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# AN OPEN LETTER TO THE NORTH DAKOTA ATTORNEY GENERAL CONCERNING SEARCH AND SEIZURE LAW AND THE EXCLUSIONARY RULE

THOMAS M. LOCKNEY*

Dear Mr. Attorney General:

I'm writing to you, North Dakota's chief law enforcement officer, to share my thoughts about the status of search and seizure law and the exclusionary rule in North Dakota.[1] I hope to convince you that North Dakota needs to do something about the law in this area, and I have some specific suggestions to carry us beyond mere repetition of the never-ending debate over the merits or demerits of the exclusionary rule. Because the success of my proposal probably depends upon its acceptance by both the legislature and the

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1. I was asked by the North Dakota Law Review to write a short essay on the recent North Dakota Supreme Court decision in State v. Thompson, 369 N.W.2d 363 (N.D. 1985). I assume they wanted something similar to my previous dissection of a North Dakota decision in *Perspectives on State v. Nagel: The North Dakota Supreme Court's Discordant Medley of Fourth Amendment Doctrines*, published at 58 N.D.L. REV. 727 (1982). In that essay, I was fairly harsh in my criticism of the North Dakota court for, among other things, its apparent result orientation, its apparent unwillingness to create discernable rules of conduct for police searches, and its apparent unwillingness to clarify or meaningfully enforce the rules it laid down. Since writing that critical essay, I have come to believe that additional doctrinal analysis and criticism is unlikely to improve search and seizure procedures. This is not because our court is unwilling or unable to analyze search and seizure law carefully. The recent cases discussed in this letter demonstrate to me that the court is taking its fourth amendment duties very seriously. But the results of such effort have convinced me that the whole enterprise of regulating the details of police searches and seizures through judicial decisionmaking enforced by an exclusionary rule is misguided.

Attorney General, I will write this as an open letter in the hope that you will share it with the next session of the legislature.

Initially, I will quickly review the search and seizure problem and the debate about the exclusionary rule. I will then explain my conclusion that the purpose of the exclusionary rule — to ensure that police officers comply with specific limits upon the manner in which they secure persons or evidence — is not being adequately met by the remedy of excluding relevant evidence. Finally, I will suggest that North Dakota create and enforce administrative rules to regulate police searches and seizures, thereby more adequately accomplishing the fundamental objectives underlying the exclusionary rule.

First things first. The fourth amendment to the United States Constitution provides, in relevant part:

> 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.[2]

Without bogging down in details, it is fair to say that the amendment on its face is designed to provide some limits on police searches and seizures. Those searches must be reasonable, and, as interpreted by the United States Supreme Court, reasonableness generally requires a procedure — a warrant authorizing the search and seizure — or a good reason for deviating from that procedure. In addition, the searches or seizures must be based on a certain

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Thus, instead of another detailed analysis of judicial doctrine, I persuaded the editors of the Law Review to allow me to offer these opinions and suggestions in this nontraditional format of a letter to someone who is interested in improving the quality of police work and law enforcement in North Dakota, and who might be able to initiate action to that end. However, because this is being published in a law journal, I will offer a modicum of conventional footnotes to allow interested readers to verify how unoriginal my ideas are. I attribute primary credit for such concessions to traditional legal scholarship and publication conventions to my research assistant, Cory Skurdal, who also prepared initial drafts of the more difficult and complicated parts of the essay, thereby allowing me time to avoid all the really hard work and instead dream about a better world. Of course, neither he nor I should be blamed for these proposals because we have stolen our ideas from others. *See infra* note 44. We are merely suggesting that reform is possible in North Dakota, where good ideas have a fighting legislative and political chance.

For those who read this "open letter" and crave additional authoritative footnotes, I offer Professor Keyser's "longest possible footnote against the use of footnotes," which, *mutatis mutandis* (please do it yourself), I incorporate herein by reference. *See* Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051, 1051 n. (1985). I now claim, but cannot prove it, the longest footnote about a footnote against footnotes.

2. U.S. CONST. amend. IV.

quantum of evidence, usually, as contemplated by the words of the amendment itself, probable cause.[3]

That relatively simple superstructure of the law of search and seizure has become increasingly complex through the evolutionary course of extensive judicial interpretation and application. In essence, the courts, including both the United States and North Dakota Supreme Courts, have attempted to lay down a code of conduct for police officer searches and seizures by implementing the requirements of the fourth amendment through "rules of reasonableness."[4]

To assure that these rules of reasonableness are followed, the United States Supreme Court fashioned the exclusionary rule as the remedy to be applied in the event violations occurred.[5] The exclusionary rule generally provides that any evidence obtained during a search or seizure which violates a subject's fourth amendment rights may not be used against him in a criminal trial.[6]

One can hardly quarrel with the basic proposition that the police need to be restrained in this free, non-police-state society. However, reasonable people (and judges must of course be included in that category) can rationally disagree about what kinds of restrictions are appropriate. Even if everyone agrees about the appropriate limits of police behavior, one can question whether those limits should be enforced by excluding relevant, probative evidence from consideration in a criminal trial. Indeed, a whole forest of trees has been sacrificed to make the paper necessary to print the extensive library of debate devoted to just that question.[7]

It is not my intention to rehash the debate about the

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3. Professor Whitebread provides a useful and brief introduction to the law of search and seizure, which may be used to supplement my extremely brief capsule summary. *See* C. WHITEBREAD, CRIMINAL PROCEDURE §§ 4.01-4.04 (1980).

4. *See* McGowan, *Rule-Making and the Police,* 70 MICH. L. REV. 659, 669 (1972).

