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CRIMINAL LAW

THE FEDERAL TORT CLAIMS ACT—AN ALTERNATIVE TO THE EXCLUSIONARY RULE?*

FRANCIS A. GILLIGAN**

By its express terms, the fourth amendment does not provide for any remedy when evidence has been obtained as a result of an illegal search or seizure. The remedy the courts have formulated to enforce the amendment, first enunciated in *Weeks v. United States*,¹ is commonly known as the "exclusionary rule."² The rule provides that evidence obtained in violation of the amendment cannot be used as evidence in a criminal trial against a person whose fourth amendment rights were violated. In *Weeks*, the Court stated that without such a rule, the amendment would be of "no value" to those accused of crime and "might as well be stricken from the Constitution."³

The exclusionary rule has been criticized by the judiciary⁴ and commentators⁵ alike be-

cause of its questionable utility. This relentless attack, together with well-publicized, flagrant violations of the fourth amendment, prompted Congress to pass an amendment to the Federal Tort Claims Act in March 1974. Basically, the amendment allows an aggrieved party to sue the federal government for some violations of the fourth amendment by federal law enforcement officials. At best the amendment appears to be a necessary, albeit limited, experiment in control of the police. It could also become a remedy for only a very narrowly defined class of cases, unfortunately having little or no effect on the law enforcement establishment. At worst, the amendment, which only provides a limited remedy, could be interpreted as a substitute for the exclusionary rule. This article focuses briefly on the rationale behind and the utility of the exclusionary rule, and then analyzes the amendment and its likely impact on the criminal justice system.

I. THE RATIONALE UNDERLYING THE EXCLUSIONARY RULE

The exclusionary rule as originally announced applied only to federal prosecutions and was not applied to the states until 1961 in *Mapp v. Ohio*.⁶ In *Mapp*, the Court justified its holding by placing some emphasis on the "imperative of judicial integrity."⁷ The Court reasoned that the government had to play fairly and should not be allowed to profit from its illegal acts.⁸ Justice Black believed that the self-incrimination clause of the fifth amendment working with the fourth amendment jus-

*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ 232 U.S. 383 (1914). For a history of the exclusionary rule see an article by Chief Justice Burger, *Who Will Watch the Watchman?*, 14 *Am. U.L. Rev.* 1, 4-10, (1964).

² In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 418 (1971), Chief Justice Burger refers to the remedy as the "suppression doctrine."

³ *Weeks v. United States*, 232 U.S. 383, 393 (1914).

⁴ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁵ Burger, *supra* note 1; Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 *TEX. TECH. L. REV.* 317 (1973); Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board*, 30 *WASH. & LEE L. REV.* 223 (1973).

⁶ 367 U.S. 643 (1961).

⁷ *Id.* at 659, quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960).

⁸ *Olmstead v. United States*, 277 U.S. 438, 469, 471 (1928) (dissenting opinions).

tified the rule.⁹ The real reason behind the rule, however, is the failure of police disciplinary procedures to effectively curb police misconduct in the search and seizure area. "The purpose of the exclusionary rule 'is to deter—to compel respect for the Constitutional guarantee in the only effectively available way—by removing the incentive to disregard it.'" ¹⁰ In *Linkletter v. Walker*,¹¹ the Court stated that "the purpose [of the *Mapp* decision] was to deter lawless action of the police."¹² Recently in *United States v. Calandra*,¹³ the Court again stated that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment."¹⁴

The exclusionary rule is often justified on the assumption that it does actually deter illegal searches and seizures and that there is no other alternative for controlling such behavior.¹⁵ As will be shown, both of these assumptions are of doubtful validity.

⁹ *Mapp v. Ohio*, 367 U.S. 643, 661-66 (1961) (Black, J., concurring). See also *Wolf v. Colorado*, 338 U.S. 25, 47-48 (1949) (Rutledge, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 633 (1886) (dictum).

¹⁰ *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). The lack of a federal remedy was a substantial factor in the Court's decision to impose the exclusionary rule. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 2-20.

¹¹ 381 U.S. 618 (1965).

¹² *Id.* at 637. See also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 413, 415 (1971) (Burger, C. J., dissenting); *Alderman v. United States*, 394 U.S. 165 (1969); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16, 34 (1953); Kamisar, *Public Safety v. Individual Liberties—Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171, 179 (1962); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1002-03 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667-72 (1970).

¹³ 414 U.S. 338 (1974).

¹⁴ *Id.* at 347.

¹⁵ See also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 413-14 (1971) (Burger, C.J., dissenting).

"The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities.... If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule."

The first attempt to statistically justify the rule was made by Justice Murphy in his dissent in *Wolf v. Colorado*.¹⁶ Analyzing data on police training practices, he indicated that police training with respect to the fourth amendment was extensive in cities in five of the six states that had adopted the exclusionary rule. He concluded: "The contrast between states with the federal rule and those without it is thus a positive demonstration of its efficacy."¹⁷

Once the Court applied the rule to the states it was not long before some of its members became positive about its deterrent effect. In *Linkletter*, Justice Clark referred to the exclusionary rule as "the only effective deterrent against lawless police action."¹⁸ Chief Justice Warren also praised the rule:

[I]ts major thrust is a deterrent one [citing *Linkletter*], and experience has taught that it is the only effective deterrent to police misconduct in the criminal context....¹⁹

Juxtaposed are the statements by other justices. In *Irvine v. California*,²⁰ Justice Jackson declared:

What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. . . . There is no reliable evidence known to us that inhabitants of those states which exclude evidence suffer less from lawless searches and seizures than those of states that admit it.²¹

And Justice Stewart in *Elkins v. United States*²² conceded that "[e]mpirical statistics are not available" to show that the exclusionary rule reduces the incidence of fourth amendment violations.

It should be noted that there is evidence that the exclusionary rule does work. The Wickersham Report found in 1931 that the "third de-

¹⁶ 338 U.S. 25, 41-47 (1949).

¹⁷ *Id.* at 46.

¹⁸ *Linkletter v. Walker*, 381 U.S. 618, 636 (1965).

¹⁹ *Terry v. Ohio*, 392 U.S. 1, 12 (1968). See also *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

²⁰ 347 U.S. 128 (1954).

²¹ *Id.* at 135-36.

²² 364 U.S. 206, 218 (1960).

gree" was extensively practiced,²³ but today crude police techniques are less common. At least arguably, the disappearance of the third degree is due to the exclusionary rule;²⁴ however, its disappearance could also simply be due to changing societal values.

There is also some proof that demonstrates the ineffectiveness of the rule. James E. Spiotto has concluded "the deterrent rationale for the rule does not seem to be justified [by the empirical study and] Canada's experience with the tort remedy suggests that viable alternatives to the...rule do exist."²⁵ This conclusion was the result of a detailed analysis of Chicago search and seizures statistics.²⁶ A main factor supporting his conclusion was the proportional increase in the motions to suppress in various categories of cases between 1950 and 1971.²⁷ He reasoned that if the exclusionary rule was an effective deterrent, the statistics would have shown a decrease in the motions to suppress.²⁸ The fallacy of this basic assumption is demonstrated when one considers several other factors which may have been functioning during this time period.

First, there has been an extension of the right to privacy in a number of areas by the Supreme Court.²⁹ Also, young attorneys have received much more extensive training in criminal procedure than past generations³⁰ and are consequently more aware of the values of motions to suppress evidence. It is also possible that attorneys for indigents may consciously or unconsciously make the motion to increase the fee paid by the government. All of these fac-

tors tend to undermine the foundation upon which Spiotto's conclusions are built.

Most commentators have agreed that there is no good data substantiating or refuting the deterrent effect of the rule,³¹ but even if the rule does act as a deterrent, it seems unlikely that it could have a significant impact. The fact that the exclusionary rule only applies at the actual trial of a criminal case tends to cut down on its impact. In most cases, the police are not concerned with convictions or even prosecutions,³² but rather with case clearances,³³ the removal of contraband items such as narcotics from circulation,³⁴ satisfying a

³¹ Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Kamisar, *Wolf & Lustig, Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); Oaks, *supra* note 12, at 755; Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 741 (1972); Comment, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 104 (1970); Comment, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 SW. U.L. REV. 68 (1972); Comment, *Federal Injunctive Relief From Illegal Search*, 1967 WASH. U.L.Q. 104; Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

³² Oaks, *supra* note 12, at 720-21. See generally H. PACKER, *THE LIMITS OF CRIMINAL SANCTION* 149-73 (1968); J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 164-81 (1966).

³³ LaFave, *Improving Police Performance Through the Exclusionary Rule—Part 1: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 447 (1965); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573, 576-78 (1971); Wright, *supra* note 31, at 740.

³⁴ Wingo, *supra* note 33, at 577. As Professor LaFave observed:

Informed observers have suggested a variety of goals or motivations other than obtaining convictions that may prompt police arrest and search and seizure. These include arrest or confiscation as a punitive sanction (common in gambling and liquor law violations), arrest for the purpose of controlling prostitutes and transvestites, arrest of an intoxicated person for his own safety, search for the purpose of recovering stolen property, arrest and search and seizure for the purpose of "keeping the lid on" in a high crime area or of satisfying public outcry for visible enforcement, search for the purpose of removing weapons or contraband such as narcotics from circulation and search for weapons that might be used against the searching officer. A large proportion of police behavior is traceable to these reasons

²³ NATIONAL COMMISSION ON LAW OBSERVANCE & ENFORCEMENT (WICKERSHAM COMMISSION), COMPLETE REPORTS 153 (1931).

²⁴ Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 722 (1974).

²⁵ Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POL. SCI. & ADMIN. 36, 49 (1973).

²⁶ Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. OF LEGAL STUDIES 243 (1973).

²⁷ *Id.* at 276.

²⁸ *Id.*

²⁹ *Chimel v. California*, 395 U.S. 752 (1969); *Katz v. United States*, 389 U.S. 347 (1967); *Aguilar v. Texas*, 378 U.S. 108 (1964). See also *Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 475 n.593 (1974).

