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The California Constitutional Right of Privacy and Exclusion of Evidence in Civil Proceedings

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The California Constitutional Right of Privacy and Exclusion of Evidence in Civil Proceedings

The prevailing view at common law was that the admissibility of evidence was not affected by the illegality or impropriety of its procurement.[1] The United States Supreme Court in *Weeks v. United States*,[2] however, fashioned a rule rendering evidence inadmissible in federal criminal prosecutions when obtained by federal officers in violation of fourth amendment protections of individual privacy against unreasonable search and seizure.[3] The fourth amendment exclusionary rule is now well established in both federal and state courts where state action in the procurement of evidence for criminal prosecutions is involved.[4] However, the application of exclusionary principles relating to the methods and propriety of evidence gathering in noncriminal cases has not

1. 29 AM. JUR. 2d *Evidence* § 408, at 466-67 (1967); 4 B. JONES ON EVIDENCE § 868 (5th ed. 1958); J. MCBAINE, CALIFORNIA EVIDENCE MANUAL § 261, at 83, Supp. 54-57 (2d ed. 1960 + Supp. 1977); C. MCCORMICK ON EVIDENCE § 137 (1954); 8 J. WIGMORE ON EVIDENCE § 2183, at 6-8 (J. McNaughten rev. 1961).

2. 232 U.S. 383 (1914).

3. The Court in *Weeks* also relied on the fifth amendment protection against self-incrimination in excluding evidence obtained in violation of fourth amendment rights. The relationship of the fifth amendment to the exclusion of evidence in federal criminal cases was further developed by the Court in *Gouled v. U.S.*, 255 U.S. 298 (1921). The scope of this comment, however, will be limited to an examination of fourth amendment principles underlying the exclusionary rule as propounded in *Weeks* and as subsequently adopted by the California courts based on the fourth amendment and Art. I § 13 of the California Constitution guarantying protection against unreasonable search and seizure.

4. The expansion of this rule to include state criminal proceedings was first enunciated by the Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), where the fourth amendment exclusionary rule was held applicable to the states under the fourteenth amendment. For a thorough analysis of the fourth amendment principles underlying this decision *see* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). It must be noted that both *Mapp* and *Weeks* dealt with the exclusion of evidence obtained by law enforcement agents, *i.e.*, where state action was involved. Subsequent to *Weeks*, the Court held in *Burdeau v. McDowell*, 256 U.S. 465 (1921), that evidence unlawfully obtained by a private individual was not subject to exclusion on the ground that the fourth amendment was inapplicable in the absence of state action. In *Mapp*, the Court did not overrule *Burdeau*, but merely extended the *Weeks* rule to apply to acts of the states. *See* notes 16 & 17 *infra* and accompanying text. In the forty-seven year period between *Weeks* and *Mapp*, states had the discretion to follow the exclusionary rule announced in *Weeks* or to observe the general common law view of admissibility. *See* Wolf v. Colorado, 338 U.S. 25 (1949).

been uniform, with courts in various jurisdictions reaching surprisingly diverse results.[5] The primary focus of this comment is to analyze the development of the fourth amendment criminal law exclusionary rule in California and to trace the expansion of its rationale into areas of noncriminal proceedings.[6] Special emphasis will be placed on the rationale for expansion of exclusionary principles and the relationship between exclusion of evidence improperly obtained and concerns for individual privacy.

There have been no California cases directly addressing the issue of exclusion of evidence obtained in a manner invasive of the right of privacy established by the California Constitution in "purely"[7] civil cases.[8] Thus, an examination of California court decisions relating to the exclusion of evidence wrongfully procured in other types of proceedings is advantageous in two aspects: first, to project possible reactions of the courts when faced with such a situation and, second, to provide a background for proposal of a "new" exclusionary rule for purely civil cases based on the express California Constitutional right of privacy.[9] These decisions will be divided into the following categories for purposes of analysis: (1) criminal proceedings, (2) "quasi-criminal" proceedings, and (3) administrative hearings.[10]

I. CRIMINAL PROCEEDINGS

Prior to *People v. Cahan*,[11] decided in 1955, California courts generally held that illegally or improperly obtained evidence was admissible in criminal, as well as civil proceedings.[12] The Califor-

5. *See* People v. Moore, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968); Annot., 5 A.L.R. 3d 670, 676-80 (1966); *Mapp v. Ohio and Exclusion of Evidence Illegally Obtained by Private Parties*, 72 YALE L.J. 1062 (1963).

6. Although there are numerous situations in which evidence is excluded from consideration at trial, this comment will deal only with the exclusion of evidence based on the manner and method of its procurement. *See* note 106 *infra* dealing with the three main bodies of the law of evidence regarding limitations on admissibility.

7. The term "purely" is used throughout the text to signify those actions instituted by a private individual against another where no state agencies are directly involved, *e.g.*, administrative proceedings, and where the action is not criminal in effect. *See* note 18 *infra*.

8. Note 4 *supra*.

9. CAL. CONST. art. I, § 1 (West Supp. 1977) which reads as follows: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." (emphasis added).

10. This is a somewhat arbitrary division and, thus, there will be some unavoidable overlap between the categories.

11. 44 Cal. 2d 434, 282 P.2d 905 (1955).

12. 19 CAL. JUR. 3d § 1020, at 110-11, § 1029, at 122-23 (1975); J. MCBAINE, CALIFORNIA EVIDENCE MANUAL § 262, at 84 (2d ed. 1960); B. WITKIN, CALIFORNIA EVI-

nia Supreme Court in *Cahan* announced an exclusionary rule applicable to criminal cases where evidence was procured by state officers in a manner violative of constitutional protections.[13] The majority in *Cahan* relied on the Fourth Amendment to the United States Constitution and Article I, section 13, of the California Constitution[14] as authority for creation of the California exclusionary rule. Justice Traynor writing for the majority states: "Thus both the United States Constitution and the California Constitution make it empatically clear that important as efficient law enforcement may be, it is more important that *the right of privacy* guaranteed by these constitutional provisions be respected."[15]

Although recognizing that neither the United States nor California Constitutions *required* exclusion of evidence to protect privacy rights, the court held the exclusionary rule to be an appropriate remedy for violations of such rights.[16] The Court expressed four reasons for its decision: (1) the court should not be a party to "dirty business", (2) constitutional guarantees of privacy were not being effectively protected by existing sanctions, (3) the deterrent effect of such a rule on illegal police conduct and (4) the

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DENCE § 49, at 51 (2d ed. 1966). The leading cases of *People v. Mayen*, 188 Cal. 237, 205 P.435 (1922) and *People v. LaDoux*, 155 Cal. 535, 102 P. 517 (1909), which espoused the common law rule of unfettered admissibility of evidence regardless of its unlawful procurement were expressly overruled in *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955). *See also* note 1 *supra* as to the admissibility of evidence in civil proceedings to which California has generally adhered.

13. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). In *Cahan*, the defendant was convicted of conspiracy to engage in horse-race bookmaking with fifteen other persons. A portion of the evidence presented at trial and admitted over defendants' objection consisted of audio recordings of various defendants and additional evidence obtained by forcible entries and seizures by police without search warrants. The recordings were made by police officers who secretly entered two of the defendant's homes and installed listening devices with receiving equipment set up in a nearby location.

14. The Fourth Amendment to the United States Constitution provides: "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. Article I, section 13 of the California Constitution states: "The right of the people to be secure in their persons, houses, papers, effects against unreasonable seizures and searches may not be violated, and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." CAL. CONST. art. 1, § 13.

15. 44 Cal.2d at 438, 282 P.2d at 907 (emphasis added).

16. *Id.* at 440, 282 P.2d at 908-09.

argument that some criminals may go free was an invalid criticism of a rule intended to further constitutional protections.[17]

Since *Cahan*, the major developments in criminal law concerning fourth amendment rights have involved the concept of reasonable search and seizure.[18] The basic rationales supporting the judicially created exclusionary rule, however, have remained largely unchanged.[19]

In *Cahan* and subsequent criminal cases that have invoked the exclusionary rule, the evidence excluded was unlawfully procured by governmental law enforcement officers. The California Supreme Court has adhered strictly to the doctrine enunciated by the United States Supreme Court in *Burdeau v. McDowell*[20] that evidence obtained by wrongful means in connection with criminal proceedings by private individuals not associated with state agents is fully admissible.[21] The California courts have consistently held the exclusionary rule applicable only to acts of the state, while evidence obtained by private individuals has been routinely admitted regardless of the manner of its acquisition.[22]

II. QUASI-CRIMINAL PROCEEDINGS[23]

California has also adhered to the view promulgated by the United States Supreme Court extending the fourth amendment exclusionary rule to cases that are technically civil but "quasi-criminal" in effect.[24] The first time the California Supreme Court

17. *Id.* at 445-50, 282 P.2d at 910-12. *See* notes 66, 70, 73 & 78 *infra* and accompanying text for a further discussion of the *Cahan* rationale.

18. These developments are beyond the scope of this comment. However, for further information on the subject, *see* B. MARTIN, COMPREHENSIVE CALIFORNIA SEARCH AND SEIZURE 29 (1971); E. YOUNGER, SEARCH AND SEIZURE 21 (1972); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

19. *See* note 86 *infra* relating to the recent changes in the "judicial integrity" rationale.

20. 256 U.S. 465 (1921).

21. People v. Moreno, 64 Cal. App. 3d Supp. 23, 135 Cal. Rptr. 340 (1976) (private security officer employed by a retail store observed shoplifting activities of defendant through the louvered door of a dressing room); People v. Wachter, 58 Cal. App. 3d 911, 130 Cal. Rptr. 279 (1976) (an off-duty sheriff, while on a fishing trip, found marijuana growing on the defendants' farm); People v. Randazzo, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (1963) (retail store detective observed shoplifting by defendant by lying on the floor and looking under a partition of a dressing room into the enclosure occupied by defendant); People v. Johnson, 153 Cal. App. 2d 870, 315 P.2d 468 (1957) (employer borrowed employees' car with consent and searched the trunk discovering stolen items which were subsequently turned over to police).

22. *Id.*

23. This term is used to denote proceedings which, although civil in nature, are criminal in effect, *e.g.*, where penalties, confinement or forfeitures are involved.

24. One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693

applied the exclusionary rule of *Cahan* in such a manner was in *People v. One 1960 Cadillac Coupe*,[25] involving a car used in the unlawful transportation of marijuana, where the court stated:

> Whatever the label which may be attached to the proceeding, it is apparent that the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objectives of criminal law enforcement. On policy the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property.[26]

Subsequently, the supreme court in *People v. Moore*[27] reached the same result when the question of admissibility of evidence seized by state officers was raised in the context of a civil narcotic addict commitment proceeding.[28] However, the court there introduced a somewhat different rationale in applying the criminal law exclusionary rules. In a six to one decision, the court created a "balancing test," holding: "whether any particular rule of criminal practice should be applied . . . depends upon consideration of the *relationship of the policy underlying the rule to the proceedings*."[29]

Applying this test to the facts in *Moore*, the court reasoned that the primary policy of the exclusionary rule was "to deter unconstitutional methods of law enforcement" so that the state would "not profit from its own wrong."[30] The nature of the commitment proceeding here, although beneficial to both the addict and to society, involved a loss of liberty and, thus, was closely akin to criminal law objectives.[31] In considering the interrelationship of these

(1965) (forfeiture proceedings); *See also* B. WITKIN, CALIFORNIA EVIDENCE § 56, at 60 (2d ed. 1966).

25. 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964).

26. *Id.* at 96-7, 396 P.2d at 709, 41 Cal. Rptr. at 293.

27. 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968).

28. Under CAL. WELF. & INST. CODE § 3100 (West 1972), a person may be involuntarily committed to a state rehabilitation center upon the states' showing of addiction to narcotics or imminent danger of such addiction. In *Moore*, police officers detained the defendant in a parking lot and in the course of questioning him obtained evidence which was subsequently admitted in the commitment proceeding. On appeal the court found the police detention to have been without reasonable cause and therefore that all evidence obtained pursuant to the detention was inadmissible. The court stated that: "[T]he guarantees against unreasonable searches and seizures as contained in the Fourth and Fourteenth Amendments are applicable to police officers seeking to enforce the criminal laws . . . . [T]he guarantees are also applicable to governmental officials seeking to enforce health and safety regulations." People v. Moore, 69 Cal. 2d at 679, 446 P.2d at 803, 72 Cal. Rptr. at 803.

29. 69 Cal. 2d at 681-82, 446 P.2d at 805, 72 Cal. Rptr. at 805 (emphasis added).

30. *Id.* at 682, 446 P.2d at 805, 72 Cal. Rptr. at 806.

