

# IN DEFENSE OF THE SEARCH AND SEIZURE EXCLUSIONARY RULE

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## I. INTRODUCTION<sup>1</sup>

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1. There is a vast literature on this subject. For a good sampling, see 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 1-373 (3d ed. 1996); Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Edward L. Barrett, Jr., *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CAL. L. REV. 565 (1955); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983); John

About a quarter-century ago, after my co-authors and I had published the fourth edition of our criminal procedure casebook,<sup>2</sup> I attended a conference with A. Kenneth Pye, then the Dean of the Duke Law School. During a break in the conference proceedings, Dean Pye, a strong admirer of the Warren Court,<sup>3</sup> took me aside to give me some advice about casebook writing. This is a fairly accurate recollection of what Dean Pye said:

On thumbing through the new edition of your casebook, I couldn't help noticing that you have eliminated a number of the pre-Warren Court cases you had in the earlier editions. I realize you were responding to the need to add a good deal of new material to the book without letting an already big book get any larger. But taking out the old cases has serious costs. In the years ahead, as more and more interesting new cases are handed down, you will feel much pressure to take out still more older cases. But this is a process you must resist.

Otherwise, by the time you and your co-authors publish your eighth or tenth edition, the confessions chapter will begin with *Miranda*<sup>4</sup> and the search and seizure chapter with *Mapp*.<sup>5</sup> This would be calamitous. For many law students (and a few young criminal procedure professors) won't appreciate *Mapp* and *Miranda*—won't really understand why the Court felt the need to take the big steps it did—unless casebooks like yours contain material that enables readers of the books to get some idea of how unsatisfactory the prevailing rules and doctrines were *before* the Warren Court arrived on the scene.

I think Dean Pye's advice about casebook writing was sound,<sup>6</sup> and

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Barker Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984); John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922). It is very hard to select the best long article ever written on the exclusionary rule, but it is relatively easy to pick the best short one—William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443 (1997).

2. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE (4th ed. 1974).

3. See, e.g., A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968). At the time he gave me advice about writing criminal procedure casebooks, Pye was one of the nation's leading criminal procedure commentators, but in later years Pye's administrative obligations as law school dean, university chancellor and university president diverted his efforts from legal scholarship. See generally Francis A. Allen, *The Scholarship of Kenneth Pye*, 49 SMU L. REV. 439 (1996).

4. *Miranda v. Arizona*, 384 U.S. 436 (1966).

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

6. Our casebook is now in its tenth edition. See YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE (10th ed. 2002). The chapter on search and seizure still does not begin with *Mapp*; the chapter on confessions still does not begin with *Miranda*.

what he had to say also applies to discussions and debates about such issues as the search and seizure exclusionary rule. We cannot (at least we should not) begin with *Mapp v. Ohio*. We need a prelude.

## II. THE PRE-MAPP ERA

Perhaps we should begin with *People v. Cahan*,<sup>7</sup> the pre-*Mapp* case in which California adopted the exclusionary rule on its own initiative.<sup>8</sup> At first, Justice Roger Traynor, who wrote the majority opinion, had not been a proponent of the exclusionary rule. Indeed, thirteen years earlier, he had written the opinion of the California Supreme Court reaffirming the admissibility of illegally seized evidence.<sup>9</sup> By 1955, he and a majority of his colleagues felt compelled to overrule state precedents and adopt the exclusionary rule. Why? The *Cahan* majority explained:

[O]ther remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule [of admissibility] have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

Justice Traynor and his colleagues seemed astounded by how casually and routinely illegally seized evidence was being offered and admitted in the California courts. After noting that Los Angeles police had candidly admitted that they had illegally installed listening devices in the defendants' homes and had described, with equal candor, how they had forcibly entered buildings without bothering to obtain warrants by breaking windows and kicking in doors,<sup>11</sup> Justice Traynor observed:

[W]ithout fear of criminal punishment or other discipline, law enforcement officers . . . frankly admit their deliberate, flagrant [unconstitutional] acts . . . . It is clearly apparent from their

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7. 282 P.2d 905 (Cal. 1955).

8. Prior to *Mapp*, state courts were free to admit or to exclude illegally seized evidence. In 1949, thirty-one states declined to exclude such evidence. A decade later, on the eve of *Mapp*, twenty-four states still rejected the exclusionary rule. See Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than "an Empty Blessing"*, 62 JUDICATURE 337, 346 (1979).

9. See *People v. Gonzales*, 124 P.2d 44 (Cal. 1942). What is even more ironic is that in 1942 Earl Warren was the California Attorney General who successfully urged Justice Traynor and his colleagues to reaffirm the rule permitting the use of illegally seized evidence. See *id.*

10. *Cahan*, 282 P.2d at 911-12.

11. See *id.* at 906 (citation omitted).

testimony that [Los Angeles police officers] casually regard [their illegal acts] as nothing more than the performance<sub>12</sub> of their ordinary duties for which the City employs and pays them.

Perhaps we should go back in time still further, three-quarters of a century, to *People v. Defore*,<sup>13</sup> the occasion for Judge (later Justice) Cardozo's famous opinion explaining why New York would not adopt the federal exclusionary rule. Cardozo maintained, as have most critics of the exclusionary rule ever since, that excluding the illegally seized evidence was not the only effective way to enforce the Fourth Amendment (or its state constitutional counterpart): "The [offending] officer might have been resisted, or sued for damages, or even prosecuted for oppression. He was subject to removal or other discipline at the hands of his superiors."<sup>14</sup>

Two decades later, in *Wolf v. Colorado*,<sup>15</sup> when the Supreme Court declined to impose the federal exclusionary rule on the states as a matter of Fourteenth Amendment Due Process, the *Wolf* majority, per Justice Frankfurter, made a similar argument. Indeed, the Court relied partly on what it called Cardozo's "[w]eighty testimony" about the availability of various alternatives to the exclusionary rule.<sup>16</sup>

The states that had rejected the federal exclusionary rule, Justice Frankfurter assured us, had "not left the right to privacy without other means of protection."<sup>17</sup> It could not, therefore, be "regard[ed] as a departure from basic standards to remand [victims of unlawful searches and seizures] to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford."<sup>18</sup>

A majority of the Court took a very different view of the various alternatives (perhaps one should say, theoretical alternatives) to the

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12. *Id.* at 907. See also Roger Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L. J. 319 (1962):

My misgivings about [the admissibility of illegally seized evidence] grew as I observed that time after time it was being offered and admitted as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity?

