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# Of Myths and Mapp: A Response to Professor Magee

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# OF MYTHS AND *MAPP*: A RESPONSE TO PROFESSOR MAGEE

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## INTRODUCTION

Forgive me for telling a story I have told before in print; I tell it again because its meaning is different for me now.

> My client, Jose Tirado, was stopped for pushing a two-wheeled shopping cart with a TV and speakers in it. Now a month before I was assigned to the case, I pushed just such a shopping cart loaded with similar items past several police officers. A friend of mine had moved a TV in that manner in the same month. Mr. Tirado is Hispanic and was poorly dressed; I am blond and was dressed for court. Mr. Tirado was walking in a poor New York City neighborhood; I was walking in Brooklyn Heights. Mr. Tirado increased his pace when followed by four plainclothes officers of another race; I certainly would have done the same. When Mr. Tirado attempted to engage a large black woman in conversation (the officer stressed her race and size), he was stopped; neither I nor my friend was detained or even followed. The suppression court sustained the police action. At oral argument of the appeal, one judge commented that he personally had moved furniture with such a shopping cart. Nevertheless, the court unanimously upheld the seizure.[1]

I am no less outraged now than when I stood up in front of that appellate court, certain that the case was won when the judge described his own behavior, but now I *am* less naive. What strikes me ten years later is—that it *is* ten years later. When I published this story in the *Yale Law Journal*, I was again confident that "the case was won;" not the particular case, of course, but the larger argument that the use of race in

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1. Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 256-59 (1983).

detention decisions was impermissible. Surely when the light of day shone on the invidious uses of race in detention decisions, reform was inevitable! But neither the law nor police practices have changed much despite widespread publicity concerning abuses, and I no longer believe we are on the eve of a revolution in this area.

Nevertheless, one thing has changed, and that is the number of African-Americans in law schools working on issues concerning race and the criminal justice system. There are a few people who have labored for many years, such as Dean Williams, whom I am delighted to finally meet. But now there are others, such as Professor Tracey Maclin, Professor Kenneth Nunn, Professor Kim Taylor, and of course, Professor Robin Magee.

So I am honored to have been asked to comment on the work of one of these young scholars, for her work is probably the only hopeful development in this area during the last decade. Professor Magee's article[2] is a very interesting paper to comment upon, for it links two bodies of work—commentary on Fourth Amendment jurisprudence and presumptions about black men—through consideration of the opposing myths of police officers and African-American men. I think these opposing myths are both a useful heuristic and an accurate description, so I find myself in agreement with Professor Magee's general thesis. I disagree, however, with two of her supporting examples, and would like to add a couple of my own.

## I. MYTHS ABOUT POLICE OFFICERS

First, with regard to the "good cop" myth, I agree that several of the Court's recent decisions cited by Professor Magee reflect a wildly optimistic view of the police. As argued by Professor Magee, cases such as *Florida v. Bostick*,[3] *Colorado v. Bertine*,[4] *United States v. Sokolow*,[5] and *Michigan Dep't of State Police v. Sitz*[6] all exhibit undue deference to police judgment and misplaced confidence that police will use discretion appropriately. In my view, willful blindness to police prejudice and excesses runs through all these cases.

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2. Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151 (1994).

3. 501 U.S. 429 (1991).

4. 479 U.S. 367 (1987).

5. 490 U.S. 1 (1989).

6. 496 U.S. 444 (1990).

I cannot agree, however, with her characterization of two earlier cases. First, I do not see that the adoption of the exclusionary rule in *Mapp v. Ohio*,[7] either by design or in effect, furthers the "good cop" myth. I will accept for purposes of argument that the exclusionary rule deters good police officers more effectively than it deters bad police officers, although I think to some extent it deters both.[8] Nevertheless, I think it a bizarre characterization of *Mapp* to say that it "rejects" remedies that "have the potential of addressing bad cops," or that it "explicitly rejected the remedies reviewed by the Court in *Wolf v. Colorado*."[9] The alternative "bad cop" remedies Magee prefers, those the Court applauded in *Wolf*, were in no way diminished by the *Mapp* decision.

