The Exclusionary Rule and Police Perjury

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> "[I]t would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion."[1]
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> "The conclusion reached on the basis of this experience is that the police are often not adverse to committing perjury to save a case."[2]

As repugnant a concept as it may seem, the guardians of our security are quite capable of deliberately lying under oath in court proceedings. It is too basic a concept to promulgate, but the police, being human, are subject to the same biases, ulterior motivations, and irrationalities that are the bases of perjured testimony by other witnesses. For the most part, police perjury in courtrooms of the United States is recognized by the defense bar, winked at by the prosecution, ignored by the judiciary, and unknown to the

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1. Bush v. United States, 375 F.2d 602, 604 (D.C. Cir. 1967). The quote by Chief Justice Burger was made prior to his elevation to the Supreme Court when he served on the United States Court of Appeals for the District of Columbia.

2. Grano, *A Dilemma For Defense Counsel: Spinnelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 UNIV. ILL. LAW FORUM 405, 409 (1971).

general public. The exact amount of police perjury in criminal proceedings is difficult to measure, but there can be no question that it exists. In certain instances, such as in suppression of evidence hearings where the proscriptions of the Fourth Amendment are a factor, policemen show a high propensity to purposely distort their testimony in order to achieve desired ends.

Intertwined with the phenomena of police perjury is the propriety of the Fourth Amendment exclusionary rule. The rule has been the focus of much hot debate since *Mapp v. Ohio*[3] made it applicable to the States. The policeman, cognizant of the fact that a violation of the rules of search and seizure may result in his case being thrown out of court, is not adverse to fabricating testimony as to the method by which his search was conducted in order to save the case. That such a drastic result—the suppression of otherwise competent evidence—should derive from a policeman's failure to conform his conduct to complex search and seizure rules is the foundation of the hostility of the exclusionary rule. Indeed, Chief Justice Burger has decried "the monstrous price we pay for the exclusionary rule"[4] and has written at length lambasting the rule as a "wistful dream."[5] Several other Supreme Court justices, present and past, agree that the Fourth Amendment does not mandate an exclusionary rule for illegally seized evidence and have joined in raising the hue-and-cry for substitutes to the exclusionary rule.[6]

This article examines the legitimacy of the criticism of the Fourth Amendment exclusionary rule. In doing so, a general theme will

3. 367 U.S. 643 (1961).

4. Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971) (Burger, C.J., dissenting).

5. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

6. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), Justices Harlan, Black, Blackmun and Chief Justice Burger dissented and indicated their readiness to abandon the exclusionary rule's application to the States. In Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973), Justice Powell indicated his own reservations with the exclusionary rule in arguing that federal habeas corpus claims under 28 U.S.C. § 2254 should not be a means to review Fourth Amendment claims of state prisoners. *Cf.*, Kaufman v. United States, 394 U.S. 271 (1969). Justice Rehnquist has indicated his distaste for the exclusionary rule in authoring important decisions significantly curtailing its application. United States v. Robinson, 414 U.S. 218 (1973); Adams v. Williams, 407 U.S. 143 (1972). Chief Justice Burger, however, has also stated that he "would hesitate to abandon it until some meaningful substitute is developed, ..." Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971). In this, he probably speaks for Justices Powell and Blackmun as well. *Cf.*, United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting, expresses a fear that a majority on the Court is now ready to jettison the rule entirely.).

emerge: the exclusionary rule is a benevolent concept crippled by police perjury and judicial hostility and seen as deserving a mercy killing by those who never wanted to give it life. It is the intent of this article to explore the extent to which police perjury and judicial hostility have crippled the purpose and effect of the Fourth Amendment exclusionary rule. The conclusion will provide suggestions which, if implemented, could breathe new life into a beleaguered Fourth Amendment.

I. EXCLUSIONARY RULE CRITICISM IN A NUTSHELL

The critics of the exclusionary rule have been many and vocal. Countless articles have been written by the rule's detractors claiming it to be ineffective in its purpose of deterring police misconduct and preserving the integrity of the courtroom.[7] While this paper is not intended to be a comprehensive exposition of all aspects of the rule's criticism, the major focuses of attack may be summarized as follows:

> First, it cannot be effective unless illegally obtained evidence is needed by the state to convict the defendant and this will not be the case when improper police conduct does not result in state acquisition or when the State has other evidence sufficient to convict. Second, many procedural obstacles exist to limit the frequency of invocation of the rule. If the appropriate motion is not made at the appropriate time, the issues may escape formal litigation. Given the predominance of the guilty plea system in all jurisdictions, it is likely that most questions on police illegality become only additional factors in the bargaining process. The defendant must also have satisfied 'standing' requirements to move to suppress. Third, indirect uses may still be made on illegally obtained evidence, such as by introduction at trial of that evidence to impeach the defendant; and, the so called 'fruits' doctrine cannot prevent all indirect benefit to the police.

7. A partial listing of the commentators who stress this and other criticisms of the rule includes: Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964); Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DE PAUL L. REV. 80 (1969); Cox, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 SOUTHWESTERN U.L. REV. 68 (1972); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Horowitz, *Excluding the Exclusionary Rule—Can There Be an Effective Alternative*, 47 L.A. B. BULL. 91 (1972); La Fave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965); Oakes, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736 (1972).

> Finally—and this is the main problem—the exclusionary rule derives whatever efficacy it may have from the underlying assumption that when the police engage in illegal conduct, it is for the purpose of securing a conviction. The fallacy in this assumption has been amply documented. It should be hoped that the Court's explicit recognition of this limitation in *Terry v. Ohio*, 392 U.S. 1 (1968), will contribute to increase the tension to that 'protean variety' of police-citizen confrontations which do not contemplate prosecution.[8]

Critics also complain that there is no empirical evidence proving the deterrent effect of the rule on police conduct. The result, so the disputants argue, is that the rule has had an adverse effect upon law enforcement in the United States because competent, relevant evidence is many times excluded merely because of an inadvertent error by a policeman not schooled in the intricacies and vicissitudes of Fourth Amendment appellate rulings. Further, the penalty for an unlawful search is not imposed directly upon the transgressing officer, but rather on society which pays the price as the accused walks out of court a free man.[9] Thus, nothing is done to mend the erring ways of the offending officer and society is prevented its day in court with the accused.

In reflecting upon this criticism, the primary purposes of the exclusionary rule should be recalled. The basic premise underly-

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8. Tiffany, *The Fourth Amendment and Police Citizen Confrontations*, 60 J. CRIM. L.C. & P.S. 442, 452 (1969). The author's last quoted reference concerns the serious issue of arrests by police merely to harrass individuals in so-called "sumptuary crimes;" *e.g.*, "cleaning up" skid row by arresting alcoholics. *See also* R. NIMMER, TWO MILLION UNNECESSARY ARRESTS (1971).

9. Former California Supreme Court Chief Justice Roger Traynor viewed the effect of the rule in quite different terms:

> [T]he guilty go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them. It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. Traynor, *Mapp v. Ohio At Large In The Fifty States*, 1962 DUKE L.J. 319, 322 (1962).

But compare Dean Wigmore's argument that the "always watchful forces of criminality, fraud, anarchy and law evasion perceived the advantage of [the exclusionary rule] and made vigorous use of it." 8 J. WIGMORE, EVIDENCE, § 2184a, n.1 (McNaughton rev. 1961). Wigmore's contention that criminals are avidly reading appellate slip sheets to utilize the latest Fourth Amendment rulings as a crime tool is fanciful, but one with some following. One adherent reiterates the proposition by blaming defense attorneys for ". . . hiding their clients from justice and retribution in the nooks and crannies of Constitutional law, leaving them free to return to their antisocial careers." *See* MCGARR, THE EXCLUSIONARY RULE: AN ILL CONCEIVED AND INEFFECTIVE REMEDY, POLICE POWER AND INDIVIDUAL FREEDOM 99 (C.R. Sowle, Ed. 1962).

ing the exclusionary rule is that in a free society, government should not resort to illegal tactics in order to prosecute its citizens for wrongdoing. "If the Government becomes a law-breaker, it breeds contempt for law," said Justice Brandeis, "[i]t invites anarchy."[10]

To discourage governmental crime in the course of criminal investigations and prosecutions, the Supreme Court determined long ago that a rule excluding illegally obtained evidence would be necessary to preserve judicial integrity. The Court stated that trial courts "[c]annot 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."[11]

To implement these policy considerations and to breathe life into the proscriptions of the Fourth Amendment, the Supreme Court in *United States v. Boyd*,[12] *Weeks v. United States*,[13] and *Mapp v. Ohio*,[14] determined that illegally obtained evidence could not be constitutionally received in federal or state courts in furtherance of a criminal prosecution. The evidence is excluded, not because it is unreliable,[15] but because the values embodied in the Fourth Amendment are of greater import to the health of a democratic society than the use of that evidence in obtaining a criminal conviction. Thus, the government's legitimate interest in investigating

10. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

11. Terry v. Ohio, 392 U.S. 1, 13 (1968). In preserving its own integrity, the judiciary fashioned the exclusionary rule to exclude unconstitutionally obtained evidence and thus "deter the lawless action of the police." *See* Linkletter v. Walker, 381 U.S. 618, 637 (1965).

12. 116 U.S. 616 (1886). Boyd is the progenitor of the exclusionary rule. The case involved a delicate interplay between the exclusionary rules of the Fourth and Fifth Amendments and Justice Brandeis carried the case to the extent that:

> To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth. Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 472 (1928).

This rationale has not been adopted in subsequent cases.

13. 232 U.S. 383 (1914).

14. 367 U.S. 643 (1961).

15. As are coerced confessions, *see, e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960), or overly-suggestive line-ups, *see, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967).

crimes and prosecuting the wrongdoer is balanced against the individual's right to be free from warrantless and arbitrary invasions of privacy by governmental agents. This balance was struck, not by nine men sitting on the Supreme Court in the early 20th century, but by the draftsmen of the Fourth Amendment. The government may fulfill its valid interest in ferreting out crime merely by heeding the words of the Constitution and conducting its searches and seizures after securing advance authorization by a neutral magistrate upon a showing of probable cause. The individual's right to privacy is also fulfilled in the knowledge that arbitrary and harrassing governmental invasions will not be tolerated by the courts.[16]

The implementation of the Fourth Amendment by means of an exclusionary rule has brought on the avalanche of hostile criticism. In pressing the case for partial or total abandonment of the rule, the critics claim that the exclusionary rule has been a failure in deterring police wrongdoing in the area of search and seizure.[17] The detractors are prepared to strike a new balance[18] within the Fourth Amendment, one which would make the American courtroom a forum in which police crime and misconduct becomes a means by which the citizenry is prosecuted. Within this new framework, alternative remedies allegedly will succeed where the exclusionary rule has failed. The proposed alternatives are examined below.

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16. *See* Holmes v. Burr, 486 F.2d 55, 74 (9th Cir. 1973) where Judge Hufstedler, dissenting, eloquently captures the point:

> Of course, the government has a great and legitimate interest in detecting and preventing crime, but that interest must be balanced against the individual's right to be free from unjustified intrusions. The balance was struck by the draftsmen of the Fourth Amendment: the governmental interest in combating crime is fully accommodated by permitting all searches and seizures, subject only to advance authorization by a magistrate upon a showing of probable cause; and the individual's expectations of privacy are protected by the knowledge that warrantless intrusions into his life will not be tolerated.

