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Paul Marcus

William & Mary Law School, pxmarc@wm.edu

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PAUL MARCUS

The Exclusion of Evidence in the United States

I. INTRODUCTION

Exclusion of evidence in criminal cases in the United States has been a topic of much debate since the early part of this century. The United States Supreme Court, in 1914, held that in a *federal* prosecution the Fourth Amendment barred the use of evidence which had been secured through an unlawful search and seizure. In the case of *Weeks v. United States*¹ the Court was interpreting the language of the Fourth Amendment to the American Constitution which provides in material part: "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" The Supreme Court in the *Weeks* case was interpreting the Fourth Amendment to apply in federal cases.

The debate over the exclusion of evidence intensified in the 1960s with the opinions by the United States Supreme Court in *Mapp v. Ohio*² and *Miranda v. Arizona*.³ In those cases the Court held that the Fourth Amendment provision regarding unlawful searches and seizures and the Fifth Amendment provision relating to the privilege against self-incrimination applied to *state* criminal actions. These provisions were construed so as to exclude in state prosecutions evidence which had been unlawfully obtained. The rationale for these holdings was stated by the Court: "Conviction by means of unlawful seizures and enforced confessions should find no sanction in the judgments of the courts⁴ [and] that such evidence 'shall not be used at all.'"⁵

As we shall see, the debate regarding the exclusion of evidence continues to rage throughout the United States. Before turning to that debate, and the policy considerations underlying it, it is impor-

PAUL MARCUS is Professor of Law, University of Arizona College of Law.

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

2. 367 U.S. 643 (1961).

3. 384 U.S. 436 (1966).

4. 232 U.S. at 392.

5. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) [opinion of Justice Oliver Wendell Holmes].

tant to look to the various sources for the exclusionary rule found throughout the country.

II. SOURCES FOR EXCLUSION

The exclusionary rule in the United States, simply put, means that if government agents have obtained evidence in an unlawful fashion, that evidence will be excluded at the criminal defendant's trial. Numerous judges have commented that there are two purposes for this rule of exclusion, referring to "the twin goals of enabling the judiciary to avoid the taint of partnerships in official lawlessness and of assuring the people . . . that the government would not profit from it lawless behavior"⁶ Three different sources exist for the exclusion of evidence in criminal cases: the supervisory power of judges over criminal cases, state statutes and constitutions, and federal constitutional provisions.

A. *Judicial Supervisory Powers*

The United States Supreme Court in the *Weeks* case was interpreting the Fourth Amendment in a case in which criminal prosecutions were brought in *federal* courts under the supervision of federal judges, most especially the United States Supreme Court Justices. As pointed out by Justice Harlan, such a situation is considerably different from applying Fourth Amendment exclusion rules to *state* prosecutions.⁷ As he noted in his dissent in the *Mapp* case: "Our role in promulgating the *Weeks* rule and its extensions . . . was quite a different one than it is here. There, in implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides."⁸

Such a practice by judges is not at all unusual in the United States. Both federal and state courts regularly provide rules for the litigation of both civil and criminal cases, including very specific rules regarding timing for filings, evidentiary considerations, and the impaneling of juries.⁹

B. *State Statutes and Constitutional Procedures*

States have been quite active in providing their own exclusion remedies for criminal defendants in state prosecutions. Little of the

6. *United States v. Calandra*, 414 U.S. 338, 357 (Brennan, J., dissenting).

7. See § II. C, *infra*.

8. 367 U.S. at 682.

9. The notion of a judicial supervisory power is discussed in *People v. Cipriano*, 429 N.W.2d 781 (Mich. 1988).

activity, however, is found in legislative statutes calling for exclusion. This Minnesota statute, for example, is unusual.

