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In the federal courts and in the courts of over twenty American states, evidence illegally obtained by law-enforcement officers cannot be received in a criminal prosecution, provided the accused objects to its admission.[1] Under the exclusionary rule if the residence quarters of a kidnapper are illegally searched by the police, the most incriminating evidence found therein, including such items as copies of ransom notes actually sent or the clothing of the victim, could not be used in a criminal proceeding against the kidnapper.[2] Whether such a rule can be defended in principle and whether it operates to discourage illegal police practices are the questions posed by this discussion.

At the outset it should be recognized that the evidence which may not be introduced is as trustworthy and reliable as any which may be considered in court. The evidence is kept out of the trial not because it is unworthy of belief, but because it is the product of police methods which violate the law.

The exclusionary evidence rule says nothing about the content of the law governing the police. It takes no position with respect to which arrests, searches and seizures, or other enforcement actions are legal or illegal. To defend the rule is not to defend any particular formulation regulating the activities of law enforcement. One can support the rule and still support the proposition that wiretapping ought to be permitted in certain circumstances under certain safeguards. One can support the rule and still hold that the present law of arrest, formed as it was before the appearance of modern professional police forces, is outmoded and requires drastic reformulation. The rule merely states the consequences of a breach of whatever principles might be adopted to control law enforcement officers.

Police officers are not controlled more rigorously by the exclusionary evidence rule than they are by force of their own respect for the law. If police obey the rules set by the community to govern police practice, they obviously will not obtain evidence illegally. The point is often missed. The chief of police of Los Angeles, writing after California adopted the exclusionary rule, stated that the "ability to prevent the commission of crimes has been greatly diminished."[3] He meant to suggest that the diminution occurred because he would have to comply with the California decision. Yet, that decision merely adopted the exclusionary rule in California; it did not change the substantive law of arrest or search at all. If the decision diminished the effectiveness of law enforcement in California, it did so by securing obedience to the law in a manner which influenced the police.

Nor are the police alone in falling into the error. Professor Edward Barrett has recently written:

> "The interplay between the exclusionary rule and the rule that searches must be justified as incidental to valid arrests presents the danger of two undesirable side effects. Pressure may be placed on the police to make arrests too early in the investigative process. Pressure may be

[1] The jurisdictions are listed in MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 745 (1957).

[2] Some states apply the exclusionary rule only in certain classes of cases. In Alabama, evidence illegally obtained from a dwelling house is excluded in the trial of certain alcohol control cases. ALA. CODE tit. 29, §210 (Supp. 1959). In Maryland, illegally obtained evidence is inadmissible in misdemeanor cases except that such evidence is admissible in prosecutions for carrying a concealed weapon. Also, in certain counties of Maryland, the exclusionary rule is inapplicable in gambling cases and, in a slightly different list of counties, the rule is inapplicable in lottery cases. MD. CODE ANN. art. 35, §5. See Salsburg v. Maryland, 346 U.S. 545 (1954). In Michigan, article 2, §10, of the state constitution provides that the exclusionary rule, otherwise applicable, shall not bar from evidence certain items listed therein.

If there is merit in the arguments of this paper, i.e., that the exclusionary rule does work to deter police misconduct, these compromises must be based upon a judgment that the deterrent effect of the exclusionary rule is a value outweighed by the value of securing convictions in some kinds of cases.

[3] PARKER, POLICE 117 (Wilson ed. 1957).

placed on the courts to water down the standards for probable cause to make formal arrests in order to avoid freeing obviously guilty defendants because of relatively minor invasions of their privacy."[4]

The pressure to arrest in order to search exists not because of the exclusionary rule, but because the law governing police conduct prohibits a search without a warrant, unless the search is incident to a valid arrest. The "side effects" referred to by Professor Barrett would, I submit, be observed in the operation of any sanction severe enough to deter the police. If courts were called upon to impose mandatory jail sentences or large fines upon officers guilty of minor violations of the rules, these side effects would be present. One can imagine judges who would place heavy burdens on the "technical" violator but who would not free the accused because of the violation, but I doubt that such judges exist in reality. Whenever the rules are enforced by meaningful sanctions, our attention is drawn to their content. The comfort of Freedom's words spoken in the abstract is always disturbed by their application to a contested instance. Any rule of police regulation enforced in fact will generate pressures to weaken the rule.

