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UNITED STATES V. JANIS: DEMISE OF THE EXCLUSIONARY RULE AND REINSTATEMENT OF THE "SILVER PLATTER" DOCTRINE IN FEDERAL CIVIL TAX CASES

by

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THIS paper addresses a relatively narrow area of the law which has developed from the broad field of litigation surrounding the fourth amendment[1] to the United States Constitution. The setting is a federal civil tax trial, where the federal government sought to utilize evidence obtained in violation of the fourth amendment by state authorities acting in their official capacities, as a basis for the civil assessment of taxes.

In November 1968 the Los Angeles police obtained a warrant for the search of two apartments and the persons of Morris A. Levine and respondent Max Janis. The aim of the search was to find and seize bookmaking paraphernalia; based upon police officer Weissman's affidavit, the warrant was issued by a municipal court. The search produced the sought-after records and $4,940 in cash. Soon thereafter, Weissman contacted an IRS agent, who analyzed the wagering records, determined the amount of respondent's gambling activity for the five days preceding the search, and made an assessment jointly against respondent and Levine for wagering taxes.[2] The cash seized was levied upon in partial satisfaction of the deficiency.

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[1]The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

[2]The wagering tax provisions are found in 26 U.S.C. § 4401. The assessment of $89,026.09 was arrived at by computing the average daily gross proceeds during the five-day period represented by the seized evidence then multiplying the resulting figure by 77, the number of days respondent was under police surveillance.

Respondent and Levine were charged in municipal court with violation of the local gambling law. Ironically, the suppression hearing was held before the same judge who issued the warrant, and the motion to suppress was granted under *Spinelli v. United States.*[3] Consequently, the judge ordered the return of all items seized, except for the cash previously levied upon by the IRS.

In June 1969 respondent filed a claim for refund of the $4,940. The claim was denied, and in December 1970 respondent Janis filed suit for that amount in district court. The government answered and counterclaimed for the balance of the assessment.

Prior to trial, both parties stipulated that the sole basis of the assessment was the items seized pursuant to the warrant and the information given to the IRS agent by Weissman. Janis moved to suppress the evidence seized, along with copies of such evidence retained by the IRS. The district court granted the motion and ordered that the assessment be quashed.[4] In an unpublished memorandum without opinion, the Ninth Circuit affirmed the lower court's decision.

The Supreme Court first dealt with the issue of burden of proof in the two separate elements of the litigation — the refund suit by Janis and the collection suit of the United States by counterclaim. In a refund suit, the taxpayer has the burden of proof as to the amount of the recovery,[5] and he must overcome the presumption of correctness that attaches to the assessment.[6] The Court concluded that the burden of proof would rest with the taxpayer.[7]

The Court, using the deterrence argument, held that the exclusionary rule does not apply in a civil tax proceeding where an officer committed a "good faith" violation of the fourth amendment.

Since the crime of tax evasion is not an observable offense,[8] very few tax cases involve search and seizure questions. The proof of the crime is rarely made by direct evidence, but by circumstantial proof of

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[3] The case of Spinelli v. United States, 393 U.S. 410 (1969), which was decided shortly after the search warrant in the instant case was executed, requires that an affidavit in support of the warrant must set forth, in sufficient detail, the underlying circumstances to afford the magistrate an independent determination of the informant's reliability.

[4] The Court held that the warrant failed the tests of *Spinelli* and Aguilar v. Texas, 378 U.S. 108 (1964). The district court held that Janis was entitled to the refund with interest, "for the reason that substantially all, if not all, of the evidence utilized by the defendants herein in making their assessment...was illegally obtained, and, as such, the assessment was invalid." 73-1 USTC ¶ 16,083 at 81,392 (1973).

[5] *See generally* 10 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION, § 58A.35 (1976).

[6] Welch v. Helvering, 290 U.S. 111, 115 (1933).

[7] 428 U.S. at 441. The Court assumed that if the evidence seized could not be used as a basis for the assessment, then the district court was correct in granting judgment for Janis. In note 11 of the opinion, the Court saw no difference between use of evidence in formulating the assessment, and its use in the case-in-chief.

[8] Avakian, *Searches and Seizures*, 1959 N.Y.U. INST. FED. TAX. 531, 541.

the elements.[9] It would be highly improbable for a federal or state officer to illegally break into a person's home and find evidence of willfulness to evade federal tax law, unless in the rare instance a double set of books is found. As a result, the incentive for police to make an illegal entry for purposes of obtaining proof of tax evasion usually is not present.[10] This rationale, however, will not necessarily prevent fourth amendment abuses from arising where state or federal officers are investigating the commission of another type of crime, such as gambling, and conduct a search which uncovers gambling objects. The authorities have evidence of possible criminal violations involving more than one jurisdiction, ranging from state law violations to federal tax evasion. The latter crime may involve federal civil tax fraud,[11] the penalty for which is designed to collect revenue and reimburse the federal government for the high expense of investigations, as well as for the losses occasioned by acts of fraud.[12]

At issue is an evidentiary crossover from state criminal proceedings to a federal civil tax fraud case, and many will argue or presume that *United States v. Janis*[13] has settled, once and for all, the issue of whether or not evidence illegally seized by state authorities can be used in a federal civil trial. This paper examines the background of the fourth amendment and attempts to fill gaps occasioned by *Janis*. The discussion necessarily includes the exclusionary rule itself and its future.

I. Overview Of The Fourth Amendment

Courts are confronted daily with balancing the power of the government to invade the privacy of one's home in order to gain evidence of wrongdoing with the constitutional right of citizens to be secure in their "persons, houses, papers, and effects."[14] If society is

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[9] Spies v. United States, 317 U.S. 492, 499 (1943); Smith v. United States, F.2d 168 (6th Cir. 1956), *cert. denied*, 353 U.S. 983 (1957). *See also* I.R.C. § 7201 for the elements required to be proven in order to convict a person for income tax evasion.

