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The Exclusionary Rule in Context

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COMMENTS

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> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Justice Brandeis dissenting in *Olmstead v. United States*[1]

I. INTRODUCTION

The United States Supreme Court decisions of the past decade have made most of the Bill of Rights guarantees applicable to the states via the fourteenth amendment.[2] These decisions have also dramatically expanded the scope of those guarantees as applied to both federal and state procedure.[3] The general trend of those decisions has been further to "constitutionalize" criminal procedure. The decisions contributing to this trend may well have produced more significant new developments in criminal procedure than all of the decisions of the previous century.

Probably the most highly publicized Supreme Court decisions of

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[1]277 U.S. 438, 485 (1928).

[2]*See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (guarantee against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial in criminal cases); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses); Klopfer v. North Carolina, 286 U.S. 213 (1967) (right to speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront opposing witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (freedom from unreasonable searches and seizures and the right to have excluded from criminal trials any evidence obtained in violation of the fourth amendment). In light of these rulings, two earlier cases might now be viewed as suggesting that the rights to public trial and to notice of the nature and cause of accusations are also incorporated within the fourteenth amendment. *In re* Oliver, 333 U.S. 257 (1948); Cole v. Arkansas, 333 U.S. 196 (1948).

The only criminal procedure guarantees remaining outside the fourteenth amendment are the eighth amendment prohibition against excessive bail and the fifth amendment requirement of prosecution of infamous crimes by grand jury indictment.

[3]In addition to the cases cited in note 2 *supra, see* Chimel v. California, 395 U.S. 752 (1969); Jenkins v. McKeithen, 395 U.S. 411 (1969); Davis v. Mississippi, 394 U.S. 721 (1969); Simmons v. United States, 390 U.S. 377 (1968); *In re* Gault, 387 U.S. 1 (1967) Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963). *See also* cases cited in note 4 *infra.*

the past decade have been those imposing new limitations upon basic police investigatory techniques.[4] These decisions have revised and expanded the limitations previously imposed in areas such as search and seizure and police interrogation and have imposed restraints upon practices such as lineup identification and wiretapping that had not previously been subject to constitutional regulation. With these new limitations added to the extensive body of prior law, the area of police investigation has become one phase of the criminal process that is extensively regulated by constitutional limitations.

The one major development common to the imposition of these constitutional limitations has been the so-called "exclusionary rule." This rule provides for the exclusion from a criminal prosecution of evidence obtained in violation of the Constitution. The United States Supreme Court currently enforces an exclusionary rule in state and federal criminal proceedings as to four categories of constitutional violations: (1) searches and seizures conducted in violation of the fourth amendment;[5] (2) confessions obtained in violation of the fifth and sixth amendments;[6] (3) identification testimony obtained in violation of these amendments;[7] and (4) evidence obtained by methods so "shocking" that the use of such evidence would violate the due process clause.[8]

Especially in the search and seizure context, the exclusionary rule has engendered much controversy as the method of enforcing vital constitutional rights.[9] In fact, in dissenting opinions in two decisions near

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[4]*See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (interrogation); Escobedo v. Illinois, 378 U.S. 478 (1964) (same); Mapp v. Ohio, 367 U.S. 643 (1961) (search and seizure); Kaiser v. New York, 394 U.S. 280 (1969) (electronic eavesdropping); Lee v. Florida, 392 U.S. 378 (1968) (same); Katz v. United States, 389 U.S. 347 (1967) (same); Gilbert v. California, 388 U.S. 263 (1967) (eyewitness identification procedures); United States v. Wade, 388 U.S. 218 (1967) (same).

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

[6]Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[7]Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

[8]Rochin v. California, 342 U.S. 165 (1952). The exclusionary rule is also applied to wiretapping evidence obtained or proposed to be used in violation of federal law. *See, e.g.*, Lee v. Florida, 392 U.S. 378 (1968). Electronic eavesdropping and wiretapping are not considered in this comment.

[9]*See, e.g.*, Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950); Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); Katz, *Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina*, 45 N.C.L. REV. 119 (1966); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

the end of the 1970-71 term, the exclusionary rule came under attack to a degree unprecedented in the modern Court.[10] On Tuesday, January 11, 1972, an hour-long television program entitled *The Advocates* was devoted to an evaluation of the exclusionary rule,[11] and many commentators have recently undertaken vigorous and extensive re-evaluations of the rule.[12] Although to date most of the debate has been concerned with the exclusionary rule in the search and seizure context, this comment will focus on the three other mentioned contexts as well.

II. A BIT OF HISTORY AND LAW[13]

The exclusionary rule has traditionally been applied to violations of the fifth amendment privilege against self-incrimination, since that provision specifically prohibits the use of such compelled testimony in a criminal case. In addition, the application of the rule has been easily justifiable where unconstitutional police activities produce inherently unreliable evidence.[14] The Court, however, has not always recognized the exclusion of relevant and trustworthy evidence as an appropriate

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[10]Coolidge v. New Hampshire, 403 U.S. 443 (1971); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). In his dissent in *Bivens* Chief Justice Burger set forth his views about the deficiencies of the exclusionary rule in the search and seizure context, urged an alternative remedy via legislation, and outlined his own model for congressional consideration. *Id.* at 411-24.

[11]The Advocates, Tues., Jan. 11, 1972, on PBS television network.

[12]*See, e.g.*, Oaks, *supra* note 9.

[13]Part II is a thumbnail survey of the evolution of the exclusionary rule intended to provide the reader with a quick reference to the bare holdings of the most significant Supreme Court cases. Some familiarity with the qualifying doctrines of "standing" and "harmless error" and a grasp of the scope and limitations of the rule itself more thorough than is presented here are essential to an understanding of the rule's operation. For the purposes of this comment's principal objectives—an examination of the policy arguments for and against the rule and an exploration of alternative methods for enforcing constitutional safeguards against police misconduct—the abbreviated discussion in this part is deemed sufficient background.

Concerning the "harmless error" doctrine, see Coleman v. Alabama, 399 U.S. 1 (1970); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1964); Cameron & Osborn, II, *When Harmless Error Isn't Harmless*, 1971 L. & SOC. ORDER 23; Note, *Harmless Error—A Reappraisal*, 83 HARV. L. REV. 814 (1970).

On standing, see Alderman v. United States, 394 U.S. 165 (1969); Mancusi v. De Forte, 392 U.S. 364 (1968); Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968); Parman v. United States, 399 F.2d 559 (D.D.C. 1968); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. Rev. 342 (1967).

Concerning scope and other limitations see One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Burdeau v. McDowell, 256 U.S. 465 (1921); Comment, *Search and Seizure by Private Parties: An Exception to the Exclusionary Rule*, 5 LAND AND WATER L. REV. 653 (1970).

[14]*See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (confession obtained by torture).

remedy to redress violations of a constitutional command—the fourth amendment—[15]that does not refer even indirectly to the admissibility of evidence.

Until 1914 the general view of the nation's courts, state and federal, was that all material and relevant evidence should be admissible in a criminal case without regard to the manner in which it was obtained.[16] For a period after 1914 the Court held that evidence illegally obtained by federal officers could not be used in a federal criminal prosecution.[17] But since the Court refused to exclude from federal criminal prosecutions evidence illegally seized by state officers, there developed the "silver platter" doctrine whereby evidence of a federal crime obtained by state officers in the course of an unlawful search could be turned over to federal authorities for use in a federal prosecution, so long as federal agents did not participate in the unlawful conduct.[18]

Before *Mapp v. Ohio*[19] was decided in 1961, the Court's position was that state courts were not constitutionally required to exclude illegally obtained evidence. In *Wolf v. Colorado*[20] the Court held that although the fourth amendment protection against unreasonable searches was " 'implicit in the concept of ordered liberty' "[21] and was thus incorporated by the fourteenth amendment, state courts were not required to exclude evidence obtained in violation of the fourth and fourteenth amendments.[22] The Court felt that the exclusionary rule of *Weeks* was *not* derived explicitly from the fourth amendment; rather, it was merely a matter of "judicial implication" and hence was not

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[15]In some of the Court's earlier fourth amendment search and seizure decisions, it indicated that the exclusionary rule was predicated on both the fourth and fifth amendments. Boyd v. United States, 116 U.S. 616 (1886). *See also* Gouled v. United States, 255 U.S. 298 (1921). More recently, however, the restrictions upon search and seizure have been derived by the Court, with the exception of Justice Black, solely from the fourth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). *See* Justice Black's dissent in Coolidge v. New Hampshire, 403 U.S. 443, 493-510 (1971), in which he reiterated his view that only the fifth amendment supports the exclusionary rule in the search and seizure context.

