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The Exclusionary Rule—The Illusion vs. the Reality

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THE EXCLUSIONARY RULE—THE ILLUSION VS. THE REALITY

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I. INTRODUCTION[1]

It is with a growing sense of frustration that I have watched the long and continuing debate over the fourth amendment exclusionary rule. It has struck me many times that the doctrinaire assertions on both sides of this controversy frequently bear very little relationship to the reality I saw first as an assistant district attorney and later as director of a legal research center dealing with questions of criminal law and procedure on a day-to-day basis. It is this perceived reality which has largely informed my judgment on the exclusionary rule, and which I hope to be able to convey in this essay.

What I have seen is, I believe, not good on the whole; it is bad, so bad that we ought to abandon totally the *Mapp v. Ohio* exclusionary rule. Thus, I am prepared to go even further than the Burger Court recently did in the *Leon* and *Sheppard* cases.[2] It has not been easy for a person who is opposed to virtually everything that Orrin Hatch and Strom Thurmond have done in other contexts to reach this conclusion, one that is no doubt contrary to the prevailing orthodoxy amongst those of us who view ourselves as "liberals."

Before discussing the reasons for this view, I would note briefly that the first step in reaching this position is one that I have been long ready to take. That is, I have long believed that the

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The views expressed here are in no way those of the MONTCLIRC research program and do not, I believe, affect my ability to accurately provide case law helpful to either side on search and seizure law.

1. This article is a revised version of some "Prepared Remarks" submitted to accompany testimony given before the Montana House Judiciary Committee on February 21, 1983, in regard to H.B. 816, which would have adopted at least portions of the general approach recommended in this article. The bill did not pass, primarily because the Legislature wanted to await the outcome of Illinois v. Gates, 462 U.S. 213 (1983).

2. United States v. Leon, 104 S. Ct. 3405 (1984); Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984) (holding the exclusionary rule inapplicable to evidence obtained by officers acting in "reasonable good faith" reliance upon a search warrant issued by a detached and neutral magistrate).

exclusionary rule is not *constitutionally* required.[3] Because my main purpose is not to discuss the constitutional question, leaving that to the Court, I would merely note that the basic reason for my position on the constitutional question is quite simple: something (here, the exclusionary rule) that is not even desirable as a matter of simple legislative *policy*, can not possibly become a necessity of "due process." Of course, it will be argued that it is not a question of what we *want* to do, but what the Constitution *commands*. While this argument would be compelling if the fourth amendment explicitly said, "P.S.: One remedy for violation of the Amendment is an exclusionary rule," such is not the case, and no amount of circumlocution or pretending to follow the dictates of the fourth amendment can hide this fact. Since the exclusionary rule has been

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3. At least absent the rare case where the police conduct "shocks the conscience." *See* Rochin v. California, 342 U.S. 165 (1952) (the famous "stomach pump" case).

Although I would not limit the due process clause to its arguable historical meaning (merely a right to "due tryal") and while I also concede that it can be interpreted as evidencing more than simply a concern for "reliability" in the truth-determining process at trial, I do not believe that acceptance of the viability of the *Rochin* principle—that even reliable confessions may be inadmissible where the methods used to obtain them seriously offend the community's sense of decency—necessarily requires acceptance of the *Mapp* rule in all its full-blown hypertechnical glory. For while acceptance of a "dignitary-rights" approach to interpreting the due process clause inevitably puts one on the proverbial "slippery slope," I am generally more comfortable standing less near the "legislative-policymaking" end of that slope and nearer the classic Cardozo-Frankfurter "judicial deference" side. If I did want to do a little "legislating," I would not hide behind "due process" but would use the supervisory power approach.

With this background in mind, and looking more closely at cases such as *Rochin*, is it indeed true, as Yale Kamisar has argued, that there is no basis for distinguishing the *Rochin*-type confession cases from the *Mapp* fourth amendment exclusionary rule? *See* Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 77-78 (1978). I submit that there is. For if the meaning of due process in its "dignitary-rights" aspect is inevitably determined by a gut-reaction kind of process into which a wide variety of policy considerations enter, then practical policy reasons for distinguishing the search and seizure situation from the custodial interrogation context might justify different due process requirements. Thus, if there is typically a greater factual "need" for the exclusionary rule in one context than in the other, then maybe this factual difference is sufficient to make exclusion a necessity of due process in one case and not in the other.

