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Admissibility of Illegally Seized Evidence in Civil Cases: Could This Be the Path Out of the Labyrinth of the Exclusionary Rule?

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The use of the exclusionary rule in criminal cases has been the subject of extensive debate since its inception. Although most efforts to modify the rule have been deemed unworkable, the author proposes a modification that is both workable and sensible. Modification would be accomplished by legislation which admits the results of illegal searches by law enforcement officers who acted in good faith, and, at the same time, provide fixed monetary sanctions against the governmental agencies whose officers conducted the search. The author proposes a good faith balancing test to determine evidence admissibility and administrative type proceedings to determine monetary sanctions, if any are necessary.

I. INTRODUCTION

The exclusionary rule, which leapt to the forefront of California law in 1955, has created an unprecedented explosion in trial and appellate litigation.[1] The intricate refinements of the rule which were derived from much of that litigation are not only baffling to police agencies, but have led to an erosion of the public's confidence in our legal system.[2]

There are a myriad of decisions dealing with the admissibility of evidence found during automobile searches. These decisions distinguish between general searches of a car and its compartments or subcompartments and between types of containers found within these compartments, and the smell, opaqueness, or

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1. In an introduction to the 1977 supplement to Witkin's treatise on evidence, the authors wrote: "The material on illegally obtained evidence has grown so large that its present size requires a physical separation from other evidentiary topics. Accordingly, the supplementary matter for Chapter II has been printed in this phamphlet . . . ." B. WITKIN & J. LEAVITT, CALIFORNIA EVIDENCE (2d ed. ch. II Supp. 1977).

2. Jensen, *Exclusionary Rule: A Denial of Justice?* L.A. Daily J., Oct. 13, 1981, at 4, col. 3.

tactile qualities of the container.[3] Such distinctions are reminiscent of the ancient philosophers' endless debate about how many angels could stand on the head of a pin. The endless refinements in the law of search and seizure, along with a basic absence of logic concerning the exclusionary rule, have provoked a number of suggestions to modify the exclusionary rule, either through judicial reinterpretation or legislation.[4]

The fundamental distrust with the rule was best summed up by Justice Cardozo, who noted "The criminal is to go free because the constable has blundered . . . . A room is searched against the law, and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the murderer goes free . . . ."[5]

A further problem with the exclusionary rule is that it appears to be aimed at the wrong target. It provides a windfall to the guilty defendant when evidence has been seized illegally. At the same time, it does not punish the wrongdoers, i.e., the erring law enforcement officials, nor does it compensate an innocent citizen who has been the subject of an illegal search which produced nothing. He or she is left to the present inadequate civil suit for damages.

The efforts to modify the exclusionary rule have been largely

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3. New York v. Belton, 101 S. Ct. 2860 (1981); Robbins v. California, 101 S. Ct. 2841 (1981); Wimberly v. Superior Court, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976).

4. *See* note 2 *supra*. An exhaustive list of articles and cases are set out in United States v. Janis, 428 U.S. 433, 449 n.21 (1976):

> See, *e.g.*, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); ALI Model Code of Pre-Arraignment Procedure § SS290.2 (Proposed Official Draft 1975); Davidow, Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal, 4 Tex. Tech. L. Rev. 317 (1973); Davis, An Approach to Legal Control of the Police, 52 Tex. L. Rev. 703 (1974); Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955); Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, 1975 Wash U.L.Q. 621; Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027 (1974); LaFave, Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police, 30 Mo. L. Rev. 566 (1965); McGowan, Rule Making and the Police, 70 Mich. L. Rev. 659 (1972); Quinn, The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights, 52 J. Urb. L. 25 (1974); Roche, A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board, 30 Wash. & Lee L. Rev. 223 (1973); Spiotto, The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the US Exclusionary Rule, 1 J. Police Sci. & Ad. 36 (1973); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Leg. Stud. 243 (1973); Comment, Federal Injunctive Relief from Illegal Search, 1967 Wash. U. L.Q. 104; Comment, The Federal Injunction as a Remedy for Unconstitutional Police Conduct, 78 Yale L.J. 143 (1968); Comment, Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 104 (1970).

5. People v. Defore, 242 N.Y. 13, 21-24, 150 N.E. 585, 587-88 (1926).

unsuccessful,[6] and in California they have been totally unsuccessful. However, an analysis of a little known line of California civil cases which have developed over the past fifteen years may reveal a rationale which would allow a modification of the rule.

Modification might be accomplished by legislation which would admit the results of illegal searches by law enforcement officers acting in good faith, and at the same time, provide fixed, easily applied monetary sanctions against the governmental agencies whose officers conducted the illegal searches. Administrative proceedings similar to workers' compensation actions could be set up to administer the monetary sanctions. This approach would require the legislature to balance the seriousness of the police misconduct against the deterrent value of the remedy devised in order to ensure law enforcement compliance with the fourth amendment[7] of the United States Constitution and the California Constitution.[8] In cases where law enforcement officers were found to be acting in good faith, the legislature could provide fixed civil sanctions, not subject to jury veto, which would be sufficient deterrents to violations of the fourth amendment. In cases where the law enforcement officers' conduct is not in good faith or otherwise "shocks the conscience"[9] of the court, the remedy of

6. The one notable exception is the judicially declared "good faith" rule of United States v. Williams, 622 F.2d 830 (5th Cir. 1980), which is discussed at length later in this article. *See* notes 72-76 *infra* and accompanying text.

7. *See* note 10 *infra*.

