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ASSAULTS ON THE EXLUSIONARY RULE: GOOD FAITH LIMITATIONS AND DAMAGE REMEDIES

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I. INTRODUCTION

All three branches of the federal government have launched recent attacks against the exclusionary rule. That rule holds that papers or things seized or obtained in violation of the fourth amendment may not be used as evidence in a criminal proceeding.[1] Several bills were introduced in the 97th Congress to modify or eliminate the exclusionary rule.[2] The Justice Department has similarly advocated modification of

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[1] Weeks v. United States, 232 U.S. 383 (1914). The statement of the rule in the text is a simplification inasmuch as evidence obtained in violation of the fourth amendment may be admitted in *some* criminal proceedings, against *some* persons, or for *certain* purposes. For a discussion of the exact scope of the rule, see Burkoff, *The Court That Devoured The Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979).

The fourth amendment reads:

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

U.S. CONST. amend. IV.

[2] S. 101, introduced by Senator De Concini on January 15, 1981 would limit application of the exclusionary rule to intentional or substantial violations of the fourth amendment. S. 101, 97th Cong., 1st Sess., 127 CONG. REC. S5154 (daily ed. Jan. 15, 1981). *See infra* text accompanying notes 108-15. S. 751, introduced by Senators Thurmond and Hatch on March 19, 1981, would eliminate the exclusionary rule altogether and provide a damage remedy against the United States and a disciplinary remedy against the offending officer. S. 751, 97th Cong., 1st Sess., 127 CONG. REC. S2401-02 (daily ed. Mar. 19, 1981). *See infra* text accompanying notes 119-37. S. 1995, an omnibus anti-crime bill introduced by Senators Dole and East, would eliminate the exclusionary rule except in cases of intentional misconduct and provides for a damage remedy for violations involving willful gross negligence or wanton disregard of the requirements of law or willful intent to subvert these requirements. S. 1995, 97th Cong., 1st Sess., 127 CONG. REC. S15673 (daily ed. Dec. 16, 1981). *See infra* text accompanying notes 107-08. S. 2231, introduced by Mr. Thurmond and Mr. De Concini on March 18, 1982, would prevent application of the rule where the search or seizure was undertaken in

the rule,[3] and the Court of Appeals Fifth Circuit in an en banc decision recently restricted application of the rule to situations where the illegal conduct of the law enforcement officer is either unreasonable or not in good faith.[4] Critics of the rule generally contend that the rule impedes effective law enforcement,[5] places an unreasonable burden on law enforcement officers to master the intricacies of the fourth amendment,[6] and promotes disrespect for law and order by releasing criminals on

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a reasonable good faith belief in its conformity with the Constitution. S. 2231, 97th Cong., 2d Sess., 128 CONG. REC. S2416 (daily ed. Mar. 18, 1982). S. 2231 is virtually identical to Recommendation 40 of the Attorney General's Task Force on Violent Crime. ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, U.S. DEP'T OF JUSTICE, FINAL REPORT 55 (1981) [hereinafter cited as TASK FORCE REPORT]. *See infra* text accompanying notes 79-107. S. 2304, introduced by Sen. De Concini on March 30, 1982, repeats the admonitions of S. 2231 and adds that evidence may not be excluded if exclusion "would constitute a grave miscarriage of justice." S. 2304, 97th Cong., 2d Sess., 128 CONG. REC. S3040 (daily ed. Mar. 30, 1982). *See infra* text accompanying notes 79-107.

Also echoing Recommendation 40, but on the House side, is H.R. 6049, introduced by Rep. Lungren on April 1, 1982. H.R. 6049 would preclude application of the exclusionary rule if the search or seizure were undertaken in a reasonable good faith belief that it complied with the fourth amendment. H.R. 6049, 97th Cong., 2d Sess., 128 CONG. REC. H1405-06 (daily ed. Apr. 1, 1982). H.R. 4259, introduced by Rep. Beard on July 24, 1981, would eliminate the exclusionary rule entirely and provide a damage remedy against the United States and a disciplinary remedy against the offending officer. H.R. 4259, 97th Cong., 1st Sess., 127 CONG. REC. H4897 (daily ed. July 24, 1981). H.R. 4259 is thus similar to S. 751. *See infra* text accompanying notes 119-37. H.R. 4422, introduced by Rep. Fiedler on September 9, 1981, which in contrast to the bills above seeks to eliminate the exclusionary rule in *state* criminal proceedings, provides for a civil damage remedy against the offending state officer. H.R. 4422, 97th Cong., 1st Sess., 127 CONG. REC. H6071 (daily ed. Sept. 9, 1981). H.R. 4606, introduced by Rep. Collins on September 28, 1981, addresses both *state* and *federal* criminal proceedings and would prevent exclusion of evidence if the evidence were obtained by a person acting in the reasonable good faith belief that such action did not violate the Constitution. H.R. 4606, 97th Cong., 1st Sess., 127 CONG. REC. H6651 (daily ed. Sept 28, 1981). H.R. 4606 is thus similar to S. 2231 and H.R. 6049. *See infra* text accompanying notes 79-107. H.R. 5971, introduced by Reps. Sawyer and Hughes on March 25, 1982, authorizes exclusion of evidence and a damage remedy against the United States except where the officer acted in a reasonable good faith belief that the search on seizure was in conformity with the fourth amendment. H.R. 5971, 97th Cong., 2d Sess., 128 CONG. REC. H1145 (daily ed. Mar. 25, 1982).

[3] The Final Report of the Attorney General's Task Force on Violent Crime, dated August 1981, included Recommendation 40, which states that "evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution." TASK FORCE REPORT, *supra* note 2, at 55. This "good faith" test was supported by Lowell D. Jensen, Assistant Attorney General for the Criminal Division of the United States Department of Justice. *The Exclusionary Rule Bills: Hearings on S. 101, S. 751, and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 3 (1982). [hereinafter cited as *Exclusionary Legislation Hearings*].

[4] United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

[5] *See infra* text accompanying notes 62-64.

[6] *See infra* text accompanying notes 65-70.

technicalities.[7]

This article examines the current constitutional foundations of the exclusionary rule and argues that the rule remains a constitutionally required sanction for fourth amendment lawlessness. The proposals to eliminate or modify the rule are examined and found wanting both in terms of constitutional fiber and administrative viability.

II. THE EXCLUSIONARY RULE AND THE FOURTH AMENDMENT

A. THE CONSTITIUTIONAL ORIGINS OF THE RULE

The exclusionary rule was foreshadowed as early as 1886 in *Boyd v. United States*,[8] where the Supreme Court analogized the use of illegally obtained evidence against a defendant to compelled self-incrimination prohibited by the fifth amendment. In that case the defendant was charged with the illegal importation of goods. During proceedings later characterized by the Supreme Court as civil in form but criminal in nature,[9] the government sought to show the quantity and value of the goods imported by the defendant and relied on a federal statute to obtain a court order requiring the defendant to produce his invoice for the goods. The Supreme Court held that the fourth amendment barred the compulsory production of the defendant's private books and papers.[10]

The rule was definitively written into our basic law in 1914 by the landmark case of *Weeks v. United States*.[11] The Supreme Court there ordered that evidence obtained in violation of the fourth amendment be returned to a defendant charged with using the mails to transport lottery tickets. The Court said that if materials obtained in violation of the fourth amendment could be used against the defendant, the guarantees of the fourth amendment "might as well be stricken from the Constitution."[12] Therefore, the failure of the lower court to grant the defendant's motion for the return of the materials illegally seized was a violation of the constitutional rights of the accused.

For the next thirty-five years, criminal litigation in the area turned principally not on the existence or desirability of the exclusionary rule, but on the scope of the underlying fourth amendment guarantees limiting federal government action. Those guarantees were not good against state government action, and so the question of a federally dictated exclusionary rule for the states did not arise. In 1949, however, a majority

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7 *See infra* text accompanying notes 71-74.

8 116 U.S. 616 (1886).

9 *Id.* at 634.

10 *Id.* at 638.

11 232 U.S. 383 (1914).

12 *Id.* at 393.

of the Supreme Court ruled in *Wolf v. Colorado* that the security of one's privacy against arbitrary intrusion by the police was at the core of the fourth amendment and was enforceable against the states by virtue of the fourteenth amendment.[13] But the Court declined to require that the exclusionary rule — which a concurring Justice characterized as a mere federal rule of evidence[14] — be applied in state prosecutions. The Court's opinion was premised, in large measure, on the assumption that other devices might be employed by the states that would be as effective as the exclusionary rule in deterring fourth amendment violations.[15] The Court even raised but did not purport to answer the question whether Congress has the authority to negate the application of the exclusionary rule in the federal courts or to make it binding upon the states in the exercise of its authority under section five of the fourteenth amendment.[16]

The doctrine of *Wolf v. Colorado* was short-lived. In *Mapp v. Ohio*,[17] the Supreme Court overruled *Wolf* and extended the application of the exclusionary rule to the states. The Court found that there were no effective deterrents to fourth amendment violations by police and other state officers, other than the exclusionary rule. Thus, the Court in *Mapp* held that the exclusionary rule is "an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause."[18] In short, the rule was held to be dictated by the fourth amendment itself and therefore applicable to the states by operation of the fourteenth amendment. Apart from its role as expositor of the Constitution, the Supreme Court has no power to impose evidentiary rules on the states. Accordingly, after *Mapp v. Ohio*, the theory advanced in *Wolf*, that the exclusionary rule is a mere federal rule of evidence or a supervisory rule imposed by the Court under its supervisory power, was no longer tenable.[19] Indeed, the Supreme Court has no authority other than the Constitution upon which to ground its holding that the exclusionary rule applies to the states. Thus, the rule is of Constitutional origin.

B. THE RATIONALES UNDERLYING THE RULE

The Constitutional status of the exclusionary rule has at various

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[13] 338 U.S. 25 (1949).

[14] *Id.* at 39-40 (Black, J., concurring).

[15] *Id.* at 30-32. The remedies that the Court seems to have had in mind are damage actions and criminal sanctions. *Id.* at 30-31.

[16] *Id.* at 33.

[17] 367 U.S. 643 (1961).

[18] *Id.* at 651.

[19] *Id.* at 648-49. *See* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 24 (1961).

times been grounded on three distinct rationales: (1) personal rights, (2) judicial integrity, and (3) deterrence. Only the last rationale retains significant vitality in Supreme Court case law today.

1. Personal Rights

Weeks v. United States is the first and still the best exposition of the exclusionary rule as necessary to protect personal rights:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against [unreasonable] searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[20]

The statement bears paraphrasing for emphasis. The Supreme Court in 1914 thought that to permit introduction of illegally obtained evidence in a criminal proceeding would be tantamount to nullifying the right of the citizen accused of a crime to be secure against unreasonable searches and seizures.[21] Commentators have elaborated the explanations for the personal rights theory. One view is that the fourth amendment is addressed not just to law enforcement agencies, but to the courts as well, and that the admission of illegally obtained evidence would constitute either a *continuing* or a *separate* violation of the fourth amendment by a court.[22] Another view is that the exclusionary sanction provides the appropriate means by which an individual asserts the right to judicial review of the constitutionality of law enforcement actions connected to his or her prosecution.[23]

The "personal rights" rationale has no doubt been impaired by the Supreme Court's opinions in cases such as *United States v. Calandra*[24] and *Stone v. Powell*.[25] In explaining why it declined to extend the exclusionary rule so far as to forbid the questioning of a grand jury witness on the basis of documents illegally seized from him, the Court in *Calandra* remarked that the exclusionary rule is not "a personal constitutional right of the party aggrieved" but "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent ef-

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20 Weeks v. United States, 232 U.S. 383, 393 (1914).

21 That theme was, understandably, muted — even ignored — when the Court decided *Wolf v. Colorado*. But it emerged again in *Mapp v. Ohio*. The Court there quoted the passage from *Weeks* just set out in the text, adding to it Justice Holmes' remark for the Court in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), that without the exclusionary rule the fourth amendment would be a mere "form of words." Mapp v. Ohio, 367 U.S. at 648.

22 *See* Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 257-60 (1974).

23 *Id.* at 295-307.

24 414 U.S. 338 (1974).

25 428 U.S. 465 (1976).

fect."[26] The formula has been repeated in other contexts. It is important to note that the distinction established by the Court in these statements is between *"personal constitutional right"* and *"judicially created remedy."* It is not clear whether the distinction the Court intended to establish is between: 1. *constitutional* and *judicially created*; 2. *personal* and *judicially created*; or 3. *right* and *remedy*.

