The Heritage Foundation Backgrounder

No. 198 | The Heritage Foundation 214 Massachusetts Avenue N.E. Washington, D.C. 20002-4999 (202) 546-4400

July 21, 1982

THE "EXCLUSIONARY RULE": TIME FOR REFORM

INTRODUCTION

A conviction for an aggravated murder, committed in 1964 (Coolidge v. New Hampshire), was reversed by the Supreme Court in 1971.[1] In reversing the conviction, the Court applied the "exclusionary rule," an extremely controversial rule of criminal procedure, which prohibits the introduction into evidence in a criminal trial of material obtained by an illegal search and seizure.* An illegal search and seizure violates the Fourth Amendment of the United States Constitution, which guarantees that

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

---

*Coolidge is a state case. It is doubtful that the exclusionary rule is sufficiently a command of the Constitution to have been required of the states by the Supreme Court. However, this paper considers only what Congress can do about the rule in the federal courts, thereby putting aside the question of continuing to require the rule of the states. What has been said by the Supreme Court in state cases about the rule itself is nevertheless relevant to a discussion of the rule at the federal level.

**Not only searches but also arrests require a warrant based on the Fourth Amendment's "probable cause" standard and obtained from a neutral magistrate. That is, the magistrate must be convinced that "probable cause" for either an arrest or a search exists before he issues the warrant. Searches or arrests made without a warrant, or without meeting the few "exceptions" permitted for searching or arresting without a warrant, are illegal. Evidence (e.g., a confession, fingerprints, etc.) or information gained from either are generally inadmissible under the exclusionary rule.

What happened in this murder case? What was the result of applying the exclusionary rule?

A 14-year old girl had been lured from her house on the pretext of a babysitting job. Eight days later, her body was found by the side of the road several miles from her home town. When evidence pointed increasingly to Edward Coolidge as the murderer, warrants to arrest Coolidge and to search his car were obtained by the police from the State's Attorney General, who was directing the investigation. Coolidge was arrested in his house. The car, sitting in the driveway, was towed to police headquarters. It was searched two days later, and twice again after a year had passed. At Coolidge's jury trial, vacuum sweepings from the car, including particles of gunpowder, were introduced as evidence that the murdered girl had been in the car, and they were part of the evidence which convinced the jury of Coolidge's guilt.

But the Supreme Court reversed Coolidge's conviction and returned the case to New Hampshire to be retried without the admission of the gunpowder evidence. The Court ruled that the search which had obtained the evidence from the car was illegal.* Thus the exclusionary rule prevented the introduction in Coolidge's new trial of reliable evidence of his guilt.

Chief Justice Warren E. Burger protested:

> This Court's decision...dramatically represents a mechanically inflexible response to widely varying degrees of police error and the resulting high price that society pays....A fair trial by jury has resolved doubts about Coolidge's guilt. But now his conviction on retrial is placed in serious question by the remand for a new trial--years after the crime--in which evidence... found relevant and reliable will be withheld from the jury's consideration.[2]

This is not a new complaint. A famous, oft-quoted charge was levelled against the rule in 1926 by Judge Benjamin Cardozo:

> The criminal is to go free because the constable has blundered....A room is searched against the law, and the body of a murdered man is found....The privacy of the home has been infringed and the murderer goes free.[3]

In the years between Cardozo's and Burger's protests, the exclusionary rule has been invoked frequently to prevent the admission

---

*The search was illegal because the search warrant, issued by the Attorney General, had not been issued by a sufficiently neutral and detached judicial officer and because the search, in effect conducted without a warrant, met the criteria of none of the limited permissible exceptions for searching without a warrant which the state claimed justified its search.

of evidence which, in many cases, would have led to conviction and imprisonment. Concurrently, the rate of serious crime has increased, along with public concern about crime.

Burger's dissent in Coolidge stimulated renewed criticism of the exclusionary rule. Critics echo Cardozo and Burger in charging that freeing the guilty by suppressing evidence gained from an illegal search, no matter how trivial the illegality, exacts a disproportionate cost from society's right to enforce its laws, convict the law's violators, and protect itself from future transgressions. Burger has said:

> Freeing either a tiger or a mouse in a schoolhouse is an illegal act, but no rational person would suggest that these two acts should be punished in the same way...society has at least as much right to expect rationally graded responses from judges in place of the "universal capital punishment" we inflict on all evidence when police error is shown in its acquisition.[4]

A variety of other criticisms also are lodged against the rule: it does not deter police illegality; it rewards only the guilty; it ignores the guilt of the offending officer. But the major charge remains that it perversely punishes society by returning the criminal to the streets for want of known, reliable evidence with which to convict. The rule is seen as part of an increasing leniency by courts that prevents society from protecting itself against lawbreakers. As such, it thereby also undermines public respect for the law.

Yet, the rule has its ardent defenders. Yale Kamisar, a noted professor of constitutional law at the University of Michigan, in testimony to Congress in March of 1982, argued:

> Almost always the court is asked to "unring the bell"--to reconstruct events as though the damaging, often damning, evidence never existed. Hence the strong resistance to the...rule. The damaging evidence "flaunts before us the price we pay for the Fourth Amendment."[5]

Because the rule reverses the illegality, many proponents believe the rule is commanded by the Constitution.

Consistently until June 21 and 23, 1982, the application of the rule and its justifications had been minimized by recent Supreme and lower federal court decisions. Even with that limitation, the rule is extremely controversial. Along with the reform of the federal Criminal Code, Congress has been considering what, if anything, can or should be done to realign the balance between the rights of society to enforce its laws and the right of the criminal defendant to due process, including the protection afforded by the exclusionary rule.

The need for congressional action has become even more urgent since June 21 and 23, 1982. On those dates the Supreme

Court decided two cases which might be used by ardent proponents of the rule to claim that the Court has refuted the constitutionality of any legislated change in the rule. That would be an absolutely false charge. However, the application of one of the decisions will reinforce some of the most undesirable effects of the current rule.*

The Attorney General's Task Force on Violent Crime recommended a reasonable, "good faith" exception to the rule.[6] This exception would "prune" the exclusionary rule so that it applied only when a search or seizure was not made by an officer believing his action conformed to law and having reasonable grounds for that belief. It retains a large proportion of the original rule, requiring that the officer at least intend to obey the law. The Justice Department has proposed such legislation.

Other recommendations would completely abolish the rule or apply it only when the illegality is willful and substantial. Abolition of the rule would admit evidence despite any official illegal activity, intentional or unintentional; a willful and substantial exception would admit evidence only when the intentional illegality of the officer reached a certain unacceptable level. Procedures to obtain monetary compensation from the government for an illegal search--a civil damages remedy--also have been proposed as an alternative to or a supplement for the exclusionary rule. And proposals for disciplinary procedures against the offending law officer have been suggested. Some proposals combine two or more of these recommendations. Congress thus far has been unable to decide among them.

