United States v. Robinson, Gustafson v. Florida, and United States v. Calandra: Death Knell of the Exclusionary Rule?*

*By Douglas A. Voorsanger***

I.

United States v. Robinson, Gustafson v. Florida and United States v. Calandra

A. Introduction

The exclusionary rule was created by the judiciary as a means of enforcing the Fourth Amendment[1] by suppressing otherwise relevant evidence which was obtained by police officers making an illegal search and seizure.[2] The judges who created the exclusionary rule recognized the sacrifice that the exclusion of admittedly probative evidence had on judicial decision making and the punishment of discovered crimes, but they stated that the exclusionary rule was the only effective means of enforcing the constitutional right "to be secure . . . against unreasonable searches and seizures."[3] These judges determined that the interest in enforcing the Fourth Amendment by way of the exclusionary rule outweighed the social sacrifices this protection entailed.

In the recent companion cases of *United States v. Robinson*[4] and

---

* This note was originally written as a research paper for a seminar in Judicial Process at Hastings College of the Law, taught by Professor Roger J. Traynor, retired Chief Justice, California Supreme Court.

** B.A., 1968, Principia College; J.D., 1974, University of California, Hastings College of the Law.

1. "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. CONST. amend. IV. The exclusion of evidence obtained by electronic eavesdropping presents special problems which will not be analyzed in this note. *See* 47 U.S.C. § 605 (1970). See cases cited note 144 *infra*.

2. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949); Weeks v. United States, 232 U.S. 383 (1914).

3. See notes 84-88 and accompanying text *infra*.

4. 94 S. Ct. 467 (1973).

Gustafson v. Florida,[5] the United States Supreme Court by majorities of 6-3 established a significant limitation to the application of the exclusionary rule in search and seizure cases in which the search is incident to a lawful custodial arrest for a traffic offense.[6] Within a month, the identical six man majority in *United States v. Calandra*[7] again refused to extend application of the exclusionary rule. Over a vigorous dissent, the majority drastically altered the theoretical basis for application of the exclusionary rule by declaring that the rule is justified *solely* by its deterrent effect on future police misconduct. The Court determined that the minimal deterrent benefit of the rule in grand jury proceedings was outweighed by its costs in terms of interference with the grand jury's functions. It held that a witness summoned to testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained by an unlawful search and seizure.[8]

This note will examine the analysis and implications of these three decisions, each of which has significance within the context of its own factual setting, but which when examined together are of even greater significance in indicating the attitude of the emerging majority of the "Burger Court" toward the exclusionary rule in search and seizure cases. This note will also discuss criticisms of the rule made by various commentators and jurists, including those of Professor Dallin Oaks based on empirical studies testing the effectiveness of the rule and those of Chief Justice Warren Burger in his dissent in the *Bivens* case.[9] The following conclusions will be explored: (1) *Robinson, Gustafson,* and *Calandra* present substantial evidence to indicate the Supreme Court will decline to extend the exclusionary rule to new contexts and will begin to cut back on some areas where the rule has been applied previously; (2) based on the findings in *Calandra* that the rule is justified solely by its deterrent effect, together with support from the empirical studies and criticisms indicating that the rule in fact is ineffective in accomplishing its stated purpose of deterring police misconduct, there is a strong possibility the Court will *abolish* the exclusionary rule and replace it with a legislative alternative along the lines of the plan recommended by Chief Justice Burger in his *Bivens* dissent; and (3) a state statute, similar to the bill recently proposed in California which abolishes the exclusionary rule in criminal cases and replaces it with a damage action against the government

5. 94 S. Ct. 488 (1973).

6. See text accompanying notes 11-56 *infra.*

7. 94 S. Ct. 613 (1974).

8. See text accompanying notes 57-81 *infra.*

9. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411-27 (1971).

entity employing the defending officer,[10] would present an appropriate vehicle to test these assumptions if such a statute were challenged and then the action were appealed to the Supreme Court.

B. United States v. Robinson

1. *Facts*

On April 23, 1968, at approximately 11 o'clock P.M., Officer Richard Jenks of the District of Columbia Metropolitan Police Department observed the defendant Willie Robinson, Jr., driving a 1965 Cadillac in that city and signaled him to stop the vehicle. As a result of an investigation four days earlier in which he had checked Robinson's operator's permit, Officer Jenks believed Robinson was operating the car after the revocation of his operator's permit. Upon being shown the same permit the defendant had exhibited four days earlier, Officer Jenks placed Robinson under arrest for operating a motor vehicle after revocation of his operator's license and for obtaining a permit by misrepresentation.[11] Since the arrest was one that involved taking the defendant into the station house,[12] by police department instructions the officer was required to make a full field search as an incident to the arrest.[13]

A full field search according to the department standard operating procedures entailed a thorough search of the individual, including an examination of the contents of all of the pockets, regardless of whether the officer believed an object in the pocket was a weapon.[14] Complying with these instructions, during his patdown search Officer Jenks felt an object in the left breast pocket of the heavy coat Robinson was wearing. Although Jenks testified he could not tell the precise size or consistency of the object, he reached into the pocket and pulled out the object, a wadded up cigarette package. He opened

10. See note 127 *infra.*

11. 94 S. Ct. at 469-70. One of these charges was a statutory offense defined by Congress, the other a violation of a District of Columbia ordinance—both carrying penalties of fines and up to 10 days in jail or up to one year's imprisonment. 40 D.C. Code § 302(d) (1967); Traffic Regulations of the District of Columbia § 157(e).

12. Metropolitan Police Department General Order No. 3, Series 1959 (April 24, 1959), in relevant part, states: "Only in the more serious of aggravated types of traffic violations, those which indicate a serious disregard for the safety of others . . . should it be necessary to make summary arrest. These include, but are not confined to: 'Fleeing from the Scene of an Accident'; 'Driving under the influence of Intoxicating Liquor or Narcotic Drugs'; 'Reckless Driving'; . . . *'Operating After Suspension or Revocation of Operator's Permit. . . .*" (emphasis added by the court). United States v. Robinson, 471 F.2d 1082, 1097 & n.23 (D.C. Cir. 1972).

13. United States v. Robinson, 94 S. Ct. 467, 470-71 n.2 (1973).

14. *Id.*; United States v. Robinson, 471 F.2d 1082, 1088 (D.C. Cir. 1972).

the pack and found fourteen gelatin capsules of heroin. Officer Jenks then placed the defendant under arrest for possession of narcotics and continued the search without finding any weapons or any additional narcotics.

Robinson was convicted on federal narcotics charges on the basis of this evidence, but on a rehearing en blanc, the District of Columbia Court of Appeals ordered the evidence suppressed and reversed the conviction on the ground that this search of the defendant violated the Fourth Amendment.[15]

In a 6-3 decision, the United States Supreme Court reversed the judgment of the court of appeals, holding that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under the amendment.[16]

2. *Fourth Amendment Requirements*

The Fourth Amendment requires that, except in certain exceptional situations, a warrant must be obtained by a police officer before he can make a search.[17] One of the traditional exceptions to the warrant requirement is a search incident to a lawful arrest.[18] A good deal of case law has examined the extent of the *area* beyond the person of the arrestee which may be searched incident to arrest.[19] In *Chimel v. California,*[20] the United States Supreme Court decided that the scope of such warrantless searches includes only the area under the arrestee's immediate control, the area from within which he might grab a weapon or destroy evidence. On the other hand, statements by the Court as to the existence and scope of authority to conduct warrantless searches of the *person* incident to a lawful arrest are mainly dicta, although the broad statements that were made generally do not attempt to limit the scope of such searches.[21]

Robinson, as well as *Gustafson*, presented the Court with

15. 471 F.2d 1082 (5-4 decision).

16. 94 S. Ct. 467 (1973).

17. Katz v. United States, 389 U.S. 347 (1967); *accord,* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

18. Adams v. Williams, 407 U.S. 143 (1972); Chimel v. United States, 395 U.S. 752 (1969).

19. *E.g.*, Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964).

20. 395 U.S. 752 (1969).

21. *E.g.*, Cupp v. Murphy, 412 U.S. 291, 295 (1973); Adams v. Williams, 407 U.S. 143, 149 (1972); Agnello v. United States, 269 U.S. 20, 30 (1925); Weeks v. United States, 232 U.S. 383, 392 (1914). *But see* Peters v. New York, 392 U.S. 40, 67 (1968).

the problem of whether the permissible scope and nature of a warrantless search of a person incident to an arrest for a traffic violation should be limited in the same fashion as the Court in *Chimel* limited the permissible scope of a search of the *area.*

3. *The Court of Appeals Decision*

a. *The Terry-Sibron-Peters trilogy.* Judge J. Skelly Wright, writing for the majority in the court of appeals decision,[22] analyzed the general statements by the Supreme Court on the permissible scope of searches of the arrested person. He relied on such cases as *Terry v. Ohio,*[23] which established guidelines for "stop and frisk" searches. *Terry* stated the principle that a search will be considered "reasonable" only if its scope is no broader than necessary to accomplish legitimate governmental objectives.[24] Despite the fact that *Terry* involved a search upon less than probable cause for arrest whereas *Robinson* involved a search incident to a valid arrest, the majority concluded that the rationale underlying the scope limitation principle applied to all searches regardless of the evidentiary basis for their initiation.[25]

Judge Wright found further support in his reading of *Peters v. New York,*[26] a case that had been conslidated with *Sibron v. New York.*[27] In *Peters,* the police officer arrested the defendant on the basis of probable cause that he was engaged in criminal activity, patted him down for weapons, and upon feeling a hard object in Peters' pocket which the officer suspected was a knife, removed the object and found an envelope containing burglar tools.[28] The Court in that case stated:

> [Officer Lasky] had the authority to search Peters, and the incident search was obviously justified by the need to seize weapons and other things which might be used to assault an officer or effect an escape as well as by the need to prevent the destruction of evidence of the crime. . . . *Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects.*[29]

Based on this language in *Peters,* Judge Wright concluded that

22. 471 F.2d 1082 (D.C. Cir. 1972).

