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## THE EXCLUSIONARY RULE: AN ILL CONCEIVED AND INEFFECTIVE REMEDY

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I am very impressed by the presentation of Professor Paulsen who, with very commendable objectivity, presented my side of the story as ably as he did his own. In a sense, he stole my thunder because I think he did an excellent job of indicating the arguments against the exclusionary rule as well as those for it.

In arguing against this rule, I realize that I take a somewhat lonely position. After forty or fifty years of its general acceptance as part of the body of American law and with the lip service that is almost habitually done it, it is hard to find people who are willing to stand against the rule. I am willing to do so, perhaps, because in my experience as a prosecutor I frequently saw guilty persons released to prey again upon society because of the operation of the rule, and I could not help but be disturbed by the experience. And I think, too, that most of us will recognize that there is a very nasty situation involving the exclusionary rule whereby corrupt law enforcement agents will make deliberate illegal searches for the express purpose, in cooperation with criminals, of forever tainting and rendering inadmissible the evidence they seize. These two circumstances give me the courage to stand against the world as far as the exclusionary rule is concerned. I have one more circumstance and that is my delight that Dean Wigmore takes my side. Where better than at Northwestern could I cite such hallowed authority for my position as Dean Wigmore.

By way of background for what I think is the approach that must be taken to the exclusionary rule, I'd like to observe that one of the major problems currently besetting our society is the rising incidence of crime. Now, we are not facing up to this problem today because it is not so intriguing and emotionally charged as integration or the missile lag or something of this sort, but it is a very real problem. Without spending a lot of time on statistics or statistical argument, it could be demonstrated, if I devoted the time to it,

that in the years since the war the incidence of crime has steadily increased in the United States at a rate more rapid than the increase in population and that, in the categories of crimes committed, there has been a gradual but perceptible shift from the less serious to the more serious offenses. Another equally disturbing fact, which I cannot statistically support but which I base on personal observation in the field, is that there is an increasing success enjoyed by defense counsel with, of course, the cooperation of the courts, and particularly the United States Supreme Court, in hiding their clients from justice and retribution in the nooks and crannies of Constitutional law, leaving them free to return to their antisocial careers. I don't pretend to be able to analyze all the causes for what I regard as this fairly sad state of affairs, but it is my thesis that one of these causes, to a greater or lesser degree, is the exclusionary rule.

With this in mind, I would like to take a fresh look at this rule, to try to strip away from it forty or fifty years of acceptance and lip service, and to try a new approach.

We are living in an era of great emphasis upon civil liberties. We sometimes act as though this generation wrote the Bill of Rights or had just recently discovered it. In our time, the Bill of Rights has been extensively rewritten by the Supreme Court and considerably broadened and expanded in the process. In our general satisfaction with this development, we sometimes tend to forget that every extension of the rights of the individual in the criminal field must necessarily and proportionately diminish the ability of society as a whole to protect itself against the criminal. The very delicate balance between the rights of the individual and the rights of society is not easily arrived at. It was the object of very considerable concern on the part of the architects of the Constitution, who built upon the experience and accumulated wisdom of Western civilization. I think

they achieved a very nice balance, and I think we tinker with it somewhat at our peril. I digress to point this out because there seems to be a current assumption that Justice Holmes invented human rights and that Justices Frankfurter, Douglas, and Black stand alone bearing the torch of human freedom.

Before 1900 there was as genuine a concern for human rights and civil liberties as there is today, but before 1900 illegally seized evidence was generally admissible in criminal proceedings in both state and federal courts without question and without qualification. We have a tendency to look back upon this as a somewhat uncivilized era. They didn't enjoy the blessings we now have such as inside plumbing, atom bombs, and automatic elevators. But they were quite a civilized society with a really genuine concern for civil rights. I think it might safely be said that in the overall view, the citizen of the nineteenth century was far freer from government regimentation and restraint than any of us in our lifetime may hope to be. The best legal minds of that era believed that we should admit all relevant evidence in a criminal proceeding, and my thesis is that we should not take their opinion lightly nor turn our back on it simply because it has become fashionable to do so over the last forty or fifty years. It was the belief of that time that the only proper criminal trial was one wherein all relevant evidence, however obtained, was produced so that justice would be done. It is at this point I take my first step in opposition to Professor Paulsen.

