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thesis entitled

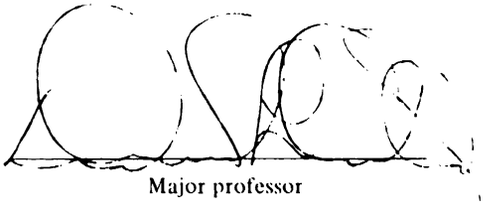
Comparative Analysis of Fourth Amendment Protections:
The Exclusionary Rule and 42 U.S.C. Section 1983

presented by

Jeffrey S. Jubera

has been accepted towards fulfillment
of the requirements for

Master of Science degree in Criminal Justice



Major professor

Date May 9, 1991

COMPARATIVE ANALYSIS OF FOURTH AMENDMENT PROTECTIONS:

The Exclusionary Rule & 42 U.S.C. Section 1983

By

Jeffrey S. Jubera

A THESIS

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

MASTERS OF SCIENCE

Department of Criminal Justice

1991

ABSTRACT

COMPARATIVE ANALYSIS OF FOURTH AMENDMENT PROTECTIONS:
THE EXCLUSIONARY RULE & 42 U.S.C SECTION 1983

By

Jeffrey S. Jubera

This paper details the legislative history of the exclusionary rule and 42 U.S.C. Section 1983 as they apply to the Fourth Amendment. It outlines each protections rationales, exceptions, and limitations. As the exclusionary rule offers a deterrence rationale for its main purpose, the paper reviews most of the research done on the exclusionary rule and police deterrence.

In regard to Section 1983, the paper examines how it evolved in today's legal system and its current role in release-dismissal agreements. The future possibility of "comparative reprehensibility" for the exclusionary rule is also examined.

The paper's primary focus is to argue that both protections have been diluted by the courts and are not preforming their desired functions, that of remedying police searches that violate the Fourth Amendment.

ACKNOWLEDGEMENTS

This paper was a long time in coming to its conclusion, and there were a number of individuals who were instrumental in this endeavor. I would like to thank my committee chairman, Dr. David Carter, for his years of support and his willingness to stay involved with the project. Most of the ideas, and especially ideals of this paper I owe to Professor Zolton Ferency. To me his classroom was a temple and the Constitution its scripture. Thank you for the lessons, Michigan State loses more than they know when they force you to retire.

I would like my parents to know that their support was amazing. Most others would have given up years ago. Finally, to my wife who endured countless work stoppages, blocks, strikes and other means of procrastination, and survived to see the final copy. Thank you all.

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INTRODUCTION

> 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 (U.S. Constitution, Amendment IV).

The Fourth Amendment to the United States Constitution is perhaps the finest example of what the Framers wanted and expected from their newly formed government. Through this statement they deemed it necessary to personal liberty that the government restrict itself during investigations against its citizens.

This paper was written with a view that the Fourth Amendment was paramount in the minds of the framers, that they willfully drafted an amendment which would take them as far as possible from England's criminal justice system. This viewpoint is necessary because, as the courts of the United States fleshed out protections for the Fourth Amendment, much of their reasoning was drawn from the perceived intent of those who wrote the Fourth Amendment.

This research encompasses two protections of the Fourth Amendment, the exclusionary rule, and the civil remedy of 42 U.S.C Section 1983. It outlines their advances through the courts. It discusses arguments for and against these protections. And it shows their eventual decline as means of relief from Fourth Amendment violations. This paper advocates that such a decline is unacceptable if the original intent of the Fourth Amendment is to remain binding. These protections once insured that the government would not trample over the idea of innocent until proven guilty, and that if it did it would not benefit from such an abuse. Previous research has looked at one or the other of these remedies. By examining both, this paper seeks to reveal the full extent of what has been sacrificed in the name of crime control.

LEGAL HISTORY OF THE EXCLUSIONARY RULE

The history of the exclusionary rule is entwined with the history of the Fourth Amendment. Both are children of the revolution from England and its search and seizure tactics. In England the power of search was long used as a means of restricting freedom of the press (Siebert, 1952). A licensing system was introduced by Henry VIII in 1538, and vast powers of search were conferred upon those who enforced the system. The Star Chamber, and later on, the Parliament, authorized virtually unlimited search powers to seek out books and other publications (Siebert, 1952). The beginning of the end for the general warrant came in the famous case of Entick v. Carrington [19 State Tr. 1030 (1765)]. This case became the source of Anglo-American law of search and seizure.

John Entick had written an unlicensed book which was regarded by the government as seditious libel. A warrant was issued to search for Entick, seize him, "together with his books and papers," and to bring him before the Secretary of State for examination. Entick was apprehended in his house, those bearing the warrant seized the books and papers in his bureau, writingdesk, and drawers. From this Entick brought an action of trespass as the warrant was general, not in naming him, but in regards to the papers to be seized.

Speaking for the defense, Lord Camden dealt with this point as the most important:

> If this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even suspect, a person to be the author, printer, or publisher of a seditious libel (at 1034).

The power claimed here by the government was one that would be exercised against a person before he was heard or even summoned; both the information and the informants would be unknown; and it would be executed by messengers in the presence or absence of the suspect as they saw fit. Camden, on the other side, was stressing the need for justification and the rights of private property. He wrote that:

> [T]he great end, for which men entered into a society was to secure their property. This right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole (at 1040).

Camden won the argument and the decision. Because of the popular feeling this case aroused, Parliament was influenced to act against general warrants (Lasson, 1937). But, aside from this action, the principles of the case are most important to the history of the Fourth Amendment. They are, first, that every official interference with individual liberty and security is unlawful unless justified by some existing and specific statutory or common law rule (Lasson, 1937). And second, that any search of private property will similarly be a

trespass and illegal unless some recognized, lawful authority for it can be produced (Lasson, 1937).

This decision and these ideals were prevalent when Congress met to draw up the Bill of Rights. The Fourth Amendment covered searches and seizures, and the obtaining of warrants. Problems stem from the Fourth Amendment because, as it has been noted, the amendment has "both the virtue of brevity and the vice of ambiguity" (Landynski, 1966). It does not define the critical word "unreasonable," nor does it indicate what the relationship is between the part prohibiting unreasonable searches and the part defining conditions under which warrants may be issued. And, unlike the self-incrimination protection in the Fifth Amendment, no mention is made of barring the fruits from a violation of the prescription from evidence (LaFave, 1978).

The Fourth Amendment was left largely untried for close to a century. Then, in 1886, came the first occasion on which the Supreme Court ordered the exclusion of evidence that the justices found to have been illegally obtained. In Boyd v. United States, at issue was a statute providing that in forfeiture proceedings, under the customs revenue law, a court could order a defendant to produce documents allegedly containing proof of guilt [116 U.S. 616 (1886)]. Failure to comply with the order would be regarded as an admission of the allegations and charges against the defendant.

The court unanimously agreed that the statute violated the Fifth Amendment privilege against self-incrimination. However, the "most creative, and most controversial feature of the opinion" came when seven members also applied the Fourth Amendment (Landynski, 1966). Justice Bradley, writing for the majority, regarded the Fourth and Fifth Amendments as intimately related. He stated that when the thing forbidden by the Fifth Amendment, namely compelling a man to be a witness against himself, was the object of a search and seizure - of his private papers - it was an "unreasonable search and seizure" which was within the prohibitions of the Fourth Amendment:

> They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment (at 621).

A number of important themes emerged from this case. First, Boyd implied that the Fourth Amendment not only forbade forcible entries, and actual searches and seizures, but rather embodied broad rights to personal freedom and security (Polyviou, 1982). These came from Entick v. Carrington as it recognized such a broad right. Bradley used Lord Camden's ideas to draft this thought:

> The principles laid down in this opinion [Entick] 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 as constitutes the essence of Lord Camden's judgement. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extorsion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or to forfeit his goods, is within the condemnation of that judgement (at 624).

This was a very sweeping statement from Bradley as no parameters are placed on this fundamental right, nor does he give criteria for recognizing a search when one is not obvious. Much is left to subsequent cases and future decisions. But, if a test can be extracted from his judgement it is that "any measure, regardless of its form, which accomplishes the same result" as a conventional search will come within the gambit of the Fourth Amendment and be evaluated according to its standards (Polyviou 1982).

The last theme of Boyd is that the guarantee from unreasonable searches and seizures, like other provisions embodying fundamental personal rights, should be construed broadly (Polyviou 1982). In Boyd, Bradley has sketched out the approach that courts should follow in cases dealing with the Fourth Amendment:

> It may be that [what happened] is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction of them 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 guard against any stealthy encroachments thereon. Their motto should be obsta principiis (at 641).

Bradley concluded the case by saying that:

> [T]he notice to produce the invoice...and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings (at 645).

This is the first statement of any clarity concerning the exclusionary rule: When any seizure of paper or things is unreasonable in the sense of the Fourth Amendment, such papers and things may not be received by any federal court in evidence against the person from whom they were seized (Polyviou 1982).

As much of an impact as Boyd made on the legal system it was nearly discarded eighteen years later in Adams v. New York [192 U.S. 585 (1904)]. The case arose when New York state officials executed a warrant for policy slips used in gambling. While seizing these they also took other private papers in order to prove Adams' handwriting on the policy slips. The Court refused to

follow the Boyd decision and reiterated the common-law rule that illegally seized evidence will not be barred from use in a criminal trial. Justice Day, writing for the Court, stated that the courts will not inquire into the means by which evidence, otherwise admissible, was obtained:

> The question was not made in the attempts to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained. This rule is thus laid down in Greenleaf (vol. 1, 254a) (at 594).

Day dealt with the Boyd case by attempting to confine it to its own unique facts. Boyd, said the Court, was limited to a situation in which a positive act was required on the part of the defendant. It involved a compulsory production of evidence rather than a seizure.

THE WEEKS ERA

In 1914 the Court was faced with another effort at suppression of evidence. In Weeks v. United States, an express company employee was arrested for running a lottery through the mail, a federal offense [232 U.S. 383 (1914)]. An initial search of his home was done by local police, without a warrant, and the evidence found was turned over to a U.S. Marshal. Weeks

made a pretrial motion for return of the evidence, contending the search and seizure to be a violation of his Fourth and Fifth Amendment rights. The Court dealt only with the issue of the Fourth Amendment. In their decision they relied heavily on the history and origin of the Fourth Amendment, and the Framers' determination to avoid the English practice of arbitrary searches and seizures. The Court noted that:

> [R]esistance to these practices had established the principle which was enacted into the fundamental law of 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 (at 385).

Justice Day went on to outline the Fourth Amendment:

> 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 to 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 obligatory upon all intrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures 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 (at 393).

Day also stated that the exclusion of evidence was the only way to ensure Weeks' Fourth Amendment rights:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.... To sanction [unlawful invasions] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action (at 394).

With this the Court applied the exclusionary rule to the Federal courts and its officers. The Court was, however, still a long way from applying it to the states:

> As to the papers and property seized by the twenty-one policemen [apart from the Marshal], it does not appear that they acted under any claim of federal authority such as would make the Amendment applicable to such unauthorized seizures.... What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies (at 394).

Weeks was separated from the Adams decision by the timely process in which the motion to exclude was brought. Weeks filed for such a motion before the trial, while Adams did not. The Court stated that motions to exclude allowed during a trial would hamper the progress of the proceedings, and were, therefore, not proper. Weeks, therefore, established the exclusionary rule for federal courts and federal law enforcement officials. There was, however, still unsettled ground in this area. Few guidelines were set out in Weeks toward

federal officials, and it did not seem that the Court was through with the rule as it applied to the states.

THE "POISONOUS TREE" DOCTRINE

In 1920 the Court dealt with an offshoot of the problem of state application when it first confronted the "poisonous tree" doctrine. In Silverthorne Lumber Co. v. United States the question was whether copies of unlawfully seized papers might be introduced into evidence after the originals had been returned [251 U.S. 385 (1920)]. Justice Holmes held that the government could not use the information obtained during an illegal search to subpoena the very documents illegally viewed (and copied) and then returned. He argued that the protection of the Constitution extends not only to physical possession of the documents, but to:

> [A]ny advantages that the government can gain over the object of its pursuit by doing the forbidden act. To grant the proposition that while the government may not search in violation of constitutional standards it may nevertheless avail itself to the fruits of illegality would mean only that two steps are required [to get the evidence] instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words (at 389).

Holmes justifies this part of the poisonous tree doctrine by calling it a logical extension of the fundamental notion that government should not benefit from its own wrongdoing; "The essence of the provision forbidding the

acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all" (at 392).

The next year, Gouled v. United States revised the point in Weeks where a motion for exclusion could be made [255 U.S. 298 (1921)]. The Weeks decision stressed that the motion to exclude unlawfully seized evidence must be made prior to the trial in order to avoid the interruption of the trial for the raising of a collateral issue (LaFave 1978). In this case the Government removed documents without Gouled knowing it. Here, the Court modified the Weeks decision to permit the motion to be made during the course of the trial, if it was the first appropriate time at which it could be made. Justice Clark wrote that "while this is a great rule of practical importance.... A rule of practice must not be allowed to prevail over a constitutional right" (at 312-313).

In regards to the evidence itself, Clark rejected the initial government contention that an unauthorized search becomes constitutionally reasonable when admission is "obtained by stealth instead of by force or coercion" (at 305). The decisive factor was not the manner of entry, but the absence of any legal method of search and seizure (LaFave, 1978).

The next series of cases dealt with the issue of federal involvement in search and seizure. Burdeau v. McDowell, in 1921, mirrored many of the early cases involving state gotten evidence [256 U.S. 465 (1921)]. The Court held that evidence supplied to the federal government by private persons was not

subject to the exclusionary rule, as Fourth Amendment protection applies only to governmental action. Arguing that the origin and history of the Fourth Amendment, as well as previous cases, indicated that it was a restraint on activities of sovereign authority, the Court saw no governmental involvement as no unreasonable search and seizure.

The importance of this case is the dissenting opinion of Justices Holmes and Brandeis. Here, they stated the first aspects of the concept of judicial integrity. That it is contrary to our political system to give government officials "an exceptional position before the law" (at 467). They further argued that "courts should not dirty their hands with illegally obtained evidence because...respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play" (at 472:Landynski, 1966). This concept of judicial integrity plays a large part in the early development of the rule.

Along the same lines were Byars v. United States and Gambino v. United States, both decided in 1927 [273 U.S. 28 (1927): 275 U.S. 310 (1927)]. Byars details federal participation in a state search and seizure. Here, state officers executed a warrant, which was defective by federal standards, and were accompanied by a federal agent, who participated in the search. The Court decided that since "the search, in substance and effect, was a joint operation of the local and federal officers," the evidence was inadmissible in a federal court (at 32). The Court did, however, emphasize that the rule still did not apply to

"evidence seized by state officers operating entirely on their own account" (at 33). Here is seen what would later be termed the "silver platter" doctrine, or the ability of state officers to conduct searches, illegal by federal standards, and hand the seized evidence over to federal officials on a "silver platter" to be used in federal court.

In Gambino, the Court put some restrictions on this process. In this case there was no federal agents involved, but the Court found that "the wrongful arrest, search, and seizure were made solely on behalf of the United States" (at 313). This was because state officers were looking for offenders to the **federal** prohibition act and turning offenders and evidence directly over to federal officials. The Court saw this to be the same as federal action (LaFave, 1978).

A second case that brought out the concept of judicial integrity is Olmstead v. United States [277 U.S. 438 (1928)]. Decided in 1928, this case held that a warrantless wiretap in violation of state law did not violate the Fourth amendment. Again, Justices Holmes and Brandeis dissented, arguing that judicial integrity should prohibit the use of this evidence:

> 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 imperiled if it fails to observe the laws scrupulously. Our government is the potent, omnipresent teacher. For good or ill will, it teaches the whole people by example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself, it invites anarchy. To declare that

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> in the administration of criminal law the ends justify 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 (at 442).

THE INCORPORATION THEORY

The question of the applicability of the Fourth Amendment to the states was finally brought up in 1949 in Wolf v. Colorado [338 U.S. 25 (1949)]. The Court was divided on how the Bill of Rights was to be incorporated into the Fourteenth Amendment. By this time, the Court was not convinced about the "total incorporation" theory, as was Justice Black. Only four justices felt that the due process clause guarantees, as against the states "the complete protection of the Bill of Rights" (Landnyski, 1966). The Court seemed content to incorporate the Bill one amendment at a time. They were still very wary of infringing on state flexibility. This is apparent in Wolf:

> The precise question for consideration is this: Does a conviction by a state court of a state offense deny "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in Weeks v. United States, 232 U.S. 383 (at 26).

The majority answered it by first stating an understanding of the due process clause and why the Court rejected the incorporation theory. Justice Franklin understood due process of law to mean:

> [N]either formal nor fixed nor narrow requirements; because due process represents living principles and because it expresses those rights which a society regards as fundamental at a given time. There cannot be a permanent catalogue of what is implied by the phrase, "frozen for all time" (at 28).

Justice Frankfurter said that reliance on a neat formula (such as incorporation) to express what are fundamental rights for enforcement purposes may satisfy our craving for certainty and clarity, but it also diminishes the notion of due process (Polyviou, 1982). Frankfurter wrote:

> The security of one's privacy against arbitrary intrusion by police - which is at the core of the Fourth Amendment - is basic to a free society. It is, therefore, implicit in "the concept of ordered liberty" and as such enforceable against the states through the Due Process Clause.... Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment. But, the ways of enforcing such a basic right raise questions of a different order.... (at 33).

He stressed this need for flexibility at the state level and showed this by pointing out the diverse methods used in handling the situation:

> We find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the states is particularly impressive in view of the careful reconsideration which they have give the problem in

> light of the Weeks decision.... As of today thirty-one states reject the Weeks doctrine, sixteen are in agreement with it. Of the ten jurisdictions within the United Kingdom and the British Commonwealth of Nations which passed on the question, none have held evidence obtained by an illegal search and seizure as inadmissible. The jurisdictions which have rejected the Weeks doctrine have not left the right of privacy without other means of protection (at 34).

So the Court, while finding that unreasonable state searches and seizures violated the due process clause of the Fourteenth Amendment, put off the exclusion of evidence in state courts. Justices Murphy and Rutledge dissented and wrote their disappointment over the Court's finding. "It is difficult for me to understand how the Court can go so far and yet be unwilling to take the step which would give some meaning to the pronouncements it utters" (at 39: LaFave, 1978).

In 1951, Stefanelli v. Minard tested the Wolf decision and found it supported [342 U.S. 117 (1951)]. Stefanelli sought relief under the 1871 Civil Rights Act after police searched for and seized property used in bookmaking without a warrant. His defense was that Wolf established that an illegal state search violates the due process clause of the Fourteenth Amendment. The Court stressed that the case touched on the sensitive question of the degree to which federal courts should intrude into the administration of criminal law at the state level. Because of the delicate balance to be preserved between federal and state powers in criminal matters, the Court held that federal courts should

refuse to overturn state criminal verdicts when evidence at state trials has been illegally secured (Polyviou, 1982). The Court stated:

> If we were to sanction this intervention, we would expose every state criminal prosecution to insupportable disruption. Every question of procedural due process of law - with its far flung and undefined range - would invite a flanking movement against the system of state courts by resort to the federal forum, with review if need be to this Court (at 123).

THE "SHOCKS THE CONSCIENCE" DOCTRINE

The Court, however, ran into some problems using these precedents in 1952. Rochin v. California displayed state search methods that offended the Court to the degree where they excluded the evidence [342 U.S. 165 (1952)]. Rochin had swallowed two tablets of morphine when confronted by police in his home. The police first attempted to choke it out of him. When that did not work they took him to the hospital where his stomach was pumped.

The decision relied heavily on the striking facts of the case. Because of the circumstances, Justice Frankfurter said he was obligated to modify his previous refusal to apply the exclusionary rule to the states. Although denying, as he did in Wolf, that the notions of due process and the standards it imposed on the government could be defined precisely, he did insist that the notion of due process had some determinable meaning; here it means that the government cannot obtain convictions by means that offend "a sense of justice" (Polyviou, 1982):

> We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. **This is conduct which shocks the conscience.**[emphasis added] Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents - this course of proceedings by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit constitutional differentiations. (at 172)

In effect, "ordinary" Fourth Amendment violations do not require state exclusion, but shocking violations do. This is one of the major steps to state exclusion in Mapp v. Ohio [367 U.S. 643 (1961)]. The Court, here, has made a distinction between types of illegal searches and seizures. This is an inconsistent legal point which seems to bother the Court later on.

Two later cases showed what kind of lines the Court would have to draw using this type of precedent. In 1954, Irvine v. California used the Rochin decision to back up their case [347 U.S. 128 (1954)]. However, the Court held that the repeated illegal entries into the petitioner's home, by police, to install and relocate a secret microphone, and to the listening to the conversations of the occupants for over a month, did not require exclusion. Justice Jackson commented that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principles declared by the Fourth Amendment" (at 130). He nonetheless concluded that

Rochin was inapplicable because "the facts of the case before us...do not involve coercion, violence, or brutality to the person" (at 134). Therefore, this case did not shock the Court's conscience and the evidence was not excluded.

No conscience shocking was apparent in Breithaupt v. Abram either [352 U.S. 432 (1957)]. Here, the majority deemed Rochin not controlling where the police took a blood sample "under the protective eye of a physician" from an unconscious person who had been involved in an automobile collision. The Court offered no explanation as to why this was not a factor in Rochin. Indeed, a physican did administer the stomach pump to Rochin. The Court was not explicit as to why the Breithaupt physician's presence made the case so less shocking than Rochin.

THE "SILVER PLATTER" DOCTRINE

In 1949, Lustig v. United States coined the term "silver platter"[338 U.S. 74 (1949)]. Where a federal officer was responsible for an invalid state search warrant the Court said that "the crux of that doctrine is that a search is a search by a federal officer if evidence secured by state authorities is turned over to federal authorities on a silver platter" (at 78- 79). There is another side to this issue and Rea v. United States ruled on the concept of a "reverse silver platter"[350 U.S. 214 (1956)]. Here, the Court ruled that a federal officer who seized evidence on the basis of an invalid federal search warrant should be denied in turning over that evidence to state authorities for use in a state

prosecution. This reversing of the Lustig definition provided an interesting question, but the Court refused to decide this issue on Fourth and Fourteenth Amendment grounds. Justice Douglas invoked the federal court's supervisory powers over federal law enforcement agencies and on this basis forbade the federal agent from testifying (LaFave, 1978). Douglas stated that the Court was simply enforcing:

> [T]he Federal Rules against those owing obedience to them...as the property seized is contraband which Congress has made subject to the orders as decrees of the courts of the United States having jurisdiction thereof (at 216-217).

