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Commentary on Baldwin

Ronald L. Akers

COMMENTARY ON BALDWIN

*Ronald L. Akers**

I want to begin with high praise for Professor Baldwin's article. He has done a superb job of reviewing the cases, judicial reasoning, legal doctrine, and underlying rationale for the exclusionary rule. He has shown clearly the historical evolution of the rule, especially since *Mapp*, decided in 1961. I found the article highly informative even though I am familiar with the social science literature and some of the legal literature on the exclusionary rule. Furthermore, I agree with Professor Baldwin's fervent support for the exclusionary rule and found little in the article from which to dissent. I do differ in some areas, however, as will be obvious from my remarks. Although I am conversant with the legal doctrine and issues surrounding the exclusionary rule, I am not a legal scholar. Therefore, I shall direct my responses primarily from the perspective of a social scientist who has researched the exclusionary rule and its impact on police behavior and support for fourth amendment norms in the community.

I agree wholeheartedly that the exclusionary rule has become the backbone of support for the fourth amendment to the United States Constitution, although historically it may have developed out of the fifth amendment. Professor Baldwin makes this point in the beginning and develops it nicely throughout the paper. Indeed, he argues that the rule has become fundamental to the fourth amendment. The rule is not just a convenient procedure, but is implicit in the fourth amendment itself and has become almost synonymous with it.

I think we need to be careful, however, about how closely the exclusionary rule becomes identified as inseparable from the fourth amendment. I subscribe to the view that the rule is separate from, although closely allied with, the fourth amendment. Professor Baldwin states that his purpose is not to plead for a dying rule, but to argue for a proper burial. If the fourth amendment is nothing without the rule, does this mean we need to bury the fourth amendment as well? If the exclusionary rule is dying, is the fourth amendement, which has become the procedural due process clause, also dying?

I do not think so. While the exclusionary rule is a judicial remedy that has an exceedingly close relationship with the constitutional norm

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*Professor of Sociology, University of Florida. Ph.D., University of Kentucky.

it supports, it is just a remedy and not the only possible remedy as inalienable as the constitutional right it serves. Abandoning or modifying the rule will not change the constitutional norm for searches and seizures. Searches must be reasonable; that is, based on probable cause and proper procedure, regardless of the remedy for deviations from that standard. Judicial destruction of the rule is not the same as destruction of the constitutional norm.

On the other hand, I do not disagree with Professor Baldwin's point that attacks on the exclusionary rule, or those aimed at the rule, have central significance in how assured citizens are that their constitutional rights are protected. The exclusionary rule is obviously the most appropriate remedy and the greater the extent to which it is compromised, the less secure we can be that law enforcement proceeds according to the highest due process standards. The exclusionary rule that mandates suppression of unconstitutionally-obtained criminal evidence is the clearest model for law enforcement adherence to fourth amendment protection. The rule is preferable to, or at least should not yield to, alternative civil, criminal, or administrative remedies. Supreme Court decisions in *Leon*, *Sheppard*, *Segura*, and other cases Professor Baldwin reviews detract from the effectiveness of the rule, and create good reason for concern. Nonetheless, I very much hesitate to say that if the rule is modified, or even done away with, the fourth amendment will lose all meaning. I do not think that Professor Baldwin comes to this conclusion either, but it is a reasonable inference from the close identity between the fourth amendment and the procedure involved in suppressing evidence seized in violation of the fourth amendment.

In addition, I share Professor Baldwin's consternation over the good faith exemptions allowed in the *Sheppard* and *Leon* cases. However, I am not as fully convinced as Professor Baldwin that the principle of a good faith exception is totally damaging to the integrity of the rule. As far as the police are concerned, a good faith exception may have positive and negative effects. An exception could so undercut the day-by-day operation of the rule that searches and seizures of questionable or clearly unconstitutional character may become more frequent and lessen police support for fourth amendment norms. I am unconvinced that this will happen. I believe that recognizing good faith mistakes may, in fact, undergird the support the rule already enjoys by countering the argument that the rule sets unreasonable standards for the police. Changes in the rule may have a similar effect in public opinion. As a social scientist, I must say that this is an empirical question to be answered by research, not foreclosed by deductive assertions.

