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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

November 29, 1971

Minutes

Members Present: Senator Wallace P. Carson, Jr., Chairman
Senator Anthony Yturri
Attorney General Lee Johnson

Excused: Representative Leigh Johnson
Representative Robert Stults

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter

Others Present: Mr. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Willard Fox, Oregon State Bar Committee on Criminal Law and Procedure
Mr. R. Dale Kneeland, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Robert Lucas, Chairman, Oregon District Attorneys' Association Criminal Law Revision Liaison Committee; member, Bar Committee
Mr. Donald R. Blensly, ODAA Liaison Committee
Mr. Jackson L. Frost, ODAA Liaison Committee
Mr. John W. Osburn, Solicitor General, Department of Justice
Mr. Michael Smith, KOAC Radio
Mr. William Snouffer, Chairman, American Civil Liberties Union

AGENDA: Search and Seizure, Preliminary Draft No. 1; January 1971
Search and Seizure, Preliminary Draft No. 2; November 1971

Senator Wallace P. Carson, Jr., Chairman, called the meeting to order at 1:35 p.m. in Room 315 State Capitol.

Mr. Paillette reminded the subcommittee that the Commission has not yet taken a position on whether or not it will attempt to codify some of the areas in the draft on search and seizure; that much of it is exploratory so as to give the subcommittee a general idea of some of the problems it will face and be in a position to help the Commission make a policy decision as to whether or not it should go ahead in some of the areas as part of the Criminal Procedure Code.

Professor Platt, Reporter for the drafts, in giving background data to the subcommittee on Preliminary Drafts 1 and 2 of Search and Seizure, remarked that Preliminary Draft No. 1 was drafted before the Commission had decided to examine the whole field and contains areas which he felt would be of more interest to the Commission. Preliminary Draft No. 2 was drafted at a later date and contains the rest of the statement. The drafts generally follow the Model Code of Pre-Arraignment Procedure (MCPP).

Professor Platt stated that there is virtually no legislative enactment in the nation embodying the scope of these drafts. Although there are fairly detailed provisions on search warrants in Oregon and other states, there is not much else, and this is an attempt to legislate completely in the search and seizure field. Up until now the law in this area has been decisional, which is one of the problems. Professor Platt was of the opinion the courts are really not in the best position to determine what the procedures should be - they usually are not familiar with police procedures and as a result there is a haphazard approach to search and seizure. Professor Platt referred to Chimel v. California, 395 US 752 (1969), which he said is codified to a certain degree in the section of the draft relating to search incidental to arrest.

It was pointed out by Professor Platt that reading a case to find out what the law is on search and seizure is virtually impossible for a police officer and it would be more advantageous for the officer to be able to refer to the statutes or at least to have a source written down in some detail. This does not now exist under the decisional law system, and in Oregon there is just a smattering of search and seizure law outside the search warrant provisions. He urged the subcommittee to consider the whole picture rather than just revamp certain parts of the law.

One of the problems with search and seizure, Professor Platt continued, is the abrasive relationship the courts have with the police. They have been put in this position, he felt, because of failure on the legislature's part. The legislature, by not enacting rules, has put the burden of developing rules on the courts which are not essentially equipped to do the job.

Mr. Johnson asked if one of the problems is the fact that the courts have set the rules in the past decade, thereby limiting the legislature, and also that many of those rules may be modified by the courts.

Professor Platt disagreed that the courts have preempted the field and said that even though the courts may revise the rules which would have the effect of changing or overruling something the legislature does, heretofore in this area they have not had legislation to deal with. He called attention to section 9 of Preliminary Draft No. 1,

Search Incidental to Arrest. Permissible Scope (subsection (1)) he said, was a codification of the Chimel rule and is very broadly drafted. The draft itself is not all due process oriented as there are many police efficiency areas in it.

Senator Yturri asked Professor Platt if his position was that since the court ultimately decides the constitutional issue, there is no impropriety in the state adopting the precise rules, subject to change by reason of influence on the legislature by certain individuals, or on the other hand by actual court cases in which the Supreme Court would say the statute is out of line.

Mr. Johnson remarked he did not disagree with the statutory approach but felt there may be some areas the subcommittee would want to leave vague.

Senator Yturri asked Mr. Johnson how this vagueness would be accomplished. Would it be by remaining silent or by making the rules broad enough to permit anything.