One further preliminary observation: The point is often made that the exclusionary rule should be rejected because the law of search and seizure and the law of arrest are filled with technicalities and inconsistencies. This point too, goes to the content of the rules rather than to the remedy. If the rules are unrealistic or unprincipled they ought to be changed. One may note that the California Supreme Court, in cases applying the exclusionary rule after its adoption, has greatly broadened the power of the police to search and to make arrests.[5]

Any fair-minded observer will find the case against excluding illegal evidence an impressive one.

Under the rule, a great many obviously guilty people must be acquitted. If the tainted evidence is barred from trial, the prosecution will frequently fail to carry its considerable burden of proof. The aim is to deter law enforcement officers from violating individual rights; however, the rule does not impose money damages or loss of liberty upon the offending officers, nor does it provide compensation for persons injured by official overreaching. Opponents have often emphasized the startling result achieved under the rule: to deter the police both the guilty defendant and the law-breaking officer go unpunished. As Judge Cardozo once put it, "The criminal is to go free because the constable blundered."[6] By freeing the criminal to return to his trade, the argument goes, the rule punishes not the official law-breaker, but rather the law-abiding citizen.[7]

The rule gives an ordinary policeman the power to confer immunity upon an offender. By overstepping the bounds of the law, a policeman's action can place vital evidence beyond the reach of the prosecution.[8]

The opponents of the rule urge that the exclusion of illegally obtained evidence is appropriate only to a tidy "fox-hunting" theory of criminal justice. The community will permit the game only so long as gamblers and other petty crooks are involved. "If a murderer, bank robber or kidnapper should go free in the face of his guilt," writes one critic, "the public would surely arise and condemn the helplessness of the courts against the depradations of the outlaws."[9] The rule destroys respect for law because it provides the spectacle of the courts letting the guilty go free.

The rule attempts to redress a violation of law without the time-honored method of direct complaint and trial on a carefully defined issue.[10] The

[4] Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 65.

[5] Comment, *The Cahan Case: The Interpretation and Operation of the Exclusionary Rule in California*, 4 U.C.L.A. L. REV. 252 (1957); Comment, *Two Years with the Cahan Rule*, 9 STAN. L. REV. 515 (1957); Comment, *Search and Seizure: A Review of the Cases since People v. Cahan*, 45 CALIF. L. REV. 50 (1957).

[6] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[7] The proposed indirect and unnatural method is as follows: "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." 8 WIGMORE, EVIDENCE §2184, at 40 (3d ed. 1940).

[8] People v. Defore, 242 N.Y. 13, 23, 150 N.E. 585, 588 (1926).

[9] Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 379 (1939). This article presents a well argued case against the exclusionary rule. Another very good statement in the same vein is Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955).

[10] On Lee v. United States, 343 U.S. 747, 755 (1951) (Jackson, J.); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

procedure looking toward exclusion of evidence interrupts, delays, and confuses the main issue at hand—the trial of the accused. The principal proceeding may be turned into a trial of the police rather than of the defendant.

Furthermore, it is argued that the social danger of police excesses is greatly exaggerated.[11] The police are restrained by their own discipline and by the political power in the community. They will take pains not to go beyond the limits of social tolerance. Only the guilty suffer or profit by admission or exclusion of evidence, the innocent have little to fear.[12] The guilty whose privacy is invaded do not suffer harm as do the innocent in a similar circumstance.[13] "He who has made his home a den of thieves, a distillery for the manufacture of contraband liquor, a warehouse for infernal machines, or a safety deposit box for forged documents . . . has not sustained the damages when its sanctity is invaded, as has the citizen who has maintained that sanctity."[14]

Finally, the case against the rule makes the most serious assertion of all: The rule does not succeed in its principal aim: to discourage illegal police action. The police, it is said, are not concerned with convictions in an important degree. A failure to convict does not touch the officer in his person or his pocketbook.[15] Professional law enforcement training is not affected by the exclusionary rule.[16] Many states which employ it are most backward in providing for police education. Without instruction most well-meaning policemen remain unaware of the law. Abusive police, of course, will be deterred by nothing. Officers will find illegal practices useful because of the clues which they reveal, although the item actually taken may not be used in court.[17] Illegal searches are not less frequent than illegal arrests in the jurisdictions which embrace the rule, yet an illegal search does forbid the use of evidence, but the illegal arrest does not affect the courts' power to try the defendant.[18]

Most disturbing is the argument that if the police are subject to the restrictions of the exclusionary rule they cannot obtain the convictions necessary to carry out their law enforcement function, and if they cannot obtain such convictions they will be tempted to harass suspects, to inflict extra-legal punishments. "The exclusionary rule," wrote Professor Waite, "has driven the police to methods less desirable than those for which the judges shut truth from the jury's ears."[19]

The case against the rule is an impressive one. In spite of the force of argument, I submit that the rule should be retained where it is in force and should be adopted where it is not now respected. Some of the arguments against the rule are unsound. Some can be met by measures other than abandoning the rule. The disadvantages which the rule does entail are worth the price which must be paid. The exclusionary evidence rule is morally correct and appropriate to a free society. It is a rule naturally suggested by the Constitution itself. It insures that the issues respecting defendants' rights are raised and litigated frequently, without great inconvenience. It is the most effective remedy we possess to deter police lawlessness.