17. Lest the reader think the exclusionary rule has no supporters, read the following works in support of a Fourth Amendment exclusionary rule: M. PAULSEN, THE EXCLUSIONARY RULE AND MISCONDUCT BY THE POLICE IN POLICE POWER AND INDIVIDUAL FREEDOM, 87 (1962). [Hereinafter cited as PAULSEN, THE EXCLUSIONARY RULE]. Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436 (1964); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961).

18. Balancing is just the course taken by the Supreme Court in United States v. Calandra, 414 U.S. 338 (1974) where Justice Powell, writing for the Court, found the necessity for orderly Grand Jury proceedings to outweigh the necessity of allowing a witness to invoke the exclusionary rule in such a proceeding.

II. AN ANALYSIS OF THE PROPOSED ALTERNATIVES TO THE EXCLUSIONARY RULE

A. *Civil Remedies*

Legislators, judges, law professors, prosecutors, and police administrators have each proposed alternatives to replace the exclusionary rule in whole or in part. Chief Justice Burger's proposal raised in his dissent in *Bivens v. Six Unknown Named Agents*[19] calls for a legislatively-created administrative or quasi-judicial remedy against the Government. The victim of a Fourth Amendment violation by the Government would be compensated by an award of money damages. The proposal would include: a) a waiver of sovereign immunity so that the Government might be sued; b) the creation of a cause of action (a federal tort claim) for damages sustained by the person aggrieved; c) the creation of a quasi-judicial tribunal to adjudicate the claims; d) a statutory provision indicating that the 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 the abolishment of the exclusionary rule from criminal proceedings.[20] Justice Burger's proposal has been embodied in proposed federal[21] and state[22] legislation.

The Burger alternative to the exclusionary rule is legislation which would enhance the common law tort remedy; it represents a realization that the current common law tort remedy against police officers has been an utter failure in compensating victims and deterring further police misconduct. The existing procedural and substantive hurdles for the plaintiff-victim of illegal police searches have been so great as to preclude relief for the victim or deter the wrongdoing policeman. In spite of this recognition,

19. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

20. *Id.* at 422-23.

21. A bill introduced by Senator Lloyd Bentsen of Texas to amend the United States Code with a modification of the exclusionary rule, S. 881, 93d Cong., 1st Sess. (1973) is discussed at 11-16 *infra.*

22. California Senate Bill 1153, introduced in the 1973 Legislative Session by Senator Robert Lagomarsino, would abolish the exclusionary rule in California, and would replace it with a statutory remedy as suggested by a committee appointed by Governor Reagan. *See,* CONTROLLING CRIME IN CALIFORNIA, REPORT OF THE GOVERNOR'S SELECT COMMITTEE ON LAW ENFORCEMENT PROBLEMS, 17-18 (Aug. 1973).

however, the same defects which are inherent in the present tort remedy also exist in the Burger proposal. For example, just as judge and jury sympathies historically have not been directed toward rewarding individuals who have been the focus of criminal investigation, absent a change in human nature,[23] the same will be true of the judicial officer hearing the claim of the victim. This would be especially true after the plaintiff had been convicted in the criminal courts with the illegally obtained evidence. The demonstration of actual damages to the plaintiff-victim will be especially difficult since the illegality of the police officer's action usually will not result in major demonstrable injury to property or the person. Further, the defense of police justification because of the officer's good faith belief in the legality of the search is a complete bar to common law or statutory tort recovery.[24] No court review would exist in the criminal proceedings and, in the rare event of a civil suit, the officer's testimony as to his subjective intent in conducting the search will defeat the victim's claim. As a deterrent to police misconduct, in the absence of an exclusionary rule, the civil remedy would pose no threat to officers bent on violating a citizen's right to privacy.

Reliance on a civil remedy, be it in tort or of the Burger proposal variety, ignores the problem of long delays on the civil calendars in the courts.[25] The civil remedy will hardly be a deter-

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23. Professor Dallin Oaks, *supra* note 7 at 673, states: "[j]uries will be unwilling to find significant damages against police officers, especially in favor of a plaintiff who was an accused or convicted criminal."

24. *See, e.g.*, Williams v. Gould, 486 F.2d 547 (9th Cir. 1973) [Suit under 42 U.S.C. 1983 (Federal Civil Rights Act) for warrantless invasion by police officer of apartment; held that good faith of officer is an available defense.] In reversing the trial court, the circuit court held:

> We comment on the merits of the defense in only one respect. Because the defense rests on good faith and reasonable belief, Officer Gould need not, in order to establish the defense, prevail on the legal position that a warrant is not required to enter a home to arrest a felon. Whether a warrant is required in such a situation is an open constitutional issue. It divides the Supreme Court. Williams v. Gould, *supra*, at 548. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 476-82 (1972). Either view as to its ultimate resolution might be entertained reasonably and in good faith. Coolidge v. New Hampshire *supra* at 548.

Although the Second Circuit held that federal police officers and agents have no immunity from suits charging violation of constitutional rights, [Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1347 (2d Cir. 1972)] the officer need not prove probable cause to establish a defense. He must only show that he acted in good faith and with a reasonable belief in the validity of the arrest and search. *Id.* at 1348. *Cf.*, Abramson v. Mitchell, 459 F.2d 955, 957 (8th Cir. 1972) (good faith reliance on court order to intercept wire or oral communications is not an absolute defense to civil suit).

25. Of the 100,453 federal civil cases pending as of December 31, 1972,

rent to police misconduct if the case is tried years after the alleged illegality occurred. In this respect, it should be noted that the Burger proposal would have the effect of bifurcating litigation and doubling the caseload in the courts. Now, in addition to the criminal proceeding, there would be a civil suit by the criminal defendant against the police officer. This would prove a costly, time-consuming duplication of litigation. If the Burger proposal were to prove more than a paper remedy, there would be of necessity a right to counsel guarantee so that the victim might pursue the legislatively-created civil remedy for unlawful search and seizure. Thus, the beleaguered taxpayer would not only foot the bill for an indigent's representation in criminal cases,[26] but would also pay for the services of a second attorney who would explore the civil remedy in the separate tribunal created for that purpose.

The common law tort remedy for illegal police action against the citizenry already established itself, by the time of the *Mapp* ruling, as a failure both in deterring police misconduct and in adequately compensating the victim.[27] One reason for the failure of the civil remedy is that individuals victimized by illegal searches by the police have refrained from civilly suing for fear of risking further harassment. The Burger alternative would not differ from

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in all federal district courts, exclusive of land condemnation cases, over forty-two percent had been pending over one year. *See* SEMI-ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 19 (1973).

26. As constitutionally guaranteed by Gideon v. Wainwright, 372 U.S. 335 (1963) and Argersinger v. Hamlin, 407 U.S. 25 (1972). Currently, federal courts have the authority to appoint counsel to represent indigent plaintiffs suing under the Federal Civil Rights Act, 42 U.S.C. § 1983. *See* 28 U.S.C. § 1915. However, Congress has not authorized funds to pay counsel for this representation.

27. Commentators prior to *Mapp* dismissed the civil remedy as "[a] supplementary method to provide damages for the few. . . ." Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. REV. 493, 503 (1952). *See also* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. OF LEGAL STUDIES, 243, 272 (1973) where the author concludes:

> From our statistical study of the manner in which police search, it can be seen that very often physical damage to property is not great, and the fact that police officers are the representatives of society and normally act in its interests probably causes many juries to hesitate before granting an award.

Even if a civil award against a policeman-defendant were granted, there is no assurance that this would have an effect on departmental policies which are violative of the Fourth Amendment.

the present remedies in this respect. Such fears may have their origin in experience or neighborhood hearsay, but they are generally coupled with a hopeless belief that the courts will not support their claims with judgments against police officers. Civil remedies have failed to deter police misconduct because even if the victim sues the policeman, obtains appointed or retained counsel to press the claim, waits the requisite period of time for the case to be heard, and then wins the case and receives a judgment for damages, the wrongdoing policeman is many times so impoverished as to be judgment-proof or so solvent as to have an insurance company pay the bill. Under the civil remedy, there has been no deterrence of police misconduct because the only penalty to the wrongdoer (in the rare event of a judgment against him) has been an unenforceable judgment or a slight increase on an insurance premium.[28] It should be noted that the Burger alternative provides even less of a deterrent possibility since the Government, not the officer, is the defendant and payor of any damages awarded.

Let us assume, however, that the above enumerated obstacles to the deterrent effect of a civil remedy are removed: the calendars of the appropriate tribunal are not congested and are reasonably accessible to resolve the dispute; the indigent plaintiff-victim has appointed counsel who is adequately compensated and prepared to effectively represent the client's interest; the trier of fact is willing, on a valid claim, to award substantial damages to the plaintiff-victim even though he has been convicted of criminal charges by the tainted evidence derived from the illegal search; and the defendant-police officer is not so poor as to be judgment-proof or not insured so as to obviate the deterrent impact of the proceeding. Would this hypothetical civil remedy truly exist independent of the criminal proceeding to have a deterrent impact on the offending officer? In an age where plea bargaining is the means by which the vast majority of criminal cases are terminated,[29] it is reasonably foreseeable that the defendant's antici-

28. The threat of false-arrest suit is one aspect of the uncertainty for which the policeman has found some recourse. Some are taking out insurance from Lloyd's of London. One policeman stated:

> By the way, I am taking out insurance by Lloyd's of London against the false-arrest suits. It's six dollars in the beginning and then three dollars a year and they protect you up to five thousand dollars. That will take a weight off my mind. The only trouble is that they don't protect you against assault charges. RUCHELMAN, WHO RULES THE POLICE, 98 (1973).

29. *See* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, § 5.3, at 244 (1971). "Since the overwhelming percentage of criminal cases in

pated civil suit against an offending police officer would be considered in the plea negotiations. A bargain in which the defendant agrees not to pursue the hypothetically effective civil remedy in return for favorable treatment in the criminal prosecution is certain to be struck. It would be a bargain founded on mutual self-interest and pragmatism. Ultimately, it would be a corruptive contract in which two wrongdoers benefit each other at society's expense.[30]

The basic defect in the concept of a civil remedy alternative to the exclusionary rule, either the common law tort or the Burger proposal, is that such remedies have failed to prove effective in either compensating the victim or deterring the transgressor. It is fanciful to believe that abolishing the exclusionary rule and replacing it with a civil remedy would magically transform the latter into an effective deterrent against police misconduct. In light of the almost unanimous agreement that civil remedies are little more than paper remedies,[31] one ponders the sincerity which the proponents bring to the issue. Is it possible that hostility to the exclusionary rule has obsessed its detractors to the point where any substitute, no matter how ineffectual, is touted as an acceptable alternative? Before alternatives can be seriously considered, their effectiveness in practice must be clearly proven. Experience dem-

all state and federal courts, something on the order of 90 percent, are disposed of by pleas of guilty . . . the exclusionary rule does not affect the vast majority of criminal cases that reach the trial court."