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized . . . for the return of the property and to suppress the use, as evidence, of anything so obtained."¹⁰

Most of the state activity, instead, has been centered in analyses of various state constitutional provisions. In a host of different areas, parallel state constitutional provisions have been interpreted by state courts to provide greater protection for criminal defendants than the federal counterparts. In short, in several areas the defendant is more likely to have evidence excluded under state constitutional law than under federal constitutional law. "The federal constitution establishes minimum rather than maximum guarantees of individual rights, and the state courts independently determine, according to their own law (generally their own state constitutions), the nature of the protection of the individual against state government."¹¹ To demonstrate both the impact of this application of state constitutional law, and the important changes in the area, we shall look to recent cases from three different states.

In *State v. Novembrino*¹² the New Jersey Supreme Court decided to reject the United States Supreme Court's exception to the exclusionary rule for searches in good faith conducted pursuant to warrants.¹³ Instead, the court remarked that state constitutional provisions may be a source "of individual liberties more expansive than those conferred by the Federal Constitution."¹⁴ Though the language of the New Jersey constitution was "virtually identical" to that of the federal fourth amendment, the court expressly rejected the United States Supreme Court view on this so-called good faith exception to the exclusionary rule.

[S]uch a rule would tend to undermine the constitutionally-guaranteed standard of probable cause, and in the process disrupt the highly effective procedures employed by our

10. Minnesota Stat. § 626.21 (1986).

11. Abrahamson, "Criminal Law and State Constitutions: The Emergence of State Constitutional Law," 63 *Texas L. Rev.* 1141, 1153 (1985) [the author is a Justice of the Wisconsin Supreme Court.] See also, the statement of Justice Stein of the New Jersey Supreme Court: "Because a state constitution may afford enhanced protection for individual liberties, we 'should not uncritically adopt federal constitutional interpretations for the New Jersey Constitution merely for the sake of consistency.'" *State v. Novembrino*, 105 N.J. 95, 99, 519 A.2d 820, 823 (1987).

12. *Id.*

13. The United States Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984) found that evidence which had been obtained as a result of a search would not be excluded if the police officer reasonably and in good faith relied upon a warrant which later turned out to be defective.

14. 105 N.J. at 124, 519 A.2d at 849.

criminal justice system to accommodate that constitutional guarantee without impairing law enforcement.¹⁵

California also has applied its state constitution to exclude evidence which would not necessarily be excluded in federal criminal cases. The court in *People v. Houston*¹⁶ rejected a decision of the United States Supreme Court under the Fifth and Sixth Amendments in which the Court had held that it was no violation of constitutional rights for government officers to conceal from the defendant the fact that his attorney was attempting to reach him at the police station so long as the attorney was not physically present there.¹⁷ The California Supreme Court found that the "state charters offer important local protection against the ebbs and flows of federal constitutional interpretation."¹⁸ The court made clear that exclusion was required under the state constitution even though the United States Constitution reached a different result.¹⁹

Finally, the most striking use of a state rule of exclusion may be the Massachusetts doctrine established in *Commonwealth v. Blood*.²⁰ There the issue concerned the common "one party consent" case in which an informer is "wired" for sound and then engages in a tape recorded conversation with the defendant. The conversation is ultimately used against the defendant because it contains her incriminating remarks. The United States Supreme Court has found that such activity is not affected by the Fourth Amendment to the United States Constitution because one of the two parties to the conversation consented to its being recorded.²¹ The Massachusetts court looked to its own state Declaration of Rights and found that while the language there was similar to that of the United States Constitution the rule of exclusion would be quite different.

15. 105 N.J. at 132, 519 A.2d at 857. See also *State v. Opperman*, 247 N.W.2d 673, 674 (South Dakota 1976) where the state court rejected the United States Supreme Court's decision regarding inventory searches of automobiles.

16. 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986).

17. *Moran v. Burbine*, 475 U.S. 412 (1986).

18. 42 Cal. 3d at 609, 724 P.2d at 1174, 230 Cal. Rptr. at 148.