Finally then, I submit that there is indeed a greater need for exclusion in the *Rochin*-type confession case than in the typical search and seizure case due to: (1) the distinct likelihood that the "decency/fairness" component of the voluntariness standard helps to assure satisfaction of the "reliability" element and (2) a generally greater need for strong restraints in what is usually a personal and "coercive" confrontation between the forces of law enforcement and the individual. This factual difference, for me, makes an exclusionary rule in the *Rochin* kind of case at least more desirable as a simple matter of policy than in the typical search-and-seizure case. Whether this difference is one of constitutional dimension is another matter, and an issue on which reasonable judges could well differ. But the point remains that there are substantial policy reasons for backing a concern for "dignitary rights" in the custodial interrogation context with an exclusionary rule, while not doing so in the typical search-and-seizure context.

only relatively recently "discovered" lurking within the confines of the fourth amendment, the inevitable "anti-majoritarian" argument trotted out about how the very purpose of the Bill of Rights is to protect helpless minorities against overbearing, "mad dog," law-and-order majorities wears rather thin here.[4]

It seems to be forgotten by some courts and commentators that the only way the federal exclusionary rule can be applicable to the states is if it is, indeed, a necessity of due process. Although the Warren Court did have a disturbing tendency to adopt what I have occasionally called a "Hey, that's a neat idea" concept of due process,[5] I doubt very much that the Burger Court will be inclined to continue this kind of judicial activism or, alternatively, will simply decide that this is not such a "neat idea" after all.[6]

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4. The early origins of the exclusionary rule, in cases involving the question of the privacy of personal papers (and the right to their return) and mainly based upon the fifth amendment, are briefly discussed in Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1363-64 (1981). Certainly, this unique historical context goes a long way toward explaining how the unusual remedy of excluding concededly reliable evidence ever could have been dreamed up.

The more immediate origins of the exclusionary rule, as applied to the states, are very thoughtfully and entertainingly detailed in F. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW, 37-49, 130-32 (1970). Graham makes three particularly interesting observations about *Mapp v. Ohio*. First, he notes that the author of the opinion in *Mapp*, Justice Clark, as a 23-year-old lawyer handling his first criminal case, had unsuccessfully tried to free the son of his family's Negro maid by arguing for an exclusionary rule. Second, he argues that the leading pre-*Mapp* decision, *Weeks v. United States*, 232 U.S. 383 (1914), had "lulled [two generations of judges] by the feeling that no doctrine that received the unanimous blessing of the Supreme Court of 1914 could be dangerously generous to defendants," the "fallacy of that assumption" being that the Court in *Weeks* "fully appreciated what it was undertaking; for while its ruling was deceptively clear-cut, the Court's reason for making it was doctrinaire [based upon at least some doctrine concerning the fifth amendment, later repudiated, *see* Schroeder, 69 GEO. L.J. at 1363 n.10] and unsupported by an analysis of where it would eventually lead." GRAHAM, *supra*, at 130. Third, he also notes the impact of the civil rights movement, law enforcement at this time being viewed as part of "the problem," especially in the South. *Id.* at 12-13.

5. I.e., if some rule of law being urged upon the Court as being constitutionally mandated struck a majority of the Court as being simply a "neat idea," then they would say sure, it must be required by that good old fudge-factor clause, the "due process" clause.

6. Those who object to the use of the term "judicial activism," at least in this instance, ought to reflect upon the fact that the Court in *Mapp* overruled prior law (*Wolf v. Colorado*, 338 U.S. 25 (1949)) despite the fact that defense counsel, hoping instead to win on another question, had not even raised the issue of the continuing validity of *Wolf*. Thus, the prosecution never had any real opportunity to brief or argue the question of the exclusionary rule. The majority noted, somewhat disingenuously, that counsel "did not insist that *Wolf* be overruled," although one amicus had raised the question. *See* Mapp v. Ohio, 367 U.S. 643, 646 n.3 (1961). The dissent more accurately noted that the question was not in petitioner's jurisdictional statement nor was it briefed or argued; "[i]ndeed when pressed by questioning from the bench whether he [defense counsel] was not in fact urging us to overrule *Wolf*, counsel expressly disavowed any such purpose"; the amicus' "request" for the Court to "reconsider" *Wolf* appeared in one lone sentence, without statement of reasons. *See id.* at 673-75.

Thus, the truly difficult question, which is already before us after *Leon* and *Sheppard*, is what ought the states to do in this area as a matter of policy, either by means of their legislative power or through their courts' interpretation of their own state constitutions or exercise of their supervisory power.[7] And this policy issue brings us to the fundamental question of whether the *Mapp* exclusionary rule is a good idea, assessed on the basis of plain common sense.

II. Advantages of the Exclusionary Rule

A. *The Utilitarian Deterrence Rationale*

The central argument for the exclusionary rule is that it is designed to protect the fourth amendment rights of *all* of us by educating the police and deterring them from illegal conduct. And a strong case can be made that the United States, unlike a country such as Great Britain, which is more homogeneous in population and has a very well-trained police force, has more need for an exclusionary rule in order to deter improper police conduct (especially in regard to the harassment of minorities and "undesirables").