30. In a criminal justice system where plea bargaining plays a preeminent role, it takes very little imagination to perceive that if the remedy is an effective one, the remedy will enter into negotiation. 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. This would, in turn, encourage over-charging of offenses to give the officer as much maneuverability as possible in these negotiations. The practical result of the theoretical idea of benefiting those individuals whose rights have been violated—the further corruption of the system with contempt for the police, courts, and all involved felt by those who are brought into the system. The further loss of respect for our institutions by those in the society with whom it comes in contact would exacerbate the problems facing criminal law today.

Brief for California Public Defenders Association as Amicus Curiae *reprinted in Law Reprints*, Vol. 4 n.10, 304-05 (1972-73) California v. Krivda, 409 U.S. 33 (1973).

31. *See* Oaks, *supra* note 7, at 673 where the author comments on the futility of existing remedies to deter police misconduct.

onstrates the futility of a civil remedy alternative to the exclusionary rule. In fact, discussion of alternatives to the exclusionary rule is deceptive. "Their statement conveys the impression that one possibility is as effective as the next. For there is but one alternative to the rule of exclusion. That is no sanction at all. . . ."[32]

B. *Criminal, Injunctive, and Contempt Remedies*

Little need be said about the effectiveness of criminal sanctions against offending officers as an alternative to the exclusionary rule. Such remedies have existed alongside the exclusionary rule without any apparent deterrence of police misconduct. An examination of the federal statutes[33] which prohibit warrantless, causeless searches of buildings and property reveals that there have been virtually no prosecutions. The reason is simple. Prosecutors will not prosecute police officers and juries will not convict them.[34] Further, criminal sanctions, even if implemented to the extent that they had some deterrent effect on the police, would not satisfy the requirement preserving judicial integrity.[35] As with the ex-

32. Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting). Former Chief Justice Traynor of the California Supreme Court in People v. Cahan, 44 Cal. 2d 434, 447 (1955) stated the problem in similar terms: "Experience has demonstrated, however, that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures. . . ."

33. *See, e.g.*, 18 U.S.C. §§ 2235, 2236 (1970). Both statutes prohibit malicious searches without probable cause or warrants for searches of dwellings. One group of researchers could find no reported prosecutions for police misconduct between 1956 and 1969:

> We have been unable to unearth any additional reported cases for the subsequent 13 years. No authoritative explanation has been given for the absence of prosecution for police offenses, but the reasons are not difficult to surmise. Prosecutors are probably reluctant to enforce these dormant criminal sanctions against police offenses because they anticipate, in our view correctly, a detrimental effect on law enforcement which is the goal of both departments, and because they consider the punishment too harsh.

LAW AND ORDER RECONSIDERED, REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, 382 (1969) [Hereinafter cited as LAW AND ORDER RECONSIDERED]. As of 1960, less than half the States had punitive sanctions against police invasions of the right to privacy. Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1960).

34. *See* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE URBAN POLICE FUNCTION, § 5.3, at 152 (Approved Draft, 1973) [Hereinafter cited as URBAN POLICE FUNCTION].

35. The Supreme Court has stated the policy foundation for the exclusionary rule as the "imperative of judicial integrity." Elkins v. United States, 364 U.S. 206, 222 (1960). According to Justice Holmes, a conviction based upon illegally seized evidence makes the prosecution and judiciary abettors to the policeman's misconduct:

ample of civil suit remedies against police officers, since the presently existing criminal remedies against wrongdoing police officers have failed to deter further police misconduct there is no reason to believe that abandoning the exclusionary rule would make the sanctions more potent.

Injunctive relief has proven to be a valuable tool with clearly predictable patterns of illegal police conduct against an identifiable plaintiff. Thus, where the police have conducted repeated sweeps of neighborhoods, searching homes without warrants based on anonymous tips, the courts have granted injunctions to prevent repeated violations.[36] Since the injunction is only useful under circumstances in which past and repeated police misconduct have demonstrated a likelihood of repetition in the future, it would have no impact on deterring common violations that occur in the more ordinary unpredictable police investigations.

Dean Wigmore once suggested that the criminal contempt sanction be used in place of the exclusionary rule:

> The natural way to do justice here would be to enforce the healthy principle of the Fourth Amendment directly, *i.e.*, by sending for the high-handed, overzealous marshal who had searched without a warrant, imposing a thirty day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal.[37]

Without an exclusionary rule and the attendant motion to suppress hearing, it is difficult to perceive how the judiciary would,

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> [N]o distinction can be made between the Government as prosecutor and the Government as judge. If the existing [criminal] code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such inequities to succeed. Olmstead v. United States, 377 U.S. 438, 470 (1928) (dissenting opinion).

36. In Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) the police had conducted over 300 searches of homes over a 19-day period without warrants and based upon anonymous tips. An injunction was granted, the Circuit Court holding:

> There can be little doubt that actions for money damages would not suffice to repair the injury suffered by the victims of police searches. . . . [T]he wrongs inflicted are not readily measurable in terms of dollars and cents. Indeed, the Supreme Court itself has already declared that the prospect of pecuniary redress for the harm suffered is 'worthless and futile'. Moreover, the lesson of experience is that the remote possibility of money damages serves as no deterrent to future police invasions. *Id.* at 202.

See also URBAN POLICE FUNCTION, *supra* note 34, § 5.3, at 152.

37. 8 WIGMORE, EVIDENCE, § 2184 (3d ed. 1940).

of its own motion, discover the instances of illegal police searches and then hold the officer in contempt.[38] Even if this posed no problem, it is unlikely that a judiciary with a general reluctance to find police action illegal in motion to suppress hearings would do so when such a finding necessitates criminal sanctions against the transgressing officer. Such a prospect would raise further problems since the officer would be entitled to a separate jury trial on the issue.[39]

All of the alternative proposals to replace the exclusionary rule not only suffer from many of the defects currently plaguing it but have attendant problems[40] of their own and offer little prospect of either deterring further police misconduct, compensating the victim, or preserving the integrity of the courtroom. In any case, almost all of the proposed alternatives currently exist as potential supplements to the rule. Their past failure as supplements to the rule indicates the futility of their role, either separately or in combination, as a replacement.

C. *The Substantial Violation Test: The Bentsen Bill*

The most seriously considered of the proposed alternatives to the exclusionary rule is that of the "substantial violation" test. This proposal would vest in the trial courts discretion whether or not

38. This is the great advantage of the exclusionary rule in criminal proceedings. Motions to suppress evidence are brought by the defendant prior to trial giving the court an opportunity to review the officer's action. Oaks, *supra* note 7, at 756, states: "The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review [of alleged violations of constitutional rights] and it gives credibility to the constitutional guarantees."

39. *See* Bloom v. Illinois, 391 U.S. 194 (1968).

40. Much of the problem of police privacy violations could be alleviated with better internal police review. However, most "[c]ommentators believe that internal police disciplinary actions are incapable of dealing with police violation of constitutional guarantees." Spiotto, *supra* note 27 at 277. This conclusion derives from a reluctance of old-line police chiefs to obey the courts' strictures in the Fourth Amendment area. Dr. Egon Bittner quotes several former big city police administrators who condoned lawless conduct by police officers in order to achieve desired ends.

> Thus, Superintendent Wilson of Chicago declared, 'If we follow some of our court decisions literally, the public would be demanding my removal as Supertindent of Police and—I might add—with justification.' Chief Parker of Los Angeles has taken the view that, 'It is anticipated that the police will ignore these legal limitations when the immediate public welfare appears to demand police lawlessness.' And Chief Schrotel of Cincinnati has stated the dilemma of the policeman in these terms: 'Either he abides by the prescribed rules and renders ineffective service, or he violates or circumvents the rules and performs the service required of him.'

E. BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY, 28-29, n.46 (1973).

to admit the evidence allegedly the product of an illegal search and seizure. Evidence would only be excluded by the trial court where a "substantial" Fourth Amendment violation was committed by the governmental agent, as opposed to automatic exclusion under the current rule. The substantial violation alternative to the exclusionary rule has been presented before Congress in the form of the Bentsen Bill[41] and, if enacted, would amend the United States Criminal Code by adding a new section[42] to redefine and limit the exclusionary rule:

> "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."[43]

In determining whether a violation is substantial, the Bentsen Bill offers several guidelines which a trial court is to consider in passing on the seriousness of the violation. These considerations would include: the extent of the deviation from sanctioned conduct, the extent of willfulness by the officer, the extent to which privacy was invaded, the extent to which exclusion would prevent similar violations, whether the evidence seized would have been discovered if the violation had not occurred,[44] and the degree to which the violation prejudiced the defendant's ability to defend himself in the proceeding in which the seized items are offered in evidence.

The second section of the Bentsen Bill provides for an amendment to the Federal Torts Claims Act along the lines proposed by Chief Justice Burger in *Bivens*.[45] The amendment would provide a tort cause of action against the United States for illegal searches and seizures conducted in violation of the Constitution by any employee of the federal government. The proposed act al-

41. *See* Bentsen Bill, S. 881, 93d Cong., 1st Sess. (1973), which adopts the suggested rule of the American Law Institute proposing that only where a "substantial violation" of Fourth Amendment rights takes place should the courts impose the death penalty to the evidence. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE — 8.02(2) (Tent. Draft No. 4, 1971). The American Bar Association voted to oppose the adoption of the Bentsen Bill in February 1973. 12 CRL 1077 (Feb. 21, 1973).
42. Proposed 18 U.S.C. § 3505.
43. *Id.* at § (b).
44. *Cf.* 18 U.S.C. § 3504.
45. Proposed 28 U.S.C. § 2691.

lows for compensatory and punitive damages, but no award or settlement of the civil action brought under the proposed section may exceed $25,000. Any recovery under the Act is a bar against other civil actions and attorneys representing the plaintiff-victim may not receive in excess of 25% of the recovery.[46]

The constitutionality of such a statute is open to question[47] and its impact on police conduct is doubtful.[48] The exclusionary rule has been criticized because policemen cannot be expected to follow the complexity of search and seizure law. The modern police officer, however, realizes that a search and seizure found to be violative of these rules should result in certain exclusion of evidence. The officer also knows that if the time is taken to secure a search warrant, the courts will take great pains to uphold the search.[49] A substantial violation test will not bring clarity to the search and seizure rulings of the courts. Instead, an additional variable will be added to the rulings. The courts presumably will be interpreting the same Fourth Amendment except that, under the Bentsen Bill, determining whether a violation of the Fourth Amendment has taken place is only the threshhold question. The second question before the court will be to determine whether or not the violation is substantial[50] and thus warrants excluding the seized

46. *Id.* at § (b).

47. In Weeks v. United States, 234 U.S. 383 (1914) and again in Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court found the exclusionary rule constitutionally required and implicit in the Fourth Amendment. This legislation would in effect overrule *Mapp* and *Weeks* as well. As was stated in Weeks v. United States, *supra* at 393, the Fourth Amendment would not be worthy of inclusion in the Constitution absent the exclusionary rule. In the 60 years since the decision in *Weeks*, the Supreme Court has not departed from the essential finding of that case: that the exclusionary rule is constitutionally required. *See* Elkins v. United States, 364 U.S. 206, 208, 210 (1959); Mapp v. Ohio, 367 U.S. 643 (1961). The validity of such a statute overruling constitutional doctrine is highly questionable.