5. *See* Weeks v. United States, 232 U.S. 383, 391-92, 398 (1914) (creation of the exclusionary rule). *See also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extension of the exclusionary rule to state and local law enforcement officers). While the exclusionary rule appeals to violations of the fourth, fifth, and sixth amendments, I refer to the rule in this letter only in the context of fourth amendment violations.

6. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914). For recent views of various United States Supreme Court Justices on the purposes of the exclusionary rule, see the seven extensive opinions covering numerous pages in the United States Reports in Segura v. United States, 468 U.S. 796 (1984); United States v. Leon, 468 U.S. 897 (1984); and Massachusetts v. Sheppard, 468 U.S. 981 (1984).

7. *See* 1 W. LAFAVE, SEARCH AND SEIZURE § 1.2 (1978). Professor LaFave provides, in the parent volume, 19 pages describing the debate on the propriety of the exclusionary rule. Extensive citation to the debaters is included. An additional 55 pages, covering the debate since 1978, are included in the supplement to § 1.2. *Id.* (Supp. 1986).

I agree with Professor Keyser's precept that "[t]he gratuitous killing of trees is an evil to be decried, not encouraged." *See* Keyser, *supra* note 1, at 1051, 1051 n. Moreover, I extend Professor Keyser's philosophy beyond unnecessary footnotes, and would include all unnecessary publication for its own sake (sometimes summarized as "publish or perish"). *Accord* R. Lee, Statement of Principle on Publication (unpublished).

exclusionary rule, which, as one scholar has noted, is "more remarkable for its volume than its cogency."[8] Instead, let me briefly summarize my personal convictions. My views are based upon years of trying to make sense of the rules and their enforcement as, at various times, a criminal defense lawyer, a prosecutor, a law school instructor, and a municipal judge.

I think that because judges generally have such a distaste for excluding relevant, probative evidence against alleged lawbreakers,[9] they distort or misinterpret the rules governing police conduct to avoid excluding evidence.[10] It also appeared to me that the North Dakota Supreme Court, in concert with or perhaps encouraged by the United States Supreme Court, was using convenient "loopholes" for avoiding serious consideration of fourth amendment questions. For example, it appeared that when the court might have had to rule that a fourth amendment violation did exist, it could often find instead that the defendant lacked standing to object to the search or seizure in question.[11] And, if the defendant had standing, the court could find that the admission of the questioned evidence was harmless.[12] Other methods used by the court to avoid questions concerning the propriety of police conduct include: the inevitable discovery doctrine;[13] characterizing the questioned activity as something other than a search or seizure;[14] and determining that the appropriate fourth amendment rule was inapplicable because it was new and would not be applied retroactively.[15]

Thus, for a number of years I lectured North Dakota lawyers and judges about the relative ineffectiveness of the fourth amendment in North Dakota, at least as reflected in the opinions of

8. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 33.

9. The North Dakota Supreme Court candidly declared its distaste for the exclusionary rule in State v. Klevgaard, 306 N.W.2d 185, 190-91 (N.D. 1981), and in State v. Johnson, 301 N.W.2d 625, 627 (N.D. 1981).

10. *See* Lockney, *supra* note 1, at 740 n. 61 (suggesting that a distaste for the exclusionary rule may be affecting how police conduct is governed).

11. *See, e.g.*, State v. Lind, 322 N.W.2d 826, 832-33 (N.D. 1982) (following United States v. Salvucci, 448 U.S. 82 (1980) by abolishing the automatic standing rule).

12. *See, e.g.*, State v. Wetsch, 304 N.W.2d 67 (N.D. 1981) (admitting evidence derived from an improper arrest was harmless error since properly admitted evidence would sustain the jury's verdict); *In re* M.D.J., 285 N.W.2d 558, 565 (N.D. 1979) (admitting gun into evidence was harmless error by reason of the overwhelming evidence that the defendant committed the crime).

13. *See* State v. Skjonsby, 319 N.W.2d 764, 786-87 (N.D. 1982); State v. Nagel, 308 N.W.2d 539, 545-57 (N.D. 1981); State v. Klevgaard, 306 N.W.2d 185, 193 (N.D. 1981); State v. Johnson, 301 N.W.2d 625, 629-30 (N.D. 1981); State v. Phelps, 297 N.W.2d 769, 775 (N.D. 1980). *See also* Lockney, *supra* note 1, at 739-44 (earlier comments on our court's use of the inevitable discovery doctrine).

14. *See* State v. Koskela, 329 N.W.2d 587 (N.D. 1983); City of Wahpeton v. Johnson, 303 N.W.2d 565, 567 (N.D. 1981); State v. Planz, 304 N.W.2d 74 (N.D. 1981).

15. *See* State v. Nagel, 308 N.W.2d 539, 545 (N.D. 1981) (rule prohibiting officers from making warrantless entry into a suspect's home for routine felony arrests does not apply retroactively).

the North Dakota Supreme Court. The effect of the exclusionary rule on police conduct was, from a law enforcement viewpoint, analogous to lightning striking — because it struck so infrequently and so unpredictably, it was not a cause for serious alarm about the loss of relevant evidence.[16] Just as I was developing this opinion, however, strange developments began to occur. First, the United States Supreme Court took significant steps to make the rules of search and seizure less restrictive[17] and added new ways to avoid the effects of the exclusionary rule.[18] Then, within the last year, the North Dakota Supreme Court surprisingly found the evidence in two criminal cases inadmissible notwithstanding relatively easy doctrinal justifications that could have achieved contrary results.[19] In another case the North Dakota court refused to support a trial court's suppression of evidence, a result that is somewhat difficult to reconcile with a general understanding of the rules involved.[20]