Remedies such as internal police review, contempt proceedings, and self-help are as viable after *Mapp* as they had been prior to *Mapp*. In addition, the remedy of damages is more viable now than it had been during the *Wolf* era. I do not understand how the Court failed to adopt remedies which could have had the effect of addressing cops not deterrable by the effect of exclusion.[10] It was not in the Court's power to adopt self-help, internal police review, or contempt proceedings; the availability of these remedies depends today, as it did after *Wolf* was decided and before *Mapp* overruled it, on the actions of other parties. Damage actions, of course, are within the Court's purview, and the Court has *expanded* civil liability for Fourth Amendment violations since *Mapp* was decided.[11]

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7. 367 U.S. 643 (1961).

8. Bad police officers, like good police officers, are concerned about the loss of their livelihood. I am not so sure that the *Mapp* Court believed that the police officers would necessarily be directly deterred by the exclusionary rule. Rather, the Court foresaw that prosecutors would have an enormous incentive to police law enforcement in order to win cases—and would therefore attempt to exert influence over police officers, good and bad, to follow constitutional mandates.

9. 338 U.S. 25 (1949).

10. Magee, *supra* note 2, at 162.

11. Post-*Mapp* interpretations of 42 U.S.C. § 1983 (1988) have expanded the liability faced by state police officers for violations of the Fourth Amendment. Harlow v. Fitzgerald, 457 U.S. 800 (1982) (noting a good faith belief that arrest was constitutional is not a defense if objectively unreasonable); Malley v. Briggs, 475 U.S. 335 (1986) (applying objective standard to police officer's action in applying for an arrest warrant). The liability of municipalities for their officers' Fourth Amendment violations has also been expanded during this period. Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978) (finding municipalities within ambit of 42 U.S.C. § 1983); Pembaur v. Cincinnati, 475 U.S. 469 (1986) (holding municipality responsible for single actions as

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Moreover, I found baffling Professor Magee's citation of *Miranda* as a contrasting case that "demonstrates the inclination of the Court to fashion a remedy that addresses both the good and bad cop . . . and further suggests that the Court's failure to do so in the Fourth Amendment jurisprudence was due to the Court's failure to imagine the overzealous or badly motivated cop in the Fourth Amendment context."[12] I do not see why the same Court that imagines police misbehavior in the station house cannot imagine it on the street. Nor do I see *Miranda* as very different than *Mapp*; both impose an exclusionary rule. If an exclusionary rule only deters good cops in the Fourth Amendment context, presumably it has the same defect in the Fifth Amendment context. For me, both *Mapp* and *Miranda* are in complete accord on how they control police behavior; neither of them have supplanted other preexisting controls, and thus, they cannot be counted as evidence of the prevailing good cop myth.

Rather than distinguishing Supreme Court gullibility by context, I would distinguish it by era; I think that the Court in the *Mapp/Miranda* era was far more able to imagine police misconduct in every venue than is the present Court.[13]

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well as repeated actions by police officers so long as action was directed by those who establish government policy); Owen v. City of Independence, 445 U.S. 622 (1980) (stating statute does not confer immunity upon municipalities for "governmental" functions or "discretionary" activities; good faith of its police officers is not a defense to municipality liability). Moreover, since *Mapp* was decided, the Court has found a federal cause of action against federal officers who violate the Fourth Amendment implicit in the Constitution. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). The objective reasonableness standard also applies to a *Bivens* action. Anderson v. Creighton, 483 U.S. 635 (1987).

12. Magee, *supra* note 2, at 166 n.60.

13. Recent cases in the Fifth Amendment area have also shown extraordinary deference to police and diminished interest in the suspect's rights. The clearest example of this trend is New York v. Quarles, 467 U.S. 649 (1984), where the Court held that a public safety emergency permitted the introduction of unwarned statements obtained through custodial interrogation—despite the fact the interrogating officer himself did not believe that public safety required him to ask the questions. Other deferential cases include Rhode Island v. Innis, 446 U.S. 291 (1980) (defining interrogation as express questioning or actions that police officers should have known were reasonably likely to elicit an incriminating response; intent to elicit an incriminating response is not sufficient); Moran v. Burbine, 475 U.S. 412 (1986) (finding *Miranda* not violated despite police officers' failure to tell defendant that an attorney had been retained for him and was attempting to reach him and their false statements to the attorney that the defendant would not be interrogated until the next day); and Oregon v. Elstad, 470 U.S. 298 (1985) (declining to suppress second confession because it was obtained after *Miranda* warnings

