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Resurrecting the Wolf: An Analysis of the Fourth Amendment Exclusionary Rule

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NOTE

RESURRECTING THE WOLF: AN ANALYSIS OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

The fourth amendment[1] safeguards an individual's property interests from unreasonable governmental intrusion.[2] The scope of its protection extends to any interest in which one has a legitimate expectation of privacy.[3] To secure this right to privacy, the "rea-

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[1] U.S. CONST. amend. IV. The fourth amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[2] *See* J. HIRSCHEL, FOURTH AMENDMENT RIGHTS 1 (1979); R. DAVIS, FEDERAL SEARCHES AND SEIZURES 3-5 (1964). The fourth amendment reflects the theories of, among others, John Locke, who stressed the sanctity of one's private property. *See* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 950 (1977). In both England and the American colonies, officials employed unrestricted search warrants or "writs of assistance" to search private homes for incriminating papers and to harass colonists. *See* R. DAVIS, *supra*, at 4. Such abuse drew criticism from British scholars, including Lord Coke. *Id.* Public dissent also raged in the colonies where the unreasonable search was proclaimed to be an "abuse that more than any one single factor gave rise to American independence." Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting).

Early state constitutions proscribed unrestricted search warrants in response to the public outcry. *See id.* at 158 (Frankfurter, J., dissenting). At present, every state has prohibited unreasonable searches and seizures in its own constitution, often parroting the language of the federal provision. *See id.* at 160-61 (Frankfurter, J., dissenting); J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 5-6 n.2 (1st ed. 1961).

[3] *See* Oliver v. United States, 466 U.S. 170, 177 (1984); Smith v. Maryland, 442 U.S. 735, 739-40 (1979); Katz v. United States, 389 U.S. 347, 350-53 (1967). The *Katz* Court held that the fourth amendment governs both the seizure of tangible items and the recording of oral statements, thus dealing the final blow to the common law property rights theory. *Katz*, 389 U.S. at 353. No longer was it necessary that there be a physical intrusion into an enclosed area or a seizure of a material object. *Id.*

The Court, in *Smith*, interpreted *Katz* as setting forth a two pronged test on the issue of a "justifiable expectation of privacy." 442 U.S. at 740. First, the individual must have

sonableness" and "warrant" clauses of the amendment have been continually interpreted in relation to each other.[4] Over the years, however, the Supreme Court has been inconsistent in its interpretation of what constitutes a reasonable search and seizure.[5] The introduction of exceptions to the warrant requirement,[6] their subsequent expansion, and the recent modification of the subsidiary issue of probable cause[7] all serve to illustrate this concept.

"exhibited an actual (subjective) expectation of privacy." *Id.* Second, the subjective expectation must be "one that society is prepared to recognize as 'reasonable' " (objective expectation). *Id.*

Despite the expansive *Smith* approach, standing requirements imposed in cases such as *Rakas v. Illinois*, 439 U.S. 128 (1978), have arguably revitalized the importance of having a property interest. *See id.* at 134; *see also infra* note 22 (cases dealing with standing); Note, *Court Sanctioned Circumvention of the Fourth Amendment*—United States v. Payner, 30 DE PAUL L. REV. 763, 767 (1981).

[4] *See* New York v. Class, 106 S. Ct. 960, 967 (1986) (test for reasonableness generally means search conducted pursuant to warrant backed by probable cause); United States v. Ventresca, 380 U.S. 102, 106-07 (1965) (preference accorded searches under warrant). *See also Harris*, 331 U.S. at 161-62, (1947) (Frankfurter, Jackson, JJ., dissenting) (subject to "minor and severely confined exceptions" every search and seizure is per se unreasonable if not conducted pursuant to valid warrant). The Court has not indicated whether one clause takes precedence over the other. *See* Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1092 n.30 (1982).

[5] *See generally* United States v. Rabinowitz, 339 U.S. 56, 63 (1950). The Court has demanded a showing of probable cause for most criminal searches. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 558 (1978); *see also infra* note 7 (explanation of probable cause). In stop and frisk situations, however, the Court has balanced the intrusion on the individual's privacy "against the opposing interests in crime prevention and detection and in the police officer's safety." Dunaway v. New York, 442 U.S. 200, 209 (1979). This balancing approach in the stop and frisk context originated in Terry v. Ohio, 392 U.S. 1, 22-24 (1968). *Terry* held that where a reasonably prudent police officer reasonably suspects that under the circumstances his safety or that of others is in danger, he may make a reasonable search of a person he suspects to be armed and dangerous, regardless of whether he had probable cause to arrest him. *Id.* at 27. *See also* New York v. Class, 106 S. Ct. 960, 968 (1986) (balance three factors: officer's safety, degree of intrusion, and whether search stemmed from "probable cause focusing suspicion on the individual affected by the search"). *Cf.* Brown v. Texas, 443 U.S. 47, 52 (1979) (when suspicion of misconduct absent, balance "tilts in favor of freedom from police interference").

[6] *See, e.g.*, Washington v. Chrisman, 455 U.S. 1, 5-7 (1982) (plain view exception); United States v. Ramsey, 431 U.S. 606, 621-22 (1977) (border searches); United States v. Santana, 427 U.S. 38, 42-43 (1976) (hot pursuit). *See also* Cupp v. Murphy, 412 U.S. 291, 295-96 (1973) (exigent circumstances); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (search pursuant to consent); Terry v. Ohio, 392 U.S. 1, 27 (1968) (stop and frisk). *See generally* R. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE 44-54 (1982) (explanation of exceptions to warrant requirement).

[7] *Compare* Illinois v. Gates, 462 U.S. 213, 238 (1983) (totality of circumstances analysis held proper standard for probable cause determination) *with* Spinelli v. United States, 393 U.S. 410, 416 (1969) *and* Aguilar v. Texas, 378 U.S. 108, 114 (1964) (combining to form more rigid two-pronged test concerning probable cause in cases of anonymous tips to police). The Court in *Gates* explicitly rejects the *Aguilar-Spinelli* test which required that the anony-

Similarly, inconsistency marks the debate concerning suitable methods of vindicating fourth amendment rights. Historically, aggrieved persons were relegated to two remedies, namely punishment of the trespassing official and recovery of the seized chattel.[8] At common law, all relevant evidence was admitted at trial, regardless of its source.[9] When the remedy of excluding illegally obtained evidence was first applied, it was considered an essential element of the right itself.[10]

In *Wolf v. Colorado*,[11] the Supreme Court discarded this reasoning and held the fourth amendment to be binding upon the states, but did not force the states to adopt the exclusionary "remedy".[12] The *Wolf* Court held that a state was free to apply its own

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mous message reveal the "basis of knowledge" and that it "provide facts sufficiently establishing either the 'veracity' of the affiant's informant, or, alternatively, the 'reliability' of the informant's report." 462 U.S. at 228-29. The Court preferred a more "common sense" approach using the two prongs merely as factors in its determination. *See id.* at 230. The *Gates* Court stressed the significance of supplementary "independent police investigation" which tends to corroborate the details of an informant's tip. *See id.* at 241.

[8] *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1538 (1972) (remedies against officials); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 690 (same); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 481, 483 (1922) (civil action, criminal contempt and return of articles). The basic common law remedies for victims of an unlawful search or seizure were actions for trespass, false arrest, false imprisonment, assault and malicious destruction of property. *See* Geller, *supra*, at 690. In early English trespass cases, absence of a lawful warrant precluded an officer's defense of official justification. *See* Dellinger, *supra*, at 1538.

[9] *See* J. WIGMORE, EVIDENCE § 2183 (1940). Dean Wigmore readily advocated the common law practice of admitting all relevant evidence, asserting that "[t]he judicial rules of Evidence were never meant to be an indirect process of punishment." *Id. See also* Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation*, 34 DRAKE L. REV. 33, 39-41 (1985) (ascertainment of truth rationale for inclusion of all relevant evidence).

[10] *See* Weeks v. United States, 232 U.S. 383, 393 (1914); Boyd v. United States, 116 U.S. 616, 622 (1886). In *Boyd*, the first case to apply the exclusionary rule, the Court found a federal law requiring an individual to produce his private papers to be used as evidence against him as violative of the fourth and fifth amendments. *See* 116 U.S. at 630, 638. The *Boyd* Court considered their admission to be an invasion of the "indefeasible right of personal security, personal liberty and private property." *See id.* at 630. The *Weeks* court unequivocally stated that exclusion was an essential ingredient of the fourth amendment, without which the amendment's protection "is of no value . . . [and] might as well be stricken from the Constitution." 232 U.S. at 393. *Weeks* imposed a direct limitation upon the authority of both the judiciary and the federal officials via the fourth amendment. *Id.* at 391-92.

[11] 338 U.S. 25 (1949).

[12] *See id.* at 33. The *Wolf* Court explicitly recognized the existence of other remedies to vindicate fourth amendment rights due to a considerable "range of judgment on issues not susceptible of quantitative solution." *Id.* at 28. Segregation of the exclusion remedy from the rights guarded by the fourth amendment was inferred from the fact that the exclusionary

effective remedy.[13] This stance was subsequently overruled in *Mapp v. Ohio*,[14] in which the Court declared the judicially created exclusionary rule to be a constitutionally required remedy.[15] The Court's current interpretation of the exclusionary rule has heightened the tension between *Wolf* and *Mapp*.[16]

This Note will first consider the recent dilution of the fourth amendment exclusionary rule subsequent to *Mapp*, primarily focusing upon the Burger Court's ad hoc balancing approach to its application. A comparison of the fourth amendment rule to exclusionary measures under the fifth and sixth amendments will reveal that exclusion under the latter two amendments are more readily justifiable. Accordingly, this Note will argue that imposition of this remedy upon the states with respect to the fourth amendment is an unconstitutional exercise of the Court's supervisory power. In this context, related principles of federalism and state autonomy, including comity and finality of judgments, will then be discussed. Finally, appropriate standards for the formulation of a remedy for fourth amendment violations will be suggested.

