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## Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United States

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## ARTICLE

# Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United States

by Professor Lewis R. Katz\* \*\*

### I. INTRODUCTION

COMPARATIVE STUDIES OF Canadian and American development in the field of fundamental individual rights are a fertile area for research. In many respects the two countries closely parallel each other. Their respective economies and defense systems are interdependent and their life styles are overwhelmingly similar. Moreover, opinion in Canada is shaped and molded by exposure to a mass media saturated with American news and entertainment.

The legal systems of both Canada and the United States share a similar heritage. Both are recent branches of British common law. The inquiry of this article is prompted by the fact that in at least one area of fundamental individual rights, the right of a citizen to be free from unreasonable searches and seizures, each nation has developed radically different remedial measures.

To illustrate the two approaches consider the following hypothetical situation:

An ill-kempt man with long hair exits a tavern. A police officer outside notices him. The police officer is suspicious that the patrons of the tavern are involved in drug trafficking, but has no evidence on this particular man. Solely on the basis of the fellow's appearance, the officer stops him and conducts a full search. He finds a quantity of marijuana in the man's pocket. He places the young man under arrest and charges him with illegal possession of a controlled substance.

Under many systems of jurisprudence the police officer's conduct would not be questioned. Nonetheless, under the laws of search and seizure in both Canada and the United States the police officer acted illegally.<sup>1</sup> He did not have reasonable cause to arrest the young man. Absent reasonable cause the attendant search was not incident to a valid arrest and therefore was illegal since there were no independent grounds to justify a warrantless search.

The above case illustrates that the governing principles concerning

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\*\* The author is grateful for the able research assistance provided by Dwight Williams, J.D. '78, and Jay Shapiro, '80. The author is also grateful to the Canada-United States Law Institute for its support during the research for this article.

<sup>1</sup> *Rex v. Brezack*, 96 C.C.C. 97 (Ont. C.A., 1949); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

arrest, search and seizure are similar. The similarity ends there. In the United States, counsel for the accused would file a motion to suppress the evidence because the search was illegal. The court would grant the motion,<sup>2</sup> and without other evidence on which to proceed the prosecution would be forced to dismiss the criminal charges. In Canada, the manner in which evidence for trial is secured is largely irrelevant. The illegally seized narcotics would be admitted as part of the Crown's case and the accused could be convicted based upon it.<sup>3</sup>

There is more at stake here than the adoption of different evidentiary rules dictating opposite results. The choice or rejection of a specific remedy, the exclusionary rule, indicates that fundamental differences exist despite the apparent similarities in the two countries' legal philosophies. The different responses to the conflict between police conduct and a citizen's right to privacy are the result of two hundred years of history and experience.

The development of and continued adherence to the exclusionary rule in the United States is reflective of the country's origins, and its lingering suspicion about government and the use or abuse of government authority.<sup>4</sup> The United States is, after all, the product of an aristocratic and middle class revolution which, even though free of the excesses of twentieth century revolutions, spawned a singular mistrust of authority. That mistrust has not abated over the past two centuries even though the United States has cast off almost all other aspects of its revolutionary origins. Public cynicism and distrust of authority have been sustained and fostered by increased government interference in almost every aspect of life as American society has evolved into a welfare state. The recent excesses of Watergate and other instances of official corruption have reinforced that public sentiment.

Distrust and hostility were early institutionalized in the U.S. constitutional system of checks and balances. Each branch of government was given power to exercise restraint upon the excesses of the other.<sup>5</sup> There ensued the development of a strong judiciary, with the Supreme Court emerging as a co-equal of the powerful executive and legislative branches of government, relying upon an entrenched Constitution as its source of power to review acts of Congress and the presidency while protecting fundamental rights enumerated in the Bill of Rights.<sup>6</sup>

Canada, in contrast, was not born of violence and does not share the United States' heritage of suspicion of authority. Canada's rise to independence and nationhood did not meet with opposition from the En-

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<sup>2</sup> *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>3</sup> *The Queen and Wray*, 11 D.L.R. 3d 673 (1970).

<sup>4</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961); *Katz v. United States*, 389 U.S. 347 (1967).

<sup>5</sup> *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974).

<sup>6</sup> C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS, AND ACHIEVEMENTS* (1928); T. LYONS, *THE SUPREME COURT AND INDIVIDUAL RIGHTS IN CONTEMPORARY SOCIETY* (1975).

glish.<sup>7</sup> Indeed, Canada's nationhood is the result of an act of the British Parliament. That legislation, the British North America Act (BNA Act),<sup>8</sup> instituted Canadian independence and operates as the Canadian Constitution, still theoretically subject to an amendment process requiring the approval of the British Parliament.<sup>9</sup>

The Canadian Constitution reflects the basic differences between the United States and Canada. It is a statement of the powers that provincial governments ceded to the newly created federal government. It did not contain at the outset and has not since been amended to include a statement of individual rights comparable to the first ten amendments to the U.S. Constitution. Thus, the BNA Act does not explicitly ensure individual rights. There is a Canadian Bill of Rights but it was enacted in this century by the Canadian Parliament.<sup>10</sup> It contains most of the rights enumerated in its American counterpart. Nonetheless, the Canadian Bill of Rights has not achieved the status of entrenched legislation and thus, unlike the American Bill of Rights, is not a significant limitation upon governmental authority.<sup>11</sup> This form of government reflects the absence of distrust that accompanied the creation of the Dominion. The Canadian system embodies the British tradition of parliamentary supremacy that has no provision for checks and balances.

Historical differences in the formation of the two nations continue to play a role, producing diverse reactions to the treatment of basic fundamental rights. Consequently, laws concerning the evidentiary ramifications of illegal arrests, searches and seizures are drastically different in Canada and the United States. The linchpin of the American approach is the exclusionary rule. The rule had its seeds in the nineteenth century and was judicially formalized in the United States in the twentieth century.<sup>12</sup> The Supreme Court applied the exclusionary rule to criminal prosecutions in federal courts in 1914.<sup>13</sup> The rule was made binding upon prosecutions in state criminal courts in 1961.<sup>14</sup> The Fourth Amendment to the United States Constitution guarantees the privacy of individual citizens against unreasonable arrests, searches and seizures.<sup>15</sup> The exclusionary rule operates to bar the prosecution from profiting from unreasonable and, hence, illegal intrusions by denying to state or federal governments the use of evidence so secured in a criminal prosecution against the person whose privacy was illegally invaded.<sup>16</sup>

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<sup>7</sup> D. CREIGHTON, *THE ROAD TO CONFEDERATION* (1964).

<sup>8</sup> 30 & 31 Victoria, c.3 (1867).

<sup>9</sup> See, D. CREIGHTON, *CANADA'S FIRST CENTURY* (1970) at 339 for a discussion of the amendment process.

<sup>10</sup> CAN. REV. STAT. c.44 (App. III) 1970, Amended 1970-71-72, STAT. OF CAN. c.38 §29.

<sup>11</sup> W. TARNOPOLSKY, *THE CANADIAN BILL OF RIGHTS* (1966).

<sup>12</sup> *State v. Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903).

<sup>13</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>14</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>15</sup> U.S. CONST. amend. IV.

<sup>16</sup> While this definitional explanation of the rule is sufficient for purposes of our consid-

Canada, however, has never adopted a general exclusionary rule. While affirming the sanctity of individual privacy and limitations of official intrusions into that privacy, Canadian law takes the position that evidence relevant to the issue of guilt or innocence must be admissible at trial even if secured as a result of an illegal arrest, search or seizure.<sup>17</sup> Presumably no matter how atrocious the official abuse, a trial judge has no option but to admit the evidence. Before the exclusionary rule was extended in the United States to the fifty states, the United States Supreme Court adopted as a way-station, the notion that police conduct which "shocked the conscience of the Court" and violated standards of basic decency obliged the trial court to exclude evidence so secured.<sup>18</sup> Canadian trial judges are given no such mandate and, in fact, are not given any discretion in this area. If the evidence is relevant, it must be admitted.<sup>19</sup> The victim of illegal police behavior is left to other remedies.<sup>20</sup>

The exclusionary rule as a means of protecting individual privacy is a peculiarly unique American institution. While traces of it may be found in other legal systems, the total commitment to excluding evidence secured by police officers in violation of the Fourth Amendment's stricture against unreasonable searches and seizures is unknown elsewhere.<sup>21</sup> The exclusionary rule elevates the policy of protecting individual privacy to a supreme position, and relegates the truth-determining function of a criminal trial to secondary importance.<sup>22</sup>

Questions concerning the sweep of the Fourth Amendment exclusionary rule continue to be raised in this country.<sup>23</sup> The most common issue is

eration here, it should be noted that the scope of the Fourth Amendment guarantee has been significantly narrowed and the breadth of the application of the remedy so sharply curtailed by the present United States Supreme Court that the protection of the Fourth Amendment is hardly as great or restrictive of governmental action as it appeared to be in the 1960's. The recent personnel changes on the Court have resulted in a decline of the protections that had been brought forth and nurtured by the Warren Court. In *California v. Minjares*, 100 S.Ct. 9 (1979), Justice Rehnquist joined Chief Justice Burger's campaign against the exclusionary rule. Justice Rehnquist's stance has been viewed as being the natural consequence of such cases as *Stone v. Powell*, 428 U.S. 465 (1976) and *U.S. v. Calandra*, 414 U.S. 338 (1974). For opinions of other Justices advocating limitations of the exclusionary rule, see, *Coolidge v. New Hampshire*, 403 U.S. 443, 510 (1971) (Blackmun, J., dissenting); *Brown v. Illinois*, 422 U.S. 590, 606 (1975) (Powell, J., concurring in part); *Stone v. Powell*, 428 U.S. 465, 536 (White, J., dissenting).

<sup>17</sup> *The Queen v. Wray*, 11 D.L.R. 3d 673 (1970).

<sup>18</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>19</sup> *The Queen v. Wray*, 11 D.L.R. 3d 673 (1970); *Hogan v. The Queen*, 48 D.L.R. 3d 427 (1974).

<sup>20</sup> Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and The U.S. Exclusionary Rule*, 1 J. POLICE SCI. AND AD. 36 (1973).

<sup>21</sup> Heydon, *Illegally Obtained Evidence*, 1973 CRIM. L. REV. 603. For a general discussion of practices in British countries, see Heydon, *Illegally Obtained Evidence*, 1973 CRIM. L. REV. 603.