³⁰ Larson, *Book Review*, 58 CALIF. L. REV. 341 (1970).

public outcry for visible police enforcement, and controlling potentially dangerous situations.³⁵ Consequently, law enforcement personnel are not always affected adversely when evidence is excluded. Aside from these non-prosecutorial goals of police action, the rule generally only applies to contested cases³⁶ where, for example, the defendant does not plead guilty. The rule does not, in effect, operate directly against the police officer, but rather against the prosecutor, who rarely, if ever, has any control over the officer's activities in the field.³⁷ Neither the judge nor the prosecutor adequately explains a court ruling on the exclusionary rule so that it might be understood by the police officer. Obviously, the officer cannot follow guidelines he does not comprehend.

This lack of communication might possibly be rectified by assigning police officers to courtroom duty; these officers would then report the results of such cases to other department members.³⁹ However, this assumes that police officers are equipped with knowledge to make a meaningful report, but it is doubtful

that even lawyers could accomplish this task considering the inconsistency of many opinions.⁴⁰ Where seized evidence is held inadmissible by an appellate court several years after the search, it is questionable whether or not there is any communication between the court and the officer.

Assuming for the sake of argument that all the information in a particular state or federal jurisdiction is consistent and conveyed to the police officer, it is still not clear whether the information would actually deter police misconduct. The average officer on the beat could not possibly retain all this information, even assuming the existence of a logical progression of the rule's development and an opportunity to consciously reflect prior to making a search.⁴¹ Professor Wingo has observed:

To the police officer acting under the pressures of the moment the search appeared to be entirely reasonable, and there was very little time to ponder the question. The United States Supreme Court may consider the case for months before making its decision, and even then is apt to be divided on its determination of the issue.⁴²

As the decisions are often inconsistent and complicated, the task placed upon the prosecutor to educate the officer is likewise impossible. One critic has stated these decisions "would not deter or enlighten a policeman in Gary with a Ph.D. who is going to law school at night."⁴³

With these three factors in mind, Chief Justice Burger stated:

[H]ow can we think that a policeman will be deterred by a judicial ruling on suppression of evidence which never affects him personally, and of which he learns, if at all, long after he has forgotten the details of the particular episode which occasioned suppression? This is an important issue which proponents of deter-

for arrest and search and seizure and thus is not likely to be responsive to any deterrent effect of the exclusionary rule.

LaFave, *supra* note 33, at 429, 443-44.

³⁵ Oaks, *supra* note 12, at 728; Wingo, *supra* note 33, at 577.

³⁶ In many jurisdictions a guilty plea can constitutionally waive a fourth amendment issue. See, e.g., Tollett v. Henderson, 411 U.S. 258 (1973).

³⁷ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416-17 (1971); Oaks, *supra* note 12, at 726. *Contra* Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting).

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

Id. at 44 (emphasis added).

³⁸ LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005, 1012 (1965); LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 MO. L. REV. 391, 402-03, 415-21 (1965).

³⁹ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 33 (1967).

⁴⁰ Spiotto, *supra* note 26, at 276. A better alternative would be a continuing education program. See Brief for American Civil Liberties Union as Amicus Curiae at 12-13, in *California v. Krivda*, 409 U.S. 33 (1972) (per curiam).

⁴¹ *Contra* Kirby v. Illinois, 406 U.S. 682 (1972).

⁴² Wingo, *supra* note 33, at 577.

⁴³ Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80, 100 (1969).

rence-by-suppression must meet; it cannot be swept under the rug.⁴⁴

It is well recognized that the police are more apt to be guided by norms within the police organization than by court decisions.⁴⁵ In many situations the violation of the fourth amendment might be encouraged by police training, departmental policy, and police superiors who are usually sympathetic where the search was "administratively reasonable." The courts themselves often encourage this by justifying the search where incriminating evidence has been found on a defendant guilty of a serious crime.⁴⁶ For example, a court upheld authorization to search 20 buildings in a city block because the victim's body was found in this area.⁴⁷ Thus, it is questionable whether the exclusionary rule actually has any direct deterrent effect upon the police. In some situations, such as a highly publicized murder, the rule might affect police behavior, but generally, there will be no deterrent effect.⁴⁸ Although the failure of the police to obey the law should not be determinative,⁴⁹ this disobedience does mandate further study of substitutional or supplemental controls.

One should also note that the exclusionary rule does not apply to the many cases where no real evidence is found. The deterrent impact then is not as broad as it could be if a remedy existed that applied to all searches.

II. UTILITARIAN VALUE OF EXCLUSIONARY RULE

Possibly the most unfortunate result of the fourth amendment rule is that it suppresses reliable evidence. Contrasted with illegally ob-

⁴⁴ Burger, *supra* note 1, at 11.

⁴⁵ Oaks, *supra* note 12, at 727-29; J. SKOLNICK, *supra* note 32, at 219-20.

⁴⁶ See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 28-29 (1967); J. SKOLNICK, *supra* note 12, at 220-23; Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 55; Chevigny, *Police Abuses in Connection with the Law of Search and Seizure*, 5 CRIM. L. BULL. 5 (1969).

⁴⁷ *United States v. Schafer*, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962).

⁴⁸ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting).

⁴⁹ *United States v. Robinson*, 471 F.2d 1082 (D.C. Cir. 1972), *rev'd on other grounds*, 414 U.S. 218 (1973).

tained confessions or eyewitness identification in violation of the right to counsel, the result of the application of the rule to tangible evidence appears illogical. Confessions obtained by coercive methods and testimony concerning an out-of-court identification that was conducted in an unnecessarily suggestive manner may be conducive to an unreliable in-court identification, but there is nothing unreliable about real evidence.⁵⁰ Thus, the suppression of real evidence has a severe impact on trials and a substantial number of criminal cases are consequently dismissed after motions to suppress are granted. A recent study in the city of Chicago revealed that approximately 45 per cent of the gambling offenses, 33 per cent of the narcotics offenses, and 24 per cent of the cases of carrying a concealed weapon were dismissed as the result of this type of motion being granted,⁵¹ and a 1971 update of these figures placed the total dismissals at 24 per cent, 36 per cent, and 22 per cent, respectively.⁵² Aside from the court time devoted to such motions, the most serious result of the rule is the discharge of obviously guilty persons.

A disturbing spin-off of these cases is a loss of public confidence in our system of justice.⁵³

⁵⁰ Cf. Oaks, *supra* note 12, at 737-38.

⁵¹ *Id.* at 685.

⁵² Spiotto, *supra* note 26, at 247. Thirty-four per cent of the court's time in Narcotics Court in Chicago during 1971 was spent on motions to suppress. *Id.* at 249.

⁵³ The thoughts of many laymen were voiced by Professor Sidney Hook:

When we read that preventive detention at the discretion of the judge (by denial of bail to repeated offenders charged with extremely violent crimes) it is denounced by some judicial figures as a "betrayal of elementary justice," as "smacking of the concentration camps of Hitler and Stalin"; when we read that a person jailed for the death of 12 persons is freed from jail and that the case against him dismissed because of prosecution's only evidence against him was a voluntary confession to the police who failed to inform him of his rights; when we read that a man who murdered one of three hostages he had taken had a record of 25 arrests ranging from armed robbery to aggravated assault and battery, and that at the time of arrest, he was free on bail awaiting Grand Jury action on charges in five separate cases in a two-month period preceding the murder; when we read that a man whose speeding car has been stopped by a motorcycle policeman who, without a search warrant, forced him to open his trunk that contained the corpse of a woman and two children, walks out of the court scot-free because the

While the Supreme Court should not make decisions on the basis of perceived public acceptance, popular dissatisfaction indicates that the Court has not finished the job it began in *Weeks*. The courts do have the obligation to maintain confidence in the justice system, and the obligation here can be met by an experimental approach to what is in essence an experimental problem. The exclusionary rule also affects the plea bargaining process⁵⁴ in situations where the prosecutor's case is weak or where he has a heavy caseload.⁵⁵ To pressure the prosecutor to negotiate a plea, defense attorneys are often encouraged to employ motions to suppress as a tactic. False testimony is likewise encouraged by the application of the rule; where the police are interested in a conviction, they may distort the truth to ensure the lawfulness of the search and the conviction of offenders.⁵⁶ Corruption of police officers is another unwanted by-product of the exclusionary rule. By manipulation of the rule a police officer may immunize an offender while appearing to do an aggressive job of law enforcement. For example, this happens where an officer makes a gambling raid without a warrant or probable cause. One study found that:

An examination of the records and a period of observation of this practice in the court is fairly convincing that the raids are made to immunize the gamblers while at the same time satisfying the public that gamblers are being harassed by police.⁵⁷

evidence is ruled inadmissible—we can only conclude with Mr. Bumble that the law's an ass.

Hook, *The Rights of Victims*, 38 ENCOUNTER 11-13 (1972). See also E. CAHN, *DISSENTS OF INJUSTICE* 14, 17 (Midland ed. 1964); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 225, 256 (1961).

⁵⁴ Nearly ninety per cent of all criminal cases are settled by negotiated pleas. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATION OFFICE OF THE UNITED STATES COURT FOR THE FISCAL YEAR ENDED JUNE 30, 1972, at 394, table D7 (1973).

⁵⁵ See Oaks, *supra* note 12, at 748. See generally Alschuler, *supra* note 54.

⁵⁶ See Amicus Curiae Brief for State of Illinois, *United States v. Robinson*, 414 U.S. 218 (1973); J. SKOLNICK, *supra* note 43, at 214-15; Burns, *supra* note 43, at 100; Chevigny, *supra* note 46, at 3, 5, 8-11.