23. 392 U.S. 1 (1968).

24. In *Terry,* the police officer did not invade the suspect's person beyond the outer surfaces of his clothing until his patdown search produced a reasonable suspicion that the suspect was armed and dangerous. *Id.* at 29-30.

25. 471 F.2d at 1092.

26. 392 U.S. 40 (1968).

27. *Id.*

28. *Id.* at 48-49.

29. *Id.* at 67 (emphasis added).

the Supreme Court had applied the scope limitation principle to the arrest-based search and found the search of Peters reasonable because it was "reasonably limited in scope by [its] purpose" and not so "unrestrained and thoroughgoing" as to violate the Constitution.[30] Since the scope limitation principle was applicable to searches incident to arrest, then the same procedures approved in *Terry* seemed appropriate to the court to test the constitutionality of the particular search; therefore, the court was required to test whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which originally justified the interference.[31]

b. *Application of the scope limitation principle.* Judge Wright then continued with a thorough and well-reasoned application of this principle to the facts of *Robinson.* He began by examining the legitimate objectives of an arrest-based search of the person and limited these objectives to two: the seizure of fruits, instrumentalities, and other evidence of the crime for which the arrest is made in order to prevent its removal or destruction; and the removal of any weapons that the arrestee might seek to use to resist arrest or effect his escape.[32]

The first objective was quickly disposed of as to the legitimacy of the search in *Robinson.* Although it is reasonable to assume that in searches pursuant to most crimes the arrestee will be in possession of the fruits, instrumentalities, or other evidence of the crime for which he is arrested, the majority did not find that Officer Jenks could have reasonably believed that Robinson would have additional evidence concerning the traffic offense once he had received Robinson's fraudulently obtained operator's permit.[33]

---

30. 471 F.2d at 1092. *See also* Chimel v. California, 395 U.S. 752 (1969). *But see* Peters v. New York, 392 U.S. 40, 77 (1968) (Harlan, J., concurring) (the dictum approving the scope of the search by the officer was a mere factual observation and not a statement of law).

31. 471 F.2d at 1093, *citing* Terry v. Ohio, 392 U.S. 1 (1968).

32. *Id.* Some confusion had been created as to possible justifications or objectives of a search by the language in Preston v. United States, 376 U.S. 364, 367 (1964) (emphasis added): "The rule allowing contemporaneous searches is justified, *for example,* by the need to seize weapons . . . as well as by the need to prevent the destruction of evidence . . . ." One student commentator noted that "[d]espite the mysterious 'for example,' a thorough search of the case law reveals no other justifications for warrantless searches incident to arrest which do not collapse upon careful inspection into one of the two bases articulated in *Preston.*" Note, *Scope Limitations for Searches Incident to Arrest,* 78 YALE L.J. 433, 434 n.12 (1969). *See also* Note, *Searches of the Person Incident to Lawful Arrest,* 69 COLUM. L. REV. 866 (1969); Note, *Search and Seizure—Search Incident to Arrest for Traffic Violation,* 1959 WIS. L. REV. 347, 349 & n.14.

33. See text accompanying note 11 *supra. Cf.* Gustafson v. Florida, 94 S. Ct. 488, 492 n.4 (1973).

The court gave a more comprehensive analysis of the second justification for searches incident to arrest: the interest of government in the safety of its police officers. Judge Wright relied primarily on the factors and procedures authorized in *Terry* and *Sibron*, which approved a self-protective search for weapons once the officer could "point to particular facts from which he reasonably inferred that the individual was armed and dangerous."[34] The permissible scope of such a search included a patdown or "frisk" of the suspect's outer clothing for weapons, with a further intrusion only after finding a weapon.

Judge Wright found *Terry* and *Sibron* particularly appropriate in the routine traffic arrest situation, in which, as in the stop-and-frisk situation, there is no evidentiary basis for a search. The most intrusive search allowable, therefore, is the limited frisk for weapons. Furthermore, Judge Wright stated that a *Terry* frisk search provides adequate protection to the officer and that any further intrusion on the individual's privacy was not warranted by the minimal additional protection a more extensive search would guarantee.[35]

4. *Supreme Court Opinion*

Justice Rehnquist, in a comparatively brief majority opinion, rejected the analysis and findings of the court of appeals, particularly its reliance on *Terry*. Justice Rehnquist began his analysis by reviewing the previous statements made by the Court in dicta concerning the scope of searches incident to arrest, as well as by examining selectively[36] certain state court cases that had been based on or had discussed the authority to make arrest-based searches. He concluded that "[w]hile these earlier authorities are sketchy, they tend to support the broad statement of the authority to search . . . rather than the restrictive one which was applied by the Court of Appeals in this case."[37] He supported this conclusion by construing the language in *Peters* quoted by Judge Wright as being merely a repetition of the factual setting of that case and not a statement of law approving the

34. 471 F.2d at 1095, *quoting* Sibron v. New York, 392 U.S. 40, 64 (1968).

35. *Id.* at 1099-1101.

36. There are a number of decisions rendered by state and federal courts which Justice Rehnquist did not discuss which have held that, absent special circumstances, a police officer may not conduct a full search of the person incident to a lawful arrest for a traffic offense. *E.g.*, United States v. Humphrey, 409 F.2d 1055, 1058 (10th Cir. 1969); People v. Superior Court, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972); State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); State v. O'Neal, 251 Ore. 163, 444 P.2d 951 (1968) (*en banc*); Barnes v. State, 25 Wisc. 2d 116, 130 N.W.2d 264 (1964). *Contra*, State v. Gustafson, 258 So. 2d 1 (Fla. 1972).

37. 94 S. Ct. at 475.

limited nature of such searches.[38] Furthermore, since the broad statements made by the Court in dicta did not speak simply in terms of an exception to the warrant requirement of the Fourth Amendment, but in terms of an affirmative authority to search, Justice Rehnquist found that such arrest-based searches also meet the Fourth Amendment's requirement of reasonableness.[39]

Justice Rehnquist also rejected the lower court's reliance on *Terry v. Ohio* by determining that the context of a search incident to a valid custodial arrest is significantly different from a permissible "frisk" incident to an investigative stop based on less than probable cause to arrest. He found the *Terry* reasoning unpersuasive in the arrest context, noting that the Court itself, in validating limited search procedures for protective purposes in *Terry,* had distinguished the different considerations involved in a search incident to arrest.

> An arrest is a wholly different type of intrusion upon the [sic] individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person.[40]

Unfortunately, the majority in *Robinson* did not clearly articulate the various considerations involved in the arrest situation that justify a greater amount of interference with the rights of the person involved. The statement quoted from Terry was the basis for justifying a limited warrantless search absent evidence sufficient to justify a belief the person had committed a crime. This general statement, taken out of context in order to prove that a full search of the individual is warranted absent the probabality that weapons or evidence would in fact be found upon the suspect, is not a particularly persuasive proposition.[41]

---

38. *Id.* at 474. In accepting Justice Harlan's interpretation of this language given in his concurring opinion to *Peters,* Justice Rehnquist stated: "We do not believe that the Court in *Peters* intended in one unexplained and unelaborated sentence to impose a novel and far reaching limitation on the authority to search the person of an arrestee incident to his lawful arrest." *Id.* See note 30 *supra.*

39. 94 S. Ct. at 471-77.

40. *Id.* at 473, *quoting* Terry v. Ohio, 392 U.S. 1, 26 (1968).

41. *But see* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 4-5 (1965). LaFave describes the arrest function as an important step in the criminal justice process to be distinguished from the preliminary investigative devices such as the stop-and-frisk primarily because of the entirely different perception both the police and the person being searched have of this function in contrast to the stop-and frisk, and also because of the more serious consequences involved in an arrest.

Further in the opinion, Justice Rehnquist added a clue as to why a shift in the balance is justified in the custodial arrest context. In rejecting the court of appeals' conclusion that the only reason supporting the authority for a full search incident to lawful arrest is the possibility of discovering evidence or fruits, Justice Rehnquist maintained that the need to disarm the suspect in order to take him into custody provided the authority for a full body search rather than the limited *Terry* frisk. He stated that in the arrest context the danger to an officer is far greater because of the extended exposure and the attendant stress and uncertainty that follows the taking of a suspect into custody and transporting him to the police station than in the more limited contact probable in the frisk situation.[42] "This is an adequate basis for treating all custodial arrests alike for purposes of search justification."[43]

Justice Rehnquist's analysis of this point again appears deficient. Both the court of appeals majority and the Supreme Court dissent conceded there is an obviously increased danger in the arrest context, but why is not the *Terry* frisk sufficient protection against this additional element of danger? As the dissent pointed out, the statistics used to support the observation of increased danger to the officer in the arrest context indicate that virtually all of the killings were caused by guns or knives, the type of weapons which will be detected by a properly conducted *Terry* frisk.[44] The justification of protecting the safety of the officer thus was apparently satisfied when Officer Jenks removed the object he felt in the defendant's pocket pursuant to the frisk search. If the cigarette package had contained a concealed weapon such as a razor blade, once the package was in the officer's possession, there was no longer any risk of the defendant's use of a weapon in the package.[45]

Justice Rehnquist's discussion of reasons justifying the increased invasion of privacy permitted in the arrest context contrasted with the frisk context is not a thorough and detailed analysis of the probability that weapons or evidence would be found in this particular search in *Robinson*, but rather is based on a more fundamental concept that

42. Approximately 30% of the shootings of police officers occur when the officer approaches a person seated in an automobile. Bristow, *Police Officer Shooting—A Factual Evaluation*, 54 J. CRIM. L.C. & P.S. 93 (1963), *cited in* Adams v. Williams, 407 U.S. 143, 148 n.3 (1972). According to the Federal Bureau of Investigation, a significant percentage of murders of police officers occur when the officers are making traffic stops. In the first quarter of 1973, of 35 murders of police officers, 11 were killed during traffic stops. 94 S. Ct. at 476 & n.5; *cf.* 471 F.2d at 1098-99 & n.25.