*Id.* at 321-22.

13. 150 N.E. 585 (NY App. Ct. 1926).

14. *Id.* at 586-87.

15. 338 U.S. 25 (1949).

16. *Id.* at 31. The Court quoted from Judge Cardozo's *Defore* opinion at considerable length. See *id.* at 31-32 n.2.

17. *Id.* at 30.

18. *Id.* at 31.

exclusionary rule a dozen years later when it handed down *Mapp v. Ohio*,<sup>19</sup> overruling *Wolf*. This time the Court dismissed alternatives to the exclusionary rule, noting that “[t]he experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.”<sup>20</sup> But the Court had nothing specific to say about the experience in any state other than California nor did it rely on empirical studies. Instead, the Court relied on comments by Justice Traynor in *Cahan*.

Asserting that the various alternatives to the exclusionary rule are worthless (or quoting statements by the California Supreme Court to the same effect) does not necessarily make them so—just as asserting (or assuming) that alternative remedies are meaningful (as both Cardozo and Frankfurter did) does not make that so. Fortunately, impressive evidence of the ineffectiveness of the so-called alternatives to the exclusionary rule does exist. But it is not to be found in the *Mapp* opinion itself. It is to be found rather in *the reaction* of law enforcement officials to the *Mapp* decision. To borrow a phrase, this reaction is the “weighty testimony”<sup>21</sup> that (despite the claims of Cardozo, Frankfurter, and others) reliance on tort remedies, criminal prosecutions, and the internal discipline of the police indeed left “the right to privacy without other means of protection.”<sup>22</sup>

### III. THE LAW ENFORCEMENT COMMUNITY’S REACTION TO *MAPP*

Although Michael Murphy, the police commissioner of New York City at the time, did not say so in so many words, he left no doubt that because New York courts (relying on the *Defore* case) had permitted the prosecution to use illegally seized evidence up to the time of *Mapp*, neither the commissioner nor the thousands of officers who worked for him had been taking the law of search and seizure at all seriously. As the commissioner recalled some time later:

I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as [*Mapp*]. As the then commissioner of the largest police force in this country I was immediately caught up in the entire problem of reevaluating our procedures, which had followed the *Defore* rule,

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

20. *Id.* at 652.

21. *Wolf*, 338 U.S. at 31.

22. *Id.* at 30.

and . . . creating new policies and new instructions for the implementation of *Mapp* . . . . [Decisions such as *Mapp*] create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their very foundations upward. Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function.<sup>23</sup>

Why was *Mapp*'s effect so "dramatic and traumatic"? Why did it create "tidal waves and earthquakes"? Why did it require "retraining" from top to bottom? Had there been *any* search and seizure training before *Mapp*?

What did the commissioner mean when he told us that prior to *Mapp* his police department's procedures "had followed the *Defore* case"? *Defore* did not set forth any procedures or permit the police to establish any procedures other than those that complied with the Fourth Amendment. It did allow New York prosecutors to use illegally seized evidence, but it did not (as the commissioner seemed to think) allow New York police to commit illegal searches and seizures. Is there any better evidence of the inadequacies of the existing alternatives to the exclusionary rule than the police reaction to the imposition of the rule?<sup>24</sup>

It appears that, prior to *Mapp*, New York prosecutors were also unfamiliar with and uninterested in the law of search and seizure. Professor Richard Uviller, a New York prosecuting attorney at the time *Mapp* was handed down, recalled that he "cranked out a crude summary" of federal search and seizure law just in time for the next state convention of district attorneys and that summary turned out to be "an instant runaway best seller. It was as though we had made a belated discovery that the fourth amendment applied in the State of New York . . . ." <sup>25</sup> That, I think, says it all.

The response of New York law enforcement officials to the

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23. Michael Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966) (citation omitted) (emphasis added).

24. If any police official's post-*Mapp* comments are more revealing than Commissioner Murphy's, it may be those of New York City Deputy Police Commissioner Leonard Reisman. Reisman told a large group of police officers why they had to learn the law of seizure at such a late date in their careers: "[In the past] nobody bothered to take out search warrants. . . . [T]he Supreme Court had ruled that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?" Sidney E. Zion, *Detectives Get a Course in Law*, N.Y. TIMES, Apr. 28, 1965, at A50.

