

ENFORCING THE FOURTH AMENDMENT: THE EXCLUSIONARY RULE AND ITS ALTERNATIVES*

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I. INTRODUCTION

The exclusionary rule compels the suppression, in federal and state criminal prosecutions,¹ of evidence seized by police in violation of the fourth amendment.² Debate over the appropriateness of the rule as a means of enforcing the admonitions of the fourth amendment has spawned hundreds of law review articles. The justification for converting more trees into paper for yet another discussion is that although the Supreme Court has thus far merely whittled away at the suppression doctrine, the Court may soon decide to abandon the doctrine entirely.³

1. The Supreme Court first applied the rule to federal prosecutions in *Weeks v. United States*, 232 U.S. 383 (1914), and extended the rule to state prosecutions in *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Ker v. California*, 374 U.S. 23 (1963), the Court held that the same constitutional standards of search and seizure developed for federal prosecutions would govern state prosecutions. The term "exclusionary rule" has been applied to rules barring admission of evidence obtained in violation of a number of constitutional provisions: *Gilbert v. California*, 388 U.S. 263 (1967) (identification testimony secured in violation of the fifth and sixth amendments); *United States v. Wade*, 388 U.S. 218 (1967) (same); *Miranda v. Arizona*, 383 U.S. 436 (1966) (involuntary confessions obtained in violation of the fifth amendment); *Rochin v. California*, 342 U.S. 165 (1952) (evidence obtained by methods that "shock the conscience" and thus violate due process). The term has also been used to describe cases barring the admission of evidence acquired in violation of federal statutes and court rules: *Lee v. Florida*, 392 U.S. 378 (1968) (47 U.S.C. § 605 (1970)); *Miller v. United States*, 357 U.S. 301 (1958) (18 U.S.C. § 3109 (1970)); *Mallory v. United States*, 354 U.S. 449 (1957) (FED. R. CRIM. P. 5(a)). Whenever the terms "exclusionary rule" or "suppression doctrine" are used hereafter, they refer only to the rule which excludes the fruits of unreasonable searches and seizures.

2. U.S. CONST. amend. IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

3. See text accompanying notes 82 & 93-96 *infra*. The Supreme Court majority clearly opposes the exclusionary rule but may wait to abandon or restrict it until Congress or a state legislature enacts an alternative or supplementary remedy for fourth amendment violations. See generally text accompanying notes 48-96 *infra*. The Court

Because such a decision could have a profound effect on criminal justice systems in America, a comprehensive review of the arguments advanced on both sides of this issue would seem to be especially timely. In this Article, following a summary of the exclusionary rule's development, these arguments are set forth and examined. In the interest of discovering the remedies most likely to secure a citizen's fourth amendment rights, this Article also considers many of the alternative or supplementary enforcement devices that have been proposed over the years.⁴

Throughout the ensuing discussion of the exclusionary rule, it might be helpful to consider to what extent the ultimate solution to the problem lies in the decriminalization of "victimless"—or complainantless—crimes, such as liquor, gambling, and certain narcotics offenses.

almost considered the fate of the exclusionary rule in *California v. Krivda*, 409 U.S. 33, rehearing denied, 409 U.S. 1068 (1972), but ultimately remanded the case to the state supreme court on the question whether the evidence had been excluded on independent state grounds. By finding an independent state basis for the decision, the California high court thwarted any chance that *Krivda* might become an important event in the life of the suppression doctrine. *People v. Krivda*, 8 Cal. 3d 623, 504 P.2d 453, 105 Cal. Rptr. 521 (1973); see 1974 Wis. L. Rev. 212.

4. The serious gap in this exploration of alternatives is the lack of discussion of the methods used by other countries to control police lawlessness. Even though there are difficulties in analogizing from foreign societies to American society, we can learn much from such a study. That exploration, however, is beyond the space limitations of this Article. Important references include: Weiler, *The Control of Police Arrest Practices: Reflections of a Tort Lawyer*, in *STUDIES IN CANADIAN TORT LAW* 416 (A. Linden ed. 1968); Address by Sir Reginald Sholl, Philadelphia Bar Association, March 7, 1968, reprinted in 118 CONG. REC. 1332 (1972); Address by Lord Chief Justice Widgery, American Bar Association Convention, July 16, 1971, reported in *New York Times*, July 17, 1971, § 1, at 1, col. 3; Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch*, 51 TEX. L. REV. 1325 (1973) (England, Scotland, Ireland, Canada); Clendenning, *Police Power and Civil Liberties*, 4 OSGOODE HALL L.J. 174 (1966) (Canada); Cohn, *The Exclusionary Rule Under Foreign Law—Israel*, 52 J. CRIM. L.C. & P.S. 282 (1961); Cowen, *Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions*, 5 VAND. L. REV. 523 (1952); Doob & Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88 (1972); Franck, *Evidence Obtained by the Police by Illegal Means*, 33 CAN. B. REV. 721 (1955) (Canada, England, Scotland); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (Scotland); Gray, *The Admissibility of Evidence Illegally Obtained in Scotland*, 1966 JURID. REV. 89; Groom, *The Admissibility of Evidence Illegally Obtained*, 13 CHITTY'S L.J. 54 (1964) (Canada); Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L.C. & P.S. 271 (1961); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 702-06 (1970) (Canada) [hereinafter cited as Oaks]; Parker, *The Extraordinary Power to Search and Seize and the Writ of Assistance*, 1 U.B.C.L. REV. 688 (1963) (Canada); Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36 (1973); Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 J. CRIM. L.C. & P.S. 272 (1961); 85 L.Q. REV. 157 (1969) (England); 2 U.B.C. LEGAL NOTES 415 (1956).

Many observers claim that "[i]t is peculiarly with reference to these victimless crimes that the police are led to employ illegal means of law enforcement"⁵ and that "[a] high proportion of motions to suppress involve such crimes."⁶ If trimming the overreach of the criminal law would substantially reduce the incidence of illegal searches and seizures and, consequently, of motions to suppress, the difficulties associated with the exclusionary rule might largely evaporate.

II. THE DEVELOPMENT OF THE EXCLUSIONARY RULE⁷

The exclusionary rule evolved from the early common law inclination to protect privacy, a concept illustrated in two mid-eighteenth century cases. In the civil trespass action of *Wilkes v. Wood*,⁸ the plaintiff, one of 49 people who had been arrested in an effort to find the author of objectionable material,⁹ mounted the first successful challenge to a

5. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 6 (1970). See also H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 349 (1968); Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 38-39; Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1028, 1034 (1974).

6. Oaks, *supra* note 4, at 724. In studies reported by Professor Oaks, "over 50 percent of the motions to suppress in Chicago and the District of Columbia were filed in cases involving narcotics and weapons . . ." *Id.* at 681. In Chicago, 26 percent of all motions to suppress were filed in gambling cases, while 24 percent and 28 percent were filed in narcotics and weapons cases, respectively. *Id.* at 681, 682. Significantly, close to 100 percent of the motions to suppress made in gambling and narcotics cases were granted, but only about 66 percent of the motions in weapons cases were granted. *Id.* at 685. Accordingly, many of the defendants released as a result of the exclusionary rule seem to be those charged with "victimless" crimes, or crimes without complainants. See text accompanying note 226 *infra*. See also Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740, 774 (1974). One must be careful, however, in characterizing offenses as victimless crimes. To the extent that narcotics cases involve dealer defendants and dangerous drugs, they do not involve victimless crimes. Moreover, the offense of unlawful possession of a lethal weapon is designed to prevent crimes with victims. On exclusion of guns, see Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & C. 373, 377 n.43 (1974).

7. See generally Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1961); Comment, *The Exclusionary Rule of Illegally Obtained Evidence: Its Development and Application*, 35 S. CAL. L. REV. 64 (1961); Comment, *Admissibility of Illegally Seized Evidence—The Federal Exclusionary Rule—A Historical Analysis*, 38 U. DETROIT L.J. 635 (1961).

8. 19 Howell's St. Trials 1154, 98 Eng. Rep. 489 (C.P. 1763). See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 132, at 992 (4th ed. 1971).

9. See L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 145 (1960).

general warrant.¹⁰ Two years later in *Entick v. Carrington*,¹¹ another civil trespass action involving an arrest for seditious libel, the plaintiff defeated a warrant to seize his private papers. The court held that no process would issue in a criminal case for a person's papers if they were to be used as evidence against him because "the law obligeth no man to accuse himself."¹²

More than 120 years later, the Supreme Court relied on *Entick* in deciding *Boyd v. United States*.¹³ The federal government had initiated a civil proceeding to declare a forfeiture of certain goods alleged to have been illegally imported by the defendant. Pursuant to federal statute, the trial court ordered the defendant to produce his invoice for some of the goods in question. Defendant complied under protest and appealed the subsequent civil judgment against him on the ground that the laws authorizing the production of the invoice were invalid. The Supreme Court held that the fourth and fifth amendments, applicable because the forfeiture proceeding was quasi-criminal, barred the compulsory production of a defendant's private books and papers because such a production was equivalent to both an unreasonable search and seizure and compelled self-incrimination.¹⁴

In 1904, the Supreme Court was willing to assume *arguendo* that the fourth amendment governed state activity,¹⁵ but four years later, in *Twining v. New Jersey*,¹⁶ the Court held that the first eight amendments to the Constitution did *not*, after all, apply to the states. Thus, in 1914, in the landmark decision of *Weeks v. United States*,¹⁷ the Court applied

10. A general warrant was an authorization from the state secretary's office in England to seize (without naming any person) the author, printer, and publisher of any obscene and seditious libel specified in the warrant. See *Draper v. United States*, 358 U.S. 307, 316 (1959) (Douglas, J., dissenting).

11. 19 Howell's St. Trials 1029, 95 Eng. Rep. 807 (C.P. 1765).

12. 19 Howell's St. Trials at 1073.

13. 116 U.S. 616, 626-30 (1886).

14. Note that *Boyd* held the private documents *immune* from seizure. This is quite a different notion from that currently associated with the exclusionary rule. Ever since *Weeks v. United States*, 232 U.S. 383 (1914), the crucial factor has been not the nature of the object sought to be seized but the procedure used (only upon probable cause) to seize the object. Thus today virtually no object is immune from reasonable seizure. Nevertheless, *Boyd* was the first hint that the exclusionary rule could be a remedy for an unreasonable search and seizure. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973).

15. *Adams v. New York*, 192 U.S. 585 (1904). The Court held that evidence, otherwise admissible, was not inadmissible on the ground that it was unconstitutionally seized; how the evidence was obtained was irrelevant. *Boyd* was distinguished as involving a defendant's resistance of a judicial order to produce documents.

16. 211 U.S. 78 (1908).

17. 232 U.S. 383 (1914).

the fourth amendment exclusionary rule only to federal criminal trials.¹⁸ In *Weeks*, the defendant was charged with the federal offense of using the mails to transport lottery tickets. Rebelling at the notion that a federal court should approve and participate in violations of the fourth amendment by receiving evidence seized illegally by federal officers, the Court held that the Government was prohibited from introducing into evidence items seized by federal officers without a warrant. Other papers and lottery tickets seized by state officers, however, were not similarly excluded from the federal trial.¹⁹

The Court distinguished *Weeks* from *Adams v. New York*,²⁰ a case in which the state was held entitled to introduce unconstitutionally seized evidence against the defendant despite the defendant's objection at trial. In *Weeks*, the defendant had moved for return of his papers and lottery tickets, not during, but prior to, his federal criminal trial. Since the Court in *Adams* had held property issues involved in search and seizure questions to be collateral to the criminal proceeding, the Court regarded its holding in *Weeks* that a defendant could petition before trial for return of his illegally seized property as consistent with *Adams*. *Adams* was also distinguished on the ground that the police officers there had obtained a valid search warrant, although the items they actually seized were not named in the warrant; in *Weeks*, by contrast, the search was invalid from the outset.

By 1920, when the Court decided *Silverthorne Lumber Co. v. United States*,²¹ the distinction made in *Weeks* between permissible motions to return property prior to trial and impermissible motions to suppress evidence during trial was no longer tenable. In *Silverthorne* the Court held that suppression could be sought after a federal criminal trial had commenced. In addition, the Court extended the protections of the federal exclusionary rule to corporate defendants. Government officers in *Silverthorne* had illegally obtained the defendant-corporation's documents, which they returned upon the corporation's motion, but only after making copies of the originals. These copies were used to frame a new indictment against the defendants. When the court subpoenaed the

18. When *Weeks* was decided in 1914, every state except Iowa admitted into evidence the fruits of unconstitutional searches. *Wolf v. Colorado*, 338 U.S. 25, 29, 33-34 (1949); *State v. Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903).

19. This rule permitting federal court use of evidence seized illegally by state officers was later appropriately dubbed the "silver platter" doctrine. See text accompanying notes 28 & 29 *infra*; note 394 *infra*. See also KOHN, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U.L.Q. 229.

20. 192 U.S. 585 (1904).

21. 251 U.S. 385 (1920); see note 100 *infra*.

originals, the corporation refused to comply and was held in contempt. Reversing the contempt citation, Justice Holmes declared:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.²²

Such pronouncements bolstered the federal exclusionary rule, but most state supreme courts still had not adopted exclusionary rules for proceedings in their lower courts.²³ Six years later, in 1926, the antiexclusionary rule states gained the distinguished support of then Judge Cardozo. Writing in *People v. Defore*,²⁴ he rejected the exclusionary rule for New York state criminal proceedings. In words that continue to be quoted by opponents of the suppression doctrine,²⁵ Cardozo declared: "The criminal is to go free because the constable blundered."²⁶

One year later, the Supreme Court considered the combined blunders of state and federal officers in *Byars v. United States*.²⁷ The federal conviction was reversed because it was based on evidence seized unconstitutionally by state police with the participation of federal officers. In 1949, Justice Frankfurter, writing for the Court in *Lustig v. United States*,²⁸ announced that the "crux" of *Byars*

is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by State authorities is turned over to federal authorities on a silver platter.²⁹

Thus, federal courts could convict a defendant on the basis of evidence that state police seized illegally, so long as the state police broke the law all by themselves.

On the same day that *Lustig* was decided, the Court handed down its important decision in *Wolf v. Colorado*.³⁰ The core of fourth amend-

22. 251 U.S. at 392. Justice Holmes subsequently reiterated this idea: "If the search and seizure are unlawful as invading personal rights secured by the Constitution, those rights would be infringed yet further if the evidence were allowed to be used." *Dodge v. United States*, 272 U.S. 530, 532 (1926).

23. In 1951, North Carolina became the first state to adopt an exclusionary rule by legislation. N.C. GEN. STAT. § 15.27 (Supp. 1951), *as amended*, N.C. GEN. STAT. § 15-27.2(f) (1975).

24. 242 N.Y. 13, 150 N.E. 585 (1926).

25. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

26. 242 N.Y. at 21, 150 N.E. at 587.

27. 273 U.S. 28 (1927).

28. 338 U.S. 74 (1949).

29. *Id.* at 78-79.

30. 338 U.S. 25 (1949).

ment protections of privacy was held applicable to the states through the fourteenth amendment because this core "is 'implicit in the concept of ordered liberty.'"³¹ Nevertheless, the states were not constitutionally required to apply the exclusionary rule because the rule was a product of "judicial implication"³² in federal cases and not expressly conferred by the fourth amendment. In short, the right was federal, but the remedy was left to the states.

The Court, impressed by the reluctance of many states to adopt the exclusionary rule following *Weeks*, thought it wise to defer to the states' judgment about the best means to enforce the right against unreasonable search and seizure. The Court was not then convinced that methods other than the exclusionary rule would not adequately protect this fundamental right.

Mr. Justice Black, concurring, argued that the exclusionary rule "is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."³³ Justices Douglas, Murphy, and Rutledge dissented from the view that the exclusionary rule was not part of the fourteenth amendment's protections. The federal exclusionary rule established in *Weeks* was unchanged by this decision.

Just a few years elapsed before the Supreme Court began to make inroads on *Wolf*, at least with respect to physical violence against persons by state police. In *Rochin v. California*,³⁴ the Court reversed a conviction based on evidence that had been forcibly seized from the state criminal suspect by pumping his stomach—police behavior that "shocks the conscience."³⁵ Two years later, in 1954, the Court allowed a conviction to stand in *Irvine v. California*,³⁶ but in an application of the theory of increasing misery, the harsh result in this case was to be instrumental in the downfall of *Wolf*.³⁷ The evidence in *Irvine* had

31. *Id.* at 27, citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

32. 338 U.S. at 28.

33. *Id.* at 39-40. This view is significant because Congress has had before it proposals to amend or abolish the exclusionary rule. See text accompanying notes 330-71 *infra*. But see note 57 *infra* and accompanying text (Justice Black's position that the interaction between the fourth and fifth amendments mandates the exclusionary rule in search and seizure cases).

34. 342 U.S. 165 (1952).

35. *Id.* at 172. See also *People v. Bracamonte*, 18 BNA CRIM. L. REP. 2099 (Cal., Oct. 7, 1975) (heroin evidence obtained by forced ingestion of emetic solution excluded as unreasonable search and seizure violating fourth amendment, court finding it unnecessary to reach due process issues).

36. 347 U.S. 128 (1954).

37. See *Allen*, *supra* note 5, at 7.

been obtained through an eavesdropping system that state officers had installed by making repeated surreptitious invasions of the suspect's home. The Court's affirmance that a state court could admit such evidence, based on the authority of *Wolf*, pointed to the inability of the law to redress a very serious invasion of privacy. In dissent, Justice Douglas again insisted that the fourteenth amendment compelled the exclusionary rule.³⁸

The following year, California Supreme Court Justice Roger Traynor provided the inevitable response to Cardozo's *People v. Defore* opinion. Embarrassed by the excessive behavior of the California police condoned in *Irvine v. California*, Traynor, writing for the majority in *People v. Cahan*,³⁹ overturned more than thirty years of precedent and adopted the exclusionary rule as an evidentiary, not a constitutional, doctrine. The police conduct in *Cahan* involved not mistakes of some rookie officer but deliberate, calculated illegality fostered by police department policy. With the approval of the Los Angeles Chief of Police, officers had secretly installed microphones in homes occupied by some of the defendants. Subsequently, arrests and searches were made without warrants, most of them after forcible entries not preceded by demands for admittance.

At about the same time, the Supreme Court was beginning to close some of the loopholes in its fourth amendment enforcement policy. In *Rea v. United States*,⁴⁰ the Court, exercising its supervisory power over federal law enforcement personnel, held that when a federal agent's evidence had been obtained by invalid federal process, the agent should have been enjoined from testifying in a state criminal trial. Then, in *Elkins v. United States*,⁴¹ the Court rejected its notorious "silver platter" doctrine, which had been in operation since *Weeks*, although the doctrine was not so named until the *Lustig* case. Federal courts could no longer receive unconstitutionally seized evidence from federal or state officials. The doctrine was overturned, however, not on constitutional grounds, but under the Court's supervisory power over the lower federal courts.

38. 347 U.S. at 149.

39. 44 Cal. 2d 434, 282 P.2d 905 (1955). This decision overruled a well-established doctrine of admissibility. See, e.g., *People v. Gonzales*, 20 Cal. 2d 165, 124 P.2d 44 (1942). For Justice Traynor's elaboration on the reasons for the change in doctrine, see Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 DUKE L.J. 319, 321-22. Traynor indicated that the harsh result in *Irvine v. California* had a significant role in shaping the decision in *Cahan*. *Id.* at 324.

40. 350 U.S. 214 (1956).

41. 364 U.S. 206 (1960).

42. 367 U.S. 643 (1961).

Finally, in 1961, in *Mapp v. Ohio*,⁴² the Supreme Court held that the states could not constitutionally convict people of crimes by using evidence seized in violation of the fourth and fourteenth amendments. In a flagrantly unconstitutional search and seizure, Ohio police had broken into Ms. Mapp's house, claiming, somewhat unconvincingly, that they had a warrant bearing on a crime unrelated to the charge of possessing obscene material finally leveled against her.

Justice Clark, writing for the Court in an opinion with which only three other Justices concurred, declared that both the integrity of the judicial process and the deterrence of police misconduct compelled the exclusionary rule in state criminal trials. The Court chose to decide the case on this ground even though the defendant's attorney had not urged that *Wolf* be overruled, but rather had based the appeal primarily on the claimed unconstitutionality of the statute under which Ms. Mapp was prosecuted.⁴³ Nevertheless, the Court held:

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.⁴⁴

Mapp thus forced twenty-four states to adopt the exclusionary rule, the other states having previously adopted the rule voluntarily.⁴⁵

Because the exclusionary rule was imposed on the states by a mere plurality opinion, it was to be anticipated that the states would maintain pressure on the Supreme Court to erode this enforcement mechanism.

Four years after *Mapp*, in *Linkletter v. Walker*,⁴⁶ the Court held that *Mapp* would be applied only prospectively because the main purpose of the exclusionary rule—deterrence of police lawlessness—would not be served by retrospective application. Although the Court conceded that some general deterrence might result from retroactive enforcement, the Court was concerned about the possibility of the “wholesale release” of prisoners who had been the victims of unconstitutional police work prior

43. *Id.* at 646 & n.3. Justice Harlan, in his dissent, further elaborated on what he considered the majority's unnecessary “reaching out” to overrule *Wolf*. *Id.* at 672-77.

44. *Id.* at 655. In light of this phrasing of the basic holding, bills pending in Congress to alter or eliminate the exclusionary rule in federal proceedings seem to have potential for changing the enforcement device required of the states by *Mapp*. See text accompanying notes 369-71 *infra*.

45. See *Elkins v. United States*, 364 U.S. 206, 219, 224-25 (1960).

46. 381 U.S. 618 (1965). On retroactivity, see Schaefer, *The Control of “Sunbursts”: Techniques of Prospective Overruling*, 42 N.Y.U.L. REV. 631, 643-45 (1967); Traynor, *supra* note 39, at 338-42.

to *Mapp*.⁴⁷ This compromise did not, however, appease the detractors of the exclusionary rule as an enforcement mechanism.

In a 1971 dissent, Chief Justice Burger launched his own assault on the exclusionary rule. Petitioner's complaint in the civil action of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*⁴⁸ alleged that, without probable cause,

agents of the Federal Bureau of Narcotics . . . entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.⁴⁹

In an opinion written by Justice Brennan, the Court held that a federal cause of action sounding in tort arises under the fourth amendment when a federal agent conducts an unreasonable search or seizure. The civil action, in which the individual federal agent is the defendant, is presumably analogous to that available under section 1983⁵⁰ for violations of constitutional rights by state officers. The Chief Justice and Justices Black and Blackmun dissented on the ground that such a remedy should not be recognized without express federal legislation. In the view of the Chief Justice, such legislation would provide an adequate enforcement mechanism for the fourth amendment so that the exclusionary rule could be abandoned. In attacking the suppression doctrine, Chief Justice Burger proposed federal legislation that he thought would pass constitutional muster⁵¹ and included an anti-exclusionary rule bibliography.⁵²

Decided the same day as *Bivens*, *Coolidge v. New Hampshire*⁵³ stimulated five opinions, each adopting and rejecting portions of the others. When the smoke cleared, the Court had held a state search of a car pursuant to a warrant unconstitutional because the warrant was not

47. Since roughly half the states had adopted the exclusionary rule before *Mapp* was decided, the anticipated flood of habeas petitions presumably would have come only from prisoners in the states forced to adopt the rule after 1961.

48. 403 U.S. 388 (1971).

49. *Id.* at 389. The unconstitutional search turned up no incriminating evidence.

50. 42 U.S.C. § 1983 (1970).

51. 403 U.S. at 422-23 (Burger, C.J., dissenting).

52. *Id.* at 426-27.

53. 403 U.S. 443 (1971).

issued by a "neutral and detached magistrate"⁵⁴ but by the state Attorney General, who served as chief prosecutor at the trial. That an attorney general was authorized under existing state law to issue search warrants when acting as a justice of the peace⁵⁵ did not make him a neutral and detached magistrate. The opinions of Justices Harlan (concurring), Black (concurring and dissenting), and Blackmun (joining parts of Black's opinion) are noteworthy for their insistence that the exclusionary rule is not required by the fourth amendment,⁵⁶ although Justice Black reiterated his view that the fifth amendment compels the rule.⁵⁷

A significant recent reference to the exclusionary rule occurred in the dicta in *United States v. Calandra*,⁵⁸ a six-to-three decision of the Court in early 1974. In holding that a witness testifying before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained by an unconstitutional search and seizure,⁵⁹

54. *Id.* at 449.

55. N.H. REV. STAT. ANN. § 595:1 (1955) (repealed 1969).

56. 403 U.S. at 490-91, 493, 496-98, 510.

57. *Id.* at 496-99; see *Rochin v. California*, 342 U.S. 165, 174 (1952) (Black, J., concurring). Compare the view that "[s]ince the typical evidence secured through an unconstitutional search and seizure is non-testimonial and non-communicative, the ability of the fifth amendment to assist the fourth amendment in suppressing such evidence is questionable." Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. L. REV. 507, 516 (1975) (footnotes omitted).

58. 414 U.S. 338 (1974). See Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Comment, *The Fourth Amendment Exclusionary Rule in the Grand Jury Setting: United States v. Calandra*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 598 (1974); Note, *Exclusionary Rule Under Attack*, 4 U. BALT. L. REV. 89, 102-13 (1974).

59. Justice Brennan dissented, arguing that the case was controlled by *Silverthorne Lumber Co. v. United States*, in which the Court had rejected any use of the fruits of an illegal search. 414 U.S. at 361-64. For further discussion of *Silverthorne*, see text accompanying notes 21 and 22 *supra*. See also Critique, *supra* note 6, at 779-90. The Critique author notes that *Calandra*, by upholding the production of illegally seized evidence before a grand jury, may merely have legitimated a long-standing practice that had gone undetected because of the secrecy of grand jury proceedings. *Id.* at 784. As early as 1966, however, the Court expressed doubt that the exclusionary rule extended to grand jury proceedings. See *United States v. Blue*, 384 U.S. 251 (1966). But note that if illegal eavesdropping produces evidence of guilt, the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2515 (1970), has been held to provide a defense to a grand jury witness held in contempt for refusing to answer questions based on that evidence. See *Gelbard v. United States*, 408 U.S. 41 (1972). The Court's reasoning in *Calandra* has recently been extended to protect the knowing use by congressional committees of unlawfully seized materials, provided agents of the committees have not themselves actively participated in the original unlawful seizure. *McSurely v. McClellan*, 521 F.2d 1024, 1043-47 (D.C. Cir. 1975) (divided panel).

the majority went out of its way to insist that the only justification for the exclusionary rule is deterrence of official lawlessness.⁶⁰

The Court may have receded very slightly from its *Calandra* position in *Brown v. Illinois*,⁶¹ in which Justice Blackmun, writing for the majority, noted that "considerations of deterrence and of judicial integrity, by now, have become rather commonplace in the Court's cases."⁶² The Court rejected the notion that the mere giving of *Miranda*⁶³ warnings dissipates the taint of a defendant's illegal arrest and renders post-arrest statements admissible. But the holding was carefully limited to rejecting a per se rule of dissipation, which, it was conceded, would otherwise eviscerate "[a]ny incentive to avoid Fourth Amendment violations . . . by making [*Miranda*] warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures . . . 'a form of words.'"⁶⁴

Moreover, the majority opinion seemed to be hinting that the Court may further restrict the exclusionary rule, at least in cases in which statements, as opposed to tangible items of evidence, are elicited as a result of fourth amendment violations:

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how *wanton and purposeful* the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted.⁶⁵

By focusing on the severity⁶⁶ of the fourth amendment violation, the Court apparently was suggesting that *Miranda* warnings, by themselves, would suffice to dissipate the taint caused by the vast majority of police illegalities that fall short of the stringent standard of "wanton and purposeful." Justice Powell, whose concurring opinion was joined by Justice Rehnquist, embraced such an approach. He distinguished "offi-

60. By adopting the position that the rule rises or falls with its deterrent capability, the majority opened the door to the world of cost-benefit analysis and the argument that since the Court cannot really tell whether the rule deters, the states may devise their own remedies. Such a determination would, of course, be the death knell of *Mapp v. Ohio*.

61. 422 U.S. 590 (1975).

62. *Id.* at 599.

63. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

64. 422 U.S. at 602-03.

65. *Id.* at 602 (emphasis added).

66. For discussion of the "substantial violation" approach to suppression of evidence, see note 261 *infra*.

cial conduct . . . *flagrantly abusive* of Fourth Amendment rights” from “‘technical’ violations of Fourth Amendment rights.”⁶⁷

Like Justice Blackmun in the majority opinion, Justice Powell may have retreated slightly from the bold assertion in *Calandra* that the *sole* justification for the exclusionary rule is its ability to deter. Justice Powell wrote in *Brown* that “[t]he *basic* purpose of the rule, briefly stated, is to remove possible motivations for illegal arrests” and that “the deterrent value of the exclusionary rule” and “the corresponding *mandate to preserve judicial integrity*” are highest in the case of “flagrantly abusive” fourth amendment violations.⁶⁸ He opined, however, that when the police transgression was neither willful nor negligent, but in good faith, “the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence.”⁶⁹ The position taken seems to be that although judicial integrity is a legitimate consideration in the application of the suppression doctrine, it cuts in favor of suppression in cases of egregiously unreasonable searches and seizures and in favor of admission in cases of “technical” violations.

According to the Court, the kind of violation involved in *Brown* is a question for the state tribunals. Justice Powell suggested that the Supreme Court of Illinois should “consider whether the officers might *reasonably*, albeit erroneously, have thought that probable cause existed.”⁷⁰ Having previously acknowledged that “[a]ll Fourth Amendment violations are, by constitutional definition, ‘unreasonable,’ ”⁷¹ the Justice apparently was proposing the often criticized rule that only “unreasonable” unreasonable searches and seizures should trigger the exclusionary rule while “reasonable” unreasonable conduct should not.⁷²

Although the Court in *Brown* was applying the suppression doctrine for the first time in four years⁷³ to overturn a defendant’s conviction, the Court hinted at the precarious fate of that doctrine: “Members of the

67. 422 U.S. at 610-11 (Powell & Rehnquist, JJ., concurring in part) (emphasis added).