43. 94 S. Ct. at 476.

44. *Id.* at 486; 471 F.2d at 1100 & n.26.

45. *See* 94 S. Ct. at 486-87 n.6 (dissenting opinion).

once a valid custodial arrest is made an incidental search of the person is also constitutional.

Justice Powell, in his concise concurring opinion to both *Robinson* and *Gustafson*, was more precise and persuasive in his analysis of the essential premise of these decisions. He asserted that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.

> [The individual's interest in privacy] is subordinated to a legitimate and overriding governmental concern. No reason then exists to *frustrate* law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest.[46]

Justice Powell's opinion supplements the reasons that justify the more extensive search which Justice Rehnquist supports with the quotation from *Terry* and a citation of statistics indicating considerable danger to the police.[47] It is disappointing, however, that Justice Powell does not elaborate on the nature of the "legitimate overriding governmental concern" to clarify more precisely the interests that justify the result of limiting the individual's right of privacy.

In his concurring opinion in *Gustafson*, Justice Stewart indicated a possible defense, one not raised by the defendant in *Robinson*, that a custodial arrest for a minor traffic offense was a violation of the Fourth and Fourteenth Amendments.[48] Justice Powell also noted that if the custodial arrest for the traffic arrest had been shown to be merely a pretext for a search actually undertaken for collateral objectives, it would be disallowed.[49] Although Robinson did claim the arrest was a pretexted justification for the search, the Supreme Court did not rule on this point since the court of appeals had accepted the government's version.[50] Neither did the Court reach the question of whether a full search would be justified by a "routine traffic stop" without a full custodial arrest. Because the majority's reasoning is based on the authority of searches incident to custodial arrest, it would not seem to indicate a predilection to extend *Robinson* to such a context.

C. Gustafson v. Florida

Gustafson v. Florida,[51] which was argued with *Robinson* and decided at the same time, is important primarily for its refinements of

46. *Id.* at 494 (emphasis added); *cf.* Rochin v. California, 342 U.S. 165 (1952).

47. *See* 94 S. Ct. at 494 n.1, *quoting* Charles v. United States, 278 F.2d 386, 388-89 (9th Cir. 1960).

48. Gustafson v. Florida, 94 S. Ct. 488, 492 (1973) (Stewart, J., concurring).

49. 94 S. Ct. at 494 n.2 (Powell, J., concurring); *see* United States v. Lefkowitz, 285 U.S. 452, 467 (1932).

50. 94 S. Ct. at 494 n.2.

51. 94 S. Ct. 488 (1973).

the statements in *Robinson* and its application of that holding in a different factual setting.

The defendant, James Gustafson, had been convicted in a Florida trial court for unlawful possession of marijuana seized during a body search pursuant to his arrest on a charge of driving without an operator's license. A municipal police officer, Smith, had stopped Gustafson during the early hours of the morning after observing Gustafson's erratic driving of a car bearing out-of-state license plates. Upon request to produce his operator's license, the defendant informed the officer that he was a student and had left his license in his dormitory room in a neighboring city. Gustafson was then placed under custodial arrest[52] in order to transport him to the police station for further questioning. Officer Smith conducted a pat-down search of the defendant, discovered and extracted a cigarette box from the coat pocket of the coat Gustafson was wearing, opened the box, and observed what he believed to be marijuana. Officer Smith then placed the defendant under arrest for possession of marijuana.[53]

In his appeal from the decision of the Florida Supreme Court declaring the search reasonable,[54] Gustafson contended, as did Robinson, that there could have been no evidentiary purpose for the search conducted by the officer. A search for weapons pursuant to what he conceded was a lawful arrest should, therefore, be limited by *Terry*. Gustafson further argued that his case was distinguishable from *Robinson* because the offense for which he was arrested carried no mandatory minimum sentence nor did the municipality's police department policies require complete body searches pursuant to field arrests as did the District of Columbia.

Justice Rehnquist, writing for the identical 6-3 majority as in *Robinson*, held that the police officer was entitled under the Fourth and Fourteenth Amendments to make a full search of the defendant's person incident to the lawful arrest, and that as in *Robinson*, the *arguable* absence of an evidentiary purpose for the search was not controlling.[55]

---

52. The charge of driving without possession of an operator's permit was subsequently dropped when the defendant produced a valid license at a later date. *Id.* at 490 n.2.

53. *Id.* at 490.

54. State v. Gustafson, 258 So. 2d 1 (Fla. 1972).

55. Justice Rehnquist noted that Florida argued that there was an evidentiary purpose for the search based on Smith's observation of erratic driving of the car creating a reasonable suspicion that the driver may have been under the influence of alcohol or unlawful drugs. The State argued further that Smith's observation of the defendant's "bleary" eyes gave him probable cause to arrest the defendant on this charge, and then to conduct a full search for evidence of that crime. 94 S. Ct. at 492 n.4. The dis-

The Court further held that even though police regulations did not require Gustafson to be taken into custody or establish the conditions upon which a full-scale body search should be conducted, contrary to the situation in *Robinson*, this distinction was without constitutional significance.

> It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest, and placed the petitioner in custody.[56]

D. United States v. Calandra

The third of this trio of cases dealing with the nature and scope of the exclusionary rule was announced a month after *Robinson* and *Gustafson* were decided. *United States v. Calandra*[57] established that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground they are based on evidence obtained from an unlawful search and seizure; in other words, the exclusionary rule does not extend to grand jury proceedings.

1. *Facts*

On December 11 and 15, 1970, federal agents searched the residence, automobile, and place of business of the defendant, John Calandra, pursuant to a search warrant issued in connection with a gambling investigation. During the search of Calandra's office and files one of the federal agents discovered certain evidence indicating that the defendant was engaged in "loansharking." Knowing there was a pending federal investigation of such extortionate credit transaction activities, the agency seized this evidence.

Calandra was subsequently subpoenaed by the grand jury investigating the loansharking and was questioned on the basis of the evidence seized during the search of his office. When Calandra invoked his Fifth Amendment privilege against self-incrimination, the govern-

---

sent persuasively disposed of the state's argument and Justice Rehnquist's intimation that this contention was valid by pointing out the following: Smith neither arrested Gustafson for driving while intoxicated nor did he give him a sobriety test; the defendant had no difficulty getting out of the car, standing up, nor did he slur his speech; Smith had not arrested the defendant for a weaving charge because there was not enough evidence, and therefore the driving behavior of the defendant could not present probable cause that Gustafson was driving while intoxicated; and defendant's bleary eyes could probably be explained by the fact that the arrest took place at 2 a.m. *Id.* at 493.

56. *Id.* at 491-92. Since the fact of custodial arrest was the basis of the authority for the search, as in *Robinson*, subjective fear of the defendant or the fact that he might be armed was irrelevant. *Id.* at 492; United States v. Robinson, 94 S. Ct. at 477; *cf.* United States v. Robinson, 471 F.2d at 1122 (dissent).

57. 94 S. Ct. 613 (1974).

ment requested that he be both compelled to answer the questions and granted transactional immunity.[58] Calandra then moved to suppress the evidence.[59] The district court, with the Court of Appeals for the Sixth Circuit affirming, held that the search warrant had been issued without probable cause and that the search had exceeded the scope of the warrant. The court ordered the evidence obtained from the search to be suppressed and returned to Calandra and further ordered that Calandra need not answer any questions of the grand jury based on this evidence.[60]

Justice Powell, writing for the already familiar 6-3 majority,[61] reversed the judgment of the court of appeals.[62]

2. *Majority Opinion*

a. *Justification of the Exclusionary Rule.* Justice Powell opened the opinion with a comprehensive discussion of the historical development and functions of the grand jury. He described the scope of the grand jury's investigative powers in determining whether a crime occurred and by whom it was committed, adding that these powers "must be broad if its public responsibility is adequately to be discharged."[63] The grand jury may compel the testimony of witnesses as it considers appropriate, and it is generally unrestrained in its operation by the evidentiary and procedural technicalities governing criminal trials. Justice Powell recognized that these broad powers have limits, however. While the grand jury may consider incompetent or inadequate evidence without being subject to challenge, it may not itself violate a valid constitutional, statutory, or common law privilege.[64]

Justice Powell then moved to an analysis of the purpose of the exclusionary rule, and in concise terms reached a significant conclusion:

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's primary purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment . . . .

58. *See* 18 U.S.C. § 2514 (1970).

59. 94 S. Ct. at 616.

60. United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972); *In re* Calandra, 332 F. Supp. 737 (N.D. Ohio 1971).

61. The line-up of the two teams includes the chief justice and Justices Powell, Rehnquist, Blackmun, Stewart, and White for the majority, with Justices Brennan, Douglas and Marshall for the dissent.

62. 94 S. Ct. at 617.

63. *Id.* at 618, *citing* Branzburg v. Hayes, 408 U.S. 665, 700 (1972).

