued.

A "good faith" exception could also result in making the magistrates themselves more lax. Now, the probability that the decision to issue a warrant will be scrutinized later, with the success of a criminal prosecution perhaps turning on the outcome, motivates issuing magistrates to perform more conscientiously and to become better informed on Fourth Amendment law. This goad is especially important because the Court has never held that the magistrate must be a lawyer or indeed have any legal training at all. In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Court held that a non-lawyer municipal court clerk could issue valid arrest warrants for violations

of municipal ordinances. A "good faith" exception would be a disincentive to legislative efforts to upgrade the status of magistrates. A relatively uninformed magistrate could be counted on to show greater deference to the police, and the evidence acquired through such a magistrate's warrants, whether properly issued or not, would be accepted in court.

Running all of these risks in order to allow prosecutors to gain use of evidence obtained in violation of the Constitution would extract a grossly high price in lost Fourth Amendment freedoms. It has been fourteen years since this Court suppressed evidence obtained under a search warrant that a magistrate had mistakenly issued, *see Spinelli v. United States*, 393 U.S. 410 (1969), and cases of this sort seem to be rare. It is not too speculative to suggest that the reason for this trend is that the exclusionary rule is succeeding: the threat of suppression, though infrequently carried out, achieves a reasonably high rate of compliance with the Fourth Amendment mandate that warrants not be issued except on probable cause.

This point leads to another. Cases, like *Spinelli*, in which a court declares an affidavit insufficient and orders evidence suppressed typically arise when the relevant standards for assessing probable cause have not yet been fully developed, and the suppression litigation serves the critical function of permitting the articulation of these standards. The Court's decision in *Spinelli* may have resulted in the loss of evidence concerning one gambler's activities, but it permitted the Court to elucidate the test that magistrates throughout the nation should apply when deciding whether an anonymous informant's tip provides probable cause for issuance of a warrant. This norm-articulation function must continue if magistrates are to continue to strike the proper balance between law enforcement requests and Fourth Amendment restrictions. In this way, the suppression of evidence seized under a warrant issued on an inadequate affidavit in one case leads directly to clearer articulation of Fourth Amendment rights and their limitations, and hence to a prevention of

future Fourth Amendment violations. As one commentator has written:

> It is . . . imperative to have a . . . procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review. . . . Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665, 756 (1970).

The present case demonstrates the costs that will have to be paid if a "good faith" exception to the exclusionary rule is adopted that will preclude suppression of evidence seized under a warrant issued without probable cause. Certiorari was originally granted because of the importance of the issue that the affidavit here raises: whether an anonymous informant's detailed tip, corroborated as it was, established probable cause without more direct evidence of the source of the tipster's information or of his credibility. As the state of Illinois noted in its request for certiorari, the courts have divided on the question of the adequacy of similar affidavits. Petition for Certiorari at 15 (citing assertedly contrary decisions). Although the ABA expresses no view on the ultimate question of whether the warrant here was properly issued, plainly valuable guidance will result should that question be answered. The lower courts and the law enforcement community need this guidance. If the affidavit here did not make out probable cause, a definitive statement to this effect will insure that in the future magistrates will decline to issue warrants under these circumstances. Alternatively, if this affidavit is adequate, magistrates will be guided accordingly in the future.[5]

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[5] An additional unfortunate consequence of the creation of a "good faith, reasonable mistake" exception would be that, henceforth, search and seizure law would be developed under state rather than federal law. The result would be a patchwork of rules. The present case is a good illustration. When the Supreme Court of Illinois ruled that the affidavit in this case was insufficient, it relied on both federal and state grounds. The court's opinion in *People v. Gates*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), noted:

A ruling that the exclusionary rule would not apply, even if the warrant should never have been issued, would preclude decision on this important question. Because Article III, § 2 of the Constitution limits this Court's power to actual cases and controversies, and because questions of the constitutionality of another branch's conduct should be avoided when possible, the Court in this and similar cases would have to rule that the evidence should not be suppressed, and it would have to avoid the now moot question whether the Fourth Amendment was violated. Such is the clear teaching of *Bowen v. United States*, 422 U.S. 916 (1975), where the Court criticized a court of appeals for addressing the merits of a Fourth Amendment claim once it had determined that the claim could not be applied to the defendant on the basis of a retroactivity analysis. *Id.* at 920-21. The Court affirmed the court of appeals on the retroactivity point, then warned:

> This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive. This practice is rooted in our reluctance to decide constitutional questions unnecessarily. Because this reluctance in turn is grounded in the constitutional role of the federal courts, the district courts and courts of

Both the Constitution of the United States (U.S. Const., amend. IV) and the Constitution of Illinois (Ill. Const. 1970, art. I, sec. 6) provide assurance against unreasonable searches and seizures of person and property. [85 Ill. 2d at 381-82, 423 N.E. 2d at 889].

Although the subsequent analysis does not expressly draw the distinction between federal and state law and indeed relies principally (but not exclusively) on federal cases, it thus appears that the decision below rested on both federal and state grounds, and indeed two dissenting justices seemed to think that this was the case. 85 Ill. 2d at 390, 423 N.E. 2d at 896 (Moran and Underwood, J.J., dissenting) (finding the search here consistent with "the United States and Illinois constitutions").

These circumstances may suggest that this case is not an appropriate vehicle for deciding any questions of federal constitutional law, *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935), *California v. Krivda*, 409 U.S. 33 (1972).

> appeals should follow our practice, when issues of both retroactivity and application of constitutional doctrine are raised, of deciding the retroactivity issue first. *Id.* at 920 (citations omitted).

A decision that an officer's "good faith" or "reasonableness" in relying on a warrant was enough to permit the contested evidence to be admitted would, like a ruling of nonretroactivity, make a ruling on the merits impossible, or at the least, readily avoidable.[6] Cases, like the instant case, could escape resolution on the merits through application of the "good faith" exception. Efficient law enforcement and individual privacy would both suffer, for magistrates would be denied authoritative guidance on whether they should issue warrants on receipt of affidavits like the one submitted here. Presumably, those magistrates who had previously refused to do so would continue in their refusal, and those who had found such affidavits sufficient would do so again. Uniform application of the Fourth Amendment would be an impossibility.

A "good faith, reasonable mistake" exception would also mean the diluting of the very aspect of Fourth Amendment protections that the framers likely deemed the most crucial for preservation of a free society—the requirement that no warrants be issued except on probable cause. Indeed, a principal objection to the proposed federal Constitution, when it was submitted to the states for ratification, was the absence of a provision expressly forbidding the central government from issuing warrants on insufficient grounds. For example, one influential critic, Elbridge Gerry, wrote in a pamphlet that was circulated at the time:

[6] The United States asserts that the courts will retain "discretion" to decide the merits of a Fourth Amendment claim in cases where "good faith" or "reasonable mistake" is also asserted as a ground for admitting the evidence. *See* Brief for the United States, at 60-63. *Bowen v. United States*, 422 U.S. 916 (1975), and its underlying rationale, would preclude decisions on the merits when cases can be decided by applying an exclusionary rule exception.

> . . . I cannot pass over in silence the insecurity in which we are left with regard to warrants unsupported by evidence—the daring experiment of granting writs of assistance in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a detestable instrument of arbitrary power, to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure. [E. Gerry, "Observations on the New Constitution and the Federal and State Conventions" (1788), reprinted in *1 The Bill of Rights: A Documentary History* 481, 488-89 (B. Schwartz ed. 1971).]

In response to such criticism, the Fourth Amendment, with its standard of probable cause, was proposed in the First Congress under the new Constitution and was ratified by the states, in order to limit the power of magistrates to issue warrants.

Justice Frankfurter has placed the Fourth Amendment in its proper historical perspective:

> The clue to the meaning and scope of the Fourth Amendment is John Adams' characterization of Otis' argument against search by the police that "American independence was then and there born." 10 Adams, *Works* 247. One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable . . . ." When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable

> cause . . . and particularly describing the place to be searched, and the persons or things to be seized. *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) [footnote omitted].

Yet proponents of a "good faith" exception, forgetting also this Court's reminder in *Weeks v. United States*, 232 U.S. 383 (1914), that the exclusionary rule was intended to apply to unreasonable searches by officers "acting under legislative or judicial sanction," 232 U.S. at 394, would withhold the rule virtually whenever that judicial or legislative sanction was present.

A "good faith" exception would also undermine the judiciary's ability to achieve adherence to Fourth Amendment standards when the police act with or without warrants. Consider, for example, those cases in which the police conduct—an arrest for significantly instrusive search—requires probable cause and where the issue now would be whether the police had it. A "good faith" exception, especially one resembling the proposal of the United States, would not entirely moot the question whether the police had probable cause to act but would soften it. The courts would ask if it was reasonable for the police to *think* that they had probable cause—regardless of whether they had in fact or not. Aside from the linguistic and logical complexities that would be generated by such an inquiry, the practical consequence would be to weaken the probable cause standard. Police searches and seizures that heretofore required probable cause would be tolerated upon the showing of something less, perhaps closer to the "articulable suspicion" that now only justifies less instrusive action. *See generally Terry v. Ohio*, 392 U.S. 1 (1968).

Evidence would be admitted if the police acted on probable cause, or something somewhat close to it, unless perhaps if the officer actually knew that what he was doing was constitutionally forbidden (although, in the view of the United States, the guilty knowledge of the offending officer would be irrelevant). The officer would be encouraged to search or arrest in a doubtful case rather

than show proper respect for Fourth Amendment rights. As previously mentioned, this result—the erosion of the Fourth Amendment itself—is precisely what the United States seeks. The difficult case—the case where prior court decisions do not clearly point the way—would remain doubtful indefinitely, since the courts would no longer be issuing definitive opinions stating whether or not probable cause was established in that particular case.[7] The courts would dispose of such cases by saying that the departure from the probable cause standard was at best a "good faith" mistake and not so egregious as to justify suppression.

Thus, a "good faith, reasonable mistake" exception to the rule is, in reality, an exception to the Fourth Amendment itself. Indeed, supporters of such an exception have said that this is just the point. For example, Professor Edna Ball has written a widely cited article in which she argues for adoption of a form of a "reasonable mistake" exception to the exclusionary rule. *See* Ball, "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule," 69 J. Crim. L. & Criminology 635 (1978). The reason for her support, however, is not that she questions the ability of the exclusionary rule to induce police conformance to judicially declared standards of probable cause. Instead, she believes that the standards as they have developed are artificially strict, and she hopes that a weakened exclusionary rule will free the police from the duty of complying with them. As she explains:

> The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against governmental intrusion . . . [W]hat

[7] Historically, the courts have been reasonably successful in developing workable tests for determining when there is and when there is not probable cause in recurring factual situations. But if the courts are not required to make this type of decision, there will be no way to sharpen the line between proper and improper police conduct.

> is required is no longer "probable cause" as presently defined, but instead "a reasonable ground for belief." *Id.* 655-56.

The state of Illinois now makes a similar argument and suggests that its real quarrel is not with the exclusionary rule but instead with judicially articulated standards of probable cause that, it says, have become artificially restrictive. If indeed probable cause standards need to be reconsidered they should be reconsidered. The ABA urges, however, that this should be done directly with no illusion that what the court is doing is of lesser constitutional significance.[8]

The abolition of the exclusionary rule whenever governmental agents come armed with a warrant would result in the loss of judicial review in another important category of searches as well—administrative searches of businesses. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), this Court held that administrative searches for possible code violations could not be conducted unless the inspector had advance judicial approval, and the Court set standards for issuance of administrative warrants. Again, in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) this Court reiterated the warrant's importance in assuring judicial control of the incidence and scope of regulatory searches. Since warrants are issued in *ex parte* proceedings, the weakening of the exclusionary rule would foreclose any adversarial judicial review to determine compliance with the standards in any particular case. The exclusionary

[8] A "good faith reasonable mistake" exception to the exclusionary rule would diminish Fourth Amendment protections in other ways as well. To the extent suppression of evidence under such an exception would depend upon an assessment of the offending officer's subjective state of mind, the fact-finding test would be nearly impossible and easily manipulated by the witness. If police perjury at suppression hearings is a problem now, the problem would be magnified greatly. *See United States v. Janis*, 428 U.S. 433, 447 n. 18 (1976). Further, trial judges who are unsympathetic to the exclusionary rule would be able to evade valid Fourth Amendment claims.

rule must be *retained* to insure respect for the constitutional principles articulated in these cases.

II. THIS COURT'S PRIOR DECISIONS DO NOT SUPPORT CREATION OF A NEW EXCEPTION TO THE EXCLUSIONARY RULE, APPLICABLE WHEN THE PROSECUTOR PRESENTS ITS CASE-IN-CHIEF AT THE CRIMINAL TRIAL OF THE VICTIM OF THE ILLEGAL SEARCH.

Last term when Alabama urged the adoption of "a 'good faith' exception to the exclusionary rule" in *Taylor v. Alabama*, 102 S.Ct. 2664 (1982), the Court stated that it had never previously "recognized such an exception," and it refused to do so in that case. *Id.* at 2669. In a number of decisions rendered in the past several years this Court has declined to extend the Fourth Amendment exclusionary rule. None however supports the result that the state of Illinois now seeks. Despite the occasional reference to an officer's "good faith" in decisions that have declined to broaden the rule, *see, e.g., United States v. Janis*, 428 U.S. 433, 434, 453 (1976); *United States v. Peltier*, 422 U.S. 531, 536 (1975), no prior decision supports elimination of the exclusionary rule in its core setting in criminal cases. Although the Court has expressed skepticism that significant additional deterrence could be achieved through exclusion of illegally obtained evidence in other contexts, it has consistently assumed the continued rigorous application of the exclusionary rule in the criminal trial setting. Only on this assumption could the marginal additional benefits that might be secured by expanding the rule be deemed insignificant or cost inefficient. Embarking on a course that compresses the rule raises similar concerns. Will any slight gain resulting from the exception justify the undermining of years of carefully delevoped Fourth Amendment jurisprudence that assumes the existence of the exclusionary rule in its current form?

For example, in *United States v. Calandra*, 414 U.S. 338 (1974), the Court held that a witness before a federal

grand jury was not privileged to refuse to answer questions on the ground that the questions were based upon evidence illegally seized from his office and files. The possibility that such a privilege might produce some incremental deterrence of police misconduct was, the Court reasoned, too ephemeral, since the evidence was inadmissible at trial. *Id.* at 351.

The possibility of admission of the illegally seized evidence at trial would plainly cut the ground from underneath this reasoning. If, by adoption of an amorphous "good faith" exception to the exclusionary rule, the Court now leaves open some hope for the police or prosecutors to think that such evidence could be used to obtain convictions at trial, then "[t]he incentive to disregard the requirement of the Fourth Amendment . . . to obtain an indictment" would increase correspondingly.

Similarly, the Court in *United States v. Havens*, 446 U.S. 620 (1980), declined to extend the exclusionary rule to generally ban the use of illegally seized evidence for impeachment. The prohibition against use in the case-in-chief was deemed deterrence enough against governmental lawlessness. *Harris v. New York*, 401 U.S. 222 (1971), and *Oregon v. Hass*, 420 U.S. 714 (1975).

Again, the possibility of admission of the illegally obtained evidence in the government's case-in-chief would destroy the deterrent effect of the rule, not merely modify it. The incentive afforded by the possibility that the evidence could contribute to the prosecutor's *prima facie* case, combined with the certainty that it would be available if necessary for impeachment purposes, could well lead a police officer to conduct an illegal search or seizure. The assumption underlying *Havens*, that the exclusionary rule barring use of illegally obtained evidence, would no longer obtain under a "good faith" exception.

Likewise, in *United States v. Janis*, 428 U.S. 433 (1976), the Court concluded that, in a federal civil tax suit, the admissibility of evidence seized by a state law enforcement officer in violation of the Fourth Amendment

would be unlikely to encourage police illegality. The police were, after all, aware that the evidence was inadmissible in a state (or federal) criminal action; indeed, the same evidence had already been suppressed prior to Janis's trial on state charges. *Id.* at 437-38. Thus the Court concluded:

> [T]he additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. *Id.* at 453-54 (footnote omitted).

Adoption of a "good faith" exception, applicable to the state criminal trial, would upset this calculus.[9] If the evidence could possibly be admitted in a state criminal trial inside "the offending officer's zone of primary interest" *id.* at 458, then the additional possibility of success in civil proceedings could well persuade the officer that a doubtful search was worth the candle. The "good faith exception" could immediately be perceived by law enforcement authorities as a relaxation of the restrictions of the Fourth Amendment.[10] Unfortunately, their reasoning would be correct.

[9] The Court's opinion in *Janis* stresses that the offending officer did not serve the sovereign that became Janis's opponent in the civil tax proceeding. 428 U.S. at 455-56. The Court expressly left open the possibility that if, on remand, Janis could show federal involvement in the state officer's illegal search, then the evidence should be suppressed in the civil case. *Id.* at 456 n. 31.

[10] *Janis* plainly lends no support to the creation of a "good faith" exception that would ever allow admission of the fruits of an illegal search at the criminal trial. The "good faith" of the officer in *Janis* was deemed relevant only in regard to the far different question of whether the exclusionary rule should be extended beyond that core context to additionally prohibit admission of the evidence in a civil proceeding, involving a different sovereign. Indeed, as has already been mentioned, the *Janis* Court explicitly left open the question whether the evidence should be suppressed at that civil proceeding—despite the officer's "good faith"—if federal involvement in the search could be shown. *See supra* note 11, citing 428 U.S. at 456 n. 31.

It is also crucial that the refusal to extend the exclusionary rule to the federal tax proceedings did not prevent a court from

But the recent case that most clearly precludes creation of a "good faith" exception to the exclusionary rule is *United States v. Johnson*, 102 S.Ct. 2579 (1982). A decision allowing admission of unconstitutionally obtained evidence if the offending officer can somehow be deemed to have acted in "good faith" would necessarily repudiate the view that the Court took in *Johnson*, in regards to both the retroactivity doctrine and the deterrent function of the exclusionary rule. It would effectively overrule *Johnson's* specific holding.

The issue in *Johnson* was whether the rule of *Payton v. New York*, 445 U.S. 573 (1980)—that the police must ordinarily obtain a warrant before forcibly entering a suspect's home to make an arrest—mandated reversal of a conviction that had already been obtained but had not yet become final when *Payton* was announced. In finding *Payton* applicable, the Court recognized that *Payton* "did not simply apply settled precedent to a new set of facts," 102 S.Ct. at 2588, but instead answered a question that the Court had expressly left open in prior decisions. At the same time, however, the Court acknowledged that *Payton* had not marked " 'a clear break with the past,' " *id.* at 2589-90, quoting *Desist v. United States*, 394 U.S. 244, 248 (1969), since it overruled no prior cases and flowed from the high value that has long been assigned to the privacy of a person's home.

Nonetheless, the government, relying on language from *United States v. Peltier*, 422 U.S. 531 (1975), argued that "the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases." *United States v. Johnson*, 102 S.Ct. at 2593. For only such rulings, the United States said, es-

passing upon the legality of the challenged search. The search had already been found to be illegal in state criminal proceedings. 428 U.S. at 437-38. Thus, there was no risk of one of the most baneful consequences of adoption of a "good faith" exception at criminal trials—the loss of all opportunity for judicial review of the constitutionality of the search or seizure. *See supra* pp. 15-18.

tablished "settled" law, of which a police officer could be properly charged with knowledge. In substance, if not in words, this was an argument that the "good faith" of the officers should allow admission of the evidence that they acquired, even if they violated the Fourth Amendment in the process, and it is remarkably similar to the argument that the United States now makes.[11] But the *Johnson* Court rejected the argument out of hand on the ground that it would reduce the retroactivity doctrine as it applies to new Fourth Amendment rulings "to an absurdity," *id.*, at 2592 since:

> [C]ases involving simple application of clear, pre-existing Fourth Amendment guidelines raise no real questions of retroactivity at all. Literally read, the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application. *Id.*

So, too, would a broader theory that would limit application of the exclusionary rule to those instances where the "bad faith" of the offending officer could be shown, since such a showing could rarely, if ever, be made if there was no "settled" rule in existence at the time of the contested search.[12]

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[11] In its brief to this Court in *Johnson*, 102 S. Ct. 2579 (1982), the United States expressed its support for "a general and relatively broad 'good faith' exception" to the Fourth Amendment exclusionary rule. However, it declined to ask the Court to adopt such an exception in that case on the ground that the narrower retroactivity theory that it tendered, and that the court ultimately rejected, should suffice to require admission of the evidence that the court of appeals had ordered suppressed. *United States v. Johnson, supra*, Brief for Petitioner at 15 n. 7. It appears, however, that the United States in that case conceived its retroactivity theory as a corollary to the broader "good faith" exception, and, indeed, despite its disclaimer the government stressed the officers' asserted "good faith" as a reason to admit the evidence. *Id.* at 28 n. 15.

[12] Of course, a "good faith" exception to the exclusionary rule would be altogether inconsistent with another important facet of the retroactivity doctrine—the principle that the defendant who first successfully presses a novel Fourth Amendment claim receives

The *Johnson* Court also rejected the government's argument that application of the *Payton* rule would not serve the policy of deterring police illegality. The Court noted:

> If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be non-retroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach." *Id.* at 2593-94, quoting *Desist v. United States*, 394 U.S. at 277 (Fortas, J., dissenting) (footnote omitted).

The same criticism may be leveled with even greater force against a "good faith" exception. An exclusionary rule exception of this sort would encourage officers to err on the side of conducting potentially unconstitutional searches and seizures even when "settled precedents" need only be applied "to new and different factual situations,"

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the benefit of the new ruling. Thus, Payton's right to the benefit of the rule announced in his case was unchallenged, *Payton v. New York*, 445 U.S. 573 (1980), and, indeed, the rule of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)—which was held non-retroactive in *United States v. Peltier*, 422 U.S. 531 (1982)—was applied to reverse Almeida-Sanchez's conviction. As is discussed above, it is necessary to apply such new rules in the cases where they are first developed if the vitally important process development of Fourth Amendment standards is to continue. Yet the announcement that evidence will henceforth be admitted if the officer can be said to have acted in "good faith" will bring this process to a grinding halt; cases like *Payton* and *Almeida-Sanchez* will no longer be decided.

United States v. Johnson, 102 S.Ct. at 2587. The police would then have ample cause to hope that even if they guessed wrong a sympathetic court would later rule that they were close enough to the mark and admit the evidence. Police administrators would have no incentive to develop officers' ability to distinguish constitutional from unconstitutional behavior, preferring the officer who aggressively pushes the Fourth Amendment to its limits and beyond, to the one who errs on the side of caution. And if, as the United States proposes, a wholly objective standard is adopted, the fruits of willful, deliberate Fourth Amendment violations will become admissible. In either form—with or without a subjective component—a "good faith, reasonable mistake" exception is fatally deficient.

Thus, this Court's prior decisions lend no material support to the project of minting a "good faith" exception to the exclusionary rule. To the contrary, adoption of such an exception would necessitate reconsideration of many difficult problems that had been laid to rest and would result in the repudiation of large bodies of decisional law in such important areas as that of retroactivity.[13]

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[13] *See* Mertens & Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo. L.J. 365, 432-43 (1981). Among other important decisions that could never have been rendered if a "good faith" exception had been in place are: *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Chimel v. California*, 395 U.S. 752 (1969); *Katz v. United States*, 389 U.S. 347 (1967). In each, a plausible claim that the officer's transgression was not committed in "bad faith" would doubtless have been made because the search or seizure found support in statute (*Ybarra* and *Torres*), because it was part of an apparently routine practice that had not been specifically condemned (*Prouse*), or indeed because it found sanction in earlier decisions of the Court (*Katz* and *Chimel*). Yet the importance of these decisions for the development of Fourth Amendment norms and hence for the protection of Fourth Amendment values can hardly be questioned.

III. A "GOOD FAITH, REASONABLE MISTAKE" EXCEPTION TO THE EXCLUSIONARY RULE WOULD WEAKEN RESPECT FOR THE FOURTH AMENDMENT BY CALLING FUNDAMENTAL CONSTITUTIONAL VALUES INTO QUESTION.

Adoption of a "good faith" exception would also impose costs of a higher order. There is, for example, evidence that the police are deterred by the exclusionary rule and not because illegal searches and seizures are themselves wrong. *See, e.g.*, Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 U. Mo. K.C.L. Rev. 24, 29 (1980) ("[T]o police, the imposition of the exclusionary rule is a prerequisite for the imposition of a legal obligation."). Permitting more illegally obtained evidence to be used in court will inevitably weaken the belief that Fourth Amendment violations are inherently wrong and they should be avoided for reasons independent of later tactical advantages or disadvantages at trial. Similar reasoning is central in the criminal law. We do not punish criminals only to restrain or deter them and others by fear of further punishment. We do so also in order to reaffirm the moral validity of society's norms, as expressed in its criminal law, so that the law will be obeyed because of a shared perception that obedience is the right thing to do. As Herbert Packer wrote:

> . . . It is not simply the threat of punishment or its actual imposition that contributes to the total deterrent effect (of the criminal law) but the entire criminal process, standing as a paradigm of good and evil, in which we are reminded by devices far more subtle than literal threats that the wicked do not flourish. These public rituals, it is plausible to suppose, strengthen the identification of the majority with a value-system that places a premium on law-abiding behavior. H. Packer, *The Limits of the Criminal Sanction* 44 (1968).

By weakening similar identification with the values of the Fourth Amendment, adoption of a "good faith" exception

will undoubtedly increase the frequency of Fourth Amendment violations.[14]

The creation of a "good faith" exception will also surely be interpreted as a statement that the criminal justice system can no longer stand the cost of excluding evidence of guilt, even if the evidence was obtained in violation of Fourth Amendment rights. It is but a small step from this position to the dangerous view that we can no longer bear the cost of police compliance with constitutional standards. If the police arrest a suspect without probable cause and, as a result, obtain incriminating evidence, suppression of that evidence exacts a cost. But it is precisely the same cost that we would have paid, though less directly, had the police respected the suspect's rights. If they had not made their arrest, the evidence would have been lost to the criminal justice system since it would not have been obtained in the first place. If suppression imposes too heavy a price for us to bear, then so perhaps does observance of the limits that the Constitution places upon law enforcement. Such a message, however unintended, would surely be conveyed if so-called "reasonable" violations of the Fourth Amendment could yield evidence admissible in court.

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[14] To be sure, the exclusion of evidence will sometimes frustrate the ability of the criminal justice system to punish those who have committed crimes, and in those instances the process of group identification with the norms of the criminal law that Packer described will not take place. Yet these instances themselves teach an important lesson: that we must sometimes sacrifice efficiency in law enforcement if we are to safeguard our civil liberties.

CONCLUSION

For the foregoing reasons, the American Bar Association respectfully submits that this Court should decline to accept a good faith or reasonableness exception to the Fourth Amendment exclusionary rule.

Respectfully submitted,

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TESTIMONY OF RICHARD WILSON, DIRECTOR, DEFENDER DIVISION, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Mr. BERMAN. Our final witness is Richard Wilson, who is director of the defender division of the National Legal Aid and Defender Association, and formerly State appellate defender for Illinois.

We welcome you today. We have received your written statement and will incorporate that into the record.

Mr. WILSON. Thank you.

I would like to begin by following suit. NLADA has also filed an amicus brief in *Illinois* v. *Gates,*[1] authored by a Detroit lawyer, a private practitioner, who wrote an excellent brief. He has written extensively in the area. His name is Kenneth Mogul.

His brief I believe very clearly states our position, and I would ask that that be incorporated into the record with my written testimony.

Mr. BERMAN. That will be done.

Mr. WILSON. I might begin by noting that I come to you as a defense lawyer. I practiced for 8 years and now consider myself a lawyer for defense lawyers. I am director of the defender division at NLADA and as such represent the interests of the public defenders of this country, who represent, in turn, the vast majority of those who are accused of crimes.

However, I would like to begin by referring back to Professor Greenhalgh's remarks. I believe we have adopted by reference his testimony on prior occasion. I don't think anybody has as clear a grasp of the case law as the professor, nor does anyone watch the Supreme Court as closely as he.

He has alluded to the fact that there are "seven exclusionary rules." I would rather say that there are seven circumstances in which the exclusionary rule is applied, which he carefully documented.

In fact, there are even more circumstances in which we use a type of exclusionary rule by virtue of privilege. Those include the marital privilege, the attorney-client privilege, the priest-penitent privilege, the doctor-patient privilege, and a number of other privileges in which we strike the balance in our court system in favor of protecting the individual over the State. That is the point of this.

Mr. BERMAN. Apparently as of last Monday a police officer privilege of some kind.

Mr. WILSON. Yes, apparently.

There is a point in all of these rules. I think it underlies what the professor described as the beauty of the Constitution; that is, that we do protect the rights of individuals, sometimes at a cost to the State.

The exclusionary rule applied in the fourth amendment cases and the exclusionary rule applied in all those seven circumstances that Professor Greenhalgh enumerated is actually quite simple. It is a simple, one-line statement.

It says when police act illegally, the product of their illegal activity is protected, and cannot be admitted in court for any purpose.

[1] *See* 103 S.Ct. 2317 (1983).