EXCLUSION OF TANGIBLE EVIDENCE UNDER THE FOURTH AMENDMENT: SUPERVISORY POWER OR CONSTITUTIONAL MANDATE

The Supreme Court's distaste for per se rules of exclusion has

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rule was judicially created, rather than explicitly required by the Constitution. *Id.*

[13] *See id.* at 33. In so doing, the Court acknowledged the feasibility of the then existing remedial measures employed by the states. *Id.* at 30-31 n.1.

[14] 367 U.S. 643, 655 (1961).

[15] *See id.* at 655. The *Mapp* Court discussed the practical effects of the exclusionary rule, including deterrence of illegal searches and seizures as well as maintenance of judicial integrity. *See id.* at 657-60. Recognition of exclusion as an essential element of the right was a prerequisite to imposition of the rule upon the states. *See* Wolf, *A Survey of the Expanded Exclusionary Rule*, 32 GEO. WASH. L. REV. 193, 218-19 (1963).

Three intermediary cases hastened the erosion of the *Wolf* "double standard." Strict requirements on standing to challenge an illegal search or seizure were relaxed in Jones v. United States, 362 U.S. 257, 265-67 (1960). In Elkins v. United States, 364 U.S. 206 (1960), the Court officially rejected the "silver platter" doctrine which permitted federal courts to use evidence obtained unlawfully by state officials. *Id.* at 215. Lastly, in Rea v. United States, 350 U.S. 214 (1956), the Court exercised its supervisory power to prevent a federal official from transferring illegally seized evidence to state authorities and from testifying in state court with respect to that evidence. *Id.* at 216-17.

[16] *See* California v. Minjares, 443 U.S. 916, 921 (1979) (Rehnquist, J., dissenting). Chief Justice Rehnquist favors the "thoroughly defensible proposition" of *Wolf*. *See id.* Justices Brennan and Marshall, however, continue to be strong proponents of the *Mapp* approach. *See* United States v. Leon, 468 U.S. 897, 940 (1984) (Brennan, J., dissenting); INS v. Lopez-Mendoza, 468 U.S. 1032, 1060 (1984) (Marshall, J., dissenting). *See also infra* notes 17-44 and accompanying text (discussion of Burger Court treatment of the exclusionary rule).

been manifested most clearly by the balancing approach utilized by the Burger Court in *United States v. Calandra*.[17] In *Calandra*, a grand jury witness refused to testify as to evidence obtained from an unlawful search and seizure.[18] Pursuant to a motion to suppress, the Court declined to apply the exclusionary rule to the "fruits" of this evidence.[19] The majority determined that the potential injury caused by disruption of grand jury proceedings outweighed the highly dubious deterrent value of exclusion.[20] The *Ca-*

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[17] 414 U.S. 338, 349-52 (1974).

[18] *See id.* at 341. The respondent's place of business was searched pursuant to a warrant issued in connection with a gambling investigation. *Id.* at 340. Although the search revealed no gambling paraphernalia, a federal agent who was aware of pending loansharking investigations discovered and seized what he concluded to be a loansharking record. *Id.* at 340-41. The district court determined that Calandra need not testify before the grand jury as to the loansharking records and granted his motion to suppress such evidence based upon insufficiency of the affidavit supporting the warrant and the fact that the search exceeded the warrant. *In re* Calandra, 332 F. Supp. 737, 746 (N.D. Ohio 1971), *aff'd*, United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972).

[19] *See Calandra*, 414 U.S. at 354-55. The phrase "fruit of the poisonous tree," as applied to derivative use of evidence, originated in Nardone v. United States, 308 U.S. 338, 341 (1939). This concept was first discussed in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), in which the Court rejected the Government's contention that the fourth amendment prohibits the use of illegally seized physical evidence but not the knowledge derived therefrom. *See id.* at 391-92. In referring to the meaning of the fourth amendment, the Court noted that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392.

The "fruits" notion was subsequently elaborated on in determining whether the product of an unconstitutional police action was admissible in evidence. *See* Brown v. Illinois, 422 U.S. 590 (1975). Therein, the Court declared that whether a confession had been obtained by exploitation of an illegal arrest or whether the causal chain between the two acts had been broken, "temporal proximity of the arrest and the confession, the presence of intervening circumstances, and . . . the purpose and flagrancy of the official misconduct" are factors to be considered. *Id.* at 603-04 (citations omitted). The Court has also noted that when there is a close causal connection between illegal police conduct and the fruits of that activity, the purpose behind the exclusionary rule is substantially served. *See* Dunaway v. New York, 442 U.S. 200, 218 (1979). *Accord* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (rejected "but for" rule in determining attenuation of the taint). *See generally* 3 LAFAVE, SEARCH AND SEIZURE § 11.4, at 612 (1978 & Supp. 1986) (discussing "fruit of the poisonous tree").

[20] *See Calandra*, 414 U.S. at 350-52. The majority concluded that there was no incentive for the official to disregard the fourth amendment's command to obtain an indictment if the evidence would only be suppressed at trial as a result. *See id.* at 351. The Court examined the unique role of the grand jury as an investigative body permitted to pursue its function "unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." *Id.* at 349. The *Calandra* majority also noted that the injury to the witness's privacy rights could be redressed by remedies other than exclusion in the grand jury proceeding. *See id.* at 354 n.10 (possible remedies for unlawful search and seizure include exclusion at trial or action for damages).

landra Court derived this balancing test from its earlier holding in *Alderman v. United States*.[21] In *Alderman*, the Court refused to grant special standing to enable codefendants to vicariously assert fourth amendment exclusion claims because the deterrent benefits in extending the exclusionary rule in such cases were outweighed by the strong public interest in prosecuting such parties.[22] This cost-benefit analysis has been subsequently employed in other contexts, thereby giving rise to several noteworthy exceptions to the rule's application.[23]

The Court applied a similar weighing process in *Stone v. Powell*.[24] The majority denied a state prisoner federal habeas corpus

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Calandra's rejection of the exclusionary rule has been limited by some to the context of a grand jury proceeding. *See* Smith v. United States, 423 U.S. 1303, 1306 (1975) (Douglas, J., opinion in chambers); Comment, *The Fourth Amendment Exclusionary Rule in the Grand Jury Setting:* United States v. Calandra, 9 HARV. C.R.-C.L. L. REV. 598, 599 (1974). *But see infra* note 23 and accompanying text (*Calandra* cost-benefit analysis employed in other contexts).

[21] *See Calandra*, 414 U.S. at 348, 350-51 (citing Alderman v. United States, 394 U.S. 165, 174-75 (1969)).

[22] *See Alderman*, 394 U.S. at 174-75. The Burger Court continues to enforce the standing requirement in search and seizure cases. *See, e.g.*, United States v. Salvucci, 448 U.S. 83, 85 (1980) (overruling automatic standing rule where possession of unlawfully seized evidence is essential element of alleged offense); Rakas v. Illinois, 439 U.S. 128, 133 (1978) (rejects "target" theory whereby any defendant at whom search is "directed" can object to admission of seized evidence). The Court refused to use its supervisory power to permit an accused to vicariously assert another's rights under the fourth amendment. *See* United States v. Payner, 447 U.S. 727, 735 (1980). For a discussion of the standing requirement to assert application of the exclusionary rule, *see generally* 3 LAFAVE, *supra* note 19, at § 11.3; Comment, *supra* note 20, at 600-09.

[23] *See, e.g.*, Massachusetts v. Sheppard, 468 U.S. 981, 987-88 (1984) (evidence obtained in good faith reliance on defective search warrant admissible); United States v. Leon, 468 U.S. 897, 913 (1984) (same); Segura v. United States, 468 U.S. 796, 799, 813-14 (1984) (independent source for search warrant renders admissible evidence obtained via warrantless entry); Nix v. Williams, 467 U.S. 431, 448 (1984) (exclusionary rule exception where evidence would inevitably have been discovered); United States v. Havens, 446 U.S. 620, 627-28 (1980) (illegally seized evidence admissible for impeachment purposes). *See also* Michigan v. DeFillippo, 443 U.S. 31, 40 (1979) (fruits of arrest made in good faith reliance on ordinance subsequently declared unconstitutional held admissible); United States v. Janis, 428 U.S. 433, 454 (1976) (evidence seized unlawfully by state officers admissible in federal tax proceeding).

Despite the initial application of the balancing test to the "fruits" of the unlawful conduct in *Calandra*, it is obvious that this approach extends to the originally seized evidence as well. *See Leon*, 468 U.S. at 913. It is also evident from the Court's decisions that the *Calandra* test applies outside the grand jury context. *See, e.g., id.* at 913 (extending *Calandra* to trial setting); INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) (applying *Calandra* analysis to civil deportation hearings); Stone v. Powell, 428 U.S. 465, 492-94 (1976) (extending *Calandra* to habeas corpus setting).