I believe that a connection exists between the exclusionary rule and the confusion of the general rules governing police conduct. The rules currently applied to control searches and seizures under the fourth amendment are, for the most part, not practically understandable by the people they are supposed to control — North Dakota law enforcement personnel. To illustrate my point about the confusion law enforcement personnel must feel about our judge-made rules, consider the following hypothetical:

> Officer Able receives a telephone call from an anonymous informant. The informant states that Clem has marijuana

16. *See* Lockney, *About Five Years in the Life of North Dakota Search and Seizure, Interrogation & Confession and Eye Witness Identification Law,* in NORTH DAKOTA PRACTICAL CRIMINAL PRE-TRIAL PROCEDURES 1, 3-18 (1985) (brief summary of recent North Dakota search and seizure cases).

17. *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (replacing the *Aguilar-Spinelli* "two pronged test" with "totality of the circumstances" analysis as the method for making probable cause determinations). *See also* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). For a discussion of how the decision in *Gates* made the rules of search and seizure less restrictive, see W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.3(c) (1984).

18. *See* United States v. Leon, 468 U.S. 897, (1984) (officer's objectively reasonable reliance on subsequently invalidated search warrant does not justify substantial costs of exclusion); Massachusetts v. Sheppard, 468 U.S. 981 (1984) (suppression of evidence not required where judge, not police officers, committed error of constitutional dimensions with respect to issuing a warrant); Nix v. Williams, 467 U.S. 431 (1984) (adopting inevitable legitimate discovery doctrine).

19. *See* State v. Sakellson, 379 N.W.2d 779, 784-85 (N.D. 1985) (unannounced entry pursuant to a "knock and announce" search warrant was not justified by exigent circumstances, or good faith exception to the warrant requirement); State v. Thompson, 369 N.W.2d 363, 366-67 (N.D. 1985) (search in reliance on a tip from an anonymous informant failed to meet even the more liberal "totality of the circumstances" analysis of *Gates,* and hence was not justified by probable cause).

20. *See* State v. Riedinger, 374 N.W.2d 866, 876 (N.D. 1985) (stolen microwave oven was admissible as the result of a "plain view seizure" though officers: (1) entered premises pursuant to search warrant covering only drugs and money but were looking to find stolen goods as well; (2) picked up the microwave to read its serial number; and (3) called in the serial number to determine if microwave was stolen). *But see* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plurality) (evidence is admissible as the result of a valid "plain view seizure" only if: (1) the prior intrusion was

in his residence, and describes Clem's residence, car, and place of work. The informant also states that he previously supplied accurate information which led to the conviction of Roy. Able verifies Clem's identity, residence, car, and work place. Able then submits an affidavit containing this information to a magistrate and obtains a warrant to search Clem's residence for marijuana. Officer Able goes to Clem's residence with Officer Baker to execute the warrant.

The officers enter a porch through a closed but unlocked storm door, and cross to an open doorway leading into Clem's residence. A doorbell is located beside the open door. Inside the door is a hall and stairway leading to the second floor. Without ringing the doorbell or knocking, and without announcing their authority, Able and Baker enter through the open door. They climb the stairs and observe Clem sitting in his living room. They then knock at the entrance to the living room and announce their authority. The officers search Clem's residence and discover a quantity of marijuana.

During the search of Clem's residence, Officer Baker observes a portable television set on a table in the lower hall. Since he had previously been told that Clem was near the area of a recent burglary, Baker decided that the search might be a good opportunity for him to observe stolen goods. Baker picks up the television in order to record the serial number, and calls the number in to the police station. It turns out that the television is stolen.

By using this hypothetical, we can examine the "rules" derived from the recent North Dakota cases I referred to earlier dealing with search warrants — a common and judicially preferred method for authorizing police searches.[21] To help make my primary point, however, let me summarize the rules as if I were lecturing a class of police officers. Assume we have intelligent officers, eager to learn the rules governing their conduct in situations similar to those in the hypothetical. They should be very interested to know the "reality" of the hypothetical since it is actually based on three recent North Dakota cases.[22]

valid; (2) discovery of item was inadvertent; and (3) it was immediately apparent that the object was contraband).

21. *See* State v. Thompson, 369 N.W.2d 363 (N.D. 1985); State v. Sakellson, 379 N.W.2d 779 (N.D. 1985); State v. Riedinger, 374 N.W.2d 866 (N.D. 1985).

22. The first paragraph of the hypothetical is derived from State v. Thompson, 369 N.W.2d 363, 364-65 (N.D. 1985). The second paragraph of the hypothetical is similar to the facts of State v.

As police officers, you must determine whether there is probable cause to search before you ask for a search warrant.[23] If the information that you believe shows probable cause includes a tip from an informant, you must exercise your prudence and common sense as a reasonable, well-trained police officer to judge its merit in showing probable cause.[24] The information or tip should be evaluated by either the *Gates* "totality of circumstances" test or the *Aguilar-Spinelli* "two-pronged veracity and basis of knowledge" test, since the North Dakota Supreme Court is unsure what test controls in North Dakota.[25]

This information should then be presented to the magistrate who will evaluate it for probable cause.[26] If the magistrate approves your probable cause presentation, he will issue a search warrant to you.[27] If the probable cause determination turns out later to be erroneous the evidence may or may not be excluded, depending upon whether North Dakota intends to apply rather than merely discuss the good faith exception to the exclusionary rule.[28] Even if North Dakota adopts the good faith exception, the evidence will be excluded notwithstanding your own actual or, as courts like to call it, "subjective" good faith, if the court later

Sakellson, 379 N.W.2d 779, 781 (N.D. 1985). The third paragraph of the hypothetical is based upon State v. Riedinger, 374 N.W.2d 866, 869 (N.D. 1985).