8. The provision of the California Constitution which parallels the fourth amendment of the United States Constitution is article one, § 13. All references in this article to the California Constitution are to that section, unless otherwise stated.

The fourth amendment to the United States Constitution states:

> 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. Article one, § 13 of the California Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

CAL. CONST., art. I, § 13. While those two provisions appear to be virtually identical, it is well established that the provision of the California Constitution is not interpreted the same as the fourth amendment. People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

9. *See* note 43 *infra*.

exclusion of the illegally seized evidence would remain. Thus, it is possible to devise a continuum of remedies to make the fourth amendment and the California Constitution meaningful.

The rules of evidence generally favor the admission of relevant and reliable evidence, no matter how it is obtained.[10] But, as Justice Blackmun pointed out when discussing the exclusionary rule, "as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable."[11] As will be shown, California courts have indeed recognized the validity of applying a balancing test to the exclusionary rule. This article will examine the exclusionary rule in civil cases, both in California and other states, and will suggest a balancing test in place of the exclusionary rule as it now stands.

II. The Exclusionary Rule in Civil Cases Outside of California

The exclusionary rule was made applicable to the states in criminal cases by *Mapp v. Ohio*.[12] Soon thereafter, the Supreme Court, in *One 1958 Plymouth Sedan v. Pennsylvania*,[13] held that the rule applied equally to civil proceedings brought by a state to obtain a forfeiture of an automobile which had been seized because it contained contraband. That decision was based on the fact that while the proceedings might be civil in form, they were really criminal in nature.[14] California has followed this rule in forfeiture cases.[15] This reasoning is consistent with the civil cases

10. "The basic rule is that all competent, substantial, credible and relevant evidence is to be available to the courts." Sackler v. Sackler, 15 N.Y.2d 40, 44, 203 N.E.2d 481, 483, 255 N.Y.S.2d, 83, 85 (1964).

11. United States v. Janis, 428 U.S. 433, 447 (1976).

12. 367 U.S. 643 (1961).

13. 380 U.S. 693 (1965).

14. *Id.* at 700.

> [A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law . . . . It would be anamolous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible.

Id. at 700-01.

15. People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964).

> The People also contend that, conceding the unlawfulness of the seizure, the exclusionary rule should not be applied in a car-forfeiture case, as the action is civil in nature. Whatever the label which may be attached to the proceeding, it is apparent that the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objectives of criminal law enforcement.

Id. at 96, 396 P.2d at 709, 41 Cal. Rptr. at 293.

in California requiring proof beyond a reasonable doubt and unanimous jury verdicts, such as mental competency or sexual psychopathic hearings.[16]

Other applications of the exclusionary rule in civil cases have not been as clear cut. Most of the decisions concerning searches by non-law enforcement persons have upheld the admissibility of illegally seized evidence in civil cases. The rationale for these decisions was that the exclusionary rule was not designed to deter non-governmental trespassers or intruders. Thus, in *Sackler v. Sackler*,[17] a divorce action, the New York Court of Appeals upheld, on two grounds, the admissibility of evidence illegally seized by a private detective. The first ground was that the search was a private search and not by a government agency, and second was that the interests of justice would not be promoted by the exclusion of convincing evidence.[18]

Similarly, other cases have upheld the admissibility of evidence seized by non-government persons in automobile tort actions. For example, in *Walker v. Penner*,[19] the plaintiff was injured in an automobile accident, and he offered into evidence a whiskey bottle taken by one of his companions from the defendant's car. That evidence was held to have been properly admitted, even though it was conceded that the seizure violated the fourth amendment. On the other hand, the results have been divided regarding the admissibility of blood alcohol tests in personal injury actions where the blood was illegally seized by law enforcement officials.[20]

The reasons advanced for the adoption of the exclusionary rule are twofold. First, and increasingly foremost, is that by excluding

16. *See, e.g.*, People v. Thomas, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); People v. Bunick, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975); People v. Bales, 38 Cal. App. 3d 354, 113 Cal. Rptr. 141 (1974).

17. 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964).

18. *Id.* at 44, 203 N.E.2d at 483, 255 N.Y.S.2d at 85. The court stressed that the evidence was seized by private detectives and did not discuss the question of whether or not state action is involved through the licensing of private detectives. *Cf.* People v. Zelinski, 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979); *In re* Deborah C., 30 Cal. 3d 125, 635 P.2d 446, 17 Cal. Rptr. 852 (1981) (both cases involving the rights of merchants with regard to observed shoplifters).

19. 190 Or. 542, 227 P.2d 316 (1951).

20. *Compare* Diener v. Mid-American Coaches, Inc., 378 S.W.2d 509 (Mo. 1964) (evidence admitted) *with* Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958) (evidence excluded).

such evidence law enforcement officers will be deterred from violating the fourth amendment.[21] While this premise is open to serious question, it is firmly rooted in fourth amendment law. The second reason advanced is the maintenance of judicial integrity.[22] Simply stated, this means that the court should not soil its hands with evidence tainted by a fourth amendment violation. The importance of these bases cannot be overestimated. If the exclusionary rule is "part and parcel of the Fourth Amendment's limitation,"[23] as Justice Brennan has suggested, then no judicial or legislative modification of the rule is possible.