This is how the Court differentiated these facts from Stefanelli v. Minard. As the court of appeals held, the underlying principle of the Stefanelli case, that the federal courts should not interfere with the course of a state judicial proceeding, was sufficiently potent to cover Rea (LaFave, 1978). So, this was still an open issue in regards to the Fourth Amendment.

There was, also, still some question as to the fate of evidence which a federal officer never had contact with. Benanti v. United States contained the comment that "it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in a federal court despite the Fourth Amendment" [355 U.S. 92, 102 (1957)].

In 1960 a much needed consensus was reached on this issue. Elkins v. United States ruled against the silver platter doctrine [364 U.S. 206 (1960)]. In

this case evidence used to convict Elkins was uncovered by Oregon police who were searching the house for obscene motion pictures. They found wire-tapping apparatus which was not covered in the warrant. The Oregon courts dismissed the evidence because the warrant was invalid. Federal officers then took the evidence for prosecution.

Justice Stewart wrote the opinion and applied "the underlying constitutional doctrine which Wolf established" (at 213). Since Wolf had determined that Fourteenth Amendment due process prohibited illegal searches and seizures by state as well as federal officers (it did not require exclusion at the state level), this incorporation marked "the removal of the doctrinal underpinning for the admission of illegally state-seized evidence in federal prosecution" (at 213:Polyviou, 1982). So, because the unreasonable search and seizure clause was in effect in the states, and the exclusionary rule held the federal courts, the exclusion of illegal state-seized evidence "must logically follow" (at 215).

The Court advanced a two-scale rationale for Elkins. First, as in previous cases, the exclusion of evidence obtained illegally by states is an exercise of the Court's "supervisory power over the administration of criminal justice in the federal courts" (at 216:Polyviou, 1982). Second, the purpose of the exclusionary rule is "to deter; to compel respect for the constitutional guarantee in the only effective available way, by removing the incentive to disregard it" (at 217:Polyviou, 1982). Stewart also brought up the aspect of judicial integrity.

The courts must not allow themselves to become "accomplices in the willful disobedience of a Constitution they are sworn to uphold" (at 222).

STATE IMPOSITION AND MAPP

In 1961 came the controversial, 5-4 decision of Mapp v. Ohio which applied the exclusionary rule to the states [367 U.S. 643 (1961)]. This decision brought the state and federal government together in the constitutional law of search and seizure. The facts of this case are well known, suffice it to say the search of Miss Mapp's home was of no credit to the Cleveland Police Department. The Court, in overturning Wolf v. Colorado, cited the fact that many states who were opposed to the exclusionary rule at the time of Wolf have since adopted the rule:

> While in 1947, prior to the Wolf case, almost two-thirds of the states were opposed to the use of the exclusionary rule, now, despite the Wolf case, more than half of those since passing on it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule (at 651).

The Court also noted the failure of "other means of protection that had been afforded the right of privacy" (at 651). The Court cited the California case of People v. Cahan, where in adopting the exclusionary rule the California court concluded that other remedies had completely failed to protect this constitutional provision [44 Cal.2d 434 (1955)].

Justice Clark further reasoned the inadmissibility of all evidence obtained by searches and seizures in violation of the Constitution in a state court by stating:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the federal government. Were it otherwise, then, just as without the Weeks rule, the assurance against unreasonable federal searches and seizures would be a "form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without the rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the 'concept of ordered liberty'" (at 653).

Finally Clark argued that imposition of the rule upon the states is supported by common sense. He argued that forbidding a federal prosecutor from introducing illegally obtained evidence, while allowing a state prosecutor "across the street" to introduce it makes no sense. Therefore, he argued, uniformity between state and federal practices in this area is the only sensible arrangement (Polyviou 1982). In a bit of wishful thinking, Clark reasoned that the decision would also promote federal-state cooperation in law enforcement activities, "if only by recognition of their mutual obligation to respect the same fundamental criteria in their approach" (at 653).

In 1963 the Court, in Ker v. California, answered one of the major questions left by the Mapp decision [374 U.S. 23 (1963)]. Many wondered whether Mapp meant that only protections at the "core" of the Fourth Amendment were safeguarded against state action, with the difference that seizures made in violation of these "core" rights would no longer be admissible. Or did the decision mean that the due process clause imposed the full force of the Fourteenth Amendment's standard of "reasonableness" on the states? If only the "core" protections were to apply, the states would retain a great deal of latitude in fashioning search and seizure rules; so long as they adhered to the ideas of "fundamental fairness," they should have complete discretion in making the rules. However, if Fourth Amendment due process were to take over, state discretion would be limited (Landynski, 1966).

Justice Clark, writing for another 5-4 majority, took the opportunity to clarify what the Court had intended in Mapp. He stated that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments" (at 33). He also denied that Mapp lays down a "fixed formula" with regard to reasonableness of state searches and seizures. He stressed that reasonableness remains a matter for the trial court to determine (Polyviou, 1982).

Clark then detailed how the Court would deal with federal-state authority problems, and gave the states some idea of how cases of Mapp origin might be decided. The Court:

> [W]ill, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record 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. However, the States are thereby precluded from developing working 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 inadmissable against one who has standing to complain (at 37).

In 1965, in Linkletter v. Walker the Court ruled on the possible retroactivity of the Mapp rule [381 U.S. 618 (1965)]. The Court decided this issue by relying on what the majority deemed to be Mapp's basic purpose:

> Mapp had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action (at 621).

Stating that past police actions would not be corrected by retroactivity, the Court ruled against such action:

> We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of police prior to Mapp has already occurred and will not be corrected by releasing prisoners involved (at 622).

This, then, was the major line of progression in the history of the exclusionary rule. From Mapp v. Ohio until the early 1970's the rule was at its

"peak." Beginning in the early 70's exceptions were placed on the rules powers. Most of these exceptions came about because of a changing emphasis in the rule's purpose. Three purposes were advanced for the advent of the exclusionary rule.

RATIONALES FOR EXCLUSION

The first rationale is stated first, and perhaps best, in Weeks. Here, the Court advances the exclusionary rule as a necessary protection of personal constitutional rights:

> If letters and private documents can thus be seized and held and used in evidence against a 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 [232 U.S. at 393 (1914)].

This is the citizen's guarantee that the Fourth Amendment will be enforced (Schlag 1982). As Justice Holmes warned in Silverthorne, without the exclusionary rule the Fourth Amendment would be reduced to a mere "form of words" [251 U.S. at 389 (1920)].

A year later in the Gouled case the Court directly referred to the exclusionary rule as a "constitutional right" [255 U.S. at 313 (1921)]. Some see it that the exclusionary rule provides the means for individuals to assert the right

to judicial review of the constitutionality of law enforcement action in regards to their prosecutions (Schrock & Welsh, 1974):

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures...should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, **and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights**.... (Weeks, at 398 emphasis added).

The second rationale is that of judicial integrity. Although it was previously discussed in Burden and Olmstead, this rationale deserves further explanation. It is a purpose which some feel should be the exclusionary rule's primary justification (Kamisar, 1978). The language had always been there, but it took the Court until 1960 in Elkins to coin the phrase "judicial integrity" [364 U.S. at 222 (1960)]. However, its start came in the Weeks decision. Borrowing from the personal rights rationale, the statement in Weeks shows the two closely related:

> 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.... To sanction such proceedings would be to affirm by judicial decision a manifest neglect**, if not an open defiance of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action (Weeks, at 398 emphasis added).

This rationale blossomed in Olmstead with the famous dissents of Holmes and Brandeis, where they argued that "apart from the Constitution the

government ought not to use evidence obtained and only obtainable by a criminal act" [277 U.S. at 469 (1928)]. Holmes then outlined the dilemma faced when using the exclusionary rule:

> [W]e must consider the two objects of our desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence should be obtained.... We have to choose, and for my part I think it less evil that some criminals should escape than that the government would play an ignoble part (at 470-71).

When Justice Stewart wrote the Elkins decision, he not only used the phrase "judicial integrity," he also stated that "the federal courts [should not] be accomplices in the willful disobediences of a Constitution they are sworn to uphold" [364 U.S. at 223 (1960)]. Stewart states, however, that he was relying on precedent and did not intend to imply that this doctrine provided a constitutional basis for the exclusionary rule (Stewart, 1983).

The final rationale, and what Terry v. Ohio deemed the "major thrust," is a deterrent one [392 U.S. 1 (1968)]. There seem to be two modes of thought involved with this rationale. The first is a punitive one - that the denial of a conviction by exclusion of evidence punishes the arresting or searching officer and thus deters him and others from further Fourth Amendment violations (Schlag 1982). This is apparent in Michigan v. Tucker where Justice Rehnquist stated that "[t]he 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" [417 U.S. 433, 447 (1974)].

A more favorable view is stated in Elkins where the purpose of the rule "is to deter - to compel a respect for the constitutional guarantee in the only effective available way - by removing the incentive to disregard it" [364 U.S. at 217 (1960)]. Instead of punishment, this relies on the goals of the criminal justice system - because, it does not impact on the individual officer, rather on agencies as a whole. So, even if lone officers are indifferent to the rule, their superiors and the agency itself are not. The agency will take such measures as training and discipline to insure that individual officers comply with the Fourth Amendment (Mertens & Wasserstrom, 1981).

These three rationales were used in the fashioning of Mapp. However, in United States v. Calandra the Court made some radical changes [414 U.S. 338 (1974)]. Calandra decided the status of illegally seized evidence in grand jury proceedings. The Court wrote this case with the deterrent effect solely in mind. Justice Powell did away with the personal constitutional right rationale by stating that "the purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim," and that the rule was "a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect, rather than a personal constitutional right of the party aggrieved" (at 347, 349).

The deterrence rationale was placed first and foremost as Powell wrote that 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" (at 347). With this in mind Powell wrote:

> [W]hatever deterrence of police misconduct may result from the exclusion of illegally-seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal (at 348).

The Court then, by default, had placed the deterrent issue as the exclusionary rule's one purpose. In the next two years three cases were decided that accepted Calandra's reasoning.

United States v. Peltier held that the exclusionary rule did not require suppression of evidence seized in searches which were unlawful under standards established in later cases, but were lawful at the time they were carried out [422 U.S. 531 (1975)]. The Court also stated that the lesson to be learned is that:

> [T]he "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 (at 537-38).

In United States v. Janis the majority refused to exclude from a federal civil proceeding evidence seized unconstitutionally but in good faith by state officers [428 U.S. 433 (19760]. The Court concluded that "the 'prime purpose'

of the rule, if not the sole one,' is to deter future unlawful police conduct" (at 436). The Court ruled out judicial integrity by stating:

> The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. The focus, therefore, must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose (at 445).

Also in 1976 was Stone v. Powell, where the Court declared deterrence to be the "primary justification" for the exclusionary rule [428 U.S. 465 (1976)]. The Court, again, discussed the inapplicability of judicial integrity:

> While courts, of course, must ever be preserving the integrity of the judicial process, this concern has limited force as justification for the exclusion of highly probative evidence (at 485).

While the Court, however, has claimed deterrence to be the main and only purpose for the exclusionary rule, there was some question as to what that conclusion was based on:

> Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supporting empirical evidence, we have assumed that the immediate effect will be to discourage law enforcement officials from violating the Fourth

> Amendment by removing the incentive to disregard it (at 473).

Not all decisions using Calandra's deterrence rationale have been decided against the rule. As late as 1981, in United States v. Johnson, the Court ruled that the holding of Payton v. New York - that the police must obtain a warrant before making a nonconsensual entry into a suspect's home to make a routine felony arrest - applies to arrest that took place before Payton was decided [457 U.S. 537 (1982); 445 U.S. 573 (1982); Stewart, 1983]. In doing so, the Court rejected the government's claim that retroactive application would not serve the purposes of the exclusionary rule:

> If, as the government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior (Johnson, at 561).

THE BALANCING TEST

The focus on deterrence has brought about a change in the decision making approach by the Court. The Court, in its post- Calandra cases, has used a balancing method termed "exclusionary analysis" (Hall, 1982). This involves a balancing of the societal costs of and the benefits from exclusion in the case at hand. Dworkin outlines some of the questions involved in this process:

> First, will exclusion here deter the police from violating the fourth amendment in the future?

> If so, to what degree will they be deterred?
> Is the deterrent value here only "incremental" or "marginal" or is it substantial?
> Second, what are the societal costs of exclusion here?
> Finally, can it be fairly said that the deterrent value outweighs the societal costs? (Dworkin, 1973 at 341)

Court statements of deterrent values have tended to be sketchy, while societal costs are usually clear-cut and easily stated in the opinions (Hall, 1982). In later cases, costs appear as a normative value, a given, which must be outweighed by the deterrent value. Hall sees the present court as changing the order of Dworkin's questions. Hall states that "in all cases thus far, the Court has asked the questions in reverse order: What are the costs? Then, what is the deterrent value, if any?" (Hall, 1982 at 646). With this, a solid case for deterrence will be needed for application of the rule. "Some deterrence or deterrence which is only theoretical and only somewhat likely is not enough to warrant application" (Hall, 1982 at 646).

Others see this differently, not as a future deterrent balancing, but as a case approach designed to punish the police for excessive search and seizure violations. Yackle sees the Court returning to the fundamental fairness doctrine of Wolf and using the approach in Rochin as its standard (Yackle, 1978).

> However all that may be, the real criticism of the Court's new approach is that it boils down to yet another dimension of the flexible, case-by-case approach to constitutional adjudication for which the Burger Court reaches in virtually every Fourth Amendment context. The Court does not reject the exclusionary rule out of hand but merely limits its

> application to cases in which the police undertake flagrant and abusive searches and seizures (Yackle, 1978 at 427).

As this discussion moves into the "good faith exception," it is apparent that societal costs are outweighing deterrence in most cases as the exclusionary rule is being applied less and less.

THE "GOOD FAITH" EXCEPTION

As with most developments in the exclusionary rule, the Court moved slowly into the issue of "good faith." The "good faith exception" is predicated on the deterrence rationale. Its basic premise is that if an officer conducts what he believes to be a legal search, yet it turns out to be illegal, excluding the evidence obtained will have no deterrent effect on the officer. This thought is outlined in an early Fifth Amendment cases, Michigan v. Tucker [417 U.S. 433 (1974)]:

> The deterrent purposes of the exclusionary rule necessarily assumes that the police have engaged in a willful, or at the very least negligent, conduct which has deprived the defendant of some right (at 447).

As discussed earlier, the Peltier Court used "good faith" in denying retroactivity. Justice Rehnquist had additional comments that suggested an even narrower approach to exclusion (Wagner, 1987). He stated that evidence

should be suppressed "only if it can be said that the law enforcement officer had knowledge...that the search was unconstitutional under the Fourth Amendment" [422 U.S. at 542 (1975)].

Janis and Stone also play a role in this exception. In Janis the Court ruled that evidence seized illegally by a state officer acting in **good faith** could not be used in a criminal proceeding, but could be used in a civil proceeding (Jensen & Hart, 1982). The Court concluded that:

> [E]xclusion 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 exclusion (Janis, at 454).

Justice White also offers a dissenting opinion in Stone v. Powell that further defines this logic:

> When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in a similar fashion in similar circumstances in the future (428 U.S. at 540).

In Michigan v. De Fillipo, the Court held that a search incident to arrest which produced evidence of another crime under a presumptively valid ordinance where the ordinance was later held to be unconstitutional would not be suppressed [443 U.S. 31 (1979);Hall, 1982). The Court said that the

arresting officer was obliged to arrest the defendant when he had probable cause, and was not "required to anticipate that a court would later hold the ordinance unconstitutional" (443 U.S. at 38).

While the next case was not an exclusionary rule decision, it laid very important groundwork for future good faith cases. In Gates v. Illinois a local police department conducted an investigation initiated by an anonymous letter alleging that Gates and his wife were drug dealers [103 S.Ct. 2317 (1983)]. Based on the letter and other corroborative evidence, a warrant was obtained to search Gates' home and car. When the warrant was executed, the police found a large quantity of marijuana and other evidence of drug dealing. The trial court's order of suppressing the evidence was affirmed by the Illinois Appellate Court, and then by the Illinois Supreme Court. The Illinois Supreme Court held that the letter and affidavit were inadequate to establish either the credibility or basis of knowledge of the informant, as required by the two-pronged Aguilar-Spinelli test (Wasserstrom & Mertens, 1984).

Although no one had initially considered the good faith exception, The United States Supreme Court ordered reargument on this issue. It seemed certain that the Court would rule on this modification. The Court, however, deferred this decision. It went instead to abandon the Aguilar-Spinelli test and replace it with a "totality of the circumstances" approach to probable cause. Justice Rehnquist reasoned that:

> [T]his 'totality of the circumstance approach' is far more consistent with our prior treatment of probable cause...than is any demand that specific 'tests' be satisfied in every informant's tip (Gates, at 2332.)

The Court also ruled that a magistrate's decision to issue a warrant should be sustained so long as there was a "substantial basis" for concluding that probable cause existed (at 2332). And lowered the probable cause standard by defining probable cause as "fair probability" (at 2332).

So, while this is not an exclusionary rule decision, the bases laid down in Gates allow for an easier road to "good faith." Needing only a "substantial basis" for a conclusion that there was a "fair probability" of success of a warrant is not being terribly strict on the policeman or magistrate (Wasserstrom & Mertens, 1984). In the following companion cases of Leon and Shepppard, the Court could have dealt with both by applying the Gates standard. Instead, it reached out to adopt the "good faith" modification to the exclusionary rule.

United States v. Leon involved a narcotics charge based on information received from an informant [104 S.Ct. 3405 (1984)]. The lower courts found that the affidavit in support of the warrant did not establish probable cause as required by the Aguilar-Spinelli test and ruled in favor of suppression. This was decided before Gates. The Supreme Court had the option of remanding the case to the lower court for reconsideration in light of Gates, or the Court itself

could have reviewed the affidavit. Either course would have found the warrant valid under Gates (Fiatal, 1986).

The Court did neither. In it haste to adopt a good faith exception, the Court brushed aside the traditional strictures against deciding important constitutional issues except when necessary for the resolution of a case (Wasserstrom & Mertens, 1984):

> Although it undoubtably is within our power to consider the question whether probable cause existed under the totality of circumstances test [of Gates]...it is also within our power, which we choose to exercise, to take the case as it comes to us, accepting the Court of Appeal's conclusion that probable cause was lacking under the prevailing legal standards (Leon, at 3412).

The Court went on to fashion a good faith exception, making evidence admissible if the seizing officer acted in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate, even if the warrant is later found to be invalid. Their justification fell squarely on the deterrence rationale. The Court said that "when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope...there is no police illegality and nothing to deter" (at 3416). Using this in a cost-benefit analysis, the Court could find no benefit from exclusion:

> [Since] penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations,...[the] marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently

> invalidated search warrant cannot justify the substantial cost of exclusion (at 3420-21).

The companion case, Massachusetts v. Sheppard, was instant backing of Leon's good faith exception [104 U.S. 3424 (1984)]. In this case the police established probable cause to search and seize evidence involved in a murder investigation. However, the only warrant form available on a Sunday afternoon was a narcotics warrant form. The issuing judge neglected to cross out the various drugs printed on the form, neither did he write on the warrant the current items to be seized. The trial court ruled that since the warrant was based on probable cause the evidence would not be suppressed. The Massachusetts Supreme Court reversed, citing that the United States Supreme Court had yet to issue a good faith exception.

The United States Supreme Court had other options available to it that would allow the evidence to be used (Fiatal, 1986). The Court, however, refused to consider the validity of the search itself and simply assumed it was unconstitutional (Sheppard, at 3428). It then applied the exception it had adopted in Leon. The Court noted that the officers "took every step that could reasonably be expected of them," and that the police are "not required to disbelieve a judge who has advised him...that the warrant he possesses authorizes him to conduct the search he has requested" (at 3430). With these decisions the Court firmly established the good faith exception to the exclusionary rule. What follows are some specifics in regards to this exception.

TYPES OF EXCEPTIONS

As early as Gates, The Court recognized that "there are several types of Fourth Amendment Violations that may be said to fall under the rubic of 'good faith'" (Gates, at 2344). There are three primary violations. The first, are those cases where the officer reasonably believed that there was probable cause for his action but the reviewing court disagrees (Wasserstrom, 1984). This is a somewhat puzzling argument because current law has probable cause based on a test of general reasonableness. Under a good faith exception evidence would be admitted where an officer makes a reasonable mistake about the existence of probable cause. Wasserstrom outlines the incompatibility:

> On a test of general reasonableness...there could be no such thing as a reasonable mistake about the existence of probable because probable cause on that interpretation means, at most, only some "reasonable" chance of success. On a test of general reasonableness, then, there would be no room for the concept of "reasonable fourth amendment violations." If on this interpretation, the officer's actions were, in the totality of the circumstances, reasonable, there would simply be no constitutional violation. An "exception" to the exclusionary rule would be illogical and superfluous (Wasserstrom, 1984 at 391).

The second type occurs when an officer, in reliance on a reasonable interpretation of a statute, concludes that he may search without a warrant, or without probable cause (Wasserstrom, 1984). Critics attack this view with the contention that if the good faith exception is applied in such cases, the

development of Fourth Amendment law will be stunted (Mertens & Wasserstrom, 1918). This will occur because courts will not decide the substantive Fourth Amendment claims under a good faith exception. Justice White addressed this argument in Gates:

> When a Fourth Amendment case presents a novel question of law whose resolution is necessary to guide future actions by law enforcement officers and magistrates, there is sufficient reason for the Court to decide the violation issue before turning to the good faith question (at 2346).

However, other Court decisions have been in opposition to this statement. Bowen v. United States ruled that unsettled constitutional issues should not be decided if the case can be disposed of on other grounds [422 U.S. 916 (1975)].

Justice White illustrates the third type by contending that "the argument for a good faith exception is strongest...when law enforcement officers have reasonably relied on a judicially issued search warrant" (Gates, at 2344). White explains this by asserting that the courts should not review the judgments of magistrates. He states:

> [T]he exclusionary rule was adopted to deter unlawful searches by the police, not to punish the errors of magistrates and judges. Magistrates must be neutral and detached from law enforcement operations and I would not presume that a modification of the exclusionary rule will lead magistrates to abdicate their responsibility to apply the law (Gates, at 2345).

This language was continued by Justice White in Leon and leads into the next topical area - the exclusion of magistrates from the deterrence rationale.

Many commentators have expressed wonder at the separation of magistrates from this process (Mertens & Wasserstrom, 1981; Jensen & Hart, 1982;Wasserstrom, 1984; Wasserstrom & Mertens, 1984; Wagner, 1987).

