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STUDENT COMMENTS

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THE TORT ALTERNATIVE TO THE EXCLUSIONARY RULE IN SEARCH AND SEIZURE

In *Mapp v. Ohio*,[1] the Supreme Court attempted to resolve a long-standing controversy over how to protect fourth amendment rights[2] by making the exclusionary rule[3] binding on the states.[4] Reliance on the exclusionary rule to protect fourth amendment rights has been attacked because it cannot and does not deter police misconduct in relation to the fourth amendment,[5] it excessively hampers law enforcement,[6] and it offers no protection for illegal searches and seizures that do not become a factor in a criminal proceeding.[7] This dissatisfaction was manifested in two recent Supreme Court decisions,[8] which suggests that the exclusionary rule may be discarded or severely limited in the near future.

In the event that the exclusionary rule is abandoned as the primary means of protecting fourth amendment rights, some workable alternative protection must be developed. As severe a critic of the rule as Chief Justice Burger concedes

> I do not propose however, that we abandon the Suppression Doctrine until a meaningful alternative can be developed. . . . Obviously the public interest would be poorly served if law enforcement officials were to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared.[9]

This comment will focus on one possible alternative—that of providing money damages to persons whose amendment rights have been violated.[10]

[1] 367 U.S. 643 (1961).

[2] U.S. CONST. amend. IV provides:
The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant 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.

[3] The exclusionary rule requires that the evidence obtained by violation of constitutional rights will not be admitted at trial against the person from whom it was seized. Boyd v. United States, 116 U.S. 616 (1914); Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L.C. & P.S. 246 (1961). In addition, evidence obtained as the "fruit of the poisonous tree can be excluded." Nardone v. United States, 308 U.S. 338, 341 (1940). This comment will deal with the rule only in relation to search and seizure, but it has been applied to other areas of constitutional criminal procedure. *See* Stovall v. Denno, 388 U.S. 293 (1967) (eyewitness indentification excluded if counsel not present at lineup or unfair procedures used); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 346 (1966) (statements of accused made during police custodial interrogation excluded unless accused informed of right to counsel and right to remain silent, and rights waived).

[4] Prior to *Mapp*, the Supreme Court had made the exclusionary rule binding on the federal courts, Weeks v. United States, 232 U.S. 383 (1914), but reasoned that since the rule was only court-made, it refused to make it binding on the states. Wolf v. Colorado, 338 U.S. 25 (1949). As of 1960, 26 of the 50 states had adopted the exclusionary rule. Elkins v. United States, 364 U.S. 206, 225–32 (1960).

[5] *See, e.g.*, McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L.C. & P.S. 266 (1961); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

[6] *See, e.g.*, Barrett, *Exclusion of Evidence Obtained By Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565 (1955); Oaks, *supra* note 5.

[7] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 200 (1967), argues that the exclusionary rule is limited to police conduct which is designed for use in a criminal case, and that only a small proportion of police abuses have that purpose. *See also* Oaks, *supra* note 5, at 720–21, 720 n. 157.

[8] In Coolidge v. New Hampshire, 403 U.S. 443 (1971), three justices expressed their dissatisfaction with the exclusionary rule. 403 U.S. at 490 (Harlan, J., concurring), 492–93 (Burger, C. J., dissenting), 510 (Blackmun, J., dissenting). In Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411–27 (1971) (Burger, C. J., dissenting), the Chief Justice articulated the basis for his disagreement. *See also* Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249, 265–66, 277–78 (1971).

[9] Bivens v. Six Unknown Named Agents, 403 U.S. at 420–21. *See* Oaks, *supra* note 5, at 755–56.

[10] For purposes of this discussion, it will be assumed that a violation occurred, for purposes of creating a cause of action, if the police conduct was such, that if any fruit of the conduct was offered at a trial, it would be excluded.

Numerous alternatives have been suggested,[11] none of which seems to be a complete answer to the problem of protecting fourth amendment rights: the use of injunctions against illegal searches and contempt of court actions for violation of the injunctions;[12] internal police sanctions to punish officers who violate the fourth amendment;[13] civilian police review boards;[14] and an ombudsman system.[15] While the tort remedy has been quickly dismissed as being incapable of providing adequate protection for fourth amendment rights,[16] the lack of clearly superior alternatives, along with the apparent success of the remedy in Canada[17] and the advocacy of such a system by Chief Justice Burger,[18] suggest that the tort alternative be given more detailed consideration.

It should be made clear at the outset that the idea of giving money damages to victims[19] as a mechanism for protecting fourth amendment rights is hardly new. The existence of the right to a common law tort remedy for violation of fourth amendment rights was given as a primary reason for the Supreme Court not adopting the exclusionary rule before 1961.[20] However, the failure of the common law tort remedy to protect fourth amendment rights was a prime consideration in the decision to make the exclusionary rule binding at both the state and federal levels.[21]

Given this failure, any use of the tort remedy as an alternative to the exclusionary rule will necessitate eliminating the shortcomings in the present tort remedy. This comment will first develop a framework for analyzing the efficiency of a pro-

[11] *See generally* F. INBAU, J. THOMPSON & C. SOWLE, CASES AND COMMENTS ON CRIMINAL JUSTICE: CRIMINAL LAW ADMINISTRATION 38–84 (3d ed. 1968).

[12] McNear v. Rhay, 65 Wash. 2d 530, 398 P.2d 732 (1965) (Finley, J., concurring); Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 RUTGERS L. REV. 526 (1957). The obvious problem with the mechanism is that the victim must know that the illegality will take place and proceed to obtain the injunction. Brinegar v. United States, 338 U.S. 160, 182 (1948) (Jackson, J., dissenting). The remedy may be useful in a situation where the police engage in a planned, obvious program of harassment. *See* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (injunction granted even though police commissioner had already ordered a stop to systematic search of black neighborhood). Even if the injunction could be obtained against all illegal searches and seizures and against the command structure of the police department, it is doubtful whether the court could enforce the injunction without serious repercussions on the whole law enforcement system. M. PAULSEN, C. WHITEBREAD, & R. BONNIE in J. CAMPBELL, J. SAHID & D. STANG, LAW AND ORDER RECONSIDERED, REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 380–81 (1969).

[13] The internal police review system suffers from a public perception that police do not adequately encourage reporting, do not properly investigate citizen complaints, nor take meaningful disciplinary steps even if violations are found. M. PAULSEN *et al.*, *supra* note 12, at 383–86.

[14] Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 17–21 (1964), advocates such a system. While this concept was popular a few years ago, structural inadequacies of the boards and police protests have resulted in such boards falling by the wayside. Feld, *Police Violence and Protest*, 55 MINN. L. REV. 721, 760 (1971). *See also* W. GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES 185 (1966).

[15] W. GELLHORN, *supra* note 14, at 192 and M. PAULSEN *et al.*, *supra* note 12, at 391–97, support this approach or some hybrid between it and the civilian review board approach. However, there is no experience with the ombudsman approach and it is impossible to judge the effectiveness of the remedy. Oaks, *supra* note 5, at 674.