⁵⁷ Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 392 (1951); Peterson,

Another cost of the exclusionary rule is that it imposes a single, inflexible, and drastic sanction without regard to the nature, circumstance, or degree of police misconduct. Whether an honest mistake or outrageous misconduct, the result is always the same—even if it means immunity from prosecution for a plainly guilty defendant. Indeed, in those cases where a police officer in a good faith effort to comply with the law secures a warrant that is later found to be technically insufficient, the evidence is excluded and the accused goes free. It is excluded notwithstanding the fact that the decision to search was made by a judicial officer and not by a police officer.

In expressing his view that the same sanction should not be applied to honest mistakes and intentional misconduct, Chief Justice Burger stated:

Freeing either a tiger or a mouse in a school-room is an illegal act, but no rational person would suggest that these two acts should be punished in the same way.⁵⁸

Logic should dictate that society has the right to a reasoned judicial response based on the misconduct involved.⁵⁹

If the exclusionary rule deters improper police conduct, then every person receives a benefit, albeit indirect. In theory, the police will respect everyone's fourth amendment rights and society will thus benefit. But at the present time the only person who receives a direct benefit is the person who has been incriminated by illegally seized evidence; an innocent person does not receive any benefit unless he can effectively recover damages as an alternative to the rule. Presently there are many reasons why suits are not brought for violations

Restriction in the Law of Search and Seizure, 52 Nw. U.L. REV. 45, 57-59 (1957).

⁵⁸ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 419 (1971) (dissenting opinion).

⁵⁹ *Id.* In at least two cases in this area the Supreme Court appears to have left room for a measured approach. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court appears to have left room for an approach based on the degree of abuse. *Id.* at 655. In *Terry v. Ohio*, 392 U.S. 1 (1967), the "traditional responsibility" of courts under the fourth amendment was described as that of guarding against "over-bearing" or harassing police conduct. *Id.* at 18.

of the fourth amendment either under 42 U.S.C. § 1983 (1970) or as a constitutional tort.⁶⁰ The fear of reprisal,⁶¹ the lack of actual damages,⁶² and the substantial delay in obtaining damages are factors which tend to discourage such remedies.⁶³ In addition, for most potential plaintiffs, the "moral aspects of the case" are not favorable;⁶⁴ only the plaintiffs with "clean hands" and some respectability can successfully sue a police officer. As for the moral aspects, the reputation of the individual plaintiff, including prior convictions, is admissible to lessen damages, impeach the witness, or to show that the officer was acting in good faith.⁶⁵

It is recognized that most illegal police action operates against the lower levels of society.⁶⁶ Possibly because these people live in high crime areas, the police realize that their lack of respectability will often prevent successful suits. These same individuals are unable to retain attorneys because most attorneys are reluctant to take this type of suit without a retainer in advance or a substantial possibility of success so that the case may be taken on a contingent fee basis.⁶⁷

Even where there is a suit against the individual officer, damages are generally not awarded. Evidently, juries are reluctant to impose damages, especially where contraband has been found. Many times only nominal damages are awarded because there have been no actual damages suffered. Without any actual damages, recovery of any punitive damages is difficult, if not impossible.⁶⁸ In some jurisdictions the plaintiff must also show malice or ill-will be-

fore damages will be allowed.⁶⁹ Even if the jury decides to penalize an over-zealous officer, the plaintiff's recovery will depend on finding free assets of the officer from which a judgment could be satisfied; this is often difficult. Where there is no compensation, the individual is required to bear the loss, but in terms of basic fault principles, the one who caused the injury or damage should bear the loss.⁷⁰ So under the present system, only those caught with evidence of a crime benefit from this application of the fourth amendment.

III. JUDICIAL REACTION

Because the exclusionary rule may not deter illegal police conduct and because of the "monstrous price" society pays, four Supreme Court Justices, when analyzing the rule in terms of its costs versus its benefits, have expressed their dislike for the exclusionary rule.⁷¹

In *Coolidge v. New Hampshire*,⁷² Justice Harlan, concurring, stated that the Court must "face up to the basic constitutional mistakes" of the *Mapp* decision. Had the fourth amendment never been held applicable to the state case, he would have had "little difficulty in voting to sustain this conviction."⁷³ "The law of search and seizure is due for an overhauling," he stated, and he suggested that such a re-evaluation start by overruling the *Mapp* decision.⁷⁴

Justice Black in *Coolidge* stated that the fourth amendment alone could not be taken as requiring the exclusion of evidence secured through an unlawful search or seizure: "That Amendment did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence."⁷⁵ If the evidence were to be ex-

⁶⁰ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁶¹ *Wingo, supra* note 33, at 579 n.45, and authorities cited therein.

⁶² *Id.*

⁶³ *Spiotto, supra* note 26, at 272.

⁶⁴ *Foote, supra* note 31, at 499-501.

⁶⁵ *Id.* at 504-08.

⁶⁶ *Spiotto, supra* note 26, at 255-57.

⁶⁷ NATIONAL CONFERENCE ON POLICE COMMUNITY RELATIONS, MATERIALS ON POLICE LITIGATION 3 (1970); *Foote, supra* note 31, at 500; Note, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453, 1462-63 (1973).

⁶⁸ *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting); *Spiotto, supra* note 26, at 272.

⁶⁹ *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting).

⁷⁰ *Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 SO. CAL. L. REV. 131, 138-39 (1972).

⁷¹ In *Coolidge v. New Hampshire*, 403 U.S. 443, 490, 492, 493, 510 (1971), Justices Harlan, Black, Blackmun and Chief Justice Burger. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971), Chief Justice Burger stated the exclusionary rule, or, to use his term, the "suppression doctrine," should be modified.

⁷² 403 U.S. 443, 491 (1971).

⁷³ *Id.*

⁷⁴ *Id.* at 490.

⁷⁵ *Id.* at 497.

cluded at all, "it must be under the Fifth Amendment, not the Fourth."⁷⁶ This view, which he had expressed previously in *Mapp*, has not been accepted by other members of the Court.⁷⁷ Justice Blackmun concurred in Justice Black's view "that the Fourth Amendment supports no exclusionary rule."⁷⁸ Chief Justice Burger also agreed that the fourth amendment does not require the exclusion of illegally seized evidence.⁷⁹ He stated that the result reached in *Coolidge* was a graphic illustration of "the monstrous price we pay for the Exclusionary Rule."⁸⁰

Also decided the same day as *Coolidge* was *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.⁸¹ In *Bivens*, Chief Justice Burger,⁸² like Justices Black⁸³ and Blackmun,⁸⁴ dissented from the holding that an individual has a federal cause of action for violation of his fourth amendment rights because he felt the majority had undertaken a legislative role.⁸⁵ The Chief Justice stated that the exclusionary rule was based on the need to "deter law enforcement authorities from using improper methods to obtain evidence."⁸⁶ Continuing, he stated, "[t]here is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials"⁸⁷

[S]ociety has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition. . . . Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the

⁷⁶ *Id.* at 498.

⁷⁷ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 412-15 (1971) (Burger, C. J., dissenting).

⁷⁸ *Coolidge v. New Hampshire*, 403 U.S. 443, 510 (1971).

⁷⁹ *Id.* at 492.

⁸⁰ *Id.* at 493.

⁸¹ 403 U.S. 388 (1971).

⁸² *Id.* at 411.

⁸³ *Id.* at 427.

⁸⁴ *Id.* at 430.

⁸⁵ *Id.* at 412.

⁸⁶ *Id.* at 413.

⁸⁷ *Id.* at 416.

experience of over a half century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct.⁸⁸

But absent some other effective sanction, the Chief Justice stated that he would hesitate before abandoning the rule.⁸⁹

Chief Justice Burger then invited Congress to "provide some meaningful and effective remedy against unlawful conduct by government officials." The statute could provide for:

- (1) A waiver of sovereign immunity;
- (2) The creation of a cause of action against the government;
- (3) The creation of a quasi-judicial tribunal to adjudicate all claims;
- (4) A provision that the statutory remedy is in lieu of the exclusionary rule; and
- (5) A plain statement that the exclusionary rule should not be applied to evidence obtained in violation of the fourth amendment.⁹⁰

IV. CONGRESSIONAL RESPONSE TO BIVENS

In response to the invitation of Chief Justice Burger, the Congress amended the Federal Tort Claims Act (FTCA) in March, 1974, to provide the victims of certain acts committed by federal law enforcement officials acting within the scope of employment, or possibly under the color of federal law, with a cause of action against the federal government.⁹¹ The amendment permits suits for claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious

⁸⁸ *Id.* at 419-20.

⁸⁹ *Id.* at 415, 420.

⁹⁰ *Id.* at 422-23.

⁹¹ PUB. L. No. 93-253 § 2 (March 16, 1974).

Section 2680(h) of title 28, United States Code, is amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: "Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

prosecution."⁹² A federal law enforcement official is defined as an "officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."⁹³ Generally, the damages under the FTCA are limited to personal injury and property damage.⁹⁴

The amendment, unfortunately, will mean many different things to many different judges and to many different administering agencies. Narrowly construed, it may provide only a limited remedy to aggrieved citizens, while with imagination, it can be a worthwhile experiment in control of the police establishment. And arguably, the amendment to the FTCA contains the provisos set forth in Chief Justice Burger's model and could be seen as an alternative to the exclusionary rule. The Tort Claims Act, as originally passed in 1946, does waive sovereign immunity and does create a judicial forum for a cause of action against the government.⁹⁵ But the last two suggestions by the Chief Justice that there must be a statement that the remedy against the government is in lieu of the exclusionary rule and a statement that the evidence obtained in violation of the exclusionary rule is admissible are regrettably not contained in the amendment to the Act.⁹⁶ Thus, the crucial issue to be examined when considering the amendment to the Federal Tort Claims Act is whether or not it is a "meaningful alternative" as contemplated by the Chief Justice.⁹⁷ As he stated:

⁹² *Id.*

⁹³ *Id.* The Judge Advocate General of the Army has opined that military police and criminal investigators are included within the term "investigative or law enforcement officers." He is also of the opinion that a unit commander, post exchange security guard, soldier on riot duty, disciplinary gate guard, or, in general, commissioned officers are not included. DAJA-AL 1974/4278, May 30, 1974. Although not discussed in this article, another doctrine that comes into play in determining whether a claim may be processed against military police or criminal investigators is the "incident to service" bar under the Federal Tort Claims Act. See *Feres v. United States*, 340 U.S. 139 (1950). The meaning of "abuse of process," and the effect of state law are additional doctrines to be considered in making such a determination.