31. *Id.*

factors, the court found that the "criminal law" nature of this proceeding provided law enforcement officers with an incentive to violate the fourth and fourteenth amendments and, therefore, held the exclusionary rule applicable to protect the rights of those facing such commitment proceedings.[32]

Two years later the California Supreme Court in *In Re Martinez*[33] further developed this "balancing test" in the context of a parole revocation proceeding.[34] In balancing the costs to society of extending the exclusionary rule against the nature of the proceeding, the Court concluded that the social consequences outweighed the interests of the parolee under the parole revocation proceeding and admitted evidence obtained by a police officer which would have been excluded if introduced in a criminal proceeding.[35]

It now appears that the California courts are willing to apply criminal law exclusionary principles in many quasi-criminal cases. Where application of the *Moore* and *Martinez* "balancing test" reveal that the nature of the proceedings and individual interests involved outweighs the cost to society of expanding exclusionary principles, such rules will be invoked.

III. Administrative Proceedings

The recent dynamic growth of administrative agencies throughout California creates some difficulty in summarizing the extent to which established judicial rules of evidence apply in administrative proceedings. To facilitate and simplify analysis of the manner in which the California courts have dealt with the applicability of the exclusionary rule in such proceedings, those agencies in which the issue has most frequently arisen will be classified under three general categories: 1) state and local regulatory boards; 2) state bar proceedings; and, 3) state agencies with judicial powers.[36]

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32. *Id.*

33. 1 Cal. 3d 641, 463 P.2d 734, 83 Cal. Rptr. 382 (1970).

34. The defendant in *In re Martinez* had his parole revoked because of a narcotics conviction received while on parole. This conviction was reversed on the basis of a violation of the fifth amendment under *Miranda v. Arizona*, 384 U.S. 436 (1966) and an unlawful search and seizure by the police. Although defendant then appealed the parole revocation decision, the revocation was ultimately affirmed by the California Supreme Court. *Id.*

35. *Id.* at 650-51, 463 P.2d at 740-41, 83 Cal. Rptr. at 388-89.

36. *See* S. Gard, Jones on Evidence, *Administrative Proceedings* § 30:1, at 325-29 (6th ed. 1972) and B. Witkin, California Evidence, §§ 21-22, at 22-24 (2d ed. 1966) for additional information on classification of administrative agencies.

A. State and Local Regulatory Boards

In California, numerous state and local administrative bodies regulate the licensing, maintenance and discipline of various businesses and professional services.[37] The exclusionary issue has arisen most often in cases involving disciplinary hearings before the State Board of Medical Examiners.[38] Relying on two previous California Supreme Court decisions[39] the First District Court of Appeal in *Elder v. Board of Medical Examiners*[40] assumed that the criminal law exclusionary rules were applicable in license revocation proceedings. The California Supreme Court denied a hearing in *Elder*, but, subsequently, in *Emslie v. State Bar of California*[41] which involved disbarment proceedings, stated that: "such denial (in *Elder*) is not to be regarded as expressing approval of a categorical rule that the exclusionary rules of the criminal law apply in license revocation proceedings merely because a penalty is involved."[42] It now appears that the California Supreme Court has impliedly rejected mechanical application of the criminal law exclusionary rule in state regulatory proceedings in favor of the "balancing test" utilized in *Moore* and *Martinez*.[43]

In a 1974 case appealing the decision of a local school board dismissing an elementary school teacher for sexual misconduct, the Second District Court of Appeal, applying the "balancing test," ruled that the criminal law exclusionary rules were inapplicable in that particular administrative proceeding.[44] Society's interest in protecting school children was found to outweigh the punitive character of the proceeding and the personal interest of the

37. Nearly all the major state agencies regulating businesses and professions are now subject to the procedural provisions of the California Procedure Act adopted in 1945. *See* CAL. GOV'T CODE § 11500 (West 1966).

38. Patty v. Board of Medical Examiners, 9 Cal. 3d 356, 508 P. 2d 1121, 107 Cal. Rptr. 473 (1973) (disciplinary action for alleged illegal sale of restricted drugs by physician); Elder v. Board of Medical Examiners, 241 Cal. App. 2d 246, 50 Cal. Rptr. 304 (1966) (Court of Appeal reversed and remanded a decision by the Medical Board revoking petitioner's license to practice medicine for alleged abuses in authorizing the refilling of prescription drugs).

39. People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964); Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 P.39 (1906). The policy considerations for both of these decisions relate to the need for exclusionary rule protection where proceedings may deprive one of his liberty or property.

40. 241 Cal. App.2d 246, 50 Cal. Rptr. 304 (1966).

41. 11 Cal.3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1974).

42. *Id.* at 229, 520 P.2d at 1001, 113 Cal. Rptr. at 185.

43. *Id.* at 229-30, 520 P.2d 1002, 113 Cal. Rptr. at 185-86.

44. Governing Board v. Metcalf, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974).

teacher involved.[45]

B. State Bar Proceedings

Although similar to state licensing and regulatory boards, State Bar disciplinary proceedings are recognized as having a unique administrative nature.[46] The California Supreme Court has, on numerous occasions, described the purpose of the State Bar Act as one of protecting the public and the legal profession from those persons incompetent or otherwise unfit for the provision of legal services.[47]

Addressing squarely the issue of admissibility of evidence procured in a devious manner by private security guards, the California Supreme Court in *Emslie v. State Bar of California*[48] held that the criminal law exclusionary rule should not be mechanically applied to State Bar disciplinary proceedings. Rather, the "balancing test" formulated in *Moore* and *Martinez* was employed. In admitting the challenged evidence the Court unanimously held that the interests involved in protecting the attorney by invoking the exclusionary rule and the detrimental effects on the integrity of the judicial process should the rule not be applied were outweighed by the social interests of protecting the public and the legal profession from unscrupulous attorneys.[49] The Court, however, refused to speculate on the applicability of exclusionary rules in other types of administrative licensing proceedings, stating: "[T]he application of such rules must be worked out on a case-by-case basis in this and other license revocation proceedings."[50]

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45. *Id.* at 551 nn. 3&4, 111 Cal. Rptr. at 727, 728 nn.3&4. The court did, however, recognize that exclusionary principles have been applied in various types of non-criminal proceedings.

46. Emslie v. State Bar of California, 11 Cal. 3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1974); Johnson v. State Bar of California, 4 Cal. 2d 744, 52 P.2d 928 (1935): In re Danford, 157 Cal. 425, 108 P.322 (1910). As such, they are not governed directly by civil or criminal rules of procedure, however, such rules are used to safeguard rights to administrative due process when necessary.

47. Note 46 *supra*. *See also* Black v. State Bar of California, 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972); Dudney v. State Bar of California, 8 Cal. 2d 555, 66 P.2d 1199 (1937).

48. 11 Cal. 3d 210, 520 P.2d 991, 113 Cal. Rptr. 175 (1974). The *Emslie* opinion is emphasized here because it is illustrative of the present position of the California Supreme Court as to the applicability of exclusionary principles in administrative hearings. It also clearly demonstrates the court's preference for the "balancing test" approach to exclusionary rule application.