<sup>22</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>23</sup> See, e.g., *Dunaway v. New York*, 99 S.Ct. 2248 (1979).

whether the suppression of evidence discourages police misconduct.<sup>24</sup> Other concerns go to the cost to the entire community when convictions are lost because the police officer erred and relevant evidence is suppressed.<sup>25</sup> Some wonder whether a society beset by a high rate of crime can bear that cost and whether there are not alternative means of protecting privacy that offer as much protection at less cost.<sup>26</sup> The debate concerning the rule is not confined to the classroom. The Chief Justice of the United States Supreme Court, Warren E. Burger, is this nation's most prominent critic of the exclusionary rule. He advocates the abandonment of the rule although a suitable alternative remedy does not exist.<sup>27</sup>

The Canadian experience on the subject of search and seizure may very well be the best place for United States lawyers to look for an alternative to the exclusionary rule. Justice Felix Frankfurter used to look upon the states as (then) forty-eight laboratories developing their own approaches to criminal justice and the protection of fundamental individual rights.<sup>28</sup> Now that the exclusionary rule is a constitutional doctrine uniformly applicable throughout the United States there can be no experimenting below this mandated level of due process.<sup>29</sup> Absent our own ability to practice alternatives to the exclusionary rule, we might logically look to Canada to examine that country's experience in protecting the right of privacy and dealing with unreasonable government intrusions. Likewise, the American experience may be helpful to the Canadians in determining solutions to common issues.

The growing disenchantment with and outright assaults upon the wisdom of the exclusionary rule in the United States prompted this study.<sup>30</sup> The number and stature of those who advocate abandonment of the rule clearly indicates that even if the rule survives the 1980's it will be subject to constant reconsideration and reshaping. As an academician and former practitioner who has known no system but one which subscribes to the exclusionary rule, I admit to a bias in favor of its retention. The

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<sup>24</sup> Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is A Deterrent To Police*, 62 JUDICATURE 404 (1979).

<sup>25</sup> *People v. DeFore*, 242 N.Y. 13, 150 N.E. 585 (1926).

<sup>26</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

<sup>27</sup> *Stone v. Powell*, 428 U.S. 465, 496 (1976) (Burger, J., concurring).

<sup>28</sup> *Adamson v. California*, 332 U.S. 46 (1947) (Frankfurter, J. concurring).

<sup>29</sup> However the states are free under the provisions of their own constitutions to impose stricter standards of due process than those imposed by the United States Supreme Court under the federal Constitution. As the Burger Court has narrowed some of the protections of the Fourth Amendment, a handful of state supreme courts have construed their own constitutions to provide greater protection. See, e.g., *People v. Brisendine*, 13 Cal. 3d 528, 531 P. 2d 1099, 119 Cal. Rptr. 315 (1975), where the California Supreme Court rejected the rulings in *United States v. Robinson*, 414 U.S. 218 and *Gustafson v. Florida*, 414 U.S. 260 (1973), authorizing full searches of persons arrested even for traffic offenses. See also, Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974).

<sup>30</sup> See note 16 *supra*.

Canadian approach intrigued me initially because, frankly, I questioned the quality of freedom that could exist in a society which considers immaterial the manner by which the prosecution comes into possession of the evidence it intends to use to obtain a verdict of guilty against one of its citizens. In effect, Canadian law ignores official illegality in the course of punishing a citizen for violating its laws.

Some Canadian researchers who have considered this issue have done so in the context of the models developed by Professor Herb Packer,<sup>31</sup> characterizing Canada as operating within the "crime control" model and the United States as operating within the "due process" model.<sup>32</sup> They conclude that Canada has traditionally deemphasized individual rights in favor of order, and that individual rights, rather than being entrenched, are subject to the discretion of the authorities.<sup>33</sup> Without at all focusing on these fundamental societal differences, Chief Justice Burger has referred to the Canadian approach to search and seizure with approval when advocating American abandonment of the exclusionary rule.<sup>34</sup>

There is an interest in Canada with how this subject is treated in the United States and there is some sentiment in Canada for adoption of a partial exclusionary rule.<sup>35</sup> Still the Canadian discourse is not nearly as strong or widespread as American advocacy of the rejection of the exclusionary rule.

I have set forth to compare the two approaches to the use of evidence secured through illegal arrests, searches and seizures, and the effects of those disparate approaches upon the quality of freedom in the two countries. Preliminarily, it is necessary to set forth briefly and generally the development and state of the law on this subject in the two countries. The discussion then turns to the quality of the protection of privacy in Canada and the United States. Finally, I consider the wisdom of applying the Canadian approach in the United States. The research for this article is not empirical and the conclusions drawn are highly subjective. These observations and conclusions are designed to fuel the debate that is ongo-

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<sup>31</sup> Packer, *The Courts, The Police and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238 (1966).

<sup>32</sup> P.G. Erickson, *The Marijuana Arrest: The Police Role in Canadian and American Perspectives* (an unpublished manuscript of the Addiction Research Foundation), Toronto, Canada. 1979.

<sup>33</sup> Hagan & Leon, *Philosophy and Sociology of Crime Control: Canadian-American Comparisons*, in *SOCIAL SYSTEM AND LEGAL PROCESS* (H.M. Johnson ed. 1978); See text of Professor Douglas Schmieser's talk this issue.

<sup>34</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, (1971) (Burger, C.J. dissenting).

<sup>35</sup> Can. B. Assn. Res. No.2, adopted Aug. 1978; LAW REFORM COMMISSION OF CANADA, *THE EXCLUSIONS OF ILLEGALLY OBTAINED EVIDENCE* (1974); Gibson, *Illegally Obtained Evidence*, 31 U. TOR. FAC. L. REV. 23 (1973).

Through the generosity of the Canada-United States Law Institute I was able to spend considerable time in Canada. During those periods I talked with countless Canadian judges, lawyers and police officers, and I was afforded the opportunity of riding with police officers in Toronto.

ing in the United States and appears to be commencing in Canada regarding the proper method of dealing with police misconduct.

## II. SEARCH AND SEIZURE IN THE UNITED STATES

Governmental intrusion upon personal privacy has been an issue of national import and concern since before the formation of the republic. It was not thrust on the political scene, like so many issues in the twentieth century, by "have-nots" seeking reform of economic and political inequities. Nor is our national concern in this area the result of disclosures and propaganda discrediting police conduct. The issue has been alive in the United States for more than two hundred years and was introduced into the national debate by the aristocratic and middle-class revolutionaries who put an end to British rule and formed a new nation. Those eighteenth century patriots understood that the privacy issue did not involve narrow concerns but rather pertained to one of the most fundamental aspects of human endeavor. Initially precipitated by intrusions which were inhibiting the colonists' ability to accumulate wealth, the battle to secure and guarantee the right of privacy transcended the revolutionary war. It continued into the period of national development because of the founders' realization that the right of privacy involved the most basic issue of limited government—official abuse of power.<sup>36</sup> The full development of this right, as with most other individual rights, was postponed until the second half of the twentieth century. Nevertheless, the seed was planted and nurtured long before the Supreme Court unveiled the Fourteenth Amendment. The Court has used the Fourteenth Amendment as its principal tool to weld the fifty states into one nation and for "putting flesh and blood on our ideals"<sup>37</sup> through the application of the fundamental guarantees of the Bill of Rights to citizens when dealing with their state governments.

### A. *The Revolutionary War Period*

The struggle to secure the right of privacy in the United States began as early as 1760. It stemmed from a policy of strict enforcement by the colonial government of its trade laws to curtail trade with France and Spain and protect the American market for British trade.<sup>38</sup> This policy was enforced through the use of general search warrants created a century earlier. These warrants authorized officials holding Writs of Assistance to "go into any house, shop, cellar, warehouse or room, or other place, and in case of resistance, to break open doors, chests, trunks and other packages" to search for and seize "prohibited and uncustomed"

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<sup>36</sup> See notes 51-54, *infra*.

<sup>37</sup> Shaefer, *Comments* 54 Ky. L.J. 521 (1966).

<sup>38</sup> N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51-53 (1937).

<sup>39</sup> 13 and 14 Car. II c.11 §5 (1662), 8 Pickering, *Statutes at Large* 81 (1763).



goods.<sup>39</sup> The Writs permitted unlimited intrusion into every segment of the colonists' lives by vesting limitless discretion in the enforcing customs officials. A search conducted under a warrant of this nature is as insidious as a warrantless search undertaken today by a peace officer solely upon his own decision and without statutory or judicially-imposed limitations. Customs officers were free to enter and search at will in the colonists' homes and businesses. No factual basis was required to justify the intrusion and no return of execution was required if no contraband was found. The Writ provided all of the necessary justification. The search under such a Writ signified that intrusions not based upon reasonable or probable cause were an element of governmental policy. Today, the arbitrary search by an officer without a warrant is the act of one official, and the victim of the intrusion may have recourse under the law.<sup>40</sup>

Resistance to Writs of Assistance developed shortly after commencement of the vigorous enforcement of the customs laws. A legal challenge was brought in the Massachusetts Superior Court in 1761 by Boston merchants opposing the reissuance of the Writs.<sup>41</sup> The colonists' cause was argued by James Otis, Jr., who passionately developed the notion of individual privacy:

Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. . . . Again these writs are not returned. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in law live forever, no one can be called to account. Thus reason and the constitution are both against this writ.<sup>42</sup>

Otis' attack upon general searches was a lost battle, but his oration was credited by John Adams as the spark which generated the movement for independence.<sup>43</sup> The court reissued the Writs and its failure to heed Otis' advice provided the growing revolutionary movement with a continuing issue to rally support.<sup>44</sup>

A Town Meeting in Boston authorized a committee to compile and publish a list of "Infringements and Violations of Rights" in 1772. Signifi-

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<sup>39</sup> T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 41-43 (1969).

<sup>41</sup> Massachusetts is the only colony where Writs of Assistance were a continuing menace. The courts in all of the colonies but Massachusetts and New Hampshire resisted requests for their issuance. Nevertheless, judges friendly to the Crown occasionally granted them. LASSON, *supra* note 38 at 73-76.

<sup>42</sup> TAYLOR, *supra* note 40, at 37.

<sup>43</sup> LASSON, *supra* note 38, at 58-59.

<sup>44</sup> *Id.* at 73.

cant attention was paid by the committee to the violation of the right of privacy by Crown officials "intrusted with power more absolute and arbitrary than ought to be lodged in the hands of any man or body of men whatsoever."<sup>45</sup> The declaration described the effects upon the citizens of such a society where the individual's right of privacy is unprotected:

Thus our houses and even our bed chambers, are exposed to be ransacked, our boxes, chests & trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants; whenever they are pleased to say they suspect there are in the house wares & for which the dutys have not been paid. Flagrant instances of the wanton exercise of this power, have frequently happened in this and other sea port Towns. By this we are cut off from that domestick security which renders the lives of the most unhappy in some measure agreeable. Those Officers may under colour of law and the cloak of a general warrant, break thro' the sacred rights of the Domicil, ransack men's houses, destroy their securities, carry off their property, and with little danger to themselves commit the most horred murders.<sup>46</sup>

#### B. *Nation Building*

Surprisingly, this issue which allegedly helped to spark the revolution was not mentioned in the Declaration of Independence, the compendium of the colonists' grievances. Between 1776 and the signing of the Treaty of Paris in 1783, however, seven of the former colonies<sup>47</sup> included in their declarations of rights condemnations of general search warrants and guaranteed in those documents the right to be free from unreasonable searches and seizures. The Constitution as originally submitted to the states similarly made no mention of search and seizure nor, for that matter, of most of the rights later appended to it in the Bill of Rights. The absence of a Bill of Rights was not a result of malice but simply the product of a group of men whose proceedings were not public and who, because they believed that what they were drafting was merely a charter for a government of limited powers, presumed that a statement of rights was unnecessary.<sup>48</sup> That omission, however, seriously jeopardized the ratification of the Constitution. The citizens of the various states had grown distrustful of government, no less of the home-grown variety than of the foreign power they had recently dispossessed. In state after state, ratification was opposed by those who were fearful of the so-called limited government. Patrick Henry conjured up a chamber of horrors in which re-

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<sup>45</sup> B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 206 (1971).