Professor Platt presented alternatives which might be used. The Chimel approach could be taken, where the statute itself really doesn't mean much and relies almost entirely on decisional law. Another way would be for the legislature to enact broad standards in the scope of the search area and provide that the actual searches be conducted according to administrative rules. These rules, Professor Platt indicated, could be drafted by the Attorney General, local government or a state agency. Inspectorial searches is another area he felt would be particularly adaptable to administrative rules.

Senator Yturri expressed concern over leaving this to administrative rules. Professor Platt replied that the administrative system would only be to inform the police officer precisely what he can do. The hearings for violations would be a regular court procedure system and would not be held before an administrative agency.

Mr. Snouffer, referring to the administrative approach aspect, said there must be uniformity in these rules, as they would have to be administered by the state police, county police and city, but that there would also be some benefits in having a statutory enactment, one of which would be to allow the courts a medium through which to retreat in a direction the Commission would wish it to go, to which Professor Platt replied it probably would be a relief to a trial judge to have a statute to use.

Search and Seizure, Preliminary Draft No. 1; January 1971

Section 1. Definitions. Section 1, Professor Platt said, is an incomplete section, left this way because it will contain a number of definitions, none of which will reflect any policy changes from present Oregon law. The type of definitions to be included will be

found in Tentative Draft No. 3 of the Model Code of Pre-Arraignment Procedure, section 1.01, and will define such things as seizure, search warrant, search, officer, individual, probable cause and others.

Section 2. Prohibition of unauthorized searches and seizures.

Professor Platt explained that section 2 is a statement which does not now exist in Oregon law but is implicit therein. It does not advance very far in the policy field but simply prohibits all searches that are not authorized by this Article. Professor Platt referred to the last line of the section which contains a reference to Article 27 of the Criminal Code regarding eavesdropping, and remarked that it is out of date because the article was deleted from the Code.

Mr. Johnson asked what the sanction would be for violations. Professor Platt replied it would be the exclusionary rule. The sections in Preliminary Draft No. 2, beginning with section 24, deal largely with this rule although Professor Platt added that the subcommittee may not wish to adopt it, as it was his opinion that the exclusionary rule was in jeopardy. He called attention to the fact that three judges on the U. S. Supreme Court are against it, with two more leaning in that direction. Justice Berger stated in his dissent in Bivens v. U. S., 91 S Ct 1999 (1971), that the exclusionary rule should be overruled, allowing an administrative procedure in its place which would challenge what the police have done, but admitting the evidence because of the inherent reliability of the evidence seized and providing another remedy for the individuals against the police in the sense that they have had their Fourth Amendment rights of privacy invaded.

The courts, Professor Platt continued, are more inclined to admit evidence that is violative of a constitutional right on the grounds that it is "harmless error", and he was of the opinion that a harmless error legislative statement may help courts in reaching a more flexible rule so that the police could benefit in specific areas where they have only slightly violated the Fourth Amendment right and there is no reason for excluding the evidence.

Mr. Osburn commented that the future of Mapp v. Ohio is unknown and if it is overruled, the courts may go back to United States v. Rabinowitz which states the Constitution prohibits unreasonable searches. The difficulty in drafting these rules is that the legislature must follow the lines of the Supreme Court in its most restrictive cases and this could create some danger of freezing the law at its most rigid point. It is impossible to anticipate whether the courts might have been willing to go further than the draft. He called attention to a recent decision in a knock and announce case, where it states there may be some circumstances where the police had violated the rule but the evidence would not necessarily be excluded, although there may be a penalty. This section, he said, would limit the exclusion unless the draft would state that only those searches prohibited by the

Constitution would be excluded and not exclude those which the statutes prohibit. Part of the job of a police officer, he continued, is to get evidence and this evidence ought to be allowed unless there is a constitutional or a strong policy bar against it.

Professor Platt remarked that there is an approach taken along this line by the ALI Tentative Draft No. 4. Section 8.2 states that "Unless otherwise required by the Constitution of the United States or of this state, a motion to suppress evidence based upon violation... shall be granted only if the court finds substantial violations...." He said there is a reflection of this in the draft. It is positively oriented to the admission of evidence instead of negatively oriented against the admission of evidence.

Mr. Johnson favored the subcommittee studying the draft on an issue by issue basis and then drafting an appropriate sanction with a severability clause. He said that because of the likelihood that Mapp v. Ohio will be overruled, the subcommittee should go on this prediction. If it isn't overruled, the exclusionary rule would be the rule.

