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GROWING DISILLUSIONMENT WITH THE EXCLUSIONARY RULE

by

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I. HISTORICAL ANTECEDENTS

IN 1914 the United States Supreme Court held in *Weeks v. United States*[1] that evidence secured by federal officers in violation of the fourth amendment could not be considered against persons prosecuted under federal law.[2] Without such a rule, said the Court, the fourth amendment right to be secure against unreasonable searches and seizures "is of no value" for those so accused and, as to them, "might as well be stricken from the Constitution."[3] In response to the argument that exclusion of illegally seized but reliable evidence amounted to suppression of the truth, the Court declared: "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[4] Although the Court could have required this exclusionary rule in federal cases through the exercise of its supervisory authority over the federal courts, the opinion in *Weeks* leaves little doubt that the Court was establishing a constitutionally based rule. Thus, after *Weeks*, if the fourth amendment provision against unreasonable searches and seizures were held to be actually absorbed or incorporated through the due process clause of the fourteenth amendment and made applicable to the states, the exclusionary rule would be carried along as a part of the "bag and baggage"[5] of that provision.

When the issue of application to the states was discussed by the Supreme Court in the 1949 case of *Wolf v. Colorado*,[6] Justice Frankfurter, writing for the majority, refused to impose the exclusionary rule on the states. Frankfurter did recognize that "[t]he security of one's privacy against arbitrary intrusion by the police—which is *at the core* of the Fourth Amendment—is basic to a free society."[7] He further conceded that there would be a violation of the fourteenth amendment if a state were "affirmatively to sanction such police incursion into privacy."[8] But Frankfurter rejected an outright incorporation of the fourth

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[1] 232 U.S. 383 (1914).

[2] Twenty-eight years earlier the Court had hinted at such a rule by way of dictum in Boyd v. United States, 116 U.S. 616 (1886), but that case held only that the compulsory production of a person's private books and papers for use in evidence against him compelled him to be a witness against himself in violation of the fifth amendment.

[3] 232 U.S. at 393.

[4] *Id.*

[5] This descriptive phrase was employed by Justice Fortas in his concurring opinion in Bloom v. Illinois, 391 U.S. 194, 213 (1968). In Duncan v. Louisiana, 391 U.S. 145 (1968), decided on the same day with *Bloom*, the sixth amendment right to jury trial was made applicable to the states. The various opinions in *Duncan* and *Bloom* provide an excellent study of the diverse positions that have been taken by members of the Supreme Court with respect to the selective incorporation doctrine. This is the doctrine which has been used by a majority of the Court during the past decade to make most of the criminal procedural guarantees of the Bill of Rights applicable to the states.

[6] 338 U.S. 25 (1949).

[7] *Id.* at 27 (emphasis added).

[8] *Id.* at 28.

amendment right and held that the due process clause did not require recognition of the exclusionary rule as "an essential ingredient"[9] of the fourteenth amendment right. In *Wolf*, then, the fourteenth amendment right against arbitrary police intrusion by the state and the fourth amendment right against unreasonable searches and seizures by federal officers remained distinctly separate, and statements to the contrary in *Mapp v. Ohio*[10] seem clearly wrong.[11]

The road from *Wolf* to *Mapp* was marked by signposts indicating that the Supreme Court was becoming more and more convinced of the necessity for excluding evidence in both state and federal courts as a means of deterring illegal searches and seizures. The basic *Weeks* prohibition against the use in federal cases of evidence illegally seized by federal officers was twice expanded. In 1956 the Court authorized injunctive action: (a) to prohibit federal officers from turning over their illegally seized evidence to state officials for use in a state trial; and (b) to prohibit federal officers from testifying concerning such evidence at the state trial.[12] The second important development was the exclusion in federal cases of evidence illegally seized by state officers but handed over "on a silver platter" for use in federal prosecutions.[13]

Finally, in 1961, the Court overruled *Wolf* and held that the exclusionary rule must be applied in state cases. In rendering the landmark decision in *Mapp*, a majority of the Supreme Court appeared to take it as settled that the fourth amendment had been made applicable to the states by virtue of Justice Frankfurter's opinion in *Wolf*. Speaking for four members of the majority,[14] Justice Clark observed: "At the time that *the Court held in Wolf that the Amendment was applicable to the States through the Due Process Clause*, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions."[15] And elsewhere, stating the Court's holding, Clark repeated this questionable reading of *Wolf*: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."[16] It has been demon-

[9] *Id.* at 29.

[10] 367 U.S. 643 (1961).

[11] *See* notes 15, 16 *infra*, and accompanying text.

[12] Rea v. United States, 350 U.S. 214 (1956). *But cf.* Wilson v. Schnettler, 365 U.S. 381 (1961).

[13] Elkins v. United States, 364 U.S. 206 (1960), rejected this so-called "silver platter" doctrine.

[14] Justice Black concurred, but only by concluding that the fourth and fifth amendments, taken together, require the exclusionary rule. *See* 367 U.S. at 661-62, in which Black looks to Boyd v. United States, 116 U.S. 616 (1886), as support for this theory. Justice Black, of course, always contended that all of the provisions of the Bill of Rights were made applicable to the states by the fourteenth amendment. Because Black's vote was necessary for a majority in *Mapp*, it could be argued that the exclusionary rule in state search and seizure cases is not really a fourth amendment requirement. *See* 367 U.S. at 672 (Harlan, J., dissenting). However, the Court has certainly treated the rule as being required by the fourth amendment alone. See especially the recent decision in Coolidge v. New Hampshire, 403 U.S. 443, 499 (1971), in which Justice Black, concurring in part and dissenting in part, remarked: "The Court today announces its new rules of police procedure in the name of the Fourth Amendment, then holds that evidence seized in violation of the new 'guidelines' is automatically inadmissible at trial. The majority does not purport to rely on the Fifth Amendment to exclude the evidence in this case."

[15] 367 U.S. at 655 (emphasis added).

[16] *Id.*

strated, however, that the right of privacy recognized in *Wolf* was strictly a creature of the fourteenth amendment, separate and apart from the analogous fourth amendment right. The presence of such a right "at the core" of the fourth amendment certainly does not lead inexorably to the conclusion that a *similar* fourteenth amendment right is identical in nature or scope. That Frankfurter intended no incorporation of the fourth amendment by the fourteenth in *Wolf* is made doubly clear by his joining Justice Harlan's dissent in *Mapp*, in which Harlan reminded the Court:

> It cannot be too much emphasized that what was recognized in *Wolf* was not that the Fourth Amendment *as such* is enforceable against the States as a facet of due process . . . but the principle of privacy 'which is at the core of the Fourth Amendment.' . . . It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments.[17]

There is no question, of course, that with *Mapp* the commands of the fourth amendment became applicable to the states. It is important to recognize, however, that this was accomplished at least partly by use of the assumption—questionable at best—that incorporation of the fourth amendment by the fourteenth had in fact already been announced by the Court. As stated earlier, if we *are* to assume that the fourth amendment is applicable to the states, then the exclusionary rule would seem also clearly applicable, since in *Weeks* that rule was stated to be a necessary ingredient of the amendment. This is precisely what Justice Clark concluded in *Mapp*.