There are obviously other permutations, but these three seem to be the most likely. In my view, the Court undoubtedly meant to contrast the notion that the rule is a personal entitlement with the view that it is a judicially created entitlement. It is doubtful that any significance can be attached to a distinction between constitutional and judicially created entitlements, as the Court's continued application of the exclusionary rule to the states can be predicated only upon a constitutional imperative.[27] As for the proffered distinction between a *right* and a *remedy*, it is doubtful that the Court thereby meant to denigrate the constitutional stature of the rule, since there is no doubt that criminal defendants retain the right to have the remedy applied in the appropriate circumstances. In short, the constitutional stature of the rule remains undiminished by the fact that it is "judicially created" and is characterized as a "remedy." The personal rights theory, on the other hand, appears to have been rejected.

2. Judicial Integrity

In *Weeks v. United States*, the Court also sounded the theme of the need to maintain the integrity of the courts and refused to participate in convicting people on the basis of unlawful seizures:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[28]

Two fundamentally different types of arguments have been advanced to support the judicial integrity rationale. First, consequentialist

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[26] 414 U.S. at 348.

[27] *See supra* text accompanying notes 18-19. Professor Kamisar further argues that if the exclusionary rule is a matter of "judicial implication," such a characterization hardly distinguishes the rule from the bulk of constitutional law. Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5 (1979).

[28] Weeks v. United States, 232 U.S. 383, 392 (1914). *See* Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973).

arguments have been offered to suggest that judicial sanction of law enforcement illegality, or indeed, even the appearance of such judicial sanction, breeds contempt for law and the courts.[29] Non-consequentialist arguments have also been raised to claim that the courts have a duty to refrain from sanctioning fourth amendment lawlessness.[30] Both of these foundations for the judicial integrity rationale could serve as bases for application of the exclusionary rule regardless of whether such application serves to deter law enforcement illegality.

The judicial integrity rationale, like the personal rights rationale, has been denigrated in several recent Supreme Court opinions.[31] It retains some limited vitality, having been restated in one recent case:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution . . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights . . . . [T]his inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.[32]

In effect, however, this view of the judicial integrity rationale redefines its commands so as not to exceed those imposed by the deterrence rationale.

3. Deterrence

The modern rationale for the exclusionary rule is that it operates to deter substantive fourth amendment violations.[33] At times the deterrence rationale is stated as if it meant that the denial of a conviction by excluding the fruit of an illegal search or seizure amounts to punishment of the arresting or searching police officer and thus deters him and his colleagues from further fourth amendment violations. Justice Rehnquist seemed to have this view of deterrence in mind when he wrote the Court's opinion in *Michigan v. Tucker*.[34] He stated that by refusing to admit evidence gained as a result of police conduct that has deprived a

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[29] Perhaps the most celebrated statement of this view (albeit, not in constitutional dress) is contained in Justice Brandeis' dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[30] This consideration seems but a mere refinement of the language of *Weeks v. United States* cited *supra* in the text accompanying note 28. This strand of the judicial integrity rationale is closely associated with the personal rights theory. *See* Shrock & Welsh, *supra* note 22, at 366-72.

[31] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 485 (1976).

[32] United States v. Janis, 428 U.S. 433, 458 n.35 (1976). *See also* Dunaway v. New York, 442 U.S. 200, 218 (1979) ("integrity of the courts" mentioned along with deterrence as rationale for the exclusion of evidence).

[33] "[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures. . . ." United States v. Calandra, 414 U.S. 338, 347 (1974).

[34] 417 U.S. 433 (1974).

defendant of a fourth amendment right, "the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."[35]

A more realistic view is that the purpose of the rule "is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."[36] Professor Amsterdam has felicitously expanded upon this terse statement by the Court. He explained that the exclusionary rule "is not supposed to 'deter' in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set," but instead deters in the way branding a television set with the social security number of the owner deters by making the set a less attractive object of larceny because of its decreased resale value in the hands of anyone except the branded owner.[37] A television set may still be stolen,

> [b]ut at least the effort to depreciate its worth makes it less of an incitement than it might be. A criminal court system functioning without an exlusionary rule, on the other hand, is the equivalent of a government purchasing agent paying premium price for evidence branded with the stamp of unconstitutionality.[38]

Mertens and Wasserstrom have likewise made it clear that the exclusionary rule's deterrence of misconduct does not operate on individual law enforcement officers alone; rather, it impacts upon law enforcement agencies, and even if lone officers are indifferent to the rule, their superiors and the agency itself are not. The agency will take measures such as training and discipline to insure that individual officers comply with the fourth amendment.[39] When the deterrence rationale is

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[35] *Id.* at 447.

[36] Elkins v. United States, 364 U.S. 206, 217 (1960). The distinction between the conception of deterrence articulated in *Elkins v. United States* and Justice Rehnquist's formulation in *Michigan v. Tucker* is twofold. First, Justice Rehnquist views the rule as a form of *punishment* rather than as the removal of an incentive. *See infra* text accompanying notes 38-40. Second, Justice Rehnquist views the object of the rule's deterrence to be lone investigating officers rather than the department or agency itself. It is clear, however, that the Court recognizes at least that the rule is not addressed solely at investigating officers: the deterrent purpose of the rule is to "encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." Stone v. Powell, 428 U.S. 465, 492 (1976).

[37] Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431 (1974).

[38] *Id.* at 431-32.

[39] [A]nalogy between the deterrent effect of criminal law and the deterrent effect of the exclusionary rule . . . fails under close analysis, because the exclusionary rule operates through mechanisms that simply have no anologue in the penal law. Unlike the criminal law, which seeks to control the behavior of the general public, the exclusionary rule attempts to influence the conduct of members of various law enforcement agencies. Although there are many such agencies, each is a structured governmental entity. It is likely that the threat of the exclusionary sanction will influence these various police units and through them, the individual officers. Consequently, even if a particular constable is indifferent to whether his arrest and seizures result in convictions, those who run the

so understood, a law enforcement officer clearly would not have the same incentive to observe the requirements of the fourth amendment were there no such rule. To put the case in the terms used by the Court in *Janis*, where the Court equated judicial integrity with deterrence, to admit the illegally seized evidence would encourage fourth amendment violations. Evidence of the truth of this proposition — which seems nearly self-evident — is found in Professor Kamisar's account of the reaction to *Mapp*. He found that one of the most common complaints of the law enforcement officials after *Mapp* was that the application of the exclusionary rule would require the police to change their policies with respect to searches and seizures — in short, to observe for the first time the requirements of the fourth amendment.[40]

C. THE RELATION OF THE DETERRENCE RATIONALE TO THE CONSTITUTIONAL STATURE OF THE RULE

There is no doubt that the deterrent function of the exclusionary rule is central to its constitutional status. The nature of the relation between the deterrent function of the rule and its constitutional status, however, requires elucidation. If one views deterrence of law enforcement misconduct as the only foundation for the rule, it then seems to follow that the exclusionary rule is warranted only to the extent that equally effective deterrents are not provided by the states and the federal government. Such a reading might seem at odds with the unequivocal statements in *Mapp v. Ohio* that the exclusionary rule is part and parcel of the fourth amendment and is constitutionally required.[41] How does one reconcile the deterrence rationale of the rule with the *Mapp v.*

police department are concerned with successful prosecutions. Further, although individual officers might entertain hostility toward Fourth Amendment rights, police departments are not likely to share such a view, at least officially. . . . Even if prosecutors cannot always find the time to explain the Fourth Amendment to the police, many of the larger police departments hire legal counsel to make legal standards intelligible to the policemen on patrol.

Mertens & Wasserstrom, Forward: *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399-401 (1981).

[40] Professor Kamisar documents the reaction of several Minnesota police officials when *Mapp v. Ohio* extended the exclusionary rule for the first time to the states. He writes:

But when the Court decided *Mapp v. Ohio* in 1961, and imposed the exclusionary rule on Minnesota and other "admissibility states" as a matter of federal constitutional law, it caused much grumbling in police ranks. . . . If the police feared that evidence they were gathering in the customary manner would now be excluded by the courts, the police must have been violating the guarantee against unreasonable search and seizure all along. . . . The heads of several police departments . . . reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure *had just been written.*

Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 70-72 (1978).

[41] *See supra* text accompanying note 18.

Ohio language which accords an unconditional constitutional status to the rule?

Two interpretations of *Mapp v. Ohio* are examined below in terms of this issue. The first is the view that the fourth amendment requires an effective deterrent and that exclusion is conclusively presumed, as a matter of constitutional law, to be that effective deterrent. The second interpretation is the view that the fourth amendment requires an effective deterrent and that exclusion is the only (or the only acceptable) enforcement mechanism available to the Court.

Much might appear to turn upon which of these two competing interpretations is accepted. If the Court in *Mapp v. Ohio* ruled that the exclusionary rule is conclusively presumed to be the only acceptable deterrent of fourth amendment violations, then the ability of Congress to disturb that holding by reaching a different conclusion or by enacting substitute enforcement mechanisms would be severely curtailed.[42] If, on the other hand, the Court merely held that in light of the historical circumstances facing it, its limited powers precluded adoption of any effective enforcement mechanism other than exclusion, then Congress, by providing a substitute enforcement mechanism or by concluding through fact-finding that historical circumstances have changed, would have greater latitude to modify or eliminate the exclusionary rule.[43] After examining the strength and weaknesses of each of these two interpretations, I conclude that the perceived tension between the unconditional constitutional stature of the rule and its deterrence rationale is in fact a red herring, for *Mapp v. Ohio* does not require mere deterrence, but a *deterrent safeguard*. Thus, I opt for a third interpretation, one which is ultimately more consistent with both the language and the rationale of *Mapp v. Ohio*.

The first interpretation — that the rule is conclusively presumed to

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[42] *See infra* text accompanying notes 158-76.

[43] The argument would be as follows: if all the Constitution requires is the establishment of an effective deterrent for fourth amendment violations, then enactment of such a deterrent by the states and Congress obviates the necessity for applying the exclusionary rule. *See infra* text accompanying notes 45-50. Such an argument appears to be, in large part, purely academic since neither the states nor Congress have taken any significant steps to establish effective deterrents other than the exclusionary rule for the deterrence of fourth amendment violations. Certainly, none of the bills introduced in the 97th Congress, *see supra* note 2, appear to provide any realistic promise of deterring fourth amendment violations. *See infra* text accompanying notes 79-137. For a thorough discussion of the various conceivable alternative deterrents to the exclusionary rule, see Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621, 684-722. Certainly, one can conceive of any number of deterrents that might be as effective as the exclusionary rule; the problem is that such deterrents would impose other grave costs on society and are extremely unlikely ever to be adopted as legislation by the Congress or the states. *See infra* note 126 and accompanying text.

be the deterrent required by the fourth amendment — finds solid foundation in the language of the *Mapp* decision. In overruling *Wolf v. Colorado*, the *Mapp* Court characterized that decision's refusal to extend the exclusionary sanction to the states as "bottomed" on factual considerations — in essence, on the presence of other adequate means for enforcing the fourth amendment.[44] The Court in *Mapp v. Ohio* examined and rejected these factual premises but, significantly, cautioned that "they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment."[45] In concluding its analysis of the *Wolf v. Colorado* decision, the *Mapp* Court reiterated that "the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling."[46] Thus, there are solid grounds for the argument that the extension of the exclusionary rule to the states in *Mapp v. Ohio* was not based upon a failure of the factual assumptions of *Wolf v. Colorado*, but rather upon a constitutional imperative unrelated to and independent of particular factual or historical circumstances facing the Court at the time. Implicit in this view is the conclusion that if the factual premises underlying *Wolf v. Colorado* had been correct (i.e., if adequate alternative means of enforcing the fourth amendment had been established by the states) the Constitution still would have required extension of the exclusionary rule to the states. *Mapp v. Ohio* thus suggests that the foundation for the exclusionary rule rests exclusively in the Constitution and not just on the congruence of a certain historical state of affairs with a constitutional imperative.

The second interpretation of *Mapp v. Ohio* — that the fourth amendment requires *an* effective deterrent and that exclusion is the only acceptable enforcement mechanism within the limited arsenal of the Court — appears at odds with the language just discussed above. Indeed, in extending the exclusionary rule to the states, the Court apparently did not condition its holding upon the fact that the Court's limited powers severely restricted the options available to enforce the fourth amendment.[47] Nevertheless, if the exclusionary rule ultimately rests

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[44] Mapp v. Ohio, 367 U.S. at 650-51.

[45] *Id.* at 651.

[46] *Id.* at 653.