25. H. Richard Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, 35 VAND. L. REV. 501, 502 (1982).

imposition of the search and seizure rule is hardly unique. Six years earlier, when the California Supreme Court adopted the exclusionary rule on its own initiative in *People v. Cahan*,<sup>26</sup> the reaction of the Los Angeles Chief of Police, William Parker, had been quite similar to the one his New York City counterpart displayed when *Mapp* was decided.<sup>27</sup>

In Pennsylvania—another state whose courts had admitted illegally seized evidence prior to *Mapp*—a young Philadelphia assistant district attorney (and a future U.S. Senator), Arlen Specter, left little doubt that in this state, too, the so-called alternative remedies to the exclusionary rule had had virtually no effect. Commissioner Murphy had likened *Mapp* to a “tidal wave” and an “earthquake”; Mr. Specter compared it to a revolution:

Police practices and prosecution procedures were revolutionized in many states by the holding in . . . *Mapp v. Ohio* that evidence obtained from an illegal search and seizure cannot be used in a criminal proceeding. . . . [There are indications] that the imposition of the exclusionary rule upon the states is the most significant event in criminal law since the adoption of the fourteenth amendment . . . . *Mapp* has rewritten the criminal law treatise for states which had admitted evidence regardless of how it was obtained.<sup>28</sup>

Mr. Specter, like Commissioner Murphy, seemed to equate the relevance of the law of search and seizure with the presence or absence of the exclusionary rule, a remedy for the violation of a body of law the police were supposed to be obeying all along:

[T]he *Mapp* decision has significantly impaired the ability of the police to secure evidence to convict the guilty . . . . The law abiding citizen who must walk on some Philadelphia streets at two o'clock in the morning would doubtless prefer to be subjected to a search, without any cause, and have the police do the same to the

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26. 282 P.2d 905 (Cal. 1955); see *supra* note 7 and accompanying text.

27. Chief Parker told the public that the commission of a serious crime would no longer “justify affirmative police action until such time as the police have armed themselves with sufficient information to constitute ‘probable cause.’” WILLIAM H. PARKER, POLICE 117 (Wilson ed., 1957), quoted in Yale Kamisar, Wolf and Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1153-54 (1959). He also pledged that he and his officers would work “within the framework of limitations” imposed by the law of search and seizure “[a]s long as the Exclusionary Rule is the law of California.” *Id.* at 131. For substantial extracts from Chief Parker’s responses to the *Cahan* decision and for comments on his reaction, see Kamisar, *supra*, at 1153-54.

28. Arlen Specter, *Mapp v. Ohio: Pandora’s Problems for the Prosecutor*, 111 U. PA. L. REV. 4 (1962).

man standing idly at a corner; but that cannot be done under *Mapp*.<sup>29</sup>

#### IV. HAS THE EXCLUSIONARY RULE INHIBITED THE DEVELOPMENT OF ALTERNATIVE REMEDIES?

One can hear the critics of the exclusionary rule now. *Mapp v. Ohio*, some say, removed both the incentive and the opportunity to develop effective alternative means of enforcing the Fourth Amendment. Indeed, Chief Justice Warren Burger once said that “the continued existence of [the exclusionary rule] inhibits the development of rational alternatives.”<sup>30</sup> However, it is hard to take this argument seriously.

First of all, as opponents of the exclusionary rule never tire of telling us, large portions of police activity relating to the seizing of criminal property do not produce (and may not even have been designed to produce) incriminating evidence, and thus do not result in criminal prosecutions.<sup>31</sup> Whatever the reason for the failure to impose direct sanctions on the offending officers in these instances, it cannot be the existence of the exclusionary rule. The issue need not, and should not, be framed in terms of whether we should enforce the Fourth Amendment by an exclusionary rule *or* tort remedies against the offending officers *or* departmental sanctions. Nothing prevents the use of “internal sanctions” against the police “simultaneously with the use of the exclusionary rule.”<sup>32</sup> After all, “[n]o proponent of the exclusionary rule has suggested that it should act in isolation.”<sup>33</sup>

Moreover, blaming the failure to develop any effective “direct sanctions” against offending police officers on the exclusionary rule itself, to borrow a phrase from Carol Steiker, “ignores history.”<sup>34</sup> For many decades a large number of states had no exclusionary rule, yet

29. *Id.* at 42.

30. *Stone v. Powell*, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring).

31. See, e.g., Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL’Y 457, 463-64 (1997) (describing alternate benefits of illegal evidence seizure).

32. Cf. A. Kenneth Pye, *Charles Fahy and the Criminal Law*, 54 GEO. L.J. 1055, 1072 (1966) (explaining that exclusionary rule is invoked because of failure of “internal sanctions” above).

33. *Id.*

34. Steiker, *supra* note 1, at 849; see also Kamisar, *supra* note 8, at 346, 350 (describing lack of initiative on part of states to develop alternatives between adoption of federal exclusionary rule and decisions of *Mapp*, 367 U.S. 643 (1961) and *Wolf*, 338 U.S. 25 (1949)).



none of them produced any meaningful alternatives to the rule. Almost half a century passed between the time the federal courts adopted the exclusionary rule<sup>35</sup> and the time the Court finally imposed the rule on the states. But in all that time, not one of the twenty-four states that still admitted illegally seized evidence on the eve of *Mapp* had developed an effective alternative to the rule.<sup>36</sup> Thus, five decades of post-*Weeks* “freedom” from the inhibiting effect of the federal exclusionary rule failed to produce any meaningful alternative to the exclusionary rule in any jurisdiction.

One can hear the critics of the exclusionary rule again. Some of them are telling us that times have changed. Have they?

#### V. ARE TODAY’S POLITICIANS MORE LIKELY TO IMPOSE EFFECTIVE “DIRECT SANCTIONS” AGAINST THE POLICE THAN THE POLITICIANS OF YESTERYEAR?

Is there any reason to believe that today’s or tomorrow’s politicians are, or will be, any less fearful of appearing “soft on crime” or any more interested in protecting people under investigation by the police than the politicians of any other era? Is there any reason to think that the lawmakers of our day are any more willing than their predecessors to invigorate tort remedies (or any other “direct sanction”) against police officers who act overzealously in the pursuit of “criminals”?

