Hastings Law Journal

Volume 27 | Issue 6 Article 3

7-1976

Making the Constable Culpable: A Proposal to Improve the Exclusionary Rule

Alys Rae Boker

Carol A. Corrigan

Making the Constable Culpable: A Proposal To Improve the Exclusionary Rule

By ALYS RAE BOKER* *and* CAROL A. CORRIGAN**

TWENTY years ago California adopted the exclusionary rule[1] originally articulated by the United States Supreme Court in *Weeks v. United States.*[2] Since then California appellate courts have delivered over six hundred decisions[3] adjudicating whether particular police conduct was reasonable under the circumstances. Some commentators feel that this cornucopia of cases has helped clarify the boundaries of acceptable police conduct; others view the cases as a morass of conflicting opinion generated by courts trying to apply a nebulous standard to highly particular fact situations.[4] Whatever one's view, however, it is becoming increasingly clear that the exclusionary rule has been only marginally successful in achieving its goal of curbing improper police conduct. We do not intend to review all that has been written about the rule; this analysis has been ably presented elsewhere.[5] Nor will this article offer a lengthy debate on the merits and failings of the rule.[6] What follows,

* B.A., 1954, University of Texas; LL.B., J.D., 1966, Golden Gate Law School. Senior Trial Deputy, Alameda County District Attorney's Office; member, California Bar. Ms. Boker's primary responsibility is the argument of superior court suppression motions.

** B.A., 1970, Holy Names College; J.D., 1975, University of California, Hastings College of the Law. Deputy, Alameda County District Attorney's Office; member, California Bar.

1. *See* People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
2. 232 U.S. 383 (1914).
3. *See* A. BELL, JR., BELL'S SEARCHES, SEIZURES & BUGGING COMPENDIUM (1974).
4. See note 6 *infra.*
5. *See, e.g.*, Comment, *Trends in Legal Commentary on the Exclusionary Rule,* 65 J. CRIM. L.C. & P.S. 373 (1974) [hereinafter cited as *Exclusionary Rule*].
6. *Compare* Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures,* 25 COLUM. L. REV. 11 (1925); Hall, *Police and Law in a Democratic Society,* 28 IND. L.J. 133 (1953); Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171 (1962); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices,* 30 MO. L. REV. 391 (1965); Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319, *with* Burger, *Who Will Watch the Watchman?,*

instead, is a brief consideration of the drawbacks of the suppression doctrine as it operates in California courts today and suggested modifications designed to increase its efficacy and reduce its dysfunctions.

The Rule and Its Drawbacks

The seminal cases establishing the exclusionary rule all involve flagrant police misconduct.[7] It is not difficult to accept the courts' view that, in a free society, the law cannot allow agents of the state to break into homes or to abuse suspects physically. In the context of blatant and intentional police misconduct, the exclusionary rule does not let the criminal go free "because the constable blundered."[8] Rather, it operates to preclude judicial sanction of a constable's patently illegal behavior. Yet the great debate over the suppression doctrine continues to rage, in part because both sides have failed to distinguish between such reprehensible activity on one hand and honest police error or misjudgment on the other.

In developing the exclusionary rule the courts have proceeded on a case by case basis, scrutinizing each fact situation and determining whether, under all the circumstances, specific conduct was reasonable.[9] Having analyzed the facts with surgical precision, however, the courts attempt to cure all deficiencies with the same panacea—suppression of the evidence. As will be developed below, the time has come for a refinement of available remedies to provide a more balanced approach to the problem than that presented by the overly simplistic exclusionary rule. One should note briefly at the outset, however, that in addition to the infirmity associated with its overly broad application, the rule itself suffers from a shaky analytical foundation. Both the United States[10]

14 AM. U.L. REV. 1 (1964) [hereinafter cited as Burger]; Peterson, *Law and Police Practice: Restrictions in the Law of Search and Seizure*, 52 NW. U.L. REV. 46 (1957); Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971) [hereinafter cited as Wingo].

7. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (warrantless forced entry over objection of resident); Rochin v. California, 342 U.S. 165 (1952) (recovery of swallowed drugs by induced vomiting); Weeks v. United States, 232 U.S. 383 (1914) (breaking and entering into home followed by warrantless search and indiscriminate seizure of personal belongings); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) (numerous forced entries, buggings, and warrantless seizures).

8. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

9. *See* People v. Wilson, 145 Cal. App. 2d 1, 5, 301 P.2d 974, 977 (1956).

