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State Exclusionary Rule As a Deterrent Against Unreasonable Search and Seizure, The

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THE STATE EXCLUSIONARY RULE AS A DETERRENT AGAINST UNREASONABLE SEARCH AND SEIZURE*

(A Study of the Problem in Illinois)

Both the Illinois[1] and the Federal[2] Constitutions guarantee every person living in Illinois the right to be free from unreasonable invasions of his privacy by officers of the state and its subdivisions.[3] The records of a single Chicago court reveal 4,593 violations of this right by police in a single year.[4] No other constitutional guarantee is so openly flouted with so little public outcry. The people, usually jealous of their constitutional freedoms, do not react to this violation of a fundamental guarantee as they do to violations of the right to freedom of speech, press, religion, and assembly. It does not shock the public conscience like brutal coercion of confessions or punishment without the safeguards of a trial.

This apathy is probably founded, at least in part, on the nature of the violation, for in practice the victims of illegal searches are usually lawbreakers. The dangers inherent in acquiescing to illegal enforcement of the law are hence not readily apparent to the law-abiding public. Moreover, the interest of the courts in the right of privacy is of recent origin,[5] since the greatest part of the law of search and seizure has developed since World War I.

The storm center of this development has concerned the methods by which the right of privacy is to be enforced. Although the Supreme Court of the United States has recognized that the right is protected by the Due Process Clause of the Fourteenth Amendment,[6] it has not prescribed any remedy which states must provide to satisfy the requirements of due process. The Illinois courts, in interpreting the guarantees of the Illinois Constitution, have adopted the rule which the Federal Supreme Court promulgated for federal practice: that evidence obtained in violation of the constitutional right of privacy is not admissible in a criminal prosecution.[7] A majority of the state courts have rejected this view,[8] and the wisdom of the rule has been debated for over thirty years.[9]

* This article also appears in Volume 47 of the Northwestern University Law Review.

[1] ILL. CONST. ART. II, §6.

[2] U. S. CONST. AM. XIV (the Due Process Clause); Steffanelli v. Minard, 342 U. S. 117(1951); Wolf v. Colorado, 338 U. S. 25, 27(1949).

[3] The applicable constitutional provisions are designed to protect the people from the action of State governments, not from the action of the Federal Government or of private individuals. People v. Castree, 311 Ill. 392, 143 N.E. 112(1924).

[4] See note 33 *infra.*

[5] Plumb, *Illegal Enforcement of the Law*, 24 CORN. L.Q. 337, 354 *et seq.*(1939).

[6] See note 2 *supra.*

[7] Weeks v. United States, 232 U.S. 383(1914); People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923).

[8] See Wolf v. Colorado, 338 U.S. 25, 29(1949).

[9] Pro: Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1(1950). Con: Plumb, *supra* note 5.

The Illinois Exclusionary Rule

The Illinois exclusionary rule requires the courts to refuse evidence obtained in violation of the Constitution when such evidence is offered in a criminal prosecution against the one whose rights have been violated, provided that the defendant makes a timely motion to suppress such evidence.[10] The illegally seized evidence is not only excluded in court, but may not be used at all, and the testimony of witnesses discovered by virtue of the search may not be received.[11]

To be "timely," the motion to suppress must, if possible, be made before the trial.[12] Refusal of the court to hear a motion made at the proper time is reversible error.[13] Denial of the motion to suppress where the evidence was in fact obtained in violation of the Constitution is likewise error,[14] but not necessarily grounds for reversal.[15] Where the motion is denied, the defendant must also object to the admission of testimony about the search if the question is to be preserved for review.[16]

The exclusionary rule operates only to exclude evidence seized by state officers.[17] This is in accord with the long established view that the guarantees of a state constitution operate only to protect the individual from the state.[18] Any participation by a state officer in an unlawful search will bring the search within the rule.[19] While the courts could readily forbid the admission of evidence illegally seized by federal officers on the grounds that the use of such evidence violated the policy of the state, they do not do so.[20] This failure to exclude *all* illegally seized evidence may lead to conspiracies between state and federal officers to exchange the fruits of illegal searches.[21] Invasions of privacy by private individuals do not present the same problem of government sanction for constitutional violations.[22]

The most controversial element of the exclusionary rule has been the limitation on the standing of the defendant to complain of the seizure and admission of the evidence. The defendant must show not only that the seizure was unlawful, but also that the violation was a personal injury or, as it is usually expressed, that the admission of the evidence would

[10] People v. Castree, 311 Ill. 392, 143 N.E. 112(1924); People v. Brocamp, 307 Ill. 448, 138 N.E. 728(1923).

