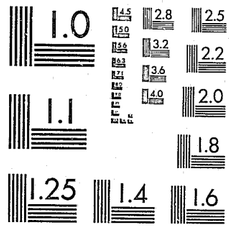
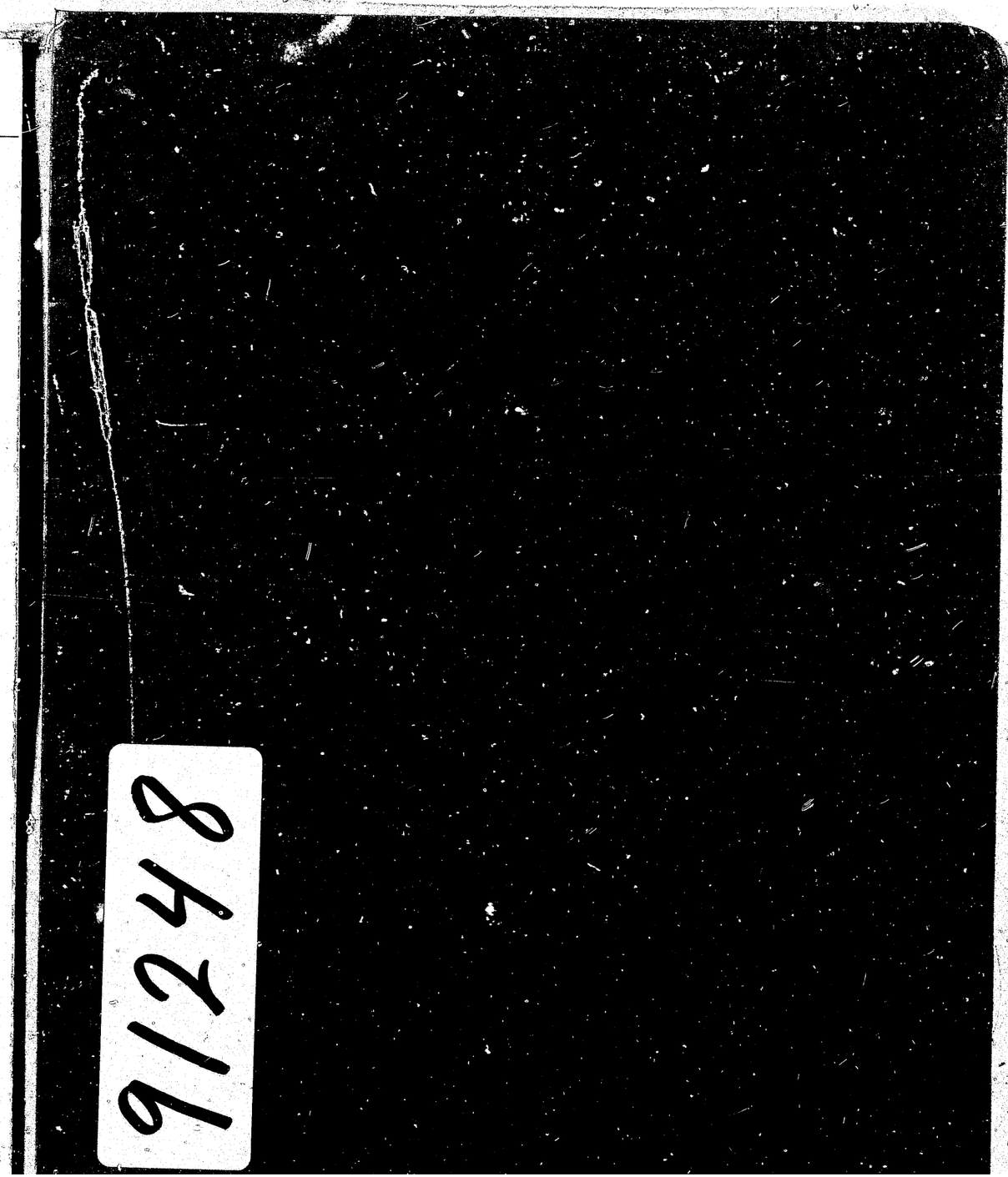





**National Institute of Justice**
**United States Department of Justice**
**Washington, D.C. 20531**





MF-1

# Department of Justice

ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE CANADIAN BAR ASSOCIATION

9:30 P.M. EDT
THURSDAY, SEPTEMBER 1, 1983
THE BALLROOM
QUEBEC MUNICIPAL CONVENTION CENTRE
QUEBEC, QUEBEC

Thank you, Mr. Ambassador. And let me thank you, President Fortier and all of your colleagues in the Canadian Bar Association, for making me an honorary member. Mr. McKercher, let me congratulate you in advance, if I may, on your new position. You will be leading a distinguished and important group as president of the Canadian Bar Association.

Canada and the United States occupy the same continent and share a lengthy border. Our histories intersect at many points. We have many things in common. One of our common possessions is the common law. Based on the unwritten laws of England, the common law was generally derived from principles based on justice, reason, and common sense.

Tonight I would like to address a question that first arose in the common law tradition many centuries ago. It is the question of whether evidence illegally obtained by law enforcement officials is nonetheless admissible by the prosecution in a criminal trial.

As you know, this is a question regarding the law of evidence. And according to the common law, evidence unlawfully seized is admissible in a criminal case.

Canada has generally followed the common law tradition. Indeed, it has adhered to what may be called the inclusionary rule, so-called because judges may not exclude from trial evidence illegally obtained by the police. The United States, on the other

hand, has adhered to the exclusionary rule, under which judges must exclude from trial evidence unlawfully seized.

Today, on both sides of the border, there is interest -- indeed controversy -- about this very old question regarding the law of evidence. There is sentiment in Canada in support of giving judges some discretion to exclude evidence. Meanwhile, there is sentiment in the United States in favor of abolishing the exclusionary rule, or at least changing it so that judges might be able to admit evidence in instances where now they must exclude it.

Tonight I thought it might be useful to reflect on what has happened, and is happening, in our respective countries in regard to this question. Whatever changes Canada may or may not decide to make to its inclusionary rule, I believe the time has come for the United States to modify its exclusionary rule.

Let me begin by considering the situation in your country. Canada has for years given top, even exclusive, priority to the value of protecting its citizens by adhering to the common law approach to this question. According to the common law, followed in the classic English case of Kuruma v. The Queen, the way in which police behave in securing evidence is irrelevant to determining the guilt or innocence of an accused person.

In 1970, in the leading Canadian case, your Supreme Court followed the commonwealth jurisprudence, deciding in The Queen v. Wray that a trial judge has no discretion to exclude



truly relevant evidence. This case provoked dissent, not only on the Court itself but also among the legal and lay public.

Supporters of the common law approach argued that civil remedies are available for those who believe their rights have been violated. Opponents of the common law approach insisted that judges must have some discretion to exclude evidence, arguing that in some instances the only way a judge can do right by the accused and maintain the good name of the court is to banish certain evidence.

This debate intensified in 1974, when your Supreme Court had the opportunity in Hogan v. the Queen to consider the question of illegally obtained evidence in light of the Canadian Bill of Rights, adopted in 1960. Here the Court reaffirmed Wray, saying there were no grounds for excluding the evidence at common law.

Since Hogan, several proposals for change have been suggested, but none has been adopted. Last year, however, the constitutional Charter of Rights and Freedoms came into force. And it includes language relevant to the question before us tonight.

Section 8 of the Charter states the right of "everyone . . . to be secure against unreasonable search and seizure." Section 24(1), an enforcement provision, states that anyone whose rights or freedoms have been infringed or denied may apply to the court for such a remedy "as the court considers appropriate and just." Section 24(2) follows, saying that, in such a proceeding, where a court finds that evidence was obtained in a manner that denied rights and freedoms guaranteed by the Charter, the evidence "shall be excluded if it is established that, having regard to all the

circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

Some commentators believe that Hogan would now be reconsidered. Your Supreme Court has yet to apply the Charter to the issue of illegally obtained evidence. And there is some question, as you know, as to how far the Supreme Court will go in interpreting and applying any part of the Charter. Your courts have traditionally acted with restraint.

Even so, you now have new constitutional provisions. And far more so than the Bill of Rights of 1960, they point Canada away from a purely common law regime towards a constitutional one. The Charter's place as the supreme law of the land and its specific language in regard to search and seizure suggest that Canada might take a new approach to the question of whether judges may exclude evidence.

We in the United States early adopted, as you know, a written Constitution. The original Constitution of 1787 did not include a Bill of Rights. But concern for individual liberty prompted the addition of a bill of rights very shortly after the Constitution was ratified. The relevant part of our Bill of Rights -- the Fourth Amendment -- says: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

This amendment is similar to Section 8 of your Charter of Rights and Freedoms, and indicates a similar concern for the basic rights of the individual, a concern bred of our



revolutionary experience, of our strong contempt for the General Warrants issued during that time. The Fourth Amendment, however, did not come outfitted with an exclusionary rule. And in fact for almost 100 years the common law approach that you have maintained and which was our inheritance, too, was accepted by every federal and state court, indeed every judge.

This is not to suggest that the United States tolerated unreasonable searches and seizures, in violation of the Fourth Amendment. Such actions were still unconstitutional. But the remedy during those 100 years was different. It was not a remedy against the evidence, in the sense of demanding its exclusion, but a remedy consistent with the common law tradition, making the person who committed the unreasonable search or seizure liable, typically, for damages in trespass.

This situation began to change in 1886, when the Supreme Court created an exclusionary rule in a case in which the accused's private papers had been seized. What was unreasonable to the Court, and thus unconstitutional, was not the manner in which the papers had been taken but their legal status -- they were, in the Court's view, the accused's "private property," not illegal goods. And private property could not be used as evidence against the accused.

The Court's solicitude for private property was evident twenty-eight years later, in 1914. The letters and correspondence of an accused person had been seized from his home, in his absence and without his authority, and without warrant for either his arrest or a search of his house. The accused made an application

to the court to have the items returned. The application was denied. After a second application and a second denial, the letters then were placed in evidence against him. The Court, relying this time wholly on the Fourth Amendment, ruled that the failure to restore the letters to the accused was a denial of his personal property rights. The Court concluded that the government could not lawfully make use of the accused's private property -- it was excluded as evidence from the trial. This case, Weeks v. United States, thus maintained the property-grounded rule of exclusion devised earlier, attaching it firmly to the Fourth Amendment and applying it to all federal courts.

Six years later, the Court shifted its focus from the legal status of the evidence to the manner in which it had been seized. By 1920 all federal courts were obliged to exclude evidence obtained through so-called "forbidden acts."

Over the next three decades, 16 states adopted the exclusionary rule, with 31 states refusing to do so. In 1949 the Supreme Court first addressed the question of whether the exclusionary rule should apply to the state courts. Although the Court refused to do so on this occasion, it did extend the exclusionary rule to the states a dozen years later, in 1961, in Mapp v. Ohio.

Thus the exclusionary rule has been enforceable against both federal and state prosecutions for the past 22 years. And it has been enforced in an almost absolute manner. The seriousness of the crime has not mattered. Neither has the significance of the evidence. It has made no difference, either, whether law enforcement



officers made a good-faith effort to ensure the legality of the search. The pursuit of procedural justice has eclipsed the pursuit of substantive justice, with the result that demonstrably guilty criminals have gone free. One of the leading students of the Fourth Amendment, has estimated that, for the year 1977-1978, between 45,000 and 55,000 felony and serious misdemeanor cases were dropped by prosecutors because of exclusionary-rule problems.

I mentioned movies earlier. This summer one of the movies playing to audience applause in the United States is "The "Star Chamber." You might not expect a movie about the fine points of criminal law to interest the movie-going public, but the public understands very well the injustice that occurs when, as happens in "The Star Chamber," criminal after criminal falls through the exclusionary-rule crack.

In the opening episode of the movie, a murderer of five elderly women, chased by police, drops his pistol into a trash can. The police wait until the garbage truck pulls up and has scooped up the trash before searching through it, on the theory that the trash in a garbage truck is public property while trash in a trash can is private. But the judge throws out the evidence on grounds that the trash was still private refuse until it had been mixed with the rest of the garbage. The police, you see, made the big mistake of searching the trash while it still lay in the scoop of the garbage truck, before the scoop lever had been pulled and the private trash had become public trash. If this sounds highly technical, or even slightly insane, audiences across the United States have had no trouble relating to this sequence of

events. For similar stories have occurred all too often in real life.

In the United States we have had to ask, increasingly, how the exclusionary rule can be justified. The principal rationale given by our Supreme Court has been twofold -- to deter police misconduct and to preserve judicial integrity by preventing courts from becoming "accomplices in the willful disobedience of a Constitution they are sworn to uphold."

In recent years, the Court has failed to cite the judicial integrity rationale, emphasizing deterrence instead. But a substantial body of evidence has questioned the efficacy of the exclusionary rule in achieving the goal of deterrence. Indeed, all but one of the seven empirical studies of the deterrent effectiveness of the rule conclude that it does not generally deter. And the author of the one article comes to no settled conclusion as to deterrent effectiveness.

These studies on deterrence to one side, the more important point is that our courts tend to apply the exclusionary rule in situations where the rule cannot possibly serve as a deterrent. How can the exclusionary rule deter police misconduct in situations not covered by existing case law? Where the courts have not spoken, police cannot know what the law requires.

More questions continue to be raised about the value of the exclusionary rule. Just this past year, for example, the National Institute of Justice found "a major impact" of the rule



on state prosecutions in California. The institute's study examined all felony arrests in our most populous state for the years 1976 through 1979. According to the study, more than 4,000 of all state felony cases declined for prosecution were rejected because of search and seizure problems, and almost three quarters of these involved drug charges. In the offices studied, approximately one third of all felony drug arrests were declined on search and seizure grounds.

Furthermore, about half of all of those freed because of exclusionary-rule problems were rearrested during the next two years, on average, three times.

Some in my country have called for the abolition of the exclusionary rule. At the least, some modification of the rule is needed. Accordingly, the Reagan administration has proposed legislation that would eliminate the exclusionary rule in those circumstances in which the rule could not possibly have its intended deterrent effects.

Our proposal would create a so-called "good-faith exception" to the exclusionary rule. Specifically, it would allow the admission of evidence whenever an officer either obtains a warrant or conducts a search or seizure under such circumstances that no officer acting reasonably could have been expected to know that what he did would be considered unlawful.

It is important to stress that whether the officer has acted in "good-faith" is not a matter of his personal, subjective belief. It rather must be the objective view of the court, having weighed all the relevant circumstances, that the officer acted in good faith.

Our proposal coincidentally reflects the wisdom of your Law Reform Commission's 1974 study on the exclusion of illegally obtained evidence. That study recognized, as a basic principle, that an irregularity in obtaining evidence is not in itself a reason for excluding it. The study implied an important distinction when it suggested giving a judge discretion to depart from this principle and exclude evidence unlawfully obtained if the violation of liberty was "the result of a deliberate voluntary act committed in bad faith."

As with so many questions in the criminal law, the urgency in regard to the question of illegally obtained evidence is to strike the right balance. And as to the interests that must be balanced, Lord Cooper, in a famous Scottish case, wrote:

"The law must strive to reconcile two highly important interests . . . the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and . . . the interest of the state to secure that evidence bearing upon the commission of a crime and necessary to enable justice to be done shall not be withheld from courts of law on any mere formal or technical ground. Neither of these objects can be insisted upon to the uttermost.

"The protection for the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference . . . The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing



all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."

The proper balancing of these interests is our common goal. I am sure that as we -- and you -- consider this question we will in our respective ways achieve that objective.

END