Concerning the purpose of the exclusionary rule, the plurality opinion in *Mapp* placed some emphasis on the "imperative of judicial integrity,"[18] but the real reason for adoption of the rule was stated as follows: "the purpose of the exclusionary rule '*is to deter*—to compel respect for the constitutional guaranty *in the only effectively available way*—by removing the incentive to disregard it.' "[19]

II. Two Questionable Theses

The Supreme Court's enchantment with the exclusionary rule in fourth amendment cases has been largely dependent upon two hastily drawn conclusions: (1) that the rule will act as a deterrent against illegal arrests, searches, and seizures, and (2) that there are no other "effectively available" means of enforcing the amendment. One of the objectionable features of both *Weeks* and *Mapp* is that in neither case did the Court really inquire into the validity of either of these two theses.

A. *The Rule as a Deterrent*

Judge Friendly has noted that the use of the word "deter" in describing the purpose of the exclusionary rule "suggests" an analogy with the purpose of

[17] *Id.* at 679 (Harlan, J., dissenting).
[18] *Id.* at 659, quoting Elkins v. United States, 364 U.S. 206, 222 (1960).
[19] *Id.* at 656 (emphasis added), quoting Elkins v. United States, 364 U.S. 206, 217 (1960).

punishment in the criminal process.[20] That purpose is often said to be twofold: (1) the direct deterrence of future criminal acts by the convicted offender, and (2) a general deterrence of similar acts by others in the community who observe that punishment is imposed for commission of the particular offense.[21] Can this same theory be applied to the effect of the exclusionary rule on the police? Will an individual policeman, observing that evidence secured by him illegally has been excluded at trial, be deterred from similar illegal conduct in the future? Will police in general be deterred from making unlawful arrests and searches because of the exclusion of evidence that was improperly obtained by other police officers?

An obvious flaw in the analogy is that a convicted offender is punished personally, while the exclusionary rule operates directly only against the prosecutor who is thwarted in his attempt to have the evidence admitted but who rarely, if ever, has any control over the persons responsible for the illegal conduct.[22] Considered in a broader context, the prosecutor represents the people, who in turn are obliged to accept less than the truth in the case and, therefore, are also "punished" by the rule. Those left unpunished are the obviously guilty defendant and the police officer who conducted the illegal search. Indeed, the rule has often been criticized as providing protection *only* for the guilty.[23] Of course, as Professor LaFave has pointed out, if there is a deterrent effect, the police will be restrained from engaging in illegal conduct that is directed at innocent as well as guilty individuals.[24] On the other hand, once the illegal invasion has been accomplished, it is the guilty who will profit by application of the exclusionary rule—evidence that proves guilt or clearly tends to do so must not be considered.[25] As for the erring policeman, one might expect at least a reprimand or other form of disciplinary action, if only as punishment for damaging the state's case. It is more likely that general police response will be disdain for the court's action and complete sympathy with the individual policeman's position.[26]

Another stumbling block to deterrence is that the police are often not so much concerned with convictions as with arrests and case clearances. At the time the search is conducted the trial is only a distant possibility; the immediate goal is to apprehend the offender and secure the evidence which proves

[20] Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965).

[21] *See* Gardiner, *The Purposes of Criminal Punishment*, 21 MODERN L. REV. 117 (1958).

[22] *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 726 (1970) [hereinafter cited as Oaks]; Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting).

[23] *See, e.g.*, Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A.J. 815, 816 (1964).

[24] LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 393 (1965) [hereinafter cited as LaFave].

[25] There may be cases in which the accused is merely an innocent victim of circumstances, but it is likely that in the great majority of cases the illegally seized evidence actually proves the defendant's guilt.

[26] In fact, the recent study by Professor Oaks "failed to reveal a single law enforcement agency where individual sanctions are tied to an application of the exclusionary rule." Oaks 710. "[T]he officer was assured of the sympathy of his superiors so long as he acted 'in conformity with administrative norms of police organization . . . .'" *Id.* at 727.

that he is the offender. This will result in "clearance" of the case.[27] In many instances there is never even any thought of seeking a prosecution. This is particularly true in cases involving gambling, liquor, narcotics, and drug offenses. The purpose of a search and seizure here may be harrassment of the offenders or the removal of contraband items, such as narcotics, from circulation. This type of police action has the desired effect of demonstrating to the public that efforts are under way to control these criminal activities.[28] The exclusionary rule can obviously play no role whatsoever in these cases, nor in instances in which the police are acting only to control a potentially dangerous situation,[29] since no trial is even contemplated.

Finally, consider the numerous cases in which the police have simply made an honest and understandable error in judgment. It is likely that a substantial percentage of illegal police searches and seizures would fall within this category. There has been no intentional undercutting of fourth amendment requirements. 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.[30] The United States Supreme Court may consider the case for months before making its decision, and even then is apt to be divided in its determination of the issue. In fact, Supreme Court case law governing arrests, search, and seizure has been badly blurred by shifting sands. This has been especially true on the problem of the warrantless search incident to arrest, a situation which involves most crucially the arresting officer's exercise of discretion.[31] The difficulty in determining what is "reasonable" under the

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[27] LaFave illustrates the police thinking as follows:

> Inasmuch as it is common police practice to measure efficiency in terms of the number of arrests or 'clearances' made, any drop-off in arrests (even of the unconvictable) would likely be viewed within the department as a sign of retrogression. Somehow a record of 100 arrests and 80 clearances but only 10 convictions outshines one of 30 arrests, 25 clearances, and 20 convictions. This near obsession with the apprehension of the offender as an end in itself also filters down to the lowest ranks, where the natural ardor of the chase also takes hold.

LaFave 447.

[28] *See* LaFave 429, 443-44. *See also* Oaks 721-22:

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

[29] Note the reference to "keeping the lid on" in the statement quoted in note 28 *supra*. *See also* Oaks 728: "The patrolman is oriented to approach incidents that threaten order not in terms of enforcing the law but in terms of 'handling the situation.'"

[30] *See, e.g.*, Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 590 (1955).