23. State v. Thompson, 369 N.W.2d 363, 372 (N.D. 1985).

24. *Id.*

25. *Id.* at 366. *See* Illinois v. Gates, 462 U.S. 213 (1983); Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). For a discussion of the *Gates* and the *Aguilar- Spinelli* tests concerning the reliability of an informant's tip, see W. LAFAVE AND J. ISRAEL, *supra* note 17, § 3.3(c).

Much of the uncertainty and confusion surrounding the *Gates* and the *Aguilar-Spinelli* tests is created by the possibility of different standards under parallel provisions in the federal and state constitutions. That possibility is well canvassed, and created, by the various opinions in State v. Sakellson, 379 N.W.2d 779 (N.D. 1985), State v. Thompson, 369 N.W.2d 363 (N.D. 1985), and State v. Riedinger, 374 N.W.2d 866 (N.D. 1985). The general theories and debate about the existence of different rules emanating from federal and state constitutions (translation: the fine points) are extensively analyzed in a recent symposium on the topic of state constitutional law. *See The Emergence of State Constitutional Law,* 63 TEX. L. REV. 959 (1985).

Whether such divergence is a good thing, or not, is beyond the scope of this cursory essay. My more limited point is that the reality of such divergence in North Dakota, *see, e.g.,* State v. Orr. 375 N.W.2d 171 (N.D. 1985), or its uncertain possibility, *see, e.g.,* State v. Sakellson, 379 N.W.2d 779 (N.D. 1985); State v. Thompson, 369 N.W.2d 363 (N.D. 1985); State v. Riedinger, 374 N.W.2d 866 (N.D. 1985), enormously complicate the job of a police officer trying to understand the rules. I do not think the officer's attempt to study the over 400 pages of the Texas Law Review's symposium would help much either.

26. State v. Thompson, 369 N.W.2d 363, 370 (N.D. 1985).

27. *Id.*

28. *See id.* at 372 n. 5. *See also* State v. Sakellson, 379 N.W.2d 779, 790 (N.D. 1985) (Erickstad, C.J., dissenting). For a discussion of the good faith exception, see *infra* notes 38-40 and accompanying text.

"objectively" determines that as a reasonably well-trained officer you should have known that the probable cause finding by the magistrate was erroneous.[29]

When entering the object premises to execute the warrant, you must announce your authority and purpose before breaking in.[30] Entering an open door is a breaking.[31] If you misjudge the actual entrance to a dwelling and, for example, knock too late, your action constitutes a violation of statutory law and a violation of the fourth amendment.[32] Good faith in making the mistake is probably not sufficient to avoid application of the exclusionary rule.[33]

Once you have entered the premises, your intent to search for evidence not specified in the warrant is irrelevant (in most cases) to the validity of the search actually conducted if a hypothetical reasonable officer without your intent would believe he should observe and seize other items found in plain view.[34] In other words, your motive to look beyond the scope of the warrant doesn't extend the scope of the search beyond the warrant.[35] It is also irrevelant to the so-called "inadvertence test" for the plain-view doctrine if you had no probable cause to look for the additional, unwarranted items when you formed your irrelevant subjective intent to search beyond the scope of the warrant.[36] Your motive to look for other evidence, coupled with close examination of an item, movement of the item to check for a serial number, and verification of the item's stolen character by a radio check of that serial number, are insufficient to convert your action from a justified plain view observation and seizure into a search beyond the authorized scope of the warrant.[37]

Running through my discussion thus far has been the idea of so-called "good faith." Let me summarize for you some of the good faith doctrine. When you decide to

29. State v. Thompson, 369 N.W.2d 363, 372 (N.D. 1985).
30. N.D. CENT. CODE § 29-29-08(a) (1974).
31. State v. Sakellson, 379 N.W.2d 779, 783 (N.D. 1985).
32. *See id.* at 784.
33. *Id.* at 784-85.
34. State v. Riedinger, 374 N.W.2d 866, 871-72 (N.D. 1985).
35. *Id.* at 874.
36. *Id. See also* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality) (seizure of item in plain view of officer is permissible if there was a valid prior intrusion, discovery of the item was inadvertent, and it is immediately apparent the objects are evidence).
37. State v. Riedinger, 374 N.W.2d 866, 875 (N.D. 1985).

obtain a warrant, and a magistrate issues the warrant, you cannot rely on the magistrate's decision to issue the warrant unless you are sure that a reasonably well-trained officer would be justified in believing the magistrate's determination was correct.[38] This is assuming that the North Dakota Supreme Court decides to apply the United States Supreme Court's good faith exception, which it has discussed but not yet applied as the controlling law of North Dakota.[39] Of course, if you are able to determine that the magistrate was incorrect, you should not have attempted to obtain the warrant in the first place.[40]

When you enter the premises to execute a warrant, you must believe in good faith that you are authorized to engage in the course of conduct you choose to follow.[41] But your belief must also be such that a court can later determine objectively that you acted reasonably, that is, based upon articulable reasons sufficient to cause a reasonable and reasonably well-trained officer to have your belief that you were acting lawfully. Again, this is if the court in Bismarck does in fact decide to adopt a good-faith exception for North Dakota.