BLANKETING THE MAGISTRATES

Justice White offers three reasons why the exclusionary rule cannot be used to affect the behavior of magistrates when issuing a warrant. First "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges of magistrates" (Leon, at 3418). This is an interesting point as it comes with very little case backing. As discussed earlier, the rule started with no deterrent issue in mind. It was seen as a personal constitutional right and as a method of preserving judicial integrity. In recent years the Court has moved fully into the realm of deterrence. Still, the Fourth Amendment was adopted to prohibit the issuance of warrants that did not satisfy its requirement of probable cause (Sunderland, 1978). If the Court wishes to deter an action, it should be the issuance of invalid warrants. A process that not only includes the affidavit to establish probable cause - done by police - but, also a review of that affidavit by a magistrate. Justice White possibly meant that the exclusionary rule, in practice, would not deter magistrates from issuing invalid warrants (Wagner, 1987). If so, then his next two points are merely backing.

The second reason is that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment

of that lawlessness among these actors requires application of the extreme rule of exclusion" (Leon, at 3418). Here, the Court has made a statement for which there is almost no proof. Indeed, studies have shown that magistrates "expressed reluctance to substitute their judgement for that of investigating officers" (Wasserstrom & Mertens, 1984 at 106). Other researchers have reported similar attitudes (LaFave, 1978). White does acknowledge these findings, but dismisses them with: [W]e are not convinced that this is a problem of major proportions" (Leon,at 3418). White mixes logic and fails to see what is apparent:

> The real issue, however, is not how well magistrates are performing now, but whether their performance is likely to deteriorate if their errors will no longer result in suppression. If the warrant issuing process is functioning as well as Justice White says it is, this is a reason for retaining the exclusionary rule.... One would have thought that the old adage, "if it ain't broke don't fix it," would have some appeal... (Wasserstrom & Mertens, 1984 at 108).

The third, and in the Court's mind, "most important," is that magistrates are "neutral judicial officers, [not] adjuncts to the law enforcement team" (Leon, at 3418). And they will not be deterred from issuing an invalid warrant by the threat of exclusion (reminiscent White's first point) because "they have no stake in the outcome of particular prosecutions" (at 3418). Justice White expounds on this by stating that a more effective remedy for an abusive magistrate is "close supervision or removal" (at 3419). There is evidence, however, to show that magistrates do consider themselves as adjuncts to police efforts (Wasserstrom & Mertens, 1984). And that police look for an "easy" magistrate:

> Empirical studies have shown that police 'shop around' for a magistrate who is lenient, and that there is much disparity between magistrates as to how much evidence is required to obtain a search warrant (LaFave, 1982 at 353).

While the exclusionary rule does not prevent magistrate shopping, it can contain it somewhat. With the exclusionary rule an invalid warrant will suppress the evidence seized. Under the good faith exception, evidence seized under an invalid warrant can be admitted. It is a possible circumstance that the police need only concern themselves with getting a warrant, not necessarily one that will stand up to review (Wagner, 1987).

EASING POLICE RESPONSIBILITY

This argument brings up the last issue (to be discussed here) coming from Leon and the good faith exception. As may be apparent, there exists a real possibility for the police to take advantage of the good faith exception.

The Court came to the good faith exception in the following manner. Where a police officer acting with "objective good faith" obtains a warrant from a magistrate and acts by it, then "there is no police illegality and thus nothing to deter" (Leon, at 3420). Normally, the officer "cannot be expected to question the magistrate's probable cause determination or his judgement that the form of the warrant is correct" (at 3420). Therefore, "penalizing the officer for the magistrate's error, rather than his own cannot logically contribute to the

deterrence of Fourth Amendment violations" (at 3420). Since neither magistrate or officer can be deterred, "the marginal or nonexistent benefits produced by suppressing evidence...cannot justify the substantial costs of exclusion" (at 3421). As stated earlier, this takes considerable heat off the police. If they make an error, yet receive a warrant, they, and the evidence seized are effectively insulated.

Yet another actor in the law enforcement process that the Court fails to recognize is the prosecutor. Prosecutors want to make sure that evidence seized is admissible, and they are taking an active role in the warrant process (LaFave, 1984). In both Leon and Sheppard, prosecutors reviewed and approved the affidavits which the police prepared (Leon, at 3410; Sheppard, at 3427). A study of United States Attorneys reported that they regularly screen search warrant applications (Wasserstrom & Mertens, 1984). The primary reason given for their action was to "avoid possible suppression of evidence at trial due to an invalid arrest warrant" (at 114). The conclusion reached by this study suggests that:

> [T]he [good faith] exception may provide a **disincentive** to the conscientious screening of warrant applications, for when police obtain an invalid warrant on the basis of an affidavit that a prosecutor has disproved, this might well count against the officer's claim of reasonable reliance (at 115).

The Court does, however, realize that an officer's reliance on a warrant is not objectively reasonable. At the end of Leon it identified four instances where

suppression would be appropriate: where the officer induced the magistrate to issue the warrant with information he "knew was false or would have known was false except for his reckless disregard of the truth" (at 3421); where "the issuing magistrate wholly abandoned his judicial role" (at 3422); where the warrant was based on a affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (at 3422); and where the warrant is "so facially deficient...that the executing officers cannot reasonably believe it to be valid" (at 3422). So, this was the state of the exclusionary rule in 1984. The good faith exception had been adopted, but the Court was far from finished with its modifications.

THE "INDEPENDENT SOURCE" DOCTRINE

This exception got its start in Silverthorne, when that court declared that facts illegally acquired do not:

> [B]ecome sacred and inaccessible. If knowledge of them is gained from an independent source they may be proven like any others, but the knowledge gained by the government's own wrong cannot be used by it [251 U.S. at 392 (1920)].

In 1984 the Court decided Segura v. United States where agents illegally entered the defendant's apartment and discovered evidence [468 U.S. 796 (1984)]. When a search warrant arrived later, the agents seized the items already discovered and some new evidence as well. Although the admissibility

of the evidence discovered during the initial, illegal search was not before the Court, it did admit the evidence that was discovered after the warrant arrived. The Court cast doubt on the admissibility of evidence that had been discovered initially during a illegal search and then rediscovered in a legal search (Note, 1988). They stated this in a deterrent mode by saying that "whatever evidence they discover as a direct result of the [illegal] entry may be suppressed" (Segura, at 812).

This did not last long, as Murray v. United States was decided in 1987 and held that evidence discovered during an illegal search may be admitted if officers subsequently obtain an "independent" search warrant and "rediscover" the evidence [108 S.Ct. 2529 (1988)]. Justice Scalia argued that this broader concept of the independent source doctrine was implicit in the inevitable discovery doctrine (Note, 1988). This doctrine allows the admission of illegally obtained evidence on the grounds that police inevitably would have discovered it through constitutional means.

With this decision, the Court grants the police the incentive to make illegal "confirmatory" searches before seeking a warrant (Note, 1988). Justice Scalia rejects the argument that the independent source exception would undermine the exclusionary rule's deterrent thrust. He reasons that:

> [W]hatever incentives might exist for conducting "confirmatory" searches would be more than outweighed by the knowledge that such action would increase the burden of showing that any subsequent

> warrant was obtained independently of the prior illegal search (Note, 1988 at 164).

The Court's argument rests on the inquiry as to whether the warrant was tainted by the previous illegal search. Justice Scalia established a two-part test to ensure that the warrant is truly independent of the illegal search. The courts must first, "examine whether the agent's subjective intent to seek the warrant was prompted by observations from the initial illegal search" (Murray, at 2535). And second, determine "whether the information obtained during the [illegal] entry was presented to the magistrate and affected his decision to issue the warrant" (at 2536).

Justice Marshall offered a dissent that dealt with the incentive system the Court seemed to establish. He noted that obtaining a warrant is inconvenient and time-consuming (at 2358). Officers having probable cause have an incentive to search illegally to determine whether it is worthwhile to obtain a warrant (at 2538). If the search uncovers no evidence, the police have saved the time and trouble of obtaining a warrant (at 2358). If evidence is discovered, Marshall reasons, the officers may later "independently" seek a warrant to seize the evidence found in the illegal search (at 2358). Justice Marshall sees this as a possibility because the police "have knowledge and control of the factors central to the trial courts determination" of the independentness of the warrant (at 2359).

THE "INEVITABLE DISCOVERY" DOCTRINE

This is different from the independent source exception in that it can reach both derivative and primary evidence. While the independent source exception applies only when the evidence to be suppressed is a derivative from an earlier illegality. It too grew from the language in Silverthorne and reached its apex in Nix v. Williams [469 U.S. 431 (1984)]. This case was the reargument of Brewer v. Williams [430 U.S. 387 (1977)], (Famous for the "Christian Burial Speech").

In Williams II, the Court adopted the "inevitable discovery" exception. Much reliance was put on the independent source exception and its rationale (Wasserstrom & Mertens, 1984). A cost-benefit argument was used where the Court recognized the high social cost of exclusion; "letting persons obviously guilty go unpunished for their crimes," is accepted so that "the prosecution is not to be put in a better position than it would have been had no illegality transpired" (Williams II, at 442). The Court balanced that cost to assure that "the prosecution is not put in a worse position simply because of some earlier police error or misconduct" (at 443). The Court reasons that suppression in an inevitable discovery case would not merely return the prosecution to the position it would have been in without the illegal seizure; it would place the prosecution in a worse position because it would bar the use of evidence that would have been discovered anyway (Note, 1987).

In People v. Stith, the New York Court of Appeal adopted a significant limitation upon the inevitable discovery exception [69 N.Y.2d 313 (1987)]. It held that the exception is not to be applied to primary evidence and thus limited its application to evidence discovered as a result of what was derived from the primary evidence (at 319). This rationale is based on the fact that primary evidence is the direct product of police misconduct. And "it can never be claimed that a lapse of time or the occurrence of intervening events has attenuated the connection between the evidence ultimately acquired and the initial misconduct" (at 319). The Court felt that the deterrence rationale would not be advanced, as this application could "encourage unlawful searches in the hope that probable cause would be developed after the fact" (at 319-20).

This issue has not come before the United States Supreme Court, but it is an interesting point in the continued decline of the exclusionary rule.

STUDIES OF DETERRENCE AND THE EXCLUSIONARY RULE

As was described in the previous chapter, the exclusionary rule was based on several ideas. Throughout its early existence the rationales of a constitutional right and judicial integrity controlled its usage. However, after Calandra, the deterrence rationale was the sole reason for its existence.

With the shift in nature of the rule came the development of studies to test its efficacy. There was not much to test when the rule was based on the principle of judicial integrity. But, the move toward deterrence gave researchers and critics something to chew on. Every early study tried to show that the exclusionary rule did, or did not, deter police from illegal search and seizure. However, more than 20 years of research have yielded almost negligible results in either direction. This, perhaps, added more fuel to the critics' side as they complained the Court was using a remedy that no one could show worked or didn't work.

Perhaps in response to this criticism, the Court amended its decision making process. Cases are now being decided using a cost-benefit analysis. The benefits of deterrence are being weighed on a case-by-case basis against

the costs to society when an offender is released because of ill-gotten evidence. Costs have been amply provided by critics:

- The rule releases many otherwise guilty persons, some of whom are dangerous or violent;
- It diminishes public respect for the legal and judicial system;
- It fails to distinguish between more and less serious crimes...;
- It excludes the most credible kinds of evidence;
- It intensifies plea bargaining, since a questionable search may well be one of the bargaining points between prosecution and defense; and
- The rule tends to push the judiciary toward dangerously expanded notions of what is a legal search in order to admit evidence which judges are reluctant to suppress (Schlesinger 1979 at 405).

Research done with this analysis in mind looked at what costs the exclusionary rule would extract from society, specifically, how many individuals were not prosecuted because the rule excluded needed evidence.

This discussion will review six studies done of the exclusionary rule, examining the methods used and the results. A review of this kind is necessary as the Court has based the exclusionary rule on the rationale of deterrence. If, in fact, research can show that it doesn't deter police actions, the courts have no basis for keeping the rule. Getting significant results for this conclusion, however, has not been easy. In fact, results that point in any direction have been limited. The reason for this lack of findings stems from the action to be studied. Deterrence studies have always focused, not on deterrence, but on

nondeterrence. That is, researchers have examined instances where the police were not deterred from committing an illegal search and seizure by the exclusionary rule. From this information they conclude how well, or how poorly, the exclusionary rule is working. The nature of deterrence, unfortunately is not an act to be recorded, but a nonaction that has yet to be properly measured.

As this discussion will point out, the research to date has revealed when an officer has not been deterred from an illegal act by the rule. However, with no base number of the potential occurrences of this kind to compare to, a given number of nondeterred actions does not fulfill a decisive purpose in the debate over the efficacy of the rule. What needs to be known is the actual attitude of the officer. Does an officer think about the rule before, or while, entering into a situation that would require a search? A study that could record whether an officer does or does not go through the process would satisfy the definition of deterrence. That is, faced with the loss of evidence, an officer will make a choice not to conduct an illegal act. Unfortunately, a study of this nature has yet to be developed.

DALLIN OAKS - 1970

In the late 1960s the concept of deterrence began to find its way to the forefront of the rationale for the exclusionary rule. One of the first, and certainly one of the most influential studies, was a report published in 1970 by Dallin

Oaks. By 1970, Oaks was able to premise his research with the position that "the principle current argument for the exclusionary rule is a factual one: exclusion of evidence obtained by illegal means will deter law enforcement officials from the illegal behavior" (at 671).

A review of the cases and studies to date showed Oaks three views of the issue. First a Court that accepted the rule as gospel, with little or no evidence to back its opinions: "Its major thrust is a deterrent one, and experience has taught that it is the only effective deterrent to police misconduct in the criminal context" (Terry v. Ohio, , at 12). This was the Warren Court, and this view was the reason for the rule's growth. With Chief Justice Burger, a new conclusion was reached that led to the diminishing of the rule:

> I suggest that the notion that suppression of evidence in a given case effectively deters the future action of the particular policeman or of policemen generally was never more than wishful thinking on the part of the Courts (Burger 1964, at 12).

Finally, a compromise, a better-than-nothing attitude that has, perhaps, given the rule life for this long:

> The fact that there is little agreement and little evidence that the exclusionary rule does not deter police lawlessness is much less significant, I think that the fact that there is much agreement and much evidence that all other existing alternatives do not (Kamisar 1978, at 70).

Oaks dismisses this last view with one of the best statements relating to the exclusionary rule: "That there is no alternative cure for cancer does not prove the effectiveness of treatment by the 'expressed juice of the wholly-headed thistle'" (Oaks, at 677). So, in order to supply some support to either side of the deterrent debate, Oaks conducted his study by examining past research and combining those findings with current data. This provided a before and after look at aspects Oaks considered related to deterrence.

His findings can be summarized as follows:

1. In study cities of Washington, D.C., and Chicago, more than half the motions to suppress evidence (a measurement used to determine when the police had acted illegally) dealt with narcotics and weapons offenses. The rest of the motions were largely gambling charges in Chicago, and offenses against property in Washington, D.C. Oaks concludes that "[t]his is persuasive evidence that the search and seizure practices that are supposed to be effected by the exclusionary rule are concentrated in the enforcement of these few crimes" (Oaks, at 706).

2. In 1969, 45 percent of the motions to suppress concerned with gambling were granted in Chicago. Similarly, for narcotics and concealed weapons charges, 33 percent and 24 percent, respectively, were granted. These numbers reflect that illegal search and seizure, in the investigating of gambling, narcotics, and weapons offenses, were commonplace. Oaks feels that this

provides "evidence that the exclusionary rule does not deter Chicago police from making illegal search and seizure in a large proportion of the cases that come to court in these crime areas" (Oaks, at 707).

3. Differences in the functioning of the criminal justice system can make comparison between jurisdictions misleading. Washington, D.C., for example, has a low proportion of successful motions to dismiss because the prosecutor has the ability to screen cases and withhold those where the evidence will probably be excluded.

4. Oaks examined twelve years of statistics pertaining to law enforcement in Cincinnati which revealed:

   (a) that the adoption of the exclusionary rule has no apparent effect upon the number of arrests or convictions in narcotics, weapons or gambling offenses; and

   (b) that the adoption of the exclusionary rule had no immediate effect on the percentage of stolen property recovered, but there was a gradual decrease commencing several years after the Mapp decision (Oaks, at 707).

Oaks sees this as evidence that the exclusionary rule did not effect a significant change in Cincinnati's search and seizure practices in gambling, weapons or narcotics offenses. However, some long-range effect might be drawn from this in respect to conformity in searches for stolen property.

5. Oaks has no firm evidence, but draws these conclusions from what he has seen:

   (a) Police training in search and seizure rules is more extensive where there is an exclusionary rule;

   (b) Police adherence to legality in searches was thought to have increased generally after the Mapp decision, with the proportion of perceived increase in states that Mapp had forced to adopt the exclusionary rule being larger that the increase in states that had the rule all along;

   (c) Police effectiveness in searches was perceived to have decreased more in states that had just adopted the exclusionary rule than in states that had the rule before Mapp (Oaks, at 708).

6. In New York, reportedly shortly after Mapp, narcotics arrests based on evidence that was reportedly found in plain view more than doubled. Oaks views this as "evidence that police were fabricating testimony in order to comply with arrest formalities and circumvent the exclusionary rule" (Oaks, at 708).

7. Finally, Oaks conducted a review of the current writings on the exclusionary rule. From this he drew conclusions which seemed to fit his research:

   (a) The exclusionary rule has contributed to an increased awareness of constitutional requirements by the police;

   (b) The exclusionary rule will not affect police practices where the police have no desire to prosecute;

(c) The effectiveness of the exclusionary rule as a control upon police behavior varies in direct proportion to the seriousness of the crime; and

(d) In general...the most important determinants of police behavior are the institutional values of the police department, which set a higher value on the prevention of crime and apprehension of the criminal than upon adherence to legal "technicalities" concerning police behavior. Consequently, police will conform their testimony to the content necessary to avoid these "procedural" barriers and to assure accomplishment of their law enforcement objectives (Oaks, at 709).

In the end Oaks advances the argument that the method of using the exclusionary rule as a device for deterring illegal search and seizure by police is a failure. He states:

> There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution (at 755).

He goes further to cite three costs the exclusionary rule puts on the criminal justice system. First it "provides no recompense for the innocent," in that where the police are guilty of an illegal search and seizure no compensation is made to the victim (at 755). In an event where the police mistake one apartment for another, break down the door, search the residence and find some illegal substance, the substance would be excluded and the charges dropped, but the individual would still find himself restoring a residence with no payment from the police.

Second, the rule "frees the guilty" (at 755). The exclusionary rule usually affects physical evidence, normally the most probative type of evidence. Such evidence sometimes clearly indicates that an individual is guilty, however, because the police came about it in an illegal manner, it cannot be used and the individual goes free. This is the most visible aspect of the exclusionary rule, the "technicality" that infuriates society.

Third, Oaks' research revealed that the exclusionary rule created the "occasion and incentive for large-scale lying" by police officers (at 755). Many police, when confronted with a situation in which their actions led to an illegal act, lied so as not to lose the evidence. So, often the police view their charge not in terms of strict legal obeyance, but to handle situations in the safest manner possible. Often that might require an officer to perform an illegal search and seizure in order to confiscate illegal contraband. A simple change in the explanation regarding probable cause could turn an illegal search into a legal search and valid arrest upon that search.

JAMES SPIOTTO - 1973

In 1973, due to Oak's statements that evidence of the exclusionary rule's efficacy was inconclusive, James Spiotto conducted a study, also at the University of Chicago Law School, and using Oaks as an advisor (Spiotto,

"Search and Seizure," 1973). Spiotto attempted to study the rule's effectiveness directly, using raw numbers gathered from several research efforts. He made some very pointed statements concerning the rule and its operation. However, his research approach was seriously flawed, thus limiting the effect this work had on the criminal justice system.

Discussed earlier in this chapter was the problem associated with measuring the deterrent effects of the rule directly. That is, deterrence is a non-event, and most direct measures can only show when the police were not deterred. Spiotto used, as a measurement, cases where motions to suppress evidence were filed based on alleged illegal police misconduct. This he felt was the "only empirical mechanism available to measure illegal police practices and the working of the exclusionary rule" (Spiotto, at 246). The criticisms of this method are numerous. Assuming for a moment that motions to suppress do offer insight into deterrence, there are still gaps in such a position. The biggest problem is that motions to suppress only occur when a case has come to court. There are points all along the way where a legitimate case of illegal search could be cast aside. In fact, it might never enter the system. An illegal search that does not result in an arrest does not come to court, therefore, no chance to file for suppression. Recognizing this, it is obvious that very few searches come under judicial scrutiny.

Still, Spiotto used such data to make two statements against the exclusionary rule. His first test was to measure the rate of recidivism among officers who had conducted illegal searches. He found that in June 1971:

> ...while 276 defendants in 172 narcotics court cases made motions to suppress, only 130 police officers were involved. Thus nine officers were responsible for 25 cases involving 34 defendants and in the 25 cases each of the officers repeated, within a one month period, the same type of search practice that had already in that month been held unlawful... (Spiotto, "Search and Seizure," at 276).

Spiotto concluded that some police were not deterred by the exclusionary rule and thus the "deterrent rationale for the exclusionary rule does not seem to be justified" (Spiotto, "Canadian Tort," at 38).

This is not an accurate conclusion based on Spiotto's data and method. Spiotto lacks comparison figures to show that that amount of recidivism is a problem that has continued in spite of the exclusionary rule. It could be that before the advent of the rule the recidivism rate was much higher. It has been recognized that Spiotto:

> [M]akes a mistake common to several other commentators when he confuses the subjective evaluation that illegal searches are still too prevalent with the suggestion that the exclusionary rule has had no effect at all (Critique, 1974, at 740).

This problem, again, ties into the earlier discussion of deterrence being a non-event and hard to measure. Spiotto's second test was an attempt at a time-line study. He used data from 1950 and 1969 (Oaks' study), and his own

numbers collected in 1971. He again utilized motions to suppress as his indicator of deterrence. Using raw numbers of motions filed and motions granted he concluded:

> This empirical study indicated that over a 20-year period in Chicago the proportional number of motions to suppress evidence allegedly obtained illegally increased significantly. This is the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct (Spiotto, "Canadian Tort," at 37).

This statement is amazingly illogical for a researcher to make. Spiotto made this conclusion using raw numbers, no controls. It can be assumed that Chicago grew in population from 1950 to 1971, thereby increasing the crime rate, and presumably the arrest rate. A natural occurrence of increase arrests would be a rise in the motions to suppress.