Given the principal that the reason for the rule is the deterrent effect, it follows logically that:

> [T]he exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement.[24]

It has been persuasively argued that it is doubtful that any law enforcement officer would ever be thinking about the possibility of using illegally seized evidence in a civil case.[25] On the other

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21. "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." United States v. Calandra, 414 U.S. 338, 348 (1974). Indeed, Justice Blackmun has suggested that the "judicial integrity" factor, when properly analyzed, is very similar to the deterrent factor. *See* United States v. Janis, 428 U.S. 433, 453 n.35 (1976). "The basic purpose of the exclusionary rule is to deter unconstitutional methods of law enforcement." People v. Moore, 69 Cal. 2d 674, 682, 446 P.2d 800, 805, 72 Cal. Rptr. 800, 805 (1968).

22. Mapp v. Ohio, 367 U.S. 643, 658-59 (1961). *See also* People v. Taylor, 8 Cal. 3d 174, 179, 501 P.2d 918, 921, 104 Cal. Rptr. 350, 353, (1972), wherein the California Supreme Court said: "We recently reiterated that the twofold purpose of this rule is 'to deter law enforcement officers from engaging in unconstitutional searches and seizures by removing their incentive to do so, and to relieve the courts from being compelled to participate in such illegal conduct.'" A California appellate court affirmed those purposes in Governing Bd. v. Metcalf, 36 Cal. App. 3d 546, 549, 111 Cal. Rptr. 724, 726 (1974), when it stated: "The secondary purpose underlying the exclusionary rule is to preserve the integrity of the judicial process by keeping it free of the taint of the use therein of improperly obtained evidence."

23. United States v. Calandra, 414 U.S. at 360 (Brennan, J., dissenting) (quoting Mapp v. Ohio, 367 U.S. at 651).

24. 414 U.S. at 348. *Calandra* approved the use of illegally seized evidence in questioning a witness before the grand jury.

25. The California Appellate Court for the Second District noted that:

> There is doubt, though, whether the first and primary reason for the rule exists to any appreciable degree in civil cases. The police in making investigation of suspected criminal activity are, we surmise, generally completely unaware of any consequences of success in their investigative efforts other than the subsequent criminal prosecution of the suspected offender.

Governing Bd. v. Metcalf, 36 Cal. App. 3d at 549, 111 Cal. Rptr. at 726. "[T]he bungling police officer is not likely to be halted by the thought that his unlawful conduct will prevent the termination of parole because the authority cannot consider

hand, the policy of preserving judicial integrity would be just as important in a civil action as in a criminal case.[26] Therefore, when illegally seized evidence is admitted in a civil action, the courts are balancing the policy favoring the exclusion of tainted evidence to preserve judicial integrity against the public policy underlying the particular law involved, such as divorce or personal injury. It is this balancing procedure that is significant rather than the actual result in any individual case.

This was the precise analysis used by Justice Blackmun in *United States v. Janis*,[27] where the Court held that evidence illegally seized by a state law enforcement officer was admissible in a federal civil action involving the government as the plaintiff. In *Janis*, police officers, acting under the authority of a search warrant valid on its face, seized bookmaking paraphernalia from the defendant. Subsequent to the issuance of the warrant, the Supreme Court decided the case of *Spinelli v. United States*.[28] The defendant was prosecuted in the Los Angeles Municipal Court, and he argued that the affidavit in support of the search warrant did not meet the two-pronged probable cause test of *Spinelli*.[29] The judge who issued the warrant agreed and sup-

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the evidence that he unlawfully procures." In re Martinez, 1 Cal. 3d 641, 649-50, 463 P.2d 734, 740, 83 Cal. Rptr. 382, 388 (1970).

> In applying the exclusionary rules to attorney disciplinary proceedings we find practically no deterrent effect upon any law enforcement officer who might be tempted to use unconstitutional methods to obtain evidence for use in a criminal trial. Here, as in the situation in *Martinez* the officer might not even know that the suspect was an attorney and might not even contemplate the consequences of an arrest or conviction upon professional disciplinary proceedings.

Emslie v. State Bar, 11 Cal. 3d 210, 229, 520 P.2d 991, 1002, 113 Cal. Rptr. 175, 186 (1974).

26. "There can be no doubt but that the second aspect of the policy underlying the exclusionary rule [*i.e.*, judicial integrity, *see* note 24 *supra*] obtains in both civil and criminal cases." Governing Bd. v. Metcalf, 36 Cal. App. 3d at 549, 111 Cal. Rptr. at 726.

27. 428 U.S. 433 (1976).

28. 393 U.S. 410 (1969).

29. In *Spinelli* the Court refined its test for establishing probable cause in order to obtain a warrant. The original test had been previously articulated in Aguilar v. Texas, 378 U.S. 108 (1964). In order to satisfy the *Aguilar* test and properly issue a warrant based "on hearsay—an informant's report—what is necessary . . . is one of two things: the informant must declare either (1) that he himself has seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it." Spinelli v. United States, 393 U.S. 410, 425 (1969) (White, J. concurring). The *Spinelli* Court extended the test by adding the possibility that a warrant could be issued where the *Aguilar* test was insufficient if the facts sworn in the affidavit by the anonymous informer could be inde-

pressed the evidence.[30]

On the basis of this evidence, the United States Internal Revenue Service determined that the defendant owed almost $90,000 in wagering taxes for his bookmaking activities. They made an assessment of those taxes and seized $4,940 in cash, which had been seized by the police pursuant to the invalid warrant. In upholding the use of this illegally seized evidence in the federal tax proceedings, Justice Blackmun emphasized that the deterrent effect under these circumstances was slight. He then went on to apply the balancing test in deterring the admissibility of the evidence. His conclusion was:

