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Foreword

Exclusionary Rules: An Introduction

By Paul N. Halvnik*

The law abounds in exclusionary rules. The law of evidence deals with little else. Is it hearsay? Exclude it. Is the witness incompetent? We shall not hear from him. Is the proffered evidence untimely and inconsistent with a discovery order? Then it cannot come in. Spectral evidence is no longer fashionable, even in Salem, although a witch cannot be nailed without it. Torture brings some of the best evidence, but there is no civilized court that will listen to it.

There are times when the rules of evidence promote the search for truth and times when they hinder it, but a legal system cannot function without them. Their value transcends the investigation of any particular fact or case; that, after all, is what any system of law is about. Ad hoc resolution of human disputes is a method of procedure, but we would not call it a legal procedure. Although there are situations in which a severing of procedural restraints might serve the interests of truth, experience suggests that the gain would be transitory and ultimately destructive. Truth and the methods used to find it are not distinct and separable, as Madison knew before Heisenberg.

This issue of the Hastings Law Journal devotes two Articles to the "exclusionary rule." By that the authors mean exclusionary rules of constitutional dimension. No garden-variety exclusionary rules are discussed, but both Articles acknowledge that the Constitution has more than one exclusionary rule. There is the express exclusionary rule of the fifth amendment—"No person . . . shall be compelled in any criminal case to be a witness against himself,"—as well as the exclusionary consequences that result from the double jeopardy clause.¹ Exclusionary rules also attend and vindicate the first,² fourth,³ sixth,⁴ and

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¹ A.B., 1960; LL.B., 1963, University of California, Berkeley.
² U.S. Const. amend. V.
fourteenth amendments.

Professor Goodpaster concentrates on the fourth amendment's exclusionary rule. Although unenthusiastic about this rule, Professor Goodpaster insists that it cannot be abandoned absent an alternative remedy for vindication of the right to privacy guaranteed by the fourth amendment. Professor Goodpaster proposes an administrative scheme to protect fourth amendment privacy rights, but concedes that the adoption of such a mechanism is remote. As his plan includes the payment of money damages and attorney's fees to criminals, his pessimism is amply justified.

Confirmation for his pessimism is immediately forthcoming from the authors of the second Article, Van de Kamp and Gerry. They decry administrative mechanisms and propose instead a New Centralism. The problem, as they see it, is that California has its own constitution, which is enforced, as is any constitution, by rules of evidence. Their answer, disarming in its simplicity, is to repeal the California Constitution. They propose an amendment that would make the California Constitution precatory, with no influence on the law of evidence; constitutional rules would have one source and one source only, the United States Supreme Court.6

A state constitution that serves no purpose other than to incorporate by reference the decisions of the United States Supreme Court seems a waste of lumber. What are the justifications for such a startling proposal? Van de Kamp and Gerry give us three.

1) It is the natural order of things. State constitutional rules are a "new" development. In truth, state constitutions, and their interpretation, antedate the federal constitution. As John Marshall reminded us in Barron v. Baltimore,7 "Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated."8

2) State constitutions confuse things. Van de Kamp and Gerry complain that the California exclusionary rule is considerably broader than the federal rule. It is, however, constitutionally forbidden to have exclusionary rules that are narrower than those announced by the

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6. More precisely, the California Constitution would be repealed in criminal proceedings, but would remain in full force elsewhere, a situation that ought to produce a great deal of confusion.
8. Id. at 247.
United States Supreme Court. Thus, Van de Kamp and Gerry have conveyed less information than might appear. An independent state constitution is necessarily broader than the federal constitution; otherwise it is redundant or unconstitutional.

3) Van de Kamp and Gerry prefer the United States Supreme Court to the California Supreme Court. This preference is the primary thrust of their Article, but, aside from the question whether the contrast between the members of particular courts at particular times is a sound reason for altering our organic law, is there any reason to share their preference? They do not approve of People v. Triggs \(^9\) and Bielicki v. Superior Court, \(^10\) in which the California Supreme Court held that when I enter a restroom stall and close the door I will be free from the concern that the police are spying through peepholes. The protection of my privacy in these moments, however, does not extend to California’s federal enclaves. \(^11\) I may be shy and fastidious, but I prefer the California rule.