10. "The purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" Mapp v. Ohio, 367 U.S. 643, 656 (1961), *quoting* Elkins v. United States, 364 U.S. 206, 217 (1960).

and the California[11] supreme courts based their acceptance of the exclusionary rule on the assumptions that it would deter improper police conduct and that it was the only effective means of doing so. While the courts found these arguments theoretically compelling, the experience of twenty years in this state and of over half a century in the federal system shows that in reality the rule has not worked as expected.

The early opinion writers and commentators supported their assertions concerning deterrence with theories rather than empirical data.[12] A more factual approach was taken in 1970 when Professor Dallin Oaks published the results of a comprehensive study of the rule's effectiveness.[13] The study represented the "largest fund of information yet assembled on the effect of the exclusionary rule,"[14] and the author's conclusions cast serious doubt on the theoretical underpinnings of the suppression doctrine.[15] Oaks wrote that the data were not statistically dispositive, but based on his review of the evidence he argued as follows:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosection. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.[16]

A later comprehensive study undertaken by James E. Spiotto affirmed

11. "We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of the police officers . . . ." People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955). "Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives." *Id.* at 448, 282 P.2d at 913. *See also* Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

12. *See, e.g., Exclusionary Rule, supra* note 5, at 376-84.

13. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks].

14. *Id.* at 709.

15. *See Exclusionary Rule, supra* note 5, at 382-83.

16. Oaks, *supra* note 13, at 755.

Oaks's conclusion that the rule failed to deter police misconduct effectively.[17]

Why has a rule so logically developed by some of the country's leading jurists failed? The reasons are twofold. First, the courts presuppose a closer link than actually exists between on-the-street police conduct and courtroom procedure. Second, they have tried to deal too facilely with an extremely complex problem.

An Ineffective Deterrent

In *People v. Cahan*[18] Chief Justice Traynor wrote that "[p]olice officers . . . are primarily interested in convicting criminals."[19] This observation is not precisely accurate. Police officers are primarily interested in *apprehending* criminals,[20] which is quite another matter. The officer observes or receives a report of criminal behavior and takes action to arrest those apparently responsible. Once this objective is accomplished, he moves on to new investigations.

The average time between arrest and disposition of a suppression motion is 131.21 days.[21] Thus, an officer can receive no feedback on the propriety of his behavior for nearly four and one-half months.[22] In actuality, he seldom learns of the outcome of the hearing.[23] He comes into court, testifies as to what he did, and leaves the attorneys and judge to worry about the legal ramifications of his behavior. He suffers no disciplinary action if the evidence is suppressed,[24] and rather than experiencing pressure from his peers and superiors, he receives support

17. *See* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973).

18. 44 Cal. 2d 434, 282 P.2d 905 (1955).

19. *Id.* at 448, 282 P.2d at 913.

20. *See* LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391 (1965); Oaks, *supra* note 13, at 720-24; Wingo, *supra* note 6, at 576-77.

21. This figure is based on a computer analysis of all hearings on suppression of evidence conducted under section 1538.5 of the California Penal Code in the Alameda County Superior Court from January 1974 to November 1975 (on file in the Alameda County, California, District Attorney's Office).

22. It should also be noted that this lag refers only to the period between arrest and superior court ruling on the issue. If either side elects to appeal the superior court decision, it may be years before this question is finally resolved.

23. See Burger, *supra* note 6, at 12.

24. "[D]iligent inquiry has failed to reveal a single law enforcement agency where individual sanctions are timed to an application of the exclusionary rule. The rule is apparently expected to achieve its purpose without them." Oaks, *supra* note 13, at 710. *See also, id.* at 725-26; Burger, *supra* note 6, at 11.

and sympathy for having a good arrest thrown out on a technicality.[25] As the system currently operates, those who violate the search and seizure laws are not punished or even held personally culpable. Instead, prosecutors are denied the opportunity to enforce laws, and ultimately citizens are denied the protection those laws are designed to ensure. As Professor Oaks observed:

> [T]he exclusionary rule is well tailored to deter the prosecutor from illegal conduct. But the prosecutor is not the guilty party in an illegal arrest or search and seizure, and he rarely has any measure of control over the police who are responsible.[26]

