SPHEX CLUB
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See note below.

REOPENING GATES

The Fourth Amendment to the Constitution is under attack. It comes in the form of a desire to modify or, for some, to abolish the Supreme Court's exclusionary rule.

It is my intention tonight to support the rule.

In approaching this subject, I can't help but think about the grandfather who doted on a grandson. Alas, the lad lived some distance from his grandfather. The grandfather was constantly looking for gifts to give the six-year old boy. His latest selection was a beautiful book on penguins. Eager to learn how the six-year old had received the gift, he phoned to hear that, "Yes, it was a nice book, grandfather, but it told me more about penguins than I wanted to know."

I knowingly take the risk that you may hear more about the exclusionary rule than you want to know.

The ranks of attackers of the exclusionary rule are formidable, indeed. They include the President, the Chief Justice of the Supreme Court, the Attorney General of the United States, the Governor and the Attorney General of this Commonwealth, a state legislator from this area and various Senators, columnists and commentators.

The Fourth Amendment, of course, is intended to protect against unreasonable search and seizure. Its exact words are:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not

that the search was legal. These include Governor Robb and Attorney General Baliles.

I have considerable trouble understanding how the Congress -- much less a State -- can abolish or modify the Supreme Court's interpretation of a constitutional amendment. But, be that as it may, the most significant action affecting the future of the exclusionary rule is now before the Supreme Court itself, where its Chief Justice has publicly expressed his belief that the rule should be abolished, and at least one other member, Justice Sandra Day O'Conner, has indicated her support for modification of the rule. Last Fall, the Court heard arguments on an appeal from the highest Court of the State of Illinois, in a case entitled Illinois v. Gates; ~~thus, my title, Reopening Gates~~. Shortly after the arguments had been heard, the Court, with three Justices dissenting, restored the case to the Calendar for reargument, (thus my title, "Reopening Gates") specifically to determine if Weeks v. United States (the 1914 decision which first established the Rule) and Mapp v. Ohio (the 1961 case which extended it to the states) should, to any extent, be modified so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

So, this issue is very much alive. Since March First of this year, the Justices have had under advisement the arguments addressed specifically to our subject tonight. The Lynchburg morning paper for March Second carried a story as follows. Maybe you read it. The headline was, "Soften Rule on Evidence Asked." The story:

"WASHINGTON (AP) -- An honest mistake by police

should not prevent juries from considering unlawfully seized evidence, the Reagan administration told the Supreme Court on Tuesday.

Rex Lee, the administration's highest-ranking courtroom lawyer, urged the court to soften, with a "good faith" exception, its 69-year-old rule barring all such evidence.

But Chicago lawyer James Reilley warned that any bending of the so-called exclusionary rule will be interpreted by law enforcement authorities as a signal 'not to take the Fourth Amendment as seriously.'

The Constitution's Fourth Amendment bans unreasonable police searches and seizures.

The Supreme Court created the exclusionary rule in a 1914 decision to deter unlawful police conduct, and in 1961, gave the rule constitutional dimension by applying it to state criminal cases.

The rule means that convictions based, even in part, on such legally tainted evidence must be overturned.

Under it, evidence obtained in a search or after an arrest, later found to be unlawful, cannot be used against a criminal defendant.

The rule has come under heavy attack by many law enforcement officials and political conservatives -- including President Reagan -- who contend it works to penalize society for what often are 'honest' mistakes by police officers.

Several bills now pending in Congress would sharply limit the rule in federal cases, but the constitutionality of such legislation is an open question.

'The rule now applies to exclude evidence no matter what the error, large or small', Assistant Illinois Attorney General Paul Biebel Jr. told the justices Tuesday'."

I hope that, by our discussion, we may at least have a better understanding for, and appreciation of, the important issues

that they will decide.

We ought to begin with the Fourth Amendment itself. Many of you know its history much better than I. One authority describes its genesis as follows:

> "The Fourth Amendment was not a construct based on abstract considerations of political theory, but was drafted by the framers for the express purpose of providing enforceable safeguards against a recurrence of highhanded search measures which Americans, as well as the people of England, had recently experienced. These abuses which in the American colonies took place largely in the fifteen years before the American Revolution and which extended over a much longer time in England had done violence to the ancient maxim that 'A man's house is his castle'."