19. "The debates at the Constitutional Convention of 1849 made quite clear that the language of the Declaration of Rights which comprises Article I of the California Constitution was not based upon the federal charter at all, but upon the constitutions of other states. When the 1849 Constitution was adopted, of course, the Fourteenth Amendment to the federal constitutional rights have been applied to the states, did not yet exist. Indeed, a reading of both the 1849 and 1878 constitutional debates reflects a common understanding that it was the *state* Constitution, and not the federal, which would protect the rights of California citizens against arbitrary action by the state." 42 Cal. 3d at 609 n. 13, 724 P.2d at 1174 n. 13, 230 Cal. Rptr. at 149 n. 13 (emphasis in original). But see, *People v. Ledesma*, 251 Cal. Rptr. 417 (Cal. 1988).

20. 400 Mass. 61, 507 N.E.2d 1029 (1987).

21. See generally, *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. White*, 401 U.S. 745 (1971).

It is not just the right to a silent, solitary autonomy which is threatened by electronic surveillance: It is the right to bring thoughts and emotions forth from the self in company with others doing likewise, the right to be known to others and to know them, and thus to be whole as a free member of a free society.²²

C. Federal Constitutional Provisions

Under the United States Constitution, two major areas of exclusion have been the focus of judicial interpretation. These relate to the Fourth Amendment's prohibition against unreasonable searches and seizures and the Fifth Amendment's privilege against self-incrimination.²³

The landmark Fourth Amendment case applying the rule of exclusion in both state and federal actions is *Mapp v. Ohio*.²⁴ The Court recognized that it had previously found that "in a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."²⁵ In *Mapp*, however, the Court concluded that the Fourteenth Amendment Due Process Clause did incorporate the Fourth Amendment rules in state actions, including the rule of exclusion. The majority of the Court was deeply troubled by a sense that without exclusion of evidence, constitutional rights could not be protected due to the "obvious futility of relegating the Fourth Amendment to the protection of other remedies."²⁶

The ignoble shortcut to conviction left open to the State tends to destroy the entire system for constitutional re-

22. 400 Mass. at 69, 507 N.E.2d at 1034. In several American states, constitutional amendments have been passed which restrict the ability of state courts to take independent roles regarding the exclusion of evidence. See, Abrahamson, *supra* note 11, at 1154.

23. The Sixth Amendment right to counsel also plays a role in this area. The seminal case of *Gideon v. Wainwright*, 372 U.S. 335 (1963) applied the Sixth Amendment right to counsel to state criminal actions in addition to federal prosecution. The major Sixth Amendment exclusion case involves police interrogation. In *Masiah v. United States*, 377 U.S. 201 (1964) the defendant was formally indicted for violating federal narcotics laws. He retained a lawyer, pleaded not guilty and was released on bail. Thereafter an undercover police officer, "succeeded by surreptitious means" in receiving incriminating statements by the defendant. *Id.* at 201. The Court found that such questioning, after the defendant had been charged, violated his right to have an attorney present during all critical stages of the prosecution. The statement of the defendant, though reliable and not coerced, was excluded because "the Constitution which guarantees a defendant the aid of counsel at such a trial surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding." *Id.* at 204.

24. 367 U.S. 643 (1961).

25. In *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

26. 367 U.S. at 652.

straints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like affect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to an individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.²⁷

The exclusionary rule adopted by the United States Supreme Court in *Mapp* covering unreasonable searches and seizures was the subject of tremendous criticism at the time,²⁸ such criticism has not abated in the thirty years since the decision was rendered. Indeed, over this thirty year period, several decisions of the United States Supreme Court have been rendered which have limited the reach of the exclusionary rule of *Mapp*.²⁹ Still, the basic Fourth Amendment exclusionary rule put forth by a majority of the United States Supreme Court Justices in the *Mapp* case remains the law in the United States today.

Perhaps the most controversial application of the exclusionary rule is that found in the United States Supreme Court's decision in *Miranda v. Arizona*.³⁰ There the Supreme Court took several actions which infuriated its critics.³¹ The Court found that the Fifth Amendment privilege against self-incrimination was to be applied

27. *Id.* at 660.