The Failings of the Single Solution Approach

In addition to these difficulties of operation, the rule itself is not sufficiently refined to meet the complex problems presented by search and seizure cases. If all suppression motions involved instances of flagrant police brutality or trespass, the issue would be straightforward and the solutions could be equally uncomplicated. Fortunately, the vast majority of cases argued today do not involve the blatant misconduct which prompted adoption of the rule.[27] This fact indicates that the rule has successfully deterred flagrant misconduct and that, as an ultimate penalty, it will continue to do so. The exclusionary rule, however, does not reflect recognition of the fact that the majority of situations involve a police officer who, in the confusion and danger of the moment, must instantly decide whether he can look into a car, pat down a suspect, or serve a warrant. The officer who must make his decisions under pressure has neither the time nor the training to engage in a sophisticated legal analysis.[28]

---

25. Jerome Skolnick spent fifteen months in 1962 and 1963 conducting participatory observation studies of an unnamed police force in a city of 400,000. His conclusions indicate that police officers are far more influenced by the norms of their departments than by court decisions, that they are far more concerned with following police rules than with conforming to court standards, and that they will not be sanctioned for behavior resulting in evidentiary suppression as long as their actions are consistent with internal regulations. *See* J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966).

26. Oaks, *supra* note 13, at 926, *citing* Katz, *Supreme Court and the State: An Inquiry into Mapp v. Ohio in North Carolina*, 45 N.C.L. REV. 119, 141 (1966). *See also* Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 225, 257 (1961); Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169, 194 (1955).

27. *See* B. MARTIN, COMPREHENSIVE CALIFORNIA SEARCH & SEIZURE 3 (Supp. 1972).

28. *See* Burger, *supra* note 6, at 11; Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952 (1965) [hereinafter cited as Friendly].

One writer describes the situation in terms of an inverted pyramid.[29] The ultimate question is whether, given the totality of the circumstances, the officer acted reasonably. At the broadest part of the structure is the supreme court, which has months to analyze the problem, and after their examination the justices, as reasonable men, may differ in their conclusions. Before the case ever reaches them, the court of appeal will have considered it for weeks or months. Before appeal, prosecution and defense attorneys will have spent days or weeks marshaling their arguments for magistrates and superior court judges. In the course of this process of scrutiny, each reviewer looks with calm contemplation over the shoulder of the officer in the field who, at the point of the pyramid, is expected to reach the right decision instantly.

The mere fact that an officer's job is difficult does not excuse him from doing it properly, and as an agent of a free society, he must operate within the constitutional parameters which that society provides. The exclusionary rule is one means to ensure compliance, but as a tool it is not sufficiently sensitive to treat different kinds of police misconduct or mistake appropriately. The exclusionary rule is based on the same principle as any criminal statute;[30] by its operation society attempts to deter disapproved conduct through the imposition of a penalty.

In Victorian England every felon, from murderer to pickpocket, was subject to the same sanction—hanging. In this area our constitutional thinking has evolved, and, while recognizing the deterrent aspect of punishment, we also require that punishment be proportionate to the crime for which it is invoked.[31] If we require this proportionality in the treatment of those who break the law in one sphere, it is only consistent to provide for similar proportionality when censuring the unlawful conduct of those attempting to enforce the law.[32] Furthermore, the substantive criminal law imposes punishment directly upon those responsible for the transgression. It is the thief who is punished, not the shopkeeper. Yet, as discussed above,[33] the sanctions of the suppression doctrine fall not upon the offending officer but on the prosecution and ultimately upon the victim of the crime.

29. *See* 6 POINT OF VIEW 138 (publication of the Alameda County, California, District Attorney's Office).

30. Friendly, *supra* note 28, at 951-52. *See also* Burger, *supra* note 6, at 11.

31. *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972); *see* Comment, *California's Cruelty Criteria: Evaluating Sentences After In re Lynch*, 25 HASTINGS L.J. 636 (1974).

32. Friendly, *supra* note 28, at 952.

33. See note 26 & accompanying text *supra*.

Toward a More Flexible Solution

The suppression doctrine is offered as a single remedy for a single problem—improper police conduct resulting in unreasonable search and seizure. While exclusion is indeed a single solution, the problems it addresses are multiple. The rule operates not only in cases in which constitutional protections are cavalierly disregarded, but in a number of other situations as well. For example, the doctrine comes into play in each of the following instances.