The same is true with all protected privileged material. That applies across all of the various rules that he described.

What is complicated and what has confused lawyers like myself in practice and police officers on the beat is the law of search and seizure.

Changing the exclusionary rule by modification or by abolition is not going to change the law of search and seizure one whit. It is not going to make it any easier for any police officer on the beat to interpret those circumstances in which they can properly act.

The exceptions to the exclusionary rule which now exist are not going to change. They are still going to have to learn them all. A memo from Attorney General Sachs that says that you shouldn't act except in good faith isn't going to solve the problem on the street. In fact, it will only confuse what happens on the street.

The exclusionary rule only comes into play in the court system itself. That is a point that can't be forgotten, I think.

Mr. CONYERS. I think that is perhaps one of the most important points that you could make. I was hoping that from your point of view that would be dealt with.

I must say that I get the impression too often that there are a fair number of law enforcement officers who listen to this stuff and if they don't laugh, they smile and say, "Are you kidding? We are going into court in Detroit. Here is this teenager who has been incarcerated in Wayne County jail for 3 months, and who is going to raise it, anyway?" The circumstances in which it doesn't get raised are probably more disturbing than the circumstances in which it does.

Mr. WILSON. That is clearly true. I think the minuscule number of cases in which it is raised also speaks to the lack of need for this kind of legislation at this point.

I think you have heard cataloged ad nauseum the studies that indicate that the exclusionary rule is invoked very rarely; probably, as you suggest, not enough; and that it is successful even fewer times. Even when it is successful, it does not necessarily free the guilty. The prosecution can proceed forward. Some of those studies have indicated that conviction rates run as high as 50, 60, or 70 percent even after the evidence in question has been excluded.

There just isn't any question about that. In fact, we have to look at the picture a little bit more cosmically. I would like to do that.

I think that we have unduly focused on what is the easiest victim of all to focus on, and that is the court system. Every single one of this administration's proposals, virtually without exception, except for the prison initiatives, have focused almost exclusively on the court system itself: amendments to the exclusionary rule, the insanity defense, a number of other purported reforms.

I suggest that the facts with regard to crime control bode rather for a look much more broadly at the causes, prevention and reduction of crime rather than at the adjudication of crime.

We have suggested in our testimony, and it is common knowledge, that of every 100 crimes that occur, only 30 are reported, and of those 30 only 6 result in conviction.

I think that means that of those cases—we are talking about a very small universe of cases that even go through the court system.

To meddle in the court system, we are looking in the wrong place. We need to look much more broadly back at some of the causes and reporting of crime.

When we look at the cases that are processed through the system, we see another very telling statistic; that is, of those cases which do get prosecuted, about 85 percent result in conviction, and about 90 percent of that 85 percent come as a result of pleas of guilty.

Mr. BERMAN. What was the 6-percent figure?

Mr. WILSON. The 6 percent is those who are ultimately convicted, the 6 of 100 who are convicted.

Mr. BERMAN. Did you say 30 are arrested?

Mr. WILSON. Yes; 30 are arrested.

Mr. BERMAN. Six are convicted?

Mr. WILSON. Six are convicted.

Mr. BERMAN. But 85 percent of those prosecuted are convicted?

Mr. WILSON. No; I am sorry—30 percent are reported and 6 result in arrest.

Mr. BERMAN. I always assumed it was 6 percent resulting in arrest. I have heard the figure in 6 percent of the crimes someone is arrested for.

Mr. WILSON. I did misstate it at first, but I stated it correctly just now; that is, 30 percent of all crimes are reported and 21 percent of that—that is, 6 cases out of 100—result in arrest. Of those cases in which an arrest occurs, the prosecution statistics then come into play. I am sorry for having misstated that.

What those statistics do tell us is that judges are strict now. They are under a great deal of pressure. The fear that the public feels about crime has made judges react in a very strong way to motions to suppress, or to any kind of activity that goes on in their courtrooms.

As a practicing defense lawyer, I can state unequivocally that it is almost laughable to suggest that judges go out of their way to grant motions to suppress or any motion on behalf of the defendant. Our system is very effective at convicting once an arrest occurs.

If we are concerned with speed in the process—and I think that is a legitimate concern, and this body has heard a number of proposals regarding speedy trial provisions—I don't believe that the adoption of this kind of exception is going to assist speedy dispositions.

I think what it will do is add one more line to a motion to suppress that says the police officer did not act in good faith.

Then we will have a pretrial hearing, at which we will attempt to bring out the facts regarding what the officer's good faith was, in addition to all the complicated law about search and seizure.

The judge who is disposed to grant a motion to suppress will still grant the motion to suppress. A judge who is not, will not. I don't believe it will make one whit of difference.

I did cite a new study which has just come out very recently, in December, done by the National Institute of Justice, which I believe bears mention before I complete my testimony.[2]

That study has been offered by several members of the Attorney General's Task Force on Violent Crime in their amicus brief in *Gates* to show that the exclusionary rule is doing great damage to the operation of our court system.

They cite to a 4.8-percent rejection rate in cases in which the exclusionary rule is invoked in California. The study focused on California.

As we pointed out in our brief, and I would like to point out today, even that 4.8 percent, assuming that that is an alarming rate, and I don't believe it is, given the statistics we have on the cases that go through the system, that that 4.8-percent rejection rate was a percentage of all cases which were rejected and not all cases which were referred for the prosecution.

If we look at the cases where search and seizure is the question involving all cases referred for prosecution, that percentage is reduced to 0.8 percent, eight-tenths of 1 percent of all cases which are referred for prosecution.

That statistic I think agrees in fact with a recent study done by then Attorney General, and recently elected Governor, George Deukmejian, who in his own statistics suggested that the search and seizure issues only come up in 0.7 percent of the cases that pass through the California criminal justice system.

Mr. BERMAN. Except he spent a lot of his time trying to change the California exclusionary rule. I was in the legislature at the time.

I might also say, and this is totally tangential but it appeared yesterday in the Los Angeles Times, that after 8 years of running on law and order issues and tougher sentences, he now has to deal with a budget in California, and he says he thinks sentences are tough enough and we don't need to send people to prison for any longer than we are now. He just totally flipped.

Mr. WILSON. It all depends on the hat you are wearing.

In any event, I think the statistic is still very telling in that the effort to change the law was as misguided as the current efforts are.

Finally, I would like to suggest that there really is no good alternative, and I don't think that is a reason we should abandon it. I think it is a valid and useful rule, but there really isn't a good alternative.

We have talked a little bit this morning about alternatives. You suggested earlier the possibility of firing the police officer who acts improperly. I think that is a nice theory, but in practice it doesn't happen.

Mr. BERMAN. I agree with that, and I am a supporter of the exclusionary rule because I don't see any good alternative. I do think, though, that it is a mistake to cling to the exclusionary rule as firmly as we would embrace the protections of the fourth amendment.

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[2] EDITOR'S NOTE.—National Institute of Justice, Criminal Justice Research Report—"The Effects of the Exclusionary Rule: A Study in California" (1982).

In unlawful search cases, the evidence seized is still reliable evidence. It is not like a coerced confession or something like that. If in theory there were an alternative that was a better deterrent, it would seem to me that then it would pay for people who have supported the rule in the past to rethink their support. I just don't know what that alternative is.

Mr. CONYERS. Somebody ought to invent one. That is what lawyers frequently do. That is where most of these laws, I hate to suggest, come from. Somebody sat down and said there ought to be a law against invasion of privacy, and lo and behold there appeared one.

I don't think that this is the final gesture in this area that we will centuries from now be grappling with. I think somewhere along the line maybe someone reading this hearing will say, let's sit down and figure out a new way, and 100 years later perhaps it will be introduced into the law. I think that that is perfectly conceivable.

Mr. BERMAN. That is all I am really saying, is that there should be enough—in and of itself it is not an end, it is not a principle, it is just the best thing around until somebody thinks of a better alternative.

Mr. WILSON. I would in one sense agree with that, in the sense that I don't think we should necessarily give up our search for other ways to protect citizens and their rights to privacy and still effectively prosecute the guilty.

However, I would suggest that the number of circumstances in which we use an exclusionary rule suggests that the rule as it is used in the fourth amendment context isn't just a nice convenience for the time being. There are a number of circumstances that represent a pattern in which we have decided to protect the rights of individuals over those of the State.

Those same circumstances are invoked in circumstances in which privilege is used. In other words, your suggestion that there is in fact reliable evidence behind this rule is the case in every one of those circumstances. Something I tell my doctor that might be used against me in a criminal case is certainly reliable evidence, but my doctor can't tell about it.

Mr. BERMAN. We don't know of any other way to get patients to talk to their doctor without that rule.

Mr. WILSON. Exactly, because we value talking to doctors more than we value bringing that evidence out in a criminal case. We do value independent, factual, observable investigation in criminal cases that does bring out facts and prove guilt.

That is what underlies the exclusionary rule. We don't want to taint the integrity of the court system. I suggest that is as valuable, if not more a more valuable purpose for the exclusionary rule than deterrence of police misconduct.

Mr. CONYERS. I heard Professor Greenhalgh say there were seven parts to the exclusionary principle, seven exceptions. It seems to me that you really view this a little bit differently.

Mr. WILSON. As I suggested, he said there are seven exclusionary rules. I said I would rather characterize it as there is one exclusionary rule that says when police act illegally you can't use the evidence, period. That is the exclusionary rule. It is very simple.

There are many circumstances in which we use that rule to prevent purportedly reliable testimony or evidence from coming into a criminal trial. That is because—it is so basic but we need to keep going back and saying it over and over again, and we certainly say it to juries when we try jury trials—this is a guilt-seeking process, it isn't always a truth-seeking process. We are trying to prove someone guilty beyond a reasonable doubt.

We can only use evidence which we all agree on is usuable in that process to prove that guilt. There are several circumstances, the exclusionary rule being one, and one that I believe is very valuable, in which we say no, we are not going to allow that kind of evidence to come in because we value the right of the individual to be protected under those myriad cases that the professor cited that say we aren't going to invade privacy, we are going to protect them in this process.

In fact, I think it is instructive that the couple involved in the *Gates* case has not been convicted. Everyone from the Chief Justice on down has suggested that they are guilty. No court has ever said that yet. I would hope that we haven't lost sight of that in this whole process, that we only invoke guilt when a judge or a jury says that someone is guilty.

If we decide we are going to change that rule, then we might as well abandon the whole system because if you or I get to say that this person is guilty because they have some marihuana in their basement, then we don't need a judge, we don't need a jury, we don't need police. We can just have gulags.

Mr. CONYERS. You look like another one of these witnesses who is not a betting man. Were you satisfied with the arguments in *Gates*? Were you there when they were made?

Mr. WILSON. Yes; I did appellate practice for about 8 years, and I never bet on the outcome of a case, those I argued or any others. I am not particularly confident about the outcome of this case, given the circumstances in which it was ordered to be reargued.

There were some questions—as I pointed out in my written testimony, where I tried to include some reference to that case and the oral argument—that I thought were interesting. The judges were certainly not letting the proponents of the good faith exception off the hook very easily, which I found heartening.

There were also some instructive implications from their questions; that is, almost all of their questions, did not go to the invocation of the exclusionary rule but to the law of search and seizure. They got back into questions about informants and *Aguilar* and *Spinelli*,[3] which was the very issue that came up the first time.

There were also many questions about whether they could apply a good faith exception if a warrant had issued from a magistrate and were they talking about the good faith of the magistrate.

That, I think, is some indicia of how judges in the trial court will struggle. If the judges in the Supreme Court couldn't figure it out, imagine what the trial judges are going to do when a good faith exception is adopted. Imagine trying to figure out who they apply it against and in what circumstances it applies.

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[3] EDITOR'S NOTE.—*Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).

Mr. BERMAN. How do you fire the policeman for the bad faith of the magistrate.

Mr. WILSON. Exactly. Again, I wouldn't say how it is going to come out. I think Professor Greenhalgh, referred to the number of other cases that have been granted certiorari in the fourth amendment area. This again is a pretty strong indication that the court intends to take a close look at the fourth amendment during this term, and probably others to come.

Mr. CONYERS. That is not to be celebrated.

Mr. WILSON. Oh, no, I don't believe so. It just means more work for defense lawyers.

Mr. CONYERS. That we can bet on.

Mr. WILSON. I have no other remarks, unless you have any other questions.

Mr. BERMAN. You did seem to imply—and I have heard this from others—that the exclusionary rule is constitutionally based, so that we are not really empowered to change it here, are we? These are interpretations of the fourth amendment and therefore beyond the prerogatives of Congress to deal with, I guess.

Mr. WILSON. Yes; I think that is right.

Mr. BERMAN. Probably good, too.

Mr. WILSON. That is probably good. All I would suggest is you should not make it even more complicated by these current proposals.

Mr. BERMAN. Thank you very much for your testimony. It has been very interesting.

[The prepared statement of Mr. Wilson and material submitted for record follow:]

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STATEMENT OF RICHARD J. WILSON

on behalf of

THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

before the

SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

concerning

EXCLUSIONARY RULE LEGISLATION

March 10, 1983

Mr. Chairman, I am Director of the Defender Division of the National Legal Aid and Defender Association (NLADA). Our Association was founded in 1911 by members of the private bar concerned about the availability of legal services to poor persons in the United States. Since that time NLADA has grown into a coalition of private lawyers, legal aid and legal services attorneys, public defenders, poor persons, members of the judiciary and other public officials. Our organization remains the only national organization devoted to advocating and assuring that high quality legal services are afforded persons in both civil and criminal cases, regardless of a person's ability to pay counsel.

I am a criminal defense lawyer by training and experience. From 1972 until 1980 I served with the State Appellate Defender office in Illinois. Since coming to Washington and NLADA I have traveled extensively throughout the United States visiting public defenders in their offices. I have learned that not only are the majority of criminal defendants represented by publicly-compensated counsel, but most of the victims of crime come from the same community as the defendants. While crime is certainly a problem of national significance, its major impact is on the poor -- both as victim and defendant. For this reason our Association has a major concern with present efforts to abolish, "modify," "limit" or "define" the exclusionary rule.

Few issues have been studied, debated, and considered as thoroughly as the exclusionary rule. Extensive hearings have been held in both houses of Congress to consider this issue. The United States Supreme Court's grant of re-argument on this issue in Illinois v. Gates has stimulated additional debate and, to my mind, exaggerated media interest. Today you are hearing from a distinguished group of criminal justice professionals who will provide you

with additional insight. To me, however, the issue is straightforward: of what value is the exclusionary rule and what will be the ramifications of its abolition or limitation.

Early on in our history certain decisions were made concerning the rights of persons charged with crime. These rights were neither self-evident nor required by the common law. Certainly such rights as trial by jury, counsel, the privilege against self-incrimination, and the right to be free from unreasonable searches and seizures were not designed to make it easier to convict criminal defendants. We must remember that these rights do not apply only to the criminal but to everyone. Each of us has a stake in ensuring that the police, prosecution, and courts meet certain minimal requirements. This emphasis upon the rights of the accused is a fundamental value in our Constitution which separates our system of justice from that in communist or totalitarian countries and which has stood us well for two centuries.

The Supreme Court has interpreted the Fourth Amendment prohibition of unreasonable searches and seizures to require the exclusion, for all purposes, of evidence illegally sought or seized. The exclusionary rule is therefore implicit in the Fourth Amendment. For the Congress to tinker with such a basic concept is not only a retreat from a fundamental right which separates America from criminal justice systems around the world, it is an unconstitutional invasion on the power of the judicial branch to interpret the Constitution.

Even now, the Supreme Court is considering a decision in Illinois v. Gates, No. 81-430. NLADA has submitted an amicus curiae brief in that case, and I attended the recent oral argument. The confusion of the Court over the positions

asserted by the Attorney General of Illinois and the Solicitor General of the United States point out the inherent problems in adopting a "good faith" exception.

The facts in Gates are useful to our discussion here. The Bloomington, Illinois police received an anonymous handwritten letter on May 3, 1978, alleging that Lance and Susan Gates, husband and wife, were planning to travel to Florida "in a few days" to buy drugs. The letter said they would drive back to Illinois with "over $100,000.00 in drugs" in their trunk, and that a similar amount was in their basement.

Police tracked the couple to Florida and back, following their travel by car back to Illinois on May 5th and 6th.* On the basis of these observations and the letter, a Circuit Judge in DuPage County issued a warrant, finding "probable cause."

At the trial, another Circuit Judge held that the first judge had erred in finding probable cause. On appeal to the Illinois Supreme Court, prosecutors lost again in a 5-to-2 decision saying the letter failed to meet legal requirements for tips from anonymous informers, enunciated in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). The issue of "good faith" by police was never argued by prosecutors in Illinois or in initial briefs filed in the U.S. Supreme Court on the "anonymous tip" issue. The U.S. Supreme

*In a recent article in The Washington Post, former police officer James Fyle, now a professor of criminal justice, notes that "Bloomington police did not attempt the simple next step of observing the couple unloading bales of marijuana from their car trunk, which would have provided firm ground for the warrant." Fyle, "Don't Loosen Curbs on Cop Searches," The Washington Post, Feb. 27, 1983.

Court ordered re-argument on the "good faith" issue after the original oral arguments were complete.

Questions from the Justices during oral argument were common-sense. Whose error was it here, the police or the magistrate? Did probable cause exist when the warrant issued, and if not, can the subsequent observations of the police establish probable cause? Is the "good faith" exception applicable to the question of whether probable cause exists; i.e., can something less than probable cause permit a legal search? The debate swirled about these issues, but two fundamental points emerged. First, the argument was not "about" the exclusionary rule at all, but rather about the law of search and seizure. The rule is simple and clear -- if evidence is illegally seized, it cannot be admitted in court for any purpose. The issue in Gates, and in all debate in this area, is over the complicated body of decisions dealing with what is an illegal search. Changing the exclusionary rule will not change the law of search and seizure one iota, but will clearly make it more complicated and confused.

And that is the second problem. Even if the rule is changed, the need for legal challenges by defense lawyers and impartial judicial review of police decisions will not be eliminated. If anything, the process will become a protracted exercise in plumbing the mind of the officer (and maybe the issuing magistrate, if a warrant is involved) to determine whether the search or seizure was innocent or malicious, innocuous or vindictive. These needless quests into the past for "honest mistakes," as endless as those of Diogenes and his lamp, can be avoided by maintaining the present clarity of the rule.

Perhaps the most widespread misconception about the exclusionary rule is that the rule acts to exclude all illegally-seized evidence in every case. This is simply not true. The U.S. Supreme Court has recognized that such inflexibility would keep out evidence the government had discovered on its own without using illegal means. Once a search or seizure has been determined to be illegal, a court must then decide if the evidence is so "tainted" that it cannot be admitted. The U.S. Supreme Court has recognized two ways in which this "taint" can be removed and evidence admitted. The first of these is instances in which the evidence was obtained from an "independent source." See Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920). Under this test the government must show that leads or information developed by the police or private sources, and unrelated to the illegal search, led to the discovery of the evidence.

The second exception is where tainted evidence can be admitted if the prosecution shows that the evidence acquired by illegal means inevitably would have been obtained by legal means. See U.S. v. Crews, 445 U.S. 463 (1980). Such evidence is excluded only when the prosecution cannot show the existence of an independent source for discovering the evidence.

Furthermore, current Fourth Amendment law already provides extensive flexibility in the determination of the officer's objective reasonableness. An officer's belief that certain facts exist will, if the facts would be sufficient to create probable cause, uphold a search or seizure whether or not the facts later turn out to have existed, so long as the belief was objectively reasonable at the time. Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959); Delaware v. Prouse, 440 U.S. 648 (1979). Hearsay and rumor, if properly supported, may be relied upon in order to establish probable cause, cf., e.g.,

Spinelli v. United States, supra; Aguilar v. Texas, supra; Draper v. United States, 358 U.S. 307 (1959), and an officer receives the benefit of the doubt when he or she has been required to make a quick factual judgment. Warden v. Hayden, 387 U.S. 294 (1967). When acting on the basis of their experience, police may also even attach significance to circumstances that would appear inocuous to a lay person. United States v. Cortez, 449 U.S. 411 (1981).

Where a search warrant has been obtained, great deference is accorded a magistrate's determination of probable cause, and "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." United States v. Ventresca, 380 U.S. 102 (1965). In practice, a warrant is invalidated only if the magistrate's judgment was "arbitrarily exercised." Cf., e.g., United States v. Giacalone, 541 F. 2d 508, 513 (6th Cir. 1976) (en banc).

Any Congressional modification of the exclusionary rule would amount to but a symbolic gesture. While apparently intended to "fight crime," efforts to abolish the rule can have no real impact on crime, and in fact only serve to divert attention from seeking real solutions. When one considers that only 30% of all crimes are reported and only 21% of all reported crimes result in arrest[1], it suggests that Congress is addressing the wrong issue by looking exclusively at the adjudicatory process in court. Moreover, the one study done

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[1] Law Enforcement Assistance Administration, Criminal Victimization in the United States, 1978, 12-14 (1980) (only 30% of crimes reported to police); Federal Bureau of Investigation, Uniform Crime Reports 175 (1979) (only 21% of reported crimes in 1978 resulted in an arrest).

Because career or habitual criminals generally commit more than one crime per year, "clearance rate" statistics (which relate arrests to the number of crimes) probably understate the proportion of criminals who arrested each year. See, C. Silberman, Criminal Violence, Criminal Justice, 101-02 (1978).

on the impact of the Exclusionary Rule in federal courts found that in only 1.3% of the cases was evidence excluded and in less than 1% did this exclusion affect the outcome in the case.[2] Thus out of 2,000 crimes committed only 600 will be reported, in only 170 will arrests be made, and the Exclusionary Rule will affect the result in one case or less out of the original 2,000 crimes which occur. Considering further that Congress can only adopt legislation to apply to federal courts, and that the large majority of violent (and other) crimes are prosecuted in state courts, any suggestion that this type of legislation will reduce crime is not only incorrect, it is a disingenuous ploy to make it appear that Congress is "getting tougher on crime."

One new study has been completed since NLADA's last appearance before this Committee in 1982. This is the National Institute of Justice's (NIJ) report entitled, "The Effects of the Exclusionary Rule: A Study in California" (December 1982).* The report is heavily relied upon by several members of the Attorney General's Task Force on Violent Crime appearing as amicus curiae in Illinois v. Gates. The study asserts "a major impact of the exclusionary rule on state prosecutions." NIJ study at 2. The study, however, is seriously flawed in at least three ways.

First, and most important, the report indicates a 4.8% rejection rate (4,130 cases) for cases involving search and seizure problems. NIJ study at

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

*Two other studies were not mentioned before. These are the reports of the Institute for Law and Social Research (Inslaw) entitled "What Happens After Arrest: (May 1978) and "A Cross-City Comparison of Felony Case Processing" (April 1979). Both reports found little impact on the system by invocation of the exclusionary rule.

12. Even accepting this modest rate as "alarming," it is inaccurate. The percentage is inflated by measuring rejections against the total number of cases rejected (86,033) rather than the total number of caes referred for prosecution (520,993). If this is done, the accurate percentage of caess affected by search and seizure problems during the four-year period is a minuscule eight-tenths of one percent. The same process occurs in the detailed data, where the impression is created that 71.5% (2,953 cases) of all felony drug charges statewide were rejected for search and seizure problems. Again, the percentage here is of the 4.8% rejected cases, not all cases referred. These grossly misleading figures are a disservice to a supposedly impartial federal agency.

A second problem occurs with the methodology in Los Angeles, where a "special survey" was conducted. NIJ study at 11. This called on District Attorney personnel, certainly not unbiased researchers, to evaluate case information after the fact to determine "whether or not a search and seizure problem was the primary reason for case rejection." The report concedes that the information obtained is "not based on routinely recorded case rejection information." This subjectivity also flaws the discussion of "police screening." NIJ study at 9.

Finally, the NIJ study reports concerns which apparently were not shared by the California Justice Department, under George Deukmejian, now Governor. That office's latest report for 1981 shows a .7 percent rejection rate by prosecutors due to "illegal searches and seizures." The most frequently cited reasons for rejection were lack of probable cause, lack of evidence or refusal by the victim to prosecute. See, Adult Felony Arrest Dispositions in California, 8 (1981).

These statistics I have quoted are sometimes used to support abolition of the exclusionary rule since "it doesn't work anyway." Every public defender knows that the burden is heavily on the defense in asserting any type of suppression motion. Judges are extremely reluctant to grant such motions, particularly in the many "routine" cases involving indigents. To anyone providing representation to poor people in criminal cases the assertion that significant numbers of defendants "go free" because of the exclusionary rule is -- frankly -- laughable. The assertion that crime will be reduced by modification of the rule by Congress is a cruel hoax being perpetrated on the American people by those who should know better.

Yet the real ramification of the rule has been in improved police education and procedures. It is ironic to me that many of those now favoring abolition of the rule point with pride to the improved police procedures which have been adopted as a direct consequence of the rule. To assert now that the rule should be eliminated is both illogical and insensitive to the abuse by law enforcement which led to the rule's creation. Contrary to the repeated assertions made, the exclusionary rule has worked and is working today to improve police practices without resulting in "criminals going free."

I can understand the public's frustration with the criminal justice system. By any measure the state systems are severely underfunded and understaffed. This lack of resources leads to the necessity of disposing of cases in a way not always consistent with justice. Sometimes this injustice is done to the public, but other times the defendant is dealt with summarily due to inadequate time and resources. All too often persons within the system -- including some defense lawyers -- have a political, personal, or financial interest in an outcome

not consistent with justice. I am certain that the exclusionary rule adds to the public's frustration, particularly in view of the way it is characterized by those who seek to abolish the rule. Yet it is simply not responsible for Congress to choose this rule -- applying only in federal courts -- as a way to enhance the public's respect for our criminal justice system. Members of Congress of both political parties, liberal and conservative, as well as both Presidents Carter and Reagan, worked to abolish the Law Enforcement Assistance Administration (LEAA) without any consideration being given to the many LEAA projects which certainly improved the law enforcement and adjudicatory systems and may have even reduced crime. If Congress were truly concerned about improving the operation of the system of justice, it should review what was done by LEAA and move towards funding projects demonstrated to enhance the process.

There may well be other ways to remedy Fourth Amendment violations. Some civil remedies already exist. The fact is, however, that the exclusionary rule is the least expensive way to protect all citizens. The maintenance of this rule assures that law enforcement officers are mindful of everyone's rights -- not just those accused of committing crime. A tort remedy already exists when appropriate, but most often a person not ultimately charged with a crime has insufficient resources to pursue such claim unless the alleged violation is truly outrageous and the likelihood of substantial damages very high. Other remedies include criminal actions, contempt, civil actions and internal discipline. These remedies all suffer from well-documented shortcomings having mostly to do with our sympathy for beleaguered police and hostility to the accused. See generally, United States Commission on Civil Rights, Who is Guarding the Guardians: A Report on Police Practices (October 1981). The beauty of the exclusionary rule is that it assures judicial determination of the legality

of the actions of police in a way which can then protect everyone. No other remedy suggested provides this broad-scale impact at so low a cost.

Mr. Chairman, I submit that the exclusionary rule is the means which courts have adopted for enforcing the fundamental principle embodied in the Fourth Amendment. The rule has resulted in manifestly improved police procedures, though only in a tiny number of cases has the prosecution been affected by the exclusion of evidence under the rule.

Any modification of the rule by Congress would not only impermissibly invade the authority of the judiciary but would also indicate a retreat from this basic constitutional safeguard. The exclusionary rule is the most effective and least costly way of assuring that all citizens are protected from violations of the Fourth Amendment. As one ex-police officer has said, "the 'good faith' exception would have little or no effect on police practices or crime. It would just give abusive officers a safer way around the Fourth Amendment and encourage more violations." Fyle, supra, p. 3.

Most of all, however, changing the exclusionary rule will not have any effect on crime. Moreover, efforts to adopt such legislation divert the Congress and the nation from seeking effective solutions to the problem of crime in our country. We urge the Congress to reject efforts to modify the exclusionary rule.

No. 81-430

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF ILLINOIS, - - - - Petitioner,

versus

LANCE GATES AND SUSAN GATES, - Respondents.

—On Re-Argument—
On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases: (Cont'd)

Cases: (Cont'd)

v

Cases: (Cont'd)

Constitution:

Articles and Books:

vi

Articles and Books (Cont'd):

Miscellaneous:

vii

INTEREST OF AMICUS

(1) The National Legal Aid and Defender Association [NLADA] is a not-for-profit organization whose members include the great majority of public defender offices, coordinated assigned counsel systems and legal services agencies in the nation. The organization also includes two thousand individual members, most of whom are private practitioners.

NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional rights, particularly from violation by police, and in assuring full access to the courts for trial and appellate level litigation concerning those rights.

(2) NLADA joins respondents in opposing any modification of the exclusionary rule.

(3) NLADA has received the written consent of both parties for the filing of this brief.

viii

SUMMARY OF ARGUMENT

The exclusionary rule in its present form is the sole means of effectively furthering the policy values underlying the Fourth Amendment. It was preceded by widespread police illegality, and it has resulted in extensive improvement in police practices at minimal evidentiary cost and on the basis of objective criteria. Fourth Amendment jurisprudence already takes into account an officer's reasonable mistakes of facts and accords great deference to a magistrate's decision to issue a warrant.