49. *Id.* at 229, 520 P.2d at 1002, 113 Cal. Rptr. at 186.

50. *Id.* at 230, 520 P.2d at 1002, 113 Cal. Rptr. at 186, where the court stated: "[T]he application of such rules must be worked out on a case-by-case basis in this and other license revocation proceedings."

C. State Agencies With Judicial Powers

There are a number of state administrative bodies created with provisions which make them, in some aspects, equivalent to courts. One such body is the Worker's Compensation Appeals Board.[51] In a landmark case dealing with the admissibility of evidence wrongfully obtained in a Worker's Compensation proceeding, a unanimous decision by the supreme court in *Redner v. Workmen's Compensation Appeals Board*[52] stated that:

> [T]he high purposes of the compensation law should not be perverted by resort to evidence perfidiously procured . . . the board may not rely upon evidence obtained . . . by deceitful inducement of an applicant to engage in activities which he would not otherwise have undertaken . . . *we cannot sanction the carriers' attempt to profit by its deceitful inducement . . . The legal process cannot be stultified by crowning such amoral maneuvers with apparent success.*[53]

Prior to *Redner* the courts had refused to exclude fraudulently obtained motion picture film from Worker's Compensation hearings.[54] Thus, the supreme court's decision in *Redner* was a departure from the traditional rules of evidence in compensation cases which had previously admitted all probative evidence regardless of the manner in which it was obtained. The exclusionary rule propounded in *Redner* was based on two broad principles. First, the imperative of judicial fairness and, second, denial of unjust

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51. *See* W. HANNA, THE WORKER'S COMPENSATION LAWS OF CALIFORNIA, *Department of Industrial Accidents* § 1.02, at 1-6, 1-17 (2d ed. 1977) for an in depth discussion of the background, purposes and procedures of the Worker's Compensation Appeals Board.

52. 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971). Redner, the Worker's Compensation applicant, was initially found to have a 57% permanent disability by the Worker's Compensation referee and began receiving such benefits. Subsequently, private investigators retained by his employers' Worker's Compensation carrier befriended Redner and invited him to a party held at a ranch where a great number of mixed drinks were served. Redner became inebriated and was induced to go horseback riding. While concealed in a barn on the ranch premises, the investigators took motion pictures of Redner riding, saddling, and walking a horse. The appeals board then granted a reconsideration of Redners' case, and based on the motion picture evidence, held that he should receive no permanent disability compensation.

53. *Id.* at 95, 97, 485 P.2d at 807, 809, 95 Cal. Rptr. at 455-57 (emphasis added).

54. *See* Carson v. Workmen's Comp. Appeals Bd., 31 Cal. Comp. Cases 291 (1966). Rather than excluding such evidence, the courts prior to *Redner* left the applicant to seek redress for this wrong by instituting a separate action for invasion of privacy where the intrusion involved would have been objectionable or offensive to the reasonable man. *See* Shernoff, *The Demise of the Sub Rosa Investigation*, 45 STATE BAR J. 853. Additional factors involved in bringing such an action will be discussed *infra*.

enrichment to those attempting to profit by their wrongdoing.[55]

It has been suggested that the rationale advanced in *Redner* may have a potentially broad effect on the admissibility of evidence in all civil cases.[56] Although the statements in *Redner* were phrased in broad terms and the logic of excluding such evidence in "purely" civil cases where there are more formalized rules of evidence is seemingly sound, the supreme court has yet to expressly expand the *Redner* holding in the context of purely civil proceedings.

It has also been suggested that if rules of evidence in civil proceedings are designed "to promote efficient fact finding and to best elicit the truth", there is no sound reason to apply different rules in administrative tribunals where resolution of fact is also the primary objective.[57] However, as explained in *Redner*, the Worker's Compensation Appeals Board is not bound by such common law or statutory rules and may prefer to make inquiries in a manner "best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of the Workmen's Compensation laws."[58] It may be reasonably inferred from the unanimous opinion in *Redner* that the supreme court's attitude toward excluding evidence wrongfully obtained in a situation where rules of evidence are relaxed indicates an outlook amenable to ruling similarly in situations where more formalized and rigid rules of evidence are applied.

It is important to note the marked departure of the courts from the traditional rule of admissibility of evidence which governed California for over one hundred years.[59] In the relatively brief period since *Cahan*, the California courts have expanded the rules of exclusion from criminal proceedings into "quasi-criminal" actions as well as into administrative hearings on a case-by-case basis.[60] Thus, the climate appears to be favorable for a further expansion of exclusionary principles into "purely" civil proceedings, particularly where rights of individual privacy are concerned.

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55. 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971).

56. Note, *Fraudulently Obtained Films*, 60 CAL. L. REV. 918, 921 (1972) where the author states: "[W]hile the discussion of the grounds for involving appellate review relates only to workmen's compensation cases, the underlying rationale of the exclusionary rule is applicable to civil trial proceedings as well."

57. S. GARD, JONES ON EVIDENCE, *Nature of Evidence* § 1:9, at 12 (6th ed. 1972).

58. 5 Cal. 3d at 95, 485 P.2d at 807, 95 Cal. Rptr. at 455-56.

59. *See* notes 9&10 *supra*.

60. *See* notes 24 & 36 *supra* and accompanying text.

IV. PROPOSAL OF A "NEW" EXCLUSIONARY RULE FOR CIVIL CASES

It is appropriate to note here that courts in a few other states have addressed the issue of exclusion of evidence wrongfully obtained in "purely" civil cases with divergent results.[61] Ohio and New Jersey courts have held that evidence unlawfully acquired by private individuals was inadmissible in civil proceedings.[62] The holdings in these cases, however, were based on interpretations of *Mapp v. Ohio*[63] applying the fourth amendment exclusionary rule equally to civil and criminal proceedings. Although not expressly overruled in their jurisdictions, the validity of these decisions is highly questionable today in view of United States Supreme Court decisions subsequent to *Mapp* restricting its effect to criminal cases where state action is involved.[64] Adopting an alternative approach, the Florida Supreme Court, in a 1973 holding, excluded evidence wrongfully obtained by a private individual in a marriage dissolution action, basing the ruling on a state wiretap statute enacted for the protection of individual privacy.[65]

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61. *See generally* Annot., 5 A.L.R. 3d 670, 676-80 (1966) and text *infra*.

62. Del Presto v. Del Presto, 92 N.J.Super. 305, 223 A.2d 217 (1966) (motion to suppress evidence in a divorce case granted where plaintiff and private investigators secured evidence by illegal entry into defendants' home); Williams v. Williams, 8 Ohio Misc. 156, 221 N.E. 2d 622 (1966) (motion for a new trial based on newly discovered evidence in a divorce proceeding where the husband took letters from the wife's automobile without consent).