[11] People v. Schmoll, 383 Ill. 280, 48 N.E.2d 933(1943); People v. Martin, 382 Ill. 192, 46 N.E.2d 997(1942); People v. Stokes, 334 Ill. 200, 165 N.E. 611(1929). *But cf.* People v. Michaels, 335 Ill. 590, 167 N.E. 857(1929).

[12] People v. Kissane, 347 Ill. 385, 179 N.E. 850(1932); People v. Anderson, 337 Ill. 310, 169 N.E. 243(1929); People v. Winn, 324 Ill. 428, 155 N.E. 337(1927). This requirement is based on the principle that the court will not stop the trial to decide collateral issues. People v. Brocamp, *supra* note 10. Failure to enter the motion at the proper time constitutes a waiver of the objection. People v. Brooks, 340 Ill. 74, 172 N.E. 29(1930). The court may view this as a retroactive consent to the search, rendering it a valid search. See People v. Matthews, 406 Ill. 35, 92 N.E. 2d 147(1950).

[13] People v. Kissane, People v. Anderson, People v. Winn, all cited *supra* note 12.

[14] People v. Grod, 385 Ill. 584, 53 N.E. 2d 591 (1944).

[15] If the defendant is guilty by his own admission, and the sentence is not fixed by the jury, the admission of such evidence is considered to be harmless. People v. Taylor, 319 Ill. 174, 149 N.E. 797 (1925). Likewise, if the court finds that the jury was not prejudiced by the admission of the evidence, the conviction will stand. People v. Stokes, 334 Ill. 200, 165 N.E. 611(1929).

[16] People v. Reid, 336 Ill. 421, 168 N.E. 344 (1929); People v. Saltis, 328 Ill. 494, 160 N.E. 86(1928).

[17] People v. Touhy, 361 Ill. 332, 107 N.E. 849 (1935); People v. Castree, 311 Ill. 392, 143 N.E. 112(1924).

[18] People v. Castree, *supra* note 17.

[19] *Cf.* People v. Dalpe, 371 Ill. 607, 21 N.E.2d 756(1939) (postal inspector led search, accompanied by two police officers).

[20] Exclusion on grounds of policy would not involve any constitutional question; it would require only the adoption of a rule of evidence.

Federal courts could prohibit the admission of evidence illegally procured by state officers on the grounds that the federal courts have an interest in the enforcement of the federal right of privacy guaranteed by the Fourteenth Amendment and that they will protect this right as they do that guaranteed by the Fourth Amendment. See Allen, *supra* note 9, at 23.

[21] See Lustig v. United States, 338 U.S. 74(1949).

[22] Allen, *supra* note 9, at 23.

violate his privilege against self-incrimination.[23] It is difficult to find justification for this illogical union of two distinct constitutional guarantees. Initially the courts may have had difficulty in justifying the exclusionary rule solely on the grounds of the search and seizure clause[24] in the face of the arguments that these provisions prohibited only the search itself. To buttress their conclusion, they had recourse to the privilege against self-incrimination.[25] If there is any basis in this theory of interaction, it should also operate to exclude the admission of evidence obtained with a warrant[26] since the use of a warrant *compels* the defendant to give evidence against himself.[27] Thus the self-incrimination argument proves too much. Exclusion of illegally seized evidence must draw all of its constitutional support from the search and seizure provisions.

The Effectiveness of the Exclusionary Rule

Justification for the rule demands a choice between individual and public security. Some difficulty in law enforcement is the price which must admittedly be paid for the right of privacy. To justify its continuance and extension, therefore, the rule must be shown to be more beneficial to the individual than it is harmful to society.

The proponents of the rule seek to justify it on two grounds: a "clean hands" doctrine that a court should not permit the admission of evidence tainted with illegality; and the efficiency of the rule in deterring unlawful invasions of privacy.[28] They urge that, by de-

[23] People v. Grod, 385 Ill. 584, 53 N.E. 2d 591 (1944) (§§6 and 10 of Art. II of Ill. Const. used together; unreasonable search one which compels a man to give testimony against self); People v. Exum, 382 Ill. 204, 47 N.E. 2d 56(1943) (if search is equivalent to compelling testimony against self it is prohibited); People v. Brocamp, 307 Ill. 448, 138 N.E. 728(1923) (an illegal search compels defendant to give testimony against self). People v. Castree, 311 Ill. 392, 143 N.E. 112(1924), does not squarely rest the justification for the exclusionary rule on grounds of self-incrimination, and contains a statement to the effect that the *admission* of illegally seized evidence violates the search and seizure provisions of the Constitution. *Id.* at 396, 143 N.E. at 114.