Further, assuming that this is a "before and after" study (the 1950 data collected before Mapp), one would expect a natural rise in the amount of motions to suppress. After all, why would someone bother to file a motion if there was no legal action for it to follow. Spiotto again believes that the rise from 1950 to 1971 is due to the fact that the exclusionary rule is not an effective form of deterrence. To document this conclusion he wrote a most incredible statement that further discounts his findings:

> [D]uring the period 1950-1971, in the course of which the exclusionary rule was introduced into Illinois, there was a proportional increase in the motions to suppress...Yet it would seem that if the exclusionary rule had a strongly deterrent effect on the police, the

> proportional number of motions to suppress would have decreased over that period of time (Spiotto, "Search and Seizure," at 276).

Incredibly, Spiotto based his "before" data on the Mapp decision when Illinois had adopted the exclusionary rule in 1924 after the Supreme Court ruled in Weeks. So, there is no "before" measure of motions to suppress in Spiotto's study. Without this base of pre-rule data, Spiotto cannot infer that the rule has no effect. As there is no change in the independent variable, deviations in motions to suppress can be attributed to something besides the exclusionary rule, such as population growth.

Spiotto's research is important when one realizes the impact such conclusions had on the criminal justice system. Spiotto was obviously not a supporter of the rule, and did not feel that offenders deserved laws that protected them. He states that "the constitutional rights of those who pose a serious and substantive threat to the welfare of society can and should be narrowly defined" (Spiotto, "Canadian Tort," at 39). The majority of this study was devoted to showing the costs that the rule brings to society, in terms of letting the guilty go free. As before, he uses data that do not support his conclusion. Data are taken from the research he did in Chicago in 1971. Comparisons are made between narcotics, gambling, and weapons cases. He gets the best numbers from narcotics cases, so he uses only these in his discussion. He found that those with the most arrests, the longest records, had

the highest rate of success when filing a motion to suppress. This, he felt, showed that the exclusionary rule was letting out the worst offenders:

> Activity by the police that amounts to an abridgement of a constitutional requirement should be measured by its effects on the innocent, not merely by its effect on the guilty. One cannot ignore that a robber or murderer whose primary objective is to escape detection may have a greater interest in the right of privacy than one who has not committed a crime (Spiotto, "Canadian Tort," at 39).

This is an interesting statement as it points out Spiotto's clear bias against the rule; his research looked at narcotics cases and his conclusions jumped to robbers and murders. It is even more interesting as he admits that motions to suppress rarely succeed in crimes of a serious nature. His statistics showed that motions were granted in a murder trial only 13 percent of the time, in his study, two in a two month period (Spiotto, "Search and Seizure," 1973).

Spiotto had obviously entered this research with his conclusions in hand. He felt that the exclusionary rule was an ineffective deterrent and he interpreted his statistics on police recidivism to support that end. He also believed that the exclusionary rule extracted a high cost from society in the number of guilty offenders it allowed back on the street. To illustrate this point, he expanded the statistics from one small area to cover a larger body of more "sensitive" crimes. His statistics are not useless, however; they do reveal some part of how the police perceive the exclusionary rule. This will be discussed further at the end of the chapter.

BRADLEY CANON - 1973

Bradley Canon took a different approach to research into the exclusionary rule (Canon, 1973). In 1974 he began with an outlook opposing that of Oaks and Spiotto. Canon believed that the research to date had been incredibly insufficient to draw the conclusions found in earlier studies. He seems to be the first one to study this issue while actually believing in the exclusionary rule and its purpose. Of course, this works in similar fashion to the others; as they pulled conclusions to negate the rule from scant evidence, so Canon sought to find support even if he stretched the evidence.

The first part of this study goes to reviewing previous work and discussing the downfalls of the conclusions. Canon writes that there are three reasons why the existing studies are inconclusive. First, the evidence is drawn from an "insufficient sample" (at 698). Oaks studied Cincinnati, Spiotto looks at Chicago, and other smaller works also concentrated on one city. Because of the incredible interplay of characters that are involved with the exclusionary rule, generalizing the evidence from one jurisdiction beyond that city is dangerous. Chicago, for example, was well known for its leniency in granting motions to suppress. They also have no screening process for prosecutors; all cases go to trial.

Canon's second problem with past research is that the "evidence damning the exclusionary rule, as well as the perspective dictating its collection, is quite dated" (at 699). This problem entails the collection period for previous studies. Most such research was taken within a year or two after Mapp, with any before series statistics coming a year or so prior to Mapp. Canon argues that it is not realistic to see a significant change immediately following a court decision. Rather, change should take place more slowly as the full impact of a Supreme Court decision hits local departments. Sometimes it requires the backing of several local court rulings to make such a policy more complete.

The third weakness Canon finds with past studies relates "not as much to the findings...per se as to the perspective in which the research was undertaken and the findings featured" (at 701). As was pointed out previously, "most of the researchers have either sought out evidence of the exclusionary rule's failure or upon finding it they have spotlighted it in their discussions" (at 701). Canon makes the point that this is not how such work should have been carried out. Since this was dealing with such an ingrained activity, searches without warrants, after the Mapp decision noncompliance should have been expected, and studies should have treated any positive change as noteworthy or unusual.

This is precisely the attitude which Canon takes with him into this study. The scope of this research was very broad, and some of its methods are not precise. However, Canon was fairly careful not to generalize by acknowledging and respecting the weaknesses of his methods. In many of the areas studied

the only data available was what could be remembered by long-term police officers and prosecutors. For example, Canon placed a lot of emphasis of the issuance of search warrants before and after Mapp. This, he felt, was a truer measure of the rule's function, to enforce compliance with the Fourth Amendment, than examining motions to suppress. Unfortunately, police departments did not keep many records regarding the issuing of search warrants before Mapp so Canon was forced to rely on what was remembered - if not specific numbers, then general trends.

What he found was that, if looked at in 1973, police were getting up to 200% more search warrants than before Mapp. Canon believed that this was due not only to Mapp, but to later cases which refined and expanded Mapp, such as Chimel v. California, which limited a search incident to arrest to areas within the person's immediate control [395 US 752 (1968)]. Canon states:

> [T]here clearly has been a significant increase in the use of search warrants by police in comparison to the period prior to Mapp. It is commonly conceded that...search warrants were a rarity and that police conducted numerous illegal searches before the exclusionary rule was applied to the states in Mapp. In contrast to this, metropolitan police now use roughly 1.1 search warrants a year for every 1000 persons...[I]n all but a few cities, the increase is now of such magnitude that we can believe that a greater proportion of current police searches follow constitutional guidelines than was the case before the imposition of the exclusionary rule (at 715-716).

Canon follows this conclusion with an attempt to discredit Spiotto's study of motions to suppress. Canon's data were obtained by questioning police and

prosecutors as to their frequency of dropping charges due to an illegal search. While concluding that there is little evidence to support Spiotto, Canon admits that there is scant data to prove the opposite.

Canon's work was broad-based and employed some loosely scientific methods. Based upon the data, collected Canon was able to refute most of the earlier studies of the exclusionary rule. However, he was not able to offer proof-positive that the rule operated as it was intended. Most of what was concluded came about because of Canon's attitude toward the rule. That is what makes this study important -- it is the first to be done by a researcher who was in sympathy with the rule. Because of this, Canon viewed the rule as similar to many profound judicial decisions. He recognized that Mapp could take five or ten years for the courts to define its meaning. He also understood time was critical in changing the staff of a police department from one that was used to the days of no warrants to one that saw Mapp as a given.

Canon also placed Mapp in a system of change effected by court decisions in other areas of the criminal justice process. He believed that such decisions taken as a whole would work toward a new attitude of policing, one that would heed the exclusionary rule. Canon stated that these decisions:

> [N]ow require behavior in law enforcement agencies heretofore alien to the system's participants. This means that the pressure on these agencies to accommodate their operations to new policies exists not only in the area of search and seizure but in virtually every phase of their operations...If this restructuring succeeds generally, it is likely to

> enhance the exclusionary rule's probabilities of success (at 728).

With this in mind, Canon's conclusions painted a more effective exclusionary rule than Spiotto or Oaks envisioned.

These first three studies viewed the exclusionary rule as a method of deterring police action, as was the intent of the courts when deciding such cases. As previously discussed, however, the courts began to change their decision making process from deterrence-based to a cost-benefit analysis. With this the benefits of deterrence are being weighed on a case-by-case basis against the costs to society when a suspect is released because of ill-gotten evidence. This shift in the courts' reasoning brought about a change in the nature of exclusionary rule research. Since the statistics collected on deterrence had been fairly vague, and no one researcher had come to a positive, statistically significant conclusion, future research examined the cost side of the equation. Studies tried to show what costs the exclusionary rule would extract from society. Specifically, how many individuals were not prosecuted because the rule excluded needed evidence.

NATIONAL INSTITUTE OF JUSTICE - 1982

The National Institute of Justice (NIJ) was the first to issue a study aimed at he costs of the exclusionary rule in terms of "lost" convictions (NIJ, 1982).

This research was conducted in California using statewide data, for the most part, which examined three areas: felony cases rejected for prosecution because of search and seizure problems; what types of crimes those cases consisted of; and a measure of recidivism as to those individuals whose cases were rejected. The study made what appeared to be impressive findings:

- Statewide, 4,130 cases or 4.8 percent of all felony arrests rejected for prosection from 1976 through 1979 were rejected because of search and seizure problems (at 1);
- 71.5 percent of the felony cases rejected for prosecution in California between 1976 and 1979 because of search and seizure problems involved drug charges (at 2);
- 32.5 percent of all felony drug arrest referred for prosecution in 1981 to the Pomona prosecutor's office were rejected...because of search and seizure problems (at 2);
- 45.8 percent of the 2,141 defendants not prosecuted for felonies in California in 1976 and 1977 because of the exclusionary rule were arrested within 2 years of their release (at 2).

These figures were impressive as they seemed to contradict an earlier study done by the Comptroller General (Comptroller, 1979). The Comptroller General research, conducted in response to a Congressional request, devoted a small part to search and seizure arrests on a federal level. They found that only 0.4 percent of the cases studied were rejected because of search and seizure problems. The NIJ's number of 4.8 percent, therefore, gave critics of the exclusionary rule a bit more ground to work with. And they used it quickly as the somewhat distorted facts of the study were cited by Justice White in his

concurring opinion in Illinois v. Gates [103 S. Ct. 2317 (1983)]. In a footnote Justice White stated:

> The effects of the exclusionary rule are often felt before a case reaches trial. A recent study by the National Institute of Justice of felony arrests in California during the years 1976-1979 "found a major impact of the exclusionary rule on state prosecutions." The study found that 4.8% of the more than 4,000 felony cases declined for prosecution were rejected because of search and seizure problems. The exclusionary rule was found to have a particularly pronounced effect in drug cases; prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems (103 S. Ct. at 2342 n. 13).

Ignoring for a moment that this statement contains a major error of fact, it is representative of the view which the NIJ study presented, that the exclusionary rule did extract a large cost from society.

First, to the statement's mistake. Justice White wrote that "4.8% of the more than 4,000 felony cases declined for prosecution" were done so because of a search problem. This is a bad misreading of the NIJ's finding as 4,000 (actual 4,130) was the total number of cases rejected for search and seizure problems out of a felony case rejection total of 86,033. So the 4.8% figure was correct, however, that number should not be used to define the impact of the exclusionary rule on arrests.

When the Comptroller General staff compiled their data they used as a base number the total number of felony arrests referred to the prosector. From

that they calculated that 0.4 percent of the cases were rejected because of search and seizure problems. However, the NIJ withheld its final number from the total felony cases rejected. Thomas Davies feels that this method is inappropriate because:

> [T]he percentage of declined arrests that are rejected because of the rule tells us not what the costs of the rule are but only how the rule compares with other problems that result in the rejection of arrests. Indeed, the percentage of declined cases that are rejected because of illegal searches depends heavily on how much difficulty prosecutors experience with other, unrelated problems (Davies, 1983 at 633).

When the base number for total arrests is used (520,933), that calculation reveals that only 0.8% were declined because of search and seizure problems. This is a significant departure from 4.8% and could be used to show the exclusionary rule as having minimal impact.

A further misrepresentation is the statement that "prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems." This was taken from numbers gathered in a manner separate by NIJ. They went to two prosecutors' offices and collected a very small sample of cases (114 and 145) for further review. These offices were not chosen because of their typical nature. It seems that a fairer standard of measure would have been to use statewide data as they had in the earlier section. If this were to have been done it would have shown that only "2.4% of all drug arrests in California for 1978-1981 were rejected by prosecutors because of illegal searches" (Davies, 1983 at 639).

The NIJ study did help to clear up one point of common public concern about the exclusionary rule. Most perceive the rule as letting dangerous criminals, robbers and murderers back on the street. This study revealed that 71.5% of the cases rejected because of search and seizure problems involved drugs. The crimes of robbery, rape, and murder combined for 2.5%.

The high percentage of drug offense problems can reasonably be explained by the nature of the way police are combatting drugs. With officer-initiated contacts, numerous street and car arrests, and a crime that depends solely on the material seized, these types of arrests offer the greatest chance for an illegal search or seizure. To further show their impact, if drug-related crimes were removed from the amount of arrests rejected for prosecution, the total "cost" figure would fall from 0.8% to 0.35% (Davies, 1983).

This reasoning can also be applied to the NIJ's findings of recidivism among those released by the exclusionary rule. The study showed that 50% of the defendants not prosecuted in 1980 were rearrested within two years. Most of these were rearrested more than once, and as to be expected most dealt with drug offenses.

This study brought about much public comment, some due to error and some of it due to what many felt was a distortion of the calculations. It did, however, go a long way to show how small the impact of the exclusionary rule

is on violent crimes. However, because of the way the numbers were presented other researchers quickly tried to expand this look into the costs of the rule.

PETER F. NARDULLI - 1983

In 1983, Peter Nardulli attempted to answer the questions he felt were suspect in the NIJ study (Nardulli, 1983). Nardulli described his effort as a "comprehensive study of criminal courts to evaluate the impact or costs of the exclusionary rule on felony prosecutions in a more complete, detailed, and systematic manner" (at 590). His was an ambitious project which collected data from nine counties of populations ranging from 100,000 to 1,000,000. These, he felt, while not representative, were diversified enough to provide a fairly unbiased report.

Motions to suppress are used as the primary data for assessing the impact of the exclusionary rule. However, Nardulli only measures this event at the trial court level, something he feels is justified because "interviews indicate that there appears to be little screening by prosecutors or lower courts in the nine counties" (at 593). He does not say if this was a criteria for using these particular counties or if he just got lucky in the draw. It is questionable, however, to what extent his interviews reached. Trial court is a long way up the criminal justice system's ladder. Few, if any, prosecutors would carry a case that far only to lose their evidence. Still, Nardulli felt that "while it is possible that a small number of illegally obtained evidence cases were screened out by

prosecutors or in preliminary hearings in lower courts, it is unlikely that they would have any substantial effect on the analysis that follows" (at 593).

Most of Nardulli's comments focus on the suppression of physical evidence as he realizes that this issue is what flames the controversy over the rule. The study also included, however, data regarding motions to suppress confessions and motions to suppress identifications. Nardulli is succinct in his findings as he states that "all are rare events" (at 593). He used a total of 7,767 examined cases and found that motions to suppress a confession are filed in the most cases, fewer than 7% of the cases; motions to suppress physical evidence and motions to suppress identifications are each filed in less than 5% of the cases.

When examining physical evidence it was shown that, as expected, motions to suppress evidence are highest in those crimes where the suppression of the evidence tends to dismiss the case, i.e., drug and weapon charges. The success of such a motion is similar to that reported by the Comptroller General and the NIJ study, 0.7%. When broken down by crime type, motions to suppress were most successful again in drug and weapons cases, 2.8% and 3.4% respectively. All other offenses had a success rate of 0.3%.

Nardulli then goes on to measure what may be the "true" cost when dealing with motions to suppress, the loss of a case because of the lack of

evidence through suppression. Using a base conviction rate of 88% he found that an unsuccessful motion had no impact on the conviction rate; 89% of those who filed an unsuccessful motion were convicted. However, when a motion was granted and physical evidence was suppressed only 22% were convicted. When viewed as a percentage of all cases, however, the occurrence is very small, only 0.56%.

Further measures are made as to the exact costs that are made by the rule. Next Nardulli questions what types of offenders are let go because of suppression. He found that as a percentage of "lost" cases, fewer than 8% are serious crimes (robbery, arson, and burglary). Sixty percent involve victimless crimes such as possession of drugs or a weapon. Analysis as to what sentences these individuals would have received revealed that 65% of those not convicted would have received sentences of less than six months.

Due to these statistics Nardulli concludes that the exclusionary rule, as applied through physical evidence, identifications, and confessions has a "truly marginal effect on the criminal court system" (at 574). Even as Nardulli restates that the findings are not representative he gives an indication that he believes they can be generalized; "their diversity, the size of the data base, and the minuscule effect of the rule make it unlikely that a more representative sample would produce a very different picture" (at 574). In an effort to beat the critics to the point, Nardulli tries to defend his reasoning for not including the

screening phase of the process. He does not believe that much screening went on or should go on:

> [T]he findings reinforce earlier conclusions about the likely "noneffect" of prior screening (in these courts) on this analysis. Why would prosecutors in charge of screening (who tend to be entry-level prosecutors) or lower court judges (who are usually elected from local districts) take responsibility for dismissing cases on the basis of legal arguments that have only remote chances of being accepted by trial court judges? The reality of the matter is that there is little incentive for them to do so, especially in more serious cases. Thus it is unlikely that this analysis has missed the rule's impact on many serious cases (at 575).

It seems a bit naive of Nardulli to believe that screening does not take place, and he only mentions prosecutors or lower court judges. He does not get into the possibilities of police screening. However, focusing on the phrase "serious cases," there is a good possibility that Nardulli is correct in stating that the rule has very little effect on these cases. Cases such as these involve public scrutiny and, therefore, are investigated and prosecuted in a careful manner.

This piece of research was very helpful as it came during a time when the Supreme Court was well on its way to watering down the rule because of the extreme costs it places upon society. Nardulli was able to show that if the courts wanted to decide such cases through a cost-benefit analysis, the overall costs were not that high. The benefits might still be questionable, but the courts could not rely on the age-old excuse that the rule frees countless guilty criminals.

MYRON ORFIELD - 1987

The final piece of research to be examined is a study done in 1987 by Myron Orfield (Orfield, 1987). It seems appropriate that this work would go back to the same study area as Oaks, that of the Chicago Police Department. Similar to Oaks' study Orfield questioned whether the police were deterred from illegal acts by the exclusionary rule. Unlike Oaks' research, however, Orfield conducted a small, intensive study of how certain officers were affected by the rule. His sample size was very small, 26 officers, all from the Narcotics Section of the department. (He chose narcotics officers because the majority of suppression motions are made in narcotics cases.) Further, unlike Oaks' research, are his findings; that the rule has "created a system of incentives for individual officers, reinforced by institutional practices also prompted by the rule, that deters unlawful police searches" (at 1054). This is a far cry from Oaks' assertion that the rule has no deterrent powers and should be abolished.

Orfield's study asked and answered several important questions before delivering these conclusions. First, he asked if the officers were being educated by the courts to the requirements of the Fourth Amendment. Many critics of the rule feel that the police have little knowledge of something so "complex" as Fourth Amendment law, and that they never learn if the cases they worked on were subjected to the rule. (This is an important tenet of the deterrence theory. If the officer never learns of the results of his actions, or learns from those

results, the concept of deterrence can never work.) Orfield discovered that 85 percent of his sample always found out when their evidence had been suppressed and found out immediately (mostly this resulted from the officers being in court at the time of the suppression). The department also makes sure the officer is informed by publishing the results of all cases. Further, a ranking officer and the state's attorney go over the suppression in detail with an officer. The majority of the officers also indicated that they usually understood why their evidence had been suppressed.

Second, Orfield examined the effectiveness of the suppression hearing in teaching officers about Fourth Amendment law. He found that the officers learned the most about changes in search and seizure law from in-court appearances. Orfield believes that this:

> [C]onfirm[s] that [an] in-court experience is not only the most important way of learning about changes in the law, but also the most effective way of learning about the law of search and seizure in general (at 1037).

He combines this with normal training by stating that training did not firmly take hold until the officers were placed in a real-life situation in the courtroom.

Third, Orfield asked a question directly tied to deterrence; how often do officers learn something from having evidence suppressed. Most officers learned something every time or very frequently. Those that did not learn from the experience stated that the law was fairly simple and their evidence was

suppressed because of a "judgement call" often related to warrantless, exigent circumstances searches.

Orfield then questioned what the officers learned from the suppression experience. Foremost, the officers learned the law of search and seizure; to use a warrant in all possible instances, and to act cautiously when searching without a warrant. The officers also cited, as reported earlier, how important their time in court was, as a learning experience. Another lesson suppression taught the officers was to be more careful and thorough in their case reports.

Another question relating directly to deterrence was why and how often officers have evidence suppressed more than once for the same reason. This is a question of specific deterrence; if the rule was functioning properly officers should be deterred from making an illegal search, they especially should not make the same mistake twice. Most of the officers felt that this occurred rarely. However, when this type of incident did happen it was usually a case where the officers knew themselves to be in the wrong, but wanted to seize the evidence merely for the purpose of removing it from the street. This seems to be a more frequent occurrence in narcotics work than in other fields because of the nature of the evidence.

Orfield went on to learn the role of the courts in punishing officers for illegal searches. This has been a major criticism of the rule, that it does not punish the individual officer who is responsible for the illegal search or seizure.

He found that the most significant form of punishment was the "officer's personal disappointment at the loss of a potential conviction" (at 1042). While on its face this may not seem like a demanding punishment, it lends itself to an attitude which stays with the officer. One that insures such an event will not happen again. In the same vein, another form of punishment is the suppression hearing itself. Unless an officer is prepared and sure of his work, a defense attorney or judge can make a suppression hearing a humiliating experience. Most of the sampled officers, once subjected to that, wished never to be caught in the wrong again.

Outside of the courtroom, the department metes its own punishment. In Chicago, two suppressions cause an officer's transfer or demotion. Also, any suppression results in several meetings with superior officers and the state's attorney. Further, an officer who abuses the Fourth Amendment is "punished" by his superiors and peers by receiving a reputation as someone who is "incompetent," or maybe even dishonest; "it might be thought that he is collaborating with the defense" (at 1048).

The major criticism of Orfield's research, of course, is its sample size. There is little room for generalization when a study's sample consists of only twenty-six subjects, in one section of one city's police department. However, his findings seem entirely consistent with that of Cannon; that through time the exclusionary rule will be adopted by police departments as a valid method of policing. This way the rule will be enforced by the police as part of a

professional ethical doctrine. While one cannot generalize too broadly from Orfield's research in Chicago, it matches Cannon's ideas as to the progression of acceptance of the exclusionary rule. This is evidenced by a statement from a department section head:

> I would not do anything to the exclusionary rule. In my personal opinion it is not a detriment to police work. In fact the opposite is true. It makes the police department more professional. It enforces appropriate standards of behavior...In this unit, seldom if ever does the law of search and seizure keep us from making the searches we should be able to make (at 1016).

