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# THE PROPER BALANCE: EXCLUSION OF EVIDENCE OR EXPULSION OF POLICE OFFICERS

HONORABLE JOHN F. KEENAN\*

I propose to start off with two quotes. My first quote is “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.”<sup>1</sup> That is, of course, the Fourth Amendment, which is our kickoff point for all this.

The second quote that I have is a quote from a great distinguished former Supreme Court Justice who, before going on the Court, was president of the American Bar Association. So, he was, in a sense, the leading lawyer in the United States, and the quote is from Justice Powell in *Robbins v. California*.<sup>2</sup> “[T]he law of search and seizure . . . is intolerably confusing.”<sup>3</sup>

Now starting with the first quote and going to the second quote, let me give you some views that I have that are probably controversial, and that I expect 99% of the audience will immediately disagree with and wish to send me back quickly to Foley Square.

Today the exclusionary rule is so much a part of our legal landscape that it’s very hard to believe that it wasn’t applied to the states before 1961.<sup>4</sup> Not until 172 years after the adoption of the Fourth Amendment did the United States Supreme Court first impose it on the states.<sup>5</sup> Supporters of the exclusionary rule find it very hard to point to a single statement from the time of

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<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> 453 U.S. 420 (1981).

<sup>3</sup> *Id.* at 430.

<sup>4</sup> *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

<sup>5</sup> *See id.*

the founding fathers through Reconstruction supporting the exclusion of evidence at a criminal trial because of the Fourth Amendment. That is not to say that the Constitution should be violated. When police officers violate the law, there must be a meaningful sanction or meaningful sanctions. A balance has to be maintained between being fair and being effective, because all of these things are delicately balanced. That's what the whole society is about—balance.

The exclusionary rule as binding on the states resulted, as you all know, from the 1961 case of *Mapp v. Ohio*.<sup>6</sup> Lots of people don't remember what the facts of *Mapp* were. Let me just briefly summarize them. Ms. Mapp was living on the second floor of a two-family brick house in Cleveland, Ohio,<sup>7</sup> and she rented out some rooms to boarders in the house. On May 23, 1957, three police officers came to her home and demanded entrance.<sup>8</sup> They explained that they were searching for someone in connection with a recent bombing.<sup>9</sup> Ms. Mapp called her lawyer and after talking to him told the officers she wouldn't let them in without a search warrant.<sup>10</sup> The officers left.

Three hours later the same three officers, in addition to others, returned and forced their way into Ms. Mapp's house.<sup>11</sup> She followed behind them demanding to see their search warrant.<sup>12</sup> Finally, one of the cops produced a piece of paper that Ms. Mapp grabbed and shoved down the front of her blouse.<sup>13</sup> A struggle ensued, and one of the police officers tried to retrieve the piece of paper.<sup>14</sup> He handcuffed Ms. Mapp, and the officers went about their search.<sup>15</sup> The bombing suspect wasn't found. No bombs were found, and the piece of paper turned out not to be a search warrant.<sup>16</sup>

However, the officers did find four books,<sup>17</sup> which were alleg-

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<sup>6</sup> *Id.*

<sup>7</sup> *See id.* at 644.

<sup>8</sup> *See id.*

<sup>9</sup> *See id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See id.* at 644-45.

<sup>16</sup> *See id.* at 645.

<sup>17</sup> *See id.*

edly obscene.<sup>18</sup> Along with the books there was a hand drawn picture which was later described as being " 'of a very obscene nature.' " <sup>19</sup> Because of these books and the picture, Ms. Mapp was convicted of possession of obscene materials.<sup>20</sup> The appellate courts in Ohio affirmed.<sup>21</sup> She appealed to the Supreme Court of the United States. The Supreme Court agreed to hear the case because the case obviously raised many questions.<sup>22</sup>

Among the issues urged before the Supreme Court were the constitutionality of the charge to the jury, the sentence, the statute upon which the conviction was based, and the issue of police misconduct. The Supreme Court, as we know, ultimately decided that the Fourth Amendment applied to the states.<sup>23</sup> However, the Fourth Amendment issue, addressing the legality of the police officers' search, was not really discussed by the judges at all in the lower courts in Ohio. The only party to brief the issue wasn't a party. It was an amicus, the American Civil Liberties Union,<sup>24</sup> that briefed the Fourth Amendment issue in *Mapp v. Ohio*. Prior to *Mapp*, the Supreme Court had never said that evidence obtained illegally in a state prosecution had to be excluded altogether.

Mr. Justice Clark wrote the Court's opinion, and although the majority agreed that Mapp's conviction should be reversed, only four of the Justices agreed to reverse solely on Fourth Amendment grounds. Justice Stewart concurred upon First Amendment grounds,<sup>25</sup> and Justice Black on both Fourth and Fifth Amendment grounds,<sup>26</sup> and the three other Justices argued that the Fourth Amendment issue was not even properly before the court.<sup>27</sup> The end result was that a First Amendment controversy having to do with the right to keep pornography in a resi-

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<sup>18</sup> See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1367 (1983).