[10] Avakian, *supra* note 8, at 541. *See* Andresen v. Maryland, 427 U.S. 463 (1976), which indicates that the fifth amendment self-incrimination argument can no longer be made by one whose books and records are legally seized pursuant to a search warrant. This case may indicate more frequent uses of search warrants by the Commissioner, where the use of the IRS summons found in I.R.C. § 7602 would be impractical, such as when recommendation for prosecution has already been made. *See generally* Donald v. United States, 400 U.S. 517 (1971), for the test of when an IRS summons may not be used; and Lipton, *Search Warrant in the Tax Fraud Investigations*, 56 A.B.A.J. 941 (1970).

[11] I.R.C. § 6653 (b) provides in pertinent parts: "If any part of any underpayment ... of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment."

[12] Helvering v. Mitchell, 303 U.S. 391 (1938).

[13] 428 U.S. 433 (1976), *reh. denied*, 429 U.S. 874 (1976).

[14] U.S. Const. amend IV.

to safeguard the right to privacy, it should afford redress to the individual for acts in violation of this right.

Society has fostered a belief that the law enforcement process treats the law-abiding citizen equitably. This belief has caused the individual to forget that the conception of this attitude was the result of the presence of presumably fail-safe devices which prevent the erosion of constitutional rights. As a result, a citizen, sometimes even with the knowledge that he is the suspect,[15] may be willing to fully cooperate with authorities in allowing them to search his house.

Courts in criminal cases will exclude evidence obtained by an "unreasonable search or seizure." This conclusion is derived from the words of the fourth amendment itself and needs no addition by the courts. Conversely, one would gather that fruits of "reasonable" searches or seizures would be allowed into evidence. Thereby, the question of what constitutes "reasonableness" pervades every suppression hearing.[16] Since the fourth amendment does not address situations where evidence is obtained by other means, if there is no search or seizure, the question of reasonableness is never reached.[17] Noting that a jail shares no similarity, in terms of privacy, with a home, an automobile, an office, or a hotel room,[18] the Supreme Court in *Lanza v. New York*[19] rejected the argument that a public jail was the equivalent of a person's "house" and apparently limited the applicability of the fourth amendment to instances involving persons, houses, papers, and effects.

Since the issue of "reasonableness" has been considered extensively in the literature, this discussion presumes that a particular search or seizure either is or is not violative of the fourth amendment. This presumption is the foundation for the principal question of whether evidence seized in violation of the fourth amendment should be admissible in a federal civil tax trial. The term "illegal search and seizure" refers to a search or seizure that does not meet fourth amendment standards, not that it is merely in violation of state law.[20]

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[15] Avakian, *supra* note 8, at 531.

[16] In the federal courts, the procedure to be used by the defense is enunciated in FED. R. CRIM. P. § 41(e). For the procedure to be used prior to indictments, *see* DiBella v. United States, 369 U.S. 121 (1962).

[17] United States v. Dionisio, 410 U.S. 1, 15 (1973).

[18] *Id.* at 143. These latter locales had been held previously as constitutionally protected areas in the following cases: Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Goulded v. United States, 255 U.S. 298 (1921): (business locale); Amos v. United States, 255 U.S. 313 (1921); Davis v. United States, 328 U.S. 582 (1946) (store); Lustig v. United States, 338 U.S. 74 (1949); United States v. Jeffers, 342 U.S. 48 (1951) (hotel room).

[19] 370 U.S. 139, 144 (1962).

[20] United States v. Dudek, 530 F.2d 684 (6th Cir. 1976). There the court refused to suppress where failure to comply with a state rule for making prompt return of the search warrant and for verifying inventory related to an event which occurred after an

II. ORIGIN AND DEVELOPMENT OF THE EXCLUSIONARY RULE

Prior to 1914, the admissibility of evidence in civil or criminal trials was not affected even if such evidence had been procured in violation of the fourth amendment. In that year, the Supreme Court in *Weeks v. United States*[21] made the admissibility of evidence dependent upon the means by which the evidence was obtained. The exclusion of evidence obtained in violation of constitutional rights was not new; the Court as early as 1886, in *Boyd v. United States,*[22] had provided that evidence was inadmissible where a person was compelled to incriminate himself in violation of the fifth amendment.

In *Weeks*, the defendant was charged with use of the mails for lottery purposes. The state and federal authorities had searched his home twice without a warrant and had obtained incriminating letters and correspondence. Alleging a violation of his fourth and fifth amendment rights, the defendant petitioned for the return of all seized materials. The Court traced the history of the fourth amendment to the abominable general warrants in England and the writs of assistance in the American colonies, both of which were used by governmental authorities to search freely without judicial supervision.[23] The Court cited *Boyd* for the proposition that the essence of the offending procedure is not the physical act of breaking doors or disturbing effects, rather the violation results from a breach of a person's privacy.

The fourth amendment was looked upon not only as a grant of a right, but also as a restraint upon the exercise of governmental authority. To allow federal courts in criminal cases to admit evidence obtained by illegal police activity would be to sanction the illegality. The decision required that the correspondence seized by the federal authorities be returned to the petitioner and its use suppressed[24] as evidence at trial. The evidence illegally seized by state authorities, however, was not suppressed, as the Court held that the fourth amendment did not apply to state officials who were not acting as agents of the federal government.

The *Weeks* decision, therefore, punished the federal authorities by instituting the exclusionary rule in federal criminal trials. This holding set the stage for new legal guidelines. A good example of these guidelines is found in *Byars v. United States*[25] where a federal

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otherwise valid search was completed. *See also* United States v. Scolnick, 392 F.2d 320 (3rd Cir. 1968).