[47] The Court in *Mapp* made no mention of the fact that the Court's powers in fashioning a remedy for fourth amendment violations were limited. This is in stark contrast to the question raised (but not answered) in Wolf v. Colorado, 338 U.S. 25, 33 (1949), whether Congress has the authority to negate the application of the exclusionary rule in the federal courts or to make it binding upon the states in the exercise of its authority under § 5 of the fourteenth amendment. Thus, in *Wolf*, the Court was aware that Congress conceivably had power to

upon a deterrence rationale, it seems awkward to argue that deterrence specifically requires exclusion as a sanction, irrespective of the historical and factual circumstances and irrespective of the presence or absence of other deterrent sanctions that might be applied by state authorities. Deterrence of law enforcement misconduct as a social goal or policy does not seem to require any particular sanction, but rather any sanction which works. It is therefore difficult to argue, on the one hand, that the exclusionary sanction is an unconditional requirement of the fourth amendment and, on the other, that the rationale supporting the exclusionary rule is deterrence. Clearly, deterrence alone cannot be the rationale which makes the exclusionary rule an *unconditional* requirement of the fourth amendment.[48]

This last thought might lend some support to the view that the exclusionary rule is not an unconditional requirement of the fourth amendment, but rather an unconditional requirement so long as its deterrent function is not served by some other equally effective means.[49] This view, however, is completely at odds with the *Mapp* Court's caveats that extension of the exclusionary rule to the states was not grounded upon the failure of the factual assumptions underlying *Wolf v. Colorado*.[50]

Thus, it is difficult to choose between the two interpretations, as both are less than wholly acceptable: there is a fundamental tension between positing deterrence as the rationale of the rule and suggesting that the rule is *unconditionally* required by the fourth amendment.[51] In fact,

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impose remedies on the states for violations of the fourth amendment under § 5 of the fourteenth amendment. In extending the exclusionary rule to the states, however, the Court in *Mapp v. Ohio* appears to have been completely unconcerned with the power of Congress to fashion remedies for fourth amendment violations under § 5 of the fourteenth amendment. The omission of any such concerns in the opinion thus suggests that the extension of the exclusionary rule to the states was not and would not be affected by Congressional enactment of additional fourth amendment remedies under § 5 of the fourteenth amendment.

48 This conclusion, of course, only follows if one assumes that the objective of deterring law enforcement misconduct can conceivably be served by a remedy other than the exclusionary rule. It may be that as a practical and political matter alternative deterrents could not be enacted because they would be too costly or burdensome. *See infra* note 126.

49 This seems to be the view of Chief Justice Burger, who as early as 1971 stated: "I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials. . . . I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting).

50 *See supra* text accompanying notes 44-47.

51 One could, of course, argue that the decision in *Mapp v. Ohio* does not require a reconciliation of the rule's constitutional status with its deterrent purpose because the rule's constitutional status in that case did not rest upon the rule's deterrent function. *See* Comment, *Constitutional Law: The Fifth Circuit's "Good Faith" Exception to the Exclusionary Rule — Well-Reached or Overreached?* 33 U. FLA. L. REV. 300, 303 (1981) (suggesting that the constitutional status of the rule is unrelated to its deterrent function). The best refutation to such an argument is the opinion in *Mapp* itself, which in nearly the same breath clearly advances deter-

however, this tension exists only because the wrong premises have been chosen. *Mapp v. Ohio* does not require merely deterrence of fourth amendment violations; it requires *assurance* that fourth amendment violations are deterred—an entirely different matter.[52] The *Mapp* Court

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rence as the predominant rationale for the rule and unequivocally proclaims the unconditional constitutional status of the rule. Mapp v. Ohio, 367 U.S. 643, 655-56 (1961).

[52] Assurance that law enforcement misconduct is deterred requires more than simply taking actions designed to deter such misconduct. The object of deterrence is the achievement of a result. The object of assurance of deterrence is *knowledge* that an effective means is being used to achieve the result. Assurance of deterrence implies a course of action which, in the absence of secure knowledge of whether there are (conceptually and as a matter of law) alternative remedies that work, will provide certainty that something is done effectively to deter law enforcement misconduct.

Generally, the courts demand assurance of some result (i.e., deterrence of misconduct) when merely prescribing the result is not certain to bring it about. In such cases, the courts will demand more than the result desired because given problems of uncertainty, only such a course of action can be known to accomplish the result desired. A clear example of this type of judicial reasoning is the Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). In that case, the Court was called upon to determine whether confessions obtained in custodial settings were procured by coercion and thus in violation of the privilege against self-incrimination. In the course of its decision, the Court formulated what is now referred to as the "Miranda warnings" and announced its intention to exclude evidence obtained as a result of custodial interrogation not prefaced by these warnings. *Id.* at 479. The opinion, however, cannot be interpreted as suggesting that the mere failure to use these warnings indicates that the custodial interrogation was coercive. Rather, the opinion requires the Miranda warnings because only such precautions will assure that evidence obtained as a result of the interrogation was procured in a noncoercive manner. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 250-52 (1971).

Another prominent example of judicial reasoning which rests on the concept of assurance is the chilling effect doctrine of the first amendment. The chilling effect doctrine calls for protection of some speech not within the ambit of the first amendment on the rationale that failure to do so would result in leaving certain speech within the ambit of the first amendment unprotected. *See* Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685, 694-98 (1978).

While the theory of *Mapp v. Ohio* offered in the text, the *Miranda* warnings, and the chilling effect doctrine have some common characteristics rooted in the inability of the courts to achieve the desired result merely by prescribing it, the precise nature of the problem and the solutions offered in each case differ. In *Miranda v. Arizona*, for instance, one possible characterization of the problem is the inability of the courts to obtain reliable evidence in each particular case by which to judge the coerciveness of a particular custodial interrogation; the solution offered by the Court is the creation of a "safe haven" informing law enforcement officers of the steps they must take to avoid certain constitutional challenges. By constrast, the decision in *Mapp v. Ohio* may be characterized in part as resting upon the inability of the courts to determine the *general* effectiveness of deterrent remedies for fourth amendment violations that might logically be enacted by the federal and state governments. *See infra* note 53. The solution offered by the Court is the direct judicial creation of a deterrent remedy independent of any legislation that might be enacted by the federal government and the states.

The differing approaches taken by the Court in *Miranda v. Arizona* and *Mapp v. Ohio* impacts upon the constitutional status of the rules announced in these decisions. Thus, the Court has recognized that *Miranda* warnings are not *specifically* required by the privilege against self-incrimination. Michigan v. Tucker, 417 U.S. 433, 444-46 (1974). And indeed, the decision in *Miranda v. Arizona* contemplates that Congress could modify the "safe haven" created by *Miranda* warnings. 384 U.S. at 490. By contrast, the opinion in *Mapp v. Ohio* an-

was faced with the recognition that the various state remedies to enforce the fourth amendment simply did not work. It was convinced that the exclusionary rule would serve as a deterrent and it therefore accorded a constitutional status to the rule. But if the fourth amendment merely requires *a* deterrent, why should the exclusionary rule be enshrined as the eternal remedy? The answer is that the rule deters, and if no other remedy works or is available to deter police misconduct, or if the effectiveness of other remedies cannot easily be determined or cannot be determined with certainty, then at the very least the exclusionary rule will serve the deterrent function.[53] An important consideration leading to

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nounced that the exclusionary rule was specifically required by the fourth amendment, a position which has never been rejected by the full Court.

[53] The point is that the exclusionary rule serves as an assurance or a guarantee that fourth amendment violations are deterred. Other remedies fail to provide any such assurance. *See infra* text accompanying notes 119-37.

Because the fourth amendment requires, even under the weakest interpretation, the establishment of an effective deterrent, failure to grant an unconditional constitutional status to the exclusionary rule would compel the Court to review the deterrent adequacy of alternative remedies adopted by the state and federal legislatures. Part of the problem with such review is one of timing: how can the Court determine the adequacy of an alternative remedy (for instance, damages) absent a "track record" showing the effectiveness or lack of effectiveness of the remedy? This problem may not be insurmountable, although the Court would be called upon to make difficult determinations of when a remedy has been given sufficient time to prove its worth. More important, however, is the prospect that the Court would never be able to muster reliable evidence on the deterrent adequacy of alternative remedies. How is the Court to define the level of deterrence required by the fourth amendment, and how can it obtain proof that such a level of deterrence has been attained or not by a particular remedy? These troubling questions can help explain why the Court in *Mapp v. Ohio* endowed its own deterrent remedy (the exclusionary rule) with an unconditional constitutional status rather than conditioning application of the exclusionary rule on the absence of other equally effective deterrents.

On an abstract level, it would have been possible for the *Mapp* Court to adopt an approach similar to that taken in *Miranda* and to outline for the states and the federal government what an acceptable fourth amendment sanction would look like. *See supra* note 52. Indeed, Chief Justice Burger did just that in his dissent in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411-27 (1979) (Burger, C.J., dissenting). The crucial (though speculative) inquiry to be answered in view of the minority status of Chief Justice Burger's approach is why a *Miranda*-like Court pronouncement on fourth amendment sanctions is inappropriate.

The answer in large part is that the Court is incapable of defining the level of deterrence required by the fourth amendment in an abstract manner and that there is a multiplicity of sanctions that could logically (though in my view, not practically) be formulated and enacted to deter fourth amendment violations. The exclusionary rule, by contrast, approximates the optimum level of deterrence, for it does no more and no less than remove the incentive to disregard the strictures of the fourth amendment. *See* Elkins v. United States, 364 U.S. 206, 217 (1960); *see also supra* text accompanying notes 33-42.

Another explanation for the failure of the Court to articulate a *Miranda*-like pronouncement on the minimal requirements for a state or federal government fourth amendment remedy is that such an exercise would be futile. While one can logically conceive of fourth amendment sanctions (criminal penalties or scheduled civil damage remedies) that might deter violations as much as (and indeed, more than) the exclusionary rule, such sanctions would no doubt be politically unacceptable because of the social costs involved. For an elabo-

this conclusion is that only the exclusionary rule insures that the contours and meaning of the fourth amendment will be litigated and thus defined.[54]

This interpretation of *Mapp v. Ohio* is consistent both with the deterrence rationale underlying the rule and the rule's unconditional constitutional stature. What is more, the interpretation is closer to the language of *Mapp v. Ohio* than either of the two preceding interpretations. Most commentators have assumed that *Mapp v. Ohio* established deterrence as the rationale for the rule. In point of fact, however, *Mapp v. Ohio* speaks of the need for a *deterrent safeguard* — an entirely different concept. The meaning of "safeguard" is, roughly, "a precautionary measure." The exclusionary rule was thus intended to serve as a deterrent last line of defense in order to dispel the absence of knowledge that there would be alternative methods which worked to deter law enforcement misconduct. As a last line of defense against fourth amendment violations, elevation of the rule to constitutional dimensions is particularly appropriate. If other methods are enacted by the government and if they work, then fourth amendment violations will abate and application of the exclusionary rule will decline.[55]

In short, taking seriously the *safeguard* aspect of the *Mapp v. Ohio* holding goes a long way toward understanding what is in fact a highly sensible decision. The interpretation offered here is also closest to a fair reading of the substantive right protected by the fourth amendment. The fourth amendment is in some sense a unique provision: unlike other constitutional guarantees, it requires a deterrent remedy. The first

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ration of this view, see *infra* note 126. A final explanation for the Court's unwillingness to describe the minimal requirements for an acceptable fourth amendment remedy is that such a course of action would be tantamount to the rendition of an advisory opinion and thus outside the sphere of the Court's powers.

[54] *See infra* text accompanying notes 128-37.

[55] If other remedies for fourth amendment violations are provided in addition to the exclusionary rule, and if these remedies work, one would expect a decrease in the number of fourth amendment violations and thus a decrease in the number of cases in which the suppression doctrine is applied. Thus, not only are the costs associated with the exclusionary rule avoidable in the sense that law enforcement agencies can take the steps necessary to avoid violations, but the number of instances where the exclusionary rule is applied can also be curtailed by the adoption of effective remedies that curtail violations of the fourth amendment. In view of the fact that enactment of effective remedies for fourth amendment violations would in and of itself curtail the number of cases in which the suppression doctrine would be applied, it is somewhat perplexing that Chief Justice Burger, in outlining for Congress a proposed damage remedy of a quasi-judicial nature, suggested that the establishment of such a remedy should be accompanied by a legislative repudiation of the exclusionary rule: "Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 423 n.7 (1971) (Burger, C.J., dissenting).

amendment has not been interpreted to require a deterrent remedy, nor the fifth, nor the eighth.[56] The fourth amendment, unlike these other guarantees, protects a special right, "[t]he right of the people *to be secure* in their persons, houses, papers and effects."[57] It is not the right to carry on an activity which the fourth amendment protects; nor is it even merely the right to be free from certain types of government processes.[58] It protects the right to a certain state of affairs—one in which people are *to be secure* in their persons, houses, papers, and effects against government intrusion. Unlike other constitutional guarantees, the fourth amendment thus requires the government to take certain *affirmative steps* to insure that this state of affairs is achieved.[59] This is why the fourth amendment requires not just a deterrent, but a deterrent safeguard. The holding of *Mapp v. Ohio* that the exclusionary rule is a constitutionally required deterrent safeguard has never been disturbed by the Court. Indeed, the safeguard language has often been repeated by the Court.[60] Thus, the "safeguard" theory of the exclusionary rule remains the most acceptable interpretation of *Mapp v. Ohio*. The question remains, however, whether the current Court would adhere to such a theory or in-

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[56] When the Court holds a state or federal statute to be unconstitutional under the first amendment, and refuses to impose the consequences that would normally flow from application of the statute if it were upheld, the Court does not speak in terms of deterrence. There is no mention in such decisions of deterring legislators from drafting statutes which violate the first amendment. Similarly, when a court finds that an agent of the government (whether it be a high school principal or a police officer) has violated the first amendment, the court does not speak of deterring such actions. Obviously, striking down a statute certainly discourages legislators from promulgating legislation which violates the first amendment. Similarly, holding that an agent of the government has violated the first amendment is hardly a ringing endorsement of such action. Nevertheless, the Court in invalidating government action under the first amendment does not speak in terms of deterrence. Thus, although the invalidation of a statute under the first amendment may be said to deter such state action as much as suppressing illegally obtained evidence may be said to deter fourth amendment violations, it is significant that the Court chooses to speak in terms of the goal of deterrence in the latter instance, but not in the former.