[16] K. DAVIS ADMINISTRATIVE LAW TREATISE § 26.03 (1958); Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 24 (1925); Barrett, *supra* note 6, at 568; Foote, *Tort Remedies for Police Violations of Individua-Rights*, 39 MINN L. REV. 493 (1955); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 72–73 (1957); Plumb, *Illegal Enforcement of the Law*, 24 CORN. L.Q. 337, 386 (1939).

[17] Oaks, *supra* note 5, at 701–706, suggests that the Canadian tort remedy is real, has been reasonably effective, and has been a major factor in controlling law enforcement behavior.

[18] Bivens v. Six Unknown Named Agents 403 U.S. 388, at 411–27 (1971) (Burger, C. J., dissenting) [hereinafter cited as *Bivens*].

[19] The tort remedy will include the right to obtain damages by bringing an action under 42 U.S.C. § 1983 (1970), which provides that anyone who is deprived of any right, privilege, or immunity secured by the Constitution or laws of the United States under color of state law can seek an appropriate remedy for redress. Monroe v. Pape, 365 U.S. 167 (1961), is the leading case applying this law specifically to the search and seizure area.

[20] The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection . . . it is not for this court to condemn as falling below the minimum standards assured by the Due Process Clause a state's reliance upon other methods, which if consistently enforced, would be equally effective.

Wolf v. Colorado, 338 U.S. 25, 30–31 (1949). *Id.* at 30–31 n.1 indicates that the tort remedy was one of the other methods.

[21] When the Supreme Court of California adopted the exclusionary rule, the opinion noted:

We have been compelled [to adopt the exclusionary rule] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers.

People v. Cahan, 44 Cal. 2d 434, 445, 202 P.2d 905, 921 (1955). In *Mapp*, Mr. Justice Clark wrote, "The experience of California that such remedies have been worthless and futile is buttressed by the experience of other states." 367 U.S. at 652.

cedure for protecting fourth amendment rights. It will then isolate the reasons for the failure of the tort remedy as it existed before *Mapp*. Finally, this comment will examine whether these failures can be overcome satisfactorily so that the tort remedy can be made an effective alternative to the exclusionary rule.

GOALS OF A SYSTEM TO PROTECT FOURTH AMENDMENT RIGHTS

In attempting to protect fourth amendment rights, two goals are apparent, deterrence of violations of fourth amendment rights and compensation of the violations that do occur. Historically, the greatest consideration in deciding what protection is to be given fourth amendment rights has been given to deterring violations of those rights. Creation of an environment where law enforcement officers will have no incentive to conduct illegal searches and seizures has been emphasized. While *Mapp* did not specifically emphasize the deterrence factor,[22] subsequent decisions have made it clear that deterrence was the prime consideration in *Mapp's* adoption of the exclusionary rule.[23]

The deterrence goal seems justified both in light of our philosophical approach to civil liberties and in light of practical considerations. In the area of civil liberties, our philosophy has been to deter violations of rights rather than to ultimately vindicate rights. This is illustrated by the existence of the declaratory judgment, whereby enjoyment of rights may be provided without protracted litigation.[24] Further, the controversy concerning the Pentagon Papers[25] underscores the fact that given a choice between allowing enjoyment of rights or denying those rights and later deciding whether the denial was proper, we favor the former course. In the fourth amendment area, it is better to initially prevent an unreasonable search from occurring than to later decide that the search was unreasonable and attempt some compensatory action.[26]

On a more practical level, society has a vested interest in deterring violations of rights because such police violations exacerbate social tensions.[27]

This is not to say that an adequate system of deterring violations of fourth amendment rights would totally eliminate tensions, given that other police misconduct might still occur. However, any reduction in social tensions is desirable[28] and the historically deterrent goal of fourth amendment protection devices should be maintained in any alternative to the exclusionary rule.

While deterrence of illegal police conduct should be the primary goal of a system to protect fourth amendment rights, it must be conceded that no system can, or should, deter all violations of fourth amendment rights. A law enforcement officer might technically violate a citizen's fourth amendment rights, though he acted in good faith and believed that he was complying with constitutional requirements. To the extent that a fourth amendment protection device so deters police as to prevent such actions, law enforcement is seriously hampered. The exclusionary rule does not recog-

[22] *Mapp* cannot be said to enunciate the deterrence theory in that only five justices made clear their acceptance of the exclusionary rule, and of those, Justice Black based his concurrence on the fifth amendment rationale that admitting the evidence from an illegal search, in effect, constituted self-incrimination. 367 U.S. at 361–66. However, Justice Clark's opinion contained suggestion of the deterrence rationale. *Id.* at 648, 656.

[23] The deterrence rationale became clear in Linkletter v. Walker, 381 U.S. 618, 637 (1965), where *Mapp* was denied retroactive effect and the Court said, "the purpose [of the *Mapp* decision] was to deter the lawless action of the police. . . ." *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 352 (1967). *See also* Oaks, *supra* note 5, at 670. Oaks States:

> It is apparent that the principal current argument for the exclusionary rule is a factual one: exclusion of evidence will deter law enforcement officers from illegal behavior.

Id. at 671.

[24] Dombrowski v. Pfister, 380 U.S. 479, 487 (1964), emphasized that declaratory judgments are issued against a statute in order to avoid the chilling effects on personal liberties which might result if the prosecution were commenced, even though the defendant may ultimately be acquitted. Though the declaratory judgment remedy has been limited in scope by the recent decision in Younger v. Harris, 401 U.S. 37 (1971) (threat to plaintiff's federally protected rights must be such that it cannot be eliminated by his defense against a single state criminal prosecution), the remedy still indicates some desire to avoid having constitutional rights depend on the plaintiff winning a protracted suit.

[25] New York Times Co. v. United States, 403 U.S. 713 (1971) (prior restraint of publication disallowed).

[26] This philosophy is also exemplified by the Supreme Court's demand that search warrants be obtained wherever possible. *See* Coolidge v. New Hampshire, 403 U.S. 443, 449–51 (1971); Katz v. United States, 389 U.S. 347, 357 (1967). The purpose is to have a disinterested magistrate examine the facts in an attempt to avoid unreasonable searches, rather than to conclude later that the search was unreasonable.

[27] *See, e.g.*, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 206, 284, 305 (paper ed. 1968).

[28] The relation of police misconduct to civil disorders suggests a subgoal of the deterrence goal, namely that the protective system must deal with searches and seizures not intended to produce evidence to be used at trial. *See* note 7 *supra* for the dimensions of this problem.

nize that such honest mistakes are bound to occur in the best programs of law enforcement. If the search is deemed unreasonable under fourth amendment standards, the motivation of the officer is irrelevant with regard to preventing the exclusion of evidence.[29] A rational fourth amendment protection system should recognize that some violations are bound to occur and provide compensation to the victim of the search, rather than exclude the evidence produced in the same way that it is excluded for a wanton and willful violation of fourth amendment rights. Thus, in addition to deterring illegal searches and seizures, a fourth amendment protection device should make some provision for adequately compensating those victims of illegal searches that cannot and should not be deterred.[30]

In seeking an alternative to the exclusionary rule, two goals become apparent. First, the system must do at least as good a job of deterring illegal police conduct with respect to fourth amendment rights as the exclusionary rule. Second, to the extent that the deterrent effect is ineffective, as it will be to some extent under any system of deterrence, an alternative device should be available to adequately compensate the victim of illegal searches and seizures.[31] The existing tort remedy has failed to meet these goals. Before attempting to determine whether the tort remedy can be made into an effective alternative to the exclusionary rule, the reasons for this failure must be isolated.