[21] 232 U.S. 383 (1914).

[22] 116 U.S. 616 (1886).

[23] Avakian, *supra* note 8, at 537.

[24] The Author uses the words "suppressed" and " excluded" interchangeably.

[25] 273 U.S. 28 (1927).

conviction was reversed on the grounds that the federal officer's level of participation in a state search was sufficient to qualify as a joint federal-state search.[26] The Court treated this kind of search as one which was conducted solely by federal agents. The issue for future cases was whether, from all the facts adduced at trial, it could be said that the federal agent participated sufficiently in the state search to transform it into a joint federal-state search, thus yielding grounds for suppression of evidence under *Weeks* and *Byars.*

Apart from this narrowly drawn issue, the *Byars* decision specifically recognized the right of the federal government to utilize evidence illegally and independently seized by state authorities.[27] This anomalous situation was aptly described by Mr. Justice Frankfurter in *Lustig v. United States:*[28] "[A] search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."[29] The *Weeks* and *Byars* decisions, therefore, permitted the practice which became known as the "silver platter" doctrine.

The major obstacle in applying the rule[30] to state court proceedings was the holding in *Weeks* that the fourth amendment applied to federal, not state, officials. In *Wolf v. Colorado,*[31] the Court refused to apply the rule to state court proceedings but, by holding that the right to privacy guaranteed to citizens under the fourth amendment is enforceable against the states through the due process clause of the fourteenth amendment,[32] laid the foundation for the eventual application of the rule to such proceedings. In refusing to exclude the evidence, the Court reasoned that to apply the rule would be to reject other reasonable methods adopted by the states which had

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[26] The Court noted the following facts which supported the proposition that the federal officer was invited to join the search in his official capacity, and not as a private individual: Instead of asking for additional state officials, the state officer in charge specifically asked for the federal agent; the evidence obtained in the search (counterfeit strip stamps to be used on bonded whiskey) not within the purview of the state search warrant, nor did the evidence relate to any violation of state law; upon seizing the evidence in question, all parties considered the federal agent to have the right to such evidence. *Id.* at 32-33.

[27] The Court used the words, "improperly seized by state officers operating entirely upon their own account." This language left the door open for use by federal officials of evidence seized by state officers in blatant disregard of the fourth amendment as well as inadvertent violations. *Id.* at 33.

[28] 338 U.S. 74 (1949).

[29] *Id.* at 78-79.

[30] The exclusionary rule will hereinafter be referred to simply as the "rule."

[31] 338 U.S. 25 (1949).

[32] *Id.* at 26-27. In order to reach such a conclusion, the Court relied upon the test earlier laid down by Justice Cardozo, wherein he stated that the Due Process Clause exacts from the states, for the lowest and the outcast, all that is "implicit in the concept of ordered liberty." *See* Palko v. Connecticut, 302 U.S. 319, (1937).

not followed *Weeks.*[33] Further, the Court suggested that while the rule was needed as a deterrent to misconduct by federal officials, no such compelling need justified its application to state and local officials. The Court believed that the "wrath of public opinion" at the local level would rise up and punish the offending local officers more effectively than at the federal level.[34]

The Court, however, did not wait long before making exceptions to this general rule. In the case of *Rochin v. California*,[35] a state narcotics conviction was reversed because state police, without warrant or other justification to search, caused petitioner's stomach to be pumped, thereby producing morphine tablets which were later used as evidence against him. The Court found the police activities so offensive to "the concept of ordered liberty" that use of the rule was justified.[36]

Two years later in *Irvine v. California*,[37] the Court, declining to exclude evidence of gambling obtained by local authorities who had illegally entered petitioner's house and implanted a "bugging" device, tilted in the opposite direction. Instead of finding the police activity as offensive as that in *Rochin*, the Court described the exclusionary rule as an incomplete remedy:

> Rejection of the evidence does nothing to punish the wrong-doing official, while it may and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.[38]

Thus, except for the most extreme cases, a state official could be in violation of the fourth and fourteenth amendments and still have the illegal evidence admitted over objection at trial. The evidence could also be used in a federal criminal trial. Assuming that no federal official participated in the search, the same evidence could be used at both state and federal levels.[39]

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[33] As of the date of the *Wolf* decision, thirty states had rejected the *Weeks* doctrine, seventeen states adhered to it, and one state (Iowa) had formulated the exclusionary rule prior to *Weeks*. *See* Appendix to the *Wolf* opinion, 338 U.S. at 33-39.

[34] "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of the police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." Wolf v. Colorado, 338 U.S. at 32-33.

[35] 342 U.S. 165 (1952).

[36] The Court noted that the facts stirred up more than second-thoughts of overzealous police activity. "This is conduct which shocks the conscience....They [police activities used] are methods too close to the rack and the screw to permit of constitutional differentiation." *Id.* at 172.

[37] 347 U.S. 128 (1954).

[38] *Id.* at 136.