68. *Id.* (emphasis added).

69. *Id.* at 612.

70. *Id.* at 615 (emphasis added).

71. *Id.* at 609.

72. For discussion of this “reasonableness” test, see text accompanying notes 303 & 304 *infra*.

73. See note 252 *infra*.

Court on occasion have indicated disenchantment with the rule Its efficacy has been subject to some dispute.⁷⁴

That Justice Blackmun understated the antagonism to the rule of a majority of his brothers is evident in the Court's five-to-four decision in *United States v. Peltier*,⁷⁵ handed down the day before *Brown*. The case involved a border search that clearly violated *Almeida-Sanchez v. United States*;⁷⁶ the marijuana found in this search was admitted in evidence, but the Court of Appeals for the Ninth Circuit reversed the conviction on the authority of *Almeida-Sanchez*.⁷⁷ Reversing the Ninth Circuit decision, the Court held that *Almeida-Sanchez* would not apply retroactively, even to cases that, like *Peltier*, were pending on direct review at the time *Almeida-Sanchez* was decided. The dissenters argued that under clearly established principles of retroactivity, the majority was in error and concluded that hostility to the exclusionary rule was the most likely explanation for the strained reasoning of Justice Rehnquist's opinion for the Court.⁷⁸ Moreover, the dissenters emphasized that it was the federal exclusionary rule of *Weeks* that was under attack and not the state rule of *Mapp*.⁷⁹

The majority's test for the retroactive application of search and seizure decisions was worded in very general terms:

If the purpose of the exclusionary rule is to deter unlawful police conduct 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 under the Fourth Amendment.⁸⁰

The principle is so broadly stated, and the majority's dislike of the suppression doctrine is so apparent, that Justice Brennan, who has emerged as the Court's most vocal defender of the doctrine, feared the principle would spill over into ordinary search and seizure cases that do not involve questions of retroactivity.

An analysis of the Court's unsuccessfully veiled reformulation [of the exclusionary rule] demonstrates that its apparent rush to discard 61

74. 422 U.S. at 600 n.5.

75. 422 U.S. 531 (1975). For a summary of the Supreme Court's spring 1975 exclusionary rule decisions, see 44 U.S.L.W. 3101-02 (1975).

76. 413 U.S. 266 (1973).

77. *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974).

78. See 422 U.S. at 550-51 (Brennan & Marshall, J.J., dissenting).

79. *Id.* at 552 n.10.

80. *Id.* at 542.

years of constitutional development has produced a formula difficult to comprehend and, on any understanding of its meaning, impossible to justify.

. . . True, the Court does not state in so many words that this formulation of the exclusionary rule is to be applied beyond the present retroactivity context. But the proposition is stated generally and, particularly in view of the concomitant expansion of prospectivity announced today . . . I have no confidence that the new formulation is to be confined to putative retroactivity cases. Rather, I suspect that when a suitable opportunity arises, today's revision of the exclusionary rule will be pronounced applicable to all search and seizure cases.⁸¹

The Court has indeed been asked to extend *Peltier* in precisely the manner Justice Brennan fears, and the Court has agreed to consider the question. On the last day of its 1974-1975 term, the Court granted certiorari in *Stone v. Powell*,⁸² in which the Court of Appeals for the Ninth Circuit held that evidence seized during defendant's arrest for vagrancy under an ordinance later found to be unconstitutional was inadmissible at the defendant's trial for murder. One of the questions presented is whether the "exclusionary rule [should] apply to suppress the fruits of a reasonable search incident to arrest based upon probable cause for violation of [a] then valid ordinance."⁸³

But even if the Court does not extend *Peltier* to allow admission of the evidence in *Stone*, the *Peltier* reasoning would, according to Justice Brennan, still have ominous implications.

[T]his new doctrine could stop dead in its tracks judicial development of Fourth Amendment rights. For if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional [because the police would not know or be chargeable with knowledge that their behavior was unconstitutional], the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts.⁸⁴

An insight into the extent of the majority's, or at least Justice Rehnquist's, hostility to the exclusionary rule may come from observing the Court's translation of Justice Brennan's concern that opportunities for

81. *Id.* at 551-52.

82. 422 U.S. 1055 (1975), *granting cert. to* 507 F.2d 93 (9th Cir. 1974). For a summary of the oral argument in *Stone v. Powell*, see 44 U.S.L.W. 3485-89 (1976).

83. 43 U.S.L.W. 3681 (1975).

84. *United States v. Peltier*, 422 U.S. 531, 554 (1975) (dissenting opinion).

judicial articulation of fourth amendment values will cease⁸⁵ into a question "[w]hether today's decision will reduce the responsibilities of district courts"⁸⁶

The majority's contribution to the ongoing debate over the justifications for the exclusionary rule is ambiguous. In its opinion, the Court acknowledged that "considerations of . . . judicial integrity" are relevant in determining whether to exclude evidence⁸⁷ although the Court "has relied *principally* [but not exclusively] upon the deterrent purpose served by the exclusionary rule"⁸⁸ in making that determination. Later, however, the opinion lapsed into repeated references to "*the purpose of the exclusionary rule [being] to deter.*"⁸⁹ Justice Douglas, in a separate dissent, countered with a reference to "*the purposes of the exclusionary rule.*"⁹⁰ Justice Stewart joined only that portion of Justice Brennan's dissent challenging the Court's break from established retroactivity principles, rather than those parts deploring the assault on the exclusionary rule. Thus, six members of the Court remain firm in their opposition to the suppression doctrine and continue to set the stage for a Court determination that, because the exclusionary rule seems deficient in serving its primary goal of deterrence, at least *Mapp v. Ohio* should be overruled, and perhaps *Weeks v. United States* as well.⁹¹ Justice Brennan voiced the alarm of the suppression doctrine's defenders:

85. *Id.* at 554-55.

86. *Id.* at 542-43 n.13.

87. *Id.* at 538-39. Indeed, "the 'imperative of judicial integrity' played a role in this Court's decision to overrule *Wolf v. Colorado*" *Id.* at 536.

88. *Id.*

89. *E.g., id.* at 542 (emphasis added).

90. *Id.* at 543 (Douglas, J., dissenting) (emphasis added).

91. Justice Brennan, whose dissent in *United States v. Calandra* was joined by Justices Douglas and Marshall, warned of this prospect:

In *Mapp*, the Court thought it had "close[d] the only courtroom door remaining open to evidence secured by official lawlessness" in violation of Fourth Amendment rights. . . . The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases. . . .

414 U.S. at 365. See also Note, *supra* note 57, at 518.

Professor Kaplan believes the exclusionary rule will not be abandoned by the Justices currently sitting on the Supreme Court:

Justices Douglas, Brennan, and Marshall have indicated their satisfaction with the exclusionary rule [citing Justice Brennan's *Calandra* dissent]. Justices White and Stewart have been reluctant to overturn or restrict past decisions, even those with which they originally disagreed. See, e.g., *Kirby v. Illinois*, 406 U.S. 682, 705 (1972) (White, J., dissenting).

I said in my dissent in *United States v. Calandra* . . . that that decision left me "with the uneasy feeling that . . . a majority of my colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search-and-seizure cases." . . . My uneasiness approaches conviction after today's treatment of the rule.

. . . .

If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule, with no opportunity afforded parties most concerned to be heard, would be indefensible in any circumstances. But to attempt covertly the erosion of an important principle . . . clearly demeans the adjudicatory function, and the institutional integrity of this Court.⁹²

Forthright confrontation of the exclusionary rule may be on the Court's agenda for its 1975-76 term. Before adjourning for the summer, the Court granted certiorari in *Wolff v. Rice*,⁹³ in which Omaha police had obtained a search warrant subsequently found to have been issued improperly. The Court of Appeals for the Eighth Circuit held that the judge conducting the suppression hearing erroneously considered facts in the possession of the police but not presented to the magistrate who issued the warrant.⁹⁴ Excising such facts, the Court of Appeals ruled that the warrant under which police searched for explosives was not supported by probable cause and that the evidence seized must be suppressed. The Supreme Court has agreed to consider several questions, including the following: "Should [the] Fourth Amendment exclusionary rule be modified to admit evidence obtained by good-faith conduct of police where exclusion would have no deterrent effect?"⁹⁵ Because *Wolff v. Rice* involves an illegal seizure by state

Kaplan, *supra* note 5, at 1040 n.72. The effect of the resignation of Justice Douglas and the appointment of Justice Stevens upon Professor Kaplan's calculus is presently unclear. Justice Powell has indicated that he would not suggest the total abandonment of the exclusionary rule "in the absence of some other deterrent to deviant police conduct." *Schneekloth v. Bustamonte*, 412 U.S. 218, 267-68 n.25 (1973) (concurring opinion). Whether or not the result in *Calandra* ultimately leads to the abandonment of the suppression doctrine, it may reduce the number of motions to suppress in felony cases since, in most instances, defendants plead guilty after they are indicted. See Critique, *supra* note 6, at 783.

92. 422 U.S. at 550-51, 561-62 (dissenting opinion).

93. 422 U.S. 1055 (1975).

94. *Rice v. Wolff*, 513 F.2d 1280 (8th Cir. 1975).

95. 43 U.S.L.W. 3681 (1975). The Court has also granted certiorari in *United States v. Miller*, 421 U.S. 1010 (1975), a case presenting the question whether "exclu-

police, it requires reconsideration of *Mapp*, but not of *Weeks*. Factually, the case is conducive to further erosion of the exclusionary rule; the defendant, a local Black Panther leader, is seeking to use an apparently minor fourth amendment violation to reverse his conviction of first-degree murder in connection with the bombing death of a police officer. If the opponents of the suppression doctrine have their way, the Court will use *Wolff* to resurrect *Wolf*.⁹⁶

III. JUSTIFICATIONS FOR THE EXCLUSIONARY RULE

Argument for and against the exclusionary rule has focused on three basic questions: (A) whether it is constitutionally compelled, (B) whether in fact the rule deters violations of the fourth amendment, and (C) regardless of its deterrent effect, whether the rule's social benefits exceed its social costs.

A. Constitutionally Compelled

1. Personal Privacy Right of the Defendant

Both the fourth and the fourteenth amendments protect persons against unreasonable searches and seizures. If it is an unconstitutional invasion of privacy to seize property unreasonably, it is an unconstitutional invasion of privacy to keep and use such property. The unreasonable seizure that is barred by the fourth amendment continues as long as the evidence is held; implicit in the ban on seizing is the ban on using after seizing.⁹⁷

sion of evidence obtained by defective grand jury subpoenas [is] required at retrial." 43 U.S.L.W. 3641 (1975).

96. Partially overruled by *Mapp*, *Wolf v. Colorado* had held that the fourth amendment, but not its exclusionary enforcement device, was applicable to the states. See text accompanying notes 30-33 *supra*. For a summary of the oral argument in *Wolff v. Rice*, 422 U.S. 1055, *granting cert. to* 513 F.2d 1280 (8th Cir. 1975), see 44 U.S.L.W. 3485-87 (1976). Conceding that "the privilege of overruling Supreme Court decisions should ordinarily remain with that court," Judge Van Graafeiland recently protested the unwillingness of his brothers to modify the exclusionary rule without waiting "for the proverbial 'brown cow' case to be decided" by the Supreme Court. *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), *reported in* 18 BNA CRIM. L. REP. 2465, 2467 (1976).

97. *But cf.* text accompanying note 163 *infra*. Such an argument harks back to the basis of *Boyd v. United States*, 116 U.S. 616 (1886), which was the right to the return of property illegally seized. A difficulty with this view is that even as early as *Boyd*, a person had a right to the return only of property that was lawfully his—he had no right to recover contraband that had been seized. Thus, in the vast majority of cases

2. *Personal Right Not to Be Convicted on Unconstitutional Evidence*⁹⁸

The framers of the Constitution could not have intended the community "to reap an advantage that could be secured only by violating" constitutional commands.⁹⁹ The fifth amendment's due process and self-incrimination clauses give the federal criminal defendant and, through the fourteenth amendment, the state criminal defendant a right not to be convicted on the basis of evidence obtained in violation of the fourth amendment.¹⁰⁰ What does the due process clause mean if it does not mean that a defendant cannot be convicted on evidence obtained in violation of due process of law?¹⁰¹

in which motions to suppress are made—those involving drugs, gambling paraphernalia, and weapons—the victims of illicit seizures would not have a privacy right to return of the property. See Kaplan, *supra* note 5, at 1030.

Compare the view that suppression of wrongfully obtained evidence is a form of compensation to the defendant for the violation of his constitutional rights. See Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 153-54 (1948). This view has been criticized by Judge Friendly and by Justice Traynor. Friendly, *supra* note 4, at 951; Traynor, *supra* note 39, at 335. In *United States v. Calandra*, the Court stated that the "purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . ." *United States v. Calandra*, 414 U.S. 338, 347 (1974). See generally Note, *supra* note 57, at 508-10.

98. The right given primary protection by the fourth amendment may not be the right to privacy, but "a privilege against conviction by unlawfully obtained evidence." Allen, *supra* note 5, at 35. In *Calandra*, the Supreme Court stated that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Some commentators consider this suggestion that "the exclusionary rule does not function as a fundamental right of the accused" to be a serious departure from precedent. See Critique, *supra* note 6, at 787. See also Note, *supra* note 57, at 509.

99. Allen, *supra* note 5, at 34. See also *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

100. See Oaks, *supra* note 4, at 671 n.25. In *Calandra*, the Court stated that the exclusionary rule is not a "personal constitutional right" of the defendant. *United States v. Calandra*, 414 U.S. 338, 348 (1974). Consider, nevertheless, the following view:

The idea that a person has a personal right under the fourth amendment alone without the aid of the fifth amendment to have illegally obtained evidence excluded is strengthened by the result in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). There a corporation was involved as a defendant and of course had no right against self-incrimination. Nevertheless, the Court suppressed the evidence.

Note, *supra* note 57, at 509 n.14. For discussion of *Silverthorne*, see text accompanying notes 21 & 22 *supra*.

101. See Brief for the American Civil Liberties Union and the American Civil Liberties Union of S. Cal. as Amici Curiae at 6, in *California v. Krivda*, 409 U.S. 33 (1972) [hereinafter cited as Brief for ACLU]:

Justice Black, among others, championed the view that the self-incrimination clause, and not the due process clause, precluded convicting a person on evidence taken from him illegally.¹⁰² This view, however, has never gained the support of a majority of the Supreme Court.¹⁰³

To find on the one hand that the State has violated a defendant's fourth amendment rights in obtaining evidence against him, and then to find on the other hand that his conviction based upon such evidence has been obtained consistent with the requirements of due process of law is unacceptable logic.

Although Justice Frankfurter opposed mandating the exclusionary rule in state criminal proceedings, he wrote, in a coerced confession case handed down the same day as *Wolf*, that "[i]n holding that the Due Process Clause . . . vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedures before liberty is curtailed or life is taken." *Watts v. Indiana*, 338 U.S. 49, 55 (1949).

For arguments supporting the position implicit in the rhetorical question asked in the text, see *Mapp v. Ohio*, 367 U.S. 643, 657 (1961); *Wolf v. Colorado*, 338 U.S. 25, 47-48 (1949) (Rutledge, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 633 (1886); *Allen*, *supra* note 5, at 35.

Those who take the position that the fourteenth amendment due process clause requirements are more flexible than those provisions of the Bill of Rights that the due process clause applies to the states would not agree that the due process clause requires the same exclusionary rule as does the fourth amendment. Even if the fourth amendment compels exclusion regardless of the severity of the constitutional violations, these persons might argue that there is no denial of fourteenth amendment due process meriting suppression unless a police officer *intentionally* violates a person's fourth amendment rights. See generally Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 187-92 (1969).

102. See *Mapp v. Ohio*, 367 U.S. 643, 661-66 (1961) (Black, J., concurring). On Justice Black's position, see Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A.L. REV. 1129, 1141-42 n.48 (1973). For similar views, see *Wolf v. Colorado*, 338 U.S. 25, 47-48 (1949); *Davis v. United States*, 328 U.S. 582, 587 (1946); *Feldman v. United States*, 322 U.S. 487, 489-90 (1944); *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting); *Agnello v. United States*, 269 U.S. 20, 33-34 (1925); *Boyd v. United States*, 116 U.S. 616, 643 (1886); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 347-50 (1967); cf. Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1088-90 n.16 (1959). Contrast Justice Holmes' contention that the fifth amendment does not include an exclusionary rule because under that amendment a "party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228 U.S. 457, 458 (1913); see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting). Professor Hill has contended that *Linkletter v. Walker*, 381 U.S. 618 (1965), by holding *Mapp* prospective only, undercut the self-incrimination justification. Hill, *supra* note 101, at 182-83 n.14.

103. Self-incrimination clause protection has been limited to the suppression of testimonial evidence. Kamisar, *supra* note 102, at 1131.

3. *Only Effective Means to Assure Police Compliance with Fourth Amendment*

It is said that because there is no other effective remedy for unreasonable searches and seizures, the exclusionary rule is implicit in the fourth and fourteenth amendment—"an essential part of the right to privacy."¹⁰⁴ To deny the remedy in such circumstances is to deny the right

104. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); see *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 433 (1974); Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925); cf. Perlman, *Due Process and the Admissibility of Evidence*, 64 HARV. L. REV. 1304 (1951) (calling the rule "the most effective remedy"); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 14 (1956) (dubbing the rule "the most effective judicial deterrent"); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 738 (1972). The questions whether the exclusionary rule deters and whether other devices might deter are considered in the text accompanying notes 130-39 & 183-205 *infra*.

Even if the exclusionary rule does not effectively deter, it may be important that it is a clearly visible remedy, teaching the public that violations of the right will not be ignored. The argument might then be not that the rule is the most effective deterrent but that it is the most publicly visible legal response. Professor Kamisar has suggested that our uncertainty about whether the exclusionary rule deters is less important than our knowledge that other alternatives will not deter. Kamisar, *supra* note 102, at 1150. Professor Oaks criticizes this view, writing:

Kamisar is merely saying what the Supreme Court and a considerable number of scholars have said over and over again, that in the absence of any better alternative, we are willing to take the deterrent effect of the exclusionary rule solely on the basis of assumption.

Oaks, *supra* note 4, at 678 (footnote omitted). But Kamisar's statement may be aimed more at what Oaks termed "the inappropriateness of an important federal constitutional right . . . without a clearly available federal remedy." *Id.* at 673; see *id.* at 711. See also Critique, *supra* note 6, at 780-81.

Consider this children's nursery rhyme quoted in Christensen, *Suppression of Evidence Without the Aid of the Fourth, Fifth and Sixth Amendments*, 8 HAWAII B.J. 109 (1972):

For every evil under the sun
There is a remedy or there is none
If there be one try and find it
If there be none, never mind it.

If a nursery rhyme can be used to support the suppression doctrine, burlesque jokes are not out of order as weapons of attack:

This reasoning (that the exclusionary rule is legitimate because "nothing else works") reminds one very much of the old vaudeville skit about the drunk looking for his keys under a light post. When questioned he admitted that he had lost the keys some blocks away but argued that it made no sense to look there because it was far too dark.

Kaplan, *supra* note 5, at 1032. See also an ode to the *Mapp* majority in Comment, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 SW. U.L. REV. 68 (1972).

itself. Accordingly, many of the attacks on the exclusionary remedy are really attacks on the substantive right to be free from unreasonable searches and seizures.¹⁰⁵ The only proper avenue for redress that the detractors of the rule have, therefore, is to amend the Constitution by repealing the fourth amendment or to overturn (insofar as inconsistent) *Wolf v. Colorado*, which held the fourth amendment applicable to the states through the fourteenth. This recourse clearly is one which proponents of the exclusionary rule would oppose as not in the best interests of society.

4. *Judicial Integrity Diminished by Approval of Law Breaking in the Name of Law Enforcement*

a. *Statement of the Argument*

For those charged with enforcing and upholding the laws to violate them with impunity is anarchistic.¹⁰⁶ This basis for contending that the exclusionary rule is constitutionally required has been called "the imperative of judicial integrity."¹⁰⁷ Courts must avoid even the appearance of approving or participating in unlawful searches and seizures by using evidence so obtained lest they denigrate the principles underlying the Constitution.¹⁰⁸

105. See Brief for Respondents at 81-83, *California v. Krivda*, 409 U.S. 33 (1972); Remarks by New York Senator Robert F. Wagner, New York Constitutional Convention of 1938, RECORD OF THE NEW YORK CONSTITUTIONAL CONVENTION 559-60 (1938), reprinted in Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 19 n.56 (1950); Allen, *supra* at 19. But cf. Oaks 737 (unresponsive retort to Professor Allen). Consider also Professor Oaks' contention that the "handcuffs-the-police" objection to the exclusionary rule is actually an attack on the substantive right involved. *Id.* at 754. See text accompanying notes 206-08 *infra*.

106. Justice Walsh, writing for the minority in the leading Irish case of *People v. O'Brien*, [1965] Ir. R. 142, 169 (Sup. Ct. 1964), argued that should Ireland ever experience the "lamentable state of affairs" represented by widespread police misconduct, the exclusionary rule would be preferable to "a rule which might appear to lend itself to expediency rather than to principle." Professor Oaks maintains that in America "[w]e know that there is *widespread illegal law enforcement* behavior" Oaks 716 (emphasis added).

107. *Elkins v. United States*, 364 U.S. 206, 222 (1960).

108. The courts must endeavor "to avoid the taint of partnership in official lawlessness . . ." *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). In *Terry v. Ohio*, Chief Justice Warren stated: "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." 392 U.S. 1, 13 (1968). See also Brief for Cal. Pub. Defenders Ass'n as Amicus Curiae at 48, *California v. Krivda*, 409 U.S. 33 (1972); Note, *supra* note 57, at 510-11; Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the*

In the language of the game theory of the adversary process,¹⁰⁹ "fair play" requires that the government not profit from its own illegal acts.¹¹⁰ Because an individual's fundamental rights cannot be sacrificed in the interest of expediency without threatening the basis of a free society,¹¹¹ Justice Brandeis maintained that the government should be denied relief when it enters court with the unclean hands of a Constitution-violator.¹¹² And Holmes thought it better for some criminals to go free than for government to "play an ignoble part."¹¹³ According to Chief Justice Warren, society has a

deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from

Scope of the Exclusionary Rule, 20 U.C.L.A.L. REV. 1129 (1973); text preceding and accompanying notes 19-22 *supra*.

109. Cf. J. FRANK, COURTS ON TRIAL 80 (1949). See also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting) and authorities cited therein. Compare Justice Stone's comment that "[a] criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." *McGuire v. United States*, 273 U.S. 95, 99 (1927).

110. See *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). See also *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

111. "There exists today no greater danger to the democratic process than this ends-[conviction of the guilty] justifies-the-means [illegal search plus perjury] rationale." C. Sevilla, *ReMapping the Exclusionary Rule: An Alternative Suggestion*, 1973 (unpublished paper of a California public defender). See also *United States v. King*, 478 F.2d 494, 505-06 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States v. Calandra*, 465 F.2d 1218, 1226 (6th Cir. 1972), *rev'd*, 414 U.S. 338 (1974); Sevilla, *Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839 (1974); Note, *The United States Courts of Appeals: 1972-1973 Term Criminal Law and Procedure*, 62 GEO. L.J. 401, 406-07 (1973).

112. See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Brandeis' dissent was not based on constitutional grounds. For the criticism that Brandeis' view represents an exercise of judicial power "beyond judicial competence," see Hill, *supra* note 101, at 212 & n.169. Professor Hill's view is subject to the objection that, under the traditional equitable doctrine of clean hands, the government should be held to a higher standard of behavior than private individuals.

113. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting). Compare the position taken by Justice Walsh of the Irish Supreme Court: With respect to intentional violations and absent "extraordinary excusing circumstances . . . such as the imminent destruction of vital evidence," "[t]he defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offense." *People v. O'Brien*, [1965] Ir. R. 142, 170 (Sup. Ct. 1964). On the other hand, J. Edgar Hoover has stated in opposition to the exclusionary rule: "[I]t is well to remember the words of Patrick Devlin, former Justice of the High Court of England: 'When a criminal goes free, it is as much a failure of abstract justice as when an innocent man is convicted.'" FBI LAW ENFORCEMENT BULLETIN (Sept. 1971).

illegal methods used to convict those thought to be criminals as from the actual criminals themselves.¹¹⁴

The same concern was echoed by Justice Clark when he wrote for the majority in *Mapp v. Ohio*: "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."¹¹⁵

b. *Analogy to Treatment of Coerced Confessions*

Although Professor Oaks has expressed doubts about whether the judicial integrity rationale determines search and seizure cases,¹¹⁶ there seem to be strong arguments that it does determine cases in the coerced confession area and that it should determine at least some kinds of search and seizure issues. Most commentators support exclusion of involuntary confessions regardless of their opinion of the exclusionary rule in search and seizure cases. The traditional rationale for this distinction is that a coerced confession is likely to be unreliable (because the suspect will falsely confess to end the coercive interrogation), while the seizure of tangible evidence without probable cause does not make the evidence any less reliable.¹¹⁷ Whether or not

114. *Spano v. New York*, 360 U.S. 315, 320-21 (1959). See also Allen, *supra* note 105, at 20.

115. 367 U.S. at 659. Justice Frankfurter also shared this view that the integrity of the legal system plays a very real role in the survival of the republic. On *Lee v. United States*, 343 U.S. 747, 758-59 (1952) (dissenting opinion).

116. He offers as proof several examples of affirmed convictions predicated on illegally seized evidence. Oaks, *supra* note 4, at 669-71. But see *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465 (1976). See also Comment, *supra* note 104, at 76.

117. See, e.g., *Linkletter v. Walker*, 381 U.S. 618, 629-35 (1965); AMERICAN BAR ASSOCIATION CRIMINAL LAW SECTION, COMMITTEE AND SECTION REPORTS TO THE HOUSE OF DELEGATES, Recommendation 1-6, at 12 (1972); Friendly, *supra* note 4, at 951; Oaks 666, 737-38. Perhaps illegal seizure does diminish the reliability under some circumstances. Illegally obtained narcotics, for example, may be unreliable because of the ease with which police can frame a suspect by planting drugs on him or on his property if the police do not have to convince a magistrate of probable cause. Of course, police who have gone before a magistrate may still plant narcotics, but they might have to perjure themselves in the affidavits for warrants, which may be a risk some officers would choose not to run.

It has been asserted that there are only two issues of reliability in search and seizure cases: whether the evidence was found in the place alleged and the extent to which it incriminates the defendant. Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 Sw. L.J. 573, 583 (1971). The planting of contraband involves the first issue. The second issue arises in those cases "in which the accused is merely an innocent victim of circumstances," *id.* at 576 n.25, such as *United States v. Jeffers*, 342 U.S. 48 (1951),

illegal seizure diminishes the reliability of evidence, reliability is not a sufficient basis for distinguishing the treatment of involuntary confessions and unlawfully obtained evidence. This insufficiency is obvious when one observes that involuntary confessions that have been corroborated (and are therefore reliable) are nevertheless excluded.¹¹⁸

Why then are corroborated involuntary confessions excluded? Professor Paulsen has reasoned that they are excluded at least "in part because the police have engaged in forbidden conduct of a most serious kind and will not be permitted to keep the advantage of it."¹¹⁹ The same theme reappears in the Supreme Court's opinion in *Spano v. New York*:¹²⁰

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law¹²¹

According to Professor Kamisar, the general exclusion of coerced confessions is based on dual rationales: unreliability and deterrence of police illegality.¹²²

But if both reliable and unreliable confessions are excluded, are there significant differences between illegal confessions and wrongfully seized evidence that would make the exclusion of one more likely to deter than

in which defendants' nephew stored narcotics in their hotel room without their permission or knowledge. See Kamisar, *supra* note 102, at 1120 & n.122. Indeed, *Mapp v. Ohio* appears to have been such a case. There was evidence that Ms. Mapp had no knowledge of the obscene matter in the storage area of her dwelling. It should be remembered that

if the practices of law enforcement officers raise significant doubts as to whether the evidence they offer is trustworthy, the evidence may be excluded whether or not obtained in violation of constitutional or statutory standards.

Hill, *supra* note 101, at 197.

118. See, e.g., *Kaufman v. United States*, 394 U.S. 217, 224 (1969); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Rogers v. Richmond*, 365 U.S. 534 (1961). Justice Traynor, in referring to cases excluding involuntary confessions, asserted that "[t]he constant basis for exclusion proved to be other than untrustworthiness of confessions resulting from coercion, however crude or subtle; such confessions could at times be highly trustworthy." Traynor, *supra* note 39, at 325 (footnote omitted).

119. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 428 (1954).

120. 360 U.S. 315 (1959).

121. *Id.* at 320.

122. Kamisar, *supra* note 102, at 1115 & n.109. Compare the Supreme Court's declaration in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), that "constitutionally impermissible methods," not the untrustworthiness of an involuntary confession, render it inadmissible.

the exclusion of the other? If one theorizes that confessions are elicited only when prosecution is the goal, suppressing coerced confessions might have a greater deterrent effect on police than exclusion of illegally obtained evidence.¹²³ Under this theory, it would be useless for police to obtain an illegal confession because they would not be able to use the confession in court. It is not uncommon, however, for police to interrogate a person and seek a confession "to obtain the recovery of stolen property, to locate a kidnapped person or to clear a crime, all without intention of prosecuting."¹²⁴

Perhaps the same judicial integrity rationale used to justify the exclusion of reliable confessions obtained without *Miranda*¹²⁵ warnings ought to bar tangible evidence seized in contravention of the fourth and fourteenth amendments. If it can be demonstrated that coerced confessions are usually the product of deliberate, or at least nonaccidental police misconduct, a plea for parity might be limited to substantial (for example, intentional, reckless or grossly negligent) fourth amendment violations. As for what constitutes a substantial violation of American constitutional provisions, consider the perspective of a commentator who has examined the approaches to the police illegality problem not only in the United States but also in England, Canada, Scotland, and Ireland:

While there is a growing consensus that the exclusionary rule should be limited to cases of grave constitutional violation, . . . [w]herever unlawful acts are part of a pattern, [the acts] are also inescapably grave violations of constitutional rights, and therein lies the "American dilemma" of the exclusionary rule.¹²⁶

It can be argued that the analogy between the fourth and fifth amendments breaks down because the fifth amendment contains an explicit exclusionary rule while the fourth amendment does not.¹²⁷ It

123. For the many other purposes police have for conducting searches and seizures besides gathering evidence for a criminal prosecution, see text accompanying notes 192-94 *infra*.