63. 367 U.S. 643 (1961). *See also* note 4 *supra*.

64. *See* Note, *Mapp v. Ohio and Exclusion of Evidence Illegally Obtained by Private Parties*, 72 YALE L.J. 1062, 1072 (1963) where the author states that:

> [A]lthough the considerations underlying the federal exclusionary rule do not appear to warrant its extension to cases of evidence unlawfully seized by private persons and submitted in civil or criminal suits, the question of whether an exclusionary rule to govern such cases is justified, independent of the rationale of the federal exclusionary rule, remains.

See also Sackler v. Sackler, 15 N.Y.2d 40, 225 N.Y.S. 2d 83, 203 N.E. 2d 481, 5 A.L.R. 3d 664 (1964) where the Court of Appeals of New York held that neither state nor federal prohibitions against unreasonable searches and seizures required exclusion of evidence in a divorce proceeding which was illegally obtained by the husband-plaintiff and several private investigators employed by him. The court relied on the United States Supreme Court decision in *Burdeau v. McDowell* in holding that the fourth amendment was intended only as a restraint upon acts of the state and rejected defendants' contention that *Mapp v. Ohio* overruled *Burdeau* principles.

65. Markham v. Markham, 272 So.2d 813 (Fla. 1973); *see also* Note, *Evidence Illegally Seized by a Private Person Excluded from Civil Proceedings*, 26 FLA. L. REV. 166 (1973). The author, commenting on *Markham*, advances an argument relevant to the situation in California regarding the right of privacy. He states:

> [T]he Florida Constitution provides another ground for excluding the evi-

A. Background On The Right Of Privacy

Before discussing the merits of a creation of a "new" civil exclusionary rule based on the California constitutional right of privacy, it is necessary to consider the political background and judicial constructions of this newly expressed right.

The United States Supreme Court and various state courts have had to make rather contorted efforts to arrive at a recognizable constitutional right of privacy.[66] California courts are no longer constrained to do so since the passage of the 1972 amendment to the California Constitution expressly giving personal privacy rights to all Californians.[67] In California tort law, however, "invasion of privacy" has been long recognized and is now a well defined area of law.[68]

The only "legislative history" of California's constitutional right of privacy is set forth in the election brochure argument favoring voter adoption of the provision in the 1972 statewide election.[69] The brochure argument delineates three primary points as to the purpose and scope of the constitutional right of privacy. First, it identifies four basic "mischiefs" which the amendment intended to remedy: (1) "government snooping," that is, gathering of personal information; (2) overbroad collection of unnecessary personal information *by governmental and business interests*; (3) the improper use of information properly obtained for a specific purpose; and (4) the lack of a reasonable check on the accuracy of

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dence wrongfully seized in the instant case. The constitution secures a general right of privacy by providing that people shall be free from unreasonable searches and seizures and unreasonable interceptions of private communications . . . . The instant case extends the constitutionally protected right of privacy to intrusions by private parties by requiring the exclusion of evidence seized by electronic eavesdropping. Arguably, this extension should also apply to physical searches and seizures. Since a physical intrusion violates a person's privacy just as much as an intrusion by wiretapping, a search and seizure by trespass should also be within the scope of the constitutional guarantee. The instant decision could support the extension of constitutional exclusionary rule to all evidence unreasonably seized by private individuals and sought to be introduced into any judicial proceeding.

66. *See* Note, *California's Constitutional Right to Privacy*, 64 CAL. L. REV. 347, 352 n. 42 (1976).

67. CAL. CONST. art. I, § 1 (West Supp. 1977).

68. L. JOHNS, CALIFORNIA DAMAGES LAW AND PROOF, *Invasion of Privacy* §§ 11.1-11.3, at 361-63 (2d ed. 1977); W. PROSSER, TORTS § 117, at 804-14 (4th ed. 1964). *See also* Cain v. State Farm Mutual Automobile Insurance Co., 62 Cal. App.3d 310, 132 Cal. Rptr. 860 (1976); Noble v. Sears, Roebuck and Co., 33 Cal. App.3d 654, 109 Cal. Rptr. 269 (1973).

69. *See* California Voters Pamphlet (1972); Carter v. Commissioner on Qualifications. etc., 14 Cal.2d 179, 93 P.2d 140 (1939); In re Quinn, 35 Cal. App. 3d 473, 110 Cal. Rptr. 881 (1975) as to the use of election brochure arguments in constructions of constitutional provisions passed pursuant to a vote of the people.

existing records.[70] Second, the argument clearly indicates that the amendment does not *per se* prohibit all encroachments upon individual privacy, but requires a compelling interest for any such invasions.[71] Third, the statement points out that the constitutional provision "creates a legal and enforceable right of privacy for every Californian" indicating that the amendment is "self executing," that is, it provides for a private cause of action based on the privacy provision.[72]

The new privacy amendment was first (and, at this writing, most extensively) discussed by the California Supreme Court in *White v. Davis*.[73] The court stated in a unanimous opinion that:

> [A]lthough the general concept of privacy relates . . . to an enormously broad and diverse field of personal action and belief, the moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provisions' primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy.[74]

In *White* the court viewed the particular facts as clearly fitting within the protection against the "government snooping" aspect of the new privacy right.[75] The court, however, did not expand upon the scope of protections cognizable within the other purposes of the privacy provision as set forth in the brochure argument.

The First District Court of Appeal in *Porten v. University of San Francisco*,[76] discussed the purpose of the constitutional privacy provisions to remedy the "improper use of information properly

70. California Voters Pamphlet (1972) (emphasis added).

71. *Id.*

72. *Id. See also* White v. Davis, 13 Cal.3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

73. 13 Cal.3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975). *White* involved police officers conducting covert surveillance of college classes while posing as students, thus enabling police to compile extensive dossiers on professors and students.

74. *Id.* at 773-74, 533 P. 2d at 233, 120 Cal. Rptr. at 105 (emphasis added).

75. *Id.* at 775-76, 533 P.2d at 234, 120 Cal. Rptr. at 106, where the court stated: "In several respects, the police surveilance operation . . . epitomizes the kind of governmental conduct which the new Constitutional amendment condemns . . . routine stationing of . . . police agents . . . constitutes 'governmental snooping' in the extreme."

76. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976). *Porten* involved an alleged misconduct on the part of the defendant-university in disclosing plaintiffs' grades (earned at a prior university) to the State Scholarship and Loan Commission in violation of an alleged understanding that such grades would be used only for purposes of evaluating plaintiffs' admission to the defendant-university.

obtained for a specific purpose."[77] Although the plaintiffs' allegations failed to state a cause of action based on the traditional tort of "invasion of privacy," the complaint was held to constitute a prima facie violation of the constitutional right of privacy.[78] The court in *Porten* apparently sensed the expansive intent of the supreme court in *White* where constitutionally protected rights of privacy are at stake. Further, the *Porten* court definitively stated what the supreme court had alluded to in *White*, noting that: "[P]rivacy is protected not merely against state action, it is considered an inalienable right which may not be violated *by anyone.*"[79]

From the preceding discussion it is apparent that the constitutional right of privacy was intended to protect against intrusive acts of private individuals as well as against those of the sovereign. It is suggested here that the scope of privacy rights protected by this provision should extend to include invasions of privacy by private litigants intended to reap evidentiary fruit for use in pending or contemplated legal actions. If, as in *Porten*, the "*improper* use of information *properly obtained* for a special purpose" is within the ambit of constitutional protection, then information *improperly obtained* for such use should certainly fall within such protections.[80]

As previously stated, the purpose of this comment is to examine whether the creation of a new exclusionary rule would be an appropriate and necessary protection for constitutional privacy violations. As the supreme court in *White* stated, the purpose of the privacy provision is to "afford individuals some measure of protection" from threats to personal privacy.[81] The injunction sought and granted in *White* was found to be an adequate "measure of protection" for the specific privacy right violated.[82] Since *White* did not involve a criminal or civil proceeding against those whose privacy was invaded, the issue of alternative remedies available for such violations was not addressed by the court. Indeed, in no supreme court case has it been contended that pro-

77. *Id.* at 831, 134 Cal. Rptr. at 842.

78. Only a few months prior to *Porten*, the court in *Cain v. State Farm Mutual Auto Ins. Co.*, 62 Cal. App. 3d 310, 132 Cal. Rptr. 860 (1976), indicated that an action for damages would be cognizable under the constitutional right of privacy. In *Cain*, the defendant insurance company allegedly sent investigators to conduct surveillance of the plaintiff. This was apparently done to obtain evidence to use in an impending legal action arising out of an auto accident in which the plaintiff was involved. *Cain* is of particular interest here because the facts involved may parallel situations in which exclusion of evidence in a civil action may be appropriate.

79. 64 Cal. App. 3d at 829, 134 Cal. Rptr. at 841 (emphasis added).

80. *See* notes 24, 36 & 61 *supra* and accompanying text.

81. 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 105.

82. *Id.*

curement of information in a manner violative of constitutional privacy rights for use as evidence in a civil case should be sanctioned by exclusion of such evidence at trial.[83]

V. RATIONALE AND SOCIAL POLICY CONSIDERATIONS FAVORING A "NEW" EXCLUSIONARY RULE

The California Supreme Court, which broke from the traditional rules of evidence in *Cahan* by creating the criminal law exclusionary rule, was in a position analogous to that which the members of the court may face in the future when confronted with the issue of whether to create a "new" exclusionary rule for purely civil cases in situations where evidence was obtained in violation of explicit constitutionally protected privacy rights. Accordingly, the rationale advanced by the court in *Cahan* is germane to a discussion regarding the creation of a "new" exclusionary rule.

As previously discussed, the *Cahan* court based its decision to create an exclusionary rule primarily on four rationale.[84] These will now be examined in light of their relationship to the propriety of a "new" exclusionary rule.

A. The Imperative of Judicial Integrity

In reference to unlawful gathering of evidence by state officers, the court stated that "out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.' "[85] Although the emphasis in exclusion of evidence in criminal trials has shifted primarily to the deterrence rationale in recent United States Supreme Court decisions[86], the judicial integrity rationale remains viable in Cali-

83. This was proposed in a criminal context, however, in *People v. Moreno*, 64 Cal. App. 3d Supp. 23, 135 Cal. Rptr. 340 (1976). In *Moreno* a motion to suppress evidence was based both on the fourth amendment (also, CAL. CONST. art. I, § 13) and the California constitutional right of privacy, but was denied by the Appellate Department of the Los Angeles County Superior Court. The fourth amendment exclusionary rule was held inapplicable because there was no state action (on principles of *Randazzo*) and the proposed exclusionary rule based on the right of privacy was rejected on grounds that the fourth amendment rule was sufficient protection of privacy rights in criminal cases.

84. *See* note 17 *supra*.

85. 44 Cal. 2d at 445, 282 P.2d at 912.

86. *See* Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973) for a thorough analysis of the erosion of the judicial integrity rationale. *Compare United States v. Janis*, 428 U.S. 433, 454 (1976) where the Court refused to apply

fornia.[87] Concern for the integrity of the judicial system should not be restricted to criminal contexts. Fostering respect for the courts should be an equally important goal in civil proceedings where private citizens have come to a legal forum for adjudication of their respective rights and duties as opposed to seeking redress for personal wrongs by private efforts. Reiteration of the California Supreme Courts' statement in *Redner* that "[T]he legal process cannot be stultified by crowning such amoral maneuvers with apparent success"[88], patently reveals the courts' desire to protect the sanctity of the judicial system from all stealthy encroachments.

B. The Deterrence Rationale

A second basis for exclusion of evidence advanced in *Cahan* was that "given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law" rather than to jeopardize their objectives.[89] In criminal cases, the necessity for the exclusionary rule as a deterrent to unlawful police conduct is significant because civil remedies have proven to be unsatisfactory to adequately protect privacy rights afforded by the constitution.[90]

The need for a "new" exclusionary rule in purely civil cases to deter conduct invasive of personal privacy by private individuals is dependent on two factors. First, whether alternative judicial remedies in themselves would be an effective deterrent to such

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the fourth amendment exclusionary rule in a federal civil tax proceeding in which evidence was unlawfully obtained by a state police officer without federal participation. The Court concluded that "exclusion . . . of evidence . . . has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule." *See also United States v. Peltier*, 422 U.S. 531 (1975) and *Michigan v. Tucker*, 417 U.S. 433 (1974) which deal with the issue of the exclusionary rule and its deterrent purpose.

87. Although the deterrence rationale has drawn the principle attention of the California courts in determining whether to apply the criminal law exclusionary rule, they have not expressly repudiated the judicial integrity argument. *See* 1 Cal. 3d at 641, 648, 654, 463 P.2d at 734, 739, 742, 83 Cal. Rptr. at 382, 387, 390; 69 Cal. 2d at 682, 446 P.2d at 805, 72 Cal. Rptr. at 805; People v. Parnham, 60 Cal.2d 378, 385, 384 P.2d 1001, 1005, 33 Cal. Rptr. 497, 501 (1963); Note, *Imperative of Judicial Integrity and the Exclusionary Rule*, 4 WEST. ST. U. L. REV. 1 (1976).