[24] 428 U.S. 465, 493-95 (1976).

relief despite the fact that illegally seized evidence had been introduced at his trial, holding that he had been afforded an opportunity for full and fair litigation of his fourth amendment claim.[25] The minimal deterrent effect of exclusion in the habeas corpus setting was considerably outweighed by the detriment to the truthfinding process of the criminal justice system.[26] The trial court's adequate opportunity to consider the claim seemingly satisfies the judicial integrity argument some still advance for applying the rule.[27]

The *Calandra, Alderman,* and *Stone* holdings have a significant common denominator: the effective elevation of the deterrence rationale as the primary purpose of the fourth amendment exclusionary rule.[28] Accordingly, the *Calandra* majority expressly rejected the view that the rule was constitutionally required in all

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[25] *See id.* at 494. The Court emphasized the narrowness of its holding by noting that the exclusionary rule has "minimal utility" when sought to be applied to fourth amendment claims in a habeas corpus setting. *See id.* at 495 n.37. *Cf.* Rose v. Mitchell, 443 U.S. 545, 560-61 (1979) (distinguishing habeas corpus reversal of conviction based upon racially discriminatory grand jury selection from reversal based upon fourth amendment claims because in former case, trial court rather than police committed constitutional violation).

[26] *Stone,* 428 U.S. at 490, 492-94. The Court considered the assumption that deterrence would result if police feared that federal habeas corpus review might reveal previously undetected flaws in searches or seizures dubious. *See id.* at 493. Critics of the fourth amendment exclusionary rule cite diversion from, and injury to, the truth-finding process in a criminal trial as the rule's major flaw. *See* United States v. Ceccolini, 435 U.S. 268, 277 (1978); McCORMICK ON EVIDENCE § 168, at 463 (E. Cleary 3d ed. 1984); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure,* 80 COLUM. L. REV. 436, 449 (1980).

[27] *See Stone,* 428 U.S. at 486. Courts would thereby be prevented from becoming accomplices to unlawful invasions of citizens' rights by admitting the "fruits of such invasions." *See* Terry v. Ohio, 392 U.S. 1, 12-13 (1967).

The *Stone* Court observed that the concern for judicial integrity has minimal force as a justification for application of the exclusionary rule. *See* 428 U.S. at 485. *See also infra* note 64 and accompanying text (judicial integrity rationale cannot justify rule's imposition upon states). Support for judicial integrity as a purpose of the exclusionary rule still can be found in the minority opinions of Justices Brennan and Marshall. *See, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 594 n.19 (1980) (Brennan, J., concurring) (exclusionary rule furthers "independent 'imperative of judicial integrity' "); United States v. Payner, 447 U.S. 727, 744-45 (1980) (Marshall, J., dissenting) (exclusion considered exercise of Court's supervisory power to protect integrity of judicial system).

[28] Although unsupported by empirical evidence, the deterrent effect of the exclusionary rule was at one time presumed. *Stone,* 428 U.S. at 492. This presumption has been essentially abrogated in United States v. Leon, 468 U.S. 897 (1984), wherein the Court noted that deterrence is ineffectual in light of objectively reasonable police activity. *See Leon,* 468 U.S. at 918-19. In general, the effectiveness of exclusion as a deterrent has been subject to extensive criticism. *See* Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives,* 2 J. LEGAL STUD. 243, 276 (1973); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 671-72 (1970).

cases.[29] The rule's aim is to protect society from future violations of the amendment rather than to punish the offender or to specifically redress the individual's injury.[30] Implicit in this stress upon deterrence is the conceded recognition of equally effective alternative remedies.[31]

Contrast with Fifth Amendment

Initially, the exclusionary rules of the fourth and fifth amendments were considered complementary.[32] However, with the Court's narrowing of the fifth amendment to a testimonial privilege and its expansion of the fourth amendment to encompass any legitimate privacy interest, this is no longer the case.[33] Despite its terse wording, the fifth amendment privilege against self incrimination[34] encompasses two limitations on governmental authority:

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[29] *See Calandra*, 414 U.S. at 348. The Court officially rejected the interpretation of the rule as a "personal constitutional right of the party aggrieved." *Id.*

[30] *See Calandra*, 414 U.S. at 347. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). The exclusionary rule was not intended to punish judges and magistrates for their errors concerning issuance of warrants. *See Leon*, 468 U.S. at 916 (1984). Since there is no direct punishment levied against the erring official, some consider the exclusionary rule to be an ineffective deterrent. *See* Oaks, *supra* note 28, at 709-10.

[31] *See* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 181, 185 (1969) [hereinafter Hill, *Supervisory Power*]; Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1118 (1969) [hereinafter Hill, *Constitutional Remedies*]. Professor Hill asserts that unless a particular remedy is held to be an integral part of a constitutional right, substitutes will be permitted or at least considered as to their comparable effectiveness. Hill, *Supervisory Power*, *supra*, at 185. This is particularly relevant due to the Constitution's silence on the matter of remedies. Hill, *Constitutional Remedies*, *supra*, at 1118.

[32] *See* Gouled v. United States, 255 U.S. 298, 305-06 (1921); Boyd v. United States, 116 U.S. 616, 630 (1886). The initial invasion and seizure were considered violative of the fourth amendment, while the admission of the seized evidence at trial violated the fifth. *See Gouled*, 255 U.S. at 306; Note, *supra* note 2, at 959. Closely related to this interdependency was the traditional "mere evidence" rule, which permitted the government to search only for contraband, instrumentalities and fruits of the crime, but not for mere evidence. *See id.* at 960. For a discussion of the rule, see generally Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966). It was subsequently repudiated by the Court, *see* Warden v. Hayden, 387 U.S. 294, 310 (1967), as a result of the Court's changing perspective as to both the fourth and fifth amendments. *See* R. MCNAMARA, *supra* note 6, at 32.

[33] *See* Warden v. Hayden, 387 U.S. 294, 302-06 (1967) (tangible items seized not subject to fifth amendment privilege; shift under fourth amendment from property to privacy interest); Schmerber v. California, 384 U.S. 757, 761 (1966) (fifth amendment privilege does not encompass use of blood taken from defendant as evidence); *supra* note 3 (expansion of fourth amendment protection to encompass legitimate expectation of privacy).

[34] U.S. CONST. amend. V. The fifth amendment provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Id.*

the prohibition against coerced confessions and the safeguarding of individuals from being compelled to testify against themselves.[35] Although a distinction between the two limitations is no longer observed,[36] the development of each concept in our case law has been divergent.[37] Both derive from the common law intolerance of the old English inquisitorial practices.[38] Nevertheless, in finding the extortion of confessions through "inducements engendering either hope or fear"[39] deplorable, the Supreme Court chose to impose this prohibition against the states much earlier.[40] The Warren Court

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[35] *See* H. WAY, CRIMINAL JUSTICE AND THE AMERICAN CONSTITUTION 147 (1980); J. WIGMORE, EVIDENCE § 2266 (Mc Naughton rev. ed. 1961). Dean Wigmore saw a clear distinction between the "rule excluding untrustworthy Confessions" and the "rule giving a Privilege against compulsory testimonial Self-Crimination." *Id.* at 401. As separate principles, the latter encompasses only in-court statements made by witnesses, whereas the broader "confession rule" also applies to out of court statements by the defendant. *See id.* Contemporaneously, Professor Morgan conceded the distinction, but recognized the self incrimination privilege as encompassing the prohibition against confessions coerced by the police. *See* Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 29-30 (1949).

[36] *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964), in which the Court overruled the stance taken in Twining v. New Jersey, 211 U.S. 78 (1908), by incorporating the fifth amendment privilege against compelled testimony into the fourteenth amendment as had previously been done with respect to its counterpart confession rule. *See* Brown v. Mississippi, 297 U.S. 278, 285 (1936). Thus, both privileges were extended to state proceedings. *See Malloy*, 378 U.S. at 6.

[37] *See* J. WIGMORE, *supra* note 35, at §§ 818, 2250, 2266 (origins of two privileges differ by one hundred years). A double standard evolved in Supreme Court decisions with respect to the imposition of the two privileges upon the states. In Bram v. United States, 168 U.S. 532 (1897), the fifth amendment self-incrimination privilege controlled the issue of coerced confessions in federal proceedings. *See id.* at 542. In Twining v. New Jersey, 211 U.S. 78 (1908), the Court refused to impose the "exemption from compulsory self-incrimination" upon the states. *See id.* at 99. Twenty eight years later, the Court held that "[c]ompulsion by torture to extort a confession is a different matter," and voided the conviction on due process grounds. *See* Brown v. Mississippi, 297 U.S. 278, 285 (1936) (confessions extorted by hanging and whipping accused void as violative of due process). Hence, until *Malloy* overruled *Twining*, the states were bound by the confession rule but not by the privilege against compelled testimony. *See infra* note 39.

[38] *See* D. NISSMAN, E. HAGEN, P. BROOKS, LAW OF CONFESSIONS 26-44 (1985) [hereinafter LAW OF CONFESSIONS]; H. WAY, CRIMINAL JUSTICE AND THE AMERICAN CONSTITUTION 133-36 (1980). *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968) (overview of common law inquisitorial practices and historical developments of fifth amendment).

[39] Bram v. United States, 168 U.S. 532, 558 (1897). The Court in *Bram* declared that the general rule as to confessions was that they are to be "free and voluntary." *Id.* at 557. In that case, the Court described the broad fifth amendment privilege as "comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes." *Id.* at 548.