48. The *per se* exclusionary rule has played an important role in initiating and maintaining police training of search law in the more advanced departments. *See, e.g.*, Wilson & Alprin, *Controlling Police Conduct: Alternatives to the Exclusionary Rule*, 36 LAW & CONTEMP. PROB. 488, 498-99 (1971). The advent of discretionary admissibility of tainted evidence would create an interesting training dilemma. *See* note 50 *infra*.

49. United States v. Ventresca, 380 U.S. 102 (1965).

50. One might ask what is a substantial violation? Will the test be simply one of the overall reasonableness of the officer's conduct in each particular case? If so, the number of pre-trial suppression hearings will certainly not diminish and the police will have at least the same problems of predicting and understanding differing judicial interpretations of search law. In short, the "substantial violation" test is no more than a warmed-over plate of due process "shocks the conscience" rules that were rejected in *Mapp* as unworkable. *Cf.* Rochin v. California, 342 U.S. 165 (1952). Such a due process "shock" approach was condemned by Justice Jackson even prior to *Mapp*:

evidence. With the additional variables, the police will have the same problems of predicting and understanding differing judicial interpretations of search law.[51] More important will be the prospect of officers abusing the privacy of citizens confident that a sympathetic local judge will find the violation of the defendant's rights "insubstantial." In effect, the extent of the individual's right of privacy will be determined by the police officer's good faith. For if the standard will be that of the reasonableness of the officer's decision (certainly a reasonable action by the officer will not be deemed a substantial violation of the Fourth Amendment), then evidence produced by illegal means will become admissible and in a sense legal merely because the officer subjectively believed his conduct reasonable and the conduct did not objectively shock the conscience of the court.

If the courts will have trouble recognizing and articulating a substantial violation warranting exclusion of evidence, questions will arise as to uniformity in administering the proposed standard. It is no secret that some of the judiciary is openly hostile to the exclusionary rule.[52] Trial courts with a negative attitude toward the exclusionary rule will simply use the new substantial violation cri-

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> We are urged to make inroads upon *Wolf* by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock is more serious, the states must exclude the evidence or we will reverse the conviction. . . . [Such] a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground. Irvine v. California, 347 U.S. 128, 133-34 (1954).

51. Chief Justice Burger has noted the differing judicial concepts of reasonableness:

> Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not 'reasonable' amply demonstrate. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 417 (1971).

A new substantial violation test will prove no easier for the courts to interpret or the policeman to comprehend. However, the ability of the police to grasp legal concepts should not be underestimated. During hearings on motions to suppress evidence based on alleged illegal search and seizure, some have demonstrated an uncanny ability to shape their testimony to the latest appellate notions of reasonableness. *See* Section IV *infra.*

52. According to Judge Hufstedler, dissenting in Holmes v. Burr, 486 F.2d 55, at 74 (9th Cir. 1973) "[H]ostility to the exclusionary rule permeates opinion after opinion commencing with *Olmstead.*"

teria as a facile bootstrap to admit tainted evidence. Judges of a more liberal orientation will be more reluctant to find constitutional violations insubstantial and will continue to suppress illegally obtained evidence. Thus, justice will vary according to the differing philosophies of the trial courts to a greater degree than it does today.

Ostensibly, the provision in the Bentsen Bill for relief[53] against the government is to provide a deterrent against future misconduct by the police. Four factors point toward an opposite conclusion: the officer is not a defendant and thus not directly affected by the outcome; the government, not the officer, pays the award to the victim; bringing such a suit bars the victim from suing the officer directly, thus providing the officer a statutory immunity; and finally, the admissibility of illegally seized evidence in the criminal proceedings, in light of the officer's statutory immunity, will encourage more aggressive police investigations and undoubtedly more Fourth Amendment violations.

The failure of the exclusionary rule to deter police misconduct has yet to be proven. Detractors of the rule claim that the exclusionary rule is supported only by "recourse to polemic, rhetoric, and intuition,"[54] but the same may be said of the opponents of the rule who advocate the Bentsen Bill alternative. There is no empirical substantiation of claims that the rule is not a deterrent.[55] The detractors put forth an alternative, a statutory tort claim for the victim, which is likely to duplicate the failure of existing remedies to deter police misconduct or reimburse the victim. Additionally, there can be no question that judicial integrity would be demeaned under a substantial violation test in that the courtroom would now be the forum for evidence obtained illegally by the

53. The realism brought to this problem by proponents of alternatives to the exclusionary rule is dubious. No one can seriously contend in light of past experience ". . . that governmental units will bear any substantial expenditure to compensate the most probable victims of illegal police misconduct—the bums, drifters, petty crooks, or big-time operators—in the face of the pressing public need for schools, hospitals, roads, and yes, prisons. Until some governmental unit somewhere is in fact giving adequate civil recovery for unconstitutional law enforcement, I retain my stubborn doubt whether the idea can be made to work." PAULSEN, THE EXCLUSIONARY RULE, *supra* note 17, at 94.

54. Oaks, *supra* note 7, at 755.

55. The exhaustive study conducted by Professor Oaks concludes there are no conclusive findings demonstrating a lack of the deterrence value of the rule.

> 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. *Id.* at 709.

government (albeit by an "insubstantial" violation of the Fourth Amendment). The court, in effect, would ratify the illegal police conduct. The price to be paid for taking part in such activity is not measurable statistically; however, the impact of the judiciary bestowing its approval on illegal police action will not speak well for the credibility of the courts.

The threat to the integrity of the judicial process in abolishing the exclusionary rule is no small matter. "Crime is contagious," wrote Justice Brandeis, and if the government becomes a lawbreaker, it "breeds contempt for the law; it invites every man to become a law unto himself."[56] The relationship between lawlessness and the exclusionary rule has not been lost on court analysts. Defendants who believe their rights infringed by government agents are allowed, under current procedures, to litigate the issue like private attorney generals and air the grievance before the court. As reported by a task force to the National Commission on the Causes and Prevention of Violence:

> A final point about the exclusionary rule and its relation to violence: we may guess that the urge to destructive behavior is greatest when the actor is moved by a sense of frustration grounded in a feeling of injustice which he is unable to combat. The exclusionary rule, however, provides an outlet within the law for frustration stemming from the belief that the defendant has been treated unjustly by the police. By a motion to suppress the defendant can in effect strike back at authority in the very proceeding which is aimed at convicting him.[57]

The admission of constitutionally tainted evidence places a judicial imprimatur on the conduct which produced it. The appearance would be one of granting "[t]he right of [privacy,] but in reality . . . withhold[ing] its privilege and enjoyment."[58]

In sum, the Bentsen Bill and other proposed statutory alternatives to the exclusionary rule suffer from many of the same defects inherent in the exclusionary rule. What is important to note is that the alternatives, like the rule itself, recognize the necessity

56. Olmstead v. United States, 377 U.S. 438, 485 (1928). This basic recognition was reiterated in Mapp v. Ohio, 367 U.S. 643, 659 (1961):

> The criminal goes free, if he must, but it is the law that sets him free. 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.

57. LAW AND ORDER RECONSIDERED, *supra* note 33, at 370.

58. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

for safeguarding the constitutional right to be free from unjustified governmental invasion of the right to privacy. The right of privacy, the "most comprehensive of rights and the right most valued by civilized men,"[59] is a right so precious that it would be foolish to abruptly abandon the predominant remedy for its violation and rely on ineffectual alternatives. Many of the exclusionary rule's opponents recognize this and conclude that the rule should not be abandoned in the absence of a realistic alternative remedy for conduct violating the Fourth Amendment.[60]

As previously suggested with respect to other alternatives to the exclusionary rule, the most prudent approach to the problem is to implement an effective civil remedy without modifying the rule. Then, if the alternatives were to prove effective deterrents against police misconduct, the deleterious aspects of the exclusionary rule would soon be reduced. However, if the statutory remedy would prove a failure in deterring police misconduct, at least the exclusionary rule would remain as the sole bulwark against governmental illegality.

In an age where electronic surveillance,[61] computer bank dossiers,[62] and overzealous governmental agents[63] have suggested the

59. Olmstead v. United States, 377 U.S. 438, 478 (1928).

60. *See* Chief Justice Burger's dissent in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 420 (1971) and Oaks *supra* note 7, at 756-57. THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 106 (1973) recommends that the deterrent effect of the exclusionary rule be studied prior to any modification.

61. *See* 1 B. SCHWARTZ, RIGHTS OF THE PERSON 248 (1968) where the author describes the frightening threat to privacy posed by technology:

> The 'frightening' aspect referred to is particularly pertinent when we consider the most recent advances in electronic surveillance. These include parabolic microphones to pick up conversations at a distance, ultraminiature wireless microphones no larger than a pencil eraser, recorders so small they can be built into cigarette lighters, as well as microwavebeam devices with a range of 1,000 feet or more and ability to penetrate through walls and other obstacles. The devices in question have either been developed or 'are on the brink of reality'.

62. The Federal Bureau of Investigation currently maintains a National Crime Information Center now in its seventh year of operation. The NCIC is a computerized information system established as a service to all law enforcement agencies. As of November 1, 1973, there were 4,904,977 active records in NCIC of which 431,767 were "criminal history records" of persons with "significant" arrests or convictions. The system averages 130,639 transactions daily. *See* FBI LAW ENFORCEMENT BULLETIN, THE NATIONAL CRIME INFORMATION CENTER, 8-10, 14 (January 1974). *See also* United States v. White, 401 U.S. 745, 757 (1971) (Douglas, J., dissenting). Schwartz, *supra* note 61, at 258 notes with regret that "in writing about this whole area of personal privacy, one is left all too much with the feeling, referred to before, that the law is in the process of being outflanked by technological advances."

onslaught of an Orwellian state, it is not the time to strip the Fourth Amendment of its only enforcement mechanism. In the face of these and other threats to the right to privacy, the exclusionary rule is more important today than ever before:

> In times not altogether unlike our own they [the framers of the Constitution] won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.[64]

No one doubts the importance of maintaining this important constitutional *right* to privacy. It is the *remedy* for conduct violating this right which has been the focus of dispute. As discussed below, judicial negativism toward the remedy, the exclusionary rule, has crippled the effectiveness of the Fourth Amendment as a safeguard against governmental violations of the right to privacy. Thus, in addition to supplementing the exclusionary rule by the alternative remedies discussed above, it will be necessary also to resuscitate the exclusionary rule itself in order to insure its deterrent impact.

III. JUDICIALLY IMPOSED LIMITATIONS OF THE EXCLUSIONARY RULE

One inherent limitation of the exclusionary rule which detracts from its function as a deterrent to police misconduct is its narrow area of application. Through the use of a pre-trial motion to suppress evidence, a defendant may bring before a trial court allegations that evidence was obtained by the government by means of an illegal search and seizure. Through the use of this motion the judiciary is able to scrutinize police conduct toward the citizenry, then formulate and apply rules mandated by the Fourth Amendment. The rulings of the court and the threat of the exclusion of evidence derived from a violation of these rules are expected

63. The years 1972 and 1973 revealed criminal conspiracies in the highest levels of government involving massive plans (some executed) for spying, wiretapping and burglary. The course of the Watergate affair has demonstrated how easily some officials in government believe they can profit, monetarily or politically, from flaunting the Fourth Amendment rights of certain citizens. Against this prospect, the exclusionary rule stands to prevent governmental exploitation of such criminality in the courtroom.