Defects In The Present Tort Remedy

The Sovereign Immunity Doctrine

One of the major shortcomings in the present tort remedy is its inability to provide suitable defendants against whom recovery can be sought. The present system tends to restrict liability to the police officer or other governmental agent conducting the search. The doctrine of sovereign immunity,[32] if in effect,[33] provides an absolute bar to bringing an action against the governmental body employing the law enforcement officer. Even if the doctrine has been curtailed, an exception may be created for acts of law enforcement officers.[34] Florida, for example, although it was a pioneer in abandoning the sovereign immunity doctrine,[35] still holds that "[i]t is unthinkable that a municipal corporation exercising its police power for the protection of the public, should be liable for every mistake in judgment by its officer." [36] Moreover, if the plaintiff attempts to bring his action under the Civil Rights Acts,[37] the employer of the offending officer cannot be held accountable.[38] The net result of these various doctrines is that, by and large, the aggrieved person will only be able to seek redress against the law enforcement officers in-

[29] *But see* ALI Model Code of Pre-Arraignment Procedure § 8.02(2)(3) (Tent. Draft No. 4, 1971), where the committee suggests that evidence be excluded only where the violation of rights is substantial. Some of the factors to be considered include the extent of deviation from lawful conduct and the extent to which the violation was lawful. This idea has received judicial support in United States v. Soyka, 394 F.2d 443, 452 (2d Cir. 1968) (Friendly, J., concurring).

[30] While the fourth amendment says nothing about providing compensation for victims, philosophically if a right is violated there should be a remedy. Moreover, this philosophy is recognized in *Bivens*, where the majority held that violation of fourth amendment rights per se created a cause of action for damages. 403 U.S. 388, (1971).

[31] The idea of compensation also has a relation to the deterrence goal. The deterrent is provided by the fact that potential offenders know that their misconduct will result in a penalty against them and in favor of the victim. Thus the potential for compensation creates the force which deters deliberate violations in the first place.

[32] The sovereign immunity doctrine developed out of the idea that the "king can do no wrong" and that it is a contradiction to allow the sovereign to be sued in courts he created without the king giving his consent. When monarchies were replaced by democratic forms of government, the same analysis was applied with "government" being substituted for "king." W. Prosser, Law of Torts § 131, at 970–71 (4th ed. 1971). The doctrine has been specifically applied to actions by police officers. *Id.* at 979.

[33] The doctrine of sovereign immunity has been under attack in recent years and is being abrogated both legislatively and judicially. At the federal level the doctrine was largely abolished by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (1970). Seventeen states have court decisions at least partially abrogating the doctrine at the municipal level, and five states have statutory enactments doing the same thing. Prosser, *supra* note 32, at 984–87. Many of the decisions or laws pertaining to municipal liability also apply to state governments. *Id.* at 977, 984–87. The doctrine is, however, still quite strong at the state and local level for acts of policemen. 2 C. A. Antieu, Municipal Corporation Law § 11.11 (1971), 18 F. McQuillian, Municipal Corporations § 53.79 (3d ed. 1963, and Supp. 1971).

[34] 28 U.S.C. § 2680(h) (1970) creates an exception for any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights within the otherwise broad abrogation of the sovereign immunity doctrine on the federal level.

[35] W. Prosser, *supra* note 32, at 985, citing Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

[36] City of Miami v. Albro, 120 So. 2d. 23, 26 (Fla. App. 1960).

[37] *See* note 19 *supra*.

[38] Monroe v. Pape, 365 U.S. 167, 191 (1961), held that a local government is not a person for purposes of the act and thus it cannot be held liable for actions of its policemen who violate the act.

volved, rather than against the relevant governmental unit.

The problem with bringing suit against individual officers is finding assets sufficient to satisfy a judgment.[39] Even if this problem were overcome, there is a serious policy question as to whether the officer should be made to pay. The threat of large judgments could deter vigorous law enforcement by the individual officer, deter qualified people from entering public service, and unjustly penalize officers and their families for what may only be a mistake in judgment.[40] To the extent that the lingering concept of sovereign immunity dictates that the sole available defendant is the offending officer, a dilemma results. Either the victim of the illegal search and seizure is inadequately compensated, and no real deterrence of police misconduct occurs, or the victim is adequately compensated at the expense of undesirable over-deterrence of the law enforcement structure.

Inadequacies in Substantive Law

Theoretically, the victim of an illegal search and seizure is at no loss for causes of action on which to base recovery. The right to a common law trespass action has long existed, and its existence was given as a major reason for refusing to adopt the exclusionary rule before 1961.[41] Of more recent vintage are the right to seek damages under 42 U.S.C. § 1983, where one's right to be free from unreasonable searches and seizures has been denied under color of state law,[42] and the right to state a cause of action for damages against federal officers because of violation of fourth amendment rights.[43] There is, however, a large gap between these theoretical rights of action and effective remedies.

There will be no recovery if the person sued has a complete defense available. In the common law trespass action, in many jurisdictions, an officer serving a warrant fair on its face cannot be held liable for damages.[44] It is unclear what defenses may be available in a non warrant situation.[45] In a section 1983 action the officer apparently has a defense based on some combination of good faith and probable cause.[46] Thus, while one may have been a victim of an illegal search and seizure, there may be no liability on the part of any of the participants.

Furthermore, assuming liability on the part of the officer can be shown, the standard for damages may preclude recovery. The usual standards for compensatory damages in a trespass action are phrased in terms of injury that naturally, directly, and proximately results from the wrong,[47] or as the injury to property, feelings, and reputation, plus family disturbance, resulting from the search.[48] There is also a right to recover punitive damages in some states if the offending officer acted with malice or ill will[49] or in reckless and wanton disregard of plaintiff's rights.[50] In federal actions under section 1983, plaintiffs are not necessarily limited to state rules on damages, but federal rules may be used.[51] The general standard in the federal area for compensatory damages is out of

[39] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 7, at 199; Mathes & Jones, *Toward A "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 908 (1965). The average minimum salary of a policeman is $8,477 and the average maximum is $10,040. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 150 (92d ed. 1971).

[40] Mathes & Jones, *supra* note 39, at 908. *See also* M. PAULSEN, *et al.*, *supra* note 12, at 375; Paulsen, *supra* note 16, at 73.

[41] *See* note 20 *supra*. For states recognizing the trespass remedy, *see, e.g.*, Grumon v. Raymond, 1 Conn. 40 (1814); Eleuteri v. Richman, 148 N.J. Super. 303, 128 A.2d 743 (1956); Doane v. Anderson, 60 Hun. 586, 15 N.Y.S. 459 (N.Y. 1891); Deaderick v. Smith, 33 Tenn. App. 151, 230 S.W.2d 406 (1950); Dellastatious v. Boyce, 152 Va. 368, 47 S.E. 267 (1929). The trespass action could be combined with other common law actions such as false arrest or false imprisonment if the course of conduct containing the search also contained the elements of these offenses.