28. Justice Harlan, joined by Justices Frankfurter and Whitaker, dissented in *Mapp*. He complained that the exclusion rule was poor policy; he was particularly concerned that the federal courts were imposing rigid rules in fifty different state jurisdictions. See, discussion in § IV, *infra*.

29. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) where the United States Supreme Court imposed severe restrictions on those who could raise Fourth Amendment claims under the doctrine of "standing". The question, according the Court in *Rakas*, was not whether evidence has been unlawfully obtained, but rather whether the individual petitioner "could legitimately expect privacy in the areas which were the subject of the search and seizure." *Id.* at 149. Other restrictions, such as the good faith exception, harmless error, and the doctrine of retroactivity, are discussed in § III. B, *infra*.

30. 384 U.S. 436 (1966).

31. Perhaps the sharpest of the critics were the dissenting Justices, Harlan, Stewart and White, who complained that the decision "represents poor constitutional law and entails harmful consequences for the country at large." *Id.* at 504.

against the states through the due process clause of the Fourteenth Amendment.³² Then the Court, through Chief Justice Earl Warren, found that the privilege would not be satisfied in the usual police setting³³ unless the defendant was specifically warned of the right to remain silent, the right to have an attorney present, and the fact that anything said by the defendant would be used against him at trial.³⁴ What made the opinion more striking, and more powerful, was that the Court found that if the warnings were not given exclusion was the proper remedy because the prosecution could not use the defendant's statements against him at trial to prove his guilt.³⁵

The *Miranda* decision continues to be debated even today.³⁶ Moreover, some severe limitations have been imposed on the holding of *Miranda* including the government's ability to use the confession for purposes of impeachment when the defendant testifies at trial,³⁷ and the inapplicability of *Miranda* to situations in which the interrogation by the officers is not for reasons of receiving incriminating information but rather to protect the public.³⁸ In spite of these limitations and protests, *Miranda* remains the law today; an exclusion in the Fifth Amendment context will be used in the pretrial police interrogation setting and in different settings as well.³⁹

The dissenters referred to the Court's holding as a "new constitutional code of rules for confessions." *Id.*

32. The Court had actually applied the Fifth Amendment privilege against the states in an earlier case, *Malloy v. Hogan*, 378 U.S. 1 (1964).

33. *Miranda* applies where the defendant makes statements in response to interrogation by police officers given while she is held in custody.

34. "Unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

384 U.S. at 444.

35. *Id.*

36. For an intense debate concerning *Miranda*, see, Marcus and Markman, "The *Miranda* Decision Revisited: Did It Give Criminals Too Many Rights?", 57 *U.M.K.C. L. Rev.* 15 (1988).

37. The Court in *Harris v. New York*, 401 U.S. 222 (1971) held that if the defendant takes the stand and makes a statement at trial which is inconsistent with the earlier statement, that earlier statement can be used to impeach his testimony (though not to prove guilt) even though *Miranda* had not been satisfied.

38. This "public safety" exception was adopted in *New York v. Quarles*, 467 U.S. 649 (1984). There the defendant had been chased by the police after allegedly committing a sexual assault. He was cornered at a supermarket and was asked where his gun could be found. His incriminating response was held not to violate *Miranda* because the "threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657.

39. See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981) where *Miranda* was held to apply to pretrial psychiatric examinations exploring the defendant's competency to stand trial and his sanity at the time of the offense. The United States Supreme Court recently reaffirmed *Miranda* in *Duckworth v. Eagan*, 109 S. Ct. 2875 (1989).

III. APPLICATION OF THE RULES OF EXCLUSION

The American exclusionary rules have been the subject of much controversy both in the United States and elsewhere. Two important questions have been raised in recent years regarding this controversy. First, what is the actual impact of the exclusionary rule? Second, in what ways has the rule been limited in application?