Senator Yturri, referring to the administrative procedure whereby the defendant might seek relief, asked Professor Platt what else could be done to compensate the defendant, other than the exclusionary rule. Professor Platt replied that a substantial damage award against the city employing the police officer could be the compensation. The attack taken by Justice Berger, he said, is that the hearing will not be a judicial hearing but that it would be an administrative hearing without a jury. Mr. Johnson suggested imposing a fine on the officer but Professor Platt replied this would, undoubtedly, be paid by the city or county.

Mr. Lucas was in agreement with Mr. Osburn's observations that section 2 was unduly restrictive. He visualized the U. S. Supreme Court getting into a situation where perhaps it expands the probable cause search area to a premise of some sort and if this happens Oregon will be limited because of the statute. Mr. Lucas favored the subcommittee trying to come up with a new approach - something to take the place of the exclusionary rule in certain cases or to authorize some of the more liberal ways to deal with warrants, giving the police a better tool to work with.

Mr. Johnson stated he did not understand what was so unduly restrictive about section 2 but the question was what the sanction should be.

Chairman Carson reminded the subcommittee that Article 27, the eavesdropping provision, was placed in the draft before any action

had been taken by the legislature. He asked if there was any feeling about attempting to draft an eavesdropping code that would be acceptable to the legislature.

Mr. Johnson suggested resubmitting Article 27 as a separate bill.

Mr. Paillette remarked that Article 27 was an exception to the substantive code because it was basically procedural and could become part of the procedure code. In any event, it could be incorporated by reference in the Search and Seizure Article.

Mr. Johnson was in favor of discussing further the sanction provision of the draft. He said that this is now becoming more urgent due to the pending court decision on Mapp v. Ohio.

Chairman Carson felt the members of the subcommittee were all aware that their attitude towards the sanction determines whether this is stated in a positive sense or a negative sense, and the drafting would have to be changed to a great degree.

Professor Platt stated the first three sections are generally applicable to the whole draft, and section 4 began to get into the specifics of search and seizure law, the ones that more typically get the attention of the courts.

Section 3. Permissible objects of search and seizure. This section, Professor Platt said, contains different and broader language and removes some doubt as to some objects that are seizable, and information concerning the commission of the crime. At the present time there is no statute mentioning this. Oregon law now contains a provision in the search warrant law which applies on its face only to search warrants, but has been construed by the courts to apply to all searches incident to arrest as well. The section is a restatement in a broader sense of ORS 141.010 plus an addition in subsection (2) dealing with intermingling of documents.

Subsection (2) is an approach to the problem the police have when seizing documents, some of which contain Fifth Amendment materials, and are not subject to seizure. The procedure suggested in this section can be read with section 6 of this draft and section 9 of Preliminary Draft No. 2 and states, in effect, that documents may be seized which are not testimonial in character. In the case of a diary, Professor Platt said, the police may not seize it without some type of prejudgment by a magistrate. What is envisioned is that when in doubt, the officer will seize the items or seal them and then ask the magistrate to inform him what can or cannot be seized.

Mr. Lucas was of the opinion the law is not clear that the diary is protected by the Fifth Amendment, and stated that if this is in

Oregon statutes and the U. S. Supreme Court rules it is not protected, Oregon would not have the benefit of searching the diaries. He did not see any point in putting this in the draft.

Professor Platt expressed the view that diaries should be covered by the Fifth Amendment, because if a person cannot be forced to incriminate himself, why should the courts be allowed to examine his diary.

Mr. Johnson said the Fifth Amendment is designed to protect the individual from being compelled, and the diary is not a matter of being compelled, it is something done voluntarily.

Senator Yturri said the diary is forced disclosure which is comparable to the utterance.

Mr. Blensly referred to the last phrase in subsection (2) "unless they have served or are serving a substantial purpose in furtherance of a criminal enterprise." He said it would be almost impossible to draft an application for a search warrant under that language.

Mr. Frost stated that in reading the commentary to this section he would think the purpose of it would be to restrict the objects that would be subject to search and seizure rather than specifying the kind of articles.

Professor Platt replied that it is a restrictive provision. Mr. Frost said that if it is intended to be restrictive, then when one applied for a warrant, the magistrate could deny the warrant on the basis that what the police would be looking for would not fit into any of these categories. Professor Platt replied he was not suggesting the magistrate would deny the seizure of the documents, but only that there are documents relating to private matters which should not be subject to police intrusion.