[42] *See* note 19 *supra*.

[43] *Bivens* 403 U.S. 388 (1971), granted this right.

[44] *See, e.g.*, Williams v. Franzoni, 217 F.2d 533 (2d Cir. 1954); Campbell v. Blankenship, 308 Ky. 808, 215 S.W.2d 960 (1940); Houghtaling v. State, 11 Misc. 2d 1049, 175 N.Y.S.2d 659 (1958); McFarland v. Shirkey, 106 Ohio App. 517, 151 N.E.2d. 797 (1958).

[45] Neither the plaintiff's bad reputation nor the fact that the search produced incriminating evidence can be pleaded as a defense. McClurg v. Brenton, 123 Iowa 368, 98 N.W. 81 (1904).

[46] Pierson v. Ray, 386 U.S. 547, 555 (1967), provides that a defense is available where the elements of good faith and probable cause are present. However, Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968), held that mere good faith without probable cause is not a defense.

[47] *See, e.g.*, State v. Wynn, 214 Miss. 348, 56 So. 2d 824 (1953); Bouillion v. LaClede Gaslight Co., 148 Mo. App. 462, 129 S.W. 401 (1910) (private party trespass).

[48] *See, e.g.*, Fennemore v. Armstrong, 29 Del. 35, 46 A. 204 (1915); Dellastatious v. Boyce, 152 Va. 368, 147 S.E. 267 (1929). *See also* Wolf v. Colorado, 338 U.S. 25, 43 (1949) (Murphy, J., dissenting).

[49] Fennemore v. Armstrong, 29 Del. 35, 46 A. 204, (1915); Dellastatious v. Boyce, 152 Va. 368, 147 S.E. 267 (1929).

[50] *See, e.g.*, Khrebiel v. Henkle, 152 Iowa 604, 129 N.W. 945 (1911); Caffini v. Hermann, 112 Me. 282, 91 A. 1009 (1914).

[51] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

pocket pecuniary losses, plus an award for emotional and mental distress.[52] Punitive damages may also be recovered under section 1983 if the defendant has acted willfully or in gross disregard for plaintiff's rights.[53]

These standards suggest that unless the offending law enforcement officer substantially damages the premises to be searched, *i.e.*, causes large out of pocket expenses, the possibility of substantial recovery is minimal at best,[54] since many potential plaintiffs will have a difficult time showing injury to reputation and feelings.[55] The availability of punitive damages does little to improve the situation, because the required degree of malice and ill will is probably the exception rather than the norm in police conduct. If the requisite level of misconduct is present, the offending officer probably did more than just conduct an illegal search, and the plaintiff would do better by seeking damages for the other misconduct.[56]

Even if some threshold claim to adequate damages can be established under these standards, the common law action for trespass will allow mitigation[57] of damages. Among grounds held admissible for mitigation of damages are the poor reputation of the plaintiff prior to the incident,[58] the good faith or lack of malice by the offending officer,[59] and the fact that the victim was ultimately convicted of a crime on the basis of evidence seized in the search.[60] Given the possibility of mitigation of the already inadequate damages, providing redress for victims of fourth amendment violations adequate to deter these violations is virtually precluded.

Procedural Problems

In addition to the lack of suitable defendants and the inadequacies of the substantive law in the area of defenses and damages, the potential plaintiff in a search and seizure case may be confronted with various procedural problems. If the victim of the illegal search has been convicted of a crime and imprisoned since the incident, the concept of civil death, whereby a prisoner cannot bring civil actions while he is imprisoned, may act as a bar to his bringing any action for damages.[61] The possible expense of litigation coupled with the long delay in action on civil suits may also act as a deterrent to a potential plaintiff bringing a suit.[62] Moreover, lawyers are not anxious to get involved in such suits because of the low probability of success.[63] Both of these factors have

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[52] Donovan v. Reinbold, 433 F.2d 738 (4th Cir. 1964).

[53] Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970) (punitive damages assessable if conduct is willfull and in gross disregard of rights).

[54] *See* Foote, *supra* note 16, at 500; Paulsen, *supra* note 16, at 72.

[55] Two examples demonstrate the problem. In Sexton v. Gibbs, 327 F. Supp. 134 (N.D. Tex. 1970), the plaintiff in a § 1983 action was given $750 in compensatory damages for the humiliation, embarrassment, discomfort and loss of rights suffered because of a false arrest and illegal search of his car. In Mason v. Wrightson, 205 Md. 481, 109 A.2d 128 (1954), a lawyer's humiliation from being illegally searched was found to merit one cent in damages. Courts seem to concede that, in effect there will be no real recovery.

> Given the fact that no violence or injury greater than necessary was done, it is probable that very small damages will be recovered upon another trial.

Sanford v. Nichols, 13 Mass. 286, 290 (1816).

[56] M. PAULSEN, *et al.*, *supra* note 12, at 373.

[57] The theory behind allowing mitigation is that all facts and circumstances which tend to explain or disclose the design of the party committing the wrongful act should go to the jury for their consideration. *See, e.g.*, Simpson v. McCaffery, 13 Ohio 508 (1844).

[58] Banfill v. Boyd, 122 Miss. 288, 84 So. 227 (1920); Paulsen, *supra* note 16, at 72. "The proof of bad reputation may also be used to show probable cause for a search, thus defeating of claim for punitive damages." Foote, *supra* note 16, at 514.

[59] DeHart v. Gray, 245 S.W.2d 434 (Ky. App. 1952); Gamble v. Keyes, 35 S.D. 644, 133 N.W. 888 (1915); Sutherland v. Kroger Co. 144 W. Va. 673, 110 S.E.2d 716 (1959) (in action for search against private party, circumstances tending to arouse reasonable suspicion may be shown).

[60] Long v. Mann, 259 Ala. 17, 65 So. 2d 500 (1953) (search subsequent to a false arrest disclosed contraband which formed basis for conviction). The fact that such a standard results in inadequate damages and no real deterrence has been recognized and approved by courts.

> This is doubtless true and ought to be true. He who has voluntarily made his home a den of thieves, a distillery for the manufacture of contraband liquor, a warehouse for infernal machines or a safety deposit box for forged documents of counterfeit causes has not sustained the same damages when its sanctity is invaded as has the citizen who has maintained that sanctity.

Massantonio v. People, 77 Colo. 392, 398, 236 P. 1019, 1021 (1925). Theoretically, under the exclusionary rule, this situation could never arise because the illegally seized evidence could not be used to sustain a conviction. However, to the extent that the tort remedy is viewed as an alternative to the exclusionary rule, this sort of philosophy will have to be recognized and dealt with.

[61] Thirteen states, listed in Comment, *Civil Death—A New Look At An Ancient Doctrine*, 11 WM. & MARY L. REV. 988 (1970), have such statutes.

> Potential plaintiffs who are in prison usually must wait until they are released to get their tort remedy. In the meantime, the statute of limitations may run, or the defendant may be able to get the suit dismissed for lack of prosecution.