124. Oaks, *supra* note 4, at 722. Professor Oaks emphasizes that such situations are exceptional and that the "predominant incentive for interrogation is to obtain evidence for use in court." *Id.*

125. *Miranda v. Arizona*, 383 U.S. 436 (1966).

126. Baade, *supra* note 4, at 1361-62.

127. The fifth amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V. The fourth amendment is quoted in note 2 *supra*. In 1925, in a leading article on the exclusionary rule, Professor Atkinson argued that the case for a fourth amendment exclusion-

must be realized, however, that although the framers did not provide for the exclusion of illegally seized evidence from court, the reasons for including such a clause may never have occurred to them. For the framers, the fourth amendment may well have been a response to the widespread invasions of privacy by the British in the past, invasions aimed at harassing the colonists rather than at securing evidence to be used in court. Thus, the ban on unreasonable searches and seizures may not have been written with an awareness that one day Americans would routinely be subjected to unlawful searches for the purpose of gathering evidence for their convictions.¹²⁸ In interpreting the fourth amendment then, jurists should consider both the past and present conditions and remember that "[a] constitution states or ought to state not rules for the passing hour, but principles for an expanding future."¹²⁹

B. *Deters Unreasonable Searches and Seizures*

1. *Direct Persuasion*

Although over the years some authorities have asserted flatly that the exclusionary rule effectively deters police from conducting unreasonable searches and seizures,¹³⁰ it seems more accurate to describe the rule as

ary rule was in some respects even stronger than the case for a fifth amendment exclusionary rule. Atkinson, *supra* note 104, at 29.

128. Cf. *Draper v. United States*, 358 U.S. 307, 316-20 (1959); T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 45 (1969); J. Spiotto, *An Empirical Study of the Exclusionary Rule: From Its Origins to Its Alternatives* 10 n.25, April 24, 1972 (unpublished paper on file at University of Chicago Law School Library and United States Dept. of Justice); Amsterdam, *supra* note 104, at 362, 397, 398, 401, 450 n.168; Friendly, *supra* note 4, at 948; Spiotto, *supra* note 14.

129. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 83 (1921) (emphasis original). In a similar vein, Professor Amsterdam has stated:

I see [no] reason to conclude that the framers intended the fourth amendment, any more than the rest of the Bill of Rights or the Constitution, to state a principle like the dwarf in Gunter Grass' *Tin Drum*, who suddenly and perversely decided to stop growing because growth was what grownups expected of him.

Amsterdam, *supra* note 104, at 399.

130. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Elkins v. United States*, 364 U.S. 206, 217 (1960); *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting); cf. *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465, 2466 (1976) (Mansfield, J.). For a theoretical argument that the rule should deter police illegality, see Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703, 712. For the argument that the rule may be said to deter because few egregious cases of police violations have been reported since its adoption, see American Bar

detering only certain kinds of police misconduct. When police want the subject of their search and seizure to be prosecuted, they generally take more care to act within the Constitution than they otherwise might.¹³¹ Professor Oaks has concluded that in "crimes such as homicide, where prosecution is almost a certainty and where public interest and awareness are high . . . the exclusionary rule is likely to affect police behavior."¹³² In this situation, the rule deters by making it unprofitable for police to seize evidence illegally.¹³³

Professor Allen has suggested that the rule also plays a corrective role when the illegal conduct results from "remediable ignorance of the law."¹³⁴ According to Professor Oaks,

[s]cholars who have made sustained observations of police operations have . . . [concluded that] [t]he exclusionary rule has contributed to an increased *awareness* of constitutional requirements by the police.¹³⁵

Nevertheless, the acid test is not awareness but compliance.¹³⁶ In this regard, it is interesting to consider the complaint of a Pennsylvania prosecutor that "[t]here can be no doubt that the *Mapp* decision has significantly impaired the ability of the police to secure evidence to convict the guilty."¹³⁷

Association Section on Criminal Justice, *Majority Report*, in SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, Report No. 107c, at 9 (1973 A.B.A. Mid-Year Meeting).

131. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 14 (1968); W. LAFAYETTE ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 488 (1965); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967); J. SKOLNICK, JUSTICE WITHOUT TRIAL 225, 228 (1967); authorities cited in Oaks 721 n.157. But compare Professor Oaks' conclusion that "there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution." Oaks 755.

132. Oaks 731; cf. statement by Oaks, *quoted in note 131 supra*.

133. Justice Clark asserted that the rule removes the incentive to disregard constitutional guarantees. *Mapp v. Ohio*, 367 U.S. 643, 652, 656 (1961). See also *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465, 2466 (1976).

134. Allen, *supra* note 5, at 37.

135. Oaks 708 (emphasis added).

136. Cf. *id.*

137. Specter, *Mapp v. Ohio: Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4, 42 (1962). See also Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939 (1966). A number of polls and surveys have been taken to test the perceived effectiveness of the exclusionary rule. In an informal poll of federal judges at the 1972 Judicial Conference of the United States Court of Appeals for the Ninth Judicial Circuit, a

2. *Indirect Persuasion Through Community Pressure*

In an expression of apparently unwarranted faith in Americans, Justice Traynor declared in 1955 that exclusion of unconstitutional evidence would "arouse public opinion as a deterrent to . . . law enforcement officers who allow criminals to escape by pursuing them in lawless ways."¹³⁸ Unfortunately, public opinion, at least in this country, has condemned the courts for making life difficult for zealous police officers; rarely has public opinion condemned the police for their illegal tactics. Frustrated with procedural due process requirements that benefit "criminals," many people abhor the exclusionary rule as yet another tactic guileful defendants can use in attempting to save their unworthy necks. The notion that communities will deter their public servants from violating people's constitutional rights, although attractive, seems quixotic.

Despite the impressive array of criminal justice scholars and practitioners who have denied the capacity of the exclusionary rule to deter misconduct in most situations, Professor Oaks' article reports:

The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule.¹³⁹

strong majority opposed the total abandonment of the exclusionary rule, a somewhat weaker majority favored modification of the rule, and by a vote of 111 to 73, the judges felt the suppression doctrine has been an effective deterrent to law violation by police. *The Exclusionary Rule*, 61 F.R.D. 259, 285-86 (1974). An opinion survey of 90 police chiefs, sheriffs, trial judges, prosecutors and defense counsel in North Carolina revealed that approximately 70 percent felt the exclusionary rule was "an effective way of reducing the number of illegal searches." Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio In North Carolina—The Model, the Study and the Implications*, 45 N.C.L. REV. 119, 134 (1966). In a 1963 survey of "one randomly selected police chief, prosecuting attorney, judge, defense attorney, and A.C.L.U. official in each of the fifty states to determine among other things their perceptions of changes in police behavior before and after *Mapp v. Ohio*," 57 percent of the respondents from the 24 states which had already adopted the suppression doctrine prior to *Mapp* felt there was an increase in police adherence to legality in making searches since 1961; 75 percent of the respondents from the 24 states required to adopt the rule by *Mapp* reported an increase. S. NAGEL, *IMPROVING THE LEGAL PROCESS* 9-11 (1975).

138. *People v. Cahan*, 44 Cal. 2d 434, 448-49, 282 P.2d 905, 913-14 (1955). Justice Traynor was not alone in holding this belief. See, e.g., Allen, *supra* note 105, at 20.

139. Oaks 709. Other attempts to test the exclusionary rule's deterrent effect have, as Justice Stewart predicted in *Elkins v. United States*, 364 U.S. 206, 218 (1960), failed to assemble "conclusive factual data." See Katz, *supra* note 137; Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 Wis. L. REV. 283; Spiotto, *supra* note

Of course, we do not know whether our police, with a demonstrated willingness to overstep constitutional boundaries, would be stepping even more on constitutional rights if there were no exclusionary rule. This uncertainty about deterrence and the belief that other rationales may justify retention of the suppression doctrine have stimulated vigorous debate about the rule's social costs and benefits.

C. *Social Benefits*

1. *Maintenance of Popular Respect for Legal System*

The argument is made that admitting the fruits of official lawlessness would generate popular disrespect for the criminal justice system and laws in general. "If the Government becomes a law-breaker," declared Mr. Justice Brandeis, "it breeds contempt for the law . . ." ¹⁴⁰ But, as with Justice Traynor's hope that the public would focus their frustration with rising crime on police wrongdoing rather than on the courts, this notion does not seem to be true. ¹⁴¹ This Article shall return later to the question whether exclusion of illegally obtained evidence prevents, rather than promotes, popular disrespect and lack of confidence.

14; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practice*, 34 ROCKY MT. L. REV. 150 (1962); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87 (1968); Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. REV. 493 (1952). Judge Mansfield, expressing tentative confidence in the exclusionary rule's deterrent capacity, noted that "[g]iven the fragmentary empirical evidence regarding the actual effectiveness of the exclusionary rule in deterring unconstitutional searches, any discussion of its deterrent effects must be undertaken with considerable humility." *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465, 2466 (1976).

For criticism of the methodology used by some researchers to disprove the rule's ability to deter, see Amsterdam, *supra* note 104, at 475 n.593; Critique, *supra* note 6. The conclusion of the Critique is that the various attempts to measure empirically the rule's impact do "not demonstrate the ineffectiveness of the exclusionary rule. Rather, [they] tend to illustrate the obstacles that stand in the way of any sound, empirical evaluation of the rule." *Id.* at 763.

140. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). See also *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Linkletter v. Walker*, 381 U.S. 618, 635 (1965); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); *Elkins v. United States*, 364 U.S. 206, 222 (1960); *Walder v. United States*, 347 U.S. 62, 64-65 (1954).

141. For Justice Traynor's view, see *People v. Cahan*, 44 Cal. 2d 434, 448-49, 282 P.2d 905, 913-14 (1955). Of course, we deal with imprecise measurements of what a majority of Americans seem to feel. To say that public anger would not be aroused by reception of unconstitutional evidence is not to say that a significant and vocal minority of citizens would not object vigorously.

2. *Avoidance of Misconceptions Flowing from Rule's Abandonment*

Both defenders and detractors of the exclusionary rule seem to agree that the rule's abandonment might be misread by police as a license to conduct unreasonable searches and seizures—a real risk given our legacy of overzealous police conduct. Even such an ardent opponent of the rule as Chief Justice Burger asserted that

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.¹⁴²

In the pre-*Mapp* case of *Salsburg v. Maryland*,¹⁴³ however, the Court rejected the argument that state legislative withdrawal of the exclusionary rule would amount to affirmative sanction of unreasonable searches and seizures.

Abandoning the rule in theory might or might not bolster police illegality. In practice, however, it seems apparent that police who currently complain of being handcuffed¹⁴⁴ would have little hesitation about using their new-found freedom, unless a substitute enforcement device had sharper teeth than the exclusionary rule.

3. *Avoidance of Insult to Police Professionalism by Abandoning Rule*

Rather than adopt the cynical view of police intentions that underlies the previous argument, some proponents of the exclusionary rule appeal to the better instincts of law enforcement officers. Conducting the floor debate that persuaded the American Bar Association's House of Delegates to vote for retention of the present exclusionary rule, Samuel Dash asserted that abandonment would insult the police because it would be tantamount to saying they cannot work effectively under the Constitution. He also reported that the International Association of Chiefs of

142. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (dissenting opinion). The Chief Justice thinks this risk would be diminished if the exclusionary rule were not abandoned until a substitute remedy were in force. As might be expected, defenders of the exclusionary rule foresee problems of police misunderstanding if the rule is abandoned. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 44-46 (1949) (Murphy, J., dissenting); *People v. Cahan*, 44 Cal. 2d 434, 437-38, 282 P.2d 905, 907 (1955); cf. *Kamisar*, *supra* note 102, at 1094 n.39.

143. 346 U.S. 545 (1954).

144. See, e.g., *Nagel*, *supra* note 139, at 283-86; *Specter*, *supra* note 137, at 42. To the extent these complaints are sincere, the exclusionary rule has at least some deterrent value.

Police have found the exclusionary rule "an aid to the professionalism of police."¹⁴⁵

4. *Opportunity for Judicial Scrutiny of Police Operations and Articulation of Constitutional Standards*

Even steadfast opponents of the suppression doctrine admit that the exclusionary rule has helped focus judicial attention on the need to train and supervise police.¹⁴⁶ To Professor Oaks,

[t]he advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law.¹⁴⁷

The occasion for judicial review that the rule provides is of paramount importance. Although there seems to be little incentive for the victim of an unreasonable search and seizure to prosecute the various alternatives to the exclusionary rule, the rule does provide the victim with incentive to litigate the legality of the search if he has been charged with an offense and the prosecution has decided to use the illegally obtained evidence. Thus, the exclusionary rule has the "salutary effect

145. 1973 Mid-Year Meeting of A.B.A. House of Delegates, February 1973, reported at 41 U.S.L.W. 2438 (1973). Mr. Dash at that time was Chairman of the A.B.A. Section on Criminal Justice.

146. GOVERNOR'S SELECT COMMITTEE ON LAW ENFORCEMENT PROBLEMS, REPORT: PROTECTING THE LAW-ABIDING: "CONTROLLING CRIME IN CALIFORNIA" 155 (1973) [hereinafter cited as GOVERNOR'S SELECT COMMITTEE]. Advocates of the exclusionary rule concur. See *United States v. Peltier*, 422 U.S. 531, 554-57 (1975) (Brennan, J., dissenting); Brief for Cal. Pub. Defender's Ass'n, *supra* note 108, at 61-62. Without taking a position on the exclusionary rule other than to call the arguments supporting it "unpersuasive," Professor Weinreb notes that "judicial involvement [with the fourth amendment] mostly depends" on the exclusionary rule. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974).

147. Oaks 756. See also GOVERNOR'S SELECT COMMITTEE 155 (rule "has helped focus attention on the importance of constitutional rights"); W. LAFAVE, *supra* note 131, at 504-05 (judicial articulation of constitutional rights in conjunction with exclusionary rule has increased public awareness of constitutional requirements); Amsterdam, *supra* note 104, at 429. A Second Circuit panel recently asserted its belief that the suppression doctrine makes magistrates "aware that their decision to issue a search warrant is a matter of importance . . . [and] may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires . . ." *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465, 2466 (1976).

. . . that search and seizure issues are litigated and the boundaries and protections of the Fourth Amendment become rules of law enunciated by our courts."¹⁴⁸ Without the incentive to appeal to the Supreme Court that the exclusionary rule provides criminal defendants, the Court might find itself lacking the opportunity to adjust the rules of criminal procedure and fourth amendment substantive rights to rapidly changing social circumstances. The risk is that our constitutional rights will atrophy.¹⁴⁹

Would an alternative device, such as a tort action against the offending officer or his employer, focus a reasonable amount of attention on questions concerning police practices? The California Public Defender's Association contends it would not:

148. Brief for Cal. Pub. Defenders Ass'n, *supra* note 108, at 60.

149. See *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465 (1976). Justice Traynor described the effect of the California Supreme Court opinion that, prior to *Mapp v. Ohio*, held the exclusionary rule applicable in search and seizure cases:

The *Cahan* decision had one immediate salutary effect. Public ignorance and indifference now gave way to lively public discussion on the problem of what constitutes lawful police conduct. The realization struck many for the first time that the conduct of police in searches, seizures, arrests, and investigations could be crucially relevant in criminal prosecutions. In the midst of partisan hues and cries more than one thoughtful observer came to realize how passive the average law-abiding citizen must have been and how emotional he had now become about constitutional guarantees that concern him as significantly as they concern the most sordid criminal.

Traynor, *supra* note 39, at 322-23. The great California jurist went on to decry the absence of Supreme Court guidance on fourth amendment standards when the exclusionary remedy is not available:

For more than a decade, *Wolf's* right without a remedy frustrated the possibilities of litigation in the Supreme Court that could have given more than spectral illumination of the right. In consequence no case law developed at the highest level to yield guiding standards for determining what searches and seizures would be subject to condemnation under the fourteenth amendment. The most we learned was to be newly skeptical of the old adage that half a wolf is better than none.

Id. at 327.

Justice Brennan in his dissent in *United States v. Peltier*, 422 U.S. 531, 554 (1975), warned against "stop[ping] dead in its tracks judicial development of Fourth Amendment rights," and Justice Reed, no great friend of suppression, recognized in *Upshaw v. United States*, 335 U.S. 410, 427 (1948) (dissenting opinion), that the admission of illegally obtained evidence, at least in federal trials, "would imperil the efficacy of those constitutional rights." See also *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson J., joined by Frankfurter & Murphy, JJ., dissenting). Some authorities oppose the exclusionary rule because they feel it makes for bad law on the substantive constitutional rights, but agree that these rights might atrophy without the impetus that the exclusionary rule gives to people to assert their rights. See text accompanying note 147 *supra*.

It is folly to expect the powerless within the society to pursue remedies against the authorities since the poor often lack the resources, energy, time and knowledge to make alternatives complete remedies. At least at the present time, defense attorneys and public defenders who represent the indigent can raise these issues.¹⁵⁰

Consider also Justice Jackson's observation in *Irvine v. California*¹⁵¹ that an innocent victim of a search may refrain from bringing a tort action if he does not want to reveal publicly that he has been under suspicion. For these and other reasons, proposed alternatives may not ensure the necessary judicial scrutiny of behavior affecting constitutional rights.

5. *Avoidance of Prejudice to Rehabilitation Efforts*

The Canadian Committee on Corrections has suggested that reception of unconstitutionally seized evidence, at least when the evidence has been obtained through a deliberate violation of rights, will tend to decrease the possibility for the defendant's rehabilitation.¹⁵² This justification for the exclusionary rule could be extended, however, to all illegal seizures—inadvertent as well as deliberate. Surely the defendant may be penalized for crimes involving negligence and recklessness, which are less than deliberate violations of the law. In his eyes, therefore, the Committee, by proposing to admit the fruit of negligently and recklessly unconstitutional searches and seizures, would allow the police to break the law in ways that he cannot. This perception is not likely to increase the offender's respect for a system of law, but rather is likely to exacerbate his lawless behavior.

IV. ARGUMENTS AGAINST THE EXCLUSIONARY RULE

It is an inflexible rule requiring judicial suppression of reliable evidence regardless of the gravity of the police illegality and with dubious constitutional authority.¹⁵³

150. Brief for Cal. Pub. Defenders Ass'n, *supra* note 108, at 61.

151. 347 U.S. 128, 137 (1954).

152. CANADIAN COMMITTEE ON CORRECTIONS (popularly known as the Ouimet Committee), *TOWARD UNITY: CRIMINAL JUSTICE AND CORRECTIONS* 74 (1969).

153. Wingo, *supra* note 117, at 582. James Spiotto has offered his own sweeping indictment of the exclusionary rule:

Suppose a legal anarchist, dedicated to the subversion and overthrow of a country by legal means, sought to create a rule which would effectively bring this about. The main objectives of this destructive rule would be: (1) to corrupt police, both the overzealous and the greedy; (2) to prevent the innocent from

A. *Not Constitutionally Compelled*

1. *Never Was Constitutionally Compelled*

a. *No Express Exclusion Provision in Fourth Amendment*

It has been argued that the absence of any express mention of the exclusionary rule in the fourth amendment indicates that the framers did not intend constitutionally to require such a rule.¹⁵⁴ The difficulty with this argument, however, is that the fourth amendment provides no remedy whatsoever for its violation, and it would be odd to assume that violation with impunity was the expectation of the framers.¹⁵⁵

b. *Mere Rule of Evidence or Product of Supreme Court's Supervisory Power*

Prior to *Mapp v. Ohio*, it was often argued that the exclusionary rule was not a constitutionally-compelled remedy,¹⁵⁶ but a mere rule of evidence or simply a product of the Supreme Court's supervisory power over lower federal courts.¹⁵⁷ If the Court's supervisory power was the

having any remedy; (3) to break down the trust and working relationship between the police, prosecutors, courts and citizens; (4) to let only the very guilty go free; and (5) to have a rule which police openly flaunt. Such an anarchist would be hard pressed to find a better rule than the exclusionary rule to fulfill his purpose.

J. Spiotto, *An Empirical Study of the Exclusionary Rule: From Its Origins to Its Alternatives*, *supra* note 128, at 120-21. See also Little, *The Exclusionary Rule as a Means of Enforcing Fourth Amendment Morality on Police*, 3 IND. L.F. 375 (1970); Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955); Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679 (1944).

154. See Wingo, *supra* note 117, at 585. Professor Kaplan suggests that "[w]hile it is certainly possible that an interpretation first made 125 years after a constitutional provision might nonetheless be an appropriate one, the time lag between the adoption of the fourth amendment and the first appearance of the exclusionary rule is at least some indication that it was hardly basic to the constitutional purpose." Kaplan, *supra* note 5, at 1030-31 (footnote omitted).

155. Moreover, it may be that no mention was made in the fourth amendment of a remedy for attempts to introduce unconstitutionally seized property into evidence because the problem was not in the minds of the framers. See text accompanying note 128 *supra*.

156. Compare the American Civil Liberties Union position that the Supreme Court did not fashion a remedy for illegal searches and seizures when it enunciated the constitutional requirement of the exclusionary rule in *Weeks* . . . and again in *Mapp* It merely stated its refusal consciously to facilitate and reward the unconstitutional activities of the executive branch.

Brief for ACLU, *supra* note 101, at 6.

157. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 39-40 (1949) (Black, J., concurring); *Field v. United States*, 263 F.2d 758 (5th Cir. 1959); *Jeffers v. United States*, 187 F.2d

only authorization for the rule, then a Court-mandated suppression doctrine for the states would conflict with the basic tenets of federalism because the state judicial systems are not subject to the extra-constitutional supervision of the federal courts.¹⁵⁸

In *Mapp v. Ohio*, however, the Supreme Court derived from the Constitution the power to require state courts to suppress evidence. Professor Allen read this announcement by the Court as the death knell of the supervisory power argument against the state rule.¹⁵⁹ And in *Malloy v. Hogan*,¹⁶⁰ the Court declared that "*Mapp* necessarily repudiated the *Twining* concept of the privilege [not to be convicted on unconstitutional evidence] as a mere rule of evidence"¹⁶¹

c. *Not a Remedy for Invasion of Defendant's Privacy*

Judge Friendly has argued that the exclusionary rule is not intended to vindicate the right of privacy of the victim of an illicit search and seizure because the benefit received (often, release from custody) is wholly disproportionate to the wrong suffered.¹⁶² Moreover, unless one is prepared to view judicial reception of unconstitutional evidence as a continuing or new violation of the ban on unreasonable seizures, it is

498, 508 (D.C. Cir. 1950) (Prettyman, J., dissenting); *Collins v. Webb*, 133 F. Supp. 877, 878 (N.D. Calif. 1955); *State v. Hillman*, 84 R.I. 396, 399, 125 A.2d 94, 95 (1956); Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 U.C.L.A.L. REV. 1, 18 (1961).

158. See, e.g., *McNabb v. United States*, 318 U.S. 332, 340-41, 347 (1943); Hill, *supra* note 101, at 193, 212, 214; Comment, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453, 1467 (1973); cf. *Marshall v. United States*, 360 U.S. 310, 313 (1959); *Jencks v. United States*, 353 U.S. 657, 668 (1957).

159. Allen, *supra* note 5, at 24.

160. 378 U.S. 1 (1964).

161. *Id.* at 9. In considering pronouncements about what *Mapp* necessarily did or did not repudiate, one should bear in mind Judge Friendly's observation that "no majority of the Supreme Court has held that the [Fourth] Amendment compels [the exclusionary rule], see *Mapp v. Ohio*, 367 U.S. 643, 661 . . . (1961) (concurring opinion of Mr. Justice Black)." *United States v. Soyka*, 394 F.2d 443, 452 (2d Cir. 1968) (dissenting opinion). Justice Traynor has stated that *Mapp's* exclusionary rule "is no mere rule of evidence, but part and parcel of the Constitution." Traynor, *supra* note 39, at 339.

162. Friendly, *supra* note 4, at 951. "Indeed, this lack of proportionality demonstrates why the exclusionary rule cannot be justified as a moral imperative preventing the courts from soiling themselves with tainted evidence." Kaplan, *supra* note 5, at 1036. Chief Justice Burger, during oral argument of *United States v. Calandra*, 414 U.S. 338 (1974), commented that the exclusionary rule is not a remedy—*i.e.* a right of the individual—but "a means of keeping the system healthy." 14 BNA CRIM. L. REP. 4044, 4045 (argued Oct. 11, 1973).

difficult to assert a personal right to privacy as justification for the rule. At least with respect to grand jury proceedings, a majority of the Supreme Court has made clear that the violation is complete when the evidence is seized by the police; thus the subsequent presentation of the illegally seized evidence to the grand jury does not constitute a new violation.¹⁶³

d. *No Right to be Free from Conviction on Unconstitutional Evidence*

Mapp rested in part on "seeming adoption of Justice Rutledge's thesis in *Wolf* that there is a constitutional right not to be convicted on the basis of illegally-seized evidence."¹⁶⁴ By refusing to apply *Mapp* retroactively, however, the Court in *Linkletter v. Walker*¹⁶⁵ may have undermined this thesis:

Justice Clark, again writing for the Court, gave as a principal reason for the decision the fact that the "deterrent . . . purpose" of the exclusionary rule would not "be advanced by making the rule retrospective. The misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved."¹⁶⁶

163. *United States v. Calandra*, 414 U.S. 338, 354 (1974). For criticism of this reasoning, see Critique, *supra* note 6, at 780-81. Some judges urge that introduction of the illegally seized evidence is itself a further violation of the criminal defendant's right of privacy. *Verdugo v. United States*, 402 F.2d 599, 616 (9th Cir. 1968) (separate opinion), *cert. denied*, 397 U.S. 925 (1970).

164. Hill, *supra* note 101, at 183.

165. 381 U.S. 618 (1965).

166. Hill, *supra* note 101, at 184 n.14, quoting *Linkletter v. Walker*, 381 U.S. 618, at 636-37 (1965). Justices Black and Douglas, dissenting in *Linkletter*, conceded that the majority had abandoned the notion that the rule is intended to protect personal rights:

One reason—perhaps a basic one—put forward by the Court for its refusal to give *Linkletter* the benefit of the search and seizure exclusionary rule is the repeated statement that the purpose of that rule is to deter sheriffs, policemen, and other law officers from making unlawful searches and seizures. The inference I gather from these repeated statements is that the rule is not a right or a privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights [T]he undoubted implication of today's opinion that the rule is not a safeguard for defendants but is a mere punishing rod to be applied to law enforcement officers is a rather startling departure from many past opinions, and even from *Mapp* itself.

381 U.S. 618, 648-49. Some authorities have suggested maintenance of the exclusionary rule despite their concurrence that the focus on personal rights is misdirected. See, e.g., *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465, 2466 (1976).

See also the summary of oral arguments in *Stone v. Powell*, 422 U.S. 1055 (1975), granting *cert. to* 507 F.2d 93 (9th Cir. 1974), and *Wolff v. Rice*, 422 U.S. 1055, granting *cert. to* 513 F.2d 1280 (8th Cir. 1975), in 44 U.S.L.W. 3485, 3486-87 (1976).

e. *Rationales of Rule Undercut by Standing and Collateral Use Doctrines*

Both the standing requirements and the numerous ways in which the unconstitutional evidence may permissibly be used in our criminal justice system arguably undercut the deterrence and judicial integrity rationales. Before a criminal defendant may move to suppress evidence as the fruit of an unconstitutional seizure, he must have standing to make the motion.¹⁶⁷ Professor Oaks has declared that

[i]f the exclusionary rule were seriously bent on deterring the police or on avoiding judicial involvement in illegal behavior it would exclude all illegally seized evidence, without inquiry into whose property or personal rights were violated.¹⁶⁸

Illegally obtained evidence may be used for purposes of indictment, impeachment, sentencing, and parole and probation revocation hearings; if a private person or a private investigator unaffiliated with the government made the illegal seizure, the evidence is admissible for substantive purposes as well.¹⁶⁹ Moreover, the general rule that a

167. See *Brown v. United States*, 411 U.S. 223 (1973); *Combs v. United States*, 408 U.S. 224 (1972) (per curiam); *Alderman v. United States*, 394 U.S. 165 (1969); *Jones v. United States*, 362 U.S. 257 (1960). See generally *Amsterdam*, *supra* note 104, at 360-61; Note, *Police Coercion of Witnesses*, 1973 WASH. U.L.Q. 865, 867-73; Note, *Standing to Object to an Unlawful Search and Seizure*, 1965 WASH. U.L.Q. 488. Professor Amsterdam urges "that the Supreme Court's 'standing' rules constitute an incitement to the police to conduct unconstitutional searches against small fish in order to catch big ones . . ." *Amsterdam*, *supra* at 433.