[31] *See* Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. 56 (1950); Trupiano v. United States, 334 U.S. 699 (1948); Harris v. United States, 331 U.S. 145 (1947). An interesting list of quotations reflecting the Court's seesaw approach to this problem may be found in Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80, 98-100 (1969). *See also* Landynski, *The Supreme Court's Search*

fourth amendment has been further aggravated by inconsistent decisions from lower court judges, many of whom appear to look upon certain *types* of offenses as more appropriate for application of the exclusionary rule than others.[32] There is also a dismal failure by trial judges to explain their rulings satisfactorily. Professor LaFave describes a typical hearing on a motion to suppress as follows:

> As the hearing on the motion progresses, it is not uncommon for there never to be a clear statement by any party or by the judge himself of precisely what aspect of the officer's actions lies at the heart of the controversy. When the judge ultimately either grants or denies the defense motion to suppress, it is unlikely that he will give any explanation. Any elaboration on the ruling is directed toward counsel, and no effort is made to enlighten the officer on the matter.[33]

As LaFave has emphasized, if a rule of conduct cannot be made clear to the person who must follow it, any deterrent effect it may otherwise have had is likely to be neutralized entirely.[34]

It is probably impossible to reach a truly reliable empirical determination concerning the success of the exclusionary rule in deterring illegal searches and seizures. However, the most recent attempt, by Professor Dallin H. Oaks of the University of Chicago Law School, yielded findings of which the following is a sample. (1) In Chicago in 1969 motions to suppress evidence were "the dispositive event" in forty-five percent of the gambling cases and in thirty-three percent of the narcotics cases.[35] These rates "seem considerably higher than would be necessary if the Chicago police were really serious about observing the search and seizure rules."[36] (2) Police officers have long felt that their duty to recover stolen property overrides adherence to fourth amendment requirements. The study failed to show any correlation between adoption of the exclusionary rule and a decrease in recovery of stolen property.[37] This indicates that the exclusionary rule probably does not induce greater conformity with Fourth Amendment rules. (3) The police do not look upon the exclusionary rule as a protective device for the citizenry, but see it as a "hindrance" in fighting crime and are willing to manufacture probable cause or violate the rules governing search and seizure when they feel it is important to do so in solving crime.[38] In this regard, the police tend to "rely on departmental rather than legal norms of behavior."[39]

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for Fourth Amendment Standards: The Warrantless Search, 45 CONN. B.J. 2 (1971).

The Court has also been indecisive and its opinions confusing on the problem of warrantless automobile searches. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Cooper v. California, 386 U.S. 58 (1967); Preston v. United States, 376 U.S. 364 (1964).

[32] "In some communities many trial judges display a higher degree of leniency in what they characterize as 'minor gambling cases' than they do in most other cases." LaFave 429. *See also id.* at 404-05.

[33] *Id.* at 403.

[34] *Id.* at 396. *See also* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1003 (1965).

[35] Oaks 684-85.

[36] *Id.* at 685-86.

[37] *Id.* at 692-93.

[38] *Id.* at 700-01 (summarizing the conclusions of J. SKOLNICK, JUSTICE WITHOUT TRIAL (1967)).

[39] *Id.* at 701.

Despite the gathering of "the largest fund of information yet assembled on the effect of the exclusionary rule," Professor Oaks was compelled to conclude that the information was insufficient either to sustain or refute the deterrence theory.[40] However, his own personal conclusions were more decisive:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution.[41]

B. *Alternatives to the Exclusionary Rule*

While it is probably true that there is no presently effective means of enforcing the fourth amendment, there are enforcement tools available which could be made effective. In truth, adoption of the exclusionary rule in search and seizure cases may have impeded development and refinement of far better alternatives.[42] Let us examine some of the most likely possibilities.

Civil Action for Damages Against Policeman. Dissenting in *Wolf v. Colorado*,[43] Justice Murphy presented persuasive arguments against reliance on the availability of a tort action for damages as a deterrent to fourth amendment violations.[44] In most cases there will be either little or no direct injury to person or property as the result of an unlawful search. This may give a complainant pause in bringing suit at all,[45] particularly if the search uncovered incriminating evidence against him. Even if the action is brought, and the fourth amendment violation is proved, it is likely that no more than nominal damages will be awarded.[46] Punitive damages may be available, but as Justice Murphy indicated "the plaintiff must show the real ill will or malice of the defendant,"[47] and this will be extremely difficult in most cases, especially in view of the average juror's sympathetic response to vigorous law enforce-

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[40] *Id.* at 709.

[41] *Id.* at 755.

[42] *See id.* at 753.

[43] 338 U.S. 25 (1949).

[44] *Id.* at 41-47 (Murphy, J., dissenting).

[45] It has also been suggested that some individuals will be deterred from bringing suit by fear of police reprisals. *See* Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 WASH. L. REV. 407, 430 (1961), citing Comment, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182 (1952).

[46] In addition to Murphy's *Wolf* dissent, 338 U.S. at 41, see Barrett, *supra* note 30, at 568; Oaks 673; Sloane & Leedes, *A Mapp for the Road Towards Exclusion*, 35 TEMP. L.Q. 27, 37 (1961); Comment, *The Exclusionary Rule of Illegally Obtained Evidence: Its Development and Application*, 35 SO. CAL. L. REV. 64, 74 (1961). It is interesting to note, however, that in Canada "the remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of the police and to express that resentment by a proportionate judgment for damages." Martin, *The Exclusionary Rule Under Foreign Law*, 52 J. CRIM. L.C. & P.S. 271, 272 (1961). The exclusionary rule has not been followed in search and seizure cases in Canada. *Id.* at 271-72. In fact, it is "unique to American jurisprudence" as applied in search cases. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

[47] Wolf v. Colorado, 338 U.S. 25, 41 (1949). (Murphy, J., dissenting).

ment.[48] Finally, even if there is recovery, collection will be difficult. A policeman's lot is not a wealthy one.[49]

It should be noted that a federal cause of action for damages is available against state and local officials by statute,[50] and the Supreme Court has recently approved a new federal "cause of action under the Fourth Amendment" against federal officials whose fourth amendment violations result in injury to another.[51] Overall, despite the inherent limitations discussed above, it is quite possible that the threat of civil liability serves as a deterrent to illegal police conduct in more situations than does the exclusionary rule.

Penal Sanctions. Factors similar to those discussed in connection with the tort remedy make criminal proceedings against policemen an even more unlikely tool for enforcing compliance with the fourth amendment. District attorneys are naturally going to be hesitant to prosecute a policeman in connection with law enforcement activities, and juries are probably inclined to accord the policeman that crucial reasonable doubt.[52] In this regard, an honest and reasonable belief by the policeman that the action in question was lawful under the circumstances should be a good defense. It would be unthinkable to impose penal sanctions without requiring that the prosecutor prove malice, intent, recklessness, or at least a substantial deviation from reasonable police conduct.[53] In fact, perhaps neither criminal liability nor personal financial liability should be imposed without a showing of willfulness or actions that were "clearly beyond the limits of authority or 'jurisdiction.' "[54]

Disciplinary Action. Administrative disciplinary action against the individual policeman who violates the fourth amendment is more appropriate in most cases than any other available enforcement measure. Such action could be in the form of interdepartmental discipline after a police review of the alleged violation, or it could be as a result of an independent evaluation of the facts by a civilian review board. Because of the obvious difficulty in obtaining ob-

[48] In his *Wolf* dissent Justice Murphy went on to point out various additional limitations on recovery in some jurisdictions:

> [R]ecovery may yet be defeated by the rule that there must be physical damages before punitive damages may be awarded. In addition, some states limit punitive damages to the actual expenses of litigation. . . . Others demand some arbitrary ratio between actual and punitive damages before a verdict may stand. . . . Even assuming the ill will of the officer, his reasonable grounds for belief that the home he searched harbored evidence of crime is admissible in mitigation of punitive damages. . . . The bad reputation of the plaintiff is likewise admissible.