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I must also disagree with Professor Magee's interpretation of *United States v. Leon*.[14] I can be less vehement and long winded about this objection than my objection to her characterization of *Mapp*, for I have no more fondness for *Leon* than does Professor Magee. There are many reasons to object to *Leon*,[15] but I do not see the charge that it contributes to the "good cop" myth as one of those reasons. By its terms, *Leon* anticipates police officers will act in bad faith while seeking a warrant. Rather than abolishing the exclusionary rule in the warrant context, the *Leon* Court restricted its applicability to police officers who acquire the authorizing warrant while acting unreasonably or *in bad faith*; the exception is for officers who, acting reasonably and *in good faith*, rely upon a warrant. If the Court were presuming there were no officers in the "bad faith" category, the Court would simply eliminate the exclusionary rule in warrant cases—or apply it only to "unreasonable" reliance cases. Instead the Court holds that "in the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."[16] Because the *Leon* decision explicitly acknowledges the need to control the bad police officer (something most recent Supreme Court cases fail to consider at all), I cannot see that it contributes to the good cop myth.

Having agreed with several of Professor Magee's examples of cases that manifest the "good cop" mythology and disagreed with two, I would add a few more that I think support her hypothesis. Professor Magee notes the Court's general lack of interest in "pretext" arguments. Specifically, arguments that police activity for which there is a legally adequate justification, *but which were not motivated by that justification*, should be deemed illegal. Obviously a lack of interest in pretext searches is at least consistent with, if not determined by, the view that there are

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had been administered despite the fact that defendant first confessed without *Miranda* warnings and was never told that his first confession was inadmissible).

14. 468 U.S. 897 (1984).

15. One such reason is identified by Professor Magee: the possibility of warrant shopping. The Court dismissed that possibility as "too speculative." *Id.* at 918. I agree with Professor Magee that it is not too speculative to be of concern, but this only shows that the Court failed to predict that police officers would engage in this particular form of misconduct—not that the Court was promoting a good cop myth by not predicting police misconduct.

16. *Id.* at 926.

very few of them. More troubling to me, however, than pretext cases, is the Court's myopic treatment of another form of bad faith—the manipulation of the administrative framework governing the exclusionary rule. Faced with blatant bad faith manipulation of the standing rules,[17] the impeachment rules,[18] and the fruit of the poisonous tree rules,[19] the Court has not blinked. These cases all imply that the number of police officers that would deliberately violate the Fourth Amendment, provided there were no consequences for such a violation, is so insignificant that the Court need not be concerned about such officers when fashioning the rules for the administration of the exclusionary rule.

## II. MYTHS ABOUT AFRICAN-AMERICAN MEN

I have nothing to criticize here. I would, however, more heavily emphasize the Court's share of responsibility for the "bad black man" myth. The Court did not create this myth, but it has contributed to the myth's prevalence in several ways. As Professor Magee pointed out with regard to the *Bostick* decision, the Court passively contributes to racism when it does not examine whether race has been a factor in police action. This reasoning applies not only to *Bostick*, but also to the decisions in

17. *See* United States v. Payner, 447 U.S. 727 (1980). In *Payner*, the district court found that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the government intrusion" and that IRS agents stole the briefcase of a third party with no justification in order to obtain evidence against Payner. United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977), *aff'd*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980). Despite these undisturbed findings, the Supreme Court found the district court's use of its supervisory power to suppress the evidence to be impermissible. *Payner*, 447 U.S. at 733.

18. *See* United States v. Havens, 446 U.S. 620 (1980), where the Court upheld introduction of illegally seized drugs when the defendant testified truthfully on direct examination, but lied only in response to questions asked by the prosecutor on cross-examination.