⁹⁴ 28 U.S.C. § 1346(b) (1970).

⁹⁵ 28 U.S.C. §§ 1346, 2674 *et seq.* (1970).

⁹⁶ Pub. L. No. 93-253 § 2 (March 16, 1974).

⁹⁷ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 420 (1971).

Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.⁹⁸

In order to come to a reasoned conclusion as to whether or not the amendment is a "simple structure"⁹⁹ providing a meaningful substitute for the rule, the amendment itself and the entire act must be examined in detail.

The Claims Procedure Under the Federal Tort Claims Act

The act is an efficient vehicle for processing claims and is procedurally so simple as to encourage aggrieved parties to file claims. Before a suit may be brought in a federal district court under the Act, a claim must be filed against the federal agency whose agent allegedly violated the plaintiff's fourth amendment rights;¹⁰⁰ only after this claim has been denied, or six months has elapsed since the claim was filed, may a civil suit be instituted.¹⁰¹ The claim must be submitted in writing, and must state the damages as a sum certain;¹⁰² this is a jurisdictional requirement and cannot be waived.¹⁰³ The amount claimed is significant, for if the claim is administratively denied, a complaint filed in a district court is limited to the amount claimed originally, absent a showing of newly discovered evidence not reasonably discoverable at the time of the administrative claim or a showing of intervening facts relating to the amount claimed.¹⁰⁴

Once a claim has been filed the federal agency may settle any claim up to \$25,000,¹⁰⁵ and any claim in excess of that amount may be settled only with the prior written approval of the Attorney General or his designee.¹⁰⁶ Settlement authority under the Act includes not only the authority to pay the claim submitted, but

⁹⁸ *Id.* at 421.

⁹⁹ *Id.* at 422.

¹⁰⁰ 28 U.S.C. § 2675 (1970).

¹⁰¹ *Id.*

¹⁰² 28 C.F.R. § 14.2a (1974).

¹⁰³ *Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971).

¹⁰⁴ 28 U.S.C. § 2675(b) (1970).

¹⁰⁵ 28 U.S.C. § 2672 (1970).

¹⁰⁶ *Id.*

also to compromise the claim.¹⁰⁷ It should be noted that the vast majority of claims under the act presumably will be administratively handled, obviating the need to go to court.¹⁰⁸ Once the claim has been denied, trial in federal district court is before a judge alone,¹⁰⁹ thus avoiding a jury potentially biased in favor of a police officer.

A suit under the Federal Tort Claims Act cannot be successful unless it falls within the conditions of the statute waiving sovereign immunity. The amendment to the Act specifically depends upon the "provision of this chapter [§§ 2671-2680] and section 1346(b) of title 28."¹¹⁰ Section 1346(b) provides that the cause of action must meet the following requirements before sovereign immunity will be waived:

- (1) Claim for money damages;
- (2) Claim for damage or loss of property or death or personal injury;
- (3) The damage must have been the result of a negligent or wrongful act;
- (4) Such act must have been committed by a federal employee;
- (5) The employee must have been acting within the scope of employment; and
- (6) The circumstances must be such that a private person would be liable under state law if such a person committed the act.¹¹¹

Money Damages and Injury to Person or Property

These requirements may severely limit the scope of the amendment's usefulness. The claim

¹⁰⁷ *Id.*

¹⁰⁸ *Hearings on H.R. 10439 Before the House Subcomm. on Claims and Governmental Relations, 93d Cong., 2d Sess. 33 (1974).*

¹⁰⁹ 28 U.S.C. § 2402 (1970). Suits against the United States pursuant to the FTCA can only be brought in a federal district court. 28 U.S.C. § 1346(e) (1970).

¹¹⁰ PUB. L. No. 93-253 § 2 (March 16, 1974).

¹¹¹ 28 U.S.C. § 1346(b) (1970):

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

must be for "money damages . . . for injury or loss of property, or personal injury or death"¹¹² and, this provision being met, the federal government becomes liable for actual and compensatory damages. While it would seem that the definition of property and personal damage would be a federal question, it is, by the terms of the statute, left to state law.¹¹³ In most tort situations, there will be little difficulty in interpreting this section. For example, where a government driver operating a government vehicle negligently collides with another vehicle there is usually property damage and in some cases personal injury. However, in uncommon tort situations involving an illegal search or seizure, occasioned by either a failure to comply with the no-knock statute or the lack of probable cause, there may not be any property damage, let alone personal injury. In fact, personal or property damage may be the exception rather than the rule in fourth amendment situations. The harms often incident to an unlawful search or seizure include invasion of privacy (often a dwelling home), a permanent loss of the feeling of security at home and in other private enclaves, humiliation, damage to reputation and dignity, mental and emotional distress, and ultimately being subjected to the search or seizure.

Compared to the other types of harms, mental or emotional distress is the most assessable, generally recoverable as a parasitic damage where it results from a trespass to land¹¹⁴ or from assault, battery, or false imprisonment.¹¹⁵ These types of damages will usually accompany a violation of the fourth amendment, and thus at least this one type of damage should be recoverable.

It should be noted that the FTCA has never prohibited suit for the intentional infliction of mental distress, invasion of privacy, or negligence. However, the act prohibits the award of

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

¹¹² *Id.*

¹¹³ 28 U.S.C. § 1346 (1970); 28 U.S.C. § 2672 (1970). See *Hendry v. United States*, 418 F.2d 774, 780 (2d Cir. 1969).

¹¹⁴ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 44 (3d ed. 1964).

¹¹⁵ *Id.* at 67-68.

what are usually a major part of the damages in those cases: punitive damages. It seems that the intent of the amendment to the act—to allow damages for the intentional torts of policemen—impacts on these already allowed causes of action, possibly allowing suit where it would not have been allowed before. Where mental or emotional distress are inflicted without an accompanying compensable tort, the government may or may not be liable under the many state laws. Where a law officer, by abusing his position or the legal process, intentionally or recklessly inflicts a mental or emotional harm and his conduct is extreme or outrageous, liability will be found in most jurisdictions.¹¹⁶ Where the conduct is not extreme or outrageous, there is usually no recovery without resulting bodily harm.¹¹⁷ There are still a few states that require some type of impact and still others that consider resulting bodily harm a prerequisite to collecting in any case for emotional damage.¹¹⁸ One should also note that the law varies from state to state as to bystanders.¹¹⁹ Where the offending act is merely negligent, bodily harm is generally required for recovery,¹²⁰ but there are a few jurisdictions that will award damages when only mental or emotional harm occurs.¹²¹

The other harms mentioned above are less concrete than emotional distress, and, hence, recovery for damage solely to those interests would be even more difficult, if not impossible, even if they accompanied another intentional tort. What little legislative history there is of the act demonstrates that the Congress intended to protect those interests uniquely harmed by unlawful searches and seizures. The Senate Report indicates that pain, suffering, and humiliation are intended to be compensable,¹²² as is an invasion of privacy.¹²³ It also

states that the purpose of the bill is to make the government liable for “the same type of conduct alleged to have occurred in *Bivens*.”¹²⁴ In *Bivens* the conduct resulted only in a cause of action for humiliation, embarrassment, and mental suffering.¹²⁵

The legislative history also indicates that the government would be liable for “constitutional torts.”¹²⁶ The Court in *Bivens* recognized that the “interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.”¹²⁷ With respect to damages this is especially true; the interests to be protected by the amendment include not only property rights but all the intangibles contained within the rubric of privacy. The amendment thus protects society and its members from more than just ordinary tortious acts.

There are two ways that courts can effectuate this apparent congressional intent. First, they can find that while the law of the state is the general rule, where there is conflict with the intent of the Act itself, federal law controls.¹²⁸ Unfortunately, the conflict is between a nonsubstantial legislative history and some very specific statutory language. Nonetheless, the unique nature of the right of privacy and the fact that the amendment is later in time than the original statutory limitation augment the history and make this the probable interpretation. Second, in states where recovery for mental distress is limited, courts can consider all offensive encounters between police and citizens as per se extreme and outrageous, and intentional rather than negligent. This telescoping of federal policy through state law does not, however, take care of all of the

¹¹⁶ W. PROSSER, HANDBOOK OF THE LAW OF TORTS 60 (4th ed. 1971); RESTATEMENT OF TORTS 2d § 46 (1965).

¹¹⁷ W. PROSSER, *supra* note 116, at 60–61; RESTATEMENT, *supra* note 116, at § 46, comment d.

¹¹⁸ See, e.g., *Duty v. General Finance Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954).

¹¹⁹ W. PROSSER, *supra* note 116, at 61.

¹²⁰ *Id.* at 328–29.

¹²¹ E.g., *Pillou v. Legg*, 68 Cal. 2d 28, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

¹²² 119 CONG. REC. 21569 (daily ed. Nov. 30, 1973).

¹²³ *Id.* There was never an exception to the FTCA on suing for invasion of privacy.

¹²⁴ *Id.*

¹²⁵ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389–90 (1971).

¹²⁶ 119 CONG. REC. 21569 (daily ed. Nov. 30, 1973).

¹²⁷ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

¹²⁸ See *Young v. United States*, 184 F.2d 587 (D.C. Cir. 1950); *State of Maryland, Use of Burkhardt v. United States*, 165 F.2d 869 (4th Cir. 1947); cf. *Erie v. Thompson*, 337 U.S. 163 (1949).

less concrete interests protected by the amendment. In both situations, substantial damages could be awarded because the amendment to the act and the fourth amendment, which it implements, are intended to protect these unique constitutional interests. The remedy in this light would not, in essence, be a punitive remedy, which the act specifically prohibits.¹²⁹

The provisions of the act that require use of the law of the state can be read consistently with the congressional intent to compensate for other than physical and property damage: Congress could have intended to compensate for these interests only when the state allows such compensation. However, the Congress' major concern was evidently with only the unique damages that occur during an unlawful search and seizure, indicating an intent to compensate in all such cases.