64. *Id.* at 617-19.

> In sum, *the rule is* a judicially-created remedy *designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.*[65]

Concluding that the purpose of the exclusionary rule was solely one of deterrence of future police misconduct, the majority rejected what the dissent considered the most important purpose of the rule, that of providing a means of giving content and meaning to the Fourth Amendment's guarantees. The dissent conceived of the exclusionary rule as accomplishing the twin goals of maintaining the "imperative of judicial integrity" by avoiding the taint of partnership in official lawlessness, and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior. The dissent further maintained that the deterrent justification for the rule was "at best only a hoped for effect."[66] The majority's response was that by rejecting an unprecedented extension of the exclusionary rule to grand jury proceedings when the rule's objective could not be effectively served, and when historic values would be unduly prejudiced, the Court was not betraying the "imperative of judicial integrity."[67]

b. *The Balancing Process.* The majority recognized that the Supreme Court has never interpreted the exclusionary rule to extend to all proceedings or against all persons who have been victims of illegal searches and seizures, but only where application of the rule would most efficaciously

---

65. *Id.* at 619-20 (emphasis added). Powell cited and quoted from several cases for support for this conclusion, including: Terry v. Ohio, 392 U.S. 1, 29 (1968); Tehan v. United States, *ex rel.* Shott, 382 U.S. 406, 416 (1966); Linkletter v. Walker, 381 U.S. 618, 637 (1965); Mapp v. Ohio, 367 U.S. 643, 656 (1961); and Elkins v. United States, 364 U.S. 206, 217 (1960).

66. 94 S. Ct. at 624-26 (Brennan, J., dissenting); *see In re* Martinez, 1 Cal. 3d 641, 653-56, 463 P.2d 734, 741-43, 83 Cal. Rptr. 382, 390-92 (1970) (Peters, J., dissenting).

67. 94 S. Ct. at 623 n.11. At least one commentator has pointed out that while the arguments supporting the justification of the "imperative of judicial integrity" appear in the rhetoric of Supreme Court decisions, it is doubtful that this argument decides cases, since federal courts may still enter valid judgments of conviction against a defendant who was brought before the court by illegal means such as kidnapping, arrest without probable cause, or arrest upon a warrant that was illegal or insufficient. Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 669 (1970) [hereinafter cited as Oaks], *citing* Frisbie v. Collins, 342 U.S. 519 (1952); Albrecht v. United States, 273 U.S. 1, 8 (1927); Stallings v. Splain, 253 U.S. 339, 343 (1920); Ker v. Illinois, 119 U.S. 436 (1886). Furthermore, other highly respected judicial systems in common law jurisdictions such as England and Canada have not found it necessary to exclude improperly obtained evidence to preserve the integrity of their courts. Oaks, *supra,* at 669. "[T]he *raison d'être* of the exclusionary rule is the deterrence of lawless law enforcement . . . ." Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, 334. *See generally* Oaks, *supra,* at 671-72.

serve its remedial objectives.[68] Justice Powell reasoned that a balancing process must be applied to determine whether the potential benefits of extending the rule to grand jury proceedings outweighed the potential injury to its historic role and functions.[69] The potential detriment included transforming the traditional investigative and accusatorial function of the grand jury into a preliminary trial on the merits, causing delay and disruption necessitated by extended litigation of issues only tangentially related to the grand jury's primary objective, and interfering with the effective discharge of the grand jury's duties.

Against this potential damage the majority could find that only an uncertain and at most minimal benefit would result. The rule currently allows suppression of illegally obtained evidence from criminal trials. To extend the rule to this new context, aimed at deterring improper searches and seizures of evidence to be used by the grand jury, would add little incremental deterrent effect. The Court reasoned that a prosecutor would not be likely to request an indictment by the grand jury on the basis of such evidence when that evidence could not be used at trial to obtain a conviction.

The Court concluded that the damage which would result from extension of the exclusionary rule to grand jury proceedings outweighed the benefit of any possible incremental deterrent effect. The Court also held that grand jury questions based on illegally obtained evidence worked no new Fourth Amendment wrong beyond that caused by the original invasion of the individual's privacy. Based on the same considerations of logic and policy, it declined to extend the exclusionary rule to the derivative use of the evidence.[70]

3. *Dissenting Opinion*

In his dissenting opinion Justice Brennan stated that the majority misused controlling case authority as well as overlooked relevant analogous authority which compelled an opposite result. *Silverthorne*

68. Powell cited the "standing requirement" as an example. 94 S. Ct. at 620. In Alderman v. United States, 394 U.S. 165 (1969), the Court refused to extend the exclusionary rule to one who was not the victim of the unlawful search because of the minimal deterrent effect that would result from such exclusion.

69. 94 S. Ct. at 620-21.

70. *Id.* at 621-23. Powell mentioned at least two other remedies the grand jury witness would have as redress for the injury to his privacy and to prevent further future violations. He could use the exclusionary rule to prevent the evidence and its fruits from being used in a criminal trial where he was a defendant, and have that property returned to him, and he could sue the wrongdoing police officers in a civil suit for damages. *Id.* at 623 n.10; *see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). *See also* Note, *Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity*, 24 HASTINGS L.J. 987 (1973).

Lumber Co. v. United States,[71] the case purportedly misused, was quite similar factually to *Calandra*. In *Silverthorne*, federal agents had illegally seized evidence from the Silverthornes and their lumber company (defendants) and presented this evidence to the grand jury which had previously indicted them. A district court ordered the evidence suppressed and returned, but the grand jury subsequently issued a subpoena *duces tecum* to produce the documents. When the defendants refused, they were cited for contempt. The Supreme Court reversed, holding the subpoenas invalid because they were based on the fruits of an illegal seizure.

The *Calandra* majority had distinguished *Silverthorne* because in that case the primary consequence of the decision was the exclusion of evidence in the criminal prosecution already authorized by the grand jury. The grand jury did not need the evidence to perform its investigative or accusatorial functions. Calandra, on the other hand, had not been previously indicted and did not have standing[72] as a criminal defendant to invoke the exclusionary rule. Exclusion of evidence in *Calandra* would interfere with the effective functioning of the grand jury's duties.[73]

Justice Brennan argued quite persuasively that the majority had overlooked the fact that the grand jury's interest in regaining the documents in *Silverthorne* may have been to secure information for grand jury indictments on criminal charges against the Silverthornes and others, rather than to use the illegally obtained evidence in the previously authorized criminal prosecution. He thought that *Silverthorne* controlled, and since it was not overruled by the majority, an affirmance of the lower court's holding was in order.[74]

Justice Brennan also found the reasoning in *Gelbard v. United States*[75] persuasive.[76] The Court in that case allowed a grand jury witness to refuse to answer questions based on information obtained from the witness' communications unlawfully intercepted through wiretapping and electronic surveillance. Justice Powell had distinguished *Gelbard* as a case based exclusively on a statute designed to provide special protection against the unique problems posed by misuse of wiretapping and electronic surveillance.[77]

71. 251 U.S. 385 (1920).

72. See note 68 *supra*.

73. 94 S. Ct. at 622 n.8. The majority also discounted the broad dicta used by the Court in *Silverthorne* which had considered the exclusionary rule's justification as being based on values other than its deterrent effect which, it contended, subsequent decisions of the Court had undermined. *Id.*

74. *Id.* at 626-27.

75. 408 U.S. 41 (1972).

76. *See* 94 S. Ct. at 627.

77. *Id.* at 623 n.11.

The dissenting justices seemed most displeased with what they perceived as the majority's total misconception of the purpose or justification of the exclusionary rule. In analyzing the reasoning of the majority which the dissenters found "plainly at war" with *Mapp* and previous decisions which had regarded the exclusionary rule as an essential part of the Fourth and Fourteenth Amendments, Justice Brennan expressed disapproval not only of the results reached in this case, but also of the more drastic results he foresaw should the majority's reasoning be carried to its logical extreme:[78]

> I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search and seizure cases; for surely they cannot believe that application of the exclusionary rule at trial furthers the goal of deterrence, but that its application in grand jury proceedings will not "significantly" do so.[79]

Justice Brennan's expression of alarm would not seem to be a mere rhetorical device. By framing the underlying justification for application of the exclusionary rule as based solely on its deterrent effect on police misconduct, rather than on the "imperative of judicial integrity" or some inherent right of the person searched to have this evidence excluded, the majority radically altered the balancing process used to determine "reasonableness" of a search and seizure. In essence the majority made it more difficult for petitioners to establish a case requiring extension of the rule to new search and seizure contexts. It also opened up the possibility that prior decisions in which considerations other than the deterrent effect were used in the balancing process might require reconsideration based on this new standard. But even more troublesome to the dissent was the possibility that the majority's view of the exclusionary rule could result in its *total* abandonment by attacking the incremental deterrent value effected by its application in criminal trials. The majority had in fact noted that there was some disagreement as to the practical efficacy of the rule in criminal trials, but determined that the facts of *Calandra* did not present such an issue for decision.[80]

In anticipation of future attacks by the majority upon the very existence of the exclusionary rule, Justice Brennan concluded his dissenting opinion by quoting Dallin Oaks, one of the most frequently cited critics of the rule. In the cited portion of the quotation Oaks listed numerous advantages which the rule provides apart from any

78. *Id.* at 624-26.
79. *Id.* at 628.
80. *Id.* at 620 n.5.

direct deterrent effect.[81] Justice Brennan neglected to quote the first sentence of the paragraph by Oaks, however, which puts Oaks' comments into a context that greatly weakens their value to the dissent's position. Professor Oaks was speaking as an advocate of *abolishing* the exclusionary rule, but not until an alternative was developed which would perform the essential functions of the rule. Putting these remarks in their original context, Justice Brennan's use of this authority suggests that the minority members of the Court were establishing a position in anticipation of future cases challenging the rule. Implicit in their position is that the exclusionary rule should not be abolished without establishing viable alternatives, and that an ineffective or partially effective remedy is better than no remedy at all to maintain Fourth Amendment guarantees of individual freedom from illegal goverment intrusion.