Each alternative proposal imposes costs that offset some of its benefits. What clearly would offer more benefits than costs is a package combining a reasonable, good faith legislative exception to the rule, a civil damages remedy, and congressional enactment of federal rules of evidence to mitigate some of the current technicalities and contradictions of Fourth Amendment law.

Enactment of federal rules of evidence is probably a long-range project, if simply because no prior work has been done on it. Legislation proposing the reasonable, good faith alternative and a civil damages remedy has been introduced and hearings have been held. These proposals could be enacted as amendments to the Violent Crimes and Drug Enforcement Act soon to be considered by Congress.

Such a package would permit rearticulation of broader, sounder justifications of the rule than merely its deterrence of future violations of constitutional guarantees by law enforcement personnel and it would mitigate criticisms of the rule as it now

---

*See attached Appendix for a discussion of these cases.

operates. It offers a better balance between the two partially conflicting objectives, society's right to enforce its law and the criminal defendant's right to constitutionally guaranteed protections. And by continuing to require that law enforcement officers intend to obey the law, this package constitutes a strong symbolic position from which to begin an assault on crime. That requirement of intent, combined with the reasonable flexibility granted law enforcement officers by the good faith exception, should help restore faltering public confidence in the law.

DEVELOPMENT OF THE RULE

Boyd v. United States[7] and Weeks v. United States[8] established the exclusionary rule for the federal courts. Boyd held that a law compelling submission of private papers to a court for use as evidence, in effect compelling someone to be a witness against himself in violation of the Fifth Amendment, also resembled the unreasonable search and seizure prohibited by the Fourth Amendment even though physical entry of the defendant's house had not occurred. The law was declared unconstitutional; the papers were returned, or "excluded" from evidence. Weeks "suppressed" incriminating papers seized by a law officer searching a defendant's house without a warrant, in his absence, and without his consent. The search, it was ruled, violated the Fourth Amendment; to protect those rights, the documents had to be excluded.

In Boyd and Weeks the material excluded was neither contraband nor weapons, but private papers. Their protection is at the core of personal liberty secured by law. As Justice William R. Day said in Weeks:

> [It was the] determination of the framers of the Amendments...to provide...a Bill of Rights, securing to the American people...those safeguards which had grown up in England to protect the people from unreasonable searches and seizures....by which there had been invasions of the home and the privacy of the citizens and the seizure of their private papers in support of charges, real or imaginary, made against them....under ...the so-called writs of assistance...in the American colonies....Resistance to these practices had established the principle...enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers.[9]

The rule's applicability has been extended, probably because there is no sufficient way to protect privacy in constitutionally secure places without the extension.* The rule now applies even

---

*Schlesinger argues that illegally possessed items do not enjoy an equal protection. Steven R. Schlesinger, Testimony before the U.S. Senate Judiciary Subcommittee on Criminal Law, October 5, 1981, esp. pp. 2-5. For purposes of this paper, it is sufficient to note that this is not a widely accepted argument although it deserves further consideration.

to contraband or illegally possessed items and weapons. In 1920, it was ruled that illegally obtained evidence cannot be used to procure further evidence; the derivative evidence was called the "impermissible fruit of the poisonous tree."[10] Since 1963, verbal testimony obtained through an illegal seizure has also been excluded.[11]

Not only has there been expansion of the types of evidence excluded, but since 1960, evidence obtained illegally by state officers has been excluded from federal criminal trials even if the federal officers did not participate in the illegality.[12] The Warren Court, moreover, several times expanded the range of collateral review proceedings in which illegally seized material could be challenged.[13] The two most extensive expansions of the rule's application, however, resulted from extending the rule to the states and strengthening the rules of Fourth and Fourteenth Amendment search and seizure law.

Requiring state conformance with the rule was a two-step process. In 1949, in Wolf v. Colorado,[14] Justice Felix Frankfurter argued that the concept of "privacy against arbitrary intrusion by the police..."[15] at the heart of the Fourth Amendment guarantee was required of the states by the due process clause of the Fourteenth; in short, the states, too, were prohibited from making unreasonable searches and seizures. But Frankfurter believed the Fourteenth Amendment did not require the same means of enforcement as the Fourth. By 1961, in Mapp v. Ohio,[16] the Supreme Court had determined that suppression of illegally seized evidence was the only way to insure the privacy rights guaranteed against the states.

The effect of expanded application was magnified by the development of search and seizure law. The Warren Court increased the stringency of all criminal procedure requirements for both state and national government. Under the Fourth and Fourteenth Amendments, for example, standards for obtaining warrants were tightened and exceptions to searches without warrants greatly narrowed. With more searches and seizures made illegal, the rule suppressed more evidence.

Despite the expansion, however, the rule never has been fully applied. For instance, illegally seized evidence can be used to attack credibility in response to perjurious testimony on cross-examination.[17] Or only the person whose constitutional rights were violated can successfully request suppression of the damaging evidence; co-defendents and co-conspirators do not have "standing."[18] Significantly, even the Warren Court declined to apply Mapp's requirement of state adherence to the rule to cases concluded prior to Mapp.[19]

In recent years, the Court has refused to expand further the rule's application. Indeed, its use has been cut back. The 1974 Calandra decision,[20] for instance, did not allow a grand jury witness to refuse to answer questions based on the illegal seizure

of evidence. Stone v. Powell[21] held that where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, collateral federal habeas corpus relief may not be granted on the basis that illegally seized evidence had been introduced at the trial.

Both the original and subsequent limitations imply recognition of the exclusionary rule's costs to society, particularly as its scope was expanded and evidence was suppressed more frequently. This train of events has been accompanied by a deemphasis of the rule's broader justifications.

RATIONALES OR JUSTIFICATIONS OF THE RULE

Five interrelated justifications have been developed over the life of the rule.

I. The Exclusionary Rule Is of Constitutional Origin.

Proponents of the rule claim that it is a necessary, even if implied, component of constitutional guarantees against unreasonable searches and seizures.* If true, Congress cannot modify the rule by simple legislation. But those proposing abolition or modification label it a "judicially created rule of evidence."** It seems, however, that the extreme formulation of either argument is incorrect.

The rule is not, as its critics insist, "a judicially created rule of evidence" any more than is the prohibition on coerced confessions, which has been developed to implement the Fifth

---

*See, e.g., Kamisar, op. cit.; Stephen H. Sachs, "Statement...of Attorney General of Maryland," Testimony before the U.S. Senate Judiciary Subcommittee on Criminal Law, October 5, 1981, esp. pp. 3-5.

The claim of constitutional origin is usually made when the rule's use is expanded. Justice Day so argued in Weeks (232 US 383, 391-393), as did Justice Clark when requiring the exclusionary rule of the states in Mapp (367 US 643, 649, 654-655). Recently, Justices William Brennan, Thurgood Marshall, and William O. Douglas have made this argument in an unsuccessful protest to diminishing the rule's application. See, e.g., Justice Brennan in Calandra, 414 US 338, 360.