“If anything,” observes Carol Steiker, “the escalating public hysteria over violent crime from the 1960s through the present makes it is [sic] even more ‘politically suicidal’ today to support restrictions on police behavior than it was before 1961.”<sup>37</sup> Consider, too, the disheartening comments of Donald Dripps:

American legislatures consistently have failed to address defects in the criminal process, even when they rise to crisis-level proportions. For example, when the *Miranda* Court invited Congress and the states to experiment with alternatives to traditional backroom police interrogation, Congress responded by adopting Title II [of the Omnibus Crime Control and Safe Streets Act of 1968], which stubbornly insisted on the traditional practice. To this day only two American jurisdictions, Alaska and Minnesota, require taping interrogations. In both instances the state

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35. See *Weeks v. United States*, 232 U.S. 383 (1914).

36. See *Elkins v. United States*, 364 U.S. 206, 224-25 (1960).

37. Steiker, *supra* note 1, at 850 (citation omitted); see also Amsterdam, *supra* note 1, at 379 (“[T]here will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control.”).

courts, rather than the state legislature, were the source of reform.

Legislatures across the United States have found billions of dollars for prisons,<sup>38</sup> but the support for indigent defense is shamefully inadequate. No legislature has adopted reforms of police identification procedures, even though we have known since the 1930s that mistaken identification is the leading cause of false convictions.<sup>39</sup> Legislatures . . . have not adopted statutory requirements for judicial warrants, or the preservation of exculpatory evidence, or plugged holes in the exclusionary rule, let alone delivered the effective tort remedy exclusionary rule critics have advocated for decades.

The record is not an accident, but the product of rational political incentives. Almost everyone has an interest in controlling crime. Only young men, disproportionately black, are at significant risk of erroneous prosecution for garden-variety felonies. Abuses of police search and seizure or interrogation powers rarely fall upon middle-aged, middle-class citizens. . . . [S]o long as the vast bulk of police and prosecutorial power targets the relatively powerless (and when will that ever be otherwise?), criminal procedure rules that limit public power<sup>40</sup> will come from the courts or they will come from nowhere.

A new book by Welsh White relates an incident that illustrates the formidable political power possessed by the law enforcement community.<sup>41</sup> As the result of a lawsuit brought by an alleged victim of abusive police interrogation practices, a police investigator looked into charges against a Chicago police commander and those working for him. He concluded that for a period of more than ten years the commander and his men had been torturing suspects into confessing. In 1993, the commander was dismissed from the police force.<sup>42</sup> But allegations of police misconduct continued to fill the air. For example, ten Illinois prisoners on death row maintained that the Chicago commander and his men had extracted confessions from them by

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38. See, e.g., Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2067 (2000) (alluding to congressional and local jurisdictional decreases in resources devoted to indigent defense).

39. See also Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 542 (1975) (deploring the fact that Congress simply attempted to repeal the 1967 Supreme Court cases extending right to counsel to police lineups without offering anything in their place).

40. Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 45-46 (2001) (citations omitted).

41. See WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* 128-36 (2001).

42. See *id.* at 130.

torture.<sup>43</sup>

In the wake of the controversy surrounding these alleged police torture cases, the Illinois legislature at one point seemed prepared to enact a law requiring the police to video or audiotape their interrogation practices. But the law enforcement community expressed its strong opposition to the bill, claiming that it would create new obstacles and expand the rights of the accused “at the expense of crime victims, public safety and law enforcement.”<sup>44</sup> The bill died in committee.<sup>45</sup>

As Justice Traynor noted long ago in *Cahan*, “even when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights” because illegal arrests and unlawful searches “lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials . . . .”<sup>46</sup> Moreover, unlike the Chicago torture cases, illegal searches and seizures do not raise doubts as to a defendant’s innocence. If the police and their allies can crush legislative reform efforts in the confessions area as decisively as they did in the wake of the Chicago police scandal—despite serious questions about the guilt of a number of people on death row—how much difficulty will they have defeating legislative proposals to impose direct sanctions on them for committing Fourth Amendment violations?

One half of Judge Guido Calabresi’s proposed alternative to the exclusionary rule is to impose a system of “direct punishment” on the offending police officer.<sup>47</sup> Perhaps Judge Calabresi has in mind the imposition of substantial fines, suspensions without pay, or dismissal from the force, depending on the seriousness of the officer’s Fourth Amendment violation. One fails to see, however, why this part of his proposal will fare any better in the political arena than many other “direct sanction” proposals that have failed over the years.

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43. *See id.* at 130-31.

44. *Id.* at 136.

45. *See id.*

46. 282 P.2d 905, 913 (Cal. 1955).

47. Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 116 (2002).

## VI. POLICE PERJURY AND JUDICIAL "WINKING"

As other critics of the exclusionary rule have done,<sup>48</sup> Judge Calabresi notes that the police frequently lie in court to evade the exclusionary rule.<sup>49</sup> Still worse, there is good reason to believe that in a significant number of cases, judges "knowingly accept police perjury as truthful."<sup>50</sup> There are at least two responses to this criticism of the exclusionary rule.

First, Myron Orfield's interviews with approximately forty Chicago criminal division judges, prosecutors, and public defenders left no doubt that police perjury and judicial toleration of it were widespread, but he concluded:

Although recognizing the [exclusionary] rule's imperfections, respondents believe it is the only mechanism that injects any restraint in the system, or any respect for rights. Though often evaded, the respondents believe that by creating a *possibility* of suppression, the rule makes<sup>51</sup> the Fourth Amendment a factor in police and judicial thinking.

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Critics might also argue that pervasive perjury is a cost of the exclusionary rule, and as such, outweighs any incremental benefit gained by the rule's uneven deterrent effect. Respondents . . . nevertheless believe that the exclusionary rule has dramatically improved police behavior and should be retained. . . . Today, while police often perjure themselves, they also, because of the exclusionary rule, often obey the Fourth Amendment.<sup>52</sup> By any measure, this is an improvement [over pre-*Mapp* days].