[57] U.S. CONST. amend. IV (emphasis added).

[58] Certainly, the warrant clause of the fourth amendment is designed to protect the people from certain types of government processes. It is well documented that the specific preeminent concern of the framers of the fourth amendment was with the abuses under the general warrants and writs of assistance, or as Professor Amsterdam puts it, "The rummagings of the English messengers and colonial customs officers." Amsterdam, *supra* note 37, at 398. But then, there is that other clause to the fourth amendment which does not merely state that unreasonable searches and seizures are prohibited, but actually states that a right of the people to be secure against unreasonable searches and seizures shall not be violated.

[59] *See* Mertens & Wasserstrom, *supra* note 39, at 385-86 n.100.

[60] Thus, even in United States v. Calandra, 414 U.S. 338 (1974), which announced the downfall of the personal rights theory, the Court states that "the rule is a judicially created remedy *designed to safeguard* Fourth Amendment rights *generally* through its deterrent effect." *Id.* at 348 (emphasis added). The actual decisions of the Court may, however, cast some doubt about how seriously the Court takes both the *deterrence* and *safeguard* objectives of the exclusionary rule. *See infra* text accompanying notes 99-107.

stead construe *Mapp v. Ohio* as merely requiring application of the exclusionary rule in the absence of any other effective deterrents. Even under the weaker interpretation of *Mapp v. Ohio*, the exclusionary rule remains a constitutional requirement so long as no other effective deterrents are established. It may well be that the exclusionary rule retains a type of *unconditional* constitutional status because practical and political considerations preclude any realistic prospect that other effective remedies might ever be established by the states or the federal government.[61]

III. THE MAJOR CRITICISMS OF THE EXCLUSIONARY RULE

Much of the discussion of eliminating or modifying the exclusionary rule takes as a premise that the rule has had something to do with the nationwide growth of serious crime. That view was reinforced by the modification of the exclusionary rule proposed by the Attorney General's Task Force on Violent Crime.[62] The belief that elimination or modification of the exclusionary rule would give the citizenry reason to feel more secure in their homes or on the streets is, however, either fantasy or deception. A study by the General Accounting Office of federal criminal prosecutions revealed that in only 1.3% of the 2,084 cases studied was evidence excluded as the result of a fourth amendment violation.[63] Exclusionary rule problems were the primary reasons for prosecutiorial decisions not to prosecute in only .4% of cases analyzed in which such a decision was made.[64] Clearly, large numbers of guilty men and women are not going free as a result of the application of the rule.

Given these facts, the only conceivable law enforcement justification for curtailing the exclusionary rule is a belief that its elimination or modification would allow law enforcement officers to be more effective because they would feel less constrained by the substantive inhibitions of the fourth amendment. There is indeed substantial evidence that this

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61 *See infra* notes 126-37 and accompanying text.

62 *See supra* note 3. Not only is it peculiar to discuss the exclusionary rule in the context of addressing the problem of violent crime, but it is also peculiar that the Justice Department should address the question of violent crime at all. Violent crimes are usually local, not national, in scope; the federal government possesses no special expertise in dealing with violent crime. It is ironic than an administration which advances the promise of a New Federalism and a return of local power should go out of its way to make a federal case out of problems which have heretofore been addressed at the local level.

63 COMPT. GEN. OF THE U.S., IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979). Of course, in this 1.3% of the cases, the exclusion of evidence did not necessarily result in an acquittal. *See also* INST. FOR LAW & SOCIAL RESEARCH, WHAT HAPPENS AFTER ARREST (1978) (less than one percent of all arrests were refused by the prosecutor for failure of the police to respect the arrestee's due process related rights).

64 COMPT. GEN. OF THE U.S., *supra* note 63.

would be precisely the effect of eliminating or modifying the rule.[65] But it is not the rule in particular which inhibits or impedes law enforcement; it is *any* effective enforcement of the fourth amendment.[66] Indeed, while critics call for curtailment of the rule, many of their attacks are directed at a body of fourth amendment law which is claimed to be impenetrable, arbitrary, and exceedingly technical.[67] It is said that law enforcement officers should not be required to comprehend or decipher rules upon which nine justices cannot agree.[68] Such claims are misdirected.[69] If the fourth amendment is too complex then either action should be taken to simplify its commands or law enforcement officers should prudently withdraw from confidently testing its limits.[70] The ex-

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65 *See infra* text accompanying notes 79-137. *See also* W. LAFAVE, SEARCH AND SEIZURE 29, 30 (1978).

66 As Senator Robert Wagner pointed out in the 1938 New York State Constitution Convention: "All the arguments [that the exclusionary rule will handicap law enforcement] seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself . . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

"It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform."

Kamisar, *supra* note 40, at 73.

67 Thus, a significant portion of the testimony of Lowell D. Jensen, Assistant Attorney General of the Justice Department's Criminal Division, at the hearings on S. 101 and S. 751 is devoted to a discussion of fourth amendment case law. Mr. Jensen asserts that the cases reflect "disagreements by federal judges, not police misconduct . . . [or] a process of second-guessing police officers conducting warrantless searches in the field." *Exclusionary Legislation Hearings*, *supra* note 3, at 5. These are objections to the scope or definition attributed by judges to the fourth amendment — they are not objections to the exclusionary rule.

68 *See id.* at 126-27 (testimony of George Nicholson, Senior Assistant Attorney General, California Department of Justice, in his private capacity as legal consultant for Laws at Work); *id.* at 115-16 (testimony of Frank Carrington, Executive Director, Crime Victims Legal Advocacy Institute, Inc.). The argument made by Messrs. Nicholson and Carrington is essentially that some fourth amendment law is too complicated to be understood; therefore, law enforcement officers ought not to be held accountable to such fourth amendment standards. The argument proves far too much, for if portions of the fourth amendment cannot be understood, it is not just the exclusionary rule which will fail to deter, but *any* remedy. In this conclusion, we see evidence that much of the wrath directed at the exclusionary rule by its critics is more properly addressed to the substantive rules of the fourth amendment. *See infra* note 75.

69 *See* W. LAFAVE, *supra* note 65, at 25.

70 It very well may be that the substantive law of the fourth amendment has become too complex to offer the hope that it might be faithfully followed by law enforcement agents. There is no doubt that the Burger Court increasingly has sought to define the limits of the fourth amendment in terms that are highly fact-specific and not easily applicable to any situation other than the one presented in the case decided. Decisions of constitutional import which depend upon such trivial factual differences are highly unfortunate. *See* Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973). If fourth amendment law is indeed incomprehensible then the appropriate extra-judicial solution is a forthright assault on its substantive provisions by means of the amendment process.

clusionary rule itself, however, should not be blamed for the vagaries of substantive fourth amendment law or the vicissitudes of the rules on standing.

Another major argument raised by critics of the exclusionary rule is that it promotes disrespect for law and order by releasing criminals on technicalities.[71] Again, one wonders whether this argument is aimed at the exclusionary rule or the fourth amendment: would awarding damages to criminals for technical violations of the fourth amendment promote respect for law and order? It may be questioned to what extent public perceptions of law and order should be allowed to play a role in defining the scope and enforcement of constitutional rights.[72] Indeed, one wonders why the courts are somehow held to be the agents responsible for releasing the criminal when it is in fact the constable who blundered and the blunder could have been avoided.[73] One also wonders if

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The attempt to redefine the right by altering the remedy, however, is a legally clumsy (albeit politically astute) device to redefine the right.

[71] Justice Rehnquist, for instance, has urged that in light of the substantial growth in federal criminal statutes and the extension of the exclusionary rule to the states, society may no longer tolerate the release of criminals "because of what seems to the great majority of the citizens of the country to be a technical violation of the rights secured . . . by the Fourth Amendment to the United States Constitution." California v. Minjares, 443 U.S. 916, 920-21 (1979) (Rehnquist, J., dissenting from denial of stay). For a discussion of the argument that the exclusionary rule promotes disrespect for the criminal justice system, see Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & C. 343, 359-60 (1980).

[72] This type of problem can arise when the validity of any rule of law is founded upon the consequences it will purportedly promote. If a rule of law is adopted because it will bring about certain consequences, then the wisdom of adopting that law depends upon an assessment of how the relevant actors will respond to that law. The problem with such consequentialist theories is that the relevant actors may very well have some rather perverse beliefs and dispositions. A consequentialist theory, however, takes such perverse beliefs and dispositions as a given or as a fixed point in prescribing the rule of law. The result, of course, may very well be a rather perverse rule of law — that is, one which is based on the assumption of the same perverse world view as that of the relevant actors.

Therefore, the argument that the exclusionary rule is a poor remedy for fourth amendment violations because it promotes disrespect for law and order, necessarily adopts a certain view of what constitutes law and order, and that view of law and order presumably includes the idea that criminals should not be freed on technicalities. It is not clear why a court rendering a fourth amendment decision should take as a given that criminals should not be freed on technicalities simply because a significant portion or even a majority of the population believes that is so. A significant portion or even a majority of the population may very well believe that due process is in large part inefficient and unwarranted. Very few persons would argue on that premise alone that due process is generally unwarranted because it promotes disrespect for law and order. An argument that the exclusionary rule releases criminals on technicalities and therefore promotes disrespect for law and order is, therefore, not terribly convincing unless we are given some good reason to think that there is something inconsistent between law and order and releasing criminals on technicalities.

[73] The blundering constable was introduced into exclusionary rule polemics by Justice Cardozo, who coined what came to be the slogan of exclusionary rule critics: "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

the argument raised by the critics could not also apply to constitutional guarantees other than the fourth amendment; in the first or fifth amendment areas one could as well argue that courts should refrain from striking down overbroad or vague criminal statutes in cases in which the defendant's conduct clearly could have been outlawed under a more precisely drafted statute.[74]

In short, the foregoing arguments raised against the exclusionary rule are less than overwhelming in tenor. One argument, however, is significant. Some (a few) defendants accused of grave offenses do go free, and we know or at least strongly suspect that but for the exclusionary rule some would have been convicted.[75] The cost thereby imposed on society is not trivial, but it is a cost that can be avoided if law enforcement officers would remain a safe distance from the limits of impermissible conduct under the fourth amendment. More important, perhaps, is the fact that this cost — if it is to be incurred at all — is sanctioned by the fourth amendment itself which in balancing the relative values of privacy and criminal law enforcement has determined that the latter will sometimes have to suffer to safeguard the former.

IV. THE PROPOSALS

The institutional critics of the exclusionary rule have focused recently on two means of curtailing its perceived evils.[76] Some of the proposals urge the adoption of some version of the "good faith" test.[77] The Attorney General's Task Force on Violent Crime, for instance, recommends that the exclusionary rule not apply if the law enforcement officer acted in the "reasonable good faith belief" that his action conformed to the fourth amendment.[78] Other proposals seek to replace some or all of the exclusionary rule with a civil damage remedy against

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74 *See supra* note 72.

75 Again, however, the suggestion that hordes of criminal suspects are being released to prey upon society by virtue of the exclusionary rule is patently false. More important is the recognition that any effective remedy for fourth amendment violations will result in allowing some criminal suspects to avoid prosecution and some criminals to avoid conviction. *See* J. KAPLAN, CRIMINAL JUSTICE 215-16 (1978). The perceived problem with the rule is not so much that it allows criminals to go free — any remedy would do that. The perceived problem is that we get to see *who* goes free after they have been arrested and are within the grasp of the judicial system. *Id.* But therein also lies the deterrent value of the rule: failure to observe the fourth amendment translates into highly tangible social costs.

76 A whole host of modifications and substitutes for the exclusionary rule have been offered at one time or another. These include various proposals for damage remedies in the courts or in administrative tribunals against the United States, the states, or the offending officers; measures designed to make application of the rule hinge on the gravity of the harm inflicted or the intentionality of the offending agent; and outright abandonment without substitute. The various proposals are discussed in Geller, *supra* note 43.