Id. at 43.

[49] The problem of collection is frequently cited as a major obstacle to effectiveness of the tort remedy as a protector of fourth amendment rights. *See, e.g.*, Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 787 (1970); Barrett, *supra* note 30, at 568; Morris, *supra* note 45, at 429; Oaks 673.

[50] *See* 42 U.S.C. § 1983 (1964), as applied in Monroe v. Pape, 365 U.S. 167 (1961).

[51] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[52] *See* Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955), relied on in Oaks 673.

[53] Existing statutes imposing criminal liability will generally require malice or willfulness. *See* Edwards, *supra* note 52, at 624.

[54] Mathes & Jones, *Toward a "Scope of Official Duty" Immunity For Police Officers In Damage Actions*, 53 GEO. L.J. 889, 907 (1965).

jectivity by a police review board, the civilian review alternative seems highly preferable.[55]

There are a number of advantages to administrative discipline as a means of deterring illegal police conduct. It is pointedly directed at the individual offender, and the reasons for any punitive measures taken would undoubtedly be explained to the policeman.[56] Disciplinary measures could be more carefully tailored to the circumstances in each case with particular attention given to the police officer's culpability. Thus, no action or only an administrative reprimand might be appropriate in many cases, while forfeiture of pay, suspension for a specified period, or expulsion from the police force could be imposed for more serious violations. Finally, it is certain that civilian review boards would not feel the same reluctance as juries in punishing a police officer in a proper case. Neither, however, is such a board likely to go to the opposite extreme and recommend or impose unwarranted disciplinary measures. Such an objection to the civilian review system has been found unsupported in actual practice.[57]

To those who dismiss the possibility of establishing a civilian review program that would be supported by the general public, it is submitted that there might be more ready acceptance of the plan if the public were made sufficiently aware of the operation and effect of the fourth amendment exclusionary rule, and if creation of the civilian review board were coupled with or preceded by abolition of that rule. In addition, the composition, procedures, and powers of the board must be very carefully formulated, and the public should be fully informed concerning the board's functions and authority.[58]

A New Civil Action Against the Government. An action against the police officer's employer under the principle of *respondeat superior* would assure an injured party adequate compensation and would be perfectly proper in view of the public's stake in vigorous but proper law enforcement. The idea is by far the most effective *compensatory* device yet designed to put teeth into the promises of the fourth amendment. Some of its proponents see it as providing a deterrent effect as well, reasoning that "[a]fter not very many outlays of public funds the taxpayers and administrative heads would insist upon curbing

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[55] Most law enforcement agencies probably have some type of internal procedure for handling complaints. *See* Barton, *Civilian Review Boards and the Handling of Complaints Against the Police*, 20 U. TORONTO L.J. 448, 454 (1970). *See also* Oaks 674; Comment, *Lawless Law Enforcement*, 4 LOYOLA U.L. REV. 161, 163 (1971), in which the author remarks: "When police 'police' themselves, complaints are either ignored or, more often, an impossible burden of proof is placed on the complainant."

[56] *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 17 (1964).

[57] *See* statistics in Barton, *supra* note 55, at 460, where, in discussing the Philadelphia Police Advisory Board (which was dissolved in December 1969), the author notes:

> In the eight-year period up to 1966, out of 627 complaints, 400 were informally settled or dropped. Approximately 150 complainants had hearings, and recommendations adverse to an officer occurred in only 44 cases, normally as a result of incidents classed as 'brutality.' These recommendations were: dismissals, 2; suspension (up to 30 days), 23; reprimand, 19.

[58] Chief Justice Burger has suggested specific guidelines for a civilian review board in Burger, *supra* note 56, at 17-19.

unlawful police action."[59] The proposal has been endorsed by a number of writers and judges,[60] including most recently the Chief Justice of the United States, who has suggested the following specific guidelines for proposed legislation:

> (a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
>
> (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
>
> (c) the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;
>
> (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
>
> (e) provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.[61]

Under Burger's proposal the need for an authoritative formulation of fourth amendment standards would be met by providing "appellate judicial review . . . on much the same basis that it is now provided as to district courts and regulatory agencies."[62]

There are two needs in connection with enforcement of the fourth amendment. One is the deterrence of police violations; the other is compensation for those whose fourth amendment rights have been infringed and who have suffered some injury. It is submitted that a combination of the civilian review board and the proposed new civil proceeding against the government would provide the most effective framework for meeting these two needs. The policeman would be deterred by a real prospect of disciplinary action, and the victim of illegal activities would be in a much more favorable position for recovery of adequate damages. Significantly, unlike the exclusionary rule, both procedures would provide a forum for consideration of cases involving innocent victims of police misconduct when no criminal proceedings result.

III. ACCEPTING THE WEEKS/MAPP SUPPOSITIONS

Even if the two theses discussed above are accepted as valid, imposition of the exclusionary rule as a constitutional requirement in search and seizure cases is still extremely difficult to justify. It is an inflexible rule requiring judicial suppression of reliable evidence regardless of the gravity of the police illegality and with dubious constitutional authority.

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[59] *Report of California State Bar Committee on Criminal Law and Procedure*, 29 CAL. ST. B.J. 263, 264 (1954), cited in Barrett, *supra* note 30, at 594.

[60] In addition to the sources cited in note 59 *supra*, see McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L.C. & P.S. 266, 268 (1961); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 387 (1939); Oaks 717-18; Taft, *supra* note 23, at 817.

[61] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

[62] *Id.* at 423.

A. *Suppressing the Truth*

The most troublesome aspect of the rule is its direct suppression of the truth. In this connection, application of the rule in cases involving illegally obtained confessions should be contrasted.[63] The rule's operation there can be supported on the ground that confessions are inherently suspect, and, when the confession has been obtained illegally, the courts are justified in treating it as unreliable evidence. Of course, the unreliability rationale has not been the primary basis for the Supreme Court's adoption of the exclusionary rule in the confession cases,[64] but it does provide significant support for the rule in those cases. This is also true of the exclusion of courtroom identifications which have been shown to be dependent upon a pretrial confrontation between the witness and the accused conducted in an unnecessarily suggestive manner[65] or without according the accused his sixth amendment right to counsel.[66] Again, the rule may be considered appropriate to assure the exclusion of evidence—*i.e.*, identification testimony—reasonably believed to be unreliable.[67] With illegally seized evidence, however, the only possible issues of reliability are: (a) whether the evidence was in fact found in the place alleged, and (b) if so, to what extent does it connect the defendant to the offense. The legality or illegality of the search has no bearing on these issues and, thus, can in no way affect the determination of whether the offered items constitute reliable evidence of guilt.[68] In most cases the evidence is actual proof of guilt, and "[t]he criminal is to go free because the constable has blundered."[69]

The discharge of obviously guilty persons is the most serious and direct result of the exclusionary rule, but there are also unfortunate side effects. One is that many criminal trials will suffer unnecessary and distracting delay while arguments are made on the motion to suppress evidence and the judge ponders his decision on this complex and crucial issue. The focus of the proceedings shifts abruptly from the question of guilt or innocence of the defendant to the question of the legality of police activities.[70] This, of course, is not the

[63] *See* Oaks 666.