88. 5 Cal. 3d at 97, 485 P.2d at 809, 95 Cal. Rptr. at 457.

89. 44 Cal. 2d at 448, 282 P.2d at 913.

90. Mapp v. Ohio, 367 U.S. 643, 650-54 (1961); People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955); *see also* Note, *Mapp v. Ohio and Exclusion of Evidence Illegally Obtained by Private Parties*, 72 YALE L. J. 1062, 1070-71 (1963), where the author suggests several reasons for the failure of civil actions as a deterrent to illegal police activity. For example, the fear of subsequent police harrassment, the likelihood that a jury would be sympathetic toward police over-zealousness and the fact that policemen have a nearly judgment-proof status.

actions and, second, whether the public would be sufficiently aware of the existence of such a rule in advance of the commission of "privacy invading" acts in order to make exclusion a valid deterrent to such actions. The first factor will be discussed in depth below to retain continuity with the analogy to the *Cahan* rationale. In reference to the second factor, the conduct of state law enforcement officers in criminal prosecutions is presently the target of the exclusionary deterrence.[91] State officers having been formally trained for their duties are normally well apprised of the exclusionary effects of wrongful search and seizure. By comparison, private litigants are less likely to have knowledge of such rules, and it follows that the exclusion of evidence wrongfully obtained would be less likely to have a significant deterrent effect. Modern techniques of civil litigation, however, often call for the services of professional private investigators. This is especially true in many situations where the issue of acquisition of evidence by intrusions upon the privacy of the opposing litigant would be involved.[92] Professional investigators whose business depends upon the production of effective information would reasonably be expected to know of such an exclusionary rule and, consequently, be deterred from engaging in activities encroaching upon the personal privacy of others.[93] Civil litigants cognizant of the exclusionary rule would be, thereby, "impelled to obey the law" just as are state law enforcement officers.

While the deterrent effect may not in itself provide complete justification for the creation of a "new" exclusionary rule, it would certainly provide an added measure of protection to personal privacy. This would be particularly true where alternative legal remedies may not provide adequate protection.

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91. 44 Cal. 2d at 448, 282 P.2d at 913.

92. *E.g.*, private investigations conducted in connection with personal injury, dissolution of marriage, and various types of insurance related litigation.

93. It must be pointed out that the exclusion of evidence on a privacy basis would be likely to extend to evidence obtained in violation of only the opposing litigant's privacy rights. The right of privacy (common law and constitutional) has been held to protect only the interests of the one whose rights were violated, *i.e.*, it is a purely personal right. *See* Cowing v. City of Torrance, 60 Cal. App. 3d 757, 131 Cal. Rptr. 830 (1976); Hendrickson v. California Newpapers, Inc., 48 Cal. App. 3d 59, 121 Cal. Rptr. 429 (1975). *See also* L. JOHNS, CALIFORNIA DAMAGES LAW AND PROOF, *Invasion of Privacy* § 11.1, at 361-62 (2d ed. 1977).

C. *Adequacy of Remedies Protecting Constitutional Rights*

Advancing a third rationale for a "new" criminal law exclusionary rule Justice Traynor, speaking for the *Cahan* court, stated: "[I]f courts are to discharge their duty to support the state and federal Constitutions they must be willing to aid in their enforcement . . . Experience has demonstrated, however, that neither administrative, criminal or civil remedies are effective in suppressing lawless search and seizure."[94] It is suggested here that this rationale is equally applicable to purely civil proceedings in many circumstances. As previously discussed, the right to damages for physical invasion of privacy is well established in California.[95] The California Constitution privacy provision provides additional protections to privacy rights for which damages may not in all situations give adequate redress. For example, where invasions of privacy which would give rise to criminal sanctions[96] are minor in nature, those committing such acts are unlikely to be prosecuted regardless of the devastating effects the information acquired by such tactics may have as admissible evidence in a civil proceeding.[97] Likewise, civil actions would not be expected to yield extensive damages where relatively insignificant offenses to privacy rights were perpetrated.[98] This would be especially true if the jury in such an action was aware of a prior proceeding terminating in the present defendant's favor where the disputed evidence was instrumental in the outcome. Also it seems rather improbable that adequate damages for an invasion of privacy would be awarded by a jury who sees the plaintiff as a "wrongdoer."

D. *Furtherance of Constitutional Purposes*

The final ground for exclusion in *Cahan* was that the exclusionary rule served to further the purpose of the constitutional provisions involved: "[H]e (the criminal) does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught."[99]

In civil cases the traditional rule that all probative evidence is

94. 44 Cal. 2d 447, 282 P.2d at 913.

95. *See generally*, note 54 *supra*.

96. Such as trespass, electronic surveillance, etc.

97. *See* notes 50 & 51 *supra*.

98. *See* notes 50 & 51 *supra*. *See also* Comment, *A Comment on the Exclusion of Evidence Wrongfully Obtained by Private Individuals*, 1966 UTAH L. REV. 271, 275.

99. 44 Cal. 2d 449, 282 P.2d at 914.

admissible regardless of how obtained[100] is juxtaposed against the need for exclusion of evidence secured at the expense of express inalienable constitutional rights. Society's concern in civil cases is not whether criminals are allowed to go free, but whether private litigants should be permitted to benefit by introducing into evidence information acquired by constitutionally forbidden means. If a new exclusionary rule is deemed necessary to fully protect constitutional privacy rights, arguments opposed to such a rule should be addressed to the wisdom of the constitutional provision itself. The tenor of thought in the nation as a whole, and particularly in California, has been increasingly directed toward the desire for enhanced personal privacy.[101] Thus, legislative and judicial reactions to the "privacy movement" have created a favorable attitude toward expansion and protection of such rights.[102]

The primary legal and social policy considerations upon which the *Cahan* exclusionary rule was established appear also to favor the creation of a new exclusionary rule for civil cases where constitutional privacy rights are involved. Several other related factors warrant discussion at this point, as well.

First, the maxim that no one should profit from his own wrong[103] would strongly support the exclusion of evidence wrongfully obtained in civil cases. Where the wrongful party is not amenable to complete restitution to the party wronged by his acts, he is indeed reaping an unfair profit from his improper conduct.