My colleague Lonn Lanza-Kaduce and I have researched the exclusionary rule in Florida, studying both law enforcement and public responses. We have found that the rule already enjoys considerable support and legitimation among both law enforcement and the public and is the remedy preferred by both. This should not be surprising given the long history of the concept of a right to protection from unreasonable searches in Anglo-American society, which Professor Baldwin reviews so well in his paper. Professor Baldwin believes that the rule has fallen from public favor, but this is not what we have found. Fear of crime exists, but so do appreciation and moral support for the constitutional norms of security from unreasonable searches among citizens.

Further, our research revealed that clearly unconstitutional searches occur with very low frequency. Even questionable searches are atypical in police work, at least in the kinds of departments in our study. Challenges in court based on bad searches and loss of cases through suppression of evidence occur with an even lower frequency. Police understand and support the standard set by the exclusionary rule.

Another major point that Professor Baldwin makes, on which he is absolutely correct, is that deterrence of police misconduct in searches has almost become the exclusive basis on which the majority in the Supreme Court has reached decisions in recent cases. The deterrence doctrine is the major underlying justification for good faith exemptions to the suppression of evidence allowed in those cases. The majority in *Mapp* recognized the centrality of the exclusionary rule in upholding, according to Baldwin, the rationale of preserving integrity in the guilt determination process along with the deterrence rationale. Subsequent decisions, however, have narrowed the rule to the service of deterrence and have employed a restrictive cost/benefit analysis, much to the detriment of other aspects of the rule.

This is true not only of court decisions; social research on the effects of the exclusionary rule has also focused exclusively on the deterrent effects of the rule on police search behavior. Neither sound legal reasoning nor good research compels such a result because the operation of the exclusionary rule has a poor conceptual fit with the doctrine of deterrence. The deterrence theory is that persons refrain from criminal acts because of the fear of punishment for the offense. Illegal conduct is said to be deterred through the threat of direct, certain, swift, and severe legal punishment for the person committing the offense. The exclusionary rule is ill-designed to provide a direct negative sanction for misconduct as envisioned by deterrence theory. Exclusion of evidence offers at most an indirect sanction and does not interfere with other possible benefits to law enforcement through col-

lateral uses. Moreover, the evidence we have from our research is that the exclusionary rule does not exercise a direct deterrent effect on police search behavior.

Professor Baldwin argues that courts should recognize integrity of the law, rather than deterrence, as the central purpose of the rule. I strongly agree. The operation and effect of the rule fit this concept and the empirical evidence better than deterrence. The integrity rationale is supported by public perception and is a model of professional, constitutionally sound law enforcement for the police. Thus, its impact on the police may come more from educative effects that exert a positive influence on police behavior and undergird the moral and professional support for constitutional norms already existing among the police. In our research we have found more evidence in favor of the educative and indirect effects of the rule on the police mediated through the policies of the police department. I wholeheartedly agree with Professor Baldwin's statement, in section IV.D., that "any process or technique used to replace the exclusionary rule must both deter future police misconduct and educate law enforcement officials about prevailing legal standards — a twin goal currently fulfilled by the suppression hearing and judicial opinion writing." He reiterates in section IV.E., "If the exclusionary rule is justified simply on deterrence grounds, then the law has reduced its educational and moral force to the least common denominator."

In summation, Professor Baldwin's analysis of the Court's misplaced reliance on the deterrence doctrine and his emphasis on the centrality of integrity and educative force of the exclusionary rule are, in my opinion, correct. Both recent court decisions and social research on the exclusionary rule have ignored the moral and educative effects of the rule. Our research has given some support to the idea that the impact of the rule on police conduct, in fact, does not depend on deterrence based on the fear of suppression or loss of cases. Rather, its impact is more related to the professional and constitutional standard that it holds up to the police, both directly and through the department. If the good faith doctrine undermines this, then it will truly have diminished the exclusionary rule.