[16]Weeks v. United States, 232 U.S. 383, 393-98 (1914).

[17]*See, e.g.*, Kremen v. United States, 353 U.S. 346 (1957); Grau v. United States, 287 U.S. 124 (1932); Weeks v. United States, 232 U.S. 383 (1914).

[18]See Lustig v. United States, 338 U.S. 74 (1949); Byars v. United States, 273 U.S. 28 (1927).

[19]367 U.S. 643 (1961).

[20]338 U.S. 25 (1949).

[21]*Id.* at 27. The Court in *Wolf* adopted the Palko v. Connecticut, 302 U.S. 319 (1937), fundamental rights interpretation of the fourteenth amendment. 338 U.S. at 26. This approach is no longer used today. *Palko* was overruled by Benton v. Maryland, 395 U.S. 784, 794 (1969).

[22]338 U.S. at 28.

binding on the states. Therefore, the majority opinion in *Wolf* held that the exclusionary rule was not fundamental to the basic rights protected by the fourteenth amendment and that the states were free to choose other remedies to prevent unlawful searches.[23] In a concurring opinion, Justice Black suggested that the exclusionary rule, applied in federal cases under *Weeks*, was "not a command of the fourth amendment but . . . a judicially created rule of evidence"[24] adopted pursuant to the Court's supervisory power over federal courts. At the time of the *Wolf* decision seventeen states applied an exclusionary rule and the remainder rejected it.[25]

As the Supreme Court was presented with more and more cases of state violations of the fourth amendment, it became apparent that the remedies chosen by the states to prevent unlawful conduct were ineffective. As a result, in *Rochin v. California* the Court created a narrow "exception" to *Wolf* by holding that the fourteenth amendment did require exclusion from state trials of evidence obtained by police activities that were so flagrantly abusive of individual privacy as to "shock the conscience" of a civilized society.[26]

In *Rochin,* three detectives broke into the defendant Rochin's room and saw two capsules on a night table next to his bed. Rochin quickly put these capsules into his mouth. The detectives immediately jumped on him to extract the capsules, but were unsuccessful. They then took him to a hospital where a doctor, under police direction, forced an emetic solution through a tube into Rochin's stomach. As a result of the "stomach-pumping," Rochin vomitted. The vomitted matter contained two morphine capsules which were used in evidence to convict Rochin. Justice Frankfurter's opinion concluded that this was "conduct that shocks the conscience"[27] and that Rochin had been convicted "by methods that offend the Due Process Clause"[28] of the fourteenth amendment. The *Rochin* decision has not been overruled.

In *Elkins v. United States,*[29] the Supreme Court abrogated the "silver platter" doctrine, relying partly on the fact that the *Wolf* decision had held that the fourth amendment prohibition of unreasona-

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[23] *Id.*
[24] *Id.* at 40.
[25] *Id.* at 38.
[26] 342 U.S. 165, 172-74 (1952).
[27] *Id.* at 172.
[28] *Id.* at 174.
[29] 364 U.S. 206 (1960).

ble searches and seizures applied to the states. With the *Elkins* decision it became quite evident that the *Wolf* doctrine was being eroded.

Finally, in 1961, in the famous *Mapp v. Ohio*[30] decision, the Court overruled *Wolf* and held both that the fourteenth amendment fully incorporated the fourth amendment guarantee and that the exclusionary rule was an essential element of that guarantee. The Court in *Mapp* noted that other remedies against unreasonble searches had proven ineffective[31] and that the trend in the state courts was toward adoption of the exclusionary rule.[32] By disallowing the use in a criminal prosecution of unconstitutionally obtained evidence and thus removing one incentive the police might otherwise have to disregard the fourth amendment, the exclusionary rule was designed "to compel respect for the constitutional guarantee."[33] The Court argued that the rule constituted the only effectively available way to accomplish that end. The Court discounted Justice Cardozo's argument that the rule permitted "[t]he criminal . . . to go free because the constable had blundered"[34] in favor of "the imperative of judicial integrity."[35] "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[36]

The *Mapp* analysis was subsequently extended to require exclusion of evidence obtained incidentally during an unconstitutional search and seizure. In *Wong Sun v. United States,* [37] the Supreme Court excluded an admission of a defendant made in direct response to an unconstitutional entry and arrest. The Court held that all evidence, tangible or intangible, obtained so immediately from a violation of the fourth amendment constituted a "fruit" of official illegality and was therefore subject to the exclusionary rule.[38]

At this point, the two other important contexts in which the rule

[30]367 U.S. 643 (1961).

[31]*Id.* at 651-53.

[32]*Id.* at 660. By the time the *Mapp* decision was rendered more than one-half of the states had adopted an exclusionary rule.

[33]*Id.* at 656. The Court was quoting its own opinion in Elkins v. United States, 364 U.S. 206, 217 (1960).

[34]367 U.S. 659. Justice Cardozo's comment was made in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[35]367 U.S. at 659, *quoting* Elkins v. United States, 364 U.S. 206, 222 (1960).

[36]367 U.S. at 659.

[37]371 U.S. 471 (1963). *See* Silverman v. United States, 365 U.S. 505 (1960); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[38]371 U.S. at 484-85.

applies will be briefly examined. First, *confessions* obtained in violation of the fifth and sixth amendments must be excluded from the evidence in a criminal prosecution.[39] The fifth amendment provides the privilege against self incrimination.[40] This privilege applies in any civil or criminal proceeding and also to any custodial interrogation of a criminal suspect by police.[41] The sixth amendment, of course, is concerned with the right to counsel. Secondly, the rule requires the exclusion of *identification* testimony and evidence obtained in violation of the fifth and sixth amendments.

Before *Miranda v. Arizona*[42] the Court's scrutiny of the use of confessions in criminal cases focused on the issue of "voluntariness." The criteria for determining whether a confession was admissible as "voluntary" or barred as "coerced" changed over the years, but the case-by-case process of articulating constitutional requirements for interrogation persisted throughout that period.[43] As early as 1897 the Supreme Court held that an involuntary or "coerced" confession was not admissible in federal courts,[44] and in 1936 the Court held that the use of a coerced confession as evidence against the accused in a state criminal trial constituted a violation of the fourteenth amendment's due process clause.[45]

The law of "coerced confessions," however, became the subject of criticism. Many felt, and justly so, that the law in this area was inadequate to combat intimidation, coercion, and ignorance. What really goes on at the police station was felt to be largely a matter of the defendant's testimony versus that of the police. In response, the Supreme Court extended the sixth amendment right to counsel to the

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[39]Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964). Recently the Supreme Court held in Harris v. New York, 401 U.S. 222 (1971), that although illegally obtained evidence cannot be used as part of the prosecution's case against the accused, it can be used to impeach the testimony of the defendant if he chooses to take the witness stand in his own defense. The *Harris* case involved a *Miranda* violation, but the decision would seem to be applicable to other situations involving illegally obtained evidence.

[40]Miranda v. Arizona, 384 U.S. 436 (1966).

[41]Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Mississippi, 297 U.S. 278 (1936); United States v. Carignan, 342 U.S. 36 (1951); United States *ex rel.* Weinstein v. Fay, 333 F.2d 815 (2d Cir. 1964).

[42]384 U.S. 436 (1966).

[43]*See* Spano v. New York, 360 U.S. 315 (1959); Thomas v. Arizona, 356 U.S. 390 (1958); Stein v. New York, 346 U.S. 156 (1953); Rochin v. California, 342 U.S. 165 (1952); Haley v. Ohio, 332 U.S. 596 (1948); Lisenba v. California, 314 U.S. 219 (1941).