Van de Kamp and Gerry are critical of Burrows v. Superior Court \(^12\) because the court held that, without the benefit of legal process or the consent of a bank customer, the police cannot lawfully obtain copies of the customer’s bank statement from the bank. It is unclear, however, why the government should have access to our bank records without a warrant. The records are not going to disappear. If the government has good cause for invading our financial privacy, it will have no problem finding a magistrate who will recognize it.

Van de Kamp and Gerry are repelled by People v. Brisendine \(^13\) because it does not permit a full search of a person arrested for a traffic infraction. They prefer the federal rule, adding that they do not think it will mean that we must submit to strip searches whenever we make a faulty lane change. A number of police departments, less permissive than the authors, have reached the opposite conclusion, and there seems to be no reason for supposing that they are wrong. But as long as there is a California Constitution and a Brisendine decision, I need not worry about it.

The co-authors reserve their harshest criticism for one of Justice Traynor’s most venerated opinions, People v. Martin. \(^14\) In Martin, the court held that when the police have acted unlawfully, the criminally

\(^11\) Smayda v. United States, 352 F.2d 251 (9th Cir. 1965).
\(^12\) 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).
\(^13\) 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).
accused need show no invasion of his or her individual property interests to invoke the exclusionary rule, because “such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them."\textsuperscript{15} In other words, if the government is interested in stealing the books of Payner and finds that Wolstencroft has them in his possession, the rule that Van de Kamp and Gerry prefer encourages the government to burglarize Wolstencroft and use the evidence against Payner. The United States Supreme Court approved such a scheme in \textit{United States v. Payner}.\textsuperscript{16} Thus, when the “plumbers” burglarize the office of Dr. Fielding and steal the files of Daniel Ellsberg, the Constitution of the United States permits the purloined evidence to be used against Daniel Ellsberg. Ellsberg has no standing to complain of the burglary. I prefer Justice Traynor’s rule.

Whether one court is wiser than another is not the significant issue. The significant issue is our conception of the Bill of Rights and the spirit in which we approach it. The liberties it guarantees are not a nagging and impractical set of handcuffs; they are the substance and soul of the nation. They should not be interpreted grudgingly. As the Supreme Court stated when first passing upon the fourth amendment in \textit{Boyd v. United States},\textsuperscript{17} we should adhere “to the rule that constitutional provisions for the security of person and property should be liberally construed” because a “close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.”\textsuperscript{18}

Neither of the following Articles proceeds in this spirit. Professor Goodpaster, a literalist, suggests that the fourth amendment exclusionary rule is not a constitutional necessity because, unlike the fifth amendment, the fourth amendment contains no express exclusionary language. This is true also of the sixth amendment. Would Professor Goodpaster propose an administrative alternative to the sixth amendment’s exclusionary rule, permitting the government to use information against an accused that was obtained by eavesdropping on conversations between an attorney and his or her client? If not, then he should

\textsuperscript{15} \textit{Id.} at 760, 290 P.2d at 857.  
\textsuperscript{16} 447 U.S. 727 (1980).  
\textsuperscript{17} 116 U.S. 616 (1886).  
\textsuperscript{18} \textit{Id.} at 635. In his famous dissent in \textit{Olmstead v. United States}, 277 U.S. 438 (1928), Justice Brandeis called \textit{Boyd} “a case that will be remembered as long as civil liberty lives in the United States.” \textit{Id.} at 474 (Brandeis, J., dissenting). \textit{Boyd} was effectively overruled by the Burger Court in \textit{Fisher v. United States}, 425 U.S. 391 (1976).
explain his reasoning, because there is a much stronger case for the fourth amendment’s exclusionary rule than there is for the sixth’s. The fourth and fifth amendments are intimately related, as the Supreme Court noted in *Boyd v. United States*.

They throw great light on each other. For the “unreasonable searches and seizures” condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man “in a criminal case to be a witness against himself,” which is condemned in the Fifth Amendment, throws light on the question as to what is an “unreasonable search and seizure” within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.19

The fourth amendment, like the fifth, inhibits the way in which government may go about collecting evidence. The evil that inspired it, the hated writs of assistance by which the English enforced their revenue laws, was a principal cause of the American Revolution. The Revolution was not about taxes; it was about procedure. The questions raised by the colonists were: 1) How is the body which imposes taxes to be selected? and 2) How will those laws be enforced? John Adams, no misty-eyed liberal, said of James Otis’s 1761 argument against the writs of assistance that “then and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born.”20