A moral position of a high order gives support to the rule. It is unseemly that the government should with one hand forbid certain police conduct and yet, at the same time, attempt to convict accused persons through use of the fruits of the very conduct which is forbidden. As Mr. Justice Holmes put it in his *Olmstead* dissent:

> "It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it a less evil, that some criminal should escape than the Government should play an ignoble part."[20]

And Mr. Justice Brandeis, also dissenting in *Olmstead*, insisted that the use of illegal evidence "is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination."[21]

[11] 8 WIGMORE, EVIDENCE §2184 (3d ed. 1940).
[12] Plumb, *op. cit. supra* note 9 at 371.
[13] *Id.* at 386.
[14] Massantonio v. People, 77 Colo. 392, 398, 236 Pac. 1019, 1021 (1925).
[15] Waite, *op. cit. supra* note 9, at 194.
[16] *Ibid.*
[17] Plumb, *op. cit. supra* note 9, at 380.
[18] Waite, *op. cit. supra* note 9, at 193.
[19] *Id.* at 196.
[20] Olmstead v. United States, 277 U.S. 438, 470 (1928).
[21] *Id.* at 484.

The Director of the Federal Bureau of Investigation has written as follows:

> "One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his

The moral point not only rests upon an ethical judgment that governmental hypocrisy is an evil to be avoided for its own sake, but also it takes into account the serious undermining of trust in government which is an unavoidable consequence of any scheme permitting the state to benefit from unlawful conduct. Surely the government is a teacher, particularly in a society which leaves large areas of life for private planning and action. Public conduct becomes the model for private behavior. Few things are more subversive of free institutions than a mistrust of official integrity. When the police themselves break the law and other agencies of government eagerly reach for the benefits which flow from the breach, it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place. In our common speech we often refer to our officials with words of "otherness." How often do we say, "they" will tax us, "they" will appoint the police chief, or "they" will pass a law. It is corrosive of the vitally necessary trust in government if we all understand that "they" do not abide by the law which "they" assert. The conviction that all government is staffed by self-seeking hypocrites is easy to instill and difficult to erase.

No one has insisted on this point more eloquently than Justices Brandeis and Frankfurter. "Our Government is the potent, the omnipresent teacher," wrote Mr. Justice Brandeis.

> "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 anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."[22]

Mr. Justice Frankfurter put it in these words:

> "The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet."[23]

The use of illegal evidence involves the courts, the branch of government most dependent upon popular respect, in a kind of ratification of illegal conduct. Judge Traynor of the Supreme Court of California has observed, "The success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced."[24] When the prosecutor takes evidence gained by the lawless enforcement of the law and places it before a court, that court by accepting the offer of proof becomes inevitably drawn into the lawlessness. At least, many of the community's most scrupulous and noble will see it so. Judge Condon of Rhode Island has made the point in these words: "If courts receive evidence knowing that it has been unconstitutionally obtained, they . . . give judicial countenance to the government's violation of the Constitution."[25] Listen once more to a sentence from Holmes: "If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."[26] The exclusionary rule dissociates the court from any police policy of systematic violation of law.

In the federal courts the exclusionary rule is grounded in the provisions of the Fourth Amendment. In part, this constitutional position was taken because the justices in *Weeks v. United States* embraced the view that the courts, by permitting the use of illegally obtained evidence, came to participate in the violation of the offending federal police officer and hence to violate the Constitution themselves. Mr. Justice Day, speaking for a unanimous court, wrote concerning the Fourth Amendment:

> "This protection is equally extended to the action of the Government and officers of the law acting under it. To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for

organization and the entire profession is to be found guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism." FBI Law Enforcement Bulletin 1-2 (September 1952).

[22] Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion).

[23] On Lee v. United States, 343 U.S. 747, 759 (1959) (dissenting opinion).

[24] People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 912 (1955).

[25] State v. Olynick, 113 A.2d 123, 131 (R.I. 1955) (dissenting opinion).