CONCLUSIONS

It would seem that the critics are wrong about the exclusionary rule. The latest studies point to the possibility that the rule is being structured into everyday thought of police officers, and that its use is not releasing a horde of violent criminals into society. Still the rule is of such a nature that a single case can lead to public and professional criticism. Also, as stated at the beginning of this chapter, there has been no definitive study to show the true workings of deterrence. No study has been able to examine the decision making process a police officer goes through when deciding whether to search.

There have been other costs associated with the rule besides letting possibly guilty individuals go free. A major concern among critics and police departments is that the rule fosters perjury. Arguments are made that police

often perjure themselves in an attempt to generate probable cause in cases where it did not initially exist. This can occur either at the trial stage or earlier when applying for a warrant. Orfield examined this among his small sample and found that while it was not common practice it was used in some types of cases more than others; most notably when the evidence was found "in plain view" or in "drop cases" (Orfield, 1987 at 1049). Orfield's solution to this problem was that judges seem to be aware of possible deception from police officers and closely scrutinize cases. He cites other institutional reforms that might help control perjury such as tighter prosecutorial review of search warrants. However, as Orfield initially pointed out, most searches where an officer is tempted to commit perjury involve exigent circumstances where there is no time to issue a warrant. The only way to control perjury in such instances is through stricter professional norms, which can only come about through time.

Until recently police were well insulated against the exclusionary rule. Departments have a long history of "protecting their own." When the rule was first instituted police were almost expected to work against it as it was such an instance of judicial "handcuffing." As the rule was used more often it became apparent to departments that it was here to stay and they must adapt to it as much as possible. As "old school" officers retired and newer troops who never knew anything but the rule began to take over, abuses of the Fourth Amendment became less common; less common, but still happening. Institutional punishments, as Orfield described, were used by the criminal justice system to deal with such abuses. Such punishment is, however, rather menial

in the actual problems it can cause an officer. Further, there seems to be no real punishment for the instances of perjury, only that of the case being lost. By viewing these two possibilities it is easy for an officer to abuse the Fourth Amendment and fully expect little or no admonishment. Another arena, however, opened up for victims of such abuse, as described in the next chapter.

LEGISLATIVE HISTORY OF U.S.C. 42 SECTION 1983

Section 1983 has as its history the Civil War, the Thirteenth Amendment, the Fourteenth Amendment, the Ku Klux Klan, and the Civil Rights Act of 1871. Entwined through all these events is the concept of federalism; the limiting of control that the federal government will have over the states. In the early forming of the union this notion was popular due to the founders' break from a tyrannical Mother England. The federal government had a very limited role in early America.

The problem of slavery began a change in the idea of federalism. States were now being seen as the oppressors and minorities were looking to the federal government to protect them. The victory of the Union over the Confederacy gave incredible powers to the federal government. The reconstruction era saw an impressive increase in legislation regulating state powers (Hyman, 1973). The Thirteenth Amendment abolished slavery and gave Congress the authority to enforce this act through legislation:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction (U.S. Const. amend. XIII).

The states, however, found ways around this amendment and Congress soon passed the Fourteenth Amendment which affirmed citizenship to the freed slaves:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (U.S. Constitution, amendment XIV).

Even though the states viewed this as an abuse of federalism, it was a fairly conservative piece of legislation as it created no new civil rights (Hyman, 1973). Congress was still following the ideal of federalism as it allowed the states to create whatever rights they saw fit for all citizens.

The government was still faced with resistance from the southern states. Particular attention was being given to the acts committed by the Ku Klux Klan. President Grant issued an appeal to Congress warning that the states were no longer in control of the situation (Hyman, 1973). From this came the Civil Rights Act of 1871, providing protection against official inaction and the toleration of lawlessness (Development, 1977). Congressmen who drafted the legislation dealing with these abuses saw an organized plan of violence beyond common felonies. The legislators, while outraged at the Klan's crimes, saw as equally abhorrent the practices of state and local law enforcement in overlooking the Klan's activities (Development, 1977).

The Civil Rights Act of 1871 made several improvements in the federal enforcement powers concerning civil rights. The Act expanded the president's power of using the military to protect federal rights, and allowed him to temporarily suspend habeas corpus. The Act also expanded federal criminal and civil law to reach private conspiracies. Further, the Act included a seemingly unimportant Section dealing with civil remedies against persons who acted under color of law to violate a person's constitutional rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress (42 U.S.C. Section 1983).

The Supreme Court, however, limited the application of the Fourteenth Amendment as it applied to civil rights law. In the Slaughterhouse Cases, the Court limited the protection of the amendment to only those rights necessary to the existence of national government [83 U.S. 36 (1873)]. This decision excluded almost all civil rights from the purview of the federal government. Further cases held that conduct by state officers in violation of their authority was not "state action" [United States v. Harris 106 U.S. 629 (1882); Civil Rights Cases 109 U.S. 3 (1883)]. This effectively immunized the primary objective of the Act of 1871 from federal power. The period from the end of reconstruction

to the depression saw the judiciary allow increased state police power, signaling a return to the idea of federalism (Shapo, 1965). Because of the Court's narrow reading of the Fourteenth Amendment, virtually no actions were brought under Section 1983. Between 1871 and 1920 only 21 cases were brought under the Section (Development, 1977 at nt. 139).

Use of Section 1983 increased after the 1920s as the Court began the slow process of incorporating the Bill of Rights into the Fourteenth Amendment (Steinglass, 1988). Much of this growth was confined to the area of voting rights (Shapo, 1965). Here, the state action was taken pursuant to an unconstitutional state or local statute, and therefore fit the narrow definition of "under color" of law [Nixon v. Herndon 273 U.S. 526 (1927); Hague v. CIO 307 U.S. 496 (1939)].

In two later cases the Court expanded the "under color" phrase by rejecting the premise that the term required conduct be authorized by a state statute. The Court stated that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state action is action taken 'under color' of the law" [United States v. Classic 313 U.S. 299, 326 (1941)]. Screws v. United States redefined the term "under color" when holding that a sheriff's fatal beating of a prisoner was conduct "under 'pretense' of law" [325 U.S. 91, 111 (1945)]. Although these were both criminal actions, they still established that "under color" of law covered unlawful

actions of a state officer as long as the "pretense" of authority under which he acted furthered a constitutional violation (Development, 1977).

THE WINDOW OF MONROE

It took circumstances of which the Klan would have been proud to bring Section 1983 out of its years of obscurity. Early one Chicago morning, thirteen policemen broke into the home of Mr. Monroe without a warrant. The policemen roused the family from bed at gunpoint, made them stand naked in the living room, and ransacked the house, all the while subjecting the family to verbal and physical abuse. Mr. Monroe was then taken to the station, detained for ten hours on "open" charges, and interrogated about a two-day-old murder. Mr. Monroe was not taken before a magistrate, though one was available, and was not permitted to call an attorney or his family. He was then released without being charged of any crime.

Monroe v. Pape brought before the courts a Section 1983 suit against the City of Chicago and the individual officers whom the suit claimed "acted under color of the statutes, ordinances, regulations, customs, and usages of...the City of Chicago" [365 U.S. 167, 169 (1961)]. The Court, under Justice Douglas, found that the officers' conduct violated Mr. Monroe's constitutional rights and applied Screws' definition of "under color" of law. Screws, however, required a showing that the defendant had acted with the specific intent of depriving

another of his constitutional rights. In Monroe, Justice Douglas concluded that since Section 1983 does not contain an explicit requirement that the defendant's conduct be willful, plaintiffs need not prove that the defendant acted with "specific intent to deprive a person of a federal right" (at 187). Instead, Douglas reasoned, Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural courses of his actions" (at 187).

The Court relied heavily on the legislative history of the Civil Rights Act of 1871 in deciding Monroe. Douglas cited three rationales that Congress had in enacting Section 1983. The statute would override discriminatory state law; would provide a remedy where state law was inadequate; and would provide a federal remedy where the state remedy, although adequate in theory, was not available in practice (Development, 1977; Kritchevsky, 1988; Monroe, at 173-74). The Court remembered how lax some states were in the enforcement of Constitutional rights:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies (at 180).

From this the Court fashioned a fourth purpose for Section 1983: to provide a supplementary federal remedy. Justice Douglas stated that "[t]he federal

remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one in invoked" (at 183).

Even as the Court fashioned new boundaries for Section 1983, it would not go so far as to hold the City of Chicago liable. The Court had to reach some to find cause, but found support in the Congressional rejection on the Sherman Amendment: a proposed anti-Klan action of 1871 which would have held the inhabitants of the city in which certain violent acts took place liable for compensation (Shapo, 1965). Justice Douglas believed Congress rejected the amendment because it would be unconstitutional to obligate municipalities to administer state law (Kritchevsky, 1988). Therefore, the City of Chicago, and all municipalities, were not available defendants in a Section 1983 suit.

THE GOOD FAITH EXCEPTION

Although Monroe opened many doors for Section 1983 actions it was still a fairly inaccessible remedy. With municipalities being immune from suit, a plaintiff could expect very little in the way of damage awards. In the area of law enforcement, the situation was often more depressing.

Long before it was ever applied to the exclusionary rule, the notion of good faith protected police officers from civil suit. In Pierson v. Ray a suit was brought against a Mississippi trial judge and an arresting officer [386 U.S. 547 (1966)]. The plaintiffs filed under Section 1983 for false arrest and

imprisonment. The Supreme Court ruled the trial judge immune since he acted within his judicial jurisdiction. The Court also held the officer to be immune if he arrested in good faith, in spite of the law's unconstitutionality. The Court felt that:

> A patrolman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied (at 555).

Somewhere here the Court has made a jump in logic from the tort standard of Monroe where a man is responsible for the natural course of his actions, to Pierson's good faith standard where state-of-mind of the defendant must be shown. Further, when this immunity is combined with Monroe's rejection of suits against municipalities, a citizen has no remedy for damages caused by an officer acting in good faith on an unconstitutional law (Kates & Kouba, 1972).

EXPLORING THE LIMITATIONS OF MONROE

Many of the cases following Monroe were attempts to find strategies which would hold municipalities accountable in Section 1983 cases. Monroe had clearly closed off such an application in the area of damage remedies.

Several lower court cases tried to circumvent Monroe's definition of "persons" in the arena of injunctive relief (Schnapper, 1979). The Supreme Court, however, firmly rejected this bifurcated approach to municipal liability. In City of Kenosha v. Bruno, Justice Rehnquist held that Monroe provided no inference that municipalities were "persons" for Section 1983 purposes [412 U.S. 507 (1973)]. He further ruled on the split application of liability by stating:

> [N]othing in the legislative history...or the language actually used by Congress...suggest[s] that the generic word "person"...was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them (at 513).

The Court held strong to this notion of municipal immunity. One reason for this view could be that the Court had no framework that would allow for a suit against an entity such as a municipality (Whitman, 1988). Section 1983 suits are decided under tort law, historically an action of one individual against another. Liability is imposed when one person goes too far and intrudes on the interests of another. And in going too far, the individual fails to compensate the injured party for his conduct. Problems arise because there has been no separate language for harms caused by groups or institutions (Whitman, 1988). Suits against municipalities meet such a barrier:

> [T]he perspective adopted from tort encourages the Justices to convert the problem of institutional morality into one of individual morality; tort language leads them to look for individual choices and motives, for an actor or a "mind" that can be evaluated. In most cases the possibility of looking at an institution as a unit distinct from the separate individuals who compose it is not considered. For example, the

> Justices fail to see that injuries can be brought about quite inadvertently through the workings of institutional structures (Whitman, 1988 at 226).

This situation is illustrated in Rizzo v. Goode, a class action where the plaintiffs sought injunctive relief from the city of Philadelphia to reduce police abuse by properly handling citizen complaints [423 U.S. 362 (1976)]. Still trying to avoid Monroe's municipal immunity holding, the suit was filed against "those in charge" of the police department (at 380). The trial court found a pattern of violations, and ordered the officials to implement a program for dealing with citizen complaints that satisfied minimum constitutional standards (Development, 1977). This was affirmed by the Third Circuit; however, the Supreme Court reversed.

The Court, using an individual-to-individual view, found the plaintiffs' controversy to be with the individual line officers who directly violated their rights, and not with supervisory personnel. The object of judicial scrutiny could only be the conduct of individual defendants. Relief could not be granted unless evidence established a tight causal connection between the harm to specific named plaintiffs and the conduct of specific named defendants (Whitman, 1988). In Rizzo, the Court was looking at higher-level officials as defendants, and required deliberate wrongdoing on their part. There had to be a showing of an "affirmative link [between established incidents of police misconduct against the plaintiff and] the adoption of a plan or policy by [the defendants] - express or

otherwise - showing their authorization or approval of such misconduct" (Rizzo, at 371).

The Court held against the plaintiffs in Rizzo because they could find no explicit decision of the defendants that could have caused their injury. The Court overlooked that it is the duty of higher officials to curb police misconduct, and in light of this the behavior of the Philadelphia officials was an explicit violation of that duty. The attention of the Court was drawn, instead, to the specific acts committed against the plaintiffs. As to improper supervision by police officials, the Court saw it as a "political controversy," and not a judicial one (at 371). Such a tight reading of Section 1983 did little to make it an effective remedy against official abuses.

ATTORNEY'S FEE ACT

The adoption of more restrictive language of Section 1983 was not the only reason few suits were filed. Since the language restricted awards to individual defendants, the damages were usually minimal. Many defendants balked at the prospect of filing and winning a 1983 suit, being awarded nominal damages, and still having to pay an attorney's costs. In 1975 the Supreme Court ruled that they lacked the power to award fees without Congressional approval [Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)].

Congress took up this issue in 1976, and the debates showed the favorable attitude Congress had toward the issue of attorney's fees. Senator Turney stated:

> But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If a citizen does not have these resources, his day in court is denied him; the Congressional policy which he seeks to assert and vindicate goes unvindicated and the entire Nation, not just the individual citizen, suffers. (122 Cong. Rec. 33313).

From these debates, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, an amendment to 42 U.S.C. Section 1988:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1980 and 1981, [1981, 1982, 1983, 1985, and 1986] of the Revised Statutes, Title IX of Public Law 92-318 or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

It can be said that this act kept the drive for civil rights litigation alive in the face of the Court's restrictive holdings. Perhaps due to increased arguments, and a continued volume of cases, the Court, in 1978, rewrote Section 1983 law and opened a new era in civil rights litigation.

MONNELL'S EXPANSION

In 1978 the Court decided that its analysis of Monroe was incorrect. The Court, in Monell v. Department of Social Services, reread the history surrounding the Sherman Amendment and Section 1983 and held them to be different in intent [436 U.S. 658 (1978)]. Municipalities, therefore, could be subjected to constitutional tort actions. To support this view Justice Brennan looked to the meaning of the word "person" as it was used in lawmaking in 1871. He concluded that during the writing of the Civil Rights Act of 1871 "it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis" (at 687).

The decision then turned to the issue of when a "local governing body" could be held liable (at 690). Justice Brennan ruled quickly on the issue of vicarious liability. He wrote that a municipality could not be held "liable solely because it employs a tortfeasor - or, in other words, a municipality cannot be held liable under Section 1983 on a respondeat superior theory" (at 691). The Court was looking for some "action" on the part of the municipality in order to find it liable. Again, this points to the Court's problem of viewing tort actions in any other setting other than individual to individual (Whitman, 1988). Its conclusions went to the issue of causation:

> We conclude, therefore, that a local government may not be sued under [Section] 1983 for an injury inflicted solely by its employees or agents. Instead, it

> is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [Section] 1983 (Monell, at 694).

With Monell, Section 1983 became an available, usable means to remedy constitutional wrongs. There was now access to counsel, access to a defendant, and access to the city purse. Yet, Monell was not a complete guide to holdings of municipal liability. The Court left unclear two important concepts, the fleshing out of which was left to the lower courts.

The first area which the Court left clouded is the definition of an "official policy." The Court offers several different meanings throughout the Monell decision:

> (1) [A] policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers (at 690).
>
> (2) [An action or policy that has] received formal approval through the body's official decisionmaking channels (at 691).
>
> (3) [An action or policy] made by its law makers or by those whose edicts or acts may fairly be said to represent official policy (at 694).

The second area was what type of causal link was needed to hold a municipality liable for Section 1983 actions. It was this area that the lower courts explored for some time after Monell.

MODELS OF LIABILITY

Monell had required some type of causal link between a policy or custom and a constitutional violation. However, the Court never settled on one method to establish this causality. Lower court decisions have advanced three separate methods to show causation (Kritchevsky, 1988).

Compulsion:

The compulsion model comes directly from the facts in Monell. Here, a municipality is held liable for a policy or custom that directed or commanded a constitutional violation. As in Monell, a policy that when followed, necessarily caused a constitutional injury, places it under the compulsion model (Schnapper, 1979). This model comes from the Court's language in Monell where a municipality could be liable when an official's action "implements or executes" a policy or custom (at 690; Kritchevsky, 1988). This was very clear in Monell. When the municipality forced the plaintiffs to take leaves of absence, it implemented or executed a policy statement. An earlier decision had already ruled this policy to be unconstitutional [Cleveland Board of Education v. LaFluer, 414 U.S. 632 (1974)].

This is the strictest reading of Monell, yet, the easiest for the courts to decide; just look for policies that compel constitutional violations. To use this narrow model, however, is to require that a policy or custom command a

violation, and that it be unconstitutional. This will be very difficult to do in most cases. Few municipalities knowingly have written unconstitutional policies. Most likely the plaintiff must try to establish policy or custom by showing past incidents of similar behavior and that policymakers allowed this to continue (Kritchevsky, 1988).

Tort-Causation:

A second approach is suggested by the Court's statement that a municipality is liable when an "action pursuant to official municipal policy of some nature caused a constitutional tort" (Monell, at 691). The Court also stated that municipal liability was "an allegation that official policy is responsible for a deprivation of rights" (at 690). This seems to be a review of Monroe where the Court held that Section 1983 liability "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (Monroe, at 187). Under this view a governmental policy that is itself constitutional could "cause" a constitutional violation and allow liability to be imposed (Kritchevsky, 1988).

Much of this model is borrowed from tort law. Courts consider established municipal courses of action to be policies. From this they ask if the policies were the actual and proximate cause of a constitutional violation (Schnapper, 1979). This is much more lenient than the compulsion model as the courts do not require proof of a specific type of municipal policy. They look instead to a municipality's routine way of operating. These are its policies, and

they can lead courts to impose liability when the interaction between several policies is responsible for a constitutional violation (Kritchevsky, 1988).

Municipal Fault:

Many Section 1983 suits are filed in response to inadequate training or inadequate supervision. Suits of this nature claim that these inadequacies caused an official to violate an individual's constitutional right. These would normally fall under the tort-causation model, as the court would look to a municipality's training or supervisory policies to determine whether these policies were the cause of the violation. Some courts have added a new element, that of municipal fault. Here a municipality could be held liable only if it was at fault in establishing its training or supervisory policies (Kritchevsky, 1988). Unlike the tort-causation model, the plaintiff must prove culpability in order to establish liability.

Early cases went to the level of fault necessary; gross negligence, recklessness, or something else (Kritchevsky, 1988). A lower court held that the plaintiff had to show a degree of culpability greater than mere negligence in order to establish liability [Leite v. City of Providence, 463 F.Supp. 585 (1978)]. The court wanted a showing of "deliberate indifference...that the city can fairly be considered to have acquiesced in the probability of serious police misconduct" (at 589). This reading makes it very hard to establish municipal liability. Solid evidence of past behavior on the part of the municipality is needed to show fault.

This comes very close to pushing the model into the compulsion view. Tort-causation asks the question of whether a municipality should be held liable because its policy or custom caused a constitutional violation. The fault-based model, with its need for prior behavior, seems to ask whether a municipality should be held liable for having a certain policy or custom (Kritchevsky, 1988).

These, then, were the rationales used by the lower courts to establish causation. It was very much a geographical distinction and the Supreme Court left this question alone for awhile. Since Monell opened municipalities to suits, it was time to test other institutions and individuals.

IMMUNITIES

The strict reading of Section 1983 provides for no defenses. Privileges or immunities are not mentioned in its language. The Supreme Court chose, however, to mince logic in this regard. They reasoned that "a tradition of immunity was so firmly rooted in common law and was supported by such strong policy reasons" that Congress surely would have specified had they wanted immunity abolished [Owen v. City of Independence, 445 U.S. 622, 634 (1980)]. Adding to this is the Court's concern for public office. It feels that "the public interest requires decisions and action to enforce laws for the protection of the public," and that unless some immunities are given to officials they may

decide to take no action in fear of civil suits (Pierson, at 555; Whitman, 1986). Justice Powell views it as "attempt[ing] to ensure that public decisions will not be dominated by fear of liability for actions that may turn out to be unconstitutional" (Owen, at 652).

There are two main types of immunities which the Courts have granted; absolute and qualified. A third type, sovereign immunity concerns suits against states.

SOVEREIGN IMMUNITY

Sovereign immunity is generated from the Eleventh Amendment and protects states from being sued as states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State (United States Constitution, Eleventh Amendment).

The Supreme Court addressed this issue in a 1983 setting by deciding Eldeman v. Jordan [415 U.S. 651 (1974)]. Precedent held the Court to examine where the funds to be sued for came from:

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants [Ford

> Motor Company v. Department of Treasury, 323 U.S. 459, at 464 (1945)].

In Eldeman the Court held fast to this line of reasoning:

> [A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief...and may not include a retroactive award which requires the payment of funds from the state treasury.... It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action (at 668-677).

After Monell established that municipalities could be considered "persons" in a 1983 suit, the Eldeman plaintiffs reworked their argument in order to hold states as "persons" within 1983. In Quern v. Jordan, the Court held to its previous position on this issue, stating:

> [W]e are simply unwilling to believe...that Congress intended by the general language of Section 1983 to override the traditional sovereign immunity of the States. We therefore conclude that neither the reasoning of Monell, or of our own Eleventh Amendment cases subsequent to Eldeman, nor the additional legislative history or arguments...justify a conclusion different from that which we reached in Eldeman [440 U.S. 332, at 341 (1979)].

With this the Court remained unmoved from the view that the State, specifically the state purse, is safely protected within the Eleventh Amendment.

ABSOLUTE IMMUNITY

The second type of immunity granted by the courts, absolute immunity, has been used sparingly. This immunity is the total shielding of specific groups

of officials. It is tolerated because the courts feel that the cost of a victim of official misconduct going uncompensated is outweighed by the need for certain officials to perform their duties without fear of suit (Rudovsky, 1986). This attitude is spelled out in Imbler v. Pachtman where the Supreme Court established absolute immunity for prosecutors [424 U.S. 402 (1976)].