[39] *See Janis*, 428 U.S. at 445 n. 14. The Court stated that the fact that the exclu-

Elkins v. United States[40] marked the death of the "silver platter" doctrine as it related to criminal proceedings. In *Elkins*, petitioners were indicted and tried for the federal offenses of intercepting and divulging telephone communications and conspiring to do so.[41] The evidence consisted of recordings and a recording machine seized by state officers from petitioner's home. Two state courts had held that the search and seizure were unlawful, but the federal district judge applying *Byars* admitted the evidence. The Court of Appeals for the Ninth Circuit affirmed. Noting that even though the latter case removed the "doctrinal underpinning" of the "silver platter" doctrine, the federal courts continued to honor evidence seized illegally by state authorities.[42] The Supreme Court traced the origin of the rule from *Weeks* to *Wolf* and pointed out that to perpetuate the "silver platter" doctrine would be to distinguish evidence obtained in violation of the fourth amendment from that obtained in violation of the fourteenth amendment.[43] The Court admitted that there were no empirical statistics to reflect that those who lived in states that had adopted the rule enjoyed more constitutional protection than those living in states that allowed illegally seized evidence to be admitted.[44] In abrogating the "silver platter" doctrine, the Court seemed to rely on the gradual move by state courts since *Weeks* to exclude evidence illegally seized by state authorities;[45] more importantly, most of the exclusionary states that had considered the issue held that evidence illegally seized by *federal* officers must be excluded in a *state* court proceeding if the means of obtaining such evidence violated state law.[46]

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sionary rule was not applied by the Supreme Court did not mean that widespread abuse existed. On the contrary, tort remedies, internal disciplinary rules, and state-made exclusionary rules allayed fears of blatant police activities.

[40] 364 U.S. 206 (1960).

[41] Actually, the original search warrant did not call for the seizure of evidence of the crimes charged, but instead called for the seizure of obscene pictures and recordings related to such obscene materials. The state officers found paraphernalia believed to have been used in making wiretaps. *Id.* at 207 n. 1.

[42] *See id.*, at 214 n. 6 (representative list of such cases).

[43] *Id.* at 215. "The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." (Footnote omitted). *See also* People v. Defore, 242 N.Y. 13, 22-23, 150 N.E. 585, 588 (1926), wherein Judge Cardozo noted that incongruity.

[44] To date, there appears no valid way to accurately measure the effect of the rule on deterring illegal police activity. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). *See also* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEG. STUD. 243 (1973).

[45] *See Elkins*, 364 U.S. at 219 where the Court commented that at that time not more than half of the states continued to follow totally the rule that evidence is admissible, no matter how obtained. *See also* Appendix to *Elkins*, 364 U.S. at 224-25.

[46] Little v. State, 171 Miss. 818, 159 So. 103 (1935).

Two of the more persuasive reasons used by the Court in *Elkins* to support its holding were the concepts of "federalism" and "judicial integrity." The Court stated that a healthy federal-state relationship, which comprises "federalism," cannot be served where a federal court sitting in an exclusionary state admits evidence illegally seized by state authorities. In doing so, the federal court is frustrating state attempts to insure constitutional liberties.[47] "Judicial integrity," on the other hand, not only relates to the relationship of the federal government to the states, but to society in general. The words of Mr. Justice Brandeis aptly expressed this doctrine: "Our government is the potent, the omnipresent teacher. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[48]

The Court discussed deterrence of illegal police activity as a reason for the exclusionary rule, but it cited no empirical evidence to show that the rule had, in the past, actually deterred illegal police activities. Although the Court strained to give credence to the rule by pointing out that since *Weeks* the Federal Bureau of Investigation had not been rendered helpless, nor had federal courts been frustrated in their quest for the administration of criminal justice, it did not venture to say how much more effective criminal justice would have been had the rule not been applied. By denying the federal government the right to use evidence illegally seized by state authorities, the Supreme Court effectively ended the "silver platter" doctrine for criminal law purposes.[49]

III. THE RATIONALE OF THE EXCLUSIONARY RULE

Before considering *Janis* and other cases dealing with the exclusionary rule in relation to civil cases, one needs to examine the reasons why such a rule is required. Emphasis should be on whether federal law in the form of the fourth and fourteenth amendments has been violated, not whether the search or seizure is in violation of state or

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[47] *See* Wolf v. Colorado, 338 U.S. at 33-39. Conversely, the Court noted, a federal court sitting in a state in which the rule had not been adopted, would not frustrate state policy by excluding evidence illegally seized by state officers. The Court stated that to abolish the state-to-federal silver platter doctrine would not interfere at all with individual states' freedom to apply their own preventive measures, such as tort remedies against police officers.

[48] *See* Olmstead v. United States, 277 U.S. 438, 485 (1928). *See also* McNabb v. United States, 318 U.S. 332 (1943).

[49] A year later, the Supreme Court made the rule applicable to state court proceedings, where state officers had illegally seized evidence. Mapp v. Ohio, 367 U.S. 643 (1961). Conversely, the California Supreme Court rejected the "reverse" silver platter doctrine as contrary to *Elkins*. People v. Kelly, 66 Cal. 2d 232, 424 P.2d 947 (1967).

local law.[50] The rule is unique to the United States; Britain and other civilized countries have not found it necessary to invoke its use.[51]

Courts in the United States have continued to advance the premise that deterrence of illegal police searches and seizures is promoted if the rule is invoked, but this line of thinking is considerably weakened by the lack of empirical evidence. Dallin H. Oaks has produced one of the most thorough works in this area,[52] and he concluded that the idea of excluding evidence illegally seized makes sense theoretically, but the more than fifty years since the rule was invoked in *Weeks* have not produced persuasive evidence that the rule does, in fact, deter illegal police activity.[53]

Professor Charles Alan Wright concluded that the rule only benefits criminals, as a search of an innocent person's house will produce no incriminating evidence to be suppressed.[54] Since courts are still suppressing evidence, he surmised that the rule was an imperfect deterrent tool. He noted several reasons why police, even with knowledge that the rule will later be invoked, would conduct illegal searches. First, police activities are sometimes carried out, not necessarily to obtain convictions, but for other reasons.[55] Second, police may not know or care whether evidence is eventually admitted or excluded. Finally, even an officer acting in good faith will not know all the intricacies of the federal law of searches and seizures and may inadvertently violate the Constitution.