The defendant may satisfy this requirement by claiming ownership of the material seized and seeking to have it returned or impounded [People v. Savanna Lodge No. 1095, Loyal Order of Moose, 407 Ill. 227, 95 N.E. 2d 328(1950); People v. DeMarios, 401 Ill. 146, 81 N.E. 2d 464(1948)] or by showing that it was taken from his home [People v. Grod, 385 Ill. 584, 53 N.E. 2d 591(1944)]. Evidence taken from the custody of a third person is admissible. People v. Bain, 359 Ill. 455, 195 N.E. 42(1935).

[24] Ill. Const. Art. II, §10.

[25] A possible change of position by the Federal courts may be found in the fact that Wolf v. Colorado, 338 U.S. 25(1949), omits any reference to the privilege against self-incrimination. See Allen, *supra* note 9, at 14–16.

[26] Plumb, *Illegal Enforcement of the Law*, 24 Corn. L. Q. 337, 374(1939).

[27] An example of the anomalous rulings produced by the reliance on self-incrimination and the requirement of an allegation of ownership is the distinction drawn by the court between the search of the defendant's automobile and a search of his house. No claim of ownership is necessary if the evidence is taken from the defendant's home, but the claim must be made if it is taken from his automobile. People v. Grod, 385 Ill. 584, 592, 53 N.E. 2d 591, 595(1944). The court defines an unlawful search as one which has as its object compelling a man to give testimony against himself. People v. Grod, *supra*. It rules that a search of a house is unreasonable by this definition as a matter of law, but that the unreasonableness of a search of an automobile depends upon the circumstances. While this result may be justified on policy grounds, it cannot be rationalized by an argument based on self-incrimination.

The admission of evidence taken from third persons might be justified on the grounds that the privacy of the defendant was not invaded, but it cannot be said that the admission of property claimed by the defendant is any less a violation of the provision against self-incrimination merely because it was taken from the possession of another. In United States v. Jeffers, 342 U.S. 48(1951), the Court has asserted that the fact that contraband illegally seized was in the possession of a third party does not prevent its exclusion. The Illinois courts would do well to adopt this view.

[28] Fraenkel, *Recent Development in the Federal Law of Search and Seizure*, 33 Iowa L. Rev. 472, 498 (1948).

priving law enforcement officers of the fruits of their violations, the rule will discourage unlawful searches,[29] and, moreover, that there is no other remedy which can be substituted for it. The opponents of the rule answer the "clean hands" argument by maintaining that it is worse to permit the guilty to escape punishment than for the courts to ratify unlawful searches.[30] They point out that it offers no relief for the innocent victim where no evidence is discovered. While they do not deny that some method of enforcing the right of privacy is necessary, those opposing the rule deny its efficiency and offer substitutes which do not require the sacrifices inherent in the exclusionary rule.[31] The rule's proponents admit that some of the methods advocated may fill the gaps left by the exclusionary rule, but they deny that other methods can effectively serve the same function.

Consideration of these arguments suggests the basic issue: Is the exclusionary rule efficient? Is there a substitute for it which does not involve freeing some guilty defendants? If the exclusionary rule is not effective, the "clean hands" doctrine is scant justification for the results it has produced. If there is another remedy for the problem of violations of the right of privacy, its substitution for the rule would find staunch support.

The major weakness of arguments either for or against the exclusionary rule is the lack of empirical evidence of the effectiveness of the rule in fulfilling its function. Certain comparative studies which might demonstrate the effectiveness conclusively cannot be made since the only figures obtainable are those showing the extent of illegal searches in jurisdictions where the rule applies. As a consequence, such figures must be carefully interpreted.

A study of the records of Branch 27 of the Chicago Municipal Court[32]—popularly known as the "Racket Court"— for the year 1950 indicates that the rule has failed to deter any substantial number of illegal searches. In 4,673 out of 6,649 cases,[33] the legality of the method of obtaining evidence was put in issue by the defendant. In 4,593 of these cases, the court determined that the search had in fact been illegal and granted the motion to suppress the evidence. No cases were found in which a conviction was secured despite the suppression of the evidence. Figures showing the distribution of motions to suppress by offense charged are set out in the table on the following page.

Careful consideration must be given to the type of offense included in this study, since this court does not deal with any of the more serious crimes. It is interesting to note the difference in the percentage of illegal searches in the two most serious offenses studied—carrying concealed weapons and narcotics violations—and those in the gambling offenses. These figures, coupled with the fact that with the passage of time the number of cases involving illegal searches which have reached the Illinois Supreme Court has decreased,[34] may indicate that the exclusionary rule is most effective in discouraging illegal searches in cases involving serious offenses, where conviction is important.[35] Conversely, where the

[29] Allen, *supra* note 9, at 20. Similar reasoning is said to underlie the exclusion of a coerced confession which is verified by other evidence. *Id.* at 26.