In 1863, William Pitt protested the cider tax and its enforcement provisions. In words which have rung out through the centuries, he cried: "The poorest man in his cottage bid defiance to all the force of the Crown. It may be frail--its roof may shake--the wind may blow through it--the storm may enter--the rain may enter-- but the King of England cannot enter; all his force dares not cross the threshold of that ruined tenement."

A most famous case which reflects the English determination to protect personal privacy was Entick v. Carrington, decided in 1765. Entick, the editor of a critical publication, the Monitor, was the victim of a general search in which his papers were seized. Entick brought a suit for trespass which won a jury verdict of three hundred pounds. Lord Camden delivered the opinion of the Court of Common Pleas, sustaining the verdict on appeal.

"If this point should be determined in favor of the (government), the secret cabinets and bureaus of every subject in the King-

dom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer or publisher of a seditious libel."

By June, 1776, Virginia had already moved to provide a constitutional guarantee against recurrence of the abuse.

The First Article of the Virginia Constitution contains the Bill of Rights and the provisions are introduced by these words:

> "A declaration of rights made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government."

The prohibition against unreasonable search and seizure is in paragraph 10 of Article I. It provides:

> Section 10. General warrants of search or seizure prohibited.
>
> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Unfortunately, the courts in Virginia have not seen fit to give this provision real clout. Since it deals only with general warrants, they have held that it does not apply to searches where warrants are not obtained, and evidence so seized was not excluded in a criminal proceeding; that is, until 1961, when the Supreme Court of the United States brought such evidence under the protection of the Federal Constitution through Article 14 of the Bill of Rights.

Virginia claims one more significant tie to the Fourth Amendment. The original draft, which survived nearly intact, was authored by James Madison.

The idea that evidence seized in violation of the Fourth Amendment should not be used against the accused whose rights were violated was first incorporated into law by the Supreme Court in a 1914 opinion, in a case entitled Fremont Weeks v. United States. The Court, at that time, included as Chief Justice, Edward Douglas White, Justice Oliver Wendell Holmes and Charles Evans Hughes. Justice William R. Day wrote the opinion for a unanimous Court--there were some unanimous courts in those days.

The facts were these: The defendant was arrested by a police officer without warrant at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant and, being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day, police officers returned with the marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officers had a search warrant.

Weeks was charged with the unlawful sale of lottery tickets.

Among the papers retained and put into evidence were a number of lottery tickets and statements with reference to the lottery, taken at the first visit of the police to the defendant's room, and a number of letters written to the defendant in respect to the lottery, taken by the marshal upon his search of defendant's room.

The Court was asked to decide whether evidence so seized, clearly in violation of defendant's Fourth Amendment rights, could properly be introduced into evidence. The Court briefly reviewed the Amendment's history as follows:

It took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument, a Bill of Rights securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, ~~such as~~ were permitted under the general warrants issued under the authority of the government, by which there had been invasions of the home and privacy of the citizens and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers. The opinion then quotes a particularly

forceful excerpt from ~~a much earlier~~ an earlier Supreme Court case:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his door and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasions of his indefeasible right of personal security, personal liberty, and private property, ~~where that right has never been forfeited by his conviction of some public offense,~~--it is the invasion of this sacred right which underlies and constitutes the essence of the matter."

And, similarly, Justice Day quotes an opinion written by Chief Justice White:

> ". . . both of these Amendments (the Fourth and Fifth) contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

Mr. Justice Day goes on:

> "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 accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlaw-

ful 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."

Then, addressing the central issue as to whether evidence so obtained could be admitted, Justice Day writes:

> "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. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action.
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> * * * 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.
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> * * * *
>
> We therefore reach the conclusion that the

> letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant. The court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed."