168. Oaks, *supra* note 4, at 734. Accordingly, some commentators have urged the exclusion of unconstitutionally seized evidence without regard to standing requirements in order to promote deterrence. See *Grove, Suppression of Illegally Obtained Evidence: The Standing Requirement on Its Last Leg*, 18 CATH. U.L. REV. 150, 177-78 (1968); Note, *The Vicarious Exclusionary Rule in California*, 24 STAN. L. REV. 947, 957-59 (1972). It is also argued that the standing requirements derive from a notion that exclusion of unconstitutional evidence is a personal right and that such requirements are inconsistent with the attempt in *United States v. Calandra*, 414 U.S. 338 (1974), to make deterrence the sole justification for the exclusionary rule. See *Critique*, *supra* note 6, at 782-83. For an attempt to reconcile the standing requirements with the deterrence justification for the suppression doctrine, see Note, *supra* note 57, at 514-15. See generally *White & Greenspan, Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970); Comment, *Standing to Object to an Unreasonable Search and Seizure*, *supra* note 102, at 349.

The standing requirements may be eliminated, as they have been in California, by allowing vicarious assertion of the right to have illegally seized evidence suppressed. See *Kaplan v. Superior Court*, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971); *People v. Martin*, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955); *Traynor*, *supra* note 39, at 335; Note, *Vicarious Exclusionary Rule in California*, *supra* at 957.

169. See *United States v. Calandra*, 414 U.S. 338 (1974) (use before grand jury);

defendant waives his claim of unreasonable search and seizure by pleading guilty may further undermine the deterrence and judicial "clean hands" rationales.¹⁷⁰

United States v. Blue, 384 U.S. 251 (1966) (use before grand jury); Walder v. United States, 347 U.S. 62 (1954) (impeachment); 34 OHIO S.L.J. 706 (1973); cf. United States v. Winsett, 518 F.2d 51 (9th Cir. 1975) (parole revocation hearing); United States v. Hill, 447 F.2d 817 (7th Cir. 1971) (parole revocation hearing); United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971) (sentencing); United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (2d Cir. 1970) (parole revocation hearing); Verdugo v. United States, 402 F.2d 599, 613 (9th Cir. 1968), cert. denied, 397 U.S. 925 (1970) (sentencing); Commonwealth v. Woods, 455 Pa. 1, 312 A.2d 357 (1973), cert. denied, 419 U.S. 880 (1974) (limit on use for impeachment); *Majority Report of the Committee on Federal Legislation of the American Bar Association on S. 2657, 92nd Cong., 1st Sess. (1971)*, reprinted in 119 CONG. REC. 4237, 4238 (1973) (private illegal procurement of evidence) [hereinafter cited as *Majority Report of the Committee on Federal Legislation*]. See also *The Exclusionary Rule*, supra note 137, at 276 (remarks by Donald Santarelli at 1972 Judicial Conference of the United States Court of Appeals for the Ninth Judicial Circuit). On illegal searches and seizures by private investigators, see N.Y. Times, June 26, 1975, § 1, at 18, col. 4, which describes the extent of illegal wiretap advice and services offered by private detective agencies, as reported by President Ford's National Wiretap Commission. With respect to the kind and degree of police participation necessary to trigger the fourth amendment when the illegal search was initiated by a private person, see *State v. Morris*, 42 Ohio St. 2d 307, 329 N.E.2d 85, (1975), cert. denied, 44 U.S.L.W. 3392 (1976).

It has also been asserted that the Supreme Court's "treatment of 'taint' as a question of fact instead of a question of reasonable anticipation encourages illegalities that the police or prosecution can subsequently 'attenuate' by undetectable uses of their own products." Amsterdam, supra note 104, at 433. In *Brown v. Illinois*, 422 U.S. 590 (1975), the Supreme Court held that merely giving a defendant his *Miranda* warnings does not dissipate the taint of a defendant's illegal arrest and render post-arrest statements admissible. The Court carefully limited its holding, however, to rejection of a per se rule that taint is automatically attenuated in "cure-all" fashion by the utterance of *Miranda* warnings. *Id.* at 602. Attenuation remains a question of fact.

One proponent of the exclusionary rule has argued that to serve the imperative of judicial integrity and prevent totalitarian police tactics the rule should be expanded to "extra-trial proceedings," such as sentencing, parole revocation and civil narcotics commitment hearings. Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, supra note 102, at 1147-49. For the suggestion that the Supreme Court has struck a compromise between the interests of a criminal defendant and those of society by excluding illegal evidence at trials and admitting it at "extra-trial proceedings," see *id.* at 1151.

The prospect that illegally seized evidence might be admitted without providing grounds for overturning a conviction on appeal through the "harmless error" doctrine would strike still another blow at the deterrence and judicial integrity rationales. But this doctrine has had little application in the search and seizure area. See Note, supra note 57, at 522. See also Comment, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88 (1974).

170. See Annot., 20 A.L.R.3d 724 (1968).

Of course, to observe an inconsistency between the often cited justifications for the rule on the one hand and the procedural requirements and permissible uses of illicit evidence on the other is not to establish where the error lies. Either broadening the use of the exclusionary rule or abandoning these justifications would resolve the imbalance.

f. *Reception of the Evidence Not Unfair to Defendant*

Since the fourth amendment does not expressly provide for exclusion, some proponents of the rule rely on the basic concepts of fairness implicit in the criminal justice system. But consider in this regard, the following thoughts of a Canadian justice:

The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.¹⁷¹

2. *No Longer Constitutionally Compelled*

Even when, in the apparent absence of alternatives, a procedural rule is held to be constitutionally required, it may cease to be so if suitable alternatives are developed, or if other measures have eliminated or brought under control the evil at which it is aimed. In short, constitutional holdings in some matters of implemental detail may not be immutable.¹⁷²

a. *Inability to Deter*

As indicated above, the current posture of the Supreme Court majority seems to be that effective deterrence is the only possible justification for constitutionally compelling the exclusionary rule.¹⁷³ Although Professor Oaks carefully indicated the inconclusiveness of his exhaustive study of the rule's deterrent ability,¹⁷⁴ many critics of the rule have swept past his uncertainties and have asserted that his study disproved the deterrent efficacy of the rule.¹⁷⁵ Such critics maintain that although

171. *The Queen v. Wray*, [1970] 11 D.L.R.3d 673, 689-90 (1970) (Maitland, J.).

172. Hill, *supra* note 101, at 181.

173. Text accompanying note 60 *supra*; see text accompanying notes 88-91 *supra*. See also *People v. Williams*, — Colo. —, 541 P.2d 76 (1975) (dissenting opinion).

174. See text accompanying note 139 *supra*.

175. E.g., *Majority Report of the Committee on Federal Legislation*, *supra* note 169, at 4239; Comment, *supra* note 6, at 383. The *Majority Report* stated: "Dallin Oaks,

the rule was thought to have deterrent capacity when it was adopted, the rule's sole constitutional justification is now vitiated by its failure to deter.

At least in cases in which deterrence is clearly impossible, critics contend, an unreasonable search and seizure should not trigger a suppression order. For example, it has been argued that it is counterproductive to exclude evidence when a warrant is found to be defective if the police officer made a good faith effort to secure a warrant and to obey probable cause requirements.¹⁷⁶ The police officer is purportedly punished by exclusion, even though the court, not he, made the error. Events over which a person has no control, the argument continues, cannot be deterred no matter how much the person is punished.

There is force to this argument; but if one recognizes that the false or misleading allegations made by police in their affidavits for warrants are not necessarily made in good faith, it would certainly be sensible to attempt to deter the duping of magistrates. A significant increase in false and misleading affidavits for warrants might occur, however, if a blanket rule were announced providing that a warrant would bar any objection to the admission of unconstitutionally obtained evidence.

in his highly regarded study, . . . concluded that the exclusionary rule has been ineffective as a deterrent." The student commentator referred to "the findings of [Oaks'] study that police misbehavior was not deterred by the exclusionary rule" and declared that such findings were corroborated by the empirical research of James Spiotto, *see* note 14 *supra*. Spiotto's research, however, has been severely criticized on methodological grounds. *See* Critique, *supra* note 6. Chief Justice Burger in his *Bivens* dissent stated the half truth that "there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials" and then asserted, without citing authority: "Suppressing unchallenged truth . . . demonstrably has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur given the pressures inherent in police work having to do with serious crimes." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416, 418 (1971) (emphasis added). As Professor Oaks pointed out, his data "obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." Oaks 709 (emphasis added). By failing, however, to check whether the number of warrants sought by police increased following *Mapp*, Professor Oaks omitted a potentially important source of information for his research. Those commentators and courts that assumed without proof that the exclusionary rule was an effective deterrent have incurred the biting criticism that such a belief "is a logical enough theory, impregnable in the library. But in light of eventualities it appears to have been dim-visioned theory spectacted in rose." Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 685 (1944).

176. *See* Majority Report of the Committee on Federal Legislation, *supra* note 169, at 4239. For a contrary position, see the majority opinion in *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465 (1976).

b. *No Longer the Only Effective Deterrent*

Clearly, the Court has been motivated to adopt and retain the exclusionary rule, at least in part, because the Court has perceived the rule as the only effective remedy for violation of fourth amendment rights.¹⁷⁷ Implicit in such a position, however, is the factual conclusion that alternatives are ineffective. If this conclusion is shown to be false, the constitutional need for suppression of illegal evidence is open to serious question. The Court's awareness that the exclusionary rule might no longer be constitutionally compelled if effective alternatives were available is reflected in its comment, in a slightly different context, in *Miranda v. Arizona*.¹⁷⁸

Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have that effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.¹⁷⁹

Even such strong critics of the rule as Chief Justice Burger and Professor Oaks recognize, however, that one cannot seriously argue that effective alternatives are available until tenable replacements are enacted by legislatures.¹⁸⁰ Although several interesting alternative proposals

177. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting); Perlman, *supra* note 104.

178. 384 U.S. 436 (1966).

179. *Id.* at 467. For statements of similar attitudes, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting); *Gilbert v. California*, 388 U.S. 263, 273 (1967); *United States v. Wade*, 388 U.S. 218, 239 (1967).

180. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) ("I would hesitate to abandon it until some meaningful substitute is developed"); Oaks 756 ("the exclusionary rule should not be abolished until there is something to take its place"). For a similar statement by Justice Powell, see note 91 *supra*. In determining whether states should be entitled to petition the Supreme Court for approval of their alternative enforcement devices, consideration must be given to the propriety of the Court's inviting litigation in case after case to determine the efficacy of each state's substitute remedy. The Court has been asked to permit relaxation of the exclusionary rule in states that have created acceptable tort remedies for violations of fourth amendment rights. For a summary of the oral arguments in *Stone v. Powell*, 422 U.S. 1055 (1975), *granting cert. to* 507 F.2d 93 (9th

have been made, few have been tested in practice. Until data are available concerning the effect of these alternatives, it is impossible to state with any degree of certainty that these alternatives are either more effective or less effective than the exclusionary rule. Justice Brennan, in a dissent written after nearly all of the proposed alternatives discussed later in this Article had been described in published works, concluded that "no equally effective alternative has yet been devised."¹⁸¹

c. *Lack of Necessity Due to Increased Police Professionalism*

A group called Americans for Effective Law Enforcement (AELE) has urged that the exclusionary rule is no longer constitutionally compelled because today there exists a high degree of police professionalism. Moreover, they assert, the vast majority of illegal searches and seizures are made in good faith by police who are trying to obey the rather confusing law of probable cause. Thus, since the police violations are unintentional in most cases in which evidence is excluded, freeing a criminal is an unduly harsh result. In any event, the few "bad" police officers are not deterred by the exclusionary rule.¹⁸²

B. *Obstacles to Effective Deterrence*

1. *No Personal Bite*

Although the exclusionary rule often sets defendants free, it imposes no personal or financial penalty on the officer or his employing agency.¹⁸³ The only personal consequence for the officer is his possible

Cir. 1974), and *Wolff v. Rice*, 422 U.S. 1055 (1975), *granting cert. to* 513 F.2d 1280 (8th Cir. 1975), see 44 U.S.L.W. 3485 (1976).

181. *United States v. Peltier*, 422 U.S. 531, 535 (1975).

182. See Brief for Americans for Effective Law Enforcement as Amicus Curiae at 11-19, *California v. Krivda*, 409 U.S. 33 (1972). Professor Amsterdam rejects the notion that the exclusionary rule is weakened by its lack of direct sanction against the individual police officer:

It is not supposed to "deter" in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set—a theory of deterrence, by the way, whose lack of empirical justification makes the exclusionary rule look as solid by comparison as the law of gravity.

Rather, the exclusionary rule is designed to operate in the manner of the procedure now being used in some appliance stores with the encouragement of police authorities: branding the social security number of the purchaser into the chassis of new television sets in order to make them less attractive as objects of larceny by diminishing their resale value in the hands of anyone but the true owner.

Amsterdam, *supra* note 104, at 431.

183. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403

disappointment at having failed to "put a criminal behind bars." In addition, the officer may share the general uneasiness of those citizens who feel that the community is "full of crooks."

2. *Delayed Bite*

A time lag frequently exists between the officer's illegal conduct and the exclusion of evidence. Indeed, exclusion may come months or even years later. This temporal distance is said to weaken the deterrent effect of the rule.¹⁸⁴

3. *A Bite out of the Blue*

The police officer often feels hopelessly confused by the law of probable cause; but since not even the Justices of the Supreme Court agree on what the rules are, this confusion is not surprising.¹⁸⁵ To the officer untrained in law, many decisions that suppress the fruits of his diligent efforts are both unforeseeable and incomprehensible. Unable to understand the rules governing search and seizure, even the officer acting in good faith is likely to run afoul of constitutional requirements. And when the sanction is applied indiscriminately—and, for the policeman, inexplicably—to inadvertent as well as flagrant violations, the rule loses both its credibility and effect.

The deterrent effect is further reduced by the police officer's failure to perceive any readily available alternatives to risking violation of the fourth amendment in his effort to maintain order, catch criminals, and return stolen property. Nor have the courts been particularly helpful in facilitating the officer's perception of lawful alternatives. For example, judges rarely communicate to the policeman their reasons for invalidating his conduct,¹⁸⁶ nor do they generally write opinions or explain orally

U.S. 388, 416 (1971) (Burger, C.J., dissenting); *Irvine v. California*, 347 U.S. 128, 136 (1954); *Oaks*, *supra* note 4, at 725.

184. See GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 145; Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 11 (1964).

185. See, e.g., W. LAFAYE, *supra* note 131, at 164-81; Burger, *supra* note 184; LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255; Landynski, *The Supreme Court's Search for Fourth Amendment Standards: The Warrantless Search*, 45 CONN. B.J. 2 (1971); *Oaks* 725, 731; Comment, *supra* note 104, at 70-71. As one commentator put it: "Enough is enough. These processes would not deter or enlighten a policeman in Gary with a Ph.D. who was going to law school at night." Burns, *Mapp v. Ohio: An All American Mistake*, 19 DEPAUL L. REV. 80, 100 (1969). See also Traynor, *supra* note 39, at 330.

186. See, e.g., Burger, *supra* note 184, at 12; LaFave, *Improving Police Performance*

why they have granted the motion to suppress.¹⁸⁷ For that matter, few police departments systematically attempt to educate their officers on the subject of fourth amendment rights.¹⁸⁸

Proponents of the exclusionary rule urge that better communication concerning substantive constitutional rights would make the rule a better deterrent.¹⁸⁹ Opponents, however, are skeptical. They point out that not only does the police officer lack the capacity to obey all of the fourth amendment rules, but faced with suppressions that seem to operate both unpredictably and unfairly, he also lacks the incentive to obey these rules.

4. *Misdirected Bite*

Opponents argue that excluding evidence is the wrong sanction because exclusion has no effect whenever admission of evidence is not the police officer's goal.¹⁹⁰ Whether in 1886 it was true that "the

Through the Exclusionary Rule, 30 Mo. L. Rev. 391, 403 (1965); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1012 (1965); Oaks 730-31; Spiotto, *supra* note 14, at 276. Indeed a policeman may never learn of the exclusion if he is not in court when the order is made. For further discussion of the lack of communication between courts and police, see J. SKOLNICK, *supra* note 131, at 219-29; S. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* 83-99 (1970); Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROB. 467 (1971).

The Washington, D.C. Police Department has experimented with a monitoring system in which officers are assigned to the courts and the prosecutors' offices to report on all cases dropped or dismissed for reasons involving unconstitutionally seized evidence. See Wilson & Alprin, *Controlling Police Conduct: Alternatives to the Exclusionary Rule*, 36 LAW & CONTEMP. PROB. 488, 498-99 (1971). One student commentator has proposed that the court should, at the request of the criminal defendant, notify the police department, the United States Attorney, the District Attorney, and the municipal corporation counsel of an allegation that evidence was seized unconstitutionally. Comment, *supra* note 104, at 88. An Associate Deputy Attorney General of the United States, who heads the Justice Department's task force on modification of the exclusionary rule, has suggested that often police officers never bother to find out about the outcome of cases even when they could do so. *The Exclusionary Rule*, *supra* note 137, at 274 (remarks by Donald Santarelli at 1972 Judicial Conference of the United States Court of Appeals for the Ninth Judicial Circuit).

187. See Wingo, *supra* note 117, at 578. Compare the "Judges' Rules," promulgated by the Queen's Bench in England to guide police in obtaining confessions. See M. ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* 93 (1973).

188. See J. SKOLNICK, *supra* note 131, at 219-20.

189. See, e.g., Brief for ACLU, *supra* note 101, at 10-11, citing LaFave & Remington, *supra* note 186, at 1012.

190. See *Terry v. Ohio*, 392 U.S. 1, 14 (1968); Oaks 721 n.157 and authorities cited therein.

'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself,"¹⁹¹ today it seems clear that a substantial number of illegal searches and seizures are not directed toward prosecution.

The desire for prosecution is often low, for example, when police confiscate gambling paraphernalia, liquor, or narcotics. Frequently, police use such confiscations as self-help punitive sanctions or as ways merely to remove the contraband from circulation. In the control of prostitutes and homosexuals and whenever there exists a public outcry for visible enforcement, unlawful invasions of privacy are rarely aimed at gathering evidence for a prosecution. Police similarly lack a goal to prosecute when they attempt to recover stolen property or make self-protective weapons searches.¹⁹²

Jerome Skolnick reports that generally the desire of the policeman for prosecution is greater the bigger the "pinch," that is, the more serious the crime.¹⁹³ "[I]n a small pinch," he explains, "the policeman is usually not interested in an arrest but in creating an informant."¹⁹⁴

But even if a policeman might want to have a prosecution instituted, he may be willing to sacrifice this objective in favor of some other end, such as recovering stolen property or imposing a short incarceration and bail and court costs on a suspected criminal. When motivations such as these underlie the officer's illicit conduct, the exclusionary rule is unlikely to have any deterrent effect. Furthermore, the institutional pressures to arrest generally bear more heavily on police officers than do the pressures to convict. The latter pressures fall mainly on the prosecutor, and to the extent the prosecutor can control the actions of the police, he is a prime target for the deterrence provided by the exclusionary rule. As Chief Justice Burger pointed out, however, the prosecutor cannot normally prevent police from violating constitutional rights:

191. *Boyd v. United States*, 116 U.S. 616, 633 (1886).

192. See generally LaFave, *supra* note 186, at 443-44; Oaks 721-22. Professor Allen notes that the fourth amendment is violated most often in the effort to control vice crimes (such as gambling, drugs, prostitution), which are frequently handled by police through methods not intended to lead to prosecution, primarily because of public ambivalence toward the conduct made criminal. Thus, in those cases in which the fourth amendment is most violated, the exclusionary rule has its least possible deterrent capacity. Allen, *supra* note 5, at 38-39.

193. J. SKOLNICK, *supra* note 131, at 224.

194. *Id.* at 228.

[T]he prosecutor who loses his case because of police misconduct is not an official of the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.¹⁹⁵

An additional point made by detractors of the exclusionary rule is that the rule will not deter police wrongdoing unless the illegal evidence is needed by the government to obtain a conviction.¹⁹⁶ This point does not reduce the rule's deterrent capacity, however, because the policeman will rarely know at the time he decides to conduct a search whether the prosecution will need the evidence seized.

In essence, the "misdirected bite" argument maintains simply that the exclusionary rule fails to deter a significant number of the illegal searches and seizures that police officers routinely conduct. It seems reasonable to assume, however, that at least when police officers intend the objects seized to be used as evidence in a prosecution, the rule has some deterrent force. The argument then is in reality a call for supplementary deterrent devices to close the gaps rather than a call for the abandonment of the exclusionary rule.

5. *Bigger Bites*

Judicial threats to exclude evidence are outweighed in the minds of most police officers by counterpolicies and countervoices. Even if the officer understands the rules of search and seizure, the condemnation by fellow officers and superiors is likely to be a more forceful deterrent than is the condemnation by a judge. If the officer responds accordingly, the exclusionary rule will not deter whenever police values differ from legal rules.¹⁹⁷

195. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 417 (1971). See also *Irvine v. California*, 347 U.S. 128, 136 (1954); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 30 (1967) [hereinafter cited as TASK FORCE: THE POLICE]; Oaks 726; Wingo, *supra* note 117, at 576.

196. See Tiffany, *The Fourth Amendment and Police Citizen Confrontations*, 60 J. CRIM. L.C. & P.S. 442, 452 (1969).

197. See TASK FORCE: THE POLICE 28-29; Oaks 727. Professor Oaks concedes, however, that the existence of the exclusionary rule may "reinforce" police officers "who are disposed to observe the search and seizure rules but need something tangible to give fellow officers as their reason for doing so." *Id.* at 712.

Careful observers of police behavior report that a policeman who unlawfully invades a citizen's privacy may be conforming to department policy, written or unwritten.¹⁹⁸ Such department policy is influenced not only by the pressure to make arrests, but also by the perception that following court mandates may endanger the policeman's safety and impede the apprehension of criminals. For example, law enforcement personnel typically have little respect for, and little desire to comply with, the requirement that an officer knock and announce his presence before entering a dwelling. The knock may give a suspect time to secure a weapon or destroy evidence.

Some police administrators condone disregard of the law because they feel that violation of the fourth amendment is expected of policemen by a public interested in aggressive law enforcement.¹⁹⁹ Professor Oaks, agreeing that the public approves police illegality in the name of fighting crime, claims that a policeman's violation of the fourth amendment rights of a citizen "entails no loss of prestige" among colleagues or in the larger community.²⁰⁰ Thus the bigger bite of countervalues diminishes the deterrent effect of the exclusionary rule.

6. *Might Not Bite*

Deterrence is impaired because the odds are good that a policeman can violate the Constitution without detection by a court. In part, this condition exists because most criminal prosecutions follow the plea bargaining route. Motivated by the state's possession of wrongfully obtained incriminating evidence, the defendant may plead guilty and not even move to suppress the illegal evidence.²⁰¹ And because the policeman knows that such guilty pleas will often be made, the deterrent effect of the exclusionary rule is further reduced. "If capital punishment does not deter an offender because it will not happen," Professor Burns has

198. E.g., E. BITTNER, *THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 28 n.46 (1970); *TASK FORCE: THE POLICE* 28-29. See also Oaks 700 (summarizing Jerome Skolnick's observations on police attitudes and behavior in light of the exclusionary rule).

199. E. BITTNER, *supra* note 198 (quoting several urban police chiefs to this effect); Sevilla, *Exclusionary Rule and Police Perjury*, *supra* note 111, at 13.

200. Oaks, *supra* note 4, at 724; see *id.* at 727.

201. Sometimes, of course, a defendant will not plead guilty until he has lost a motion to suppress, but prosecutors seeking to avoid preparing argument on a motion to suppress may use lenient plea offers to tempt defendants into early guilty pleas. For further discussion of the interaction between guilty pleas and the exclusionary rule, see text accompanying note 230 *infra*.

asked, "why should court exclusion of evidence or appellate reversal of trial decisions deter police when 90 percent of the time there will be no trial?"²⁰²

Other sustainable motions to suppress are never sustained because the motion is not timely made and thus the right to exclusion is waived²⁰³ or because the defendant lacks standing to assert the violation. The exclusionary remedy will not operate in either instance, and the policeman and prosecutor may, therefore, use the fruits of unconstitutional labors to convict the defendant.

Further decreasing the likelihood that the exclusionary rule will be applied is the reluctance of some trial courts to suppress obviously tainted evidence. Such judicial contempt for law, far from deterring misconduct, permits and encourages it. Moreover, if a policeman is willing to lie under oath about the manner in which he obtained the evidence, he will frequently succeed in preventing suppression, since officers of the law usually are given more credence than criminal defendants in courtrooms.²⁰⁴ But, even if a court holds that the evidence cannot be used to prove guilt, the policeman's efforts may not have been wasted; such evidence may still legitimately be used for purposes of impeachment, and sentencing and parole revocation hearings.²⁰⁵ Thus, opponents argue, because the risk is low that the policeman will suffer the consequences of the exclusionary rule, deterrence is unlikely.

C. *Social Costs*

1. "*Handcuffs the Police*"

This is a common cry.²⁰⁶ A small random sample of criminal justice officials in various states surveyed two years after *Mapp v. Ohio* suggested that police effectiveness had decreased more in states that had been forced to adopt the exclusionary rule by *Mapp* than in states that already had the rule.²⁰⁷ As Professor Oaks and several others have

202. Burns, *supra* note 185, at 96.

203. See, e.g., ILL. ANN. STAT. ch. 38, § 114-12(c) (Smith-Hurd 1970).

204. See Oaks 725; Sevilla, *Exclusionary Rule and Police Perjury*, *supra* note 111, at 12; Spiotto, *supra* note 14, at 269.

205. See note 169 *supra* and accompanying text.

206. See, e.g., GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 145-46; American Bar Association Section on Criminal Justice, *Minority Report*, in SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, Report No. 107c, at 19 (1973 A.B.A. Mid-Year Meeting); Specter, *supra* note 137, at 42; cf. Nagel, *supra* note 139, at 42.

207. It has been noted, however, that the FBI, which has operated under the federal exclusionary rule since 1914, has not found the rule an impossible burden. See Elkins

pointed out, however, the "handcuffs" argument is nothing but an attack on the substantive right to be free from unreasonable invasions of privacy by the government.²⁰⁸ Why are the police said to be handcuffed? It is possible that the rule deters their aggressive efforts to some extent, but it is more likely that police feel manacled because they are prevented from using the fruits of illegal searches. Even without the exclusionary rules, however, government officers would be barred by the fourth and fourteenth amendments from conducting these searches.

2. *Encourages Unlawful Police Conduct*

If there is a germ of validity in the "handcuffs" argument, it is that the vagueness of the fourth amendment rules, coupled with the exclusionary remedy, produces a chilling effect on the policeman's urge to pursue criminals aggressively.²⁰⁹ Not only is the suppression doctrine said to deter lawful police work, but also, according to critics, it actually stimulates unlawful conduct. Police, suspecting they will be unable to obtain the evidence required to control certain behavior through the criminal justice system, devise self-help measures—that is, they take the law into their own hands.²¹⁰ Moreover, a police officer desiring to

v. United States, 364 U.S. 206, 218 n.8 (1960); Ernst, *The Policeman and Due Process*, 2 J. PUB. L. 250, 251 (1951); Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 173-74 (1953). But see Barrett, *Exclusion of Evidence Obtained by Illegal Searches: A Comment on People v. Cahan*, 43 CAL. L. REV. 565, 592 (1955) (analogy unpersuasive because of differences between the resources and responsibilities of FBI as compared with state and local police departments). Regarding the perceived impact of *Mapp v. Ohio* on police practices, see Critique, *supra* note 6, at 758-60; note 137 *supra*.

208. E.g., 1 NEW YORK STATE CONSTITUTIONAL CONVENTION, REVISED RECORD 560 (1938), reprinted in J. MICHAEL & H. WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION*, 1191, 1192 (1940) (remarks by Senator F. Wagner); Kamisar, *supra* note 102, at 1153-54; Oaks 754. Consider Professor Kaplan's comment:

Probably the major reason for the high political price of the exclusionary rule is that, by definition, it operates only after incriminating evidence has already been obtained. As a result, it flaunts before us the costs we must pay for fourth amendment guarantees. Of course, the command of the fourth amendment itself contemplates less than complete efficiency in criminal law enforcement. The problem is that the exclusionary rule rubs our noses in it.

Kaplan, *supra* note 5, at 1037.

209. Allen, *supra* note 5, at 39. But cf. note 207 *supra*.

210. GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 152 ("If because of the rule, police cannot obtain the convictions they consider necessary to carry out their law enforcement function, they may resort to harassing raids and confiscation to impose extra-judicial punishment"); see TASK FORCE: THE POLICE 187; Allen, *supra* note 5, at 39; Oaks 750-52; Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 257 (1961).

avoid exclusion of evidence may feel impelled to lie about the conditions of the arrest or search and seizure. Professor Oaks reports that an unidentified police official admitted that officers routinely

“lie about [their conformity with] the no-knock rule [which requires an announcement of authority and purpose before forcing entry in a private dwelling] because it affects their personal safety.”²¹¹

To say that the exclusionary rule tends to foster false testimony to satisfy admissibility standards is perhaps less a condemnation of the legal remedy than of police integrity. But regardless of the cause, the problem remains. Some police officials estimate that officers distort the facts in approximately one-third of all cases in which they are assisted by special detail policemen, such as the vice squad. And when the defendant is a “professional thief,” the incidence of lying about probable cause for arrest and search may be as high as 98 percent.²¹² As the state of Illinois urged in an amicus brief, “The effect of the exclusionary rule in search and seizure cases is not deterrence but perjury.”²¹³

Perhaps even more reprehensible than convictions secured with falsified police reports is another practice made possible by the exclusionary rule: collusion between police officers and defense attorneys to obtain the acquittals of guilty defendants. That such collusion occurs repeatedly has been documented.²¹⁴ At least the lying to convict can be

211. Oaks 741 n.226 (brackets in original). See also Oaks 697-99 (sharp increase in number of arrests involving narcotics dropped to ground prior to arrest, as evidence of police fabrication of grounds to satisfy probable cause requirements). On police false testimony in general, see J. SKOLNICK, *supra* note 131, at 214-15; J. Spiotto, *supra* note 128; Kuh, *The Mapp Case One Year After: An Appraisal of Its Impact in New York*, 148 N.Y.L.J. 4, 4 n.2 (1962); Oaks 739-42; Younger, *Constitutional Protection on Search and Seizure Dead*, 3 TRIAL, August/September, 1967, at 41; Comment, *supra* note 158, at 1458 n.43.