[44]Bram v. United States, 168 U.S. 532 (1897).

[45]Brown v. Mississippi, 297 U.S. 228 (1936).

police station in the famous *Escobedo v. Illinois*[46] decision. In *Escobedo* the Court held inadmissible a statement obtained from a defendant after he had been denied the assistance of counsel. Next, in *Miranda v. Arizona*,[47] the Supreme Court established elaborate procedural safeguards designed to protect the privilege against self-incrimination in the police station even though the statements given by the accused were, by traditional standards, voluntary. *Miranda* extended the fifth amendment privilege against self-incrimination to custodial interrogation. Failure to follow the *Miranda* procedures means that any statements the suspect made, however voluntarily, are inadmissible at trial.[48] As a consequence of the *Escobedo* and *Miranda* decisions, the exclusionary rule applies to confessions and admissions even where the evidence is not subject to challenge as inherently untrustworthy. As a result of the interaction between the sixth amendment right to counsel and the fifth amendment privilege against self-incrimination, the rule has evolved that once a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, he has a right to counsel at every critical stage of the proceedings.[49] Any confessions or incriminating statements obtained from a suspect at a time when he is denied his constitutional right to counsel must be excluded.[50]

The Omnibus Crime Control and Safe Streets Act of 1968,[51] applicable to federal criminal trials, purports to overturn *Escobedo-Miranda*

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[46]378 U.S. 478 (1964). *See also* Massiah v. United States, 377 U.S. 201 (1964).

[47]384 U.S. 436 (1966).

[48]*Id. See generally* United States v. Drummond, 354 F.2d 132 (2d Cir. 1965); United States *ex rel* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965).

[49]*E.g.*, Mempha v. Rhay, 389 U.S. 128 (1967) (right to counsel at every stage of a criminal proceeding at which substantial rights of a criminal accused may be affected; there, proceeding to revoke probation). Examples of critical stages other than the trial itself include Coleman v. Alabama, 399 U.S. 1 (1970) (counsel required at preliminary hearing even though the hearing is not a required step in the state's procedure); United States v. Wade, 388 U.S. 218 (1967) (lineup and certain identification proceedings); Miranda v. Arizona, 384 U.S. 436 (1966), and Escobedo v. Illinois, 378 U.S. 478 (1964) (custodial interrogations); White v. Maryland, 373 U.S. 59 (1963) (preliminary examination wherein pleas to the charge are made); Hamilton v. Alabama, 368 U.S. 52 (1961) (an arraignment, if certain defenses must be pleaded at that time or if the defendant pleads guilty); Moore v. Michigan, 355 U.S. 155 (1957) (the entering of a guilty plea at any time); Townsend v. Burke, 334 U.S. 736 (1948) (sentencing).

Examples of "non-critical" stages of the criminal proceedings at which the right to counsel has been held not to exist include proceedings for taking and analyzing the accused's fingerprints, handwriting samples, blood samples, and clothing. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966). *See generally* United States v. Wade, 388 U.S. 218, 227-39 (1967).

[50]*See* cases cited notes 47-49 *supra*.

[51]18 U.S.C. § 3501 (1970).

to the extent that the absence of warnings required by these cases does not, under the Act, per se render inadmissible a defendant's confession or incriminating statements. Under this statute the sole test for admissibility is voluntariness; failure to warn the accused of his rights is treated as merely one factor in determining voluntariness. The constitutionality of this legislation is presently undetermined, and, if it is constitutional, its effect upon state criminal trials is unknown.

In federal courts, as a matter of judicial policy rather than of constitutional law, the rule has developed that any statements made by the arrestee while being detained unnecessarily before being taken to a magistrate for arraignment must be excluded at trial.[52] The roots of this rule are found in the 1943 Supreme Court decision *McNabb v. United States*.[53] In the exercise of its "supervisory power" regarding the formulation and application of proper standards for the enforcement of the federal criminal law in federal courts, the Court held in *McNabb* that incriminating statements elicited from defendants during unlawful detention by federal officials are inadmissible in federal courts—even though the illegal detention does not by itself make a resulting confession involuntary. The requirement was reiterated in *Mallory v. United States*.[54] The Court now views the *McNabb-Mallory* exclusionary rule as a judicial sanction for violations of Rule 5(a) of the Federal Rules of Criminal Procedure, which requires that an arrested person be taken before a committing magistrate "without unnecessary delay."[55]

Although the *McNabb-Mallory* decisions were grounded upon the Court's supervisory power over the federal courts, most commentators viewed them as attempts by the Court to avoid the tremendous problems inherent in the due process voluntariness test, and thus there was some expectation that the *McNabb-Mallory* rule would ultimately be rested upon a constitutional foundation and applied to the states. This did not come to pass, perhaps because subsequent decisions holding that there was a constitutional right to counsel at certain pretrial "critical stages" provided a better stepping stone. The anticipated move away from sole reliance upon the voluntariness test occurred in *Escobedo v. Illinois*.[56] *Escobedo* was a cautious step, for the holding was carefully limited to

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[52]*See* Mallory v. United States, 354 U.S. 449 (1957).
[53]318 U.S. 332 (1943).
[54]354 U.S. 449 (1957).
[55]FED. R. CRIM. P. 5(a).
[56]378 U.S. 478 (1964).

the unique facts of the case, but it was generally assumed that this newly established right to counsel in the police station would thereafter be expanded on a case-by-case basis. Instead, the Court just two years later decided *Miranda v. Arizona*,[57] which was grounded upon the fifth amendment privilege against self-incrimination and prescribed a specific set of warnings as prerequisites to all future custodial interrogations.

The *McNabb-Mallory* rule was substantially overturned by the Omnibus Crime Control and Safe Streets Act of 1968.[58] Under this Act, as long as the statement is voluntarily made *within six hours* following arrest or detention, it is admissible even though the defendant was not yet arraigned. If the delay in arraignment is more than six hours, then incriminating statements made by the accused will be admissible only if the delay is shown to have been reasonable in view of the means of transportation and the distance to be travelled to the magistrate.

The final major category in which the exclusionary rule is applicable concerns identification testimony obtained in violation of the fifth and sixth amendments. Lineups, identification evidence, the right to counsel at lineup and identification proceedings, and the privilege against self-incrimination were considered by the Supreme Court in *United States v. Wade*[59] and *Gilbert v. California*.[60] The Court in *Wade* held that a pretrial confrontation for the purpose of identification is a critical stage in criminal proceedings at which the accused has a right to have counsel present.[61] The Court emphasized that lineups are highly unreliable unless fairly conducted.[62] In-court identification evidence will be excluded if tainted by such pretrial confrontation.[63] The Court in *Gilbert* noted that if the witness can identify the defendant without the aid of the lineup and the lineup did not unduly influence him, the failure to respect the defendant's right to counsel may be harmless error;[64] but if the testimony of an identifying witness is the direct result of an illegal lineup, exclusion of such testimony is the only effective sanction.[65]

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[57]384 U.S. 436 (1966).

[58]18 U.S.C. § 3501(c) (1970).

[59]388 U.S. 218 (1967). For a recent case, see United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970), *noted in* 16 VILL. L. REV. 741 (1971).

[60]388 U.S. 263 (1967).

[61]388 U.S. at 227-29.

[62]*Id.* at 229-35.

[63]*Id.* at 239-43.

[64]388 U.S. at 272-73.