Likewise, there is no doubt that the exclusionary rule has an important "tone-setting" psychological effect. Total abolition of the exclusionary rule, unless very carefully explained, might give the police the erroneous impression that the fourth amendment has been abolished, and that they are now free to do as they like.[8]

Finally, the argument also has been made that the exclusionary rule permits the fine-tuned development of fourth amendment law. This development is something that a "good faith" exception arguably would not do, since a close question of fourth amendment law need not be addressed where the police conduct satisfied the reasonable good faith standard.[9]

As to this essential point, then, it does seem to me that despite some imperfections, the exclusionary rule has proven to have a significant impact on police search-and-seizure conduct. Most po-

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7. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982). *See also* McCormick on Evidence § 155 (2d ed. 1972) (example of supervisory power rule).

8. Of course, as noted below, this would not be true, for a wide variety of civil remedies now exist.

9. But see the discussion *infra* as to how the exclusionary rule may, instead, be actually corrupting the development of fourth amendment law. *See also Leon*, 104 S. Ct. at 3422 n.26.

lice are schooled in the law of search and seizure, and not inconsiderable efforts are made to follow the dictates of the fourth amendment in order to avoid suppression of evidence, all of which apparently did not occur, at least to this extent, prior to *Mapp v. Ohio*. And while the abolition of the exclusionary rule would not make *me* feel any less secure in my privacy rights, there would be some remaining concern about the lot of the typical minority or political undesirable. In short, although I do not think we would see a return to pre-1961 standards of police behavior if *Mapp* were reversed (and we have *Mapp* to thank for hastening the reform in this area), it remains true, I think, that *Mapp* is to date our only proven deterrent. Thus, it can be contended that we should not abandon a proven system for protecting fourth amendment rights until equally effective alternative remedies are in place.

B. *The "Judicial Integrity" Argument*

The second argument for *Mapp* is the so-called "imperative of judicial integrity"[10] claim, something to the effect that courts should not lend their support to or "sanction" illegal police activity by admitting into evidence the results of illegal police conduct. Although this argument has a certain surface plausability, it is difficult to know what to make of it, especially in view of the long string of United States Supreme Court decisions (some from the Warren Court era) which have given the argument short shrift. In these decisions, the Court has admitted *Mapp*-tainted evidence for impeachment purposes, or in grand jury proceedings, or in numerous other noncriminal-trial contexts, where the need for the evidence was found to outweigh the minimal incremental deterrent value of applying the exclusionary rule.[11] All of this suggests that the "judicial integrity" argument is something of a "make-weight" argument. Certainly, it has not been applied to totally preclude trial of a person illegally arrested.[12] So one is left to wonder if, in the last analysis, the argument consists of anything more than the substitution of high-sounding phrases for a careful, common-sense analysis of the consequences of one course of action versus another.

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

11. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 664, 667-72 (1970).

12. *See, e.g.*, United States v. Crews, 445 U.S. 463 (1980); Frisbie v. Collins, 342 U.S. 519 (1952).

III. DISADVANTAGES OF THE EXCLUSIONARY RULE

A. *The Exclusionary Rule Frees the Guilty*

The first and most obvious disadvantage of the exclusionary rule is that it frees the guilty. Several points can be made, however, which may ameliorate this disadvantage. First, some studies indicate that only a very small percentage of defendants are actually freed by the exclusionary rule.[13] Second, a more subtle point is that maybe it is not so terrible that some people are freed, given the typical "overreach" of much of our substantive criminal law and, more importantly, the state of our prison system. It may be that an individual who is unexpectedly freed, due to the operation of the exclusionary rule, has a better chance of "rehabilitation" out of prison than he would in prison. It may be the first real break that he ever got in his entire life, which in itself could have a beneficial impact.

I make this comment to suggest what is perhaps a deeper point about the exclusionary rule and an explanation of how such a seemingly paradoxical rule could have been tolerated at all. At least part of the reason, in my opinion, that we adopted such an unusual "cut-off-your-nose-to-spite-your-face" kind of rule is that we are not really as serious about the importance of the end goals of the criminal justice system (for example, rehabilitation or incapacitation) as we sometimes say we are. For if we were truly serious about the importance of these end goals, would we deprive ourselves of information that is clearly relevant to deciding whether an individual should be subjected to the various sentencing dispositions? No, we would not. If we were trying to decide the results of some truly important matter, such as a presidential election, would we deprive ourselves of information relevant to making that critical decision merely because a candidate had violated a technical rule? No, we would not. Why the difference when it comes to evidence relevant to criminal cases? I think that at least part of the answer is our secret suspicion that because of the generally dismal state of our so-called "correctional" system, we are not actually able to effectuate the goals of our criminal justice system.