77 The good faith test is thoroughly debunked in Mertens & Wasserstrom, *supra* note 39.

78 *See supra* note 3. The legislative expressions of the good faith test are found in S. 2231,

the United States. Examination of these proposals shows that they depart radically from the Supreme Court's interpretation of the fourth amendment and that they are wholly unworkable.

A. THE GOOD FAITH TEST

The "good faith" test would prevent application of the exclusionary rule where the law enforcement officer acted in the reasonable good faith belief that his conduct conformed to the fourth amendment.[79] While the wording of the exception seems innocuous enough, actual implementation would gut the exclusionary rule and lay much of the groundwork for its eventual elimination.

Defenders of the good faith test suggest that the deterrent objectives of the exclusionary rule cannot be served by its application in cases in which a law enforcement officer acted in a reasonable good faith belief that his conduct was proper.[80] This position is patently incorrect. Excluding evidence seized illegally but in good faith serves to deter fourth amendment violations insofar as it gives the law enforcement officer an incentive to engage in learning.[81] A good faith exception, by contrast, treats law enforcement knowledge and application of fourth amendment law as a *fixed* rather than a *dynamic* phenomenon. Accordingly, such an exception makes sense only if a law enforcement officer is incapable of expanding his knowledge and capacities.[82] The good faith exception

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S. 2304, H.R. 5971, and H.R. 6049. H.R. 4606, by contrast, would apply the good faith test not just to federal but to state criminal proceedings as well. *See supra* note 2.

79 Recommendation 40 of the Final Report of the Attorney General's Task Force on Violent Crime states:

> We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief. We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings, or support federal legislation establishing this rule or both.

TASK FORCE REPORT, *supra* note 2, at 55. The test apparently draws its inspiration from United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981), which in turn seems to have found support in Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & C. 635 (1978).

80 *See* United States v. Williams, 622 F.2d 830, 842 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981); TASK FORCE REPORT, *supra* note 2, at 55-56; Note, *Good Faith and the Exclusionary Rule: Demise of the Exclusion Illusion*, 30 AM. U.L. REV. 863 (1981); *Exclusionary Legislation Hearings*, *supra* note 3, at 8 (testimony of Ass't Att'y Gen. Jensen).

81 The term "learning" is used broadly here to include not just the learning of fourth amendment law and problems, but also the assimilaton of police procedures, the enhancement of perception and deductive reasoning, and any other aspect of police work that might conceivably contribute to minimizing the risk of fourth amendment violations.

82 If a violation of the fourth amendment is unavoidable, then by definition *that* violation

necessarily focuses on the state of mind of the officer at the time of the violation, and thus implies that if the officer acted in good faith at that time, no more could be expected of him. Yet, if the law enforcement officer had engaged in greater learning activities prior to the violation, it is possible that no violation would have occurred. In sum, the good faith standard focuses attention on the officer's state of mind at a fixed point in time — the time of the violation.

The object of deterrence, however, is not necessarily temporally limited to that point in time. It would be naive to think that the critical law enforcement behavior which has to undergo modification is limited to the time of the violation. Law enforcement officers are not born constitutional scholars endowed with artistic sensitivities who just happen in the midst of a search or seizure to succumb to an insurmountable desire to violate the fourth amendment. It is clear that many fourth amendment violations could be eliminated simply by means of training, and that the good faith of the lone police officer is not necessarily an indication of whether training has been sufficient. There is no reason to believe that a law enforcement officer's good faith describes the limits of his ability to learn and observe the commands of the fourth amendment. Similarly, law enforcement agencies can perfect observance skills, cautionary tactics, and other techniques with which officers are instructed to approach factual situations implicating fourth amendment concerns.

The reasonableness prong of the good faith test does not alleviate the temporal rigidity of the good faith test. Reasonableness lends some "objectivity" to the test, but does not expand the time frame under scrutiny. First, it is important to note that the appearance of objectivity provided by a reasonableness standard is largely illusory. Under the good faith test, the reasonableness standard is applied not to the officer's conduct, but rather to his belief.[83] The beliefs which will be scrutinized, however, will generally be fact-specific and it is doubtful that a ruling on the reasonableness of one officer's belief will have any relevance to the reasonableness of another officer's beliefs. Each court deciding upon the reasonableness of a belief will create its own vision of reasonable

in those *specific* circumstances cannot be deterred. If an officer is viewed as having finite and immutable capacities to comprehend or apply the fourth amendment in his daily work, then "good faith" defines the boundary between those violations that can be deterred (insofar as he is concerned) and those that cannot. In effect, if one adopts this unrealistic and insulting view of an officer then the fact of the officer's good faith means that the violation was unavoidable. Any realistic view of law enforcement and law enforcement officers makes clear, however, that there is no perfect correspondence between an officer's good faith (not even his reasonable good faith) and the unavoidability of a particular violation of the fourth amendment. *See infra* text accompanying notes 82-86.

83 *See supra* note 79.

mental processes and then apply this "standard" to a belief which likely will never be encountered again in any fourth amendment case.

Analysis of whether a belief is reasonable therefore fails to lend objectivity to the good faith test. This is true not only because of the fact-specific nature of the "beliefs," but also because, in applying standards of reasonableness to beliefs, one must take into account the peculiarities of the conditions upon which the belief is based. As will be seen, such a reasonableness inquiry does not expand the time frame under scrutiny. When we examine the reasonableness of an officer's belief, we are asking not what is reasonable for an officer to learn or to master, but what is reasonable for an officer to know, perceive, or remember at a particular point in time.[84] An inquiry into the reasonableness of a belief is temporally limited, since a belief is a fixed phenomenon. To determine its reasonableness, one must hold all background facts constant (e.g., the training of the officer, the institutional environment of the law enforcement agency, the neighborhood). If one changes these background facts, the reasonableness of the belief may be affected. Consequently, an inquiry into the reasonableness of a belief requires that the background facts be taken as fixed points.

The exclusionary rule as it currently stands addresses a time frame of police behavior which is much broader: the offending officer is held responsible for the failure to avert the violation at *any* point in time. Because the exclusionary rule addresses a broader time frame than the good faith test, and because the rule, in contrast to the good faith test, does not presume that an officer's knowledge or capacities are inalterable, it is clear that application of the rule can and does serve to deter misconduct, even where an officer acted in a reasonable good faith belief.

Inclusion of the reasonableness prong in the good faith test is, in fact, somewhat ironic given that the fourth amendment proscription is itself couched in the language of reasonableness.[85] Where a court apply-

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[84] Note that I am not suggesting that the reasonableness element necessarily fails to demand at least a minimum amount of training in fourth amendment law. In defining the good faith test, United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981) required a belief "based upon articulable premises sufficient to cause a reasonable, *and reasonably trained*, officer to believe that he was acting lawfully." *Id.* at 841 n.4a (emphasis added). (Whether the legislation adopting a good faith test would be read equally narrowly is open to speculation.) More important, however, even under the restrictive definition of reasonableness contained in *United States v. Williams*, the amount of training that the officer has had to assimilate in order to assert the good faith exception is frozen at a specific quantity, a threshold which, once satisfied, suffices to avoid application of the exclusionary rule.

[85] This irony could well acquire significant dimensions inasmuch as the "reasonableness" standard of the good faith test can only make sense if it is interpreted in a manner different from the "reasonableness" requirement of the fourth amendment. Failure to accord a different meaning to the two standards of reasonableness would in effect mean that the good faith

ing the good faith test holds that an officer's erroneous belief was reasonable, the court will in effect be suggesting that either (1) it is permissible for an officer to be ignorant of certain portions of the fourth amendment, or (2) it is permissible for an officer to use less than his best judgment, perception, or efforts in seeking to comply with fourth amendment requirements.[86] In other words, all that is required of officers is a reasonable good faith attempt to conform to the law. This sounds reasonable — until, of course, one considers extending the same innocuous language to other areas like legislators and the first amendment, or to defendants in antitrust cases.

Thus far we have considered the reasonable good faith belief standard as if the only party subject to deterrence were the offending officer. This is, of course, too simplistic a view. Other officers, superiors, and law enforcement institutions themselves are targeted by the exclusionary rule.[87] Thus, to the extent that the rule affords an impetus toward litigating the contours of the fourth amendment and serves as the occasion for a court pronouncement on the same, application of the rule may be said to deter violations.[88] This remains true even if the violation was reasonable and in good faith, because exclusion serves as the incentive for the suppression motion and the occasion for the court's teaching. Of course, there are limits to this view. If the rule were applied in a significant number of cases where the officer could not have avoided the violation, then in effect officers might come to perceive the application of the rule as unrelated to anything within their control.[89] There are, however, few circumstances where it is plausible, let alone realistic, to suggest that

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test is nothing more than a partial codification of what the fourth amendment already requires (i.e., reasonableness). No one suggests that the good faith test is designed to accomplish such modest results. The only possible conclusion, therefore, is that the reasonableness standard of the good faith test is designed to exempt certain fourth amendment violations from the deterrent impact of the exclusionary rule on the basis of a reasonableness standard which remains undefined, but is perforce looser than the reasonableness requirement of the fourth amendment.

86 *See* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044-45 (1974).

87 *See* Mertens & Wasserstrom, *supra* note 39, at 394-401. *See also supra* text accompanying notes 38-40.

88 *See* Mertens & Wasserstrom, *supra* note 39, at 401-05.

89 In order for the exclusionary rule to deter misconduct, decisions must convey some message of what constitutes unacceptable behavior, and this message must be received by law enforcement agents capable of instituting compliance with the decision. If the message received, however, is that the rule will be applied even in circumstances where the violation could not have been avoided, then deterrence may be frustrated. If this message is received with sufficient intensity and frequency by law enforcement agents, they may come to believe that application of the rule is often or generally unrelated to anything within their control. The law enforcement agent engaging in a search or seizure may come to believe that a court will likely exclude the illegally obtained evidence (even though in this instance the violation was unavoidable) simply to teach a lesson to other officers on what constitutes a violation of the fourth amendment.

the violation could not have been avoided. Indeed, in light of the fourth amendment's non-absolute standards (e.g., probable cause, reasonable suspicion, exigent circumstances) the very notion of an unavoidable violation makes little sense. It is quite clear that the fourth amendment, by virtue of its reasonableness and probable cause language, makes allowances for certain mistakes of law and fact.[90] Thus, the very fact that a violation of the fourth amendment has occurred tends to belie any argument that the violation was unavoidable. In any case, the issue of whether a fourth amendment violation was based upon a reasonable good faith belief is a much broader inquiry than the question of whether the violation was unavoidable.

Recognizing that the fourth amendment itself takes into account certain "mistakes" of law and fact in deciding whether a search or seizure is reasonable, one wonders what the good faith test is supposed to accomplish. The Court of Appeals for the Fifth Circuit, in *United States v. Williams*, established two branches for the good faith test: the technical violation and the good faith mistake.[91] The former appears analogous to a mistake of law and the latter to a mistake of fact.

A mistake of law exception to the exclusionary rule is particularly troublesome insofar as it suggests that law enforcement officers are not responsible for knowing or observing certain parts of the fourth amendment. Indeed, some proponents of the good faith test clearly maintain that certain parts of the fourth amendment are too complicated and that law enforcement officers cannot reasonably be held accountable to honor those portions of the amendment.[92] Therefore, so the argument goes, a good faith test is welcome relief from the overly exacting rigors of the fourth amendment. This argument proves too much.

Another troubling aspect is that the mistake of law branch gives the courts, in effect, two chances at writing the law of the fourth amendment. They can first declare what the fourth amendment requires, and then they can declare when those requirements will have legal consequences. The danger is that the substantive law of the fourth amendment will become increasingly complex and esoteric, because the good faith exception will leave the courts with a sure method of avoiding the practical consequences of elaborating detailed and refined (but incomprehensible) rules.[93] In short, the good faith test will to some extent free

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[90] Mertens & Wasserstrom, *supra* note 39, at 425-26, 429-30.

[91] *See* United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981) (quoting Ball, *supra* note 79, at 635).

[92] *See supra* note 68.

[93] It has often been recognized that there is an inverse relation between the scope of a principle and its strength. For instance, rights are more likely to be absolute when their scope is narrow. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 261 (1977); Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 275-76 (1981). In the

the courts from developing a substantive fourth amendment doctrine which is comprehensible; reasonable good faith belief will become the governing standard.