It was not until 1961, that the Court held that, as a matter of due process of law, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a state court, as it had been in a federal court. The case was Dollree Mapp v. Ohio. Mrs. Mapp was convicted in an Ohio court for possession of lewd and lascivious books and pictures, based on evidence which the Ohio court found was obtained from an unlawful search of her house. The facts are these: On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city, pursuant to information that ". . . a person was hiding out in the home who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Mrs. Mapp, and her daughter by a former marriage, lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance, but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later, when four or more additional officers arrived on the scene. When

Mrs. Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile, Mrs. Mapp's attorney arrived, but the officers, having secured their own entry and continuing in their defiance of the law, would permit him neither to see Mrs. Mapp nor to enter the house. It appears that Mrs. Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and, as a result of which, they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted (her) hand" and she "yelled (and) pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor, including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building, and a trunk found therein, were also searched. The obscene materials, for possession of which she was ultimately convicted, were discovered in the course of that widespread search.

At the trial, no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home."

With such facts, it is, perhaps, not too surprising that the Court would find the evidence should be excluded. Mr. Justice Clark's opinion for the Court states:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties; so, too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'. . . . To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it'."

Warming to his task, Justice Clark concludes:

> "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against

> the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.
>
> The judgment of the Supreme Court of Ohio is reversed.

While the Court split five to three, the dissent makes an important observation:

> Essential to the majority's argument against Wolf is the proposition that the rule of Weeks v. United States, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts.

If Justice Black is correct in this observation from the dissent, clearly Congress and the State legislatures are without power, short of a Constitutional Amendment, to change the rule.

Now, we should examine the case that is before the Court at the present time. After initial argument going to the law-

fulness of the search and seizure itself, the Court restored the case to its Calendar for argument on the issue of whether Weeks and Mapp should be overruled or modified. In the Court's words, ". . . so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."

The Court, in ordering reargument, did not explain if the "reasonable belief" was to be that of the police officers or of the official who issued the warrant.

Gates v. Illinois arose in Chicago from these facts: On May 3, 1978, the Bloomingdale police department received by mail an anonymous handwritten letter which alleged that Susan Gates and Lance Gates, her husband, were planning to travel to Florida in a few days for the purpose of obtaining illegal drugs. The letter read:

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida where she leaves it to be loaded up with drugs, then Lance flys (sic) down and drives it back. Sue flys (sic) back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.

> I guarantee (sic) if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.
>
> Lance & Sue Gates
>
> Greenway
>
> in Condominiums."

The Chief of Police delivered the letter to Charles Mader, a detective of the Bloomingdale police department, and Mader requested one of the department's radio operators to seek assistance from the Secretary of State's office in Springfield in obtaining a specific address for the Gateses. That office advised that an Illinois driver's license had been issued to a Lance Gates, residing at a stated address in Bloomingdale. Mader then communicated with a confidential informant who had, he claimed, provided reliable information to Mader during the previous two years. Upon examining certain financial records, to which the informant had access, he reported a new address on Greenway Drive in Bloomingdale for the Lance Gates who had previously resided at the address in Bloomingdale furnished by the Secretary of State's office.

Upon inquiry, Mader was told by an officer of the Chicago police department, assigned to O'Hare Airport, that "L. Gates" had made a reservation with Eastern Airlines on its Flight 245, which was to depart from O'Hare on May 5, at 4:15 p.m. The final destination of the flight was West Palm Beach, Florida.

On May 5, Mader was told by William Morely, an agent of

the Drug Enforcement Administration, that "Lance Gates" had boarded Eastern Airlines Flight 245, bound for Florida. The following day, Morely informed Mader that Gates had arrived in West Palm Beach, had proceeded by cab to the West Palm Beach Holiday Inn, and had entered a room registered to Susan Gates. Agent Morely told Mader that he observed Gates and an unidentified woman leave the room at 7 a.m. and enter a red-vinyl-over-gray Mercury with 1978 Illinois license number RS 8437. Records at the Secretary of State's office showed that the license plate was registered for Lance B. Gates, but had been issued for a different automobile.

Based on the anonymous letter, the described information obtained from the law-enforcement authorities, and the verification of the address obtained from the confidential informant, Mader, on May 6, sought and obtained, in the circuit court of Du Page County, a search warrant for both the Gates' residence in Bloomingdale and the car they were driving from Florida.