This, however, is a poor excuse for a rule of law. If we feel

13. *See* Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Research on "Lost" Arrests*, 1983 AM. B. FOUND. RESEARCH J. 611. *But see* National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* (1982) (larger numbers of cases dropped in screening or plea bargaining due to operation of the exclusionary rule).

queasy about the state of our prisons (and we should), the answer is not to sporadically release a few murderers and rapists into our midst, but to do something positive about this concern, by making our penitentiaries places where at least some pretense of rehabilitation occurs.[14] In short, we should take more seriously the importance of the stated goals of our criminal justice system (assuming we can ever agree on what precisely they are, and their relative priority) rather than deprive the truth-determining process in criminal cases of relevant information.

Before leaving the first point, it may be noted that a not insignificant consequence of freeing the guilty is that some of the individuals who are freed because of the exclusionary rule are going to commit serious crimes, including *killing people*. Thus, unless we are either naive or totally lacking in intelligence, there should be no doubt in any of our minds but that numerous lives throughout this country have been forfeited because of the operation of the fourth amendment exclusionary rule. And who can put a value on a human life?

B. *The Exclusionary Rule Undermines Our Sense of Justice*

Another disadvantage of the exclusionary rule is that it does nothing for the innocent victim of an illegal search. It is no rebuttal, as Professor LaFave attempts to do, to counter that "this argument misperceives the function of the exclusionary rule."[15] The point remains that the exclusionary rule does not provide any direct relief to those innocent persons aggrieved by unreasonable searches and seizures. This departure from the normal remedial operation of the law is only one small aspect of an even larger problem, however.

One cannot escape the conclusion that the exclusionary rule violates our sense of justice. Many years ago, as a law student talking to average citizens about the exclusionary rule, it was obvious to me that despite all the efforts made to justify it, the general public just does not believe in the exclusionary rule. Although the law should not depend upon what the "general masses" may "feel," it does seem that the public is on to something here. When the victim in a rape case sees the person who raped her walk free because of the operation of the exclusionary rule, it violates the victim's sense of justice. Quite simply, two wrongs do not make a

14. Indeed, if we were truly serious about the fourth amendment, we would do something that would really get the attention of the police, for example civilian review boards. *See infra* text accompanying notes 32-35.

15. 1 W. LAFAVE, SEARCH AND SEIZURE § 1.2 at 23 (1978).

right. The public's sense of injustice in such cases may lead (and, according to anecdotal stories it has led) to private retribution. If the criminal justice system is seen as ineffective in achieving its major goals, then we are in danger of encouraging vigilante justice and a disregard for law.[16]

C. *The Exclusionary Rule Occasions Substantial Monetary Costs and Court Delays*

Perhaps a much more important disadvantage is the monetary cost occasioned by the exclusionary rule. Incredible amounts of litigation are generated by the exclusionary rule, from pretrial suppression motions to appeals and state and federal collateral attacks. My own experience as an assistant district attorney in Philadelphia in the early 1970's was that upwards of 70% of our time was spent litigating issues that had absolutely nothing to do with the question of guilt or innocence, with perhaps 50% of our total time being spent on nothing but fourth amendment exclusionary rule questions. Our office alone consisted of 160 attorneys, with double that number in support staff. With the additional cost of defense counsel, judges, courtrooms, and their staff, the cost each year is enormous. To those who make the inevitable response that criminal "justice" (of course, begging the question as to what is "justice") is priceless and that the cost should be irrelevant, it must be said that this attitude simply overlooks the fact that there are only two sources of such funds: either new taxes (unlikely in the extreme) or fewer government expenditures for things such as hospitals, schools, and prisons.

Likewise, the exclusionary rule is obviously a substantial contributor to one of the most significant problems in our legal system today, that of court delay. The handling of fourth amendment exclusionary rule questions in trial and appellate courts obviously crowds other cases from the dockets. For instance, every year the United States Supreme Court feels obliged to decide another dozen 5-4 decisions supposedly trying to clarify the law in this difficult area, often creating still more litigation as to the meaning of the most recent cases.

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16. *See, e.g.*, Missoulian, March 31, 1985, at 10 ("Goetz to be Entangled in Legal System He Hates . . . . Subway gunman Bernhard Goetz probably will spend the rest of 1985 enmeshed in a court system that he says he despises because it lets 'criminals get out of jail before their victims get out of the hospital.' "); NEWSWEEK, February 4, 1985, at 23 ("A Break for New York's 'Vigilante' ").