<sup>46</sup> *Id.* at 45.

<sup>47</sup> Virginia, Delaware, Pennsylvania, Maryland, Massachusetts, New Hampshire and Vermont.

<sup>48</sup> Both the original United States Constitution and the British North America Act have surface similarity, in that neither document deals with individual liberties. Of course, the inclusion of the Bill of Rights in the United States Constitution makes these two documents quite distinguishable.

pressive state officials would be aided by powerful federal officers to deprive citizens of their privacy:

When these harpies are aided by excisemen, who may search, at any time, your houses and most secret recesses, will the people bear it? If you think so, you differ from me. Where I thought there was a possibility of such mischiefs, I would grant power with a niggardly hand; and here there is a strong possibility that these oppressions shall actually happen. I may be told that it is safe to err on that side, because such regulations may be made by Congress as shall restrain these officers, and because laws are made by our representatives, and judged by righteous judges: but, sir, as these regulations may be made, so they may not; and many reasons there are to induce a belief that they will not.<sup>49</sup>

James Madison, who was eventually to author and serve as principal proponent of the Bill of Rights when it came before the Congress, had earlier questioned in a letter to Thomas Jefferson whether "parchment barriers" could have any effect upon "overbearing majorities" when "its control is most needed."<sup>50</sup> Jefferson replied to Madison with a timeless defense of the need for a written and entrenched statement of rights:

Experience proves [critics say] the inefficacy of a Bill of Rights. True. But though it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, & those which attend the want of it. The inconveniences of the declaration are that it may cramp government in its useful exertions. But the evil of this is short-lived, trivial & repairable. The inconveniences of the want of a Declaration are permanent, afflicting & irreparable. They are in constant progression from bad to worse. The executive in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for long years.<sup>51</sup>

Opponents of the new Constitution rallied the opposition by accentuating the fears caused by the absence of a Bill of Rights. When the new government under the Constitution began its operation in 1789 half of the former colonies were demanding an addition to the charter to contain some formal statement of individual rights. Five of the new states specifically included recommendations pertaining to a prohibition of unreasonable searches and seizures or guidelines for the issuance of warrants.<sup>52</sup>

<sup>49</sup> LASSON, *supra* note 38, at 92.

<sup>50</sup> *Id.* at 78, n.91.

<sup>51</sup> S. PADOVER, THOMAS JEFFERSON AND THE FOUNDATIONS OF AMERICAN FREEDOM 105 (1965).

<sup>52</sup> SCHWARTZ, *supra* note 45, at 1167.

When the first Congress assembled, representing the eleven states that had ratified the Constitution, Congressman James Madison of Virginia, whose opposition to a Bill of Rights had been overcome either by Jefferson's persuasiveness or as a result of the fact that he had nearly been defeated in his bid for a House seat because of his early ambivalence to a Bill of Rights, became the sponsor and floor leader for such a statement. Shortly after Washington's first inauguration, Madison submitted his first draft proposal. It has been suggested that had someone of lesser prestige and persistence than Madison championed the cause for a Bill of Rights in Congress, its enactment might not have occurred because of the Federalist majority's opposition in the Congress.<sup>53</sup>

Madison's proposal concerning searches and seizures contained all of the important words and phrases of what later was to become the Fourth Amendment, but in its original form it was clearly directed only to general warrant searches, one of the principal grievances of the former colonists.<sup>54</sup> Deftly, through the mysteries of the committee process, the language was transformed into its present form prohibiting all unreasonable searches and seizures, not just those resulting from improprieties in the warrant procedure. This change, of course, represents the greatest safeguard the Fourth Amendment holds, since an overwhelming majority of police searches and seizures are without benefit of warrants. Had the broad prohibition against all unreasonable searches and seizures not been written into the amendment, it is conceivable that the Supreme Court might have determined that almost all arrests, searches and seizures were not subject to constitutional constraints.<sup>55</sup> Whatever the principal fears and intent of the framers of the Fourth Amendment, the language ultimately adopted would have to undergo tortuous construction today if the constitutional protection were to be denied to all but the few police intrusions covered by warrants.

The adoption and subsequent ratification of the Fourth Amendment provided the tool for the development of the right of privacy and limitations upon official intrusions into the private sector. The blossoming of that right, as well as the others enumerated in the Bill of Rights, depended upon the development of the Supreme Court and the entire federal judiciary as the ultimate interpreters of the Constitution with the power to evaluate legislation in terms of its conformity with the Constitution and to measure the propriety of official conduct in light of constitutional restraints. The entrenched position of the Constitution and the activist role of the Supreme Court as a co-equal branch of government was

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<sup>53</sup> LASSON, *supra* note 38, at 79-105.

<sup>54</sup> SCHWARTZ, *supra* note 45, at 1027.

<sup>55</sup> Professor Telford Taylor, *see* note 40 *supra*, contends that the Supreme Court turned the Fourth Amendment on its head when the Justices applied the constitutional standards intended to cover warrants to warrantless arrests and searches and also by exaggerating both the dangers of warrantless searches and the practical benefits of the warrant procedure.

clearly established early in the nineteenth century by Chief Justice Marshall's landmark opinion in *Marbury v. Madison*,<sup>56</sup> providing both the tool and the machinery essential to the later maturing of these fundamental rights.

### C. *Development of the Exclusionary Rule*

The underpinnings for all later decisions protecting the individual right of privacy appear in the 1886 United States Supreme Court decision, *Boyd v. United States*.<sup>57</sup> *Boyd* was decided under both the Fourth and Fifth Amendments but the Court's reasoning relied most heavily upon the Fifth Amendment's explicit exclusion of compelled self-incrimination. A glimmer of the exclusionary rule appeared in federal and state decisions at the end of the nineteenth and beginning of the twentieth century with statements such as: "These constitutional safeguards would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for the protections against its use,"<sup>58</sup> and "[Not to exclude] is to emasculate the constitutional guaranty, and deprive it of all beneficial force or effect in preventing unreasonable searches and seizures."<sup>59</sup> There are decisions during this period rejecting the exclusionary rule,<sup>60</sup> but the impetus for its full evolution and development existed in *Boyd* and other nineteenth century decisions.

In 1914, the Court formally adopted the exclusionary rule in *Weeks v. United States*,<sup>61</sup> holding that evidence secured by federal law enforcement officers in violation of an accused's Fourth Amendment rights could not be used in a federal criminal prosecution against that accused. The *Weeks* opinion did not adopt the exclusionary rule as a deterrent to illegal police behavior. Rather, the Court simply treated the exclusionary rule as a logical corollary to the language of the Fourth Amendment and its guarantee of individual privacy. The Court discussed the importance of the Fourth Amendment and developed a charter setting forth the role of the courts in enforcing it:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory

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<sup>56</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>57</sup> 116 U.S. 616 (1886).

<sup>58</sup> *United States v. Wong Quong Wong*, 94 F. 832, 834 (9th Cir. 1899).

<sup>59</sup> *State v. Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903).

<sup>60</sup> *Adams v. New York*, 192 U.S. 585 (1904).

<sup>61</sup> 232 U.S. 383 (1914).

upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.<sup>62</sup>

Furthermore, the Court said that while efforts to bring the guilty to punishment are praiseworthy, those efforts "are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."<sup>63</sup>

Clearly, then, the Supreme Court did not adopt the exclusionary rule principally to deter illegal police behavior, although it is fair to infer an expectation on the part of the Court that it would have that effect. The Court's primary reason appears to be a belief that if a trial court looks the other way and ignores the unconstitutional manner in which the evidence in question is secured then the courts would be sanctioning "a manifest neglect if not an open defiance of the prohibitions of the Constitution."<sup>64</sup> The belief was that through such silence the courts would become a party to the illegality and help to make it a fundamental right without a remedy.

The applicability of the *Weeks* rule was limited to federal criminal trials. For thirty-four years thereafter there was no decision applying the general principles of the Fourth Amendment to the states through the due process clause of the Fourteenth Amendment. When such a decision was finally rendered in 1949 in *Wolf v. Colorado*<sup>65</sup> only the principle of freedom from unreasonable intrusions was made applicable to the states through the due process clause of the Fourteenth Amendment, not the federal remedy—the exclusionary rule. Despite the most egregious violations of the right, the states remained free to choose remedies to protect or not to protect that right. The Court reasoned that the exclusionary rule was not an explicit requirement of the Fourth Amendment but was a matter of judicial implication and thus not constitutionally mandated.<sup>66</sup>

Even during this hands-off period, the Supreme Court fashioned an exclusionary rule, albeit very limited, which was applied to the states for certain extraordinarily unreasonable intrusions committed by state and local law enforcement officers. A unanimous Supreme Court in *Rochin v.*

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<sup>62</sup> *Id.* at 391-392.

<sup>63</sup> *Id.* at 393.

<sup>64</sup> *Id.* at 394.

<sup>65</sup> 338 U.S. 25 (1949).

<sup>66</sup> *Id.*

*California*<sup>67</sup> held that the conditions surrounding certain unreasonable searches and seizures required the suppression of the fruits of those intrusions in state criminal proceedings notwithstanding the general non-applicability of the exclusionary rule to the states. Mr. Justice Frankfurter, who wrote the majority opinion in *Wolf*, also wrote for five members of the *Rochin* Court stating that a conviction based upon the fruits of illegal police behavior violated due process when the conduct of the police "shocked the conscience" of the Court and offended its sense of justice.<sup>68</sup> In *Rochin*, police officers, without authority, entered the accused's home and jumped upon him in an unsuccessful attempt to extract two morphine capsules which he deliberately had swallowed to prevent their seizure. A subsequent stomach pumping by a doctor, against the accused's will, produced the morphine capsules. While not overruling *Wolf*, the Court was acknowledging that notions of due process, and thus the Constitution itself, required an exclusionary rule to protect the rights of citizens against some form of illegal police behavior. The inherent subjectivity of the *Rochin* test became readily apparent when Justice Frankfurter broke from the majority of the Court in a later case. The majority's conscience in that case was not "shocked" by illegal police behavior which involved the planting of hidden microphones in a suspect's marital bedroom,<sup>69</sup> rather than an atrocious invasion of the accused's body.