[64] *See, e.g.*, Spano v. New York, 360 U.S. 315, 320 (1959), in which the Court stated: "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . ." And in Rogers v. Richmond, 365 U.S. 534, 541 (1961), the Court pointed out:

> To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many . . . cases . . . independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement.

See also Miranda v. Arizona, 384 U.S. 436, 458-60 (1966), for a discussion of the "complex of values" underlying the privilege against self-incrimination.

[65] *See* Stovall v. Denno, 388 U.S. 293 (1967).

[66] United States v. Wade, 388 U.S. 218 (1967).

[67] *See* Oaks 666.

[68] *See* Cohn, *The Exclusionary Rule Under Foreign Law—Israel*, 52 J. CRIM. L.C. & P.S. 282, 283 (1961); Taft, *supra* note 23, at 816; Comment, *The Exclusionary Rule of Illegally Obtained Evidence: Its Development and Application*, 35 SO. CAL. L. REV. 64, 65 (1961).

[69] This is Cardozo's famous statement on the effect of the exclusionary rule in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[70] *See, e.g.*, Oaks 742.

purpose of a criminal trial. One critic of the rule has properly reminded us that not only is the determination of guilt or innocence of the defendant the "most important function" of the criminal trial, "it is its only function."[71] To allow the criminal proceedings to be transformed into a court of inquiry concerning the alleged police illegality is nothing less than evasion by the courts of their responsibility in the case.[72]

Another disturbing outgrowth of these cases is a loss of public confidence in our system of justice. Ironically, a strong argument against admissibility of illegally seized evidence has been that it allows the government to profit by its own lawbreaking and, thus, "breeds contempt for law."[73] Indeed, the public's confidence in its *police force* may be undermined by repeated showings of police misconduct. But respect for and confidence in our *judicial system* would seem to be much more dangerously threatened by the continued refusal of the courts to consider perfectly reliable evidence that proves the guilt of the accused.[74] To set the defendant free as a result of the exclusion of illegally seized evidence is certain to be looked upon as acquittal on a "technicality," a complaint that is heard so frequently from the general public. Another method of controlling police behavior—even one that has heretofore been unfavorably regarded by a large segment of the community[75]—would undoubtedly be more acceptable to the public than this truth suppression device.

B. *An Inflexible Sanction*

The exclusionary rule in search cases not only compels suppression of the truth, but does so indiscriminately, without regard for degrees of police illegality. Consider case one: A police officer has an unfounded suspicion that *X* committed a certain robbery. He breaks and enters *X*'s house without a warrant, causes considerable damage to the premises during a general ransacking of the place, and finally succeeds in uncovering items which had been taken during the robbery in question. This leads to an arrest of *X* on the robbery charge. Compare case two: Two police officers, without a warrant, but having probable cause to believe that *Y* has committed a robbery, go to *Y*'s house and arrest him on the front porch. Not wanting to risk removal of evidence from the house by a member of *Y*'s family or a confederate, one of the officers enters the house and looks summarily through several rooms, discovering stolen items in an upstairs bedroom.

The searches in both of the above cases are illegal under the fourth amendment as currently interpreted by the United States Supreme Court. The search

[71] McGarr, *supra* note 60, at 267. McGarr then quotes Wigmore, protesting that the rule "puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect." 8 J. WIGMORE, EVIDENCE § 2184, at 36 (1940). *See also* Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

[72] "[C]riminal courts exist for the protection of society, and they fail this purpose, this duty, if they release a prisoner in the face of evidence of his guilt because another has failed the same duty." Plumb, *supra* note 60, at 378.

[73] Mapp v. Ohio, 367 U.S. 643, 659 (1961).

[74] *See* Plumb, *supra* note 60, at 378.

[75] *See* the discussion of the civilian review board in notes 55-58 *supra*, and accompanying text.

in case one is patently objectionable. In case two there is probable cause for the arrest, and the prosecutor may argue that the search is incident to a lawful arrest and, thus, covered by an exception to the requirement for a search warrant. However, the Supreme Court presently requires that a search incident to arrest must be limited to the area within the arrested person's immediate control.[76] The interior of the house here is clearly not within Y's immediate control, yet the illegality of this search obviously cannot compare with the gross violation of fourth amendment rules in the first case. Nevertheless, the result in each case will be exclusion of the evidence seized. Chief Justice Burger has referred to this inflexibility as "universal 'capital punishment'" for illegally obtained evidence and has likened it to "a police order authorizing 'shoot-to-kill' with respect to every fugitive."[77]

The exclusionary rule in its fourth amendment application is far too absolute in scope. There is no way to modify the harsh effect of the rule in appropriate cases. As Barrett has said: "there will always be a substantial number of cases in which the defendant will go free, however clear his guilt may be, and however much more serious his crime may be than the policeman's error."[78] Honest errors of judgment are treated as harshly as willful and malicious misconduct, and this alone makes the rule unreasonable in a large proportion of the cases to which it is applied.

C. *Constitutional Basis*

In view of the serious objections to exclusion of reliable but illegally seized evidence, it might be expected that a clear constitutional mandate could be shown in support of the requirement. The fourth amendment prohibits unreasonable searches and seizures and requires that warrants be issued only upon a showing of probable cause, but there is no statement concerning enforcement of these guarantees.[79] It is certainly reasonable to assume that had the fourth amendment been designed to require exclusion of evidence seized in violation of its provisions, it would have been drafted so as to make this purpose explicit. There is no question that the Supreme Court could impose the requirement in federal cases in the exercise of its supervisory authority over the federal court system. In addition, Congress might see fit to establish the rule as an implementing device; and it probably could do so even for state criminal proceedings, since it is expressly given the authority to enact "appropriate legislation" for the enforcement of the fourteenth amendment's command of due process.[80] However, there is much to be said for the position that the Supreme Court has overstepped its authority by writing into the fourth amendment a constitutional requirement that is simply not there.[81] This is not to advocate such a restrictive approach as to prevent the Court from inter-

[76] *See* Chimel v. California, 395 U.S. 752 (1969).

[77] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

[78] Barrett, *supra* note 30, at 591.

[79] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[80] U.S. CONST. amend. XIV, § 5. *And see* Katzenbach v. Morgan, 384 U.S. 641 (1966).

[81] *See* Black's discussion in his opinions in Coolidge v. New Hampshire, 403 U.S. 443,

preting the Constitution in light of present-day realities, for there is a significant difference between a liberal interpretation of constitutional language and the outright addition of language to the constitution.