Once you are searching the premises, your personal intent to search for things not authorized by the warrant is irrelevant in that it will not cause the search to be invalidated as an exploratory search beyond the scope of

38. *See* United States v. Leon, 468 U.S. 897, (1984) (evidence is admissible if it was obtained by officers acting in reasonable reliance on a search warrant which was ultimately found to have been issued without probable cause).

39. *See* State v. Thompson, 369 N.W.2d 363, 372 & n.5 (N.D. 1985). Perhaps the lecture should also include a comment about the United States Supreme Court's very recent decision in Malley v. Briggs, 106 S. Ct. 1092 (1986). *Briggs* held that police officers have only qualified immunity against civil rights suits for illegal arrests. *Id.* at 1096. And, *Briggs* further held that an officer is not shielded from liability by merely asserting that he believed the facts contained in a warrant affidavit and that it was reasonable for him to rely on the judgment of a judicial officer who issued the warrant. *Id.* at 1098-99. My colleague, Professor Randy Lee, brought *Malley v. Briggs* to my attention by giving me a copy with the following question scribbled on it:

> Am I correct, for the generalities of it, to say that this case, plus JUDICIAL IMMUNITY, leaves us in a place where the burden of BEING WRONG ABOUT THE LAW falls heaviest on the one* who is LEAST likely to know the law's subtleties and lightest on the one** *MOST* likely to be able to deal with them? If so, the law is a [sic] ASS.
>
> *policeperson
> **judge

Another colleague, Professor Marcia O'Kelly, says Professor Lee is correct. Since they are both very smart lawyers, I think you should probably bring the *Malley v. Briggs* decision to the attention of our police officers and their insurers.

40. *See supra* note 25 and accompanying text.

41. State v. Sakellson, 379 N.W.2d 779, 785 (N.D. 1985).

> the warrant, so long as you didn't have probable cause to include the items in your warrant application and so long as another hypothetical officer, acting as you did but without your intent, could have searched for and seized the additional evidence.[42] Any questions, or is it all clear?

Does this make much sense to you, as the state's chief law enforcement officer and an experienced, highly qualified, well-educated lawyer? If it's as confusing to you as it is to me, imagine the reaction of police officers. Perhaps I've misstated the "rules" or misinterpreted the cases and judicial opinions. If so, I doubt very much that adjusting my belief description to fit another lawyer or judge's reading of the cases, even if more accurate, would result in additional clarity or intelligibility to even a well-trained police officer.

It seems the courts are incapable of laying down clear rules. I suspect at least part of the reason for the problem is that judges labor under pressure exerted on them in a criminal appeal by the "rock" of approval for controversial and complex police practices, and the "hard place" of excluding relevant and probative evidence. Each decision can be criticized on several grounds. If the search is deemed improper, the decision may be criticized as hampering the police, excluding valuable evidence, and perhaps even providing a criminal with a windfall: the avoidance of conviction. Alternatively, if the search is deemed proper the decision may be criticized as insufficiently protecting citizens' privacy from intrusive police practices. Sometimes both criticisms may be leveled at the same decision. In any event, people cannot consciously and conscientiously follow rules that they do not understand. Until the courts create rules that can be comprehended by the police, excluding evidence as a means of ensuring compliance is, as a practical matter, about as effective as spitting into the wind.

I believe that we should, however, recognize that the exclusionary rule is a necessary evil. It is evil in the simple sense that, as Cardozo said years ago, it is illogical to let the criminal go free because the constable blundered.[43] But it is necessary if we do not want to declare open season on citizens by over zealous or confused police officers. If the exclusionary rule is a necessary evil, it is my view that we need to pay more serious attention in North

42. State v. Riedinger, 374 N.W.2d 866, 871-72 (N.D. 1985).
43. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

Dakota to the rules of conduct it is meant to enforce. And, if lawyers and judges can't make them clear enough, perhaps we need to look elsewhere for the creation of clearer rules. I believe that we should consider greater administrative involvement in the creation of rules for police conduct. Over ten years ago, Professor John Kaplan offered a logical plan for doing just that, and it is time to see if his proposal is workable.[44]

Professor Kaplan noted that:

> The exclusionary rule, which appears to be focused upon the misbehavior of the individual policeman, does not take into account the fact that the policeman approaches his job with departmental expectations, with his own departmental training, either official or unofficial, and with the fear of departmental discipline for improper conduct. These departmental rewards and sanctions are far more important to him than the threat of exclusion of any evidence he might illegally seize.[45]

Kaplan therefore suggests that we refocus our efforts on police departments themselves, as well as on the individual police officers. The essence of his proposal is that the exclusionary rule, rather

44. *See* Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027 (1974). In addition to Professor Kaplan's article, which inspired my suggestions, there is impressive literature on the subject of rulemaking by or for the police. *See, e.g.*, Caplan, *The Case for Rulemaking by Law Enforcement Agencies,* 36 LAW AND CONTEMP. PROBS. 500 (1971); Goodpaster, *An Essay on Ending the Exclusionary Rule,* 33 HASTINGS L.J. 1065 (1982); McGowan, *supra* note 4; Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights,* 52 J. URB. L. 25 (1974).

*See also* W. LAFAVE, SEARCH AND SEIZURE § 1.2(f) (1978). Professor LaFave discusses Professor Kaplan's proposal under the heading "Limiting the exclusionary rule to institutional failures." *Id.* at 38. He suggests that Kaplan's proposal

> deserves serious attention, for it is directed toward the most desirable objective of prompting law enforcement agencies to engage in careful self-study for the purpose of producing clear and comprehensive rules to govern day-to-day police practices. The difficult question, it would seem, is whether the proposal could be feasibly implemented.