A. *The Impact*

Exclusionary rules have, undoubtedly, had great impact in many ways on the American criminal justice system. The rule of exclusion stands as an important symbol to both the law enforcement officers and the general public that illegal activity by police will not benefit law enforcement officials and will result in severe sanction.⁴⁰ Moreover, in the several decades since the adoption of the exclusionary rule, wide-scale funding for police training institutes and education programs have been initiated in order to comply with the mandate of the United States Supreme Court and avoid the exclusion of evidence.

With respect to the question of the impact in individual cases, however, the answer is much less certain. If the question is, does the exclusionary rule result in large numbers of serious felony cases being dismissed, the answer appears to be no, the impact in this area is relatively slight. The leading report was prepared by the Comptroller General of the United States in 1979. In "Impact of the Exclusionary Rule on Federal Criminal Prosecutions" the report indicated that one out of six defendants filed some type of suppression motion but "the overwhelming majority of these motions were denied." Indeed, the Comptroller General found that less than one percent of "the declined defendants cases were declined due to Fourth Amendment search and seizure problems."⁴¹

If, then, the evidence does not show wide-scale dismissal of cases resulting from the exclusionary rule,⁴² why has the adoption of

40. Perhaps the best and most thorough treatment of the rules of exclusion is Professor Lafave's excellent book, *Search and Seizure: A Treatise on the Fourth Amendment* (1978).

41. Letter of Elmer Staats, Comptroller General of the United States to Senator Edward M. Kennedy, dated April 19, 1979.

42. See also Nardulli, "The Societal Costs of the Exclusionary Rule Visited," 1987 *U. Ill. L. Rev.* 223, 238-39:

"The results reported in this article reinforced those reported earlier, and, in some respects, go beyond them. Clearly the prominence of the role played by the exclusionary rule does not necessarily increase with the size of the jurisdiction studied. Despite differences in the mix of the cases, the severity of the caseload pressure, and the organization of police forces among larger and smaller locales, the exclusionary rule accounts for only a minor portion of case attrition."

the exclusionary rule been so controversial? Several answers seem clear. While the impact may not be widespread, it is present and in some cases prosecutions have been dismissed specifically due to the application of the exclusionary rule. Moreover, as some argue, the exclusionary rule is the wrong remedy to deal with police misconduct because it results in guilty and dangerous individuals going free.⁴³ Finally, it seems clear that one of the key reasons for the controversy is that in a small, but highly publicized, number of cases, extremely dangerous individuals have had their convictions reversed.⁴⁴ For instance, the defendant in *Miranda v. Arizona*⁴⁵ had been convicted of kidnapping and rape; the defendant in *Brewer v. Williams*,⁴⁶ a widely-publicized Sixth Amendment case, had been convicted of murder; the defendant in *Franks v. Delaware*,⁴⁷ an important Fourth Amendment case, had been found guilty of rape, kidnapping, and burglary.

B. Limitations

Three major limitations have been imposed by the United States Supreme Court in connection with rules of exclusion. The first is widely used throughout the United States and is known as the doctrine of harmless error. If a violation has occurred under the Fourth, Fifth and Sixth Amendments, generally the conviction of the defendant is not automatically reversed.⁴⁸ Instead the question becomes whether the court can conclude that the error in admitting the evidence which should have been excluded is "harmless beyond a reasonable doubt." This doctrine has been applied in a host of different areas relating to Fourth Amendment violations,⁴⁹ statements by co-defendants,⁵⁰ and comments on the failure of the accused to testify.⁵¹ As the Supreme Court stated in *Chapman v. California*:

We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the auto-

43. See, § IV *infra*.

44. Though the defendants in these cases typically are not set free. They are required to stand trial again, with the excluded evidence not part of the government's case.

45. 384 U.S. 436 (1966).

46. 430 U.S. 387 (1977).

47. 438 U.S. 154 (1978).

48. The major exception is the ruling in *Gideon v. Wainwright*, establishing the right to counsel at trial. A violation of this right is held to be prejudicial in all cases.