Foote, *supra* note 16, at 508.

[62] M. PAULSEN *et al.*, *supra* note 12, at 374.

[63] *See* Note, *Philadelphia Police Practices and The Law of Arrest*, 100 U. PA. L. REV. 1182 (1952).

combined to convince many disadvantaged people that they have no effective channel for lodging complaints against a police officer.[64] Finally, the potential plaintiff must present his case to a jury. The unfortunate fact is that the social status of the average victim of an illegal search is such that the average juror will not be sympathetic but, more likely, will be hostile to the victim's cause.[65]

On balance then, the major inadequacies of the present system in providing a tort remedy for illegal searches and seizures suggest that the following elements must be available to provide an adequate remedy.[66] First, the aggrieved victim should have redress against a financially capable defendant. Second, there must be some form of absolute liability for illegal searches and seizures. Third, the measure of damages must provide an adequate level of recovery. Fourth, the system must be open to all victims, be easy to use and avoid the pitfalls of the jury system. It remains to be seen however, whether a system embodying these elements will provide a workable alternative to the exclusionary rule.

The Tort Remedy as an Alternative to the Exclusionary Rule

The Burger Proposal

Any change in the tort remedy for violation of fourth amendment rights would have to be made in the individual state legislatures. The most that can be done here is to suggest a model solution.[67] Thus far, it appears that only one comprehensive proposal has been set out as a possible solution to be adopted by the various jurisdictions.[68] This proposal, as set forth by Chief Justice Burger, has five elements:

(a) a waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned dities;
(b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
(c) the creation of a tribunal, quasijudicial in nature or perhaps patterned after the United States Court of Claims to adjudicate all claims under the statute;
(d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
(e) a provision directing that no evidence otherwise admissible shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.[69]

With regard to the specific problems inherent in the present tort remedy, this proposal seems to be a step in the right direction. The abrogation of sovereign immunity in this area would guarantee financially responsible defendants, while avoiding the over-deterrence inherent in leaving the individual officer as the potential defendant.[70] The proposal also appears to create absolute liability for violation of rights, thus avoiding the possibility of the defenses mentioned above.[71] The quasijudicial nature of the board appears to eliminate the procedural problems inherent in the present system by avoiding crowded courts and removing the possibility that jury prejudice will deny adequate recovery.[72]

[64] M. Paulsen *et al.*, *supra* note 12, at 374. *See also* Hundley, *Dynamics of Recent Ghetto Riots*, 45 J. Urban L. 627, 630 (1968).

[65] *See* Foote, *supra* note 16, at 500; Paulsen, *supra* note 16, at 72.

[66] The question of actions for wrongful eavesdropping has not and will not be considered. Katz v. United States, 389 U.S. 347 (1967), makes clear that such actions violate fourth amendment rights. However, 18 U.S.C. §§ 2510–2520 (1970) may already have provided a remedy in this area in that a criminal penalty is prescribed for those who eavesdrop in § 2511, and a civil action for damages is set up under § 2520 whereby the victim receives either $100 per day or $1,000, whichever is greater, in actual damages, plus the possibility of punitive damages and attorney's fees. Of course, exactly how one finds out that he is being spied upon is another question. *See* Sen. Rep. No. 1097, 90th Cong. 2d Sess. (1968).

[67] It is possible that true uniformity could exist given recent success in adopting various uniform laws such as the Uniform Commercial Code.

[68] Specifically, Burger proposes that the federal government adopt the proposal first.

> Once the constitutional validity of such a statute is established, it can reasonably be assumed that the States would develop their own remedial systems on the federal model. Indeed, there is nothing to prevent a State from enacting a comparable statutory scheme without waiting for Congress.

Bivens, 403 U.S. at 423–24 (Burger, C. J., dissenting).

[69] *Id.* at 422–23.

[70] *See* notes 33–40 *supra* and accompanying text.

[71] *See* notes 44–46 *supra* and accompanying text.

[72] The quasijudicial board could presumably fashion simplified procedures, thus decreasing cost and increasing speed of action. The concept of civil death, *see* note 61 *supra*, should probably be specifically abrogated by statute. As to the question of possible jury prejudice:

> I doubt that lawyers serving on such a tribunal would be swayed either by undue sympathy for

Despite the improvements offered by the Chief Justice's proposal, one critical problem is not adequately dealt with: the problem of how damages will be measured and awarded. The Chief Justice analogized his system to the respondeat superior concept that prevails in an action against a store owner for an illegal search by a security guard,[73] suggesting that damages in such actions are "often sufficient in size to provide an effective deterrent and to stimulate employers to corrective action." [74] However, the respondeat superior doctrine only guarantees that a financially capable defendant is available. It does not alter common law damage standards. In order to produce adequate damages, the doctrine presupposes an average plaintiff, with average feelings and reputation. The common law standard of damages for an illegal trespass will compensate the injury to those feelings and that reputation.[75] The victim of a police violation of fourth amendment rights is more likely to lack this aura of respectability, and the common law allows evidence of this lack of respectability to be introduced in mitigation of damages.[76] Thus, the respondeat superior doctrine is unlikely to have the same effectiveness as a general fourth amendment protection device as it has in compensating those who have been wrongfully searched by a private party.

One possible solution to this problem would be to provide some statutory minimum level of damages, with the minimum set high enough to adequately compensate the victim and to provide sufficient incentive to the police department to curb illegal practices. This approach has the additional advantage of minimizing the need for assigning a dollar value to intangibles such as loss of reputation on a case by case basis. There is also precedent for such a solution in the area of wiretapping.[77] Of course, deciding where the statutory minimum should be set could prove difficult, but this approach seems to offer the best hope for solving the damages problem.

Thus, it seems that the Chief Justice's proposal, with the addition of a minimum damages provision, could alleviate what seem to be the major shortcomings of the present tort remedy. However, even with these improvements it is quite possible that no tort system can produce adequate deterrence of police misconduct and that any system that attempts to produce it will be politically unacceptable.

The Problem of Deterrence

Even if a system removing the major problems of the present tort remedy were adopted, it is unclear that the crucial goal of deterrence[78] would be realized. Those who advocate abrogation of the doctrine of sovereign immunity argue that imposing liability on governments will force them to take steps to correct police misconduct. For example:

> Police tactics are often institutional and awards against the state may modify institutional practices.[79]

> Controls over personnel are not likely to be established where only isolated items of liability exist, whereas tort liability would doubtless force them upon the municipalities.[80]

> [Imposition of liability for torts will not result in interference with proper carrying out of municipal functions]. It is more likely that the potential liability thus imposed will operate to compel the discharge of dangerous or incompetent persons.[81]

Such statements seem to be little more than pure speculation. Indeed, at least one critic of the exclusionary rule concedes that there is no empirical proof for the proposition that imposition of liability will have the deterrent effect expected.[82] The closest thing to such empirical evidence is found in the industrial safety field where there is some evidence that imposition of liability has the effect of forcing the employer to isolate accident-prone

officers or prejudice against criminals that has sometimes moved lay jurors to deny claims. *Bivens*, 403 U.S. at 423 (Burger, C. J., dissenting).