> If the exclusionary rule is the 'strong medicine' that its proponents claim it to be, then its use in the situation in which it is now applied (resulting, for example, in this case in frustration of the Los Angeles police officers' good-faith duties as enforcers of the criminal laws) must be assumed to be a substantial and efficient deterrent. Assuming this efficacy, the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation.[31]

III. The Exclusionary Rule in California Civil Cases

The development of the law in California concerning the admissibility of illegally seized evidence in civil cases has been mostly in the review of administrative proceedings concerning license revocations in various professions. California first adopted the exclusionary rule in 1955, in *People v. Cahan*.[32] Soon thereafter, the rule was extended to forfeiture proceedings, which were considered criminal proceedings for the purposes of the exclusionary rule.[33]

Analogously, in *People v. Moore*,[34] in a proceeding to civilly commit a narcotic addict, the court held that even though the nar-

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pendently corroborated. "The informer's report must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered." *Id.* at 415.

30. 428 U.S. at 437-38.

31. 428 U.S. at 453-54.

32. 44 Cal. 2d 434, 282 P.2d 905 (1955).

33. In People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 96-97, 396 P.2d 706, 709, 41 Cal. Rptr. 290, 293 (1964), the California Supreme Court stated that:

> The People also contend that, conceding the unlawfulness of the seizure, the exclusionary rule should not be applied in a car-forfeiture case, as the action is civil in nature. Whatever the label which may be attached to the proceeding, it is apparent that the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objectives of criminal law enforcement. On policy the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property.

See also note 15 and accompanying text *supra*.

34. 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968).

cotic addict statutes are civil in nature, they have so many of the features of a criminal case that "[w]hether any particular rule of criminal practice should be applied in a narcotic addict commitment proceeding depends upon consideration of the relationship of the policy underlying the rule to the proceeding."[35] The court emphasized that the deterrent effect on law enforcement officials would be enhanced by the exclusion of evidence in commitment proceedings, even though such proceedings are, to some extent, for the benefit of the addict. Narcotic addict proceedings "involve a loss of liberty, and the proceedings are for the benefit of society as well as the addict."[36] Therefore, the court held that the exclusionary rule was applicable to such proceedings.[37]

However, a similar analysis led to an opposite result in a case involving the use of illegally obtained evidence in a parole revocation proceeding by the Adult Authority. In the case of *In re Martinez*[38] the California Supreme Court employed the same balancing test but came to the conclusion that:

> the social consequences of imposing the exclusionary rule upon the authority can be disastrous. Conceivably, if the improperly obtained evidence were the sole basis for parole revocation, the authority might find itself unable to act in the case of the paroled murderer whom the police improperly discovered had cached a minor armory for future use or the paroled narcotics peddler who had collected a quantity of heroin for future sale.[39]

The court pointed out that the deterrent effect of the rule is slight, in that often the law enforcement officer does not even know the person is a parolee and is very unlikely to consider the question of admissibility in a parole revocation hearing when out on the streets enforcing the law.[40] The court also emphasized the balancing nature of this test when it pointed out that if the police conduct "was so egregious as to offend 'the traditions and collective conscience of our people,' "[41] then the result might be different.

In the first case that involved considerations of the exclusionary

35. *Id.* at 681, 446 P.2d at 805, 72 Cal. Rptr. at 805.
36. *Id.* at 682, 446 P.2d at 805, 72 Cal. Rptr. at 805.
37. The fact that the end result of such proceedings resulted in the incarceration of the "patient" for substantial periods of time may well have been the most significant factor in this case. *Id.*
38. 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970).
39. *Id.* at 650, 463 P.2d at 740, 83 Cal. Rptr. at 388.
40. *Id.*
41. *Id.* This is referring to the violation which shocks the conscience of the court or is done in bad faith. *See* Rochin v. California, 342 U.S. 165 (1952).

rule in administrative proceedings to revoke a license, it was assumed that the exclusionary rule would apply.[42] However, in *Pierce v. Board of Nursing Etc. Registration*,[43] the court of appeal for the fourth district cast some doubt on the application of the exclusionary rule in a case involving proceedings to revoke the license of a nurse. The court noted there were important public policy considerations involved when the licensing entailed the healing art "where the welfare of sick and helpless persons depends on his integrity, fidelity and skill."[44] Thus, the need to balance the public policy and public good against the deterrent effect of the exclusionary rule was alluded to, although the court went on to hold the search legal and, therefore did not have to decide the exclusionary rule application.

In *Governing Board v. Metcalf*,[45] the appellate court considered the exclusionary rule in detail. *Metcalf* concerned the use of evidence of lewd acts by a school teacher in the restroom of a downtown department store. The evidence was obtained in violation of the fourth amendment and the California Constitution. After carefully balancing the purposes of the exclusionary rule against the public policy of protecting children and the educational process, the court determined that the exclusionary rule should not be applied. The court pointed out that it was doubtful that the law enforcement officers would be deterred from violating the fourth amendment by excluding the evidence from such a proceeding. The court reasoned that it would be very unlikely that law enforcement officers would know who the particular person involved was at the time of gathering the evidence or, even if they did, would have any knowledge that such evidence would be used in a license revocation administrative hearing.[46] In addition, the court emphasized the "many ways that children are entitled to special protection."[47] However, the court indicated that it might

42. "In view of the foregoing it will be assumed here that the exclusionary rule will apply to an administrative hearing where the proceeding contemplates the deprivation of a license which is recognized as a property right, as is the right to practice medicine." Elder v. Bd. of Medical Examiners, 241 Cal. App. 2d 246, 260, 50 Cal. Rptr. 304, 315 (1966).