A "reasonable belief" or "good faith" exception to the exclusionary rule would undermine the Warrant Clause, erode protection of Fourth Amendment rights, especially of minorities, halt substantive development of Fourth Amendment law, encourage police ignorance and be administratively unfeasible; it would ultimately leave people "secure . . . only in the discretion of the police."

In the past ten years this Court has significantly narrowed the scope of application of the rule, and no further modification is warranted.

ARGUMENT

A "Reasonable Belief" Exception to the Exclusionary Rule Would Undermine the Warrant Clause, Erode Protection of Fourth Amendment Rights, Especially of Minorities, Halt Substantive Development of Fourth Amendment Law, Encourage Police Ignorance and be Administratively Unfeasible, and it Should be Rejected.

The history of American freedom is, in no small measure, the history of procedure. *Malinski* v. *New York*, 324 U. S. 401, 414, 64 S. Ct. 781, 89 L. Ed. 1029, 1037 (1945), Frankfurter, J., concurring.

Introduction

A "reasonable belief" or "good faith" exception to the exclusionary rule would respond to the frustrations of police officers who execute unconstitutional warrants or err in determining whether they have sufficient information to justify an arrest or stop or excuse the issuance of a warrant. In doing so, however, such a rule would turn the Fourth Amendment upside down. It would place the police above the law and unleash forces that would, in the end, leave people "secure . . . only in the discretion of the police."

The Fourth Amendment is the fundamental provision by which the privacy rights of homeowners and drifters, native-born citizens and immigrants, conformists and dissidents, law-abiding citizens and criminals are protected under our constitutional scheme. These rights are among our most cherished, yet they are among "the most difficult to protect [, for] officers themselves are the chief invaders, there is no enforcement outside of court[,]" and, unlike some other constitutional rights, "there is no way in which the innocent citizen can invoke advance protection." *Brinegar* v. *United States*, 338 U. S. 160, 181-182, 69 S. Ct. 1302, 92 L. Ed. 1879, 1893-1894 (1949), Jackson, J., dissenting.

2

Moreover, the values of the Fourth Amendment are seemingly remote and its benefits largely abstract and unseen—the unlawful stop or raid of a home that is *not* made, the unfounded warrant that is *not* issued—while the costs of enforcing its mandates are concrete and visible—the suppression today of actual evidence. In times of great frustration about crime this apparent anomaly leaves the Amendment, its values and the rules by which it is enforced vulnerable targets for criticism, yet it is in times such as these that the Amendment and these rules must be most vigorously protected.

In *Weeks* v. *United States*, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), this Court unanimously held that the values underlying the Fourth Amendment could only be adequately protected by excluding from evidence in federal court materials obtained unconstitutionally by federal officers. In so ruling, this Court stressed that without an exclusionary rule "the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution." 232 U. S. at 393, 58 L. Ed. at 656.

These words were reiterated in *Elkins* v. *United States*, 364 U. S. 206, 209-210, 80 S. Ct. 1437, 4 L. Ed. 2d 1669, 1673 (1960), and echoed again in *Mapp* v. *Ohio*, 367 U. S. 643, 648, 660, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 1086, 1093 (1961), where this Court held that the exclusionary rule is "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words' [,] . . . an empty promise."[1]

[1]While *Mapp* and *Wolf* v. *Colorado*, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), were both decided by a closely divided Court, in each case opponents of applying the exclusionary rule to the states based their positions *not* on opposition to the rule

(Footnote continued on following page)

3

The Values and Purposes of the Fourth Amendment

Recent decisions of this Court have focused on deterrence of unlawful police conduct as the primary justification for the exclusionary rule, downplaying the value of other considerations. Cf., e.g., *Stone* v. *Powell,* 428 U. S. 465, 482-486, 491-493, 96 S. Ct. 3037, 49 L. Ed. 2d 1067, 1081-1083, 1086-1087 (1976). Deterrence was not even discussed as a basis for the rule until *Elkins,* however, and it is clear that the rule furthers at least four other vital goals as well:

First, the exclusionary rule upholds "the imperative of judicial integrity" in litigation involving Fourth Amendment rights, for, as the Court stressed in *Elkins,* 364 U. S. at 223, 4 L. Ed. 2d at 1680, citing Holmes, J., dissenting in *Olmstead* v. *United States,* 277 U. S. 436, 470, 48 S. Ct. 564, 72 L. Ed. 944, 953 (1928), " 'no distinction can be taken between the Government as prosecutor and the Government as judge;' "

Second, as this Court pointed out in *Terry* v. *Ohio,* 392 U. S. 1, 12, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 901 (1968), the rule is the solè judicial means by which these rights may effectively be protected:

> . . . *experience has taught that it* [*the exclusionary rule*] *is the only effective deterrent to police misconduct in the criminal context,* and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." (emphasis added)

(Footnote continued from preceding page)
itself, but on considerations of federalism. It is only recently that any member of this Court has expressed opposition to the rule itself.

4

Third, the exclusionary rule plays a critical role in the development of substantive Fourth Amendment law. Mertens and Wasserstrom illustrate this point in "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo. L. J. 365, 404, 405-406 (1981):

> By functioning as the primary mechanism through which the courts develop and articulate the limits of the Fourth Amendment itself, the exclusionary rule plays an indispensable role in preventing Fourth Amendment violations . . . even when a court declines to suppress evidence.

Fourth, the exclusionary rule serves as an overriding symbol of our society's commitment to the primacy of law over the raw power of government and its agents "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436, 440 (1948). Indeed, to many observers, "[T]he symbolic value of the exclusionary rule is perhaps its most immeasurable aspect." Geller, "Is the Evidence in on the Exclusionary Rule?" 67 ABA J. 1642, 1645 (1981).

The Fourth Amendment exists not to assist the police or relieve their disappointments but to limit their conduct and that of magistrates. Officers' beliefs as to the legality of their actions are irrelevant. This Court has emphasized in two major Fourth Amendment decisions that

> . . . good faith on the part of the arresting officers is not enough. *Henry* v. *United States,* 361 U. S. 98, 102, 80 S. Ct. 168, 4 L. Ed. 2d 134, 138 (1959)
>
> We may assume that the arresting officers acted in good faith in arresting the petitioner. But "good faith

on the part of the arresting officers is not enough." . . . [citing *Henry, supra*] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police. *Beck* v. *Ohio*, 379 U. S. 89, 98, 85 S. Ct. 223, 13 L. Ed. 2d 142, 148 (1964)

This axiom was recently reaffirmed in *Delaware* v. *Prouse*, 440 U. S. 648, 654, 99 S. Ct. 1391, 59 L. Ed. 2d 660, 668 (1979), when Justice White stressed in his opinion for the Court that "the reasonableness test usually requires, at a minimum, that *the facts upon which an intrusion is based be capable of measurement against 'an objective standard.'*" (emphasis added)

Protection of Fourth Amendment rights is a difficult process under the best of circumstances, but this Court recognized as long ago as *Weeks, supra,* that law enforcement in this country too often does not operate within the law. There is a "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions." 232 U. S. at 392, 58 L. Ed. at 655. Justice Jackson stressed the breadth of police illegality in his dissenting opinion in *Brinegar, supra,* 338 U. S. at 181, 92 L. Ed. at 1893, cited with approval in *Elkins, supra,* 364 U. S. at 217-218, 4 L. Ed. 2d at 1677-1678:

> *Only occasional and more flagrant abuses come to the attention of the court . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.* (emphasis added)

A "Good Faith or "Reasonable Belief" Test Is Inherently Subjective and Would Undermine Fourth Amendment Rights.

A "good faith" or "reasonable belief" standard in applying the exclusionary rule would be subjective under any definition. While some proponents of the exception argue that subjectivity could be avoided by requiring that an officer's personal belief be "objectively reasonable" as well, cf., e.g., Brief *Amici Curiae* Seven Former Members of the Attorney General's Task Force, *et al.*, at 21-22, objectivity cannot be provided by reference to a "reasonable officer's" mistaken belief as to the law. Allowing an officer's beliefs as to the law to carry weight under *any* circumstances is precisely what makes the rule subjective. Rather than eliminating subjectivity, inclusion of a "reasonableness" element in the test merely adds a second layer of it. Emphatically rejecting the concept of "good faith" or "reasonable belief," Professor LaFave recently wrote:

> . . . *it is nothing short of nonsense to talk of a reasonable belief that there is probable cause,* for the probable cause standard itself takes into account reasonable mistakes of fact.[2] If mistakes of law were also to be taken into account, then the law becomes whatever the officer thinks it is. LaFave letter, Hearings on the "Exclusionary Rule Bills," 97th Congress, 1st and 2nd Sessions, Senate Judiciary Committee, Subcommittee on Criminal Law [hereinafter Hearings] (1982) at 793-794 (emphasis added)

In cases involving warrants, a "good faith" exception to the exclusionary rule would virtually destroy the Warrant Clause. Warrants are usually issued *ex parte* and generally after at best perfunctory scrutiny. They may be, and in some states often are, issued by clerks or part-time

[2]See discussion, *infra,* pp. 9-10.

magistrates untrained in the law. Cf., e.g., *Shadwick* v. *City of Tampa,* 407 U. S. 345, 92 S. Ct. 2119, 32 L. Ed. 2d 783 (1972). Further, the Warrant Clause, by its language, is directed at protecting against unlawful or abusive *issuance* of a warrant. Cf., e.g., *Weeks, supra,* 232 U. S. at 394, 58 L. Ed. at 656. For these reasons, full judicial review of decisions to issue warrants is essential to the viability of the Warrant Clause. If a "good faith" exception were adopted in such cases, effective review, judicial self-policing and access of litigants to the courts for protection of Fourth Amendment rights in criminal cases would all be severely curtailed.

If an officer's subjective "good faith" were to become the standard, the scope of review would be so narrow that only in cases of perjury or reckless submission of an affidavit could courts assure the "essential" "detached judgment of a neutral magistrate . . ." *Gerstein* v. *Pugh,* 420 U. S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54, 65 (1975). There would be no effective way to determine that a warrant was issued by a person "sever[ed] . . . from activities of law enforcement," *Shadwick* v. *City of Tampa, supra,* 407 U. S. at 350, 32 L. Ed. 2d at 789; *Coolidge* v. *New Hampshire,* 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), or was based on probable cause, or "particularly describ[ed] the place to be searched, and the persons or things to be seized." Further, even if such a determination were made in some cases, it would be unenforceable and, therefore, of no value.

Justice Powell's opinion for the Court in *United States* v. *United States District Court,* 407 U. S. 297, 315-316, 92 S. Ct. 2125, 32 L. Ed. 2d 752, 765 (1972), illuminates why police good intentions have no place in evaluating claims of violation of the Warrant Clause:

> *The warrant clause* of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It *is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.* It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." (cite omitted; emphasis added)

Because it would be extremely rare that an officer was not "well-intentioned" as to the propriety of a warrant, under a "good faith" exception the Warrant Clause, the "bulwark of Fourth Amendment protection," *Franks* v. *Delaware,* 438 U. S. 154, 164; 98 S. Ct. 2674, 57 L. Ed. 2d 667, 677 (1978), would become "dead language."

Further, if a primary justification for a "good faith" exception is to account for an officer's need to make split-second decisions in rapidly unfolding encounters, cf., e.g., Supplemental Brief for the United States as *Amicus Curiae* at 28-29; *United States* v. *Williams,* 622 F. 2d 830, 842 (5th Cir. 1980) (*en banc*), concurring opinion, this consideration argues *against* adoption of such an exception in cases where, because a warrant has been obtained, there clearly was no need for instantaneous action.

In either a warrant case or a warrantless case, a "reasonable belief" or "good faith" exception would also be an abdication of the judiciary's constitutional duty, for it would effectively give the police a voice in the probable cause determination. It is, however, the responsibility of the courts to determine the legality of police conduct. Justice Powell emphasized this point as well in *Gerstein* v.

Pugh, supra, 420 U. S. at 112-113, 43 L. Ed. 2d at 64, citing *Johnson* v. *United States, supra,* 333 U. S. at 13-14, 92 L. Ed. 2d at 440:

> "The point of the *Fourth Amendment,* which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its *protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*" (emphasis added)

By condoning objectively unreasonable conduct based on asserted "good faith," such an exception would also create the anomaly of a "reasonable unreasonable search."

Current Fourth Amendment law is also already flexible in taking into account an officer's objectively reasonable mistakes of *fact*: An officer's belief that certain facts exist will, if the facts would be sufficient to create probable cause, uphold a search or seizure whether or not the facts later turn out to have existed, so long as the belief was *objectively* reasonable at the time. *Beck* v. *Ohio, supra; Henry* v. *United States, supra; Delaware* v. *Prouse, supra,* 440 U. S. at 654-655, 59 L. Ed. 2d at 668.[3] Hearsay and rumor, if properly supported, may be relied upon in order to establish probable cause, cf., e.g., *Spinelli* v. *United States,* 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar* v. *Texas,* 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 623 (1964); *Draper* v. *United States,* 358 U. S. 307, 79

[3] *Hill* v. *California,* 401 U. S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971), relied on by both Petitioner, Brief at 22, and the United States, Supplemental Brief at 34-35, is an example of a reasonable mistake of *fact* and provides no support to the argument for a "good faith" exception for mistakes of *law*.

S. Ct. 329, 3 L. Ed. 2d 327 (1959), and an officer receives the benefit of the doubt when he or she has been required to make a quick factual judgment. *Warden* v. *Hayden,* 387 U. S. 294, 298-299, 87 S. Ct. 1642, 18 L. Ed. 2d 782, 787 (1967). When acting on the basis of their experience, police may also even attach significance to circumstances that would appear innocuous to a lay person. *United States* v. *Cortez,* 449 U. S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621, 629 (1981).

Where a search warrant has been obtained, great deference is accorded a magistrate's determination of probable cause, and "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States* v. *Ventresca,* 380 U. S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684, 689 (1965). In practice, a warrant is invalidated only if the magistrate's judgment was "arbitrarily exercised." Cf., e.g., *United States* v. *Giacalone,* 541 F. 2d 508, 513 (6th Cir. 1976) (*en banc*).

The irrelevance of an officer's subjective intent is also reflected in cases declining to invalidate an arrest based objectively on probable cause but for a subjectively invalid reason. As this Court recognized in *Scott* v. *United States,* 436 U. S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168, 178 (1978):

> *. . . the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.* (emphasis added)[4]

[4] Elsewhere in *Scott,* Justice Rehnquist suggests in *dictum* that while an officer's intent is irrelevant to the determination of

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Justice White also addressed the irrelevance of subjective bad faith in his opinion dissenting from the dismissal of *certiorari* in *Massachusetts* v. *Painten*, 389 U. S. 560, 565, 88 S. Ct. 660, 19 L. Ed. 2d 770, 773 (1968):

> . . . sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.

These observations illustrate that the balance between individual rights and the power of government depends not on an officer's subjective intent in a given case but on the balance of rights struck in the Constitution. Cf., *Dunaway* v. *New York*, 442 U. S. 200, 213-215, 99 S. Ct. 2248, 60 L. Ed. 2d 824, 836-837 (1979).

The Deterrent Impact of the Exclusionary Rule

Arguments in favor of a "good faith" exception mistakenly consider only individual deterrence. Criminal trials are not private actions, however, and as Professor LaFave stressed in his Senate testimony, "exclusion is not a sanction to which the officer is personally subjected, but rather is a sanction that is imposed upon the system." Hearings at 328. Justice Stevens explained the point in his concurring opinion in *Dunaway, supra*, 442 U. S. at 221, 60 L. Ed. 2d at 841:

> The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

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whether there has been a substantive violation, it may be material to the decision of whether to suppress the fruits of that violation. 436 U. S. at 135-136, 56 L. Ed. 2d at 176-177. This distinction is inconsistent with the constitutional foundations of the exclusionary rule, however, and it fails properly to consider the broader values served by the Amendment and the rule. See pp. 3-5 *supra*.

Deterrence may be either individual or general, and while the former is admittedly difficult to quantify,[5] solely to focus on this point misses the forest for the trees. It is on a larger scale that the deterrent value of the exclusionary rule is most significant.

However imprecise the rule's impact may be in individual cases, it is nevertheless real. Professor Loewenthal concluded after "countless" interviews with and observations of New York City police officers from 1971 to 1974 and again between 1976 and 1978 that

> there is substantial evidence that the police themselves would not respect courts which did not support constitutional standards by excluding any evidence which was unconstitutionally obtained. Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L. Rev. 24, 29 (1980)

Beyond individual case deterrence, plainly visible systemic deterrence is illustrated, in part, by the existence of extensive, high-quality police training programs in constitutional rights that did not exist prior to *Mapp*.

Maryland Attorney General Stephen H. Sachs, previously United States Attorney for the District of Maryland, recently underscored the relationship between the exclusionary rule and police training during testimony before

[5]See, e.g., Mertens and Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo. L. J. 365, 389-390 (1981) and studies cited therein.

the Senate Judiciary Committee's Subcommittee on Criminal Law:

> In my state, *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years. Sachs, Hearings at 41

Included in post-*Mapp* training are "much longer training periods for new officers, especially courses about constitutional rights," "in-service training, [which was] virtually non-existent before," a higher calibre of training, "training geared to practical situations such as stop and frisk exercises," and "testing constitutional law knowledge on promotional exams." *Id.*, at 41-42.

Even Professor Ball, a proponent of a "good faith" exception, concedes that the rule has accomplished "increased police training and awareness about their responsibilities." Ball, "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule," 69 J. Crim. L & Criminology 635, 656 (1978).

Observers of police practices have also noted a gradual acceptance of the exclusionary rule over time, as officers accustomed to illegal practices have either retired or come to accept the rule and new officers, unused to the old standard, have been hired and trained to function within the law. See, e.g., Mertens and Wasserstrom, *supra,* 70 Geo. L. J. at 394-401; Sachs, Hearings at 23, 30.

The deterrent value of the exclusionary rule is also illustrated vividly by initial police reaction to *Mapp*. *Mapp* did not change substantive Fourth Amendment law one iota, yet in its wake then-New York City Police Commissioner Murphy argued that it had required total restructuring of his department's training procedures "from the very top administrators down to each of the thousands of foot patrolmen . . . ." Kamisar, "Is the Exclusionary

Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment," 62 Judicature 66, 72 (1978) (quoting Murphy, "Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments," 44 Tex. L. Rev. 939, 941 (1966)).

Commissioner Murphy's reaction to *Mapp* underscores this Court's crucial observation in that case that an exclusionary rule was necessary, in part, because without it local police were simply not complying with the dictates of the Fourth Amendment. *Mapp* v. *Ohio, supra,* 367 U. S. at 657-658, 6 L. Ed. 2d at 1091-1092.[6] It was this same observation that led the California Supreme Court to adopt an exclusionary rule six years earlier in *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 (1955). Explaining the evolution of his feelings on the matter, then-California Supreme Court Chief Justice Traynor later stated:

> My misgivings about its admissibility [illegally obtained evidence] grew as I observed that time after time it was being offered and admitted as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent . . . Traynor, "*Mapp* v. *Ohio* at Large in the Fifty States," 1962 Duke L. J. 319, 321-322

Sachs emphasized the same point when he testified that "in the heat of the chase, and in the absence of effective sanction, I believe that we would define those [Fourth Amendment] rights, to put it mildly, somewhat narrowly." Hearings at 38. Stated in other words, without an exclusionary rule, police would too often not follow the law.

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[6]This point was recently conceded by the Police Executive Research Forum in its prepared statement to the Senate Subcommittee Hearings, *Id.*, at 299.

15

A "Good Faith" or "Reasonable Belief" Test Would Encourage Police Ignorance, Halt Substantive Development of Fourth Amendment Law and Be Administratively Unfeasible.

A "good faith" exception to the exclusionary rule would also encourage police ignorance of the law, a circumstance that would itself produce greater police illegality. Professor Kaplan, a critic of the exclusionary rule, has stressed that such an exception

> would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Kaplan, "The Limits of the Exclusionary Rule," 26 Stan L. Rev. 1027, 1044 (1974)

Judge Wilkey, an outspoken opponent of the rule, finds a "good faith" exception unpalatable, agreeing that "[t]he 'good faith' exception puts a premium on ignorance and lack of training in law enforcement agencies." Wilkey, "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," (National Legal Center for the Public Interest, 1982) at 36.

See also Schlesinger, Hearings at 72 and 803; prepared statement and letter of the Police Executive Research Forum, Hearings at 298 and 795; American Bar Association letter, Hearings at 797-798; Sachs statement, Hearings at 43; LaFave, "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,' " 43 Pitt. L. Rev. 307, 342-343 (1982); Mertens and Wasserstrom, *supra*, 70 Geo. L. J. at 431.

16

This Court did not develop substantive Fourth Amendment law until after *Weeks*, and it did not seriously apply substantive Fourth Amendment law to the states until after *Mapp*. A decision creating a "good faith" exception to the exclusionary rule would " 'stop dead in its tracks judicial development of . . . [these] rights.' " LaFave, *supra*, 43 Pitt. L. Rev. at 354, quoting Brennan, J., dissenting in *United States* v. *Peltier*, 422 U. S. 531, 554, 92 S. Ct. 2313, 45 L. Ed. 2d 374, 391 (1975).

Even if a "good faith" exception were stated to require an initial decision as to the legality of the police conduct involved, in practice busy trial courts with heavy dockets could be expected to do just the opposite. Such a practice would also be consistent with this Court's long-standing policy of avoiding constitutional questions whenever possible. *NAACP* v. *Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

A "good faith" exception would also create an impossible administrative situation, requiring judges and defense attorneys to delve into the subjective intent of police officers whose self-serving words the former are unlikely to discount and the latter are unlikely to refute. Given the nature of the inquiry, an officer's personality and manner of address would become at least as significant as the facts of the arrest or search involved.

Nor would litigation likely be confined to scrutinizing the subjective processes of individual officers. Rather, the entire training program of a department would be at issue in at least some cases, and in others involving more than one officer (by no means a rare occurrence), the various and possibly conflicting states of mind of numerous officers would be at issue. The result would be "an unabated waste of judicial resources." Wilkey, *supra*. See also LaFave,

supra, 43 Pitt. L. Rev. at 355-357; Kaplan, *supra,* 26 Stan. L. Rev. at 1044-1045; Mertens and Wasserstrom, *supra,* 70 Geo. L. J. at 447-449.

A "good faith" standard, necessarily involving a case-by-case approach, would also be extremely difficult to apply with any degree of consistency or uniformity. Compare *Irvine* v. *California,* 347 U. S. 128, 74 S. Ct. 381, 98 L. Ed. 561 (1954), Jackson, J., plurality opinion, and Clark, J., concurring.[7]

The Exclusionary Rule Has Minimal Evidentiary Costs

A "good faith" exception is not warranted by the evidentiary costs of the rule. Contrary to the often-voiced claim that the rule results in large numbers of guilty persons going free, the empirical record belies this claim. As this Court stressed in *Elkins, supra,* 364 U. S. at 217, 4 L. Ed. 2d at 1677, the rule is remedial, not punitive, and it is not "the inevitable and certain result" of application of the rule "that the guilty criminal defendant goes free." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 215, 223 (1978). Application of the rule results only in the loss of that evidence obtained by or directly derived from the violation. Only in

[7]See also Pitler's response to the argument that only "nontechnical" violations of *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), should require exclusion:

> [Such a rule] involves a great deal of subjectivity on the part of judges, making it extremely difficult to draw any real lines of distinction. Unable to foresee what activity will result in the exclusion of evidence, law enforcement officials may find it difficult to establish workable rules of procedure and convenient not to take the proscription seriously. Pitler, " 'The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 Cal. L. Rev. 579, 583 (1968).

possessory offense cases is an end to the prosecution likely to be "inevitable."[8, 9]

[8]In many cases convictions are, in fact, obtained following reversal without the use of illegally seized evidence. In *Coolidge* v. *New Hampshire,* 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *Davis* v. *Mississippi,* 394 U. S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1967); and *Bumper* v. *North Carolina,* 391 U. S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), for example, defendants were all reconvicted without the use of the evidence suppressed in their individual cases. Cf. Mertens and Wasserstrom, *supra,* 70 Geo. L. J. at 445-446. The myth equating suppression with dismissal often draws on then-Judge Cardozo's well-known line from *People* v. *DeFore,* 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926), "The criminal is to go free because the constable has blundered." Apart from the factual inaccuracy of the statement, Cardozo's suggested first alternative to suppression is also worth noting: "The officer might have been resisted . . ." *Id.* *Amicus* doubts that such an option was reasonable in 1926; in 1983, it is unthinkable.

[9]It is also untrue that "the exclusionary rule benefits only those who are unquestionably guilty." Supplemental Brief for the United States at 45. Evidence admitted at trial may establish, for example, that an accused was physically near contraband seized from a place in which the accused had a reasonable expectation of privacy, but this by itself neither proves that the accused was in legal possession of the contraband, nor is it always true that that was the case. Numerous persons find themselves in suspicious circumstances at one time or another without having committed any crime whatever.

The Solicitor General is similarly incorrect in asserting that suppression results in "erroneous verdicts." Supplemental Brief at 14. The Fifth Amendment privilege preventing a guilty defendant from being required to incriminate himself or herself, the attorney-client privilege and the marital privilege at times all result in probative, truthful evidence not being presented at trial. Similarly, the prosecution may fail to present sufficient evidence to establish a guilty accused's guilt beyond a reasonable doubt. Just as acquittals under these circumstances are not "erroneous verdicts," so, too, is a verdict not erroneous when evidence has been withheld in order to protect Fourth Amendment values.

The exclusionary rule does not define in any way what police conduct is lawful or unlawful; it merely defines the procedural remedy for some unlawful conduct. It is the Fourth Amendment which restricts the activities of the police and of the courts, and it is the Fourth Amendment which, when followed, at times deprives the government of some evidence.

An officer who complies with the Fourth Amendment in the first place obtains no less admissible evidence than an officer who has violated the rule and had evidence suppressed as a result. In fact, the prudent officer may obtain *more* admissible evidence. By obtaining a properly supported search warrant to support his or her actions in a situation where another officer acts unjustifiably without a warrant, or hastily with an inadequate warrant, for example, the officer abiding by the Constitution obtains more evidence for use in a prosecution.

Empirical evidence on the evidentiary costs of Fourth Amendment enforcement within the federal system demonstrates an extremely minimal impact on the results of criminal prosecutions. In a 1979 study of 2,804 defendant cases in 38 United States Attorneys' offices, the General Accounting Office found that in less than half the cases involving a search or seizure was a motion to suppress even filed and that in only 1.3% of the defendant cases was evidence excluded as the result of the filing of a motion to suppress. General Accounting Office, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," (1979) at 9-11. Even where a motion was granted in whole or in part, the rate of conviction remained over 50% (as compared with an 84% conviction rate in cases where motions had been denied). *Id.*, at 13. Overall, a finding of illegal search and seizure resulted in dismissal or acquittal in only

0.7% of the cases studied. Moreover, in cases where prosecution was declined, search and seizure considerations played a part in the decision not to prosecute in only 0.4% of cases. *Id.*, at 13-14.[10]

Two other studies, one of prosecutions in Washington, D.C., and other cities by the Institute for Law and Social Research [Inslaw] and the other in New York City by the Vera Institute of Justice, provide further support. Inslaw found that Fourth Amendment issues "appear to have little impact on the over-all flow of criminal cases after arrest." Geller, *supra*, 67 ABA J. at 1644.

The Vera Institute concluded further that the exclusionary rule "does not seem to produce dismissals in cases brought into the criminal process in which the searches are probably illegal and the evidence could be suppressed." *Id.*

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[10]Citing the December 1982, National Institute of Justice report, "The Effects of the Exclusionary Rule: A Study in California," the Solicitor General criticizes the GAO report, claiming that " '[m]ost of the federal caseload at the time of the [GAO] study was composed of such white collar crimes as embezzlement, fraud and forgery. Search and seizure issues are seldom raised in these cases.' " Supplemental Brief at 48, citing NIJ study at 7. The NIJ study cites no authority for this claim, and, in fact, it is incorrect. The GAO study determined that, depending on the size of the United States Attorney's office studied, between 69% and 88% of the cases accepted for prosecution involved charges where seized evidence would be susceptible to search and seizure challenge. GAO report, Appendix II at 7.

At the Senate Subcommittee hearings the Government also questioned the reliability of the GAO's findings for their asserted failure to consider prosecutions dropped prior to formal entry into the system. Hearings at 87. However, this factor, too, was expressly accounted for in the study. GAO report, Appendix II at 13-14.

Most recently, the 1982 National Institute of Justice study, "The Effects of the Exclusionary Rule: A Study in California," found that only 4.8% of all felony cases rejected for prosecution in California between 1976 and 1979 —only 0.8% of all cases referred for prosecution—were declined for search and seizure problems.[11, 12]

Professor LaFave has also written that, "[T]here is reason to believe that the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed." LaFave, *Search and Seizure* §1.2 n 9 (1981 Supp).