The Supreme Court finally reversed *Wolf* in 1961, in *Mapp v. Ohio*.<sup>70</sup> Forty-seven years after the Court applied the exclusionary rule to federal criminal proceedings, it extended the exclusionary rule for Fourth Amendment violations to state criminal proceedings. By 1961 the atmosphere in the Supreme Court was definitely changing;<sup>71</sup> gone was the Court's reticence to find a broad and distinctive meaning in the Fourteenth Amendment's guarantee against state violations of due process. The Court rejected the assertion in *Wolf* that the exclusionary rule was merely a creature of judicial implication and reasserted its earlier position developed in *Weeks* affirming the exclusionary rule's constitutional origins and justifications. The Supreme Court also pointed out that the factual considerations stressed in the *Wolf* opinion no longer existed. By 1961, a majority of states had applied the exclusionary rule on their own because, as the Court stressed, the other remedies failed to secure compliance with the constitutional provision.<sup>72</sup> The failure to apply the exclu-

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<sup>67</sup> 342 U.S. 165 (1952).

<sup>68</sup> *Id.* at 172-173.

<sup>69</sup> *Irvine v. California*, 347 U.S. 128 (1954).

<sup>70</sup> 367 U.S. 643 (1961).

<sup>71</sup> Under the leadership of Chief Justice Warren, the Supreme Court assumed an activist role expanding individual rights on several fronts. The greatest impact of this Court is felt in the areas of civil rights requiring desegregation of all public aspects of American life, reapportionment which ended the rural domination of state legislatures, and the application of the Bill of Rights to state criminal proceedings.

<sup>72</sup> 367 U.S. 643 (1961).

sionary rule, the Court said, was to make the right of privacy meaningless and amounted to a withholding of its privilege and enjoyment. Perhaps most profound in light of later criticism of the decision was the Court's insistence that permitting the introduction of illegally seized evidence served to encourage disobedience to the federal Constitution.<sup>73</sup>

The years since *Mapp* have hardly been tranquil. *Mapp v. Ohio* resolved one issue and opened the door to many others. Search and seizure questions have predominated in criminal litigation just as the prosecution of crimes has dominated all areas of litigation and preoccupied the courts.<sup>74</sup>

As an aftermath of *Mapp*, courts at every level have been compelled to spend considerable time on search and seizure issues and have had to expend considerable thought on the meaning of the Fourth Amendment guarantee. The legal community, particularly, and the lay community as well, have focused on the limits of permissible police behavior and by necessity on the meaning and parameters of the Fourth Amendment assurance of individual privacy and freedom from unreasonable searches and seizures. Perhaps the most noteworthy, yet frequently the most overlooked effect of the exclusionary rule has been the spotlight it has focused upon the greater issue involving the relationship between citizens and police in a free society. Unlike any other approach to the consideration of these issues, the exclusionary rule provides a forum in which their consideration is unavoidable. Motions to suppress evidence are filed in courts throughout this country every day, and within that context the issues must be faced. Along with issues of freedom and individual integrity, society is also forced to face up to the cost of this freedom; and that cost is substantial. Every time it is determined that a police officer erred, either through blunder or intentionally, relevant and reliable evidence of guilt is excluded and a potentially guilty person may go free as a direct result of that police error. It is exceedingly healthy for a society to be continually faced with such basic issues of freedom and its costs. The exclusionary rule demands that society constantly reaffirm its commitment to individual freedom, as it daily reconsiders the basic questions as to when and under what circumstances police intrusions into individual privacy satisfy the constitutional test of reasonableness.

In recent years, state and federal courts, and ultimately the Supreme Court, have persistently redefined reasonable police behavior to meet various sets of circumstances. Often the outcome has been to relax the restrictions upon police behavior in order to round the sharp edges of the exclusionary rule.<sup>75</sup> Most recently, the Supreme Court has cut back on

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<sup>73</sup> *Id.*

<sup>74</sup> Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 G.W.L. REV. 529 (1978); I D. NEDRUD & M. OBERTO, *THE SUPREME COURT AND THE CRIMINAL LAW* (1979).

<sup>75</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).



the scope of the exclusionary rule, claiming that application of the exclusionary rule to various proceedings will not help to deter illegal police practices.<sup>76</sup> The most egregious and effective assault of the present Supreme Court upon the exclusionary rule has been its decision to bar Fourth Amendment claims from being raised in federal habeas corpus attacks upon convictions.<sup>77</sup> That decision is broad and wide-sweeping because the potential for collateral attack was the most potent weapon for ensuring the enforcement and protection of constitutional rights at criminal trials. Notwithstanding reinterpretations of constitutional standards and curtailment of the applicability of the exclusionary rule, the rule has been weakened but remains largely intact and continues to be the subject of widespread attack.

### III. SEARCH AND SEIZURE IN CANADA

Contrary to the experience in the United States, the right to privacy and the concern over limitations upon police power to conduct searches and seizures have never been critical issues in Canada. Separation from England and the formation of the Dominion was not the wrenching experience that it was a century earlier in the United States. Privacy, or the lack thereof, and police illegality simply were not issues that arose in the making of an independent Canada.

#### A. *The Canadian Bill of Rights*

The Canadian Constitution is the British North America Act of 1868, legislation enacted by the British Parliament creating the Dominion of Canada and dividing the powers of government between the provincial governments and the newly created federal government.<sup>78</sup> Like the framers of the American Constitution, the drafters of the BNA Act did not deem it necessary to include within its provisions guarantees of individual rights. The document concentrates upon defining the powers delegated to the federation and perpetuates the roles enjoyed by the provinces.<sup>79</sup> Unlike the American experience, Canada's Constitution was not greeted by a popular movement demanding its early amendment to include a statement enumerating individual rights and guaranteeing the inviolability of those rights.

Technically, the Canadian Constitution still resides in England; as an act of the British Parliament, it can only be amended by legislation of

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<sup>76</sup> *E.g.*, *United States v. Calandra*, 414 U.S. 338 (1974), where the Court declined to apply the exclusionary rule to grand jury proceedings.

<sup>77</sup> *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>78</sup> 30 & 31 Victoria, c.3, (1867).

<sup>79</sup> The Canadian Constitution guarantees that matters such as education and laws regulating marriage remain within the sole jurisdiction of the provinces. The Constitution insured that the provinces would be able to maintain their individual characteristics. B.N.A. Act, 30 & 31 Victoria, c.92(8), s.92(12).

that body. No one would suggest, however, that the British Parliament would attempt to exercise any discretion in this matter. Amendments are proposed to the British Parliament by the Canadian government but custom dictates that amendments will be enacted only if unanimously supported by the governments of the ten provinces. The unanimity requirement has impeded the amendment process and is the reason that the Canadian Bill of Rights was not made a part of the Constitution.<sup>80</sup>

Prime Minister John Diefenbaker was the principal proponent of the Canadian Bill of Rights.<sup>81</sup> Fearing that political factors would prevent unanimous provincial support for a constitutional amendment, Diefenbaker proposed the Bill as an ordinary Act of Parliament. It was adopted in that form in 1960.<sup>82</sup>

The Bill of Rights contains an enumeration of fundamental rights including those affecting the criminal process. The latter rights pertain exclusively to post-arrest procedures and guarantees of a fair trial.<sup>83</sup> The Bill of Rights contains no specific reference to search and seizure. There is, however, a broad guarantee that life, liberty and security will not be deprived without due process of law.<sup>84</sup> Furthermore, section 5 provides that the specific enumeration of individual rights shall not be construed "to abrogate or abridge any human right or fundamental freedom not enumerated . . . that may have existed in Canada at the commencement of this Act."<sup>85</sup> This document might be read so as to find the basis for enunciating support for a fundamental right to be free from unreasonable intrusions by relying upon the broad guarantee of due process as well as the reaffirmation of those rights not enumerated but existing at the time of the enactment of the Bill of Rights. However, the Supreme Court of Canada has not relied upon the document to chart a course developing protections for those rights that are enumerated, let alone rights that are not enumerated.<sup>86</sup>

The Bill of Rights provides that every law of the Canadian Parliament shall be so construed and applied as not to abrogate, abridge, or infringe any of the rights or freedoms contained within the document. Thus, the Bill of Rights language could be read as at least constructing a framework within which to test the validity of other Acts of Parliament.<sup>87</sup> Nonetheless, even that narrow role may be limited because a provision in

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<sup>80</sup> D. CREIGHTON, *supra* note 9, at 315.

<sup>81</sup> Tarnopolsky, *The Canadian Bill of Rights: From Diefenbaker to Drybones*, 17 MCGILL L.J. 437 (1971).

<sup>82</sup> D. CREIGHTON, *supra* note 9, at 315.

<sup>83</sup> Canadian Bill of Rights (C.B.R.) CAN. REV. STAT. App. III (1970), §2.

<sup>84</sup> *Id.* Part I §1(a).

<sup>85</sup> *Id.* Part II, §5.

<sup>86</sup> Laskin, *The Canadian Bill of Rights: A Dilemma for the Courts*, 2 INT'L & COMP. L.Q. 519 (1962).

<sup>87</sup> Bowles, *Our Courts and Our Parliament View The Canadian Bill of Rights*, 1 MAN. L.S.J. 55 (1962-1965).

the Bill of Rights, itself, specifies that Parliament may expressly declare that a statute "shall operate notwithstanding the Canadian Bill of Rights."<sup>88</sup> The Supreme Court of Canada has been reluctant to employ the Bill of Rights to challenge the scope of parliamentary supremacy, even when enumerated, fundamental rights are at stake.<sup>89</sup> With rare exception, the Supreme Court of Canada has shown great timidity when reviewing Acts of Parliament and determining whether they conform to the protections guaranteed in the Bill of Rights.<sup>90</sup> This has prompted one scholar to claim that the Court simply is not making the assessments that Parliament expected of it when it enacted the Bill of Rights.<sup>91</sup>

In light of the reluctance the Supreme Court has shown in fulfilling its specified obligation to review federal legislation, it is hardly surprising that the Court has not expanded the impact of the Bill of Rights to include review of police practices and provincial legislation. One case in particular, *Hogan v. The Queen*,<sup>92</sup> demonstrates the Bill of Rights' negligible role in the area of police conduct. Hogan was arrested for drunken driving<sup>93</sup> and taken to a police station for a breathalyzer test. Before the test was administered Hogan's companion called his lawyer who promptly arrived at the police station. Hogan requested an opportunity to consult with the lawyer whom he knew was at the station. The police conducting the test refused permission, telling Hogan that he did not have the right to see anyone before the test. They further advised Hogan that if he refused to take the test he would face an additional criminal charge based upon his refusal to comply.<sup>94</sup> Hogan then complied with the police directive without consulting with his attorney.