43. 255 Cal. App. 2d 463, 63 Cal. Rptr. 107 (1967).

44. *Id.* at 466, 63 Cal. Rptr. at 109.

45. 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974).

46. *Id.* at 549, 111 Cal. Rptr. at 126.

47. The law has long recognized in many ways that children are entitled to special protection. This is particularly true during the process and period of their compulsory education. In this case Metcalf was with his sixth grade pupils of both sexes generally from 8:30 a.m. to 3 p.m. each school day, and once or twice a week in season, on his own, he helped transport children to and from games of football, basketball and baseball. Children of the age of his pupils tend to idolize their teachers. Although the restroom incident involving Metcalf became known only to the district superintendent, his secretary and the principal of Metcalf's school, it

not apply the same rule on "non-moral" grounds, thus intimating that the nature of the interest to be protected is an important consideration.[48]

The *Metcalf* decision was shortly followed by *Emslie v. State Bar*,[49] a decision of the California Supreme Court which held that the exclusionary rule did not apply to State Bar proceedings which lead to the disbarment of an attorney. Emslie was arrested in Las Vegas. While evidence was found which linked him with numerous hotel room burglaries, criminal charges against him in Nevada were eventually dismissed. The California Supreme Court held that the evidence was legally seized, but also went on to hold that such evidence, even if illegally seized, would be admissible in such proceedings.[50] The court again emphasized that there would be almost no deterrent effect upon enforcement officers because they probably would not even know that there would be professional disciplinary proceedings as a result of their actions. The court stated that "a balancing test must be applied in such proceedings and consideration must be given to the social consequences of applying the exclusionary rules and to the effect thereof on the integrity of the judicial process."[51] However, the decision was not a sweeping one which allowed the use of evidence illegally seized under any circumstances in a license revocation proceeding as the court specifically emphasized that rules must be worked out on a case-by-case basis.[52]

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was the principal's professional opinion that if the incident ever became known to Metcalf's fellow teachers, his pupils or to parents of those pupils, Metcalf would have been unable to function effectively thereafter as a teacher and his exemplar image would have been destroyed. *Id.* at 550, 111 Cal. Rptr. at 727.

48. *Id.* at 551, 111 Cal. Rptr. at 728. The court went on to state that: "Deprivation of one's opportunity to follow one's profession in this state may be a much more severe punishment for a criminal defense than anything the criminal law imposes." *Id.* at 551-52, 111 Cal. Rptr. at 728. This is the only case which seems to recognize the fact that many times a criminal prosecution may actually have less impact on a person than a civil or administrative proceeding.

49. 11 Cal. 3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1974).

50. The fact that the court decided the issue in this case is somewhat unusual in that ordinarily an appellate court will not decide an issue which is not necessary to the decision of the case. The court obviously felt the importance of the question required it to decide the issue. "While we have concluded from our independent review of the record that there was no unlawful search or seizure the issue is of sufficient importance to require consideration here." *Id.* at 226, 520 P.2d at 1000, 113 Cal. Rptr. at 184.

51. *Id.* at 229, 520 P.2d at 1002, 113 Cal. Rptr. at 186.

52. While we hold that the exclusionary rules are not part of administrative due process in State Bar disciplinary proceedings we do not intimate

An interesting extension of this principle occurred in a recent case in which evidence illegally seized by the police of one city was used in disciplinary proceedings involving a police officer from another city. The California Court of Appeals for the Second District upheld the use of this evidence. The California Supreme Court ordered the opinion depublished; so this question is still left open.[53]

Two cases from a different area of the law have found the appellate court applying the same balancing test in reaching the result that evidence illegally seized would not be excluded. *In re Christopher B.*[54] and *In re Robert P.*[55] both involved proceedings to declare a minor child a ward of the court because of an unfit home. At issue was the admissibility of evidence, of the unfit nature of the home, alleged to have been illegally seized. The evidence was observations of, and photographs taken by, police officers of the filthy and unkept nature of the home where the children lived. This evidence was held to have been properly admitted. The court balanced the deterrent effect of exclusion, which was found to be slight, against the possibility that the extension of the rule "might result in the suffering or deprivation of innocent children."[56] The court decided that the potential harm to the children was too high a price to pay for the slight deterrent effect.[57]

The common factor in all of the above cases was that the police conduct in each case was explicitly found to be in good faith and did not "shock the conscience" of the court. Once such a finding was made, the courts did not hesitate to apply a balancing test to

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> that circumstances could not be presented under which the constitutional demands of due process could not countenance use of evidence obtained by unlawful means in a proceeding conducted by such governmental agency or administrative arm of this court. The application of such rules must be worked out on a case-by-case basis in this and other license revocation proceedings.

Id. at 229-30, 520 P.2d at 1002, 113 Cal. Rptr. at 186. (probably referring to conduct which "shocks the conscience").

53. Sattler v. City of Los Angeles, 121 Cal. App. 3d 511, 175 Cal. Rptr. 390 (1981). Perhaps one of the problems in police disciplinary cases is that police officers are probably well aware of the police disciplinary procedures and exclusion may well have a much greater deterrent effect than is present in the other cases. On the other hand, the public policy of having uncorruptable and law abiding police officers is substantial. A supreme court hearing was denied on October 22, 1981, and the official reporter of decisions was directed not to publish this opinion in the Official Reports, pursuant to Rule 976 of the California Rules of Court.