[30] See the dissenting opinion of Judge Thompson in People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924); Plumb, *supra* note 33; Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679(1944).

[31] Primarily a tort action for damages and prosecution for trespass. See note 30 *supra*.

[32] This court has cognizance of all policy and gambling cases in the City of Chicago, all offenses committed within the "Loop" district, and, until the formation of a special Narcotics Court in 1951, all narcotics cases. For a study of this court from a different point of view, see Dash, *Cracks in the Foundations of Criminal Justice*, 46 ILL. L. REV. 385(1951).

[33] The term "case" refers to a single defendant, and not to the prosecution resulting from a single arrest which may involve forty defendants or more.

[34] An examination of the Illinois Supreme Court Reports, revealed approximately 23 cases for the 1920's, 15 for the 1930's, 10 for the 1940's, and two in 1950.

[35] Other factors naturally enter into these figures, such as the suceptibility to discovery of narcotics and concealed weapons violations on arrest for other

Offense	No. of Cases	No. of Motions	Granted			Denied
			No.	% to total motions	% to total cases	
Policy†	2,133	1,558	1,520	97.6	71.3	38
Gambling	461	376	375	99.7	81.3	1
Keeper of Gaming House	791	694	686	98.8	86.7	8
Violations of Sec. 191*	2,463	1,847	1,827	93.5	74.3	20
Carrying Concealed Weapons	513	142	129	90.8	25.1	13
Narcotics	288	56	56	100.0	19.4	0
Total	6,649	4,673	4,593	98.3	69.1	80

† Also known as the "numbers racket."

* Covers such charges as inmate of a gambling house; violations always occurred in conjunction with other gambling offenses.

police believe that a policy of harrassment is an effective means of law enforcement, the exclusionary rule will not deter their use of unlawful methods. From observations made in the court, it is obvious that the police are aware of the requirements of the rule. Indeed, in gambling cases, their testimony seems calculated to insure the exclusion of the seized evidence, or at least to save time in disposing of a case in which the search is obviously illegal.[35A] Rarely is any attempt made by either the officer or the prosecutor to secure a denial of the motion to suppress, unless the seizure was legal beyond any possible doubt. Judicial practice has also contributed to the wide scope of the rule in gambling cases. If in the prosecution of several defendants arrested in a gambling raid, the evidence must be excluded as to the principal offender (such as the keeper), the court excludes it as to all defendants. In effect, the judges of Branch 27 have extended the exclusionary rule to the limits advocated by those denying the dependence of the rule on the privilege against self-incrimination.[36]

A finding, however, that the rule has no substantial effect on police conduct in minor offenses does not mean that the exclusionary rule should be abolished. Unless some other device can be suggested which will reach all cases, the problem facing the lawmakers and courts is that of finding some supplement to the rule which will deter violations of the right of privacy in conjunction with minor offenses.

The Alleged Causes of Illegal Searches

Before examining methods of enforcing the right of privacy other than the exclusionary rule, an understanding of the causes of illegal searches is essential. Five reasons are generally assigned for the predilection of the police to invade the privacy of individuals notwithstanding enforcement of the exclusionary rule: (1) ignorance; (2) corruption; (3) fear of a "tip-off"; (4) over-technical search warrant requirements; (5) harrassment.

It seems inconceivable that anyone can seriously contend that the police do not understand the need for obtaining warrants. In the "Racket Court," the same officers appear day after day and watch the court free those whom they have arrested because the evidence was illegally obtained. On occasion their testimony sounds like a classroom recital of the facts which will render a search invalid. Literature has been issued by the Attorney General[37] and

offenses, and the awareness of prosecutors of the futility of prosecution where evidence is illegally seized.

[35A] For the supporting opinion of another observer, see Dash, *supra* note 32, at 391.

[36] See Allen, *supra* note 9, at 22.

[37] The Attorney General has issued a pamphlet, The Law of Arrest in Illinois, prepared by Lee E. Daniels for the Illinois State's Attorneys' Association.

by the Chicago Crime Commission[38] explaining the limits of the right to search. There may be a lack of knowledge of the requirements for a warrant, but certainly not of the fact that a warrant must be obtained.[39]

While corruption may be a factor in the type of testimony given by the officer, or in inducing him to make an illegal raid rather than a legal one when the "heat is on," it is difficult to prove. It should be noted that a police officer may immunize a criminal from prosecution by an illegal search, since evidence illegally seized may never be used. If the evidence illegally seized is the only evidence, the criminal must go free. As might be expected, judges and prosecutors in the Municipal Court deny that police corruption is a significant factor.