At trial, Hogan's counsel argued that the breathalyzer test results were inadmissible because they were obtained in violation of the right to counsel guaranteed by the Canadian Bill of Rights. Section 2(c)(iii) of the Bill provides that "no law shall be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay." The Supreme Court of Canada did not dispute that the results of the breathalyzer test, the evidence upon which the conviction rested, were illegally obtained in violation of a right enumerated in the Bill of Rights. Nevertheless the Court affirmed the conviction without exclusion of the evidence. The Court reached this result even while acknowledging that its earlier landmark ruling in *Regina v. Drybones*<sup>95</sup> "accorded a degree of paramouncy to the provisions of [the

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<sup>88</sup> C.B.R. CAN. REV. STAT. App. III (1970).

<sup>89</sup> W. TARNOPOLSKY, *supra* note 11, at 67 (1966).

<sup>90</sup> *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651; *Canada v. Lavell*, 38 D.L.R. 3d 481 (1973); cf. *Regina v. Drybones*, 9 D.L.R. 3d 473 (1970).

<sup>91</sup> Tarnopolsky, *supra* note 81.

<sup>92</sup> 48 D.L.R. 3d 427 (1974).

<sup>93</sup> REV. STAT. CAN. c.34, s.236 (1970).

<sup>94</sup> 48 D.L.R. 3d at 430 (1974).

<sup>95</sup> 9 D.L.R. 3d 473 (1970).

Bill of Rights]. . . ."<sup>96</sup> Then by way of dismissing that paramountcy Justice Ritchie, for the majority said:

[W]hatever view may be taken of the constitutional impact of the Canadian Bill of Rights, . . . I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of 'absolute exclusion' on the American model which is in derogation of the common law rule long accepted in this country.<sup>97</sup>

Rather than according supremacy to the explicit provisions of the Bill of Rights, the Canadian Supreme Court in *Hogan* relegated them to the status of excess baggage by granting those sections less impact than a common law rule of evidence.

One commentator disagreed with the preeminence accorded to the common law rule of evidence: "[I] cannot see how, even if the Canadian Bill of Rights were deemed to be a mere statutory enactment, a Canadian court could possibly conclude that a common law rule cannot be overruled by a statutory enactment, and a subsequent one at that."<sup>98</sup> The Court's reluctance to review the police officer's conduct in the *Hogan* case in light of the Bill of Rights creates what has been described by Professor Walter Tarnopolsky as an anomalous result when attempting to reconcile that decision with the Court's earlier pronouncement in *Drybones*. If Parliament were to enact a provision in the Criminal Code denying a suspect's right to consult with counsel before taking a breathalyzer test, that provision would be inoperative according to *Drybones* because it is inconsistent with the Bill of Rights. But when that fundamental right is violated by a police officer acting on his own initiative without legislative authorization, the decision in *Hogan* dictates that the Canadian Bill of Rights be ignored.<sup>99</sup>

Justice Laskin, now Chief Justice, criticized the Court's readiness to give greater importance to a common law rule of evidence than to a provision of the Bill of Rights. In his dissent he discussed the constitutional issues involved. He concluded that judicial development of an exclusionary rule is the only means of protecting constitutional rights. His reasoning might serve as the basis for future arguments by U.S. as well as Canadian proponents of the rule because it deals with the intrinsic worth of such a rule despite its shortcomings.

The American exclusionary rule, in enforcement of constitutional guarantees, is as much a judicial creation as was the common law of admissibility. It is not dictated by the Constitution, but its rationale appears to be that the constitutional guarantees cannot be adequately served if their vindication is left to civil actions in tort or criminal prose-

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<sup>96</sup> 48 D.L.R. 3d at 434 (1974).

<sup>97</sup> *Id.*

<sup>98</sup> Tarnopolsky, *The Supreme Court and Civil Liberties*, 14 ALBERTA L. REV. 58, 87-88 (1976).

<sup>99</sup> *Id.* at 89.

cutions, and that a check rein on illegal police activity which invades constitutional rights can best be held by excluding evidence obtained through such invasions. Whether this has resulted or can result in securing or improving respect for constitutional guarantees is not an easy question to answer. . . .

It may be said that the exclusion of relevant evidence is no way to control illegal police practices and that such exclusion merely allows a wrongdoer to escape conviction. Yet where constitutional guarantees are concerned, the more pertinent consideration is whether those guarantees, as fundamentals of the particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means; it would equally challenge the present law as to confessions and other out-of-Court statements by an accused. In the United States, its Supreme Court, after weighing over many years whether other methods than exclusion of evidence should be invoked to deter illegal searches and seizures in state as well as in federal prosecutions, concluded that the constitutional guarantees could best be upheld by a rule of exclusion.<sup>100</sup>

Finally, Justice Laskin discussed the role that the courts must play in enforcing the Bill of Rights, accorded quasi-constitutional status by *Drybones*. Since the Canadian Bill, like the American Bill of Rights, does not embody any sanctions for the enforcement of its terms, Justice Laskin propounded that it must be the function of the courts to determine what impact the Canadian Bill of Rights is to have.<sup>101</sup>

The Canadian Bill of Rights is only two decades old. Just as the broad, expansive view as advanced in *Drybones* in 1970 has been eroded, *Hogan* too, is unlikely to be the last word on the status of the Bill of Rights. There is opposition, even among civil libertarians, however, to turning the Canadian Bill of Rights into entrenched legislation with an activist Supreme Court imposing it as a constitutional document. Professor Douglas Schmeiser has written, "[i]t is also not unfair to point out that the English tradition, where people look to Parliament as the champion of liberty, has in fact led to a far freer society than the American tradition which looks to the courts for protection."<sup>102</sup> Instead, Professor Schmeiser looks to other institutions for the protection of individual rights, including human rights commissions, ombudsmen, and law reform commissions. He points to the American experience where he claims that the United States Supreme Court, in applying the Constitution, blocked needed social reform.<sup>103</sup>

<sup>100</sup> 48 D.L.R. 3d at 442-43.

<sup>101</sup> *Id.* at 443.

<sup>102</sup> Schmeiser, *Entrenchment of a Bill of Rights: Disadvantages of an Entrenched Canadian Bill of Rights*, 33 SASK. L. REV. 247, 251 (1968).

<sup>103</sup> It would be fairer to say that, on the whole, Americans have been able to look to the Supreme Court as well as to the Congress as champions of liberty. In general, the American

### B. *A Rule of Admissibility*

The rule in *Hogan* demonstrates an unwillingness to fashion a constitutional basis for the exclusion of evidence. At the same time common law rules have been developed by the Canadian Supreme Court which result in the almost total inclusion of reliable evidence without any consideration given in a criminal trial for the manner in which the evidence was secured. Consequently, Canadian law on the subject of search and seizure has not experienced the explosive development that the law has undergone in the United States. In fact, the Canadian law on search and seizure resembles the nineteenth century English common law prevailing when Canada became an independent nation, more closely than it does current English law.

The principal differences between Canadian and U.S. law dealing with privacy is that Canadian law permits the use in a criminal trial of evidence acquired through unreasonable searches and seizures. The principal difference between Canadian law on the subject and its English counterpart is that Canadian judges are granted virtually no discretion and must permit the prosecution to use such evidence notwithstanding how it came into the government's possession, while English judges are granted the discretion, even if only in exceptional cases, to exclude evidence resulting from aggravated illegal searches and seizures.<sup>104</sup>

The Canadian rule was set forth in a 1970 Supreme Court decision, *Queen v. Wray*,<sup>105</sup> which determined whether a murder weapon which the police were led to through an involuntary confession was admissible in evidence at the accused's trial. The majority pointed out that the involuntary confession was inadmissible because such evidence is not reliable, but held that all other evidence which is reliable and relevant is admissible regardless of how the prosecuting authorities acquired it. The Court purportedly did not strip trial judges of all discretion to suppress evidence. It held that if the challenged evidence operates unfairly against an accused, it may be excluded by the trial judge. According to the Court's definition, illegally seized evidence which operates unfairly against an accused is limited to evidence "the admissibility of which is tenuous, and

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experience does not support Professor Schmeiser's contention. It is certainly true that at times the Supreme Court has blocked social reform, but in those instances it has delayed and not caused a permanent deferral. Freedom has been most jeopardized in the United States during periods when the Supreme Court failed to utilize the Constitution as a buffer between individual rights and freedoms and the actions of other branches of the federal government and the state governments often prompted by the over-zealousness of the majority. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968); *Korematsu v. United States*, 323 U.S. 214 (1944); *Schenck v. United States*, 249 U.S. 47 (1919). In balance, an activist Supreme Court enforcing the Constitution has served American society well, and has been an almost constant source for the strengthening of individual freedoms and protection from official oppression.

<sup>104</sup> *Jeffrey v. Black*, [1978] 1 A11 ER 555.

<sup>105</sup> 11 D.L.R. 3d 673 (1970).

whose probative force in relation to the main issue before the Court is trifling."<sup>106</sup> By defining so restrictively what sort of evidence may be excluded, the Court diminished the opportunity for a trial judge to exercise meaningful discretion. A vigorous dissent, relying upon the same English cases cited in Justice Martland's majority opinion, asserted that the rule in *Wray* represented a departure from the English approach.<sup>107</sup> Although he was not on the Canadian Supreme Court at the time of *Wray*, a statement in Chief Justice Laskin's later dissent in *Hogan* stands as a commentary upon the policies underlying the *Wray* majority's handling of a trial judge's discretion to exclude illegally obtained evidence:

The choice of policy here is to favour the social interest in the repression of crime despite the unlawful invasion of individual interests and despite the fact that the invasion is by public officers charged with law enforcement. Short of legislative direction, it might have been expected that the common law would seek to balance the competing interests by weighing the social interest in the particular case against the gravity or character of the invasion, leaving it to the discretion of the trial Judge whether the balance should be struck in favour of reception or exclusion of particular evidence.<sup>108</sup>

The effect of a general rule of admissibility is to remove from the context of a criminal case any inquiry into the manner in which the prosecuting authorities obtained the evidence to be used in attempting to convict an accused and possibly deprive him of his liberty. The underlying justification for this approach is premised upon the belief that a criminal trial is not the proper forum in which to evaluate the conduct of the police in bringing the accused to court.<sup>109</sup> The propriety of police methods is simply considered irrelevant when considering the accused's guilt or innocence. The virtual elimination of a trial judge's discretion to consider the propriety of police and prosecutor conduct signifies a total commitment to the guilt-determining function of a criminal trial. This approach is characteristic of a criminal justice system that emphasizes order and crime control.

### C. *Writs of Assistance*

The continued existence in Canada of Writs of Assistance is further evidence of that society's deemphasis of due process in favor of crime control. No other feature of Canadian criminal justice is likely to have as great an impact upon an American observer than the continued vitality of the Writs. They were a factor in the American Revolution, and the

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<sup>106</sup> *Id.* at 689-90.

<sup>107</sup> *Id.* at 681.

<sup>108</sup> 48 D.L.R. 3d, at 442.

<sup>109</sup> McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J. CRIM. L.C. & P.S. 266 (1961).