<sup>19</sup> *Id.* (quoting Appellee's Motion to Dismiss or Affirm at 4-5, *Mapp v. Ohio*, 367 U.S. 643 (1961) (No. 236)).

<sup>20</sup> See *Mapp*, 367 U.S. at 643-45.

<sup>21</sup> See *id.* at 645; *Ohio v. Mapp*, 166 N.E.2d 387, 388, 391 (Ohio 1960), *rev'd* *Mapp v. Ohio*, 367 U.S. 643 (1960).

<sup>22</sup> See *Mapp*, 367 U.S. at 645-46.

<sup>23</sup> See *id.* at 654-55.

<sup>24</sup> See *id.* at 643.

<sup>25</sup> See *id.* at 672 (Stewart, J., concurring).

<sup>26</sup> See *id.* at 661-63 (Black, J., concurring).

<sup>27</sup> See *id.* at 672-75 (Harlan, J., Frankfurter, J., Whittaker, J., dissenting).

dence was transformed into the most important search and seizure decision in American history.

My observations about *Mapp* were shared in great measure by the late New York State Supreme Court Justice Harold Rothwax who has written on this subject extensively.<sup>28</sup>

Now, obviously, all that doesn't have a lot to do directly with *Terry v. Ohio*,<sup>29</sup> but without *Mapp* there never would have been a *Terry*. Now, you in the audience have heard more about *Terry*, yesterday and today, from true experts on the subject, unlike myself, than you will hear for years to come. So, I'm going to continue to move a little bit away from *Terry* to what to me is a more fundamental consideration. Who was one of the most civil liberty minded Justices of this century, and what did he write in *Coolidge v. New Hampshire*?<sup>30</sup> I'm talking about Justice Hugo Black. "The Fourth Amendment prohibits unreasonable searches and seizures. The Amendment says nothing about consequences. It certainly nowhere provides for the exclusion of evidence as the remedy for violation."<sup>31</sup>

I submit that Justice Black may have been correct. The Fourth Amendment does not state that illegally obtained evidence must be excluded. We've come to that point entirely on our own. Most of you are New Yorkers—even those of you now from Ohio and Miami. Who was the most renowned New York jurist of the 20th century? Benjamin Cardozo. What did Judge Weinstein tell you that Cardozo wrote? He told you this morning that in the *People v. Defore*,<sup>32</sup> way back in 1926, in refusing to apply the exclusionary rule, Cardozo wrote, "[t]he criminal is to go free because the constable has blundered . . ."<sup>33</sup> and that was his view of the exclusionary rule.

Now, the sanctions mandated by the exclusionary rule are, in a major sense, being imposed against society. The suppressed gun, the suppressed counterfeit money, the suppressed narcotics,

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<sup>28</sup> See JUDGE HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF THE CRIMINAL JUSTICE SYSTEM* (1996). Judge Rothwax has also discussed this topic in several of his reported decisions. See, e.g., *People v. Winograd*, 480 N.Y.S.2d 419 (Sup. Ct. 1984); *People v. Tomao*, 467 N.Y.S.2d 987 (Sup. Ct. 1983); *People v. Campbell*, 451 N.Y.S.2d 987 (Sup. Ct. 1982); *People v. Edelstein*, 415 N.Y.S.2d 366 (Sup. Ct. 1979).

<sup>29</sup> 392 U.S. 1 (1968).

<sup>30</sup> 403 U.S. 443, 498 (1971) (Black, J., concurring in part and dissenting in part).

<sup>31</sup> *Id.* at 496.

<sup>32</sup> 150 N.E.2d 585 (N.Y. 1926).

<sup>33</sup> *Id.* at 587.

they do not have any negative impact on the police official who was found to have violated the defendant's Fourth Amendment rights. Former Police Commissioner McGuire, who I know spoke here this morning, and who is to me a premier public servant, did not break detectives back to uniform or even reduce first grade detectives to second grade because the evidence they seized was suppressed. What I wonder is whether the Fourth Amendment and society might not be better served if the sanctions were imposed upon the individual law enforcement officer who violated the defendant's rights rather than upon the community by the suppression of the evidence.

If the police are misbehaving to the degree suggested by those who have been speaking since I have been here today, why could not a system be devised whereby, depending upon the seriousness of the constitutional violation by the police, the individual officer could be penalized? The penalty could range all the way from dismissal from the force, the most extreme, through fines, down to loss of vacation time, or merely a reprimand for the less serious violations. If we have been able to create a sentencing grid of forty-three levels with six criminal history categories for the scores and scores of criminal violations in the United States Code,<sup>34</sup> I don't see why we could not grade the degree of the violation by the law enforcement official. This punishment to be imposed by the trial judge would result in the admission of the evidence and the punishment of the two guilty parties: The criminal defendant and the offending policeman. I recognize, obviously, that this suggestion is controversial, but I submit that if there is a real desire to curb police excesses in the Fourth Amendment area, this might be the way to do it rather than to penalize society by suppressing guns, narcotics and other contraband.