54. 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (1978).

55. 61 Cal. App. 3d 310, 132 Cal. Rptr. 5 (1976).

56. *Id.* at 321, 132 Cal. Rptr. at 12.

57. *Id.* "Recognizing the special protection afforded children by the law, we will not ignore the reliable evidence here presented and risk the welfare of the children on the basis the evidence was the result of an unlawful and warrantless search." *Id. See also In re* Christopher B., 82 Cal. App. 3d 608, 615, 147 Cal. Rptr. 390, 394 (1978).

determine the admissibility of the evidence. Using similar reasoning, California courts have held that illegally seized evidence may be admitted in probation revocation hearings. While this might appear to be an erosion of the rule excluding such evidence in criminal cases, in reality it is not. Probation revocation hearings are not considered criminal hearings per se, but are more akin to administrative hearings, such as parole violation hearings.[58]

In *People v. Hayko*,[59] the first California case to decide this issue, the defendant pled guilty to possession of illegal drugs and was sentenced. Based on that conviction, the court revoked the defendant's probation which had been granted in a previous case. On appeal, the new conviction was reversed on the ground that a motion to suppress had been erroneously denied, resulting in illegally seized evidence being improperly used against the defendant. The appellate court held that the reversal of the defendant's new conviction did not take away the right of the judge to revoke probation based on the illegally seized evidence. The court ruled that in a probation revocation hearing the judge does not determine "whether the defendant is guilty or innocent of a crime. Rather, he must determine whether the convicted offender 'can be safely allowed to return to and remain in society.' "[60]

People v. Rafter[61] also upheld the use of such illegally obtained evidence in probation revocation proceedings. However, *Rafter* went even further because it actually required the trial court to consider such evidence at a probation revocation hearing. At the revocation hearing, the superior court had excluded evidence of a conviction in the federal court subsequent to the grant of probation. The federal conviction had been reversed on the sole ground that it was a product of an unreasonable search. The appellate

58. However, the role of a judge in considering the question of whether a convicted offender's probation should be revoked is analogous to the role of the Adult Authority in determining whether a parolee's parole should be revoked. The judge is not determining whether the defendant is guilty or innocent of a crime. Rather, he must determine whether the convicted offender 'can be safely allowed to return to and remain in society.'

People v. Hayko, 7 Cal. App. 3d 604, 610, 86 Cal. Rptr. 726, 730 (1970).

59. *Id.*

60. *Id.*

61. 41 Cal. App. 3d 557, 116 Cal. Rptr. 281 (1974). This case was decided after the United States Supreme Court gave added procedural protections to defendants facing parole and probation revocation proceedings. *See* Morrissey v. Brewer, 408 U.S. 471 (1972).

court ruled that the federal conviction should have been admitted, reasoning that all relevant evidence should be considered in such a hearing unless the police conduct involved would "shock the conscience"[62] of the court.

In summary, the common theme in all of the cases mentioned was that the good faith mistake of the officer and the remoteness of the deterrent effect of exclusion of the illegally obtained evidence were balanced against the importance of the societal interest which was being litigated. If bad faith or shocking conduct had been involved, the results as to the admissibility of the evidence would have been different.

IV. LEGISLATION AND THE GOOD FAITH RULE—IS IT POSSIBLE TO CHANGE THE EXCLUSIONARY RULE IN CALIFORNIA THROUGH LEGISLATION?

A legislative response to the exclusionary rule is only possible if the exclusionary rule is truly a judicially created answer or sanction to enforce the fourth amendment and the California Constitution. If exclusion itself is a constitutional right, the legislature, and for that matter the courts, could not alter the rule in any way.[63] On the other hand, if it is not a constitutional right, but rather a remedy to enforce the basic rights encompassed in the fourth amendment, legislative and judicial interpretation is possible.

The California Supreme Court, as well as the United States Supreme Court, have made it clear that the rule is not a constitutional right. They have repeatedly stated that the rule is to "deter law enforcement officers from engaging in unconstitutional searches and seizures by removing their incentive to do so, and to relieve the court from being compelled to participate in such illegal conduct."[64] Thus, the California Supreme Court has delineated the rule in a manner which allows the legislature to act.

Any legislation would have to concern only "good faith" actions by the police. The definition of a "good faith exception" has been set forth in much detail by other commentators,[65] but generally it is thought to encompass two basic situations. The first is where

62. 41 Cal. App. 3d at 561, 116 Cal. Rptr. at 281. Any attempts to extend this type of reasoning into a true criminal case have not been successful. For instance, the use of a prior illegal arrest could not be used in the equation of probable cause for a new arrest. People v. Maxwell, 78 Cal. App. 3d 124, 144 Cal. Rptr. 95 (1978).

63. *See* note 25 *supra*.

64. *See* note 24 *supra*.

65. For an excellent article on this subject see: E. Ball, *Good Faith And The Fourth Amendment: The "Reasonable" Exception To The Exclusionary Rule*, 69 J. CRIM. L. & C. 635 (1978).

"an officer may make a judgmental error concerning the existence of facts sufficient to constitute probable cause."[66] The second is where "an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled."[67] The latter violations would be termed "technical violations."

The United States Supreme Court has considered the question of good faith and the exclusionary rule in a number of cases. In *Peltier v. United States*[68] the Court considered good faith in relation to judicial integrity and deterrence. Although the case was decided on retroactivity grounds the Court used the good faith doctrine in its analysis.

