The Exclusionary Rule

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The Supreme Court found occasion on Monday to remind Attorney General Mitchell, a slow learner, that "when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." The case before the court involved a search and seizure by New Hampshire police officers conducted on the basis of a warrant issued by the Attorney General of New Hampshire (who had assumed charge of a murder investigation and was later the chief prosecutor at the trial) acting as a justice of the peace. The Supreme Court reversed a conviction of the accused on the ground that the warrant for the search and seizure did not satisfy the requirements of the Fourth Amendment because it was not issued by a "neutral and detached magistrate." Mr. Mitchell has a notion (grotesquely mistaken in our judgment) that he can authorize a search and seizure, without obtaining the approval of a neutral and detached magistrate, whenever he deems it "reasonable" to do so in a situation involving national security.

The judgment of the Supreme Court seems to us natural enough and in clear conformity with the historic meaning of the Fourth Amendment. But one aspect of this case that seems to us surprising is a single-page opinion by Mr. Chief Justice Burger, dissenting in part and concurring in part, which declares: "This case illustrates graphically the monstrous price we pay for the Exclusionary Rule in which we seem to have imprisoned ourselves."

The Exclusionary Rule, to state it very simply, provides that courts will not admit as evidence in criminal prosecutions material obtained in violation of the Constitution or the laws. Thus, the fruits of an unlawful search are inadmissible no matter how probative and reliable they may be; and a confession wrested from a suspect by torture or threats may not be used against him even though its validity may be demonstrated by independent investigation. It is true, of course, that this rule operates sometimes to punish the public which sees a manifestly guilty man go free simply because a policeman, through error or excessive zeal, has transgressed the law in arresting him or seeking evidence to convict him.

Dissenting in a related case, the chief justice observed that "the rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence." And, indeed, there is a great deal of experience, we think, to show that this theory is entirely valid. That it does not always deter police misconduct is no proof that it is without deterrent value. The chief justice himself says, "I do not propose, however, that we abandon the Suppression Doctrine (the Exclusionary Rule) until some meaningful alternative can be developed . . . Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared."

The chief justice acknowledges that private damage actions against individual police officers afford no "meaningful alternative." As he says with considerable understatement, "Jurors may well refuse to penalize a police officer at the behest of a person they believe to be a 'criminal' and probably will not punish an officer for honest errors of judgment. "Criminals," moreover, are reluctant to go to courts to right the wrongs done to them. And, besides, few policemen are able to pay substantial damages in the unlikely event that a judgment should be rendered against them.

The remedy suggested by the chief justice is that the government itself should afford "compensation and restitution for persons whose Fourth Amendment rights have been violated." This seems to us reasonable and just, so far as it goes; and we should be glad to see Congress establish the mechanism for such a remedy. But we do not see any reason to suppose that it will effectively curb police carelessness regarding constitutional rights; on the contrary, it may well provide a pretext for ignoring those rights.

More significant than all this, however, is the fact that when courts admit evidence obtained by unlawful police conduct they lend color and countenance to lawlessness. They become, in a real sense, accomplices in crime. The essential defense of the Exclusionary Rule lies in its indispensability for maintaining the purity of the judicial process. The essential argument against using evidence obtained through violation of the law is that it undermines respect not only for the courts themselves but for the law of which the courts are custodians.

In our view, the price we pay for the Exclusionary Rule is not nearly so "monstrous"—to use the chief justice's own word for it—as the price we would pay, in terms of the corruption of our courts, if we were to abandon that rule.