64. Coolidge v. New Hampshire, 403 U.S. 443, 445 (1971).

to control police conduct in the field. However, the suppression hearing is in reality only a tiny hook upon which to hang such great expectations. Since the policeman knows that the vast majority of his actions will never come under judicial scrutiny, if the deterrent effect of the exclusionary rule is to have any impact at all, there must be a degree of certainty that if the rules are not obeyed, exclusion of evidence will result.

Two patterns have emerged to erode the deterrent impact of the exclusionary rule. First, the courts have made it plain, in reviewing police action, that there is no certainty of exclusion when Fourth Amendment violations by the police produce evidence. Second, the courts have steadily narrowed the area of application of the exclusionary rule. For example, the vast majority of defendants in the criminal justice system plead guilty; those with valid Fourth Amendment claims do not raise them and are precluded from raising them later.[65] Further, allegations of Fourth Amendment violations will not be heard before a grand jury[66] or before a judge during sentencing, or during probation or parole revocations.[67]

The courts have developed refined procedural hurdles which must be overcome before a motion to suppress evidence hearing will be successful. The defendant must have proper standing in relationship to the allegedly tainted evidence before he may successfully challenge the legality of the search.[68] The motion to suppress must be brought by the defendant within certain time limitations; the failure to comply with such will result in a waiver

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65. Tollett v. Henderson, 411 U.S. 258 (1973); *cf.* Mann v. Smith, 488 F.2d 245 (9th Cir. 1973) [federal habeas corpus review unavailable to state prisoner raising legality of search after guilty plea where state procedure allows state court appellate review].

66. United States v. Calandra, 414 U.S. 338 (1974).

67. United States v. Hill, 447 F.2d 817 (7th Cir. 1971) [parole revocation]; People v. Mason, 5 Cal. 3d 759 (1971) [Court may strip probationer of Fourth Amendment right to refuse search of any law enforcement officer]. In United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) the appellate court held that evidence obtained in violation of the Fourth Amendment and excluded during the trial was admissible for sentencing purposes. *Cf.* Verdugo v. United States, 402 F.2d 529 (9th Cir. 1968), *cert. denied*, 395 U.S. 925 (1970) which came to the opposite conclusion.

68. In Alderman v. United States, 394 U.S. 165, 174 (1968) the Supreme Court said with respect to standing:

> There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.

See also Brown v. United States, 411 U.S. 223 (1973).

of the claim.[69] Even if successful in suppressing the evidence, should the defendant later take the stand and testify that he never possessed the illegally obtained evidence, the government may introduce the evidence to impeach the defendant's testimony.[70]

In addition to developing procedural hurdles as condition precedents to bringing suppression motions, the courts have also narrowly restricted the area in which the Fourth Amendment has application. If the defendant is deemed to have abandoned the property seized, he has no right to challenge the legality of the search.[71] If a private citizen conducts an illegal search resulting in evidence turned over to the prosecution, no motion to suppress will be heard since the Amendment only precludes illegal governmental action.[72] If the evidence is seized after being seen in plain view at a time the governmental agent was in a place in which he had a right to be, no right to challenge the seizure exists.[73] Of course, if the defendant has consented to the search by the governmental agent, no suppression motion will succeed even if the defendant had no knowledge of his right to refuse the consent.[74] Any time an officer makes a lawful custodial arrest, the right to search the person of the arrestee is secured and a motion challenging the legality of such a search is doomed.[75] The courts have further narrowed the scope of the Fourth Amendment for searches conducted at the international border,[76] for numerous administrative searches,[77] and for searches without a warrant where exigent circumstances exist.[78] Further, no newly promulgated Fourth Amendment ruling

69. Valid Fourth Amendment claims may be lost to a defendant due to incompetence of counsel; *e.g.*, People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963), wherein the California Supreme Court found that ineffective assistance of counsel had been rendered because counsel was unaware of the rule of law that allowed him to challenge the legality of a search; or as part of trial counsel's strategy in not raising the issue. *See* F. BAILEY & H. ROSENBLATT, HANDLING NARCOTIC AND DRUG CASES, § 206 (1972).

70. *See* Walder v. United States, 347 U.S. 62 (1954). Brook v. United States, 449 F.2d 1296 (9th Cir. 1971).

71. *See, e.g.*, Eisentrager v. Hocker, 450 F.2d 490 (9th Cir. 1971).

72. *See* Burdeau v. McDowell, 256 U.S. 465 (1921).

73. *See, e.g.*, Harris v. United States, 390 U.S. 234 (1968).

74. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

75. *See* United States v. Robinson, 414 U.S. 218 (1973).

76. *See* Carroll v. United States, 267 U.S. 132 (1925).

77. *E.g.*, United States v. Schafer, 461 F.2d 856 (9th Cir. 1972).

78. *See* Warden v. Hayden, 387 U.S. 294 (1967).

has ever been given retroactive effect to nullify searches of defendants convicted prior to the new holding.[79]

Even where a motion to suppress evidence is brought in timely fashion and exposes the search as illegal, numerous trial courts erroneously rule the evidence admissible and place the burden on the appellate courts to declare the evidence illegally obtained. This is particularly true in serious cases where the pressures for convicting the defendant are great and sympathies for the latter are lacking. The appellate courts, however, have invoked the doctrine of "harmless error" to affirm such convictions where untainted evidence is sufficient to support the conviction.[80]

There is no question but that the judicial pendulum is swinging in such a fashion as to narrow the areas in which the exclusionary rule has application.[81] Concomitant with this trend is the risk of steadily decreasing the deterrent impact of the exclusionary rule. Search and seizure rulings are not self-executing. If they are not routinely enforced or applied, they will not be obeyed. Enforcement by exclusion is effective in deterring police misconduct only where exclusion is a certainty. In serious police investigations which are likely to give rise to prosecutions, the police are most prone to conform their conduct to the law since such cases will

79. Linkletter v. Walker, 381 U.S. 618 (1965) [holding Mapp v. Ohio, 367 U.S. 643 (1961) non-retroactive]; Desist v. United States, 394 U.S. 244 (1969) [holding Katz v. United States, 389 U.S. 347 (1967) non-retroactive]; Williams v. United States, 401 U.S. 278 (1972) [holding Chimel v. California, 394 U.S. 752 (1969) non-retroactive].

80. *See, e.g.*, Westover v. United States, 342 F.2d 684, 689-690 (9th Cir. 1965), *rev'd on other grounds*, Miranda v. Arizona, 384 U.S. 436 (1966). The nationwide average for federal criminal appellate reversals for fiscal year 1971-1972 was 13.4%. ANNUAL REPORT OF THE DIRECTOR, AD. OFFICE OF THE U.S. II-8 (1972). A study of Chicago practice reflected that when the Fourth Amendment is involved the percentage of conviction affirmances in exclusionary rule cases is much higher. When the Government appealed cases where the lower court had ruled to exclude the evidence, the reversal rate skyrocketed:

> An examination of federal court cases reveals the same basic pattern: a small number of appeals by federal prosecutors combined with a high percentage of reversals on appeals by the government and a high percentage of affirmance on appeals by defendants. In 1971, 158 defendants appealed from motions to suppress denied in the federal courts; in 92% of these cases the lower federal court was affirmed. During that year the government appealed (pursuant to 18 U.S.C. § 3731 (1970)) only eight times, and in these appeals the trial court was reversed in 75% of the cases. Spiotto, *supra* note 27 at 252 n.37.

81. *See* United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting):

> [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 exclusonary rule in search and seizure cases. . . .

undergo judicial scrutiny when a prosecution results.[82] Since a police officer usually has no way of knowing whether or not an investigation will lead to a criminal prosecution, most sophisticated police departments and officers follow court rulings in order to insure successful prosecutions.[83]

The circumstances under which the exclusionary rule may be invoked are limited. Due to judicial negativism toward the rule, the instances in which the rule is activated to exclude evidence when warranted are also limited. If these limitations weaken the deterrent impact of the rule on police misconduct, deterrence becomes impossible where the judiciary does not squarely administer the rule in the context of the selected cases which come before it. When a trial court fails to suppress demonstrably tainted evidence, it not only encourages police contempt for the judicial process and the Fourth Amendment rights of the citizenry, but it invites further violations.

The determination of the legality of a search is not always an easy decision. The courts are interpreting complex rules with competing values pressuring for opposite results. The difficulty of determining the validity of a search is compounded by the incidents of perjury by witnesses before the court. During suppression hearings, especially in certain classic contexts, the practice of police perjury has been substantial. This phenomenon and its impact upon the exclusionary rule are the subject of attention below.

IV. RECOGNIZING AND COPING WITH POLICE PERJURY

If the deterrent impact of the exclusionary rule is frustrated by the rule's limited applicability, it is totally undermined when police officers perjure themselves at suppression hearings. Criminal law practitioners,[84] academicians,[85] law enforcement advocates,[86] and

82. The rule controls the police "in direct relation to the gravity of crime of the suspect." J. SKOLNICK, JUSTICE WITHOUT TRIAL, 225 (1966).

83. *See* note 48 *supra.*

84. *See* interview with defense attorney Martin Garbus in *Police Perjury: An Interview With Martin Garbus*, 8 CRIM. L. BULL 363, 364-65 (1972):

> [I]n some thirteen years of practice I have handled perhaps 150 drug cases as defense counsel. I cannot recall a single case—not one—where I was not convinced that to a greater or lesser degree the police witness shaped his testimony.

Criminal law practitioners generally support Garbus' observation. *See,*

prosecutors[87] recognize that the motion to suppress hearing is a fertile field for police perjury. The policeman

> . . . sees the need to be able to reconstruct a set of complex happenings in such a way that, subsequent to the arrest, probable cause can be found according to appellate court standards. In this way, as one district attorney expressed it, 'The policeman fabricates probable cause.'[88]

To many courts, the idea that a police officer would commit perjury during a motion to suppress hearing is not a welcome one. Judges see police officers simply as men performing their duties. When the conflict is between a defendant and a police officer as to testimony concerning the events surrounding the search, the trial court must decide which of the witnesses to believe. When such competing versions of events are placed before trial courts, the latter see police officers as not having "the motive nor the interest"[89] that defense witnesses have to lie. The question becomes one of comparing the biases or prejudices of the witnesses, and it is the police officer who is seen as being without an interest to further by altering testimony. This judicial frame of reference often has rewarded police perjury with the denial of the motion to suppress illegally seized evidence.

Creating an awareness within the judiciary of this problem is but a first step. The California Supreme Court recognized this phenomenon and detailed the motivating factors behind police perjury:

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e.g., D. BERNHEIM, DEFENSE OF NARCOTICS CASES, § 3.11 (1972); KING, DEFENSE OF A DRUG ABUSE CASE, CRIMINAL DEFENSE TECHNIQUES § 57.03(4) (Bernstein ed. 1973); ROSENGART, BUSTED, 66-67 (1972); TARLOW ON SEARCH WARRANTS, 34 (1973). The media has recently noted the phenomenon as well. *See Cop's Credibility*, TIME, Feb. 4, 1974 at 79.