[65]*Id.* at 273: "In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally

The Court in *Wade* held that a lineup did not violate the fifth amendment privilege against self-incrimination, since merely exhibiting his person for observation by witnesses and using his voice as an identifying physical characteristic involved no compulsion of the accused to give evidence of a testimonial nature.[66] *Gilbert* held that a handwriting exemplar, as distinguished from the content of what is written, is an identifying physical characteristic outside the protection of the fifth amendment.[67] *Gilbert* and *Wade* rested on the sixth amendment counsel guarantee. Nevertheless, the Court in *Gilbert* recognized that if a testimonial communication had occurred during these procedures, as where the handwriting exemplar contained incriminating statements, the evidence would be excluded under the fifth amendment.[68]

Extensive criticism of *Wade* and *Gilbert* was voiced in Congress during the consideration of the Omnibus Crime Control and Safe Streets Act of 1968, but the only response in the version of the Act ultimately adopted was the addition of the provision that "[t]he testimony of a witness that he saw the accused commit or participate in the commission of the crime . . . [is] admissible in evidence in [any federal criminal prosecution]."[69]

Quite apart from the issue of the right to counsel, a defendant may be able to show that a pretrial confrontation resulted in such unfairness that it infringed his right to due process of the law.[70] In *Palmer v. Peyton*,[71] a rape case, the witness could give no description of her attacker other than that he was a Negro who had a high pitched voice and wore an orange-colored shirt. The police arrested the defendant on the basis of information supplied by an informer. They showed the victim the defendant's voice from an adjoining room. No other voices were provided for comparison. This procedure was found so inherently suggestive as to create a likelihood of mis-identification.[72]

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objectionable practice must prevail over the undesirability of excluding relevant evidence."

[66]388 U.S. at 221-33.

[67]388 U.S. at 266-67.

[68]*Id.*

[69]18 U.S.C. § 3502 (1970).

[70]*E.g.*, Stoval v. Denno, 388 U.S. 293 (1967). *See also* Simmons v. United States, 390 U.S. 377 (1968).

[71]359 F.2d 199 (4th Cir. 1966).

[72]Part II of this text is meant to give the reader some insight into the application of the exclusionary rule in the four mentioned major categories. Admittedly, the discussion in Part II is brief and far from exhaustive. It is therefore suggested that in order to understand more fully the application of the exclusionary rule, the reader should familiarize himself with the doctrines of

III. EXAMINATION OF THE JUSTIFICATIONS FOR AND EFFECTIVENESS OF THE EXCLUSIONARY RULE

The exclusionary rule is the Supreme Court's technique for enforcing police violations of constitutional guarantees. Two justifications have been given for the exclusionary rule, one normative and one factual.[73] The normative justification is founded on the "evil" of government participation in illegal conduct. It focuses on the anomaly of the government's forbidding conduct on the one hand while at the same time participating in forbidden conduct by using evidence acquired in violation of a defendant's constitutional rights. Justice Holmes thought it better for some criminals to escape than for the government to "play an ignoble part."[74] Justice Brandeis spoke of the need to "preserve the judicial process from contamination,"[75] but he added the pragmatic argument that illegally obtained evidence should be excluded to maintain respect for law and to promote confidence in the administration of justice.

Professor Francis A. Allen gave modern voice to this justification by suggesting that

> perhaps it may be urged that any process of law which sanctions the imposition of penalties upon an individual through the utilization of the fruits of official lawlessness tends to the destruction, not only of the rights of privacy but of the whole system of restraints on the exercise of the public force which would seem to be inherent in the

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"harmless error" and "standing" as they relate to this subject matter. Furthermore, a more complete understanding of the scope and limitations of the rule itself will be beneficial. However, for the purposes of this comment Part II is sufficient.

Concerning the "harmless error" doctrine, see Coleman v. Alabama, 399 U.S. 1 (1970); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1964); Cameron & Osborn 11, *When Harmless Error Isn't Harmless*, 1971 L. & SOC. ORDER 23; Note, *Harmless Error—A Reappraisal*, 83 HARV. L. REV. 814 (1970).

Concerning the "standing" doctrine, see Alderman v. United States, 394 U.S. 165 (1969); Mancusi v. De Forte, 392 U.S. 364 (1968); Simmons v. United States, 390 U.S. 377 (1968); Jones v. United States, 362 U.S. 257 (1960); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968); Parman v. United States, 399 F.2d 559 (D.C. Cir. 1968); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967).

Concerning scope and other limitations, see One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Burdeau v. McDowell, 256 U.S. 465 (1921); Comment, *Search and Seizure by Private Parties: An Exception to the Exclusionary Rule*, 5 LAND AND WATER L. REV. 653 (1970).

[73]Oaks, *supra* note 9, at 668.

[74]Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

[75]*Id.* at 484 (Brandeis, J., dissenting).

concept of civil liberty.[76]

In a recent case, *Terry v. Ohio*,[77] the Supreme Court declared that "[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." Neither the government nor the police should be permitted to profit from its own wrong. The Supreme Court has referred to this normative justification of the rule as "the imperative of judicial integrity."[78]

The factual justification for the rule is the assertion that excluding evidence obtained unconstitutionally will reduce violations of the constitutional prohibitions. It is argued that the exclusion of evidence obtained by an unconstitutional method is expected to have the relatively immediate effect of deterring law enforcement officials from improper behavior. In addition, by stressing the seriousness of society's commitment to observing the constitutional mandates, "the exclusionary rule is expected to invoke the moral and educative force of the law and thus to have the long term effect of encouraging greater conformity."[79]

When the Supreme Court has had to make decisions on the scope of the exclusionary rule, its opinion has usually stressed and its reasoning seems to have been dictated by the factual considerations of deterrence rather than the normative arguments of judicial integrity. Thus, in *Elkins v. United States*,[80] in which the Court decided that evidence obtained in an illegal search by state officers must be excluded in a federal criminal trial, the Court gave this explanation of the exclusionary rule: "Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[81] The discursive prevailing opinion in *Mapp* quoted the *Elkins* statement and otherwise characterized the exclusionary rule as a "deterrent safeguard."[82]

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[76]Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 20 (1950).

[77]392 U.S. 1, 13 (1968).

[78]Elkins v. United States, 364 U.S. 206, 222 (1960).

[79]Oaks, *supra* note 11, at 668. On the deterrence idea see Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1966); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 334. *See also* Kaufman v. United States, 394 U.S. 217 (1969).

[80]364 U.S. 206 (1960).

[81]*Id.* at 217. *See also* Allen, *Due Process and State Criminal Procedure: Another Look*, 48 NW. U.L. REV. 16, 34 (1953).

[82]Mapp v. Ohio, 367 U.S. 643, 648, 656 (1961).

Especially since the *Mapp* decision in 1961, there have been volumes of literature on the effectiveness of and the justification for the exclusionary rule.[83] The majority of the literature has been directed at the exclusionary rule in the search and seizure context. With this in mind, a large part of the following analysis will revolve around the rule in this context.

(A) Search and Seizure

The critics of the application of the exclusionary rule to evidence obtained by an unconstitutional search or seizure are numerous.[84] It seems safe to say that if a suitable alternative to the rule were found, some of the critics would advocate complete abolition of the rule.[85] The preponderance of the criticism is directed at the exclusionary rule's alleged ineffectiveness in deterring improper police conduct,[86] although the normative justification has also been challenged.[87] The salient weakness, so it is felt, of the exclusionary rule as a device to deter improper

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[83]*See, e.g.*, Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Burns, *Mapp v. Ohio: An All American Mistake*, 19 DEPAUL L. REV. 80 (1969); Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968); Friendly, *The Bill of Rights as a Code of Criminal Procedure* 53 CALIF. L. REV. 929 (1965); Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition*, 1969 SUP. CT. REV. 155; Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina*, 45 N.C.L. REV. 119 (1966); Oaks, *supra* note 11; Paulsen, *The Exclusionary Rule and Misconduct by Police*, 52 J. CRIM. L.C. & P.S. 255 (1961); Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 DUKE L.J. 319.

[84]*See, e.g.*, Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964); Burns, *Mapp v. Ohio: An All American Mistake*, 19 DEPAUL L. REV. 80 (1969); Oaks, *supra* note 9.

[85]Note should also be taken of Chief Justice Burger's dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971). He proposed an alternative in the form of a model statute to be enacted by Congress. This alternative is discussed in text accompanying notes 113-14 *infra*. See also Oaks, *supra* note 9, at 667, 754-57. It should be noted that the advocates of the abolition of the exclusionary rule, at least in the fourth amendment context, may find themselves facing a constitutional obstacle. The argument has been made that the exclusionary rule is not a mere evidentiary rule but a right inherent in the protections and mandates of the fourth amendment. This view seems to be engendered from language of the Court in *Weeks*, *Wolf*, and *Mapp*. *See generally* Note, *Constitutional Law—Right to Privacy Embodied in Fourth Amendment Made Applicable to the States*, 24 GA. B.J. 445 (1962).