*Id.* at 39. (footnotes omitted). Professor LaFave's concern about implementation is not based upon a presumed inability to fashion effective rules, but rather on the demands that hearings regarding compliance might place upon the courts, and also on his recognition of the ability of judges to nullify sanctions to which they are opposed. *Id.* Since I extend Professor Kaplan's suggestion by proposing state-wide rather than department-by- department implementation, perhaps courts could make generalized determinations that the administrative rules have adequately avoided the necessity for an exclusionary remedy in North Dakota. *See* Goodpaster, *supra,* at 1100-01 (likewise proposing state-wide implementation of legislative or administrative regulation). Such determinations would then be applied in subsequent cases, leaving to individual defendants the continuing opportunity to relitigate the question. If that modification would be insufficient to avoid the implementation problem, I optimistically hope that the "serious attention" suggested by Professor LaFave could result in some other device to make implementation feasible. My point in this essay, however, is that we can't be sure until we try, and that the energy expended in the continued abstract debate about the theoretical pros and cons of the exclusionary rule would be better utilized if focused more directly on the subject of appropriate police behavior.

45. Kaplan, *supra* note 44, at 1050.

than being abolished, should be modified so that it will be "inapplicable to cases where the police department in question has taken seriously its responsibility to adhere to the fourth amendment."[46] That seriousness would be shown if the state could demonstrate three things: (1) that the police had in fact adopted a set of published regulations providing rules for proper action in the situations at issue;[47] (2) that the officers received sufficient training to ensure that they had learned the regulations;[48] and (3) that there is a history of meaningful discipline against officers who violate the departmental rules.[49] When all three items are demonstrated, courts should hold application of the exclusionary rule unnecessary, since the goal of adequate regulation of police conduct would be met.[50]

In essence, Kaplan's proposal recognizes that the exclusionary rule is perhaps at present a necessary evil. But if we could be assured of the adequacy of another method of controlling conduct, the rule would no longer be necessary. Who could object to trying to provide clearer and more detailed regulations of police conduct, or to providing more adequate police training? And doesn't it make more sense to punish an officer through significant and demonstrated administrative enforcement of departmental policies rather than through occasional judicial exclusionary rulings that do not directly affect the offending officer and that provide a windfall to the defendant?

Professor Kaplan's proposal seems eminently feasible for North Dakota. A few modifications, however, would seem in order. First, Professor Kaplan seems to suggest that each police department should adopt its own rules, and should individually litigate the application of the exclusionary remedy to the cases that arise.[51] Perhaps that approach makes sense in his home state of California, with its vast population and diversity. In North Dakota, however, we might be better advised to treat all state law enforcement agencies as a single entity. I see no reason for rules of law enforcement conduct on important search and seizure topics to vary significantly from city to city and agency to agency. Moreover, I think it would be difficult for all but a few of the larger police departments to realistically devote sufficient resources to a major project of this sort. Instead, I propose that the rules be

46. *Id.*
47. *Id.* at 1050-51.
48. *Id.* at 1051.
49. *Id.*
50. *Id.*
51. *Id.* at 1050-51.

formulated at the state level.[52] As a mechanism for creating the rules, I would suggest a commission of some sort. The organizational format could, of course, take a variety of forms.[53] This "commission," should be broadly representative: it should include a heavy concentration of experienced police and prosecution experts, other relevant experts, and perhaps representatives of the general citizenry.[54]

Regarding the training provisions of Professor Kaplan's proposal, North Dakota already provides mandatory training for all officers at the state level.[55] It would be relatively easy to provide

52. In addition to making implementation of the rules more feasible for smaller communities, a state-wide program of uniform rules of conduct would releave the court of case-by-case determinations and permit it to find that the exclusionary rule is no longer necessary in the State of North Dakota. *See supra* note 44.

53. For example, North Dakota currently provides training for peace officers and attorneys through your Peace Officer Standards and Training Board of the Criminal Justice Training Division. *See* N.D. CENT. CODE § 12-62-01 (1985) (creation of Criminal Justice Training and Statistics Division); *id.* § 12-62-03 (creation of Peace Officer Standards and Training Board). Rules of police conduct for searches and seizures could be promulgated by either the existing Training Board or a new commission legislatively created within the division, and the existing Board or the new commission could also provide peace officers and attorneys with instruction for using the new rules of conduct.

Whether the existing Board or a new commission is utilized, placing responsibility within the Criminal Justice Training Division would take advantage of the Attorney General's power to make rules necessary to carry out the powers and duties of the Division. *See id.* § 12-62-10 (Attorney General's rulemaking power). Thus the commission would have the power to formulate rules of police conduct. Any rules adopted by the Attorney General must, however, be in accordance with the Administrative Agencies Practice Act. *Id. See* Administrative Agencies and Practice Act, N.D. CENT. CODE ch. 28-32 (1974 & Supp. 1985). The commission promulgating rules of conduct could therefore function as, or function within, an administrative agency that would enforce the rules of conduct.