**The phrase is Justice Black's in Wolf, 388 US 25, 40. (When the Justice makes such comments, in Wolf or Mapp, however, they are in single concurring opinions expressing his belief that Fifth Amendment guarantees have to be added to those of the Fourth in order to necessitate the exclusionary rule. These words, thus, do not indicate the judgment of the Court and are not an authoritative statement of the origin of the rule.) See also, Malcolm Richard Wilkey, Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule (Washington, D.C.: National Legal Center for the Public Interest, 1982), p. 11; Steven R. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence (New York: Marcel Dekker, Inc., 1977).

Amendment's literal ban on compulsory self-incrimination. Yet, the exclusionary rule, like the coerced confession ban, is not specifically commanded by the words of the Constitution. And there is merit in the claim of the rule's proponents that the constitutional grant requires a means of enforcement; the rule is one such means. Like the prohibition on coerced confessions, the rule is a judicially implied rule of evidence, but grounded in constitutional principle.

Because the rule is not the direct, specific command of the Constitution, Congress has power to revise the rule. But such revision must not nullify the underlying constitutional principle.

II. The Exclusionary Rule Secures Constitutional Privacy.

This principle is the security of the privacy of individual life from unwarranted governmental invasions. It was at the heart of Justice Joseph P. Bradley's opinion in Boyd:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security.... they apply to all invasions on the part of the government...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....[22]

Or, as Justice Brennan phrased it:

> Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.[23]

III. The Exclusionary Rule Deters Official Violations of Fourth Amendment Guarantees.

Proponents believe the rule is necessary because it deters law enforcement officials from lawless invasions of constitutionally guaranteed privacy. Originally, suppression of illegally seized evidence was "the only way to deter" such invasions.[24] Lately, deterrence is thought to be the "only rationale of the rule." In Calandra, for instance, Justice Lewis Powell argued:

> 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 against unreasonable searches and seizures....[25]

Justice William Rehnquist confirmed the exclusivity of this rationale for at least a plurality of the Court in 1980.[26]

IV. The Exclusionary Rule Preserves Judicial Integrity.

Originally, a "clean-hands" or "judicial integrity" argument was made on behalf of the rule.[27] If the courts admit illegally seized evidence, this justification argues, they participate in and condone illegalities and violations of constitutional rights. Declared Justice Oliver Wendell Holmes:

> 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 inequities to succeed.[28]

V. The Exclusionary Rule Is Necessary to a Government of Laws.

The final justification is even more expansive. It builds on judicial integrity and goes to the heart of constitutional government. It proclaims that a government of laws must itself obey the law, that no part of that government may benefit from the illegal actions of another part, lest the government as a whole become a lawbreaker. If so, the people will lose respect for--and ultimately deny obedience to--the government. This theme was prominent in the earliest cases, and argued by Justice Louis Brandeis:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the 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.[29]

It was pivotal in Mapp.[30] This justification is still used but, as with judicial integrity, only by a minority of the Court.[31]

Beyond that, critics of the rule deny that judicial and government integrity are legitimate justifications of the rule. They note that only the U.S. government, of all governments with a legitimate claim to being a "government of laws," automatically excludes all illegally seized evidence from criminal trials.*

---

*Courts in other countries considered to have a government of laws usually do not "inquire into the source of the evidence" and accept or reject it depending on its legal or illegal origin. If certain kinds of illegally

Nevertheless, the judicial integrity, and governmental integrity rationales argue for retention and against major, or precipitous, modification of the rule and must be taken seriously. They exemplify the common sense adage that "two wrongs do not make a right," which is a reasonable rule of thumb. There were also problems in the years between Weeks and Mapp when states did not rule out all illegally seized evidence but allowed judges to determine if "too much" illegality had tainted the seizure, requiring exclusion of the evidence. This discretion produced idiosyncratic decisions. For example: pumping a man's stomach to retrieve capsules was "too much";[32] repeated illegal entry to install and reposition a secret microphone, finally in the bedroom, was not "too much."[33] Complaints that this constituted judicial caprice rather than legal judgment mounted. Such judicial activism is not desirable. From this perspective, a "rule" is an improvement.

Finally, Chief Justice Burger in Coolidge warned against abolishing the rule before establishing alternative measures to take its place, saying that precipitous action would send a "wrong signal" to the law enforcement community.[34] Burger's argument can be expanded. Once having chosen to use the rule as the means of enforcing the Fourth Amendment, excessive modification of it as well would send that improper signal. It could indicate that judicial integrity and government integrity have become less important.*

CRITICISMS OF THE RULE

I. The Exclusionary Rule Does Not Deter.

It is indicative of the current unease with the exclusionary rule that the Supreme Court now justifies the rule and applies it primarily, if not solely, on the grounds of its deterrent value. Yet one of the strongest and most frequent criticisms is that the rule does not deter either illegal conduct by officials or unwarranted invasions of individual privacy. Given its high social

---

obtained evidence, such as coerced confessions, are to be excluded from introduction into evidence, the exclusion is specifically mandated by the Constitution or law. In addition, judges in these systems may have the discretion to exclude evidence whose introduction they determine would violate the trial's fair character. See, for example, G. Arthur Martin et al., "The Exclusionary Rule Under Foreign Law," Journal of Criminal Law, Criminology and Police Science, Volume 52, 1961, pp. 271-292.

*This contention is substantiated by the typical protests of state law enforcement officers after Mapp imposed compliance with the rule on the states. The complaints were little more than chaffing at now having to obey the law. See, Yale Kamisar, "Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?", Judicature, Volume 62, Number 2, August 1978, pp. 66-84, pp. 69-73.

cost, argue critics, a rule that claims deterrent value must give evidence that it deters.[35]

Numerous studies have looked at such statistics as the number of motions to suppress evidence and of convictions in various cities before and after the institution of the exclusionary rule in an attempt to prove the rule's deterrent value.* But even Bradley Cannon, a foremost proponent and defender of the rule's deterrent value, has admitted:

> Existing data...make it impossible to establish empirically a universal "yes, it works" or a "no, it doesn't work" conclusion--or even approximating such a conclusion.[36]

Such inconclusiveness results in part from the excessive demands that have been made of the rule's deterrent ability. The character of Fourth Amendment law makes it unrealistic to expect the exclusionary rule to deter completely all illegal searches and seizures. Search and seizure law is extremely confusing, often turning on nuances or small peculiarities of factual circumstances, and constantly changing.

This is evident from the rules concerning what can be searched without a warrant in an automobile stopped for probable cause. The Supreme Court in 1980 held that it was legitimate to search the zippered pocket of a jacket found in an auto's passenger compartment,[37] but not two packages wrapped in opaque green plastic in the luggage compartment.[38] In each case, narcotics were found; that from the jacket pocket was admissible in evidence, that from the luggage compartment was not.**

Police are often required to make on-the-spot judgments, when the possibility of danger necessitates a search for a weapon, or when there is a need to prevent destruction of evidence. Can they be required to know and act on such fine distinctions in these circumstances? Furthermore, if they are acting in accordance with what they presume to be valid--a statute,*** a rule of the judicial circuit, a prior Supreme Court holding****--it is

---

*Steven Schlesinger's is the best presentation of the deterrence studies and their flaws. Schlesinger, Exclusionary Injustice, pp. 50-60.