Mr. Osburn commented that the independent decision by the magistrate is not reflected in the section and he read it to say that such evidence cannot be searched for or seized. Professor Platt replied that until all the sections were read there would not be a complete picture of this concept.

Search and Seizure incidental to arrest.

Section 4. Permissible purposes. There are no comparable statutory provisions currently in Oregon, Professor Platt said, but nothing in section 4 appears to be in conflict with any Oregon decisional law.

Subsection (1) states the officer who has made a valid arrest may search without a warrant to effect the arrest with all practicable safety to the officer, the arrested individual and others.

Subsection (2) gives the officer the right to furnish appropriate custodial care.

Subsection (3) gives the officer the right to obtain evidence without a search warrant for anything criminally possessed or used in connection with the offense.

Chairman Carson asked if ownership problems could arise by the language in the introductory clause stating that a search of the vehicle of the arrested individual could be conducted. Professor Platt replied there has not been a case at issue to his knowledge with respect to a search incident to an arrest. Chairman Carson was of the opinion the phrase "vehicle of the arrested individual" should be stated more clearly.

Mr. Milbank commented that he did not read the section to mean that the arrested person has to be in the car or anywhere near it; he read it to be an independent search of all he owns or claims to possess. Professor Platt replied the provisions elsewhere regarding the emergency search of vehicles will set out the areas where there are limits. He said the draft does take a very broad position with respect to allowing police to search automobiles, much broader than is now authorized by the courts, and this is reflected in the search of vehicle incident to arrest section of the draft (section 10). This section, he said, probably exceeds the scope of the search allowed by Chimel in allowing a search of the car but he was not sure if this was constitutional. He noted there were two models of criminal procedure, one the due process model, in favor of the individual, and the other the police efficiency model, in favor of the police in the investigation of crime. The courts switch back and forth as does the draft.

Mr. Lucas expressed concern over the section in that it was too broad and can be easily misinterpreted to allow the police to make a search that Chimel proscribes.

Mr. Snouffer, referring back to the introductory clause in section 4, expressed the view that this section was unnecessary because with the clause stating what can be searched, it would be very easy to skip over the limitations. Chairman Carson said the same thing could perhaps be accomplished by eliminating the specificity of "person, property, premises or vehicle" in the introductory clause. He was in agreement that the section is stated broadly and that the next few sections seemingly undo what has been said in section 4.

Section 5. Things subject to seizure. In explaining section 5, Professor Platt stated that line 4 of the section should be completed to read "section 7 of Article 5 ", which relates to the authority to use force in executing the search warrant.

Section 6. Intermingled documents. This section, Professor Platt reported, refers to search incidental to arrest and does not concern itself with search warrant cases. Line 7, he said, should be completed

to read "section 9 of Preliminary Draft No. 2", which section sets out the system to be used in deciding what documents are protected by the Fourth and Fifth Amendments.

Mr. Blensly inquired as to why this section is limited to being "connected with the offense for which the arrest is made."

The subcommittee then recessed at 3:15, reconvening at 3:30.

Professor Platt, referring to Mr. Blensly's previous inquiry, pointed out that the type of arrest will determine the type of articles to be seized and this policy is adopted in other respects throughout the draft.

Mr. Osburn said he was of the opinion this phrase was not needed in the section. If the articles would be subject to seizure under section 3, it could be limited in that section.

Professor Platt replied that the pattern the draft adopts is to be general in the introductory sections and specific later on.

Mr. Snouffer suggested changing the words "judicial officer" on lines 9 and 10 of the section to "magistrate." The subcommittee agreed this change should be made throughout the draft where applicable.

Mr. Fox asked if the hearing referred to in section 6 would be a secret hearing. Professor Platt said it would not, as the material had already been seized and it would be an adversary hearing. Mr. Fox referred to State v. Robinson which involved a search warrant and seizure. The press viewed the return when it was made and published the list in the newspaper, all of which resulted in a motion for a change of venue. Mr. Fox said problems such as that could arise if hearings regarding evidence are open to the public.

Mr. Lucas stated the section would not be needed if the policy of protecting private documents was not adopted.

Mr. Snouffer felt to the contrary. He said this type of procedure would make the search by police much faster. They could get the documents, seal them, take them to the magistrate for review and thus relieve the police from going through each sheet of paper.