85. Oaks, *supra* note 7, at 755 states: "The use of the exclusionary rule . . . creates the occasion and incentive for largescale lying by law enforcement officers."

86. In California v. Krivda, 409 U.S. 33 (1973), the State of Illinois argued as an amicus for the abolishment of the exclusionary rule because its effect ". . . is not deterrence but perjury. The rule fosters false testimony by law officers who feel they must apprehend offenders and are fearful that minor technical errors will result in their escape." LAW REPRINTS, Vol. 4, n. 10, 362 (1972-73).

87. The difficulty of the judge's task was highlighted by one Assistant District Attorney, who stated flatly that about five out of ten officers lie when they come into misdemeanor narcotics court and nearly everyone knows it. But the almost insoluble problem, he went on, is attempting to determine which five allegations are untrue."

See Note, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. & SOC. PROBS. 87, 96 n.40 (1968) [Hereinafter cited as *Effect of Mapp*].

88. J. SKOLNICK, JUSTICE WITHOUT TRIAL, 215 (1967).

89. *See* People v. Dickerson, 273 Cal. App. 2d 645, 650, 78 Cal. Rptr. 400, 403 (2d Dist. 1969).

> 1. that the natural desire of a police officer to see a criminal brought to justice may cause him to be less than candid in connection with a collateral inquiry which does not go to what appears to him to be the only relevant question: Was the defendant a thief? 2. That law enforcement is often a "competitive enterprise" [citations]; and 3. that a police officer who has conducted an illegal search and seizure may be subject to criminal, civil, and disciplinary sanctions.[90]

Professor J. Grano, a former Philadelphia prosecutor who handled almost exclusively motions to suppress involving search issues, observes that "[t]he threat of police perjury is much greater than most courts are willing to acknowledge."[91] Professor Grano comments that the prosecutors he observed oftentimes successfully used pre-suppression hearing conferences with police officers as educational preparation sessions for the policeman to learn the appropriate testimony needed to avoid exclusion of the evidence.[92] Professor Grano concludes that from his experience as a prosecutor, the exclusionary rule did at least deter deliberate police misconduct.[93] However, his observations concerning police perjury in search warrant affidavits and at suppression hearings demonstrate the manner in which that action nullifies the effectiveness of the exclusionary rule and poisons the judicial process.

Judge Irving Younger of New York has long maintained that police perjury in suppression hearings is not only prevalent but pervasive. As a criminal law practitioner and law professor, Younger wrote[94] of the ease with which policemen successfully perjure themselves in court. Upon elevation to the bench, Judge Younger faced the issue; his opinion is an excellent example of the self-imposed reluctance of the judiciary to do anything meaningful about the problem. In *People v. McMurty*,[95] Judge Younger

90. *Id.* at 650 n.4, 78 Cal. Rptr. at 403.
91. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405, 408-09 ("Perjury is a powerful word, but it must be recognized that no other will suffice.")
92. *Id.* at 410.
93. *Id.* at 423-24.
94. Judge Younger, as a criminal law practitioner and law professor, wrote bitterly that "every lawyer knows who practices in the criminal courts, police perjury is commonplace." Younger, *Constitutional Protection in Search and Seizure Dead?* 3 TRIAL 41 (Aug.-Sept. 1967); *see also* Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596.
95. 64 Misc. 2d 63, 314 N.Y.S.2d 194 (Crim. Court City of N.Y. 1970).

confronted the classic motion to suppress hearing where either the defendant or the police officer was lying. The police officer testified that as he was conducting his normal duties, he saw the defendant drop a container on the ground. The officer walked to the container, opened it, found marijuana, and arrested the defendant. The defendant, on the other hand, testified that the police officer approached him, searched his pants, and found the marijuana in a pants pocket. The defendant further testified that he knew not to drop the container when he saw the officer because of his past experiences with the police. The problem for the trial judge was one of credibility. If he believed the officer, then the defendant's act of dropping the container constituted his abandonment of the object. When the officer saw the marijuana in the container, he then had probable cause to arrest the defendant. On the other hand, if Judge Younger believed the defendant, then the search was without cause, illegal, and the evidence must be suppressed.

In scrutinizing such dropsy testimony, Judge Younger urged four factors for consideration: 1) that dropsy testimony by the police be scrutinized with caution;[96] 2) if inherently unreal, it should be rejected; 3) if the slightest contradiction of such testimony exists (or corroboration of the defendant's testimony), the testimony again should be rejected; and 4) a determination whether the burden of proof has been carried should be carefully examined.[97] In New York, unlike the federal system or that in many other states, the burden is on the defendant to demonstrate the illegality of the search in a suppression hearing. In *McMurty*, Judge Younger found none of the above factors helpful in resolving the credibility conflict except that the defendant had not carried his burden. However, the problem of police perjury persists. "Its solution," according to Judge Younger, "is prosecutor's work. The courts can only deplore."[98]

Prosecutors, however, are not doing their work. As Professor Grano revealed, many prosecutors either wink at the prospect of fabricated police testimony or subtly encourage it. The District Attorney for the city of New York, recognizing the extent of the perjury problem, urged the New York appellate courts to shift the burden in suppression hearings from the defendant to the prosecu-

96. This is necessary because "[i]t becomes apparent that policemen are committing perjury at least in some [suppression hearings] and perhaps in all of them." *Id.* at 196.
97. *Id.* at 197-98.
98. *Id.* at 197.

tion. In *Berrios v. People*[99] a divided New York court of appeals rejected his suggestion that the burden of proof in search and seizure cases be shifted to the prosecution to alleviate the trial court's problems in detecting and responding to perjured police testimony. Although the majority opinion recognized the possibility of police perjury, the court suggested that internal police department procedures, district attorney supervision, and appellate court review will effectively curtail the alleged abuses.[100]

The dissent in *Berrios* authored by Chief Judge Fuld relied upon the District Attorney's assertion that in a substantial percentage of dropsy[101] cases, police testimony is perjured.[102] The dissenters

99. 28 N.Y.2d 361, 321 N.Y.S.2d 884, 270 N.E.2d 709 (1971).

100. *Id.* at 28 N.Y.2d 361, 369, 321 N.Y.S.2d 884, 890, 270 N.E.2d 709, 714 (1971). However, the inability of appellate courts to effectively combat police perjury has been clearly demonstrated in numerous appellate decisions. *See, e.g.*, United States v. Hood and Hood, 493 F.2d 677 (9th Cir. 1974):

> The Hoods claim that the testimony of the police officers was fabricated and cite several cases which comment on alleged increasing 'boiler plate' testimony by police officers regarding 'furtive gestures' and objects seen in 'plain view.'
> There can be no doubt that any such police conduct is reprehensible. Our freedoms could be eroded by a totalitarian police as well as by vandals. But whether or not the alleged improper police conduct actually occurred is a question of fact to be decided by the district court. While the Hoods' arguments might be persuasive to the trial judge in assessing diametrically opposed testimony from the police and the Hoods, we must view the evidence and all reasonable inferences arising therefrom in the light most favorable to the government as the prevailing party. Glasser v. United States, 315 U.S. 60, 80 (1942). It must constantly be borne in mind that it is the function of the trier of fact "to determine the credibility of witnesses[,] to resolve evidentiary conflicts and [to] draw reasonable inferences from proven facts." United States v. Barham, 466 F.2d 1138, 1140 (9th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). The trier of fact may disbelieve either the defendants or the police officers and from that disbelief, along with other evidence, draw a conclusion which is contrary to their testimony. *See* United States v. Cisneros, 448 F.2d 298, 305 (9th Cir. 1971). As we are not the trier of fact, it is not our function to review the evidence *de novo* and we must reject the suggestion that we engage in conjecture about the police officers' testimony. The trial judge was in the unique position to observe the demeanor of both the Hoods and the police officers while we have only the cold record, which is sterile in comparison. *Glasser, Barham* and *Cisneros* wisely foreclose us from substituting our view of the evidence for that of the trial judge unless his findings are clearly erroneous.

101. A "dropsy" case is one in which the policeman testifies that the defendant dropped a recognizable packet of contraband to the ground in plain view of the officer. This is not to be confused with the "drop" case

favored a shift in the burden of proof to the prosecution not only in the classic dropsy situation, but in all suppression hearings because "[i]t is the experience of many prosecutors and judges that the problems of credibility and fact-finding raised . . . are not limited to literal dropsy cases . . . but appear in all types of possessory narcotics and gambling."[103]

The pervasiveness of the police perjury problem has been amply documented in studies as well as in individual court cases where officers were exposed as perjurers. The study by Barlow[104] of pre-*Mapp* and post-*Mapp* dropsy testimony by New York city policemen during suppression hearings demonstrated an increase in proportions that could only be explained by perjury. As Paul Chevigny concludes, the study demonstrates that:

> A large number of officers knowingly violated the provisions of the *Mapp* decision and lied about the manner in which evidence for narcotics arrests was obtained, by constructing a 'dropsy' case where none in fact existed.[105]

A similar study utilizing the Barlow data as well as its own reached the conclusion that:

> . . . uniform police have been fabricating grounds of arrest in narcotics cases in order to circumvent the requirements of *Mapp*. Without knowledge of the results of this study, the two Criminal Court judges and the two Assistant District Attorneys interviewed doubted that a substantial reform of police practices in narcotics had occurred since *Mapp*. Rather, they believe that police officers are fabricating evidence to avoid *Mapp*."[106]

The *Knapp Commission Report on Police Corruption*[107] not only re-emphasized the problem of police perjury, but demonstrated that the motivation behind it is not always the desire simply to convict the guilty. Payoffs to New York city policemen by defendants and defense attorneys for testimony certain to bring about

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where a policeman wounds or kills a suspect and drops a weapon near the body to make the shooting appear to have been in self defense. *See, e.g.*, Schaffer v. Field, 339 F. Supp. 997 (C.D. Cal. 1972).

102. Berrios v. People, 28 N.Y.2d at 370, 321 N.Y.S.2d at 890-91, 270 N.E.2d at 714.

103. *Id.* 28 N.Y.2d at 372, 321 N.Y.S.2d at 893, 270 N.E.2d at 716.

104. *See* Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-1962*, 4 CRIM. L. BULL. 549 (1968).

105. *See Comments by Paul G. Chevigny*, 4 CRIM. L. BULL. 581 (1968).

106. *Effect of Mapp, supra* note 87, at 95-96. The authors quote one prosecutor who

> [S]tressed the ease with which a police officer can construct a probable-cause argument: the officer merely testifies that the contraband was in open view and, absent corroborating witnesses, the defendant can seldom convincingly contradict him. *Id.* at 96.

107. The Commission examined the New York City Police Department and found police "corruption to be widespread." 1972 KNAPP COMMISSION REPORT ON POLICE CORRUPTION 1.

the exclusion of evidence were uncovered.[108] This was accomplished by the arresting officer ambiguously writing his arrest report so that in-court testimony could later be shaped depending upon receipt of the bribe.[109] The Commission also discovered that the departmental quota requirements for felony arrests per month led to " '[f]laking' of individuals—the planting of narcotics upon a suspected individual."[110] This corrupt activity led to perjurious police testimony resulting in the convictions of innocent victims.[111]

A survey of individual cases in which police perjury has been exposed demonstrates the many ways in which perjury is employed to "legalize" searches. False statements of fact in affidavits for search warrants are commonly utilized to deceive magistrates into issuing search warrants. The courts have constructed differing tests to cope with this problem with some holding that the defendant cannot go behind the warrant to challenge the facts enumerated in the affidavit. Those jurisdictions following this rule have created a shield behind which the fabrications of the officer remain unchallenged. In light of past abuses, this rule is in need of revision to allow such challenges where appropriate.