[40] *See supra* note 37. For other early cases applying the privilege against coerced confessions see Watts v. Indiana, 338 U.S. 49, 53-55 (1949); Ward v. Texas, 316 U.S. 547, 555 (1942); Chambers v. Florida, 309 U.S. 227, 228 (1940).

stated in *Miranda v. Arizona*[41] that custodial interrogation was inherently coercive, and thus significantly expanded the definition of "coercion."[42] Demonstrating its displeasure with the strict *Miranda* prophylactic rules,[43] the Burger Court apparently chose to revert to the traditional ad hoc voluntariness test for the admissi-

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[41] 384 U.S. 436 (1966).

[42] *Id.* at 457-58. The *Miranda* Court construed its earlier holding in United States v. Malloy, 378 U.S. 1 (1964), and the voluntariness doctrine as "encompass[ing] all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice." *Miranda*, 384 U.S. at 464-65. Viewing custodial police interrogation as coercive by its very nature, *see id.* at 457-58, the Court disallowed the use of statements stemming from this procedure absent a showing by the prosecution which "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. The Court then outlined a series of warnings which, if given to a defendant prior to custodial interrogation provide the necessary protection. *Id.* at 467-73. Such warnings and subsequent waiver of one's rights "are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." *Id.* at 476.

This set of procedural guidelines and the diversion from the traditional ad hoc voluntariness test was heralded as a necessary and logical means of assuring that the accused's waiver of rights and his subsequent confession were truly voluntarily made. *See* Wright, *A Fresh Approach to the Law*, in A NEW LOOK AT CONFESSIONS: ESCOBEDO—THE SECOND ROUND 249-50 (B. George ed. 1967) [hereinafter THE SECOND ROUND]. Judge Wright praised the shift in emphasis from the trial to the pre-trial period, and considered the right to an attorney during interrogation necessary to avoid "secret inquisition." *Id.* Professor Kamisar viewed the shift of focus on the police station as the next logical step in safeguarding the self incrimination privilege. *See* Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the "Old Voluntariness" Test*, 65 MICH. L. REV. 59, 66-67 (1966). He noted that the primary problem encountered in confession cases is that custodial interrogations are secret proceedings absent any objective recordation of the facts. *Id.*

[43] *See* New York v. Quarles, 467 U.S. 649, 656 (1984); Brewer v. Williams, 430 U.S. 387, 423-24 (1977) (Burger, C.J., dissenting); Michigan v. Tucker, 417 U.S. 433, 444-45, 450-51 (1974). In each of these cases, a distinction was made between the privilege against self-incrimination and the prophylactic rules enunciated in *Miranda*. In *Quarles*, the Court held that, under the circumstances of the case, overriding concerns for public safety justified the police officer's failure to recite the *Miranda* warnings prior to his interrogation of the defendant regarding the location of the abandoned weapon. *See* 467 U.S. at 656. Chief Justice Burger, in his *Brewer* dissent, argued that a violation of a *Miranda* safeguard is not per se a violation of the fifth amendment. *See* 430 U.S. at 423-24. In *Tucker*, Justice Rehnquist viewed the *Miranda* safeguards as merely "provid[ing] practical reinforcement for the right against compulsory self-incrimination," rather than as constitutional mandates. 417 U.S. at 444. *See* Moran v. Burbine, 106 S. Ct. 1135 (1986). The *Moran* Court stressed that the underlying purpose of the *Miranda* rules was to "guard against abridgement of the suspect's Fifth Amendment rights." *Id.* at 1143. The Court has further restricted the scope of *Miranda* by limiting the definition of "custody." *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977) (voluntary visit to police station when not under arrest held not in custody). *See generally* Lane and Grossman, *Miranda: The Erosion of a Doctrine*, 62 CHI. B. REC. 250 (1981) (decline of *Miranda* under Burger Court).

bility of potentially incriminating declarations.[44] This blanket exclusion of involuntary statements under the fifth amendment ultimately rests upon the greater potential for unreliability.[45]

Contrast with Sixth Amendment

The sixth amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his Defense."[46] The right to counsel originated in the common law privilege allowing an accused to be represented at trial by his own attorney.[47] It has been enlarged by the Supreme Court to provide for state-appointed counsel for indi-

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[44] *See, e.g.*, Michigan v. Tucker, 417 U.S. 433 (1974). The *Tucker* Court held that although the police failed to provide the accused with the full measure of *Miranda* safeguards, he was not deprived of his privilege against self-incrimination because, despite this failure, the statements were voluntarily made. *Id.* at 444-46. The Burger Court has similarly negated the per se rule of exclusion by permitting the use of statements obtained in violation of *Miranda* for impeachment purposes, so long as the statements were voluntarily made. *See* Oregon v. Hass, 420 U.S. 714, 722-23 (1975). Likewise, in New York v. Quarles, 467 U.S 649 (1984), the Court did not presume that the self-incriminating statement made by the defendant was compelled because the police had failed to read him his *Miranda* warnings. *See id.* at 672 n.5.

[45] The trustworthiness standard, which prevailed at common law, *see* LAW OF CONFESSIONS, *supra* note 38, at § 1:2, was cited by the Burger court as a further justification for excluding involuntary statements. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974) (mistrust of involuntary statements). The trustworthiness standard was officially discarded by the Court in Rogers v. Richmond, 365 U.S. 534 (1961), which held that involuntary statements were to be excluded regardless of their truth or falsity. *Id.* at 540-41; *see also* Jackson v. Denno, 378 U.S. 368, 376-77 (1964). The concept of trustworthiness, nonetheless, is frequently used to distinguish exclusion of testimonial evidence from suppression of tangible evidence. *See* United States v. Leon, 468 U.S. 897, 906-07 (1984); Linkletter v. Walker, 381 U.S. 618, 638 (1965); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965). This reliability issue is easily disregarded in the fourth amendment context insofar as tangible evidence is inherently reliable. *See Leon*, 468 U.S. at 907.

[46] U.S. CONST. amend. VI. The sixth amendment also protects an accused's right "to be confronted with the witnesses against him." *Id.* Violation of this right may lead to exclusion of prior testimony which was not subject to adequate cross examination. *See* Pointer v. Texas, 380 U.S. 400, 407 (1965). For purposes of this Note, discussion of the sixth amendment will focus upon the right to counsel.

[47] *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 30 (1955); LAW OF CONFESSIONS, *supra* note 38, at § 7:2; H.F. WAY, *supra* note 35, at 287. In eighteenth century England, the right to appear with counsel was usually limited to cases in which the state's interest was so minor that it could afford to be generous, such as those involving misdemeanor defendants and civil litigants. *See* W. BEANEY, *supra*, at 8. It was denied to felony defendants unless the charge was treason. *See id.* at 9. However, each of the original thirteen states granted some form of increased protection. *Id.* at 21. Prior to ratification of the sixth amendment, Congress had passed several acts granting a general right to representation by counsel. *See id.* at 28.

gent defendants,[48] and is no longer limited to the actual trial setting.[49] The right to counsel has consistently been viewed as a necessary corollary to an accused's due process right to be heard and receive a fair trial,[50] and intertwines with the privilege against self-incrimination.[51] Accordingly, statements extracted in violation of the right to counsel are suppressed.[52]

Supervisory Power

The Supreme Court's recent limitations on the fourth amendment exclusionary rule have evoked doubts as to whether it can be constitutionally imposed upon the states.[53] This has raised ques-

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[48] In Powell v. Alabama, 287 U.S. 45 (1932), the Court held that in certain capital cases due process required that the state assign counsel to the accused. *Id.* at 71. This right was subsequently extended to all capital cases, *see* Bute v. Illinois, 333 U.S. 640, 674 (1948), and then to all felonies in Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). *See generally* W. BEANEY, *supra* note 47, at 38-79 (expansion of right to counsel for indigents).

[49] *See* Escobedo v. Illinois, 378 U.S. 478, 488 (1964); LAW OF CONFESSIONS, *supra* note 38, at § 7:3. It was not until the *Escobedo* holding that the right to counsel was recognized beyond the trial setting. 378 U.S. at 490-91. "[W]here . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," that suspect is entitled to an opportunity to consult with an attorney. *Id.* It has been extended beyond the trial setting to encompass critical stages of a prosecution. *Id.* Such critical stages include arraignments, Hamilton v. Alabama, 368 U.S. 52, 54-55 (1961), preliminary hearings, Coleman v. Alabama, 399 U.S. 1, 9 (1970), post-indictment lineups, United States v. Wade, 388 U.S. 218, 236-37 (1967), and post-trial revocation of probation, Mempa v. Rhay, 389 U.S. 128, 137 (1967).

[50] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 68-71 (1932).

[51] *See* Miranda v. Arizona, 384 U.S. 436, 470-75 (1966); Escobedo v. Illinois, 378 U.S. 478, 488 (1964). The presence of an attorney will ensure that any coercive police practices are reduced, thus "mitigat[ing] the dangers of untrustworthiness." *See Miranda*, 384 U.S. at 470. *Escobedo* recognized the right of the accused to be advised by an attorney of his rights, including his right to remain silent. *See* 378 U.S. at 488.