The American Bar Association, which "strongly supports retention of the exclusionary rule" on constitutional and practical grounds, has concluded that the "rule is not responsible for hordes of criminals going free" and that "a dispassionate examination of the facts belies the mythology

[11]520,993 cases were presented for prosecution in California in 1976-1979, of which 4,130 were rejected for search and seizure problems. To the NIJ, this demonstrated "a major impact of the exclusionary rule on state prosecutions." NIJ study at 2. This conclusion is impossible to square with the study's own factual results, however.

[12]*Amici* Seven Former Members of the Attorney General's Task Force, *et al.*, assert in their Brief that the NIJ study, *supra*, found that 71.5% of all felony drug cases statewide between 1976 and 1979 and 74% of all felony drug cases in San Diego County in 1980 were rejected for search and seizure problems. These statements are grossly inaccurate. In fact, of all felony complaints presented for prosecution statewide between 1976 and 1979, 16.5% (86,033 cases) were rejected; of the rejections, search and seizure problems accounted for only 4.8% (4,130) cases; 71.5% (2,953 cases) *of the 4.8%* rejected for search and seizure problems were drug cases. Similarly, in San Diego County in 1980, 14,478 cases were presented for prosecution and 26.5% (3,840 cases) were rejected. Of these rejections, only 8.5% (327 cases) were for search and seizure problems; 74% *of the 8.5%* rejected for search and seizure problems were drug cases. NIJ study at 10-12.

surrounding the rule." 67 ABA J. 1614 (1981); see also Greenhalgh, Hearings at 76 ff.

The exclusionary rule is also extremely limited in application, many of these limitations having been added by this Court in the past ten years.[13] In its present form, the rule is available only to individuals whose personal Fourth Amendment rights have been violated, *United States* v. *Salvucci*, 448 U. S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980); *Rawlings* v. *Kentucky*, 448 U. S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); and it does not prevent the use of unconstitutionally seized evidence before a grand jury, *United States* v. *Calandra*, 414 U. S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), or in civil proceedings, *United States* v. *Janis*, 428 U. S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976), or in impeaching a defendant's testimony. *United States* v. *Havens*, 446 U. S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980).

The exclusionary rule will also not prevent a person's prosecution when he or she has been unconstitutionally seized, *Frisbie* v. *Collins*, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952), nor a victim's in-court identification of an accused following an illegal arrest, *United States* v. *Crews*, 445 U. S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980), nor the use of evidence discovered by means independent of police misconduct, *United States* v. *Ceccolini*, 435 U. S. 268, 96 S. Ct. 1054, 55 L. Ed. 2d 268 (1978), or evidence whose connection with the constitutional violation is so attenuated as to dissipate the taint. *Nardone* v.

[13]Many of these changes have come subsequent to Justice White's dissent in *Stone* v. *Powell*, 428 U. S. 465, 536-542, 96 S. Ct. 3037, 49 L. Ed. 2d 1067, 1112-1115 (1976), in which he criticized the breadth of the rule and suggested a "good faith" exception.

United States, 308 U. S. 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939). Evidence gained as a result of an arrest valid on Fourth Amendment grounds but for violation of an enactment later held unconstitutional on due process grounds is also admissible. *Michigan* v. *DeFillippo*, 443 U. S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

In addition, a state prisoner who has had an opportunity for full and fair litigation of Fourth Amendment claims in state court may not obtain federal *habeas corpus* relief on the ground that evidence introduced at his or her trial was obtained as a result of an unconstitutional search or seizure. *Stone* v. *Powell, supra.*

The Symbolic Costs of a "Good Faith" or "Reasonable Belief" Exception

Creation of a "good faith" exception to the exclusionary rule would also have a stark symbolic and human significance. To this Court the public and the police, the ultimate yardstick of legality is admissibility:

> A ruling admitting evidence at a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence. *Terry* v. *Ohio, supra*, 394 U. S. at 13, 20 L. Ed. 2d at 901.

A decision creating a "good faith" exception would lead police to feel that "the fourth amendment is not a serious matter, if indeed it applies to them at all." Loewenthal, *supra*, 49 UMKC L. Rev. at 30. Professor Ball, too, concedes that "[a] signal from the Court that it is abating its aggressive enforcement of fourth amendment requirements is apt to evoke a consistent response from the police." *Id.*, 69 J. Crim. L. & Criminology at 656. See also LaFave, *supra*, 43 Pitt. L. Rev. at 358.

> Moreover, police doubts are likely to be stronger now than they would be if the exclusionary rule had never been imposed. *Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the fourth and fourteenth amendments, no matter what substitute remedies may be applied.*[14] Loewenthal, *supra*, 49 UMKC L. Rev. at 30 (emphasis added)

History also teaches that where police illegality occurs, the victims of that illegality are disproportionately members of racial minorities. "[O]ur unexpiated heritage of racism," McGowan, "Rule-Making and the Police," 70 Mich. L. Rev. 659, 669 (1972), has long been reflected in police lawlessness against minorities. Cf., e.g., *Report of the National Advisory Commission on Civil Disorders* (1968) at 301 and 304. This Court, too, has noted the problem of chronic police-community tension in black and other minority communities. *Terry, supra*, 392 U. S. at 14, 20 L. Ed. 2d at 902, n 11.

The dramatic increase in police training and awareness generated by the exclusionary rule has produced, in turn, an increased respect by police for individuals' constitutional rights, an incomplete process of particular value

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[14]In fact, there are no viable alternatives to exclusion. The Solicitor General concedes this possibility, Supplemental Brief at 63-64, and this Court, too, has suggested doubts as to alternatives other than exclusion. *Franks* v. *Delaware*, 438 U. S. 154, 169, 98 S. Ct. 2674, 57 L. Ed. 2d 667, 681 (1978).

Additionally, to the extent that civil remedies might be viable in some cases, where the error was a judicial officer's, the potential defendant is immune from suit. *Stump* v. *Sparkman*, 435 U. S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

Further, because of lack of access to legal services and lack of capacity to prove damages, poor persons are the least likely victims of police misconduct to be in a position to bring successful civil actions.

to minorities and one that will be reversed if the proposed exception is created.

In the twenty-two years since *Mapp*, the exclusionary rule has become an accepted fact of life to the officer on the beat, the police administrator responsible for departmental training and the average citizen going about his or her daily life. See pp. 13-14, *supra*. It has increasingly become a part of the basic fabric of our criminal procedure, an aspect of due process " 'rooted in the traditions and conscience,' " *Rochin* v. *California*, 342 U. S. 165, 169, 72 S. Ct. 205, 96 L. Ed. 183, 188 (1952), of a full generation of Americans.

Moreover, due process has always been considered by this Court to be a forward-looking concept reflecting a "progressive and self-confident society," *McNabb* v. *United States*, 318 U. S. 332, 344, 63 S. Ct. 608, 87 L. Ed. 819, 826 (1943), and retreat from prior constitutionally-based holdings has been strongly disfavored.

Just as *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), was widely and intensively criticized for many years but was ultimately reconfirmed in *Edwards* v. *Arizona*, 451 U. S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 784 (1981), so, too, ought this Court reject any modification of the exclusionary rule. Adherence to prior decisions is a paramount principle in the law, and only in cases of the clearest error will this Court set aside its own prior judgment:

> It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. *Gilman* v. *Philadelphia*, 3 Wall 713, 724, 18 L. Ed. 96, 99 (1866).

This principle is particularly important where a rule sought to be overruled or significantly modified is a relatively recent one, especially where the composition of the Court has altered substantially in the interim.[15]

It is, of course, self-evident that the Fourth Amendment does not by its express language specify how it is to be enforced. It neither states that evidence obtained in violation is to be suppressed nor that evidence obtained in a "reasonable belief" that the police conduct was legal is to be admitted. Similarly, no language in the Constitution says how this Court is to enforce the equal protection clause in the areas of public education and voting, yet to give these rights *effective* meaning this Court has ruled that separate educational facilities for black and white children are inherently unequal, *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and that, in drawing legislative boundaries, each state must accord equal strength to each citizen's vote. *Baker* v. *Carr*, 368 U. S. 186, 86 S. Ct. 691, 7 L. Ed. 2d 663 (1962). The Constitution by its language also does not state that the right to assistance of counsel includes the right to *effective* assistance, but just as the Court inferred such a requirement in *Powell* v. *Alabama*, 287 U. S. 45, 71, 53 S. Ct. 55, 77 L. Ed. 158, 172 (1932), to give that right meaning, so, too, have *Wecks*, *Mapp* and their progeny required suppression of unconstitutionally seized evidence in order to assure a viable Fourth Amendment.

If appellate decisions interpreting the Fourth Amendment are at times obscure and difficult to understand, and

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[15] Cf., e.g., *Malinski* v. *New York*, 324 U. S. 401, 417, 64 S. Ct. 781, 89 L. Ed. 1029, 1039 (1945), Frankfurter, J., concurring: "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment."

if individual officers cannot be deterred from actions held to be errors through subsequent changes in the law, then the answers lie in better training of law enforcement personnel, better communication between prosecutors' offices and police agencies and, to the extent possible, more consistent and understandable judicial opinions. Moreover, principles of retroactivity may be re-examined. Cf., e.g., *United States* v. *Johnson*, — U. S. —, — S. Ct. —, 73 L. Ed. 2d 202 (1982). To react to these and other circumstances by reducing Fourth Amendment protections, particularly to the level of police officers' subjective understanding, however, would subvert the Amendment and the values it embodies. The "[r]ights declared in words" would ". . . be lost in reality." *Weems* v. *United States*, 217 U. S. 349, 373, 30 S. Ct. 544, 54 L. Ed. 793, 801 (1910). They would become "a form of words," "an empty promise."

CONCLUSION

By its holdings, the language used to express those rulings and the symbolic meaning attached to them by those most directly affected as well as by the public in general, this Court shapes not just the Constitution but many aspects of our society for the generations that will follow us. As technology progresses and Fourth Amendment rights become increasingly fragile against "a vast array of electronic surveillance," *United States* v. *Bailey*, 628 F. 2d 938, 947-949 (6th Cir. 1980), Keith, J., concurring, it is increasingly important that this Court recall the history and values of the Amendment to assure its protection in the face of new, more insidious dangers.

Addressing the above concerns, Justices Brandeis and Stewart prophetically explained why this Court must reject the proposed exception:

> In a government of laws, existence of the government will be imperilled if it fails to observe that law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States*, *supra*, 277 U. S. at 485, 75 L. Ed. at 960, cited with approval in *Elkins*, *supra*, 364 U. S. at 223, 4 L. Ed. 2d at 1680-1681.

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. *Coolidge* v. *New Hampshire*, *supra*, 403 U. S. at 455, 29 L. Ed. 2d at 476.

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For all of these reasons, a "reasonable belief" or "good faith" exception to the exclusionary rule should be rejected, and the exclusionary rule should be reaffirmed in its present form.

Respectfully submitted,

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ACKNOWLEDGMENT OF SERVICE

KENNETH M. MOGILL, a member of the Bar of this Court hereby acknowledges service of Brief of National Legal Aid and Defender Association, *Amicus Curiae* in this cause upon: Paul P. Biebel, Jr., First Assistant Attorney General, and Daniel M. Harris, 160 N. LaSalle, Chicago, Illinois 60601; and James W. Reilley, 180 N. LaSalle Street, #1425, Chicago, Illinois 60601.

KENNETH M. MOGILL

Mr. BERMAN. That concludes our hearing. The subcommittee stands adjourned.

[Whereupon, at 11:55 a.m., the subcommittee adjourned.]

EXCLUSIONARY RULE

WEDNESDAY, APRIL 20, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m. in room 2237, Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Conyers, Edwards, Berman, and Gekas.

Staff present: Thomas W. Hutchison, counsel; Michael E. Ward, assistant counsel; and Raymond V. Smietanka, associate counsel.

Mr. EDWARDS [presiding]. The subcommittee will come to order.

The Chairman, Mr. Conyers, will be here shortly. I am a member of the subcommittee, Don Edwards.

Today the subcommittee will continue hearings on the oversight of the operation of the exclusionary rule in criminal trials. These hearings are in response to a current concern with that rule, by which illegally seized evidence is prohibited from introduction at criminal trials, regardless of its probative value.

This concern has been prompted by recommendations to abolish or modify the exclusionary rule made by the President's Task Force on Victims of Crime, the Attorney General's Task Force on Violent Crime, and various legislative proposals. These recommendations raise constitutional questions as well as questions of fact regarding the impact of the rule on police behavior and the conduct of trials. It is the purpose of these hearings to explore these questions.

Our first witness today is a good friend of mine from Alameda County, Assistant Attorney General D. Lowell Jensen. Mr. Jensen, who currently heads the Criminal Division of the Department of Justice, comes from California. He was district attorney in Alameda County.

Lowell, it is a pleasure to have you with us again. Your written statement, without objection, will be incorporated in the record. You may proceed.

TESTIMONY OF ASSISTANT ATTORNEY GENERAL D. LOWELL JENSEN, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. JENSEN. Thank you very much, Mr. Chairman. I appreciate those remarks and the opportunity to be here to discuss this topic.

As you have pointed out, I have been involved in prosecution a long time, and the exclusionary rule has been one of those issues that has been at the forefront for a good many years, both at the

faith that their conduct was in accordance with the law, even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution.

Focusing specifically on the deterrent purpose, the court concluded that evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge or may properly be charged with knowledge that the search was unconstitutional under the fourth amendment.

Another major case is *Michigan* v. *DeFillippo,*[10] decided by the Supreme Court in 1979. In that instance, the Court held that the rule should not be applied to exclude evidence when it has been seized during an arrest for violation of a statute valid at the time of the arrest, but which is subsequently declared invalid.

The Court stated:

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

Both these cases illustrate the deterrence rationale for the rule as being its principal and basic rationale at the present time.

I want to get to some areas where—I would like to point out that the rule has been expanded beyond that rationale. Before I do that, I think, as is stated in the paper, there are a couple of areas in exclusionary rule that is appropriate to mention.

There seem to be arguments about portions of the exclusionary rule or aspects that, to my mind, are nonissues. There is an argument that is made by supporters of the exclusionary rule that it really is not the kind of a thing that is going to affect the crime rate and, therefore, we should not be concerned. The point is that, unfortunately, we simply do not know how a change would affect the crime rate and the fact is that those who support modification or restatement of the rule do not hold it out as a panacea for crime rate reduction. Any thoughtful consideration of contemporary crime must recognize, unfortunately, there are no panaceas.

On the other hand, advocates for reform do point out that the rule operates to free known murderers, robbers, drug traffickers, other violent and nonviolent offenders, and that a rule of evidence which has such result without a reasonable purpose to support it is intolerable.

Another area of concern, in terms of the impact of the rule, is that there is a perception or an argument that it does not affect a great deal of cases. To a great extent, this is based upon a GAO study,[11] which I am sure the Chair is aware of. I would like to point out and make available to the committee for its record another study which was completed by the National Institute of Justice in this area in October 1982, which compiled some data from

[10] EDITOR'S NOTE.—443 U.S. 31 (1979).

[11] EDITOR'S NOTE.—General Accounting Office, Comptroller General of the United States, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions" (GGD 79-45, Apr. 19, 1979).

California.[12] The purpose was that you could get to California in that their data systems are quite sophisticated, and that you were able to look at the reasons for the rejection of cases by prosecutors, and you were able to look at those cases over a period of time.

What was found in that study was that there is a significant impact from the exercise of the rule, and its most significant impact is on drug law enforcement. The study found that nearly 3,000 felony drug cases were rejected for prosecution in California between 1976 and 1979 because of search and seizure problems. The study also focused on rearrests during the specific years of 1976 and 1977, and found that for most defendants arrested and later freed because of the exclusionary rule, that arrest was only a single incident in a longer criminal career. Forty-six percent of the 2,141 defendants not prosecuted in California in 1976 and 1977 because of the exclusionary rule were rearrested within 2 years of their release, many of them more than once. They accounted for 1,270 felony arrests within that 2-year period.

While that number of defendants, 2,141, not prosecuted in a State as large as California over a 2-year period may not seem significant, the rule of evidence that allows this number of criminals to escape probable conviction and commit further crimes with, again, not having a reasonable purpose or producing a corresponding benefit creates an untolerable burden for society to continue to bear. Although the study did not attempt to establish what percentage of those searches and seizures would have been upheld under a good faith test, the results do show that the argument that, somehow, the exclusionary rule has an insignificant impact is totally disingenuous.

Let me point out some areas where, I think, the rule has been extended beyond its rationale. The clearest example of misapplication arises when courts suppress evidence seized by police in executing a duly authorized search warrant. In that type of case, a second or third judge in disagreement with a judge who issued a warrant invalidates the search despite the absence of any police misconduct whatsoever.

To cite a recent case, *United States* v. *Leon,*[13] decided in the ninth circuit in March 1983. In that case, an informant advised police officers that he had seen two named persons selling drugs from their residence 5 months before. On the basis of the tip, the police conducted a 1-month surveillance of the two people and their residence. The surveillance was eventually expanded to cover two other residences and other persons with whom the two earlier identified people had been associating, and strongly suggested that all persons and residences were involved in narcotics trafficking. After consulting with three assistant district attorneys, the police obtained warrants from a State court judge for the search of the residences and various automobiles belonging to the suspects. The searches produced narcotics and narcotics paraphernalia.

The defendants were charged with various drug violations, but a district judge ruled that the search warrants were defective be-

[12] EDITOR'S NOTE.—National Institute of Justice, Criminal Justice Research Report—"The Effects of the Exclusionary Rule: A Study in California" (1982).

[13] EDITOR'S NOTE.—701 F.2d 187 (9th Cir. 1983), rev'd 104 S.Ct. 3405 (1984).

cause the informant's information was probably stale. Much of the evidence obtained by the search was suppressed. The ninth circuit affirmed over the objection of Judge Kennedy, who observed in his dissenting opinion that the affidavit in support of the warrants "sets forth the details of a police investigation conducted with care, diligence, and good faith."

Another example is *United States* v. *Shorter.*[14] This is a situation where local police and agents of the FBI investigating a suspected Ohio bank robber arrested him at his home and, after the arrest, the agent telephoned a Federal magistrate to obtain a search warrant by use of the telephone. In the course of the search that was subsequently authorized, incriminating evidence, including bait bills and a firearm, were found. The trial judge had ruled the search lawful, but the conviction was reversed on appeal. The reason for that was that the appellate court decided that although the officer had in fact been placed under an oath by the magistrate which incorporated all of the testimony already provided in the course of reciting the grounds for the warrant, the failure of the magistrate to require the oath at the beginning of the telephone conversation violated the law because the applicable Federal rule requires that the oath be obtained immediately.

These cases involve disagreement between judges about judicial conduct. There is no police misconduct involved whatsoever. The police were carrying out their duties as society expects them to do. The officers provided their information fully and honestly to the court and proceeded to carry out the orders of the court once the warrants were issued. Suppression of evidence in instances such as these does not serve the purpose of the exclusionary rule, the deterrence of police misconduct. In fact, it only serves to damage both a community's perception of justice and the morale of law enforcement officers who have followed the rules, only to have the evidence suppressed on the premise that they have violated the Constitution. Proper police conduct is thereby labeled illegal.

The deterrent purpose of the exclusionary rule also is not served when courts apply the rule to situations where the appellate court cases are not at all clear. These are situations where we are not dealing with a search warrant, but in those areas where a warrantless search is permitted. There are any number of cases that outline those areas and the police have had to apply the law that is applicable in those instances.

Probably the most dramatic way of describing the problem that the police have in this area would be citing the decisions that were involved in two cases decided on the last day of the 1980 term of the U.S. Supreme Court, *New York* v. *Belton*[15] and *Robbins* v. *California.*[16] Both these cases are remarkably similar in their factual situations. They involve stops by police that were lawful stops of vehicles, a subsequent search of the car and discovery of marijuana and other narcotics in closed containers. There was a developing area of law as far as so-called closed containers were concerned. So the police in both these instances made the same kind of search in the same kind of stop.

[14] EDITOR'S NOTE.—600 F.2d 585 (1979).
[15] EDITOR'S NOTE.—453 U.S. 454 (1981).
[16] EDITOR'S NOTE.—453 U.S. 420 (1981).

In the *Belton* case in New York, the final decision by the New York courts was that the search was illegal. In the California case, *Robbins,* the final decision by the court was that the search was legal. Both these cases came up to the Supreme Court and they considered both cases together and, in effect, looked at them in terms of the so-called watershed case that had been decided by the Supreme Court in 1977, *United States* v. *Chadwick.*[17]

In attempting to decide whether these cases were illegal or legal as far as the searches were concerned, you have a situation where three Justices of the Supreme Court felt that they were both illegal and three Justices felt that they were both legal. The other three Justices, in effect, decided the cases by changing—in terms of the two cases, they decided that the *Robbins* search was illegal which, in effect, reversed the California courts; and that the *Belton* case was legal, which reversed the New York court.

So we now have a situation where we have come through all this process, and we have now supposedly ruled on the area of what you can do if you are a police officer in opening a closed container in a lawful automobile stop.

I think the result was that the law was not at all clear, even after that decision. This would be the best way of describing it. Justice Brennan offered this comment in his dissent in the *Belton* case:

> The Court does not give the police any "bright line" answers to these questions. More important, because the Court's new rule abandons the justifications underlying *Chimel,*[18] it offers no guidance to the police officer seeking to work out these answers for himself.

The police were left after this series of events with no law to apply. So you have a situation where warrantless searches are permitted in certain circumstances, but it is simply not a situation where you know what the outstanding rules are.

The result was not surprising. The next term, the Court took up the same area, and they decided a case, *United States* v. *Ross.*[19] In that case, we had somewhat the same situation where the search of a brown paper bag, a so-called closed container, was found to contain heroin. It had been seized when a car was stopped. But the Court in that case repudiated the holding in *Robbins* and held that the automobile exception to the fourth amendment allows police who have lawfully stopped a vehicle which they reasonably believe to contain contraband to conduct a warrantless search of any part of it, including all containers and packages in which the contraband may be concealed. Thus, the rule of law with respect to container searches in automobiles has apparently finally been made clear.

Meanwhile, however, the defendant Robbins went free because the police at the time of the search did not apply that law that would be applied the moment the Supreme Court considered *Robbins.* So we now have a situation where *Robbins* is now found to be

[17] EDITOR'S NOTE.—433 U.S. 1 (1977).
[18] EDITOR'S NOTE.—*Chimel* v. *California,* 395 U.S. 752 (1969).
[19] EDITOR'S NOTE.—456 U.S. 798 (1982).

a lawful search in the *United States* v. *Ross* a year after we had had the situation where *Robbins* v. *California* goes back and we said that is unlawful.

So when we look at those kinds of situations, the point is that we are at a state where to say that suppression of reliable, trustworthy evidence in such a case helps to prevent police misconduct is really absurd.

We also ought to reflect upon the fact that, even in those decisions when you look at them, they are based upon a discussion of *Chadwick* which was decided in 1977 which was after the searches were conducted. So that we are, in effect, looking back and applying the standards for those searches at a point later in time.

I think I will move to the proposed legislation which we feel is a modification of that situation that will get to the problem.

Let me introduce that by, I think, an appropriate comment. The Supreme Court in the *Stone* v. *Powell* [20] case which stated in this area where they were trying to consider the proper application of the exclusionary rule:

> The disparity in particular cases between the error committed and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for fourth amendment values, if applied indiscriminately, it may well have the opposite effect of generating disrespect for the law and that administration of justice.

The action we suggest in the area of legislative limitation to the rule, as contrasted to legislative abolition of the rule, is based upon recent significant opinion in the rule rendered by the fifth circuit that I mentioned before, *United States* v. *Williams.* [21] In that case, the fifth circuit, after an exhaustive analysis of the relevant Supreme Court decisions, announced a construction of the exclusionary rule that would allow admission at trial of evidence seized during a search undertaken in a reasonable and good faith belief on the part of the Federal officer that his conduct was lawful.

A majority of the 24 judges of that court, sitting en banc, concurred in an opinion that concluded as follows:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds it shall not apply the exclusionary rule to the evidence.

In justification of this conclusion, the court first noted that the exclusionary rule is not a constitutional requirement. Rather, the court described it as "a judge-made rule crafted to enforce constitutional requirements, justified in the illegal search context only by its deterrence of future police misconduct." The court determined that the deterrent purpose was the preeminent purpose behind the rule and further noted that this purpose was not served when the improper police actions were taken in reasonable good faith. Accordingly, there was no compelling reason to apply the exclusionary rule in such cases.

[20] EDITOR'S NOTE.—428 U.S. 465 (1976).
[21] EDITOR'S NOTE.—622 F.2d 830 (5th Cir. (1980) *cert. den.* 449 U.S. 1127 (1981).

The reasonable good-faith rule announced by the fifth circuit is the same rule urged by the Attorney General's Task Force on Violent Crime, which I previously mentioned. If this rule is adopted, it will go a long way in restoring respect for the area of law involved. Law enforcement officers will no longer be penalized for their reasonable good-faith efforts to execute the law. On the other hand, courts would continue to exclude evidence obtained as a result of searches or seizures which were performed in an unreasonable manner or in bad faith, such as by deliberately misrepresenting the facts used to obtain a warrant. Thus, the penalty of exclusion will only be imposed when the officers engage in the type of conduct the exclusionary rule was designed to deter—clear, unreasonable violations of our very important fourth amendment rights.

It should be noted that the reasonable good-faith rule requires more than an assessment of an officer's subjective state of mind and will not, as is sometimes argued, place a premium on police ignorance. In fact, the rule requires a showing that the officer's bona fide good faith belief is grounded in an objective reasonableness. As the *Williams* court explained, the lawfulness of his action must be "based upon articulable premises sufficient to cause a reasonable and reasonably trained officer to believe he was acting lawfully." Accordingly, an arrest or search that clearly violated the fourth amendment under prior court decisions would not be excepted from the rule simply because a police officer was unaware of the pertinent case law. Thus, there would be and remain a strong incentive for law enforcement officers to keep abreast of the latest developments in the law.

We have suggested specific legislation to implement the reasonable good-faith exception to the rule. Our proposal was introduced in the Senate last year as S. 2231. It was based upon the language of *United States* v. *Williams.* We recommend that identical or similar language be adopted by this subcommittee in any legislation it seeks to modify the exclusionary rule. We believe that congressional legislation which embodies the *Williams* case's reasonable good faith exception to the exclusionary rule would be held to be constitutional.

Indeed, congressional action has already been invited in the well-known opinion by Chief Justice Burger in his dissenting opinion in *Bivens* v. *Six Unknown Named Agents* [22] *of the Federal Bureau of Narcotics.*

As I have already demonstrated, there is legal precedent for adoption of a reasonable good faith exception. The exception is primarily grounded on Supreme Court cases such as *United States* v. *Peltier* [23] and *Michigan* v. *DeFillippo,* [24] in which the court emphasized deterrence as the exclusionary rule's primary basis and refused to apply the rule when the conduct of the law enforcement officer was not capable of being deterred. The good faith exception is also consistent with any notions of "judicial integrity" to the extent that such a concept remains as a rationale for retaining the rule in some form. As the Supreme Court stated in *Peltier,* "the

[22] EDITOR'S NOTE.—403 U.S. 388 (1971).
[23] EDITOR'S NOTE.—422 U.S. 531 (1975).
[24] EDITOR'S NOTE.—443 U.S. 31 (1979).

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2 OF 3

'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law * * *"

Finally, it is important to remember that the reasonable good-faith exception already has undergone constitutional scrutiny and had been upheld in both Federal and State jurisdictions. The fifth circuit found the exception to be constitutional in *United States* v. *Williams,* which I have already discussed. In addition, the *Williams* holding has been followed by the highest appellate courts in New York and Kentucky. It has also been codified by at least two State legislatures, in Colorado and in Arizona. Thus, the exception already has established a solid basis of constitutional and legislative support.

I would like to emphasize that legislation adopting a reasonable good-faith exception to the exclusionary rule should be viewed as a measure that simply states the true scope of the rule. Given that deterrence is the rationale for the rule, the situations where law enforcement officers have performed a search or seizure reasonably and in the good-faith belief that their conduct comports with the law are precisely the ones in which it seems indefensible to exclude the evidence they have gathered. When a court does order suppression of evidence in such circumstances, as I have indicated, it imposes a label of police misconduct when in fact there is none. The result is that law enforcement officers suffer the personal indignity of being branded as lawbreakers while, at the same time, the public is misled into thinking that there is police abuse when it does not exist.

Implementation of the reasonable good-faith exception would limit application of the exclusionary rule to furtherance of its original purpose of deterrence. As a result, the focus of criminal proceedings would remain directed to the process of determining the truth in order to convict the guilty and acquit the innocent. Faith in the criminal justice system would be strengthened because the police and public would no longer be penalized by the unnecessary suppression of reliable evidence. This commonsense limitation of the exclusionary rule would return integrity to our judicial system and law enforcement programs. We strongly urge that legislation to this effect be adopted by this subcommittee

That would conclude my statement, Mr. Chairman. I would be happy to address any of those issues or answer any questions.

Mr. EDWARDS. Thank you very much, Mr. Jensen.

I yield to the gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

Good morning, Mr. Jensen.