D. *The Exclusionary Rule Undermines the Integrity of Both the Police and the Judiciary*

It is by now well known that there are substantial questions as to the efficacy of the exclusionary rule in controlling some areas of police activity. While the occasional inefficacy of the exclusionary rule is not by itself an excuse for abolishing it, it is nevertheless a distinct disadvantage of the way it operates in practice. Its inefficacy begins at the level of decision making by the police. For instance, it is doubtful that the police understand what they did wrong or learn very much when five years after the action in question, after state and federal lower court judges have sustained the validity of their actions, a badly divided Supreme Court concludes that their search warrant was erroneous.[17]

The result of such frustration is that the exclusionary rule now leads to police perjury. For instance, there are dozens of decisions prior to the famous *Miranda* decision (to use an example from another context) in which courts were faced with police testimony that they actually gave the detailed four-part *Miranda* warning to suspects even before the *Miranda* decision came down.[18] Studies in the fourth amendment context also point to the prevalence of police perjury when faced with the consequences of exclusion.[19] Police perjury, in turn, may affect future incidents of crime. What happens to the rehabilitation of the defendant who believes, rightly or wrongly, that the only reason he is in jail is because a police officer lied at his suppression hearing?

I submit that the exclusionary rule even may account in part for some instances of police corruption. For if the police feel that defendants can literally get away with murder (and they are right as to this part of it), then they may also tend to feel why should

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17. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969). One wag has asked how the prosecution would feel if they had had Justice Fortas, who dissented, sign the search warrant at issue in *Spinelli*.

18. *See* Evans v. Swenson, 455 F.2d 291 (8th Cir. 1972) (held that the officer in May of 1968 had given the full *Miranda* warnings "in substance"); Sheer v. United States, 414 F.2d 122 (5th Cir. 1969) (held, without quoting the warnings given, that the testimony supported the conclusion that the defendant had received "substantially" the same warnings as later required by *Miranda*); State v. Travis, 49 N.J. 428, 431, 231 A.2d 205, 207 (1967) (another pre-*Miranda* confession case upholding the trial court's finding that the prosecution witnesses' testimony that they had given *Miranda* warnings was "vague, inconsistent and lacked candor").

19. *See* Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405, 408-11; Oaks, *supra* note 11, at 739-42; Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839 (1974). *See also* F. GRAHAM, *supra* note 4, at 136-38 (noting dramatic increase in "dropsy" cases after *Mapp*).

they not get away with a little petty larceny or other minor infraction.

The exclusionary rule has also had a deleterious impact upon the judiciary. As can be documented in part by dozens of Supreme Court decisions and thousands of lower court decisions, the exclusionary rule tends to make even our courts act a bit "dishonestly," stretching the law here, twisting it there, and doing whatever else is necessary in an effort to save a case. To find evidence for this point, one only need look at the hundreds of law review articles on much of the Court's handiwork in the area of search and seizure, each commentator vying with the other for the highest degree of invective and sarcasm.[20] Even a Supreme Court Justice, concurring in a recent decision, came close to admitting that there is an inevitable pressure on the courts to dilute fourth amendment rights:

> Having reached this decision on the facts of this case, I recognize—as the dissenting opinions find it easy to proclaim—that the law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided. Much of this difficulty comes from the necessity of applying the general command of the fourth amendment to ever-varying facts; more may stem from the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder.[21]

E. *The Exclusionry Rule Adversely Affects the Rights of the Average Defendant*

It is further submitted (admittedly without any evidentiary basis other than a "hunch") that because police have a markedly negative attitude toward the fourth amendment exclusionary rule, the right of the average citizen (or even the average criminal) to be

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20. One commentator's articles alone convey a sense of this popular academic sport. *See* LaFave, *Probable Cause From Informants: The Effect of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1; LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire,"* 8 CRIM. L. BUL. 9 (1972); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255.

Recent qualified entries in this contest include the following: Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Comment, *Searching for the Fourth Amendment*, 44 BRIDGEPORT L. REV. 285 (1983).

21. Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring) (emphasis added).

free from truly serious police misconduct is less safeguarded under our current regime than it would be without an exclusionary rule. The reason for this is police frustration arising out of cases in which, for example, through sheer inadvertence or inability to anticipate unusual case law, a conviction is thrown out. It is doubtful in such cases that the police learn anything unless, unfortunately, it is to do the kind of thing that led to the civil rights case of *United States v. Delerme*,[22] in which an officer had chased a traffic offender through town, and upon apprehending him, summarily "punished" him with a beating.