212. Oaks 741-42.

213. Brief for State of Illinois as Amicus Curiae at 6, *California v. Krivda*, 409 U.S. 33 (1972). See also P. CHEVIGNY, *POLICE POWER* 187-88 (1969); J. RUBENSTEIN, *CITY POLICE* 386-90 (1973); J. SKOLNICK, *supra* note 131, at 214-15; J. WAMBAUGH, *THE BLUE KNIGHT* 178-220 (1972); Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549 (1968); Oaks 739; Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, *supra* note 139, at 95; Comment, *Police Perjury in Narcotics “Dropsy” Cases, A New Credibility Gap*, 60 GEO. L.J. 507 (1971). Contrast the view that the “exclusionary rule is a ‘cause’ of perjury only in a superficial sense. The more basic cause is the simple violation of the fourth amendment by the police that makes the perjury relevant.” Critique, *supra* note 6, at 761 n.92.

214. See *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926); Brief for State of Illinois, *supra* note 213, at 4-5; A. DEUTSCH, *THE TROUBLE WITH COPS* 14-15 (1955); GOVERNOR’S SELECT COMMITTEE, *supra* note 146, at 152; J. Spiotto, *supra* note 128;

explained as overzealousness and can be checked by equal but opposite forces; the lying to acquit, however, spells total corruption, the policeman having abandoned even the police value system. Furthermore, the exclusionary rule has the special attribute of enabling an officer to immunize a criminal defendant against conviction by intentionally conducting an illegal arrest or search and seizure in the first instance, thus making it unnecessary later to distort the facts surrounding the arrest or search. In this way, police routinely satisfy both the public outcry for crack-downs on prostitution or gambling and the pressure of organized crime for a hands-off policy.

3. *Distorts the Fact-Finding Process*

The jury is deceived when the truth is suppressed. Because the tangible evidence that is suppressed is generally no less reliable simply because it was unlawfully obtained, a strong countervailing policy ought to be present before a jury is deprived of the benefit of highly probative, available evidence. Perhaps protection of constitutional rights of citizens or "the imperative of judicial integrity"²¹⁵ is such a countervailing concern. But consider the argument that

[t]he constitutional rights of a person should not be diminished by the fact that he also committed a crime. Similarly, the fact that a person's rights were violated should not have a bearing on his own guilt. Both matters should receive a full airing in the proper forum.²¹⁶

Many other commentators have objected that the exclusionary rule shifts the emphasis of the trial from adjudication of the defendant's innocence or guilt to adjudication of police methods.²¹⁷ At worst, defense attor-

Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 392 (1951); McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L.C. & P.S. 266 (1961); Oaks 749-50; Paulsen, *supra* note 210, at 256; Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U.L. REV. 46, 57-59 (1957).

215. *Elkins v. United States*, 364 U.S. 206, 222 (1960); see text accompanying note 107 *supra*.

216. Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 74 (1974).

217. *E.g.*, 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2184a, at 51-52 (McNaughton ed. 1961); J. WILSON, VARIETIES OF POLICE BEHAVIOR 52 (1968); Barrett, *supra* note 207, at 591; Paulsen, *supra* note 210, at 256-57; Wingo, *supra* note 117, at 583-84; Comment, *supra* note 158, at 1458. Consider Justice Frankfurter's statement in *Jones v. United States*, 362 U.S. 257, 264 (1961) (emphasis added), that Federal Rule of Criminal Procedure 41(e), "requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant

neys may "become so concerned with the question of suppression that they never seriously prepare for trial or explore defenses on the merits."²¹⁸ In addition, a criminal trial may be poorly adapted to reviewing police actions because, lacking a direct complaint charging the policeman as a defendant, the court has no jurisdiction to adjudicate the policeman's guilt.²¹⁹

4. *Breeds Popular Disrespect for Law*

Because the exclusionary rule is applied whenever evidence is found to be the fruit of unlawful conduct, whether the unlawful conduct be intentional or inadvertent, commentators complain that the rule is too rigid. Most critics suggest something like a "substantial violation" test, in which a flagrant violation of the fourth amendment would trigger the exclusionary rule but an honest mistake would not.²²⁰

Arguing that exclusion is an ineffective deterrent unless the violation has been "intentionally or flagrantly illegal,"²²¹ Judge Friendly observes that the talk of deterrence is reminiscent of the criminal law's deterrent purposes. But in that context, he says, judges usually have discretion

to the question of guilt." Contrast the view that in the typical criminal justice system in the United States,

[t]he question . . . is not guilt, which is factually if not procedurally assumed, but disposition—what is to be done with the defendant. In such a system, the critics' complaint that the exclusionary rule "distracts" the attention of the court away from the issue of guilt has a rather hollow ring.

Critique, *supra* note 6, at 775 (footnote omitted).

218. Brief for State of Illinois, *supra* note 213, at 4. The assertion in the brief is not supported by evidence or citation to authority.

219. *Cf.* Paulsen, *supra* note 210, at 256-57. In effect, the court is deciding whether the criminal defendant's fourth amendment rights have been violated by the policeman in a proceeding that affords the policeman neither representation nor due process rights. Nevertheless, the policeman is not being personally punished when a court excludes evidence. If a civil judgment were rendered against a policeman for violation of a person's constitutional rights, the officer would first have an opportunity to be heard and to defend himself, and if he were made a defendant in one of the rare criminal prosecutions for fourth amendment violations, the policeman would be protected by the full panoply of due process guarantees.

220. *See, e.g.,* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting); National Ass'n of Attorneys General, Resolution, December 15, 1971, cited in Brief for Americans for Effective Law Enforcement, *supra* note 182, at 8; Barrett, *supra* note 207, at 591; *Majority Report of the Committee on Federal Legislation*, *supra* note 169; Comment, *supra* note 158, at 1458 n.44. *See also* S. 881, 93d Cong., 1st Sess. (1973). For discussion of the various proposed modifications of the standards for excluding evidence, see notes 261-64 and accompanying text *infra*.

221. Friendly, *supra* note 4, at 952.

with respect to the degree of punishment to be inflicted on the wrongdoer.²²² Chief Justice Burger notes, however, that in the case of the exclusionary rule "universal 'capital punishment'" is inflicted "on all evidence when police error is shown in its acquisition."²²³ The alleged results of such inflexibility are capricious decisions respecting equally guilty defendants:

One may be convicted, but another freed solely because in his case a police officer failed to give notice of his authority before entry, even though acting under a valid search warrant issued by a court.²²⁴

When the defendant has been charged with a serious crime, the disproportion between the violation and the remedy is thought to be even more objectionable to the public at large. Our current policy, claim the critics, makes no differentiation between the release of murderers and drunks; in addition, it treats a police mistake as more serious than the release of a murderer.²²⁵

These critics seem disingenuous, however, because they certainly must realize that most of the "criminals" freed as a result of the

222. *Id.*

223. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

224. GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 151.

225. *Id.* at 146; *cf.* Spiotto, *supra* note 4, at 39 (1973). Chief Justice Burger reiterated this view during oral arguments of *Stone v. Powell*, 422 U.S. 1055 (1975), *granting cert. to* 507 F.2d 93 (9th Cir. 1974), and *Wolff v. Rice*, 422 U.S. 1055, *granting cert. to* 513 F.2d 1280 (8th Cir. 1975). See 44 U.S.L.W. 3485, 3486 (1976). The report of the oral argument in *Wolff v. Rice* in *The Chicago Daily Law Bulletin*, Feb. 26, 1976, at 1, col. 2, quotes the Chief Justice's characterization of the issue as being whether "a man who set a booby trap to kill a policeman for personal political reasons will get off scot-free." One student commentator claims that the release of the defendant charged with rape and attempted murder in *Bumper v. North Carolina*, 391 U.S. 543 (1968), "is a common example of the operation of the so-called 'exclusionary rule.'" Comment, *The Exclusionary Rule in Search and Seizure: Examinations and Prognosis*, 20 U. KAN. L. REV. 768 (1972). For a critical appraisal of the suggestion that the exclusionary rule "favors the hardened criminal most of all," see Critique, *supra* note 6, at 764, 764-76. Cases such as *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), which involved a "particularly brutal" murder of a 14-year-old girl, are often cited to illustrate how the exclusionary rule frees serious offenders, but it is important to note that Mr. Coolidge was reconvicted in his new trial without the suppressed evidence. Mr. Miranda, incidentally, was also reconvicted without the use of his confession. *The Exclusionary Rule*, *supra* note 137, at 278 (remarks by John Flynn at 1972 Judicial Conference of United States Court of Appeals for the Ninth Judicial Circuit). An interesting and perhaps significant inquiry would be to ascertain what percentage of "serious offenders" are ultimately set free because of the suppression of evidence.

exclusionary rule are those charged not with murder but with possession offenses such as gambling, narcotics, and weapons. Conviction for these crimes virtually requires tangible evidence that can only be obtained by search and seizure. A study of motions to suppress in felony cases in the District of Columbia in 1965 revealed that in all homicide, rape, and assault cases combined, a motion to suppress was granted for only one percent of the charges. And with respect to that one percent, only one case in six was dismissed as a result of the motion to suppress.²²⁶ In short, it is obfuscatory emotionalism to imply that murderers frequently go free by invoking the exclusionary rule.

Nevertheless, people guilty of other kinds of crimes *are* set free by the exclusionary rule, and opponents of the present rule often point to the popular fear and disrespect for the legal system that is generated when criminals go free.²²⁷ The popular fear is that innocent citizens may be injured by an offender who is released because the "constable blundered."²²⁸

We must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual—the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection [judges] hold office.²²⁹

Even if the defendant is not immediately set free when evidence is suppressed, the exclusionary rule is said to contribute to the crime problem and thus to public fear. One contention centers around the rule's effect on the plea bargaining process. If the possibility of a successful motion to suppress exists, the prosecutor will tempt the defendant by offering a short term of imprisonment,²³⁰ which means the criminal will be loosed on society that much sooner. Moreover, it is

226. Oaks 686-87. See also Kaplan, *supra* note 5, at 1036; note 6 *supra*.

227. See, e.g., *State v. Bisaccia*, 58 N.J. 586, 587, 279 A.2d 675, 676 (1971); Burger, *supra* note 184, at 12, 22, 23; Paulsen, *supra* note 210, at 256. See also *People v. Williams*, — Colo. —, 541 P.2d 76, 79 (1975) (dissenting opinion).

228. *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). See also 8 J. WIGMORE, *supra* note 217, § 2184a, at 51-52; Paulsen, *supra* note 210, at 256; Wilson, *Police Authority in a Free Society*, 54 J. CRIM. L.C. & P.S. 175, 177 (1963).

229. *State v. Bisaccia*, 58 N.J. 586, 590, 279 A.2d 675, 677 (1971).

230. See GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 146, 152; Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 56 (1968); Oaks 748; Comment, *supra* note 158, at 1458.

urged that the rule requires sacrificing the certainty of conviction for the mere possibility of deterring the police officer from law breaking,²³¹ and that this loss of certainty of conviction has contributed to increased crime.²³²

The freeing of "obviously" guilty defendants is also claimed to be the source of public lack of confidence in the courts.²³³ As then Circuit Judge Warren Burger declared:

[W]e may have come the full circle from the place where Brandeis stood . . . and a vast number of people are losing respect for law and the administration of justice because they think that the Suppression Doctrine is *defeating* justice. That much of this reaction is due to lack of understanding does not mean we can ignore it.²³⁴

Certainly the courts should not ignore the majority voice, but we are dealing here with the rights of minorities. Perhaps rather than take advantage of public "lack of understanding," our courts should fulfill their great educative role by explaining the importance of safeguarding fundamental rights—even when the rights are those of our outcasts.²³⁵ It

231. See Oaks, *supra* note 4, at 737.

232. See PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 872-73 (1966) (minority report).

233. See, e.g., Burger, *supra* note 184, at 12, 22, 23; Paulsen, *supra* note 210, at 256. For attempts to measure public attitudes, see A. REISS, *Public Perceptions and Recollections About Crime, Law Enforcement, and Criminal Justice* 80-90, in *STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS* (President's Comm'n on Law Enforcement & Admin. of Justice, Field Survey III, 1967); *Crime—The Courts*, GALLUP OPINION INDEX, Report No. 45, at 12 (March 1969).

Professor Wigmore saw the suppression of highly probative evidence as inimical to popular respect for the criminal justice system:

"Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."

8 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2184, at 40 (3d ed. 1940). The problem with Wigmore's enchanting parable is his convenient, but unfounded, assumption that somehow Titus will have been "found guilty" prior to the exclusion of evidence. Professor Oaks warns that we cannot be certain the defendant is guilty. Oaks 739.

234. Burger, *supra* note 184, at 12. The reference is to Brandeis' famous statement: "If Government becomes a law breaker it breeds contempt for the law . . ." *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

235. Justice Douglas observed that "wherever a culprit is caught red-handed . . . it is difficult to adopt and enforce a rule that would turn him loose. A rule protective

is also noteworthy that in the comparable situation of freeing a defendant whose coerced confession has been corroborated, which has an equal capacity for producing disrespect for the law and courts, we nevertheless suppress the coerced confessions out of a sense of justice.²³⁶

Despite these counterarguments, the exclusionary rule remains in disfavor. Professor Wright has asserted that a rule which turns loose on society criminals responsible for violent crimes "can be justified only by clear and convincing evidence that its benefit to society outweighs this obvious cost."²³⁷ Let us, therefore, consider the additional costs that critics claim the rule imposes.

5. Causes Court Delay

It is claimed that exclusionary rule court proceedings consume a substantial amount of trial court time and create an overwhelming appellate workload.²³⁸ Moreover, some practitioners claim that witnesses willing to testify on the merits of a case become discouraged or unavailable during the delay caused by a hearing on the motion to suppress.²³⁹ If it is merely a matter of lack of personnel, it would be tempting to urge that more judges, prosecutors and defense attorneys (public or private) simply be assigned to criminal cases. After all, the public is entitled to a criminal justice system that dispenses fair and speedy services. If significant attention is required to protect the individual rights for which this country was founded, then significant resources should be allocated to the task.

Curiously, some of those who complain most stridently about court delay and the loss of witnesses propose a modified exclusionary rule with a substantial violation test.²⁴⁰ Yet a modified standard such as this

of law-abiding citizens, is not apt to flourish where its advocates are criminals." *Draper v. United States*, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting). See also *Harris v. United States*, 331 U.S. 145, 156 (1947) (Frankfurter, J., dissenting). See note 243 *infra*. On the responsibility of lawyers to play an educative role with respect to the importance of the exclusionary rule, see Traynor, *supra* note 39, at 342-43.

236. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *cf. id.* at 684-85 (dissenting opinion) (distinguishing the confession situation). Professor Oaks contends that the suppression of confessions causes dismissal less often than does suppression of physical evidence. Oaks 738.

237. Wright, *supra* note 104, at 742.

238. *Majority Report of the Committee on Federal Legislation*, *supra* note 169, at 4239; Paulsen, *supra* note 210, at 256-57; Comment, *supra* note 158, at 1457.

239. Brief for State of Illinois, *supra* note 213, at 4.

240. See *id.* For discussion of the substantial violation test, see text accompanying notes 261-64 and note 261 *infra*.

would tend to cause even *more* delay because it would require courts to make an additional finding beyond probable cause: If no probable cause existed, was the constitutional right substantially violated?²⁴¹

6. *Protects Only the Guilty*

The exclusionary rule operates only when evidence has been seized and is sought to be introduced to incriminate the defendant. Because most illegally seized evidence is reliable, the argument goes, those against whom such evidence is sought to be introduced are guilty. On the other hand, if an unconstitutional search turns up no evidence of crime, the victim of the search is innocent but cannot vindicate his constitutional rights by moving to suppress because there is nothing to suppress. To many, a rule that aids *only* the guilty²⁴² is an anathema.

The argument that the rule "protects only the guilty" is problematic. Although it is admittedly true that the exclusionary rule is an after-the-fact remedy only for those against whom incriminating evidence has been discovered, these persons are not necessarily the only ones who benefit from the educative and deterrent effect of the rule. By rejecting the fruits of an illegal search, courts arguably demonstrate the importance of constitutional rights²⁴³ and thus secure the privacy of the vast majority of Americans who do not commit crimes.

241. See *United States v. Peltier*, 422 U.S. 531, 560-61 (Brennan, J., dissenting). Judge Friendly predicts that the substantial violation approach would save time:

[T]he recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve [courts] of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one.

Friendly, *supra* note 4, at 953. In essence, Judge Friendly implies that courts would skip the question whether there was probable cause if they felt, as he thinks is true in most cases, that there was no flagrant or deliberate violation of fourth amendment rights.

242. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415-16 (1971) (Burger, C.J., dissenting); *Irvine v. California*, 347 U.S. 128, 136 (1954); *Wolf v. Colorado*, 338 U.S. 25, 30-31 (1949); *Majority Report of the Committee on Federal Legislation*, *supra* note 169, at 4239; *Oaks* 736; Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A.J. 815, 816 (1964).

243. Justice Frankfurter, in 1947, stated:

[I]t is precisely because the appeal to the fourth amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance. Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends.

Harris v. United States, 331 U.S. 145, 156 (1947) (Frankfurter, J., joined by Murphy & Rutledge, JJ., dissenting). See note 235 *supra*.

In a very different way, the same point can be made about the number of Americans potentially protected by the exclusionary rule. If one questions the basic assumption that the vast majority of Americans are innocent of wrongdoing, the question then becomes: Who are "the guilty" protected by the rule? Most of us like to believe that a "we-they" dichotomy exists between law-abiding, tax-paying citizens and criminals. This is doubtful.²⁴⁴ Rather, the crimes of most Americans are not detected or are not prosecuted, and thus only one in 100 of us becomes a criminal defendant in any given year.²⁴⁵ If police were to conduct illegal searches and to seize items illegally from the large number of Americans who actually violate the laws, perhaps the exclusionary rule would suddenly become popular. Certainly, events such as the systematic defiance of probable cause requirements in the San Francisco Police Department's dragnet searches for the "Zebra killers"²⁴⁶ should give pause to those persons who downplay the relevance of fourth amendment protections in the lives of law-abiding citizens.

Another basic objection to this "only protects the guilty" argument is that, like the argument that the exclusionary rule deters police misconduct only when there is intent to prosecute, the argument calls for supplementation, not abandonment, of the exclusionary rule. The point is that *at least it protects the guilty*, who have as strong a right to constitutional protection as the law-abiding citizens. Indeed, the exclusionary rule may not be designed to protect the innocent. To protect them may require implementing an effective tort or other remedy. This combination of remedies gives to each class of aggrieved persons the remedy most likely to afford meaningful protection from illegal police conduct.

244. A study of the extent of delinquent behavior among adolescents revealed that 88 percent had committed crimes, although only nine percent of their delinquent acts were detected by the criminal justice system. Other studies show that up to 93 percent of youthful adults admitted offenses which could have sent them to prison. Klapmutz, *Toward a New Criminology*, in *CRIME AND DELINQUENCY LITERATURE* (1973). On the "we-they" dichotomy, see Comment, *The Impending Limitation of the Scope of the Exclusionary Rule: Will the Supreme Court Vandalize the Constitution?*, 5 N.C. CENT. L.J. 91, 95 (1973).

245. Roughly two million Americans have been criminal defendants during each of several recent years. Klapmutz, *supra* note 244.

246. See N.Y. Times, April 19, 1974, at 1, col. 2 ("Hundreds of Coast Blacks Frisked in Hunt for Killers"). On April 25, 1974, a United States District Court in San Francisco enjoined the police from stopping and searching persons unless there was reason independent of a general profile used during the dragnet sweep to suspect the person had committed a crime. For discussion of injunctive relief in cases of systematic police violations, see text accompanying notes 380-85 *infra*.

7. *Discourages Development of Alternatives and Supplements*

The effort to develop exclusionary rule supplements to protect persons from whom no incriminating evidence was seized is said to be hindered by the very existence of the rule.

The enormous concentration and reliance upon the exclusionary rule may forestall the development of alternative mechanisms for controlling improper behavior by the police. By a peculiar form of federal preemption, the *Mapp* decision may sap state officials' energy and determination to control law enforcement officials in alternative ways that might prove just as effective and even more comprehensive than the exclusionary rule.²⁴⁷

In addition to limiting the incentive to experiment with new enforcement techniques, the exclusionary rule is perceived as too arbitrary and inflexible to merit imposing other currently available sanctions, such as internal police discipline, whenever evidence is suppressed.²⁴⁸

8. *Dilutes Substantive Right Against Unreasonable Searches and Seizures*

Professor Hill has observed that "[t]he definition of a right turns, in important part, on the degree to which it is implemented."²⁴⁹ Because of the myopic view that criminals are the only beneficiaries of the exclusionary rule, courts dilute the substantive right against unreasonable searches and seizures rather than suppress evidence.²⁵⁰

It has been suggested that whenever the possibility exists of a guilty person going free, the pressure on courts to distort probable cause

247. Oaks, *supra* note 4, at 753.

248. See Brief for Americans for Effective Law Enforcement, *supra* note 182, at 23-24; cf. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). For comparison, consider the view of two careful observers that American courts use the exclusionary rule because of the failure of internal discipline—the failure of police to police themselves. N. MORRIS & G. HAWKINS, *supra* note 5, at 101.

249. Hill, *supra* note 101, at 192.

250. See *Draper v. United States*, 358 U.S. 307, 314-15 (1959) (Douglas, J., dissenting); Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 55; Kaplan, *supra* note 5, at 1036-37, 1047; Note, *The Privacy Interest of the Fourth Amendment: Does Mapp v. Ohio Protect It or Pillage It?*, 74 W. VA. L. REV. 154, 155-56 (1972); note 252 *infra*. Observing that the Supreme Court dilutes the substantive right against unreasonable search and seizure so that the exclusionary rule can realistically be used for enforcement, Professor Kitch reflects: "It is all a bit backward." Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition*, 1969 SUP. CT. REV. 155, 166.

concepts in order to sustain the admissibility of evidence is analogous to the pressure on police officers to distort facts to prevent the exclusion of evidence.²⁵¹ Intentional distortion of the law by courts²⁵² is as imposing a problem as purposeful perjury by police officers. Mr. Justice Douglas warned that the weakening of probable cause diminishes the security of all people:

[T]he standard set by the Constitution . . . is one that will protect both the officer and the citizen. For if the officer acts with "probable cause" . . . he is protected even though the citizen is innocent.²⁵³

251. Brief for State of Illinois, *supra* note 213, at 6 & n.1.

252. The evisceration of fourth amendment requirements may be seen in a number of Supreme Court cases. *E.g.*, *United States v. Robinson*, 414 U.S. 218 (1973) (holding that police officer making mere traffic arrest can conduct warrantless full search of driver, without any reason to suspect that driver is concealing weapons or would be dangerous), *noted in* 8 U. SAN FRANCISCO L. REV. 777 (1974); *Gustafson v. Florida*, 414 U.S. 261 (1973) (companion case to *Robinson*); *Terry v. Ohio*, 392 U.S. 1 (1968) (giving police the much-abused right to stop and frisk citizen when police officer reasonably fears that citizen is armed and dangerous); *Brinegar v. United States*, 338 U.S. 160, 171-75 (1949) (holding that generally accepted rules of evidence do not apply in motion to suppress hearing to determine whether police had probable cause to arrest). *Compare* *United States v. Brignoni-Ponce*, 422 U.S. 873, 888 (1975) (Douglas, J., concurring) (decrying weakening of fourth amendment protections caused by *Terry*), *with* *Traynor, supra* note 39, at 334 (terming the stop and frisk procedure a service rather than a disservice to privacy rights). *See also* *Cardwell v. Lewis*, 417 U.S. 583 (1974); *United States v. Edwards*, 415 U.S. 800 (1974); *Abel v. United States*, 362 U.S. 217 (1960), *discussed in* *Kaplan, supra* note 5, at 1037; *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963).

The exclusionary rule has had another significant effect: with the exception of a few decisions turning on first amendment issues in obscenity cases, the Court's recent decision in *Brown v. Illinois*, 422 U.S. 590 (1975), marked the first time in four years that the Court held a state search and seizure unconstitutional. The four-year hiatus may well have been purposefully used to avoid reconsidering the exclusionary rule, which a holding of unconstitutionality might have required, in the absence of the kind of alternative remedy that the majority maintains is necessary before the Court would abandon the rule. In *Brown*, the Court did not re-evaluate the exclusionary rule in holding that the mere giving of *Miranda* warnings does not per se dissipate the taint of a defendant's illegal arrest and render his post-arrest statements admissible. A collateral consequence of the Court's general refusal to grant certiorari when a lower court has held a search and seizure constitutional may be the development of serious conflicts among the federal circuit cases and the tolerance of highly questionable fourth amendment law in some areas of the country. *Cf.* 34 OHIO ST. L.J. 706, 706 & n.6 (1973) (noting conflicting state and lower federal court decisions on the scope of the rule permitting unconstitutionally seized evidence to be used to impeach a criminal defendant).

253. *Draper v. United States*, 358 U.S. 307, 324 (1959) (Douglas, J., dissenting). It has been argued that abandonment of the exclusionary rule in cases in which a warrant has been secured might result in the dilution of the probable cause standard. That is, "magistrate shopping" would reduce the standard "to that required by the least demanding official authorized to issue warrants." *United States v. Karathanos*, Civil No. 75-1322 (2d Cir. Feb. 2, 1976), *reported in* BNA CRIM. L. REP. 2465, 2466 (1976).

When first encountered, this argument against the exclusionary rule may seem persuasive, even to proponents of the suppression doctrine. But the argument rests on the dubious dual assumptions that elimination of the exclusionary rule would result in a restoration of lost fourth amendment standards and that fourth amendment rights can be protected by a remedy other than the exclusionary rule. So long as tort remedies are seldom used, the probable net effect of abandoning the exclusionary rule would be to make search and seizure provisions of the fourth amendment irrelevant. Nevertheless, the widespread uneasiness with the present rule seems to make its amendment or abandonment inevitable. It is necessary, therefore, to examine the various proposals that have been made for enforcing the fourth amendment.

V. PROPOSALS FOR ENFORCING THE FOURTH AMENDMENT

A. *Positions on the Exclusionary Rule*

Analysis of case law, proposed legislation, and commentary yields three basic recommendations for dealing with the assault on the exclusionary rule: keep it, change it, discard it. The proponents of all three positions recognize that securing the constitutional rights of all people requires the implementation of other devices, either in addition to or instead of the exclusionary rule. A review of these positions and suggested devices follows.

1. *Keep It*

Although some students of the problem have suggested retaining the exclusionary rule for federal proceedings but abandoning or modifying it for the states, most authorities propose that the same policy be followed for both federal and state criminal proceedings.²⁵⁴ Leading voices for retaining the current rule include Supreme Court Justices Brennan and Marshall and former Justice Douglas.²⁵⁵ In addition, the

254. Justice Frankfurter and Professor Kamisar both advocated that the exclusionary rule be required only in federal proceedings. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949); Kamisar, *supra* note 102, at 1105. It should be noted that strong criticism of the exclusionary rule did not begin until after the rule was applied to the states through *Mapp v. Ohio*; therefore, the Supreme Court may be inclined to overrule *Mapp* but not *Weeks v. United States*, which applied the rule in federal criminal trials.

255. See *United States v. Calandra*, 414 U.S. 338, 355 (1974) (Brennan, J., joined by Douglas & Marshall, JJ., dissenting). Many commentators have been proponents of the exclusionary rule over the years. E.g., Allen, *supra* note 105, at 17-19; Amsterdam, *supra* note 104; Atkinson, *supra* note 104; Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J.

House of Delegates of the American Bar Association at its 1973 Mid-Year Meeting voted approval of the current exclusionary rule and disapproval of a congressional bill that would modify the rule.²⁵⁶ Some commentators, bold in the face of the massive assault on the rule, have urged extending the rule's application to evidence now uniformly held admissible.²⁵⁷ It should be noted, however, that included within the significant group now defending the exclusionary rule are those who are prepared to modify or abandon the rule if alternative remedies prove more effective.²⁵⁸

681 (1974); *The Exclusionary Rule*, *supra* note 137, at 278-83 (remarks by John Flynn at 1972 Judicial Conference of the United States Court of Appeals for the Ninth Judicial Circuit); Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472, 499 (1948); Hall, *supra* note 207, at 173-76; Kamisar, *Public Safety and Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171 (1962); Kamisar, *Some Reflections on Criticizing the Courts, and "Policing the Police,"* 53 J. CRIM. L.C. & P.S. 453 (1962); Kamisar, *supra* note 102; McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327 (1973); Paulsen, *supra* note 210; Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 74 (1957); Quintana, *Erosion of the Fourth Amendment Exclusionary Rule*, 17 HOW. L.J. 805 (1973); Traynor, *supra* note 39; Comment, *supra* note 58; Critique, *supra* note 6; Comment, *supra* note 244; Comment, *Judicial Integrity and Judicial Review*, *supra* note 102. Circuit judges Mansfield and Oakes recently expressed support for retention of the rule. *United States v. Karathanos*, Civil No. 75-1332 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465-67 (1976).

256. See 41 U.S.L.W. 2438 (1973).

257. In the Oliver Wendell Holmes Lectures of 1974, Professor Amsterdam argued for an expansion of the rule to suppress evidence, other than weapons, obtained as a result of a *lawful* stop and frisk:

When a frisk power allowed exclusively upon the predicate that the officer needs to protect himself from deadly assaults by a person he has stopped for questioning becomes a motive to stop and question persons whom the officer would not stop at all except for the opportunity to use a frisk as an evidence-gathering device, surely fourth amendment values are seriously infringed. And surely the exclusionary rule may properly be used to withdraw incitements of that infringement.