The third and most troubling aspect of the mistake of law branch of the test is that it supplies no limit other than "good faith" and "reasonableness" by which to determine what a law enforcement officer must know, remember, and apply in terms of the fourth amendment. How many decades will it be before trial and appellate courts, the law enforcement agencies, and the officer on the street have even a fair notion of what a reasonable good faith belief might mean in all of the many fact situations presented by fourth amendment cases?[94]

The good faith mistake of fact branch of the good faith test is also troublesome. Such mistakes are already considered under substantive fourth amendment inquiries into the reasonableness of a search or seizure.[95] Because it is unreasonable to assume that the good faith mistake branch of the test merely codifies existing case law, proponents of the test clearly intend the inquiry into the reasonableness of an officer's good faith mistake of fact to narrow somehow the class of cases where evidence is suppressed. But by how much? It is troubling to cast to the courts an experiment in restricting the exclusionary rule when the only bounds to this judicial adventure are the abstract concepts of good faith and reasonableness as applied to beliefs.[96]

Another troubling aspect of the good faith mistake of fact branch of the test is the leeway it will give lower courts to make decisions which will be all but unreviewable. The good faith mistake of fact branch is, as its name announces, fact-oriented. The determination of what consti-

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same sense, if the operative scope of the fourth amendment can be reduced by the application of a good faith test, then the rigors of its commands can be amplified at will. Thus, it is clear that one of the constraints on the development of fourth amendment principles or, at least rules, is that the prime goal of deterrence requires these principles or the rules they produce to be readily understandable. The adoption of a good faith test in some sense removes that constraint by holding out to courts the prospect that if the substantive fourth amendment law they write is too complicated, law enforcement officers will not be held accountable to observe it.

94 Not only will the good faith test produce substantial uncertainty as to the limits of the exclusionary rule, but the fourth amendment itself will fall into disrepair as the reasonable good faith of law enforcement officers obviates the need (or even the possibility) of litigating the underlying fourth amendment principles and rules at stake. *See* Mertens & Wasserstrom, *supra* note 39, at 447-53. *See also infra* text accompanying notes 116-18.

96 *See* Mertens & Wasserstrom, *supra* note 39, at 429-30.

96 The potential of the good faith test to gut the exclusionary rule and to neutralize its deterrent effect is clear. *See supra* text accompanying notes 75-95. *See also infra* notes 97-118. Because the standards of reasonableness and good faith are highly abstract and indeterminate, and the objects to which they are intended to apply (i.e., beliefs) are highly varied and fact-specific, even decades of substantial litigation would not be likely to yield any coherent understanding of the standards governing the application of the exclusionary rule under a good faith test.

tutes a reasonable good faith mistake of fact does not lend itself to manageable standards.[97] Either you see it or you don't, but you can't expect a higher court to tell you how to see it if you don't. In effect, adoption of a good faith mistake of fact exception will deconstitutionalize the law of search and seizure by smothering it in circumstantial and psychological facts. What can be expected from adoption of the good faith mistake of fact exception is an unconnected line of decisions which are all limited to their facts. By reducing constitutional principle to factual inquiries, the good faith test transfers decision making power from the Supreme Court to the lower courts and thus complicates assimilation of the fourth amendment by law enforcement officers.[98]

Finally, whenever exceptions to the exclusionary rule are made, the deterrence effect of the rule is diminished. The rule becomes harder to understand, and the imposition of its consequences in any particular circumstance becomes more uncertain. Exceptions to the rule may serve to reflect more accurately whether a particular type of violation is susceptible to deterrence.[99] But by complicating the message of the rule, an attempt to be exact in the particular case may very well lead to confusion in general. Certainly, we have seen this sort of problem with the substantive imperatives of the fourth amendment itself: attempts to apply fact-specific and refined distinctions between the permissible and the impermissible yields case law which has merit only for the individual case being decided and which no one else can understand or apply.[100]

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97 Moreover, the higher courts will have particularly little to say in developing these standards. Insofar as the issues are fact-oriented and steeped in the vicissitudes of subjectivity, the only role of the higher courts will be to declare that a lower court's application of the reasonable good faith standard to the facts was clearly erroneous as a matter of law.

98 *Cf.* Dworkin, *supra* note 70.

99 Of course, this all depends upon what one means by that "particular type of violation" or on what aspects of the fourth amendment violation one wants to abstract. If in describing the type of violation, one includes as an essential aspect of the violation that element which made the violation "inevitable," then clearly that "type of violation" cannot be deterred. If, on the other hand, in describing the essential aspects of the violation, the part which made the violation "inevitable" is disregarded, then clearly that "type of violation" is susceptible to deterrence. This distinction explains why even in "unavoidable" violations of the fourth amendment, suppression can serve to deter: if law enforcement officers are exposed to messages of the latter type, deterrence is served; if the message received is frequently of the former type, the officer may begin to perceive the courts as somewhat perverse.

100 *See supra* note 70. The objection to *fact-specific* distinctions is not that the distinctions are factual (as opposed to normative) in nature, but rather that the distinctions developed are relevant or applicable only to the fact situations which produced them. Mertens & Wasserstrom recount a practical *fact-oriented* rule developed by the Court of Appeals for the District of Columbia which clarifies the law on arrest for street drug purchases: "Generally, if the officer sees a suspect pass something in return for money under otherwise suspicious circumstances, he may arrest. If he sees only a one-way transfer, however, he may not." Mertens & Wasserstrom, *supra* note 39, at 403. This is a clear example of structuring a fourth amendment rule with due regard for the type of recurrent activities facing the police and at the appropriate level of generality.

As a result, deterrence of law enforcement misconduct is diminished. The same would be true of the exclusionary rule were the good faith test adopted. The deterrence value of the rule would be reduced because the ability of law enforcement officers to predict when the rule applies would be diminished. This reduction in capacity to determine when the rule applies results both from increased difficulty of mastering more rules (or exceptions) and from having to make more factual decisions in determining whether the rule applies.[101]

Against these objections, what do proponents of the good faith test offer as the countervailing considerations? Nothing more than the meager *possibility* that, under current law, evidence in a few cases is suppressed when violation of the fourth amendment could not have been avoided. This is a little like ordering free-form triple by-pass heart surgery to eliminate a blemish on the chest of the patient.

Unfounded in reason or policy, the good faith test also finds no support in precedent.[102] The cases that proponents of the good faith test cite in support of the constitutional validity of such legislation do not support it. In one line of cases, the Supreme Court has refused to apply the exclusionary rule retroactively to law enforcement conduct that occurred before the Court expanded substantive constitutional rights.[103] The rationale of these cases is that the deterrent function of the exclusionary rule is not furthered by application to a case in which a law enforcement officer acted properly — not just in reasonable good faith —under the law as it existed when he acted.

In another set of cases, the current Court has tailored the exclusionary rule to a narrow view of its deterrent function by holding that the rule is inapplicable in certain proceedings subsidiary or unrelated to federal or state criminal proceedings.[104] In these cases, the Court determined simply that the exclusionary rule need not be applied to proceedings such as grand jury deliberations or federal civil proceedings

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101 Aggravating these two factors is the fact that the decisions rendered by the courts would be fact-specific and would not easily yield broad principles or rules of thumb on the scope of the exlusionary rule.

102 *See* Mertens & Wasserstrom, *supra* note 39, at 433-46; Comment, *Limiting the Application of the Exclusionary Rule: The Good Faith Exception*, 34 VAND. L. REV. 213 (1981). *Contra* Ball, *supra* note 79; Hoopes, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 915, 924-27; Note, *supra* note 80.

103 *See* United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). In both of these cases, the constitutional standards of the fourth or fifth amendments had been reinterpreted after the challenged law enforcement conduct occurred.

104 *See* United States v. Calandra, 414 U.S. 338 (1974) (a witness testifying before a grand jury may not refuse to answer questions on the grounds that they are based upon illegally obtained evidence); United States v. Janis, 428 U.S. 433 (1976) (illegally seized evidence need not be suppressed in civil proceedings concerning taxes).

in order to "remove the incentive to disregard" the strictures of the fourth amendment. The refusal to accept the evidence in a criminal trial suffices to remove the incentive.

Finally, in a third line of cases the Supreme Court has declined to apply the exclusionary rule where the use made of evidence in a criminal proceeding is, in the Court's view, too remote to provide an incentive for disregarding the underlying substantive rules.[105] In these cases the Supreme Court has made the judgment that the causal connection between official misconduct and the use made of the evidence is too attenuated to require exclusion.

These three lines of cases — (1) refusal to give retroactive effect to the exclusionary rule where substantive constitutional rights change, (2) refusal to extend the exclusionary rule to subsidiary legal fora, and (3) refusal to apply the exclusionary rule where the violation is too remote from the use to be made of the evidence — do not support the drastic curtailment of the exclusionary rule contemplated by proponents of the good faith test.[106] None of these lines of cases even remotely suggests that an officer's reasonable good faith belief is an appropriate ground for rejecting application of the exclusionary rule.[107]

B. THE GOOD FAITH TEST VARIATIONS

Other proposals more noxious to the exclusionary rule than the Task Force Recommendation have been advanced. S. 101 and S. 1995, for instance, set forth two separate variations of the good faith test, both of which promise to produce maximum uncertainty and significant administrative confusion. Both of these bills propose standards for admissibility of evidence which would depend upon a myriad of factors and

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105 *See, e.g.*, United States v. Havens, 446 U.S. 620 (1980) (illegally seized evidence may be used to impeach defendant's statements on cross-examination that were reasonably suggested by defendant's direct testimony); United States v. Ceccolini, 435 U.S. 268 (1978) (causal connection between police misconduct and introduction of live witness testimony too attenuated to require exclusion of live witness testimony).

106 These three lines of cases are arguably consistent with an acceptable conception of deterrence; the good faith test is not. *See supra* text accompanying notes 80-90.

107 In recent times, the decision which comes closest to discussing the state of mind of the law enforcement officer in connection with the exclusionary rule is Michigan v. Tucker, 417 U.S. 433 (1974), where Justice Rehnquist wrote for the Court, "the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right," and when law enforcement action is taken in good faith "the deterrence rationale loses much of its force." *Id.* at 447. These statements are, of course, dicta; conceivably they might serve as the necessary citations for some future decision of the Court to adopt some legislative or judicial version of the good faith test. Such a move could be linked to precedent only by a radical exercise of selective abstraction.

factual considerations. In large part, the bills present similar problems, so the discussion below focuses only on one of them, S. 101.

S. 101 provides, in part, that "[e]vidence shall not be excluded from any Federal criminal proceeding solely because that evidence was obtained in violation of the fourth amendment . . . unless . . . such violation was *intentional* or *substantial*."[108] Because "intentional" and "substantial" violations of the fourth amendment are alternative thresholds for application of the rule under S. 101, I shall first address these two standards separately.[109]

Proponents of S. 101 probably mean to reserve the term "intentional violation" for those cases where law enforcement officers intend to conduct a search and seizure in violation of the fourth amendment or where the search and seizure is based on erroneous and unreasonable factual premises. This definition would severely curtail the exclusionary rule. Not surprisingly, it finds no support in the decisions of the Supreme Court. Application of the exclusionary rule only to intentional violations of the fourth amendment would seriously undermine even the most restrictive view of the deterrent function of the rule. It would remove the incentive for law enforcement officers to educate themselves in fourth amendment jurisprudence. It would encourage them to make warrantless searches where they believed that a warrant might be required but were not sure.

There is no doubt that negligent, grossly negligent, and reckless vio-

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108 (Emphasis added) The pertinent provision reads as follows:

§ 3505. Definition and limitation of exclusionary rule.

(a) Evidence shall not be excluded from any Federal criminal proceeding solely because that evidence was obtained in violation of the fourth amendment to the Constitution unless the court finds as a matter law that— (1) a violation has occurred and (2) such violation was intentional or substantial.

(b) In determining whether a violation is substantial for the purposes of this section, the court shall consider all of the circumstances, including— (1) the extent to which the violation was reckless; (2) the extent to which privacy was invaded; (3) the extent to which exclusion will tend to prevent such violations; and (4) whether, but for the violation, the things seized would have been discovered; or whether the relationship between the things discovered and the violation is attenuated . . . .

S. 101, 97th Cong., 1st Sess, 127 CONG. REC. S5154 (daily ed. Jan. 15, 1981). The bill appears to be a version of a proposal of the American Law Institute. *See* MODEL CODE OF PREARRAIGNMENT PROCEDURES § SS 290.2(2)-(4)(1975).