At 5:15 a.m., on May 7, Lance and Susan Gates returned by car to their home on Greenway Drive. They were immediately served with a search warrant by waiting Bloomingdale police officers. In the trunk of the Mercury, the officers found several large bundles of marijuana, weighing a total of approximately 350 pounds. A search of the Gates' residence uncovered more marijuana, weapons, ammunition, drug paraphernalia, and several scales presumably used for weighing the drugs. Police also ascertained that the couple had cocaine in their possession. They were indicted for unlawful possession of cannabis with

intent to deliver, and unlawful possession of a controlled substance. Lance Gates was separately indicted for possession of an unlicensed firearm.

The highest Court in Illinois affirmed the decision of a lower appellate court, denying use of the evidence because the warrant was issued under circumstances where the "corroboration of innocent activity was insufficient to support a finding of probable cause" as measured by the United States Supreme Court decisions interpreting the Fourth Amendment.

Much of the irritation with the exclusionary rule comes, I submit, from the extremely complex rules which have evolved from a whole line of decisions defining what are and what are not grounds for probable cause to issue a warrant; what is and what is not a possession subject to protection (i.e., a suitcase, a paper bag, etc.). Remember, the Fourth Amendment is not restricted to searches of one's home, or a dwelling. It protects us in our person, house, papers and affects wherever they may be, a car, a suitcase, etc.

So, the case, which has presented the Court with an opportunity to abolish or modify the exclusionary rule, came up as a somewhat routine issue of the proper application of the Court's complex rules on determining the sufficiency of the evidence to constitute probable cause for issuance of a search warrant. The issue of the exclusionary rule was not argued below, nor when the case was first argued before the Supreme Court last Fall. It was for this reason that three justices (Stevens, Brennan and Marshall) joined in a written dissent to the order for reargument.

So, where does the argument stand on the exclusionary rule.

The first question, it seems to me, is whether the exclusionary rule has, by judicial interpretation, become so much a part of the Fourth Amendment as to be immune from legislative interference.

As suggested by the dissenters in Mapp v. Ohio, if the Court's power to determine the admissibility of evidence comes only from its power of supervision over the lower courts, it could not promulgate such a rule applicable to the state courts, for it has, no such, supervisionary power.

The Court found its authority in the Constitution itself, holding that the Fourth Amendment extended to the states through the Fourteenth Amendment and, with it, the exclusionary rule.

The charge that the exclusionary rule is only a "man-made rule" is not the only instance where the Supreme Court, by case rule, has added to the substance of one of the Bill of Rights. The Constitution says nothing about confessions, involuntary or coerced, or otherwise. But involuntary confessions are barred. The media's right to be present during criminal court proceedings is not, as pointed out by Chief Justice Burger in the Richmond Newspaper Cases, explicitly defined or articulated in the Constitution, but it is a constitutional right.

Professor Kamisar makes the point with this story:

> "Some years ago, when attending a conference of journalists, lawyers, and judges (a conference characterized by much suspicion

of, and hostility towards, the courts), Justice Potter Stewart could contain himself no longer. After listening to the others at the conference, he asked (with obvious impatience):

'Where, ladies and gentlemen, do you think these great constitutional rights that you were so vehemently asserting, and in which you were so conspicuously wallowing yesterday, where do you think they came from? The stork didn't bring them. They came from the judges of this country, from the villains here sitting at the table'."

We need here, to refer to a case in the Fifth Federal Circuit Court of Appeals, United States v. Williams, decided July 31, 1980. The entire bench sat en banc on reargument and all agreed not to exclude the evidence, and laid down a rule for that Circuit as follows:

"Henceforth in this Circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence. . . Predictably, it will be argued that today's decision undercuts the Fourth Amendment. Not so; it concerns only the exclusionary rule, one device--but not the sole one--for enforcing this Amendment, and a device that is already far from coextensive with the Amendment itself. As for the exclusionary rule, insofar as we restrict its application, we do so only to conform that to its underlying purpose: to deter unreasonable or bad-faith police conduct."

This would seem to cut strongly against my argument that the exclusionary rule is a part of, in effect, the Fourth Amendment.

But that is not at all so. The en banc decision had twelve judges supporting the Court's opinion and ten joining in a concurring opinion.