The excuse most often given by police officials for not obtaining warrants is that the person whose premises are to be searched will be tipped-off by police officers or court officials about the impending raid. Although commonly accepted by the public, neither judges, attorneys, nor policemen seem to seriously believe that this excuse is generally valid. The fear of a tip-off, however, does at times condition the actions of investigators, whether the fear is justified or not.[40]

The requirements for obtaining a search warrant present the policeman's best argument for unlawful raids. The issuance of warrants must of course conform to the constitutional guarantee of freedom from unreasonable searches.[41] The requirements that the place to be searched and the property to be seized be specifically described[42] are obviously reasonable since the original purpose of the guarantee was to prevent general searches.[43] Limitation of the right of seizure to particular kinds of property[44] prevents searches for purely evidentiary material. The conflict arises over the court's interpretation of the words "no warrant shall issue without probable cause, supported by affidavit. . . ." Probable cause can be shown only from facts within the personal knowledge of the affiant, according to the court's interpretation, since by swearing to the affidavit he affirms the truth of all facts alleged.[45] A warrant will not issue on "information and belief."[46] The facts must be alleged with such definiteness that perjury may be assigned if they are false.[47] The policeman cannot secure a warrant unless he has observed the necessary events himself, or can persuade the witness to swear to the complaint. The "stool pigeon," and in many cases the reputable citizen, is unwilling to serve as complainant for fear of retaliation by the criminal.[48] In certain types of violations,

[38] BAKER, MANUAL ON THE LAW OF ARREST, SEARCH AND SEIZURE (1944). This is the most complete work dealing with the law in Illinois, and the only secondary source discovered which sets out the requirements for a search warrant in a practical form.

[39] See note 38 *supra*.

[40] In the recent cigarette tax fraud investigations, Mr. Ben Heineman, director of the investigation, took great precautions to avoid any leakage of information. The raiding officers were not informed of their mission until the last possible moment. The judges to whom application was made for search warrants were selected with great care.

Charles A. Bane, Chief Counsel for the Chicago City Council's Crime Committee, has stated that his investigators had the star numbers of policemen suspected of tip-offs who had been seen in well known bookie joints. Chicago Daily News, July 15, 1952, p. 10, col. 3.

[41] ILL. CONST. ART. II, §6. The provisions for search warrants and the protection against unreasonable searches must be compatible if proper force is to be given to the whole provision.

[42] ILL. CONST. ART. II, §6.

[43] Note, 46 HARV. L. REV. 1307(1933).

[44] ILL. REV. STAT. c. 38, §§691–2(1951).

[45] People v. Sovetsky, 343 Ill. 583, 175 N.E. 844 (1931); People v. Elias, 316 Ill. 376, 147 N.E. 472 (1925); People v. Prall, 314 Ill. 518, 145 N.E. 610 (1924); Lippman v. People, 175 Ill. 101, 51 N.E. 872(1898).

[46] People v. Elias, *supra* note 45.

[47] People v. Sovetsky, *supra* note 45.

[48] For an illustration of the fact that such fear is often justified, see the account of the attacks on Robert Niemeyer. Martin, SAT. EVE. POST, January 19, 1952. Merely admitting hearsay evidence may not serve to overcome this fear if the name of the informant appears in the affidavit. Florida has permitted the state's attorney to secure a warrant on hearsay evidence without revealing the source of

such as gambling or the sale of narcotics, there is no "victim" willing to serve as complainant. The commission of the offense is peculiarly within the knowledge of the parties to it, and neither party is desirous that he be discovered and punished. The effect of excluding hearsay evidence from an application for a search warrant is to deprive the policeman of the power to make a legal search in many cases. Neither historical precedent nor practical necessity require the exclusion of hearsay testimony in these *ex parte* hearings.[49] It has never been denied that hearsay evidence may be material. Since the judge has the responsibility of determining whether there is probable cause for the issuance of a warrant, it would not seem to be placing too great a burden on the public to permit him to determine the reliability of the hearsay evidence. Probable cause should not be construed to mean absolute proof.[50] Overstringent search warrant requirements can be as harmful as unrestricted issuance of warrants. The major difficulty in any alteration of the requirements for a search warrant is that the Illinois Supreme Court has held that the present interpretation is required by the Constitution.[51]

A basic motive for the use of unlawful methods is a belief in the efficacy of harassment as a means of law enforcement. Harassment is usually justified on two grounds: first, that it is cheap and effective; second, that it provides punishment for criminals who cannot be reached in any other way. Both contentions may be answered by pointing out that it is not the province of the police to decide either the means by which the law shall be enforced or that those whom the law cannot reach shall be punished. If overtechnical search warrant requirements permit criminals to escape punishment, then these requirements should be reformed. Regardless of their motives, respect for individual freedom demands that the police not be given freedom to violate the laws. Moreover, the effectiveness of harassment cannot be conceded; its effects are at best temporary.