The enormity of the power conferred by the Writs of Assistance must be read in the context of a system that does not exclude from criminal trials the fruits of illegal searches and seizures. While the absence of an exclusionary rule does not confer additional powers on the holder of this extraordinary Writ, it does virtually assure the officer who conducts a search under authority of a Writ that his exercise of discretion to make the search will never be reviewed. For example, the Customs and Excise Acts authorize searches of "any building or other place"<sup>121</sup> and the Narcotic Control and Food and Drug Acts authorize searches of "any dwelling house."<sup>122</sup> To gain entry or when once in the house, to enter rooms, the Narcotic Control Act empowers the officer with a Writ of Assistance to "break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing."<sup>123</sup> Thus officers are empowered, without prior judicial authorization or subsequent judicial review, to dismantle a house on their own decision.

As a result, the holder of the Writ is vested with virtual plenary power to decide on his own whether there is reasonable cause to warrant a search and then to conduct that search with almost equal assurance that there will be no subsequent judicial review of either the conclusion that reasonable cause existed or the manner in which the search was conducted. The Writs have been used most extensively to search for marijuana and other drugs. This use has raised considerable controversy stemming from allegations of excessively zealous conduct.<sup>124</sup>

#### D. *The Right of Privacy Act—Exception to the Wray Case*

The Canadian Parliament carved out a narrow exception to the general rule formulated in *Wray* that all reliable evidence is admissible without concern for the methods used by the police. The Right of Privacy Act<sup>125</sup> pertains to electronic, mechanical and other devices used for eavesdropping. It reflects the legislature's view that at least this type of illegal intrusion into individual privacy is so heinous that the government may not use the fruits of that illegality, *i.e.*, the seized conversation, as evidence in a criminal case.

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*Assistance*, 19 CHITTY'S L. J. 90 (1971); Case Comment and Notes, *Writs of Assistance in Canada*, 9 ALBERTA L. REV. 386 (1971).

<sup>121</sup> CAN. REV. STAT. c.C-40, §139, c.E-12, §2 (1970).

<sup>122</sup> CAN. REV. STAT. c.N-1 §10(3), c.F-27 §37(3) (1970).

<sup>123</sup> CAN. REV. STAT. c.N-1, §10(4) (1970).

<sup>124</sup> This over-zealousness does not guarantee that the police activity will be successful even on basic crime prevention and detection levels. An example of this type of weak harvest despite a large scale police action is described in Ryval, *Five Shocking Cases*, QUEST 17 (April 1979). The article reports a raid, on May 11, 1974 by fifty police on the Landmark Motor Inn Hotel outside of Fort Erie, Ontario. Under the authority of Writs of Assistance police conducted searches of 115 individuals, including thirty-six vaginal searches. A grand total of six ounces of marijuana was found, and only seven individuals were charged with crimes. The charges ranged from possession of marijuana to drinking under age.

<sup>125</sup> CRIMINAL CODE, CAN. REV. STAT. c.C-34 §§178.1-178.23 (1976).



The Act requires prior judicial authorization for wiretaps and bans the use of illegally obtained interceptions in criminal prosecutions against the originator or intended receiver of the communication. However, the Right of Privacy Act not only creates an exclusionary rule, it also grants trial judges discretion to avoid the impact of the exclusionary rule. If the evidence is relevant to the issues at stake in the criminal trial, the judge has discretion to permit the use of that evidence, notwithstanding the illegality of the means, if the illegality arose by virtue of a defect in the application for judicial authorization or the procedures involved.<sup>126</sup> That type of discretion is understandable and may be reasonable, but the Act goes further. The exception also authorizes the trial judge to exercise his discretion to admit relevant evidence, other than the communication itself but derived from the initial communication, if excluding it *may result in justice not being done*.<sup>127</sup> In this context one must assume that the contemplated injustice would be the inability to convict a person guilty as charged without the derivative evidence.<sup>128</sup> In essence, then, the exclusionary rule provided under the Privacy Act is virtually limited to the illegally intercepted communication where the illegality stems from a substantive error or an act of bad faith rather than a defect in form. Derivative evidence is virtually always admissible if it is relevant to the case and critical to the prosecution.

#### E. *Canadian Remedies for Illegal Searches and Seizures*

Absent an exclusionary rule barring the use of the fruits of illegal police intrusions, Canada looks to other means to protect its fundamental right of privacy. Canadian law and custom provide alternative remedies: motion to quash, tort suit, criminal prosecution of offending officers, and internal police discipline.<sup>129</sup> None of these alternative remedies is unknown to the American experience.<sup>130</sup>

A motion to quash a search warrant is only available, of course, where the allegedly illegal search was based upon a defective warrant. As under U.S. law a defect in the warrant may be premised upon a number of things, such as: failure to identify the crime committed and for which the evidence is sought; failure to specify with particularity the items to be searched for or the location to be searched, or failure to present to the magistrate or justice of the peace the underlying circumstances which support the officer's belief and upon which the issuing judicial officer may

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<sup>126</sup> *Id.* § 178.16(2)(b) (1976).

<sup>127</sup> *Id.* § 178.16(2)(c) (1976).

<sup>128</sup> For a discussion that attempts to determine under what conditions §178.16(2)(c) could or should be used see, Delisle, *Evidentiary Implications of Bill C-176*, 16 CRIM. L.Q. 260 (1973-74).

<sup>129</sup> Gibson, *Illegally Obtained Evidence*, 31 U. TOR. FAC. L. REV. 23 (1973); Spiotto, *supra* note 20.

<sup>130</sup> See, *United States v. Nixon*, 418 U.S. 683 (1974).

form his own conclusion as to whether reasonable cause exists.<sup>131</sup> If the warrant is quashed, the proper remedy is an order returning the seized items. However, as the evidence may be used in a criminal prosecution irrespective of the manner in which it was seized, the court may order either that the items seized be held pending prosecution or that a new warrant be issued authorizing the seizure of the returned evidence.<sup>132</sup> Consequently, a motion to quash is more a check upon judicial officers who issue search warrants than upon the police. As a remedy, its therapeutic value may be limited to reminding the issuers of warrants of their responsibilities in the process. The illusory nature of the remedy is likely to discourage victims of searches predicated upon invalid warrants from using the motion because, even if the warrant is ruled defective and therefore invalid, the victory is meaningless. Few criminal defendants are interested in moral victories.

Citizens must resort principally to the traditional tort remedy when they are the victims of illegal searches and seizures. American critics of the exclusionary rule advocate variations of the common law tort remedy as replacement for the exclusionary rule.<sup>133</sup> Use of a civil suit as a principal means of enforcing fundamental rights makes society dependent upon the willingness of individuals whose rights have been violated to come forward and expend the effort and resources to vindicate those rights.<sup>134</sup> Moreover, that dependence rests upon a class of citizens, those who are most likely to be subjected to intrusions of this nature—the young, minorities, and street people, who are also the least likely to seek legal redress for these wrongs. Awards of damages are likely to be minimal and proof of the violation difficult or nearly impossible to produce.

An American commentator, James E. Spiotto, has written, "Canada's experience with the tort remedy suggests that viable alternatives to the

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<sup>131</sup> For a good, brief discussion of the warrant process see, R. SALHANY, *CANADIAN CRIMINAL PROCEDURE* (2d), 38-39 (1972).

<sup>132</sup> Even where warrants are required and utilized, judicial review of the warrant procedure on a Motion to Quash is hardly rigorous. While reviewing courts strictly require that the warrant specify the crime which is being or has been committed, the inquiry is not substantial as to anything else. Specificity, of the same order, is not demanded as to the items to be searched for. The officer's grounds which give rise to the reasonable cause do not seem to be presented in a manner which would enable a judge to arrive at an independent conclusion that reasonable grounds exist to authorize the issuance of the warrant. To someone used to American decisions which demand that the underlying circumstances which justify the affiant's belief that a warrant should be issued be set forth for the court, some Canadian decisions denying the Motion to Quash almost seem to be implicitly based upon the notion that because the contraband or other evidence was found, reasonable cause existed to issue the warrant. See also, *Re Den Hoy Gin*, 47 C.R. 89 (Ont. Ct. App. 1965).

<sup>133</sup> See, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

<sup>134</sup> Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 755 (1970); Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970).

exclusionary rule do exist."<sup>135</sup> Mr. Spiotto offered that conclusion despite his survey of Canadian law which turned up no appellate case involving a tort action against police officers for illegal searches and seizures in the Province of Ontario, only two appellate cases in the other Canadian provinces, and a statement from a police commissioner that he could not remember any illegal search and seizure tort suits since the 1950s. In fact, the only suit which the commissioner could remember from the 1950s resulted in a finding against the police officers but the award of damages was only one dollar.<sup>136</sup> Perhaps that damage award is the best explanation for the paucity of tort suits.

A more recent, although very modest, empirical inquiry into this subject casts continuing doubt upon the viability of the tort suit as an alternative remedy in Canada. That study, conducted by the Canadian Civil Liberties Union, involved interviews during a five year period with persons in Ontario claiming to have suffered from police abuse—not only invasions of personal privacy but more grievous claims as well.<sup>137</sup> An overwhelming majority of those persons interviewed indicated no intention to seek legal redress for these alleged violations. Most of them felt that it would do no good to complain or take legal action. While it has been claimed that Canadian juries become incensed at police abuse of citizens, apparently the alleged victims of these abuses are not as confident that the outrage will extend to their cases, or at least not confident enough to bring suit. Like their neighbors in the United States, victims of illegal searches and seizures in Canada simply do not look to the civil process for redress. Moreover, when the intrusion turns up contraband or other incriminating evidence, even if there was insufficient justification for the search, this group is hardly likely to appear as sympathetic plaintiffs.

The remaining Canadian alternatives to the exclusionary rule are also well known to the American legal community. Criminal prosecution of the offending officer is a possibility, but it is not utilized for invasions of individual privacy in Canada any more than in the United States. Canadian prosecutors are not even likely to be privy to the facts surrounding the manner in which evidence was secured because the issue will not surface. Police illegality is simply not relevant to the criminal case. The information is likely to come to the prosecutor's attention only in cases involving the grossest abuse. Even then the prosecutors merely tend to refer the matter to the police department for internal discipline.<sup>138</sup>

Internal control of police officers by departmental hierarchy may be more of a reality in Canada than in the United States. Patrol officers, at least in Toronto, appear to exercise less plenary authority than their

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<sup>135</sup> Spiotto, *supra* note 20, at 49.

<sup>136</sup> *Id.* at 45, n.46.

<sup>137</sup> Canadian Civil Liberties Ass'n (CCLA), Metropolitan Toronto Police Practices, (Jan. 14, 1976).

<sup>138</sup> *Id.*

American counterparts. There are more supervisory officers responding to calls and overseeing beat officers' responses to routine calls. Whether the same situation exists in other cities is a matter of conjecture. Individual officers of the Toronto Metropolitan Police Authority appeared to be very comfortable under the eye of supervisory officers. They respond to it in a very natural manner, as though it is the established and accepted way of policing in that city.