Amsterdam, *supra* note 104, at 437-38. See also Comment, *Judicial Integrity and Judicial Review*, *supra* note 102, at 1147-64.

258. See, e.g., American Bar Association Section on Criminal Justice, *supra* note 130, at 10 (proposing retention of rule and addition of tort remedy and, if empirical data indicate tort action is effective, re-examination of *Mapp* exclusionary rule); 34 OHIO ST. L.J. 706, 707 (1973). The respondents in *California v. Krivda*, 409 U.S. 33, stated in their brief:

[T]his Court might well, in its decision in this case, promulgate alternatives to the exclusionary rule to be applied concomitantly with and in addition to the exclusionary rule. If these alternative sanctions appear workable, it may *hereafter* be possible to retreat from the exclusionary rule.

Brief for Respondents, *supra* note 105, at 89 (emphasis original). See also note 266 *infra*. For citations to most of the published defenses of the exclusionary rule, see note 255 *supra*.

2. *Change It*

Chief Justice Burger, who in *Bivens* called upon Congress and state legislatures to provide alternative remedies so that the Supreme Court could abandon the exclusionary rule,²⁵⁹ hinted that he would approve judicial restriction of the rule without awaiting legislation.²⁶⁰ It is possible that such a position could command a Supreme Court majority. If the Court were to restrict the rule, it would most likely do so by adopting one of the many formulations of the substantial violation test that have been put forward in recent years.²⁶¹ To do so would be in

259. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421-24 (1971) (dissenting opinion). Compare the position taken by Justice Powell. See note 91 *supra*.

260. Chief Justice Burger stated in his *Bivens* dissent:

Independent of the alternative embraced in this dissenting opinion, I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced.

403 U.S. at 424. Senator Bentsen of Texas obliged the Chief Justice by introducing S. 2657, 92d Cong., 1st Sess. (1971). See text accompanying note 334 *infra*.

261. See, e.g., S. 881, 93d Cong. 1st Sess. (1973) (setting forth six criteria for a substantial violation). This bill is discussed in detail in the text accompanying notes 334-371 *infra*. See particularly the text following note 338 *infra*. Judge Friendly has suggested that "intentionally or flagrantly illegal" police conduct should trigger the exclusionary rule. Friendly, *supra* note 4, at 952; see *Collins v. Beto*, 348 F.2d 823, 835-36 (5th Cir. 1965) (Friendly, J., concurring). Professor Wright would retain the rule for outrageous police conduct of the kind in *Mapp v. Ohio* and *Irvine v. California* because "[i]t is demeaning to the courts and to the legal system if conviction can rest on *blatant disregard* by the police of the constitutional rights of our people." Wright, *supra* note 104, at 744 (emphasis added). Professor Kamisar, commenting on Justice Frankfurter's position, has asserted:

To use the fruits of certain violations of due process . . . Frankfurter was to say in *Rochin v. California*, is "to sanction the brutal conduct," to afford it "the cloak of law," "to brutalize the temper of a society." But to use the fruits of other violations of due process, Frankfurter seems to have said in *Wolf*, is to do none of these things. No sanction. No cloak. No effect on society's temper. Or not enough to worry very much about.

Kamisar, *supra* note 102, at 1124 (footnote omitted). Professor Hill proposes that police "willfulness or indifference" toward constitutional violations should justify suppression of evidence. Hill, *supra* note 101, at 184. The state of Illinois has urged:

The rule excluding evidence improperly seized should be applied only when the seizure constitutes a *substantial violation* of rights and only after the court weighs the question of exclusion in light of the *public interest in obtaining reliable evidence* for the prosecution of *serious crimes of violence*.

Brief for State of Illinois, *supra* note 213, at 3 (emphasis added). Illinois in its brief also recommended considering whether the police conduct was "flagrant, deliberately abusive of basic rights or intentionally violative of obvious rules governing search and seizure." *Id.* at 13. In connection with the brief's hint that the exclusionary rule be

keeping with Justice Traynor's suggestion in *People v. Cahan* that suitable exceptions could be developed for "unreasonable searches and seizures . . . which may involve only minor intrusions of privacy or result from good-faith mistakes of judgment on the part of police officers."²⁶² One possible result of adopting a substantial violation test would be that when a police officer obtained a warrant which later proved to be defective, the exclusionary rule would not be applied because it was the issuing magistrate who was at fault and not the police officer who in good faith acted upon the warrant.²⁶³

Capturing the attitude of many of those who urge restriction of the exclusionary rule, the Governor of California's Select Committee on Law Enforcement Problems stated in its report:

There is nothing magic about the word "constitutional." Violations of constitutional rights, like any others, cover a spectrum from innocently

used sparingly in cases of "serious crimes of violence," consider Professor Kaplan's proposal that we legitimize what he thinks courts are doing anyway by abandoning the rule in the "most serious cases—treason, espionage, murder, armed robbery, and kidnapping by organized groups." Kaplan, *supra* note 5, at 1046. Only in the most egregious cases of police misconduct would Kaplan permit suppression of evidence when such a serious crime is involved. In *Michigan v. Tucker*, 417 U.S. 433, 447 (1974), Justice Rehnquist suggests that the exclusionary rule is appropriate only when a police violation is deliberate. For discussion of this case, see Note, *supra* note 58, at 113-22. See also *Brown v. Illinois*, 422 U.S. 590, 608-12 (1975) (Powell, J., concurring). The head of the United States Department of Justice task force on modification of the exclusionary rule has also urged a substantial violation test. *The Exclusionary Rule*, *supra* note 137, at 285 (remarks by Donald Santarelli at 1972 Judicial Conference of United States Court of Appeals for the Ninth Judicial Circuit).

262. 44 Cal. 2d 434, unnumbered note at 441-42, 282 P.2d 905, 909 n.4 (1955). Note, however, that in *Cahan* Justice Traynor expressly recognized that the court was adopting a rule of evidence in adopting the exclusionary rule. Developing exceptions now after *Mapp's* holding that the rule is constitutionally compelled might raise different questions.

263. See LaFave, *supra* note 186, at 411-15; *Majority Report of the Committee on Federal Legislation*, *supra* note 169, at 4239. But consider the possibility of police manipulation of the warrant system by lying to the magistrate about the factors required for probable cause. And contrast the argument that the exclusionary rule should be abandoned *except* with respect to evidence obtained pursuant to an improperly issued warrant because in that case there can be no tort remedy against the policeman, the police department, or the magistrate. Horowitz, *Excluding the Exclusionary Rule—Can There Be an Effective Alternative?*, 47 LOS ANGELES B. BULL. 91, 94 (1972); see note 309 *infra*. A divided panel of the Second Circuit recently rejected the contention that the exclusionary rule should not apply when the police officer had obtained a warrant. *United States v. Karathanos*, Civil No. 75-1332 (2d Cir. Feb. 2, 1976), reported in 18 BNA CRIM. L. REP. 2465 (1976).

trivial to deliberately terrible. It is unreasonable to fail to recognize the difference.²⁶⁴

The major objection to a substantial violation test, which will be considered in greater detail in the discussion of pending federal legislation, is that it is a vague standard that would allow a court to admit even the product of a "deliberately terrible" constitutional violation.

3. *Discard It*

The notion of abolishing the exclusionary rule entirely and imposing no substitute is an untenable position, and no serious observer is urging it. To do so would be a return to the situation in which *Wolf v. Colorado* left the state criminal defendant. As Professor Allen pointed out, the basic problem with *Wolf* was that "the Court's reach had exceeded its grasp: The Court recognized a broad, if undefined, area of federal constitutional right for which, however, no provision for federal enforcement was made."²⁶⁵

But several responsible commentators and judges have taken the position that the exclusionary rule could be abolished if a truly effective alternative becomes available.²⁶⁶ Attempts have been made in Congress and in at least one state legislature to enact statutes abolishing the exclusionary rule and replacing it with what the authors of the bills claim are effective enforcement mechanisms.²⁶⁷ These and other frequently proposed alternatives or supplements to the exclusionary rule are considered below.

264. GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 153.

265. Allen, *supra* note 5, at 5. It is unclear, however, how this situation is different from the proposition that the exclusionary rule should be abandoned as soon as state legislatures or Congress enact any device that the Supreme Court can point to as an alternative remedy—even if the device be ineffective.

266. *E.g.*, Oaks, *supra* note 4, at 755; Comment, *supra* note 104, at 91; *see* note 258 *supra*. Justice Traynor commented in *People v. Cahan*:

If those guarantees [against unreasonable searches and seizures] were being effectively enforced by other means than excluding evidence obtained by their violation, different problems would be presented . . . Experience has demonstrated, however, that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures.

44 Cal. 2d 434, 447, 282 P.2d 905, 913 (1955). One commentator has proposed a partial abandonment of the suppression doctrine in "cases where the police department in question has taken seriously its responsibility to adhere to the fourth amendment." Kaplan, *supra* note 5, at 1050.

267. *See* H.R. 5628, 94th Cong., 1st Sess. (1975); California S.B. 1153 (1973). Both bills are discussed more fully in the text accompanying notes 321-32 *infra*.

B. *Alternatives or Supplements to the Exclusionary Rule*

Several obstacles hinder the experimentation necessary before the proposed devices can be pronounced superior to the exclusionary rule. First, many state officials have retreated in disgust from the problem because they view the federal government as having usurped responsibility for control of police conduct through *Mapp v. Ohio* and other Supreme Court decisions. Second, those persons most likely to insist that any alternative be a truly effective vehicle for deterrence and judicial articulation of constitutional rights—the defense attorneys—are currently insisting that the exclusionary rule be retained. In that posture, defense attorneys have rarely suggested supplements for fear the devices they recommend will be treated as *alternatives* permitting abandonment of the rule.²⁶⁸

Neither of these obstacles seems insurmountable. Enlightened state officials ought to proceed with the quest for better constitutional safeguards even though the Supreme Court has already established minimal standards. Because the defense attorneys realize that some judges may become more reluctant to suppress evidence if such a decision will expose an officer to the risk of direct penalties, the attorneys' opposition even to experimenting with supplements is understandable. Nevertheless, this opposition of defense attorneys should not be permitted to prevent experimentation with creative supplements. During the experiments, however, defense counsel should be supported in their efforts to prevent the dilution of the substantive right against unreasonable searches and seizures.

The most effective way to measure and compare the success of the various proposed devices might be temporarily to suspend operation of the exclusionary rule in several randomly selected jurisdictions. Different sanctions would be imposed in place of the rule, and the experience of those jurisdictions would then be compared with the experience of jurisdictions that had retained only the exclusionary rule. Although no researcher would quarrel with the attempt to keep the number of variables as low as possible so that results may be attributed directly to the device in question, such experimentation may raise significant equal

268. Cf. H.R. 9623, 93d Cong., 1st Sess. (1973) (civil action with sharp teeth, introduced by Congressman Bertram Podell, 13th District, New York), *discussed in text* following note 333 *infra*; Levin, *supra* note 216 (proposed civil action), *discussed in text* accompanying notes 301-06 *infra*.

protection problems.²⁶⁰ The best available option, therefore, seems to be experimentation with different mechanisms in different jurisdictions, not as alternatives, but as supplements to the exclusionary rule.

1. *Traditional Tort Actions*

a. *Traditional Causes of Action*

The basic common law remedy for unreasonable search and seizure was an action in trespass.²⁷⁰ Other remedies available in state courts were actions for false arrest, false imprisonment, trespass, assault, and malicious destruction of property. Although all but the last are currently used in Canada,²⁷¹ opinion is nearly unanimous that traditional tort actions have been inadequate remedies for police misconduct in this country.²⁷² The traditional federal cause of action for violations of

269. *But cf.* *Salsburg v. Maryland*, 346 U.S. 545 (1954). In this pre-*Mapp* case the Supreme Court upheld the constitutionality of Maryland's partial exclusionary rule against an equal protection attack. MD. ANN. CODE, art. 35, § 5 (1971). The Maryland scheme, *inter alia*, prohibited the use of illegal evidence in specified gambling misdemeanor prosecutions in certain Maryland counties, but admitted the illegal evidence in other counties. The section was treated as superseded by *Mapp*, see *Banks v. Peper-sack*, 244 F. Supp. 675, 679 (D. Md. 1965), and was formally repealed in 1973. Courts and Judicial Proceedings Bill, ch. 2, § 2, [1973] Laws of Md. Spec. Sess. 388; see General Revisor's Note, Courts and Judicial Proceedings Bill, ch. 2, § 1, tit. 10, [1973] Laws of Md. Spec. Sess. 331-32.

270. See Spiotto, *supra* note 14. See generally Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 498, 513 (1955).

271. See Baade, *supra* note 4, at 1341; Oaks 705.

272. See, e.g., A. BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE LAW: ROLE OF THE SUPREME COURT 10-13 (1955); P. CHEVIGNY, *supra* note 213, at 248-66; A. CORNELIUS, SEARCH AND SEIZURE 42-46 (2d ed. 1930); E. HOPKINS, OUR LAWLESS POLICE 28-30, 43, 48-51, 61-75, 89-92, 293 (1931); W. LAFAVE, *supra* note 131, at 412-27; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 293 (1954); E. MACHEN, THE LAW OF SEARCH AND SEIZURE 138-42 (1950); NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 146 (1969); L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 28-31 (1947); WHO RULES THE POLICE? 98 (L. RUCHELMAN ed. 1973); C. Sevilla, ReMapping the Exclusionary Rule: An Alternative Suggestion, *supra* note 111, at 5-6; Amsterdam, *supra* note 104, at 429; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 787 (1970); Atkinson, *supra* note 104, at 22-23; California State Bar Committee on Criminal Law and Procedure, Report, 29 CAL. ST. B. ASS'N J. 263, 264 (1954); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191, 204-05 (1929); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1553-63 (1972); Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955); Foote, *supra* note 270; Grant, *Circumventing the Fourth Amendment*, 14 S. CAL. L. REV. 359, 372 (1941); Hall, *supra* note 207, at 153-57, 173; Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. &

constitutional rights by state police is section 1983.²⁷³ Unfortunately, commentators concur that this remedy has proved as ineffective as conventional state causes of action.²⁷⁴ Because of this general ineffectiveness, the specifics of these state or federal causes of action shall not be explored, although the reasons posited for their failure will be examined.

b. *Inability to Deter Police Wrongdoing*

The traditional tort actions hold little promise as devices to deter police wrongdoing because of the extreme unlikelihood that any given fourth amendment violation will result in a successful tort suit against the erring policeman. The first hurdle presented for the victim of an unreasonable search and seizure is that of sovereign immunity. Unless this immunity has been waived, the victim often has no recourse against either the policeman or the employing governmental body.²⁷⁵ More-

ST. B.J. 407, 429-30 (1961); Oaks 673; Paulsen, *supra* note 255, at 72-74 n.230; Peterson, *supra* note 214; Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 385-88 (1939); Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970); Sloane & Leedes, *A Mapp for the Road Towards Exclusion*, 35 TEMP. L.Q. 27, 37 (1961); Spiotto, *supra* note 14; Wingo, *supra* note 117, at 580; Wray, *Exclusion of Evidence Illegally Obtained*, 26 TENN. L. REV. 332, 346-51 (1959); Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. REV. 493, 502-07 (1952); Comment, *The Exclusionary Rule of Illegally Obtained Evidence: Its Development and Application*, *supra* note 7, at 74; Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1208-12 (1952).

273. 42 U.S.C. § 1983 (1970). Section 1985 provides a federal cause of action against officers who conspire to deprive a person of his constitutional rights. 42 U.S.C. § 1985 (1970).

274. See W. Briggs, 42 U.S.C.A. § 1983: An Effective Deterrent to Police Brutality? (unpublished student research paper on file at University of Chicago Law School Library); Oaks 674. Briggs studied Chicago federal court docket books for the years 1960 through 1967 and found a sample of 35 § 1983 damage actions against Chicago police officers in which the City, Superintendent, or police department was originally joined as co-defendant. Plaintiffs won in 18 of the 35 cases, the judgments totaling \$126,000. The city paid the judgments under state law, ILL. ANN. STAT. ch. 24, § 1-4-5 (Smith-Hurd 1962); *id.* § 1-4-6 (Smith-Hurd Supp. 1975), but none of the policemen in these 18 suits were even reprimanded by the police department. See generally Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972); Comment, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 104 (1970); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201 (1971).

275. See generally W. PROSSER, *supra* note 8, at 987-92; Mathes & Jones, *Towards a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO.

over, if the victim has been convicted of a crime and imprisoned, state "civil death" statutes may bar him from suing for damages during the period he is imprisoned.²⁷⁶

But even if an aggrieved citizen is able to sue, he is unlikely to do so for a variety of reasons. First of all, the would-be claimant who has been convicted and imprisoned may fear reprisal if he sues those who, for all practical purposes, are now his jailers.²⁷⁷ Second, during the plea bargaining process, he may have waived his right to litigate the constitutionality of the policeman's conduct.

If there has been an arguable violation of the Fourth Amendment, the officer's self-interest would be served by obtaining some kind of an agreement out of the accused that he not pursue the tort remedy in return for the lowering of the charge or dismissal of the complaint.²⁷⁸

Finally, most persons do not bring civil suit because of the realistic expectation that they will gain nothing from the litigation but that instead they will lose the costs of litigation.

The reasons why the victim of the unconstitutional search and seizure so often loses his suit while the defendant-policeman prevails are numerous. The first and most important reason is that the claimant who has been charged with or convicted of crimes is not likely to evoke the jury's sympathy,²⁷⁹ particularly after the defendant-policeman explains that he was only trying to protect society. Even if the claimant has not been criminally charged, he will not be a sympathetic figure to the average jury if, as most victims of police illegality, he is part of America's lower

L.J. 889 (1965); Note, *supra* note 57, at 529-30. One report argues that policemen ought to enjoy the same broad immunity that judges have under *Pierson v. Ray*, 386 U.S. 547, 554 (1967). GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 156. State courts have, however, been increasingly willing to eliminate sovereign immunity as a defense to tort suits against the state. See, e.g., *Hicks v. New Mexico*, — N.M. —, 544 P.2d 1153 (1975).

276. Foote, *supra* note 270, at 507; e.g., CAL. PENAL CODE § 2600 (Deering 1974).

277. See Brief for Cal. Pub. Defender's Ass'n, *supra* note 108, at 61; Morris, *supra* note 272, at 430; Note, *supra* note 272. Because of the risk in transporting convicts between prison and courthouse, one student commentator has suggested that a prisoner remain in prison and sue the offending police agency "through his attorney, or, if acting in *propria persona*, by a verified complaint and sworn affidavit." Comment, *supra* note 104, at 86. The fear of reprisal renders this suggestion impractical, however.

278. Brief for Cal. Pub. Defender's Ass'n, *supra* note 108, at 60. See also Foote, *supra* note 270, at 507.

279. See, e.g., Oaks 673. Although judges might be less biased than juries, compelling the policeman to defend himself in a bench trial would probably be unconstitutional as an infringement of the right to a jury trial.

class. Second, the jury bias in favor of a policeman often allows the policeman successfully to lie his way to victory by fabricating a story of adherence to constitutional requirements during the search and seizure. Third, if the policeman was acting under department policies or regulations in violating the Constitution, he can simply invoke the defense of adherence to custom.²⁸⁰

Finally, even if the plaintiff can overcome or avoid the first three difficulties, he may fail on the merits of his suit, either because he cannot prove he suffered actual damages or because he cannot meet the stiff burden of proof with respect to lack of police justification to search.²⁸¹ It has been asserted that in most cases there will be little or no direct injury to person or property as a result of a search.²⁸² Furthermore, Professor Foote has observed that criminals are not likely to have the kind of reputation that can be injured by police searches.²⁸³ And because actual damages are so difficult to prove in unconstitutional search cases, punitive damages are rarely available.²⁸⁴

Putting aside the problem of proving damages, however, the victim of unconstitutional police work still must meet an almost prohibitive burden of proof. The *Bivens* case is a recent striking example of the development of this burden. The Supreme Court in *Bivens*, after having created a federal cause of action sounding in tort to redress the deplorable conduct of the federal narcotics agents, remanded the tort

280. See GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 157; cf. Dillenbeck v. City of Los Angeles, 69 Cal. 2d 472, 446 P.2d 129, 72 Cal. Rptr. 321 (1968) (holding police training materials on operation of motor vehicle in emergency situations admissible in wrongful death action as evidence relating to appropriate standard of care).

281. *Wolf v. Colorado*, 338 U.S. 25, 43-44 (1949) (Murphy, J., dissenting); see GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 157-58; C. Sevilla, *ReMapping the Exclusionary Rule: An Alternative Suggestion*, *supra* note 111, at 5; Comment, *supra* note 104, at 79.

282. See *Wolf v. Colorado*, 338 U.S. 25, 41-47 (1949) (Murphy, J., dissenting); Wingo, *supra* note 117, at 579.

283. Foote, *supra* note 270, at 500 & n.42. See also *Butcher v. Adams*, 310 Ky. 205, 220 S.W.2d 398 (1949).

284. In traditional tort suits or § 1983 suits, 42 U.S.C. § 1983 (1970), actual damages must be proved before punitive damages can be awarded. See Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1180-81 (1931). See also Mackey v. Chandler, 142 F. Supp. 579 (W.D.S.C. 1957) (setting aside verdict for punitive damages). In 1973, however, a federal district court awarded the victim of an unconstitutional search five hundred dollars punitive damages against the local police chief who had entered the victim's residence and conducted a warrantless search of the premises. CIVIL LIBERTIES, May 1974, at 3.

claim for disposition.²⁸⁵ On remand, the Court of Appeals for the Second Circuit held that although the police officer was not immune from suit, he need not prove that he had probable cause for an arrest or search to establish a defense to the tort claim; a mere showing that he acted in good faith and with a reasonable belief in the validity of the arrest and search would suffice.²⁸⁶

But even assuming the claimant can win a damage award high enough to make suing seemingly worthwhile, the meager income of most policemen is likely to leave them judgment proof.²⁸⁷ In that case, the aggrieved party's constitutional rights are worth little more than the paper on which the court order is printed. If, however, the policeman is insured or the policeman's employer is sued in his stead, the claimant

285. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971).

286. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 456 F.2d 1339, 1347-48 (2d Cir. 1972). *Cf.* *Knell v. Bensinger*, 522 F.2d 720, *reprinted in part in* 44 U.S.L.W. 2184 (7th Cir. 1975) (prison administrator immune from damages under 42 U.S.C. § 1983 where acting in good faith and with reasonable belief in the constitutional validity of the prison regulation being enforced). Until 1974, the Federal Tort Claims Act contained a widely criticized general exception to governmental liability that denied recovery to victims of most intentional torts. 28 U.S.C. § 2680(h) (1970); *see, e.g.*, 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 25.08 (1958, Supp. 1970); L. JAFFEE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 256 (1965); Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U.L. REV. 1325, 1341 (1954). Exemplifying the kind of result criticized by the commentators is *Smith v. United States*, 330 F. Supp. 867 (E.D. Mich. 1971). The plaintiff, who had been shot by a federalized national guardsman while the guardsman was attempting to quell an urban riot, attempted to base his action under the Federal Tort Claims Act on a negligence theory in order to avoid the intentional tort exception, which expressly encompassed assault and battery. The court determined, however, that the guardsman's action was an assault, rather than just negligence; therefore, the plaintiff was not allowed to maintain the action. *See also* *Zavala v. United States*, 373 F. Supp. 954 (W.D. Tex. 1974). Then in 1974, the Federal Tort Claims Act was amended to give claimants a cause of action against the federal government for the intentional torts of the government's agents. Act of March 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, *amending* 28 U.S.C. § 2680(h) (1970) (codified at 28 U.S.C.A. § 2680(h) (Supp. 1975)). Note that the amendment created a cause of action against the federal government rather than, as in *Bivens*, an action against the offending federal officer. There have been no reported decisions under the amendment, but it seems likely that the burden and standard of proof will be the same in these cases as it was in the *Bivens* case on remand. For that reason, and because the amendment makes no provision for attorneys' fees or minimum liquidated damages, the new federal tort action will probably be no more effective than other existing remedies for transgressions by federal agents.

287. *See* TASK FORCE: THE POLICE, *supra* note 195, at 199; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, *supra* note 272, at 787; Foote, *supra* note 270, at 499; Morris, *supra* note 272, at 429; Oaks 673; Wingo, *supra* note 117, at 580.

may be able to collect his judgment, but the suit is unlikely to serve as a deterrent. With respect to insurance, the premiums are minimal. Recent premiums for policies from Lloyds of London were just \$6 down and \$3 per year for coverage up to \$5000.²⁸⁸ And if the governmental entity employing the policeman is sued, the policeman feels no direct punishment except for that which his superiors might apply. Moreover, a state, county or municipality will not be deterred from encouraging constitutional violations to the extent that it is willing to incur civil damage awards as the price for controlling crime.

c. *Adverse Effects of Using the Tort Action*

Not only does the traditional tort action fail to deter illegal police conduct; it can also have a number of adverse effects. The first such effect arises if the exclusionary rule has been abandoned and the governmental entity is inclined to incur civil damage awards whenever it wants a conviction badly enough. The government can simply buy the conviction after illegally obtaining whatever evidence it needs for the conviction.²⁸⁹ As Professor Hans Baade has stated, exclusive use of the tort remedy would "substitute subsequent cash payments for timely lawful behavior."²⁹⁰

Another possible adverse effect of using tort actions to redress police illegality is overloading of court dockets. Both Justices Black and Blackmun, dissenting separately in *Bivens*, opined that a federal tort action would flood the already-burdened courts with additional litigation.²⁹¹ Mr. Justice Black was also concerned about a third adverse effect of using tort actions, that policemen would be deterred from the "proper and honest performance of their duties."²⁹² This possible effect is the classic justification for protecting an officer from damage suits and was well articulated by Judge Learned Hand in an action for malicious prosecution:

288. WHO RULES THE POLICE?, *supra* note 272, at 98. One proposal discussed in the text would limit the possibilities for indemnification and require an officer personally to pay the premiums on any insurance he purchases. See text accompanying notes 301-06 *infra*.

289. See *United States v. Calandra*, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting); American Bar Association Section on Criminal Justice, *supra* note 130, at 10.

290. Baade, *supra* note 4, at 1361.

291. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 428-30 (1971).

292. *Id.* at 429 (Black, J., dissenting).

[I]t is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, *would dampen the ardor of all but the most resolute, or the most irresponsible*, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.²⁹³

Sharing this view, some courts have in turn weakened the traditional tort action.²⁹⁴ For this reason, as well as the other reasons discussed above, several proposals have recently been made to change the traditional tort action.

2. *Recent Proposals for Modifying the Tort Action*

a. *Federal Cause of Action Established in Bivens*

The federal cause of action against individual federal officers that the Court established in *Bivens* does not surmount any of the difficulties with the traditional tort remedies. Although the existence of a federal cause of action under the fourth amendment is new, the conventional strictures being applied by lower courts to the claimants render the action an ineffective device.²⁹⁵

b. *Miscellaneous Suggestions for Changes*

To make suits against official wrongdoers more feasible, observers have urged a number of changes, some of which are presented in this subsection; other proposed modifications are examined in the subsections on specific tort schemes which follow. Because the typical victim of police lawlessness cannot afford to hire an attorney, a right to counsel might be created for at least some kinds of civil suits.²⁹⁶ To solve the

293. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (emphasis added). Compare the similar objection that the exclusionary rule deters lawful police work. See text accompanying notes 208-09 *supra*. Surely some restraint on police conduct is justifiable in a free society, despite the risk of dampening police ardor.

294. See, e.g., *Coverstone v. Davies*, 38 Cal. 2d 315, 239 P.2d 876 (1952) (an arrest held legal in order not to make officers reluctant to arrest suspects); *Hammitt v. Straley*, 338 Mich. 587, 61 N.W.2d 641 (1953) (holding doubts should be resolved in officer's favor so that officer will not fear reprisals for aggressive law enforcement).

295. See text accompanying notes 285 & 286 *supra*. For discussion of the *Bivens* tort remedy, see Note, *A Federal Cause of Action Against a Municipality for Fourth Amendment Violations by Its Agents*, 42 GEO. WASH. L. REV. 850 (1974).

296. See *Oaks* 718; cf. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

problem of a judgment-proof defendant, several commentators have advised allowing civil actions against governmental bodies on the principle of respondeat superior.²⁹⁷ Another scheme, currently used in Canada,²⁹⁸ involves making the chief of police personally liable for the torts committed by his subordinates in the purported or actual line of duty.

Creation of a special administrative or quasi-judicial tribunal to hear civil actions alleging unconstitutional police work might eliminate the problem of lack of sympathy by the trier of fact for the claimant.²⁹⁹ Finally, to overcome the traditional inadequacy of damage awards, Professor Oaks has recommended making the enormity of the policeman's wrong, not the actual injury to the plaintiff, the measure of damages.³⁰⁰

c. *Joint Liability Plan*

Harvey Levin has proposed the following model statute, which he calls the "Joint Liability Plan":³⁰¹

1. When an action is brought against a government officer in his official capacity, charging him with a violation of the claimant's fourth amendment rights, or when such an action is brought against a governmental unit, the officer and the state, county or municipality which has jurisdic-

297. See, e.g., McGarr, *supra* note 214, at 268; Oaks 717-18; Plumb, *supra* note 272, at 387; Taft, *supra* note 242, at 817; Wingo, *supra* note 117, at 581; Note, *supra* note 295, at 862; Comment, *supra* note 104, at 81-82. See also note 286 *supra*. In California, a police department is liable for damages caused by an unreasonable search and seizure conducted by one of its officers. See CAL. GOV'T CODE §§ 815.2, 945-49 (Deering 1973).