[73] The authority cited is W. PROSSER, THE LAW OF TORTS 470 (3d ed. 1964). The basis for imposing liability on the storekeeper is the deep pocket theory of torts, namely that the storekeeper is in a better position to absorb the cost and distribute the losses. *Id.* at 471.

[74] 403 U.S. at 422 n. 5.

[75] *See* notes 47–50 *supra* and accompanying text.

[76] *See* notes 57–60 *supra* and accompanying text.

[77] 18 U.S.C. § 2520 (1970). *See* note 66 *supra*. Other writers have urged that the liquidated damages approach be taken in the fourth amendment area. Foote, *supra* note 13, at 514–15.

[78] *See* notes 21–27 *supra* and accompanying text.

[79] Jaffee, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 228 (1963).

[80] Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 454 (1941).

[81] Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 50–51 (1949).

[82] Thus far there is no showing that either enlarged liability or indemnity has realized the expectation that governmental agencies exposed to the prospect of liability would take steps to minimize their risk by effectively reducing police misbehavior. Oaks, *supra* note 5, at 673 n. 37.

employees from situations where an accident might result.[83]

These assertions that imposition of tort liability will result in deterrence of unlawful conduct are largely unfounded in logic or fact. From the point of view of the individual policeman, imposition of liability on the part of the municipality may actually remove a deterrent from his actions.[84] Such a result would flow from the fact that police would no longer worry about anyone suing them personally, believing that the victim would instead tend to sue only the government entity.[85]

Further, the criticisms of the exclusionary rule apply equally well to the tort remedy. One major argument against the deterrence-producing capability of the exclusionary rule is that the real deterrent falls on the prosecutor, not on the police. Critics claim that law enforcement is not a monolithic structure, and so, the police are not aware of the pressure created by the exclusionary rule.[86] The same argument applies to the tort remedy. The immediate impact of an adverse judgment will not fall on the police department, but on the governmental treasury. If the compartmentalized structure of law enforcement machinery prevented the frustrated prosecutor from putting effective pressure on the police to curb their illegal practices, it seems just as likely that the same compartmentalization will prevent the taxing authorities from putting effective pressure on the police.

While those who advocate the abrogation of sovereign immunity might respond that public pressure to hold down expenditures would compel elected officials to take drastic steps fo force police departments to curb illegal practices, an additional argument to be made against the deterrence-producing capacity of the tort remedy is that such pressure is unlikely to materialize. While police departments may indeed respond to political pressure,[87] prosecutors, because of public indignation over crime and lawlessness, have presumably felt the need to crack down on police abuses that result in criminals going free.[88] However, such pressure has been manifestly ineffective in forcing police to curb such practices.[89] While public concern over high taxes is as great, if not greater than, concern over crime and lawlessness,[90] it hardly seems likely that such concern, focused on budgetary officials, will result in any more effective pressure on police departments than that now applied by the prosecutor.[91]

The arguments given here against the ability of abrogation of sovereign immunity to generate a deterrent effect admittedly lack empirical verification. Yet the arguments for the proposition suffer from precisely the same defect. It may be true that if the system were put into operation it would produce the deterrent effect. However, before modifications in the tort remedy are introduced as an alternative to the exclusionary rule, we should require far more evidence of the deterrent effect of the tort remedy than we have to this date.

The Problem of Political Feasibility

While a system which has the theoretical capability to protect fourth amendment rights may be developed, such a remedy must first be politi-

[83] Competent studies, as well as experience, indicate that incentives to safety and proper execution are greatest where tort liability is imposed upon the large corporate defendant rather than upon the individual employees whose negligence or misconduct causes injury to other persons. Mathes & Jones, *supra* note 39, at 907–08. One of the sources cited is 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 11.4 (1956). But see W. PROSSER, *supra* note 32, at 451, where the argument is said to be a make-weight.

[84] Kennedy & Lynch, *Some Problems of A Sovereign Without Immunity*, 36 So. CAL. L. REV. 161, 178. This argument is subject to the response that cities will proceed against the wrongdoing officer to recover all or part of the loss. Fuller & Casner, *supra* note 80, at 69; Jaffee, *supra* note 79, at 228.

[85] To the extent that an officer worries about his family's security, he may be more careful in deciding whether to engage in illegal conduct. Of course, the result of his worrying may be over-deterrence. *See* note 40 *supra* and accompanying text.

[86] But the prosecutor who loses his case because of police misconduct is not an official in the police department: he can rarely set in motion any corrective action or administrative penalties. *Bivens*, 403 U.S. at 417 (Burger, C.J., dissenting).

[87] J.Q. WILSON, VARIETIES OF POLICE BEHAVIOR 227–36 (1968).

[88] 12% of the people in the country feel crime is the most important problem in the country. *Gallup Opinion Index*, October, 1971, at 3. Fifty-six percent feel that the crime problem ranks in the top three of all problems. *Id.*, June, 1970, at 8.

[89] If the arguments of the critics of the exclusionary rule are correct, and deterrence has not resulted, *see* Oaks, *supra* note 5, then by implication public opinion has not had any effect.

[90] Two thirds of the country feels that taxes are too high, though this apparently is always the case. Louis Harris poll quoted in LIFE, Aug. 15, 1969, at 22.

[91] Another possible response to this argument is to point to the successful Canadian experience with the tort remedy, *see* note 17 *supra*, which suggests that deterrence can result from the tort remedy. However, it seems that Canadian police tend to be much more responsive to judicial criticism of their conduct than their American counterparts, and unlike the compartmentalized structure of American law enforcement, Canadian prosecutors can exert significant control over police practices. Oaks, *supra* note 17, at 705–06.

cally accepted and instituted.[92] Insurmountable barriers may prohibit such adoption. Many jurisdictions may be dissuaded from adopting an effective tort remedy because of its expense. If police violations are as rampant as suggested by the numerous failures of the exclusionary rule,[93] and if adequate damages are available for each violation, the potential cost of an adequate tort remedy would be quite high. While state and local governments may be able to make the cost predictable by purchasing insurance, the premium for such insurance would still reflect what the insurer feels he will have to pay out and thus be quite expensive.[94] At least two factors suggest that governmental units will be unwilling to bear the burden of this expense. Given the poor financial status of many state and local governmental units[95] the cost burden of an adequate tort remedy could be met only by increasing taxes. Citizens generally believe that taxes are too high[96] and that they should not be raised.[97] Therefore, it is very doubtful that taxpayers would tolerate any large new public expenditure along this line. Moreover, the fact that the tort remedy will primarily benefit elements of the community that the average taxpayer has no sympathy for would further decrease the willingness of voters to approve of a tort remedy.[98] While the public may resent the exclusionary rule because of its alleged inhibiting effect on law enforcement,[99] the dislike for higher taxes and the dislike for paying judgments to disreputable elements suggest that the tort alternative will face serious political hurdles.