Toronto citizens who feel aggrieved about police behavior may file complaints directly with the department's complaint bureau. This office is located apart from any other police-related function and the members wear civilian clothes. Personnel in the Toronto complaint bureau evidenced a real understanding and commitment to their task. They seem acutely uncomfortable as they wonder whether they are police officers or police watchers. But even if this understanding and commitment is genuine, and it has been documented that this has not always been the case, the Complaint Bureau's ability to handle police misconduct is limited. Complaints frequently arise where only one officer and the complainant are present. The Complaint Bureau will not rule against the officer or make findings in that type of situation. Even where there are more officers present, one Royal Commission of Inquiry found that "[t]here is a tendency among policemen to cover up each other's errors and to keep silent concerning improper actions of brother officers."<sup>139</sup> Even in Toronto, where the Complaint Bureau is dedicated, the personnel seemed to feel that they were limited and that too often their hands were tied. The Royal Commission has found the complaint procedure to be totally lacking and recommended that the Bureau be taken out of the internal control of the police department and be assigned to an independent agency charged with investigation and review of police conduct. The Commission also recommended creation of an independent tribunal for the hearing of complaints.<sup>140</sup> While the recommendations have led to some changes in the manner of operation of the Complaint Bureau, such as its physical separation from the rest of the police department, the Complaint Bureau continues to function much as before; although, perhaps the commitment and sense of independence of the personnel in the Bureau may have resulted indirectly from the earlier criticism leveled against the Bureau.

Citizens do have an additional place to take their complaints about police behavior as well as other alleged wrongs or injustices committed by government officials. They can go to the provincial ombudsman.<sup>141</sup> Thus, the visibility of agencies for citizen complaints against police is markedly different from comparable operations in many American cities. Often in the United States, citizen complaints are swallowed in the police bureaucracy and the complainant frequently never hears anything further about

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<sup>139</sup> R. MORAND, *THE ROYAL COMMISSION INTO METROPOLITAN TORONTO POLICE PRACTICES* 137 (1976).

<sup>140</sup> *Id.* at 226, 267.

<sup>141</sup> Schmeiser, *supra* note 102, at 249.

the matter. However, like their American counterparts, Canadian police vigorously oppose civilian-controlled police review boards.

Despite the variety of alternative remedies, there is simply no way of knowing whether the remedies are any more effective in Canada than they were in the United States before the Court ruled in *Mapp v. Ohio*.<sup>142</sup> One critic, Chief Justice Laskin, again in his dissent in *Hogan*, expressed doubts: "They are said to have their sanction in separate criminal or civil proceedings, of which there is little evidence, either as to recourse or effectiveness; or, perhaps, in internal disciplinary proceedings against offending constables, a matter on which there is no reliable data in this country."<sup>143</sup>

#### IV. CRITICISM OF THE AMERICAN EXCLUSIONARY RULE

Whether Canada ever elects to adopt an exclusionary rule will depend upon many factors. Although none of the Canadian proposals for an exclusionary rule envisions or advocates acceptance of the broad rule now existing in the United States,<sup>144</sup> one factor in the consideration of narrower rules may be Canadian perception of how the American rule functions. The three arguments most often voiced in the United States against perpetuation of the exclusionary rule are that: (1) the cost to society is too great, (2) the exclusionary rule does not have the desired deterrent effect, and (3) the rule detracts from the ability of the police to provide effective law enforcement.<sup>145</sup>

There can be no doubt that the cost of the exclusionary rule to this society is substantial.<sup>146</sup> Guilty persons do go free both as a result of police blunders and intentional misconduct. There are benefits derived from the payment of such cost, however, which have largely remained unstated. On one level the exclusionary rule is a statement about the values and priorities of this society. The rule demonstrates that we take at least

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<sup>142</sup> 367 U.S. 643 (1961).

<sup>143</sup> 48 D.L.R. 3d 442 (1974).

<sup>144</sup> See, Can. B. Assn. Res. No. 2, (Aug. 1978), stating that if evidence is "obtained unlawfully, contrary to due process of law, or under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute" it should be excluded. Canadian Law Reform Commission, *The Exclusion of Illegally Obtained Evidence*, (1974), urged the reversal of *Wray* and to employ in its place an exclusionary rule based upon trial judges' discretion.

<sup>145</sup> Wilkey, *Why Suppress Valid Evidence?*, 13 PROSECUTOR 124 (1977); cf., Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5 (1979).

<sup>146</sup> In *Stone v. Powell*, 428 U.S. 465, 496 (1976), Chief Justice Burger, concurring, stated that

Over the years, the strains imposed by reality, in terms of the costs to society and the bizarre miscarriages of justice that have been experienced because of the exclusion of reliable evidence when the "constable blunders," have led the Court to vacillate as to the rationale for deliberate exclusion of truth from the factfinding process.

some of our constitutional guarantees so seriously and conscientiously that we are prepared to pay the price for noncompliance. It is always perplexing though, why the cost-benefit argument has not been translated into a demand for greater police compliance with the Fourth Amendment standards. Instead of focusing upon the police misconduct those offering the cost analysis focus on the loss of convictions.

Perhaps it can be argued that this society must abandon the exclusionary rule because crime is out-of-hand. Before making such a decision, however, its full ramifications must be understood. Would such a decision amount to a renunciation of the principles of the Fourth Amendment and along with it an abandonment of reasonableness as the benchmark for government intrusions? It is often forgotten that the exclusionary rule in no way sets the limits on police conduct; it merely enforces the limits that have been set under the Fourth Amendment's explicit standard of reasonableness. The standard of reasonableness has been subject to constant reinterpretation since the application of the exclusionary rule to the states in 1961. The process of reinterpretation began even during the tenure of Chief Justice Warren,<sup>147</sup> and has been continued with greater speed and relish by the present Court.<sup>148</sup> Perhaps, reinterpretation is simply a euphemism for watering down the standard of reasonableness and relaxing Fourth Amendment restrictions.<sup>149</sup> Notwithstanding these efforts, opposition to the exclusionary rule has grown.<sup>150</sup> The remedy, the exclusionary rule, may be for some a surrogate target. The true target may well be the constitutional standard of reasonableness; for if the remedy is abolished, the constitutional standard will no longer be effective or threatening.

A recent study conducted by the United States General Accounting Office,<sup>151</sup> the investigative arm of the United States Congress, questions the claim of countless lost convictions. Conducted at the request of Senator Edward Kennedy, whose Senate Judiciary Committee staff is considering legislative alternatives to the exclusionary rule, the study indicates that the cost may not be as great as has been assumed. Focusing only on

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<sup>147</sup> *Camara v. Municipal Court*, 387 U.S. 555 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967).

<sup>148</sup> *See* note 16, *supra*.

<sup>149</sup> *United States v. Peltier*, 422 U.S. 531, 544 (1975) (Brennan, J., dissenting). *See, e.g., California v. Minjares*, 100 S.Ct. 9, 11 (1979), where Justice Rehnquist made the surprising observation that "[t]he Court certainly could have held that discovery of the articles sought is compelling evidence that the search was justified. . . ."

<sup>150</sup> *See* note 16, *supra*.

<sup>151</sup> The findings of the G.A.O. report are summarized in 25 CR. L. RPT. 2185 (May 1979). The G.A.O. study is also analyzed in *NEWSWEEK*, June 4, 1979, at 86. Professor Kamisar is quoted in the article as stating, "It's nice to have a government study which shows that the cost of protecting these rights is so low." The article mentions a Law Enforcement Assistance Administration study of police departments in Los Angeles, Washington, D.C., New Orleans, Salt Lake County, Utah, and Cobb County, Georgia, which arrives at conclusions similar to the G.A.O. report.

cases in federal courts, the study found that evidence was excluded in only 1.3 percent of the cases. In those few cases, however, where a motion to suppress was granted and the evidence was excluded, convictions were obtained in less than half of the cases. Thus, it is clear that exclusion is still costly. Equally significant, however, is that evidence is excluded in surprisingly few cases.

The relatively small impact of the exclusionary rule upon litigated cases raises the possibility that a great number of cases involving bad searches are being screened out by United States Attorneys who are refusing to prosecute in those cases. The G.A.O. anticipated that inquiry and examined the impact of bad searches upon screening. Again, the exclusionary rule had surprisingly little impact. The G.A.O. reported that search and seizure problems are indicated as the primary reason for declination in only about 0.4 percent of the total of declined cases.

Notwithstanding the singular nature of these findings, the cost issue should not be summarily dismissed. Its impact is probably greater in state courts where the bulk of prosecutions arising out of on-the-street encounters and car searches takes place. However, the G.A.O. study does indicate that at least at one level of government, the costs of the exclusionary rule are surprisingly low.<sup>152</sup>

The second argument is that the exclusionary rule has not served as an effective deterrent to illegal behavior and therefore should not be retained.<sup>153</sup> This theory is premised upon the belief that the purpose of the exclusionary rule was to deter illegal police behavior, and that since it has not done that, there is no valid reason to persist in a costly futile gesture. Although language in Supreme Court opinions justifying cutbacks in the scope of the exclusionary rule supports this premise, it is clearly erroneous. The exclusionary rule was never originally justified on the basis that it would deter illegal police behavior; the notion of the rule as a deterrent

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<sup>152</sup> For a study that reflects changes in police behavior from the mid 1960's to the 1970's see, Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57 (1977). Other studies criticizing the exclusionary rule are found in Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Ban, *The Impact of Mapp v. Ohio on Police Behavior* (paper delivered at Midwest Political Science Association, May, 1973). These studies are discussed in Schlesinger, *supra* note 24; Canon, *The Exclusionary Rule: Have Critics Proven That it Doesn't Deter Police?*, 62 JUDICATURE 398 (1979).