Imbler arose when a convicted murderer won his release by charging that the prosecutor knowingly used false testimony and suppressed material evidence (Brady material) at his trial. He then went on to file a 1983 suit using the unlawful prosecution as evidence against the prosecutor. The Court denied his argument and held that a prosecutor is absolutely immune from suit when acting within the scope of his duties when initiating and pursuing a criminal prosecution. The Court examined several reasons for its finding. First is a thought to the prosecutor's effectiveness:

> [A] concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgement required by his public trust (at 423).

Second is a concern of retributive defendants:

> Such suits could be expected with some frequency, for a defendant will often transform his resentment at being prosecuted into the ascription of improper and malicious actions to the states's advocate...if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing criminal law (at 425).

Third, the Court looks to time constraints:

> The presentation of such issues in a 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. Defending [these cases]...could impose unique and intolerable burdens upon the prosecution (at 425-26).

Finally, the Court addressed the fact that other remedies exist to punish a prosecutor who violates the law:

> [T]he immunity of prosecutors from liability in suits under 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. The Court has never suggested that the policy considerations which compel civil immunity for certain government officials also place them beyond the reach of criminal law (at 428-29).

The Court has also granted absolute immunity to judges. They addressed the question in Pierson v. Ray and found that "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction (at 554)." Adding intensity to this doctrine the Court stated:

> This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequence [at 554, quoting Scott v. Stansfield, L.R. 3 Ex. 220, at 223 (1868)].

Later, the Court added some restriction on this seemingly free rein which it gave judges. Stump v. Sparkman examined the question of jurisdiction and found that "the scope of a judge's jurisdiction must be construed broadly where

the issue is the immunity of the judge [435 U.S. 349, at 356 (1978)]." Using a phrase from Bradley v. Fisher the Court defined its position:

> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction" [at 356-57; quoting Bradley, 13 Wall. 335, at 351 (1872)].

The petitioners in Stumps also argued that a judge loses immunity when acts are performed outside a "judicial" capacity. The Court agreed with this "statement of law," however, they did not find it applicable to the case-at-hand (at 360). From this they offered a definition for judicial acts within the context of judicial immunity:

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectation of the parties, i.e., whether they dealt with the judge in his judicial capacity (at 362).

The realm of absolute immunity is a small one. Besides judges and prosecutors, absolute immunity covers the President; state and regional legislators acting in a traditional legislative capacity; executive officials performing essentially adjudicative functions; and witnesses in judicial proceedings (Rudovsky, 1986).

QUALIFIED IMMUNITY

The most frequently applied defense is that of qualified immunity. This defense is on par with the prior discussion of "good faith" as it balances two competing needs. While "good faith" balanced deterring police abuse against the societal cost of losing probative evidence, qualified immunity seeks to balance the need to deter public officials from abusing their power against the interest in limiting their fear of liability while performing discretionary duties.

This subject was touched on briefly during an earlier discussion of Pierson v. Ray. In Pierson, the Court held that while a policeman could not claim absolute immunity from a 1983 suit, he could claim qualified immunity as a defense. This was vaguely defined as requiring a showing of "reasonable belief" (Comment, 1984). No other components were given for the defense.

In its next decision concerning qualified immunity the Court attempted to define the elements of this type of immunity. Scheuer v. Rhodes charged that the Governor of Ohio "intentionally, recklessly, willfully and wantonly caused an unnecessary deployment of the Ohio National Guard on the Kent State Campus," and from these actions caused the death of the plaintiffs' relatives [416 U.S. 232, at 235 (1974)]. The specific question in this case was the Governor's state of immunity. The Court decided that he was covered under qualified immunity, yet, it set no standard for others to measure their conduct. In viewing qualified immunity, the Court looked to all the facts related to the

incident, an objective test which was grounded in "reasonableness" (Levowitz, 1987). It is "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a good-faith belief," the Court stated, "that affords a basis for qualified immunity" (at 248).

This definition did not give much guidance to the lower courts regarding the boundaries of qualified immunity (Levowitz, 1987). Depending on the court, "reasonableness" could mean many things:

> Did "good faith" mean that government officials acted without malice or an evil intent, that they affirmatively believed that they were acting within the law or the limits of their authority, or that they were following what they thought were lawful orders of their superiors (Friedman, 1977)?

In an attempt to clarify the differences brought out by the Scheuer decision, the Court decided a case in which they addressed the specific question of whether the good faith standard should be decided as objective or subjective. The case of Wood v. Strickland involved the expulsion from school of two tenth graders for spiking punch at an after-school party [420 U.S. 308 (1975)]. The suit was brought against school board members claiming a denial of due process. The district court held that the Scheuer test required a showing of malice on the part of the school board. The United States Court of Appeals reversed, favoring an "objective" test over the district court's "subjective" outlook of malice. This, then, was the clear choice that the Supreme Court had to choose from in order to clarify the problems of Scheuer.

The Court, however, was not in a decisive mood that day. Instead of choosing one over the other, they packaged both in a two-pronged test. The objective prong focused on the degree to which the law in question was knowable. An official will not be immune if he acted in "ignorance or disregard of settled, indisputable law [or]...clearly established constitutional rights" (at 321-22). The subjective prong focused on the motives and intentions of a defendant. This standard requires a "malicious intention to cause a deprivation of constitutional rights" (at 322). A plaintiff need only prove one of these points to win a judgement.

The most problematic part of this test was the subjective side. One of the original purposes of the qualified immunity defenses was to decrease the federal caseload and protect public officials from frivolous litigation (Imbler; Comment, 1984). The necessary inquiry into the subjective prong of this test is an examination of the facts. This requires a jury trial, crowds the federal docket, and takes the official away from his job. All of these run counter to qualified immunity's original purposes.

The years did prove, in fact, that most of these cases were charged under the subjective prong, and were opposing the Court's original aims (Higginbotham, 1985). In order to remedy this the Court decided Harlow v. Fitzgerald [457 U.S. 800 (1982)]. This case involved the actions of senior White House aides in their dismissal of an Air Force management analyst. The

Court's opinion went directly to the abolition of the subjective test. Justice Powell wrote that suits against officials:

> [F]requently run against the innocent as well as the guilty - at a cost not only to the defendant officials, but to the society as a whole. These societal costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office (at 814).

Powell reasoned that a subjective test asked a factual question, and answering that question could "entail broad-ranging discovery and the deposing of numerous persons" (at 817). All of these reasons contributed to the Court's removal of a standard they believed to be "parculiarly disruptive" to the effective operation of government (at 817).

The Court then concentrated on defining the objective part of the test. Powell wrote that the qualified immunity doctrine would protect:

> [G]overnment officials performing discretionary functions...from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (at 818).

By focusing solely on the objective test, the Court sought to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgement" (at 818). The Court also provided instructions:

> [T]he judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade

> conduct not previously identified as unlawful.... If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors (at 818-19).

The Court took these guidelines into consideration when it decided United States v. Leon. As previously discussed, Leon established guidelines as to what constitutes objectively reasonable behavior. In the criminal court, Leon established that a warrant issued by a magistrate normally shows that the applying officer acted reasonably and in good faith in requesting the warrant. This allowed the introduction of evidence, even if it was seized with an illegal warrant. Leon also effectively insulated the applying officer from suit.

In 1986 the Court applied the Leon standard to police officers in 1983 civil suits. Malley v. Briggs decided what kind of immunity to apply to officers and in what capacity [475 U.S. 335 (1986)]. This case arose when a legal wiretap of a third party led to implications of drug use by the Briggses. Officer Malley acquired an arrest warrant using these vague conversations as probable cause and arrested the Briggses. They were taken to the station, booked, arraigned for drug possession, and released. As they were prominent community members, these facts were printed in several newspapers. They

charges against the Briggses were dropped by a grand jury due to lack of evidence. The Briggses then sued under Section 1983.

The District Court dismissed the case, ruling that the act of a judge in issuing the arrest warrant insulated the officer from liability. The U.S. Court of Appeals reversed, holding that an officer is entitled to immunity only if he has an "objectively reasonable basis for believing that the facts alleged in the affidavit are sufficient to establish probable cause" (at 339). The Supreme Court reviewed two claims by the police officer: first, that he be absolutely immune from all liability; second, that he at least be allowed qualified immunity (Morar, 1986). The Court moved quickly into the first motion and stated that they could find no common law background to support this assumption. Absolute immunity had been preserved for those functions intimately associated with the judicial phase of the process.

The second claim was based on Malley's presentation of his warrant to a magistrate. This, he asserted, proved the information on the affidavit established probable cause. The Court did not accept this argument, and using Harlow and Leon they defined the objective reasonableness test as:

> [W]hether a reasonably well-trained officer...would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest (at 345).

The Court was careful to point out that it was not requiring officers to be more skilled in the law than the magistrates, merely to be sound in their applications for warrants. Magistrates make mistakes, the Court reasoned, however, the officer "cannot excuse his own fault by pointing to the greater incompetence of the magistrate" (at 346, n. 9).

This is the state of immunities as they apply to the individual players in the criminal justice system. As stressed before, however, they are not the main subjects for 1983 suits. The expansion of suits came when Monell declared municipalities as available defendants. Municipalities hold the money and are the main subjects of most 1983 suits. How these entities were to be protected by immunity was a major concern.

The long-standing policy was to afford municipalities the protection of qualified immunity (Katz, 1982). This followed the same case progression as discussed earlier. In 1980, however, municipalities left that line of reasoning. Owen v. City of Independence opened up a wider path for victims of abuse to use. Here, the Court removed municipalities' access to qualified immunity and held that they may not use the good faith of their officers to defend a charge.

There were three main reasons for this decision. First, the Court could find no early history of granting immunity to municipal entities. Second, the Court recognized the limited access that individuals had to relief. There was a need for someone, or something, to take responsibility if a charge was

warranted. The Court saw this stating, "many victims of municipal malfeasance would be left remediless if the city were...allowed to adopt a good faith defense" (at 651). Finally, the Court continued with its argument that threat of punishment led to increased legality. The threat of suit, the Court felt, would "serve as a deterrent against future constitutional deprivations" (at 652).

This was an interesting step for the Court to take as they actually expanded an individual's access to relief. For years the Court has been slowly closing down areas where an individual who has suffered a violation of constitutional rights might sue for compensation. Still more surprising was a distinction the Court drew in 1985 which, again, provided individuals with expanded standing in a Section 1983 suit (Faber & Manak, 1985).

Brandon v. Holt arose when the plaintiffs were beaten by a Memphis Police officer who had a documented history of violent behavior [469 U.S. 163 (1985)]. The suit charged both the officer and the Director of the Department as he was acting "in his official capacity" (at 172). The Appeals Court ruled that the Director did not know of the officer's past behavior, but due to the Department's administrative policies, should have known of such actions. The Court then held the Director to have been acting in good faith and entitled to qualified immunity. The Court also ruled that the suit was not, in effect, a suit against the City of Memphis, which could not claim the good faith of its officials as a defense. The Appeals Court saw this action as a suit against the individual only.

The Supreme Court then made the surprising move of reversing this decision. The Court ruled that when a suit is against an individual acting "in his official capacity," it imposes liability on the organization he represents. They stated:

> [W]e have plainly implied that a judgement against a public servant "in his official capacity" imposes liability on the entity that he represents, provided, of course, the public entity received notice and an opportunity to respond. We now make that point explicit (at 178).

This could become a very effective way of charging an individual's action to the municipality. A suit filed against a police executive acting in an official capacity can be seen as a suit against the municipality (Faber & Manak, 1985). This bypasses the qualified immunity afforded the individual official and allows the suit to fall upon the unimmunized municipality.

EFFORTS AT LIMITATION

Monell was the focal point for change in the area of Section 1983 civil suits. It did, however, leave many unsettled questions in the minds of the players involved. As discussed earlier, a major part of the Monell decision hinged on the existence of an official policy or custom operating within the entity charged with a violation. It had the effect of a qualified immunity standard. If

the violation was part of a custom or policy established by the entity, a 1983 suit would prevail, much as a "bad faith" act by an individual. However, if the action in question was not custom or policy, the suit would fail. In effect, the municipality was acting in "good faith" and is not liable. To show such a policy or custom can be extremely difficult (Friedman, 1988). In the case of a police abuse violation, records must be gathered concerning past incidents, training, selection, etc. What exactly was needed in order to establish a policy or custom remained undecided.

TUTTLE v. CITY OF OKLAHOMA CITY

In 1984 a case was brought before the Court which asked the question; what were the parameters in establishing a custom or policy? More specifically, could a single incident of police misconduct establish a policy which would lead to said misconduct? Tuttle v. City of Oklahoma City arose when an Oklahoma City police officer, with less than a year's experience, shot and killed an unarmed individual, Albert Tuttle [471 U.S. 808 (1985). The facts are strange as Tuttle, drunk, called the police from a bar's pay phone to report a robbery and gave his own description as the robber. When the police arrived Tuttle tried to leave and the officer attempted to stop him. Once outside the bar Tuttle knelt down, and in the officer's account, reached in his boot for what the officer believed to be a weapon. The officer then shot Tuttle during this action. A toy gun was later found in Tuttle's boot.

Tuttle's wife sued the officer and the Department for gross negligence in training, supervising, and disciplining its officers. This, she felt, constituted deliberate indifference on the part of the police department toward constitutional violations. The district court instructed the jury as to what may constitute a policy:

> Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability...cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to "deliberate indifference" or "gross negligence" on the part of the officials in charge (at 813).

Using these instructions the jury acquitted the officer, finding he acted in "good faith," but found the city liable. The circuit court upheld this verdict, agreeing that the incident was a flagrant demonstration of the officer's inadequate training and supervision.

The Supreme Court, however, was of a different mind. Actually, they were of several different minds as the Court could not agree on a majority opinion. Seven justices did agree, however, that the instructions given to the jury were erroneous. The instructions were improper because they allowed the plaintiff to "establish municipal liability without submitting proof of a single action taken by a municipal policymaker" (at 821). It was unfair to punish a municipality simply because they had hired "one bad apple" (at 821). To do so

would have had the same effect as applying the doctrine of respondeat superior, already disapproved of in Monell (Taylor, 1989).

A plurality of four justices wrote the opinion and raised the issue of Monell's requirement of an affirmative link between the policy and the violation. The Court did not see an affirmative link between the shooting and the city's training policy. The Court felt it was as nebulous as reasoning Tuttle's shooting was caused by the policy of Oklahoma City hiring a police force. The plurality required "considerably more proof than [a] single incident will be necessary in every case to establish both the requisite fault on the part of the municipality and the causal connection between the 'policy' and the constitutional deprivation" (at 824).

Tuttle demands further attention as the Court dealt with causation for the first time since Monell. As stated earlier, after Monell the choice between the three different models of causation was left to the lower courts. Tuttle presented an opportunity to settle the differences that had begun to show across the country in regard to causation requirements. The plurality took this opportunity to place further limitations on 1983 suits. A tort-causation approach, in this case, might have held for Tuttle and opened up further opportunities for plaintiffs fighting constitutional policies which led to a violation. However, in Tuttle, the plurality required a "fault-based" causation analysis (at 818). The fault-based analysis goes to the state of mind of the policymaker. Policies that caused constitutional violations would come under fire only if policymakers

intended for the policy to achieve such ends. Ones that did so because of negligence might not establish the "moving force" requirement of Monell. This was the District Court's understanding during the appeal of Tuttle when they required "gross negligence" or "deliberate indifference" of police conduct (at 821). Using this the Supreme Court saw it as difficult, or impossible, to establish causation through a single incident.

PEMBAUR v. CITY OF CINCINNATI

One year later the Court was of a slightly different mind. Pembaur v. City of Cincinnati came about when a grand jury was investigating welfare fraud and concentrating on a particular doctor [106 S.Ct. 1292 (1986)]. In an effort to gain information they issued subpoenas for two of the doctor's employees. When they did not appear warrants were issued for their detention and County Deputy Sheriffs attempted to serve them. Upon arrival at the clinic, the Deputies encounter a barred door as the doctor tried to prevent them from entering the area where the employees presumably were. The Deputies spoke with their supervisor who instructed them to call the prosecutor. The County Prosecutor instructed the Deputies to go in and get the employees. After chopping their way through the door with an axe, they were able to search the clinic, however, the employees were not on the premises.

From this action the doctor was convicted for obstructing police in the performance of their duties. The doctor then filed a Section 1983 suit alleging

that the county had violated his constitutional rights under the Fourth and Fourteenth Amendments. The suit was dismissed on the grounds that the action taken by the county did not constitute "official policy" as dictated under Monell. The Appeals Court upheld this decision under the premise of Tuttle's "single incident" policy:

> We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this **one occasion**, the Prosecutor and the Sheriff decided to force entry into his office.... That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy (at 1297, citing 746 F.2d 341).

The Supreme Court had what seemed like another opportunity to solidify their decision in Tuttle. They did, however, a bit of a turn around. The Court used the precedent of Owen and City of Newport v. Fact Concerts, Inc., both cases where single incidents of illegal behavior led to a finding of 1983 liability (supra; 453 U.S. 247 (1981). From these two cases, the Court believes, came the unquestionable fact that a single incident could bring about Section 1983 liability. "No one ever doubted," the Court stated, "that a municipality may be liable under Section 1983 for a single decision by its constituted legislative body..." (at 1298). But, by Tuttle's standards such acts would have to be wholly unconstitutional and form a policy. Not something the normal city counsel does

everyday. However, Pembaur cited language of Monell in its effort to expand the responsibility of such policy-making:

> But the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. Monell's language makes it clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," and whose decisions therefore may give rise to municipal liability under Section 1983 (at 1299, citing Monell at 694).

The Court was quick, however, to emphasize that not every decision by an official constitutes a claim to Section 1983. "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered" (at 1299). A line was drawn between the ability to establish policy and the exercise of discretion in a particular instance. This is, in essence, respondeat superior but on a higher level. Here, those individuals with the power to establish policy will be connected to the municipality through respondeat superior (Brook, 1977).

In the case at hand, the Court looked to the authority granted the Prosecutor under Ohio law. The city argued that the Prosecutor lacks any policymaking authority and was only offering "legal advice" to the County Sheriffs when he ordered the Sheriffs to "go in and get" the employees (at 1300). However, the Court found that Ohio law established such policymaking power at the prosecutor's level. When the Prosecutor ordered the Sheriffs to

enter the doctor's office by force, he was acting as a final decisionmaker for the municipality and, therefore, the municipality is liable for that decision.

The distinctions made in this decision are quite amazing. Surely there is no one official at the local level with more final decisionmaking power than the police officer. As with the officer's decision in Tuttle, the decision to shoot when he felt it appropriate, nothing else is so final. Pembaur, though it expanded somewhat the scope of 1983 suits, created another buffer between the police and Section 1983 liability. Here, the Court is saying that if the Deputy Sheriffs had not contacted the Prosecutor, but had acted on their own and performed the same illegal act, no liability would have issued. Once again the Court is allowing the police to hide behind the decisions of other when their actions are illegal.

The Pembaur decision allowed for a focus back to the individual level as discussion centered on what the decision might mean for line personnel. Taken in a broader view it was another step on the Court's path to establish fault-based liability in Section 1983 suits. When examined together with the remaining case and the Tuttle decision a clearer picture of the future of Section 1983 will be available.

CITY OF SPRINGFIELD, MASS. v. KIBBE

The final decision in the discussion is City of Springfield, Massachusetts v. Kibbe [107 S.Ct. 1114 (1987)]. This case involved a fatal shooting of an individual by Springfield police after that individual fled from police and ran through several roadblocks. Clinton Thurson was suspected of breaking into an apartment and abducting a woman staying at the apartment. While stopped at an intersection Thurson was approached by a police officer. When Thurson saw the officer he drove away and in an ensuing chase ran through two roadblocks. Officer Theodore Perry, riding a police motorcycle, joined the chase after Thurson went through the second roadblock. On three occasions Officer Perry tried to pull alongside Thurson who swerved his vehicle toward Perry and forced him back. On the last two attempts Perry fired his gun at Thurson. He apparently hit Thurson with his second shot as the car came to a stop. Another officer ordered Thurson from the car and when he did not comply, struck him on the head with a flashlight, pulled him from the car, and handcuffed him. Thurson was then taken to the hospital where he later died of a gunshot wound to the head.

Thurson's estate sued the City of Springfield and the officers involved under Section 1983 for depriving Thurson of his life without due process of law. The jury awarded monetary damages against the City, and the decision was upheld by the U.S. Appeals Court for the First Circuit. The First Circuit did this by distinguishing Kibbe from Tuttle on two areas. First, the appeals court

reasoned that, unlike Tuttle, the jury instructions in Kibbe were proper as they informed the jury that they could not hold the city liable solely on evidence of a single incident of police misconduct. The appeals court determined that the jury was able to reasonably concluded from testimony, facts, and inferences that the training was inadequate.

The First Circuit also called attention to the definition of a "single incident." It saw Tuttle as involving a single officer in a single act of misconduct. Kibbe, however, involved ten police officers and several incidents of misconduct. The appeals court viewed many incidents of misconduct, even when occurring during the same event, as further evidence of municipal liability. Thus, the First Circuit felt that this decision met the Tuttle standard of considerably more proof than a single incident.

The case came before the Supreme Court and seemed to light some fires. Precedent-wise it established little as a majority of five justices dismissed the case on procedural grounds. As a window to future decisions, however, it was a solid statement of the fault-based model of liability.

When presented to the Supreme Court it was hoped that Kibbe would clarify three points (Friedman, 1988). First, whether a municipality could be held liable for the inadequate training of its employees. Second, whether the "single incident" rule of Tuttle applied only to evidence concerning one act by one officer as implied by the First Circuit. And lastly, whether a policy of inadequate

training could be inferred from the misconduct of several police officers during one incident without evidence of prior misconduct or of a conscious decision by policymakers. The majority rid itself of this case by deciding that the city had not brought up its points of appeal at the appropriate time. The dissent, however, wanted to decide the case on the merits and led by Justice O'Connor issued one of the strictest readings of municipal causation.

The dissent used Tuttle's "affirmative link" statement and Polk's "moving force" standard to require "a direct causal connection between municipal conduct and [a] constitutional deprivation" (at 1120). In the present case, Justice O'Connor viewed this connection as being "largely a matter of speculation and conjecture" (at 1121). In her view, suits dealing with police training procedures may only be used as a basis for a Section 1983 suit when "the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain" (at 1121). According to Justice O'Connor, only a certain kind of policy, those linked well enough to constitutional violations, could have the potential to establish a claim for Section 1983 (Korn, 1989). The policy needed to evidence reckless disregard or deliberate indifference to constitutional rights.