I disagree that the criminal trial has any other function except to determine the applicability of the criminal law to the particular fact situation then before the court; in other words, to determine the guilt or innocence of the individual then standing before the bar of justice. That is not only its most important function; it is its only function.

The obligation to see that justice is done has a dual aspect. It was as important in 1900 as it is today, and as generally recognized in 1900 as it is today, that the innocent be acquitted for the sake of the rights of the individual. But, in 1900 it was equally important in the minds of the Court and legal thinkers generally that the guilty be convicted for the sake of the rights of society—the rights of society to live secure in their persons and in their property. Under the view in that time, it was as unthinkable as it is today that the innocent

be convicted. But we seem to have digressed completely from the second point of view because it was very unthinkable then that a guilty man be turned loose to prey again on society as an object lesson to an over zealous policeman. Today this is considered the enlightened and prudent view. I emphasize this because I think the sharp difference of opinion between our modern attitude on this problem and the attitude of a generation or two ago should cause us to stop, pause, and reflect as to whether our view today is as enlightened as we think it is.

To turn to Wigmore for moral support, I point to a comment of his on *Weeks v. United States*,<sup>1</sup> which is the foundation stone for the federal exclusionary rule. Wigmore says,

"But the essential fallacy of *Weeks v. United States* and its successors is that it virtually creates a novel exception where the Fourth Amendment is involved, to the fundamental principle that *an illegality in the mode of procuring evidence is no ground for excluding it*. The doctrine of such an exception rests upon a reverence for the Fourth Amendment so deep and cogent that its violation will be taken notice of, at any cost of other justice, and even in the most indirect way."<sup>2</sup>

After citing some cases, Wigmore goes on, "All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, this view appears indifferent to the direct and immediate result, viz., of making Justice inefficient, and of coddling the law-evading classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer, or embezzler, or panderer."<sup>3</sup>

Wigmore was given to strong words, and those are about as strong as his usually are, but I think they emphasize his point and mine.

Now, I am as aware, I think, as most, of the abuses of law enforcement, and I am as concerned as the next man for their correction. But, I cannot accept the proposition that turning criminals loose on society by suppressing illegally

<sup>1</sup> 232 U.S. 383 (1914).

<sup>2</sup> 8 WIGMORE, EVIDENCE §2184, at 36 (1940). (Italics in the original.)

<sup>3</sup> *Id.* at 36-37.

seized evidence does adequately solve the problem of punishing the over zealous and misbehaving officer. It punishes, in fact, the innocent citizenry. The officer is not disciplined for the failure to obtain a conviction. The officer is not disciplined in our modern society for his illegal search. The federal exclusionary rule in effect now for nearly fifty years has not noticeably deterred illegal searches and seizures which, if the civil liberties groups are to be believed, are as pressing a problem today as they ever were. This federal exclusionary rule has been adopted over the years by about half of the states. There is no indication that law enforcement in these states has been imbued with any greater respect for civil liberties than in the less enlightened half of the Union not following the rule. There is not the slightest indication that the Chicago Police Department, operating under the exclusionary rule adopted by the State of Illinois, is any more zealous to protect civil liberties than the New York City Police Department which does not have such a sanction or censure hanging over it. It can be debated endlessly whether in areas where the exclusionary rule has been adopted by the state you do have better law enforcement or better regard by law enforcement agencies for the rights of individuals, but, as Professor Paulsen pointed out, so many other factors are involved that it can never be definitely stated that the exclusionary rule has had any bearing on this.