[52] *See Escobedo*, 378 U.S. at 490-91 (no statement elicited by police during interrogation is admissible if request for counsel is denied); Massiah v. United States, 377 U.S. 201, 206-07 (1964) (incriminating statements elicited by federal agents from defendant in absence of his attorney not admissible). *But see* Nix v. Williams, 467 U.S. 431, 449-50 (1984). In *Nix*, the Court held the inevitable discovery rule applicable to evidence obtained as the "fruit" of a sixth amendment violation. *Id.* at 447-48. Stressing deterrence as the purpose of excluding such evidence, the Court adopted a balancing test similar to that used in the fourth amendment cases. *See id.*; *supra* notes 20-26 and accompanying text. Applying the balancing test, the *Nix* Court stressed the detrimental effect that suppression would have on "the integrity of the fact finding process" in such a case, and noted its minimal effect as a deterrent. *Nix*, 467 U.S. at 446. The right to counsel has not been recognized in several non-trial settings such as: grand jury proceedings, United States v. Mandujano, 425 U.S. 564, 581 (1976); post-indictment photographic displays, United States v. Ash, 413 U.S. 300, 321 (1973); pre-indictment lineups, Kirby v. Illinois, 406 U.S. 682, 690 (1972).

[53] *See, e.g.*, Wingo, *Rewriting* Mapp *and* Miranda: *A Preference for Due Process*, 31 U.

tions concerning the doctrine of supervisory power, defined as the ancillary authority of the judiciary to formulate procedural rules, subject to concurrent and superseding congressional authority.[54] Traditionally, it was invoked by the Court to impose standards upon lower federal courts to achieve a fair and orderly administration of justice, beyond those mandated by the Constitution.[55] The supervisory power has been employed to establish rules of evidence and to regulate conduct outside the courtroom which violates federal law.[56] Its greatest impact has been in the criminal justice area.[57]

KAN. L. REV. 219, 227, 234 (1983) (as currently construed, neither *Mapp* nor *Miranda* may be constitutionally imposed upon states); Note, *Standards for the Suppression of Evidence under the Supreme Court's Supervisory Power*, 62 CORNELL L. REV. 364, 368 (1977) (if characterization as remedial deterrent prevails, states may be able to devise alternative deterrents).

[54] *See* Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1468, 1472 (1984). Commentators agree that the general supervisory power is derived from Article III of the Constitution. *See id.* at 1468-72; Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427, 439 (1982).

[55] *See* Casenote, *Limiting Exclusion of Evidence Under the Federal Court's Supervisory Power with a Fourth Amendment Sword:* United States v. Payner, 22 B.C.L. REV. 567, 582-83 (1981); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1050 (1965). Historically, the supervisory power has been exercised to regulate courtroom conduct. Note, *supra*, at 1052-56. Such regulation may be effectuated by finding an abuse of discretion in the trial court, particularly if the issue is the improper conduct of a judge. *See id.* at 1056-57. This type of judicial housekeeping traces back to the English system in which courtroom procedure was regulated on an ad hoc basis. *Id.* at 1054-55. Even if confined to regulating courtroom procedure, problems of inconsistency arise when the supervisory power is invoked by the lower courts. *See* Beale, *supra* note 54, at 1455-62.

[56] *See* Beale, *supra* note 54, at 1434; Imwinkelried, United States v. Payner *and the Still Unanswered Questions about the Federal Court's Supervisory Power Over Criminal Justice*, 7 NAT'L. J. CRIM. DEF. 1, 15 (1981). The modern version of the supervisory power has been characterized as a "prophylactic tool to counter government misconduct." Imwinkelried, *supra*, at 11. The expansion beyond judicial housekeeping originated in McNabb v. United States, 318 U.S. 332 (1943), in which the Court suppressed confessions obtained by arresting officers in violation of a federal statute that required that "the person arrested shall be immediately taken before a committing officer." *Id.* at 342. The Court granted suppression even though it conceded that the confessions were voluntary and, thus, not violative of the fifth amendment. *See id.* at 341; *see also* Elkins v. United States, 364 U.S. 206, 223 (1960) (evidence seized unlawfully by state officers held inadmissible in federal proceedings); Rea v. United States, 350 U.S. 214, 217-18 (1956) (supervisory power prevented federal official from testifying in state court). Invocation of the supervisory power to exclude evidence obtained in violation of standards more stringent than those constitutionally mandated allegedly serves several objectives: to preserve the integrity of judicial proceedings; to remedy violations of individual rights; and to impose sanctions against government misconduct. *See* Beale, *supra* note 54, at 1495.

[57] *See* Beale, *supra* note 54, at 1434. Use of the supervisory power has been considerably reduced by the Burger Court. *See, e.g.*, Hobby v. United States, 468 U.S. 339, 350 (1984)

The use of this supervisory power to impose extraconstitutional measures has drawn considerable criticism concerning potential separation of powers conflicts.[58] For this reason, it has been suggested that the exercise of supervisory power be confined solely to regulation of procedure within the courtroom.[59] The Supreme Court has further noted the possible infringement on state autonomy and has responded by declaring that, under the guise of the exercise of supervisory power over the states, basic principles of federalism are vitiated.[60] Accordingly, federal review of state court decisions is limited to determining whether there has been a constitutional violation.[61]

It is submitted that imposition of the fourth amendment exclusionary rule upon the states is an impermissible exercise of supervisory power. Since its basis rests in deterrence rather than vindication of rights, it appears that the Court is employing the criminal process to formulate social policy.[62] Federal judicial oversight of a state agency such as the police, which the state has equal resources to supervise, raises concerns of federalism.[63] While the

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(Court refused to dismiss indictment of white defendant who alleged discrimination against blacks in jury foreman selection); United States v. Payner, 447 U.S. 727, 731-32 (1980) (Court refused to expand standing to assert fourth amendment claims).

[58] Professor Beale asserts that exclusion of evidence or dismissal of the prosecution, in the absence of a constitutional violation, "impairs the President's ability to enforce the laws and frustrates the substantive criminal law enacted by Congress." Beale, *supra* note 54, at 1521. *See also* Note, *supra* note 53, at 447-49 (proposes bifurcated inquiry to avoid separation conflicts: whether benefits of exclusion outweigh its costs to courts and whether exclusion impermissibly intrudes upon executive's function). *But see McNabb*, 318 U.S. at 347 ("We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement").

[59] *See* Beale, *supra* note 54, at 1473-74.

[60] *See* Chandler v. Florida, 449 U.S. 560, 582 (1981); Ker v. California, 374 U.S. 23, 33 (1963). The *Chandler* Court acknowledged that "[The Supreme Court is] not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene." 449 U.S. at 582.

[61] *See Chandler*, 449 U.S. at 570, 582-83.

[62] *See* Seidman, *supra* note 26, at 436. Professor Seidman analogizes the Burger and Warren Courts' use of the criminal trial to achieve ends other than the adjudication of guilt. *See id.* at 445-46. The Warren Court sought to achieve greater civil rights, *id.* at 430-45, whereas the Burger Court apparently stressed crime prevention and control. *Id.* at 436-38. The current Court uses exclusion to protect the "collective interest of society" in deterring fourth amendment violations. *See* Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 273, 280 (1983).

[63] *See* United States v. Janis, 428 U.S. 433, 458, 459 n.35 (1976). The *Janis* Court recognized the "undesirable supervisory role over police officers." *Id.* at 458. *But see* Comment,

need to maintain judicial integrity underlies the doctrine of supervisory power, such a rationale does not support exclusion of crucial evidence.[64] As one of several remedies, none of which is an integral part of fourth amendment jurisprudence, the imposition of the exclusionary rule upon the states directly impinges upon the state's legitimate authority to select an appropriate remedy for aggrieved parties.

FEDERALISM CONCERNS

The language of the Supremacy Clause,[65] coupled with the lack of creation of inferior federal courts in the Constitution,[66] demonstrates that the Framers contemplated state court adjudication of federal constitutional questions.[67] The Supreme Court's authority to review state court determinations of federal law is firmly

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Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of Federal Courts, 72 NW. U.L. REV. 595, 614 (1978) (proposes more flexible exercise of supervision by federal courts over law officials and agencies). The federal courts could "bridge the hiatus" between the police and the judiciary by having the police demonstrate an effectively administered investigative policy within the agency to protect fourth amendment rights. *See id.* at 629. The judiciary would retain power to review compliance therewith. *See id.* at 604-05. It is submitted that such a system on the state level, between the local police and the state courts, is a viable alternative to exclusion. Moreover, problems of federalism would thereby be avoided.

[64] *See* Stone v. Powell, 428 U.S. 465, 485-86 (1976). The *Stone* Court concluded that maintenance of judicial integrity "has limited force as a justification for the exclusion of highly probative evidence." 428 U.S. at 485. Justice Rehnquist expressly rejected its applicability to exclusion in state proceedings because of its supervisory nature. *See* California v. Minjares, 443 U.S. 916, 924 (1979) (Rehnquist, J., dissenting). In addition, there is doubt as to whether exclusion promotes judicial integrity. *See* Cameron & Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109, 131 (1984) (disparity between error committed and windfall afforded likely to stir up public hostility toward government).

[65] U.S. CONST. art. VI, § 2. The Supremacy Clause provides in relevant part: "This Constitution . . . shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* (emphasis added).

[66] *See* U.S. CONST. art. III, § 1. The absence of inferior federal courts at the time of the making of the Constitution is evident in the discretionary language of the Constitution with respect to the creation of such courts: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress *may* from time to time ordain and establish." *Id.* (emphasis added).