The dissent in Kibbe was a vigorous statement of fault-based liability. It did not, however, go as far as some of the language in Tuttle. It did not advocate the compulsion model where a municipality could only be liable for injuries caused by unconstitutional policies (Kritchevsky, 1988). It has been

recognized that it is possible to have constitutional policies that do cause violations of Section 1983. In Grandstaff v. City of Borger, the municipality had a policy of refusing to investigate citizen brutality complaints which was held to be factually constitutional [107 S.Ct. 1369 (1987)]. However, the existence of such a policy was ruled to make it likely that abuse, constitutional violations within Section 1983, would continue unchecked. A finding for the compulsion model might add further to the ways that police agencies insulate themselves from liability (Kritchevsky, 1988). It would be possible for agencies to adopt facially constitutional policies that they would ignore in practice.

ANALYSIS

These three decisions have established, for the most part, where we are today in deciding Section 1983 liability. The Kibbe dissent seems to have the edge on the future of such cases as the current administration should be able to select at least one more justice who, in all likelihood, will support such an outlook. The problem with such an outlook stems from the choice of causation models. Monell offered the possibility of all three choices depending on where one read, and where one placed emphasis. The Monell Court laid down the basics and expected the lower court to flesh out the rest of the requirements. It seems, however, that the Court was a bit too general, and ten years have been spent trying to clarify its meaning.

The Kibbe dissent offers the most up-to-date opinion of the Court, so it will be used for this discussion. There are four major misconceptions that the dissent has made in Kibbe. First, and most importantly, it misreads Monell to require municipal liability to be fault-based. Proof of municipal fault was announced in Tuttle as a necessary condition for liability: "a municipality could be held liable where a plaintiff could show that it was the city itself that was at fault for the damage suffered" (Tuttle, at 828). The Court moved further on when it linked fault to causation:

> [I]t is open to question whether a policymaker's "gross negligence" in establishing police training practices could establish a "policy" that constitutes a "moving force" behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required (Tuttle, at 824, n. 7).

The Court continued this language in Kibbe where it held that the link between the municipal policy and the violation in question required that the policy evidence reckless disregard of, or indifference to, a citizen's constitutional rights. Both these statements seem to drag too much from Monell. When the Court decided Monell it was very careful to distance itself from the concept of respondeat superior. "Fault" was in its language for that reason. Monell held that municipalities were liable when its policies caused a constitutional violation. Its main conclusion with this language is that a simple employment relationship did not establish such a link.

Kibbe also errs in its inclusion of state of mind as an element of proof of a prima facie case. This requirement ignores prior holdings that 1983 contains no such provision [Daniels v. Williams 474 U.S. 327 (1986); Parratt v. Taylor]. To make out a prima facie case requires only the showing that a person acting under color of law deprived an individual of his constitutional rights (42 U.S.C. 1983; Kritchevsky, 1988). Requiring such a state of mind showing goes against the findings in Owen and Pembaur. In both cases liability was held against a municipality for an action that was constitutional when taken, but later ruled to be unconstitutional. How then can a city be "wrong" or at "fault" in such an instance? To require state of mind in the prima facie case would be to discredit precedent of this type.

Further, a state of mind requirement is incorrect when examining causation (Friedman, 1988). It has been recognized that government institutions can cause harm inadvertently. When the Court rejected "good faith" immunity for municipalities in Owen, it realized that injuries can result even when policymakers acted with good intentions. The Owen court viewed it as necessary to hold municipalities liable for these occurrences:

> Moreover, Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations.... Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights (at 651).

A state of mind requirement would make such sentiments useless as policymakers would be able to institute policy up to the point of a deliberate indifference to constitutional rights. This is a far cry from encouraging policymakers to minimize the likelihood of constitutional violations.

Further, the establishment of a state of mind requirement theoretically nullifies Section 1983. The proper Monell inquiry has been defined recently as distinguishing the "acts of the municipality from the acts of the employees of the municipality, and thereby making it clear that municipal liability is limited to action for which the municipality is actually responsible" (Pembaur, at 479). The act of the municipality has, therefore, become the primary unit of analysis. Identifying these seems to be a bit problematic.

Tuttle and Kibbe avoid this essential question by ignoring it and concentrating on the state of mind. This muddles the analysis further when one realizes that a municipality has no state of mind, only its agents can (Friedman, 1988). The Court recognized this in City of Newport v. Facts Concerts, Inc. when it would not impose punitive damages against a municipality because a municipality could have no malice. However, the current court followed such state of mind logic to its foreseeable end in Pembaur. The Pembaur court must have realized the folly in trying to pin a state of mind requirement on an entity such as a municipality, so it shifted its focus to the agents of such an institution. With this the Court had actual "policymakers" that it could evaluate for state of mind needs.

The dissent in Pembaur, however, recognized the dangers of this. First, that a major tenet of Monell had been broken:

> [T]he Court has adopted in part what it rejected in Monell: local government units are now subject to respondeat superior liability, at least with respect to a certain category of employees, i.e., those with final authority to make policy. (Pembaur, at 499).

And, perhaps more importantly, this tunnelled view of an individual actor or policymaker "blinds the Court to the ways in which harms can be caused by institutional structures and processes" (Whitman, 1986, at 248).

Justice O'Connor and the rest of the dissent in Kibbe are failing to realize that the bureaucracy of any government is an awesome machine. There is no state of mind that can be attributed to its functioning, yet, it can trample the constitutional rights of individuals in its normal operation. What happens when no one "policymaker" is "deliberately indifferent" and, therefore, responsible for a constitutional violation due to an institution's mechanics? Taken together, Pembaur and Kibbe fail to provide for such a basic occurrence.

The effect of these decisions is the further sheltering of actions taken by a municipal officer that lead to a violation of an individual's constitutional rights. When the Kibbe dissent finds itself in the majority, there will be very few avenues of redress an individual will be able to pursue. To prove deliberate indifference in a police abuse or illegal search situation seems almost daunting. Combine

this with the restrictions on the exclusionary rule and one can sense a very loose rein on a potentially dangerous horse.

MISCONCEPTIONS AND REALITIES

The preceding chapters detailed the legal history of the exclusionary rule and Section 1983 suits. The viewpoint of this paper has been that these measures are essential remedies for abuses of the Fourth Amendment by government officials. This work's reason for being is that the continued erosion of these avenues of redress will severely impact the constitutional rights of the individual and jeopardize the integrity of the courts in the process.

The initial chapters attempted, first, to show where we have been in regard to these measures, what events and perceptions motivated legislators and courts to fashions these protections. Second, an effort was made to detail court rulings which changed these protections, made them available to fewer people in fewer situations. Rationales, expressed by the court, were outlined and discussed. Research relating to the courts' standard of deterrence was presented and was shown to have little statistical significance. Studies in this area neither prove nor disprove the rationale of deterrence.

It was this paper's view that the rationales adopted by the Court were not valid theory. Several of the Court's, and many opponents' of such protections views are not based on proven factors. The Court has gone from a statement

of ethical considerations to one of seeming logic: from judicial integrity to deterrence. It is as if the Court was looking for something they could hold out and count. It was not entirely successful. If anything it was a start at basing decisions on misconceptions.

EXAMINING MISCONCEPTIONS

The arguments against Section 1983 as a Fourth Amendment protection are numerous. Some have been examined in the discussions of immunity and the good faith defense. Probably the most widely used criticism of this protection is that it created an explosion of court cases that have bogged down the judicial system. This is certainly the easiest criticism to gather data on. Merely checking the Annual Report of the Director of the Administrative Office of U.S. Courts shows the rise in civil suits. In 1961, before the ruling in Monroe, there were 270 federal civil rights suits filed (Annual Report, 1961). Ten years later the total had risen to 4,600 (Annual Report, 1972). In 1976 there were almost 13,000 civil rights cases filed out of 140,000 civil suits (Annual Report, 1976).

The rise in civil rights suits played an important part in many opinions. At most every advancement of Section 1983 applicability , dissenters warned of overburdening and the majority began to take heed. In Maine v. Thiboutot, Justice Powell wrote for the dissent:

> No one can predict the extent to which litigation arising from today's decision will harass state and local officials: nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that the consequences will be substantial [448 U.S. at 23 (1980)].

Powell continued with this position two years later in Patsy v. Board of Regents [457 U.S. 496 (1982)]. After citing rising statistics gleaned from the Annual Report he stated:

> The result of this unprecedented increase in civil rights litigation is a heavy burden on the federal courts to the detriment of all federal-court litigants, including others who assert that their constitutional rights have been infringed (at 533).

Related to the rising number of civil suits is another area of concern for opponents. Municipal insurance premiums have increased as the threat of law suit grows more prevalent. Municipalities view this as unfair: their systems may be designed to prevent such suits, yet they still pay against the possibility of one. In Hartford, Connecticut premiums were raised 200%. Colorado's liability insurance was cancelled. And Dallas resulted to self-insurance after its premiums went up 700%.

This is the result of wary insurance companies reacting, in part, to such statements as Justices Powell's. Insurance companies seem to follow along. The Insurance Information Institute, a New York-based group that speaks for the property and casualty insurance industry, cites mushrooming growth in litigation (Blodgett, 1986). Also, the Wyatt Company, a risk-management

consulting firm in Chicago and Washington, D.C., reports a more than 40% increase in public entity lawsuits between 1982 and 1985 (Blodgett, 1986).

Much has been made over the effects of these suits: an overcrowded court docket, higher insurance premiums, officials who are afraid to make decisions due to threat of suit. Some studies, however, have not had results which support these ideas.

THE YALE PROJECT

One early study, done by Yale University students, looked at what effect Section 1983 suits had on police departments, individual officers, and the plaintiffs (Project, 1979). After examining the jury selection process, and surveying jury attitudes and decisions, the Yale study concluded that overcoming jury bias was a major obstacle for the plaintiffs, or those who had some criminal background. The jury, however, "favored police officers because they were viewed as respectable people performing a difficult and necessary job" (at 814).

The study found, it seems, that police departments by-and-large ignore the process:

> Payments made by municipalities as a result of Section 1983 litigation did not generate pressure on the police departments to minimize misconduct. Damage awards were infrequent and diminutive; suits were often settled out of court for modest sums. The

> costs that did exist were hidden, legal work was done by salaried attorneys in the office of the corporation counsel, or by an insurance company as part of the municipality's comprehensive liability insurance coverage (at 813).

If they are, in fact, ignoring the threat of suit, the concept of deterrence does not appear to be valid. A concluding thought of the Yale study dealt with this problem:

> Supervisory officials were never found liable; line officers were indemnified for damage awards and settlement costs. The costs of the suits were not high ... so that little incentive was given the municipality to discipline the police.... Thus, if deterrence depends upon the imposition of financial loss on the individual police officers, or upon the imposition by municipalities of sanctions against police departments, these suits did not deter police misconduct (at 815).

The Court, however, reacted in a manner similar to their stance on the exclusionary rule's deterrent capabilities. They saw no reason why such action should not prove a deterrent to officials. In Carson v. Green they reasoned: "It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability [446 U.S. at 21(1980)]. The Court began to view such deterrence as possibly restrictive, hence, an expansion of immunity protections began in the late 70s. Again, the Carson court states this well:

> Indeed, underlying the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would otherwise deter them from acting at all (at 21).

The best example of this, the good faith defense, has already been discussed.

This seems to be another instance where the Court has followed some common belief, or public misconception and established precedent. While ruling on the exclusionary rule the Court was guided by the deterrence rationale. However, numerous research studies have provided no significant support to this theory. The deterrence rationales (exclusionary rule and Section 1983), however, are logical and should be expected to affect behavior. The Court seems to ignore that while the argument may be sound, it has not had a major effect in practice.

EISENBERG AND SCHWAB

Another example of this is the Court's attitude concerning the "explosion" in the number of civil suits brought about by Section 1983. Outlined earlier were several comments from Justices who viewed Section 1983 as a major culprit in the overcrowding of federal court dockets. Cited were statistics from the Annual Reports of the Administrative Office of U.S. Courts. These numbers revealed huge increases in suits since Monroe v. Pape; increases that the commentator attributes to Section 1983. A recent study, however, examined these statistics on a finer level and they pointed to a very different conclusion.

Thomas Eisenberg and Stewart Schwab developed their study in an effort to examine the number of "constitutional tort" suits and their impact on the system (Eisenberg and Schwab, 1987). To examine impact, the study focused on the Central District of California as a workable model, however, as an

overview they first reviewed existing stats on a national scale. What they found was that commentators were using lumped-together numbers from the Annual Reports which told very little about specific Section 1983 suits. Eisenberg and Schwab began by distinguishing between "civil rights litigation," which covers many federal provisions, and "constitutional tort litigation," which deals primarily with Section 1983 (Eisenberg and Schwab, 1987).

The numbers given at the beginning of this chapter and those given by most commentators come from general categories within the Annual Reports. Eisenberg and Schwab break down the one "civil rights filings" into four separate groups. The first major split is dividing prisoners from nonprisoners. Justice Powell, in Patsy, stated that "in 1981, over 30,000 such suits were commenced" (at 533). Yet half of these were prisoner filings. Using raw numbers, with no comparisons factored in, Justice Powell and other commentators use these statistics to foster claims of exploding growth.

TABLE I (Eisenberg and Schwab, 1987 at 662)

NATIONAL CIVIL RIGHTS FILING STATISTICS

FISCAL YEAR	NONPRISONER CIVIL RIGHTS FILINGS	PRISONER CIVIL RIGHTS FILINGS	PERCENT INCREASE OVER 1961	PERCENT INCREASE OVER 1975	
			NONPRISONER CIVIL RIGHTS	NONPRISONER CIVIL RIGHTS	PRISONER CIVIL RIGHTS
1961	296	not available			
1975	10,392	6,606	3,411%	–	–
1981	15,419	16,473	5,109%	48%	149%
1984	21,219	18,856	7,069%	104%	185%

An increase of over 7,000% is quite startling. However, data from the Annual Reports can be further specialized as to type of cases. Numbers from Table I report "civil rights" filing, a categorization that includes those filings associated with "jobs," i.e., Title VII and other employment discrimination statutes. A subsection holds those filings that deal primarily with Section 1983. Using this distinction, the numbers drop by one-half.

TABLE II (Eisenberg and Schwab, 1987 at 666)

NATIONAL INCREASES IN "OTHER CIVIL RIGHTS" FILINGS COMPARED WITH NATIONAL INCREASES IN ALL OTHER CIVIL FILINGS, FISCAL YEARS 1975 TO 1984

FISCAL YEAR	CONSTITUTIONAL TORT FILINGS	ALL OTHER CIVIL FILINGS	%INCREASE IN CONSTITUTIONAL TORT OVER PRIOR YEAR	%INCREASE IN ALL OTHER FILINGS OVER PRIOR YEAR	CONSTITUTIONAL TORT MINUS % OTHER INCREASE
1975	5,532	111,788			
1976	6,079	124,578	10%	11%	-1%
1977	6,318	124,249	4%	0%	4%
1978	6,475	132,295	2%	6%	-4%
1979	6,917	147,749	7%	12%	-5%
1980	7,213	161,576	4%	9%	-5%
1981	8,433	172,143	17%	7%	10%
1982	8,727	197,466	3%	15%	-12%
1983	9,938	231,904	14%	17%	-3%
1984	10,738	251,107	8%	8%	0%
TOTAL INCREASE FROM 1975 TO 1984			94%	125%	-31%

Eisenberg and Schwab's study reveals that when using the corrected data, constitutional tort filings either remained consistent with or decreased when compared to all other civil suit filings. This seems to indicate that Section 1983 has had no special impact on federal court filings, that advancements in this protection have not created an overwhelming number of suits. Section

1983 filings have remained constant with the general rise in civil suits. So if a problem exists it is with the system as a whole and not with one aspect.

Eisenberg and Schwab also separated prisoner filings for comparison, as these are often material for complaints. As Table I revealed, prisoner civil rights filings increase by 185% from 1975 to 1984. However, this too can be moderated when other factors are considered. Eisenberg and Schwab explain this by examining another large area of prisoner filings, habeas corpus litigation. As case law makes it more difficult to file such suits "by firming exhaustion requirements, by reducing prisoners' ability to overcome state procedural defaults, and by limiting the power to challenge fourth amendment violations," prisoner filings have shifted to Section 1983 actions (Eisenberg and Schwab, 1987 at 664). Allowing for a decrease in habeas corpus litigation reveals a net increase in prisoner filings of only 61%.

TABLE III (Eisenberg and Schwab, 1987 at 665)

NATIONAL INCREASES IN PRISONER FILINGS BY TYPE

YEAR	PRISONER CIVIL RIGHTS (A.O. CODE 550)	HABEAS & RELATED PRISONER FILINGS (A.O. CODES 510-540)	TOTAL PRISONER FILINGS	PERCENT INCREASE OVER 1975		
				CIVIL RIGHTS	HABEAS & RELATED	TOTAL INCREASE
1975	6,606	12,701	19,307			
1981	16,473	11,238	27,711	149%	-12%	44%
1984	18,856	12,215	31,107	185%	-4%	61%

Further comparison of prisoner filings with other civil filings show that they are increasing to a lesser degree. Eisenberg and Schwab controlled for

prison population increase and then compared this controlled percentage to that of all other civil suits to reveal a 19% drop against the national filing rate.

TABLE IV (Eisenberg and Schwab, 1987 at 667)

NATIONAL INCREASES IN PRISONER CIVIL RIGHTS FILINGS ADJUSTED FOR INCREASES IN PRISON POPULATION AND INCREASES IN ALL OTHER CIVIL FILINGS

YEAR	PRISONER CIVIL RIGHTS FILINGS (A.O. CODE 550)	PRISON POPUL. (000's)	ALL OTHER CIVIL FILINGS	% INCREASE IN 550 FILINGS OVER PRIOR YEAR	% PRISON POPUL. INCREASE	DIFFERENCE BETWEEN % 550 & % POPUL. INCREASE	% INCREASE IN ALL OTHER FILINGS OVER PRIOR YEAR	POPUL. ADJUSTED % 550 FILINGS INCREASE MINUS % ALL OTHER FILINGS INCREASE
1975	6,606	241	110,714					
1976	7,460	263	123,137	13%	9%	4%	11%	-8%
1977	8,235	278	122,332	10%	6%	5%	-1%	5%

Eisenberg and Schwab continued on with a much smaller in-depth study of the Central District of California. Their sample was nearly 250 cases decided in 1980-81. While their findings cannot be overly generalized they do offer some insight. One conclusion helps shed light on Section 1983's "problematic" reputation. Eisenberg and Schwab outlined the fallacy of an "explosion" of Section 1983 suits, however, they concluded, from their sample, that such cases are more burdensome than the average civil suit (Eisenberg and Schwab, 1987). More lawyer time goes into preparation, and judges are more likely to hold hearings on these cases.

As to the success of such suits, Eisenberg and Schwab found that "constitutional tort plaintiffs do significantly worse than non-civil rights litigants in every measurable way" (at 677). Plaintiffs prevail only 13.6% of the time while non-civil rights plaintiffs have a 79% success rate. It certainly does not seem to be the major threat to municipalities and public officials that it has been made out to be.

Along this same line is the terror of huge settlements that bankrupt cities. Eisenberg and Schwab viewed these perceptions as "overstated" (Eisenberg and Schwab, 1987 at 684). The final monetary tally in the 21 cases in which money was awarded in the Central District amounted to around $900.000 (Table 5). Further, in no case was the cost borne by an individual official. This might help to negate the perception that officials are deterred from performing their jobs effectively because of threat of suit.

TABLE V (Eisenberg and Schwab, 1987 at 665)

TOTAL AMOUNT RECOVERED: CASES WITH CLEAR DISPOSITION, CONSTITUTIONAL TORT CASES, C.D. CAL. 1980-81

MONEY JUDGMENTS	$282,230
SETTLEMENTS	266,060
FEES AWARDED BY COURT	337,370
FEES BY SETTLEMENT	0
TOTAL	$885,660

Eisenberg and Schwab offer a final analysis as to the difference in public opinion and their findings:

> The average constitutional tort case spends more time on the docket than the average civil rights case, more likely to generate discovery, more likely to require a hearing, and at least as likely to reach trial. Thus, the average constitutional tort case probably consumes more lawyer and judge time than do other cases. Yet constitutional tort plaintiffs are less likely to succeed.... This combination of relatively complicated cases and low success rates may foster the impression that constitutional tort cases are frivolous burdens. In addition, the psychological tendency to overestimate quantity based on a few unrepresentative but memorable cases is well documented. From a few highly visible constitutional tort cases, observers may perceive an avalanche (at 694).

This misperception can explain much; from higher insurance premiums to Justice Powell's dissents based on docket concerns. Just to reiterate, there has been a growth in Section 1983 suits and such an increase has put more of a burden on the court docket. However, Section 1983 is not to blame in and of itself, it has merely risen with, sometimes lagging behind, the overall increase in civil suits. Perhaps Justice Powell and other dissenters need to focus on civil protections that are due an individual and not on shadowy, unproven fears. If it is not the problem it has been made to be, perhaps Section 1983 needs to be expanded in those areas where fear of an overburdened system has kept protections in check.

SOME REALITIES

Misconceptualized or not, decisions are being made that are changing the scope and applicability of the exclusionary rule and Section 1983. Some are happening at the High Court level, while others are changes in administrative functions. There was one scenario that was bound to happen. Given today's preference for a plea-bargain, and municipalities' fear of law suits, release-dismissal agreements were only a matter of time.

RELEASE-DISMISSAL AGREEMENTS

A release-dismissal agreement is a contract between a defendant charged with a crime and the prosecutor who is pursuing the charges. The contract generally stipulates that the defendant will not initiate a Section 1983 suit against the municipality or its officials if the prosecutor does something favorable to the defendant's case. The prosecutor's action can be any number of things: dropping all criminal charges; lowering the charge to a less serious offense, or influencing the sentencing after a guilty verdict has been entered.

One of the first cases in this area came about when a black motorist claimed racial harassment during his arrest by two white police officers for a traffic violation [Dixon v. District of Columbia, 349 F.2d 966 (1968)]. The city agreed not to prosecute if Dixon promised not to sue the officers. Dixon

reneged on his promise and the prosecutor retaliated by charging Dixon with the original offense. The court wrote to the retaliation aspect of the prosecutor's conduct:

> The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for the redress of grievances ... the major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. Much more important, these agreement suppress complaints against police misconduct which should be aired in a free society. And they tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint. The danger of concocted charges is particularly great because complaints against the police usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest.... We must therefore ban prosecutions which are brought because the defendant refused to promise not to file a complaint against the police. Prosecutors will then have no incentive to offer or make such agreements (at 969).