(1) At 3:00 A.M., a patrolman receives a radio dispatch reporting that a burglary has just occurred. Responding to the scene, he sees a man walking from the general area and follows him into an unlighted alley. Alone and fearing that the suspect may be armed, the officer performs a pat search and feels a revolver in the man's pocket. The man is disarmed, and the weapon is retained by the officer. The gun will be excluded as evidence unless the patrolman can produce for the court at the suppression hearing "articulable facts" which made him fear that the suspect was armed.[34]

(2) In July, a detective discovers unequivocal evidence of a crime in a search which is legal under the existing law. The suppression hearing is conducted in November. In September a new decision is published which rules police behavior in a similar situation improper. The November suppression motion will be granted, even though the officer's actions were perfectly legal when performed. The criminal will go free because the investigator was unable to look into the future and prognosticate that two months later an appellate court would change the law.[35]

34. A one-to-one confrontation with an unknown person in a dark and secluded high crime area would certainly be sufficient to make most people fear for their safety. Yet these facts alone are not sufficient to allow a perfunctory pat-down. The officer must be able to testify, for example, that the person had characteristics matching witness reports of a burglary suspect or that he made a sudden threatening movement. *See* Terry v. Ohio, 392 U.S. 1 (1968); People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963).

35. An example of definitional change is provided by the development of the concept of privacy. At one time the Court was concerned with "zones" of privacy or "constitutionally protected areas." *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); United States v. On Lee, 193 F.2d 306, 314 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952). Under this formulation there was no search absent a physical penetration into a protected area. *See* Olmstead v. United States, 277 U.S. 438 (1928). In 1967 the Court shifted the emphasis from places to people and articulated the "reasonable expectation of privacy" test. *See* Katz v. United States, 389 U.S. 347 (1967). Under this new standard, a court could find a search unreasonable even though no physical intrusion had taken place. Thus, prior to *Katz*, an officer

(3) Based upon the tip of a reliable informant, an officer requests that a magistrate issue a search warrant for Smith's house. The affidavit supporting the request states in part: "*X*, a reliable informant known to the affiant (officer) to be a former heroin user, told affiant that Smith is a big heroin dealer. Furthermore, *X*, stated that Smith presently has one pound of uncut heroin on the top shelf of his kitchen cabinet at his residence at 1234 Main Street." The magistrate signs the warrant that orders the officer to conduct a search.[36] Pursuant to the court's direction the search is properly performed, and a pound of uncut heroin is found on the top shelf of the kitchen cabinet. Under the current case law the evidence could be suppressed. The affidavit should have said: "*X was in* Smith's home two days ago and there *he saw* a package of heroin in the kitchen." The magistrate should not have signed the warrant supported by the conclusional and possibly stale information given in the first affidavit.[37]

In each of these situations the truth is suppressed not because the state set out to oppress a suspect, but because a fearful officer made an error in judgment, or because the law was changed after the fact, or because a policeman performed as ordered but the direction was ill-advised. Chief Justice Burger has called this process "universal 'capital punishment' " for improperly obtained evidence and compared it to a "police order authorizing 'shoot to kill' with respect to every fugitive."[38] The chief justice argues further that just as the police must respond to different situations with appropriate conduct, so should the courts treat constitutional infringements with "rationally graded responses."[39]

The Proposal

In keeping with the recommendation of the chief justice, this

conducting an investigation could avoid suppression of evidence by taking care not to trespass physically on a protected area. Yet if a hearing was held after the decision in *Katz*, the evidence could in some cases be suppressed simply because the law had changed. *See generally*, Comment, *People v. Triggs: A New Concept of Personal Privacy in Search and Seizure Law*, 25 HASTINGS L.J. 575 (1974).

36. If the officer fails to carry out an order which is valid on its face he is subject to contempt proceedings. Herndon v. County of Marin, 25 Cal. App. 3d 933, 937, 102 Cal. Rptr. 221, 223 (1972); Walton v. Will, 66 Cal. App. 2d 509, 516, 152 P.2d 639, 642 (1944) (Moore, P.J., concurring in pertinent part); Pankewicz v. Jess, 27 Cal. App. 340, 342, 149 P. 997, 998 (1915).

37. *See* Aguilar v. Texas, 378 U.S. 108 (1964); Halpin v. Superior Ct., 6 Cal. 3d 885, 495 P.2d 1295, 101 Cal. Rptr. 375 (1972); People v. Hamilton, 71 Cal. 2d 176, 454 P.2d 681, 77 Cal. Rptr. 785 (1969).

38. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

39. *Id.*

proposal is offered as a modification of the current system provided for by Penal Code section 1538.5.[40] The above discussion indicates that the present approach is ineffective because it fails to penalize those personally responsible for infractions, results in the suppression of truth, thus placing the actual penalty on the prosecution and the victim, and does not provide for the selection of an appropriate remedy. One way to correct these dysfunctions is to bifurcate the present system, allowing the superior court judge to pass upon the evidentiary issue of admissibility and referring the case to an administrative board for the imposition of sanctions.

The Superior Court

Under this proposal the superior court judge would hear the evidence at a 1538.5 hearing, just as he does now, and would decide whether the officers acted lawfully. If he concluded that they did not, he would then rule on the nature of the police misconduct and certify the case for administrative hearing on the appropriate penalty to be imposed.

If the police behavior was flagrantly improper, as in a case of intentional and unwarranted harm to person or property, the evidence would be suppressed. A free society has no valid interest in seeing its citizens subjected to police-state tactics, and evidentiary suppression prevents the government from profiting by the intentional wrongdoing of its agents. In addition, those agents should be personally sanctioned. It is the current absence of such a sanction which is one of the rule's major failings.

If the misconduct is not blatant,[41] however, a more moderate approach is called for. It makes no sense to suppress evidence in such instances, as this remedy has been shown to be unavailing. Rather, the evidence should be admitted and those responsible for the police conduct disciplined. In this fashion the legal system could move forward in the determination of a defendant's guilt or innocence unhobbled by the suppression doctrine, while the penalty would fall more appropriately upon those who erred.

The Administrative Procedure

The police conduct having been found improper, the case would be certified to an administrative board. This board and its staff would be

40. CAL. PEN. CODE § 1538.5 (West 1970 & Supp. 1975).
41. See notes 34-37 & accompanying text *supra*.

charged by the legislature with responsibility for imposing administrative sanctions upon officers and magistrates.[42] Since sanctions would be imposed, the system must provide for procedural due process.[43] The requisite procedure would involve two tiers. Initially a reviewing officer would evaluate all the documents in the case, including the 1538.5 transcript, the police reports, and any statements offered by the suspect or witnesses. On the basis of this review the officer would recommend to the board those sanctions which he considered to be appropriate.

Available penalties would include an order for the police officer's suspension or dismissal, a fine to be paid by the officer, the department, or both, an entry of misconduct in the officer's personnel record, and a fine to be paid by the magistrate who signed a deficient warrant. This procedure would operate to penalize in a personal way those responsible for infractions and would ensure feedback from the court system to law enforcement personnel. Fines would be determined by reference to a fixed scale and would be sufficiently stringent to act as a real deterrent. Fining the department as well as the officer would increase the impetus for training and supervision.[44] Police personnel practices would be modified so that an entry of misconduct would affect an officer's promotion in salary or rank and a certain number of infractions would result in dismissal. In addition to a system of fines, an arrangement could be made with the state bar or local judicial counsel subjecting a magistrate to a penalty similar to that imposed upon an officer by including an entry of misconduct in his personnel record.

The hearing officer having made his recommendation, the case would proceed to the full board. At this stage the officer or magistrate, represented by counsel, could argue his case and present any additional documentary or testimonial evidence. After reviewing all the material before it, the board would order sanctions. If an officer's conduct was obviously improper, the board would order dismissal or suspension. If

42. The board should be composed, at least in part, of those with experience in both the legal and the practical realities of search and seizure problems. Thus, the panel should include a former police administrator and a former magistrate. In order to avoid conflicts of interest, however, these members should not be serving in those capacities while they are on the board.

43. *Cf.* Londoner v. City and County of Denver, 210 U.S. 373 (1908).

44. "After not very many outlays of public funds the taxpayers and administrative heads would insist upon curbing unlawful police action." *Report of California State Bar Committee on Criminal Law and Procedure*, 29 CAL. ST. B.J. 263, 264 (1954), *quoted in* Wingo, *supra* note 6, at 581-82. Penalizing the department would be particularly appropriate if the officer was acting in accordance with a department practice.

the conduct represented an error in judgment, a fine or personnel entry would be appropriate. The penalty imposed would be in keeping with the impropriety of the conduct. In this regard the American Law Institute has articulated a number of factors to be weighed in assessing the substantiality of the violation.[45]