[86]At this point the most recurring criticisms of the rule are set forth without citation to any particular critic. *See generally* authorities cited in notes 83 & 84 *supra* for the expression of these criticisms.

[87]One commentator argues that although the normative justification "continues to appear in the rhetoric of Supreme Court decisions, it is doubtful that this argument decides cases." Oaks, *supra* note 9, at 669. He feels that the principal justification for the rule is the factual one, the normative justification no longer being viable.

police behavior is that its penal effect is felt only when a case comes to court and there is an attempt to introduce illegally obtained evidence to secure a conviction. Consequently, the exclusionary rule is not likely to be an effective deterrent against official misconduct if that misconduct is not directed toward acquiring evidence or if the evidence sought is not intended to be used in a prosecution.

Another defect mentioned is that policemen who have been guilty of improper behavior are not affected in their persons or pocketbooks by the application of the rule. The immediate impact of the rule falls not upon the police but upon the prosecutor who is attempting to obtain a conviction. Furthermore, in terms of direct corrective effect, the exclusionary rule benefits only those persons *actually incriminated* by illegally obtained evidence. It does nothing to recompense an injury suffered by the victim of an illegal search that turns up nothing incriminating.

On the other hand, the rule has not escaped criticism by the various law enforcement officials. They insist that the exclusionary rule handcuffs the police and prevents effective law enforcement.

There are, of course, those who support the rule.[88] They argue that the rule does deter improper police conduct. One advocate says that the exclusionary rule is the "best we have" [89] and that it is "the most effective remedy we possess to deter police lawlessness."[90] Many feel that the rule has an important practical influence in that it creates a genuine incentive for police departments to educate their members in the constitutional rights of suspected persons.[91] One advocate offers the opinion that the rule has substantial regulative effect because it subjects the individual officer "to the pressure of those charged with making an efficient record of criminal convictions to avoid conduct which imperils successful prosecution. Furthermore, the regulative effect of public opinion . . . is more likely to become a reality where the consequence of an official invasion of privacy may be to deprive the state of power

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[88]*See, e.g.*, Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. (1962); Kamisar, *Wolf and Lustig, Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); Katz, *Supreme Court and the State: An Inquiry into Mapp v. Ohio in North Carolina*, 45 N.C.L. REV. 119 (1966); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961).

[89]Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 74 (1957).

[90]Paulsen, *supra* note 88, at 257.

[91]*See, e.g., id. See also* Paulsen, *supra* note 89, at 74.

to secure the conviction of a serious offender."[92]

Perhaps one of the best known of the rule's enthusiasts is Professor Yale Kamisar. He feels the factual justification for the rule is viable. His view is based on the belief that although the data is inconclusive as to whether the rule does deter, the evidence is relatively conclusive that all other existing alternatives do not.[93]

Many advocates of the exclusionary rule reject the "handcuffing the police" argument. They feel that this argument is merely a protest against the underlying constitutional and statutory rights.[94] If there is a negative effect, then it is an effect of the constitutional rules, not an effect of the exclusionary rule as a means chosen for their enforcement. Law enforcement officials who advance the "handcuffing" argument are in the untenable position of urging that the sanction be abolished so that they can continue to violate the rules with impunity.

Justice Brandeis and Justice Holmes, among others, felt that the rule was justified on the normative rationale.[95] Furthermore, recent decisions indicate that this remains a vital justification for the rule.[96] Former Chicago District Attorney Mitchel Ware agrees with these two Justices in this respect.

> I feel that the strongest argument in favor of the exclusionary rule is the need to preserve the judicial process from contamination. Our society cannot tolerate the use of evidence which has been obtained through a violation of the law, without undermining not only respect for the courts, but also for the law itself, of which the courts are allegedly the custodians.[97]

The arguments on both sides of the factual question of whether the exclusionary rule is an effective deterrent of police lawlessness suffer

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[92]Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 20 (1950).

[93]Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1150 (1959).

[94]*See, e.g.*, Oaks, *supra* note 9, at 754; Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 440 (1964).

[95]*See, e.g.*, Olmstead v. United States, 277 U.S. 438, 470, 484-85 (1928) (Brandeis & Holmes, J.J., dissenting).

[96]*See, e.g.*, Terry v. Ohio, 392 U.S. 1, 13 (1968).

[97]Letter from Mr. Mitchel Ware to the author, Feb. 7, 1972, on file in the North Carolina Law Review Office.

The discussion thus far concerning the arguments for and against the rule in the search and seizure context should give the reader an insight into the war that is being waged. However, the arguments set forth above are by no means exhaustive.

from a lack of conclusive empirical data. Consequently, both sides rely on guesswork that can persuade only those predisposed to sympathize with the particular viewpoint expressed.

Studies that have attempted to measure the impact of the exclusionary rule on police behavior have proved inconclusive.[98] Nevertheless, they have shown that police training in search and seizure rules is more extensive where there is an exclusionary rule and that the rule has contributed to an increase in police awareness of constitutional rights and requirements.[99] These studies indicate that most judges, prosecutors, police officers, and lawyers believe that the rule is an effective way to reduce illegal searches.[100]

The exclusionary rule was applied to the states only after the Supreme Court had accumulated considerable experience with police violations of the fourth amendment. Frustrated in less stringent efforts to control the abuses, the Supreme Court ultimately resigned itself to employment of the exclusionary rule. The exclusionary rule was never conceived of as a final solution for the problem. Necessarily underinclusive as well as over-inclusive in its reach, the rule was employed nevertheless because the Court realized that without it violations of the constitutional guarantee were beyond its effective control. As Professor Kamisar argued before *Mapp* was decided, "The fact that there is little agreement and little evidence that the exclusionary rule does deter police lawlessness is much less significant, I think, than the fact that there is much agreement and much evidence that all other existing alternatives do not."[101]

As the discussion thus far indicates, there is no definitive answer to whether the exclusionary rule can be factually justified. Certainly it is arguable that the deterrent function is operative in the situation in which the main police objective is to obtain a conviction. At any rate, the rule should not be abandoned until substantial evidence is presented to indicate that its factual basis is unjustifiable.[102]

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[98]*See, e.g.*, Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications*, 45 N.C.L. REV. 119 (1966); Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283; Oaks, *supra* note 9, at 709. *See generally* Allen, *supra* note 88, at 34. *See also* the numerous studies set forth and examined in Oaks, *supra* note 9, at 678-709.

[99]Oaks, *supra* note 9, at 708. *See also* Nagel, *supra* note 98, at 283-86.

[100]*See generally* Katz, *supra* note 98; Oaks, *supra* note 9, at 708.

[101]Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1150 (1959).

[102]As indicated earlier, the data thus far accumulated concerning the effectiveness of the

In light of the attacks on the factual basis of the rule, perhaps its normative basis should be re-emphasized. Some recent decisions indicate that this remains a vital justification for the rule.[103] In our times it seems essential that we do what is necessary to preserve the "imperative of judicial integrity" and to enforce constitutional mandates.

(B) Confessions, Identification Evidence, and Due Process

In addition to being the most frequent occasion for application of the exclusionary rule, search and seizure has two qualities that set it apart from other areas and make it appropriate for separate study. Evidence obtained by an illegal search and seizure is just as reliable as evidence obtained by legal means. This cannot always be said of evidence obtained by improper methods of lineup identification or interrogation. And, the exclusion of evidence obtained by an improper search and seizure is less likely to influence law enforcement behavior than is the exclusion of evidence obtained by improper means of identification or interrogation or by coercive methods.[104]

Informed observers have suggested a variety of goals or motivations other than obtaining convictions that may prompt police arrest and search and seizure.[105] These include arrest or confiscation as a primitive sanction, arrest for the purpose of controlling prostitution, arrest of an intoxicated person for his own safety, search for the purpose of recovering stolen property, search for the purpose of removing weapons or contraband such as narcotics from circulation, and search for weap-

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exclusionary rule is inconclusive. What is required to test the effectiveness of the rule is a complete and decisive empirical study of its deterrent effect on police misconduct. Professor Oaks has indicated that prior research has not demonstrated a method by which this important question can be determined. However, in his article he reviewed various aspects of deterrence suggested in the literature on the deterrent effect of punishment, applied them to the exclusionary rule, and discussed possible techniques and areas for further research. Oaks, *supra* note 9, at 709-20. With Professor Oaks' suggestions in mind, a test could be developed to measure the deterrent effect of the rule. Once a test is developed it should be administered on a nationwide basis, perhaps by a special committee of the American Bar Association.