E. Implications of Robinson, Gustafson, and Calandra

These three cases are not only significant in their individual holdings and implications, but also, when taken together, they represent a definite benchmark indicating the philosophy and attitude of the majority of the "Burger Court" regarding the application of the exclusionary rule in search and seizure cases.

The holdings in *Robinson* and *Gustafson* do not create new law but rather more clearly delineate the nature of one of the exceptions to the Fourth Amendment warrant requirements, that of searches incident to arrest. The holdings firmly establish the authority to make unrestricted searches of individuals arrested for fairly *minor* traffic offenses. The only requirement is that the ordinance or statute allows the officer in his discretion to make a custodial arrest. Only Justice Stewart indicated some reservation as to whether custodial arrest for a minor traffic offense conflicted with the Fourth and Fourteenth Amendment, and would present grounds for abuse by jurisdictions which grant overly broad authority for making custodial arrests in order to justify full warrantless searches.

As a result of these decisions it is also possible that police officers will use this authority to justify making full warrantless searches where their motive is to find evidence of other crimes. They may make use of the arrestee's speeding or failure to renew his operator's li-

81. "[I]t provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." Oaks, *supra* note 67, at 756, *quoted in* 94 S. Ct. at 629.

cense, for example, merely as an excuse for the search. This possibility for abuse is somewhat limited by a court's determination of whether the arrest was based on a pretext or not, and if so based, by that court's suppression of the evidence obtained in the search. More difficulty lies in establishing that an arrest for a minor traffic offense is a pretext, however, than in challenging the justification of an officer's search for weapons or evidence.

Robinson and its companion case *Gustafson* are perhaps just as significant, however, for the *manner* in which the decisions were articulated. In rejecting Judge Wright's careful analysis and the reasoning urged by the dissent, Justice Rehnquist refrained from a detailed justification of the reasonableness of the particular searches. Instead, he categorically recognized the validity and reasonableness of a full body search incident to any lawful arrest. In taking this approach the majority relied on ambiguous dicta and refused to accept possible contradictions raised in dicta statements of equal authority. Justice Rehnquist also *selectively* cited persuasive state authority on the issue in question, discussing only those cases which reached the result he desired. Furthermore, he rejected the case law established in an arguably similar context as the traffic arrest, namely the *Terry* limitations on stop-and-frisk searches. The method used by the majority to reach its conclusion indicates that, far from being a solution required by *stare decisis*, the opinion represented a distinct choice between two conflicting interests. The decision was to shift the balance in favor of the increased safety of police officers in arrest situations to the detriment of individual rights of privacy. The majority's approach, as Justice Marhsall remarked in his dissent, "represents a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment.[82] This approach was based on what the majority perceived as an overriding governmental interest in the function of the custodial arrest, and was limited to that arrest situation.

Calandra was a more difficult case in that it involved balancing competing interests where the governmental interest was not *overriding* and where a categorical approach was inappropriate. Justice Powell provided a more scholarly, reasoned, and persuasive analysis of the balancing of competing interests involved in extending the rule to grand jury proceedings. Nonetheless, a similar result was reached in all three cases. The interest in allowing the evidence obtained by the search to be introduced in the proceeding was found to outweigh the possible deterrent effect that an application of the rule would provide.

82. United States v. Robinson, 94 S. Ct. 467, 478 (1973) (dissenting opinion).

The majority in *Calandra* broadened the scope of its examination beyond the fact situation before the Court to an analysis of the underlying justification of the exclusionary rule. The majority then framed discussion of the various issues solely from the perspective of the rule's deterrent value. As the dissent correctly pointed out, by requiring only that the potential deterrent value of the rule in a particular context be weighed against the benefits of non-application, the Court rejected consideration of the "imperative of judicial integrity" and of any inherent right of the person searched to have such evidence excluded. This construct opens the way to subsequent cases beyond the context of *Calandra* in which the exclusionary rule may be limited or abolished entirely if a showing can be made that the rule produces little incremental deterrent value.

At least one member of the majority, the chief justice, indicated that he believes the rule is not effective in deterring police misconduct, and that it costs society too high a price in terms of loss of evidence of crimes committed and release of proven criminals. His recommendation was that the exclusionary rule be abolished and replaced with an alternative. The three cases discussed in this note, particularly *Calandra*, may indicate that a majority of the Court agrees with the chief justice. The groundwork appears to have been laid to accomplish what Chief Justice Burger advocated in his dissent in *Bivens* —the abolition of the exclusionary rule and the establishment of a legislative alternative, or in the very least, a limiting of the rule's application to eliminate the anomalies it has produced.[83]

This note will now examine several of the recent criticisms of the exclusionary rule made by commentators and jurists, including the alternative to the rule proposed by the chief justice. The conclusion presents an hypothesis as to the disposition of the majority of the Court regarding the abolition of the exclusionary rule and its alternative replacement.

II.

Criticisms of the Exclusionary Rule

A. Introduction

Although deterrence of police misconduct and protection of the individual's right to freedom from invasion of his privacy are very important interests in our society, the exclusionary rule was not used to implement these two goals until 1914. Judicial reluctance was due largely to the harsh effect caused by the exclusion of otherwise rele-

83. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 424 (1971).

vant evidence and the countervailing benefits to the functioning of the courts by using this evidence to determine facts.[84] Because of the sacrifice such a rule represented to the social values of accurate judicial decision making and punishment of discovered crimes, reliance was instead placed on various administrative, criminal, and civil remedies for enforcement of Fourth Amendment rights.

The exclusionary rule was adopted in the federal courts in *Weeks v. United States*,[85] when the Supreme Court determined that these various remedies were not effective in suppressing lawless searches and seizures, and that the exclusionary rule was the only effective means to deter such violations. This decision was followed by various state courts, such as the California Supreme Court, which created the exclusionary rule as a rule of evidence.[86] The United States Supreme Court in *Mapp v. Ohio*[87] subsequently made the exclusionary rule a constitutional mandate applicable to all the states by the Fourteenth Amendment. Despite a lack of empirical evidence to justify reliance on the deterrent effect of the exclusionary rule at its conception and even at present, jurists in cases applying the exclusionary rule made such statements as "experience has taught that [the exclusionary rule] is the *only* effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.' "[88]

Because of the controversial nature of the exclusionary rule and the conflict it presents to the values of accurate judicial decision making, the rule has naturally had many opponents. A few of the more frequent criticisms of the rule are that it "handcuffs the police," that it "allows convicted rapists and murderers on the streets," and that it represents "judicial legislation."[89] Many of these comments represent

84. "Of all the two faced problems in the law, there is none more tormenting than the admissibility of illegally obtained evidence. Whichever face one turns to the wall, the question of admissibility remains a haunting one. The evidence may be of the greatest relevance. If its admission serves to condone lawless enforcement, however, it opens the way to government intrusion on the privacy of law-abiding pople . . . ." Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 319.

85. 232 U.S. 383 (1914).

86. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). "We have been compelled to [adopt the exclusionary rule] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers . . . ." *Id.* at 445, 282 P.2d at 911.

87. 367 U.S. 643 (1961).

88. Terry v. Ohio, 392 U.S. 1, 12 (1968), *quoting* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (emphasis added).

89. *See, e.g.*, Reiss, *Public Perceptions and Recollections About Crime, Law En-*

lay opinion based on little or no actual knowledge of the legal basis of the rule. Such comments may be caused substantially by the schools, media, courts, and legal community which have inadequately explained the important values the rule protects. All too often the emphasis has been placed on the harsh injustices of convicted felons being freed on what most lay people (and many lawyers) would call "technicalities."

Not all the criticism of the exclusionary rule is merely the angry rhetoric of an outraged citizenry. One of the more effective and articulate voices to raise serious doubts as to the wisdom of this rule was that of a then federal court of appeals judge for the District of Columbia.

B. Judge Warren Burger

In 1964, in an article entitled *Who Will Watch the Watchman?*,[90] Warren Burger, then a circuit judge, focused sharp criticism on the use of the exclusionary rule as the sole tool for deterring police misconduct. From his vantage point, this appeared to be the principal reason accepted by the Supreme Court for the suppression of illegally obtained evidence. Judge Burger had not attempted to marshal statistics to justify abandoning the "suppression doctrine," but rather suggested a new mechanism to help that doctrine accomplish its goal of deterring illegal police searches.[91]

Judge Burger's most telling argument was that the record on the exclusionary rule did not show that suppression of evidence affected police conduct. He based this conclusion on an analysis of the exclusionary rule's purported goal of deterring such misconduct, and then reasoned that the deterrent factors underpinning the rule were in fact myth.

Judge Burger first indicated that deterrence meant something undesirable would happen to the individual police officer. A court's application of the exclusionary rule, he noted, did not result in a *direct* sanction against the individual officer involved.[92] The rule's effect

---

forcement, and Criminal Justice, 1 STUDIES IN CRIME & LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS § 1, at 81-85 (1967).

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

91. *Id.* at 2, 10, 13.

92. *Id.* at 11. Professor Dallin Oaks gives a more sophisticated evaluation of this objection in his collection of analyses of various scholars on aspects of deterrence. Oaks, *supra* note 67.