Negligent or Wrongful Act

The amendment to the FTCA specifically depends on sections 1346 and 2671 to 2180 which provide that the government will be liable for the negligent or wrongful acts of its employees within the scope of their employment. Prior to March 1974, an exception to liability were the torts enumerated in the amendment: "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."¹³⁰ The amendment significantly changed the statute by permitting suits for these torts committed by "investigative or law enforcement officers."

False imprisonment is an intentional tort where the defendant intentionally causes the confinement or restrains the freedom of movement of the claimant or another person.¹³¹ False arrest, like false imprisonment, is a linear descendant of common law trespass; the latter differs from the former in that false arrest is the restraint imposed by the assertion of legal authority.¹³² Both of these torts are intentional in nature. However, most actions for false arrest against police officers are not the result of intentional misconduct by the police but rather some form of careless or negligent action. In many cases the officer is acting in good faith, such as where an after-the-fact re-

view reveals that the officer did not comply with the probable cause test, the reliability test, or the basis of knowledge test.¹³³ Under a trespass theory, the voluntary confinement of the individual, even though it was in good faith, is a trespass.¹³⁴ The government is thus liable for such a trespass although there was no specific intent to unlawfully detain the claimant. The act is intentional in the sense that it was voluntary—the essence of the offense.¹³⁵ It was the clear intent of Congress to impose liability for false imprisonment and false arrest, and even in situations where only an innocent violation of the fourth amendment has taken place, such an arrest in violation of the fourth amendment would be actionable. False imprisonment is looked upon more broadly than fourth amendment violations. For example, where an officer innocently, although reasonably, arrests an individual because of a mistaken identification, he will be liable for false imprisonment.¹³⁶ However, assuming probable cause, such an arrest has been held not to violate the fourth amendment.¹³⁷

"Abuse of process" is technically a tort where the legal process has been set in motion for an ulterior motive.¹³⁸ For example, an officer may, on the basis of probable cause, arrest an individual only to compel him to surrender certain property to the officer. In another situation, the police officer may obtain a properly executed search warrant and obtain incriminating evidence, again with an ulterior motive in mind. The act of the officer in neither example violated the fourth amendment, but nevertheless, there was an abuse of process.

The legislative history indicates that the amendment does not refer to whatever the local state law defines as the tort "abuse of process." The bill was introduced because of a number of incidents in which federal agents conducted "abusive, illegal and unconstitutional 'no knock raids.'" ¹³⁹ The most notorious of

¹³³ Gilligan, *Probable Cause and the Informer*, 60 MIL. L. REV. 1 (1973).

¹³⁴ W. PROSSER, *supra* note 116, at 48.

¹³⁵ *Id.* at 45-46.

¹³⁶ *Id.*

¹³⁷ *Cf. Hill v. California*, 401 U.S. 797 (1971).

¹³⁸ W. PROSSER, *supra* note 116, at 856-58.

¹³⁹ 119 CONG. REC. 21569 (daily ed. Nov. 30, 1973).

¹²⁹ 28 U.S.C. § 2674 (1970).

¹³⁰ 28 U.S.C. § 2680(h) (1970).

¹³¹ W. PROSSER, *supra* note 116, at 42.

¹³² *Id.*

these were the raids conducted in Collinsville, Illinois, where federal agents, acting without warrants, kicked in the doors of homes without any warning, shouting obscenities.¹⁴⁰ Another example of the conduct intended to come within the purview of the amendment is the fact pattern in *Bivens*.¹⁴¹ Federal agents without any claim of federal authority, entered Bivens' home, manacled him in front of his family, threatened to arrest the entire family, and searched the house from stem to stern. At the police station he was subjected to a visual strip search.

The Congressional Record indicates that the amendment waives sovereign immunity where "law enforcement abuses involved constitutional torts."¹⁴² The federal government will be subject to:

liability whenever its agents act under color of law so as to injure the public through search and seizures that are conducted without warrants or with warrants issued without probable cause.¹⁴³

The amendment itself clarifies the meaning of the term "abuse of process" to a certain extent. "Law enforcement official" is defined as an "officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."¹⁴⁴ Surely, if the act did not apply to illegal searches and seizures but only to false arrests and false imprisonment, that expansive definition would be mere surplusage. A federal tort of "abuse of process" could also conceivably be used to allow recovery in those situations where state law does not allow recovery for mental distress and harm to privacy, reputation, and dignity, although such an extension would require a broad reading of the amended act.

Even if the language "abuse of process" is defined in a conventional tort sense, there will still be governmental liability where the fourth amendment violation amounts to a trespass.¹⁴⁵

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* See also 120 CONG. REC. 1400 (daily ed. Mar. 5, 1974) Where there is illegal entry, the aggrieved person has a cause of action.

¹⁴³ *Id.*

¹⁴⁴ PUB. L. No. 93-253 § 2 (Mar. 16, 1974).

¹⁴⁵ *Cf. United States v. Artieri*, 491 F.2d 440, 446 n.2 (2d Cir. 1974).

As with false arrest and false imprisonment, liability could be imposed even though there is a good faith violation of the fourth amendment. Where there has been an intrusion, a common law trespass may be maintained without proof of actual damage.¹⁴⁶ However, if actual damages are not shown, the defendant can only recover nominal damages.

Discretionary-Governmental Act Exception

Specific statutory exceptions to liability are set forth in section 2680. Section 2680a¹⁴⁷ first provides that the government will not be liable for an "act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."¹⁴⁸ This clause is intended to prohibit suits to test the constitutionality of a statute. Unlawful arrests because of the unconstitutionality of a statute are not uncommon; they frequently concern disorderly conduct statutes. The upshot of these arrests is that any evidence obtained is inadmissible; this result may be either because of the unconstitutionality of the statute or because of the illegality of the arrest from a fourth amendment viewpoint. Where the statute is held to be unconstitutionally vague, for example, and there would have been a valid arrest but for the failure of the statute, the ex-

¹⁴⁶ W. PROSSER, *supra* note 116 at 29.

¹⁴⁷ 28 U.S.C. § 2680(a) (1970).

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

To determine the Congressional intent as to section 2680, examine *Hearings on H.R. 5373 and H.R. 6463. Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. (1942)*. As to the discretionary act exception see *id.* at 28, 33, 35, 45. See also H.R. REP. No. 2245, 77th Cong., 2d Sess. 10 (1942). H.R. 5373 and H.R. 6463 are virtually the same as the Federal Tort Claims Act, S. 2221 as amended. SEN. REP. No. 1400, 79th Cong., 2d Sess. 30-31 (1946).

¹⁴⁸ *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 28, 33, 35 (1942)*. The exception under discussion was the same as the version eventually passed. See also *Powell v. United States*, 233 F.2d 851 (10th Cir. 1956).

ception applies and the government will not be liable. In some contexts the arrest will be unlawful for an additional reason: the officer did not have probable cause for the arrest. In the latter case, the amendment to the Act would allow a suit for this police conduct. Furthermore, there may be an arrest pursuant to an unconstitutional statute and the evidence seized held "inadmissible" because there is an overly broad search or because of the lack of any justification for a search. Two hypotheticals demonstrate this. First, *A* is arrested pursuant to a motor vehicle statute proclaimed to be unconstitutional and as a product of his arrest, certain illegal drugs have been obtained. Thus, even if the statute was valid, the seizure of evidence incident to the arrest was unlawful¹⁴⁹ and consequently, a suit under the amendment would be permissible. In the second hypothetical, again assume an arrest pursuant to an unconstitutional statute, and incident to the arrest, the search impermissibly goes beyond the "immediate area" as defined in *Chimel v. California*.¹⁵⁰ As with the previous example, a suit would be permissible under the Act.

The second clause of section 2680a states that there will be no liability when a federal agency or employee of the government performs a discretionary function whether or not negligence was present or whether or not there has been a wrongful act. This exception applies even if there has been an abuse of discretion. While the terms "federal agency"¹⁵¹ and "employee of the Government"¹⁵² are defined elsewhere in the Act the term "discretionary function or duty" is not. One can conclude that the primary purpose of this exception is evidently to prevent the disruption of the separation and balance of power between the judicial and legislative branches.¹⁵³ The problem that arises in the fourth amendment context is that most actions of police officers are in many

ways discretionary; policy decisions are often made by the cop on the beat.

In *Dalehite v. United States*,¹⁵⁴ the first case decided by the Supreme Court to deal with the FTCA discretionary function exception, the Court stated:

It is unnecessary to define . . . precisely where discretion ends. It is enough to hold . . . that the "discretionary function or duty" that cannot form a basis of a suit under the Federal Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedule of operations. Where there is room for policy or judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operation . . . in accordance with official directions cannot be actionable.¹⁵⁵

The language in *Dalehite* has resulted in a planning-operational level dichotomy to determine the application of the discretionary function exception. At least in theory, this is a relatively simple test to apply. A court might only have to examine the organizational table of the particular agency to reach its decision. But in practice, such distinctions are difficult, if not impossible, to make. At the top hierarchical level of government, decisions are made as to both day-to-day operations and those dealing with policy, and many policy decisions are delegated by top level administrators to the bottom of the police structure. It is the nature of the decision and not the official that should determine the exception's applicability.

Professor Jaffe suggests a more realistic approach. He looks to several factors: the existence of alternative remedies, the capacity of a court to evaluate the propriety of the officer's action, and the effect of liability on the budget or effective administration.¹⁵⁶ Where there ex-

¹⁴⁹ *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973).