There is another way in which the exclusionary rule may be adversely affecting the rights of the accused. Since *Mapp v. Ohio* was decided, we have seen a tremendous shift in emphasis in criminal litigation from what should be the central questions of guilt or innocence and proper sentencing, to the "game playing" associated with fourth amendment litigation.[23] This is very unfortunate, for our court system has quite enough trouble in providing a fair trial without having an additional "encumbrance" diverting attention from these critical functions. We ought to do everything we possibly can, even at substantial cost, to provide an accused a fair trial, providing all the constitutional and other procedural safeguards which help assure the integrity of the truth-determining process. But to spend large quantities of money and vast amounts of time on issues having nothing to do with guilt or innocence is not at all wise, at least in this precise context.[24]

Moreover, in addition to this deflection of the criminal justice system away from what ought to be its central purposes, it seems altogether likely that the operation of the exclusionary rule, with the concomitant public outrage, has tended to create a situation in which judicial or legislative measures that might help to provide a truly fairer trial are less likely to be adopted. Further, at the sentencing stage, I wonder whether some of the general hostility towards the exclusionary rule, which easily becomes transposed into the feeling that the courts are "too soft" on criminals, does not contribute heavily to the lengthy sentences for which American courts are so notorious. The upshot is that when one of the unfortunates who does not get off because of the exclusionary rule comes up for sentencing, the public sentiment is to "get him" and

22. 457 F.2d 156 (3d Cir. 1972).

23. *See* Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule*, 95 F.R.D. 211, 222 (1983).

24. *See supra* note 3 (possibly a different balance must be drawn in the context of confessions).

"get him *good*." Query also whether some of the current movement toward mandatory sentencing, especially some of the more extreme and unreasonable forms of it, has not received a large part of its impetus from hostility to the exclusionary rule. In short, if one looks hard at the reality of how the exclusionary rule operates in practice, it seems all too likely that it has had a very detrimental impact upon the actual rights of the average defendant.[25]

F. *Summary*

Weighing and balancing the advantages of our current exclusionary rule regime against the disadvantages, I for one find that the latter outweigh the former. Other people might put other items into the balance, or might weigh the same imponderables differently.[26] But reaching the fundamental conclusion above, I am forced to say that as a simple matter of policy, I do not favor the *Mapp* approach, regardless of what is done with new alternatives. Other alternatives, however, do exist, and they have a significant impact on the ultimate question of what we should do to protect fourth amendment rights, without needlessly imperilling other worthwhile goals.

IV. Alternatives to *Mapp v. Ohio*

A. *Modifications to the Exclusionary Rule*

We are, of course, already on our way as a matter of federal *constitutional* law to the "reasonable good faith" rule or "exception," with or without warrants. Although this approach is clearly preferable to our present one, it has the drawback of not eliminating entirely the wasteful suppression hearings, concomitant appel-

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25. But since, when push comes to shove, we basically seem to not "give a darn" about those unfortunate souls who drift through the darkened corridors of the criminal justice system, the armchair liberals can go on comfortably repeating the hallowed shibboleths surrounding the fourth amendment exclusionary rule.

26. Indeed, I would "welcome a dialogue," as they say, on whether this balancing of the pros and cons (again, on the simple common sense question of whether *Mapp* should be adopted as a matter of legislative *policy*) was adequate and fairly conducted. I am conscious of the fact that to some extent I have written this piece in an effort to get some things off my chest, and have been occasionally provocative and/or emotional, perhaps overstating points a bit. But maybe this will further the dialogue.

I might even go further here, and state that, given the closeness (in my mind) of the *policy* question, I would not object to varying judgments being made by state courts on "the" exclusionary rule (or, better yet, a variety of exclusionary rules) by way of experimentation. Then it finally would become possible to make some reasonably informed judgments on which system works best. In some states, such as Montana, where a higher premium is placed on personal privacy than on security and other concerns, a "balance" might be drawn differently from one drawn in high crime jurisdictions.

late litigation, and at least some of the other disadvantages of our current system. It is no doubt true that after several years of almost invariably unsuccessful efforts to suppress evidence under this test, fewer and fewer hearings would be held. And contrary to frequent assertions that the "reasonable good faith" test would simply entail an additional burdensome level of inquiry thereby lengthening suppression hearings, common sense suggests that on balance the hearings will be fewer and shorter, no hearings being required where it is clear that good faith existed, despite an arguably hard question under current law. In sum, although it will no doubt be claimed (and not without some justification) that the "reasonable good faith" approach is nothing more than a hollow pretense, this alternative, while imperfect, is still better than what we now have.