49. *Chambers v. Maroney*, 399 U.S. 42 (1970).

50. *Harrington v. California*, 395 U.S. 250 (1969).

51. *Chapman v. California*, 386 U.S. 18 (1967).

matic reversal of the conviction.⁵²

Another major limitation on the exclusion rules occurs when the Supreme Court decides to whom the rules should apply. That is, when the Court announces a decision under the Fourth, Fifth or Sixth Amendment which would affect rules of exclusion, is the rule to be given wholly retroactive application (applicable to all individuals who have *ever* been involved in that factual situation) or wholly prospective application (applicable only to those individuals whose cases arise after the date of the Court's decision). If the rules are given prospective application only, there is a significant restriction on the rules of exclusion. If, however, the rules are given fully retroactive application, large numbers of individuals whose cases arose well before the Court's decision will benefit from it. The general rule has been to avoid strict applications of either retroactive or prospective holdings and instead to resolve the matters on a case-by-case basis. The major exception is the Supreme Court's decision in *Gideon v. Wainwright* requiring counsel at trial. That decision was given full retroactive application. In other areas, more pertinent to the rules of exclusion, the Court has been much more narrowly focused.

In *Linkletter v. Walker*,⁵³ the United States Supreme Court applied the basic exclusionary rule of *Mapp v. Ohio* to state cases still pending on direct appeal at the time the decision was handed down, but refused to apply the rule to state convictions which had become final prior to the decision. The Court stated its reasoning:

[In deciding whether to apply a decision retroactively, we must look] to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. [*Mapp's*] prime purpose [was] enforcement of the Fourth Amendment through the [exclusionary rule]. This, it was found, was the only effective deterrent to lawless police action. This purpose [would not] be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp*. Finally, the ruptured privacy of the victims' homes and effects cannot be restored.

52. *Id.* at 22. The Court in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) said that "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." See generally *United States v. Gallo*, 859 F.2d 1078, 1082-83 (2d Cir. 1988).

53. 381 U.S. 618 (1965).

Reparation comes too late.⁵⁴

Similarly, in *Johnson v. New Jersey*⁵⁵ the Court held that the *Miranda* decision affected only those cases in which the trial began after the date of the decision. Finally, in *Desist v. United States*⁵⁶ the Court found a prior ruling regarding electronic eavesdropping⁵⁷ would be given wholly prospective application, applying only to government activities which occurred after the date of the decision.

Perhaps the most important, and the most controversial, limitation on the rules of exclusion has been used in the Fourth Amendment area. In 1984, the United States Supreme Court decided the case of *United States v. Leon*.⁵⁸ Police officers in that case conducted a search pursuant to a warrant which had been issued by a neutral and detached magistrate. The officers acted in reasonable good faith reliance on the warrant but ultimately the courts found that the warrant was unsupported by probable cause. The question in the case was whether the Fourth Amendment exclusionary rule should be modified so that the evidence which had been obtained by the officers could be used in the prosecution's case in chief. The Court found that if the police officers did act in reasonable good faith reliance on a warrant evidence would not be excluded. Looking heavily to the deterrent impact of the exclusionary rule, the Court "questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment."⁵⁹ The Court concluded that if the police officer has obtained a search warrant and has acted within its scope, normally

there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policemen can do in seeking to comply with the law. Penalizing the officer for

54. *Id.* at 629, 636-37.

55. 384 U.S. 719 (1966).

56. 394 U.S. 244 (1969).

57. In *Katz v. United States*, 389 U.S. 347 (1957) the Court held that the Fourth Amendment application "cannot turn upon the presence or absence of a physical intrusion into any given enclosure" and that electronic eavesdropping upon private conversations in a public telephone both constituted a search and seizure under the Fourth Amendment. *Id.* at 353.

58. 468 U.S. 897 (1984).