Wright concluded that the rule should be handled gingerly by the courts and should be applied only in those circumstances where the police flagrantly violate constitutional standards.[56] His solution would allow the courts to use such evidence only if the illegal search or seizure resulted from good-faith police practices. Professor Wright's solution would hinge upon a case-by-case determination of whether actions by police were made in "good faith." Such a subjective determination is often difficult and could lead to an even greater judicial quagmire than the present one in the criminal area.

Although the exclusionary rule has been regarded as the protector of an individual's fourth amendment freedoms, *United States v.*

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[50] United States v. Sudek, 530 F.2d 684 (6th Cir. 1976). There, the court refused to suppress where failure to comply with a state rule for making prompt return of the search warrant and for verifying inventory, related to an event which occurred after an otherwise valid search was completed. *See also* United States v. Scolnick, 392 F.2d 320 (3rd Cir. 1968).

[51] *See* Wright, *Must the Criminal Go Free Because the Constable Has Blundered?*, 50 TEX. L. REV. 736 (1972).

[52] *See* Oaks, *supra* note 44. *See also* Spiotto, *supra* note 44.

[53] *See* Oaks, *supra* note 44, at 671-72.

[54] *See* Wright, *supra* note 51, at 736-37.

[55] *Id.* at 740.

[56] *See* Mapp v. Ohio, 367 U.S. 643 (1961).

Calandra,[57] which held that the rule does not apply to illegally seized evidence presented before a federal grand jury, illustrates the degree to which the Supreme Court has limited its application. The case involved an illegal search conducted by federal agents, and the "silver platter" doctrine was not in issue. However, *Calandra* represented a shift of emphasis to deterrence of illegal police activity as the major reason for excluding evidence. The *Elkins* opinion stressed the concepts of "federalism" and "judicial integrity," whereas in *Calandra*, the Court noted that the purpose of the rule was to deter "future unlawful police conduct"[58] rather than to provide a remedy to the search victim.[59] In *Calandra* the rule was held to be judicially created "to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[60]

The Court buttressed its restrictive application of the rule by explaining that no court has ever expressed the idea that the rule always should be applied where evidence is seized illegally. The doctrine of "standing" was given as an example of how courts do not apply the rule unless "its remedial objectives are thought most efficaciously served."[61] The Court explained that "standing" to assert the rule has traditionally been granted only when the government seeks to use illegally obtained evidence to incriminate the victim of the unlawful search.[62] It is only under these circumstances that the need for deterrence of illegal police activity is greater than the public need for obtaining a criminal conviction.

Another example of the Supreme Court's indecisiveness on the issue of where to focus on fourth amendment rights is *Alderman v. United States*.[63] The Court, considering a question of standing, stated that fourth amendment rights are personal rights which may not be vicariously asserted. Is one to assume that those rights are personal to the individual affected for purposes of determining standing as in *Alderman*, yet not personal to the individual appearing before a grand jury, as in *Calandra*?

Other doctrines, however, in addition to standing, have limited the

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[57] 414 U.S. 338 (1974).

[58] *Id.* at 347.

[59] The Court quoted the decision of Linkletter v. Walker, 381 U.S. 618, 637 (1965), "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *See also* Critique, *On the Limitions of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 N.W.L. REV. 740 (1974).

[60] 414 U.S. at 348.

[61] *Id.*

[62] *Id.*

[63] 394 U.S. 165 (1969).

application of the rule. In *United States v. Stonehill*,[64] a district judge allowed the United States to foreclose tax liens amounting to over twenty-five million dollars on property owned by the taxpayers. Evidence was obtained by means of an illegal raid[65] by Philippine authorities on taxpayers' business premises in the Philippines, and subsequently handed over to United States authorities on a "silver platter." In allowing the admission of such evidence, the Ninth Circuit held that the fourth amendment could apply to raids by foreign officials only if United States agents, by their level of participation, had converted the search into a joint venture.[66]

A similar refusal to apply the rule arises in a situation where an individual, not acting at the behest of the state or federal government, conducts an illegal search and seizure and subsequently hands over the evidence to federal authorities.[67] These cases indicate that no matter how blatantly illegal the search and seizure is held to be, the evidence will not be suppressed unless it was obtained by state or federal governmental action. The cases also demonstrate that, except where officials conducted the illegal search, the courts will refuse to apply the rule in a broad-brush manner, for to do so would rob the prosecutors of relevant material which is sometimes the sole evidence against the defendant.

Even though the rule has been narrowed in the areas of standing, foreign searches, and individual searches independent of governmental authority, some jurists have considered totally eliminating the rule. Since *Janis* may portend its death, it is even more important to consider viable alternatives to the rule.

In an extensive dissenting opinion in *Bivens v. Six Unknown Agents*,[68] Chief Justice Burger went further than merely chastising the rule for its ineffectiveness in its deterrence of illegal police activity; he proposed alternatives to the rule, but expressed his opposition to the immediate overruling of *Weeks* and *Mapp* until some other system

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[64] 420 F. Supp. 46 (C.D. Calif. 1976). This case has a long history, and the original foreclosure suit was previously reported at 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). The Court in the foreclosure proceedings held that the denial of the motion to suppress and affirmance by the Ninth Circuit in the earlier trial was not res judicata as to the question of suppression of the evidence as the doctrine of res judicata does not apply to an interlocutory order.

[65] The raid had been held to be illegal by Philippine and United States constitutional standards. 405 F.2d at 743 (9th Cir. 1968).

[66] The underlying precept is that neither the fourth amendment, nor the rule, will apply to acts of foreign officials. Brulay v. United States, 383 F.2d 345 (9th Cir. 1967). With this point established, a court need only apply the *Byars* test, to see if there was sufficient U.S. federal participation in the search to justify classifying it as a U.S. federal search. *See* United States v. Marzano, 537 F.2d 257 (7th Cir. 1976).