**United States v. Ross, decided June 1, 1982, removed such fine distinctions and allows more general searches of cars stopped for probable cause.

***The Court sometimes recognizes this problem. See Michigan v. DeFillippo, 443 US 31 (1979). This has not always happened, however.

****The Court has also occasionally recognized this problem, as shown by United States v. Peltier, 422 US 531 (1975). This is not always the case, as shown by the relation between Robbins and United States v. Chadwick, 433 US 1 (1977). A good statement of the Robbins/Chadwick problem is contained in D. Lowell Jensen, "Statement...Assistant Attorney General, Before the U.S Senate Judiciary Subcommittee on Criminal Law," October 5, 1981, esp. pp. 6-8.

unreasonable to expect police to know, in 1975 or 1978,* that the law will change when an appellate or the Supreme Court in 1981 decides the legality of the search, and thus the admissibility of the seized evidence. It is unreasonable to expect the exclusionary rule to deter such actions by law enforcement officials.

Other misconceptions are caused by exaggerating the deterrent ability of the rule. For instance, it is argued that it is not the police officer but the prosecutor who is punished by the suppression of evidence--and it is not the prosecutor who needs to be deterred from making illegal searches. Or critics note that the rule exerts no deterrent effect on the large amount of law enforcement activity not aimed at prosecution--such as the common practice of harassing arrests of professional gamblers.[39] Similarly, since information on the final decision of a particular case, made several years after the search, usually does not flow back into the stationhouse, the "errant" police officer is not "educated" or "deterred" for the future. Furthermore, maintain the rule's critics, the officer not only is not disciplined, he may even receive a commendation because such rewards are often based on arrest records and solution of crimes.

These arguments may be true, yet ask too much of the rule. They are more a criticism that the rule is unsupplemented by other measures. Although it cannot be expected to deter all offical illegal searches and seizures, the exclusionary rule probably can have a limited, long-range deterrent influence. Particularly if supplemented by measures to educate and discipline law enforcement officers, the rule could become sufficiently prominent in their thinking to encourage them to determine action more in line with what "probably is the law." It would be easier to accept this lessened deterrence if the rule were once again recognized as having other, broader justifications.

II. There Are Significant Limits to the Rule's Protection of Privacy.

Just as it is unable to deter all illegal searches and seizures, the exclusionary rule does little to protect privacy. By suppression of evidence, it protects somewhat the privacy of the guilty from whom that evidence was illegally seized. But it makes no recompense for possible personal injury or property damage in the area searched to the guilty or to other individuals innocently present when incriminating evidence is seized. The rule does nothing for the violated privacy of the innocent victims of an illegal search. Nor does it protect those subjected to harassment searches or arrests performed without any intention of instituting prosecution. Eliminating the rule, however, will not correct these defects. Supplemental devices will.

---

*The dates of the Belton and Robbins searches.

III. Only the Guilty Benefit--They Escape Punishment.

More weighty is the charge that only the guilty benefit--by escaping punishment. Just how many, and how dangerous, are the criminals released are matters of some dispute.

Sensational murder cases, to be sure, are certain to catch the public's attention and arouse its ire--for example, Coolidge which provoked Justice Burger's protest. Most statistics, however, indicate that the incidence of suppression of evidence in murder cases is low; it is far more common in cases involving weapons, gambling, and narcotics violators.[40] And the most frequently cited statistics about the number of defendants released under the rule are contained in a 1979 survey by the Comptroller General of cases in U.S. Attorney's Offices. It found that evidence was excluded as a result of suppression motions in only 1.3 percent of the cases.* Even this, however, on a nationwide basis constitutes a sizeable number of criminals. Society has the right to try them all, convict them if guilty, and remove both their example and their threat of further danger from the streets.

To this proponents of the rule reply: Conviction must be obtained by conformance to law. The exclusionary rule "...is the price we pay for the Fourth Amendment." The point of Yale Kamisar and other proponents is that, in cases in which the rule operates, the police and courts would not have the evidence and would not know that a person was guilty without the prior illegal act. The rule operates to return the situation to the status quo before illegality.

Excluding evidence by the rule is thus no different than throwing out coerced confessions or invalidating a conviction for lack of a lawyer. Dallin Oaks, one of the ablest critics of the rule, admits that complaints that the rule helps only the guilty and hampers law enforcement are not the wisest arguments against it. He writes:

> The whole argument about the exclusionary rule "handcuffing" the police should be abandoned. If this is a

---

*Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Report of the Comptroller General, April 19, 1979.

Judge Wilkey, for instance, contends this way of tabulating the effect of the rule is incorrect. He finds a greater burden imposed on the courts in terms of the amount of judicial time expended by the rule. Wilkey, op. cit., pp. 14-16. This a legitimate criticism.

Similarly, Frank Carrington argues persuasively that figures taken from federal cases understate the operation and effect of the rule: Since state and local law enforcement is more, in his terms, "proactive," there will be more of the on-the-spot police action precipitating the possibility of search and seizures not in conformance with Fourth and Fourteenth Amendment law. Frank Carrington, "The Exclusionary Rule: A Critique and Some Suggestions," A Paper Prepared for John Jay College of Criminal Justice, May 1982, pp. 5-7.

> negative effect, then it is an effect of the constitutional rules, not an effect of the exclusionary rule as the means chosen for their enforcement. Police officials and prosecutors should stop claiming that the exclusionary rule prevents effective law enforcement. In doing so they attribute far greater effect to the exclusionary rule than the evidence warrants, and they are also in the untenable position of urging that the sanction be abolished so that they can continue to violate the rules with impunity.[41]

IV. The Exclusionary Rule Excludes the Most Reliable Evidence of Guilt.

Opponents counter that the exclusionary rule is nevertheless different than other criminal procedure rules because the evidence it excludes is the most reliable evidence, thereby distorting the "truth-finding" objective of the trial process. Indeed, material evidence is extremely conclusive and more reliable than confessions or line-up identifications.

These critics forget, however, that "the first premise" of the criminal justice system is not "to find the truth and punish the guilty." That is the second premise. The first is the presumption of innocence, that an individual is innocent until proved guilty and that guilt must be proved in a "fair trial."

Likewise, American law no longer considers the varying "reliability" of different types of evidence as meriting much weight for the purposes of its introduction into criminal trials. The reason coerced confessions, for instance, were originally excluded from trials was a concern that they were untrustworthy or unreliable, largely because of the suspect physical methods by which they were sometimes obtained. But U.S. law has moved toward discarding--or "suppressing"--coerced confessions not only because of their untrustworthiness but mainly for their lack of due process.[42] Thus the greater reliability of physical evidence suppressed by the exclusionary rule is no longer a strong legal argument for the rule's critics.