[26] Olmstead v. United States, 277 U.S. 438, 470 (1928) (dissenting opinion).

the protection of the people against such unauthorized action."[27]

The point about ratification becomes even more persuasive if we take a look at the facts of the 1955 case, *People v. Cahan*, in which the Supreme Court of California overturned a practice of many years standing and adopted the exclusionary rule:

"Gerald Wooters, an officer attached to the intelligence unit of that department, testified that after securing the permission of the chief of police to make microphone installations at two places occupied by defendants, he, Sergeant Keeler, and Officer Phillips one night at about 8:45, entered one 'house through the side window of the first floor,' and that he 'directed the officers to place a listening device under a chest of drawers.' Another officer made recordings and transcriptions of the conversations that came over in a nearby garage. About a month later, at Officer Wooters' direction, a similar device was surreptitiously installed in another house and receiving equipment was also set up in a nearby garage."[28]

When I first considered the *Cahan* case three years ago I was moved to write:

"This police conduct is not only an example of illegality, it is illegality elaborately planned with the connivance of the Los Angeles Chief of Police. It is not the case of the over-eager rookie misjudging the fine lines of the law of arrest. It is constitutional violation as a matter of police policy."[29]

So it still seems to me. The violation of constitutional rights in the case took place because the chief of police thought the evidence would be used in court. Otherwise there would have been little point to the planning of the trespass. Had it permitted the use of the evidence, the court would not only have sanctioned the infraction at hand but also encouraged other violations.

California is not alone in moving to adopt the rule because police officers were tempted to unconstitutional action by the availability of the evidence in court. The 1950 opinion of the Supreme Court of Delaware which recognized the rule in that state speaks of safeguarding against "deliberate invasion."[30]

Most constitutional or statutory restrictions on police conduct are decisions by legislators or constitution-makers that it is better for some guilty persons to go free than for the police to behave in forbidden fashion. They are, however, decisions in the abstract. The exclusionary rule has the advantage of applying the constitutional or statutory decision to a particular case. The second argument for the rule is thus that the use of the rule is a natural consequence of the restrictive principle. The rule is needed to make the constitutional or statutory safeguards something real. At the New York State Constitutional Convention of 1938, United States Senator Robert F. Wagner spoke about this point:

"Mr. Chairman, I profoundly believe that a search and seizure guarantee which does not carry with it the exclusion of evidence obtained by its violation is an empty gesture; it is an amendment which will be wholly ineffective in protecting the constitutional right of privacy which we seek to confer. If I may borrow a phrase of Justice Cardozo's which has not been quoted before, it speaks the word of promise to the ear and it breaks it to the hope. I profoundly believe that an amendment which does not provide for the exclusion of evidence is not only ineffective but it is dangerous; it is dangerous because it will promote the spectacle, unfortunately not unknown in our time, of constitutional rights which have their meaning on paper and on paper alone. Let no one who cares for civil liberty discount this danger. To guarantee civil rights in theory and permit constituted authority to deny them in practice, no matter how justifiable the ends may be or may seem, is to imperil the very foundation on which our Democracy rests."[31]

[27] Weeks v. United States, 232 U.S. 383, 394 (1914). See also the statement of the Delaware Supreme Court in Rickards v. State, 45 Del. 573, 585, 77 A.2d 199, 205 (1950), to the effect that as long as constitutional guarantees exist "we have no choice but to use every means at our disposal to preserve those guarantees."

Another constitutional point has been made. "To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 472 (1928). This point has not fared well with scholars. See 8 WIGMORE, EVIDENCE §2184, at 31 (3d ed. 1940) and Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., C. & P.S. 246, 250 (1961).

[28] People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 911-12 (1955).

[29] Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 75-76 (1957).

[30] Rickards v. State, 45 Del. 573, 77 A.2d 199, 205 (1950).

[31] N.Y. STATE CONST. CONV., REVISED RECORD 559 (1938).

Thirdly, the exclusionary rule gives every prosecuted person an opportunity to vindicate search and seizure principles for the benefit of all, insofar as violations of these principles have resulted in the production of evidence against the accused. The accused has a motive to challenge the police overreaching. He need not resort to another proceeding or hire another lawyer. The rule assures a great deal of judicial attention to these questions.

The law of arrest and illegal searches is undeveloped in states without the rule. Many legal questions about proper police conduct cannot be answered in New York because the New York courts admit illegally obtained evidence and hence have little chance to pass on questions of police behavior. The questions have not been resolved by legislation. As a by-product of California's recent acceptance of the rule, great clarification and modification of the law of arrest and search and seizure has taken place. The task is not done unless there is an easy opportunity for litigation.