That concurring opinion of the ten reads in part, ". . . Yet many of my brethren have seized the occasion to discuss what they consider an alternative ground for decision, but what to me is purely hypothetical: whether the evidence would have been admissable had the search been unconstitutional (emphasis added). Judicial self restraint should command us to defer until another day the discussion of issues that might have been material, had the arrest been improper." This probably explains why the Supreme Court refused to hear the case.

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Follows Page 20

The second issue has to do with the question of how, if not by the use of the exclusionary rule, does an individual effectively gain the protection of the Fourth Amendment to the Bill of Rights? To answer that he can sue the offending officer for damages is of small comfort, indeed. As pointed out by Professor Yale Kamisar, ". . . freedom from unreasonable search differs from most other constitutional rights." He quotes an opinion by Justice Johnson to the point:

> "Any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. . . . But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely behind the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search."

Kamisar continues:

> "In the typical case the courts do not enter the picture unless and until the challenged search has already turned up something incriminating. As a practical matter, nobody can stop the police from carrying out a search or seizure if they are unwilling to be stopped, not even a lawyer. . . . Almost always, the legality of the search is not contested in any adversary proceeding unless it has already produced incriminating evidence. Hence the strong need for the exclusionary rule. Almost always, the court is asked to "unring the bell"--to reconstruct events as though the damaging, often damning, evidence never existed. Hence the strong resistance to the exclusionary rule. The damaging

> evidence flaunts before us the price we pay for the Fourth Amendment.
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> Why do the requirements for obtaining search warrants fail to furnish adequate advance protection? Because despite repeated announcements by the Supreme Court that warrantless searches are 'per se, unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions', the exceptions are neither well delineated nor few. The overwhelming majority of searches are made without a warrant. One category alone, warrantless searches incident to arrest, 'outnumber(s) manyfold searches covered by warrants'. And the percentage of arrests made pursuant to a warrant is astonishingly small. Moreover, even in the unusual case where law enforcement officials do seek a warrant, the judicial officer's participation is 'largely perfunctory'--it is 'notoriously easy' to obtain search warrants of court orders for electronic surveillance, and even easier to obtain warrants for arrest. Thus, almost always, the first and only meaningful opportunity to decide the legality of a search or seizure arises after the fact."

The third question of major importance is dealt with effectively in the Weeks decision, and in several other Supreme Court cases. Should we stand aside and allow the police to break the supreme law of the land--the Constitution itself--and permit the government to use that criminally procured evidence against an accused, whose fundamental rights were violated?

Justice Holmes, in a dissent in Olmstead v. United States, puts it this way:

> "But I think, as Mr. Justice Brandeis says, that, apart from the Constitution, the government ought not to use evidence obtained, and only obtainable, by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical

deduction from established rules. Therefore, we must consider the two objects of 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 also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."

In his dissent in the same case, Justice Brandeis is quite eloquent:

"And if this court should permit the government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would become a lawbreaker.

Will this court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. ~~It is~~ that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

The door of a (civil) court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen. . . The court's aid is denied only when he who seeks it has violated the law

in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.

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 law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

With those inspirational words, I should rest my case. But there is some more that needs saying.

The fourth issue, it seems to me, while like the third, is, nevertheless, a separate one. What will be the result if the police are once more free to gain evidence, and prosecutors use it without any authority to guide them except their own consciences or the rules of their organizational structure?

Justice Jackson, speaking for the Court in Johnson v. United States, makes the point this way:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is

> not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

When the Mapp case was decided, the effect on the police was described by former New York Police Commissioner, Michael Murphy, who recalled that, ". . . he was caught up in the entire problem of reevaluating our procedures (and) creating new policies and new instructions for the implementation of Mapp. (Supreme Court decisions such as Mapp) create tidal waves and earthquakes. . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen."

As Professor Kamisar points out:

> "The police reaction to Mapp makes plain that the alternatives to the exclusionary

rule were woefully inadequate. Otherwise, Mapp would not have had such a dramatic effect. Otherwise, a New York City Deputy Police Commissioner would not have said at a post-Mapp training session on the law of search and seizure:

'Before (_Mapp_), nobody bothered to take out search warrants. (Before _Mapp_) the United States Supreme Court had ruled that evidence obtained without a warrant--illegally if you will--was admissible in state courts. So the feeling was, why bother?'