¹⁵⁰ 395 U.S. 752 (1969).

¹⁵¹ 28 U.S.C. § 2671 (1970).

¹⁵² *Id.*

¹⁵³ *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950). The term has a long history. See, e.g., *Marbury v. Madison*, 1 Cranch 137 (1803). The concept of discretionary function has been developed in non-Tort Claims Act cases. See Jayson, *Application of the Discretionary Function Exception*, 24 FED. B.J. 153, 155-57 (1964).

¹⁵⁴ 346 U.S. 15 (1953).

¹⁵⁵ *Id.* at 36-37.

¹⁵⁶ Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 219 (1963). See generally Clark, *Discretionary Function and Official Immunity: Judicial Forays into Sanctuaries from Tort Liability*, 16 AIR FORCE L. REV. 33 (1974); Peck, *Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act*, 48 WASH. L. REV. 391 (1973); Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Excep-*

ists an alternative remedy, the court may be more disposed to hold the Act is discretionary. However, in the fourth amendment area, the only other alternative remedies are exclusion of evidence, an unsatisfactory and not always available remedy, and a suit against a probably judgment-proof police officer.

Jaffe's second factor, the capacity of the court, stems from the principle of separation of powers. The federal courts have been determining what constitutes a violation of the fourth amendment since 1914, and this screening by the courts has not been considered undue harassment of law enforcement officials, nor does it evidently severely impede law enforcement. This is true whether the court is reviewing the question of lawful arrest, a concerted action against a dangerous criminal, or a plan for a mass arrest. The courts have also examined the constitutionality of police department regulations¹⁵⁷ and standard operating procedures¹⁵⁸ without unduly hampering the executive branch of government. The decisions made by law enforcement officials cannot be equated with the trial and error process that is used to guide the nation with its international, defense, and major domestic concerns. Limiting the freedom to experiment will not substantially prejudice the community interest in aggressive law enforcement, nor will civil liability result in "wasting" law enforcement officials' time in court. In fact, this remedy, because of its administrative claim procedure, may ultimately reduce the police officer's court-room time.

The imposition of damages on the government would not impede the executive branch of government to any great extent. It was this liability that Congress thought should be imposed on the government rather than having the loss be borne by the police officer or the individual whose rights have been violated. The evidence from jurisdictions in which sovereign immunity has been abolished shows

the fears of overburdening the budget to be unwarranted.¹⁵⁹

With respect to police officers, there is an additional reason for not considering their acts as discretionary: the benefit in the fourth amendment area from the protection of personal liberty outweighs whatever impact there may be on effective law enforcement.¹⁶⁰ Furthermore, the impact would be minimal; the courts in reviewing alleged fourth amendment violations under the exclusionary rule have not interfered with the function of the executive branch of government.¹⁶¹ As a general rule, everyday police activities are not considered discretionary acts.¹⁶²

*Scope of Employment*¹⁶³

In order for the government to be liable, the officer's conduct must occur within the "scope of his employment." The law of the place of the tort is the governing law used in this determination.¹⁶⁴ Generally, there are four factors considered in making a scope-of-employment determination: 1) the control exercised by the employee's supervisors;¹⁶⁵ 2) the degree to which the United States Government's pur-

¹⁵⁹ The evidence tends to show "that such liability was unlikely to be fiscally excessive or administratively destructive." Van Alstyne, *Government Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 969-78 (1966).

¹⁶⁰ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1346 (2d Cir. 1972).

¹⁶¹ *Pierson v. Ray*, 386 U.S. 547 (1967).

¹⁶² *Id.* See also *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir., Sept. 18, 1974); *Galella v. Onassis*, 487 F.2d 986, 993 (2d Cir. 1973); *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1014 (1972); *Sherbutte v. Marine City*, 374 Mich. 48, 130 N.W.2d 920 (1964); *W. PROSSER & Y. SMITH, CASES AND MATERIALS ON TORTS* 156 (3d ed. 1962). *But see Norton v. McShane*, 332 F.2d 855, 859-60 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); *Bershad v. Wood*, 290 F.2d 714 (9th Cir. 1961).

¹⁶³ The legislative history is silent as to the meaning of the term. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946).

¹⁶⁴ *Williams v. United States*, 350 U.S. 857 (1955). See also *Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 41, 42 (1940); *Hearings on H.R. 5373 and H.R. 6463. Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 30 (1942).

¹⁶⁵ RESTATEMENT OF AGENCY 2d §§ 228-29 (1958).

tion, 31 WASH. L. REV. 207 (1956); *Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968).

¹⁵⁷ See *United States v. Robinson*, 414 U.S. 218 (1973).

¹⁵⁸ See *Gustafson v. Florida*, 414 U.S. 260 (1973).

poses are being served at the time of the incident;¹⁶⁶ 3) the work commonly done by the employee;¹⁶⁷ and 4) the foreseeability of the employee's conduct.¹⁶⁸ In general, the government would be held liable for any intentional tort committed by a law enforcement officer where its purpose, however misguided or illegal, is wholly or in part to further the government's business.¹⁶⁹

Interesting problems result in the scope-of-employment area when police officers, purporting to be in an official capacity, and possibly wearing uniforms, commit a wrong when the officers are not actually furthering the government's business at all. The Senate Report states twice that the government is to be liable when the law enforcement agent acts either within the scope of his employment *or* under color of Federal law.¹⁷⁰ These two phrases provide opportunities for an expansive reading of "scope of employment."

State courts might look to leading federal cases when interpreting the uniquely federal phrase "under color of Federal law." Officers act under color of law when "power [is] possessed by virtue of . . . law and made possible only because the wrongdoer is clothed with the authority of . . . law."¹⁷¹ While the mere wearing of a uniform might not be enough, an act of the type only or usually performed by a policeman coupled with a uniform would appear to be sufficient.¹⁷² It could also be argued that, as the uniform itself creates respect and possibly fear, all actions in uniform except for those uniquely personal are clothed with the authority of the state.¹⁷³

The phrase in the Report—under color of federal law—may or may not be broader than the many different state laws on the scope of employment. Where an employee intentionally acts out of solely personal motives, often evi-

denced by the outrageousness of his conduct, many states will not find the employer liable.¹⁷⁴ However, progressive jurisdictions do allow recovery where the employer has provided a peculiar opportunity for loss of temper¹⁷⁵ or where the employer entrusts the employee with an instrument that is highly dangerous in itself or is capable of misuse in a highly dangerous fashion.¹⁷⁶ In a few jurisdictions, liability may extend to all acts of employees, if not unexpected.¹⁷⁷ A federal law enforcement officer is entrusted with powerful symbols of authority—a badge and a weapon. In addition, he is given the status of being a police officer and is then immersed in a brutalizing culture of violence and depravity. Thus, it seems that one of the built-in costs of the business of law enforcement is the occasional intentional violent act committed by police officers for personal motives.

Other Problems with Law of the Place

Under the amendment the imposition of liability may vary from state to state. Although liability under the FTCA is determined by the law of the place of the tort, federal law applies when it imposes a stricter duty on the federal law enforcement official.¹⁷⁸

In some cases federal law might apply even if it were less strict. For example, in one state there may be a statute forbidding all wiretapping. The question then arises as to what happens if there is a wiretap pursuant to a valid federal court-ordered wiretap warrant. Would the officer be liable for civil damages as a result of the violation of the state statute and the interaction of the amended FTCA? Another possibility is the variance in state law as to what constitutes a lawful no-knock entry. If the state law is inconsistent with constitutional requirements and is, in effect, more stringent, would the federal officer be liable for civil

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ W. PROSSER, *supra* note 116, at 463.

¹⁶⁹ W. PROSSER, *supra* note 116, at 464. See *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961).

¹⁷⁰ 119 CONG. REC. 21569 (daily ed. Nov. 30, 1973).

¹⁷¹ *United States v. Classic*, 313 U.S. 299, 326 (1941), *interpreting* 42 U.S.C. § 1983 (1970).

¹⁷² See *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961).

¹⁷³ *But see* *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968).

¹⁷⁴ W. PROSSER, *supra* note 116, at 464-66; RESTATEMENT OF AGENCY 2d § 245 comment f (1958); see also JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 216.04 (1974).

¹⁷⁵ W. PROSSER, *supra* note 116, at 466.

¹⁷⁶ *Id.*

¹⁷⁷ *E.g.*, *Russel v. United States*, 465 F.2d 1261 (6th Cir. 1972). The case is interesting in that the court of appeals and the district court disagreed over the rule in Kentucky.

¹⁷⁸ *E.g.*, *Gill v. United States*, 429 F.2d 1072 (5th Cir. 1970).

damages or for a tort under state law? The deterrence of police misconduct also poses additional problems in this setting. If the federal officers are subject to fifty-one separate rules, how can the variation of rules deter misconduct by federal law enforcement officials? While the Congress could consent to suit where federal law enforcement officials are not in compliance with the more stringent state laws, it seems that it did not intend to do so in the amendment; all it apparently wished to do was provide a damage remedy. The broader reading would impose on the federal establishment fifty-one separate criminal procedure codes, a consequence of such magnitude that some strong indication of purpose should be needed to construe the Act that way.

Detention of Goods

Section 2680(c) provides for the exclusion of any claim

arising in respect of the assessment or collection of any tax or customs duty or the detention of any goods or merchandise by any officer of customs or exercise of any other law-enforcement officer.¹⁷⁹

It should be noted that this exception was not intended to preclude suits against the federal government for items illegally seized. When the plaintiff seeks recovery of duties and taxes wrongfully assessed, recovery under the FTCA is forbidden because an adequate remedy for such recovery is currently available¹⁸⁰ and was available at the time the FTCA was enacted.¹⁸¹ For a number of years the courts had permitted suits for erroneously assessed taxes¹⁸² and duties.¹⁸³ Implicit in section 2680(c) is the concept that where goods are detained to satisfy such an assessment there could be no suit against the government under the Federal Tort Claims Act. But the

¹⁷⁹ 28 U.S.C. § 2680(c) (1970).