One could take the additional step of making even this narrowed exclusionary rule applicable only if it were in fact true, in a given jurisdiction, that there were no effective alternatives such as civilian police commissions or municipal liability for vindicating fourth amendment rights. For despite the Court's protests, it should be reasonably clear to any legal realist that an essential premise of *Mapp* was the unavailability of such alternatives.[27] Hence, where there are viable alternatives, no exclusionary rule need exist. This kind of conditionally available rule would have the advantage of being an incentive for jurisdictions to create effective alternative remedies, instead of relying upon the unhappy remedy of excluding perfectly reliable evidence. This approach would thus eliminate the current "catch-22" situation where efforts to create workable civil remedies are impeded by the existence of the exclusionary rule and, at the same time, efforts to eliminate the exclusionary rule are hindered by the lack of fully adequate alternative remedies.

Another variant to the above proposals is to combine (1) an initial assessment (as outlined above) as to whether exclusion is indeed required in view of the availability of other remedies with (2) a balancing of the *need for exclusion* (i.e., the need for deterrence, including an assessment of the seriousness of the violation of fourth amendment rights) against *the need for the evidence* (i.e.,

27. *Compare* Mapp v. Ohio, 367 U.S. 643, 651, 652 (1961) ("factual considerations" supposedly "not basically relevant" to question of existence of the exclusionary rule; but the Court then engages in a lengthy effort to demonstrate factually the "obvious futility of relegating the Fourth Amendment to the protection of other remedies") *with* Linkletter v. Walker, 381 U.S. 618, 634, 636 (1965) (candid recognition that factual premises in *Mapp* as to "worthless and futile" nature of alternative remedies were major basis for conclusion that the exclusionary rule "was the only effective deterrent to lawless police action").

the seriousness of the charge). This latter weighing analysis is one in which the Court has already engaged on many occasions when assessing the scope of the *Mapp* rule. Why could not this same type of inquiry be utilized in regard to the exclusionary rule itself? It has the advantage of addressing more directly the underlying concerns involved when dealing with the issue of exclusion of evidence.

It would no doubt be argued that such a discretionary rule would be used rarely to exclude evidence. But exclusion should be a relatively extraordinary remedy, not one utilized needlessly or routinely, and only in exceptional cases (1) where necessary (the *Mapp* premise) and (2) where the need for exclusion outweighs the reasons for nonexclusion. Thus, in practice, you likely would see exclusion primarily in minor drug cases and the like, in which the police misconduct was flagrant, i.e., it involved "bad faith."[28]

B. *Civil Suits*

Unlike when the exclusionary rule was first adopted, there now exists a number of newly effective or newly created civil remedies. At the federal level there are civil rights actions under 42 U.S.C. § 1983 (available against state police officers), remedies under the Federal Torts Claims Act,[29] and an action under a new Court-created remedy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[30] Further, in some states, a person whose fourth amendment rights have been violated may have a viable action against the state.[31] It seems to me that to some degree these remedies have been unduly neglected because the existence of the exclusionary rule has tended to shift the attention of lawyers away from such civil suits. They ought to be used more extensively.

It is true that because the defendant is less likely to be believed (unless he has other witnesses) and because of the relatively small financial resources of most law enforcement officers, the possibility of a civil law suit against an individual officer is not an

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28. That such a revised exclusionary rule would be severely limited in scope is not troubling to me, of course, since I favor its total abolition. It may be noted, however, that even under *Mapp*, due to the extent to which police perjure themselves and courts bend over backwards to avoid exclusion of evidence, we ended up with exclusion of evidence in pretty much the same limited category of cases, i.e., minor drug cases in which the police misconduct was blatant.

29. 28 U.S.C. §§ 2671-80 (1982).

30. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *See* Schroeder, *supra* note 4, at 1386-92.

31. *See* Schroeder, *supra* note 4, at 1386, 1390.

effective remedy by itself. At least a partial answer to this difficulty, however, would be to create municipal liability. Providing a financial incentive for lawsuits to protect civil rights, it would also put pressure on local officials to effectively regulate their police departments.

This is not the place for a detailed treatment of a proposal for municipal liability, but a few basic points may be made. First, recovery for both mental distress and punitive damages should be permitted, albeit with some reasonable maximums on each. For if recovery were limited to physical damages, there would almost never be any recovery, and hence no incentive for a lawsuit. On the other hand, damages arising solely out of the fact that a person committed a crime, and that society responded appropriately with arrest and incarceration, should not be compensated. Such injuries are properly attributed to the criminal conduct itself and not to any investigative misconduct by the police.

Finally, thought should be given to the standard of liability that municipalities should have. Recovery ought not to be permitted for every minor mistake in filling out a search warrant, but should be allowed only for "bad faith" or, perhaps, "reckless" violations, the kind of harassing, willful misconduct that we really want most to control. Lesser civil rights violations should be left to existing civil remedies.