298. See ONT. REV. STAT. ch. 351, § 24 (1970).

299. See text accompanying note 279 *supra*. Chief Justice Burger made this suggestion in his *Bivens* dissent. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 423 (1971). The head of the United States Department of Justice task force on modification of the exclusionary rule has expressed approval of this approach. *The Exclusionary Rule*, *supra* note 137, at 284-85 (remarks by Donald Santarelli at 1972 Judicial Conference of United States Court of Appeals for the Ninth Judicial Circuit). Perhaps simply eliminating the jury, in the case of a government defendant, would achieve the same result. In this regard, Professor Oaks has stated:

By means of the exclusionary rule the state judiciary has grown accustomed to compensating a guilty person who was aggrieved by an illegal search by awarding him his freedom. There is no reason to suppose that they would be less willing to give money damages as a form of compensation, especially when the remedy would extend to all who were aggrieved, the innocent as well as the guilty.

Oaks 718.

300. Oaks 718.

301. Levin, *supra* note 216, at 75-76.

tion over the officer's law enforcement agency shall be party defendant to the action.

2. The state, county or municipality shall pay all claims involving violations of fourth amendment rights for which its officers are liable.

3. The trier of fact shall find the following: whether the officer violated the claimant's fourth amendment rights; if the officer violated the claimant's fourth amendment rights, whether the violation was committed in an intentional, a reckless, or a grossly negligent manner.³⁰²

4. If the trier of fact finds that the officer violated the claimant's fourth amendment rights, it shall award the claimant a minimum amount prescribed by statute, and any additional amount to compensate the claimant for damages which exceed the minimum award.

5. If the trier of fact finds that the violation was intentionally committed, the state, county or municipality shall recover from the officer the damages paid to the claimant, and the officer shall be discharged from government service.

6. If the trier of fact finds that the violation was unintentionally committed but committed in a reckless or grossly negligent manner, a penalty shall attach to the officer's salary in the amount and for the duration prescribed by statute. Each time the officer is found to have committed a fourth amendment violation either in a reckless or grossly negligent manner, the penalty shall increase according to a schedule prescribed by statute.

7. Nothing shall prohibit the law enforcement agency or the civil service commission from taking disciplinary action, other than that prescribed by this plan, against the officer.

8. No individual, group, union, organization, or other representative of a government officer shall indemnify the officer, in whole or part, against a judgment resulting in liability under this plan.

Nothing shall prohibit a government officer from individually purchasing liability insurance from a group, company, corporation, or any other organization principally engaged in the business of insurance. But no individual, group, union, organization, or other representative of a

302. Levin notes that the preponderance of evidence standard would be the proper standard of proof for determining whether the officer had violated the claimant's rights but suggests that a higher standard, the beyond a reasonable doubt standard, should be used in determining whether the violation was intentional, reckless, or grossly negligent. The reason for the difference in standards is that while the first finding is the basis for determining the claimant's recovery—that is, to make the claimant whole—the second finding is the basis for assessing penalties against the officer, which is more in the nature of a criminal trial finding. *Id.* at 79 n.20.

government officer shall pay, in whole or part, the premium or other charge for any type of indemnity insurance in which said officer is indemnified or insured against liability for fourth amendment violations.

Under this scheme any unreasonable search or seizure would be the subject of a damage award payable by the government entity. The offending officer, however, would be penalized³⁰³ only for an intentional, reckless, or grossly negligent violation—in other words, only for a “very unreasonable” unreasonable search and seizure. He would not be penalized at all for a negligent violation—that is, a “merely unreasonable” unreasonable search and seizure—or for a good faith violation—that is, a “reasonable” unreasonable search and seizure. Some critics have suggested that this “unreasonableness” test may, like a substantial violation test, be a Pandora’s box:

If the substantive law of the fourth amendment is uncertain, consider the uncertainty inherent in a case-by-case evaluation by all the trial judges in the country of what “substantial violation” means. Courts will be asking themselves whether the police officer conducted a “reasonable or unreasonable” unreasonable search and seizure. It is difficult to imagine a rule that would cause greater confusion to the average police officer.³⁰⁴

Although policemen might be confused by the proposed scheme, in reality an officer should not need to understand anything except the admittedly jumbled rules of what constitutes an unreasonable search and seizure. Even though, under this scheme, a policeman could not be penalized for a merely negligent or good faith violation, he would still be expected to attempt to conform his conduct to the fourth amendment’s proscription of *any* unreasonable search and seizure.

Apparently section 7 of the model statute contemplates that a governmental entity forced to pay money damages for reckless or grossly negligent police wrongdoing will discipline the offending officer. In the case of intentional police misconduct, however, section 5 expressly requires that the officer be discharged from “government service.”³⁰⁵ A difficulty with the proposal is that juries (which presumably will be required because section 1 provides the policeman is to be made a party defendant) may still exercise their bias for the policeman by routinely

303. The penalty would be paid, not to the claimant, but into general government revenues.

304. Brief for ACLU, *supra* note 101, at 18.

305. The proposal does not specify whether the discharged officer is barred from all kinds of government service or only law enforcement-related employment.

absolving him from penalties, even though they have awarded the claimant damages. If such a practice were to become commonplace, it is doubtful that policemen would be deterred from wrongdoing even to the extent that they are deterred by the exclusionary rule.

Finally, the deterrent purpose, as opposed to the compensation purpose, of this tort action might be negated by the existence of insurance. Despite section 8's requirement that a policeman pay his own insurance premiums, as long as the premiums remain minimal, there will be little deterrent effect.³⁰⁶

d. *Nonjudicial Proceeding Providing Broad Range of Damages*

A rather complex mechanism has been suggested by a Los Angeles attorney.³⁰⁷ He would abandon the exclusionary rule for all illegally seized evidence that was otherwise relevant and admissible unless the evidence was obtained under an improperly issued warrant.³⁰⁸ Any "victim of an illegal and warrantless arrest, search or seizure" would have a civil "cause of action against the offending officer and against the governmental unit employing that officer."³⁰⁹ Although the scheme does not provide for joining the prosecutor as a defendant, if appropriate damages against the prosecutor were also available, he might be deterred from prosecuting cases without merit.

All claims would be heard without a jury by an administrative or quasi-judicial body established to hear such cases. The hearing examin-

306. See text accompanying note 288 *supra*.

307. Horowitz, *supra* note 263, at 94.

308. The author asserts that suppression is required in such a case because under his scheme, there would be no tort remedy against the police officer, police department, or the judge who issued the warrant. *Id.* at 96. But contrast the argument that "maintaining the Exclusionary Rule for judicial error only might have the undesirable effect of causing police officers to not obtain warrants in those circumstances where they should." Comment, *supra* note 104, at 85.

309. Horowitz, *supra* note 263, at 94. By withholding the tort remedy for illegal arrests, searches, or seizures when they are made pursuant to a warrant, the statute provides an incentive for the officer to obtain a warrant. By retaining the exclusionary rule in the case of an illegal seizure made pursuant to a warrant, however, the scheme may provide a disincentive for the officer to obtain a warrant. As Justice Powell noted recently, admitting the fruits of fourth amendment violations "where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated" might encourage "the police to seek a warrant whenever possible." *Brown v. Illinois*, 422 U.S. 590, 611 & n.3 (1975) (concurring opinion). Note, however, that such a procedure is subject to possible abuse by police officers. See note 263 *supra*; text accompanying notes 325 & 326 *infra*; cf. Comment, *supra* note 104, at 80.

ers would be required to be members of the bar with broad backgrounds in criminal law. Two advantages are supposed to flow from having a nonjudicial tribunal determine the claims, as opposed to a judge: First, congested trial dockets would be relieved because claims would be diverted; second, efficient claim processing would be provided as specialization and expertise developed within the tribunal.³¹⁰

Although the standard of proof would be by a preponderance of the evidence, discovery would be limited to that available in criminal cases and the defendants would have the burden of initially coming forward with evidence. Once defendants made a *prima facie* showing of probable cause, however, the burden of proof would shift back to the claimant.³¹¹ To ensure rapid determinations and close supervision by courts, there would be no review of hearing examiners' decisions at the administrative level but, as with some workmen's compensation systems,³¹² the losing party could petition for review to the state appellate courts.³¹³ The claimant, who would be required to file his action within six months of the alleged illegal conduct, would have a right to be present and testify at the hearing.³¹⁴ If the claimant was a defendant in a criminal trial, the hearing could be postponed until after the criminal proceedings terminated, thus preventing the claimant from being forced to incriminate himself to prove his claim in the civil action.³¹⁵

The novel damage provisions allow the claimant to recover the actual damages he suffered, including bail expenses, attorney's fees for representation in the *criminal* prosecution against him, damage to property (other than contraband), and lost income (other than illegal income) during pretrial incarceration *and* during *post-conviction imprisonment*. There would be no reimbursement, however, for fines paid as a result of related criminal proceedings. One catch to this seeming prisoner's paradise of damage recovery is a "but for" test: Claimant recovers only if he can show that he would not have been convicted of a crime or otherwise suffered damages *but for* the illegally obtained evidence. Therefore, if conviction could have been secured without the unconstitu-

310. Horowitz, *supra* note 263, at 97.

311. *Id.* at 94, 97-98.

312. *E.g.*, CAL. LABOR CODE §§ 5950-5956 (Deering 1973).

313. Horowitz, *supra* note 263, at 94, 98.

314. *Id.* at 94, 98-99. Inconsistent civil death statutes would necessarily be repealed to this extent. *Cf.* CAL. GOV'T CODE § 945.6 (Deering 1973).

315. Horowitz, *supra* note 263, at 99.

tional evidence, claimant may recover little or no damages.³¹⁶ A possibly unintended result of this "but for" test is that those acquitted or those not prosecuted may not be entitled to a recovery. If that result is true, this scheme would benefit only the restricted group now benefitted by the exclusionary rule.

A claimant who is entitled to recovery would receive minimum statutory damages, varying according to the "nature and extent of [the] connected criminal case, if any."³¹⁷ The more severe the claimant's injury, the higher the minimum damages. Thus, for example, a claimant who was detained until trial, convicted, and then imprisoned on the basis of unconstitutional evidence would receive a higher minimum award than a claimant who was released on bail before trial, convicted, and then placed on probation. To provide an incentive for expert litigators to handle a claimant's case, a prevailing claimant would be awarded reasonable attorney's fees.³¹⁸ Although defendants' liability for actual damages would be joint and several, punitive damages would be available only against the officer, and then only if the officer's illegal conduct was deliberate or malicious.³¹⁹

But the claimant who has committed a crime will not find this a "get rich quick" scheme. If there is a victim of his criminal conduct, the victim can establish a lien on the claimant's recovery for any actual damages the victim suffers. Nevertheless, this limitation would not deflate the compensatory aspect of the plan in the many cases in which illegal police conduct is an effort to control victimless crimes.³²⁰

e. *California Senate Bill 1153*³²¹

California Senate Bill 1153, introduced in the 1973 California legislative session by Senator Lagomarsino, was patterned after the statute proposed by Chief Justice Burger in his *Bivens* dissent.³²² The bill

316. *Id.* at 94, 121-22.

317. *Id.* at 94.

318. *Id.* at 94, 122-23.

319. *Id.* at 94, 123.

320. See text accompanying notes 5 & 6 *supra*.

321. As amended June 8, 1973.

322. 403 U.S. at 422-23 (footnote omitted):

A simple structure would suffice. For example, Congress could enact a statute along the following lines:

(a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;

(b) the creation of a cause of action for damages sustained by any person

would abolish the exclusionary rule (except for evidence obtained by illegal electronic eavesdropping) and replace it with a tort remedy against the agency that employed an offending officer. Liability would arise if a police officer conducted an unreasonable search and seizure while acting "within the scope of his employment."³²³

To encourage claimants to use the action, provision is made for reasonable attorney's fees, a minimum award of \$250, and punitive damages.³²⁴ As does the proposal discussed in the subsection above, the bill encourages policemen to obtain warrants by barring liability for any illicit searches made pursuant to a warrant.³²⁵ This bar could be a dangerous immunizational device, however, because some judges issue warrants pro forma, and thus a policeman could easily obtain a warrant while acting in bad faith.³²⁶

Since the officer is not personally made a party, there is no constitutional objection to the bill's elimination of jury trial. Nevertheless, the

aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;

(c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;

(d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and

(e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

In reference to determining the constitutionality of the statute, Chief Justice Burger stated in a footnote:

Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall.

Id. at 423 n.7.

323. If a police officer disobeying agency regulations would not be considered acting "within the scope of his employment" then evidence seized as a result of the most egregious intentional lawlessness would neither result in exclusion nor give rise to a claim by the victim of that lawlessness.

324. The \$250 minimum damages and reasonable attorney's fees provisions may have been included at the suggestion of the student author of the comment referred to in note 104 *supra*, at 80. On minimum damages, see especially *id.* at 80 n.59. Punitive damages are available only when an officer is found guilty of malicious, fraudulent or oppressive conduct. Cf. CAL. PENAL CODE §§ 630-37.2 (Deering 1974) (providing, *inter alia*, for triple damages).

325. See also Comment, *supra* note 104, at 84 (making similar proposal).

326. See AMERICAN BAR ASSOCIATION ADVISORY COMMITTEE ON THE POLICE FUNCTION, STANDARDS RELATING TO THE URBAN POLICE FUNCTION 149 (1972); notes 263 & 309 *supra*.

provisions abolishing the exclusionary rule, combined with the inseverability clause suggested by Chief Justice Burger,³²⁷ make the entire bill unconstitutional under *Mapp v. Ohio*, which held the exclusionary rule to be constitutionally compelled.³²⁸

f. *H.R. 5628, 94th Cong., 1st Sess. (1975)*³²⁹

In contrast to the Senate bill considered in detail below, the House bill introduced by Representative Steiger of Arizona completely eliminates the exclusionary rule in federal criminal proceedings³³⁰ and replaces it with a tort action against the United States. Liability arises only when a fourth amendment violation by a federal agent or someone acting at his request occurs "in the course of the official duty of such officer."³³¹ The liability is for actual and punitive damages,³³² and the action is made "the exclusive civil remedy against any person for such violation" Because the bill does nothing, however, to overcome the difficulties with traditional tort remedies, the bill would in effect permit the use of

327. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 423 n.7 (1971), *quoted in note 322 supra*.

328. The bill died on the State Senate floor in February 1974. Voorsanger, *United States v. Robinson, Gustafson v. Florida, and United States v. Calandra: Death Knell of the Exclusionary Rule?*, 1 HASTINGS CONST. L.Q. 179, 212 n.141 (1974). A few other states are collecting information concerning legislation on the exclusionary rule. In Michigan, for example, the State Bar Commissioners appointed a 25-member committee to review and recommend changes in state criminal procedure. The committee examined possible statutory modifications of the exclusionary rule, but decided not to propose legislation on that aspect of criminal procedure. Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 222, 224 (1974).

329. An identical bill was introduced by Representative Steiger in 1973. H.R. 10275, 93d Cong., 1st Sess. (1973).

330. The Senate bill keeps the rule for "substantial violations." H.R. 5628 eliminates the exclusionary rule "if there is an adequate legal remedy for any person aggrieved" Subsection (b) provides that "the legal remedy provided under subsection (c) shall be considered an adequate legal remedy."

331. The problem raised in note 323 *supra* regarding California Senate Bill 1153 is equally applicable here.

332. Subsection (c) (3) of the bill provides:

Punitive damages may be awarded . . . upon consideration of all of the circumstances of the case, including—

- (A) the extent of deviation from permissible conduct;
- (B) the extent to which the violation was willful;
- (C) the extent to which privacy was invaded;
- (D) the extent of personal injury, both physical and mental;
- (E) the extent of property damage; and
- (F) the extent to which the award of such damages will tend to prevent violations of the fourth article of amendment to the Constitution of the United States.

illegal evidence without providing any real remedy for the constitutional violation.

g. H.R. 9623, 93d Cong., 1st Sess. (1973)

Congressman Podell of New York introduced H.R. 9623 in response to the flagrant abuses by federal narcotics agents of the "no-knock" laws.³³³ Designed to fortify the fourth amendment by supplementing the exclusionary rule, the bill is a short one with sharp teeth. It makes the United States liable for treble damages for injury to persons (including damages for pain and suffering) or to property resulting from illegal entry to dwellings by federal officers searching for narcotics. Moreover, any federal official who

willfully enters or willfully causes any other person to enter the dwelling of another under color of law, but without warrant, or in violation of lawful procedural requirements, or through negligent mistake of fact, shall be immediately suspended without pay from his duties and shall, upon an administrative finding of his responsibility in such entry, be immediately discharged from his position as an officer or employee of the United States.

Because a real deterrent against police lawlessness might exist if this legislation were enacted, the exclusionary rule might then be easier to discard. Predictably, however, this bill was not reported out of the House Judiciary Committee during the 93d Congress.

3. S. 881, 93d Cong., 1st Sess. (1973)

a. Modification of the Exclusionary Rule

In response to Chief Justice Burger's request in *Bivens* that Congress provide an alternative to the exclusionary rule for the protection of fourth amendment rights, this Senate bill was first introduced in 1971³³⁴ and then reintroduced in 1973 by Senator Bentsen of Texas.³³⁵ Because the bill does not abandon the exclusionary rule, but

333. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 509(b), 21 U.S.C. § 879(b) (1970).

334. S. 2657, 92d Cong., 1st Sess. (1971).

335. The bill draws on the proposals made by Chief Justice Burger, in his *Bivens* dissent and by the American Law Institute in its *Model Code of Pre-Arrest Procedure* § SS 8.02(2) (Tent. Draft No. 4, 1971), which is reprinted in the *Bivens* dissent, 403 U.S. at 424-25. The final version of the American Law Institute's proposal, which was adopted in May 1975, makes only minor changes in the 1971 draft. AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARREST PROCEDURE § SS 290.2(2)-(4)

rather modifies it by using a substantial violation test,³³⁶ the bill does not go as far as the Chief Justice advocates. Nevertheless, if commentators are correct when they claim that the vast majority of police violations are insubstantial,³³⁷ then in practice the legislation might virtually end the suppression of evidence in criminal cases.

Indeed, the extreme flexibility of the bill's substantial violation test would enable a court determined to admit even the fruits of willful misconduct to do so with impunity. The bill provides:

In determining whether a violation is substantial . . . the court shall consider *all of the circumstances*,³³⁸ including—

- (1) the extent of deviation from sanctioned conduct;
- (2) the extent to which the violation was willful;
- (3) the extent to which privacy was invaded;
- (4) the extent to which exclusion will tend to prevent such violations;
- (5) whether, but for the violation, the things seized would have been discovered; and
- (6) the extent to which the violation prejudiced the defendant's ability to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

Because the willfulness of the violation is only one of many considerations, items seized in a deliberately unconstitutional search could be

(1975). See also *United States v. Peltier*, 422 U.S. 531, 560 & n.21 (1975) (Brennan, J., dissenting).

336. The bill provides:

Evidence shall not be excluded from any Federal criminal proceeding solely because that evidence was obtained in violation of the fourth amendment of the Constitution, unless the court finds, as a matter of law, that such violation was substantial.

Other proposed state and federal legislation would abandon the rule entirely. See, e.g., text accompanying note 330 *supra*. The bill itself is in two parts. The first part amends chapter 223 of title 28 of the *United States Code* by limiting the exclusionary rule, and the second part amends the Federal Tort Claims Act by providing a tort remedy against the United States for illegal searches and seizures.

337. See text accompanying note 182 *supra*.

338. (Emphasis added.) Some critics of the proposal have condemned this "all circumstances" test as nothing but a warmed-over version of the *Rochin v. California*, 342 U.S. 165 (1952), "shocks the conscience" test, which failed because of its extreme subjectivity and was rejected in *Mapp v. Ohio*. Brief for ACLU, *supra* note 101, at 16, 20. The harsh result in *Irvine v. California*, 347 U.S. 128 (1954), see text accompanying notes 36-38 *supra*, was said to exemplify the failure of the all circumstances test. The North Carolina legislature has considered a proposal that uses a similar substantial violation test. See Nakell, *Proposed Revision of North Carolina's Search and Seizure Law*, 52 N.C.L. REV. 277, 282 (1973).

admitted in evidence if the court were to find as a matter of law that, considering all the circumstances, the violation was not substantial.³³⁹ But if courts were to use the substantial violation test to reach such a result, the problem of police lawlessness would only be exacerbated. Certainly, officers would no longer find it pointless to seize evidence illegally when prosecution was the goal, for the evidence might very well be ruled admissible.³⁴⁰

In addition to the dilemma raised by the "willful misconduct" criterion, the factors for determining substantiality are problematic in other

339. See Comment, *supra* note 158, at 1460. One should not underestimate the extent to which determined courts can find something insubstantial as a matter of law which, as a matter of commonsense, would seem very substantial. In this regard, consider the tour de force of statutory construction accomplished in a marvelous caricature of legal reasoning entitled *Regina v. Ojibway*. Pomerantz & Breslin, *Judicial Humour—Construction of a Statute*, 8 CRIM. L.Q. 137 (1965). In the same vein, consider Lewis Carroll's delightful contribution:

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be the master—that's all."

L. CARROLL, *THROUGH THE LOOKING GLASS* 299-300 (Gossett & Dunlop ed.). Professor Kaplan argues that "[s]o long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination [whether the police illegality was 'inadvertent'] will constitute almost an open invitation to nullification at the trial court level." Kaplan, *supra* note 5, at 1045. Consider also an observation made by Justice Stewart in *United States v. Edwards*, 415 U.S. 800 (1974), in a dissent joined by Justices Douglas, Brennan and Marshall. Justice Stewart had reasoned that a warrant should have been required for the search and seizure of a jailed defendant's clothing when there was little danger that the defendant would destroy the evidence on the clothes because he was apparently unaware of its presence and when the search was not sufficiently contemporaneous with the arrest to be an incident of the arrest. Citing *Boyd v. United States*, Justice Stewart wrote:

The intrusion here was hardly a shocking one, and it cannot be said that the police acted in bad faith. The Fourth Amendment, however, was not designed to apply only to situations where the intrusion is massive and the violation of privacy shockingly flagrant.

Id. at 812.

340. See Comment, *supra* note 158, at 1461. There is another drawback to this "willfulness" approach, which admits evidence when the police officer was unaware of the illegality of his search and seizure:

It would put a premium on the ignorance of the police officer and, more significantly, on [sic] the department which trains him. . . . Nor would it suffice further to modify the rule and require that the police error be reasonable as well as inadvertent. While such a standard would motivate a police department to insure that its officers made only reasonable mistakes, it is hard to determine what constitutes a reasonable mistake of law.

Kaplan, *supra* note 5, at 1044.

ways. First, despite the fourth amendment's prohibition of all unreasonable searches and seizures, subsection (1) implicitly condones certain police deviations from the rules of search and seizure.³⁴¹ Second, although the courts have experienced difficulty in defining the right to privacy and determining when it has been invaded, subsection (3), by requiring the courts to define degrees of invasion, imposes on the courts the added burden of making metaphysical determinations. Whether exclusion of evidence "will tend to prevent such violations," as subsection (4) inquires, does bear on a court's desire to exclude the evidence, but the question seems hardly relevant to determining whether a substantial violation has occurred. Finally subsections (5) and (6) have been criticized as³⁴²

not furnish[ing] useful guidelines for the court. The bill directs attention of the court to "whether, but for the violation, the things seized would have been discovered." This "but for" test is of no help in determining whether a substantial violation has occurred since but for the violation the issue of exclusion would not have arisen.³⁴³ The final criterion focuses on the extent to which the introduction of the illegally seized evidence would prejudice the defendant. This is an extremely puzzling factor since any admissible evidence will be prejudicial to a defendant, and since virtually every critic of the exclusionary rule has faulted the exclusionary rule precisely because it suppresses incriminating and therefore prejudicial evidence.

Although they did not mention it in the list of criteria, the framers of the bill have indicated that among "all of the circumstances" to be considered is a comparison of the fourth amendment violation with the crime charged against the defendant. If, in relation to the defendant's crime and the circumstances surrounding the fourth amendment violation, the policeman's violation does not constitute a substantial violation, then the evidence would be admitted.³⁴⁴ Evidently, the bill's purpose is to provide great flexibility in admissibility of evidence decisions and to mandate exclusion only in truly extreme cases such as *Rochin v. California*,³⁴⁵ in which police forcibly pumped a suspect's stomach to "seize" supposed narcotics. Although the bill itself says nothing about

341. Comment, *supra* note 158, at 1460.

342. *Id.* at 1461.

343. "The Supreme Court has already rejected a similar but for test. See *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)." (Footnote in original.)

344. Telephone conversation with legislative assistant to Senator Bentsen, January 22, 1974; cf. Brief for State of Illinois, *supra* note 213, at 10-14 (similar proposal).

345. 342 U.S. 165 (1952).

who has the burden of proving a substantial violation or lack thereof, some commentators suggest that the intent was for the criminal defendant to prove that a substantial infringement has occurred in order to have evidence suppressed.³⁴⁶ Placing this burden on the defendant, however, may create "a presumption that even when an illegal police search has occurred, the fourth amendment violation involved was insubstantial."³⁴⁷

For all the above reasons, this Senate bill seems unlikely to ensure that courts will refrain from playing "an ignoble part" in any but the most horrid fourth amendment infractions. Moreover, because of the ease with which courts can admit the fruits of serious constitutional violations, as well as the weakness of the bill's tort remedy as a deterrent device,³⁴⁸ an increase in police violations of the fourth amendment can be expected. Finally, the requirement that federal district courts hold a suppression hearing to determine the substantiality of a violation is likely to produce at least as much court delay as presently exists under the exclusionary rule.³⁴⁹

b. *Tort Remedy*

Chief Justice Burger petitioned Congress to enact an "effective" alternative to the exclusionary rule,³⁵⁰ but the tort action provided in this bill appears to be an ineffective alternative.³⁵¹ As an amendment to the Federal Tort Claims Act,³⁵² the proposal would make the United States liable for actual and punitive damages up to a maximum of

346. See, e.g., Washington Post, Feb. 13, 1973, § A, at 2, col. 1; Comment, *supra* note 158, at 1462. Professor Kaplan, too, assumes that the burden of proving a deliberate violation of search and seizure rules would be on the defendant. He notes that "[i]t is always easier to convince jurors that a person's illegal action was inadvertent than it is to convince them it was purposeful." Kaplan, *supra* note 5, at 1045 n.93. Although it is the prosecution's burden to justify a warrantless search, the burden of proof would shift to the defendant if he "must show that the police have engaged in a criminal act in conducting the search." *Id.*

347. Comment, *supra* note 158, at 1462.

348. See subsection (b) *infra*.

349. See text accompanying notes 238-41 and note 241 *supra*. Writing about the American Law Institute's proposed "substantial violation" standards for the exclusion of evidence, which are almost identical to those in the Bentsen bill, Professor Kaplan concluded: "It is hard to conceive of a less administrable standard than this." Kaplan, *supra* note 5, at 1048 n.106. See note 335 *supra*.

350. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (dissenting opinion).

351. *But see* Comment, *supra* note 158, at 1465.

352. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (1970).

\$25,000 for any unreasonable search and seizure by a federal agent or anyone acting under him. Attorneys, under penalty of fine and imprisonment, would not be permitted to charge a claimant more than 25 percent of the judgment recovered.³⁵³ Although the federal district courts would have exclusive jurisdiction over the civil actions authorized by the bill,³⁵⁴ other applicable provisions of the Federal Tort Claims Act would require filing the claim with the federal agency responsible for the offending officer before the court case could be instituted.³⁵⁵ Frequently, the administrative proceedings may offer greater efficiency and informality in reaching just dispositions than would civil litigation. If a claimant is dissatisfied with the administrative determination, he may then file the civil action, but he will not, under a general provision of the Federal Tort Claims Act,³⁵⁶ have a right to a jury trial. Because of the traditional bias of juries in favor of police officers, however, this should not be a serious loss for most claimants.

Thus, the tort scheme envisioned by the Bentsen bill resolves a few of the difficulties with traditional tort actions.³⁵⁷ Many other difficulties remain, however, and render the bill's tort remedy inadequate. Basically, the incentives to sue are too weak to ensure the ongoing judicial scrutiny of police practice needed to prevent the atrophy of fourth amendment rights. For example, the bill establishes a \$25,000 ceiling on recovery, but does not guarantee successful claimants a minimum recovery.³⁵⁸ Moreover, although court costs may be awarded to a

353. Other provisions of the Federal Tort Claims Act similarly limit the amount the attorney may charge, but use different maximum percentages. See 28 U.S.C. § 2678 (1970).

354. In pertinent part, the bill provides:

The remedy against the United States provided by this chapter for an illegal search and seizure shall be *exclusive* of any other civil action or proceeding by reason of the same subject matter against any of the persons described in section 2692 whose act or omission gave rise to the claim.

(Emphasis added.) The title of the section, "Judgment as a bar," is inconsistent with the content of the section. The title would suggest that the plaintiff forgoes the right to bring further suit only if he loses. If he did not lose, one would assume other actions might lie. But the text of the section clearly indicates that the tort action created by the bill is to be the claimant's *exclusive* remedy, regardless of who prevails. One commentator has read the section to provide that "a judgment in favor of the aggrieved party would bar any other civil suit against the offending officer." Comment, *supra* note 158, at 1462. The section probably should be amended to harmonize the title and the text.

355. 28 U.S.C. § 2675 (1970).

356. 28 U.S.C. § 2402 (1970).

357. See text accompanying notes 275-94 *supra*. By making the government the defendant, for example, the problem of a judgment-proof defendant is solved.