The fourth principal reason supporting the exclusionary evidence rule is a kind of counsel of despair. The other remedies are totally unsatisfactory.[32] On the other hand there are reasons to believe that the exclusionary rule has an important practical influence.

An illegal arrest or search may violate the criminal law. Yet, very few criminal prosecutions of those engaging in such conduct can be found in the reported cases—a startling fact when one considers the great number of reported instances of police misconduct. Prosecutions must be brought by district attorneys, who are not likely to take a position opposed to the front line law enforcement personnel. Prosecutors are judged in terms of their record of successful prosecutions. They cannot afford the hostility of the police. Even if a willing district attorney were to be found, he would probably have a pessimistic view of his chances to succeed in a prosecution. In the overwhelming number of cases, the jury box will hold more who sympathize with the officer than with his victim.

Such evidence as we have suggests that tort suits for trespass or false arrest are ineffective either as deterrents against the police or as instruments for compensating the injured persons. Again, juries in such cases are not apt to be very sympathetic to the run-of-the-mill dope peddler, petty thief, or gambler against whom the overwhelming number of police infractions are committed. The typical plaintiff in such actions has some disadvantages which flow from the rules surrounding an action for false imprisonment or false arrest. Proof of prior reputation may be admitted to impeach credibility, to mitigate damages by demonstrating that a criminal record has already destroyed the plaintiff's reputation, and to show that a proper cause existed to support the arrest. In a good many cases, the potential plaintiff will have been convicted and imprisoned before the tort action can be started. The conviction itself may establish conclusively the presumption of proper cause for the arrest. This plaintiff will find it difficult to leave prison in order to testify and, in some jurisdictions, the civil death statutes suspend the right to sue after a conviction.

Even if he should succeed, the plaintiff in a tort action may find himself possessed of a judgment against a person unable to pay. Police are neither wealthy nor bonded. Inability to collect damages may not present the biggest problem. Actual damages may be quite small—inadequate to deter any officer or to encourage the victim to bring suit. Compensatory damages in the case of an illegal search or arrest of short duration will be an insignificant amount. Punitive damages may not be available. Infractions will seem to cause a very slight harm, hardly worth the payment of money. In short, the guilty cannot sue and the innocent will not find it profitable. Thus, injury to the "peace of mind" of the individual and the harm done to the community—the truly serious consequences of police misconduct—escape redress.

Tort recovery from the individual officer and criminal sanctions against him are disadvantageous from another point of view. If the criminal and tort law operate too efficiently against individual officers, the officers may become overcautious. Because tort damages are proportioned to harm rather than fault, tort suits may end in a great injustice to the policeman. A relatively slight infraction of the rules could result in very great harm to the victim.

The inadequacy of the conventional remedies has led to a series of suggestions to supplement or replace them. Two leading commentators have urged that the tort law be changed to provide for minimum liquidated damages and for govern-

[32] Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Note, *Search and Seizure in Illinois: Enforcement of the Constitutional Right to Privacy*, 47 NW. U.L. REV. 493 (1952).

mental liability. They also urge that the position of the plaintiff in the tort action be improved by restricting the use of character information against him and permitting him to bring suit while in custody.[33] These changes would enhance the usefulness of the tort action in controlling official overreaching by the police department. Governmental liability would assure compensation to the victim. It would not too harshly penalize the offending officer. It is assumed that the governmental unit would take steps to eliminate police guilty of serious infractions or of continued minor ones. The provision for minimum liquidated damages would ensure payment to persons of damaged reputations. It would also provide recovery in cases involving little actual damage and in cases where the harm caused by police misconduct is difficult to translate into money. Such proposals are very attractive. Were they a reality, the case in favor of the exclusionary rule would be much weakened.

Our aim should be to provide a system which could tolerate isolated instances of overzealousness, if they were promptly and justly corrected by sanctions proportioned to the fault of the officer, and which would provide compensation for injury to the victim. These objectives are consistent with the proposals to put financial responsibility upon the units of government rather than the individual officer. Yet I cannot believe that governmental units will bear any substantial expenditure to compensate the most probable victims of illegal police misconduct—the bums, drifters, petty crooks, or big-time operators—in the face of the pressing public need for schools, hospitals, roads, and yes, prisons. Until some governmental unit somewhere is in fact giving adequate civil recovery for unconstitutional law enforcement, I retain my stubborn doubt whether the idea can be made to work.

Imposing liability on government units, moreover, will not completely deter the state from engaging in unconstitutional practices. It may be very attractive for state officials, acting according to a calculus of police values, to violate now and pay later.