If the commission acts within the framework of an administrative agency, it would have the power to adopt, amend, and repeal rules in conformity with the statute it is administering or enforcing. *Id.* § 28-32-02 (Supp. 1985). Prior to adopting, amending, or repealing rules, the agency would have to adopt a procedure whereby all interested persons are given reasonable opportunity to submit data, views, or arguments concerning the proposed action. *Id.* Thus laymen, as well as members of the legal community, would be able to participate in formulating rules of police conduct. Additionally, the Attorney General, the legislative council, the administrative agency, the district court, and possibly the North Dakota Supreme Court, would all have an opportunity to review the proposed rules. *See id.* (Attorney General shall furnish opinion as to legality of proposed rule prior to final adoption); *id.* § 28-32-03.3(1) (legislative council's committee on administrative rules may object to rules that are arbitrary, capricious, or beyond authority of agency); *id* § 28-32-04 (substantially interested persons may petition for agency hearing on reconsideration, amendment, or repeal of rules); *id.* § 28-32-15 (party charged with administering agency proceeding may appeal to district court from decision of administrative agency); *id.* § 28-32-21 (party of record may appeal to supreme court for review of district court's judgment).

In North Dakota, then, an organizational framework already exists within which a commission or administrative agency could be created to formulate rules of police conduct.

54. The legislature could provide by statute for commission membership just as it provides for membership of the Peace Officer Standards and Training Board. *See* N.D. CENT. CODE § 12-62-03 (1985) (Peace Officer Standards and Training Board shall consist of the director of the Law Enforcement Training Center and six persons appointed by the Attorney General). *See also id.* § 19-03.1-01.1 (Supp. 1985) (Controlled Substances Board consists of five members, including the Attorney General and one member appointed by the Governor); *id.* § 15-38.1-03 (1981) (Education Factfinding Commission consists of three members: one member appointed by the Attorney General, one by the Governor, and one by the Superintendent of Public Instruction). Appointments to the rulemaking commission could therefore be made by the Governor and the Attorney General.

Commission membership could be drawn from the North Dakota legal community and include police officers and administrators, attorneys, and judges. I feel nonprofessionals should also be represented. If they are excluded from membership on the commission itself, however, public input prior to adoption of the rules is probably required. *See id.* § 28-32-02 (Supp. 1985) (prior to adoption, amendment, or repeal of any rule, agency shall adopt procedure whereby all interested persons are afforded reasonable opportunity to submit data, views, or arguments).

55. *See* N.D. CENT. CODE § 12-62-01 (1985).

uniform state-wide training of new police officers regarding the rules at that time. Special training seminars could be provided for experienced officers.

Finally, implementation of the proposal would require a mechanism for enforcing the rules.[56] I have no firm opinion at this point whether such an enforcement mechanism could be set up within your office similar to your control of jails and charitable gambling. Perhaps the enforcement agency should instead be entirely independent of all law enforcement and judicial entities. In any event, I am confident that your staff and the legislative council could create a structure for an agency that would enforce the rules in a meaningful manner.

I am not suggesting a prepackaged, guaranteed solution to this complex problem. Rather, I can imagine many difficulties in getting from the proposal stage to actually accomplishing the goal. As Mencken reportedly observed, "every complex problem has a simple solution, and it is wrong."[57] In this context, I would argue that Professor Kaplan's basic idea is simple when compared to alternatives, but accomplishing the actual results might be complex and difficult. What I am suggesting in this letter is that you seriously consider the concept and, if you think it has merit, that you propose legislation or a legislative study of its feasibility. The desired result is to create an atmosphere in North Dakota in which the federal courts could reasonably determine that, since an alternative police control mechanism exists, the exclusionary rule has no remaining compelling basis.

I realize there is no guarantee that the courts would in fact modify their exclusionary rule in the desired manner. We can only hope that the courts will be reasonable and logical. But if they refuse to modify their current stance, what would we lose? What can we lose by having clear, enforceable, and enforced rules for proper police conduct? Commentators have pointed out a number of advantages inherent in an administrative system to regulate police behavior. An administrative system allows for flexibility and room for experimentation in methods of law enforcement.[58] It

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56. *See* Kaplan, *supra* note 44, at 1050-51.

57. Diligent efforts by friends, Mencken buffs, and Law Review editors (not mutually exclusive classes) failed to turn up the source of Mencken's quoted quip. The quote has, however, been noted in two federal court cases, neither of which cited authority. *See* United States v. Michael, 645 F.2d 252, 264 n.6 (5th Cir. 1981) (Tate, J., dissenting) (noting that "Mencken is alleged to have once said 'For every complex problem, there is usually a simple answer — and usually it's wrong' "); Hoots v. Pennsylvania, 545 F. Supp. 1, 2 (D.W.D. Pa. 1981) (noting the "profound observation of Henry Louis Mencken that every difficult problem always has a simple solution and that solution is always wrong"). Since neither court was more successful than I in finding the actual quotation, and since their versions diverge, I felt justified in using a third version and thereby avoiding a choice between "usually" and "always."

58. *See* McGowan, *supra* note 4, at 677.

makes specialized knowledge and expertise available on a continuous and systematic basis, assisting in the formulation of rules and in informing a reviewing court of the facts and policy considerations underlying the rules.[59]

An administrative system would also allow the formulation of detailed rules defining the rights of suspects.[60] By calling for strong adversary participation during the rulemaking process, it would preserve adversary challenges to police practices.[61] Continuous reexamination of established law enforcement methods would be provided.[62] Moreover, an administrative system can address police abuse or harassment that does not result in prosecution, and therefore is not subject to the exclusionary remedy.[63]

Finally, an administrative system would permit comprehensive consideration of criminal justice issues in their appropriate and full context.[64] By separating rulemaking from determinations of guilt in a criminal proceeding, the possibility of releasing a guilty defendant would no longer have an effect on the shape of the rules.[65] And, with fewer rules formulated on the basis of unique facts, the rules that are established would be easier to understand and administer.[66] Thus the law would develop in a more intelligible pattern.