Mr. JENSEN. Good morning.

Mr. BERMAN. In your testimony—I didn't see it in your prepared remarks—you made references to the GAO study and the National Institute of Justice study. Those weren't in your prepared remarks, were they?

Mr. JENSEN. Yes; there is a reference in the prepared remarks to both of those studies.

As I indicated, I think that the committee has the GAO report, and I am not sure whether they have the NIJ report, but we would be happy to provide it.

Mr. BERMAN. I assume from your reference though, that this issue of whether or not there are in fact significant consequences to law enforcement from the application of the exclusionary rule is a legitimate basis for deciding whether to consider modifications in it.

Mr. JENSEN. I would, yes, in a positive sense. But as I pointed out, it also—I think it is important to, in effect, get to the real issues involved. As I stated, the idea that it is not a significant part of the criminal justice system, that the argument that seems to be made is really a nonissue. It is a significant part of the criminal justice system, and the NIJ study points that out in terms of real cases, significant numbers of cases, significant part of the prosecution.

As a matter of fact, if you look at it, every arrest, every search, every seizure of a physical item of evidence involves the application of the exclusionary rule. It is a major portion of the appellate courtload in terms of the work in the appellate courts. I am simply pointing those out and using those exampies to, in effect, say that the argument that this is somehow not a criminal justice issue is not correct.

Mr. BERMAN. I am not sure I understand why it is a significant criminal justice issue if there aren't significant numbers of people who would otherwise be convicted who are now being released from what you might view as an extremely broad interpretation of the exclusionary rule.

Mr. JENSEN. I think there are two answers to that. In a sense, I guess, the word significant is one of those words that you attach from your own perspective. If you look at a State like California where there are 1,000 cases a year, felonies, being rejected, I think that is a significant number.

In another sense also, I think that in any instance where a suppression, suppression of reliable evidence results in effect in the denial of the truth as far as the charge is concerned—and these do occur in major cases—that any case like that, if it doesn't have a reasonable good basis, then it is an unjustifiable kind of situation for criminal justice to tolerate. Any injustice, I think, is not tolerable. And if we are looking at this in any major case, whatever the count of the cases may be, if it is not a proper way of running the criminal justice system, it ought to be discarded.

Mr. BERMAN. But in citing those studies, part of your focus is not to just look at the cases that are dismissed at the time of trial or that result in orders barring the introduction of evidence, but rather look at how many cases have not been filed.

Mr. JENSEN. That is correct. I think that it is, in effect, a broader look at what is the impact within the whole criminal justice process rather than focusing in on one point of the process.

Mr. BERMAN. Did the GAO study look at that as well?

Mr. JENSEN. No; the GAO study looked at those cases that were decisions of cases that had already been filed.

Mr. BERMAN. In California, though, my guess would be that that study was based on decisions by local prosecutors. The search and seizure rule was at that time significantly different than the Federal rule and significantly broader than the Federal rule so that a study of California, which has since changed it constitutional provi-

sion to conform to the Federal constitutional provision, might not be a fair basis for looking at the effect of the Federal rule.

Mr. JENSEN. I think that that is an appropriate comment and observation in that these were California State cases. The GAO study was limited to Federal cases. And in another broad sense, the Federal system doesn't really deal with the great bulk of the cases that has search and seizure issues. Most of them are in local courts. One of the ideas was to go to California.

As I indicated previously, one of the reasons to go to California was their data base. Their data base is probably as sophisticated as any State. I think it really is. It provides a way of looking at it. But it also provides the problem that you cite, that we are looking at the California version of the exclusionary rule which is, arguably, as broad as any version that exists in any State. So, if you look at those cases, you are looking at cases rejected on the basis of California interpretations.

Mr. BERMAN. I just wanted the subcommittee to realize that the California standard is a broader standard than the Federal standard.

Mr. JENSEN. But, as I pointed out, although it is sophisticated data, it is not so sophisticated that you look into those cases and determine whether or not they would fit under either a good-faith exception or under a Federal rule. It is not that sophisticated. You could do that, but it would take an awful lot of effort.

Basically, what the study was to do was to look at a State system—this is a significant part of the process—and to look at it in the whole dynamic of the criminal justice process. I think it is subject to the comments that you make, however.

Mr. BERMAN. In one of your statements in your prepared testimony you talked about this good-faith standard for the police officer if he, in good faith, obtained a warrant and then went and made that search. What if the warrant were granted inappropriately, if it went beyond the constitutional restrictions? Is the good faith of the magistrate also a test here?

Mr. JENSEN. There is nothing in any decided cases, there is no articulation of the basis for the exclusionary rule that says that we are worried about judicial misconduct. The rationale for the exclusionary rule at its outset has always been that it is an effective sanction and necessary sanction against police misconduct. No one has ever suggested that we have such a problem in the courts of this country, that we have judicial misconduct that requires a sanction like the exclusionary rule. So if we are going to shift to the notion that the rationale is for judicial misconduct, that is simply not the rule we deal with now, and I would submit that that is not an appropriate way of excluding reliable evidence from the court process.

If you have a situation where a court makes a mistake—maybe that can happen, but it happens in some cases where what I pointed out are simply differences of opinion of that court as to whether or not these facts show probable cause. Under those kinds of situations, we don't have police misconduct and we have no rationale for exclusion.

Mr. BERMAN. But if a magistrate is consistently issuing warrants and police officers are consistently seeking out that magistrate to

grant them warrants to allow searches which are viewed as unlawful, and are generally accepted as unlawful, at that point, do you think the exclusionary rule should not be applied?

Mr. JENSEN. I would think that that would be a situation you would have to deal with in terms of the whole range of responses within a system. If you had a judge who was incompetent in terms of his knowledge of the rules in terms of the fourth amendment, I think this is probably a situation you really—I think we are just sort of conjuring it up—it could be a situation where the judge doesn't know the law. That still should not justify suppression.

It might justify making sure that the judge did know the law by some level of judicial training, judicial learning. It may be that if you had a situation where there was some kind of willful abuse by a judge that it could be dealt with by judicial commissions. But to impose something as draconian as removing truthful evidence from the courtroom on the premise that that is a necessary sanction to get at that kind of a problem, I just don't think is justified at all.

Mr. EDWARDS. The time of the gentleman has expired. We will come back to you in the next round.

Mr. Gekas.

Mr. GEKAS. I have just a few questions.

I think that you may have answered this question in a previous hearing that we had, perhaps not on this subject, but this subject came up.

You claim in the latter part of your statement—and I think you are correct—that the exclusionary rule has been found to be constitutional in both some Federal cases and State cases, and in Federal district courts but not by the Supreme Court yet.

Mr. JENSEN. In terms of the statement of the exclusionary rule which would be a reasonable good faith test, that has been decided by *United States* v. *Williams* [25] in the fifth circuit, and has been held to be constitutional in an appropriate statement of the rule in Federal courts. You are correct, it has not been decided by the U.S. Supreme Court.

As I pointed out earlier, there is at least one case before the court where they have an opportunity to do that. In the other cases, two State courts that I cited, the highest courts in those States have held that a good-faith reasonable exclusionary rule test would be constitutional. In two instances, State legislatures have adopted that rule.

Mr. GEKAS. My point is simply that a case that is before the Supreme Court now on a reconsideration is on this very same narrow issue; is it not, the good-faith exception?

Mr. JENSEN. The case includes that in terms of the reconsideration. The court called for an argument on that. It is a search warrant case out of Illinois where a magistrate in Illinois issued a search warrant and the decision was there was not probable cause by another judge at another time, later in terms of the process. The decision by the U.S. Supreme Court could find that it was a case of probable cause and, therefore, the case is perfectly good and reverse it on those grounds and not touch the area of good faith.

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[25] EDITOR'S NOTE.—622 F.2d 830 (5th Cir. 1980), cert. den. 449 U.S. 1127 (1981).

Or the court could reach what we are discussing now and decide on the basis that the search was one where there was complete good faith and complete proper conduct by the police. There is no question about that. The police gave all of the evidence they had, presented all of the evidence in a truthful fashion to the magistrate, and the magistrate issued the search warrant.

You have a situation here, as we have already discussed, if there is anything that is wrong, it is a judicial mistake, it is not police misconduct. So the court could conceivably reach that, but they are not required to.

Mr. GEKAS. Assuming that the decision came down tomorrow, the Supreme Court found that a good-faith exception to the exclusionary rule were constitutional, do we need to codify or to put it into the statute books?

Mr. JENSEN. I could consider whatever that rule was—if the Supreme Court were to come down and to state the *U.S.* v. *Williams* rule, it would accomplish precisely what we have suggested by the legislation. That is correct. Whether or not you would want to then go ahead with legislation would be a different issue, certainly. But we are not really dealing with that in the present reality.

Mr. GEKAS. My problem is that we overact sometimes. I am wondering if we go ahead and put a good faith exception into the legislative hopper now, and then the Supreme Court comes down and doesn't touch on that, then the statute itself would be subject to further test.

Mr. JENSEN. It is inevitable that any statute is subject to that test.

Mr. GEKAS. On the other hand, if the Supreme Court does touch on the subject and is pretty definitive on it, then we might be doing more harm than good in putting a statute on the books because a good defense lawyer could find other things that don't conform to the Supreme Court decision precisely. It would be better to leave it alone, don't you think, or don't you subscribe to that?

Mr. JENSEN. I respectfully disagree. I think that a statement legislatively would be an appropriate move. It may very well be that the Supreme Court deals with the same subject matter. As I said, there is no requirement that they do.

In our purpose in presenting this for—ever since the violent crime task force came forward with it, it has been a subject matter where we feel that a legislative statement is appropriate.

Mr. GEKAS. I may disagree with your disagreeing.

Mr. JENSEN. This is an area where one, we hope, deals in good faith. That is precisely why we want the statute.

Mr. GEKAS. I would like to proceed on it on the expectation that the Supreme Court may not touch on it. I am saying that once it does make a statement on that subject, I may want to urge that we stop the legislative process on this exclusionary rule issue.

Thank you, Mr. Chairman.

Mr. EDWARDS. In your distinguished career as district attorney of Alameda County, Mr. Jensen, did you have difficulty with this exclusionary rule, and did it result in great inconvenience and in problems that led your people to less law enforcement?

Mr. JENSEN. In my experience, there were situations where I think the rule was applied in such a fashion that it was not a

proper application of the rule. There were situations, for example, where we had cases where a search was conducted by, say, the Berkeley Police—in one instance, the Berkeley Police, in investigation of a car theft, found that one of the suspects was in custody. They had some evidence that had already been taken—that is, the personal identification of the person had been taken and was held by the police. They went and they looked at the driver's license and, with the information, then went and made a perfectly valid arrest, recovered the stolen car.

The decision was that we were going to change the rules and the appellate court said you have to get a search warrant to look at the evidence that you already hold in custody. That was a brandnew rule that nobody has ever heard about. As a result of that, a perfectly valid car theft was then suppressed and there was no conviction.

You could say that that isn't a very major case, but that is, to me, an intolerable kind of situation.

We had another case where there was a stop in Berkeley of two young girls late at night by officers who believed that the girls were engaged in prostitution. They talked to them, found they were juveniles, runaways from a juvenile home, and also discovered that they had been raped and beaten by a pimp. We prosecuted the pimp for those acts, and the decision was that the original detention of the girls had been unlawful and that tainted their testimony, and we had to get rid of that case.

Now that wouldn't occur in the Federal courts, but it did occur in our county. So I felt that was an inappropriate decision.

Mr. EDWARDS. Didn't the existence of the exclusionary rule result in departments, perhaps police departments in Alameda County, improving their training and resulting in better police practices?

Mr. JENSEN. I think that the training is a function of a number of things. It included the necessity to know the rules as far as the exclusionary rule. To that extent, I would certainly agree.

We had very elaborate training kind of mechanisms through the police agencies and through the prosecutor's office where we put out the rules as we knew them as quickly as we could based upon the decisions. As soon as a decision came down from the courts, it was analyzed, put into a form where we put it out in police lineups and in training bulletins. So we got it out as quickly as we could.

We then found ourselves in situations like I have already outlined in *Belton*[26] and *Robbins*,[27] where you couldn't tell the police what the rule was, even though you attempted to do it. Even though you had the best training in the world, you couldn't tell them a rule which was unknowable.

Mr. EDWARDS. The training is just not going to be as good if the exclusionary rule is weakened.

Mr. JENSEN. As I say, I disagree with that, in that the test would still remain as an objective test that the court would have to apply. Unless it met that objective test, there would be suppression of the evidence, which would mean that there was every bit of the same

[26] EDITOR'S NOTE.—*New York* v. *Belton*, 453 U.S. 454 (1981).
[27] EDITOR'S NOTE.—*Robbins* v. *California*, 453 U.S. 420 (1981).

kind of impetus now for efficient and effective training. I don't think it would affect that at all.

Mr. EDWARDS. I thank you very much for your testimony.

Are there other questions? Mr. Berman.

Mr. BERMAN. I have a couple more questions, Mr. Chairman.

I am unclear on the basis for thinking that one can change or carve out this good faith exception by statute as opposed to constitutional amendment. There were different references, I guess, in Supreme Court cases to an invitation to Congress to narrow it. But where did it indicate that a statute would suffice to do that?

Mr. JENSEN. It is just, as in any area, a question of the perception of what are the permissible areas of legislation, as we pointed out by citing the various cases, *U.S.* v. *Williams,* and the suggestion that congressional action was appropriate in *Bivens,*[28] that it would be proper to go ahead with legislation. As I pointed out, at least two States have done that.

Mr. BERMAN. But two States have done it under what kind of State constitution?

Mr. JENSEN. Their constitution—it would be both areas of constitutional testing involved in any State statute, both the State constitution and the U.S. Constitution. If those States have passed a good faith test and it violates the U.S. Constitution, it would be stricken.

Mr. BERMAN. What happened in *U.S.* v. *Williams* after the fifth circuit, in effect, carved out a judicial good-faith exception? Did the defendant take it to the Supreme Court?

Mr. JENSEN. No, the case did not go to the Supreme Court. I think that there was petition, but there was no grant of certiorari. In any event, the case was decided at the circuit court level. There has been no parallel decision at the Supreme Court level.

Mr. GEKAS. Would the gentleman yield for just a moment?

Mr. BERMAN. Yes.

Mr. GEKAS. The refusal to grant certiorari, how do you interpret that?

Mr. JENSEN. Legal scholars will debate over that at great length. What is really means is that the Supreme Court has not decided a good faith reasonable exception.

Mr. GEKAS. Thank you.

Mr. EDWARDS. Mr. Conyers.

Mr. CONYERS [presiding]. I just came back from Chicago, and police misconduct is really deeply embedded in my consciousness right now, Mr. Jensen. The cops there were so violently illegal—not all of them, of course—but enough of them to keep the lawyers of Chicago, the legal committees, the Election Commission, the U.S. attorney, and the States attorneys in an uproar throughout the recent election.

So for me to sit here and listen to a lot discussion about letting illegal activities of police officers be used as evidence is absolutely a waste of my time.

Mr. JENSEN. If I may, Mr. Congressman, I have not asserted in any way that police misconduct should be tolerated. If there is

[28] EDITOR'S NOTE.—*Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971).

police illegality and evidence is seized as a result, our position is and my position would be that it ought to be suppressed.

What I have been pointing out is that that is the core of the exclusionary rule which we accept. However, we are now dealing with situations where there is no police misconduct, and that is a separate and distinct problem. The *Illinois* v. *Gates*[29] case that was decided before, we cited that it is before the Supreme Court, an Illinois case where the police sought a search warrant. There is no police misconduct at all. And the issue then is should there be suppression of that evidence.

I would agree with you in the statement of this rule would retain the situation, where there is police misconduct, at whatever level, the evidence would be suppressed. But where there is no police misconduct whatsoever, when we know that, then the evidence ought not to be suppressed. So that is really our position.

Mr. CONYERS. That is where the issue becomes whether the officer was acting in good faith or not.

Mr. JENSEN. That is correct.

Mr. CONYERS. All right.

Now that you have relieved my mind of all of the horrible memories of police activity in Chicago, let's talk about policemen that act in good faith and may not be observing the law.

Mr. JENSEN. I would take the situation that I think there are different kinds of ways of looking at this. Maybe we would have to know what we define.

There is a case, I think, that illustrates what you are pointing out that also illustrates the good faith exception. *Michigan* v. *DeFillippo*[30] is a case where the police acted under a law which existed at the time and made an arrest. At a point later in time, a court decided that that law, which was the basis of the arrest, was unconstitutional. Then we had a trial based upon the original arrest. At that point, we now have a situation where the law that was in existence at the time of the arrest is now unlawful, and we know that. So we can say that the police conduct is unlawful now that we have recognized at the time of the trial.

However, at the time the conduct itself took place, there was such a law and the police were acting lawfully. That is what we are getting at, those kinds of situations where the police conduct themselves lawfully at the time of the search and, thereafter, there is a change of law, either by a decision or by some statutory kind of change. At that point, although we can say that that conduct is "unlawful," it ought not result in suppression because there was no illegality at the time the conduct took place.

Mr. CONYERS. I suppose reasonable lawyers and legislators will argue over this for time immemorial. For the life of me, of all of the matters in the Criminal Code, this has got to be one of the less serious. I suppose if you got me on a casual moment, I couldn't give a rap one way or the other what we do, there are so few cases involved.

But this super concern about policemen begins to really bother me. I have had some hearings in the new part of my district in De-

[29] EDITOR'S NOTE.—*See* 103 S.Ct. 2317 (1983).
[30] 443 U.S. 31 (1979).

troit which I thought was a great district. It was middle income and nice clean streets and the whole bit. Yet the people there are so afraid of crime it is not even funny. It is worse than some of the less integrated areas of my district.

We can't get policemen to do what they are supposed to be doing. We can't get the police system, the safety system, to work. We can't even get responses from the police. So I can't really begin to worry about whether he innocently and in good faith happens to break the law and that results in preventing evidence from coming into court.

I do not think this is a matter of magnitude that is worthy of all of the darn hearings that we have had on it.

I don't understand why this issue commands so much attention in the discussion of protecting people in this country and reducing violent crime. To me, it is minuscule. I don't think it is worth all of the attention that we are giving to it. The simple question of providing the American people with a modicum of police safety is so overriding. We never have held hearings on that. That is my fault. We have never had anybody worrying about that. We never have police coming in saying, "Look, we are concerned about this system. It isn't working. We really need to get some new methods." I am not even faulting the men and women who constitute the police. After all, they are working under the system just like all of us are.

I refuse to take this as a matter of top concern—with the responsibilities that we have in the legislative and you have in the executive—as one that needs to be worried about one way or the other. If we gave you what you wanted, I don't know what difference it would make, except that there would be more people prosecuted. I guess that would make everybody happier who want to see more people go to jail.

I think policemen owe us a lot more than we are getting. I don't see how worrying about this is going to facilitate that kind of responsibility. So, with all due respect to all of the pleadings that I have gotten from the executive on this, I think the exclusionary rule and any further modification of it is not going to be a top priority.

I understand your responsibility. You have a job to do. If I were in your shoes, I suppose I would be able to figure out how to modify my own personal opinions. You are not here as a totally free citizen to comment about this. I understand that. I hope you understand that my feelings are not directed against the administration or against the President's crime proposal or against law enforcement or against cops. It has just come out of my own experience, from this one Member's point of view, that it is silly for us to keep worrying about such a small percentage of cases in which policemen in good faith may make a mistake. The law has got to come down on one side or the other, and I think that the sooner we put this to rest, the better.

I just read a Supreme Court case on an Indians claim saying,

"We admit that we are wrong, the Indians were wiped out, we admit it was a bad decision, but it would disturb too many parties of interest to go back and reverse it. So, admitting that we are dead wrong, we are not going to disturb it."

That is the wisdom of the U.S. Supreme Court.

When you measure that against what we are talking about, I think it emphasizes the view that I express before the subcommittee today.

Mr. JENSEN. Mr. Chairman, I will just briefly state that I really do appreciate the opportunity to appear and to put this on the record before the committee. I think it is a matter of great concern, and we appreciate the opportunity to do this.

Let me say that, in terms of this issue—let me give you just a quick personal dimension. I have been a prosecutor for some 30 years. It has been a subject matter of concern all of that time. I have dealt with it for all of that time. It is a great deal of significant kind of controversy and concern in the criminal justice system.

One of the other things that I think might be an important point is that you talked about the police response and how they viewed the system and how they act in that system. One of the unfortunate results of this, and I pointed it out earlier, was that you have the police who do everything that they have been told to do, they follow the law precisely as it is, they even get a warrant and then conduct their duty that is now imposed by the issuance of that warrant. After that, they are told in the name of police misconduct that that search is no good. The lesson they have been given is that it doesn't matter whether you follow the law or whether you act in accordance with good faith and reasonableness. That is really a situation that breeds disrespect rather than anything else.

I think we ought to have a situation where the police look at their conduct and are given a reason to obey that conduct in terms of respect for law.

Mr. GEKAS. Would the gentleman yield for a moment just to follow up on that.

Mr. CONYERS. Yes.

Mr. GEKAS. The fact that this frustration comes into police work, doesn't it create in some a what's-the-use attitude which may contribute to some of the complaints that the chairman is pointing out, of underservice to some of the community concerned? The police are saying: "If I rush into this, what am I going to get myself into? Am I going to be hampered? Am I going to be later castigated?" Shouldn't we be removing some of the handcuffs of the police like the exclusionary rule that hurts their will to, in some degree, to pursue.

That is a concern that is embedded in your concern. For the very same reasons that you spoke out, Mr. Chairman, I think that we should pursue this issue. It helps the policeman to know that if we do have a good-faith exception to the exclusionary rule that some areas in which he could not have ventured under the current status for fears of the status of the law, he now, once we put this good faith exception, would have the courage and the will to pursue a certain case. That could help in your overall problem of the underservice about which you complain.

Mr. CONYERS. Maybe you are right. If there were some way that I could conclude that people could live and sleep more comfortably in their homes at night if we modify the exclusionary rule, I would go for it.

Mr. GEKAS. I don't say that that is the total answer.

Mr. CONYERS. I mean if there were some logic that would lead me—that would be a great reason for supporting this legislation, to be quite honest with you. I happen not to share that view. Maybe with you now on the committee, I will learn to go understand that view.

Let me ask you a question. I think there is a difference between a policeman rushing in and doing his duty and then finding out that the later law, as it is construed, does not allow the evidence to be admissible and an officer getting in trouble as a result of doing that. I think these are two very important distinctions. I don't think any officer should get in trouble for doing what he reasonably perceives to be his job, but what the court and what the laws and what the legislature determines the law to be, procedurally and substantively, is not a police officer's business. We are not in the business of making cops happy about the state of the law. They are law officers. They are not legislators. They are not lawyers. They are not prosecutors. They are not court officers. They are police officers.

Now, I don't give a darn what the cops think about the state of the law. If they want to change it, they should become legislators. If they want to prosecute under it, they should become lawyers and prosecutors. We are not here to keep them in some mental state of happiness or satisfaction. They have a job to do.

There are a lot of things that everybody in the legal system doesn't like. My list is as long as any police officer's. But that isn't the point. The point is that they should not be penalized, neither should they be led to believe that it will not make a difference if they do not operate legally.

I want to make it clear that I would not want any officer of the law to feel that he would be subject to some penalty as a result of him operating in good faith. That is an entirely different question from whether or not he likes the way the court treats the evidentiary matter. That is none of his public business. Privately, he can do whatever he wants about it. We are not here to satisfy the court officers or the judges. We have to operate in the one role that we have. We do not effect the law, we do not execute it; all we do is write it.

The Assistant Attorney General here has honored us with his best thinking on it. He has done an admirable job of stating the administration's feelings on this. I welcome them, as I always have. But I am not concerned—and neither do I think that we, as the lawmakers, should be concerned—about what policemen think about the law. We don't call in juvenile justice people. We have a police witness shortly, but we are not here to make them happy or make them sad. There are plenty of things they don't like in their work.

I don't think that this subject is worth any more hearings. I think we have understood it. We are going to have to drop the shoe on one side or the other. Then we will move on to far more critical questions.

Mr. GEKAS. If the gentleman will yield, I have no objection to terminating the series of hearings on this. I think you are correct on

that. I feel competent to act on this at this moment. I don't need any more testimony.

What I am concerned about, Mr. Chairman, is that it is our duty—I do believe it is in our role and in our responsibility to clarify the law and, in clarifying the law, if we can place out into the law enforcement community a sense of certainty, a sense of expectations that their pursuit of justice, their pursuit of arrests and prosecutions, would lead inexorably to conviction with a modicum or a minimum of obstacles that are artificial or unclear, that is our role and it is our responsibility, and it does help the law enforcement extablishment, and it does help society, and it does not invade any other kind of province when we do that. That is our responsibility.

I believe that this is as important as many other things we discuss. I do believe we don't need to know more about it. I would like to act on it.

My only hesitation—and I agree with you in another fashion—is to possibly wait until the Supreme Court rules definitively about it. That is a personal reason of mine, a different kind of thinking. If they do act on it and do come down with a good faith exception to the exclusionary rule that is clear, we may not have to act.

Mr. BERMAN. Would the gentleman yield?

Mr. CONYERS. Yes.

Mr. BERMAN. I have a question of clarification.

As I am listening to all of this, I am trying to think of what we are really getting with this good-faith exception. If you could freeze everything as of this moment, there are thousands of decisions from which one could presumably codify what is a lawful search and what isn't a lawful search.

Is it your position that since you have said that the good faith reasonable standard is an objective one, not a subjective one, ignorance is no excuse, that any search that violates what is in that now codified series of rules about permissible searches, any search which is outside of that permissible search area is not a good faith search?

Mr. JENSEN. That is correct.

Mr. BERMAN. If that is the case, I have to believe that of those 2,000 California cases, or whatever—hundreds of cases in your own experience you were not able to file—99 percent of them are cases that are already proscribed. In other words, the police officer went in the trunk of the car when he wasn't supposed to go into the trunk of the car, or opened the glove compartment when he wasn't supposed to open the glove compartment. The most we are buying is that in that rare case where the court decides to expand what had previously been thought of as impermissible searches—that case is still probably pretty rare—only then would you have any kind of ruling that evidence wouldn't be suppressed since the officer couldn't have known because that wasn't the rule at the time. That might happen three or five times a year, and probably in the last 5 years it hasn't happened very much at all, and may be going the other way. I mean, there is something reasonable about the notion.

But now, what you are adding is a determination in each case when that motion is being made. Was he acting in good faith,

wasn't he acting in good faith? And if it was a search that was proscribed by the 4th amendment and the 14th amendment, he is not in good faith. I just don't think law enforcement is getting very much from this good faith exception if your interpretation is the correct one. I certainly hope it is. If it is a subjective standard, then we are in a real mess.

Mr. JENSEN. The point that I think I did make is it is not only subjective, but it is objective, so that to the extent that there is a rule, the police is bound by that rule. What I pointed out is the unfortunate circumstance now is that where there is no violation of any rule and there is a situation of where there is an unknowable rule.

In a situation where the police act in good faith subjectively—and any reasonable person who looks at that in an objective fashion from the court standpoint can say that that is not a violation of the fourth amendment and that ought not to result in suppression. That is going to get at a number of cases that now have situations where evidence is suppressed. That is the effect of the rule.

Mr. BERMAN. It is hard for me to understand how it could get at a number of cases. I understand what you are saying——

Mr. GEKAS. Would the gentleman yield?

That one example that the witness gave about the pimp and the girls, that, to me, was an injustice. That was one where, with a good-faith exception to the exclusionary rule, there could have been a pursuit of that pimp that he described in his story. It is that kind of thing that we are trying to do, I believe, trying to create a set of certainties.

Mr. BERMAN. All right. I do think that in a few cases, your point will be developed. But I just have this feeling that those 2,000 cases in California you cited where the district attorneys refuse to prosecute, they were based on existing rules, and their analysis that the search had not complied with the rules that exist under California Supreme Court interpretations and, therefore, the objective good faith test wouldn't have been met. Perhaps every single one, or 98 percent, of those 2,000 cases still wouldn't have been filed. I think it has to be put in that context.

The other side of that is how do we now get into the new issue of—let's assume that there is a rationale reason for requiring a warrant for evidence that is already in the custody of the police, another example you cited. How does one get the rule expanded to include that if it is not raised on a suppression motion?

Mr. JENSEN. Once the case has been decided, it now becomes known to the court and is, therefore, applicable.

Mr. BERMAN. What is the decision?

Mr. JENSEN. The decision is that, henceforth, we are going to require that although you have taken evidence lawfully from a person at the time of arrest and you hold it in lawful custody, if you want to look at it for an evidentiary purpose, you have to get a warrant.

Mr. BERMAN. If I am a defendant, I don't want my attorney spending a lot of time carving out an area of expanded fourth amendment interpretations that have no benefit to me but only to the future——

Mr. JENSEN. That gets to the argument that once that rule has been articulated, we will get a search warrant. Now that is a rule. It wasn't a rule before. Your argument is whether or not, in the articulation of the rule, it is required that you now give it some kind of stamp by suppressing evidence under a circumstance where you are trying to call it police misconduct when it is not.