The proposal for a civil rights office, independent of the regular prosecutor, for prosecution of offenses committed by police officers, has several disadvantages.[34] First, it does not provide for compensation to the injured party. In this respect it is no better than the exclusionary rule. Secondly, it either puts the sanction directly on the police officer, by making him liable to prosecution for each instance of misconduct, or leaves prosecution so haphazard that it will fail as a deterrent. Administrative elimination of the unfit for repeated disregard of civil rights is to be preferred to the caution which might result from harsh punishment of the individual officer for a single misdeed. Thirdly, even if direct punishment is thought useful, I doubt whether many juries will convict a policeman who has violated the civil rights of a gangster.

Systematic discipline within the police department itself would be a splendid sanction if it were practiced. We just do not have examples of cities or other governmental units which have insisted that departments get rid of police officers who refuse to obey the search and seizure rules.[35]

The remedies which we have neither deter nor compensate. The exclusionary principle does not make the injured person whole; does it, in fact, act as a deterrent?

We cannot make an answer irrefutably supported by the facts. The kind of social investigation necessary to convince the already committed has not been made. The pilot studies of the American Bar Foundation are reported to be inconclusive on this issue.[36] The student editors of the *Northwestern University Law Review* made a statistical study in 1952 of the operation of the rule in a branch of the Municipal Court of Chicago.[37] The statistics demonstrated that in from seventy to eighty-five per cent of the gambling cases motions to suppress evidence on the ground of illegal search were granted. Motions succeeded in about twenty-five per cent of the narcotics cases, and in about nineteen per cent of the prosecutions for

[33] Foote, *op. cit. supra* note 32; Barrett, *Exclusion of Evidence Obtained by Illegal Searches and Seizures, A Comment on People v. Cahan*, 43 CALIF. L. REV. 565 (1955).

[34] Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U.L. REV. 46, 62 (1957); Note, *Judicial Control of Illegal Search and Seizure*, 58 YALE L. J. 144, 163 (1948).

[35] The internal disciplinary machinery in Philadelphia "has not yet been used in the case of an illegal search or arrest." Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1211 (1952). This note also contains a useful estimate of the available remedies for illegal arrest. *Id.* at 1206–12.

[36] Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1145 n.226 (1959).

[37] Note, *Search and Seizure in Illinois: Enforcement of the Constitutional Right to Privacy*, 47 NW. U.L. REV. 493, 497–99 (1952).

carrying concealed weapons. The data, partial and inconclusive as it is, suggests that the Chicago police engaged in a great deal of harassment of gamblers by bringing cases which they knew they could not win. In these cases they paid little attention to the rules of law. The lower percentage of successful motions to suppress made with respect to the more serious crimes, narcotics and carrying concealed weapons, suggests, however, that the police comply with the law in more instances when they intend to get a conviction. Perhaps the exclusionary rule has an influence here. At any rate, any study of the Chicago police must take into account the fact that one is, indeed, studying the Chicago police department, a department which has stood in need of a reformation which cannot be accomplished by legal rules alone.

Any attempt to assess the impact of the exclusionary rule is vexed by troublesome questions of cause and effect.[38] Many states with the rule of admissibility enjoy police compliance with the law, but the very infrequency of police excesses may be a reason why the rule of admissibility is tolerated. The police may control their behavior for fear the exclusionary rule might tempt the local Supreme Court if unconstitutional police conduct were to become a serious problem. In California the exclusionary rule was adopted for the very reason that outrageous police work has become common under the rule of admissibility. In some states which embrace the exclusionary principle, police behavior is of the worst sort. Yet we know that bad law enforcement depends on a great many things in addition to a rule of evidence. If the situation is bad in a state having the rule, abolition may make things a great deal worse.

If statistical proof is lacking that the rule modifies police conduct, what evidence do we have that the rule has an effect on police?

In the first place, the arguments of police spokesmen against the exclusionary evidence rule give an indication of reluctance to change police practice. For example, Chief Parker of Los Angeles said after the *Cahan* case that now the police could arrest only if they had sufficient information to constitute "probable cause" that the suspect was guilty.[39] The law to which the Chief adverted had been in force in California for a long time but, with the new rule of exclusion, the police would apparently have to take it into account. There would be little reason to complain of the substantive rules unless the exclusionary rule made them relevant to police action.