[67] *See* Robb v. Connolly, 111 U.S. 624, 638 (1884); *see also* Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118, 1133-41 (1984) (pros and cons of using Framers' ambivalence and supremacy clause as justification for current theory on Supreme Court-state court relations). In conjunction with their authority to hear federal constitutional claims, the states are to use their general remedial authority to redress any violations. *See* Hill, *Constitutional Remedies*, *supra* note 31, at 1113.

established by statute[68] and case law.[69] However, when state courts are called upon to interpret federal constitutional provisions which involve individual rights, an unavoidable tension ensues between state autonomy and federal uniformity.[70]

Federalism has been a particular goal of the Burger Court as it attempts to allow the states greater leeway from federal restraints.[71] Respect for the autonomy of the state judiciary has been most evident with respect to the states' traditional role as criminal justice administrator.[72] Implicit in the Court's balancing approach to the exclusionary rule is its deference to state courts' expertise and familiarity with local conditions.[73] Former Chief Justice Burger, among others, has advocated increased experimentation by the states in formulating remedies for fourth amendment violations.[74]

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[68] *See* 28 U.S.C. § 1257 (1976).

[69] *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (review of state criminal proceeding); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (same). The authority of the Supreme Court to review state court judgments became truly effective after the ratification of the fourteenth amendment. *See* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 2 (1956).

[70] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-33, at 122 (1978). Professor Tribe views the Court's role as entailing the determination of "whether state autonomy threatens federal interests to such an extent that uniformity must prevail." *Id.* Professor Schaefer characterizes the conflict between state autonomy and federal uniformity as one between a strong local interest in law enforcement and a competing "ideal" of fair procedure. *See* Schaefer, *supra* note 69, at 5.

[71] *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 451 (1974). The Burger Court's decentralizing tendencies in the criminal justice area have been compared to Justice Harlan's views. *See id.* Justice Harlan believed that state criminal justice systems should be free of federal constitutional restraints so long as they abided by standards of fundamental fairness. *See id.* He advocated disuniformity between the two levels of government because "[t]he powers and responsibilities of the State and Federal Governments are not congruent, and under the Constitution they are not intended to be." Griffin v. California, 380 U.S. 609, 616 (1965) (Harlan, J., concurring). *But see* Welsh, *Whose Federalism? - The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819, 819-20, 856-58 (1983) (Burger Court's approach prohibiting states to grant greater protection is hypocritical).

[72] *See* Irvine v. California, 347 U.S. 128, 134 (1954); Stefanelli v. Minard, 342 U.S. 117, 120 (1951). The *Irvine* Court recognized that the "chief burden of administering criminal justice rests upon the state courts." 347 U.S. at 134. Deference to the states in the criminal justice area is historically rooted; it was not until the twentieth century that the fourteenth amendment was extended to state criminal proceedings. *See* THE SECOND ROUND, *supra* note 42, at 39.

[73] *Cf.* Mapp v. Ohio, 367 U.S. 643, 680-81 (Harlan, J., dissenting). "Problems of criminal law enforcement vary widely from State to State." *Id.* Justice Harlan concluded: "In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement." *Id.* at 681.

[74] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S.

Critics reject such experimentation and stress that the detachment of the Supreme Court from local crime and political pressures is crucial to the effective protection of individual rights.[75] This latter argument, however, poses problems for state courts which seek to apply standards formulated haphazardly by the Supreme Court.[76]

In preserving state judicial autonomy, two concepts emerge: comity[77] and finality of state court judgments.[78] While these two concepts were intended to support the *Pullman*[79] doctrine of federal abstention from interference with pending state court proceedings,[80] it is submitted that they apply similarly to direct re-

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388, 423-24 (1971) (Burger, J., dissenting). Former Chief Justice Burger urged Congress to expressly waive its sovereign immunity as to illegal acts of law enforcement officials and to create a specific cause of action for damages arising out of fourth amendment violations. *See id.* at 422-23. As part of this proposal, Burger called for an express provision stating that this statutory remedy is in lieu of the exclusionary rule. *Id.* at 423. He would allow the states to formulate their own remedies in accordance with this "federal model." *See id.* at 423-24.

[75] *See, e.g.*, Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1359 (1970) (federal court can be more impartial in balancing state interests against individual rights); Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063, 1073 (1984) (if left to state courts, civil liberties would suffer).

[76] *See* Irvine v. California, 347 U.S. 128, 134 (1954) ("inconstant and inconsistent" federal standards caused by haphazard approach). The random selection of cases used by the Court to formulate general standards and the disagreement among the Justices within a particular case render the critics' arguments less sound. *See* Burns, Mapp v. Ohio: *An All-American Mistake*, 19 DE PAUL L. REV. 80, 89-91 (1969); Schaefer, *supra* note 69, at 6.

[77] *See* L. TRIBE, *supra* note 70, at § 3-39, at 147-48. Tribe defines "comity" as:

> [T]he fundamental premise of judicial federalism which holds that, since both federal and state courts have a duty to enforce the Constitution, there is no constitutional basis, in the absence of some infirmity in the state judicial process itself, for preferring federal to state courts as adjudicators of federal constitutional claims.

Id.

[78] *See* L. TRIBE, *supra* note 70, at § 3-39, at 148-49 n.3. Tribe outlines two requisites for a judgment to be "final": first, "the decision must 'be subject to no further review or correction in any other state tribunal,' " *id.* (quoting Market St. Ry. Co. v. Railroad Comm'n, 324 U.S. 548, 551 (1945)); and second, "the state court decision must also be 'an effective determination of the litigation and not of merely interlocutory or intermediate steps,' " *id.* (quoting *Market St.*, 324 U.S. at 551). *See generally* Note, *Relitigation of Fourth Amendment Claims Under Section 1983: Federalism and the Illusory Right to a Federal Forum*, 1980 U. ILL. L.F. 783, 794 (discusses finality in context of section 1983).

[79] *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[80] *See Pullman*, 312 U.S. at 500. The doctrine of federal court abstention from pending state proceedings, grounded on comity and finality considerations, has been applied to criminal proceedings in Younger v. Harris, 401 U.S. 37, 43-54 (1971) and Stefanelli v. Minard, 342 U.S. 117, 120-21 (1951). *See* L. TRIBE, *supra* note 70, at §§ 3-40 to 41, at 149-56 (discusses above mentioned cases). *See also* Francis v. Henderson, 425 U.S. 536, 539, 542 (1976) (employs these two concepts in habeas corpus setting).

view of final judgments. Inherent in the abstention doctrine is the recognition of state court competence in adjudicating federal constitutional claims.[81] The possibility of reversal of state court convictions based upon unclear Supreme Court guidelines severely undermines both the criminal justice system and the system of federalism.[82] This is particularly so when the reversal is grounded in such substantive matters as exclusion of highly probative evidence.[83]

Judicial concerns for principles of federalism have been manifested in varying trends in the Court's treatment of individual liberties.[84] In response to the Burger Court's retrenchment of individual liberties, some state courts, having adjusted to the highly protective policies of the Warren Court, have revitalized their own state constitutional provisions to grant greater protection.[85] The Burger Court's antagonism toward overly expansive interpretations of the federal Constitution was most clearly evidenced in its modification of the longstanding "adequate and independent" state

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[81] *See* Note, *supra* note 78, at 794.

[82] *See* Irvine v. California, 347 U.S. 128, 134 (1954) (state courts' fear of federal reversal based upon inconstant standards is unjustified).

[83] *See* Rose v. Mitchell, 443 U.S. 545, 557-58, 564 (1979). The *Rose* Court considered suppression of evidence to be significantly more detrimental than quashing an indictment. *Id.* at 564. Although an accused may be rendered immune from prosecution if highly probative evidence is suppressed, the quashing of an indictment may allow the state to begin anew. *Id.*

[84] *See generally* Swindler, *Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling*, 49 Mo. L. REV. 1, 1-11 (1984) (outlines Court's trends in twentieth century with respect to individual rights: *Lochner* era; judicial restraint; sixties' nationalization; and current retrenchment).

[85] *See, e.g.*, People v. Bigelow, 66 N.Y. 2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985) (uses state constitutional provision and declines to apply *Leon* good faith exception); People v. Johnson, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985) (rejects *Gates* totality of circumstances test and adheres to *Aguilar-Spinelli* probable cause standard); Commonwealth v. Sell, 504 Pa. 46, 66, 470 A.2d 457, 468 (1983) (reads "automatic standing" rule, previously rejected by Supreme Court, into state constitution); State v. Jackson, 102 Wash. 2d 432, 435, 688 P.2d 136, 139 (1984) (adopting *Aguilar-Spinelli* standard). *See also* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1156-93 (discusses various states' experimentation with own constitutions and reasons therefor); Wilkes, *supra* note 71, at 435-43 (cites examples of state courts evading Burger Court retrenchment); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533, 533-49 (1976) (states taking up "activist philosophy" of Warren Court and extending rights via own constitutions). One commentator suggests that some recurring themes in these activist decisions include regional ideas of individual liberty, freedom from federalism constraints, desire for state autonomy, and possible "linguistic variations" from federal provisions. *See id.* at 550.

ground doctrine in *Michigan v. Long*.[86] The *Long* Court warned that appellate jurisdiction would be exercised over state court judgments unless it is "clear from the face of the opinion" that the state court is relying upon an adequate state ground.[87] This indicates the Burger Court's disagreement with the expansive fourth amendment interpretations of many state courts. Regardless of the grounds upon which it relies, it is clear that the state must, at the very least, abide by the minimum federal constitutional requirements.[88] However, as demonstrated by the Court's current interpretation of the fourth amendment exclusionary rule, the definition of the minimum federal standard for vindicating fourth amendment rights remains an open issue.