<sup>153</sup> For a recent dialogue between influential advocates of each side of the exclusionary rule debate see, Kamisar, *Is the Exclusionary Rule an 'Illegal' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 214 (1978); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 66 (1978); Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than 'An Empty Blessing'*, 62 JUDICATURE 337 (1979); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979).

appears first in *Wolf* and most prominently in *Mapp*.<sup>154</sup> But equally important to deterrence even in *Mapp* was the rationale that the exclusionary rule promotes individual liberty and the importance of the individual by elevating principle above police expediency. Furthermore, the Court emphasized that the exclusionary rule promotes judicial integrity: that a judiciary which permits evidence to be used without inquiry concerning constitutional violations which resulted in the uncovering of that evidence, debases the courts as defenders of the Constitution and makes the judiciary a party to the official illegality.<sup>155</sup>

Granting that deterrence is now one justification for retention of the exclusionary rule, the deterrent expectation has never been honestly addressed. A rule of evidence cannot, by itself, assure compliance with the principles it serves to enforce. The exclusionary rule is not self-operative. It can only work in those instances where the police intrusion is primarily for the purpose of obtaining evidence. If the intrusion is for other purposes, such as harassment or to simply let a subject know that he is being watched by the police, evidentiary consequences of the intrusions are not likely to figure in the police officer's determination to search.<sup>156</sup>

When considering the cost of the rule to the society, the exclusionary rule has been deemed a failure as a deterrent without ever having received support other than from the judiciary. There has rarely been the continuous and intensive training in the law of search and seizure that police officers need to understand this aspect of their responsibilities. The law concerning arrests, searches and seizures is not simple. In fact, some aspects of it may be overly and unnecessarily complicated.<sup>157</sup> The development of proper judgment in police officers concerning the legality of their intrusions is one of the most critical aspects of the job. Developing and reinforcing proper judgment in this area should be one of the primary goals of police training. While it has been conscientiously pursued in some cities, by and large the matter is treated by several hours of lecture in basic police training courses as to what the law requires and is left at that. An even greater failure of leadership pertains to the inability or unwillingness of the law enforcement hierarchy to communicate to field officers an expectation that subordinates will abide by the legal limitations when initiating and conducting a search. If the exclusionary rule has been costly, it is at least partly because the consequences suffered by police officers who violate Fourth Amendment standards have not been severe. Evidence is excluded because police officers act unreasonably. It is not overly demanding on the part of society to require that police depart-

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<sup>154</sup> Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518.

<sup>155</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961); see, *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>156</sup> W. LAFAYE, *SEARCH AND SEIZURE* (1978).

<sup>157</sup> Cf. *Brinegar v. United States*, 338 U.S. 160, 175 (1949), where the Court stated that probable cause is based upon "probabilities . . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."



ments ensure that their line officers act in a reasonable fashion. Throughout the history of the exclusionary rule, that message has not gotten through to police, in large part, because it has never been conveyed. The courts and the exclusionary rule have proven to be convenient targets for police and prosecutors on which to pin the blame for cases lost when evidence is suppressed. The critics do not attach the responsibility to the officer who acted unreasonably or the police department that failed to train and lead.<sup>158</sup> The media has failed to link the lost cases to police illegality and the true targets have not been forced to respond to criticism. The message that has emerged is that a certain degree of police illegality is acceptable to the police hierarchy and the political leadership. For the exclusionary rule to work, it must be reinforced within each police department at the command of a society that demands that its law enforcement officers obey the law while enforcing it. Overlooked in determining the costs of the exclusionary rule has been the cost of not enforcing it: the ever-increasing toll of lawlessness among police who become used to disregarding judicial authority. Police illegality is a cost that no democratic society should be willing or forced to absorb.

The argument that the exclusionary rule fails to deter illegal police behavior might be more palatable if it were coupled with a demand for its revamping rather than its abolition.<sup>159</sup> Clearly, the deterrent ability of the rule is dependent upon the erring police officer's knowledge that he or she

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<sup>158</sup> N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL*, 100-101 (1969).

<sup>159</sup> *Cf.* *Stone v. Powell*, 428 U.S. 465 (1976), where Justice White suggested that the exclusionary rule should be revamped "so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief." *See also*, Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1 (1975). Under the ALI proposal, the court must use a two tier approach to determine if grounds exist for excluding evidence. Initially, the court must determine whether the violation is substantial by comparing it to a list of factors. If any one is found, the violation will be classified as substantial and require mandatory exclusion. If none of the factors requiring mandatory exclusion are found, the court must then determine if the violation was nonetheless substantial by considering "all of the circumstances." Among the items which must be considered are:

- (a) the extent of the deviation from lawful conduct;
- (b) the extent to which the violation was willful;
- (c) the extent to which the violation was likely to have led the defendant to misunderstand his position or his legal rights;
- (d) the extent to which exclusion will tend to prevent violations of the ALI code;
- (e) whether there is a generally effective system of administrative or other sanctions which makes it less important that exclusion be used to deter such a violation;
- (f) the extent to which the violation is likely to have influenced the defendant's decision to make the statement;
- (g) the extent to which the violation prejudiced the defendant's ability to support his motion, or to defend himself in the proceedings in which the statement is sought to be offered in evidence against him. *Id.* at 5, n.10.

is violating the law. Restricting the rule to bad faith violations of Fourth Amendment strictures, viewed from an objective standard, offers more substance to the drive for change. Under such an approach evidence would not be suppressed if it is the fruit of a blunder, albeit in good faith, by an officer who has received sufficient training on this subject. Even here, though, there are legitimate arguments to counter such a proposal. Whether the officer acts in good or bad faith, the citizen's Fourth Amendment rights have been violated. To permit the fruits of good faith violations to be used in criminal trials would, nonetheless, weaken the constitutional guarantee.<sup>160</sup> Moreover, the problems of looking into the police officer's mind to ascertain good or bad faith are overwhelming. Still another problem relates to the willingness of the judiciary to enforce Fourth Amendment rules. Trial courts have not infrequently been extremely hostile to the Fourth Amendment principles that they are sworn to uphold.<sup>161</sup> The good faith-bad faith dichotomy would allow such trial judges to weigh the balance unfairly in favor of the police officer, putting a premium on real or feigned ignorance and virtually eliminating the Fourth Amendment limitations. In order to ensure the application of a real objective good faith-bad faith standard, there would have to be effective channels for review of these decisions. Perhaps the most effective check upon trial court abuse of constitutional rights has been through federal habeas corpus, where the federal court makes an independent determination of the alleged constitutional violation. Unfortunately, the Burger Court in its zeal to cut back on the scope of habeas corpus review of state convictions, has virtually eliminated review of Fourth Amendment issues from the purview of habeas relief.<sup>162</sup> That action casts a pall upon even the limited desirability of the good faith-bad faith approach.

The final argument against the exclusionary rule is that it hampers effective law enforcement. The silent corollary to this criticism is that removal of the exclusionary rule will take the handcuffs off the police and

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<sup>160</sup> Essentially, the problem with using a good faith-bad faith analysis is that it substitutes the police officer's judgment for the constitutional rule. There would be considerable difficulty in actually determining the officer's state of mind at the time of his actions. Some officers, motivated by what to them is the overriding desire to arrest a criminal, might often later assert facts that would demonstrate their good faith in order to preserve the arrest even if they were not aware of those facts at the time of the arrest. Because of this there should be a hesitancy to rely on an officer's description of his state of mind in order to determine the constitutionality of his conduct. The approach that should be taken here is analogous to the manner in which probable cause is viewed. There, it is the court's view of the facts from an objective perspective, rather than reliance upon the officer's statement, that should be determinative. For an advocacy of the exclusion of all unconstitutional fruits of police conduct "however 'mild,' 'technical,' or 'inadvertant'" see, Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5, 34-35 (1979).

<sup>161</sup> Justice Harlan wrote in his dissenting opinion in *Desist v. United States*, 394 U.S. 244, 262-63 (1969): "Under the prevailing notion, . . . the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."

<sup>162</sup> *Stone v. Powell*, 428 U.S. 465 (1976).

enable law enforcement agencies to control crime. Again, the real nature of that criticism is not directed against the exclusionary rule, the remedy, but the rules it is intended to enforce, the limitations contained in the Fourth Amendment's prohibition against unreasonable searches and seizures. This criticism assumes that the redefinition of the parameters of reasonableness resulting in greater latitude for law enforcement officers is not sufficient. This argument demands that a free hand be offered to the police; and this demand needs no chamber of horrors to evoke fear. Official excesses of authority are too recent in the American past for the country to bestow this authority upon the police, essentially a paramilitary organization whose responsiveness to civil authority varies from one community to another.

There is, of course, logical inconsistency between the two arguments—that the exclusionary rule should be abandoned because it has not been an effective deterrent of illegal police behavior, and that it should be abandoned because it hampers effective law enforcement. Either the rule has hampered law enforcement and is somewhat effective as a deterrent of illegal police behavior or it has not served as an effective deterrent and thus does not diminish police efforts. The arguments cannot stand together.

## V. CONCLUSION

Neither Canada nor the United States is likely to adopt the other's solution to illegally seized evidence, but there exists a movement for change in both countries. Dissatisfaction with the approach taken to this problem is stronger in the United States. Yet it would not be surprising if by the end of the 1980s both countries were to amend their laws and adopt limited exclusionary rules, thus moving closer to each other.

Outright abandonment of the exclusionary rule in the United States would render the Fourth Amendment right to privacy meaningless because it would be totally unprotected. Existing and proposed alternative remedies lack the force and clout of the exclusionary rule. It is also unrealistic to imagine abolition resulting in a new-found ability to control and prevent crime. Any change predicated upon such a claim would be as ill-conceived as the notion, offered in the 1970s, that preventive detention would have a significant effect upon the crime rate.

There is no reason to anticipate that abolition or other significant changes in the exclusionary rule would have as little impact upon this society as a history of no exclusionary rule has had upon Canada. Despite similarities between the two countries, there remain vast differences. Canada does not have a heritage of suspicion of authority, police abuse of power, and tension between the police and minorities, young people, and other groups. While all of that appears to be changing in Canada and those suspicions and tensions may be developing, they already exist in the United States. Indiscriminate searches of individuals and automobiles by

police increase tension. If abolition or curtailment of the exclusionary rule were envisaged as granting greater authority to the police, those tensions would be exacerbated, and street encounters could become more violent. Currently, the exclusionary rule provides a means to test the legitimacy of individual intrusions. More importantly, it provides the only forum in which standards and parameters have been drafted for this type of police behavior. No other forum would be as likely to make this society as conscious of individual rights, could as effectively formulate those rights, or could define the relationship between citizens and the police as well as the suppression hearing. In the long run, that is likely to be credited as the greatest contribution of the exclusionary rule.

There is no corresponding awareness of individual rights in Canada. There has been, at least until fairly recently, a general insensitivity to police misconduct in conducting searches. Absent an exclusionary rule, judges in criminal cases are uninterested in how the police discover evidence. Thus, the issue of where police powers end and individual rights take precedence is not high in the consciousness of the legal community. Neither is it so in the press, nor among the general public. The existing Canadian alternatives to the exclusionary rule have not had the effect of making the police and public more sensitive to individual rights. Instead, the existence of illusory remedies has contributed to the sanguinity about privacy and the lack of controls that exist on the police.

The absence of citizen concern about their rights and the lack of an effective remedy tend to embolden law enforcement officers. I talked with no police officer in Canada who was the least bit concerned about civil suits or internal discipline arising out of search and seizure incidents. Even absent the pressure of citizens demanding their rights in confrontations with police, there is evidence that Canadian police are beginning to develop the self-image that seems to prevail among their American counterparts: that they represent the embattled thin barrier between anarchy and civilization.<sup>163</sup> As that attitude grows, a countervailing call for greater, more effective controls upon the police may develop across Canada.

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<sup>163</sup> MACLEANS (Oct. 2, 1976); 66 CANADIAN POLICE CHIEF, (No. 1) Jan. 1977 at 7.