The New York experience was hardly unique. A year after Mapp, Senator Arlen Specter, then a young Philadelphia prosecuting attorney, began a long article on the problems raised by that case by reporting that '. . . Police practices and prosecution procedures were revolutionized in many states (by _Mapp_)'. One state judge, he noted, had characterized the case '. . . as a "hurricane" which "swept over our fair land last June".'

'Long-standing police practices,' indicated Specter, had been 'violently uprooted'. Philadelphia police officers, '.. . who for years had presented their evidence in court without any regard to how it had been obtained, could not understand the subtleties of what constituted a legal search and seizure.' The police needed time to '. . . absorb the subtleties of probable cause and the requisites of a warrant.'

I do not see how anyone can read Commissioner Murphy's remarks or Senator Specter's twenty-year-old law review article and claim that tort remedies and other alternatives to the exclusionary rule are all that is needed to breathe life into the Fourth Amendment or say that the exclusionary rule does not significantly affect police behavior. If it does not, then why did law enforcement officials react to the adoption of the exclusionary rule as if the Fourth Amendment had just been written? Why did they develop training programs on the law of search and seizure after Mapp had been decided, but not before?

Most, if not all, of the support for abolishing the rule comes from those who are understandably concerned with the effect it has upon allowing criminals, especially those in the drug category, to go unpunished. ~~There can be as question but what the impact is felt~~. A recent study of the United States Department of Justice's National Institute of Justice, entitled The Effects of the Exclusionary Rule: A Study in California, published in December, 1982, concludes that:

> "First, the exclusionary rule does appear to be an important factor in the processing of state felony cases. The analysis of California data reveals that almost five percent of felony rejections statewide and an even larger proportion in large urban areas--up to almost 15 percent in one office in Los Angeles--were rejected for search and seizure problems. This contrasts with a rate of only four-tenths of one percent found in a 1978 study of federal cases.
>
> Second, the findings demonstrate conclusively that the effects of the exclusionary rule are most evident in drug cases and are felt in a significant portion of drug arrests. Over 70 percent of all the felony cases rejected because of search and seizure problems in California and in San Diego were drug cases. During the four-year period 1976 through 1979, almost 3,000 felony drug arrests in California were not prosecuted because of search and seizure problems. Analysis of drug arrest screenings at two local prosecutors' offices reveals that 30 percent of all felony drug arrests were rejected for prosecution because of search and seizure problems."

An article in the Washington Post, appearing February 27 of this year, is much in point. Its author is James Fyfe, a former patrolman and police lieutenant in New York City, now a

Senior Fellow at the Police Foundation and an Associate Professor of Justice at American University. He writes:

> "It is time to allow the police to engage in well-intentioned violations of our rights, to search our homes, our cars, our papers or anything else so long as they do it in 'good faith'. That is the essence of the momentous argument the Supreme Court will hear on Tuesday from opponents of the 'exclusionary rule', which bars from criminal trials any evidence the police seize illegally.
>
> Opponents of this rule are legion, because so many citizens have been led to believe that disallowing such evidence crimps law enforcement and keeps large numbers of criminals roaming their neighborhoods. Both beliefs are nonsense, even if well-meaning nonsense.
>
> As my former fellow cops on the street know, the exclusionary rule is simply irrelevant to almost all police work. Illegally seized evidence plays no part in the overwhelming majority of prosecutions, and in instances when it does, the rule barring its use in the courtroom rarely has any effect.
>
> There are several reasons for this, but most notable is the fact that trial courts almost always judge the legality of a search on the testimony of the officer who conducted the search--and police who conduct illegal searches do not go around admitting that on witness stands.
>
> It should be no surprise, then, that a study a few years ago by the Office of Management and Budget showed that motions to suppress evidence were successful in a mere 0.4 percent of all felony cases in federal courts. More recently, a National Institute of Justice study examined 874 burglary, robbery and assault cases in San Diego and Jacksonville, Florida. Its finding: A grand total of nine burglary cases were dismissed because of illegal searches and seizures, and not a single robbery or assault case was affected at all."