Another factor suggesting the political unfeasibility of the tort remedy can be found in the apathy of many jurisdictions. Numerous states had the exclusionary rule imposed on them by state supreme courts long before *Mapp* required exclusion.[100] These states apparently made no real effort to develop effective alternatives to the exclusionary rule during that time, and at least some doubt arises as to whether these same states will feel any overwhelming desire to rid themselves of the exclusionary rule at this time. Thus, no matter how well conceived the tort remedy may be, the political fact of resentment toward higher taxes and resentment of paying judgments to "criminals," coupled with the possible apathy of many states may well preclude widespread adoption of an adequate tort remedy.

Conclusion

While the tort remedy proposed by Chief Justice Burger may conceptually provide adequate compensation and solve the worst problems of the present-day tort system, it has not been shown to provide a guarantee of sufficient deterrence of police misconduct. While the present tort system cannot provide financially responsible defendants, and as a result precludes adequate compensation and deterrence, the proposed alternative compensates but, just the same, may not deter. While the present system provides inadequate damages, thus precluding adequate compensation and deterrence, the proposed remedy may provide the compensation, but its chances of being accepted are slim.

Although the tort remedy does not appear to be a viable alternative to the exclusionary rule at this time because of these problems, two possible courses of action might be taken. First, in view of the fact that many of the results of adoption of a tort remedy are uncertain, it may be worthwhile to create an experimental situation whereby various alternatives to the exclusionary rule could

[92] Conceivably, parts of the remedy could be judicially adopted, for example, the abrogation of the doctrine of sovereign immunity. *See* note 33 *supra*. However, the courts would probably view a comprehensive proposal as being within the legislative domain.

[93] If the exclusionary rule has not deterred illegal searches, but a sufficient number of illegal searches are conducted to result in a large number of criminals avoiding punishment, and if police commit a serious number of illegal searches with no intent to bring a criminal charge, then by definition there will be many opportunities for the tort remedy to operate. For a suggestion that the situations described above do occur frequently, *see* notes 5–7 *supra*.

[94] Kennedy & Lynch, *supra* note 84, at 178. *But see* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. Ill. L.F. 919, 921 (1966).

[95] *See generally* Subcomm. on Fiscal Policy, Joint Economic Comm., Revenue Sharing and Its Alternatives—What Future For Fiscal Federalism?, 90th Cong., 1st Sess. (1967); Pechman, *Fiscal Federalism in the 1970's*, 24 Nat. Tax. J. 281 (1971).

[96] *See* note 90 *supra*.

[97] U.S. News & World Rep., Feb. 10, 1969, at 28.

[98] I cannot believe that governmental units will bear any substantial expenditures to compensate the bums, grifters [*sic*], petty crooks, or big time operators who are the most probable victims of police misconduct.
Paulsen, *supra* note 16, at 73.

[99] To the extent that the public sees crime as a problem, *see* note 88 *supra*, arguably they would wish to see the exclusionary rule eliminated.

[100] *See* note 4 *supra*. Many states have been able to live with the rule for nearly fifty years, as indicated by the date the state high court adopted the exclusionary rule. *See, e.g.*, Atz v. Andrews, 84 Fla. 43, 94 So. 329 (1922); People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924); State v. Laundy, 103 Ore. 443, 204 P. 958 (1922); State v. Gibbons, 118 Wash. 171. 203 P. 390 (1922); Hoyer v. State, 180 Wisc. 407, 193 N.W. 86 (1923).

be compared and analyzed as to their viability in protecting the fourth amendment.[101] Specifically, if a state develops an alternative to the exclusionary rule, and applies it in a test case, the Supreme Court could allow that state to depend on that alternative until it is proven effective, at which point other states would be allowed to adopt it,[102] or until it is shown to be ineffective, at which time it should be discarded.

On the other hand, it may be possible to conclude without further ado that the tort remedy should not replace the exclusionary rule. In that event, it may still be worthwhile for the states to adopt a tort remedy along the lines suggested by the Chief Justice as a supplement to the exclusionary rule. Such a supplement could at least eliminate the problem of underprotection where the illegality is committed with no intention to produce evidence to be used in a criminal proceeding.[103]

[101] For judicial recognition of the idea that it would be worthwhile to have states attempt different procedures regarding what should be done with illegally obtained evidence, *see generally* Coolidge v. New Hampshire, 403 U.S. 443, 490–91 (1971) (Harlan, J., concurring).

[102] The Supreme Court should seek to encourage the greatest possible number of solutions under this theory. It would be best not to allow states to adopt substantially the same approach until that approach has proven its effectiveness.

[103] *See* note 7 *supra*.

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RECENT TRENDS IN THE CRIMINAL LAW

HANDWRITING EXEMPLARS

Two federal courts have held that the taking of handwriting exemplars and their subsequent use at trial can violate the fourth amendment. In *United States v. Harris*, 453 F.2d 1317 (8th Cir. 1972), it was held that taking exemplars for the purpose of eliciting incriminating evidence against an accused would be an unreasonable search and seizure unless the defendant voluntarily consented to giving the exemplars or the police obtained a valid search warrant. The underlying basis of the court's decision is that any activities by the police which are intended to acquire incriminating information against an accused is a search.[1] Because the police in *Harris* never obtained a search warrant, the court confined its discussion to the voluntariness of the defendant's consent. It held that voluntary consent could not have been given because the defendant was in custody at the time of writing the exemplar and he was never given his *Miranda* warnings.[2] The court emphasized that *Miranda's* purpose in deterring police conduct designed to coerce incriminating information from an accused could not be subverted by the use of exemplars.

The Seventh Circuit recognized the applicability of the fourth amendment to handwriting exemplars in *Mara v. United States*, 454 F.2d 580 (7th Cir. 1971).[2a] Applying the reasoning of an earlier case dealing with voiceprints,[3] the court held that unreasonable demands for handwriting exemplars by a grand jury violate an individual's fourth amendment right to privacy.[4] The standard for obtaining exemplars by a grand jury in *Mara* is not probable cause, but reasonableness.[5] According to *Mara*, the reasonableness test will be satisfied by a showing of the relevance of the exemplar to the inquiry being made by the grand jury, the necessity of acquiring the exemplar, and a showing that the information sought cannot be obtained in any manner other than by an exemplar.

Harris and *Mara* present a different approach to the admissibility of handwriting exemplars. Ignoring the quandry of whether they are testimonial or non-testimonial evidence,[6] they exclude exemplars on the basis of how they were acquired, not by their evidentiary classification.

PRISONERS' RIGHTS

Several recent decisions should increase the number and complexity of prisoners' rights suits brought under 42 U.S.C. § 1983. In *Wilwording v. Swenson*, 404 U.S. 249 (1971), the Supreme Court held that a prisoner suing under § 1983 does not have to exhaust state remedies before bringing a civil rights complaint and that habeas corpus petitions can be interpreted as complaints under § 1983. The Court noted that the advantage of interpreting a habeas corpus petition as a civil rights complaint is to relieve prisoners from the burden of the exhaustion of the state remedies requirement of habeas corpus petitions.

Although exhaustion has not been considered a condition precedent to bringing civil rights actions in areas other than prisoners rights,[7] prior to *Wilwording* courts consistently held that prisoners' § 1983 complaints could be recognized only if there had been exhaustion of state remedies

[1] *See* Haer v. United States, 240 F.2d 533 (5th Cir. 1957).