Second, as Laurie Levenson recently observed, there is no evidence and no reason to believe "that a police officer will be any less motivated to lie in an administrative hearing, where [his] reputation and job position are at risk, than in a criminal proceeding where the court threatens to exclude evidence."<sup>53</sup> "[I]t is important to realize,"

48. See, e.g., L. Timothy Perrin, et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 677 (1998).

49. See Calabresi, *supra* note 47, at 113.

50. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992). The study was based on interviews with thirteen judges, eleven prosecutors, and fourteen public defenders in the Chicago criminal court system. See *id.* at 81.

51. *Id.* at 123.

52. *Id.* at 132.

53. Laurie L. Levenson, *Administrative Replacements: How Much Can They Do?*, 26 PEPP. L. REV. 879, 881 (1999).

admonishes Orfield, in the course of concluding his study of Chicago narcotics officers, "that any remedial scheme that imposes a personal sanction on an officer is likely to encourage perjury."<sup>54</sup>

## VII. THE COSTS OF THE EXCLUSIONARY RULE

As many other critics of the exclusionary rule have done,<sup>55</sup> Judge Calabresi assumes that the criminal defendant who benefits from the application of the search and seizure exclusionary rule will often be a murderer or rapist.<sup>56</sup> However, an empirical study by Thomas Davies, called "[t]he most careful and balanced assessment conducted to date of all available empirical data,"<sup>57</sup> reveals that the exclusion of evidence in murder, rape, and other violent cases is exceedingly rare.<sup>58</sup> "The most striking feature of the data," reports Davies, "is the concentration of illegal searches in drug arrests (and possibly weapons possession arrests) and the extremely small effects in arrests for other offenses, including violent crimes."<sup>59</sup>

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54. Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1055 (1987). This study, based on interviews with twenty-six narcotics officers in the Chicago Police Department, was conducted while Orfield was still a law student. Seven years later when Orfield published his second empirical study, he reported that "many" of the judges, prosecutors and public defenders interviewed expressed the view "that to the extent a tort remedy would actually impose damages on police officers, it would cause the police to perjure themselves even more frequently [than they do now to thwart the impact of the exclusionary rule]." Orfield, *supra* note 50, at 126.

It strikes me that what Orfield has to say about tort actions applies to administrative sanctions as well. An officer is likely to be just as fearful about being dismissed or suspended (without pay) from the police force, or forced to pay a substantial fine, as he is about having to pay tort damages.

55. See *California v. Minjares*, 443 U.S. 916, 927 (1979) (Rehnquist, J., dissenting from denial of stay); *Stone v. Powell*, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting); Amar, *supra* note 1, at 793-98; Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 425, 432-33 (1997).

56. See Calabresi, *supra* note 47, at 115.

57. LAFAVE, *supra* note 1, at 58.

58. See Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 640, 645. According to a five-year study of California data, illegal search and seizure problems were given as the reason for the rejection of only thirteen of more than 14,000 forcible rape arrests (0.09%) and only eight of approximately 12,000 homicide arrests (0.06%). See *id.* Another study, a three-state (Illinois, Michigan and Pennsylvania) study by Peter Nardulli involving some 7,500 cases, disclosed that none of the successful motions to exclude illegally seized evidence "involved exceptionally serious cases such as murder, rape, armed robbery, or even unarmed robbery." Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 596 n.47.

59. Davies, *supra* note 58, at 680. The California data reveals that less than 0.3% (fewer

It may be that search and seizure problems arise much less frequently in murder, forcible rape, and other violent crime cases than they do in drug and weapons possession cases. Myron Orfield furnishes two other explanations, one encouraging, the other not.

The first explanation is that the more serious the crime, the greater the officer's desire to see the perpetrator convicted and, because the police care more about convictions in these cases, the more potent the exclusionary rule's deterrent effects.<sup>60</sup> Moreover, "big cases" are more likely to involve officers in specialized units "who are more likely to take the time and care necessary to comply with the Fourth Amendment."<sup>61</sup>

The second explanation is that in "heater" cases (i.e., big cases that have "the potential to arouse public ire" if the defendant "goes free" because the police violated the Fourth Amendment),<sup>62</sup> many judges will feel tremendous pressure to admit the illegally seized evidence and will often find a way to do so.<sup>63</sup> It is almost as if many judges, at least those who have to run for re-election, have informally adopted one law professor's proposal to make an exception to the exclusionary rule in prosecutions for treason, espionage, murder, armed robbery, and kidnapping.<sup>64</sup> I find this an unfortunate and dispiriting development,<sup>65</sup> but it is only one of a number of ways in which the courts have accommodated the needs of law enforcement in the

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than three in 1,000) of arrests for all non-drug offenses are rejected by prosecutors because of illegal searches. *Id.* at 619. Davies estimates that "the cumulative loss of drug arrests at all stages of felony processing in California is around 7.1%." *Id.* at 681. In *United States v. Leon*, the Court, per Justice White, estimated that "the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%." 468 U.S. 897, 907 n.6 (1984).

One may argue, as the Court did in *Leon*, that the small percentages of cases lost because of the exclusionary rule "mask a large absolute number." *Id.* at 907 n. 6. As Davies has pointed out, however, "raw numbers are not as useful for policy evaluation as percentages. In a system as large as the American criminal justice system . . . almost any nationwide measurement or estimate will look large if expressed in raw numbers." Davies, *supra* note 58, at 670.

60. See Orfield, *supra* note 50, at 82, 85, 115.

61. *Id.* at 115.

62. *Id.* at 116.

63. See *id.* at 115-23.

64. See John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046-49 (1974).

65. For extensive criticism of Professor Kaplan's proposal to limit the impact of the exclusionary rule see Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987). But see Stuntz, *supra* note 1, at 447 ("[T]he visibility of the criminal who walks away [because of the exclusionary rule] . . . makes courts see the consequences of [their rulings and may be] . . . a way of limiting counter-majoritarian excess.").

exclusionary rule era.