109 Adoption of the standard set forth in S. 101 — that there be a "substantial" or "intentional" violation of the fourth amendment before the exclusionary rule is applied — would preclude application of the rule to cases where the invasion of fourth amendment rights, although not intentional, was reckless, grossly negligent, or negligent, unless it was substantial. A substantial violation is further defined in S. 101 by a four-prong test that includes consideration of whether the violation was reckless. Reckessness is generally considered in criminal and tort law to be a lower threshold of deliberateness than is intention. Because recklessness is but one prong of a four-prong test defining substantial, it is evident that some reckless violations of the fourth amendment may ultimately be deemed not substantial. In those cases, S. 101 will preclude application of the exclusionary rule.

lations of the fourth amendment can be deterred and that the exclusionary rule can serve its deterrent function in these cases as well as in cases of intentional violations. Even the most restrictive view of the deterrent function of the rule confirms this point.[110] Justice Rehnquist wrote for the Court in *Michigan v. Tucker* that "the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."[111] To preclude application of the exclusionary rule where the violation is not intentional is therefore to reward a law enforcement officer's ignorance of the Constitution.[112] S. 101 would, in effect, implicitly encourage negligent and reckless police conduct in arrest, search, and seizure.[113]

Like the "intentional" standard, S. 101's alternative threshold of "substantial" violation is also seriously deficient in its protection of fourth amendment rights. S. 101 states:

> In determining whether a violation is substantial for the purposes of this section, the court shall consider all of the circumstances, including—
>
> (1) the extent to which the violation was reckless;
>
> (2) the extent to which privacy was invaded;
>
> (3) the extent to which exclusion will tend to prevent such violations; and
>
> (4) whether, but for the violation, the things seized would have been discovered; or whether the relationship between the things discovered and the violation is attenuated.[114]

Presumably, this four-part test requires the court to balance each of the four factors in determining whether the violation is substantial and thus whether the exclusionary rule ought to apply. The most striking feature of the "substantial violation" standard (and perhaps its most radical departure from existing Supreme Court doctrine) lies in the fact that it would delegate a whole series of highly speculative, almost metaphysical

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110 *See supra* text accompanying notes 34-35.

111 Michigan v. Tucker, 417 U.S. 433, 447 (1974).

112 As noted by Professor Kaplan (who is by no means a friend of the exclusionary rule) in connection with a proposed "inadvertence" exception to the exclusionary rule:

> There are, however, basic problems with such a modification of the rule. It would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their consitutional violations properly could be labeled as inadvertent. Nor would it suffice further to modify the rule and require that the police error be reasonable as well as inadvertent. While such a standard would motivate a police department to insure that its officers made only reasonable mistakes, it is hard to determine what constitutes a reasonable mistake of law. Moreover, the exclusionary rule is already held inapplicable where a policeman makes a reasonable factual mistake.

113 Kaplan, *supra* note 86, at 1044.

114 S. 101, 97th Cong., 1st Sess., 127 CONG. REC. S5154 (daily ed. Jan 15, 1981).

factual inquiries to the lower federal courts. Application of such a non-standard will produce a fact-specific fourth amendment case law incapable of yielding comprehensible principles and will deter assertion of fourth amendment claims.[115] The "substantial violation" standard of S. 101 vests almost complete discretion in the lower federal courts to make factual decisions on each of the four factors. It even fails to specify the thresholds for each of the four considerations. For instance, in a ruling upon the admissibility of evidence does a *substantial* invasion of privacy support exclusion? A *direct* invasion of privacy? A *serious* invasion of privacy? A *perceptible* invasion of privacy? One can ask the same questions about the degree of recklessness required to support exclusion under S. 101. In addition, S. 101 fails to establish who has the burden of proving the (indeterminate) levels for each of the four factors.

Finally, the substantial violation standard vests almost complete discretion in each federal district court judge to decide what weight to assign to each of the four prongs. As they are hardly fungible, it is not readily apparent how a court should perform the balancing of all four considerations. How does one balance an indeterminate level of recklessness against an undefined degree of invasion of privacy? In its broad grant of authority to the lower federal courts, the "substantial" violation standard leaves each federal district judge free to consider "all of the circumstances." Enactment of the "substantial" violation standard would result in a broad spectrum of views on the scope of the exclusionary rule; it certainly would not result in anything close to a recognizable rule of law.

C. GOOD FAITH TYPE TESTS AND THE ADMINISTRATION OF JUSTICE

Commentators have noted that good faith type tests have the unfortunate consequence of directing judicial inquiry toward the law enforcement officer's state of mind and away from both the substantive requirements of the fourth amendment and the adjudication of the guilt or innocence of the suspect.[116] Indeed, Mertens and Wasserstrom have

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[115] In short, the substantial violation test shows every indication of surpassing the good faith test in producing confusion and uncertainty. *See supra* text accompanying notes 79-103. *See generally* Geller, *supra* note 43, at 705-09; Comment, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453, 1459-62 (1973) (both articles discuss the weaknesses of S. 881, 93d Cong., 1st Sess. 119 CONG. REC. S4195 (1973), a precursor of S. 101).

[116] As stated by Professor Kaplan:

> There is a more serious problem with exempting searches made through inadvertent errors of law from the exclusionary rule. To do so would add one more factfinding operation, and an especially difficult one to administer, to those already required of a lower judiciary which, to be frank, has hardly been very trustworthy in this area. It is difficult enough to administer the current exclusionary rule, since police perjury can, and often does, prevent accurate findings of fact. So long as lower court trial judges remain op-

noted that under a good faith test courts may very well avoid deciding substantive fourth amendment questions by finding that an officer acted in reasonable good faith.[117]

The most serious threat to the administration of justice, however, stems from the fact that good faith type tests would require the courts to disregard almost seventy years of precedent on the exclusionary rule and to start redefining the scope of the rule from scratch.[118] Both the Task Force Recommendation and S. 101 propose fact-oriented standards for admissibility. The prospect of defining and refining those standards in the near future is illusory. The fact-orientation of the standards will hinder the establishment of uniform national rules on the scope of the exclusionary rule. Ironically, the appellate courts would not be able to provide much guidance to the lower courts because the tests prescribe extremely fact-oriented standards, and the reviewing authority of the appellate courts extends only to those decisions to admit evidence which are clearly erroneous as a matter of law.

D. DAMAGE REMEDIES

S. 751, S. 1995, H.R. 4259, and H.R. 5971 propose damage remedies as sanctions for fourth amendment violations.[119] S. 751 and H.R.

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posed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level. In order to suppress evidence, the trial judge would have to find evidence of the officer's state of mind which would be generally difficult to come by apart from the officer's self-serving and generally uncontradicted testimony. And since the necessary finding requires proof that a policeman actually has engaged in a criminal act, the defendant's burden of proof would be increased, as a psychological or perhaps even as a legal matter.

Kaplan, *supra* note 86, at 1045.

117 "The good faith exception gives trial courts a convenient method by which to side-step . . . the underlying fourth amendment issue itself, by simply excusing the officer's alleged mistakes as reasonable ones." Mertens & Wassenstrom, *supra* note 39, at 449. The result is that fewer fourth amendment issues are decided; the operative governing standard becomes reasonable good faith, rather than underlying fourth amendment concepts such as probable cause or exigent circumstances. *Id.* The depth of absurdity is reached when one considers that it would be conceivable to apply the good faith test to the body of case law governing search and seizure that would be spawned by adoption of a good faith test.

One could, of course, draft legislation which would require courts to determine the presence or absence of a violation before examining the officer's state of mind. This, however, would be largely a cosmetic measure, for significant numbers of harried judges are unlikely to devote substantial time and effort to definition of fourth amendment violations when the presence of such violations is irrelevant to the outcome of the cases.

118 *See generally* Mertens & Wasserstrom, *supra* note 39, at 447-53.

119 The bills are briefly described *supra* note 2. H.R. 4422 is significantly different from the other damages remedy bills, not only because it would apply solely at the state level, but also because it would provide a damage remedy against the offending law enforcement officer rather than the government. Nevertheless, many of the arguments raised in the text which are aimed at proposals for damage remedies against the United States have some application to H.R. 4422.

4259 would eliminate the exclusionary rule altogether, whereas S. 1995 would limit application of the rule to circumstances where the evidence was obtained as a result of intentional misconduct and H.R. 5971 would adopt the reasonable good faith test to limit the exclusionary rule. None of these damage remedies is a realistic deterrent. While S. 751 and H.R. 4259 purport to replace the exclusionary rule with a damage remedy, S. 1995 and H.R. 5971 purport to cut back the scope of the rule and provide a damage remedy — but, interestingly, this damage remedy is subject to the same type of restrictions that S. 1995 and H.R. 5971 place upon the scope of the exclusionary rule.[120] Because S. 1995 and H.R. 5971 curtail the scope of the exclusionary rule without providing an alternative remedy for that part of the rule which has been curtailed, the constitutionality of the proposals depend ultimately upon whether the restriction of the scope of the rule can be upheld. The mere fact that a damage remedy has been provided does not compensate for the reduction in the scope of the rule.[121] If the good faith type tests embodied in S. 1995 and H.R. 5971 are unconstitutional alone, the establishment of a damage remedy does not save them.

For illustrative purposes, the discussion of the damage remedies will focus upon S. 751, a bill which is apparently based upon the view that the Constitution requires some effective deterrent but not the exclusionary rule in particular.[122] As previously discussed, such a reading of con-

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[120] S. 1995 denies application of the exclusionary rule and the damage remedy unless the fourth amendment violation in each case is attributable to some threshold of misconduct. H.R. 5971 denies application of the exclusionary rule and the damage remedy where the violation was made by an investigative or law enforcement officer with a reasonable, good faith belief that it conformed with the requirements of the fourth amendment.

[121] To some extent we can presumably compensate for the loss in deterrence resulting from a reduction in the frequency of the deterrent's application by increasing the intensity of the deterrent. One might argue that S. 1995 and H.R. 5971 accomplish such a tradeoff: a reduction in the number of cases where the exclusionary rule applies accompanied by an increase in the magnitude of the sanction (exclusion plus damages). The argument would be misdirected, however, for S. 1995 and H.R. 5971 do not merely reduce the number of cases where the exclusionary rule is applied; they restrict the type of cases to which the rule applies. Because the bills present a restriction on the scope of the rule, violations falling outside the restricted scope of the rule will remain undeterred.

[122] The pertinent provision reads as follows:

S. 2692. Tort claims; illegal search and seizure

(a) The United States shall be liable for any damages resulting from a search or seizure conducted by an investigative or law enforcement officer, acting within the scope of his office or employment, in violation of the United States Constitution.

(b) Any person aggrieved by such a violation may recover actual damages and such punitive damages as the court may award under subsection (c).

(c) Punitive damages may be awarded by the court, upon consideration of all of the circumstances of the case, including —

stitutional precedent is questionable.[123] But even if it were not, S. 751 fails to hold forth any prospect that it might serve as a deterrent to fourth amendment violations.

S. 751 would eliminate the exclusionary rule entirely and would instead provide a limited damages remedy against the United States and authorize disciplinary action against offending law enforcement personnel. The damages remedy and the remedy of discipline for misbehaving police officers are surely the most obvious of the remedies the Supreme Court recognized as "worthless and futile" in *Mapp v. Ohio*.[124] The Court there recited the experience of California, whose highest court had found that "other remedies have completely failed to secure compliance with the constitutional provisions," and therefore adopted the exclusionary rule. The Court then stated:

> The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*.[125]

Any damages remedy for fourth amendment violations is bound to be ineffective as a deterrent because of the difficulty of valuing the impairment of the interests which the fourth amendment is designed to protect. The actual damages that could most easily be calculated are those for physical injuries to person and property flowing from a fourth

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(1) The extent of the investigative or law enforcement officer's deviation from permissible conduct;

(2) The extent to which the violation was willful, reckless, or grossly negligent;

(3) The extent to which the aggrieved person's privacy was invaded;

(4) The extent of the aggrieved person's personal injury, both physical and mental;

(5) The extent of any property damage; and

(6) The effect such an award would have in preventing future violations of the United States Constitution.

(d) Notwithstanding subsections (b) and (c), the recovery of any person who is convicted of any offense for which evidence of such offense was seized in violation of the United States Constitution is limited to actual physical personal injury and to actual property damage sustained as a result of the unconstitutional search and seizure.

(e) No judgment, award, compromise, or settlement of any action brought under this section shall exceed the amount of $25,000, including actual and punitive damages. The United States shall not be liable for interest prior to judgment.

(f) Any action under this section shall be brought within the period of limitations provided in section 2401(b) of this title.

S. 751, 97th Cong., 1st Sess. 127 CONG. REC. S2401-02 (daily ed. Mar. 19, 1981).

123 *See supra* text accompanying notes 41-60.

124 367 U.S. 643, 652 (1961). Damages and criminal actions were the remedies which the Court in *Wolf* thought might be effective alternatives to the exclusionary rule. Wolf v. Colorado, 338 U.S. 25, 30-31 n.1 (1949). Surely, the *Mapp* Court had these remedies in mind when it determined that *Wolf v. Colorado*'s faith in remedies other than exclusion was unfounded and overruled the decision. 367 U.S. at 652.