Retaliation was again the theme in MacDonald v. Musick [425 F.2d 373 (1970)]. Here, a prosecutor tried to establish an agreement with an individual who had been arrested for drunk driving. After MacDonald refused to waive his right to civil suit the prosecutor added an additional, and much more convictable charge of resisting arrest. The court did not view this as proper action for a prosecutor:

> It is no part the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against the policeman, even where the civil case arises from events that are also the basis for the criminal charge. We do not mean that the prosecutor cannot present such a criminal charge.

> What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case (at 375).

In 1972, Vertia Boyd was a passenger in an automobile with three male friends [Boyd v. Adams, 513 F.2d 83 (1975)]. They were driving to Chicago high school in order to pick up the mother of two of the male passengers. As they drove around the school they were stopped by undercover officers in an unmarked police car. The officers searched the car and the three male passengers. Vertia, however, refused to be searched. She was then shoved against the vehicle and pushed over to the police car. They then arrested her and brought her to the station where she was held for five hours on charges of disorderly conduct and resisting a police officer in the performance of his duty. Ms. Boyd claims that she was pregnant at this time and that the officers actions caused her to miscarry the child seven months later.

Ms. Boyd appeared at trial four months after her arrest. The prosecutor offered to dismiss all charges if she signed an agreement releasing the arresting officers and the City of Chicago from all liability. Ms. Boyd claimed she signed this agreement under duress and brought suit to find it void. She also sought an injunction against the practice of release-dismissal agreements. The district court held against all of Ms. Boyd's pleas and found release-dismissal agreements to be valid.

The appeals court ruling went to the validity of her release-dismissal agreement. The Court first established that one may voluntarily waive one's constitutional rights as long as the voluntariness of the act is consistent with standards set forth in Schneckloth v. Bustamonte [412 U.S. 218 (1973)]. The district court felt that Ms. Boyd signed the agreement under no coercion or duress. The appeals court disagreed, finding that Ms. Boyd was indeed coerced "under the age-old concept of duress by imprisonment" (513 F.2d at 88). The Court reasoned that Ms. Boyd had no money to pay the fine, therefore, she knew she was going to jail if she did not sign. This release, they stated, "was secured in such an inherently coercive context that plaintiff did not effectively waive her civil action against defendants," hence the waiver "was neither voluntary nor an intentional relinquishment or abandonment of the right or privilege" (at 88).

The Court then made a wider statement that this release-dismissal agreement was against public policy. They agreed with the district court statement that:

> [T]hese release agreements are basically odious and must have every presumption placed against their validity.... In sum, we find these release agreements odious and distasteful, to be enforced only in very rare circumstances (at 88).

And they did not feel that these facts constituted the "very rare circumstances" which were needed to justify such an agreement. There was no ruling from the Court, however, as to the general validity of these release-dismissal agreements, only that they will be reviewed under tight guidelines.

A different set of circumstances brought this matter before the courts again in Bushnell v. Rossetti [750 F.2d 298 (1984)]. Robert Bushnell entered a Baltimore police station to report a crime he had witnessed on a city sidewalk. After getting what he felt to be an inappropriate response from the police he began to verbally abuse the officers. The officers responded to this by arresting Bushnell and charging him with disorderly conduct and resisting arrest. Bushnell filed civil suit for a variety of abuses he claimed the officers inflicted upon him during his arrest.

Soon after Bushnell was tried on the criminal charges and found guilty on both counts. Before he was sentenced Bushnell was approached by the prosecutor and counsel for the City of Baltimore, defendants in Bushnell's civil suit. The prosecutor offered an agreement whereby Bushnell would drop his civil suit if the sentence was lowered to probation before judgement. This would result in there being no criminal record against Bushnell. This was certainly in Bushnell's best interest as he was an attorney and a criminal record could hurt his practice. Bushnell accepted the offer and was granted probation before judgement.

After the sentencing, however, Bushnell would not sign an order dismissing the civil charge. In district court Bushnell argued that "the entire agreement was void as against public policy and thus should not be enforced

by the district court" (at 299). The district court disagreed and the matter was brought before the appeals court.

In appeals court Bushnell argued that all release-dismissal agreements are void as against public policy. To enforce these contract would "tend to stifle full inquiry into allegations of deprivations of constitutional rights and suppress complaints about police misconduct" (at 300). The appeals court disagreed with Bushnell's proposal. After reviewing past cases in the area of release-dismissal agreements they found that Bushnell's case was different from those where release-dismissal agreements came before a case went to trial. The case was different, the Court reasoned, because the guilt of Bushnell and the actions of the police officers had already been decided during the criminal trial. "Under these circumstances there would be no possibility that prosecutorial power would be abused in the way condemned in Dixon, MacDonald, and Boyd" (at 301). The Court concluded that:

> We do not believe that the risks to public interest created by enforcing releases given under these circumstances is sufficiently great to hold them void as against public policy (at 301).

The Court was quick to add, however, that its decision in no way held that all such pre-sentence release-dismissal agreements are per se enforceable. The decision to waive one rights to civil suit must be proven to be "voluntary, deliberate, and informed" (at 302). Though not explicitly stated, the Court seemed to indicate that only these types of pre-sentence release-dismissal

agreements could be used. Release-dismissal agreements initiated before conviction would be held unenforceable under Dixon, MacDonald, and Boyd.

This rule held until the 1987 decision of Town of Newton v. Rumery [408 U.S. 386 (1987)]. In this case Bernard Rumery was arrested for tampering with a witness. The witness, Mary Deary, was the victim of a sexual assault. Rumery's friend, David Champy, had been indicted for the offense. In an effort to find out more about the matter Rumery called Deary, whom he did not know to be the victim. After two phone calls from Rumery, Deary contacted the police chief and told him she was being threatened by Rumery. The substance of the phone calls is disputed as the police were not able listen to either one. Rumery, however, was arrested on a witness tampering charge.

Rumery's lawyer soon contacted the prosecutor and told him what a weak case the city had and that after the criminal charges were cleared up Rumery was going to file a civil suit. After some discussion, the prosecutor and Rumery's attorney reached an agreement that the city would drop the criminal charges if Rumery would promise not to initiate civil proceedings. The prosecutor made it clear that a major factor in his decision to make such an offer was a concern over Deary having to testify against Rumery. He believed this would too much for Deary along with her having to testify during the sexual assault case. Rumery discussed the issue with his lawyer, and returned three days later to sign the release-dismissal agreement.

Ten months later he filed civil suit against the city claiming false arrest and defamation of character. Rumery called for the court to find the release-dismissal agreement unenforceable because it violated public policy. The district court found that the agreement was made in a voluntary manner and held it to be enforceable. The appeals court relied on Dixon, MacDonald, and Boyd to reverse the district court's holding and adopted a per se rule invalidating such agreements:

> It is difficult to envision how release agreements, negotiating in exchange for a decision not to prosecute, serve the public interest. Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights (at 391).

The Supreme Court agreed to hear the case and ruled in favor of the Town of Newton. The Court believed that the appeals court overreacted to the threat of release-dismissal agreements as against the public good. They stated that:

> The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement (at 392).

From this they felt that release-dismissal agreements, in some instances provided for the public good.

The Court then reviewed the case against Rumery's argument that release-dismissal agreements were "inherently coercive" (at 393). While finding

that some agreements may not be "the product of an informed and voluntary decision...this possibility does not justify invalidating **all** such agreements" (at 393). The Court proceeded to compare release-dismissal agreements to actions such as plea bargaining in order to show that constitutional rights could be waived in situations that were not coercive; "We have no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted" (at 393). After reviewing the circumstance surrounding Rumery's decision to waive his right to sue, the Court ruled that he had did so in a voluntary manner.

The Court then spoke to why these agreement should not be per se invalidated; why they could further the public interest. It was recognized that they may tempt prosecutors to trump up charges, or dismiss others in order to protect public officials. However, this was balanced against the economy. As was discussed earlier, much was made over the number of civil suits that are filed and their burden on the system:

> Preparation for trial, and the trial itself, will require the time and attention of the defendant officials, to the detriment of their public duties. In some cases litigation will extend over a period of years. This diversion of officials from their normal duties and the inevitable expense of defending even unjust claims is distinctly not in the public interest (at 395,396).

In the Rumery case, the Court balanced the need for a civil suit against Rumery's voluntary signing of the waiver and the prosecutor's desire to keep

Deary from having to testify. With this balance they felt that the public interest was best served in enforcing the release-dismissal agreement.

The dissenting Justices felt that this was not balanced in favor of public interest. Certainly economics should not rule this case:

> The interest in vindication of constitutional violations unquestionably outweighs the interest in avoiding the expense and inconvenience of defending unmeritorious claims. Paradoxically, the plurality seems more sensitive to that burden than to the cost to the public and the individual of denying relief in meritorious cases...the plurality's decision seems to rest on the unstated premise that Section 1983 litigation imposes a net burden on society (at 419).

They also reviewed the aspects of a "voluntary" waiver and its impact on the enforceability of release-dismissal agreements. It was agreed that Rumery made a voluntary, deliberate and informed decision to waive his rights. However, the dissent felt that this was not sufficient basis to enforce the agreement. The dissent explained:

> [T]he deliberate and rationale character of respondent's decision is not a sufficient reason for concluding that the agreement is enforceable. Otherwise, a promise to pay a state trooper $20 for not issuing a ticket for a traffic violation...would be enforceable. Indeed, I would suppose that virtually all contracts that courts refuse to enforce nevertheless reflect perfect rational decisions by the parties who entered into them (at 408).

Further argument led to a criticism of release-dismissal agreements' failure to serve society's interest in punishing the wrongdoer. The dissent hit on the plea bargaining example the plurality used to point out that in every plea

bargain the end result is an admission of guilt and the imposition of some criminal sanction. The release-dismissal agreement, however, "completely exonerates the defendant" (at 409). The dissent sees that "[n]o social interest in the punishment of wrongdoers is satisfied," only economics, as "the only interest vindicated is that of resolving once and for all the questions of Section 1983 liability" (at 410).

The dissent also questioned whose interest should be primary to the prosecutor. The plurality, the dissent argued, saw three duties of the prosecutor:

> 1) His primary duty...was to represent the sovereign's interest in the evenhanded and effective enforcement of its criminal laws (at 412).
>
> 2) [H]e sought to represent the interests of the town of Newton and its Police Department in connection with their possible civil liability to respondent (at 412).
>
> 3) [T]he prosecutor also represented the interest of a potential witness who allegedly accused both respondent and a mutual friend of separate instances of wrongdoing (at 412).

The dissent viewed the second duty as one of potential conflict and a reason why release-dismissal agreements should not be made enforceable:

> The public is entitled to have the prosecutor's decision to go forward with a criminal case, or dismiss it, made independently of his concerns about the potential damages liability of the Police Department. It is equally clear that this separation of functions cannot be achieved if the prosecutor may use the threat of criminal prosecution to obtain a favorable termination of a civil claim against the police.

Critics of the plurality's holding have focused on the interaction of the prosecutor in the civil law field and in the criminal justice system:

> Commingling the civil and criminal justice systems is improper because it permits prosecutors, even ones acting in good faith, to consider factors outside of the criminal justice system in deciding whether to prosecute. Prosecutors should not have the ability to base their decisions on the existence of Section 1983 claims. A criminal case must stand on its own merits, as extraneous factors could interfere with the proper adjudication of the case (Fielkow, 1988 at 1138).

This twin role is why the courts have been worried about the possible tempting of the prosecutor. When serving two masters, just where does one's loyalty fall? The plurality solved this question by deferring to the discretion of the prosecutor:

> [T]he mere opportunity to act improperly does not compel an assumption that all - or even a significant number of - release-dismissal agreements stem from prosecutors abandoning "the independence of judgement required by their public trust" (at 399).

In contrast, the dissenters called on the ABA Professional Model Code of Professional Responsibility where "every attorney should avoid situations in which he is representing potentially conflicting interests" (at 414). While the dissent does not state that release-dismissal agreements will surely cause a prosecutor to act unethically, they believe that the opportunity should not be available.

Analysis:

Release-dismissal agreements should not be allowed at any stage in the criminal process. The plurality in Town of Newton v. Rumery advanced two primary claims as to why these agreements should be valid. First, they thought that when properly supervised these agreements were a voluntary waiver of an individual's constitutional right. That this can occur has already been settled, what is needed is a waiver that is "voluntary, deliberate, and informed" [Jones v. Taber, 648 F.2d at 1203 (1981). The plurality maintains that in most cases such waivers reflect "highly rational judgements" and should, therefore, be enforceable (408 U.S. at 395).

The dissent is correct, however, when it states that even highly rational judgements can be coerced. It is probable, in fact, that a higher state of rationale is being used when one is being coerced. The options are offered: face a highly probable criminal conviction or give up a civil suit that has only a marginal chance at success. (Probably a better than marginal chance at success, as prosecutors will only offer such an agreement if they believe the civil suit has some merit.) Faced with such a choice, a rational individual will make a highly rational judgement to avoid criminal sanctions. This does not allow room for many other options and is, therefore, coercive.

The plurality's second basis for the validation of release-dismissal agreements is that their service to the public good outweighs any detriment they might cause. Listed as the measure which does service to the public good is

protecting public officials from the burdens of unjust Section 1983 claims. This is a worthy goal, but is it a proper one for release-dismissal agreements and does it outweigh the detriments associated with such agreements?

Release-dismissal agreements, initiated by the prosecutor, are not the proper avenue to filter out unjust Section 1983 claims. First, the prosecutor has no basis for making this determination. Section 1983 is a civil constitutional matter and not a criminal one. A determination of what is frivolous and what is meritorious should be made by the courts. Second, unjust claims are not what the prosecutor is trying to get rid of in release-dismissal agreements. Why would a prosecutor toss out criminal charges against an individual, offer exoneration to someone against whom probable cause for a criminal act has been established, if that individual had a frivolous claim in a Section 1983 suit? No, the prosecutor, when using release-dismissal agreements has one motive and two ways to achieve that end.

His motive is to protect the municipality and its officials from civil suit. He will be concerned only if he believes the suit to have merit. His avenues to achieve this are either to dismiss a solid criminal charge against the individual, or, as the dissent fears, to trump up charges in order to get the individual to deal. The plurality believes that the second option will not come about, however, it is the basis for the decisions in Dixon and MacDonald. As to the first option, is it really in the public's interest to dismiss a criminal charge against an individual, usually no. The scenario, however, for release-dismissal

agreements is usually a vague criminal charge, i.e., disorderly conduct, and a fairly strong civil suit. This makes it an easy criminal case for the prosecutor to give up and a favorable civil suit for him to get rid of. But is this in the public interest?

It is not in the public interest to have civil suits, legitimate or frivolous, dismissed by the prosecutor. It is definitely in the public interest to have all incidents of official misconduct examined by the appropriate agency, the courts. To have less is to undermine the spirit of Section 1983. Section 1983 was designed to be a check on the actions of groups which sought to abuse another. Government was one of the groups from which the act sought to protect. If the criminal justice system is accused of abuse by an individual, then it is certainly not within the spirit of Section 1983 to have that group cover up and rid itself of the accusations. Does the Grand Dragon of the Ku Klux Klan get to offer a black citizen his life in return for dropping harassment charges against the Klan? Surely not. Why then does the prosecutor, an agent of the criminal justice system, get to offer an individual his freedom in exchange for dropping charges against an abusive police department. This scenario is not in the public interest and I can think of none involving a release-dismissal agreement that is.

COMPARATIVE REPREHENSIBILITY

As to the exclusionary rule, what will the future bring? A case statement from a near Supreme Court Justice, Robert Bork, seems to sum up the prevailing attitude and might signal what is to come:

> It is not...easy to see what the shocks-the-conscience tests adds, or should be allowed to add, to the deterrent function of exclusionary rules. Where no deterrence of unconstitutional behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence [United States v. Mount, 757 F.2d 1315, 1323(1985)].

When asked to comment further on the statement, Judge Bork responded:

> One of the reasons sometimes given [in support of the exclusionary rule] is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been convinced by that argument because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society (Kamisar, 1987 at 2).

Yale Kamisar, in an article examining the future of the exclusionary rule, labeled these statements as holding an idea of "comparative reprehensibility." Kamisar outlines its various forms:

> (a) since "turning a criminal loose" is always more shocking, or at least as shocking, as admitting relevant and reliable, albeit illegally acquired, evidence, unless there are other good reasons for not doing so, a court should always admit such evidence;
>
> (b) in ruling on the admissibility of evidence obtained in violation of the fourth amendment, a court should balance the seriousness of the officer's error against the gravity of the defendant's crime and only exclude

> the evidence when, if ever, the reprehensibility of the officer's illegality is greater than the defendant's;
>
> (c) the courts should consider some crimes, e.g., murder, rape, and armed robbery, so serious that their gravity will always exceed the gravity of any unreasonable search or seizure and completely eliminate these crimes from coverage of the rule;
>
> (d) in applying the "comparative reprehensibility" test, a court might take a two-level approach, (i) **never** excluding illegally seized evidence in the "most serious" cases (because the defendant's conduct will **always** be more reprehensible than the police officer's), and (ii) freely balancing the gravity of the constitutional violation against the gravity of the defendant's crime in other cases (Kamisar, 1987 at 3).

Comparative reprehensibility is similar to the Court's current balancing system. The weight is only changed: deterrence is replaced by the reprehensibility of the government's action. To use such a system, however, is to see the possibility of one of Kamisar's approaches, that is, due to the reprehensibility of certain crimes no police actions could surpass it. Imagine the leeway this would give police while investigating certain, particularly brutal crimes. The backing for such a system is there. Among the judiciary, Arizona Supreme Court Justice James Cameron had this to say:

> [W]here the criminal conduct is more dangerous to society than the police misconduct, it does not make sense to sacrifice the criminal prosecution in order to deter the police...the gravity of ["serious crimes"] always will by definition exceed the gravity of any Fourth Amendment violation. This is because, the rhetoric of some civil libertarians to the contrary, it **is** worse to be murdered or raped than to have one's house searched without a warrant, **no matter how**

> **aggravated the later violation** [State v. Bolt, 142 Ariz. at 270 (1984)].

These opinions are somewhat frightening. Maybe the focus should be on the Fourth Amendment and not the exclusionary rule. That is the document which guarantees our right to be secure in our homes. The Framers knew what the costs would be when this was drafted. Thomas Cooley said that "it is oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity" (Kamisar, 1987 at 45). Justice Stewart has a similar view of the Fourth Amendment:

> The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals...that is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power (Stewart, 1983 at 1393).

Given the problems that the government is having controlling certain crimes it is not difficult to see such a system being initiated. Kamisar admits to the lure of the "crime control" attitude:

> It **is** frustrating to see an "apparently guilty" dangerous criminal go unpunished because the police have violated his rights. It **is** tempting to argue that the need to enforce the criminal law should justify a search that turned up damning evidence. But it is worth recalling that "Jeremiah Gridley, the attorney general of Massachusetts Bay Colony who represented the customs officers,

> argued that writs of assistance were justified by their necessity in enforcing customs laws" (Kamisar, 1987 at 45).

Many are calling for such measures in response to the "war on drugs." An article in USA Today is entitled "Suspend Liberties to Fight Effective War." Its author calls for "denying bail to dealers...common-sense relaxation of search and seizure laws in drug situations" (Ford, 1989).

Analysis:

If comparative reprehensibility was adopted, just how far would such measures spread? Would comparative reprehensibility affect Section 1983 suits? The exclusionary rule and Section 1983 have run together in terms of expansions and declines in enforceability. What if, for example, drug crimes were put on the list of crimes which were too reprehensible for the police to overcome? Under the system of comparative reprehensibility, the police could do most anything in their attempts to gather evidence. What happens, though, when their efforts touch other people? What of those who will be charged with crimes through evidence discovered during illegal searches in connection with a drug investigation, yet have nothing to do with drugs? Can those individuals invoke the exclusionary rule or will the police be protected under comparative reprehensibility? Will the final redress of Section 1983 also be cut off by such a system?

This is a hugely expansive concept. It is doubtful that the framers had it in mind to compare which party committed the worse offense. The Bill of Rights

was a demand on the government to never commit such actions. The Fourth Amendment should be enough of a measure to end illegal searches and seizures. Earlier times, however, have proven this to be impossible. It took the exclusionary rule, and Section 1983, used as reminders and punishments to instigate change among police departments. The exclusionary rule reminded courts that evidence seized illegally was "ill-gotten gains" from which the government should not profit. And it did punish those responsible by making their actions more well-known.

CONCLUSIONS

The focus of this paper has been on the exclusionary rule and Section 1983. It has detailed the history of these two Fourth Amendment protections, and has comparatively examined their purpose in preserving the integrity of the Fourth Amendment. What has been revealed is a pattern of erosion to these protections that seems to be linked to a prevailing "crime control" attitude in law enforcement. That is, in the drive to rid society of its present criminal problem, illegal drugs, the exclusionary rule and Section 1983 are being watered down to a point where their usage is minimal. Because of this, violations of the Fourth Amendment are overlooked in the name of effective law enforcement.

The Supreme Court has channeled the usage of these protections into areas where they believe enforcement of the exclusionary rule or Section 1983 will serve to deter future police violations. The paper has reviewed most of the existing research on deterrence of this kind and found that there is no statistical support for such a belief. According to most research, the police are effectively isolated against punishment and the rules which they follow are those the department itself advocates and enforces. For the Court to use such a standard in the enactment of Fourth Amendment protections is illogical.

This paper was not a statistical piece of research designed to prove or disprove the deterrence rationale, although a new study using some of the ideas outlined in Chapter II would be useful. Its purpose was to present the exclusionary rule and Section 1983 together in the same publication; to examine them side-by-side as the two primary, maybe only, instituted protective remedies of the Fourth Amendment. And from this comparative exam realize the gross extent to which they have been pared down; realize how far the government may intrude into private life, abuse the Fourth Amendment, with no repercussion. This paper's purpose was to make it clear that much has been lost.

Are there recommendations? Only of the most basic kind, yet those are often the ones that carry the biggest impact. What is needed is a return to the view that the government should not profit from its wrongdoing. The Fourth Amendment was meant to keep police out of private lives when they did not have probable cause of criminal activity. The Fourth Amendment should be enough of a restriction on police to keep this from happening, yet before the exclusionary rule police rarely bothered with search warrants. And before Section 1983 came into play there was no monetary remedy for the damage that was done by a careless government.

So let us return to looking at the exclusionary rule as a method of securing judicial integrity, and using Section 1983 as an avenue for damages. Will some guilty go free? Certainly, but only to the point where police do not do

their jobs properly. The Founders did not write the Fourth Amendment in order to make it easier on the police. They wrote it in hopes of minimizing one of societies most traumatic experiences, an unwelcomed governmental intrusion into a private life.

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