Alternative and Supplementary Remedies

Other suggested methods for enforcing the right of privacy should be assessed by two criteria: (1) whether these methods can achieve the same results presently achieved by the exclusionary rule; (2) what areas not covered by the exclusionary rule they may reach.

A. Tort Action

It has long been decided that an illegal search is an invasion of individual rights for which an action for damages will lie.[52] Great

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his information. North v. Florida, 159 Fla. 854, 32 So.2d 915(1947). Such an affidavit makes it extremely difficult for the defendant to attack the warrant on the ground that it was issued without probable cause. Complete anonymity for the informant, however desirable in procuring information, may be too great a burden on the defendant. However, relieving the informant of the necessity of appearing in court, or of signing an affidavit, may itself have a salutary effect, even though his name appears in the record.

[49] Ely, *"Probable Cause" in Connection with Application for Search Warrants*, 13 St. Louis L. Rev. 101(1927); Note, 46 Harv. L. Rev. 1307(1933).

[50] And so the court has said. People v. De Geovanni, 326 Ill. 230, 157 N.E. 195(1927). But see the facts in People v. Prall, 314 Ill. 518, 145 N.E. 610 (1924). In the recent Illinois cigarette tax fraud investigations, the investigators felt compelled to go to great lengths to satisfy the requirement of personal knowledge and procurement of facts to show probable cause. They made use of multiple affidavits, the validity of which has not been tested in the Illinois courts. One investigator purchased cigarettes by the carton which he mailed unopened to a stamp expert. The expert examined the stamps to determine if they were fraudulent. If the stamps were counterfeit, another expert, posing as a sales tax investigator, obtained invoices showing where the retailer had purchased the cigarettes. On the affidavit supporting the application for a search warrant for search of the premises of the distributor, each verified only the facts within his personal knowledge.

[51] Lippman v. People, 175 Ill. 101, 51 N.E. 872 (1898).

[52] The earliest United States case discovered was that of Grummon v. Raymond, 1 Conn. 40(1814), in which the court held that an action in trespass would lie for a search under an invalid warrant.

claims have been made for the tort action as a means of supporting the right of privacy by the opponents of the exclusionary rule.[53] An attempt has been made to secure a compilation of tort actions in appellate courts.[54] No such Illinois cases were discovered. And an examination of the cases which were found should convince the most determined supporter of this action as an alternative remedy that in practice it has failed to provide any adequate protection against illegal searches. Its value is only as a supplementary method to provide damages for the few not aided by the exclusionary rule.

Certain other objections to the tort action as a sanction for invasions of the right of privacy may also be made. The cause of action is not dependent on the innocence of the plaintiff, but his ability to recover substantial damages may well be.[55] While it may not distress one that criminals cannot be compensated for the discovery of their crimes,[56] this factor is important in determining the effectiveness of the tort action as a deterrent. If the policeman faces no substantial pecuniary loss in the majority of cases, he will not desist from harassment. In Chicago, he is not even subject to the cost of defending the suit.[57] Furthermore, most criminals and criminal suspects would hardly invite police retaliation by instituting civil proceedings.

If the value of the tort action is merely to compensate the few victims of illegal searches who would be able to obtain a recovery sufficient to justify the cost of the action, it is useless unless supplemented by measures which would impose financial liability on someone

[53] Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 692(1944); Plumb, *supra* note 5, at 385.

[54] In 40 cases discovered, from 1814 to 1949, which involved officers and not private citizens, the plaintiffs recovered in 18, and judgments for the defendant were reversed or the propriety of the form of action upheld in 14. The defendants secured a verdict in the remaining eight. In the cases where a recovery was secured, the amount was not specified in five.

The plaintiffs were limited to a recovery of property loss in eight cases. Godat v. McCarthy, 283 Fed. 689 (D. Mass. 1922) (property returned because of failure to institute forfeiture proceedings); Buckley v. Beaulieu, 104 Me. 56, 71 Atl. 70 (1908) (destruction of premises in search for liquor; $1,000); Boston & Maine R.R. v. Small, 85 Me. 462, 27 Atl. 349(1893) (failure to make return on warrant; $10 damage to railroad car); Jones v. Fletcher, 41 Me. 254(1856) (search of barn under warrant for search of house; value of lquor seized); Fisher v. McGirr, 67 Mass. (1 Gray) 1(1854) (unconstitutional statute; value of liquor seized); McCoy v. Zane, 65 Mo. 11(1877) (warrant void on face); Westover v. Calder, 64 Mont. 264, 209 Pac. 306(1922) ($2,175 for liquor shipment seized without warrant; judgment for $5,000 punitive damages reversed) Boyd v. Genitempo, 260 S.W. 934(Tex. Civ. App. 1924) (value of fishing nets illegally seized).