[103] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 13 (1968).

[104] *See generally* REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967); REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 181 (1967); J. WILSON, VARIETIES OF POLICE BEHAVIOR 48.

[105] W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY, chs. 21-24 (1965); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 448-55 (1965); J. SKOLNICK, JUSTICE WITHOUT TRIAL 220 (1967).

ons that might be used against the searching office. A large proportion of police behavior is thus not likely to be responsive to any deterrent effect of the exclusionary rule.

The variety of reasons why an improper search and seizure takes place is in marked contrast to the limited objectives motivating police to engage in the kinds of illegal conduct that cause the exclusion of a coerced confession or an improper lineup identification. In exceptional situations a person may be interrogated just to obtain the recovery of stolen property or to locate a kidnapped person, all without the intention of prosecuting, but the predominant incentive for interrogation is to obtain evidence for use in court. Consequently, police conduct in this area is likely to be responsive to judicial rules governing the admissibility. "There can be no doubt [that the Supreme Court's rulings about interrogation procedures] had much to do with the fact that today the third degree is almost non-existent."[106] One commentator has observed that the problem of interrogation was relatively easy to bring under judicial control by appellate decisions "precisely because it was part of the crime solving function of the police . . . ."[107] The same success may be expected for the new rulings on lineup identifications.

Nevertheless, many of the arguments advanced against the exclusionary rule in the search and seizure context have also been advanced in the interrogation and lineup contexts.[108] For example, Professor Amsterdam argues that the decisions of the Supreme Court have had a very limited effect on the police in protecting the rights of suspects.[109] Professor Driver adds: "The *Miranda* warnings fail to provide safeguards against the social psychological rigors of arrest and interrogation except to the extent they prevent interrogation altogether."[110]

There have also been empirical studies of the effect of the exclusionary rule in these other areas. For example, since the *Miranda* decision in 1966, a number of empirical studies have sought to trace its impact on interrogation procedures.[111] However,

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[106]REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967).

[107]J. WILSON, *supra* note 104, at 48.

[108]*See generally* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785 (1970); Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968).

[109]*See generally* Amsterdam, *supra* note 108.

[110]Driver, *supra* note 108, at 59-61.

[111]*See, e.g.*, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967);

> [a]t this time, it is difficult to synthesize the observations of these projects into comprehensive conclusions. Potential for generalization is undercut by frequently inadequate or unrepresentative sample groups, by the lack of comparative data of police practices before *Miranda*, and by the differences in methods among the various projects.[112]

Therefore, any empirical study undertaken to examine the rule in the search and seizure context should include a study of the effect of the rule in all of its contexts.

IV. THE ADDITION OF MORE "BITE" TO THE RULE

(A) The Burger Proposal: Is Replacement Rather Than Supplementation Feasible?

In his dissent in *Bivens v. Six Unknown Narcotics Agents*,[113] Chief Justice Burger suggested that Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose fourth amendment rights have been violated. He found the conceptual basis for his remedy in the tort law doctrine of respondeat superior. He also set forth guidelines for a model statute which Congress could enact.[114]

The alternative that Chief Justice Burger proposed in *Bivens* seems to be inadequate in various respects and should not be adopted. The model guidelines do provide a cause of action against the government

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Seeburger & Wettick, *Miranda in Pittsburg—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967); Robinson, *Police and Prosecutor Practice and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425.

[112] S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 945 (2d ed. 1969).

[113] 403 U.S. 388, 411 (1971).

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> (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) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

Id. at 422-23.

for damages, but there is no provision to compensate a plaintiff for the cost of bringing such a suit. The fact that one may lose and go unreimbursed for the costs of pursuing the suit would seem to be a deterrent to bringing it. Therefore, it is doubtful that an individual of low income could afford to bring a suit under this proposal. Furthermore, under the proposed guidelines it is arguable that government liability for police "torts" is not a sufficient condition for effective deterrence. Some police illegality is an inevitable concomitant of the human element in law enforcement, and departmental policymakers, according to their own scheme of values, may find it advantageous to violate now and pay later. Such a decision is especially likely in situations in which the exclusionary rule does not apply and there is no other deterrent—in other words, where prosecution is not contemplated and conviction is not the motivating factor.

It should be noted that the damages recoverable under the proposed guidelines are not assessed against the "guilty" officer but apparently come from the government itself. The police officer does not seem to be directly chastized for his sins. In addition, the scope of the alternative proposed is very narrow. It includes only fourth amendment violations by federal officers. Nothing in the guidelines purports to cover other constitutional violations or violations by state officers. Chief Justice Burger assumes that if the proposed statute is constitutional the states will adopt similar remedial systems based on the federal model, but *no* foundation is laid for this assumption. It should be noted that historically most states have refused to waive governmental immunity in police "tort" cases despite repeated urgings by scholars.

One strong criticism of the exclusionary rule has been that it does not deter when police act in situations in which prosecution is not contemplated. If officers merely seek to harass a citizen, the exclusionary rule does not influence the officers to cease. However, this is not necessarily a telling argument against the rule; it may be viewed as calling only for the creation of other remedies. The need is for supplementation, not abandonment. As was indicated earlier, the exclusionary rule was not designed to be the final solution for the problem.

Some of the Supreme Court decisions in the last few years also indicate a need for the exclusionary rule to be supplemented. One important group of decisions arose in the "harmless error" doctrine context. Affecting the reach of the exclusionary rule is the doctrine of "harmless error," under which convictions are not to be reversed unless the error has prejudiced the defendant's case. Mr. Justice Black's major-

ity opinion in *Chapman v. California*[115] established that the issue of whether or not a federal constitutional error is harmless is governed by federal law and that all constitutional errors are not necessarily harmful. But the Court held that

> before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard . . . [than the former requirement that there be a reasonable possibility that the evidence complained of might have contributed to the conviction].[116]

On June 2, 1969, however, the Supreme Court held in *Harrington v. California*[117] that a constitutional error in the trial of a criminal offense was harmless because "overwhelming" untainted evidence supported the conviction. The three dissenters in *Harrington* declared that the deterrent effect of the exclusionary rule will ultimately be substantially vitiated by this approach to the question of harmless error.[118]

The need for supplementation is further illustrated by the fact that the rule as it now operates neither protects innocent persons from illegal police conduct nor compensates them for breaches of their constitutional rights.[119] Furthermore, the rule does not punish the police who participate in this illegal conduct. Even in the situations in which there is a prosecution, rejection of the evidence does nothing to punish the wrongdoing official.

Thus, the need for additional—not substitutional—remedies for enforcing the substantive rules governing police conduct is apparent. Less apparent is which of the various possibilities is soundest theoretically and practically.

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[115]386 U.S. 18 (1967).

[116]*Id.* at 24.

[117]395 U.S. 250 (1969).

[118]*Id.* at 255. *See also* Harris v. New York, 401 U.S. 222 (1971). This decision, like the present "harmless error" doctrine, seems to undercut the effectiveness of the exclusionary rule.

[119]*See generally* Irvine v. California, 347 U.S. 128, 136 (1954); Brinegar v. United States, 338 U.S. 160, 181 (1949); Wolf v. Colorado, 338 U.S. 25, 30 (1949); 8 WIGMORE ON EVIDENCE § 2184, at 51-52 (McNaughton ed. 1961).

For example, illegal arrests which are designed to harass rather than to prosecute, physical abuse of suspects or persons in custody, unnecessary destruction of property, illegal detentions which are not motivated by a desire to secure confessions, and similar serious forms of police illegality are not affected by the exclusionary rule.