358. A number of commentators have urged that a minimum recovery be included

prevailing party under the Federal Tort Claims Act, reasonable attorney's fees may not be awarded.³⁵⁹ The absence of provisions for either minimum liquidated damages or reasonable attorney's fees, combined with the 25 percent limit on contingency fees, makes it improbable that penniless plaintiffs—the most likely victims of police transgressions—will secure the services of attorneys who are willing and able to help them.³⁶⁰

In addition, by imposing no penalties on the offending officer, the bill does nothing to deter official wrongdoing, except for whatever speculative effect a damage award might have, first on agency policy and then on the officer. Some of the creative proposals discussed earlier, such as attaching the salary of an errant policeman, discharging him from office for an intentional breach of a person's constitutional rights, or even making the police chief personally liable, might be inserted into the bill to sharpen the remedy's teeth. Otherwise, because of the loopholes in the substantial violation test that governs the evidence-excluding branch of the bill, the government may have the shocking option of buying an illegal conviction.

c. *Constitutionality*

If, as some authorities claim, the federal exclusionary rule is not constitutionally compelled, but merely a product of the Supreme Court's supervisory power over the lower federal courts,³⁶¹ Congress could modify the exclusionary rule without raising constitutional issues.³⁶² If, however, the federal exclusionary rule is of constitutional origin,³⁶³ then

as an element in any fourth amendment tort remedy. *See, e.g., Barrett, supra* note 207, at 594-95; Foote, *supra* note 270, at 515.

359. 28 U.S.C. § 2412 (1970). Suits involving illegal electronic surveillance authorize recovery of reasonable attorney's fees. 18 U.S.C. § 2520(c) (1970). A recent amendment to the Federal Tort Claims Act would seem to suffer from many of the same defects that afflict S. 881. *See* note 286 *supra*.

360. Contrast the proposal discussed in the text accompanying notes 317 & 318 *supra*.

361. *See* text accompanying notes 156-58 *supra*. *Elkins v. United States*, 364 U.S. 206 (1960), overturned the silver platter doctrine in an exercise not of constitutional interpretation but of the supervisory power. *See* text accompanying note 41 *supra*.

362. The supervisory power controls the lower federal courts, but does not bind the Congress any more than it binds the states, *see* note 158 *supra* and accompanying text, and Congress has authority under articles I and III of the Constitution to "create and abolish remedies and regulate practice and procedure in the federal courts." Comment, *supra* note 158, at 1467; *see Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937).

363. *See, e.g., United States v. Calandra*, 414 U.S. 338, 360-61 (1974) (Brennan, Douglas & Marshall, JJ., dissenting); *Wolf v. Colorado*, 338 U.S. 25, 48 (1949) (Rutledge & Murphy, JJ., dissenting).

the constitutionality of S. 881 depends on the Supreme Court's willingness to overrule prior doctrine. For a majority of the Justices—all but Justices Brennan and Marshall—the constitutionality of replacing or modifying the exclusionary rule would probably depend on the deterrent capacity of the proposed alternatives. The six- or seven-man majority would view *Mapp v. Ohio* as having been based merely on the factual conclusions that the exclusionary rule deters police wrongdoing and that the rule is the only effective remedy for so doing. Almost certainly, the Chief Justice and Justices Blackmun, White, and Rehnquist would hold S. 881 constitutional.³⁶⁴

Long before Congress was considering any legislation similar to S. 881, Justice Black declared that the exclusionary rule “is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.”³⁶⁵ Answering their brother Black's concurring opinion in *Wolf v. Colorado*, Justices Rutledge and Murphy rejected “any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment.”³⁶⁶ More recently, and since S. 881 was introduced, similar arguments have reappeared. While several commentators have specifically endorsed the bill,³⁶⁷ Justices Brennan, Douglas and Marshall, dissenting in *United States v. Calandra*, have echoed the sentiments of Justices Rutledge and Murphy.³⁶⁸ In the last analysis, however, a majority of the Supreme Court Justices seem convinced that Congress may constitutionally retire the exclusionary

364. See the Chief Justice's dissent in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 413 (1971), and the opinion of the Court in *United States v. Calandra*, 414 U.S. 338 (1974). In *Elkins v. United States*, 364 U.S. 206 (1960), Justice Stewart took a strong position favoring application of the exclusionary rule to the states. Because the case involved the use of illegal evidence in federal courts under the silver platter doctrine, the position taken was unnecessary to the decision and therefore all the more noteworthy. See also the summary of oral arguments in *Stone v. Powell*, 422 U.S. 1055 (1975), *granting cert. to* 507 F.2d 93 (9th Cir. 1974), and *Wolff v. Rice*, 422 U.S. 1055, *granting cert. to* 513 F.2d 1280 (8th Cir. 1975), in 44 U.S.L.W. 3485, 3486 (1976).

365. *Wolf v. Colorado*, 338 U.S. 25, 39-40 (1949) (Black, J., concurring). See also *Coolidge v. New Hampshire*, 403 U.S. 443, 490-92, 496-500, 510 (1971) (views of Justices Harlan, Black, and Blackmun).

366. *Wolf v. Colorado*, 338 U.S. 25, 48 (1949) (dissenting opinion).

367. E.g., Wingo, *supra* note 117, at 588; Wright, *supra* note 104, at 745. See also Vance, *Why the Exclusionary Rule Should be Modified*, 7 THE PROSECUTOR 399 (1971) (reporting support for the predecessor measure by the National District Attorneys' Association).

368. 414 U.S. 338, 360-61 (1974).

rule. The various arguments set forth above that the exclusionary rule is mandated by the Constitution seem unlikely to change this conviction.

d. *Effect on State Criminal Proceedings*

Although S. 881, on its face, alters the exclusionary rule only in federal criminal proceedings,³⁶⁹ its enactment would also permit the states to modify the exclusionary rule because of, and not despite, *Mapp v. Ohio*. It must be remembered that the ultimate rationale of *Mapp* was that since state courts must protect the same right that federal courts protect, they must do so by the same sanction.³⁷⁰

It would seem to follow, therefore, that a valid federal modification of the exclusionary rule would by force of the *Mapp* decision permit adoption by the states of a substantially similar solution to the problem without Supreme Court modification of the *Mapp* holding that ". . . [t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. . . ." ³⁷¹

To be consistent, the Court would have to permit state modification along the lines of S. 881, but the Court probably should not allow the states to revert to the pre-*Mapp* situation in which many states afforded no meaningful remedy at all for fourth amendment violations.

4. *Other Proposals*

In addition to the numerous proposals for modified tort actions, including that embodied in S. 881, several other devices for controlling police lawlessness have been suggested.

a. *Criminal Prosecution*

Some commentators have urged that offending officers be criminally prosecuted.³⁷² The state and federal laws necessary for such prosecu-

369. See note 336 *supra*. Presumably Congress might be able to attack *Mapp* directly through its power to implement fourteenth amendment rights. U.S. CONST. amend. XIV, § 5; see *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Congress would have to argue, however, that it was not "diluting" constitutional rights. See *id.* at 651 n.10; Allen, *supra* note 5, at 6.

370. See text accompanying note 44 *supra*.

371. *Majority Report of the Committee on Federal Legislation*, *supra* note 169, at 4240.

372. E.g., J. WIGMORE, *supra* note 233 (recommending 30-day imprisonment for contempt of the Constitution); *Majority Report of the Committee on Federal Legislation*, *supra* note 169, at 4239 (recommending criminal prosecution of law officers responsible

tions are already on the books,³⁷³ but the laws have remained dormant.³⁷⁴ This disuse results primarily from the reluctance of prosecutors to bring actions against those who supply them with the evidence essential to perform successfully their prosecutorial role.³⁷⁵ Because of the independence and discretion prosecutors have traditionally enjoyed in America, little can be done to require prosecutors to bring such

for "obviously unreasonable searches and seizures"). See generally B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES (1973); Edwards, *supra* note 272; Foote, *supra* note 270, at 493-94; Morris, *supra* note 272, at 428; Paulsen, *supra* note 210, at 260; Wingo, *supra* note 117, at 580.

373. State criminal statutes are of various kinds. Some make the officer criminally liable for conducting a search without a warrant or with an invalid warrant: MINN. STAT. ANN. § 629.402 (Supp. 1976); MO. REV. STAT. § 558.190 (1969); MONT. REV. CODES ANN. § 94-7-401 (Spec. Pamphlet 1974, Interim Supp. 1975); N.J. STAT. ANN. § 33:1-65 (1940); N.Y. PENAL LAW § 195.00(1) (McKinney 1975); OKLA. STAT. ANN. tit. 21, § 535 (1958); VA. CODE ANN. § 19.1-88 (1960); WASH. REV. CODE ANN. §§ 10.79.040, -.045 (1961).

Others punish the affiant for maliciously procuring a search warrant: ALA. CODE tit. 15, § 99 (1959); ALASKA STAT. § 12.35.060 (1972); ARIZ. REV. STAT. ANN. § 13-1454 (1956); CAL. PENAL CODE § 170 (Deering 1974); FLA. STAT. ANN. § 933.16 (1973); IDAHO CODE § 18-709 (1948); IOWA CODE § 751.38 (1966); MICH. STAT. ANN. § 28-1259(8) (1972); MINN. STAT. ANN. § 626.22 (Supp. 1975); MONT. REV. CODES ANN. § 94-7-203 (Spec. Pamphlet 1974); NEV. REV. STAT. §§ 199.130, -.140, -.440 (1973); N.J. STAT. ANN. § 33: 1-64 (1940); N.Y. PENAL LAW § 240.50 (McKinney 1975); N.D. CENT. CODE § 29-29-18 (1974); OKLA. STAT. ANN. tit. 22, § 1239 (1951); ORE. REV. STAT. § 133.992 (1973); S.D. COMPILED LAWS ANN. § 23-15-11 (1967); UTAH CODE ANN. § 77-54-21 (1953).

Still other state laws make the officer criminally liable if he willfully exceeds his authority under the search warrant: CAL. PENAL CODE § 146 (Deering 1974); FLA. STAT. ANN. § 933.17 (1973); IOWA CODE § 751.39 (1966); MICH. STAT. ANN. § 28.1259(7) (1972); MINN. STAT. ANN. § 626.22 (Supp. 1975); NEV. REV. STAT. § 199.450 (1973); N.Y. PENAL LAW § 195.00(1) (McKinney 1975); N.D. CENT. CODE § 29-29-19 (1974); OKLA. STAT. ANN. tit. 21, § 536 (1950); *id.* tit. 22, § 1240 (1950); S.D. COMPILED LAWS ANN. § 23-15-17 (1967); TENN. CODE ANN. § 40-510 (1955); UTAH CODE ANN. § 77-54-22 (1953).

Federal criminal laws proscribe malicious procurement of a search warrant, 18 U.S.C. § 2235 (1970), conducting a search without a warrant, 18 U.S.C. § 2236 (1970), and conspiracy against the federal rights of citizens, 18 U.S.C. § 242 (1970). See also 18 U.S.C. §§ 2234, 2511, 2515. With respect to § 2515, see *United States v. Giordano*, 416 U.S. 505 (1974). There have been no reported convictions under § 2236 since it was enacted in 1935. Note, *supra* note 57, at 525 n.122.

In Scotland, criminal penalties are imposed on errant policemen. Baade, *supra* note 4, at 1330.

374. Foote, *supra* note 270, at 494; Oaks 673; C. Sevilla, ReMapping the Exclusionary Rule: An Alternative Suggestion, *supra* note 111, at 4; Atkinson, *supra* note 104, at 24.

375. See, e.g., B. GEORGE, *supra* note 372, at 94; GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 155; Foote, *supra* note 270, at 493; Morris, *supra* note 272, at 428; Paulsen, *supra* note 210, at 260; Wingo, *supra* note 117, at 580.

actions. In Australia, by contrast, when a judge finds that the privacy rights of a criminal defendant have been violated, the judge orders the prosecutor to commence proceedings against the officer. But even if American prosecutors were willing to bring criminal actions against offending police officers, the burden of proving malice or willfulness and the burden of persuading a jury to convict are difficult to meet.³⁷⁶

To increase the likelihood of prosecution, it has been suggested that a separate Civil Rights Office be established in each jurisdiction. The Office would be independent of the prosecutor and "charged solely with the responsibility of investigating and prosecuting alleged violations of the Constitution by law enforcement officials."³⁷⁷ Whomever is made responsible for prosecution, however, the victims of the fourth amendment violations might possibly be compensated under statutes that recompense victims of crimes.³⁷⁸

Of course, not all commentators favor criminal sanctions for the control of police; many fear that the police would then be deterred from aggressive, proper enforcement of the law.³⁷⁹

b. *Injunctive Relief*

In *Lankford v. Gelston*,³⁸⁰ the United States Court of Appeals for the Fourth Circuit held that citizens whose dwellings were searched without

376. See *Oaks*, *supra* note 4, at 673; *Paulsen*, *supra* note 210, at 260; *Wingo*, *supra* note 117, at 579-80.

377. Peterson, *supra* note 214, at 62. For an analysis of the drawbacks of such a proposal, see *Paulsen*, *Safeguards in the Law of Search and Seizure*, *supra* note 255, at 73. See also *Roche*, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeal Board*, 30 WASH. & LEE L. REV. 223 (1973).

378. The 94th Congress has been virtually flooded with bills to provide compensation for victims of crime. Each bill contains its own list or description of crimes or acts that could give rise to claims for compensation, but for the most part, these lists are limited to violent crimes causing personal injuries. See, e.g., H.R. 9074, 94th Cong., 1st Sess. (1975); H.R. 287, 94th Cong., 1st Sess. (1975); S. 1399, 94th Cong., 1st Sess. (1975); S. 1, ch. 41, 94th Cong., 1st Sess. (1975). *But cf.* H.R. 3073, 94th Cong., 1st Sess. (1975).

379. E.g., GOVERNOR'S SELECT COMMITTEE, *supra* note 146, at 155-56; *Atkinson*, *supra* note 104, at 24; *Edwards*, *supra* note 272, at 629. Other commentators are concerned about the possible adverse effect on police morale and even about the possibility that the enforcement of such a criminal statute "could be violative of due process in that there might be an insufficient notice of the conduct which would constitute a crime. See generally *Dombrowski v. Pfister*, 380 U.S. 479 (1965)." Comment, *supra* note 104, at 90 n.92.

380. 365 F.2d 197 (4th Cir. 1966). See also *Wheeler v. Goodman*, 298 F. Supp. 935 (W.D.N.C. 1969).

probable cause as part of a dragnet search of a black community were entitled to injunctive relief. Relying on *Mapp v. Ohio*, the court reasoned that money damages would be an ineffective deterrent to the unconstitutional police conduct³⁸¹ and therefore issued an injunction under section 1983³⁸² to forbid any further illegal searches. At that time, the police had already conducted more than 300 illegal searches of dwellings, and the police commissioner had ordered the cessation of further searches without probable cause. Since the commissioner's order did not, however, specifically prohibit searches based only on anonymous tips or state that such searches did not constitute searches based on probable cause, the court found that the directive did not relieve the need for an injunction.

Several commentators have approved the use of injunctive relief in the case of systematic violations by the police.³⁸³ Unfortunately, an injunction is likely to be no more effective as a deterrent than the *Lankford* court thought money damages would be. In addition to the difficulties of framing and enforcing an order, courts are inclined to reject any remedy that would place them in the role of systematically supervising police conduct.³⁸⁴ As Justice Jackson, joined by Justices Frankfurter and Murphy, explained:

We must remember . . . that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way

381. See also *Fifth Ave. Peace Parade Comm. v. Hoover*, 327 F. Supp. 238 (S.D.N.Y. 1971); *Wilson v. Webster*, 315 F. Supp. 1104 (C.D. Cal. 1970); text accompanying note 246 *supra*. A number of questions remain unresolved by federal courts concerning the use of state and federal injunctions against state and federal police. See *Amsterdam*, *supra* note 104, at 447 n.137.

382. 42 U.S.C. § 1983 (1970).

383. E.g., Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 RUTGERS L. REV. 526 (1957); Note, *supra* note 295; Comment, *supra* note 274; Comment, *Lawless Law Enforcement*, 4 LOYOLA U.L. REV. 161 (1971); Comment, *Federal Injunctive Relief from Illegal Search*, 1967 WASH. U.L.Q. 104; Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968). See also CAL. PENAL CODE § 637.2 (Deering 1974).

384. See *Rizzo v. Goode*, 96 S. Ct. 598 (1976). The district court order entered in *Rizzo* and affirmed by the court of appeals had required the Philadelphia Police Department to modify internal procedures for handling citizens' complaints and had provided for continuing judicial surveillance over the police department's operation. *Council of Orgs. v. Rizzo*, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd sub nom. Rizzo v. Goode*, 506 F.2d 542 (3d Cir. 1974). Characterizing the order as a "sharp limitation on the department's 'latitude in the dispatch of its own internal affairs,'" the Supreme Court reversed the court of appeals decision. 96 S. Ct. at 608. The Court relied on principles of federalism as "additional factors weighing against" the use of federal equity power for fashioning state agency procedures to minimize misconduct on the part of a "handful" of the agency's employees. *Id.* at 607.

in which the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the act in terms of money.

But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision, and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. *There is no opportunity for injunction or appeal to disinterested intervention.* The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.³⁸⁵

With its contempt of court sanction, the injunction can occasionally be a helpful enforcement mechanism, but because the situations in which it can effectively be used are rare, the injunction should not be falsely acclaimed as an effective alternative to the exclusionary rule.

c. *Summary Proceeding*

Responding to the need to translate written criminal penalties into actual criminal punishment, several commentators have suggested a kind of "summary proceeding in the nature of contempt, in which the court would take the initiative . . . without the intervention of the prosecutor."³⁸⁶ As an alternative or supplement to the exclusionary rule, the summary proceeding may have great potential and deserves careful study and experimentation.

d. *Ombudsman*

Commentators who have studied other countries' problems of controlling police have viewed the ombudsman concept as a possible solution to the problem in this country.³⁸⁷ Acting as an independent government

385. *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (emphasis added).

386. Plumb, *supra* note 272, at 388; see California State Bar Committee on Criminal Law and Procedure, *supra* note 272, at 264-65 (proposal by the California Bar Committee); Oaks 674.

387. See N. MORRIS & G. HAWKINS, *supra* note 5, at 101. On ombudsmen generally, see AMERICAN BAR ASSOCIATION SECTION OF ADMINISTRATIVE LAW, OMBUDSMAN COMMITTEE, DEVELOPMENT REPORT, April 15, 1971-June 30, 1972; W. GELLHORN, OMBUDS-

official, the ombudsman could take direct penal action against offending police officers, or instead rely on publicity and public opinion to control police illegality. Professor Oaks believes the ombudsman notion is worth pursuing, although thorough experimentation will be required since "there is virtually no United States experience with an ombudsman in this role"³⁸⁸ State or federal enabling legislation would be required to provide this experience.

e. *Internal Police Discipline*

If internal police discipline were to be used to control typical fourth amendment violations, stringent sanctions would be available, such as forfeiture of promotion, loss of prestige, removal from duty, or other disciplinary measures. The notion, however, that police departments will regulate themselves in this area is greeted skeptically by the public, and rightfully so, since few police departments ever punish officers for fourth amendment violations.³⁸⁹ Some commentators feel that this

MEN AND OTHERS (1966); W. GELLHORN, *WHEN AMERICANS COMPLAIN* (1966); S. HURWITZ, *THE OMBUDSMAN* (1962); TASK FORCE: *THE POLICE*, *supra* note 195, at 202-04; Davidow, *Criminal Procedure Ombudsman As a Substitute for the Exclusionary Rule: A Proposal*, 4 *TEX. TECH. L. REV.* 317 (1973); Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 *J. CRIM. L.C. & P.S.* 160 (1967); Spitto, *supra* note 14.

388. Oaks, *supra* note 4, at 674. See also Davidow, *supra* note 387. For opposition to the ombudsman idea, see Comment, *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 *J. CRIM. L.C. & P.S.* 256, 257 (1972).

389. See note 274 *supra*. Professor Oaks in his extensive research found not a single instance of a police department that tied its disciplinary sanctions to application of the exclusionary rule by the courts. Oaks 710. See generally Note, *The Administration of Complaints by Civilians Against Police*, 77 *HARV. L. REV.* 499 (1964). Nevertheless, one commentator urges that we attempt to "use the carrot rather than the stick" in moving toward police department self-regulation. Accordingly, he proposes that "none of the searches of a department should be subject to the exclusionary rule if the department is up to standard." Kaplan, *supra* note 5, at 1051 n.112. To be "up to standard," a department would have to promulgate and publish regulations for compliance with the fourth amendment, institute training programs, and discipline offending officers. *Id.* at 1050-51. It is possible that "the regulations governing on-the-street behavior might be sufficient but not those concerning electronic eavesdropping," that is, a department might be up to standard in one area of activity but not in another area. *Id.* at 1053. Kaplan's approach significantly rewards good-faith planning by police administrators. Under the scheme, no suppression would be ordered even when a clearly unconstitutional search and seizure was made, so long as that misconduct was a departure from normal, "up to standard" behavior by officers in that police department. As Kaplan admits, this approach can be justified only if the right of an individual defendant to have suppressed all evidence that has been unconstitutionally seized from him is not recognized. For a similar proposal, see Caplan, *The Case for Rulemaking by Law Enforcement Agencies*,

remedy can be made workable through legislative guidelines on proper police conduct.³⁹⁰ Nevertheless, it is doubtful that police professionalism in this country has developed to the extent that the protection of our constitutional rights can be entrusted to the same group against whose zealously the rights were given.

f. *External Police Discipline*

Some commentators find a potentially powerful mechanism for controlling police transgressions in boards commonly labeled "civilian review boards." Such boards might be more willing than juries to impose penalties for police offenses.³⁹¹ Although several observers find this a much more promising alternative than internal police discipline,³⁹² oth-

36 LAW & CONTEMP. PROB. 500, 510-11 (1971). On internal police discipline generally, see Amsterdam, *supra* note 104, at 428-29.

390. *E.g.*, J. Spiotto, An Empirical Study of the Exclusionary Rule From Its Origins to Its Alternatives, *supra* note 128. See also Israel, *supra* note 328; Note, *supra* note 272, at 1211. Compare the growing support for enforcing the fourth amendment by having police departments develop agency rules for the conduct of searches and seizures: K. DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY (1971); Caplan, *supra* note 389; McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); Wilson & Alprin, *supra* note 186; Wright, Book Review, 81 YALE L.J. 575 (1972). Professor Amsterdam urges an interpretation of the fourth amendment that would require police administrators to promulgate such rules. Amsterdam, *supra* note 104, at 416-31, 474 n. 580. Professor Kaplan suggested that federal legislation imposing rule-making duties on law enforcement administrators might be appropriate under section 5 of the fourteenth amendment, although he doubts the political feasibility of enacting such legislation today. Kaplan, *supra* note 5, at 1043. If police agencies were obligated by statute or constitutional interpretation to promulgate and adhere to search and seizure rules, courts might be able to control law enforcement activity that does not breach the warrant or probable cause requirements. *Cf.* note 257 *supra*. In this regard, consider Justice Traynor's declaration that local statutes or rules "will have constitutional sanction, for whatever action is illegal is perforce unreasonable." Traynor, *supra* note 39, at 328. But compare Traynor's later assertion that police conduct which "is not unreasonable in the circumstances . . . is not rendered unreasonable in the event that it is deemed to have involved a civil trespass." *Id.* at 337.

Not all commentators view police rule-making as a tenable alternative to the exclusionary rule. Some assert:

[T]he rule making alternatives would quickly be co-opted to protect police liberties with the fourth amendment. . . . [R]ule making would serve to allow the police to take the initiative away from the courts in defining the legality of search practices, thus maximizing police power rather than confining it.

Critique, *supra* note 6, at 794. See also Caplan, *supra* note 389, at 500, 503-04; Quinn, *Effect of Police Rulemaking on the Scope of Fourth Amendment Rights*, 52 J. URBAN L. 25 (1974).

391. See Wingo, *supra* note 117, at 580-81.

392. *E.g.*, N. MORRIS & G. HAWKINS, *supra* note 5, at 101; Goldstein, *supra* note 387; Oaks 674; Wingo, *supra* note 117, at 581. See generally Barton, *Civilian Review Boards*

ers view the various experiments with this scheme as failures.³⁰³

g. *Incentive System*

Some students of the subject have made the interesting proposal that we pay policemen a certain amount, for example \$100, each time that the fruits of their searches are successfully received in evidence.³⁰⁴ This

and the Handling of Complaints Against the Police, 20 U. TORONTO L.J. 448 (1970); Note, *supra* note 389. A creative suggestion for externally disciplining errant police officers was made by Justice Walter V. Schaefer of the Illinois Supreme Court. To "curb the obvious potential for evil in the promiscuous use of stop and frisk as a technique of harassment," he suggested state legislation along the following lines:

A requirement . . . that an officer who stops a citizen and frisks him must report the circumstances in writing and in full detail, would tend to reduce abuses and to insure that police officers are always conscious of the necessity that every such detention be justified. And since the victim of the unwarranted stop and frisk which does not lead to arrest is unlikely to complain because of inertia, lack of time, fear of retribution or a host of other reasons, it might be desirable also to authorize the institution of disciplinary proceedings based upon such reports, by persons outside of the law enforcement agency.

Schaefer, *The Fourteenth Amendment and Sanctity of the Person*, 64 NW. U.L. REV. 1, 14 (1969).

393. *E.g.*, TASK FORCE: THE POLICE, *supra* note 195, at 200-02. Political opposition from police and the public has been considerable. See Feld, *Police Violence and Protest*, 55 MINN. L. REV. 731 (1971); Goldstein, *supra* note 387; Oaks 674; Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, *supra* note 383.

394. See J. White, *Constitutional Criminal Procedure—Cases and Questions 63b* (unpublished materials for class in criminal procedure at University of Chicago School of Law, Spring 1974). The advantage of this scheme is that it has a direct effect on the individuals conducting the searches. Another approach with a similarly direct impact (albeit a deterrent one) is that found in the early Roman statutes, the Twelve Tables. Enacted in 451-450 B.C., these laws ordained a ritual in which persons could search one another's houses for stolen property. The statute exempted a person from penalties even when the search turned up no stolen goods, provided he proceeded in the following manner:

[O]ne wishing to search must do so naked, girt with a *licium* and holding a platter What, it has been asked, is the *licium*? Probably it is some sort of cloth for covering the privy parts. . . . [There are] two explanations of the requirement of a platter in the hands—namely, that the object is to engage the searcher's hands and so prevent him from palming anything off, or else that it is for him to place on it what he finds. . . . At any rate there is no doubt that the statute is complied with whatever the platter is made of.

1 THE INSTITUTES OF GAUUS, bk. III, §§ 192-93 (F. Zulueta transl. 1946). Such a scheme had already been termed "ridiculous" by the classical period in 200 A.D., *see id.* § 193, but one must admit that it probably places the searcher in a sufficiently embarrassing posture to deter any but those acting in good faith and that it ingeniously solves the problem of bringing contraband onto the premises to plant during the search. While any platter apparently would suffice in most cases, perhaps when one searched on behalf of another, a custom developed of using a silver platter, a custom which Justice Frankfurter may have unearthed in his research for *Lustig v. United States*, 338 U.S. 25 (1949). See text accompanying notes 28 & 29 *supra*.

incentive system might also have broad implications for the control of police in other areas, such as obtaining confessions and the appropriate use of firearms. It is at least an idea worth testing in a controlled experiment. Although the monetary cost may be high, it may be a minimal one to pay for freedom from unreasonable searches and seizures. On the one hand, the proposal is limited because it affects only that small percentage of searches and seizures aimed at securing evidence for a prosecution. On the other hand, the proposal may stimulate police to press a greater percentage of their arrests on to prosecution.

h. *Police Training*

The exclusionary rule is said to provide an incentive for training police to be aware of a suspect's rights.³⁹⁵ If law enforcement officials would fully instruct police officers about a suspect's rights and insist that these rights not be violated, perhaps police behavior would improve. One view suggests that concomitantly with the exclusionary rule, federal funds could be used to create a National Police and Law Enforcement Academy to train police leaders in search and seizure techniques. If this proved to be successful in reducing police wrongdoing, perhaps the exclusionary rule could then be limited.

i. *Restructured Police-Prosecutor Relationship*

Historically, the American police department has been independent of the prosecutor's office: that is, neither police nor prosecutor directly gives or takes orders from the other. As a result, the prosecutor, who is a prime target for the effective deterrence of the exclusionary rule,³⁹⁶ is unable to command police officers to conduct their searches within constitutional bounds. If, however, both police and prosecutor were subject to the same political authority, as is the situation in Canada,³⁹⁷

395. See Paulsen, *supra* note 210, at 257. This incentive may have prodded the California legislature to enact statutes setting minimum standards for police training. See CAL. PENAL CODE §§ 13510-14 (Deering 1974).

396. See text accompanying note 195 *supra*.

397. See Baade, *supra* note 4, at 1340. In testimony before a congressional committee, Professor Pye (then Dean) of Duke University Law School urged that the most promising replacement for the exclusionary rule in America would be to make the prosecutor ultimately responsible for all criminal justice functions. *Hearings on the Improvement and Reform of Law Enforcement and Criminal Justice in the United States Before the House Select Committee on Crime*, 91st Cong., 1st Sess., at 686-87 (1969).

that authority could effectively insist on police work that would facilitate, not preclude, the successful prosecution of wrongdoers.

VI. CONCLUSION

The exclusionary rule should be retained in federal and state criminal proceedings. Currently, there exists no other mechanism for the meaningful judicial articulation of fourth amendment rights; without this articulation, those rights might atrophy. Despite gaps in the rule's deterrent ability, even its most ardent detractors concede that police are probably dissuaded from conducting unreasonable searches and seizures when successful prosecution is their goal. As legislatures continue their efforts to decriminalize "victimless" crimes, efforts that might resolve many of the difficulties associated with the exclusionary rule, the legislatures should also experiment with promising supplementary devices for enforcing the fourth amendment. If and when these devices prove superior to the exclusionary rule, the rule might be modified to allow reception of evidence seized wrongfully but in good faith. At that point only vigilance could prevent the police and courts from abusing such flexible tests. In any event, the strange fruit of egregiously unconstitutional searches must never be allowed to underpin a criminal conviction, lest justice in our democracy appear the height of hypocrisy.