V. The Exclusionary Rule Is Not Sufficiently Discriminating.

The critics charge that the exclusionary rule acts with "unproportionality," that it applies the same sanction in all cases. It does throw out evidence in petty theft trials as well as in murder trials. It does suppress evidence in cases where the police officer makes a good faith mistake as well as where the police officer either carelessly or willfully disregards the law.

Other criminal procedures, however, operate with similar lack of discrimination. For instance, confessions are ruled inadmissible not only if they are coerced through physical abuse, but also if a suspect has not been read his Miranda rights, or not taken before a magistrate soon enough after his arrest.

VI. The Exclusionary Rule Undermines the Law.

Probably the most serious major criticism of the rule indicts it on grounds of contradicting its own broadest justifications: it undermines the law, to some extent even by encouraging illegal activities, and it undermines public respect for the law because "when the constable blunders, the criminal goes free," making a mockery of the law.

Law is undermined by the exclusionary rule. Plea bargaining is increased, for the prosecutor will be more likely to bargain if there is an exclusionary rule threatening to throw out evidence. Reports that police render perjured testimony about the circumstances of searches--"the weapon was in plain sight"; "the suspect threw the narcotics to the ground in a futile attempt to get rid of it"--are probably true.[43] Even such conservative Justices as John M. Harlan feared that judges stretch the contours of the law in order to avoid suppressing evidence and turning a dangerous criminal out on the streets.[44]

The matter of judges stretching the law should not be regarded with too much concern. For despite some decisions by the current Supreme Court, Fourth Amendment law has become more strict.

It is doubtful that plea bargaining would be greatly reduced if the rule were abolished. There are many other factors which impel a prosecutor to plea bargain. It is suspected as well that law officers lie about the circumstances of the reading of Miranda rights or confessions and the procedures of lineups or witness identifications. That is, the rule is not the sole source of such abuses. It is unfortunate that these abuses occur; but elimination of a rule of criminal procedure to which these activities respond is not the best solution. If the rule could be narrowed and supplemented to moderate its defects, the value that such a pruned rule would have in symbolizing the commitment of constitutional government to the rule of law, even if it meant "policing itself," would be overriding.

The most definitive argument against the rule remains that public respect for the law can be undermined by freeing criminals in spite of concrete evidence of their guilt and giving rise to the perception that the rule allows the guilty to "win" and law and society to "lose." This is particularly true when, for example, a mere technical deficiency in a warrant renders it void and the search and seizure illegal, when the difference between legality and illegality rests on hairline distinctions, or when a law officer presumes the validity of a statute or of an established judicial rule, later overruled. It is these excesses that have become intolerable and that tip the necessary balance between the rights of the individuals in society and the rights of the criminal defendant.

REASONABLE, GOOD FAITH EXCEPTION; CIVIL DAMAGES; CONGRESSIONAL RULES OF EVIDENCE

Releasing a criminal may be the stiff "price we have chosen to pay" for enforcing the Fourth Amendment's protection of the security of private life from unwarranted, unreasonable, or unauthorized invasion by government. But the cost has been excessively magnified with the expanded application of the exclusionary rule and the increasing stringency of Fourth Amendment law. It should and can be reduced, while other deficiencies of the rule can be moderated by supplemental measures. This can be accompanied by a congressional legislative "package" containing:

1. a reasonable, good faith narrowing exception to the exclusionary rule;

2. a waiver of "sovereign immunity," which now exempts the government from being sued, and institution of a monetary or civil damages remedy for illegal searches and seizures;

3. enactment of rules of evidence to eliminate some of the peculiarities and technicalities of Fourth Amendment law and moderate its strictness to conform to the "reasonableness" standard of the Fourth Amendment itself.

The reasonable, good faith narrowing of the rule is recommended by the Attorney General's Task Force on Violent Crime and has been proposed as legislation by the Justice Department. It has already been accepted as the rule of the Fifth Court of Appeals in United States v. Williams.[45] That Court reasoned:

> ...the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reasons for the rule cease, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high--in this instance the release on the public of a recidivist drug smuggler--with few or no offsetting benefits.[46]

An advantage of this pruned version of the rule is its probable constitutionality. A good, though not conclusive, indication that the Supreme Court accepts its constitutionality is the Court's denial of certiorari to review the Williams decision.*

---

*101 S. Ct. 946 (1981).

Frank Carrington also made this point and agreed that the denial of certiorari, in this instance, was a probable indication of Supreme Court acceptance of the reasonable, good faith exception in the original version of his article cited above. Carrington, op. cit., p. 2.

The Appendix to this Backgrounder, and a forthcoming revision of the Carrington article, explain the June 1982 Supreme Court decisions that, despite their surface appearance, do not completely undermine this conclusion.

Illegally seized evidence still would be inadmissible, but only when the constable could not prove to the satisfaction of the court that his search and seizure had been carried out in full belief that he was acting in accordance with the law and that he had reasonable grounds for that belief. Acting with an arrest or search warrant would be an automatic way for the officer to show good faith, unless it could be proved that the warrant had been obtained with intent to deceive.

Determining whether the constable acted in reasonable good faith would, as claimed by those who argue for complete abolition of the rule, require, as currently, that time in the trial be allocated to consider "the guilt" of someone other than the criminal defendant. But this also occurs as a result of other criminal procedures and is an irremediable part of a criminal justice system seeking not only the truth but due process as well. And while plea bargaining would not cease, it could be minimized by pruning the rule because the prosecutor would have his "backbone stiffened" by the greater support for the police in the good faith exception.

Of equal import, fewer criminals would escape trial, conviction, and punishment. Evidence would not be suppressed nor criminals released in those circumstances most irritating to society which appear to make a mockery of the law--the times when there is the greatest lack of proportion between the action of a law officer and the criminal defendant.

Contrary to the claims of both critics who would abolish the rule and its proponents, the good faith exception supplemented with the requirement of "reasonable belief" that action conformed to the law does not put a "premium on the ignorance" of the law enforcement officer. Thus it does not encourage violations of Fourth Amendment law.[47] This formulation of the rule might even encourage law enforcement agencies to increase training in Fourth Amendment law so that their personnel could prove the reasonableness of their belief that their actions had conformed to the law. This is particularly likely if the law enforcement agency's budget were liable for some set portion of the damages assessed the government under the supplemental civil remedy: it would pay to educate. As a result, even the minimal deterrent influence of the rule in protecting the privacy of personal life from unwarranted invasions would be enhanced.

The greatest benefit from so pruning the rule would be the rejuvenation of the rule's justification on the basis of its contribution to judicial and governmental integrity. This in turn would add support to more moderate and realistic expectations for the rule's ability to deter violations of constitutionally guaranteed privacy against illegal searches and seizures. The mistakes permitted by the exception would be "honest mistakes"--"blunders," in Cardozo's words, not willful violations--and could be recognized as one category of those "harmless errors" which do not vitiate the overall fairness of the trial. Furthermore,

courts would not be tempted to stretch Fourth Amendment law to accommodate technical blunders, honest mistakes, and subsequent changes in the law to prevent suppression and acquittal. The trial might not be perfect; but, as Justice Rehnquist has noted, "the duty is not to provide a perfect trial but rather a fair one."[48]

Requiring the government to act in accordance with the law but allowing for flexibility to accommodate honest mistakes is a necessary adjustment of society's and the criminal defendant's rights. It is also a far better moral stance from which to begin a tougher law-and-order assault on serious crime. With the increase in crime and the mounting public concern about it, this assault is legitimate. At the same time, preserving a pruned exclusionary rule does not sacrifice constitutional principles to combat crime; "It manifests our refusal to stoop to conquer."[49] What Clark said in Mapp can be said even more accurately once the police--and the society for which they work--are allowed honest mistakes committed without illegal intent:

> Our decision...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.[50]

To raise a barrier to illegal invasion of privacy, the government must be made liable to civil suit by those wronged. Waiving sovereign immunity and allowing monetary compensation (a civil damages remedy approximating the current Federal Tort Claim Act) from the government as the representative of the law enforcement agency* would answer a number of criticisms currently lodged against the rule. There should be a minimum amount awarded to compensate for honest mistakes, and the award should increase with increasing illegality and willful disregard of the law.

It is precisely this award even for honest mistake illegalities that neutralizes critics' complaints that a premium is put on ignorance by the good faith exception. Police departments that fail to educate their personnel will nonetheless be held responsible for damages. Courts could consider the sufficiency of law enforcement agencies' training programs as part of the reasonableness standard, both when deciding if the good faith exception has been met as well as when determining the amount of damages awardable.

---

*It would be impossible because of the probable limited size of law enforcement officials' personal resources to assess damages against them. It would be unconscionable to assess damages against an individual law officer making an honest mistake.

For the first time, the innocent victim of a fruitless search, as well, would have recourse and receive recompense. Compensation cannot completely repair ruptured privacy, but it is better than no recourse at all. And having to spend time testifying in the damages suit--especially if supplemented by financial responsibility for some proportion of the monetary damages awarded--might stimulate law enforcement agencies to educate their personnel better and to stiffen internal discipline. For those critics who still believe the prosecution is unfairly singled out, the result of this civil damages supplement would target some punishment more directly toward the perpetrator of the illegal search. Again, the combined effect of improved education and discipline might upgrade the deterrent influence of the total package.

Those who favor abolishing the rule charge, however, that, as long as it exists in any form, courts or other reviewing agencies will hesitate to award damages or punish offending officers, partially for fear that these judgments will filter back into criminal proceedings and trigger application of the rule.[51] There is also fear of a general reluctance to punish law enforcement officers, with or without any version of the rule.

Yet, recognition of honest mistakes now will not provoke suppression. Only intentional illegality will. This should make courts less hesitant to award damages or impose punishment. (Interestingly, Canadian juries have been harsh on offending law officers.[52] Possibly American juries and courts will be also--especially if the flexibility of a good faith effort is permitted the law officer.)

Finally, it is the substance of Fourth Amendment law that, even more than the exclusionary rule, seems ludicrous and tends to create public disrespect. Fourth Amendment law probably was carried to an extreme in the Warren Court years and distorted a reasonable tension between the rights of the individuals in society to enforce law and order and of the individual criminal defendant to due process. The Fourth Amendment, after all, prohibits only unreasonable searches and requires only a standard of probable cause, not "near certainty," for issuance of warrants.

To redress this imbalance, in connection with long-term reform of the federal Criminal Code, Congress could enact rules of evidence to alleviate some of the extremes and technicalities of Fourth Amendment law. This would make the law easier to understand, easier to teach to law enforcement personnel, and more reasonable to demand obedience to, and respect for, from the law enforcement community and the public alike.

For instance, Congress could have legislated what was recently decided in United States v. Ross--that all containers in all cars stopped on probable cause suspicion of illegal activity can be searched for evidence of crime. Or Congress might try to itemize in broad terms what constitutes probable cause, or what information from an informer is sufficient for requesting and

obtaining a warrant. Such legislated, rather than judicially created, rules are more politically acceptable.

CONCLUSION

The exclusionary rule, which suppresses illegally seized evidence from introduction into criminal trials, is a rule of evidence adopted to enforce the constitutional guarantee against unreasonable search and seizure by reinstating the legal knowledge of a criminal defendant's guilt to what it was before law enforcement officers violated those guarantees. It might not have been necessary for U.S. law to adopt this particular means of enforcement. Since it has been adopted, however, to abolish the rule altogether probably would send the "wrong signal," as it would appear to condone illegal activity by law enforcement personnel.

Nevertheless, the rule now exacts too high a cost for enforcing those constitutional guarantees because its application can effect the release of guilty defendants without conviction and punishment for want of legal possession of reliable evidence. Excessive application of the exclusionary rule unbalances the tension between society's right to protect its citizens from lawbreakers--the most fundamental civil liberty of all individual citizens--and the right of the individual criminal defendant to due process and a fair trial. This imbalance makes a mockery of the law and undermines the respect of the ordinary law-abiding citizen. Only on the continued respect for, and confidence in, the law by the citizenry can a government of law rest.

As the exclusionary rule's costs have become more obvious with its expanded application and more stringent Fourth Amendment law, courts often have tried to limit its operation. They have justified retaining the rule mainly by stressing that it deters future illegal invasions of individual privacy. Paradoxically, on its own, that is the weakest justification of the rule. The most that can be expected from it is a minimal deterrent influence which may encourage law enforcers to act in accord with Fourth Amendment guarantees.

Deemphasizing the more generalized justifications of the rule, judicial and government integrity, in which all citizens have an interest, has only intensified criticism--that the rule does not deter, does not protect privacy, benefits only the guilty, and acts disproportionately. Recognition of the rule's contribution to judicial and governmental integrity is a necessary addition to the minimal deterrent influence justification in order to remind society of the benefits it gets in return for the cost it pays in freeing the criminal.

These justifications can be rejuvenated by a legislative package which narrows the rule to the reasonable, good faith exception recommended by the Justice Department and supplements it by making government liable through monetary damages for

illegal searches. In addition, Congress should enact rules of evidence clarifying Fourth Amendment law.

The reasonable, good faith exception maintains the commitment of the government to abide by the law, yet tolerates honest mistakes by law enforcement officials. This should eliminate the imbalance that causes disrespect for law: if so pruned, the public, if grudgingly, should be more willing to recognize the exclusionary rule as "the price we pay for the Fourth Amendment."

Supplementing the pruned rule with the possibility of monetary damages against the government would blunt several complaints now made against the rule. It would be available to the innocent as well as the guilty; do more to protect individual privacy, if only by recompense; and, perhaps, improve somewhat the deterrent influence of the rule by enhancing the education, if not the internal discipline, of law enforcement personnel.