¹⁸⁰ 26 U.S.C. § 7441 *et seq.* (1970 and Supp. 1972); 28 U.S.C. § 211 *et seq.* (1970 and Supp. 1972).

¹⁸¹ 26 U.S.C. § 1100 *et seq.* (1940 and Supp. 1946); 28 U.S.C. §§ 296-7 (1940 and Supp. 1946).

¹⁸² *Manseau v. United States*, 52 F. Supp. 395 (E.D. Mich. 1943); *Exchange National Bank of Shreveport v. United States*, 46 F.2d 566 (W.D. La. 1931).

¹⁸³ *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901).

legislative history is not helpful in determining when suits are precluded where there has been a seizure under a forfeiture statute; only the suits arising from the "detention of goods by customs officers" are specifically precluded by the statute.¹⁸⁴ The Act was seemingly not intended to except from the recovery those suits arising from illegal seizures by law enforcement officials, yet, it has unfortunately been interpreted as excepting suits resulting from the illegal detention of goods by customs officials or the agents of the FBI.¹⁸⁵ To continue to interpret the statute in this manner would clearly be contrary to the basic purpose of the recent legislation.

Punitive Damages and Attorneys Fees

The Act prohibits the award of punitive damages,¹⁸⁶ and it does not provide for attorneys' fees. Indeed, it limits allowable attorneys' fees for those rich enough to afford to pay them to twenty per cent of the award, compromise, or settlement, and twenty-five per cent of any judgment.¹⁸⁷ Some attorneys believe, rightly or wrongly, that the low fee schedule, at least low in comparison to outside-the-Act tort claim representation, is designed to discourage lawyers from representing people having claims under the Act.¹⁸⁸ The failure to provide for attorneys' fees may make any remedy under the Act, like individual police liability, more illusory than real. However, this con-

¹⁸⁴ H.R. REP. No. 2245, 77th Cong., 2d Sess. 10 (1942); *Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942). *Cf. id.* at 44-45.

¹⁸⁵ *United States v. One 1951 Cadillac Coupe de Ville*, 125 F. Supp. 661 (E.D. Mo. 1954). *See also United States v. Artieri*, 491 F.2d 440, 446 n.2 (2d Cir. 1974) (dictum); *State Marine Lines, Inc. v. Shultz*, 359 F. Supp. 512 (D.S.C. 1973) (Section 2680(c) precluded claim against the government when agents of the Bureau of Customs searched plaintiff's vessel and seized certain goods from the vessel while it was docked in navigable waters); *Jones v. Federal Bureau of Investigation*, 139 F. Supp. 38, 42 (S.D.N.Y. 1956), *rev'd on other grounds*, 252 F.2d 529 (2d Cir. 1957) ("If plaintiff intends to charge a detention of property by the agents in the exercise of their duties, the claims are excepted" by section 2680(c)).

¹⁸⁶ 28 U.S.C. § 2674 (1970).

¹⁸⁷ 28 U.S.C. § 2678 (1970).

¹⁸⁸ *Hearings on H.R. 10439 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary* 93d Cong., 2d Sess. 34 (1974).

clusion is questionable, at least with respect to the very poor, for several reasons. Under much of the claims procedure there is little need for an attorney. In situations where one is required, the legal services or Office of Economic Opportunity lawyers may be available to institute action against the federal government. But for persons who are somewhat more affluent and do not qualify for legal aid, it may be difficult, if not impossible, to procure an attorney, and as a consequence, any legal remedies available to them might be lost.

The failure of the amendment to provide for punitive damages indicates that it was not intended to act as a deterrent and dictates that it in fact will not act as a deterrent. An interesting comparison can be made with the Omnibus Crime Control and Safe Streets Act of 1968, which provides the following sanctions for illegal wiretapping: "(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher; (b) punitive damages; and (c) a reasonable attorney's fee and other litigation costs reasonably incurred."¹⁸⁹ It seems illogical to provide punitive damages for illegal wiretapping while not allowing them for an unlawful search or seizure, which can be a much more brutalizing experience.

The Non-Exclusiveness of the Remedy

It should also be noted that the remedy provided by the amended statute is not an exclusive one, and the law enforcement officer can still be sued in his private capacity. This is in contrast to other situations in which government employees have committed a wrong. For example, drivers of government automobiles¹⁹⁰ and doctors working for the Veteran's Administration¹⁹¹ cannot be sued as individuals.

V. THE AMENDMENT AS A SUBSTITUTE FOR THE EXCLUSIONARY RULE

Whether the exclusionary rule should be limited because of this amendment depends on the familiar assumptions upon which the rule is based. If the rule is to continue to function, one must assume that the exclusionary rule de-

ters illegal misconduct and that there is no reasonable alternative to the rule.

Although no hearings were held on the bill, its passage at least arguably demonstrates that the Congress found that the exclusionary rule does not effectively deter police misconduct. The bill does not, however, state that it is to be applied in lieu of the exclusionary rule; nor does it state that evidence obtained in violation of the fourth amendment is admissible in evidence. This could be an oversight as was the use of the term "abuse of process" and the failure to consider the detention exception, but it seems likely that it was not. The bill was, in all probability, a response to the Chief Justice's invitation, which expressly set forth those conditions. The Committee proposing the amendment stated:

[T]his provision should be viewed as a counterpart to the *Bivens* case and its progeny, in that it waives the defense of sovereign immunity so as to make the government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens*.¹⁹²

The failure to include the conditions set forth by Chief Justice Burger evidences the Congressional intent to retain the present exclusionary rule. As Congressman Wiggins stated, "[T]he remedy is created without the benefits of that exploration [of the exclusionary rule] and without modifying this exclusionary rule."¹⁹³ It could be argued that if the first three suggestions set forth by the Chief Justice are met and provide a reasonable alternative, the last two suggestions are superfluous. This argument hinges on the assumption that the alternative to the exclusionary rule must provide an adequate remedy.

[N]umerous proposals have been studied for providing an adequate court remedy for victims of illegal searches. The key word is adequate since an illusory remedy might serve to eliminate any means of redress, given the possibility that courts might see such an apparent remedy as a basis for modifying or eliminating the exclusionary rule.¹⁹⁴

¹⁸⁹ 18 U.S.C. § 2520 (1970).

¹⁹⁰ 28 U.S.C. § 2679 (1970).

¹⁹¹ 38 U.S.C. § 4116 (1970).

¹⁹² 119 CONG. REC. 21569 (daily ed. Nov. 30, 1973).

¹⁹³ 120 CONG. REC. 1400 (daily ed. Mar. 5, 1974).

¹⁹⁴ *Id.*

As enacted, however, the amendment does not provide a reasonable alternative; what is needed in its place is an alternative that satisfies the interests involved.

As far as the interests of the community and the individual are concerned, a meaningful alternative must protect the right of privacy and compensate the individual regardless of whether incriminating evidence has been found. Additionally, any alternative devised must also deter future misconduct on the part of police officers while at the same time not eliminating aggressive law enforcement and conviction of the guilty. While not inhibiting public service in the various law enforcement agencies, the alternative must maintain police morale while at the same time encouraging improvement in recruiting, selection, and training. Lastly, the alternative should not breed contempt for the courts.

A determination as to the reasonableness of the alternative requires analyzing the various community interests. This analysis assumes that liability may be imposed under the amendment for violations of the fourth amendment.

Prior to the amendment to the Federal Tort Claims Act, an individual whose rights had been violated was required to pursue his remedy against the police officer under state substantive law, section 1 of the Civil Rights Act of 1871¹⁹⁵ or the federal common law cause of action,¹⁹⁶ although individuals in a few states might sue the state or a political subdivision of the state when sovereign immunity had been waived.¹⁹⁷ It is doubtful, however, that individ-

ual liability of the officer does promote the interests of the community; individual judgments will not induce any systemic change.¹⁹⁸ Because the supervisor of the officer and the municipality are not involved there will be little incentive to prevent violations of the fourth amendment. Many studies have shown that where liability is placed on the individual employee rather than on the large corporate defendant, there is little deterrent effect.¹⁹⁹ If damages were placed on the federal government, there would be at least theoretically an incentive to decrease the damages imposed on the municipality by improving training and supervision. Additionally, if damages are imposed because of the actions of the same official on a number of occasions, there would be an incentive to take direct disciplinary action against the officer by the way of fine, suspension, or elimination.

The motivation of the individual officer in supporting his family by working in law enforcement becomes significant when the threat of financial liability adversely affects his job performance.²⁰⁰ It is possible that he will not zealously perform his duties. It also seems un-

REV. CODE §§ 4.92.010-4.96.020 (1970 and Supp. 1973); WYO. STAT. ANN. § 15.1-4 (1965).

¹⁹⁸ Little, *The Exclusionary Rule of Evidence as a Means of Enforcing Fourth Amendment Morality on Police*, 3 IND. L.F. 375, 406 (1970); Kates & Kouba, *supra* note 70, at 140-41; Note, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453, 1465 (1973); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1209 (1971). *But see* Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 261 (1961); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 387 (1939). This may be an added cost of law enforcement which the public is willing to bear. Another reason why there must be a systemic approach.

¹⁹⁹ Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965).

²⁰⁰ *Id.* at 907. This objection was raised by Congressman Wiggins when he stated that the remedy against the law enforcement agent is not exclusive. This possibility of liability may result in "overly excessive caution." 120 CONG. REC. 1401 (daily ed. Mar. 5, 1974). This shortcoming would be eliminated if H.R. 10439, § 4, 93d Cong. 2d Sess. had been enacted. *Hearings on H.R. 10439 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 13-14 (1974).