Chief Justice Burger, dissenting in *Bivens v. Six Unknown Federal Narcotics Agents*,[69] argued at length that the Court could change the exclusionary rule "if an effective remedy is provided against the government."[70] He went on to say that he would "hesitate to abandon it until some meaningful substitute is developed."[71] Nevertheless, he felt that the rule was "both conceptionally sterile and practically ineffective in accomplishing its stated objective."[72]

Because the exclusionary rule is primarily based on its supposed deterrent effect, its underpinnings are weakened unless there is some showing that it actually deters illegal conduct of police officers. While studies have shown that the rule has probably resulted in an increase in police education, which is certainly laudable,[73] they have not shown that the rule actually deters law enforcement officers from violating the fourth amendment.[74]

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66. *Id.* at 635.
67. *Id.* at 635, 636.
68. 422 U.S. 531 (1975).
69. 403 U.S. 388 (1971).
70. *Id.* at 414.
71. *Id.* at 415.
72. *Id.*
73. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 Mo. L. Rev. 391 (1965).
74. The most exhaustive collection of these studies is contained in United States v. Janis, 428 U.S. 433, 450 n.22 (1976), which reads:

> The salient and most comprehensive study is that of Oaks, cited above in n.20. Professor (now President) Oaks reviews at length the data in previous studies and the problems involved in drawing conclusions from that data. The previous studies include, *inter alia*, D. Oaks & W. Lehman, A Criminal Justice System and the Indigent: A Study of Chicago and Cook County (1968); J. Skolnick, Justice Without Trial (1st ed. 1966); Goldstein,

The Chief Justice argued in *Bivens* that the response to unlawful police conduct should vary with the severity. He stated:

[F]reeing either a tiger or a mouse in the schoolroom is an illegal act, but

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Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543 (1960); Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 Cornell L.Q. 436 (1964); Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim L.C. & P.S. 171 (1962); Kamisar, *Wolf* and *Lustig* Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083 (1959); Katz, The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications, 45 N.C.L. Rev 119 (1966); Kuh, *supra*, n.18; Nagel, Testing the Effects of Excluding Illegally Seized Evidence, 1965 Wis. L. Rev. 283; Paulsen, the Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L.C. & P.S. 255 (1961); Comment, Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy, 47 Nw. U.L. Rev. 493 (1952); Weinstein, Local Responsibility for Improvement of Search and Seizure Practices, 34 Rocky Mt. L. Rev. 150 (1962); Younger, Is Constitutional Protection on Search and Seizure Dead?, 3 Trial 41 (Aug-Sept 1967); Comment, Effect of *Mapp v. Ohio* on Police Search-and-Seizure Practices in Narcotics Cases, 4 Colum. J.L. & Soc. Probs. 87 (1968).

Oaks discusses the types of research that may be possible, and the difficulties inherent in each. His final conclusion is straightforward:

"Writing just after the decision in *Mapp v. Ohio*, Francis A. Allen declared that up to that time, 'no effective quantitative measure of the rule's deterrent efficacy has been devised or applied.' [Allen, Federalism and the Fourth Amendment: A Requiem for *Wolf*, 1961 Sup. Ct. Rev. 1, 34.] That conclusion is not yet outdated. The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." Oaks, *supra* n. 20, at 709.

More recently, Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L. J. 681 (1974), discusses the data collected and reviewed by Oaks, and explores the difficulties in drawing conclusions from those data. The paper also reviews studies that appeared subsequent to the Oaks article: Spiotto, *supra*, n.21, at 243, and two papers by Michael Ban, The Impact of *Mapp v. Ohio* on Police Behavior (delivered at the annual meeting of the Midwest Political Science Assn, Chicago, May 1973) and Local Courts v. The Supreme Court: The Impact of *Mapp v. Ohio* (delivered at the annual meeting of the American Political Science Assn, New Orleans, Sept. 1973). Canon describes his own research, but his data and conclusions appear to suffer from many of the same difficulties and faults present in the prior studies, many of which are explicitly recognized. Consequently, although Canon argues in favor of retaining the exclusionary rule while Oaks argued against it, Canon's conclusions are no firmer than are Oaks': "Consequently, our argument is negative rather than positive; we are maintaining that the evidence from the 14 cities certainly does not support a conclusion that the exclusionary rule had no impact upon arrests in search-and-seizure type crimes in the years following its imposition." Canon, *supra*, at 707. "Consequently, we cannot confidently attribute the increased use of search warrants entirely or even primarily to police reaction to the exclusionary rule." *Id.*, at 713. See also *id.*, at 724-725 and at 725-726. Canon concedes that "the inconclusiveness of our findings is real enough," *id.* at 726, but argues that the exclusionary rule should be given time to take effect. "Only after a substantial amount of time has passed do trends of changing behavior (if any) become apparent." *Id.*, at 727. One might wonder why, if the substantial amount of time necessary for the rule to take effect is extremely relevant, the study fails to take into account the fact

> no rational person would suggest that these two acts should be punished in the same way . . . . Society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition.[75]

He advocated a legislative response, and his suggestion that there should be a balancing test is in accord with the California cases just reviewed.[76]

In *United States v. Williams*,[77] the United States Court of Appeals for the First Circuit recently adopted the good faith test when it stated: "sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized."[78] The court explained its reasoning with the following language:

> We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good faith ones. Where the reason for the rule ceases its application must cease also. The cost to society of applying the rule beyond the purpose it exists to serve are simply too high—

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that over half the States have had an exclusionary rule for a significantly greater length of time than *Mapp* has been on the books.