59. *Id.* at 918.

the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.⁶⁰

IV. THE POLICY CONSIDERATIONS

For the past 30 years in the United States the rules of exclusion in criminal cases have been sharply debated and harshly criticized. The primary criticism is one which has existed for decades. Essentially it is the notion that the exclusionary rule is the wrong mechanism for dealing with unconstitutional law enforcement techniques. Two famous American jurists had widely different views of the matter. Justice (then judge) Cardozo noted that the defect with the exclusionary rule is that "the criminal is to go free because the constable has blundered."⁶¹ California Chief Justice Roger Traynor, however, took a very different view of the matter, contending that this criticism

is not properly directed at the exclusionary rule, but at the constitutional provisions themselves. It was rejected when those provisions were adopted. In such cases had the Constitution been obeyed, the criminal could in no event be convicted. He does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught.⁶²

Moreover, the evidence with respect to the number of criminals going free as a result of the exclusionary rule is unclear, at best.

Contrary to the claims of the rule's critics that exclusion leads to "the release of countless guilty criminals," these studies have demonstrated that federal and state prosecutors very rarely drop cases because of potential search and

60. *Id.* at 921. The Court did note, however, that reliance on a warrant would not *always* be viewed as satisfying the rules regarding exclusion of evidence.

"We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search. Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Id. at 922-23.

61. *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 587 (1926).

62. *People v. Cahan*, 282 P.2d 905, 914 (1955).

seizure problems.⁶³

The criticism has also been made that imposing a constitutional exclusionary rule on state courts will unduly inhibit the experimentation of individual states and improperly impact on state-federal relations. The response has been that a uniform constitutional principle under the Fourteenth Amendment due process clause is required in all important criminal procedure matters. Still, the criticism of Justice Harlan as stated in his dissent in the *Mapp* case is powerful.

An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of this Court's function in relation to the state and federal courts. Our role in promulgating the [federal rule] was quite a different one than it is here. There, in implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides. Here we review state procedures whose measure it is to be taken not against the specific substantive commands of the Fourth Amendment but under the flexible contours to the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mold state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done. . . .⁶⁴

Perhaps the chief criticism directed against the exclusionary rule relates to the deterrent impact it has on law enforcement conduct. As one court has noted, "the *raison d'être* of the exclusionary rule is the deterrence of official misconduct."⁶⁵ With this viewed by some as the only true rationale for the exclusionary rule, the case becomes a difficult one to satisfy, as the numerous studies have not clearly demonstrated the hoped for impact. As the Supreme Court itself noted,

No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect.⁶⁶

Two major responses have been given to the argument that the

63. *United States v. Leon*, *supra*, 468 U.S. at 950 (Brennan, J. dissenting).

64. 367 U.S. at 682 (Harlan, J. dissenting).

65. *People v. Cipriano*, 429 N.W.2d 781, 789 (Michigan 1988).

66. *United States v. Janis*, 428 U.S. 433, 452 n. 22 (1976). The matter was stated forcefully in Allen, "The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases," 1975 *U. Ill. L. Forum* 518, 537.

"The reason why the deterrence rationale renders the exclusionary rule

exclusionary rule does not deter. The first is the sense as to the basis for the rule. That is, there are those who would argue that deterrence is *not* the only, or even the chief, rationale for the exclusionary rule. Indeed, as Justice Brennan once stated, the purpose of the exclusionary rule is to satisfy "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government would not profit from its lawless behavior . . . not the rule's possible deterrent effect were uppermost in the minds of the framers of the rule."⁶⁷ Moreover, Professor LaFave, the leading American expert on the exclusionary rule, has pointed out that the difficulty with the deterrence argument is how the Court perceives deterrence and applies it in this context.