In *Tarlow on Search Warrants*,[112] the author includes an exhuastive analysis of the problem of perjured police affidavits to support search warrants. The author's survey of state and federal law reveals a great deal of uncertainty and differing treatment by the courts as to whether or not a defendant may raise and litigate the issue of perjured police affidavits. In the California case of *Theodor v. Superior Court*,[113] state statutes allowed the defense to

> challenge the factual veracity of an affidavit in support of a warrant and if material statements contained therein are demonstrated to be false and if the affiant was unreasonable in believing the

108. *Id.* at 96-97.
109. *Id.* at 30.
110. *Id.* at 28.
111. Waverly Logan, in his testimony before the Commission, told of an occasion when he flaked a suspect. He had arrested a suspected narcotics seller and planted four bags of narcotics on him. At the precinct house the prisoner told two narcotics detectives how the arrest had been made. One of the detectives then took Logan aside and carefully instructed him on how to write up the complaint in order to make the case stick. *Id.*, at 104.
112. TARLOW ON SEARCH WARRANTS, 31-77 (1973).
113. 8 Cal. 3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972).

> truth of such information, those facts must be excised from the affidavit and probable cause tested from the remaining truthful information.[114]

Other jurisdictions follow different procedural approaches with several creating insurmountable barriers[115] behind which perjured affidavits remain to support otherwise illegal searches. This is an area of law where reform would best follow the *Theodor* example.

An important example of the problems discussed in this section is *United States v. Marshall, et al.*, 488 F.2d 1169 (9th Cir. 1973), where an appellate court noted the facility with which officers in this narcotics house search case perjured themselves both in affidavits and in trial testimony:

> Two of the agents seem quite willing to make false affidavits, in which facts are distorted to achieve a result, such as a finding that seized evidence was in plain view. One agent, when confronted with the facts demonstrating that his affidavit was false, did not admit that it was false; it was merely 'inconsistent'.[116]

The *Marshall* opinion is instructive for its language condemning the federal agents for their evasive, perjurious testimony which made a mockery of the witness oath.[117] In reversing the lower

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114. *Id.* at 100-01, 501 P.2d at 251, 104 Cal. Rptr. at 243.

115. *See* TARLOW ON SEARCH WARRANTS 39 (1973):

> There presently is uncertainty as to whether the right to attack statements in an affidavit is constitutionally required and as to the extent and manner in which the right is enforceable in federal courts. As phrased by Justice Mosk:
>
> > The constitutional argument is primarily that the thrust of *Aguilar v. Texas*, [378 U.S. 108 (1964)], with its emphasis on the factual basis for an affiant's conclusion of probable cause, naturally presupposes correct, and not perjured or erroneous facts.

For one example of how misrepresentations in warrant affidavits are considered, *see United States v. Upshaw*, 448 F.2d 1218 (1971) discussed in TARLOW, *supra* at 40-41.

116. United States v. Marshall, 488 F.2d 1169, 1171 (9th Cir. 1973).

117. The court noted the "impenetrable jargon" used by the agents when testifying in court about their affidavits and conduct:

> They do not get into their cars; they enter official government vehicles. They do not get out of or leave their cars, they exit them. They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity. They do not watch or look; they surveille. They never see anything; they observe it. No one tells them anything; they are advised. A person does not tell them his name; he identifies himself. A person does not say something; he indicates. They do not listen to a telephone conversation; they monitor it. People telephoning to each other do not say 'hello;' they exchange greetings. An agent does not hand money to an informer to make a buy; he advances previously recorded official government funds. To an agent, a list of serial numbers does not say what an exhibit is; he says it purports to be. The agents preface answers to simple and direct questions with 'to my knowledge'. They cannot describe a conversation by saying 'he said' and 'I said'; they speak in conclusions. Some-

court's upholding the consent search, the *Marshall* court expressed its doubts that the words allowing the agents to enter the home were ever spoken.[118]

Other appellate courts have noted officer perjury during suppression hearings[119] and have made an effort to do something about it. Although perjury is possible on both sides in any case, police perjury must be deemed more serious than that of ordinary citizens. When a police officer violates the public trust by perjuring himself in order to cover up his own previous illegality, he makes a mockery of criminal justice. As Professor Grano has suggested,

> The rules of criminal procedure should take cognizance of the realistic temptation to distort truth and should be designed to encourage resistance to that temptation. The present rules do not encourage resistence . . . .[120]

The recommendations for monitoring police testimony indicated by the majority in *Barrios v. People*, have all to some extent been tried and have failed. Internal police review, although to be encouraged, is certainly no answer in light of past failure. Shifting the burden of proof is also not the panacea. Many jurisdictions currently have the burden placed upon the prosecution to sustain the legality of the search, yet police perjury has not evaded these

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> times it takes the combined efforts of counsel and the judge to get them to state who said what. Under cross-examination, they seem unable to give a direct answer to a question; they either spout conclusions or do not understand. This often gives the prosecutor, under the guise of an objection, an opportunity to suggest an answer, which is then obligingly given. *Id.* at 1171, No. 1.

118. *Id.* at 1187.

119. In People v. Carter, 26 Cal. App. 3d 862, 875, 103 Cal. Rptr. 327, 335 (2d Dist. 1972), the appellate court quoted the trial judge's comments concerning the policeman's testimony at the suppression hearing:

> I am not too impressed by Officer Barfield anyway. I think that if he hadn't been a police officer and had testified the way he did, that I probably would have referred him to the District Attorney for an investigation as to perjury in the proceeding right before me because I think his conduct there was absolutely reprehensible. . . .

See also Veney v. United States, 344 F.2d 542 (D.C. Cir. 1965) where Judge Skelly Wright criticized an obvious pattern of police perjury during hearings on line-ups. Justice Frankfurter expressed complaints about the lack of credibility of American policemen. *See* Harris v. United States, 331 U.S. 145, 172 (1947) (dissenting). Credibility problems extend all the way to the highest levels of the United States Department of Justice. *See, e.g.*, United States v. King, 478 F.2d 494 (9th Cir. 1973).

120. *See* Grano, *supra* note 91 at 423-24.

domains. Judge Younger's criteria for viewing police testimony with caution in suppression hearings has merit, but as demonstrated in the *McMurty* case, many cases will balance between two equally believable (or unbelievable) versions—one by the police officer and one by the defendant. Few courts will rule in favor of a defendant under such circumstances no matter where the burden rests.

What is required is a recognition by the judiciary that police perjury can and does occur during suppression hearings. Second, the classic contexts in which perjured testimony is forthcoming should also be recognized. Third, a procedure by which to resolve the conflict of credibility must be implemented. Once the judiciary demonstrates that it will take steps to detect and deal with perjured testimony from either side, it will find the problem greatly diminished. The frequency with which the judiciary faces perjured testimony is directly proportional to its reaction to it. As demonstrated in a Chicago study, those judges who do not invariably accept such tales find that it is not often presented. Conversely, judges who blindly accept all police testimony in suppression hearings are the judges who most often receive perjury.[121]

With statistical studies proving it, candid judges and prosecutors admitting it, and common sense mandating it, there can be no doubt that not infrequently during suppression hearings a substantial amount of police perjury takes place. For the judiciary to refuse to accept this fact is, as Justice Frankfurter once said, "to ignore as judges what we know as men."[122] Examples of contexts in which police officer testimony is often fabricated to create a justification for a search are numerous, but would include testimony that: the defendant dropped the contraband in view of the

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121. Summarizing the results of a study by the student authors in the Columbia Journal of Law & Social Problems, James Spiotto concludes:

> The judge who sat in Narcotics Court in Chicago up until 1969 shared the student authors' cynicism as to the veracity of police testimony; he could not imagine that defendants would throw evidence to the ground at the sight of police. In many circumstances it is inconceivable that defendants would still be within the reach of the 'long arm of the law' after the police officer who had been cruising at 25 m.p.h. spotted the defendant dropping the packet, stopped the car, got out of the car, retrieved the packet, opened it, ascertained the narcotic substance contained therein, and then and only then put the suspect under arrest. This judge's attitude seems to have carried over to the present, as can be seen by the very low percentage of 'drop' cases in Chicago Narcotics Court (4%). Other jurisdictions, like New York, where judicial disdain for 'drop' cases did not seem to be a factor, had 28% of all narcotic cases resulting from the 'drop' circumstance. *See* Spiotto, *supra*, note 27 at 269 n.13.

122. Watts v. Indiana, 338 U.S. 49, 52 (1949).

officer,[123] the defendant consented to be searched,[124] the officer smelled the contraband prior to the search,[125] a reliable informant gave information justifying the search,[126] proper announcement and notice were given prior to breaking a door to enter a house,[127] a defendant made a "furtive movement" when stopped, thus arousing the suspicions of an officer toward an area of the defendant's car,[128] or that the evidence conveniently appeared in plain view.[129] This, of course, does not exhaust the list of possibilities since any search case may produce false patterns of police testimony to meet the exigencies of different governmental agents. Nor does it mean that police perjury invariably will be forthcoming at every suppression hearing. The initial hurdle rests in developing an interest in the judiciary to recognize police perjury as a problem and then to do something about it.

Judges who are alert to the problem of police perjury during suppression hearings have the means by which to put a stop to it. When the testimony of the witnesses at the hearing is in direct conflict and equally credible, the court should invite either side to submit the results of a polygraph examination performed by a highly competent examiner selected by the trial court. Submis-

123. *See, e.g.*, Trujillo v. United States, 294 F.2d 583 (10th Cir. 1961).

124. The Supreme Court has recognized the dubious nature of police testimony that a defendant would allow a search of an area where contraband is sure to be discovered. *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543, 549 n.13 (1968), *citing* Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954): "[N]o sane man who denies his guilt could actually be willing that policemen search his room for contraband which is certain to be discovered."

125. *See, e.g.*, Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963).

126. *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1968) where the dissent notes "[i]t is not unknown for the arresting officer to misrepresent his connection with the informer, his knowledge of the informant's reliability, or other information allegedly obtained from the informer." *Id.* at 316 n.2.

127. *See, e.g.*, United States v. Bustamonte, 488 F.2d 4 (9th Cir. 1973). For comment on the incidence of police perjury on the issue of proper knock and announcement, *see* Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 164-65 (1971).

128. *See, e.g.*, Gallik v. Supreme Court, 5 Cal. 3rd 855, 489 P.2d 573, 97 Cal. Rptr. 693 (1971); *see also* People v. Superior Court, 3 Cal. 3d 807, 827 (1970), where the California Supreme Court noted "[t]hat police reliance on so-called 'furtive movements' has on occasion been little short of subterfuge."