[67] Burdeau v. McDowell, 256 U.S. 465 (1921).

[68] 403 U.S. 388 (1971). *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964).

was substituted.[69] The majority opinion in *Bivens* held that, regardless of absence of such remedy in the literal words of the fourth amendment, a victim of an illegal federal search had a cause of action against the federal agents conducting the search. The basis of Burger's dissent was founded upon a "separation of powers" argument that the Court, by providing the remedy, was wrongfully exercising a Congressional prerogative.[70]

Burger's alternative proposal to the rule is that Congress should enact legislation to waive sovereign immunity and to establish a quasi-judicial forum, comparable to the United States Court of Claims, empowered to award money damages to aggrieved parties. This plan, of course, would come with a proviso that the seized evidence which would otherwise be admissible would not be excluded solely because it was obtained in violation of the fourth amendment.[71] Along with the common disadvantage of forcing the aggrieved party to file an action and wait for its disposition, the cost of this plan would be the proliferation of the federal administrative structure. Whether the Burger proposal would act as a deterrent to unlawful police conduct is questionable. Assuming it would, the plan's advantage would be great, since it would allow the prosecutor to use relevant and material evidence to prove his case. Although others have proposed similar remedies,[72] the tort alternative will continue to carry with it the inherent weakness of burdening the aggrieved party with court costs, attorney's fees, and lengthy delays in getting to trial. The Burger proposal, although fashionably streamlined in comparison to the ordinary tort remedy, is dependent entirely upon whether Congress will enact sweeping legislation required to create such a system.

IV. THE EXCLUSIONARY RULE IN CIVIL TAX CASES

Prior to *Janis*, one of the most formidable cases which seemed to support the exclusion of illegally seized evidence in a civil case was *Silverthorne Lumber Company v. United States*.[73] This case involved a criminal proceeding, but its language buttressed the rule's application in the civil area. Federal authorities conducted an illegal search of corporate premises and seized the corporation's books and records.

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[69] "Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared." Bivens v. Six Unknown Agents, 403 U.S. 388, 421 (1971).

[70] *Id.* at 411-12.

[71] *Id.* at 422-23.

[72] Hoenig and Walker, *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. CRIM. L. C. & P. S. 256 (1972); Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1 (1975).

[73] 251 U.S. 385 (1920).

The books and records were returned to petitioners pursuant to a court order, but not before the authorities had made copies of them and had issued a subpoena duces tecum for the return of the originals. Contempt orders were issued, and an appeal was taken. Holding that the government could not utilize knowledge illegally gained to demand production of evidence by a more regular form (for example, a subpoena duces tecum), the Supreme Court reversed. The Court continued: "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the Court *but that it shall not be used at all.*"[74] (Emphasis added).

In *Rogers v. United States,*[75] the First Circuit Court of Appeals held that illegally obtained evidence was inadmissible, where the United States attempted to recover customs duties on liquors imported into the country. Other cases[76] have dealt with the rule in the context of the civil area. The Tax Court's major pronouncement on this subject is *Efrain T. Suarez.*[77] The petitioner was a doctor whose office was searched illegally by local authorities who seized his books and records and used this evidence to gain a conviction for conspiracy to commit abortion and for attempted abortion.[78] A few days later, copies of the clinic's daily records were given to the Internal Revenue Service, which proceeded to use such evidence as the sole basis for a statutory notice of deficiency. In applying the rule, Judge Hoyt read the fourth amendment literally to conclude that its own language draws no distinction between criminal and civil cases. Citing

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[74] *Id.* at 392.

[75] 97 F.2d 691 (1st Cir. 1938). Note that although this case involved the collection of custom duties, it was relevant to all civil actions prior to *Janis* involving the assessment and collection of taxes, interest, and penalties.

[76] In Tovar v. Jarecki, 173 F.2d 449 (7th Cir. 1949), the court held that the assessment for marijuana tax was penal in nature, not civil. The court allowed an injuction against an assessment based upon illegally obtained evidence. In Jarecki v. Whetstone, 82 F. Supp. 367 (N.D. Ill. 1948), it was held that the fourth amendment applied where an action was brought to enforce a summons requiring the defendant to produce books and records disclosing financial conditions with respect to an investigation pertaining to her income tax liability. The court in United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966) directed that illegally seized evidence which was contraband be destroyed, and that the illegally seized non-contraband items be returned to the taxpayer who was the subject of a tax assessment.

[77] 58 T.C. 792 (1972). *Compare* this case with that of John W. Singleton, 65 T.C. 1123 (1976). There, an airport search of a taxpayer's person produced large amounts of cash. When this fact was discovered later by the IRS, the cash was made a basis for a statutory notice of deficiency. The Tax Court held that the airport search violated the taxpayer's rights, but nonetheless refused to apply *Suarez* because the connection between the illegally obtained evidence and the commissioner's proof became so attenuated so as to dissipate the taint of the search.

[78] 58 T. C. at 799 (1972).

language in *Olmstead*,[79] he ignored the deterrence issue and founded his opinion on the doctrine of judicial integrity.