¹⁹⁵ 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹⁹⁶ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁹⁷ ALASKA STAT. § 09.65.070 (1962); CAL. GOV'T. CODE §§ 815.2, 818 (1966); HAWAII REV. LAWS § 245A-2 (Supp. 1965); IDAHO CODE ANN. § 41-3505 (1961); IOWA CODE ANN. §§ 25A1-A20 (1967); MINN. STAT. § 466.01-15 (1963); NEV. REV. STAT. § 41.031 (1973); N.H. REV. STAT. ANN. § 412.3 (1968); N.C. GEN. STAT. §§ 143-291, 300.1 (1973); N.D. CENT. CODE § 404307 (1968); WASH.

just to penalize an officer financially for the performance of his tasks. This is particularly true where liability might be imposed for mere negligence or the failure to exercise "reasonable judgment." But this line of reasoning would not hold true where liability is imposed for intentional violations of an individual's rights.²⁰¹ If individual liability does become a part of everyday life, it is possible that public service will be reduced.

The public has an interest in encouraging the right to privacy on one hand and aggressive law enforcement on the other, yet, under the amendment neither is achieved. Privacy will be encouraged only if the rule deters police misconduct, but the amendment does not accomplish this. From the perspective of the officer, if the rules vary from state to state, the rules will be hopelessly complex and confusing, thus serving as a guide to few. Aggressive law enforcement may be discouraged because the remedy against the federal government is not an exclusive remedy, and the officer will remain personally liable. In fact the plaintiff may be expected to sue both the individual police officer and the federal government. Additionally, where action is brought under the Federal Tort Claims Act, the individual plaintiff may use the civil rules of discovery, and since, in many cases, they are broader than the criminal discovery rules, significant delay in any criminal trial of the defendant can be expected. Last, and most importantly, damages may be awarded in only a limited number of cases. Where they are awarded they will probably be so minimal that they will be considered as merely an acceptable cost of law enforcement. The failure of the amendment to allow punitive or exemplary damages precludes its real effectiveness. In sum, the amendment is dangerous if seen as a substitute for the rule; it could be interpreted by law enforcement officers as a signal to ignore court guidelines regarding searches.

VI. THE AMENDMENT AS AN EXPERIMENT IN CONTROL OF POLICE

Both the courts and the administrative agencies should liberally construe the Act as it has been amended. The overall supervision of the

²⁰¹ See ABA STANDARDS RELATING TO THE URBAN POLICE FUNCTION 11 (1974 Draft).

FTCA rests with the Tort Section, Civil Law Division, Department of Justice. It may be that the chief of that section will apply the old adages of "pay now and save later" and "you must spend money to make money." By construing the statute liberally in the questionable areas so as to award damages, the Department of Justice may in the long run save the time and effort of the police, prosecution, and the courts. Even construed narrowly, the amendment provides a monetary remedy for harm to person or property when officers, in good faith, commit one of the listed torts. Broadly construed by both courts and the agencies authorized to pay claims, these amendments can be regarded as a worthwhile experiment in control of the law enforcement structure.²⁰²

The amendment does contain several very good features. Claims are easy to file and can often be filed without the assistance of a lawyer. Most are administratively handled and thus avoid long court delays. All persons injured by unlawful searches and seizures are protected, not just those eventually brought to trial. And if the claim is administratively denied, the trial is in federal court before a judge alone, possibly allowing recovery for even claimants with "dirty hands."

To have an impact on the police at lower levels, however, the Act must be liberally construed. Abuse of process, scope of authority, and the discretionary function exception should all be interpreted so as to allow recovery. Actions should be allowed even where the only damages incurred are to intangible interests such as privacy, mental and emotional equilibrium, and reputation. Violations of federal laws and rules should be considered along with state laws in determining whether a tort has been committed. If the act is so construed, and the agencies and judges are not niggardly with damages,²⁰³ law enforcement structures will be pressured into controlling the police. To save

²⁰² *Id.* at 10. "[Current methods of review and control of police activities] should be continually reevaluated and changed when necessary to achieve both effective control over the exercise of police authority and the effective administration of criminal justice."

²⁰³ Consider the fine example set by the New York Court of Claims, which recently awarded \$14,000 for fright, fear, shock, depression, loss of

money, police administrators can be expected to discipline offenders, and, more importantly, administrators should be motivated to effect organizational changes, formulate needed rules, upgrade training, utilize in-house counsel more extensively, and select officers more carefully.²⁰⁴

As a word of caution one should note that liberal construction does not necessarily mean construction by liberals or by judicial activists. In this case, liberal construction requires only that the amendment be given the effect intended by the Congress. However, the opportunity to experiment with the remedy may be lost because of the emotional and symbolic value given to the rule. Staunch opponents of the rule may seize upon the amendment as a substitute for the exclusionary rule, even though it is a very inadequate substitute. The abolition of the rule, with no tested, effective, established substitute could be a signal to the law enforcement establishment that a return to pre-*Mapp* practices is being encouraged. On the other hand, staunch supporters of the exclusionary rule may react against the amendment as an attack on the rule and all for which it stands. But even they should realize that the rule by itself is not now sufficient.

VII. NEW LEGISLATION

This article examined the assumptions made by the Supreme Court in applying the exclusionary rule to state and federal criminal trials. One of these primary assumptions is that the rule is necessary to deter unlawful police misconduct. A corollary of this justification is that by deterring illegal police misconduct, the right to privacy of all individuals in the United States will be enhanced. However, only one study has concluded that the rule does not deter illegal police misconduct,²⁰⁵ and the conclusion reached during this study may not be supported by its own statistics. Nevertheless, there are very practical reasons why the rule does not deter illegal police misconduct.

consortium of husband and loss of services of husband resulting from an illegal no-knock search. *Herman v. State*, 357 N.Y.S.2d 811 (Ct. of Claims, 1974).

²⁰⁴ See ABA STANDARDS RELATING TO THE URBAN POLICE FUNCTION 7-11 (1974 Draft); Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703 (1974).

²⁰⁵ Spiotto, *supra* note 26.

If the deterrence assumption is erroneous, should the Court limit or abandon the rule even though it is at least partially true that there is no reasonable alternative to the rule? The answer would seem to be no; regardless of the changes in the alternatives since *Mapp*, the Supreme Court would be ill-advised to limit or abolish the exclusionary rule until there is a reasonable alternative that will foster the interests of the public, the police, and the individual whose rights have been violated. Now more than judicial action is required to bring these reasonable alternatives into existence.

Better drafting of Public Law 93-253 would have eliminated some apparent inconsistencies.²⁰⁶ For example, the term "abuse of process" should be eliminated and the term "illegal search and seizure" should be substituted, thus indicating the true intent of the legislature.

Congress could expand on the remedies in the Federal Tort Claims Act by passing an amendment to the Act that would specifically eliminate many of the technical defenses now available to the government in these types of suits. Such an amendment should also provide for substantial liquidated damages,²⁰⁷ attorneys' fees, punitive damages, and should not limit damages to property or personal injury. Future legislation should bar action against the individual officer except when there has been an intentional violation of the fourth amendment for personal reasons not connected with the scope of the officer's employment. On the state level similar legislation should be enacted.²⁰⁸

²⁰⁶ There are other minor problems that should be covered in any new legislation: Does a federal tort claim judgment act as a bar in a later suppression hearing? See 28 U.S.C. § 2676 (1970). Can admissions used in a claims proceeding be later used in a trial? *Simmons v. United States*, 390 U.S. 372 (1968), would seem to indicate no, but the answer is less than settled. Are the wider civil discovery rules applicable at the FTCA proceeding, even though that procedure effectively allows the wider discovery for the criminal case?

²⁰⁷ 120 CONG. REC. 1401 (daily ed. Mar. 5, 1974): "[L]iquidated damages may be necessary for any proper damages."

²⁰⁸ Much also needs to be done at the local level. The municipalities should establish an effective police disciplinary review board. The majority of the board should be composed of civilians appointed by the elected executive officer for a period of 5-15 years. The enabling statute should provide that these individuals may not be removed except for misconduct. The complaint procedure should provide a method whereby complaints may

Unfortunately, rather than correcting the deficiencies in the Act, a bill has been introduced to overrule the Act.²⁰⁹

Damages will not deter improper police action in some situations. Thus, in any case where there has been a patently outrageous violation²¹⁰ of an individual's right to privacy, any evidence obtained should be inadmissible in evidence, thus continuing the existence and application of the exclusionary rule in limited circumstances. Absent such a violation the evidence would be admissible.

If the recommended changes are adopted, the

be filed orally or in writing by the individual injured or by a third party. This complaint will be filed with the board itself who will conduct its own investigation. The board will decide whether to dispose of the matter informally or to conduct public hearings where the parties may be represented by a spokesman. The board should possess subpoena power that will enable it to call witnesses for the public hearing or during the preliminary stage of the investigation. If a finding of a violation of the fourth amendment is reached, the board can take appropriate disciplinary action including dismissing the officer or suspending him from the police force. The interests of the community under this systemic approach would be protected.

²⁰⁹ H.R. 15925, 93d Cong., 2d Sess. (1974).

²¹⁰ Cf. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046-49 (1974). This standard would be similar to that adopted in *Rochin v. California*, 342 U.S. 165, 172 (1952).

interest of the public in convicting the guilty while at the same time protecting the right of privacy will be satisfied. The limitation of the exclusionary rule to outrageous violations of constitutional rights should insure that reliable evidence will not be excluded because of a single inflexible rule and the imposition of governmental liability should be an incentive to prevent future illegal actions. The results will be seen most immediately in police administration; expanded educational programs and reform in recruitment, selection, and police supervision should rapidly occur. If public liability does not result in these changes, it will at least spread the risk of loss where there has been property damage and personal injury so that no individual will face financial ruin. Relieving the police officer of liability will ensure effective law enforcement and avoid any chilling inhibitions on public service.

If these changes are made in the Federal Tort Claims Act, a viable alternative to the exclusionary rule will be created. The existence of this alternative will enable us to eliminate much police conduct which is unlawful while at the same time not interfering with the overall effectiveness of the criminal justice system. The constable will not blunder, nor will the criminal go free.