The Warren Court has been disbanded for more than thirty years. Since then, with only a few exceptions,<sup>66</sup> the Burger and Rehnquist Courts have waged a kind of “guerilla warfare” against the law of search and seizure.<sup>67</sup> As a result, Judge Cardozo’s oft-quoted criticism of the exclusionary rule— “[t]he criminal is to go free because the constable has blundered”<sup>68</sup>—is out of date. The Court has taken a grudging view of what amounts to a “search” or “seizure” within the meaning of the Fourth Amendment and has taken a relaxed view of what constitutes consent to an otherwise illegal search or seizure; it has so softened the “probable cause” requirement, so increased the occasions on which the police may act on the basis of “reasonable suspicion” or in the absence of any reasonable suspicion, and so narrowed the thrust of the exclusionary rule that nowadays the criminal only “goes free” if and when the constable has blundered badly.<sup>69</sup>

66. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that the use of a thermal imager or, more generally, any “sense-enhancing” technology to obtain “any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search—at least where (as here) the technology in question is not in general use”) (citation omitted).

67. Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987).

68. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

69. A dozen cases should suffice. See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (concluding that exclusionary rule does not apply to parole revocation hearings even when officer who conducted illegal search was aware of person’s parole status); *Whren v. United States*, 517 U.S. 806 (1996) (ruling that police may stop a motorist where there are adequate grounds to believe that some traffic violation has occurred, even though the stop is pretextual); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (ruling that police may search dwelling house on “apparent authority” of a third party who lacks actual authority to consent); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (holding that in order to combat drunk driving, police may stop all motorists at sobriety check points absent any individualized suspicion); *Alabama v. White*, 496 U.S. 325 (1990) (illustrating how little is needed to constitute “reasonable suspicion” to stop suspect’s car and to question her); *California v. Greenwood*, 486 U.S. 35 (1988) (finding that police examination, for evidence of crime, of contents of opaque sealed plastic trash bags left for collection not a “search”); *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that police aerial surveillance of a fenced-in backyard not a “search”); *Illinois v. LaFayette*, 462 U.S. 640 (1983) (finding that police may search through shoulder bag at stationhouse inventory of arrestee’s effects, even though all the inventory objectives could be achieved “in a less intrusive manner”); *Illinois v. Gates*, 462 U.S. 213 (1983) (replacing existing probable cause structure with “totality-of-circumstances” test and stressing that probable cause is a “fluid concept” and that it requires only a “substantial chance of criminal activity”); *Florida v. Royer*, 460 U.S. 491 (1983) (stating in passing that certain police-citizen “encounters” or “contacts,” such as asking a person at an airport to show her driver’s license and airline ticket, were not a “seizure”); *New York v. Belton*, 453 U.S. 454 (1981) (finding that even though police lack any reason to believe that a car contains evidence of crime, if they have adequate grounds to make a custodial arrest of driver, they may search

Judge Calabresi argues that the downsizing of the Fourth Amendment and the protections to privacy it provides, because of the pressure the exclusionary rule puts on courts to avoid freeing a guilty defendant, should make liberals hate the exclusionary rule.<sup>70</sup> I think not.

A meaningful tort remedy or administrative sanction or *any other effective alternative* to the exclusionary rule would also exert strong pressure on courts to make the rules governing search and seizure more "police-friendly." As Monrad Paulsen noted on the eve of the *Mapp* case: "Whenever the rules are enforced by meaningful sanctions, our attention is drawn to their content. The comfort of Freedom's words spoken in the abstract is always disturbed by their application to a contested instance. Any rule of police regulation enforced in fact will generate pressures to weaken the rule."<sup>71</sup>

There is no denying that one of the effects of the exclusionary rule has been to diminish the protection provided by the Fourth Amendment. But this is probably the price we would have had to pay for *any* means of enforcing the Amendment that had a bite—one that actually worked.

The only time the Amendment would not impose the societal costs that critics of the exclusionary rule complain about—and the only time it would not put pressure on the courts to water down the rules governing search and seizure—would be if it were "an unenforced honor code that the police may follow in their discretion."<sup>72</sup>

#### VIII. JUDGE CALABRESI'S PROPOSAL

As Tracey Maclin has reminded us,<sup>73</sup> ever since the 1930s,<sup>74</sup> commentators have deplored the inadequacies of existing tort remedies against offending police officers and proposed various ways

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the entire interior of the car, including closed containers found in that area, even after the driver has been removed from the car and handcuffed); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (holding that suspect may effectively consent to an otherwise unlawful search even though he was never informed, and no evidence existed that he was ever aware, of his right to refuse officer's request).

70. See Calabresi, *supra* note 47, at 112. See also Slobogin, *supra* note 1 (arguing that the exclusionary rule is systemically harmful to Fourth Amendment values).

71. Paulsen, *supra* note 1, at 256.

72. *U.S. v. Leon*, 468 U.S. 897, 978 (1984) (Stevens, J., dissenting).

73. See Maclin, *supra* note 1, at 60 n.289.

74. See Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936); William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939).



to invigorate these remedies (although nothing seems to have come of it). Therefore, I find quite noteworthy Judge Calabresi's view that, in the ordinary unlawful arrest or illegal search case, tort remedies will not work.<sup>75</sup> I agree with him that, although jurors often identify with the plaintiff in a tort action, they are unlikely to do so when the plaintiff is a criminal or a suspected criminal.<sup>76</sup> However, I find the alternative to the exclusionary rule that Judge Calabresi proposes disappointing.

Judge Calabresi's proposal has two parts: First, after the person has been convicted, a hearing would take place to determine whether the police had obtained evidence illegally and, if so, whether the officer(s) had done so inadvertently, negligently, willfully, or wantonly. Based on the flagrancy of the police misconduct, the defendant would then be given a reduction of two, three, or four points on the sentencing guidelines.<sup>77</sup> Second, the officer or officers who were found to have violated the Fourth Amendment would then be subjected to a separate system of direct punishment which would vary, depending upon the flagrancy of the misconduct.<sup>78</sup> I assume that one or more of the officer's superiors would determine what the punishment should be.