Oaks begins by specifying different aspects of deterrence, including *special deterrence*. Special deterrence is the effect of a sanction on an individual who has already experienced it. Since the exclusionary rule does not impose any direct punishment, but only possible disappointment at seeing evidence suppressed and consequently seeing the suspect freed, it is not aimed at special deterrence. Furthermore, according to

was therefore limited to its *indirect* sanction. Whatever undesirable effect the indirect sanction might have on the officer was seriously diluted, however, because of the time lag between the policeman's improper conduct and the final judgment. Sometimes the officer did not even learn of the ultimate disposition of the case in which he committed an unconstitutional act. And even where he or his associates were informed about the case, these professionals, along with their fellow citizens, often did not understand the complexities of the newly created law. Judge Burger pointed out an additional defect. Many of the court opinions indicated a perception of law enforcement as a monolithic unit, and either expressly or impliedly stated that suppression of evidence illegally obtained by the policeman will impress the zealous prosecutor who will instruct the police not to engage in such conduct. Such a simplistic perception, Judge Burger contended, was inaccurate.[93]

Oaks, there is no evidence of individual sanctions against officers by superiors being tied to application of the exclusionary rule. *Id.* at 709-10.

The exclusionary rule is therefore meant to achieve its goals by *general deterrence*, which includes two kinds of effects, one immediate and the other long range, by discouraging violations by individuals who have never experienced any sanction against them. The immediate or *direct* deterrence, manifested in compliance induced by the threat of the sanction, depends on numerous factors for its effectiveness, including: how effectively the rule is communicated to the individual officer and his realization that the evidence will be inadmissible in court if he makes an unconstitutional search; how gravely the officer perceives the consequences of excluding evidence, and upon how these compare to any competing alternatives he may have. *Id.* at 710-11.

Indirect and long range effects operate in three ways as a probable deterrent effect of the exclusionary rule. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 42-45 (1968); Andenaes, *Does Punishment Deter Crime?*, 11 CRIM. L.Q. 76, 80-81 (1968); Zimring, *Perspectives on Deterrence* (Center for Studies of Crime and Delinquency, National Institute of Mental Health, Monograph Series, 1970).

The first, and probably most important, is the "moral or educative" influence of the rule in teaching what society accepts and what it will not accept as appropriate personal behavior. It should be noted that the effect of this influence probably depends on the police official's view of whether the majority of society agrees with the court-made rule and his general concept of the function of the judiciary.

The second indirect effect is that the rule helps develop patterns or habits of conforming behavior that continue to influence an individual's conduct long after he has ceased to weigh the pros and cons of observance, particularly as to those aspects of conduct that become highly routine.

The third indirect effect is that it gives a potential offender an additional reason to resist the temptation and thus to reinforce the position of those officials who need only this additional incentive to guarantee their compliance with the law. Oaks, *supra,* at 711-12.

Although it is argued that the exclusionary rule has little direct deterrent effect, over the long run the moral and educative force of the rule most likely produces some sense of moral obligation. *Id.* at 729.

93. Burger, *supra* note 90, at 13; *see* Wolf v. Colorado, 338 U.S. 25, 44 (1949). See text accompanying notes 109-110 *infra.*

Judge Burger then remarked that the supposition that suppression of illegally obtained evidence deters future action on the part of the particular policeman is no more than "wishful thinking."[94] He concluded that the proper objective should be to get the watchman, the policeman, to watch over himself, and then proposed an alternative tool to supplement the exclusionary rule which would redirect this collective flagellation to the individual public officials who commit wrong.[95]

The alternative remedy, according to Judge Burger, should be an independent civilian police review board which would determine how and why an incident occurred, fix responsibility, make recommendations as to suspensions or discipline, and take any additional steps necessary to prevent further occurrences.[96]

Judge Burger's final word was a sharp denunciation of the purpose and effect of the exclusionary rule:

> The public has accepted—largely on faith in the Judiciary—the distasteful results of the Supression Doctrine; but the wrath of public opinion may descend alike on police and judges if we persist in the view that suppression is a solution. At best it is a necessary evil and hardly more than a manifestation of sterile judicial indignation even in the view of well motivated and well informed laymen. We can well ponder whether any community is entitled to call itself an "organized society" if it can find no way to solve this problem except by suppression of truth in the search for truth.[97]

C. Dallin Oaks

1. Introduction

Unfortunately, most of the arguments made by Judge Burger, like most of the theoretical underpinnings postulated by the judges creating the exclusionary rule, are based only on theory. There was little to no firm empirical data on the effectiveness of the exclusionary rule in deterring police misconduct.[98] The legal community needed, and in 1970 received, a partial installment to meet the need for a basis of evaluating the proven effectiveness of the rule in the well-written

94. Burger, *supra* note 90, at 12.

95. *Id.* at 15.

96. *Id.* at 17-19.

97. *Id.* at 23.

98. At the time *Mapp v. Ohio* was decided, the only published empirical evidence on the rule's deterrent effect included eleven responses to Justice Murphy's inquiries about the extent of police training in areas with and without the rule, a student comment suggesting that the rule did not deter unlawful searches in enforcing gambling laws in Chicago in 1950, and some writings intended to show law enforcement had not been crippled in areas where the rule was adopted. Oaks, note 67 *supra*, at 675. See note 100 *infra*.

and well-documented article by Dallin H. Oaks,[99] a University of Chicago law professor and Executive Director of the American Bar Foundation.

In a careful and balanced presentation, Professor Oaks presented the historical and theoretical basis of the exclusionary rule and its emphasis on deterring police misconduct, and then reviewed the current research, as well as the various previously published studies on the rule's deterrent effect. He also discussed possible techniques and areas for further research suggested by these studies and by analyses of specific theoretical problems with regard to the rule.[100]

Oaks used this preliminary background material to provide a comprehensive detailing of specific *limitations* upon the effectiveness of the exclusionary rule as a means of deterring illegal searches and seizures, as well as its specific *negative effects.*[101] In gathering together and evaluating the prominent authorities who have commented on this subject, Oaks strengthened the position advocated in the Burger article. As Oaks himself admitted, he "provide[d] ammunition for those who would seek to abolish or restrict its application."[102]

99. Oaks, note 67 *supra.*

100. The research methods used to gather the various data and recommended for future studies included a *before-and-after* method of comparison of conduct in jurisdictions that have the exclusionary rule with those that do not, a *field observation* in a single area during a single period of time to determine the effect of the rule, and various opinion evidence by experts. The various studies included: the first recorded test to evaluate empirically the assumptions underlying the exclusionary rule, a questionnaire sent to 38 large cities by Justice Murphy and described in his dissent to Wolf v. Colorado, 338 U.S. 25, 44-46 (1949), which unfortunately was sorely lacking in scope of questioning and in scientific method; a more adequate survey seeking opinions on police training and other effects of the rule which was sent to five persons in each state by Stuart Nagel in 1963 (Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283); court statistics measuring the incidence of motions to suppress in Chicago and the District of Columbia; comparative studies of arrest and conviction for weapons, narcotics, and gambling offenses before and after the adoption of the rule in Cincinnati over a period of five years before and six years after the adoption of the rule; a study of the amount of contraband or illegally possessed material seized by police in Cincinnati during periods before and after the *Mapp* decision; a very valuable study made by Columbia Law School students of evidentiary grounds for arrest and subsequent disposition of misdemeanor narcotics cases in New York City before and after *Mapp* (Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOCIAL PROB. 87 (1968)); detailed observation of police behavior in a book by Jerome Skolnick (J. SKOLNICK, JUSTICE WITHOUT TRIAL (1967)) and by Wayne LaFave in his American Bar Foundation field study of arrest practices in Kansas, Michigan and Wisconsin during 1956-57 (W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965)); and a superficial discussion by Oaks of how Canada discourages illegal behavior by its law enforcement officials without use of an exclusionary rule. Oaks, *supra* note 67, at 678-706.

101. Oaks, *supra* note 67, at 720-54.

102. *Id.* at 720.

Because of the significance of Oaks' arguments, findings, and conclusions to the thesis of this note, the author has taken the liberty of paraphrasing the Oaks article extensively.

2. *Limitations on the Effectiveness of the Rule*

The first specific limitation noted by Oaks on the rule's deterrent effect is that it operates only when a case comes to court and where there is an attempt to introduce the illegally obtained evidence to obtain a conviction. As the Supreme Court noted in *Terry v. Ohio*:[103]

> Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.[104]

Instances involving conduct where the rule would be applicable would seem to be a small minority of cases where there is an actual illegal search and seizure. Moreover, evidence will not be suppressed in the large majority of cases where the person illegally searched pleads guilty.[105]

A second major limitation on the effectiveness of the exclusionary rule is that it operates under conditions which are unfavorable for effective general deterrence, at least by means of direct effect.[106] Citing the writings of Johannes Andenaes[107] and other scholars on this point, Professor Oaks stated that the effectiveness of the rule will be affected by the following conditions:

Risk of detection, conviction and punishment. "Rejection of the evidence does nothing to punish the wrong-doing official . . . ."[108] The policeman who conducts the unreasonable search and seizure is neither affected by money damages nor criminal punishment. The perceived risk of unwanted detection and adjudication of fault is slight, and once in a courtroom, doubts are usually resolved in favor of the police officer. Furthermore, these police officers are rarely disciplined by their superiors for their misconduct which causes evidence to be suppressed.[109]

---

103. 392 U.S. 1 (1968).

104. *Id.* at 14.

105. Oaks, *supra* note 67, at 720-24; *see* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967).

106. See note 92 and accompanying text *supra.*

107. Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 960-64 (1966).