Federal rules of evidence could make Fourth Amendment law less strenuous, more reasonable, and more comprehensible to law enforcement personnel. As a result, the rule is likely to be invoked less frequently and only rarely, if at all, in the particular instances so annoying to society.

Redressing the balance between law and order and the criminal defendant's procedural rights, while nevertheless retaining a commitment to governmental obedience to law, would build a powerful position from which to begin the long overdue assault on violent crime. As two first steps, a reasonable, good faith exception to the exclusionary rule and a civil damages remedy for violation of Fourth Amendment guarantees should be enacted.

Roberta B. Dunn, Ph.D.
Policy Analyst

FOOTNOTES

1. 403 US 443 (1971).

2. 29 LEd2d 629, 639-640. The Chief Justice's Coolidge dissent was part of his dissent in Bivens v. Six Unknown Federal Narcotics Agents, 403 US 338 (1971).

3. People v. Defore, 150 N.E. 585 (1926), 587-588.

4. Justice Burger in Coolidge, 29 LEd2d 619, 640.

5. Yale Kamisar, "How We Got the Fourth Amendment Exclusionary Rule and Why We Need It," Testimony before the U.S. Senate Judiciary Subcommittee on Criminal Law, March 25, 1982, p. 7.

6. Attorney General's Task Force on Violent Crime, Final Report, August 17, 1981, pp. 55-56.

7. 116 US 616 (1886).

8. 232 US 383 (1914).

9. 232 US 383, 390.

10. Silverthorne Lumber Co. v. United States, 251 US 385 (1920); see also Nardone v. United States, 302 US 379 (1931).

11. Wong Sun v. United States, 371 US 471 (1963).

12. Elkins v. United States, 364 US 206 (1960).

13. See, e.g. Kaufman v. United States, 394 US 206 (1960).

14. 338 US 25 (1949).

15. 338 US 25, 27.

16. 367 US 643 (1961).

17. See, e.g., Walder v. United States, 347 US 62 (1954).

18. See, e.g., Jones v. United States, 362 US 257 (1950), Alderman v. United States, 394 US 165 (1969).

19. Linkletter v. Walker, 381 US 618 (1965).

20. United States v. Calandra, 414 US 338 (1974).

21. 428 US 465 (1976).

22. 6 S.Ct. 524, 532.

23. Miller v. United States, 357 US 301 (1958), 313-314.

24. "The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guarantee in the only effectively available way--by removing the incentive to disregard it." Elkins, 364, US 206 (1960), 217.

25. 414 US 338, 347.

26. California v. Minjares, 443 US 916, 61 LEd2d 892, 896.

27. Powell even gave it a passing nod in Stone. 428 US 465, 484-486.

28. Olmstead v. United States, 277 US 438 (1928), 470.

29. Olmstead, 227 US 438, 485.

30. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.... The ignoble shortcut to conviction left open to the State tends to destroy the entire system of consitutional restraints on which the liberties of the people rest." 367 US 643, 660.

31. See, for example, Brennan's dissent in Calandra, 414 US 338, 356-357.

32. Rochin v. California, 342 US 165 (1952).

33. Irvine v. California, 347 US 128 (1954).

34. 403 US 388, 420-421.

35. Steven R. Schlesinger, "The Exclusionary Rule: Have Proponents Proven that It Is a Deterrent to Police?", Judicature, Volume 62, Number 8, March 1979, pp. 404-409.

36. Bradley Cannon, "The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police?", Judicature, Volume 62, Number 8, March 1979, pp. 398-403, p. 403. See also the Schlesinger reply in Judicature, cited above.

37. New York v. Belton, 49 LW 4915 (1981).

38. Robbins v. California 49 LW 4906 (1981).

39. Both Wilkey and Schlesinger make these points.

40. Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure," The University of Chicago Law Review, Volume 37, Number 4, Summer 1970, pp. 665-757, pp. 681-689.

41. Ibid., p. 754.

42. See, e.g., Rogers v. Richmond, 365 US 534 (1951) and Jackson v. Denno, 378 US 368 (1964).

43. Oaks, op. cit., pp. 697-699.

44. Coolidge, 403 US 443, 491.

45. 622 F2d 830 (1980).

46. 622 F2d 830, 840.

47. Not only opponents but also proponents of the rule so criticize the good faith exception. See Wilkey, op. cit., p. 36; Schlesinger, "It Is Time to Abolish the Exclusionary Rule," Wall Street Journal, September 10, 1981. See also Wayne R. LaFave, "Statement...," Before the U.S. Senate Judiciary Subcommittee on Criminal Law," March 25, 1982.

48. Michigan v. Tucker, 417 US 433 (1974), 446.

49. Sachs, op. cit., p. 3.

50. 367 US 643, 660.

51. See, e.g., Schlesinger, "It Is Time...."; Wilkey, op. cit., pp. 35-36.

52. Martin, op. cit., p. 272.

APPENDIX

Legislation to prune the exclusionary rule so that it operates only when the rule can reasonably be expected to deter and to make clear that it is unreasonable to expect police to act other than in accord with current law became even more desirable on June 21 and 23, 1982, when the Supreme Court decided United States v. Johnson[1] and Taylor v. Alabama,[2] respectively. These cases might be used by the rule's proponents to claim that the Court has decided against the reasonable, good faith exception. This is not, however, what the court decided.

In Taylor v. Alabama, the Court ruled that a robbery suspect's confession should not have been admitted into evidence in his trial because it was "the poisonous fruit" of an illegal arrest. At the conclusion of his majority opinion, Justice Marshall commented:

> Alternatively, the State contends that the police conduct here argues for adopting a "good faith" exception to the exclusionary rule. To date, we have not recognized such an exception, and we decline to do so here.[3]

That comment is gratuitous--in legal terms it is obiter dictum, a "by the way" remark which is not involved in the determination of the case at hand.

The only question at issue in Taylor was whether, despite the illegal arrest, the confession should have been admitted because

> ...intervening events [broke] the casual connection between the illegal arrest and the confession so that the confession [was] "'sufficiently an act of free will to purge the primary taint.'"[4]

The dissent specifically agreed that this was the proper rule of law.[5] The question was the interpretation of the facts.

Taylor had, for instance, been read his Miranda rights three times, been in custody (mostly alone) for six hours, and visited with his girl friend and a neighbor. The majority decided that these events did not break the connection between the illegal arrest and the confession, so it had to be excluded at the trial. The dissent agreed with the trial and Alabama Supreme Court that all the circumstances, taken together, sufficiently broke the "taint of the illegal arrest,"[6] and thus they would have admitted the confession. Otherwise, Justice Sandra O'Connor and the other dissenters--such known critics of the rule as Burger, Rehnquist, and Powell--would have suppressed the confession.