Mr. BERMAN. I understand that. What I don't understand is why the court ends up making that rule, should still require a warrant when the defendant, who is raising the issue of evidence, by definition can't get the evidence suppressed because it wasn't a rule before. Why should I spend a lot of time writing a brief arguing that point when it can't help my client?

Mr. JENSEN. That is simply an argument that we have to give a reward of an unjust suppression of evidence in a case that results in no prosecution when we know there is reliable, trustworthy, truthful evidence that ought to be there. It is simply a distortion of the system.

Mr. BERMAN. That is one way of looking at it.

The other way of looking at it is that we have frozen the lot at a particular point in time because there is no forum for arguing that with new technologies and new situations certain kinds of things which have been done up until now really shouldn't be done because they violate the fourth amendment.

Mr. JENSEN. This is a good point. It is deserving of a good deal of discussion.

I would once again come back and say there is nothing that says the progress of the law is dependent upon unjust decisions in individual cases.

Mr. BERMAN. Thank you.

Mr. CONYERS. We are grateful for your coming before us. You always provoke a lot of controversy among the members of the subcommittee.

Mr. JENSEN. Mr. Chairman, I hope that is taken in the sense that we have contributed to your knowledge about a subject matter of a good deal of concern.

Mr. CONYERS. Why don't we all hold our breath until June and see what ye old nine men are going to do. That could make our job a little easier, couldn't it? Why not facilitate matters instead of rushing ahead in either direction?

Mr. JENSEN. We put this before the Congress last year, and we are reasserting it. We think that it is an appropriate thing to consider.

Mr. CONYERS. Thank you for coming.

Thank you, sir.

Mr. JENSEN. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Jensen follows:]

PREPARED STATEMENT OF D. LOWELL JENSEN

I am pleased to be here today to present the views of the Department of Justice on the Fourth Amendment "exclusionary rule," a topic of critical import for the enforcement of criminal law in this country. As you will recall, I testified before the Subcommittee on this same subject during the last Congress on June 2, 1982 and detailed a legislative proposal to limit, but not eliminate, the application of the rule. Our proposal was and is, simply, that the exclusionary rule would not be applied in cases in which the law enforcement officers conducting the search acted in a reason-

able and good faith belief that their actions were lawful. Unfortunately, although several hearings were held in both the House and Senate, no legislation relating to the exclusionary rule was passed in the 97th Congress. Since that time, however, the Supreme Court heard reargument on March 1, 1983 in the case of *Illinois* v. *Gates*, No. 81-430, in which both sides were asked to address the question of whether the Fourth Amendment exclusionary rule should be applied in cases where the police acted in reasonable good faith. Moreover a study by the National Institute of Justice has been recently completed which sheds new light on the deleterious effects of the present application of the rule. Finally, new legislation has been introduced at the request of the Administration in the present Congress which would restrain the exclusionary rule within rational boundaries. It is contained in Title III of H.R. 2151, The Comprehensive Crime Control Act of 1983. I will be discussing the NIJ study, and this legislative proposal in greater depth, but permit me to outline for the Subcommittee the various issues I would like to cover today:

(1) What the exclusionary rule is and how it has developed;
(2) Specific cases which illustrate contemporary implementation of the rule; and
(3) Proposed legislative changes in the rule that we believe will restore common sense to the federal criminal justice process and eliminate unjust results in the implementation of the rule.

THE RULE AND ITS DEVELOPMENT

It is important at the outset to recall the specific words of the Fourth Amendment upon which the rule is based: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

It is apparent that the "exclusionary rule" itself is not articulated in the Fourth Amendment or, for that matter, in any part of the Constitution, the Bill of Rights, or the federal criminal code. the exclusionary rule is, rather, a judicially declared rule of law created in 1914, when the United States Supreme Court held in *Weeks* v. *United States*, 232 U.S. 383, that evidence obtained in violation of the Fourth Amendment is inadmissible in federal criminal prosecutions.

This doctrine was criticized by many commentators from the start, but the rule became firmly implanted in the federal criminal justice system. The states, however, were divided in their opinion of the rule. In the three decades following Weeks, sixteen states adopted the rule while thirty-one states refused to accept it.

It was not until 1949 that the Supreme Court was squarely confronted with the question of whether the exclusionary rule should be applied to state criminal prosecutions. In *Wolf* v. *Colorado*, 338 U.S. 25 (1949), the Court held that although the guarantees of the Fourth Amendment applied to the states through the due process clause of the Fourteenth Amendment, the Fourteenth Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. Later, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court reversed its decision in Wolf and held that because the Fourth Amendment right of privacy was enforceable against the states through the Fourteenth Amendment, "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

Before I discuss the purpose of the exclusionary rule and the problems posed by its present application, I think it is important to address some of the misplaced arguments raised in the current debate over the rule. It is my opinion that the issues discussed in these arguments are, upon proper analysis, non-issues.

One of these non-issues relates to the impact of the rule on the crime rate. Supporters of the rule claim that advocates for modification of the present rule argue incorrectly that reforming the rule reduce the crime rate. The fact, however, is that advocates for reform do not claim that any such change is a panacea for crime rate reduction. Any thoughtful consideration of contemporary crime must recognize, unfortunately, that there are no panaceas. On the other hand, advocates for reform do point out that the rule operates to free known murderers, robbers, drug traffickers and other violent and non-violent offenders and that a rule of evidence which has such a result without a reasonable purpose to support it is intolerable.

Another non-issue relates to the impact of the rule on criminal cases. Supporters of the rule cite a 1979 General Accounting Office report which found that evidence was actually suppressed in only 1.35% of a sample of federal criminal cases and argue that modification or abolition of the exclusionary rule is, therefore, not a significant criminal justice issue. Aside from the inevitable analytic flaws in the GAO report—for example, it did not consider cases not ever presented to United States Attorneys because the law enforcement agency involved felt they presented Fourth Amendment problems—any common sense perspective on the criminal justice world

must take note that the exclusionary rule is a necessary consideration of every police arrest and of every seizure of physical evidence, that the rule is the overwhelming component of drug case litigation, and that the appellate court overload which faces every judicial system in this country is due in no small measure to appeals of exclusionary rule issues.

Indeed, with respect to the drug area, results of a recent study by the National Institute of Justice demonstrate that search and seizure law has a significant impact on drug law enforcement. The study found that nearly three thousand felony drug cases were rejected for prosecution in California between 1976–1979 because of search and seizure problems. The study also focused on rearrests during the years 1976–77, finding that: "For most defendants arrested and later freed because of the exclusionary rule, that arrest was only a single incident in a longer criminal career." Forty-six percent of the 2,141 defendants not prosecuted in California in 1976 and 1977 because of the rule were rearrested within two years of their release, many of them more than once. These 981 persons accounted for 2,713 arrests, 1,270 of which were for felonies. While 2,141 defendants not prosecuted because of the exclusionary rule in a state as large as California over a two year period may not seem significant, a rule of evidence that allows this number of criminals to escape probable conviction and commit further crimes without having a reasonable purpose or producting a corresponding benefit creates an intolerable burden for society to continue to bear. Although the study did not attempt to establish what percentage of those searches and seizures would have been upheld under a good-faith test, the results do show that the argument that, somehow, the exclusionary rule has an insignificant impact is totally disingenuous.

JUDICIAL RATIONALE OF THE EXCLUSIONARY RULE

Discussion of the true issues pertaining to the exclusionary rule must begin with an examination of the purpose behind the rule. When the exclusionary rule was first articulated in Weeks, supra, the Court justified its holding on two grounds: deterrence of unlawful police conduct and maintenance of judicial integrity. In *Elkins* v. *United States*, 364 U.S. 206 (1960), the court stated the deterrence ground as follows:

"Its purpose is to deter—to compel respect for the Constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

The judicial integrity rationale was based on the notion that courts should be prevented from being "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Early exclusionary rule cases mentioned both rationales. However, over time, as the rule has been explicated, the asserted rationale of judicial integrity essentially has been abandoned.

The emergence of deterrence as the reason for the rule is aptly illustrated by the Court's opinions in Fourth Amendment retroactivity cases. In *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the court, considering the issue for the first time, refused to apply *Mapp* v. *Ohio* retroactively. The Linkletter Court observed that the basis for Mapp's application of the exclusionary rule to the states was its finding that the rule "was the only effective deterrent to lawless police action." Applying that premise to the *Linkletter* case, the court noted that it "cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved." *Id.* at 637. Likewise, in *Desist* v. *United States*, 394 U.S. 244 (1969), the Court observed that "[t]he exclusionary rule 'has no bearing on guilt' or the fairness of the trial." *Id.* Accordingly, it "decline[d] to extend the court-made exclusionary rule to cases in which its deterrence purpose would not be served." *Id.*

More recently, in *United States* v. *Peltier*, 422 U.S. 531 (1975), the Court held that the policy underlying the exclusionary rule did not require the suppression of evidence seized in searches which were clearly unlawful under standards established before the trial of Peltier in the case of *Almeida-Sanchez*, 413 U.S. 266 (1973), but were lawful at the time they were actually carried out, which was before *Almeida-Sanchez* was decided. The Court observed that although Supreme Court decisions applying the exclusionary rule to unconstitutionally seized evidence have referred to "the imperative of judicial integrity," the Court has relied principally upon the deterrent purpose served by the exclusionary rule. The Court further noted that the lesson to be learned from the retroactivity cases is that "the 'imperative of judicial integrity' is . . . not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." *Id.* at 537–38. Focus-

ing specifically on the deterrence purpose, the Court concluded that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542.

In *Michigan* v. *DeFillippo,* 443 U.S. 31 (1979), the Court held that the rule should not be applied to exclude evidence when it has been seized during an arrest for violation of a statute valid at the time of the arrest but which is subsequently declared invalid. The Court stated:

"The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule." *Id.* at 38 n.3.

The declaration in the retroactivity cases of the deterrence rationale for the exclusionary rule is also apparent in the Court's approach to determining whether the rule should be applied in a variety of other circumstances. In *United States* v. *Calandra,* 414 U.S. 338 (1974), the Court held that a witness before a grand jury could not refuse to answer questions based on evidence obtained in violation of the Fourth Amendment. In that case, the Court stated that the "purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."

In *United States* v. *Janis,* 428 U.S. 433 (1976), the Court refused to exclude from a federal civil proceeding evidence seized unconstitutionally but in good faith by state law enforcement officers. The court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." *Id.* at 454. Because the evidence in both *Calandra* and *Janis* had been obtained unlawfully, application of the judicial integrity rational would have required suppression of the evidence. However, as noted above, the Court considered the deterrent purpose of the exclusionary rule as its primary rationale and concluded that the evidence should not be suppressed.

The deterrence rationale was also used as the basis of exclusionary rule analysis when the Court held that unlawfully seized evidence is admissable to impeach the defendent's testimony at his criminal trial, *United States* v. *Havens,* 446 U.S. 620 (1980) and that no person other than the defendant has standing to ask for the invocation of the exclusionary rule. See *Rakas* v. *Illinois,* 439 U.S. 128 (1978). In sum, the judicial integrity rational has essentially been abandoned by the Court as a factor in its exclusionary rule analysis.

PROBLEMS WITH THE RULE

As the above cases demonstrate, the Court has clearly established that the true purpose behind the exclusionary rule is the deterrence of police misconduct. The heart of the problem with the exclusionary rule lies in its application: the courts have gradually expanded its application to situations in which the rule cannot possibly serve as a deterrrent. This expansion has distorted the preeminent purpose of the rule with the result that the truth finding process is impeded, and society is done a grave and unnecessary injustice.

The clearest example of misapplication of the exclusionary rule arises when courts suppress evidence seized by police in executing a duly authorized search warrant. In that type of case a second or third judge, in disagreement with judge who issued the warrant, invalidates the search despite the absence of any police misconduct. Consider in this regard *United States* v. *Alberto Antonio Leon* (9th Cir. Mar. 4, 1983). In that recent case, an informant advised police officers that he had seen two named persons selling drugs from their residence five months before. On the basis of that tip, the police conducted a one-month surveillance of the two people and their residence. The surveillance eventually expanded to cover two other residences and other persons with whom the two earlier identified people had been associating, strongly suggesting that all persons and residences were involved in narcotics trafficking. After consulting with three assistant district attorneys, the police obtained warrants from a state court judge for the search of the residences and various automobiles belonging to the suspects. The searches produced narcotics and narcotics paraphernalia.

The defendants were charged with various drug violations but a district judge ruled that the search warrants were defective because the informant's information was probably stale. Much of the evidence obtained by the search was suppressed. The Ninth Circuit affirmed over the objection of Justice Kennedy, who observed in his dissenting opinion that the affidavit in support of the warrants "sets forth the details of a police investigation conducted with care, diligence, and good-faith."

United States v. *Shorter,* 600 F. 2d 585 (6th Cir. 1979), is another example of the exclusionary rule being applied where an authorized search warrant is invalidated by a second judge or court. In that case, local police and agents of the Federal Bureau of Investigation (FBI) arrested a suspected Ohio bank robber at his home. After the arrest, the FBI agent telephoned a federal magistrate and stated his grounds for a search warrant which was then issued by the magistrate as permitted by law. The subsequent search produced incriminating evidence, including bait bills and a firearm. The trial judge ruled the search lawful, but the conviction was reversed on appeal. The appellate court decided that although the officer had in fact been placed under an oath by the magistrate which incorporated all the testimony already provided in the course of reciting the grounds for the warrant, the failure of the magistrate to require the oath at the beginning of the telephone conversation violated the law because the application Federal Rule requires that the oath be obtained "immediately."

These cases involve disagreements between judges about judicial conduct—there is no police misconduct involved. The police were carrying out their duties as society expects them to do: the officers provided their information fully and honestly to the court and proceeded to carry out the orders of the court once the warrants were issued. Suppression of evidence in instances such as these does not serve the purpose of the exclusionary rule, the deterrence of police misconduct. In fact, it only serves to damage both a community's perception of justice and the morale of law enforcement officers who have followed the rules only to have the evidence suppressed on the premise that they have violated the Constitution. Proper police conduct is thereupon falsely labeled as illegal.

The deterrent purpose of the exclusionary rule also is not served when courts apply the rule to situations where the appellate court cases are not at all clear, where the law is thoroughly confused or even in situations where the cases are in flat contradiction. Police often are confronted with the question of whether to conduct a warrantless search in the field when the circumstances they are facing are not covered by existing case law.

Last term, the United States Supreme Court decided two cases that aptly illustrate this point, *New York,* v. *Belton,* — U.S. —, 101 S. Ct. 2860 (1981), and *Robbins* v. *California,* — U.S. —, 101 S. Ct. 2842 (1981). The cases are remarkably similar factually. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Therefore, in *Robbins,* the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marijuana. In *Belton,* the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

Both cases required an analysis of the "automobile exception" cases which pertain to the validity of warrantless searches of cars and their contents (*see* e.g., *Carroll* v. *United States,* 267 U.S. 132 (1925); the doctrine of "search incident to arrest" as defined by *Chimel* v. *California,* 395 U.S. 752 (1969); and the watershed case of *United States* v. *Chadwick,* 433 U.S. 1 (1977), in which the Court held that police must obtain a warrant to open a closed container in an automobile where the possessor of the container has exhibited a "reasonable expectation of privacy" in that particular container.

When the Supreme Court decided *Belton* and *Robbins,* three justices opined that both searches were legal, three justices opined that they were both illegal; and three justices controlled the ultimate decision that *Robbins* was illegal and *Belton* legal. To add to the confusion, the *Robbins* search now said to be illegal had been found to be legal by the California courts and the *Belton* search now said to be legal had been found to be illegal by the New York courts. When *Robbins* was finally decided, 14 judges had reviewed the search: seven found it valid; seven, invalid. Now that *Robbins* and *Belton* have been decided, do we know the law which governs police conduct in similar searches? Justice Brennan offers this comment in his *Belton* dissent:

"The Court does not give the police any 'bright line' answers to these questions. More important, because the Court's new rule abandons the justifications underly-

ing *Chimel,* it offers no guidance to the police officer seeking to work out these answers for himself."

To the same end, Justice Rehnquist dissented in *Robbins* by citing the language for Justice Harlan in his concurring opinion in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971):

"State and Federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an every day question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime."

It was not surprising, therefore, that the whole field of law involved in these cases was again before the United States Supreme Court less than a year later in *United States* v. *Ross,* — U.S. —, 102 S. Ct. 2157 (1957). In that case, which involved the search of a brown paper bag containing heroin found in a car's trunk, the Court repudiated the holding in *Robbins* and held that the "automobile exception" to the Fourth Amendment allows police who have lawfully stopped a vehicle which they reasonably believe to contain contraband to conduct a warrantless search of any part of it, including all containers and packages, in which the contraband may be concealed.

Thus, the rule of law with respect to container searches in automobiles has apparently been finally made clear. Meanwhile, however, the defendant in *Robbins* who possessed thirty pounds of marijuana, went free because the police at the time of the search did not apply the law as it would be applied at the moment the Supreme Court considered the *Robbins* case. It is probably a small consolation for the police in that situation that their view of the law was ultimately borne out in a subsequent case. To say that the suppression of reliable, trustworthy, evidence in such a case helps to prevent police "misconduct" is absurd.

As we reflect upon the rule of law resident somewhere within these decisions, let us also consider an important fact which is often overlooked in exclusionary rule discussions. The search in *Robbins* actually took place on January 5, 1975, long before *Chadwick* was decided on June 21, 1977. At the very least, it is fair to say that the applicable rule at the time of the search was even more elusive at the time of the search than it is today, and yet we have imposed the final definitive sanction of suppression of reliable, trustworthy evidence in such a situation on the assumption that this judicial act will deter police misconduct.

With respect to this typical exclusionary rule analysis, it is instructive to note that the standard to which police are held in Fourth Amendment cases is stricter than that to which attorneys must comply when they are judged under the Sixth Amendment guarantee that criminal defendants to be represented by competent counsel. Consider in this regard *People* v. *Russell,* 101 Cal. App. 3d 665 (1980), an automobile stop/closed container case decided by a California appellate court in 1980,

In *Russell,* once again there was a lawful stop, lawful opening of the car trunk, and police discovery of marijuana when they unzipped a flight bag. At trial the search was uncontested, and the defendant convicted. On appeal it was contended that his counsel at trial was incompetent under the Sixth Amendment when judged against the California standard announced in *People* v. *Pope,* 23 Cal. 3d 412 (1979), which requires that an appellant "show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." In support of this position, the defendant argued that counsel had not asserted that opening the flight bag required a search warrant under the requirement of *People* v. *Dalton,* 24 Cal. 3d 850 (1979), a California search and seizure case in which the court had applied the holding in *Chadwick, supra,* despite the fact that the search took place prior to the *Chadwick* decision.

The Court rejected the defendant's contention that the attorney was incompetent, stating:

"It was first noted that the hearing on Russell's motion to suppress evidence occurred February 13, 1979. The opinion of *People* v. *Dalton* was filed six months later, August 16, 1979. It is doubtful that Pope requires, under pain of being held to have furnished constitutionally inadequate representation, such prescience on the part of a lawyer for one criminally accused."

Implicit in that language is a conclusion that the state of the law of search and seizure was such that a criminal defense attorney, when confronted with the issue in the courtroom, was not expected to be aware that there was a Fourth Amendment violation on those particular facts. Indeed, the court found that a reasonably prepared attorney was not expected to anticipate that a future search and seizure decision, *People* v. *Dalton, supra,* would hold similar police conduct unlawful. Yet as

was illustrated in the *Dalton* and *Robbins* decisions, there is no such hesitation in requiring "such prescience" on the part of police officers faced with precisely the same problem of legal analysis which confronted the attorney in Russell.

Retroactive application of the exclusionary rule represents still another instance in which the rule's deterrent purpose is not served. In the past, the United States Supreme Court itself has established that courts should decline to apply the exclusionary rule in many cases expanding the scope of Fourth Amendment rights. See *United States* v. *Peltier, supra*; *Linkletter* v. *Walker, supra.* In *Peltier,* for example, the Court noted that neither of the purposes served by the exclusionary rule—deterrence of unlawful police conduct and preservation of judicial integrity—would be served by giving retroactive effect to decisions announcing new search and seizure rules. Law enforcement officers can hardly be deterred from breaking a "rule" that did not exist at the time of the activity in question.

However, despite the fact that the deterrent purpose is not furthered in retroactive use of the rule, last year a divided Court in *United States* v. *Johnson,* — U.S. — (1982), held that the Fourth Amendment standard established in *Payton* v. *New York,* 445 U.S. 573 (1980) is to be applied retroactively. As a basis for its conclusion, the Court noted that Payton "resolved a previously unsettled point of Fourth Amendment law," unlike the *Peltier* case, which involved the overturning of a long-standing practice supported by continuous judicial approval by a lower court. Unfortunately, the standard established in Johnson leaves the police officer in both of those situations in the same predicament: he or she is still held to know a law which does not exist in the present and will only exist if a future court recognizes and declares it.

The consequence of applying the exclusionary rule in the cases discussed above is two-fold. First, the purpose of the exclusionary rule is not served when the officers believe, in good faith, that they are performing a lawful search. When law enforcement officers obtain a warrant in good faith or when they make a reasonable, good faith attempt to predict the decisions that future courts will make, there exists no logical basis for excluding the evidence they have gathered. Applying the rule in these cases fails to further in any degree the rule's deterrent purpose, since conduct reasonably engaged in, in good faith, is by definition not susceptible to being deterred by the imposition of after-the-fact evidentiary sanctions.

Second, application of the exclusionary rule when the police have acted reasonably and in good faith results in attaching a false label to proper police conduct. This adversely affects the criminal justice system by fostering the public perception that police are engaged in lawless, improper conduct when that is simply not the case. The Supreme Court recognized these effects in *Sone* v. *Powell,* 428 U.S. 465 (1976), in which is stated:

"The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice."

The unjustified acquittals of guilty defendants due to application of the exclusionary rule has resulted in a growing concern by our citizens that our system of justice is lacking in sense and fairness. Unfortunately, it seems unlikely that any of these conceptions by the public will change as long as the exclusionary rule remains in its present form and courts continue to expand its application to situations where law enforcement conduct has been manifestly reasonable.

PROPOSED LEGISLATION MODIFICATION

The specific action we suggest in the area of legislative limitation of the rule, as contrasted to legislative abolition of the rule, is based upon a recent significant opinion on the rule rendered by the Fifth Circuit. In *United States* v. Williams, 622 F.2d 830 (5th Cir. 1980), the Fifth Circuit, after an exhaustive analysis of the relevant Supreme Court decisions, announced a construction of the exclusionary rule that would allow admission at trial of evidence seized during a search undertaken in a reasonable and good faith belief on the part of a federal officer that his conduct was lawful. A majority of the 24 judges of that court, sitting *en banc,* concurred in an opinion that concluded as follows (*Id.* at 846–847):

"Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet

taken in a reasonable, good-faith belief that it was proper. If the court so finds it shall not apply the exclusionary rule to the evidence."

In justification of this conclusion, the court first noted that the exclusionary rule is not a constituitional requirement. Rather, the court desecribed it as "a judge-made rule crafted to enforce constitutional requirements, justified in the illegal search context only by its deterrence of future police misconduct." The Court determined that the deterrent purpose was the preeminent purpose behind the rule and further noted that this purpose was not served when the improper police actions were taken in reasonable, good faith. Accordingly, there was no compelling reason to apply the exclusionary rule in such cases.

The reasonable good faith rule announced by the Fifth Circuit is the same rule urged by the Attorney General's Task Force on Violent Crime. If implemented, we believe that this restatement of the exclusionary rule would go a long way toward insuring that the rule would be applied only in those situations in which police misconduct logically can be deterred. Law enforcement officers will no longer be penalized for their reasonable, good faith efforts to execute the law. On the other hand, courts would continue to exclude evidence obtained as as result of searches or seizures which were performed in an unreasonable manner or in bad faith, such as by deliberately misrepresenting the facts used to obtain a warrant. Thus, the penalty of exclusion will only be imposed when officers engage in the type of conduct the exclusionary rule was designed to deter—clear, unreasonable violations of our very important Fourth Amendment rights.

It should be noted that the reasonable, good faith rule requires more than an assessment of an officer's subjective state of mind and will not, as is sometimes argued, place a premium on police ignorance. In fact, the rule requires a showing that the officer's bona fide good faith belief is grounded in an objective reasonableness. As the *Williams* court explained, the officer's belief in the lawfulness of this action must be "based upon articulable premises sufficient to cause a reasonable and reasonably trained officer to believe he was acting lawfully." Accordingly, an arrest or search that clearly violated the Fourth Amendment under prior court decisions would not be excepted from the rule simply because a police officer was unaware of the pertinent case law. Thus, there would remain a strong incentive for law enforcement officers to keep abreast of the latest developments in the law.

CONSTITUTIONALITY OF CONGRESSIONAL MODIFICATION

The Department of Justice has suggested specific legislation to implement the reasonable, good faith exception to the rule. Our proposal was introduced in the Senate last year as S. 2231, which is based on the language in *United States* v. *Williams* enunciating the reasonable good faith exception. We recommend that identical or similar language be adopted by this Subcommittee in any legislation that seeks to modify the exclusionary rule. We believe that Congressional legislation which embodies the *Williams* case's reasonable, good faith exception to the exclusionary rule would be held to be constitutional.

Indeed, Congressional action in this area was explicitly invited by Chief Justice Burger in his dissenting opinion in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), in which he stated that "the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced." Id. at 424. As a possible alternative to the rule, the Chief Justice suggested that Congress develop a new statutory remedy for victims of unconstitutional searches and seizures. However, the tort remedy was not offered as the exclusive acceptable substitute. Supreme Court decisions during the past decade support the conclusion that the Court today would sustain reasonable congressional action limiting the rule without the substitution of a new remedy, so long as the modified rule furthered the purpose of the exclusionary rule as articulated by the Court.

As I have already demonstrated, there is legal precedent for adoption of a reasonable, good faith exception. The exception is primarily grounded on Supreme Court cases such as *United States* v. *Peltier, supra* and *Michigan* v. *DeFillippo, supra,* in which the Court emphasized deterrence as the exclusionary rule's primary basis and refused to apply the rule when the conduct of the law enforcement officer was not capable of being deterred. The good faith exception is also consistent with any notions of "judicial integrity" to the extent that such a concept remains as a rationale for retaining the rule in some form. As the Supreme Court stated in *Peltier, supra,* "the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law . . . ."

Finally, it is important to remember that the reasonable, good faith exception already has undergone constitutional scrutiny and been upheld in both federal and state jurisdictions. The Fifth Circuit found the exception to be constitutional in *United States* v. *Williams,* which has already been discussed. In addition, the *Williams* holding has been followed by the highest appellate courts in New York and Kentucky. See *People* v. *Adams,* 442 N.E. 2d 537 (N.Y. Ct. App. 1981) and *Richmond* v. *Commonwealth,* 29 Cr. L. 2529 (Ky. Ct. App. 1981). It has also been codified by at least two state legislatures. See Colo. Rev. Stat. § 16-3-308 (1981); Ariz. Ch. 161 (1982). Thus, the exception already has established a solid basis of constitutional and legislative support.

CONCLUSION

I would like to emphasize that legislation adopting a reasonable, good faith exception to the exclusionary rule should be viewed as a measure that simply states the true scope of the rule. Given that deterrence is the rationale for the rule, the situations where law enforcement officers have performed a search or seizure reasonably and in the good faith belief that their conduct comports with the law are precisely the ones in which it seems indefensible to exclude the evidence they have gathered. When a court does order suppression of evidence in such circumstances, it imposes a label of police misconduct when in fact there is none. The result is that law enforcement officers must suffer the personal indignity of being branded as lawbreakers, while at the same time the public is misled into thinking that there is widespread police abuse when it does not actually exist. Moreover, indiscriminate application of the exclusionary rule allows the determination of guilt or innocence to be made without assessment of all the probative and trustworthy evidence available, thereby rendering the criminal justice system unreliable and impotent.

Implementation of the reasonable, good faith exception would limit application of the exclusionary rule to furtherance of its original purpose of deterrence. As a result, the focus of criminal proceedings would remain directed to the process of determining the truth in order to convict the guilty and acquit the innocent. Faith in the criminal justice system would be strengthened because the police and public would no longer be penalized by the unnecessary suppression of reliable evidence. This common sense limitation of the exclusionary rule would return integrity to our judicial system and law enforcement programs. We strongly urge that legislation to this effect be adopted by this Subcommittee.

Mr. Chairman, that concludes my prepared testimony. I would be pleased to answer any questions the Subcommittee might have.

Mr. CONYERS. We will now hear from the vice president of the National Association of Police Organizations, currently on leave from the Detroit Police Department, Mr. Robert Scully. He has been an officer since 1967 in the DPOA. He has been before our committee before.

We have your testimony which will be incorporated in the record. If you will introduce your friend with you, you can begin in your own way. Welcome to the subcommittee once more.

TESTIMONY OF ROBERT SCULLY, ON BEHALF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, ACCOMPANIED BY CARY BUTSAVAGE, LEGISLATIVE ADVOCATE, NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Mr. SCULLY. Thank you, Mr. Chairman.