Surely the question of whether the exclusionary rule did or could deter in the particular case is irrelevant, for the 'exclusionary rule is not aimed at special deterrence' but instead is intended 'to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it.' That is, in the last analysis, deterrence 'is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred.'⁶⁸

Finally, the argument is made that even if the exclusionary rule works as anticipated,⁶⁹ other alternatives are available which would achieve the same result at less cost to society. Two, in particular, have been suggested. The first has not been reviewed favorably because it calls upon the government to prosecute in criminal actions police officers who purposely violate the constitutional rights of individuals. As noted more than 40 years ago by Justice Murphy:

Little need be said concerning the possibilities of criminal prosecution. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.⁷⁰

The principle alternative to the exclusionary rule concerns a

vulnerable is that the case for the rule as an effective deterrent of police misbehavior has proved, at best, to be an uneasy one."

67. *United States v. Calandra*, 414 U.S. 338, 357 (1974) [Brennan, J. dissenting].

68. LaFave, "The Fourth Amendment Today: A Bicentennial Appraisal", 32 *Villanova L. Rev.* 1061, 1083 (1987).

69. Some would argue that it is more than simply effective, it is far too effective in terms of the impact on the criminal justice system. *See, e.g.*, Marcus & Markman, *supra* n.36 at 17-18.

70. *Wolf v. Colorado*, 338 U.S. 25, 42 (1949) [Murphy, J., dissenting.]

civil action in which the aggrieved party could recover substantial damages against law enforcement officials or governmental entities. This alternative was put forth by former Chief Justice Burger when he encouraged Congress to "develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."⁷¹ The difficulty with this alternative is that very few legislative bodies have taken up the challenge and in fact enacted such civil legislative remedies.⁷² Instead the only true alternative in this area has been to rely on traditional civil remedies which have worked poorly.

But there is an appealing ring in another alternative. A trespass action for damages is a venerable means of securing reparation for unauthorized invasion of the home. Why not put the old writ to a new use? When the Court cites cases permitting the action, the remedy seems complete.

But what an illusory remedy this is, if by "remedy" we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment. The appealing ring softens when we recall that in a trespass action the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages — a penny, or a dollar. Are punitive damages possible? Perhaps. But a few states permit none, whatever the circumstances. In those that do, the plaintiff must show the real ill will or malice of the defendant, and surely it is not unreasonable to assume that one in honest pursuit of crime bears no malice toward the search victim. . . . The bad reputation of the plaintiff is likewise admissible.⁷³

V. CONCLUSION

The exclusionary rule in the United States is seemingly explainable only as a result of great concern regarding government overreaching vis-a-vis individual rights of privacy and liberty. As Professor Stepan has well noted, in the first known manual for interrogators in the 14th century, the Spanish inquisitor Eymericus stated: "*Non refert quomodo veritas habeatur, dummodo habeatur.*"

71. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 422 (1971) [Burger, C.J. dissenting].

72. *But see* the strong economic analysis argument in Posner, "Excessive Sanctions for Governmental Misconduct in Criminal Cases," 57 *Wash. L. Rev.* 635 (1982).

73. Justice Murphy dissenting in the *Wolf* case, *supra*, 338 U.S. at 42-43. He went on to note rather dramatically that "there is but one alternative to the rule of exclusion. That is no sanction at all." *Supra*, at 41.

Translated, "it does not matter by which methods truth has been obtained so long as it has been obtained."⁷⁴ As a result of historical and societal views in the United States, however, that point of view has been rejected with a vengeance. While there has been widespread criticism of the exclusionary rule, substantial support for it still exists in the United States and it is used throughout the country. Perhaps the best explanation for this apparently drastic remedy was offered by Justice Clark in the case establishing the exclusionary rule for unlawful searches and seizures, *Mapp v. Ohio*. In response to criticism regarding the harshness of the exclusionary doctrine, Clark noted that "there is another consideration — the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."⁷⁵

The argument was stated forcefully by Justice Frankfurter decades ago:

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole.⁷⁶

74. Stepan, "Possible Lessons From Continental Criminal Procedure, in *The Economics of Crime and Punishment* at 181 [American Enterprise Institute for Public Policy Research, (1973)].

75. 367 U.S. at 659.

76. *Harris v. United States*, 331 U.S. 145, 173 (1947) [Frankfurter, J. dissenting].