In the second place, it seems reasonable that the rule will generate pressure upon enforcement officers to improve the quality of their work. I believe that the police officers themselves are interested in obtaining convictions. Men have an interest in the final product of their work. However that may be, prosecuting attorneys are certainly interested in convictions. They can be counted upon to exercise an influence toward obedience of the law. Public opinion may join the prosecutors in a demand for more careful enforcement if citizens witness many persons released because of official infractions.[40]

Thirdly, we can look at police training schools and discover that a great deal of emphasis is placed on the rules of arrest and search and seizure in the schools of the exclusionary jurisdictions. Mr. Justice Murphy's inquiry, described in his dissent in *Wolf v. Colorado*, has often been cited.[41] The Metropolitan Police Department of the District of Columbia received a series of lectures on how to operate under the law after the decision in *Mallory v. United States*, a United States Supreme Court decision excluding from evidence in federal courts any confession made during a period of illegal detention.[42] In a speech to the International Association of Chiefs of Police in September, 1959, Mr. Quinn Tamm, Assistant Director of the F.B.I., said:

> "We must present in our schools thoughts such as these for the cogitation of our trainees:
>
> "What does it profit a police officer to discover and apprehend a person responsible for a crime if he does so in a manner so reprehensible to the rule of law that the evidence is inadmissible in court and consequently worthless in bringing him to justice? What good is a confession, even one which conclusively is shown to be true by after-discovered evidence, if it is declared inadmissible in evidence because the court deems that it was involuntarily obtained? We must emphasize the fact that the short-cut of an involuntary confession becomes a boom-

[38] See the estimate of the effect of the exclusionary rule, especially in California after the *Cahan* case, in Kamisar, *op. cit. supra* note 36, at 1145–58.

[39] *Id.* at 1158.

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

[41] 338 U.S. 25, 41 (1949).

[42] THOMAS, THE MALLORY RULE: PRESENT STATUS AND EFFECT 20 (unpublished paper on file in the Columbia University Law School Library, 1960).

erang which flies back and hits not only the officer himself but his entire department and the community as a whole. . . ."[43]

Finally, we sometimes find statements, worthy of our attention, which assert that the rule has a corrective effect. Recently, Mr. Justice Stewart of the United States Supreme Court stated that the weight of the available evidence supports the proposition that the exclusionary rule is useful.

"But pragmatic evidence of a sort is not wanting. The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted."[44]

Mr. Myron G. Ehrlich, a Washington, D. C., lawyer, has reported that since the *Mallory* case magistrates are available for preliminary examination twenty-four hours a day in the District.[45] The *Washington Post* has reported its opinion that the Washington police have exhibited more diligence in complying with the law since *Mallory*.[46] Governor Brown, while he was still Attorney General of California, expressed his conviction that the exclusionary rule had improved police practice in California.[47] Further, a reading of the lower court opinions in the District of Columbia leaves the writer with the impression that police practices there have changed after *Mallory*.[48]

Let me take just a few more moments to make very brief responses to propositions advanced by opponents of the rule.

Opponents say that the police will act illegally to obtain clues although, under the rule, any evidence taken by the illegality could not be used. The point raises a problem under the rule but not an argument against it. The exclusionary principle applies to the "fruit of the poisonous tree" as well as to the tree itself.[49] The problem is how to discover what evidence is the "fruit" of illegality in order to suppress it. The answer lies in requiring the police to disclose the source of offered proof if it is requested.[50]

Opponents say that the police will, themselves, impose extra-judicial punishments, such as beatings, if they are prevented from convicting the most dangerous. Surely no community ought to permit continual assaults by officers, no matter how lofty the motive with which the blows are struck. I cannot believe such conduct would long be tolerated.

Opponents say that the exclusionary rule is itself overly technical and arbitrary. They are right. That the rule is somewhat capricious is an argument for improvement, not abolition. The United States Supreme Court only recently swept away a lot of technical law concerning who has standing to challenge illegal evidence.[51] The deterrent effect of the rule will be increased because of this development.

Opponents say that the rule is disruptive of the main business of a trial. I am not persuaded. The motion to suppress is properly made in advance. Where a later determination is necessary or proper, there is little in actual experience to suggest that proceedings are unduly disturbed by the administration of the rule.

Opponents say that the exclusionary rule interferes with the process of getting at the truth at a trial. They are right. Some evidence may be excluded which could have helped to establish the facts. Yet, surely, a trial has purposes other than to lay reality bare. A trial is a part of government's teaching apparatus. Social values of the greatest importance receive expression in the court room. To reach a decision in accordance with the truth is only one value which, in some circumstances, may have to bow before others.

A recently formulated criticism suggests that the rule is deficient in that it gives a remedy for invasions of privacy which are not as important

[43] Reported in 8 Civil Liberties in New York, No. 2, p. 4, col. 5 (November 1959). This paper is the official organ of the New York Civil Liberties Union.