19. *See* Segura v. United States, 468 U.S. 796 (1984), where the Court held that an initial illegal entry into premises and search of those premises did not require the suppression of evidence later seized from those premises pursuant to a valid warrant; this was despite the fact that the agents who had entered and searched illegally remained on the premises until other agents arrived with the search warrant.

*California v. Hodari*,[20] and *United States v. Mendenhall*,[21] where the Court ignored racial issues very near the surface of those cases.[22]

Moreover, the Court has actively contributed to racist myths concerning the proclivity toward crime of people of color by permitting the immigration and naturalization service to use racial stereotypes about crime. In both *United States v. Brignoni-Ponce*[23] and *United States v. Martinez-Fuerte*,[24] the Supreme Court upheld the use of race as a legitimate factor in INS detention decisions. Because these cases do not even apply equal protection analysis to the use of race, they suggest that detention decisions are insulated from ordinary constitutional prohibitions on the uses of race, a matter of concern not only for its implications for Latinos harassed by the INS, but also for African-Americans (and Latinos) harassed as suspected drug couriers.

These implications have not been lost on drug enforcement officials or the lower courts. It is clear that the Drug Enforcement Agency, as well as some local drug enforcement squads, consider race in determining whom to detain.[25] Most lower courts have not condemned such invidious uses of race,[26] and the Supreme Court either agrees, or has not been enthusiastic enough to correct such injustices by granting certiorari in such cases. Thus, at least tacitly, the Court has condoned assumptions about the likely criminality of African-Americans and other people of color.

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20. 499 U.S. 621 (1991).

21. 446 U.S. 544 (1980).

22. *See also* INS v. Delgado, 466 U.S. 210 (1984) (concerning the legality of "factory surveys" of individual workers without individualized suspicion that the workers were illegal aliens).

23. 422 U.S. 873 (1975).

24. 428 U.S. 543 (1976).

25. For a recent case, see United States v. Travis, 837 F. Supp. 1386 (E.D. Ky. 1993) (approving the use of race as a factor in airport stops, and citing the Supreme Court's decisions in *Brignoni-Ponce* and *Martinez-Fuerte* as support). *See also* United States v. Taylor, 956 F.2d 572, 580 (6th Cir. 1992) (en banc) (Keith, J., dissenting); United States v. Harvey, 16 F.3d 109, 112 (6th Cir. 1994) (Keith, J., dissenting); Johnson, *supra* note 1, at 233-36.

26. *See supra* note 25.

## III. SOME FINAL THOUGHTS

I wanted to mention briefly a possible objection to the foregoing. The defendant in the first story *was* guilty, as are the persons in almost all of the reported cases that challenge police actions. Professor Magee might have argued, though she did not, that the exclusionary rule itself contributes to the "bad black man" myth, by focusing our attention on the guilty. Certainly I have heard that argument elsewhere. When I was invited to meet with the NAACP in Binghamton, New York, one member expressed great concern that organizational activity relating to police abuses should focus on *innocent* victims of such abuses.

But I think of Chris Johnson, whose entire black *church* basketball team was detained and searched—unsuccessfully—by a white police officer because a member of the opposing white church's team was missing his watch. I think of Michelle Johnson, on her way to visit graduate schools at which she had been accepted, whose luggage was torn apart because she was an African-American woman in a hurry at an airport. I think of Donna Douglas, on her way back to law school, who watched her car torn apart at the Delaware Water Gap because she was an African-American with Florida plates. I think of Sam Tarver, who was subjected to numerous random shakedowns when he returned to Harlem, despite his successes in professional school. I think of Eric Richardson, telling my Criminal Procedure class this year how he manages to speak calmly to police officers who stop him just to see why an African-American is driving through a white area. I think of all the other innocent African-Americans I know who tell similar stories. We have not protected the innocent.

Where race and the police are concerned, I do not think we can focus on innocence. If there is to be progress, we have to focus on racism. The exclusionary rule is one vehicle for such a focus. It is both shabby and prone to breakdowns (particularly given the present drivers), but I would not like to see it abandoned, at least not until there is assurance of better transportation.