It should be remembered also that there are means other than the exclusionary rule for protecting the Fourth Amendment rights of our citizens. Admittedly, these do not seem adequate at the moment. I would suggest, however, that much of the energy now being given to supporting the federal exclusionary rule might be directed to an exploration of the possibilities of strengthening the remedy of the citizen against the officer violating the rights. I know of no serious studies currently going on to consider the problem, and it is an area which should be explored. I recognize the futility of giving the individual, the injured citizen, a civil remedy against an impoverished policeman where his only remedy must be in damages. But, I agree with the comment of Professor Paulsen that one of the considerations most deserving of attention in this field is that of shifting the financial responsibility for improper conduct of policemen, on a *respondet superior* basis, to the municipality or sovereign which

employs them. This would be difficult to achieve, but it certainly would be worth the effort. Proper administration of such a system might not be easy to come by, but again it certainly would be worth the effort.

If the remedy were against the municipality and if it were fairly applied by a court, I think the city might very quickly take steps to educate, restrain, and deter its police force from illegal conduct, and I cannot accept the proposition that this could not be worked out. The redressing of the rights of an individual by awarding him damages in a court of law is something so fundamental to our system that I don't think it can be lightly said that in this area or in any other it cannot be applied to any current problem we have.

My conclusion then is that *Weeks v. United States* is a piece of pure judicial legislation and an attempt to achieve a social goal. I hate to see the Court legislating to achieve social goals, but it seems to have become a Supreme Court hobby in recent years. The Court created an evidentiary rule to achieve a stated social purpose. I think the rule was ill conceived, and the purpose is not being achieved by it. Another deterrent for illegal searches and seizures must be found which does not punish society as a whole for the misconduct of the individual law enforcement agent.

As I mentioned earlier, the federal exclusionary rule in the forty to fifty years of its existence has been adopted by only about half of the states. Apparently it has not been found to be so completely impressive and overwhelmingly logical that the forty-eight (or now fifty) states rushed to accept it. I think it should be abandoned by those states that now follow it and dropped by the federal courts as well. The decisions applying it demonstrate its lack of logic, and I think history demonstrates its failure. Better ways to enforce the strictures of the Fourth Amendment against law enforcement agents can certainly be found, and I don't think any genuine effort has been made to develop them. But, far from abandoning the exclusionary rule, the federal courts and the United States Supreme Court are now moving swiftly in the opposite direction.

In recognition of the inherent limitations of the rule, its application has been traditionally hedged about with some very broad exceptions which Professor Paulsen has described for you. The chief of these is the generally recognized and long

standing rule that evidence illegally seized by state officers may be used in the federal courts if federal agents have not cooperated in the seizure. This major exception to the exclusionary rule, which drastically reduced its potential for public mischief, is apparently about to disappear. Despite clear-cut and long standing precedent, the United States Court of Appeals for the District of Columbia in October, 1958, in *Hanna v. United States*,<sup>4</sup> reversed a federal conviction based upon evidence illegally seized by state officers in Maryland. This state seizure was not a brazen violation of individual rights but a rather close question of whether the officers had acted properly. (I'd agree with the court in deciding that the officers did not act properly, but I merely point out that it was not an outrageous abuse of the officers' discretion.) The court based its decision on a study of a progressive series of Supreme Court opinions, and the conclusion it drew from these opinions was that the trend of the Supreme Court thinking was toward eliminating the so-called "silver platter doctrine." So Judge Hastie hurried to be the first on the band wagon and beat the Supreme Court to it. The Seventh Circuit subsequently considered the same question in *United States v. Camara*<sup>5</sup> and, unlike the District of Columbia and in the face of the *Hanna* decision, they thought it appropriate to wait for the Supreme Court rather than to lead the way, so they followed the traditional rule. But, Judge Hastie's prediction is probably right, and I think the federal "silver platter doctrine" is on its way out.<sup>6</sup>