A reduction of the prison sentence, based on the degree to which the police violated the defendant's rights, is an unusual aspect of Judge Calabresi's proposal. He assures us that this feature would provide the defendant with a significant incentive to bring up the fact that the evidence introduced by the state was obtained illegally. Perhaps so,<sup>79</sup> but the more relevant question is how, if at all, this part of the judge's proposal would influence the police. Would it constitute a *disincentive*—a means of eliminating, or at least reducing, significant police incentives to illegal searches where the police contemplate prosecution and conviction?<sup>80</sup> I think not. This feature of

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75. See Calabresi, *supra* note 47, at 114.

76. See *id.*

77. See *id.* at 116.

78. See *id.* at 116-17.

79. Judge Calabresi assures us that since, under his proposal, the legality of the police conduct would not be examined until the trial was over and the defendant convicted, the prosecutor would lack any incentive to charge more. See *id.* at 116. But every conscientious prosecutor would know at the outset, long before a post-trial hearing took place, whether or not the police acted illegally in the case, or, at the very least, whether or not there was a serious possibility that, at a post-trial hearing, one or more officers might be found to have acted illegally.

80. See generally Amsterdam, *supra* note 1, at 431-32; Phillip Johnson, *New*

Judge Calabresi's proposal would likely have no impact on the police at all.

Chief Justice Burger once argued that the exclusionary rule does not affect police officers' behavior.<sup>81</sup> However, Myron Orfield's Chicago study strongly indicates otherwise.<sup>82</sup> Every judge, prosecutor, and public defender he interviewed expressed the belief that "officers care about convictions and experience adverse personal reactions when they lose evidence."<sup>83</sup>

Under Judge Calabresi's proposal, however, the victim of the police misconduct could be, and would be, convicted on the basis of evidence the police obtained in violation of the Fourth Amendment, even when the violation was gross or willful. I am convinced that the police do care whether the evidence they obtained leads to a conviction or whether such evidence is thrown out by the court. But a conviction is one thing; the length of the sentence is something else. I find it hard to believe that the police care one whit whether the person convicted on the basis of their unlawful acquisition of evidence is sentenced to four years or five, ten months or twelve. From the perspective of the police, the important thing—perhaps the only thing—is that their actions resulted in the conviction of a criminal and a substantial stretch of prison time for him. In other words, their illegal actions "paid off."

Therefore, the efficacy of Judge Calabresi's proposed alternative to the exclusionary rule must turn on the other half of his proposal—what he calls a separate system of direct punishment of the individual officer after a post-trial determination that the officer committed a search and seizure violation.<sup>84</sup>

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*Approaches to Enforcing the Fourth Amendment* 4 (Working Papers, Sept. 1978) (on file in the University of Michigan Law Library), quoted in YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 229-30 (5th ed. 1980) and cited in *United States v. Leon*, 468 U.S. 897, 916 n.14 (1984).

81. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416-17 (Burger, C.J., dissenting).

82. See Orfield, *supra* note 50 and accompanying text.

83. *Id.* at 82. Those interviewed also believed that "police change their behavior in response to the suppression of evidence" and that the operation of the exclusionary rule "effectively educates officers in the law of search and seizure and that the law is not too complicated for police officers to do their jobs effectively." *Id.*

For an earlier study by the same author of Chicago narcotics officers see the discussion in note 54, revealing that officers experience "personal disappointment at the loss of a potential conviction" and that "[t]he significant amount of time spent on these investigations, together with their danger and uncertainty, create a strong emotional commitment to conviction." Orfield, *supra* note 54, at 1042.

84. See Calabresi, *supra* note 47, at 116.

We can be fairly certain that if the police believed Judge Calabresi's system of direct punishment for Fourth Amendment violations would really work, they would resist its adoption for the same reasons they would be unhappy about other systems of "direct sanctions" against them (such as tort remedies) that really worked. They would argue forcefully, and with some plausibility, that if six-month suspensions without pay and/or substantial fines were imposed on them for search and seizure violations (presumably the kind of "direct punishments" Judge Calabresi contemplates), they "would be afraid to conduct the searches they should make."<sup>85</sup>

Orfield's study of Chicago narcotics officers discloses that they clearly preferred the exclusionary rule to a system of "direct sanctions" against them.<sup>86</sup> This finding may be somewhat misleading. Few police are enamored of the exclusionary rule. If they had their druthers, most would prefer the pre-*Mapp* days, when, in many states, no viable means of enforcing the protection against unreasonable search and seizure existed.<sup>87</sup> However, the police would rather live with an "indirect" sanction, like the exclusionary rule, than a direct

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85. For an example of this line of thought, see Orfield, *supra* note 54, at 1053. See also Stuntz, *supra* note 1:

[O]verdeterrence is a danger because the police have no strong incentive to undertake the marginal (legal) search or arrest. The result is that the usual legal tool—damages, fines, criminal punishment—are likely to cause more harm than good if they are widely used. If an officer faces serious loss whenever he makes a bad arrest, he will make fewer bad arrests, but also many fewer good ones.

*Id.* at 445.

86. See Orfield, *supra* note 54, at 1051-54.

87. See *supra* notes 10-29. But see Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24 (1980). This is, so far as I know, the most comprehensive study of police attitudes toward the exclusionary rule. Loewenthal, who taught police officer students at John Jay College of the City University of New York at the time, conducted many interviews with police commanders on all levels, as well as with the police officer students. He was also a participant-observer on forty tours of duty concerning various phases of police work.