It has been contended that the fourth and fifth amendments together require the exclusionary rule.[82] Under the fifth amendment, however, as Justice Holmes once noted, "[a] party is privileged from producing the evidence, but not from its production."[83] Even Justice Black, who was the chief proponent of the overlapping amendments theory,[84] appeared to restrict the application of this doctrine to those instances in which the defendant was compelled to participate in some way in producing the evidence in question.[85]

The structure housing the exclusionary rule in search and seizure cases is built upon a shaky constitutional foundation. This fact would make abandonment of the rule a much easier step for the United States Supreme Court.

IV. RECENT DEVELOPMENTS

A. *The Oaks Study*[86]

Publication of an important new empirical study on the effectiveness of the exclusionary rule, with findings that reinforce the doubts already surrounding the rule, is in itself a highly significant development. Professor Oaks' study has been cited by the Chief Justice of the United States as showing the failure of the exclusionary rule to deter illegal searches.[87] The study's conclusion that, at best, there is no evidence that the exclusionary rule deters,[88] and Professor Oaks' own opinion that it has been "a failure in that vital task,"[89] probably assures widespread reconsideration of the rule in the law journals and, in fact, may already have influenced some of the other important new activity in this area.

B. *American Law Institute*

In the latest draft of its Model Code of Pre-Arraignment Procedure,[90] the

496 (1971) (Black, J., concurring and dissenting); Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., concurring).

[82] *See* Mapp v. Ohio, 367 U.S. 643, 662 (1961) (Black, J., concurring).

[83] Johnson v. United States, 228 U.S. 457, 458 (1913).

[84] The suggestion had been made as early as 1886 in Boyd v. United States, 116 U.S. 616 (1886). *See* note 2 *supra.*

[85] *See* Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971) (Black, J., concurring and dissenting); notes 112-16 *infra,* and accompanying text. Black would have relied exclusively upon the fifth amendment for suppression of evidence in any case. 403 U.S. at 498. A majority of the Supreme Court has often stated that the fifth amendment is applicable only where the accused is compelled to produce "testimonial" evidence. *See, e.g.,* Gilbert v. California, 388 U.S. 263 (1967) (requiring handwriting sample did not violate the privilege); United States v. Wade, 388 U.S. 218 (1967) (requirement to appear in lineup and to speak words solely for voice identification did not violate privilege against self-incrimination); Schmerber v. California, 384 U.S. 757 (1966) (taking blood sample from accused without his consent did not violate the privilege). It is interesting to note that Justice Black dissented from each of these rulings, 388 U.S. at 277, 388 U.S. at 243, and 384 U.S. at 773, respectively.

[86] *See* the discussion of the Oaks study at notes 35-41 *supra,* and accompanying text.

[87] *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

[88] *See* note 40 *supra,* and accompanying text.

[89] Oaks 755.

[90] ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 4, Apr. 30, 1971).

highly respected American Law Institute, citing the Oaks study, voiced concern with the practice of excluding all illegally seized evidence and emphasized that it was "not, as a matter of policy, wedded to the exclusionary rule as the sole or best means of enforcing the Fourth Amendment."[91] In its section on motions to suppress evidence the Institute adopted language that calls for a balancing approach to the question: "Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a violation of any of the provisions of this code *shall be granted only if the court finds that such violation was substantial.*"[92] Although in debates on this section one member wondered whether it was necessary for a model code to restate existing constitutional rules if such rules reflect an incorrect interpretation of the Constitution,[93] a majority felt that the proposal "must be concerned with what is constitutionally possible in the present state of the law."[94] This accounts for the provision requiring that the motion to suppress be granted if "required by the Constitution of the United States."[95] In the light of this language the proposal could be taken as recommending no departure whatsoever from established practice. However, the thrust of the section is obviously toward a weighing of interests, and in the commentary it is suggested that "the constitutional issue itself may be affected by the factor of substantiality."[96] This factor, then, becomes the key feature of the proposal.

In determining whether a particular violation of the fourth amendment has been "substantial" all circumstances are to be considered, but the following factors are specifically listed in the model code provision:

(a) the importance of the particular interest violated;
(b) the extent of deviation from lawful conduct;
(c) the extent to which the violation was willful;
(d) the extent to which privacy was invaded;
(e) the extent to which exclusion will tend to prevent violations of this Code;
(f) whether, but for the violation, the things seized would have been discovered; and
(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.[97]

With the exception of clause (g), concerning "the extent to which the violation has damaged the defendant's case,"[98] all of these factors are clear in meaning and, in general, are appropriate for consideration. However, the focal point of a court's inquiry should depend upon the purpose for retaining the exclusionary rule in this limited form. If the purpose is to deter illegal police conduct, the issue of primary concern should be whether the violation was deliberate, since a willful violation is far more likely to be deterred than an honest error in judgment. This would be akin to the practice in Scotland,

[91] *Id.* § SS 8.02, Commentary.
[92] *Id.* § SS 8.02(2) (emphasis added).
[93] 9 BNA CRIM. L. REP. 2179 (June 2, 1971).
[94] ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 8.02, Commentary (Tent. Draft No. 4, Apr. 30, 1971).
[95] *Id.*
[96] *Id.*
[97] *Id.* §§ SS 8.02(2)(a)-(g).
[98] *Id.* § SS 8.02, Commentary.

in which the judge exercises discretion in determining whether to exclude illegally seized evidence, and in which the chief question considered is "whether the departure from strict procedure has been adopted deliberately and by way of trick."[99] Judge Friendly has suggested the same approach, believing that the "aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights."[100] Taking this view, the model code provision could have been worded to provide initially that no evidence is to be excluded unless the court finds that exclusion will "tend to prevent violations," using the language of clause (e), above. In determining this the inquiry would be whether the "violation was willful," (clause (c)), giving due consideration to "the extent of deviation from lawful conduct" (clause (b)) and "the extent to which privacy was invaded" (clause (d)). The finding of a gross deviation from lawful conduct, for example, or a "shocking" invasion of privacy would certainly tend to show willfulness on the part of the police officer. The importance of the interest violated (clause (a)), and whether or not the items would have been discovered anyway (clause (f)), have little if any bearing on whether exclusion of evidentiary items will tend to deter other violations.

That the deterrence factor has been listed independently in the model code indicates that the drafters considered the purpose of their modified exclusionary rule to be at least twofold, with deterrence playing perhaps only a secondary role. The primary goal could be seen as that "imperative of judicial integrity"[101] which the Supreme Court mentioned in the *Mapp* case. With this as the paramount concern the framework of the proposal takes on more meaning. Certainly the nature of the interest being protected becomes of considerable importance. And even the question of whether the evidence would otherwise have been discovered becomes a legitimate point of inquiry, for if it would have been discovered even without the illegal conduct, then admitting it at the trial is not nearly so destructive of "judicial integrity." Weighing these factors with the nature of the policeman's conduct provides an eminently sound balancing approach as an alternative to the present inflexibility of Supreme Court policy.