(B) Tort Actions in State Courts

In general, a policeman is personally liable under state law for torts arising from his law enforcement activities.[120] Consideration of tort liability must proceed simultaneously on two fronts: effectiveness as a deterrent and utility as a mode of redress. In order to eliminate violent response to alleged police misconduct, our society must achieve both of these objectives. The average citizen must be confident that police misconduct is the deviant rather than the normal behavior and that he can effectively redress injuries suffered because of police improprieties.

Causes of action theoretically encompassing police misconduct are false arrest, false imprisonment, malicious prosecution, trespass, and assault and battery. These tort actions have proved inadequate. The present tort remedies are ill-suited for controlling the police since the measure of damages is not related to the enormity of the wrong committed. Instead, the damages are determined by the injury suffered by the plaintiff, and that injury often cannot be measured in economic terms.[121] This defect could be remedied by changes in the measure of damages.[122]

An initial defect in civil recovery both as a means of redress and as a deterrent to police misconduct is the cost of the suit. Unfortunately, litigation is most costly (and consequently least attractive) in those cases in which redress is most needed—brutality cases in which recovery is likely to depend on the resolution of disputed factual issues necessitating a protracted trial.

There are other criticisms of the existing tort remedies, such as the reluctance of juries to find significant damages against police officers, especially in favor of a plaintiff who was an accused or convicted criminal. Fortunately, there are some signs of change in these areas.[123]

An effective tort remedy against the offending officer or his em-

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[120]*See generally* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Rubenstein, *Liability in Tort of Judicial Officers*, 15 U. TORONTO L. REV. 317 (1964); W. PROSSER, THE LAW OF TORTS 127-36, 834-59, 987-92 (4th ed. 1971). Federal officers can be sued in state courts on state causes of action, but by virtue of a special federal statute these federal officers may remove to the federal district court. 28 U.S.C. § 1442(a) (1970). *See* Aycock, *Introduction to Certain Members of the Federal Question Family*, 49 N.C.L. REV. 1, 17-23 (1970).

[121]*See* Foote, *supra* note 120, at 504-16. Professor Foote discusses the present tort actions and their inadequacies and makes suggestions for an effective tort remedy.

[122]*Id.*

[123]Recent cases in the federal courts may portend the development of one or more effective federal damage remedies against illegal law enforcement conduct. *E.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1970). On the subject of damages, a Seventh Circuit decision held

ployer could be a useful supplement to the exclusionary rule.[124] A practical tort remedy would give courts an occasion to rule on the content of constitutional rights and could provide a viable remedy with attendant direct deterrent effect upon the police whether or not the injured party was prosecuted.

However, the fact that several crucial variables are unknown probably will prevent immediate heavy reliance on the state tort remedy. These factors include the extent to which persons who are harmed by illegal police conduct actually would resort to such a remedy (the utilization of remedy) and the extent to which official agencies would attempt to prevent illegal conduct if they were subjected to liability therefor (the deterence element).

(C) Causes of Action under Section 1983

In addition to state common law tort remedies, a citizen aggrieved by police misconduct may have a cause of action under section 1983, the present embodiment of the Civil Rights Act of 1871,[125] which creates a federal cause of action for the deprivation under color of state law of "any rights, privileges, or immunities secured by the Constitution . . . ."[126] It should be immediately apparent that the Act of 1871 applies only to state action and not to federal action. Congress has not passed a general statute making federal officers liable for acts committed "under color" but in violation of their federal authority.[127]

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that a plaintiff in a civil rights action could recover for attorneys fees incurred and for confinement suffered as a result of the invasion of his constitutional rights. Kerr v. Chicago, 424 F.2d 1134 (7th Cir. 1970). The Fourth Circuit recently held that a youth whom a police officer had shot in a reckless use of force during an arrest attempt could recover damages under the Civil Rights Act and could also recover damages—including pain and suffering—for assault and battery under a pendent claim based on state law. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970).

[124]*See generally* Foote, *supra* note 120; Oaks, *supra* note 9, at 756-57.

[125]Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

[126]42 U.S.C. § 1983 (1970):

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

See also Comment, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 104 (1970); Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights*, 39 N.Y.U.L. REV. 839 (1964).

[127]Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). The Court held that it would not fill the

Section 1983 was originally designed to remedy the widespread abridgment of the rights of Negroes that characterized the Reconstruction period in the South.[128] Recently, however, the Supreme Court has read the broad statutory language to authorize civil tort suits in federal courts against state law enforcement officers, and a steady stream of such cases now flows through the lower federal courts.

Section 1983 derives much of its present strength from *Monroe v. Pape*,[129] which was decided by the Supreme Court in 1961. In that landmark case James Monroe alleged that thirteen Chicago policemen broke into his home at 5:45 a.m., routed his whole family from bed, ransacked every room in his house, detained him at the police station for ten hours on "open charges," and finally released him without filing criminal charges against him. The Supreme Court held that these allegations were actionable under section 1983. The Court noted that even action wholly contrary to state law is nevertheless action "under color of law" if the policemen are clothed with the indices of authority. Moreover, the *Monroe* majority held that since section 1983 does not include the word "willfully," a complainant need neither allege nor prove a "specific intent to deprive a person of a federal right."[130] Finally, the Court reasoned that since one of the purposes of section 1983 was to afford a federal right in federal courts, the federal remedy is supplementary to any existing state remedy and the state remedy need not be exhausted before the invocation of section 1983.[131]

One issue that remained after the *Monroe* decision was whether some degree of bad faith or other fault in the deprivation of the citizen's constitutional rights is an element of the federal cause of action under section 1983. The Court confronted this issue in 1967 in *Pierson v. Ray*.[132] In that case petitioners, a group of Negro and white clergymen, were arrested for sitting in at a segregated interstate bus terminal in Mississippi. Subsequent to their arrest and conviction, the statutory provision upon which their arrest had been based was declared

"hiatus" Congress has left in this area. Note the judicially created civil damages remedy for fourth amendment violations by federal law enforcement officials (who are not covered by § 1983) in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1970).

[128]*See generally* Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAWYER 70 (1964).

[129]365 U.S. 167 (1961).

[130]*Id.* at 187.

[131]*Id.* at 183.

[132]386 U.S. 547 (1967).

unconstitutional, and their cases were remanded and later dropped. In their subsequent suit under section 1983, the Supreme Court proclaimed that the defenses of "good faith and probable cause" were available to the policemen.[133]

Although the *Pierson* decision established that policemen are not strictly liable for unconstitutional activity, the scope of the defenses which it recognized is not yet clear. An additional question remaining after *Pierson* is the scope of police activity covered by the "rights, privileges, or immunities" clause of section 1983. It clearly covers illegal searches or seizures and unconstitutional arrests. And it would seem that it also covers gross acts of police brutality, conduct which denies due process because it shocks the conscience. However, Section 1983 cannot be employed to regulate the day-to-day conduct of the policeman on patrol.

Thus, section 1983, a *potentially* useful device for compensating individuals who are substantially injured by unconstitutional police conduct, is uncertain with respect to both its scope and the defenses to a cause of action under it. In addition, section 1983 is subject to all the intrinsic weaknesses of the existing state tort remedy[134] and also to the additional limitation of affording a cause of action only against *state* law enforcement officers.[135] Despite these inherent limitations, however, section 1983's federal remedy for deprivation of constitutional rights does permit compensation of citizens whose persons or property is significantly damaged due to clearly unlawful police activity.

(D) The Injunction as a Supplement

One potentially effective type of judicial relief—the injunction—has been largely ignored. This seems especially strange when one considers that the exclusionary sanction is limited to evidence offered at trial, whereas the injunction may be employed to deter conduct in advance of any trial. The injunction offers the prospect of immediate relief from unconstitutional conduct and a powerful deterrent from engaging in that specific conduct. Simply as a matter of judicial equitable prerogative, such relief is easily justified: section 1983 is available in "an action at law, *suit in equity*, or other proper proceeding . . . ,"[136] and

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[133] *Id.* at 555-57.