One plaintiff recovered $200 for an illegal search and assault and battery. Caffinni v. Hermann, 112 Me. 282, 91 Atl. 1009(1914). An award which included damages for mental suffering amounted to only $250. U. S. Fidelity & Guaranty Co. v. State, 121 Miss. 369, 83 So. 610(1919). The only really substantial recovery for an illegal search alone was obtained in an action where the instigator of the search was joined with the officer. Larthet v. Forgay, 2 La. Ann. 524(1847) (warrant for adjacent building; $2,000). The plaintiff was awarded $500 where the officer maliciously procured the warrant. Norton v. Burnett, 181 Ark. 1132, 29 S.W.2d 683 (1930). Where the officer knew that the warrant was illegally issued, a judgment for $180 was recovered. Campbell v. Blankenship, 308 Ky. 808, 215 S.W.2d 960(1948).

[55] See Sandford v. Nichols, 13 Mass. 285 (1816) (court stated that it was unlikely that the plaintiff could recover substantial damages since the property seized was subject to forfeiture, and there was no evidence of excessive force; plaintiff abandoned his claim).

[56] Proof that evidence of a crime or contraband was actually discovered would counter any allegation of malice and substantially limit damages recoverable. It is doubtful if any damages could be recovered for mental suffering or injury to reputation. Property damage is not usually very great. See Sandford v. Nichols, note 55 *supra*.

[57] The Corporation Counsel defends policemen in cases arising out of the performance of their duties. See also Hall, *Law of Arrest in Relation to Contemporary Social Problems*, 3 U. of CHI. L. REV. 345, 346–51(1936).

other than the police.[58] Police officers are not noted for their financial responsibility. One method generally advocated is the requirement of an official bond broad enough to cover acts of the officer which violate the Constitutional right of privacy. Most official bonds impose liability for acts done "under color of office."[59] The interpretation of what acts meet this qualification is sufficiently broad in most jurisdictions to cover illegal searches and seizures.[60] Imposing liability on the municipality serves the same purpose as the bond requirement, and it has the additional virtue of having some tendency to cause official and public pressure to be exerted in preventing illegal searches and seizures.[61] The extent of such pressure would depend on the burden placed on the city. There is no more reason to believe that tort actions would become widely prevalent even with this guarantee of satisfaction, since the same problems of obtaining a judgment would still exist.

A recent act of the Illinois Legislature[62] imposes liability on the City of Chicago[63] for all injuries to person or property caused by policemen in the performance of their duties except where such injury is caused by willful misconduct. The constitutionality of the statute was upheld in a recent case involving false arrest.[64] It will be interesting to see if it has any effect on illegal searches and seizures in Chicago, since the act contains a provision exempting the City from liability for willful misconduct of the officer.[65] Furthermore, the statute relieves the policeman of all liability and, unless official pressure is of significant proportions, may actually serve to accentuate the disregard for the right of privacy.

A right of action for damages for a deprivation of rights, immunities, or privileges secured by the Federal Constitution is provided by the Civil Rights Statutes.[66] These statutes apply to the rights protected by the Due Process Clause of the Fourteenth Amendment,[67] and may provide another forum for a tort suit. However, they provide no greater assurance for the plaintiff that he will be able to collect a judgment than the private tort action unsupported by an official bond or municipal liability.

B. Criminal Prosecution

Criminal prosecution of officers for violations of the right of privacy has sometimes been suggested. The suggestion is usually rejected on the grounds that a prosecuting attorney cannot be expected to prosecute the police

[58] Comment, 58 YALE L. J. 144, 146-7(1948).

[59] Actions on official bonds: Walker v. Graham, 233 Ala. 539, 172 So. 655 (1937) (no punitive damages in an action on bond); People v. Kinnison, 94 Colo. 350, 30 P.2d. 249(1934) (constable and surety liable for seizure of auto without warrant); McMahan's Adm'x v. Draffen, 242 Ky. 785, 47 S.W.2d 716(1932) (both officer and surety liable for acts in excess of warrant; only officer liable for acts done without warrant); Jackson v. Harries, 65 Utah 282, 236 Pac. 234(1925) (sheriff and sureties liable for search exceeding warrant); Ladd v. Miles, 171 Wash. 44, 17 P.2d 875(1932) (officer and sureties liable for unlawful procurement of warrant); Lynch v. Burgess, 40 Wyo. 30, 273 Pac. 691(1929) (sheriff and surety liable for search exceeding warrant).