C. *Rumblings from the High Court*

Coolidge v. New Hampshire.[102] In this recent case police officers arrested defendant inside his home "for the commission of a particularly brutal murder."[103] Immediately following the arrest the police exercised control over the defendant's automobile, which was parked in the driveway to the house, and

[99] Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 J. CRIM. L.C. & P.S. 272, 274 (1961). *See generally* Gray, *The Admissibility of Evidence Illegally Obtained in Scotland*, 1966 JURID. REV. 89, 100-01, 113, in which the author takes issue with the Scottish cases, pointing out that another determining feature in those cases has been the gravity of the offense with the exclusion of evidence more likely to result where the offense is a minor one.

[100] Friendly, *supra* note 20, at 953.

[101] *See* note 18 *supra*, and accompanying text.

[102] 403 U.S. 443 (1971).

[103] This is Justice Stewart's description in his opinion for the Court. *See id.* at 445.

later the same day the car was towed to the police station. A search and vacuuming of the car took place two days later and on two additional occasions prior to defendant's trial. A search of the automobile had been authorized by a warrant issued by the state attorney general, acting as a justice of the peace, who had taken charge of the investigation in this case and who later served as chief prosecutor in the case. At the trial vacuum sweepings, including particles of gun powder taken from the automobile, were admitted in evidence against the defendant. Assuming validity of the defendant's arrest, a majority of the United States Supreme Court held that the seizure of the automobile and the subsequent searches thereof were violative of the fourth amendment, and, thus, the vacuum sweepings were inadmissible under the exclusionary rule.[104]

One member of the majority was Justice Harlan, who wrote a special concurring opinion in the case to express his belief that the Court must eventually "face up to the basic constitutional mistakes"[105] of the *Mapp* decision.[106] Had the fourth amendment never been made applicable to state cases, Harlan would have had "little difficulty in voting to sustain this conviction."[107] He expressed sympathy with law enforcement officers and the great sense of frustration they must feel over a state of the law which makes it so uncertain when evidence of a heinous crime may be seized in connection with a valid arrest. "The law of search and seizure is due for an overhauling," he declared, and suggested that such a reevaluation should begin by overruling the *Mapp* case.[108]

Concurring in part and dissenting in part, Mr. Justice Black reiterated his view that the fourth amendment alone cannot be taken as requiring the exclusion of evidence secured through an unlawful search and seizure: "That Amendment did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence."[109] Black be-

[104] The Court held that in this case the New Hampshire Attorney General failed to meet the fourth amendment requirement of a "neutral and detached magistrate," and accordingly the warrant for search of the automobile was invalid. *See id.* at 449, citing Johnson v. United States, 333 U.S. 10 (1948). Then, assuming validity of the arrest, the Court concluded the seizure of the car in the driveway was not incident to the arrest of the defendant inside the house, nor was it justified as being a seizure of evidence in plain view. 403 U.S. at 456, 464-72. Finally, distinguishing Chambers v. Maroney, 399 U.S. 42 (1970), the Court found no "exigent circumstances" to bring the case within the special exception governing automobile searches. 403 U.S. at 458-64. In *Chambers* the car was stopped on the open highway, there was probable cause to search it, and a failure to search might have resulted in loss of the evidence because of the mobility of the vehicle. Since an initial intrusion was justified in *Chambers*, the Court saw no difference between an immediate search on the highway and seizure of the automobile with a subsequent search at the police station. In *Coolidge*, however, the car was immobile at the time of arrest. The Court found it "abundantly clear that there is a significant constitutional difference between stopping, seizing and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." *Id.* at 463 n.20. In other words, in *Coolidge* there was no justification for an initial search of the automobile without a warrant, and thus the subsequent search at the police station was invalid.

[105] 403 U.S. at 491 (Harlan, J., concurring).

[106] Mapp v. Ohio, 367 U.S. 643 (1961).

[107] 403 U.S. at 491 (Harlan, J., concurring).

[108] Harlan would at the same time overrule Ker v. California, 374 U.S. 23 (1963), and naturally so, since *Ker* established that the federal constitutional standard would thenceforth be used for determining the reasonableness of state as well as federal searches and seizures.

[109] 403 U.S. at 497 (Black, J., concurring and dissenting).

lieved that if evidence was to be excluded at all, "it must be under the Fifth Amendment, not the Fourth."[110] The fifth amendment, of course, is clearly couched in exclusionary terms—prohibiting an individual from being "compelled in any criminal case to be a *witness* against himself"[111]—but Black always read this language as though it actually provided that no person could be compelled to "give *evidence* against himself."[112] Thus, his fifth amendment exclusionary rule would apparently bar use of any evidence secured by compelling the defendant to participate in some way in producing that evidence.[113] This would cover the evidence in the *Mapp* case[114] and in many of the cases involving what a majority of the Supreme Court has termed "non-testimonial" evidence.[115] However, under this view the evidence in *Coolidge* would clearly be admissible, since the defendant was compelled to do nothing in connection with the police officers' seizure of the automobile.[116] Regardless of the *scope* of Black's fifth amendment exclusionary rule, it is perfectly clear from his *Coolidge* dissent that the ever-widening scope of the fourth amendment to cover such law enforcement tactics as electronic surveillance,[117] and the narrowing of the scope of searches incident to a valid arrest,[118] convinced him that the time had come to oppose more vigorously the indiscriminate exclusion of all illegally seized evidence.[119]

Mr. Justice Blackmun concurred in Justice Black's view "that the Fourth Amendment supports no exclusionary rule,"[120] which could be interpreted as a flat rejection of the rule by Blackmun. Chief Justice Burger also agreed that the fourth amendment does not require the exclusion of illegally seized evidence, and he specifically rejected the idea that such evidence could be properly excluded under the fifth amendment.[121] To the Chief Justice, the result in *Coolidge* was a graphic illustration of "the monstrous price we pay for the Exclusionary Rule."[122]

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[110] *Id.* at 498.

[111] U.S. CONST. amend. V (emphasis added).

[112] 403 U.S. at 498 (Black, J., concurring and dissenting) (emphasis added).

[113] Black did recognize that "people are obliged to yield to a *proper* exercise of authority" under the fourth amendment. *See id.* (emphasis added).

[114] In that case police either pried open a screen to make their entry or broke a glass in the front door in order to open the door. After entering the house they waved a sheet of paper at Miss Mapp and falsely told her it was a search warrant. She grabbed the paper and tucked it into her bosom. In the scuffle which ensued the paper was recovered by the officers, who then handcuffed Miss Mapp and forced her to accompany them on their thorough search of her house. *See* 367 U.S. at 644-45. In addition to the compelling influences here, the seized articles were private books and other printed matter alleged to be "lewd and lascivious books, pictures and photographs." *Id.* at 643. Thus, the *Mapp* case, for Justice Black, was better decided by reference to Boyd v. United States, 116 U.S. 616 (1886). *See* Black's discussion of *Boyd* in his *Mapp* concurring opinion, 367 U.S. at 662, 663; and again in *Coolidge*, 403 U.S. at 497.

[115] *See* note 85 *supra.*

[116] Black further found that the seizure of the car in *Coolidge* was reasonable and, thus, concluded: "The evidence . . . violated neither the Fifth Amendment which does contain an exclusionary rule, nor the Fourth Amendment which does not." 403 U.S. at 510.