[44] Elkins v. United States, 364 U.S. 206, 218 (1960).

[45] THOMAS, *op. cit. supra* note 42, at 23. Thomas also reports that Senator Hennings of Missouri held the opinion that the *Mallory* rule has changed police practice in the District of Columbia; that the United States Park Police claim to have made changes in their mode of operation. *Id.* at 24. A lawyer in the criminal practice, Mr. James R. Scullen, disagreed and asserted that police methods in the District are unchanged by *Mallory*. *Id.* at 23.

[46] Washington Post and Times Herald, June 14, 1959, p. E1, col. 1–6.

[47] Letter republished in Kamisar, *op. cit. supra* note 36, at 1158.

[48] THOMAS, *op. cit. supra* note 42, at 3.

[49] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[50] United States v. Frankfeld, 100 F. Supp. 934 (D. Md. 1951), shows how difficult it is to get a hearing on wiretapping allegations. The problem is discussed in Note, *Exclusion of Evidence Obtained by Wiretapping: An Illusory Safeguard*, 61 YALE L. J. 1221 (1952).

[51] Jones v. United States, 362 U.S. 257 (1960).

as other outrages which the exclusionary rule cannot reach.

> "An inherent characteristic of the exclusionary rule is that it puts the greatest pressure to conform to the rules regarding arrest and detention. In its direct application, of course, the rule comes into play only when a successful police search has turned up evidence which is to be offered at the trial. But even as a deterrent it affects only those aspects of police illegality which are likely to result in the acquisition of physical evidence of guilt and are undertaken for the purpose of securing the prosecution and conviction of a suspected offender. 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 rule or by the cognate rule excluding coerced or illegally obtained confessions. In short, the rule has a deterrent impact only on illegal searches and those illegal arrests to which searches are incident. And it has impact on those procedures only in those situations in which the police are proceeding with the conscious purpose of securing evidence to use in prosecuting the defendant."[52]

This passage contributes an important idea to the discussion, but the argument does not speak to the worth of the exclusionary rule. The passage ought to be followed by a call to create better remedies *in addition* to the rule. To say that the exclusionary rule cannot operate to deter all police misconduct is not to say that the rule should be abandoned. It should be supplemented.

The basic political problem of a free society is the problem of controlling the public monopoly of force. All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty. The exclusionary rule is the best and the most practical way for the law to deter those officials who would make inroads upon that security. It is morally right. It provides frequent opportunities for litigation of the issues. It is the best tool we have to give life to the constitutional safeguards against unreasonable interferences by the professional agencies of law enforcement.

* * *

ADDENDUM

Since the preceding pages were written the Supreme Court of the United States has held that the states are bound to exclude illegally obtained evidence in state criminal trials.[53] The reasons given for that decision are, of course, directly relevant to the thesis of the present paper. First, the majority of the Court affirmed that the exclusionary rule is required by the Constitution itself. The rule was said to be "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been 'reduced to a form of words'."[54] An interesting point about this formulation is the fact that it does assert that the exclusionary rule is a "*deterrent* safeguard." The point is not simply that the Constitution requires the rule without respect to its aspect as a deterrent to police misconduct. Secondly, the opinion points out, "If the government becomes a lawbreaker, it breeds contempt for law." Thirdly, the opinion states, quoting from *Elkins v. United States*,[55] there is "pragmatic evidence of a sort" to warrant a belief that the exclusionary rule does deter. Fourthly, "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."[56]

One final reason was given by the Court. Because the states, before Mapp, could use illegally seized evidence and the federal prosecutors could not, an unhappy temptation existed in some states.

> "In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal

[52] Barrett, *op. cit. supra* note 4, at 54–55.

[53] Mapp v. Ohio, 81 S. Ct. 1684 (1961).
[54] *Id.* at 1688.
[55] 364 U.S. 206 (1960).
[56] 81 S. Ct. at 1694.

courts, this inducement to evasion would have been sooner eliminated."[57]

Mr. Justice Black joined in the Court's opinion but based his decision on the ground that the interrelationship between the Fourth and the Fifth Amendments requires the application of the exclusionary rule.

[57] *Id.* at 1693.

The battle for the exclusionary evidence rule as a principal weapon against police misconduct has been won—for the moment, at least. In my view the reasons in support of the rule clearly justify the outcome. Whether the view is correct is now a question to be put to experience. We have a chance to determine whether we can operate law enforcement agencies within the bounds of the constitutional rights to privacy.