Mr. Lucas observed that section 6 does not say the police cannot read the documents, and that this is only contained in the commentary. Professor Platt replied that section 9 of Preliminary Draft No. 2 would show the restrictions. Section 9, he said, refers to search warrant provisions and this would probably come up under search warrants more often than under the search incident to an arrest situation, especially since Chimel limits the scope of that search. Professor Platt added that the hearing would be held before the judge who issues the warrant.

Mr. Blensly disagreed with this and said the draft states the hearing would be held before the "judicial officer having jurisdiction of the offense for which the arrest was made."

In light of this statement, Mr. Snouffer suggested section 6 be amended to conform to section 9 because there was some provision for having this hearing before the magistrate who actually issued the warrant, which was agreeable to Professor Platt.

Section 7. Search incidental to arrest for minor offense. Professor Platt explained that section 7 is aimed at prohibiting the police from making an arrest for a traffic violation in order to use the search incidental to arrest provision. The section would forbid the search unless there is a Terry v. Ohio type of situation where there is fear for the officer's safety. This is a policy decision to limit the activities of the police in areas where too often the arrest is made on a minor offense when the real purpose is to search.

Mr. Lucas said an officer has the right to search a major traffic offender if he is taken to the police station. If something is found during this search, this evidence should be admissible in court. Professor Platt replied the section is not intended to cover a major traffic offense and agreed the draft should be more specific in this area. Mr. Johnson suggested the draft be limited to a Class B or C misdemeanor.

Mr. Lucas questioned the term "violation" in the section. Mr. Paillette replied the Criminal Code contained only two "violations" - (1) refusing to assist a police officer and (2) refusing to assist a fireman, although there are others outside the Criminal Code.

Section 8. Custodial search. Professor Platt remarked that there is little law regarding the authority of the police on custodial searches. There is no direct statutory authority for this in Oregon and the U. S. Supreme Court has never spoken to this issue to his knowledge. He said the draft reflects present practice.

Chairman Carson gave an example where the police, during a custodial searched, checked a wallet and found counterfeit money. He said the search, for custodial purposes and inventory, was necessary. Professor Platt replied that by looking at the face of the money the police were not doing anything unreasonable but by recognizing the money as counterfeit, they are entitled to arrest the possessor and search more thoroughly.

Mr. Johnson was concerned about the word "custodial." "Custodial purposes" he said, tends to relate more to purposes of security and wondered whether the word "inventory" should be included. Professor Platt said this context is used in the commentary.

Section 9. Search of the person incident to arrest. Subsection (1) of this section is the codification of Chimel which restricts the scope of the search incident to arrest.

Mr. Johnson questioned the meaning of "area within his immediate control." Professor Platt replied it meant the desk before him, the glove compartment or a file and if arrested in the home, it would mean the person, garments, surface of the body and area within his immediate control. He said Chimel states this no longer means the garage or other areas of the home.

Subsection (2) relates to privacy, and this subsection provides that only when necessary are the police to publicly embarrass an individual. Chairman Carson asked if there was any sanction for this violation to which Professor Platt replied there was not.

Subsection (3) provides that there must be a strong probability before allowing the search of body cavities and this can only be accomplished if it appears that the delay of procuring a search warrant would result in the disappearance of the objects of the search.

Mr. Blensly asked if the draft contained a section which states the manner in which the search may be made in taking a blood sample. Professor Platt said it did not and Mr. Blensly was of the opinion the draft should contain language specifically authorizing the extraction of blood sampled. Professor Platt agreed.

Subsection (4). This is another general statement that the police are not entitled to search beyond what the person is arrested for.

Subsection (5). Mr. Blensly asked if the police would be prohibited from seizing a car registration. Professor Platt said only if it is relevant to the arrest can this be done, and the police officer would be exceeding his authority if he examined other documents in the wallet.

Mr. Lucas asked if the documents or other recordings which may not be read or otherwise examined relate only to those items in a privacy area, such as the diary. He said this statement had the effect of prohibiting the police from using evidence such as a counterfeit bill or securities.

Mr. Johnson, referring back to the diary question in section 3, said the right of privacy is protected by the requirement of a search warrant, and he was against the idea of extending it to the point of saying it is an absolute prohibition against having certain private documents examined.

Mr. Osburn said part of the difficulty, if this rule were introduced, is that it is calling upon police officers to do what lawyers say then can never do and that is determine what a document is before it is read. By adding this rule it makes it extremely difficult for the officer.

Mr. Blensly said another difficult step is taking it to the magistrate who only knows a portion of the case and makes the final evaluation as to materiality.