V. THE JANIS DECISION

The Supreme Court in *Janis* refused to apply the exclusionary rule in a civil tax proceeding where the offending state officer committed a good faith violation of the fourth amendment. Using the deterrence rationale for the rule, the Court seized upon the fact that no empirical data exists to support the efficacy of the rule.[80] The Court noted that if the rule is as efficient as its supporters claim, then sufficient deterrence has been reached in the criminal area, without the necessity of extending it to civil cases. On the other hand, if the rule merely provides marginal deterrence in the criminal area, then since the deterrence is attenuated by the fact that another sovereign uses the evidence, it should not be extended to the civil area.[81] The Court concluded that the costs to society in excluding the evidence would be too extensive and that the probability of deterrence would be small.[82]

The Court dismissed the line of cases cited by Janis as involving only "intrasovereign" violations[83] and concluded that *Suarez*[84] was incorrect because it did not focus on deterrence and because the Tax Court did not distinguish between intersovereign and intrasovereign uses of unconstitutionally seized material.[85] In an extensive footnote,[86] the Court, in order to negate the *Suarez* holding, refused to apply the "judicial integrity" doctrine. By intertwining the deterrence issue with judicial integrity, the Court surmised that if no deterrence results from the rule's application, then the admission of evidence in a federal civil proceeding is unlikely to encourage fourth amendment violations.[87] Thus, the Court reasoned, it follows that judicial integrity remains intact since no such violations are committed or encouraged. The Court overlooked the fact that even though the violation against Janis was committed "in good faith," to admit evidence might encourage more vigorous cooperation between state

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[79] 277 U.S. 438 (1928); 428 U.S. 433 (1976).

[80] 428 U.S. at 453.

[81] *Id.* at 453, n. 27.

[82] *Id.* at 453-54.

[83] *Id.* at 456. *See* Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969), *cert. denied*, 396 U.S. 986 (1969); Knoll Associates Inc. v. F.T.C., 397 F.2d 530 (7th Cir. 1968); Powell v. Zuckert, 366 F.2d 634 (1966); Iowa v. Union Asphalt & Roadoils Inc., 281 F. Supp. 391 (S.D. Iowa 1968); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966). *See also* Hand v. United States, 441 F.2d 529 (5th Cir. 1971).

[84] 58 T.C. 792 (1972).

[85] 428 U.S. at 457.

[86] *Id.* at 458, n. 35.

[87] *Id.*

and federal agencies in the civil area after the courts have determined that such evidence could not be used in a criminal trial.

Justice Stewart in a dissenting opinion[88] considered the issue of intersovereign cooperation. He focused upon the dual purpose of the wagering taxes: to raise revenue and to aid state and federal authorities in enforcing criminal penalties against gambling violators.[89] The close proximity of the civil action to the criminal area led Stewart to observe that close cooperation between these two sovereigns might result and that

> [S]ociety must not only continue to pay the high cost of the exclusionary rule (by foregoing criminal convictions which can be obtained only on the basis of illegally seized evidence) but it must also forfeit the benefit for which it has paid so dearly.[90]

That such cooperation between state and federal officials exists is clear from the facts of this case, as well as from other sources.[91]

A careful distinction should be made between purely civil actions, as in *Janis*, and forfeiture proceedings, where the evidence seized is sought to be destroyed or sold by the sovereign, instead of being returned to the rightful owner. The latter proceeding has been characterized in *Boyd* as "quasi-criminal" in nature,[92] and, as such, the evidence would be excluded under *Weeks* and *Mapp*. The disturbing factor in *Janis*, which Stewart points out in his dissenting opinion, is that these civil penalty provisions not only serve to raise revenue, but also assist state and federal authorities in the enforcement of criminal sanctions and thus take on a quasi-criminal nature. Thus *Janis* may signal a future move by the Court to abrogate the rule's operation in a situation similar to that found in *One 1958 Plymouth Sedan v. Pennsylvania.*[93] The Supreme Court held that in a pro-

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[88] 428 U.S. at 460.

[89] *Id.* at 461. Stewart cites Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), to the effect that the wagering taxes are primarily aimed at a group inherently suspect of criminal conduct, and that those who properly assert the privilege against self incrimination with respect to the wagering tax may not be criminally punished for failure to comply with their requirements.

[90] 428 U.S. at 463.

[91] The Asterisk accompanying the text at 462 of the opinion contains questions asked of Officer Weissman, and his responses. They clearly show that he would probably contact the IRS whenever a "major-size book" is seized. *See* INT. REV. MANUAL, Ch. 9900, Sec. 283.3 (4) (1975), for an indication that the IRS is well aware of such cooperation.

[92] 116 U.S. 616, 634 (1886). The fourth amendment does not insure a return of all property illegally seized. *See* DeRevil, *Applicability of the Fourth Amendment in Civil Cases*, 1963 DUKE L. J. 472, 485 (1963).

[93] 380 U.S. 693 (1965). Most cases predating this case applied the *Boyd* rationale to exclude illegally seized evidence in forfeiture cases. United States v. Butler, 156 F.2d 897 (10th Cir. 1946); United States v. Physic, 175 F.2d 338 (2d Cir. 1949).

ceeding to forfeit a car which allegedly had been used illegally to transport liquors, illegally seized evidence would be inadmissible. If the Court continues to apply *One 1958 Plymouth Sedan,* one should not consider *Janis* as impliedly overruling that case.

VI. Conclusion

Every effort should be made by practitioners to limit *Janis* to its narrow facts: the "silver platter" doctrine should apply in civil cases only where the state officer has acted in "good faith," and only where no federal participation is present in the search or seizure itself. The case potentially poses a serious threat to the automatic exclusionary rule in criminal proceedings. In addition, the courts are left with a difficult factual determination of what constitutes "good faith" action by law enforcement officers.

The language of *Janis*, particularly in Note One, indicates "good faith" means that from all the facts adduced at trial the state officers had proceeded in a reasonable manner and in accordance with the legal requirements at the time the warrant was obtained and at the time the search was made.[94]

Professor Wright's suggestions[95] may be compatible with *Janis*, for he proposes that evidence be admissible in criminal trials if there has not been a "substantial" violation of the fourth amendment by the police.[96] Thus, a realistic possibility exists that courts could find the absence of "good faith" anytime there has been a "substantial" violation by the police.