The gentleman to my right is Mr. Cary Butsavage. He is the legislative advocate for the National Association of Police Organizations. He is located here in Washington, DC.

Thank you for the introduction. I am Robert Scully. I am a Detroit police officer. I have been a Detroit police officer since 1967, and the elected vice president of the DPOA, and I am the elected executive vice president of NAPO.

You have before you our prepared testimony. I think we would just like to make it a part of the record. To move this hearing

along, if you would have any questions of either myself or our legislative advocate, we would be glad to answer them for you.

Mr. CONYERS. What do you think the court is going to do?

Mr. BUTSAVAGE. Have you got a coin?

Mr. SCULLY. A coin or a crystal ball, I have no idea, sir.

Mr. CONYERS. How much worse will your life be if the good-faith exception is rejected?

Mr. SCULLY. I am here reflecting personally, my personal knowledge in the city of Detroit. I have had conversations over the last couple of days trying to come up with different examples from our legal advisory staff in the Detroit Police Department, and they put me in touch with Inspector Ray Murray of the Narcotics Section, where they seem to feel that the exclusionary rule, as it stands today, has the most adverse impact. I talked with Ray Murray. Basically, he gave me a number of examples.

Probably something you are familiar with is the Young Boys, Inc., situation that we have back in the city of Detroit. That specific area with the Young Boys, Inc., is where they are finding a great deal of difficulty in the attempts of prosecution of that organization.

Mr. CONYERS. What is the problem?

Mr. SCULLY. I will give you one specific example. It is probably again the police officers' fault. To make everybody familiar here, the Young Boys, Inc., is an organization in Detroit of approximately—and I say approximate because they don't really know—of about 700 kids. They range from the age of 7—the youngest is 7 years old—up to about 27 years old was the last one they arrested.

By the Young Boys, Inc., the older people in the organization put the younger people out there on the street to sell the narcotics. They work right on street corners in the city of Detroit.

One specific example is where one of our narcotic crews happened to be going down the street and noticed the activity taking place at an intersection of some people they have known belonged to the Young Boys, Inc. One of the ways that they do operate is you have a youth out there who is 12 years old and the older person is in back of them. The youth will have a styrofoam cup. That is one of the operations that they work under.

The police officers in this narcotics crew knew this operation and they observed it for a while. But instead of following—and maybe the proper procedure—and going and getting different search warrants, they went up and snatched the cup and found the paraphernalia in the cup, and they placed the juvenile under arrest and detained him. They also detained the adult accompanying him.

That case was just an example of where the evidence was kicked out by the judge at the hearing.

Mr. CONYERS. What ought the officer had done?

Mr. SCULLY. Unfortunately, I guess that is part of the reason that we are here in favor of the good-faith exception, because of the fact—I, myself, am not an attorney and I do not know all of the laws. I don't know all of the cases that were cited here today. I think that is probably a prime example of why we do need a good faith exception to the rule.

Mr. BUTSAVAGE. One thing I wanted to add with respect to that is that you hear arguments made that you really can't enforce the

good faith. What is good faith? As the assistant U.S. attorney testified, indeed it is a combination of subjective and objective tests.

When I am not a legislative counsel for the police, I represent labor unions in various matters. We have a thing in labor law, the good-faith doubt as to the union's majority status. And they look at various tests—indeed, throughout the law, it is clear that there are various objective considerations that the courts can look at as evidence of the officer's—or whatever the subject might be—good faith.

Courts are, in fact, very adept at developing those kinds of standards and those kinds of factors which will be evidence of an officer's subjective good faith. I just don't think that to say that there is no way that we can enforce this rule because good faith is too nebulous, I don't think that is correct.

Mr. BERMAN. It has been about 11 years since I played in that field, but, as I recall the law, that is an example which, I think, defeats that argument because that argues for the subjective test. As I recall, an employer can see signed affidavits under penalty of perjury that they want *x* organization to represent them for the purpose of collective bargaining, and the employer can send back the letter saying he has a good-faith doubt about the majority status of the union and trigger a whole election process.

Mr. BUTSAVAGE. It has been some time since you have been in the field, I think. That is not the case. I don't want to get into a debate about it.

Mr. BERMAN. Does the organization accept the Assistant Attorney General's interpretation that, saying what you just said—"we don't know all of the laws on this subject"—doesn't get you into the good-faith exception, you are presumed to know all of the laws on the subject, and if you conduct a search that violates an existing ruling of the court in the jurisdiction in which you are operating, you are no longer operating in good faith?

That is my understanding of what his view of this good-faith exception is, in that you are presumed to have knowledge of it and cannot effectively assert the good-faith defense of "I didn't know this law," or "I wasn't aware of that ruling that made this an impermissible search." Do you agree?

Mr. BUTSAVAGE. I agree with you.

Mr. BERMAN. Do you think that the officer has to be presumed to know all the existing body of laws, and that a search in violation of those laws is not a good-faith search?

Mr. BUTSAVAGE. He should be.

Mr. BERMAN. OK.

Mr. WARD. Mr. Scully, I apologize for being out of the room briefly.

I understand you were speaking about a particular case in Detroit involving a drug sale. Could you just briefly review the facts on that? In particular, I would be interested to know on what basis the evidence was suppressed.

Mr. SCULLY. I have some examples here with me. I don't think they give the reason.

Mr. CONYERS. We were interested, Mr. Scully, because if somebody had dope out on a public intersection and the police could see

it, there may be an exception to the exclusionary rule that would allow that to be admitted.

It is not at all clear to me what the problem is of a policeman seizing evidence in this kind of circumstance. I don't know why there would be any exclusionary rule operating, much less the necessity for a good-faith exception.

Mr. SCULLY. Mr. Chairman, it is unfortunate—I do have some examples here, but the short synopsis they wrote up on these things does not give the law or why the case was kicked out. It lists just that it was dismissed at the hearing exam by the trial judge. The prosecutor failed to issue a warrant.

Mr. CONYERS. Let's ask your counsel to flesh these out and send them in to our committee. They involve my district, and I would like to understand how the courts are ruling on these matters that we are legislating on. If you would, I would be glad to see that.

Mr. BUTSAVAGE. I would be glad to, Mr. Chairman.

Mr. CONYERS. Are there further questions?

Mr. BERMAN. No; thank you.

Mr. CONYERS. Thank you, gentlemen.

Mr. SCULLY. Thank you.

Mr. CONYERS. I am glad to see you again, Mr. Scully.

[The prepared statement of Mr. Scully follows:]

STATEMENT OF ROBERT SCULLY ON BEHALF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE HOUSE COMMITTEE ON THE JUDICIARY

Mr. Chairman, my name is Robert Scully and I am speaking here today on behalf of the National Association of Police Organizations (NAPO), an organization which represents some 65,000 working police officers nationwide. We are grateful for the opportunity to present to you the views of NAPO on the exclusionary rule, particularly since our organization is overwhelmingly composed of officers who work in the streets, and must deal with some of the problems created by the exclusionary rule on a day-to-day basis. I am a police officer on leave of absence from the Detroit, Michigan Police Department.

At the time of its judicial creation, the so-called "exclusionary rule" was designed to deter unlawful police misconduct in obtaining evidence. Unfortunately, over the years, the boundaries of the exclusionary rule has been so greatly expanded that now it is applied in situations where it could not conceivably serve its original purpose of deterring unlawful police misconduct. As it is presently applied, the exclusionary rule acts as a positive hindrance to the proper execution of the duties which police officers on the street must perform. Because the exclusionary rule has been applied in situations far beyond its original scope, it naturally produces situations where criminals are freed because of technical defects or events beyond a police officer's control.

For instance, we have seen the situation all too often in which courts have permitted the suppression of evidence seized by police officers during the course of searches pursuant to a duly authorized warrant, because the warrant, obtained in absolute good faith by the police officers, was later found to have minor or technical defect.

More typical for the officer in the street is to be confronted by a situation in which he must make an immediate decision as to whether he may properly make a warrantless search. This situation often takes place when an arrest is being made simultaneously. In this setting, the police officer has to make an on-the-spot legal analysis as to whether or not his search is legal.

While most police officers are trained in the "do's" and "don'ts" of making warrantless searches during the course of an arrest, we simply cannot always make a reasoned legal analysis when faced with a potentially hazardous encounter with a suspect. Given the immediacy of the situation and the different results reached by the Courts (depending on the Federal Circuit), we feel it is both unreasonable and unwarranted to apply the exclusionary rule in this set of circumstances, where the

officer is acting in good faith. And, Mr. Chairman, I underline the words "acting in good faith."

We feel that the application of the exclusionary rule where an officer is acting in a reasonable and good faith belief that his actions are lawful not only undermines the confidence of the public in our system of criminal justice, it also undermines the effectiveness and morale of the public safety officers in the street. We certainly do not want to ignore important evidence while we are making an arrest, nor do we feel particularly good when we see otherwise valid and probative evidence suppressed because of a technical defect in a warrant. To this end, we believe that the Congress should enact legislation which would act to limit the exclusionary rule to permit the introduction of evidence which was obtained during a search undertaken by a law enforcement officer if that officer reasonably believed in good faith that his or her conduct was in accordance with the law.

Having stated what our position is on this mater, I think it is also important to make clear what our position is not. We are clearly not taking the position that officers be given an unlimited free hand with respect to searches, but rather that the Congress and the Courts recognize that the main focus of any criminal proceeding should be the issue of whether or not a crime has been committed. We are not saying that our conduct should not be reviewed and considered, but instead that where an officer acts in a reasonable good faith belief that his actions are lawful, the main reason for the exclusionary rule (deterrence) has little, if any, application.

We think that corrective legislation in this area is long overdue, and we thank the Committee for the opportunity to present our views on this important issue. I will be glad to answer any questions you might have at this time.

Mr. Conyers. Our final witness is Dr. James Fyfe of American University, senior fellow with the Police Foundation. He has been with the police department in New York. He has written and studied extensively on police science and criminal justice.

We welcome you before the committee. We will incorporate your statement into the record.

Mr. Fyfe, you have studied the wider subject, and I am beginning to get interested in the whole question of the police from an administrative point of view. I don't know if you have looked at any of this. There is the whole question of how the money is used, how the administrations are set up. Each police department operates quite independently of other police departments. There is no requirement that any one be patterned after another. So you have quite divergent administrative organizations and quite different views as to how the resources of money and manpower are to be administered.

I have begun to wonder if there isn't a lot more information that could be worked up on that. It is kind of hard for a citizen to walk into the precinct and say: "I want to see how you guys are spending the money." They would probably look at him and maybe want to hold him for investigation. It is hard to find out from your friendly local police what their budgets are and how the money is being spent and who makes the decisions on manpower. These are arcane questions.

Usually the thing that comes out at the bottom line is that we need more cops in our neighborhood or crime is going up and can you put some more policemen in the streets. We sort of miss this point about the administration question.

TESTIMONY OF JAMES J. FYFE, PROFESSOR, AMERICAN UNIVERSITY SCHOOL OF JUSTICE

Mr. FYFE. I think you are right, Mr. Chairman. There are at least 17,000 police departments in the United States, and the standards and training among them vary very dramatically.

In brief, knowing that my written testimony will go into the record, there are two parts of the equation involved in the good faith exception. One is the law, and the other is the police officer's knowledge of the law. I think that, before we change the law because cops don't know the law, we should try to improve police officers' training, knowledge of law, and the administration of the police departments.

If you look among the 17,000 police departments in the United States, you find that some are very well trained, others are not trained at all and, in those cases, they are quite often not held accountable for their actions by the courts who are supposed to judge the objective reasonableness of their actions. So I think that is where the real problem lies.

The International Association of Chiefs of Police in 1967 did a study where they found that the average American police officer had less than 200 hours worth of training, while the average barber had 4,000 hours of training. I don't think we can argue that the laws should be changed, because people—who, in general, are trained far less than our barbers—don't know the law.

In most cases, even in the good faith cases that we can identify—and I think Mr. Berman made some interesting observations about how we determine good faith—in fact, we have to determine an officer's good faith on the basis of his testimony because there is no other objective evidence. And it is silly to assume that a police officer who goes out and violates people's rights on the streets will testify in good faith in court.

But to Mr. Berman's point—the issue, I think, is that police officers are simply not trained in the law. The law is generally not very complex. The case that was discussed here this morning was *Illinois* v. *Gates*,[1] the Supreme Court case that is now pending. The law in that case was certainly not complex. I think any well-trained police officer knows that, in order to obtain a warrant on the basis of information provided to him in an anonymous letter, he has got to go out and corroborate some of the criminal allegations that are made. In the *Gates* case, the police corroborated nothing. The police corroborated that the husband in that case took a flight to Florida and drove back with an unidentified woman the next day. So there simply was not probable cause, because the police corroborated none of the criminal activity alleged in the letter they had received.

The police, in my mind, should not have sought to obtain the warrant in that case at that time, and certainly the magistrate who has been told, not by one other judge, but by three other judges that he was wrong, should not have issued the warrant.

One other observation I would make is that when we talk about the exclusionary rule as a deterrent to police misconduct, I think we have to expand our view a bit and think about it as a deterrent to magisterial misconduct. If the good-faith exception is legislated and if the Congress has the authority to do that—which is a question I can't answer—the legislation provides that existence of a

[1] EDITOR'S NOTE.—*See* 103 S.Ct. 2317 (1983).

warrant will be prima facie evidence that officers are acting in good faith. What that does is make warrants irreversible.

I was a police officer for 16 years, and I know many magistrates, I know many prosecutors, and I know many police officers. I know that there is some dissatisfaction that the Supreme Court is, in effect, irreversible. What people are doing here is asking this Congress to make every magistrate in the land a court of last resort, because there will be no appeal from a magistrate's determination of probable cause.

As we see in the *Gates* case and as we see in a great number of appeals that travel through the court system, magistrates make mistakes. It is a principle of our democracy that everybody should have a boss. The only people I know who don't have a boss are the nine old men you talked about—the Supreme Court—and there is a lot of unhappiness about that.

When we look at the qualifications of low level magistrates around the country, I have problems with making them not accountable to anyone by weakening the exclusionary rule, because the exclusionary rule is the only remedy for judicial misconduct. One cannot sue a magistrate for professional errors made in good faith. We learned that, frankly, the bench does not discipline its members or require them to go through very much training when they make mistakes.

I think also that Mr. Jensen's argument that the good-faith mistake is not misconduct misses the point. When we look at violations of law, we first look at whether or not the law was violated. Only then do we look at the motives and thoughts of the person involved. If a police officer has acted in good faith and violated the fourth amendment of the Constitution, he has committed an illegal act and, by definition, his conduct is misconduct. He may not have known that it was misconduct, but it is his police chief's responsibility not to put him out on the street without an adequate knowledge of right and wrong.

If we argue otherwise, we are arguing that violations of the law by those sworn to enforce the law should be excused because of ignorance of the law. I think that is unacceptable, and I think that we should not consider overruling the Supreme Court before we modify the deplorable state of police training and knowledge of law around the country.

I thank you.

Mr. CONYERS. Well said.

That ends the hearings for the day.

Mr. FYFE. Thank you.

[The prepared statement of Mr. Fyfe follows:]

Statement of Prof. James J. Fyfe

Mr. Chairman and Members of the Subcommittee:

I am pleased and honored to appear before you today to discuss the proposed "good faith" exception to the exclusionary rule. Based on my experience as a police officer and my research as a scholar, I oppose any change.

Before doing that, let me review briefly my background. Since 1979, I have been an associate professor of justice at The American University, and a senior fellow of the Police Foundation. I am also a contributing editor of the Criminal Law Bulletin, and have consulted and worked on police and criminal justice matters with a variety of police organizations, government agencies, and citizens' groups. I have published three books and approximately 25 articles, book chapters, and monographs on police and criminal justice matters.

For the 16 years prior to 1979, I was a New York City police officer. I worked on patrol for nine years in Brooklyn, Times Square, and Queens, and have participated in hundreds of arrests, searches, and seizures. I hold several departmental citations for excellent police duty, and left the department as a lieutenant after serving in the Police Academy for nearly six years. While I was a police officer, I earned bachelor's, master's, and Ph.D. degrees in criminal justice and was an adjunct professor at John Jay College of Criminal Justice, City University of New York.

I do not appear here as the spokesman of either The American University or the Police Foundation. I appear as an individual who has spent his adult life doing police work, and thinking, studying, teaching, and writing about police work.

I know that the legislation under consideration by this subcommittee applies only to federal court proceedings. For several reasons, however, I would prefer not to limit my observations to federal prosecutions, but to discuss the exclusionary rule generally. One reason is that the Supreme Court is now

considering a case that presents many of the same issues as the proposed legislation, and its decision will affect state criminal prosecutions as well as federal prosecutions.[1] Second, the decisions of the United States Congress regarding the present proposed federal legislation undoubtedly also will influence many state legislatures.[2] If this Congress approves the proposed legislation, it is probable that many states also will enact similar legislation. Third, much of the evidence marshalled on behalf of a good faith exception is based upon analyses of data gathered at the state level, where the bulk of this country's criminal prosectutions occur.[3]

Because I am not an attorney or a political scientist who has studied at great length issues of federalism and the balance of powers, I will leave to those more qualified than I questions about the authority of Congress to modify a rule promulgated by the Supreme Court to protect the Constitutional rights of Americans.

However, I would like to discuss five issues concerning the Fourth Amendment, the exclusionary rule, and remedies for unreasonable search and seizure.

1. Good Faith Execption Unworkable

The first reason that this Congress should not enact a good faith exception is that it places an impossible mandate on our criminal courts. A good faith exception requires courts to determine whether police had were acting in good or bad faith, and that simply cannot be done. There is no objective test that will allow the courts to divine a police officer's thoughts and motives.

Our trial courts presently are charged with the responsibility of determining what occurred at police searches and seizures and with ruling on the reasonableness of those searches and seizures. That is a difficult task because

these determinations are usually based upon the testimony of the officers involved. Even under the best of circumstances, parties to an incident perceive it subjectively rather than objectively. Under the worst of circumstances, when officers intentionally conduct searches that violate the Fourth Amendment, we cannot assume that their violations will come to light or that they will admit their "bad faith" on the witness stand. Instead, it is more realistic to assume that they will also testify in bad faith, and lie about the circumstances of their searches and about their motives.

Stated most simply, the only way to determine whether an officer has acted in good faith during the course of an illegal search is to ask him whether his thoughts and motives were noble or malicious. It is hopeless to expect admissions of malice from officers who knowingly conduct illegal searches. To such officers, the rules mean as little in the courtroom as they do on the streets.

In my experience, such officers are a very small minority who do a great deal of damage to citizens' rights, police-community relations, and our concept of justice. Such officers view the criminal process as a game and, like baseball pitchers who throw at batters' heads, they will do anything to win it. Such officers reason that, since criminals are not constrained by the rules, and since criminals often lie from the witness stand, police are at a disadvantage if they allow themselves to be constrained by the rules or by the truth.

A good faith exception will saddle our trial courts with the impossible task of trying to get inside officers' heads. A good faith exception will provide overzealous officers with another way around the rules, and will increase the damage done by that small minority of abusive officers in our police

service. Those who suggest otherwise, and who point out that there is no evidence of abuse of the good faith exception where it has been adopted,[4] are engaged in circular reasoning of the most ingenuous kind. No such evidence has been found or should have been expected because it must come from the testimony of abusive officers, and they are not going to provide it. I would also point out that I have seen no evidence of improvements in the efficiency or effectiveness of the justice system where the good faith exception is in force, nor have I seen any evidence that the good faith exception has affected in any measurable way rates of crime and victimization in those places.

2. Exclusionary Rule Only Available Remedy for Illegal Search.

Those who favor a good faith exception also argue that redress for victims of illegal searches is most appropriately obtained through suits against the officers and police departments involved, and that it makes little sense to remedy illegal searches by excluding from criminal trials reliable evidence of guilt.[5]

This argument is flawed. In the real world, the exclusionary rule is the only effective way to deter and remedy illegal police searches. To prevail in a suit against a police officer who has illegally searched him, an individual must prove that the officer involved was acting in bad faith, because police officers who act illegally but in good faith enjoy immunity from civil liability for their actions. Again, it is implausible to expect an officer who has knowingly searched somebody illegally to admit that from the witness stand when a profession of good faith will relieve him of liability.

Further, even if such a case can be proven, its consequences to the officer and police department involved will almost certainly be nil. Under prevailing law, muncipalities are immune from paying punitive damages for the illegal acts

of their employees.[6] Officers may be ordered to pay punitive damages, but these are usually quite small, not recoverable, or indemnified by the officer's employer. From the point of view of the municipality that is the defendant in such a case, therefore, the worst possible outcome is an award of compensatory damages. But illegal searches (especially of persons not found in possession of contraband) rarely result in the lasting damage or disability that must be demonstrated before the award of meaningful compensatory damages.

Proponents of a good faith exception also argue that an effective deterrent and remedy for illegal police searches is internal discipline administered by the superiors of the officers involved. There is no question that this would be true if we could expect that such discipline would follow illegal searches. But, as Chief Justice Burger has pointed out, we cannot expect that.[7]

We cannot expect it because police chiefs, under great pressure to "do something about crime," cannot be expected to discipline officers who have been overzealous in their own personal fights against crime. Does anyone <u>really</u> expect, for example, that a police officer whose illegal search resulted in the confiscation of a large amount of drugs would be disciplined by his police department for his illegal actions? I know of no statistics regarding internal discipline of police officers who were found at suppression hearings to have conducted illegal searches, but in my 20 years of experience with the police, I have never heard of such a case, in New York City or any other jurisdiction.

Indeed, even in the most egregious cases of violations of citizens' Constitutional rights, the remedies provided through the courts and police disciplinary proceedings are usually slight and hardly serve as a deterrent to

misconduct by either officers or their employers. Two years ago, I testified in a federal bench trial in which an Atlanta police officer was found to have violated a citizens' Constitutional rights by unreasonably seizing him, beating him, and shooting him to death. In that case, the judge ruled that the officer's shooting also violated Georgia's criminal law, and that the officer had, therefore, incurred criminal liability.

It cost the man's family $4,000 to bury him. As a remedy for the violations of his rights to liberty, due process, and life, his family was awarded a total of $25,000. They have not yet recovered a nickel for their loss because the City of Atlanta is fighting even that judgment.[8] The officer involved has never been prosecuted, has never been disciplined by his superiors, and is still employed in good standing as an armed police officer of the City of Atlanta.

I discuss this case only for one purpose: to point out that the remedies available through the civil courts or police departments to citizens whose rights have been violated by police--or to the survivors of such citizens--are often ineffectual and of little deterrent value. If an unreasonable seizure, beating, shooting, and death is worth only $25,000, and if the officer involved suffers no penalty from his employer, how meager may the remedies be for a mere unreasonable search?

<u>3. Exclusionary Rule and Magisterial Accountability</u>.

The legislation now before Congress provides that, absent a showing of fraud in an officer's applications for search warrants, such warrants constitute <u>prima facie</u> evidence of officers' reasonable good faith. Consequently, evidence seized under authority of search warrants by officers not shown to have lied or "recklessly disregarded the truth" on their affidavits to issuing magistrates would not be subject to exclusion.

This proposal places an astonishing degree of faith in the magistrates who issue search warrants. Indeed, it would make courts of last resort of our lowest magistrates. I find it startling and inconsistent that those who are so critical of the exclusionary rule, which was fashioned at the highest level of the American judiciary, now ask this Congress to overrule the Supreme Court, at the same time that they propose to exempt from any review the lowest magistrates' determinations of probable cause.

I know many police officers and prosecutors. Often, in private conversation--and sometimes in public statements--they are critical of the decisions and qualifications of magistrates and trial court judges. Often, I agree with them. I do not think that murderers should receive sentences of probation, but that has happened on occasion. I do not think that armed robbers and hostage-takers who hold police at bay for several hours should be released on $250 bond, but that has also happened. I do not think that a criminal sentence should be decided by a courtroom flip of a coin or by a show of spectators' hands, but those things have also happened. But if we demand review of judicial leniency or arbitrariness in such cases, we must also provide a check on judicial leniency and arbitrariness where determinations of probable cause are concerned.

It is a fundamental principle of our democracy that public officials be held accountable for their decisions. Police officers answer to their superiors. Police chiefs answer to mayors. Members of this Subcommittee answer to the electorate. Only the nine members of the Supreme Court answer to no higher authority or stand before no electorate.

The legislation being considered by this Subcommittee demonstrates that there exists some dissatisfaction that the highest court in the land enjoys that

status, and that there exists some sentiment that its decisions should be subject to review. How great will that dissatisfaction become if we also exempt from review the determinations of probable cause of every magistrate in the land?

It is easy to predict one consequence of automatic admission of evidence seized by officers not shown to have lied to magistrates. Police officers and prosecutors know that there are "cops' judges" who accept at face value nearly everything officers say, and who are believed to give the benefit of every doubt to prosecutors. Defense attorneys know that also, so they seek to argue their cases before "defendants' judges," who are believed to review more carefully all police testimony, and who are believed to compel police and prosecutors to adhere rigidly to evidentiary and procedural rules. In the city where I was a police officer, my fellow officers welcomed the opportunity to appear before a judge known around the courthouse as "Sam the Sender," but few would have voluntarily chosen to appear before a "defendants' judge" known as "Cut-'Em-Loose Bruce."

If a good faith exception becomes law, and if warrants are made irreversible, even the most well-intentioned officers will be encouraged to seek warrants from "cops' judges," whose definitions of probable cause may be more lenient than those of "defendants' judges." Then, armed with irreversible warrants and with a good faith defense against civil liability, they will execute those warrants.

4. Exclusionary Rule Does Deter Good Faith Illegal Searches.

The purpose of the exclusionary rule is to deter police misconduct in the form of illegal searches and seizures. The exclusionary rule is admittedly not an absolute deterrent, but there are few absolutes in any sphere of human activity. The fact is the exclusionary rule is the best deterrent to illegal searches and seizures that the best legal minds in the United States have been able to devise in the 200 years since magistrates and law enforcement officers had unchecked power to authorize and execute searches and seizures of persons and property. We have learned that police departments do not deter officers by disciplining them for illegal searches. If police departments disciplined such officers, a police disciplinary action would follow each successful defense motion to suppress evidence, but that does not occur. Experience suggests also that civil remedies for those illegally searched are also ineffective, and that they do not deter.

Those who favor a good faith exception argue that the exclusionary rule is applied in situations in which no police misconduct is involved, that exclusion cannot deter officers from making good faith mistakes, and that exclusion wrongfully labels as illegal conduct mistakes made by officers acting in good faith performance of their duties. Those arguments are false.

Regardless of the thoughts and motives of the officers involved, searches that violate the Fourth Amendment of the Constitution--the fundamental law of this land--are illegal. Because they are illegal, they are by definition, misconduct. To argue that good faith violations of the Fourth Amendment are not illegal and do not involve misconduct is to argue that ignorance of the law should excuse violations of law by those charged with enforcing the law.

The argument that the exclusionary rule cannot possible deter good faith violations of the Fourth Amendment ignores the responsibilities of police chiefs, whose duty it is to see that police officers know the difference between legal searches and illegal searches. Good faith mistakes occur because individuals do not know the rules. The exclusion of evidence seized illegally but in good faith by officers who do not know the rules of search should alert their supervisors and chiefs to the fact that officers are acting prematurely or otherwise in violation of Constitutional requirements. Chiefs are then put on notice that it would be improper and unprofessional not to improve officers' knowledge of law and legal requirements for search and seizure.

The exclusionary rule serves not only to deter individual officers from illegal searches,[9] but should be viewed as a means of deterring police chiefs from failing to properly train and supervise their officers so that they conduct searches in a way that is lawful.

In his dissent in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,[10] Chief Justice Burger said that:

> Policemen do not have the time, inclincation, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow.

Unfortunately, the Chief Justice's assessment is all too accurate. The public policy implication of his observation, however, should not call for the good faith exception. A good faith exception accepts as a given the generally poor state of police knowledge of the law they are sworn to enforce. The policy implication of the Chief Justice's observation is that police chiefs must take the time to train officers in the law they are sworn to enforce.

-11-

With some rare exceptions, the law of search is not complicated, and it requires no great amount of legal training to assure that officers possess the information they need to act in conformity with the Constitution.[11] Certainly, that was true of Illinois v. Gates, the good faith exception case pending before the Supreme Court. In that case, there existed no probable cause when the police applied for and obtained their search warrant, because the police had corroborated none of the criminal activities alleged in the letter they had received from their anonymous informant.[12]

It does not follow that the law should be changed because it is sometimes mistakenly violated by police and--as the Gates case illustrates--by magistrates. Instead, we should seek to change the other half of the equation involved in good faith mistakes: officers' and magistrates' insufficient knowledge of the law.

With some exception, the efforts being made to provide police knowledge of the law are deplorable. Sixteen years ago, the International Association of Chiefs of Police observed that American police officers, on the average, received considerably less training than barbers. I know of no American jurisdiction in which police officers benefit from as much training as the 4,000 hours the Chief's Association cited as the norm for American barbers.[13] Most American police officers receive more and better training than was available 16 years ago, but we still have a long way to go before our police are as well trained as our barbers. I say this not to denigrate barbers, but to point out that the people who cut our hair are better trained in their craft than the people who enforce our laws, and who are authorized by those laws to search, seize, and even to kill in our behalf.