Senator Yturri said there is a relationship between section 6 and the diary question in section 3.

Chairman Carson referred to the phrase "unless they have served or are serving a substantial purpose in furtherance of a criminal enterprise" which is contained in subsection (2) of section 3. He said the police would really not know if the personal diaries and letters were serving a substantial purpose unless they were read, but by reading the documents, the protection of privacy has been eliminated.

Mr. Paillette commented that the crime for which the arrest was made would largely control what documents could be seized. Chairman Carson replied that this is not what is stated in the draft as it reads "in furtherance of a criminal enterprise." He suggested continuing the sentence to show that it was the criminal enterprise for which the arrest was made. Professor Platt said the concept of the relationship of the documents to the arrest comes later on in the draft.

Mr. Johnson asked how subsection (2) of section 3 would operate. He said that supposedly the police could not get a warrant for any of the personal letters because they would not know if they were serving a criminal purpose. Professor Platt replied he recognized this difficulty but could not respond to the question; perhaps the intermingled documents provisions should be considered at a later time.

Members of the Bar Association attending the meeting were asked to present any additional comments or ideas they might have relating to search and seizure.

Mr. Lucas asked if Professor Platt would research the area with respect to the emergency situation where a search warrant is needed but the officer does not have enough time to go through the formal affidavit procedure. The police may have enough time for a telephone call to the judge to secure the authorization, and he felt the police should be allowed this tool under certain circumstances.

Senator Yturri asked those present their views as to the extent to which the Commission should pursue codifying this whole area.

Mr. Frost stated he would like to see more emphasis on simply the steps to be taken to protect these rights rather than an attempt to over-define all the factors involved.

Mr. Lucas was of the opinion the subcommittee should redo the search warrant procedure statutes and set up some better procedure

for having hearings later. The search warrant law should be made very detailed and provisions should be made for a good hearing procedure.

Mr. Blensly said he had come to the meeting opposed to codifying search and seizure because he felt flexibility was needed, but now he may be in agreement in some areas, depending on the balance which is reached. He commented that in the area of searching an automobile, the rulings have changed five times in approximately six years. This is an area where the police have legitimate complaints as they don't know what to do and where to go. He agreed that codification should be done in areas where there is no great conflict.

Mr. Snouffer said the idea of codifying was good, and even though the subject is essentially procedural, there are areas that are very close to substantive law that would be codifying current Supreme Court decisions. When dealing with the fringes of substantive law, there will be problems as there will be disagreement on what a given case says, and what the policy should be for the state. Mr. Snouffer added that he was in full agreement with Mr. Blensly's observations.

Mr. Johnson asked the participating members what type of sanction they felt would be appropriate if Mapp v. Ohio were reversed.

Mr. Lucas responded that before Mapp v. Ohio, Oregon still used the exclusionary rule and suggested checking into some of the systems of other countries.

Mr. Frost said there could be a case where an officer has wilfully exceeded his authority. In this case he felt the sanction should fall on the officer. Another case could have the sanction fall on the city.

Mr. Johnson suggested a civil penalty against the officer who intentionally violates the law.

Mr. Paillette remarked that the wiretapping provisions in the existing law contain penal sanctions. Illegal wiretapping carried criminal sanctions. He said he did not feel a tort liability is any more the answer in this area than it is for unlawful wiretapping.

Mr. Johnson pointed out that the judge who hears the motion to suppress could have the power of awarding restitution. Professor Platt said this was a possibility. This way the prosecutor would not be put in a position of prosecuting a person he relies on in making cases for him.

Mr. Blensly agreed with this concept and said it would be preferable to have this on a judicial basis rather than have penal sanctions.

Professor Platt said the focus should not be on penalizing the officer in dollars. The penalty should be on the people who administer the duties of the officer. He commented that the ALI version is an exclusionary rule with a harmless error provision, so that if there is not a substantial violation by the police, the evidence is not excluded. He felt this was a more reasonable attitude to take but the question is how this would be translated into effective legislation.

Mr. Lucas stated that Preliminary Draft No. 2 reads that the hearing to suppress will apply to any violation of the chapter, to include things after the warrant has been issued that formerly the exclusionary rule did not apply to. He would hope the subcommittee would see fit to limit the exclusionary rule to things related to probable cause and not anything that might take place after the search. Professor Platt replied that in Preliminary Draft No. 2 a section was drafted for the very purpose of raising the policy question.

The next meeting will be at the call of the Chairman.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission