Post 6/30/75

The Court and the Exclusionary Rule

INCLUDED IN THE host of opinions that surged out of the Supreme Court last week was one that bodes ill for the future of criminal justice. It was not what the Justices did in the case—although that was bad enough—but the reason they gave for doing it that troubles us. For the majority's reasoning, as two of the four dissenting Justices pointed out, foreshadows the demise of the exclusionary rule, which has served the country well throughout most of this century.

The exclusionary rule, created by a unanimous Court in 1916, originally barred from use in federal criminal trials any evidence seized in violation of the Fourth Amendment's ban against unreasonable searches. It has since been applied to other kinds of evidence obtained illegally or unconstitutionally, and its reach was expanded in 1961 to cover state as well as federal trials. Ever since then, the rule came in for heavy criticism of two kinds. First, it *does* permit demonstrably guilty persons to go free if the police violated their rights while acquiring evidence against them. Second, the rule does not distinguish between violations that are deliberate abuses by the authorities and those that entail accidental or minor mistakes by officers in the field or judges on the bench.

Running through the opinion written by Justice Rehnquist for the majority in this case and also through an opinion by Justice Powell in another case was the proposition that the exclusionary rule ought to be modified at least to take care of the second of these objections to it. "If the purpose of the exclusionary rule is to deter unlawful police conduct," Justice Rehnquist wrote, "then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional . . ." Justice Powell suggested that evidence should not be excluded as long as it had been obtained "in good faith" on the basis of a warrant that turns out to be invalid or a law that is subsequently declared unconstitutional.

Both Justices—and indeed a majority of the Court—seem to believe that this sharp alteration in the exclusionary rule would not harm the criminal justice system. But it seems to us that the opposite is true. The rule was created to achieve two ends. One was to deter illegal police activities, and the rule does provide the best existing sanction against violations by police of the individual rights protected by the Fourth, Fifth and Sixth Amendments. The other was to maintain the integrity of the judicial process. Justice Holmes once put it this way:

> *. . . we must consider the two objects of desire both of which we cannot have and make up our minds which to chose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it as lesser evil that some criminals should escape than that the government should play an ignoble part.*

The change in this rule that seems to be proposed by the Court's majority essentially ignores this second of its purposes and depreciates the value of its first. The rule now puts a premium on intelligent police work. By altering it so that constitutional violations by officers who know no better are excused, the premium is put on unintelligent police work. Similarly, by excusing violations as long as a judge has signed a warrant, the incentive is shifted away from high judicial standards in issuing those warrants.

Either development, we believe, would lower substantially the quality of law enforcement and criminal justice which has improved greatly since the exclusionary rule was applied to the states 14 years ago. One would make it possible for police to justify unconstitutional arrests and searches, and the other would give lower court judges power to cut corners on the guarantees of the Bill of Rights. We hope that a majority of the Court will have second thoughts about the implications of its logic.