Most recently, Critique, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 Nw. U.L. Rev. 740 (1974), reviews the Oaks, Canon, and Spiotto papers and the studies mentioned therein. The comment discusses the design difficulties present and involved in studying the deterrent effect of the exclusionary rule in general. Although a proponent of the rule, the author concludes:

"A review of Spiotto's research and that conducted by others does not demonstrate the ineffectiveness of the exclusionary rule. Rather, it tends to illustrate the obstacles that stand in the way of any sound, empirical evaluation of the rule. When all factors are considered, there is virtually no likelihood that the Court is going to receive any 'relevant statistics' which objectively measure the 'practical efficacy' of the exclusionary rule." *Id.*, at 763-764.

The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied. It is, of course, virtually impossible to study the marginal deterrence added to *Mapp* by the *Elkins* silver platter rule because of the difficulty of controlling the effect of intersovereign exclusion.

We are aware of no study on the possible deterrent effect of excluding evidence in a civil proceeding.

75. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

76. "I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials." *Id.* at 421.

77. 622 F.2d 830 (1980).

78. *Id.* at 840.

> in this instance the release on the public of a recidivist drug smuggler—with a few or no offsetting benefits. We are not persuaded that both reason and authority support this conclusion.[79]

The basic assumption of the *Williams* ruling was that "a police officer will not be deterred from an illegal search if he does not know that it is illegal."[80]

There is a need for a response to violations of the fourth amendment which is more finely graded than the exclusionary rule. California has developed rules which allow such evidence in civil proceedings when good faith of the officers is shown. If, as has been suggested by Chief Justice Burger and others, additional sanctions are developed as a deterrent, the exclusionary rule could be modified in California.

An approach could be set up which, like the present workers' compensation proceeding, would take the civil remedy for an illegal search out of the present court system. It is necessary to take any civil remedy out of the present civil law because jurors are notoriously reluctant to give monetary awards to persons who have admittedly violated the law.

> There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete, as in the arrest of the wrong person or the search of the wrong house. There is serious doubt, for example, that a drug peddler caught packaging his wares will be able to arouse much sympathy in a jury on the ground that the police officer did not announce his identity . . . .[81]

A system of fixed awards to be given for various kinds of violations could be established. Such a proposal might take the form of a $1,000 award given to any individual who is the victim of a good faith illegal search of person or vehicle. For an illegal search of a residence the individual would receive $2,000. If the search were found to have been conducted without good faith or in a manner that shocks the conscience of the court, then the awards would be tripled. It would be desirable to allow the aggrieved person to elect to bring an action in the civil courts, just as he can now. That would allow the litigant to choose to pursue a larger award or punitive damages for a particularly serious violation.

Thus, a rational monetary penalty against the governmental agency, coupled with a finding of good faith on the part of the law enforcement officer, would allow the use of illegally seized evi-

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79. *Id.*

80. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 740 (1972). While this argument has much validity, critics can say that while it obviously will not deter the officer in the case before the court, it can deter other officers in the future if they learn about the decision.

81. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting).

dence. In those cases where the acts of the officer shock the conscience of the court or where there is not good faith, the evidence would continue to be excluded. Such a system of sanctions would probably have more deterrence value than the present exclusionary rule. Anyone familiar with the response of local government agencies to the imposition of fiscal penalties would know that this might be a very meaningful remedy and local councilmen and members of the board of supervisors are as extremely sensitive to fiscal penalties. If there were a monetary sanction, there would be more pressure on police chiefs and sheriffs to deter illegal searches by their officers than there exists presently.

The basis for the exclusionary rule is theoretical at best. It assumes that the officer really cares whether a case in which he makes an arrest leads to a conviction. This assumption is doubtful because usually the only "rewards" the officer gets is based on the arrest itself and/or the seizure of contraband or stolen goods.[82] Monetary sanctions, which could certainly lead to internal disciplinary action, would be a much greater deterrent.

V. CONCLUSION

It is doubtful that the present application of the exclusionary rule satisfies anyone. Even the rule's proponents must concede that the intricate complexities of the cases have rendered it difficult to administer. What started out as an apparently simple response to a problem has turned into a quagmire swallowing up a great amount of precious judicial time. When a rule does not work well, it should be changed if a better solution can be found. There is a better solution for dealing with illegally obtained evidence than the exclusionary rule in its present form. The following summary could be a way to accommodate all the competing interests.

1. Illegally seized evidence would not be excluded if it were seized by officers acting in "good faith."

2. An independent agency would be given the power to award fixed monetary awards to persons who were subjected to illegal searches.

3. Such awards would be payable by the governmental agency employing the law enforcement officer who conducted the search.

82. J. SKOLNICK, JUSTICE WITHOUT TRIAL 219-235 (2d ed., 1975).

4. The right to a jury trial in such proceedings would not be available.

5. The present tort remedy in the civil courts would be available, but the plaintiff would have to elect either the regular civil lawsuit or the administrative process.

6. If the search were not in "good faith" or one which "shocks the conscience" of the court, the evidence would be excluded.

Based on the cases considering the rule in California, it appears that the legislature could enact valid legislation, like that proposed, which would alter the exclusionary rule. It appears that one of the main reasons for adhering to the rule is because it is the rule. As Justice Holmes said:

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitations of the past.[83]

Perhaps the time has come.

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83. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).