129. *See, e.g.*, United States v. Marshall, 488 F.2d 1169, 1183 (9th Cir. 1973).

sion to the test must be purely voluntary and the results strictly limited to resolving the dispute at the suppression hearing. In one recent California case, *People v. Cutler*,[130] a trial court was faced with the common conflict of testimony between a governmental officer and a defendant during the suppression hearing. The officer testified the defendant consented to a search of his suitcase which revealed marijuana. The defendant disputed the testimony. The defendant elected to submit polygraph results which corroborated his version of the events. Admission of the evidence tipped the balance of credibility in favor of the defendant and led to the granting of a motion to suppress the evidence.

Polygraph results are uniquely appropriate to resolving the credibility conflicts that are plaguing trial courts during suppression hearings. The Ninth Circuit Court of Appeals has cited polygraph results as a highly reliable technique of determining truthfulness.[131] Since a jury is not involved in a suppression hearing, many of the controversial issues surrounding the admission of polygraphic evidence during the trial of guilt or innocence would not be involved.[132] The trial court would select or approve the competent examiner to test the witness, and reduce the possibility of an incompetent or a charlatan distorting results in favor of either party. With the trial judge selecting the examiner, there would be little judicial time wasted at foundational hearings to establish the reliability of the technique or the competency of the examiner.[133] In short, the polygraph technique when limited strictly to the suppression hearing and used to resolve otherwise insoluble credibility conflicts, will prove a valuable tool in determining where the truth lies.

There exists then a reliable and efficient means by which the judiciary may resolve seemingly irreconcilable conflicts of credibility between police and lay witnesses. Although the emphasis in this article has been upon police perjury, there is no question but that other witnesses before a judge during a suppression hearing may similarly "[p]erform minor surgery upon the facts when

130. People v. Cutler, No. A 126 (Sup. Ct. L.A. Cty. Nov. 6, 1972).

131. United States v. DeBetham, 470 F.2d 1367, 1368 (9th Cir. 1972); the district court's lengthy analysis of the foundational evidence in support of the accuracy of polygraph results may be found at 348 F. Supp. 1377 (S.D. Cal. 1972).

132. *See* United States v. Stranberg, 179 F. Supp. 278, 280 (S.D.N.Y. 1959). More recently, eight trial courts have seen fit to admit polygraph evidence. *See* Note, *The Emergence of the Polygraph at Trial*, 73 COLUM. L. REV. 1120 (1973).

133. This general approach was suggested by Judge Joiner in United States v. Ridling, 350 F. Supp. 90 (W.D. Mich. 1972).

the time comes to testify . . . ."[134] The focus has been placed on police perjury to expose a problem too long ignored by most of the judiciary and offer a prospect for resolution. To continue ignoring the incidence of perjury in suppression hearings demeans the search for truth to a meaningless charade.

Where the policeman's testimony is seen with the same potential bias of lay witnesses, the question simply becomes one of resolving credibility conflicts. To solve this problem, some commentators suggest that the credibility of policemen always be in doubt.[135] But this suggestion is both unrealistic and unworkable.[136] The testimony of each witness must be viewed in light of probable motivation, bias, and demeanor while on the witness stand. When these factors fail to achieve a resolution, other available tools must be utilized. The polygraph is the ideal tool for weeding mendacity from the courtroom, and restoring veracity to the testimony at suppression hearings is a prerequisite to enforcement of the Fourth Amendment.

V. THE EDUCATIVE IMPACT OF THE EXCLUSIONARY RULE

By providing court review of police conduct, the exclusionary rule not only gives life to constitutional rights but also provides an immeasurable educative lesson in Fourth Amendment rights to the police. One commentator on police performance notes:

> The price of exclusion may be worth paying, however, if, as a consequence, search and seizure standards are further developed and clarified, resulting in a higher level of police performance in the future.[137]

This is not to say that the courts should have the ultimate or sole authority in the day-to-day supervision of police conduct. There are limitations in reliance upon the courts as reviewers of

134. Kuh, *In-Field Interrogation: Stop, Question, Detention, and Frisk*, 3 CRIM. L. BULL. 597, 604 (1967).

135. Comment, *Police Perjury in Narcotics 'Dropsy' Case: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

136. As Martin Garbus has stated in evaluating this suggestion:

> [I]f the Georgetown authors think that courts are going to treat cop-witnesses as though their credibility is always in doubt, then they're just living in another world. Garbus *supra* note 84 at 374-75.

137. La Fave, *Improving Police Performance Through the Exclusionary Rule—Part I—Current Police and Local Court Practices*, 30 MO. L. REV. 391, 394 (1965).

police conduct.[138] However, through the exclusionary rule and suppression hearings the judiciary does have a unique opportunity to communicate to individual officers and entire departments the rules governing the citizenry's right to privacy. The failure of the judiciary to utilize this opportunity undermines the potency of the exclusionary rule as a deterrent to future police misconduct.

> As for the exclusionary rule, its limited impact is attributable in large measure to inadequate communication between police and the courts . . . police must be be more effectively informed as to what must be done to avoid exclusion.[139]

Court analysts describe the small amount of feedback from the courts and prosecutors to police departments as to questionable search and seizure practices.[140] When individual police officers involved in a motion to suppress leave the courtroom confused rather than clarified as to what proper conduct should be, the judiciary fails in its important educative function. It does not seem too great a task to require the prevailing party at a motion to suppress to prepare written findings of fact and conclusions of law for the judge's signature to be sent by the prosecutor to the involved policeman and the latter's departmental superior. In this manner, an officer might better know where he went wrong or right in a search case. Such needed communication might also be a first step in revising those police departmental policies which produce illegal searches by officers in the street.

If the judiciary has failed in its role of recognizing and demanding truthful testimony at suppression hearings, it can also be faulted in this failure to communicate the rule of law to the police. Many judges have failed to properly use the warrant procedure to buffer police-citizen confrontations with the authorization of a neutral and detached judicial officer. An interesting study by La Fave and Remmington describes how numerous judges abuse the warrant process by casual and careless authorization of warrants.[141] The study illustrates this point by describing a judge

138. *See* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785 (1970).

139. LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1012 (1965).

140. The most serious question, on which the present study casts some light, is whether the exclusionary rule is effective in deterring unlawful searches. We find generally little feedback from courts and prosecutors to police departments as to questionable search and seizure practices. The individual police officer who is involved in a motion to suppress often leaves the courtroom confused rather than clarified as to what his proper conduct should be. Spiotto, *supra* note 27, at 276.

141. LaFave & Remington, *supra* note 139 at 992-1000.

who, while conducting preliminary hearings would casually and quickly sign ten to fifteen search warrants.[142] Ironically, this has led to the same judge holding his own search warrants invalid simply because he did not take the time to do the job correctly in the first instance. The study concludes

> In practice, the extent of real judicial participation when the warrant is issued after arrest is certainly no greater than it is when the warrant is issued prior to arrest. The process is routine and does not involve judicial inquiry into whether a basis for the arrest exists.[143]

Judicial inattention to warrant authorization can only have a bitterly frustrating impact on a police officer when an improperly drawn warrant is declared void to nullify the fruit of the search. The Supreme Court has ennunciated the principle that the police should obtain a warrant when time permits prior to a search.[144] The officer looks to the warrant as a means of insuring that the product of the search will be safely gathered and admissible for trial purposes. By rubber-stamping police requests for warrants, the judge increases the risk of nullifying the search later. For the police officer to be apprised of this fact at a suppression hearing where evidence is quashed is a bitter lesson learned too late.[145]

Finally, with respect to the beneficial educative effect of the exclusionary rule, there is little doubt that the exclusionary rule has had a noticeable effect on the course of police training. Virtually every big city police training school places emphasis on the rules

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142. *Id.* at 992-93.

143. *Id.* at 1000.

144. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 484 (1971):

> [T]hat the police must obtain a warrant when they intend to seize an object outside the scope of a search incident to an arrest—can be easily understood and applied by the courts and law enforcement officers alike. It is a principle that should work to protect the citizen without overburdening the police and a principle that preserves and protects the guarantees of the Fourth Amendment.

145. Those judges who sign warrants without consideration of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), defeat the purpose of the law.

> If methods such as the warrant process are to be encouraged as a way of protecting individual rights, then those responsible, particularly the judiciary, must take the responsibility seriously and give it meaning in actual practice. The pro forma issuance of warrants hardly inspires police confidence in the process as an important aspect of democratic government.

URBAN POLICE FUNCTION, *supra* note 34 at 149.

of arrest and search and seizure.[146] An inherently beneficient characteristic of the exclusionary rule is that it puts pressure on the police to conform to these rules so that the fruit of their work will not be wasted.

VI. Conclusion

"[T]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."[147] In assessing the current arguments for abandoning the exclusionary rule in favor of other alternatives, the evolutionary etiology of the rule should be considered. The rule, like the Fourth Amendment,[148] evolved in the federal courts after a long history of abuse demonstrated a need for a mechanism by which the judiciary could oversee police-citizen confrontations and formulate rules to insure the right to privacy of the citizenry. The exclusionary rule was applied to the States only because of the failure of local law enforcement agencies to devise methods of controlling police misconduct and for lack of alternative remedies to deter such misconduct. The courts have been almost alone in attempting to effectively restrain unlawful privacy invasions by the police because no other institution has made the effort.[149]

In assuming the responsibility of watching over certain police conduct, the courts have delineated rules of search and seizure which police are expected to follow or suffer exclusion of evidence derived from a wrongful search. Because the penalty of exclusion is disliked by much of the judiciary, the courts have loosely interpreted the rules to uphold searches. The result is that the law

146. Monrad Paulsen, *supra* note 17 at 95, noted that prior to *Mapp*, the states which had the most police training with respect to search rules were exclusionary rule jurisdictions. Nevertheless, "the average barber receives 4,000 hours of training. The average policeman receives less than 200 hours." National Advisory Commission on Criminal Justice Standards and Goals, A National Strategy to Reduce Crime, 122 (1973).

147. Coppedge v. United States, 369 U.S. 438, 439 (1967).

148. The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right. Byars v. United States, 273 U.S. 28, 33-34 (1926).

149. The plain fact is that the Court is in the business of policing the police because nobody else is and because in a society that likes to think of itself as 'free' and 'open' someone has to do the job. Packer, *Who Can Police the Police*, The New Yorker Review, Sept. 8, 1966, quoted in Urban Police Function, *supra* note 34 at 157 n.189.

of search and seizure (which is also the law governing the right of privacy) is interpreted to expand police power at the expense of personal privacy. This is an unfortunate by-product of the exclusionary rule, but one outweighed by the knowledge that without the rule search law would remain in an unsophisticated infancy.

That the exclusionary rule sometimes brings about certain undesired consequences does not mean that it is undesirable. It provides for judicial review of police conduct that would otherwise go unmonitored; it gives life to constitutional rights that would otherwise be disregarded; and it educates the guardians of our security as to the limits to which privacy may be sacrificed in the name of order.

If the rule has not had the deterrent effect expected, it is because the judiciary has not fulfilled its role in enforcing it. With proper enforcement by the judiciary of the exclusionary rule the current deficiencies may be mitigated. Enforcement can only begin with resolution of the pervasive problem of police perjury and with the beginning of constructive educational feedback to police officers and departments by the courts. Thus, the solution to the inadequacies of the rule lies in its vigorous enforcement by the judiciary, not in its abandonment.