Skeptics might argue that administrative rules could prove inferior to judicial rules. I have two responses to that objection. First, not bloody likely. But that conclusion is based in part upon my assessment of the rules that presently exist. Someone might reasonably disagree with my characterization of the rules and my judgment that they are inadequate. I would remind the potential naysayer, however, that the court rules and interpretations would not be eliminated, only supplemented and refined. The constitutional rules articulated by the courts would continue in force as benchmarks for the administrative rules. And, because the administrative rules would be subject to review and revision by the courts as a matter of federal and state constitutional law,[67] there would be no lack of judicial guidance for the development of the rules.

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59. *See id.* at 678.
60. *See id.* at 680.
61. *See* Goodpaster, *supra* note 44, at 1104.
62. *See* McGowan, *supra* note 4, at 681.
63. Goodpaster, *supra* note 44, at 1103.
64. *Id.* at 1102.
65. *Id.*
66. *Id.*
67. *See also* N.D. CENT. CODE § 28-32-15 (1974) (party to an administrative agency proceeding may appeal to district court from adverse decision ); *id.* § 28-32-21 (Supp. 1985) (party of record may appeal to supreme court for review of district court's judgment).

Perhaps my goal is idealistic and unattainable. If so, the conclusions we must draw from that pessimistic prediction should cause us deep despair about the current scheme as described in my introductory comments.[68] What sense does it make to control police conduct by excluding relevant, highly probative evidence simply because officers have violated rules that cannot be stated with sufficient clarity or detail to provide the officers adequate advance guidance?

Summarizing the main points in this letter, I believe that the rules of search and seizure in North Dakota are so confusing and indeterminate that they are unable to serve as meaningful guides to police conduct. Continued use of the exclusionary remedy to enforce the rules is, therefore, mainly a waste of time and resources. Control of the police through administratively created and enforced rules should be tried as an alternative to reliance on court-made rules. The North Dakota Supreme Court in *State v. Goehring*[69] recently recognized that teaching officers standard procedures at the police academy may serve as an important check against impermissible, unbridled discretion.[70]

The main thrust of Professor Kaplan's proposal, which I have outlined for you here, is that such procedures should be created for,

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68. *See* text accompanying *supra* notes 2-7. Craig Bradley, my former colleague in the Justice Department, recently and eloquently explained in great scholarly detail his reasons for concluding that "the fundamental problem with fourth amendment law is that it is confusing." Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472 (1985). Obviously, Professor Bradley and I are in agreement on that point. His suggestion to remedy the problem is that the courts should implement one of the following two models: (1) rely on a general rule of reasonableness rather than trying to formulate clear rules; or (2) require warrants in all cases except true emergencies. *Id.* at 1481-98. I am not sure that the proposals in my letter are necessarily inconsistent with his proposed models. But his first model, as he recognizes, would not satisfy civil libertarians without some alternative method of controlling the police. *Id.* at 1501.

I am even less certain how critical legal scholars might react to my proposals for clearer, but administratively-generated rules. To the extent they find legal rules hopelessly or unavoidably indeterminate, they might find the proposal naively utopian. However, to the extent that they equate legal and political rulemaking, they might endorse the open placement of control in an administrative, legislative context. An attempt to elaborate the relationship of my comments to the critical legal studies movement is beyond the scope of this letter. I add these brief comments merely to hint that, even in North Dakota, critical legal scholarship is a force to be reckoned with. Even Professor Bradley reacts by claiming an intention to strive for ideological neutrality, a legal process orientation that I doubt would satisfy critical scholars. *See id.* at 1472 n.17. I admit a contradiction between my apparently similar aspiration and my critical skepticism about the possibility of neutral rules, but like Professor Bradley I believe something needs to be done.

69. 374 N.W.2d 882 (N.D. 1985).

70. *See* State v. Goehring, 374 N.W.2d 882, 888 (N.D. 1985). In *Goehring*, a highway patrol officer stopped the defendant's car pursuant to a routine safety check. *Id.* at 883. After the safety check revealed no problems, the officer asked to see the defendant's driver's license: his normal procedure. *Id.* at 884. Since it had expired, the officer ran a check on the license and found it was suspended. *Id.*

The defendant appealed his resulting conviction for driving with a suspended license, arguing that the inspection was constitutionally impermissible under the United States Supreme Court's ruling in Delaware v. Prouse, 440 U.S. 648 (1979). *Id.* The North Dakota court, however, found the facts of the case at bar significantly different from those in *Prouse.* 374 N.W.2d at 887. While *Prouse* involved a random stop for the sole purpose of checking a driver's license, the officer in *Goehring* testified that the safety checks were conducted according to the policies and procedures established

taught to, and enforced against the police.[71] You, as Attorney General, could then show the courts that North Dakota has and enforces such detailed rules consistently within the general constraints of the fourth amendment. Then you would be justified in arguing that North Dakota courts no longer have any logical reason to exclude evidence in the occasional criminal case where it was obtained in violation of the rules.

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by the North Dakota State Highway Patrol. *Id.* Since the concern in *Prouse* was with the "unconstrained exercise of discretion" by the officer, the *Goehring* court indicated that an established procedure for vehicle inspections might be permissible under the fourth amendment if officer discretion were curtailed. *Id.* at 888. Nonetheless, because the state failed to introduce any evidence showing what the "established" procedures were, it was not surprising that the court was unable to determine whether the phantom procedures sufficiently curtailed police discretion. Thus Goehring's conviction was reversed. *Id.*

71. *See* Kaplan, *supra* note 44, at 1050-51.