RECOMMENDED STANDARDS AND ALTERNATIVES

The Burger Court has granted state courts the authority to balance the interest of the individual against those of society to determine whether or not to exclude evidence obtained in violation of the fourth amendment.[89] It is suggested that the advantages of the balancing process are most evident at the remedial stage, rather than during the primary determination of whether or not a

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[86] 463 U.S. 1032 (1983). The Burger Court's anti-expansionism first emerged in California v. Green, 399 U.S. 149 (1970), in which the Court ruled that the California Supreme Court's interpretation of the sixth amendment confrontation clause was erroneous because it was overly expansive. *See id.* at 164. *See also* Welsh, *supra* note 71, at 819-29 (author sees antagonism as hostility toward individual rights).

[87] *Long*, 463 U.S. at 1040-41.

[88] *See* Cooper v. California, 386 U.S. 58, 62 (1967); Brown v. State, 657 S.W. 2d 797, 799 (Tex. Crim. App. 1983); Schlulter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079, 1100 (1984).

[89] *See supra* note 23 (balance extends beyond grand jury setting and "fruits of the poisonous tree" situations). Balancing is particularly useful in fashioning equitable remedies. *See* Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 593 (1983). Professor Gewirtz discusses two types of remedies—rights maximizing and interest balancing. *See id.* at 588-89. Gewirtz apparently approves of interest balancing when federalism issues are involved. *See id.* at 600 n.32. This remedy balances the "net remedial benefits" to the aggrieved party against the net costs it imposes on a "broader range of social interests." *Id.* at 591. The concept of rights maximizing focuses upon which remedy will be most effective in eliminating adverse consequences of the violation suffered by the aggrieved party. *See id.* Under this theory, a remedy which is not completely effective will be permitted only if a more effective remedy is impossible to achieve. *See id.* at 593. Gewirtz would support a less effective remedy if the societal interests involved were very important. *See id.* at 592. Despite his primary emphasis upon racial desegregation remedies, it is submitted that this concept of interest balancing at the remedial stage, closely allied with the *Calandra* test, is valid in the search and seizure contest.

constitutional violation has occurred.[90] In keeping with the Court's emphasis on deterrence, primary stage balancing should be minimal, because it is at this point that clear guidelines are needed as to what constitutes a reasonable search and seizure.[91] Furthermore, different interests are considered at each stage: At the primary stage, the immediate necessity of the official's action is considered in determining its reasonableness;[92] the more long-range societal costs to the criminal justice system are weighed at the remedial stage.[93]

A Questioning of the Remedial Value of the Rule

A remedy's effectiveness is measured both by its ability to compensate for the present violation and by its success as a deterrent.[94] The Burger Court's holdings clearly question the value of the exclusionary rule as a deterrent to fourth amendment violations.[95] The rule has also been attacked as an inequitable compen-

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[90] *See* Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1145 (1984). *See also* Gewirtz, *supra* note 89, at 678-79. Professor Gewirtz discusses the dichotomy between the rights-declaring stage and the remedial stage. *See id.* The judge's role in the earlier stage is to be unaffected by politics and personal beliefs. In the second stage, however, a judge may have to weigh these factors in order to give the term "reasonable search and seizure" a concrete meaning. *See id.* It is submitted that a need for clarification of the "ideal" provides an educational tool to law enforcement entities.

[91] *See supra* note 5. Interests to be weighed at the "reasonableness" stage should be limited to any immediate danger to the police officer and the surrounding public. *See* Note, *supra* note 90, at 1145.

[92] *See generally* Gewirtz, *supra* note 89, at 593-98 (balancing recognizes "unavoidable remedial imperfection" and multiple goals). Specifically, in the search and seizure context, application of a balancing approach at the remedial stage avoids disproportionate results, favors fundamental fairness, and serves to replace the piecemeal exceptions to the exclusionary rule. *See* Cameron & Lustiger, *supra* note 64, at 151. *But see* Note, *supra* note 90, at 1145 (Court should develop objective criteria that must be met before before invoking balancing).

[93] *See supra* note 26 (exclusion deflects truth finding process of trial). Other relevant factors include the consequences of releasing guilty individuals and the effect of such a release on crime deterrence. *See* Stone v. Powell, 428 U.S. 465, 490-91 (1976). *See generally* Cameron & Lustiger, *supra* note 64, at 132 (three categories of costs of exclusionary rule). Additionally, there are further administrative costs in the form of clogging the courts and slowing the judicial process. *See id.*

[94] *See* J. HIRSCHEL, *supra* note 2, at 1; Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573, 582 (1971). Judge Wilkey suggests two additional objectives of a remedy in the search and seizure context, namely, to keep the guilty from being released and to provide effective guidance to the police. *See* Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule, reprinted in* 95 F.R.D. 211, 229-43 (1982).

[95] *See supra* notes 28 (where officers believe their actions are consistent with fourth amendment, exclusionary sanction does not deter). Professor Oaks distinguishes between

satory device in that it overcompensates victims who are guilty in fact by immunizing them from prosecution,[96] while it fails to compensate innocent victims for the harassment suffered at the hands of fourth amendment violators.[97] A viable alternative must compel fourth amendment compliance and fair compensation of *all* victims of illegal searches and seizures. Although a number of commentators have suggested alternatives to the exclusionary rule, none have been practically effective in serving the several purposes of the rule.[98] The imposition of criminal penalties upon offending police officers has been infrequent due to prosecutorial reluctance in bringing charges against law enforcement agents,[99] and the heavy evidentiary burden of proving intent in such cases.[100] Furthermore, it is unlikely that a jury will convict a police officer when the complaining witness is an accused or convicted criminal.[101]

The utilization of injunctive relief and contempt sanctions

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general deterrence and special deterrence. *See* Oaks, *supra* note 20, at 709-12. Special deterrence is the effect of a sanction on an individual who has already been subject to same by his past misconduct. *See id.* at 709. General deterrence includes both the direct effect of compliance through the threat of a sanction and the indirect effect of conforming one's general behavioral patterns to avoid the threat of punishment. *Id.* at 710-11. Oaks considers the exclusionary rule to be insufficient as a special deterrent since it does not entail direct punishment of the erring official. *See id.* at 709-10.

[96] *See* Oaks, *supra* note 28, at 749-50. Exclusion of highly probative tangible evidence most often results in total immunization from prosecution for a crime committed. *See id.*; WILKEY, *supra* note 94, at 211. Judge Cardozo, in People v. DeFore, 242 N.Y. 13, 150 N.E. 585 (1926), *cert. denied*, 270 U.S. 657 (1926), set forth this illustrative scenario: "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . [t]he privacy of the home has been infringed, and the murderer goes free." *Id.* at 21, 23-24, 150 N.E. at 587-88.

[97] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 417-18 (1971) (Burger, C.J., dissenting). As a remedial device, the exclusionary rule fails in instances when the police "seek to achieve control over crime through methods which are more direct from their point of view, like harassment or abuse of offending citizens." B. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 135-36 (1966). Control over such activities as gambling, prostitution and open homosexual activity appears to be most often subject to this unlawful police harassment. *See id.*

[98] *See* Oaks, *supra* note 28, at 673.

[99] *See* Geller, *supra* note 8, at 713-15. (1975). Professor Geller suggests that prosecutors who must work with police on a daily basis will be reluctant to seek sanctions against their crime-fighting allies. *See id.*; Hall, *The Alternatives to the Exclusionary Rule*, 3 CRIM. JUST. J. 303, 312 (1980).

[100] *See* Wingo, *supra* note 94, at 580. A prosecutor would, at minimum, need to prove negligence on the part of the police officer in order for criminal sanctions to be imposed. *See id.* However, it would appear unfair to impose criminal liability for mere negligence. *See id.*

[101] *See* Oaks, *supra* note 28, at 673. The problem of jury bias in favor of police officers cannot be avoided in criminal prosecutions by requiring bench trials owing to the sixth amendment right to a trial by jury "[i]n all criminal prosecutions." U.S. CONST. amend. VI.

have similarly been dismissed.[102] Likewise, internal disciplinary programs have not yet been recognized as an effective substitute for exclusion.[103] Such a program would require close judicial supervision because of the inevitable camaraderie amongst coworkers.[104] External review boards established by the municipalities and comprised predominantly of civilians well-versed in police procedure might provide a more objective forum.[105] Former Chief Justice Burger has advocated the establishment of such boards and has recommended that they be granted powers similar to those of grand juries.[106] These boards appear viable so long as their actions, like all administrative determinations, are subject to judicial review.[107]

The common law remedy for unreasonable searches and seizures consisted of a tort action in trespass[108] supplemented by

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[102] *See* Comment, *Contempt of Court as an Alternative to the Exclusionary Rule*, 72 J. CRIM. L. & CRIMINOLOGY 993, 997 (1981) (questionable applicability of contempt sanction); Geller, *supra* note 98, at 715-17. The injunctive remedy has little force in search and seizure law because most often the violation is a single incident. *See id.* at 717. *See* Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson J., dissenting) (innocent citizens cannot anticipate unreasonable searches in order to seek injunctive relief). It was appropriate, however, in Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966), where the police continually searched dwellings in a black community without probable cause. *See id.* at 202.

[103] *See* Geller, *supra* note 98, at 718. "The notion . . . that police departments will regulate themselves . . . is greeted skeptically by the public . . . it is doubtful . . . that the protection of our constitutional rights can be entrusted to the same group against whose zealousness the rights were given." *Id.*

[104] *See* Oaks, *supra* note 28, at 674; Geller, *supra* note 58, at 718.