125 Mapp v. Ohio, 367 U.S. at 652-53 (1961).

amendment violation. Many searches and seizures clearly prohibited by the fourth amendment do not, however, result in bodily injury or destruction of or damage to property. What are the damages to be awarded where a police officer, without probable cause but very politely and courteously, proceeds to scrutinize the contents of a briefcase or purse and finds nothing incriminating? Absent reasonable suspicion or probable cause, such conduct by the law enforcement officer would be in violation of the fourth amendment, yet it is hard to conceive of any practical way to calculate damages for such invasions of the right of privacy.[126] How is a jury supposed to put a dollar figure on such an intangible as invasion of privacy? Perhaps the answer is clear: where the police officer has conducted himself so politely and courteously, no damage is suffered. But if this is the case, then in most instances involving violations of the fourth amendment, no damages will be awarded; police officers only rarely injure people or damage or destroy property wantonly in the execution of their duties.

Yet the fourth amendment's protection is not limited to security from physical invasions of body and property by law enforcement officers. It does not even principally concern itself with such physical harms. On the contrary, the fourth amendment speaks of "[t]he right of the people to be secure in their persons, houses, papers, and effects."[127] This emphasis on "the right of the people to be *secure*" clearly defines a right of privacy that is substantially broader than the bare right to have one's body and possessions left intact. The fact that it is difficult to put a dollar figure on what privacy is worth does not mean that privacy is worth nothing.

Nevertheless, in the absence of extreme police misconduct there is good reason to suppose that the damage awards in most cases would be minimal. And, of course, because damage awards would be small, the incentive to sue would also be minimal. Thus, a damages remedy that

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126 One possibility, of course, is to establish a minimum level of damages. For example, H.R. 4422, which would apply to the states, allows a damages action against the offending state agent and a minimum scheduled amount of $500. H.R. 4422, 97th Cong., 1st Sess., 127 Cong. Rec. H6071 (daily ed. Sept. 9, 1981). This type of approach is not likely to work because of political and practical considerations. Five hundred or even $1,000 in minimum damages is clearly not a sufficient quantity to induce a client or his lawyer to institute suit, incur expenses, and draw the wrath of the police department. *See supra* note 131-33. On the other hand, if the minimum scheduled damages are too high, the proposal will be politically unacceptable to Congress because it will allow the filing of spurious suits simply for the settlement value. (Indeed, if the floor is set too high and spurious suits result, deterrence may be lessened, for law enforcement agencies will then be penalized regardless of whether officers have actively committed violations.) The problem is that under a regime of scheduled damages, there may be no stable equilibrium point in terms of providing adequate deterrence and avoiding imposition of unacceptable costs on law enforcement agencies.

127 U.S. CONST. amend. IV.

does not compensate for invasions of privacy apart from physical injury to body or property will be ineffective in deterring police misconduct which impinges upon the interest in privacy.[128]

There are other reasons why few damage actions are likely to be brought. Many of the persons who would be most likely to bring such actions live, at best, in uneasy accommodation with the enforcement officers whom they would be accusing of wrongdoing. Moreover, if convicted and imprisoned, the prospective fourth amendment plaintiff would be in the hands of the authorities — if not those who violated his rights, then, certainly (at least in the view of the convict) their close colleagues. There is bound to be fear of reprisal.[129]

Professor Amsterdam has described the institutional disincentives for an accused party to pursue a damages remedy against law enforcement officers:

> Where are the lawyers going to come from to handle these cases for the plaintiffs? *Gideon v. Wainwright* and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on "cover" charges? The opportunity to represent his client without fee in these resulting criminal matters?[130]

The institutional obstacles to bringing suit under a damages remedy such as S. 751 are not limited to those accused of crimes. Some of the more severe disincentives to sue for violations of the fourth amendment are common to both suspects and wholly innocent citizens. Thus, a jury is very unlikely to make a significant damage award to police misconduct victims who are in fact, or who by virtue of their position as plaintiffs merely appear to be, criminal suspects. The sympathies of the jury will most likely lie with the law enforcement officers, who were, after all, engaged in doing their job.[131] There is no doubt that in this type of litigation the defendant would seek to introduce evidence of the crimes on account of which the plaintiff was searched and his property seized. No doubt the defendant would also seek to introduce evidence of

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128 *See* Mertens & Wasserstrom, *supra* note 39, at 408.

129 *See* Geller, *supra* note 43, at 692.

130 Amsterdam, *supra* note 37, at 430.

131 A defendant policeman in a section 1983 action may benefit from the image of authority and respectability evoked by his office . . . . On the other hand, the plaintiff's reputation, if not already sullied by a criminal record, may be called into question simply because the case arises from a confrontation with the police. Finally, juries may be prejudiced against some plaintiffs because of their race or unconventional lifestyles.

Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 783-84 (1979).

suspicious or unorthodox behavior by the plaintiff. Under a damages remedy these would be legitimate issues, as they are relevant to the issue of whether the law enforcement officers had probable cause to conduct the search or seizure. The jury would thus most likely conclude that the plaintiff is a rather unsympathetic sort seeking to harass those charged with crime control.[132] Moreover, as noted by Professor Amsterdam and others, the plaintiff would be up against a team of professional investigators and testifiers, making the practical obstacles to recovery all but insuperable.[133]

The specific damages provisions of S. 751 exacerbate these inherent difficulties with the damages remedy. Most egregiously, S. 751 limits recoverable damages to those for "actual physical personal and . . . actual property damage."[134] Thus, by its very terms, S. 751 precludes damage awards for impairment of the principal interest protected by the fourth amendment — the interest in privacy.

Given this limitation on the type of damages that may be recovered, S. 751 scarcely expands the existing right of citizens to be compensated by the United States for the abusive practices of its law enforcement officers. Under the Federal Tort Claims Act,[135] one can already sue the United States for assault, battery, false imprisonment, false arrest, and other common law torts committed by investigative or law enforcement officers which result in injury to body or property.[136] The only expansion in the availability of damage awards provided by S. 751 is in the class of cases in which serious injury has been inflicted on a person's body or property in violation of the fourth amendment but in a manner that did not involve any actionable intentional or negligent tort

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132 The reasons why the victim of the unconstitutional search and seizure so often loses his suit while the defendant-policeman prevails are numerous. The first and most important reason is that the claimant who has been charged with or convicted of crimes is not likely to evoke the jury's sympathy, particularly after the defendant-policeman explains that he was only trying to protect society. Even if the claimant has not been criminally charged, he will not be a sympathetic figure to the average jury if, as most victims of police illegality, he is part of America's lower class. Second, the jury bias in favor of a policeman often allows the policeman successfully to lie his way to victory by fabricating a story of adherence to constitutional requirements during the search and seizure.

Geller, *supra* note 43, at 692-93.

133 Police cases are an unadulterated investigative and litigative nightmare. Taking on the police in any tribunal involves a commitment to the most frustrating and thankless legal work I know. And the idea that an unrepresented, inarticulate, prosecution-vulnerable citizen can make a case against a team of professional investigators and testifiers in any tribunal beggars belief. Even in a tribunal having recognized responsibilites and some resources to conduct independent investigation, a plaintiff without assiduous counsel devoted to developing his side of the case would be utterly outmastered by the police. No, I think we shall have airings of police searches and seizures on suppression motions or not at all.

Amsterdam, *supra* note 37, at 430.

134 S. 751, 97th Cong., 1st Sess. 127 CONG. REC. S2401-02 (daily ed. Mar. 19, 1981).

135 28 U.S.C. §§ 2674, 2680 (1976).

136 *See* Norton v. United States, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978).

of a law enforcement officer. There may be such cases, but it is not easy to hypothesize their facts.

S. 751 futher exacerbates the problems that are inherent in any damages remedy by capping the permissible award at $25,000 for actual and punitive damages combined. The $25,000 ceiling would deter suit. Twenty-five thousand dollars is not a great deal of money on which to gamble the kind of costs (including attorney fees unless the case were taken on a contigent basis) that are associated with suits against the United States in federal court and that would presumably be borne by the plaintiff if he lost. Although S. 751 permits the court to award claimants attorney's fees, and thus superficially appears to provide incentives for lawyers to represent claimants, these incentives are negligible. Under 28 U.S.C. § 2678, which is expressly applicable to damage claims under S. 751, an attorney may not charge his client more than twenty-five percent of any judgment rendered or more than twenty percent of any settlement. This percentage limit on attorney's fees means that the absolute maximum an attorney may charge is $6,250 in a judgment and $5,000 in a settlement. As damage awards under S. 751 in the vast majority of cases are likely to be below the $25,000 ceiling,[137] many claimants (who are likely to be poor) would have grave difficulties securing the services of able counsel.

E. THE DISCIPLINARY REMEDY

S. 751 contains a section that provides:

> An investigative or law enforcement officer who conducts a search or seizure in violation of the United States Constitution shall be subject to appropriate discipline in the discretion of the Federal agency employing such officer, if that agency determines, after notice and hearing, that the officer conducted such search or seizure lacking a good faith belief that such search or seizure was constitutional.[138]

This provision in effect vests discretion in the federal agencies to discipline personnel who commit violations of the fourth amendment. The federal agencies already have such discretion and thus this provision authorizing disciplinary measures adds nothing new.

V. CONCLUSION

The conceptual bankruptcy and the constitutional infirmity of the recent institutional attacks on the exclusionary rule are evident. Neither

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[137] One study indicates that the average award in fourth amendment suits brought under 42 U.S.C. § 1983 was $5723. Project, *supra* note 131, at 789.

[138] S. 751, 97th Cong., 1st Sess., 127 CONG. REC. S2401- 02 (daily ed. Mar. 19, 1981).

the good faith type tests nor the damage remedies discussed offers any realistic prospect of deterring fourth amendment violations.

The good faith type tests would launch the federal courts on an uncharted expedition to rewrite the scope of the exclusionary rule, an expedition guided only by the elusive and abstract concept of "reasonable good faith belief." In curtailing the scope and diluting the strength of the exclusionary rule, these tests will effectively abridge the fourth amendment.

The reason we are asked to embark on this jurisprudential adventure is deceptively simple: proponents claim that law enforcement misconduct stemming from a reasonable, good faith (albeit erroneous) belief cannot be deterred. But this claim is based upon a tunnel vision perspective of how the exclusionary rule serves its deterrent function, a perspective which is wholly inadequate. Moreover, directly contradicting the stated deterrent purpose of the exclusionary rule, the good faith type tests will excuse law enforcement officers and agencies from assimilating certain portions of the fourth amendment. In addition, the vagueness and the fact-specific nature of the standard will insure that the standards governing exclusion will become wholly incomprehensible.

On first impression, the good faith type tests appear reasonable. The allure of the tests, however, rests only in the high degree of abstraction by which they are offered and defended: "How could one ask any more of a law enforcement officer than reasonable good faith?" When the machinations of this formalism are laid bare it becomes apparent that the good faith type tests are nothing more than epistemological artifice. The tests place an inordinate degree of confidence in the ability of courts to define and discover when an officer has acted on the basis of a reasonable good faith belief. By the same token, the good faith type tests hypostatize the capacities of law enforcement officers. In effect, the tests may well be considered insulting to law enforcement agents, for the tests suggest that there is a fourth amendment accessible to and binding upon judges and a lesser, simplified fourth amendment which is all that law enforcement officers need (or can) obey.

The epistemological tricks of the good faith type tests are especially deserving of rejection if one accepts the *deterrent safeguard* theory of *Mapp v. Ohio* offered herein. Under that theory, the constitutional status of the exclusionary rule rests not merely on the fact that the rule deters misconduct, but also on the fact that the rule provides assurance that misconduct is being deterred. Because the good faith type tests place so much confidence in the ability of courts to define and determine when a law enforcement agent has acted upon a reasonable good faith (though

erroneous) belief, these tests undermine the safeguard function of the exclusionary rule.

The deterrent safeguard theory has special application to the damage remedy proposals which would eliminate the exclusionary rule altogether. The exclusionary rule is warranted under the deterrent safeguard theory precisely because we cannot know whether there are alternative remedies which will work to deter police misconduct. Rather than confront the absence of any remedies for fourth amendment violations, and rather than face the uncertainty of whether enacted remedies would work, the Court in *Mapp v. Ohio* endowed the exclusionary rule with an unconditional constitutional status. The damage remedy legislation recently proposed directly denies these concerns. In fact, it holds out the opposing prospect — that until we find out whether damage remedies work, and perhaps even thereafter, there may be no sanction at all for violations of the fourth amendment.

In terms of the specific damage remedies discussed herein, however, there is no reason to wait long to determine whether they will work. Violation of the intangible interests protected by the fourth amendment, when asserted by plaintiffs who are, or merely appear to be, criminal suspects, will not likely result in substantial damage awards from juries. As a result, lawyers can hardly be expected to rush to the courts to press such claims. Thus, not only will the incentive on law enforcement officers to learn the commands of the fourth amendment become minimal, but the reduced litigation of fourth amendment issues will leave the constitutional right a dry, abstract shell.