[134] *See* text accompanying notes 120-24 *supra.*

[135] *See* note 126 *supra.*

[136] 42 U.S.C. § 1983 (1970).

the use of the injunction to deter unconstitutional police conduct was generally approved by the Supreme Court in the only case to raise the issue—*Hague v. C.I.O.*[137] In *Hague*, the C.I.O. sought to enjoin the mayor, the police chief, and other officials of Jersey City from continuing an anti-union harassment campaign of arrests, deportation of organizers, and suppression of union circulars and public meetings. The district court issued a permanent injunction prohibiting the defendants and their agents from continuing their deliberate policy of constitutional violations. With two dissents from the seven Justices sitting, the Supreme Court affirmed.[138]

If the injunction is to have any utility as a remedy for police abuse, it must mandate affirmative action by the officials responsible for police conduct. Section 1983 authorizes the imposition of liability on high police officials.[139] Certainly a police commissioner acts "under color of [a] statute, ordinance, regulation, custom, or usage, of [a] State or Territory."[140] The decisions implementing the Supreme Court's rulings on school desegregation and legislative reapportionment clearly demonstrate that a federal court has the power to vindicate federal constitutional rights by issuing a mandatory injunction against state and local officials.[141] If confronted with a pattern of tolerated violations of the constitutional rights of certain individuals, the court should declare the existence of the wrong and direct the police commissioner to correct it. At any rate, the use of an injunction as a supplement should be more fully and carefully explored.

(E) Increasing the "Bite" of the Rule Itself

It can be argued that the direct effect of the exclusionary rule has

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[137]307 U.S. 496 (1939), *aff'g with modifications* 101 F.2d 774 (3d Cir. 1939), *aff'g* 25 F. Supp. 127 (D.N.J. 1938).

[138]Other cases involving injunctive relief against improper police conduct include Perez v. Ledesma, 401 U.S. 82 (1971); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); N.A.A.C.P. v. Thompson, 357 F.2d 831 (5th Cir. 1966), *cert. denied*, 385 U.S. 820 (1967). On the use of federal injunctive relief from unconstitutional police conduct, see *Federal Injunctive Relief From Illegal Search*, 1967 WASH. U.L.Q. 104 (comment on *Lankford, supra*); Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968); Annot., *Propriety of Federal Injunction Against Use in State Criminal Trial of Evidence Unlawfully Obtained*, 27 L. ED. 2D 984 (1971).

[139]*See generally* Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

[140]42 U.S.C. § 1983 (1970).

[141]*See, e.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964).

been reduced by limitations of its scope. Some of these limitations have recently been removed, but at least one remains. Courts employ the exclusionary rule only at the behest of a person who has "standing" to make the motion to suppress.[142] For example, in the search and seizure context to have standing a person must be aggrieved by the unlawful search and seizure.[143] A person has no standing to invoke the exclusionary rule, however, if the evidence was obtained through an unlawful invasion of the rights of some other person, even though the evidence is being used in an attempt to convict the former of a crime.[144]

The standing limitation is inconsistent with both of the asserted justifications for the exclusionary rule. If the rule is meant to deter the police and avoid judicial involvement in illegal behavior, it should exclude all evidence obtained in violation of constitutional prohibitions without inquiry into whose rights were violated. Following this reasoning, several commentators have urged abolition of the standing requirement.[145] Thus far only the California Supreme Court has heeded the call.[146]

(F) Civil Actions for Damages in Federal Courts

In *Bivens v. Six Unknown Named Agents*,[147] the Supreme Court upheld a private claim for money damages in federal court against federal agents for violation of guarantees secured by the fourth amendment. This decision is especially important because there is no "federal officer" counterpart to section 1983, which provides a cause of action against state officers. The Court in *Bivens*, however, did not decide whether a federal officer may employ an immunity defense, nor did it detail the scope or limitations of such an action.

Congress has recently made it a crime to execute a search warrant with unnecessary severity or willfully to exceed one's authority in executing it,[148] to procure the issuance of a search warrant maliciously and

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[142]*See, e.g.*, Alderman v. United States, 394 U.S. 165 (1969); Mancusi v. DeForte, 392 U.S. 364 (1968). *See generally* White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970).

[143]*See, e.g.*, Jones v. United States, 362 U.S. 257 (1960).

[144]Alderman v. United States, 394 U.S. 165 (1969).

[145]*See, e.g.*, Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 22 (1950); Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 DUKE L.J. 319, 335.

[146]People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

[147]403 U.S. 388 (1971).

[148]18 U.S.C. § 2234 (1970).

without probable cause,[149] or to search maliciously without a warrant and without reasonable cause.[150] Arguably, an implied civil right of action for damages would also lie for violation of these provisions.[151]

(G) Some other Considerations

The deterrent effect of the exclusionary rule is dependent to some extent on whether the rules it is supposed to enforce are stated with sufficient clarity to be understood and followed by police officers. This point applies not only to the direct deterrent effect of the rule but also to its longer range moral and educative effect. "For if the trumpet give an uncertain sound, who shall prepare himself for battle?"[152] Though undoubtedly clear in some areas of police behavior, the procedures to be followed are notoriously complex in others. In this respect the courts and legislatures can do much by providing clarity in the decisions and laws they make.

Consideration should be given to implementing legislation which would impose the penalty for constitutional violations directly on police officials rather than letting it fall on the prosecutor who is attempting to obtain a conviction or upon society as a whole. In fact, several authorities have proposed legislation to impose liability on political subdivisions the officers of which have committed an offense.[153] Furthermore, more efficient intra-departmental discipline of the police should be considered.[154] Internal review is undoubtedly the quickest and most efficient method of regulating the conduct of peace officers. A punishment decreed by an insider such as a police chief is likely to be accepted by both the officer guilty of misconduct and the department as a whole.

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[149] *Id.* § 2235 (1970).

[150] *Id.* § 2236 (1970).

[151] *See generally* Griffin v. Breckenridge, 403 U.S. 88 (1971) (cause of action in favor of private individual against another private individual for violation of 42 U.S.C. § 1985(3) (1970)); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); *see also* 18 U.S.C. § 2520 (1970) (civil action for damages for anyone injured by illegal wiretapping); 18 U.S.C. § 242 (1970) (action for deprivation of rights under color of law).

[152] *Corinthians* 14:8. Professor Oaks translates this as follows: "[i]f the rules are a clarion call for protecting the rights of the individual, then the trumpet gives an uncertain call." Oaks, *supra* note 9, at 731.

[153] *See, e.g.*, 3 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 25.17, 26.03 (1958); Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1964).

[154] *See generally* GELLHORN, WHEN AMERICANS COMPLAIN (1966); Note, *The Administration of Complaints by Civilains Against the Police*, 77 HARV. L. REV. 499 (1964).

While a judge on the District of Columbia Circuit Court of Appeals, Chief Justice Burger made an interesting suggestion of a method to reinforce the impact of the exclusionary rule:

> As we see it, unless implemented, the Suppression Doctrine is a manifestation of sterile indignation and is essentially negative . . . . Something more is needed; as a starting point, some of us—a minority at the moment—would direct the District Court, in every case where evidence is suppressed because of an officer's violation of a statute or constitutional provision, to send a copy of the transcript on the motion to suppress evidence to the Commissioners of the District of Columbia and other executive officials having responsibility for those officers whose actions are found to warrant suppression of vital evidence in a criminal case.[155]

Professor Amsterdam feels that those outside the judicial systems, such as community groups and police departments, must take the lead in protecting the rights of defendants by formulation of rules for police conduct. He points out that that the Supreme Court, like any other court, lacks the sort of supervisory power over the practices of the police that is possessed by the chief-of-police or the district attorney. The Court can review police practices and thus define the rights of suspects subject to those practices only when the practices become an issue in a law suit.[156]

CONCLUSION

Despite some weaknesses and limitations in scope, the exclusionary rule should not be abolished. Rather, there is a need for additional remedies to supplement the rule. If constitutional rights are to be anything more than pious pronouncements, some measurable consequence must attend their violation.

The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review of police procedures and gives credibility to constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term

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[155]Killough v. United States, 315 F.2d 241, 257-58 n.5 (D.C. Cir. 1962).

[156]*See generally* Amsterdam, *supra* note 108; Landynski, *The Supreme Court's Search for Fourth Amendment Standards; The Problem of Stop And Frisk*, 45 CONN. B.J. 146 (1971).