Improper search warrants would be treated as follows. If an officer obtained a warrant by intentionally misleading a magistrate, the violation would be flagrant per se, and the sanctions discussed above would be imposed upon the officer. If a warrant was technically improper because of a mistake by both officer and magistrate, both would be penalized. If the officer took no part in obtaining the warrant or if he was not responsible for the warrant's deficiency, the penalty would fall on the magistrate alone.[46]

In cases in which violations were not flagrant, the board might be given the option of suspending the imposition of penalties. In order to prevent this alternative from providing a loophole which would reduce the remedy to a sham, however, such an option would be limited. It would be appropriate in instances in which the law was changed, making an officer's legal conduct retroactively improper, or in which a case was appealed and the justices differed in their evaluations of reasonableness.[47]

In addition to hearing cases certified by the superior court, the board would serve as a reviewing panel to deal with infringements alleged by citizens who were never arrested or brought into the criminal system but who claimed to have been subjected to improper police search. The board would thus fill a gap noted by many critics of the

45. The factors given by the ALI are: "(a) the importance of the particular interest violated; (b) the extent of deviation from lawful conduct; (c) the extent to which the violation was willful; (d) the extent to which privacy was invaded; (e) the extent to which exclusion will tend to prevent violations of this Code; (f) whether, but for the violation, the things seized would have been discovered; and (g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 8.02(2) (Tent. Draft No. 4, 1971). To this list the authors would add as a factor the extent to which the officer's conduct reflected a moderate attempt to ensure his safety which he, in good faith, felt to be threatened.

46. To do otherwise would be unjust to the officer. The signed search warrant constitutes a court order directing him to act; failure or refusal to do so subjects him to citation for contempt. See note 36 *supra*.

47. It seems inequitable to censure a police officer for conduct if appellate justices cannot agree on the reasonableness of his behavior.

exclusionary rule, that it protects criminals but affords no remedy to the innocent.[48]

Appeal

There would be two distinct points at which an appeal could be undertaken. After the superior court hearing on the propriety of the search, either defense or prosecution could contest the judge's legal findings at the court of appeal level, just as they can under the present system. In addition, the legislation establishing this new procedure would give the officer or magistrate special standing to challenge the superior court's ruling. The extension of such standing would be required, since the officer or magistrate is not properly a party to the 1538.5 hearing. Such an appeal would suspend any board action until the legal issue was resolved. If the decision was reversed and the search found to be lawful, no further board action would be necessary, since the board would only hear cases of alleged police misconduct.

If the board did act, however, an officer or magistrate wishing to appeal its decision would proceed by way of a writ of mandate to the superior court. The writ would request court review of the record of the board's proceedings and a ruling on the sufficiency of the record to support the board's action. The granting of the writ would be discretionary, but the exercise of that discretion, as well as any subsequent court ruling, would be reviewable through the standard procedure.

Feasibility of the Proposal

We recognize that this proposal will not be enthusiastically received in many quarters. Its implementation would result in the creation of a new administrative board which would require a substantial outlay of public funds for its operation, and many people will object to this expense. The present system, however, is no less costly. Great amounts of police and court time are spent on cases which never come to judgment because evidence is suppressed. Perhaps more important, society pays dearly in the coin of public respect and confidence in the judicial system. Police officers and magistrates who would be subjected to penalties will object that the sanctions would further inhibit law enforcement. Each of these objections has some merit, but on balance each must yield to the need for a more effective remedy than that currently provided by the exclusionary rule.

48. *See, e.g.*, Irvine v. California, 347 U.S. 128, 136 (1954); Wingo, *supra* note 6, at 576.

If the guarantee against unreasonable searches and seizures is to mean anything, it must be effectively protected by the legal system. That protection is not now afforded by the suppression doctrine. What we have currently is an inefficient tool which too often punishes those not responsible, allows the guilty to avoid prosecution, and generally fosters frustration and diminished respect for the legal structure among the citizenry, including members of the bench and bar. What is needed is a more sensitive tool which will balance the suspect's right to freedom from unreasonable searches and citizens' right to effective law enforcement.

The courts have stated repeatedly that they will not dispose of the exclusionary rule in the absence of an alternative.[49] The option offered here may be cumbersome and costly, but we can no longer pay the price which the suppression doctrine exacts. If this alternative is unworkable, then another must be found. As Chief Justice Burger has written:

> Instead of continuing to enforce the suppression doctrine inflexibility, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct.[50]

49. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting).

50. *Id.* at 420.