[60] The majority of decisions seem to utilize the definition in 24 R.C.L. 965 §59: "Would he have acted in the particular instance if he were not clothed with his official character, or would he have so acted if he were not an officer? If he assumed to act as an officer—whether under valid or void process, or under no process whatever—the bondsmen should be held, as he is held, for they are the sponsors of his integrity as an officer while acting as such." *Contra:* McMahon's Adm'x v. Draffen, *supra* note 59.

[61] See note 58 *supra*. Municipalities are not liable in these cases in the absence of statute. Tzatzken v. Detroit, 226 Mich. 603, 198 N.W. 214(1924) (good bibliography of cases and authorities). The Federal Tort Claims Act does not apply to tort suits for illegal searches. Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

[62] ILL. REV. STAT. c. 24, §§1-15(1951).

[63] The act applies only to cities over 500,000 in population.

[64] Gaca v. Chicago, 411 Ill. 146, 103 N.E.2d 617(1952).

[65] This point was not argued on appeal in the *Gaca* case, *supra*.

[66] REV. STAT. §§1979, 1980(1875), 8 U.S.C. §§43, 47(1946).

[67] Hague v. C.I.O., 307 U.S. 496(1939).

upon whose cooperation his success depends.[68] There is a federal statute which renders an officer or employee of the United States who searches a dwelling without a warrant, or searches any other building maliciously or without probable cause, liable to a fine of $1,000 for the first offense and a similar fine and/or imprisonment for a year for the second.[69] The effectiveness of such measures may be judged by the fact that there apparently have been no prosecutions under this law.[70]

An independent prosecuting agency has been suggested as a means of overcoming this natural reluctance of a prosecutor to prosecute his own aids.[71] Federal laws provide for prosecutions for violations of state officers who, under color of law, deprive anyone of the rights, privileges, and immunities secured by the Constitution or laws of the United States.[72] This statute applies to rights secured by the Due Process Clause of the Fourteenth Amendment.[73] Under this statute, a special police officer of the State of Florida was convicted for using force and violence to extort a confession.[74] If this statute is stringently enforced, it may provide proof of the effectiveness of the independent prosecuting agency. No cases under it involving search and seizure have been discovered.

Any attempt to enforce the right of privacy by criminal prosecution must be prepared to overcome the natural reluctance of a court or jury to convict an officer attempting to enforce the law, even by violating it, unless the violation is of a shocking nature. In most cases, the idea of prosecution is subject to the same criticism as a tort suit: the jury will not be convinced that the offense merits censure in a sufficient number of cases to render it an effective deterrent.

C. Mandatory Punishment

The only method by which the police officer could be reached directly in every case of an unlawful search would be a semi-automatic, mandatory action, not dependent on a hearing before a jury or commission. One possible method of carrying this out would be to require a defendant seeking the suppression of evidence to file a complaint against the officer as part of his motion. The court could determine the admissibility of the evidence and the culpability of the officer at the same time since the issue would be essentially the same. All of the parties would be before the court. The officer would have an opportunity to be heard, and would be represented by the state's attorney, rather than prosecuted by him. The culpability of the officer might be measured on the same terms as his liability to an action in tort. If the court finds that the search and seizure was unlawful, it should be required to impose a punishment ranging from suspension to forfeiture of office, depending on the nature of the violation, and the number of previous violations. An appeal is not required by due process[75] and could well be denied in this case. This would necessitate making the trial court's determination final with respect to the policeman, regardless of the outcome of an appeal by the defendant.

A principal weakness inherent in such an arrangement is the danger of judicial sympathy for the policeman. The judge may be reluctant to find the search illegal when he must impose a penalty on the policeman. However, this defect may be mitigated by the fact that the severity of the penalty remains within the province of the judge. And, on the other hand, this system provides the necessary incentive for the defendant to appear against the officer. It relieves the state's attorney of the burden of prosecuting his own staff or those upon whom he must rely. The officer is given a fair opportunity to defend himself. While this type of action cannot displace the exclusionary rule, partially because it relies on it for its effectiveness, and partially because the punishments advocated are not so severe as to deter an officer in a serious case, it would seem to close one of the gaps in the enforcement of the

[68] See Allen, *supra* note 9, at 18.

[69] 18 U.S.C. §2236(1946).

[70] See Nueslein v. District of Columbia, 115 F.2d 690(D.C. Cir. 1940); 18 U.S.C.A. §2236(1951).

[71] Comment, 58 YALE L. J. 144(1948).

[72] 18 U.S.C. §242(1946).

[73] Williams v. United States, 341 U.S. 97(1951).

[74] *Ibid.*

[75] Ohio *ex rel.* Bryant v. Akron Park District, 281 U.S. 74(1930).