In *Janis*, Officer Weissman clearly was acting in "good faith"; the

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[94] 428 U.S. at 435. *See* United States v. Peltier, 422 U.S. 531 (1975), wherein the Supreme Court refused to vitiate a search made in good faith, simply because the search in question was followed by another decision, which would have made the search illegal. The Court commented:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence siezed in that manner....[T]he "imperative of judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by law enforcement officials is not permitted by the Constitution.
> 422 U.S. at 537-38.

[95] *See* Wright, *supra* note 51.

[96] *Id.* Professor Wright notes that the American Law Institute lists several factors to determine whether police violations are "substantial." The most important of these are: the extent to which the police have deviated from fourth amendment standards, whether the violation was wilful, and whether exclusion of the evidence would act as a deterrent. *See generally*, Loe, *the ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 Ga. L. Rev. 1 (1975).

case which ultimately invalidated the warrant, *Spinelli*, had not been decided at the time the warrant was issued. He could not be expected to follow legal requirements of a case which had not been decided. In contrast, a situation is found where police deliberately violate the fourth amendment.

In between these two extremes is the case of a state officer who tries to do his job correctly, in accordance with the Constitution, but who fails to execute a legal search only because of his lack of knowledge of the myriad of cases in the search and seizure area, or because of a change in existing law. Evidence seized under those situations should be admitted in a civil tax trial, for to do otherwise would be to presume that the officer was not acting in "good faith."

Janis is limited to *inter*sovereign, as opposed to *intra*sovereign, seizures. One of the strongest reasons the Court gave for not extending the rule to the civil tax area was that state police would not be deterred by such exclusion since the federal civil case falls outside "the offending officer's zone of primary interest."[97] Conversely, since the enforcement of the federal laws is within the federal officer's zone of primary interest, one may argue that an *intra*sovereign transfer (within the federal hierarchy) would require the deterrent effect of the exclusionary rule.

With this conclusion in mind, taxpayer counsel should attempt to prove that federal participation existed in a state search. In order to ascertain when a state search becomes a federal one,[98] courts must now follow pre-*Elkins* law, such as the *Byars* case, and more recent cases, such as *Stonehill* in the foreign search area.

A more far-reaching question is whether *Janis* represents the first step toward abrogation of the rule as to all cases, both civil and criminal. The rule will probably remain entrenched in the criminal realm and will be replaced only after Congress follows suggestions such as those suggested by Burger in his dissent in *Bivens*. To do otherwise would leave search victims only with the general right to sue federal or state officials in court, a situation that would lengthen already burgeoning court dockets. A premature death of the rule might also encourage illegal police activity, a situation proponents of the rule fear will occur.

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[97] 428 U.S. at 458.

[98] In Lustig v. United States, 338 U.S. 74 (1949), the Supreme Court held that if a federal officer participated in the search before the search was completed, he was deemed to have participated in it. The following recent cases support this general proposition: United States v. Newton, 510 F.2d 1149 (7th Cir. 1975) (federal participation in existence where federal officials were present when airline employee opened luggage without warrant or probable cause, and federal officials came prepared to conduct field test on narcotics); United States v. Davis. 482 F.2d 893 (9th Cir. 1973) (airline boarding search part of an overall nationwide anti-hijacking effort, and constituted governmental action for purposes of fourth amendment); United States v. Sellers, 483 F.2d 37 (5th Cir. 1973) (federal participation present where federal officials had been informed and

Janis apparently has settled fewer questions than it has raised. If the seizing state officer has acted in "good faith," the IRS now can be assured of using illegally seized evidence as a basis for assessment of a civil tax. Such an assessment would be protected by the presumption of correctness[99] which was unaltered by *Janis*. The Commissioner could also utilize the presumption of correctness to support additions to the tax, such as for failure to file a return or pay the tax,[100] or for negligently or fraudulently failing to pay such tax.[101]

The *Janis* decision may result in more aggressive cooperation between the two sovereigns in areas such as gambling and unbonded whiskey. If such cooperation does materialize, courts predictably may return to the *Byars-Weeks-Mapp* rationale to prevent police abuse in the civil area.

The decision in *Janis* makes the taxpayer's rebuttal of such presumptions more difficult, since he may not allege the issue of illegality in a "good faith" state seizure.[102] Therefore, *Janis* leaves the taxpayer with one main avenue of escape, to prove that the evidence was obtained illegally *and* in "bad faith." If successful, the taxpayer should be entitled to injunctive relief against assessment or collection.[103]

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two federal agents participated in search); United States v. Townsend, 394 F. Supp. 736 (E.D. Mich. 1975) (the test of joint participation not exclusive, the dominant theme being whether state officers cooperate for the benefit of federal sovereign).

[99] *See* pp. 14-15 of text accompanying note 77-79 *supra*.

[100] I.R.C. § 6651.

[101] I.R.C. § 6653.

[102] Previously, a tax was rendered illegal, and thus uncollectable, if the basis for the formulation of such tax was illegally seized evidence. Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969). The court there refused to supply injunctive relief without more information as to whether "irreparable harm" would occur to taxpayer if assessment or collection were not enjoined. Nevertheless, it held that injunctive relief would be appropriate in circumstances where the government's only basis for assessment was illegally obtained evidence, as under no circumstances could the government ultimately prevail.

[103] *Id.* at 585-86. This presupposes two things: 1) that the government has no legal evidence independent of the illegal taint, which could be used as a basis for assessment, and 2) that the courts will not extend *Janis* to bad-faith violations. As to the injunctive issue *see generally*, Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Laing v. United States, 423 U.S. 161 (1974); and Comm'r v. Shapiro, 424 U.S. 614 (1976).