Second, those opposed to the criminal law exclusionary rule created in *Cahan* argued that exclusion of evidence in criminal cases was inconsistent with the rule allowing private litigants to use evidence illegally procured.[104] Today, with the acceptance of the exclusionary rule in criminal cases, the situation is reversed. Admission of evidence wrongfully obtained in civil cases is now

100. *See* note 1 *supra.*

101. *See generally* S. J. Ervin, *The Right of Privacy*, 64 ILL. B.J. 276 (1976); S.Symms & P. Hawks, *The Threads of Privacy: The Judicial Evolution of a "Right of Privacy" and Current Legislative Trends*, 11 IDAHO L. REV. 11 (1974); T. Towe, *A Growing Awareness of Privacy in America*, 37 MONTANA L. REV. 39 (1976).

102. Note 101 *supra.*

103. 2 POMEROY, EQUITY JURISPRUDENCE § 397 (5th ed. 1941); B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §§ 7, 8, at 5232-34 (8th ed. 1974).

104. 44 Cal. 2d at 443, 282 P.2d at 910; *see also* Munson v. Munson, 27 Cal. 2d 659, 166 P.2d 268 (1946).

incongruent with the well established criminal law exclusionary rules. Accordingly, uniformity of such rules could now be attained by recognition of a new exclusionary rule for civil cases. Finally, a brief look at the "balancing test" of *Moore* and *Martinez*[105] involving admissibility of evidence in administrative hearings would be instructive. If seen in the light of privacy protection, the test would weigh the policy underlying exclusion of evidence against the interests involved in the particular proceeding and the cost to society of extending exclusionary protections. Having discussed the policy considerations at length above, the remaining half of the balance as to the societal costs warrants examination. The types of proceedings dealt with previously (*i.e.*, criminal, quasi-criminal and administrative) involved state interests significantly different than those present in purely civil cases. In criminal and quasi-criminal actions the state has a substantial interest in the protection of its citizenry from society's malefactors. Also, administrative bodies act as an "arm of the court" in the performance of their respective duties providing protection for society as deemed necessary by state government.[106] However, in purely civil proceedings, the court is acting as a forum for the litigation of claims and adjudication of personal rights and duties of private parties. Consequently, the state would seemingly have less justification in admitting evidence wrongfully obtained in civil action than it would when, as in criminal prosecutions, the protection and safety of society is involved generally.[107]

Turning to the last element of the balance involving the costs to society, some criticisms of the creation of a new exclusionary rule will be considered. Initially, the traditional view propounds that if rules of evidence are designed to enable courts to reach the truth, it follows that all trustworthy and reliable information should be

105. *See* notes 30 & 33 *supra* and accompanying text.

106. *See* note 36 *supra*.

107. It is of course acknowledged that the state has a substantial interest in the type of evidence admissible in civil cases in promoting and preserving the judicial process as an effective and viable institution in society. It has been suggested that there are three main bodies of the law of evidence pertaining to limitations and restrictions on the admissibility of evidence. First, those limitations arising from the expediency of the efficient functioning of the trial courts such as the exclusion of unnecessary or cumulative evidence. Second, those evidentiary restrictions dealing with the relevancy and materiality of facts presented to the issue in dispute. Finally, those limitations stemming from public policy considerations such as the attorney-client privilege or doctor-patient privilege and those rules dealing with the competency of witnesses. It is within this third body of evidentiary rules that the exclusion of evidence based on the manner and method of its procurement falls. S. GARD, JONES ON EVIDENCE § 1:8, at 9, 10 (6th ed. 1972). Thus, the states' interest in admitting such unlawfully obtained evidence must be viewed only within the scope of this third body of evidentiary law.

placed before the court.[108] Exceptions to this view are found in criminal, quasi-criminal and administrative proceedings where individual privacy rights are deemed superior to the need for all reliable information.[109] In these proceedings the potential cost to society is high relative to the societal costs involved in the outcome of purely private matters. A related argument provides that the courts should not attempt to decide collateral issues.[110] This argument reasons generally that the method by which the information was procured is not in issue, rather the proper consideration is whether such information is relevant to the case at hand. This argument is countered by the reasoning that the courts need not concern themselves with the "guilt" or civil liability of a person wrongfully obtaining evidence at trial, rather, the court merely refuses to admit such evidence thereby denying the party any "profit" from his wrong as is presently done in criminal proceedings. It is also contended that the cost to society is high in the delay and confusion caused by exclusionary rules.[111] There appears to be nothing, however, that would prevent efficient judicial dispatch of exclusionary issues outside the presence of jurors such as is done in the criminal courts.[112]

VI. CONCLUSION

A careful analysis of California court decisions since *Cahan* reveals an expansionary trend in the area of exclusion of evidence improperly obtained. Initial court departures from traditional rules of admissibility of evidence in criminal cases, and subsequent expansion of exclusionary principles into quasi-criminal actions and various administrative hearings within a relatively brief period of time, suggest a climate amenable to the creation of a new exclusionary rule for purely civil cases.

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108. Note 1 *supra*.

109. *See* notes 13, 24 & 36 *supra* and accompanying text.

110. Note 109 *supra*. *See also* Note, *Admissibility of Illegally Obtained Evidence in Noncriminal Proceedings*, 22 FLA. L. REV. 38 (1969).

111. Note 110 *supra*.

112. Exclusionary rules would probably be less frequently invoked in civil cases due to the broad rules of discovery in California. *See generally* D. LOUISELL & B. WALLY, MODERN CALIFORNIA DISCOVERY 2d §§ 1.01, 1.02, at 1-9, supp. 3 (1972 & Supp. 1977). Such an exclusionary rule, however, would conceivably encourage strict observance of limits of discovery and proper methods of evidentiary acquisition. *See generally* Conklin, Leahy & Condon, *Evidence Obtained by Unlawful Search and Seizure-Admissibility in Criminal and Civil Cases and Other Proceedings*, 20 TRIAL LAWYER GUIDE 49 (1976).

A constitutional provision explicitly granting a right of privacy to all Californians provides a potentially sound basis for fashioning such a rule. "Although the full contours of the new constitutional provision have as yet not even tentatively been sketched,"[113] the constitutional right of privacy certainly appears broad enough in scope to encompass activities undertaken to obtain information for use at trial. This provision has also been construed as an "inalienable right" calling for protection from private as well as state acts.[114]

The principle considerations on which the criminal law exclusionary rule was grounded are viable today and by analogy favor creation of an exclusionary rule for civil cases. This, combined with other important social policy factors, ostensibly outweighs the traditional arguments raised against extension of exclusionary principles. As eloquently stated by Mr. Justice Sutherland, in *Frank v. United States*:

> [S]ince experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the falacy or unwisdom of the old rule.[115]

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113. 13 Cal. 3d at 773, 533 P.2d at 233, 120 Cal. Rptr. at 105.
114. 64 Cal. App. 3d at 829, 134 Cal. Rptr. at 842.
115. Funk v. United States, 290 U.S. 371, 381 (1933).