Writs of assistance gave revenue officers the power to search without cause.21 The fourth amendment’s response is to require that searches be supported by cause and that they be specific, not general. The fourth amendment prohibits the government from invading our

19. 116 U.S. at 633. The Court did not have a fourth amendment case until 1886, and was to have no more until this century, because Congress refused to give the executive branch any but the most limited of search powers before the First World War. The legislative history is collected by Justice Frankfurter in three dissenting opinions. *See* United States v. Rabinowitz, 339 U.S. 56, 68 (1950); Harris v. United States, 331 U.S. 145, 155 (1947); Davis v. United States, 328 U.S. 582, 594 (1946) (Frankfurter, J., dissenting). State governments were not limited by the fourth amendment until 1949, when the Supreme Court held that the fourteenth amendment, by incorporating the fourth, prohibits the states as well as the federal government from unreasonably violating an individual’s privacy. *Wolf v. Colorado*, 338 U.S. 25 (1949). The *Wolf* opinion had no effect, however, for the Court did not include the exclusionary rule as part of the fourth amendment. *Wolf* is our only experience of a fourth amendment without an exclusionary rule, and it was disastrous. The mistake was corrected in *Mapp v. Ohio*, 367 U.S. 643 (1961).

20. 2 LEGAL PAPERS OF JOHN ADAMS 107 (Wroth & Zobel ed. 1965).

privacy without good reason, because liberty needs breathing room. The government might discover more crime by keeping us all under surveillance, but the fourth amendment strikes the balance against general surveillance. When the government, without cause, enters our homes and seizes our books and papers, it is no more entitled than anyone else to convert our papers to its use.

Professor Goodpaster, however, asks whether prohibiting the government from using evidence that it has stolen is an effective way of enforcing the fourth amendment, questioning whether the exclusionary rule in fact deters unlawful police conduct. The concept of deterrence, however, is not involved here. If someone were to tell you that he never parks his Mercedes on the street with the window open, the key in the ignition, and his wallet lying on the dashboard, adding that he calls these precautions "deterrence," would you not say that he was using the word "deterrence" in a peculiar manner, and that there is a significant distinction between removing incentives for lawlessness and deterring lawlessness? If the purpose of the fourth amendment's exclusionary rule is to remove the incentive for lawlessness rather than to deter it, then the effectiveness of the exclusionary rule is manifest. In 1954, the year before the California Supreme Court adopted a search-and-seizure exclusionary rule, there were but seventeen search warrants issued in the entire County of Los Angeles. Now there are thousands. The significance of that fact can only be appreciated when we understand the purpose of the warrant requirement. No one expressed it better than Justice Jackson:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Both Articles discuss the wisdom of a "good faith" escape from the fourth amendment's strictures. Professor Goodpaster does not care for it, but Van de Kamp and Gerry think it a good idea. Under a good

faith exception, a search otherwise illegal would be validated if the police officer testified that he or she did not know he or she was violating the law. If ignorance of the law is to become an excuse, then the last place to start should be with law enforcement agencies. Law enforcers should be better acquainted with the law than the citizenry at large, and it seems strange to offer them an incentive for ignorance. Moreover, it is clear that a good faith exception would make a sham of the fourth amendment.

If ignorance becomes an excuse for the government’s violations of laws, then the government will not be held to the same standards as its citizens. Since a reluctant King John conceded the point in 1215, no government has been comfortable with the notion that it, as well as the governed, must conform to the law. Oliver Cromwell’s response is typical. When the judges, “with all humility, mentioned the law and Magna Carta, Cromwell told them, with terms of contempt and derision, their magna f____ should not control his actions; which he knew were for the safety of the Commonwealth.”

The fourth amendment is the first written constitutional guarantee of the right of privacy, but it is no longer the only one. Other nations have copied its sentiment. Article 55 of the fundamental law of the Union of Soviet Socialist Republics provides: “Citizens of the U.S.S.R. are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of those residing in it.”

Although it says that, everybody knows that the Soviet Constitution is a cynical document. When the K.G.B. breaks into the home of a Soviet dissident and steals his or her papers, the judge, instead of reproaching the police and returning the documents to their owner, conspires with the police to use the documents against the dissident. Comparing article 55 to the fourth amendment, it can be said, confuses the shams of a police state with a charter for liberty.