And, after reviewing the facts in the Gates case, he goes on:

"According to his brief, Fahner (Illinois Attorney General) will urge the Supreme Court to rule, at the least, that the Gates warrant was valid and that the evidence obtained under it should be admitted. Winning this argument might eventually convict the Gateses; unfortunately, it would also expose the rest of us to house and auto searches based on anonymous letters and fruitless police observations.

Fahner's side might view such a victory as an accomplishment of sorts, but this is not their broad purpose. Fahner and those who have joined his argument with amicus curiae briefs are seeking something far more profound: Supreme Court sanction of well-meaning but illegal police searches and seizures.

Under the standard they propose, courts would have to determine that police had acted in a willfully unconstitutional way for the resulting evidence to be barred from a trial. The evidence would be admissible, however, if police, on their own or with warrants, search homes or offices or other property and seize property in 'reasonable', 'good faith' violations of citizens' rights.

Indeed, some Fahner supporters--attorneys general of 31 states--'emphatically submit that the rule should never be applied in cases involving duly issued warrants, absent a clear showing of fraud by (police who sought the warrant) or the unreasonable execution of the warrant'.

Their briefs make some familiar points, particularly the contention that the exclusionary rule encourages 'the ever expanding criminal component of our society' and results in the freeing of great numbers of criminals. But their arguments for the 'good faith' exception, while reasonable-sounding on their face, generally ignore the real world--at least the world I know from 16 years as a New York City police officer and from my work with police officers throughout the country.

In the real world, police chiefs, under great pressure to reduce crime, pass that pressure on to officers, evaluating them almost exclusively by how many arrests and convictions they chalk up. Some officers--though not most--respond by overlooking constitutional niceties and conduct will-fully illegal searches.

Most of the targets of these searches are not suburban couples like the Gateses. Many are young people on inner-city streets who are summarily directed to 'assume the position' and submit to a search. Others are young drivers whose autos are searched. While police sometimes discover marijuana in pockets or car truns, more often nothing is found. The targets are simply left humil-iated, resentful and--since cops are not foolish enough to do these things before audiences--without means of proving what happened.

To whom can they complain? To police chiefs who have encouraged such searches? Who would take their word over the officers?

Suggesting that trial courts can disting-uish between 'good faith' mistakes and 'willfully' unconstitutional searches re-quires us to believe that officers who abuse their power will expose themselves to disciplinary action and civil liability by testifying truthfully. That is a hopelessly naive belief.

This is also why it is disingenuous to argue, as one supporting brief does, that there is no evidence of abuse of the 'good faith' exception in the two federal court circuits that have adopted it. That evidence, too, must come from the testimony of abusive officers, who are not going to provide it.

The contention that the exclusionary rule is letting all those criminals prowl our streets is another fiction. One of the Fahner supporters' own briefs, for example, quotes selectively from a study of the ex-clusionary rule's effect in California during 1976-79, but it omits the bottom line:

> Exclusion of evidence resulted in dismissals in only one, or every 2,500 reported violent felonies in that period.
>
> . . . .
>
> Equally, if not more troubling, is the suggestion that evidence obtained pursuant to search warrants <u>never</u> be excluded from trials. That would place an astonishing degree of faith in the magistrates who issue warrants. Indeed, it would make them the court of last resort on this question, a frightening prospect when one considers the quality and practices of many magistrates."

It is fundamental to our heritage that it is not too great a price to pay for freedom that some guilty persons go free that the innocent may be protected in their freedom. The california study, to me, tells us we must continue to impress upon our law enforcement people that they, too, must obey the law.

In our necessary concern for an ever-growing problem of crime in this country, let not the victims of crime include the Bill of Rights--the embodiment of our liberties.

This paper was prepared by Raymond E. Baker for the April 23 1983
meeting. He planned to present it up until three days before the
meeting, but was unable to do so because of an emergency operation
for a malignant growth in his head. The paper was ably presented
on April 23 by fellow-lawyer & SPHEX CLUB member Robert C. Wood III.
Ray Baker's operation was not successful, and he died May 22.

-Raymond H. Williamson, Secy