-12-

Those who seek a good faith exception point out that other freedom-loving countries do not employ an exclusionary rule in their criminal proceedings.[14] But that is not the only way in which our criminal justice system is unique. American criminal courts are unique because they are based on an adversarial model rather than the inquisitorial model employed in most other countries. Our police are unique because they are decentralized to a greater degree than is true of any other western country. With that great decentralization comes a wider variation in police standards and training, and police knowledge of the laws under which they work than is true of any other western country. I know of police departments in which officers are very well trained and very knowledgeable of the law. I also know of police departments in which officers are given guns, badges, and all the powers of office with absolutely no training to prepare them for their difficult work. I know of courts that have ruled that it is reasonable and not grossly negligent for police departments to violate the minimum training laws of their states by failing to provide officers with any training whatever.

We do not take seriously suggestions that we should adopt an inquisitorial model of justice. We do not take seriously suggestions that we should change our police system to the highly centralized model found in other countries. Why then should we consider modifying the only effective safeguard, in terms of policing, of Fourth Amendment rights? Those who seek the good faith exception would far better serve the cause of justice and police professionalism if they argued for better legal training for police and for in-house legal counsel to advise officers whether their warrant affidavits meet Constitutional standards.

Regardless of the stated purpose of the exclusionary rule, we would also be well advised to think of it as a means of deterring misconduct by magistrates who issue warrants when there exists no probable cause to do so. Application of the exclusionary rule is the only way to do that. Unlike police officers and police departments, judges cannot be sued for their professional mistakes. The judge who issued the warrant in the Gates case, for example, no doubt acted in good faith when he did so. But he has been told by three other courts that he erred in a fundamental professional judgment, and he now faces the possibility that the highest court in the land will also rule that his determination of probable cause was in error. It is unlikely that he will make the same good faith error again, just as it is unlikely that the police involved will repeat their good faith errors.

5. Effects of Exclusionary Rule and Good Faith Exception Greatly Overstated.

Proponents of a good faith exception suggest that great numbers of dangerous criminals are set free to prey upon the public because the exclusionary rule is so frequently applied in cases in which officers have made good faith illegal searches.[15] That simply is not so. There is no empirical research that supports that suggestion, and those who argue otherwise misinterpret the relevant research.

The most recent study of the effects of the exclusionary rule, for example, was conducted by the National Institute of Justice, and found that 4.8 percent of the felony cases rejected by California prosecutors during 1976 to 1979 failed because of "search and seizure problems.[16] That sounds very impressive--
after all, 4.8 percent is nearly one in 20.

That statement, however, must be read very carefully. Upon closer examination, it is not at all an impressive argument for a good faith exception.

Many sophisticated observers have interpreted it to mean that 4.8 percent of California's felony cases failed prosecutorial review or were dismissed because of "search and seizure" problems.[17] The 4.8 percent to which the National Institute of Justice refers is a percentage of rejected cases, rather than a percentage of all cases. Thus, one of every 20 failed cases was rejected because of "search and seizure problems," while the other 19--95.2 percent--failed for other reasons. The cases that failed because of "search and seizure problems" represent 0.78 percent of all felony cases presented to prosecutors in those years, nearly three quarters of which (71.5 percent) involved allegations of drug offenses rather than crimes against people or property.

The data relevant to consideration of the effects of the exclusionary rule and "search and seizure" problems in California during 1976 to 1979 are these:

Cases presented to prosecutors	520,993 (100.00%)
Cases rejected by prosecutors	86,033 (16.51%)
-other than search and seizure problems	81,903 (15.72%)
-search and seizure problems	4,130 (0.78%)
Type case rejected for search and seizure problems	
drugs	2,953 (0.57%)
burglary	237 (0.05%)
assault	134 (0.03%)
robbery	88 (0.02%)
grand theft auto	48 (0.009%)
grand theft	33 (0.006%)
rape	12 (0.002%)
murder	4 (0.001%)
other felonies*	641 (0.12%)

*Includes weapons possession offenses and others not specified.

Without ignoring the seriousness of these failed cases, it is fair to say that search and seizure problems have very little effect on California prosecutors' decisions to proceed with cases, especially those involving offenses against people. During 1976-79, 648,336 murders, rapes, assaults, and robberies were reported to California police. About one in 2,500 of those offenses (248, or 0.04 percent) resulted in prosecutorial decisions not to proceed. Further, once a case gets to court, the exclusionary rule's effects are no more impressive. NIJ reports that 10 (1.9%) of the 519 preliminary hearings on felony cases in the Los Angeles District Attorney's Central Branch during August 20-September 20, 1982, resulted in search and seizure related dismissals. The research also analyzed the 15,403 felony dismissals in California Superior Courts during 1976 to 1979, and found that 575 were because of search and seizure problems. These represent about one in 250 (0.4 percent) of the estimated 157,147 felony cases processed through California Superior Courts during those years.[18]

Again, it is difficult to conclude that the exclusionary rule has a significant effect on criminal prosecutions in California (where the exclusionary rule is more stringent than in any other state).[19] Indeed, search and seizure related dismissals (not all of which involve good faith mistakes) are insignificant even in comparison to other reasons for case failure. The evidence provided by the recent NIJ study is consistent with that found in federal courts by the General Accounting Office,[20] and in San Diego and Jacksonville by researchers from the University of California-Davis.[21] None of these studies shows that the exclusionary rule is significant impediment to prosecution.

Conclusions.

In my view, the appropriate course of action regarding the pending good faith legislation is clear. It should be rejected by this Subcommittee and by Congress.

Enactment of the legislation would place upon our courts the impossible burden of divining police officers' thoughts and motives. It will remove the only working remedy for illegal police search, will discourage police professionalism, and will give the stamp of approval to police incompetence and misconduct. It will remove the only remedy for judicial misconduct and incompetence in issuance of warrants, and will make every magistrate in the land a court of last resort.

Finally, it will lead the American people to become even more disappointed and distrustful of the criminal justice system than is true now. That is so because the public has been led to believe that the exclusionary rule is a signficant impediment to justice. If this legislation is enacted and found to be within the authority of this Congress, the American people will soon find that they have gained nothing, and that they have lost the best means of assuring an important Bill of Rights guarantee.

It is true that the current exclusionary rule protects some small number of criminals. That is unfortunate, but it is a necessary and minor trade-off for the protection against judicial and police incompetence and abritrariness that the rule provides for the rest of us.

Thank you very much.

NOTES

1. Illinois v. Gates, No. 81-430.

2. See, e.g., Chief Justice Burger's dissent in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403U.S. 388, 412-424 (1971).

3. National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982).

4. At least one of the amicus curiae briefs filed in Gates, supra, note 1, makes this argument.

5. See, e.g., John P. Granfield, "Revising the Exclusionary Rule," The Atlanta Journal-Constitution, April 6, 1983.

6. City of Newport v. Fact Concerts, Inc., 453U.S. 247 (1981).

7. Note 2 supra.

8. Gilmere v. Atlanta, U.S.D.C. Atlanta, #C80-181 (1982).

9. It has been my experience that officers whose searches are ruled unconstitutional at suppression hearings attempt to find out why they were ruled in error, and to avoid future similar mistakes.

10. Note 2 supra.

11. One such exception was the convoluted state of automobile search law that prevailed prior to U.S. v. Ross, 50U.S.L.W. 4580 (June 1, 1982). See James J. Fyfe, "Robbins, Belton & Ross: The Policeman's Lot Becomes a Happier One," Criminal Law Bulletin, September/October 1982.

12. The only information in the Gates letter confirmed by the police before they applied for their search warrant was Mr. Gates' flight from Illinois to Florida.

13. Reported in National Advisory Commission on Criminal Justice Standards & Goals, Police, 1973, 380.

14. Note 5 supra.

15. Norman Darwick, "Why Keep Good Evidence Out of Court?" Washington Post, March 22, 1983.

16. Note 3 supra.

17. See, for example, Note 5 supra; Ira Glasser, letter to the editor of the New York Times, February 7, 1983.

18. Obtained from California Bureau of Criminal Statistics.

19. In a number of cases, the California Supreme Court has ruled that evidence in California courts must be suppressed in circumstances not mandated by the Fourth Amendment. One of the provisions of California's recent Proposition Eight in fact, was designed to bring the California courts' application of the exclusionary rule into conformity with U.S. Supreme Court rules.

20. Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions, 1979.

21. Floyd Feeney, Forrest Dill, and Adrianne Weir, Arrests Without Conviction: How Often They Occur and Why, 1982.

PREPARED STATEMENT OF JAMES J. FYFE

Into the current debate about the exclusionary rule,[1] the staff of the National Institute of Justice (NIJ) has released a study of the rule's "practical effects" on state criminal justice operations.[2] In its report, NIJ—the research arm of the United States Department of Justice—presents data concerning California cases in which prosecutions were rejected or dismissals obtained because of apparently violative searches and seizures. NIJ also reports on the arrest histories of persons involved in these cases but, as befits an impartial and official research group, does not offer extensive interpretations of its findings. Instead, the study merely reports them in order to help "policymakers and others attempting to understand how the rule presently works and the implications of any changes in its application." [3] The major findings of the research are three:

First, the exclusionary rule does appear to be an important factor in the processing of state felony cases. The analysis of California data reveals that almost 5 percent of felony rejections statewide and an even larger proportion in large urban areas—up to 15 percent in one office in Los Angeles—were rejected for search and seizures problems.

Second, the findings demonstrate conclusively that the effects of the exclusionary rule are most evident in drug cases and are felt in a significant portion of drug arrests. Over 70 percent of all the felony cases rejected because of search and seizure problems in California and San Diego were drug cases. During the four-year period 1976 through 1979, almost 3,000 felony drug arrests in California were not prosecuted because of search and seizure problems.

For many defendants, the rejected arrest was only one in a series of arrests. In San Diego, two-thirds of the defendants in rejected cases had either prior or subsequent arrests on their records. Almost half of the defendants in the statewide data set whose cases were rejected for search and seizure problems were rearrested within two years. Also, the defendants both statewide and in San Diego who were rearrested had an average of three rearrests during the following-up period. Analysis of the nature of the felony rearrests statewide reveals that, although many of the rearrests were for drug crimes, the majority were for personal or property crimes, or for other felony offenses.[4]

This workshop discusses those findings and the data and analyses upon which they are based.

SOME CAVEATS

Any discussion of the NIJ study's contribution to knowledge about the effects of the exclusionary rule should be preceded by an explanation of the study's limitations. First, as NIJ rightly points out, the study provides no final resolution to the debate over the exclusionary rule. That is so because the study does not deal at all with the rule's raison d'etre: the deterrence of police misconduct. While decision

[1] See, e.g., Canon, "The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?" 62 Judicature 398 (1979).
[2] National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California.*
[3] *Id.* at ii. The study examines only the application of the rule to search and seizure, and does not include for analysis case affected by Fifth and Sixth Amendment provisions.
[4] *Id.* at 18.

makers in legislatures, executive offices, and the courts should certainly take into account the rule's possible effects on arrest, conviction, and recidivism rates (especially if these are substantially influenced by the exclusion of evidence of unquestioned probative value), these considerations should not be the ones upon which a determination to overhaul the rule should be made. Unless the NIJ study or other research demonstrated that the rule caused widespread criminality or victimization, the most useful analysis of its effects requires study of the degree to which the rule deters unreasonable searches. No research (including the NIJ study) finds that the rule is responsible for such a state of criminal anarchy. Thus, despite the good efforts of NIJ, its research has not advanced knowledge about the core issue in this debate.

The NIJ study also points out that the only recent empirical study of the exclusionary rule examined its effects upon federal felony prosecutions,[5] which comprise only a very small (and atypical) fraction of the daily business of American justice. To study the effects of the rule on state felony prosecutions, however, NIJ necessarily chose California as a research site. It did so because the data required for its analyses were richest and most available in California, a state whose crime justice statistics are probably the most comprehensive and most useful criminal justice data base in the nation.[6] It is probably, in fact, that the generally poor criminal justice statistics maintained by other states would have made it impossible to have readily available data for this study in any state but California.

The fact that such rich data are available only in California, however, suggests a second limitation of the study: it is probable that the operations of the California state and local justice systems studied are unique cases not readily generalizable to other states. Not only are California's criminal justice statistics unique, but its police are also unique. They are generally better educated, better trained, and better paid than are police in other states.[7] Despite their generally high qualifications, there is also evidence to suggest that they may also be more aggressive in their dealings with suspicious persons and circumstances than are police in other states, and that they may consequently experience more difficulty convincing prosecutors and judges of the reasonableness of their searches and seizures than is generally true of police in other states.[8] In addition, it is also likely that a greater proportion of their business may involve attempts to detect drug offenses [9]—which the study found to comprise the majority of cases affected by the exclusionary rule—than is true of other police. In short, if California police are generally more aggressive in their attempts to detect crime than is true of other police, and if they work in an environment characterized by a relatively high frequency of drug offenses, the exclusionary rule may affect the operations of California's criminal justice system more than is true in other states. If that is so, the study's findings might not hold in other states.

THE EXCLUSIONARY RULE AND FELONY PROCESSING

Given these caveats, we can proceed to interpret the findings of the NIJ study. NIJ first sought to describe the effects of the exclusionary rule upon police screening of arrests made by officers.[10] Statewide data for such an analysis were not available, but the researchers found and were given access to records of all San Diego Police Department felony arrests during October, 1981, in which the police department itself declined to forward cases to the prosecutor, but instead released arrestees without charges. Here, the researchers report that:

"Although problems with victims and witnesses or lack of sufficient evidence were cited as the main reasons for release in more than 60 percent of the cases, search and seizure problems were reported to be the primary reason for 6 percent of these releases by the police. Based on these data, San Diego officials estimate that in 1981, approximately 130 felony arrestees were released and the charges against them dropped by police primarily because of a search and seizure problem." [11]

Without knowledge of the total number of felony arrests in San Diego, or of the percentage of that total screened out of the system, it is not possible to determine the effects of the rule on the San Diego arrest process. Further, because the method by which San Diego officials used the October, 1981 data to arrive at their estimate that 130 felony arrestees were freed by police during 1981 because of the rule, it is not possible to determine how many offenders "walked" because of the rule during October, 1981. In addition, the study does not identify the specific search and seizure problems involved in these releases (e.g., improper auto search; search without probable cause; improper warrant; improper search of premises), so that it is not possible to predict the effects upon these figures of various changes in the application of the rule. Finally, the study does not indicate the alleged offenses for which the releases suspects were originally arrested by police, so that it is not possible to determine the extent to which the released suspects may have caused injury to people or loss or damage to property.[12]

Far more easily determined, however, is the fact that the exclusionary rule's impact on arrest screening (6 percent) was less than one-tenth as great as the effect of "problems with victims and witnesses or lack of sufficient evidence" (more than 60 percent). Thus, it would appear that the exclusionary rule is a far less significant barrier to police referrals of arrests to prosecutors than are problems with victims and witnesses or lack of sufficient evidence. Further, it is probable that the cases affected by the exclusionary rule involved far less damage to public interests or to individuals or property than is true of the cases screened out because of problems with victims, witnesses, or evidence sufficiency. If the statewide data analyzed in the NIJ study are comparable to the October, 1981 San Diego data, it is probable that a great percentage of the San Diego exclusionary rule releases involved neither victims nor witnesses, but instead involved offenses related to sale or possession of narcotics or weapons.[13] Weapons and drug cases only infrequently involve victims or witnesses, and very rarely involve questions of evidence sufficiency: individuals become victims or witnesses to weapons offenses when those weapons are used in crimes of violence, so that problems with victims or witnesses would most often involve arrests in which such offenses become the primary charge.[14] In addition, because it is difficult to hypothesize a weapon or drug possession arrest without the actual recovery by the police of a weapon or a drug, it is also probable that evidence sufficiency is rarely a problem in such cases. Conversely, it is almost certain that the manner in which such evidence was found and seized by the police is the major barrier to processing such arrests.

Both quantitatively and qualitively, therefore, it is evident that the effects of the exclusionary rule on police screening of San Diego felony arrestees is miniscule in comparison to the effects of problems with victims and witnesses or evidence sufficiency. If 130 people, most of whom were arrested for drug offenses, were released by San Diego police because of search and seizure problems during 1981, it must be that more than 1,300 people, a far greater percentage of whom were arrested for crimes against people or property, were released for reasons other than the exclusionary rule. The major implication of that finding appears to be that eliminating problems with victims and witnesses and seeking means of developing evidence sufficient for successful prosecution would have far greater effect on the operations of San Diego's police arrest screening process than would any alteration of the exclusionary rule.

The NIJ study also examined the degree to which the exclusionary rule affected prosecutors' decisions to proceed against the arrestees brought to them by police. Statewide, the researchers report that 4.8 percent of the felony cases rejected for

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[5] Comptroller General of the United States, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions.*

[6] The California Bureau of Criminal Statistics compiles Offender-Based Transaction Statistics (OBTS) that track arrestees through the system to final disposition of their cases. These are generally regarded by researchers as a unique and valuable data base. See, e.g., Pope, *The Judicial Processing of Assault and Burglary Offenders in Twelve California Counties.*

[7] See, e.g., Police Executive Research Forum and Police Foundation, *Survey of Police Operational and Administrative Practices—1981.*

[8] See, e.g., *Lawson* v. *Kolender,* pending U.S. Supreme Court #81-1320 which involves a challenge to the Constitutionality of a California statute and its enforcement by police in the San Diego area. The statute requires "suspicious persons" to identify themselves and to explain their presence to police officers, and defines as a misdemeanor the failure to do so. The plaintiff in this case was arrested more than ten times in 20 months for violating this statute.

[9] See, e.g., National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Organized Crime* at 14, which reports that drug importation and distribution is a "major manifestation" of organized crime in the western United States, and that there "are many independents operating in the areas bordering Mexico."

[10] Note 2 *supra* at 9. The screening process examined here involves the determination by police officials of whether individuals taken into custody should be released from police facilities without charges.

[11] *Id.* at 9.

[12] *Id.*

[13] *Id.* at 12–13. The California statewide data regarding the types offenses alleged in cases subsequently dropped because of search and seizure problems are discussed below.

[14] An individual who employed a handgun in a robbery, for example, would face the primary charge of robbery.

prosecution during 1976–1979 were rejected primarily because of search and seizure problems. Thus, more than 24 of every 25 cases rejected for prosecution were rejected for reasons other than the exclusionary rule. Further, as a percentage of all felony cases brought by police to California prosecutors, search and seizure rejections are infinitesimal. During 1976–1979, the study reports, California prosecutors were presented by police with 520,993 felony cases. Of these, they rejected 86,033 (16.5 percent), 4,130 of which (0.8 percent of total cases) were rejected for search and seizure reasons.[15] In San Diego during 1980, the study reports, prosecutors were presented with 14,478 felony cases. Of these, they declined to proceed in 3,840 cases (26.5 percent), citing search and seizure problems in 327 cases (8.5 percent of total rejections; 2.3 percent of all felony cases).[16] In the Los Angeles County District Attorney's Pomona office in 1981, prosecutors declined to proceed in 493 felony cases, 58 (11.8 percent) of which involved search and seizure problems.[17] NIJ researchers also selected a random sample of 432 felony cases rejected by the Los Angeles County District Attorney's Central Operations office in 1981, and found that 63 (14.6 percent) were rejected because of search and seizure problems.[18]

What do these numbers show? They show that, in California as a whole, and in the San Diego and Los Angeles offices studied, the great majority of rejected cases involve prosecutorial problems other than search and seizure. As both a percentage of cases rejected and as a percentage of all cases handled by prosecutors (where those data are available), therefore, search and seizure rejections are quite small. Equally interesting is what the numbers do not show. Like the police screening figures presented in the study, the prosecutorial rejection figures provide no information concerning the numbers of people who are searched under circumstances violative of the exclusionary rule, and who are released on the street without being arrested because they are found to be in possession of no contraband.

The NIJ researchers also surveyed the effects of the rule on cases that reached California courtrooms. Here, records of the Los Angeles County District Attorney's Central Branch revealed that 519 preliminary hearings on felony cases were held in lower courts during August 20–September 20, 1982. Thirty-two (6.2 percent) of these resulted in dismissals, ten (1.9 percent) because of search and seizure problems. At the trial level, the researchers analyzed the 15,403 felony dismissals in California Superior Courts during 1976–1979, and found that 575 (3.7 percent) involved search and seizure problems. The study presents no figures that make it possible to determine the significance of search and seizure related dismissals as a percentage of all Superior Court felony case dispositions, but the estimate of the California Bureau of Criminal Statistics is that 157,147 felony cases were processed through California Superior Courts during those years.[19] Thus, the 575 search and seizure dismissals represent one in 250 (0.4 percent) of the felony cases that came before California Superior Courts during 1976–1979. It is again difficult to conclude that different dispositions in these relatively few cases would have better served Californians' quality of life or the cause of justice in any substantial way, especially if the cost of such change had been a weakening of the evidentiary rules that determine the outcomes of all criminal cases coming before the bench.

TYPE OF CRIME

To supplement its quantitative analyses of the effects of the exclusionary rule, NJ obtained data on the most serious charges against felony arrestees whose cases were rejected by prosecutors throughout California during 1976–1979. Of the 4,130 rejections reported, 2,953 (71.5 percent) involved alleged drug offenses, 41 (15.5 percent) involved "other felonies",[20] and 217 (5.3 percent) involved burglaries. Assualt, robbery, rape, and murder, the four offenses included in the Federal Bureau of Investigation's violent crime index, accounted for 248 (6.0 percent) of all rejections,[21] or about one in every 2,500 (0.04 percent) of the 648,336 such offenses reported to California police during those years.[22]

[15] *Id.* at 10. The percentage of total cases rejected for search and seizure related problems (0.8 percent) is not presented by NIJ, but was calculated by this author.
[16] *Id.* at 10. Here again, the percentage of total cases rejected for search and seizure reasons (2.3 percent) is not presented in the NIJ report.
[17] *Id.* at 11.
[18] *Id.*
[19] The author is grateful to Charlotte Rhea of the California Bureau of Criminal Statistics for providing these figures, which the Bureau estimates may be underreported by 30 to 35 percent.
[20] Note 2 *supra* at 12 reports that "other felonies" include weapons offenses and felonies other than drug offenses, burglary, assault, robbery, grand theft auto, grand theft, rape, and murder.
[21] *Id.* Percentage of rejections by offense are as follows: Assault—3.2 percent; robbery—2.1 percent; rape—0.3 percent; and murder—0.1 percent.
[22] Derived from Federal Bureau of Investigation, *Uniform Crime Reports* 1976–1979.

While the impact of the rule on prosecutorial decisions to proceed with cases involving alleged violent crimes appears negligible, the study suggests that prosecutions of drug offenses are more seriously affected. In Pomona, for example, prosecutors reviewed 1,131 felony cases in 1981, and rejected 58 (5.1 percent) on search and seizure grounds. Among the 114 drug cases reviewed, however, 37 (32.5 percent) were rejected for search and seizure reasons. Similar figures were obtained in NIJ's sample of Los Angeles Central Office Operations case reviews, where 4.6 percent (63) of all felony cases and 29 percent (42) of all drug cases were rejected.[23] Thus, it is clear that the police officers and prosecutors most frustrated with the exclusionary rule are those whose business involves the processing of drug cases.

THE ACTORS

NIJ's survey of the criminal histories of those whose cases were diverted out of the system because of search and seizure problems analyzes several data sets. The past arrest records of the 327 individuals whose cases were rejected by San Diego prosecutors in 1980 resulted in the finding that 169 (58.3 percent of those whose files were located) had been previously arrested; 145 (50 percent) had records of prior felony arrests, and 24 (8.3 percent) had prior misdemeanor arrests only.[24] No data are presented on either the nature of the charges or the dispositions of prior arrest cases.

The records of these same 290 subjects were then examined for histories of arrests subsequent to their 1980 case rejections. Here it was found that 152 individuals (52.4 percent) had been rearrested by October 30, 1982. These included 121 individuals (41.7 percent) rearrested for felonies and 31 (10.7 percent) rearrested on misdemeanor charges. In addition, the study reports that eight subjects (2.8 percent of total) were rearrested on 10–18 separate occasions, that eight others (2.8 percent) were rearrested seven to nine times, and that 26 (9.0 percent) were rearrested four to six times. Fifty-seven (20 percent) were rearrested for felonies more than once, 12 of whom (4.1 percent of total) were arrested on six or more occasions, and 27 (9.3 percent) were subsequently rearrested for offenses involving firearms.[25]

Among the California felony arrestees whose cases were rejected because of search and seizure problems during 1976–1977, 981 (45.8 percent) were rearrested within two years. These subjects accounted for 2,713 rearrests (nearly three per rearrestee), 1,270 (46.8 percent) of which involved felonies, while violent (or personal) felonies were charged in 153 cases (15.6 percent). The study presents no indication of the number of subjects involved in these rearrests by specific statutory offense type.[26]

Finally, the study informs us that 200 (69 percent) of the San Diego County arrestees whose files were identifiable had histories of arrests either prior to or subsequent to the rejection of their cases on search and seizure grounds.[27] Except for the observation that, "in spite of the delay which occurs between arrest and incarceration, 5.5 percent, or 16 of the San Diego arrestees studied, were shown to have been arrested, convicted, and sent to State prison by October, 1982," [28] the study does not discuss the dispositions of the arrests either before or after the search and seizure related releases among any of the samples and populations studied.

Interpretation of these findings is difficult. They are offered by NIJ so that we might learn something about "the effects on society" [29] of the release of individuals whose criminal charges were dropped because of search and seizure problems. But what do we learn from these figures? Are we to infer that prior arrest records would somehow not exist had these persons not subsequently been arrested for charges dropped because of search and seizure problems? That hardly seems likely. Or are we to assume that the exclusionary rule frequently benefits those who have been previously arrested? Does that imply that the rule should be altered because those whose cases are affected by it have previously shown themselves unworthy of protection from unreasonable searches? That seems unlikely also, especially since the study provides no information about the dispositions of prior arrests, or about what had been previously proven about those with prior records. Nor, with the exceptions of telling us that three persons had been arrested twice within the same year on charges dropped because of search and seizure problems,[30] does it tell us

[23] Note 2 *supra* at 13.
[24] *Id.*
[25] *Id.* at 14.
[26] *Id.* at 16 classifies felony rearrests by charges, but does not classify felony *rearrestees* by charge. The felony rearrests by charge are as follows: Drugs—594 (46.8 percent); property—323 (25.4 percent); other—200 (15.7 percent); and personal—153 (12.0 percent).
[27] *Id.* at 17.
[28] *Id.* at 15.
[29] *Id.* at 13.
[30] *Id.*

how many prior arrests were also dropped because of search and seizure problems. Or does the study suggest that the great percentage of those with prior arrest records among those rejected for search and seizure reasons indicates that police do not rigidly adhere to Fourth Amendment requirements when dealing with those they know to have been previously arrested?

Other dilemmas exist in interpretation of NIJ's analysis of the subsequent arrest records of those whose cases were dropped because of search and seizure problems. More than half of the San Diego subjects in this study were rearrested within a short period of time, some as often as 18 times. Does that analysis lead to the conclusion that alteration of the exclusionary rule would have prevented the acts with which those people were charged on arrests subsequent to their search and seizure related rejection? That also seems unlikely: had the original charges against them not been dropped, would they have been incarcerated and incapable of committing subsequent acts during the period studied? That is not probable, given the delay between commission of a crime and incarceration noted by the study. Would alteration of the exclusionary rule have prevented 18 future arrests of an individual within a relatively short period of time? Or should we not analyze with care the 17 occasions upon which the individual involved was subsequently arrested and released so that he might be free to commit the last of his alleged offenses? Does the exclusionary rule account for the apparently high rate of recidivism among those studied? If not, what would changing it accomplish, except to increase the rate of unreasonable searches that do not result in arrest, and that never appear on official data sources?

CONCLUSIONS

NIJ's study is certain to draw considerable attention and, as NIJ notes, to serve as a basis for arguments on both sides of the debate over the justification and need for alteration of the exclusionary rule. Even though the study does not address the major question in this debate—the effects of the rule on police misconduct—it is a valuable piece. It suggests that the rule affects very few of the felony cases that enter the California system, and that most of those it does affect involve drug offenses rather than crimes against persons or property. If the outcome of those cases is unsatisfactory, it may be best to alter police techniques of enforcing drug laws, rather than to consider alteration of a rule that is the best approach to deterrence of police misconduct the courts have been able to devise over the last two hundred years. Similarly, if we are to earnestly seek means of assuring that those who have committed criminal acts do not escape liability for their misconduct, we should first explore means of reducing the relatively great numbers of cases in which prosecutions are dropped because of problems with witnesses, victims, and the sufficiency of evidence. Alongside those police and presecutorial problems, the exclusionary rule shrinks to insignificance from event the toughest law enforcement perspective.

Mr. CONYERS. The hearing is adjourned.

[Whereupon, at 11:35 a.m., the subcommittee was adjourned.]

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