[105] *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 16 (1964); Wingo, *supra* note 94, at 581. Former Chief Justice Burger recommends that the civilian review board be independent of, but cooperative with, the police department. *See id.* at 16. Some commentators argue that external review boards (as well as internal disciplinary proceedings) have great deterrence potential because of the direct impact of the penalties invoked against the officer. *See* Burger, *supra*, at 15; Wilkey, *supra* note 94, at 230-31; Wingo, *supra* note 94, at 581. Some suggested disciplinary measures include a penalty against the officer, a reprimand, a fine, a delay in promotion, a suspension, or discharge. *See* Wilkey, *supra* note 94, at 230.

[106] *See* Burger, *supra* note 105, at 17-23. Burger recommended that the Board be empowered to subpoena witnesses and that it have access to police records. *See id.* The Board should likewise receive general immunity from liability. *See id.* Its primary task would be to recommend disciplinary action to be taken against the officer based upon its findings. *See id.* at 18-19. The Board would also have the power to direct that the police agency inquire into its own general procedures. *See id.* In a particularly egregious case, the Board would be able to recommend dismissal of the offending officer. *See id.* In *Bivens*, Burger urged the formation of a quasi-judicial tribunal on the federal level as a remedy to a fourth amendment violation patterned after the Court of Claims. *See* 403 U.S. at 423 (Burger, C.J., dissenting).

[107] *See* Wilkey, *supra* note 94, at 230 (judicial review of administrative remedy).

[108] *See supra* note 8 (discussing common law action for trespass).

statutory tort actions.[109] However, these remedies are beset with judgment collection problems. First, although the deterrent effect would be greatest if recovery was directly from the offending officer,[110] it has been argued that compensation should be provided by the government because of the possibility that the officer will be judgment-proof.[111] Second, a greater obstacle to recovery is sovereign immunity.[112] In one proposed system of recovery, the government, having waived sovereign immunity, would pay the amount above which the officer is unable to pay and would later recover the money by garnishing his salary.[113] The difficulty of proving damages in cases of fourth amendment violations presents yet another obstacle to recovery.[114] This obstacle could be removed by establishing a minimum amount recoverable which could be fixed by statute.[115] Punitive damages and reasonable attorney's fees

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[109] *See, e.g.*, 42 U.S.C. § 1983 (1982) (constitutional tort action against state or municipal official).

[110] *See* Geller, *supra* note 8, at 694-95. Geller argues that liability insurance minimizes the effect of a tort suit against an officer as a deterrent because the insurance works an indirect recovery from the officer. *See id.* He poses a similar argument against an action against the government entity. *See id.*

[111] *See* Geller, *supra* note 8, at 695; Note, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 SW. U.L. REV. 68, 81 (1972). One method employed in Canada is a tort action against the chief constable of the police force and the provincial police commissioner based upon the theory of respondeat superior. *See* Oaks, *supra* note 28, at 701-09. However, its feasibility is questionable when applied in the larger cities of the United States. *See id.* at 706-09.

[112] *See Bivens*, 403 U.S. at 422-23 (Burger, C.J., dissenting). In his proposed statutory remedy to the exclusionary rule, Former Chief Justice Burger acknowledged the problem of sovereign immunity and suggested that it be waived in cases of illegal police conduct. *See id.* Congress subsequently waived immunity in the Federal Tort Claims Act. *See* Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (1982)). The statute was passed in response to the "no-knock" raids then being conducted by federal narcotics agents. *See* S. REP. No. 588, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 2789, 2790-91.

[113] *See* Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 75, 76 (1974). In this proposed system of recovery, the governmental entity would be reimbursed for the full amount of damages it has paid if the officer's conduct was intentional. *See id.* If the officer's conduct was grossly negligent, a penalty would be attached to the officer's salary and would increase in amount for each violation. *Id.*

[114] *See* Geller, *supra* note 8, at 693; Wingo, *supra* note 94, at 579. A lack of actual injury as the direct result of the unlawful search was earlier noted by Justice Murphy in his dissent in *Wolf*, 338 U.S. at 42-43. Often the damages would be nominal in a trespass action because they are limited to physical injury to one's property. *Id.* at 43.

[115] *See* Geller, *supra* note 8, at 703; *see also* Note, *supra* note 111, at 80 (statutory provisions setting minimum amounts recoverable not uncommon, particularly in civil rights area). Examples of damages recoverable by a victim later prosecuted may include bail expenses, court costs, attorney's fees for representation in the criminal prosecution, damage to property, and lost income but not the fines paid as a result of a conviction. *See* Geller, *supra*

could be assessed as both additional deterrents and compensation for the costs of bringing the suit.[116]

The Solution: Tort Liability Determined at a Mini-Trial

Despite this litany of obstacles, it is submitted that effective legislation and administration will enable a tort action for damages to be a viable alternative to the exclusionary rule. Further, the "mini-trial" model proposed by Judge Wilkey[117] would provide a sound forum for the determination of such damages. This model requires the initiation of a proceeding immediately after the criminal proceeding in which the constitutional violation is originally alleged.[118] The advantage of this procedure is that it provides for the speedy determination of the constitutional issue and any economic damages by a judge who is already familiar with the facts in dispute.[119] A trial by jury is not required because of the civil nature of the proceeding,[120] thus eliminating the problem of jury bias.[121] Furthermore, this "summary proceeding" would no more increase a court's docket than does a suppression hearing.[122]

Despite arguments favoring national uniformity, it is submitted that it is patently unfair that the varying factual circumstances of each case should be ignored by applying the exclusionary rule indiscriminately.[123] The utilization of the "mini-trial" method

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note 8, at 701.

[116] *See* Geller, *supra* note 8, at 709-11. It is submitted that awards of attorney's fees and punitive damages must be provided through legislation. This is particularly so with respect to punitive damages, which often are not recoverable in the absence of actual damages. *See Wolf*, 338 U.S. at 43 (Murphy, J., dissenting).

[117] *See* Wilkey, *supra* note 94, at 231; Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. TEX. L.J. 531, 538 (1982).

[118] *See* Wilkey, *supra* note 94, at 231. The complainant would bear the burden of proving the alleged violation by a preponderance of the evidence. *Id.* at 232.

[119] *Id.* This post-trial proceeding also remedies the problem of representation by counsel. It is submitted that in the legislative scheme establishing this mini-trial, an indigent should be able to retain his state-appointed counsel for the purposes of litigating this constitutional claim. *Cf.* Geller, *supra* note 8, at 696 (provision for some form of aid for indigent plaintiffs necessary to make tort remedy meaningful); Oaks, *supra* note 28, at 717-18 (same).

[120] *Cf. supra* note 101 (constitutional right to jury trial encompasses only "all criminal prosecutions").

[121] *Cf.* 28 U.S.C. § 2402 (1982) (remedial legislation against government where jury bias eliminated by non-provision of jury trial).

[122] *See* Wilkey, *supra* note 94, at 236.

[123] *See* Wilkey, *supra* note 94, at 224. An oft-cited flaw of the exclusionary rule is its failure to discriminate between the degrees of culpability of the officer or the degrees of harm to the victim of the illegal search and seizure. *Id.* In addition, the rule does not distinguish amongst degrees of crimes allegedly committed by the accused. *Id.* at 224. *See also*

would tailor each resolution of a fourth amendment violation to the particular facts of each case. The "mini-trial" would need to satisfy the standards of due process, and provide the essential elements of notice and an opportunity to be heard by a competent tribunal with respect to the constitutional claim. Failure to comply with these minimum standards would be reversible error.[124]

According to Judge Wilkey, a "courageous" judge could initiate the mini-trial alternative.[125] The trial judge could reserve judgment on a motion to suppress until the main trial was concluded and then conduct a hearing on the conduct of the officer.[126] If the officer's actions did not violate the fourth amendment, the conviction would stand; if his actions were violative, the conviction would stand if and only if appropriate disciplinary action was taken against the erring officer.[127] If such a procedure was implemented, Judge Wilkey maintains, "the Supreme Court itself would leap at the chance to validate the district judge's action in creating a new and viable effective deterrent to police action violating the Fourth Amendment."[128] Finally, it is submitted that Judge Wilkey's "mini-trial model" presents an appropriate substitute for the exclusionary rule, and would effectively deter unreasonable search and seizure as well as provide a forum in which an aggrieved victim may seek redress.

CONCLUSION

The Burger Court's balancing approach to the application of the fourth amendment exclusionary remedy seems to indicate that exclusion is not constitutionally required in all cases. While stressing deterrence as the primary purpose of exclusion, the Court itself has expressed doubts as to its effectiveness. This Note has asserted that imposition of the exclusionary rule upon the states to cure fourth amendment violations constitutes an impermissible exercise of the Court's supervisory power over a state court's rightful

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Hall, *supra* note 99, at 313 (reporting American Law Institute's balancing test providing for flexible modification of exclusionary rule). It is for these reasons that other remedies are preferred because they can be tailored to fit the surrounding circumstances. *See* Wingo, *supra* note 94, at 584-85 (criticizing exclusionary rule's inflexibility).

[124] *See* L. TRIBE, *supra* note 70, at 123.

[125] *See* Wilkey, *supra* note 94, at 240.

[126] *See id.*

[127] *Id.*

[128] *Id.*

authority to select an appropriate remedy for the violation. Instead, it is suggested that the Court return to its earlier approach permitting state courts to fashion their own remedies in cases of fourth amendment violations. Finally, it is recommended that a "mini-trial" tort action for damages against both the officer and governmental entity involved would best enforce fourth amendment rights via its twin aims of deterrence and compensation.

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