*Terry*, when decided, was criticized widely as being too pro-law enforcement. It has been pointed out here several times today that the 1960s were a turbulent 10 years—the Kennedy assassinations, the King assassination, the urban riots, and the Vietnam protests. Although the Court is not political, it does live in the real world. Most of the Justices live within the Beltway, and I suppose they watch the Washington television. Tele-

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<sup>34</sup> See generally Federal Sentencing Guidelines Manual, 18 U.S.C.A. ch.5, pt. A (West 1987 & Supp. 1998).

vision news in the District of Columbia carries a lot of crime stories. The decision that Detective McFadden and his colleagues on the Cleveland Police Department acted properly was, in my view, a sane and appropriate one given the state of the law in 1968. *Terry* itself and subsequent elaborations on *Terry* developed a standard that is about as clear as most Fourth Amendment standards can be, and it is adequate to distinguish permissible from impermissible law enforcement confrontations with suspects, at least as far as stops are concerned. In fact, the results reached under *Terry* are practical, reasonable, and I think generally defensible, so long as we have, if we're going to have it, an exclusionary rule. They are practically as good as we are going to get. The extension of *Terry* to a number of different situations that are analogous to stops for the most part has been logical and defensible.

Now, some of the views that I heard I'd like to comment on, and some of the thoughts that have been expressed by others I'd like to comment on. There is no question that what Judge Jack Weinstein said this morning is correct. The most pervasive problem in American society is race. There's no question about that, and the criminal justice system and tinkering with it are not going to solve that problem. You can tinker with criminal justice and maybe help the overall problem, but the criminal justice system isn't going to solve the race problem because, indeed, the criminal justice system has been described by some as the cancer ward of our society.

We heard a lot about the reduction in crime. The reduction in crime isn't because of *Terry*, and the increase in crime between 1966 and, let's say, 1992 wasn't because of *Miranda*.<sup>35</sup> Those who say that one stopped it and the other caused it, I don't think are being realistic. Crime is primarily a sociological phenomenon. There's no question about it. Everybody knows that. There are certain things that law enforcement can do and has done, and hopefully will continue to do.

One recent step in the New York area, that I don't think has ever received the degree of plaudits and congratulations that it should, is the joint efforts by the federal officials and the state officials to prosecute the very violent and serious street drug

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<sup>35</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that statements obtained from defendants without instruction of constitutional rights were inadmissible as violative of the Fifth Amendment right against self incrimination).

gangs who, in the late 1980s and the early 1990s, took over whole areas of this city. Groups like the Wild Cowboys,<sup>36</sup> a group called the Velasquez Organization, the C&C Gang, the Willis Avenue Lynch Mob<sup>37</sup> and other violent street gangs are what I am referring to.<sup>38</sup> The homicide rate in precincts where those gangs operated in the late '80s and the early '90s has been reduced by two thirds and three quarters because the same people were going out and assassinating 10, 15, 20 people. Those killers are now in prison. I just presided over a case, 20 homicides by one gang in one case.<sup>39</sup> In the precincts where those crimes occurred, with these people off the street the citizenry now has a lot less to fear and a much lower crime rate. And I think that, in that area, the police department of the city, the federal officials and the prosecutors ought to be congratulated.

That didn't tell you an awful lot about *Terry vs. Ohio*, but thank you.

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<sup>36</sup> See Scott Ladd, *Cowboys Riding Shotgun in Bronx*, NEWSDAY, Oct. 11, 1993, at A06; Scott Ladd, *Drug Gang 'Enforcer' Arrested*, NEWSDAY, Mar. 30, 1994, at A04.

<sup>37</sup> See Matthew Purdy, *U.S. Drives Out Bronx Drug Gang*, CHI. TRIB., Oct. 20, 1994. Seth Faison, *Mott Haven Gangs Clash Over a Turf Called Heroin*, N.Y. TIMES, Jul. 23, 1994, at A5.

<sup>38</sup> See *United States v. Rodriguez*, No. 94 CR. 313, 1998 WL 26189 (S.D.N.Y. Jan. 26 1998) (mem.); *United States v. Polanco*, No. 96 CR. 0229, 1997 WL 27141 (E.D.N.Y. Jan. 21, 1997) (mem.); Francis A. McMorris, *U.S. Prosecutor is Using RICO on Gangs*, WALL ST. J., May 28, 1997, at B5.

<sup>39</sup> See *United States v. Velasquez*, No. S9 96 CR. 126, 1997 WL 529047 (S.D.N.Y. Aug. 25, 1997).