In other words, all nine justices agreed that the arrest was illegal, that it was based on information insufficient to establish "probable cause" and to obtain a warrant, and that absolutely no effort was made by the police to get sufficient information.[7] The policemen making the arrest did not act in good faith--it had been the law for years that the minimal information in the informant's tip was insufficient to obtain a warrant or support a warrantless arrest.[8] Furthermore, the Supreme Court had handed down a decision in 1975,[9] three years before Taylor's arrest, ruling that confessions obtained via such illegal arrests would be excluded, unless intervening events attenuated the illegality and made the confession a product of free will. A policeman acting in reasonable good faith would have known both that the arrest was illegal and that the confession would be inadmissible in most instances. No wonder Justice Marshall said that the Court declined to adopt a good faith exception in this case--this was not an instance of good faith, and both majority and dissent clearly knew that to be so.

Furthermore, if the Court had wished to reject a reasonable, good faith exception, Marshall had the opportunity to do so in Taylor. He could have appended a footnote to his gratuitous remark, indicating that the Court was specifically overruling the Fifth Circuit's adoption of the reasonable, good faith exception in Williams, which the Supreme Court previously had let stand in its denial of certiorari. But Marshall did not even mention the Williams case, much less cast doubt on the denial of cert. or overrule the Williams holding. The legitimacy of the reasonable, good faith exception is not in the least diminished by Taylor and Marshall's obiter dictum.

The Johnson case, however, demands congressional legislation of the reasonable, good faith exception, not because Johnson denies the legitimacy of such an exception altogether but because it makes the standard of "reasonable" knowledge required of the law officer unreasonably high. Johnson held that all Supreme Court decisions construing the Fourth Amendment but not overruling clear prior precedent or practice and constituting a "clean break" with past law will be applied retroactively to all cases not yet finally decided in the standard appellate process. As a result, the exclusionary rule will be applied "retroactively" to exclude evidence gained from a search or seizure in which the principles of law had been, as the Johnson Court labelled them, "unsettled." The Court claimed Johnson was such a case.

In the Johnson case, in 1977 the United States Secret Service entered Johnson's home without a warrant and, in effect, without his consent to make a routine felony arrest. Johnson confessed to his crime while the agents were searching his house, and his confession was admitted as part of the evidence which convicted him. But, in 1980, almost three years after Johnson's arrest, the Supreme Court decided Payton v. New York.[10] Since Payton held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into the suspect's home to

make a routine felony arrest, any evidence obtained pursuant to that arrest is "illegally seized" and prevented by the exclusionary rule from presentation as evidence in a criminal trial. So applying Payton's 1980 holding to the 1977 Johnson search meant that Johnson's arrest was illegal, his confession excluded, and his conviction reversed.

Justice Harry Blackmun, also for Justices Powell, Brennan, Marshall, and John Paul Stevens, argued that unless evidence in non-final cases was excluded when decisions were finally made in "unsettled areas" of law

> ...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.[11]

Nevertheless, Blackmun's majority accepted the reasonable, good faith exception when police had acted in accordance with clearly established precedents and practices. This is the rationale for Johnson's acceptance of United States v. Peltier and its refusal to apply another Fourth Amendment decision--one it considered to be a "sharp break"--retroactively.[12]

Isn't it a distortion of the proper balance between society's rights to enforce its laws and the criminal defendant's rights to due process to expect so much of law enforcement personnel? Certainly it would be desirable to have the exclusionary rule exert a "deterrent influence" on officials to nudge their action to higher constitutional standards. But certainly it is unreasonable to expect the rule to deter all action taken with the intent to obey the law which, nevertheless, does not precisely tally with standards articulated later. And certainly it is unreasonable for society to pay the price of exclusion of evidence and loss of conviction in these cases. Even Justice Blackmun admitted as much when he refused to extend further the application of the rule in United States v. Janis[13] and quoted Professor Amsterdam:

> "[I]t will not do to forget that the Weeks rule is a rule arrived at only on the nicest balance of competing considerations and in view of the necessity of finding some effective judicial sanction to preserve the Constitution's search and seizure guarantees. The rule is unsupportable as reparation or compensatory dispensation to the injured criminal, its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of federal law enforcing officers.' As it serves this function, the rule is a needed, but grud[g]ingly taken, medicament; no more

> should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest as declared by the Congress." A. Amsterdam, Search, Seizure, and Section 2255, 112 U. Pa. L. Rev. 378, 388-389 (1964)....[14]

A careful reading of Johnson indicates that Justice Blackmun was probably swayed by arguments against judicial activism to impose retroactivity uniformly on non-final cases. His constant quotations from Justice Harlan reflecting on the previous non-predictability of the Court in decisions determining whether to apply new rules of law retroactively is strong proof of this concern. Likewise, that argument was probably responsible for capturing Justice Powell's vote for the Johnson majority. As admirable as the goal of judicial restraint is, however, it has the undesirable result after Johnson of requiring too much of police officers and exacting too high a price from society. The Johnson Court did not rule out a reasonable, good faith exception to the rule, but it clearly made it necessary for Congress to legislate a more sensible definition of that rule.

It is also important to note that between Johnson and Taylor the members of the Court majority and the dissents shifted. Justices Byron White, Burger, Rehnquist, and O'Connor dissented in Johnson; Justices O'Connor, Burger, Powell, and Rehnquist in Taylor. At one time or another, the four among those five who are not recent appointees have indicated dissatisfaction with the rule and a desire at least to cut it back. Justice O'Connor's dissent in both cases, as well as her votes in criminal cases her first term, indicate her apparent agreement. Thus, noting the votes, the combination of Johnson and Taylor means that only a plurality of four Justices can in any way be counted as hesitant to prune the rule--even under the most liberal reading possible of those two cases. A majority of five Justices is still countable for revision of the rule. And, as noted, Justice Blackmun, the author of Johnson, is on record as having qualms about extending application of the exclusionary rule to instances when it cannot be expected to deter, bringing the total to six Justices.

Thus, Johnson and Taylor in no way reverse the Williams case or the Supreme Court's denial of certiorari in it. Because of Johnson's unreasonably high standard of knowledge required of law enforcement personnel, albeit the result of commendable motives by at least Justice Blackmun, however, these cases add urgency to the necessity for Congress to revise the exclusionary rule and legislate the proposed reasonable, good faith exception.

FOOTNOTES

1. 50 LW 4742 (1982).

2. No. 81-5152 (1982).

3. No. 81-5152, Court opinion, p. 5

4. Ibid., pp. 2-3.

5. No. 81-5152, Dissent, p. 4.

6. Ibid., pp. 7-8.

7. No. 81-5152, Court opinion, pp. 1, 3; Dissent, pp. 1, 4.

8. See, e.g., Aguilar v. Texas, 378 US 108 (1964). See also Davis v. Mississippi, 394 US 721 (1969), in which the Court chastised police action taken without any effort of good faith compliance with the law and therefore suppressed evidence.

9. Brown v. Illinois, 422 US 590 (1975).

10. 445 US 573 (1980).

11. 50 LW 4748.

12. 50 LW 4748.

13. 44 LW 5303 (1976).

14. 44 LW 5310.