C. *Police/Civilian Disciplinary Commissions and Related Control Mechanisms*

Fourth amendment and other civil rights violations could also be deterred through a variety of mechanisms which more directly control police behavior, such as civilian (or mixed composition) review boards and internal police investigative procedures. What is desired is to make any such administrative bodies effective in safeguarding civil rights while at the same time providing procedural safeguards to insure that the administrative bodies do not become so oppressive and intrusive that proper law enforcement is hampered and persons actually become afraid to be police officers. Although such control mechanisms appear to have been largely ineffective to date,[32] it seems likely that in the long run some form of local civilian disciplinary board will be one of the most effective ways to protect fourth amendment rights. Again, if we are, as we

32. *See, e.g.*, Littlejohn, *The Civilian Police Commission: A Deterrent of Police Misconduct*, 59 U. DET. J. URB. L. 5 (1981). *But see* Wilkey, *supra* note 23 (existence of exclusionary rule has deterred creation of various police disciplinary measures).

say we are, truly serious about securing fourth amendment rights against police misconduct, it makes sense to do something direct and affirmative about that concern. Lawyers in particular, as problem solvers, ought to be able to devise a system which achieves the kind of balance just described.

Without attempting a detailed description of what a good police disciplinary board ought to look like,[33] a rough outline of one approach can be set forth. Created by state legislation, local civilian review boards should exist in all cities over a certain size. The boards should meet certain guidelines and be approved by the state attorney general as satisfying those guidelines. The guidelines would assure minimum criteria for an effective and fair police disciplinary process, while allowing sufficient leeway for local authorities to engage in potentially valuable experimentation with varying procedures.[34] The following guidelines come most readily to mind.

Complaint forms should be readily available in police stations, in the offices of city and county prosecutors, and in the office of the local police disciplinary board. Also, some mechanism should exist to assure that these completed forms do in fact reach the chief or responsible officers in each of these locations.

A process to screen and investigate complaints should be provided. The process should screen out clearly frivolous complaints, with appeal to the full board. Further, since the lack of investigative powers has been the downfall of many past civilian review boards, these boards also should have the power to ask the local prosecutor to issue a subpoena, a refusal being appealable.

The board itself should be an objective and impartial tribunal, with broad representation of various viewpoints. For example, it could include a criminologist, a public defender, and a prosecutor. Further, it would be appropriate to have a representative of the police as a nonvoting member. His nonvoting status would avoid placing him in an embarrassing position; but his presence on the board could provide invaluable expertise as to the nature of police work.

The hearing itself should have several features. First, there should be a full opportunity for the complainant to present evidence. After a decision has been rendered, there should be disclos-

33. Indeed, one should probably *not* do so, since it is preferable in many ways to let different communities develop their own solutions, any differences serving as valuable experimentation.

34. A system of "police commissions" has been in place in Montana since 1907 and might serve as a useful system to study. *See* MONT. CODE ANN. §§ 7-32-4151 to -4164 (1983). One sees periodic evidence that the system is being used to some extent. *See, e.g.*, Missoulian, Feb. 6, 1985, p. 21 ("Ronan Officers Disciplined for Misconduct").

ure of the outcome to the complainant, with findings and reasons.[35] Second, there should be full due process safeguards for the person against whom the complaint is made. There should be recordings of the proceedings, if only by tape recorder, and the proceedings should be reviewable by a court of record only on the record, not *de novo*. Alternatively, or perhaps in addition, provision could be made for appeal to a statewide review board. Such a statewide board also would be particularly important for insuring review of police actions in communities too small to adequately staff a local board.

The ultimate disposition (or recommendation to either the police chief or the mayor) should be within the discretion of the board, depending on the seriousness of the infraction and any record of prior infractions. The dispositions available should no doubt range from a mere reprimand or a "demerit" for minor infractions through temporary suspension, delay in promotion, or demotion, to dismissal for the most serious infractions. Finally, an officer's reasonable good faith belief that he was acting in accordance with the law should be a defense in this kind of disciplinary proceeding.

V. CONCLUSION

The question is not whether to abolish the fourth amendment, but how to secure most effectively this fundamental civil right without unnecessarily harmful consequences. No other country on earth uses an approach that is on its face as absurd as the *Mapp v. Ohio* exclusionary rule. Furthermore, a close examination of the hard realities of this regime demonstrates that we would be better off without it, and better still with other remedies which more directly attack the problem. This is not to say that any of these other remedies are perfect. (Nothing in life seems to be.) There are problems and costs associated with each, but they are far less than those associated with the *Mapp* approach.

35. Although this could be difficult with a multimember board, it probably can be done and would help insure fairness to the parties, as well as provide consistency by developing a kind of "common law" of proper police conduct.