[2] Without reaching the fourth amendment issue, the court in United States v. Long, 325 F. Supp. 583 (W.D. Mo. 1971), *aff'd*, 453 F2d 1317 (8th Cir. 1972), held that handwriting exemplars are inadmissible when obtained without giving the defendant a *Miranda* warning. In Bradford v. United States, 413 F.2d 467 (5th Cir. 1969), the court held that giving an exemplar after receiving a *Miranda* warning is an indication that the defendant offered the writing voluntarily.

[2a] *Cert. granted* —U.S.— (1972).

[3] *In re* Dionisio, 442 F.2d 276 (7th Cir. 1971) *cert. granted*,—U.S. (1972).

[4] *See* Katz v. United States, 389 U.S. 347 (1967).

[5] *But see* United States v. Praigg, 336 F. Supp. 480 (C.D. Cal. 1972), where the standard for acquiring exemplars cannot be reasonableness, but must be probable cause. One explanation for this contrary result in *Mara* is that *Praig* was not concerned with a grand jury witness but with an accused held in police custody.

[6] Gilbert v. California, 388 U.S. 263 (1967), and Schmerber v. California, 384 U.S. 757 (1966), held that nontestimonial evidence such as handwriting exemplars and blood tests are not protected by the fifth amendment privilege against self-incrimination. *See also* United States v. Izzi, 427 F.2d 293 (2d Cir. 1970); United States v. Bandy, 421 F.2d 646 (8th Cir. 1970); United States v. Rudy, 429 F.2d 993 (9th Cir. 1970); United States v. Doe, 405 F.2d 436 (2d Cir. 1968); State v. Thompson, 256 La. 934, 240 So.2d 712 (1970); State v. Toelle, 10 Md. App. 292, 269 A.2d 628 (1970); Smith v. State, 462 P.2d 328 (Okla. Crim. App. 1969).

[7] *See, e.g.*, Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

within the meaning of 28 U.S.C. § 2254. A variety of reasons have been used by the courts to justify this requirement. First, it was held that allowing relief under § 1983 where there was no requirement of exhaustion would erode the balance of federal-state comity created under 28 U.S.C. § 2254.[8] Second, the courts created a rule of pleading in which a prisoner had to opt for habeas corpus relief even though his case was properly cognizable under § 1983 as well.[9] Third, some courts severely restricted the applicability of § 1983 remedies, holding that they could not be used to grant equitable relief or release of prisoners from confinement.[10] In this last circumstance, habeas corpus was the proper procedure.

Wilwording rejects the first two rationales of prios case law. Under *Wilwording*, exhaustion is neither required by 28 U.S.C. § 2254 nor must a prisoner bring his case in habeas corpus when he has a civil rights complaint on the very same issues. The third justification of the prior cases, that § 1983 cannot be used for the release of prisoners, is not specifically answered by the Court in *Wilwording*.

However, the Second Circuit recently held that the third rationale is not totally correct. In *Rodriquez v. McGinnis*, 451 F.2d 730 (2d Cir. 1972), the court of appeals reversed itself on rehearing[11] and held that prisoners' complaints seeking release can properly be construed as § 1983 actions. Thus, the Second Circuit, one of the more adamant courts in dismissing civil rights complaints,[12] held that petitions requesting release from custody might be cognizable under § 1983 and do not have to be brought in habeas corpus. Although most members of the majority felt that the Court's opinion in *Wilwording* was not necessary for their decision; three judges felt constrained to note that they were reversing solely on the basis of the Supreme Court decision.

The dissenting judges in *Rodriquez* noted that the combined effect of the majority's holding and *Wilwording* will be to increase considerably the number of § 1983 cases, overburdening the federal courts with more evidentiary hearings than would have been necessary if complaints were interpreted as habeas corpus petitions.[13] The problem foreseen by the dissenters might be augmented by *Haines v. Kerner*, 92 S. Ct. 594 (1972), where the Supreme Court held that § 1983 complaints should be liberally construed and not summarily dismissed for failing to state a claim upon which relief can be granted.[14] Furthermore, the Court in *Haines* held that prisoners bringing § 1983 actions should be given every opportunity to present evidence to substantiate their claims.

A second area in which the federal courts might have increasingly large workloads in § 1983 cases is the growing recognition of pendent jurisdiction in civil rights cases. The court in *Eidschun v. Pierce*, 335 F. Supp. 603 (S.D. Iowa 1971), held that it would take jurisdiction over a state common law tort claim when brought with a prisoner's § 1983 action. While some other courts have exercised pendent jurisdiction in prisoners' rights cases,[15] none have done so where one of the defendants in the pendent state claim was not a party in the § 1983 action.[16] *Eidschun* held that taking jurisdiction of such a claim was proper.

Notwithstanding the misgivings of the *Rodriquez* dissenters, these recent cases contribute significantly to adjudicating prisoners' suits. If a prisoner has a § 1983 claim, it should be liberally construed. The claim will not be dismissed for failure to exhaust state remedies and state tort claims may be brought with it.

[8] Smart v. Avery, 411 F.2d 408 (6th Cir. 1969); Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963).

28 U.S.C. § 2254 requires that available state remedies be exhausted before seeking habeas corpus relief.

[9] Grayson v. Montgomery, 421 F.2d 1306 (1st Cir. 1970); Baker v. McGinnis, 286 F. Supp. 280 (S.D. N.Y. 1968); King v. McGinnis, 289 F. Supp. 466 (S.D. N.Y. 1968). *But see* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

[10] Rodriquez v. McGinnis, 451 F.2d 730 (2d Cir. 1971); Katzoff v. McGinnis, 441 F.2d 558 (2d Cir. 1971); Gaito v. Ellenbogen, 425 F.2d 845 (3rd Cir. 1970). Consistent with this determination of stating a claim under § 1983 is the holding by some courts that only habeas corpus can be used for release from confinement. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Long v. Parker, 390 F.2d 816 (3d Cir. 1968).

[11] Rodriquez v. McGinnis, 451 F.2d 730 (2d Cir. 1971).

[12] *See, e.g.*, Rodriquez v. McGinnis, 451 F.2d 730 (2d Cir. 1971); Katzoff v. McGinnis, 441 F.2d 558 (2d Cir. 1971).

[13] The dissenters noted that evidentiary hearings will almost always have to be made in § 1983 cases, while they are not nearly as frequent in habeas corpus proceedings.

[14] *See also* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Sharp v. Sigler, 277 F. Supp. 963 (D. Neb. 1967), *aff'd*, 408 F.2d 966 (8th Cir. 1969).

[15] *See, e.g.*, Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971). *But see* Commonwealth of Pennsylvania *ex rel.* Feiling v. Sincavage, 313 F. Supp. 967 (W.D. Pa. 1970), *aff'd*, 439 F.2d 1133 (3rd Cir. 1971) (the Civil Rights Act was never intended to allow the pendency of state common law claims).

[16] Barrows v. Faulkner, 327 F. Supp. 1190 (N.D. Okla. 1971).