One final comment, however, on an even more far reaching decision which received far less attention than the *Hanna* decision, *Rea v. United States*<sup>7</sup> In *Rea*, a federal officer seized narcotic evidence, some marijuana, in a search which was later held to have been improper, and the evidence was ordered suppressed. A prosecution of the same individual was undertaken by the state for the same narcotics violation, and the federal narcotics agent was subpoenaed to testify for the state and to produce the evidence he had seized. In a very extraordinary and to my mind unprecedented move, the defense went into federal

court and moved for an order enjoining the federal narcotics officer from testifying in the state proceeding or producing his evidence there. His motion was denied. On appeal, the Supreme Court enthusiastically embraced the notion that this federal officer certainly should be enjoined from playing his ignoble role as a person appearing for the state to produce the ill-gotten evidence which he had in his possession. No constitutional question was involved in this case, the Court said. It was acting under its general supervisory authority over federal law enforcement agents. Now, that concept lies in the case like a time bomb. If the Supreme Court has had a general supervisory authority over federal law enforcement agents, it has never occurred to me to suspect its existence prior to now. And the Court was so confident that it had it, it did not bother to explain, give precedent, or indicate where it got it. This ignoring of the concept of the division of our government into three separate branches wherein authority of a supervisory nature over law enforcement agents rests, as I thought, with the executive branch, leads me to wonder where the Court is going to go next in following up this so called supervisory authority that it has invented for itself. With this simple phrase and explanation, the Court said that it would prevent a federal law enforcement agent from testifying in the state criminal proceedings. I think that case is probably more startling than *Hanna* and will have, in the course of the next generation, far-reaching consequences. I do not rejoice that the Court has adopted this supervisory role, because I do not agree with the philosophy of the Court with regard to federal law enforcement agencies and their tactics.

I think we are living in an era where in the course of emphasis upon individual civil liberties the Court has come dangerously close to upsetting the balance which it is necessary to preserve between the rights of the individual and the rights of society as a whole. In tying the hands of our law enforcement agencies under the philosophy that a criminal prosecution is sort of a sporting contest where the odds must be even, we may be submitting our society to the inroads of a criminal element which ultimately we will not be able to control. I am not suggesting as a blood-thirsty prosecutor that everybody is guilty and they should be marched to jail without a trial. But, I do suggest to you that we consider how far we have strayed from the proposition that the function of

<sup>4</sup> 260 F.2d 723 (D.C. Cir. 1958).

<sup>5</sup> 271 F. 2d 787 (7th Cir. 1959).

<sup>6</sup> Several months after the completion of the Conference at which this paper was delivered, the Supreme Court lived up to the advance billing in the *Hanna* case and overruled the "silver platter doctrine." See *Elkins v. United States*, 364 U.S. 206 (1960).

<sup>7</sup> 350 U.S. 214 (1956).

a trial is to send a guilty man to jail and to acquit an innocent man. If we disturb that function or envision the function of a trial to be anything else, we are stripping the government of the power to protect us against criminals and crime.

The views I have expressed, I gather, have been very rarely heard lately, but I commend them for your serious consideration.

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#### ADDENDUM

In the case of *Mapp v. Ohio*,<sup>8</sup> the United States Supreme Court had before it a search by local police officers, clearly illegal by federal standards but not so in the mind of the Ohio Supreme Court.

<sup>8</sup> 81 S. Ct. 1684 (1961).

The Court decided to take a new look at the rule of *Wolf v. Colorado*,<sup>9</sup> "that in a prosecution in a State Court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

In lengthy opinions, the Justices impatiently note that the progress of the states in embracing the exclusionary rule while "inexorable" is also "halting." Unable to wait, the Court convinces itself at length that the exclusionary rule is inherent in the Due Process Clause where *Wolf* had specifically found it not to be. Thus the last exception falls. Illegally seized evidence is inadmissible in all courts, no matter by whom seized.

<sup>9</sup> 338 U. S. 25 (1949).