[117] *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

[118] *See* Chimel v. California, 395 U.S. 752 (1969). *See also* note 31 *supra*, and accompanying text, concerning the Supreme Court's seesaw approach in cases on this problem.

[119] *See* 403 U.S. at 499-500 (Black, J., concurring and dissenting).

[120] *Id.* at 510 (Blackmun, J., dissenting).

[121] *Id.* at 492-93 (Burger, C.J., dissenting in part and concurring in part).

[122] *Id.* at 493.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.[123] The *Bivens* case arose as the result of a thorough search by federal narcotics agents of petitioner's apartment in connection with a presumably illegal arrest on suspicion of narcotics violations. Seeking $15,000 damages, petitioner brought suit against the federal officers in a federal district court, only to have his complaint dismissed for failing to state a cause of action.[124] This ruling was affirmed by the court of appeals,[125] but the United States Supreme Court reversed. Writing for the majority, Justice Brennan held that "petitioner's complaint states a cause of action under the Fourth Amendment" entitling him "to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."[126] Thus, while there is no statutory authority for such a civil cause of action against federal officers, as exists with regard to state officials acting "under color of law,"[127] the *Bivens* case has in effect created a cause of action under authority of the fourth amendment.

Chief Justice Burger,[128] like Justices Black[129] and Blackmun,[130] felt that the Court had undertaken an essentially legislative role in this case,[131] but he emphasized the significance of the Court's action in relation to the exclusionary rule or, as Burger often prefers, the "Suppression Doctrine." The ineffectiveness of the rule, proclaimed Burger, is "illustrated by the paradox that an unlawful act against a totally innocent person—such as petitioner claims to be—has been left without an effective remedy, and hence the Court finds it necessary now, 55 years later, to construct a remedy of its own."[132] Thus, while disagreeing with the Court's assumption of authority to fill this gap, Burger saw the *Bivens* decision as bald recognition of the fact that the exclusionary rule "has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur given the pressures inherent in police work having to do with serious crimes."[133] Handling the latter type of situations in exactly the same fashion as gross abuse of authority especially troubled the Chief Justice. It was in this regard that he made the statement, quoted earlier in this Article, comparing the rigidity of the exclusionary rule to a "police order authorizing 'shoot-to kill' with respect to every fugitive."[134] Just as we have a right to expect that police response to an escaping fugitive will be reasonably related to "the gravity and need," so also, said Burger, may we properly expect that the courts will react to violations of constitutional rights with "rationally graded responses."[135] This in-

[123] 403 U.S. 388 (1971).
[124] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 276 F. Supp. 12 (E.D.N.Y. 1967).
[125] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969).
[126] 403 U.S. at 397.
[127] 42 U.S.C. § 1983 (1964).
[128] *See* 403 U.S. at 411 (Burger, C.J., dissenting).
[129] *See id.* at 427 (Black, J., dissenting).
[130] *See id.* at 430 (Blackmun, J., dissenting).
[131] "Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not." *Id.* at 412 (Burger, C.J., dissenting).
[132] *Id.* at 415-16.
[133] *Id.* at 418.
[134] *Id.* at 419. *See also* note 77 *supra*, and accompanying text.
[135] 403 U.S. at 419 (Burger, C.J., dissenting).

flexibility of the rule, together with the absence of empirical evidence showing deterrence of illegal police conduct, convinced Burger that the rule cannot be justified "in view of the high price it extracts from society—the release of countless guilty criminals."[136] Nevertheless, the Chief Justice was unwilling in *Bivens* to reject the rule outright in the absence of "some meaningful alternative."[137] Unfortunately, he noted, we have grown to rely on the rule as "the exclusive remedy for unlawful official conduct," so that our position may very well be much like the "narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be."[138] Despite the failure of the exclusionary rule to accomplish its objective of deterrence, a sudden and total abandonment without providing any substitute remedy, might give the erroneous impression "that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared."[139] Pending action by the Congress and/or the states[140] to develop "reasonable and effective substitutes,"[141] such as Burger's own proposal for a new civil action against the government,[142] the Chief Justice appealed in *Bivens* only for a reexamination of "the scope" of the rule with a view toward "at least some narrowing of its thrust."[143] Presumably this would involve an effort by the courts to develop a "rationally graded response" to fourth amendment violations, giving due consideration to the seriousness of the violation and to the question of whether it reflected a malicious and callous disregard for constitutional rights or was an understandable and honest error of judgment.

V. CONCLUSION

With an important new empirical study supporting the assertion that the exclusionary rule has failed to provide significant deterrence of fourth amendment violations, opponents of the rule will now be pressing with renewed enthusiasm for total rejection of the rule by the Supreme Court. On the Court itself, as has been demonstrated, four justices expressed in the *Bivens* and *Coolidge* cases a willingness either to abandon the rule entirely or to make substantial inroads on its application. Depending significantly upon future appointments to the Court,[144] the most likely prospect appears to be a reevaluation and, perhaps, a gradual withdrawal of the exclusionary rule from search and seizure cases. Initially, the Court could adopt a balancing approach

[136] *Id.* at 416.
[137] *Id.* at 420.
[138] *Id.* at 421.
[139] *Id.*
[140] "Once the constitutional validity of such a statute is established, it can reasonably be assumed that the States would develop their own remedial systems on the federal model. Indeed there is nothing to prevent a State from enacting a comparable statutory scheme without waiting for the Congress." *Id.* at 423-24.
[141] *Id.* at 421.
[142] *See* note 61 *supra*, and accompanying text.
[143] 403 U.S. at 424 (Burger, C.J., dissenting).
[144] The departure from the Court of Justices Black and Harlan left only two members (Burger and Blackmun) who have specifically voiced opposition to the Fourth Amendment exclusionary rule. Speculating that the President's new appointees hold views which are substantially in accord with those of the Chief Justice and Justice Blackmun, opposition to the rule on the Court probably may be expected to increase.

similar to that proposed by the American Law Institute[145] and by Chief Justice Burger in his *Bivens* dissent. This would result in a narrowing of the rule's application and would provide a suitable transition to complete rejection of the rule. During this transition period, new vehicles for handling fourth amendment violations[146] could be developed and tested in practice. Assuming success with the new enforcement methods, it would appear that the Supreme Court might very likely be willing to discard the exclusionary rule in fourth amendment cases entirely.[147]

Developments along the lines discussed above would be welcome relief indeed from the present blunderbuss approach to fourth amendment violations. In the carefully reasoned words of Chief Justice Burger:

> 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 the Common Law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct.[148]

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[145] *See* notes 90-101 *supra*, and accompanying text.

[146] *See* the discussion of potential alternatives in notes 42-62 *supra*, and accompanying text.

[147] It is possible that the Court might be eventually willing to reject the rule as a constitutional requirement but, exercising its supervisory powers over the federal courts, insist upon retaining it in federal cases.

[148] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 420 (1971) (Burger, C.J., dissenting).