108. Irvine v. California, 347 U.S. 128, 136 (1954) (Jackson, J., dissenting).

109. Oaks, *supra* note 67, at 725-26. *See also* Burger, *supra* note 90, at 12.

Severity of penalty. The immediate impact of the exclusionary rule is misplaced. It falls upon the prosecutor attempting to obtain a conviction rather than upon the police. While the exclusionary rule may be well tailored to deter the prosecutor from improper conduct, it is less appropriate to deter police, who are generally independent and coordinate authorities, but operate under a variety of motives other than to facilitate prosecution.[110]

Competing norms of behavior. Any direct deterrent effect of the rule is neutralized by the perceived needs of the situation and by the competing norms of police behavior. Even if a police officer's conduct was illegal and resulted in the loss of a conviction, according to the observations of Jerome Skolnick, the officer would be disciplined only if he failed to behave as a reasonable officer in conformity with administrative norms of police organization.[111] The policeman is more oriented toward approaching events that threaten order in terms of "handling the situation" rather than in terms of "enforcing the law."[112] Furthermore, the operation of the rule does not have a reforming effect over competing norms of police behavior in many areas since it is the conduct of the individual officer rather than the policy of the department which is being reviewed.[113]

Effective communication. The sanction and the reasons for the sanction must be communicated to the target population to be an effective general deterrent. There is reason to believe that communication between police, courts, and prosecutors is insufficient in this respect.[114]

In order to have a direct deterrent effect, and to accomplish the rule's long range moral and educative goals, the various laws and decisions must be stated with sufficient clarity to be understood and followed by the average police officer. Due to the unquestioned complexity of rules dealing with arrest and search and seizure, this area would not appear to be a favorable one for a deterrent sanction to be effective. The degree of effectiveness of such a sanction varies greatly in relation to the gravity of the suspect's crime. The question of whether prosecution is assured or public interest in the case

110. Oaks, *supra* note 67, at 726-27.

111. J. SKOLNICK, JUSTICE WITHOUT TRIAL 219 (1966).

112. J. WILSON, VARIETIES OF POLICE BEHAVIOR, at chs. 1, 2, 9 (1968).

113. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 31-33 (1967).

114. LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965); LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 MO. L. REV. 391, 415-21 (1965); Oaks, *supra* note 67, at 730.

is aroused is also important.[115]

3. *Negative Effects of the Exclusionary Rule*

Professor Oaks also presented some of the possible negative effects of the rule which represent disadvantages or costs to society for its implementation, regardless of whether or not it effectively deters police misconduct. These effects include the following.

Nothing for the innocent, but freedom for the guilty. In terms of direct corrective effect, the rule only benefits a person incriminated by illegally obtained evidence. It does nothing to recompense the victim who has suffered an injury when the search failed to turn up anything incriminating.[116] Justice Robert Jackson articulated his objection to this condition in this fashion:

> Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will, release the wrongdoing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.[117]

It has been argued that complaints about the exclusionary rule freeing the guilty seem to be "less an assault on the exclusionary rule than upon the validity of the substantive right sought to be protected by constitutional provisions forbidding unreasonable searches and seizures."[118] This argument would seem to be an overstatement, however, since the rule is patently deficient in its failure to give direct protection to the innocent as well as the guilty, notwithstanding its purported effect of deterring unreasonable searches and seizures.

---

115. Oaks, *supra* note 67, at 731-32. As Jerome Skolnick concludes: "[A]ll these reasons—the norm of police alertness; the requirement that police confiscate illegal substances; the tendency toward a presumption of the legality of the search once the illegal substance is found; the fact that in a 'small pinch' the policeman is usually not interested in an arrest but in creating an informant; the fact that the defense will be impressed by the presence of incriminating evidence; the sympathy of police superiors so long as policemen act in conformity with administrative norms of police organization; the difficulty of proving civil suits for false arrest . . .—militate against the effectiveness of the exclusionary rule. In short the norms of the police are fundamentally pragmatic. Since the policeman has everything to gain and little to lose when he uses the 'reasonableness of the search and seizure' standard in small cases, he does so, even though this is not the prevailing legal standard." J. SKOLNICK, JUSTICE WITHOUT TRIAL 224 (1966).

116. Oaks, *supra* note 67, at 736-39.

117. Irvine v. California, 347 U.S. 128, 136 (1954) (dissent); *see* 8 WIGMORE ON EVIDENCE § 2184, at 51-52 (McNaughton ed. 1961); Paulsen, *The Exclusionary Rule and Misconduct by The Police*, 52 J. CRIM. L.C. & P.S. 255, 256 (1961).

118. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 NW. U.L. REV. 1, 19 (1950).

Fostering false testimony by the police. To the extent that police officers avoid the operation of the exclusionary rule by deliberate false testimony about the circumstances of the arrest or search and seizure,[119] the exclusionary rule not only fails to achieve its own objectives, but it also corrupts law enforcement officials and degrades the whole system of criminal justice.[120]

Delay and diversion from the question of guilt or innocence. A criminal prosecution of one person would seem an indirect and awkward forum for inquiring into the behavior of some other person, a police officer, with a view to punishing him or creating some deterrent against similar conduct in the future. One commentator has summarized the arguments on this negative effect:

> The [exclusionary] rule attempts to redress a violation of law without the time-honored method of direct complaint and trial on a carefully defined issue. The procedure looking toward exclusion of evidence interrupts, delays, and confuses the main issue at hand—the trial of the accused. The principal proceeding may be turned into a trial of the police rather than of the defendant.[121]

Side effects on the criminal justice system. Although a systems analysis technique would be required to identify the number of uncertainties concerning various causes of change in the legal system, according to Professor Oaks the exclusionary rule seems to have produced several undesirable side effects on the criminal justice system. One such effect, noted by Edward Barrett, Jr., is that the rule creates pressure upon courts to weaken the rules governing probable cause to make an arrest where an obviously guilty defendant is seeking to suppress clear physical evidence of his guilt.[122] Another side effect is that motions to suppress may be responsible for some delay in the disposition of individual cases. The rule may also have an important and detrimental effect upon the timing and substance of guilty-plea bargaining and related sentencing decisions. This negative effect is especially apparent in areas where bargaining occurs before the motion to suppress is litigated.[123]

Police immunization of criminals. In addition to the cost of free-

119. J. SKOLNICK, JUSTICE WITHOUT TRIAL 215 (1966); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases,* 4 COLUM. J.L. & SOCIAL PROB. 87 (1968).

120. Oaks, *supra* note 67, at 740.

121. Paulsen, *The Exclusionary Rule and Misconduct by the Police,* 52 J. CRIM. L.C. & P.S. 255, 256-57 (1961).

122. Barrett, *Personal Rights, Property Rights and the Fourth Amendment,* 1960 SUP. CT. REV. 46, 55; *see* 8 WIGMORE ON EVIDENCE § 2184, at 52 n.44 (McNaughton ed. 1961); Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition,* 1969 SUP. CT. REV. 155, 157-58.

123. Oaks, *supra* note 67, at 747-49.

ing the guilty by applying the exclusionary rule to any evidence that is essential to the prosecution, there is an additional negative effect in the dangerous power this vests in the police, permitting them to immunize a criminal from prosecution by deliberately making an unreasonable search and seizure. One context in which it has been suggested that a police officer might be tempted to make a bad arrest purposely is in a juvenile case to assure that the juvenile cannot be found guilty and be subjected to a harsh penalty. Other contexts involving intentional misconduct based on corruption of the officer are also conceivable.[124]

Forestalling the development of alternative remedies. The exclusionary rule cannot be *replaced* as long as it remains a constitutional mandate, but it could be *supplemented,* particularly in areas where it has proven ineffective. One negative side effect of the concentration and reliance upon the rule, however, may be to forestall the development of alternative mechanisms for controlling police misconduct. Due to the federal preemption of *Mapp,* the rule may have the specific effect of discouraging states to develop alternative methods of deterrence other than the exclusionary rule.[125]

These negative aspects of the rule are costs which society must pay and must be weighed when evaluating the value of the exclusionary rule in protecting the individual's Fourth Amendment rights.

D. Chief Justice Burger and the Bivens Case

In 1972, after he was elevated to the Supreme Court, Chief Justice Warren Burger used *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[126] as a platform to voice his continued disagreement with the exclusionary rule whose "history. . . . demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective."[127] Although the *Bivens*

124. *Id.* at 749-50; *see* Dash, *Cracks in the Foundation of Criminal Justice,* 46 NW. U.L. REV. 385, 390-92 (1951).

125. Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring); Oaks, *supra* note 67, at 753.

126. 403 U.S. 388 (1971).

127. *Id.* at 415 (dissenting opinion). The case held that federal narcotics agents who, without a warrant or probable cause, entered the plaintiff's apartment to arrest him and subject him to a strip search, violated the Fourth Amendment; consequently, their acts gave rise to a federal cause of action for damages against the individuals despite the lack of a statutory basis for such civil suit. On remand of a reserved question, the Second Circuit held that the agents did not have executive immunity for their acts performed under color of federal law, but they did have a special defense of "good faith and reasonable belief." That holding rejected a long line of standing precedent extending the immunity privilege to low ranking federal officers. 456 F.2d 1339 (2d Cir. 1972). For a scholarly and well-researched analysis of *Bivens* on re-

holding represented an attempt to provide an additional remedy to *supplement* the suppression doctrine (the same objective he had previously encouraged by use of an independent police review board),[128] the chief justice in his dissent argued that it was inappropriate for the courts to take such a step. Furthermore, he maintained that an entirely different approach to this problem was required. Relying to a great extent on the Oaks study for a marshaling of facts indicating the exclusionary rule's ineffectiveness,[129] Chief Justice Burger advocated that the rule be *abolished* and replaced with a legislative alternative.[130]

The chief justice employed the same arguments and much of the same language utilized in his previous article[131] to justify his opposition to the rule, as well as the analysis and conclusions of Oaks and some of the other authorities cited previously in this note. He demanded some clear demonstration of the benefits and effectiveness of the rule to justify its use in view of the high price society must pay by "the release of countless guilty criminals."[132]

Claiming that the doctrine represents a mechanically inflexible response to widely varying degrees of police error, Chief Justice Burger commended attempts to provide rationally graded responses to police error acquiring evidence, such as the American Law Institute's Model Code of Pre-Arraignment Procedure.[133]

Emphasizing that the reporters were not wedded to the exclusionary rule as the sole or best means of enforcing the Fourth Amendment, the writers of the American Law Institute's draft had recommended that a motion to suppress evidence be granted only if the court finds that the violation involved was *substantial.* The factors to be considered in such a determination would include: the importance of the particular interest violated; the extent of deviation from lawful conduct; the extent to which the violation was willful; the extent to which privacy was invaded; the extent to which exclusion would tend to prevent violations of this code; whether, but for the violation, the things seized would have been discovered; and the extent to which the violation prejudiced the moving party's ability to support

---

mand, see Note, *Bivens v. Six Unknown Named Agents: A New Direction in Federal Police Immunity*, 24 HASTINGS L.J. 987 (1973).

128. See text accompanying note 96 *supra.*

129. Compare text accompanying note 91 *supra.*

130. 403 U.S. at 411-27.

131. Burger, *supra* note 90.

132. 403 U.S. at 416. *See also* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 33 n.172.

133. 403 U.S. at 419, 424-26, *quoting* ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ SS 8.02(2), (3) (Tent. Draft No. 4, 1971).

his motion, or to defend himself in the proceedings in which the things seized were offered in evidence against him. The *fruits* of prior unlawful searches were also required to be suppressed unless the prosecution could meet the burden of proving that the evidence would probably have been discovered by the officials regardless of the illegal act, and the exclusion would not be necessary to deter further violations.[134]

The chief justice stated that in criticizing the exclusionary rule he was not faulting the judges who had originally created the rule to enforce the Fourth Amendment, "[b]ut we can and should be faulted for clinging to an unworkable and irrational concept of law. My criticism is that we have taken so long to accomplish these desired objectives. And there are better ways."[135]

Chief Justice Burger was not advocating the overruling of *Weeks* and *Mapp* and the abandonment of the exclusionary rule without first developing some meaningful alternative.[136] His recommendation was that Congress and the various state legislatures should adopt an administrative or quasi-judicial remedy of damages against the government itself to compensate persons whose Fourth Amendment rights were violated: "The venerable doctrine of respondeat superior in our tort law provides an entirely appropriate conceptual basis for this remedy."[137]

Chief Justice Burger stated that such a quasi-judicial tribunal, perhaps patterned after the United States Court of Claims, with lawyers serving as fact finders rather than lay jurors with less objective standards, would obviate the criticism which suggests that lay prejudice against "criminals" would prevent recovery of damage claims. In addition to the damage action, disciplinary or other internal measures could be taken against the offending officer. Finally, appellate judicial review would be available under current administrative law standards to determine and articulate standards, thus replacing the moral and educative purpose of the exclusionary rule.[138]

---

134. *Id.*

135. 403 U.S. at 420.

136. *Id.* at 420-21. Compare Justice Harlan's concurring opinion in Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971), decided the same day as *Bivens*, in which Harlan did advocate overruling *Mapp* and Ker v. California, 374 U.S. 23 (1963), because he saw them as being primarily responsible for serious distortions and incongruities in the law of search and seizure. Citing the Oaks article, Justice Harlan expressed disapproval of the states being governed by federal law on search and seizure, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings.

137. 403 U.S. at 422, *citing* W. PROSSER, THE LAW OF TORTS § 68 (3d ed. 1964); *cf.* Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 907-08 (1965).

138. 403 U.S. at 423.

If the exclusionary rule were abolished and Congress replaced it with such an alternative, the major faults of the rule would be removed—completely innocent persons who were victims of illegal police misconduct would have a remedy, and the otherwise relevant evidence suppressed under the rule would not be available to the court. Furthermore, such a remedy would provide a flexible response to various degrees of illegal conduct which is impossible under the exclusionary rule.[139]

One of the chief justice's final comments quite appropriate to the scope of this note deserves mention:

> Independent of the alternative embraced in this dissenting opinion, I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced.[140]

Fate of the Exclusionary Rule Under the Burger Court

When the exclusionary rule was judicially created as a means of deterring unreasonable intrusions upon individual constitutional rights by the police, the judges recognized the sacrifice such exclusion of admittedly probative evidence represented to the social values of accurate judicial decision making and punishment of the discovered crimes. Because other remedies were ineffective, however, and because the exclusionary rule was considered "the only effective means of deterrence" of such misconduct, these judges determined that the sacrifice involved was outweighed by the protection of important individual rights.

Since the creation of this remedy, commentators and critics such as Dallin Oaks and Chief Justice Burger have presented persuasive evidence and arguments that the rule rests on weak foundations. There is reason to believe the rule is not effective in deterring police misconduct. Its limitations, primarily its failure to protect the large number of persons who plead guilty to an offense and those whose Fourth Amendment rights are violated but are not prosecuted, along with the various negative effects or costs associated with application of the rule, warrant replacing it with some other alternative.

---

139. "Unlike the exclusionary rule, [damages] could provide graded responses to police misconduct and give citizens some degree of direct control over police conduct. Such a sanction could also express social disapproval of unconstitutional searches equally as well as presently expressed by the exclusionary rule." Note, *Money Damages for Unconstitutional Searches: Compensation or Deterrence?*, 1972 UTAH L. REV. 276, 280. Complete analysis of Chief Justice Burger's alternative and whether it corrects or improves the specific limitations and negative effects of the exclusionary rule is beyond the scope of this note.

140. 403 U.S. at 424.

The *Robinson, Gustafson,* and *Calandra* cases indicate a distinct shift in the attitude of the majority of the Supreme Court in evaluating whether the exclusionary rule should be extended to additional contexts involving illegal searches and seizures. The majority's failure to extend the rule in these cases, as well as the implication discussed previously of making the deterrent effect of the rule the sole justification for its application, suggest that the majority agree with the findings of the rule's critics. Furthermore, the Court's actions imply that presented with the proper case and statistical backing to prove the rule's ineffectiveness, it might analyze the deterrent benefit of the rule in criminal trials and find that the costs of the rule outweigh its benefits.

Even if the exclusionary rule is ineffective in deterring police misconduct, it would seem that the rule should not be abolished before an appropriate alternative is developed, and it would be most unlikely that the Court would take such a step. The most appealing alternative appears to be that proposed by Chief Justice Burger in his *Bivens* dissent, an alternative created by the legislature waiving sovereign immunity as to acts of police misconduct, the creation of a quasi-judicial tribunal to adjudicate all claims of violation of the proposed statute, and reliance upon money damages payable by the government employer. Internal police discipline, aided by recommendations of this tribunal, would supplement this remedy and deter future abuses. Review by the courts of decisions of this tribunal would also be available to maintain the moral and educative role in articulating the standards required by the Fourth Amendment. Such a plan would eliminate many of the limitations and negative aspects of the exclusionary rule and would provide some measure of deterrence against future misconduct.

As the chief justice advocated in his dissent in *Bivens,* the individual states may proceed and adopt their own legislation prior to congressional approval. These states could create alternative remedies to the exclusionary rule based on the format suggested by Chief Justice Burger, and make the damages remedy contingent on the Court's declaring the exclusionary rule no longer a constitutional requirement. Such legislation, or similar federal legislation, would provide an appropriate vehicle to test the hypothesis urged by the rule's critics. If the legislation were challenged, and then the action was appealed to the Supreme Court, the rule could be proved ineffective and the Court could hold, circumstances permitting, that the rule does not warrant being maintained.[141]

141. Such a legislative proposal was introduced into the California Senate by Senator Lagomarsino and was supported by Governor Reagan. S.B. 1153 (1973), *as*

Such a legislative alternative to the exclusionary rule would not obviate the objection to pre-rule alternatives of the moral incongruity of the state flaunting constitutional rights and at the same time demanding its citizens to observe the law.[142] As Justice Brennan stated in his dissent to *Calandra,* requiring the person illegally searched to seek redress in money damages only creates a situation where "officialdom may profit from its lawlessness if it is willing to pay a price."[143]

The six man majority on the Court in recent cases has not been persuaded by these arguments, however, and its reluctance to extend the exclusionary rule in these three cases leads to the conclusion, based on the criticisms and studies showing the rule to be ineffective, that the Court may soon strike down the rule. Barring this drastic step, it appears that the present Court will not extend the exclusionary rule to other contexts and will review previous holdings and declare that earlier determinations as to applicability of the rule are no longer valid.[144]

---

amended June 8, 1973. The bill died, however, when it failed to get out of its house of origin by the required deadline, midnight January 30, 1974.

142. People v. Cahan, 44 Cal. 2d 434, 446-47, 282 P.2d 905, 912 (1955).

143. United States v. Calandra, 94 S. Ct. 613, 628 (1974).

144. *See, e.g.,* United States v. Matlock, 42 U.S.L.W. 4252 (U.S. Feb. 20, 1974); United States v. Kahn, 42 U.S.L.W. 4245 (U.S. Feb. 20, 1974).