Professor Loewenthal found "strong evidence that, regardless of the effectiveness of direct sanctions, police officers could neither understand nor respect a Court which purported to impose constitutional standards on the police without excluding evidence obtained in violation of those standards." *Id.* at 29. He also found that the police "have great difficulty believing that standards can have any real meaning if the government can profit from violating them," *id.* at 39, and that regardless of what substitute remedies may be provided, the police "are bound to view the elimination of the exclusionary rule as an indication that the fourth amendment is not a serious matter, if indeed it applies to them at all." *Id.* at 30. See also Orfield, *supra* note 50, at 128 ("None of the narcotics officers previously interviewed believed that the exclusionary rule should be abolished. Several officers said they appreciated the rule because it gave them a reason, within their peer group, to act properly. Some thought a 'good faith exception' would be appropriate."); Orfield, *supra* note 54, at 1051-52 (same).

one. Moreover, the exclusionary rule is not something the police can fight and defeat in the political arena—it is a remedy that judges control and can apply “without being dependent upon the actions of other branches of government.”<sup>88</sup>

The police can, however, have a large effect on the alternatives to the exclusionary rule, because other actors such as legislators, prosecutors, and police brass control these.<sup>89</sup> For one thing, the police can invoke their formidable political clout<sup>90</sup> to prevent a plan like Judge Calabresi’s from ever being adopted. Moreover, even if such a plan were adopted, the police could prevent it from being applied in appropriate cases.

Judge Calabresi’s proposed system would probably not overcome the resulting police resistance. But the greater danger is that a plan like the judge’s might be adopted, displacing the exclusionary rule, yet rarely be enforced. It might turn out to exist only on paper.

One cannot help thinking of *INS v. Lopez-Mendoza*,<sup>91</sup> a case that declined to apply the exclusionary rule to civil deportation proceedings. One reason the Court gave for the conclusion it reached was that the Immigration and Naturalization Services (“INS”) “has its own comprehensive scheme for deterring Fourth Amendment violations by its officers”<sup>92</sup>—a system of rules and regulations restricting INS agents’ conduct in dealing with aliens, a program for giving new officers “instruction and examination in Fourth Amendment law,” and “a procedure for investigating and punishing immigration officers who commit Fourth Amendment violations.”<sup>93</sup> These programs and procedures, the Court assured us, “reduce the likely deterrent value of the exclusionary rule.”<sup>94</sup>

The trouble was, as dissenting Justice White was quick to point out, that the *Lopez-Mendoza* majority failed to cite “a single instance” in which the INS procedures had been invoked.<sup>95</sup> Moreover, other

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88. Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835, 838 (1999).

89. *See id.*

90. *See supra* notes 37-46 and accompanying text.

91. 468 U.S. 1032 (1984).

92. *Id.* at 1044.

93. *Id.* at 1044-45.

94. *Id.* at 1045.

95. *Id.* at 1054 (White, J., dissenting). Nor did the INS claim that any of the eleven officers terminated and any of the nine officers suspended in recent years for misconduct toward aliens had been disciplined for Fourth Amendment violations, and it appears that all the officers terminated “were terminated for rape or assault.” *Id.* at 1055 n.2.

portions of the majority opinion were likely to shake one's confidence in the vaunted procedures the INS was supposed to have in place for deterring, investigating, and punishing Fourth Amendment violations. Even an "occasional invocation of the exclusionary rule might significantly change and complicate the character of [deportation] proceedings," the Court told us, because "[n]either the hearing officers nor the attorneys participating in those hearings are likely to be well versed in the intricacies of Fourth Amendment law."<sup>96</sup> The Court also indicated that application of the exclusionary rule to deportation proceedings "might well result in the suppression of large amounts of information that had been obtained entirely lawfully," because "INS arrests occur in crowded and confused circumstances."<sup>97</sup> Moreover, the Court told us that requiring INS agents to keep "a precise account of exactly what happened in each particular arrest" would be impractical, considering the "massed numbers of ascertainably illegal aliens . . . ."<sup>98</sup>

To avoid a replay of the paper procedures for deterring Fourth Amendment violations in place at the INS, I suggest that we proceed slowly and cautiously with Judge Calabresi's proposal. As noted earlier, many unlawful arrests and searches do not turn up any incriminating evidence or result in any criminal prosecutions.<sup>99</sup> In the unlikely event that Judge Calabresi's scheme of directly punishing the offending officer is put in place, a better plan is to keep the exclusionary rule in the first three to five years for instances of police misconduct that result in criminal prosecutions and to use the new

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One of the exclusionary rule's virtues is that "[c]laims are inexpensive to raise, and the facts on which they rest usually do not involve much independent digging by defense counsel." Stuntz, *supra* note 1, at 453. Moreover, the fact that the exclusionary rule is tied to criminal prosecutions "ensures that lots of claims are raised, which in turn allows courts to serve as reasonably good watchdogs for certain kinds of police misbehavior." *Id.* at 455.

96. *Lopez-Mendoza*, 468 U.S. at 1048.

97. *Id.* at 1049.

98. *Id.* at 1049-50. This led dissenting Justice White to say:

Rather than constituting a rejection of the application of the exclusionary rule in civil deportation proceedings, however, [the majority's] argument amounts to a rejection of the application of the Fourth Amendment to the activities of INS agents. If the pandemonium attending immigration arrests is so great that violations of the Fourth Amendment cannot be ascertained for the purpose of applying the exclusionary rule, there is no reason to think that such violations can be ascertained for purposes of civil suits or internal disciplinary proceedings, both of which are proceedings that the majority suggests provide adequate deterrence against Fourth Amendment violations.

*Id.* at 1059 (White, J., dissenting).

99. *See supra* note 31.

administrative sanctions against those officers whose misconduct failed to produce any incriminating evidence. In the unlikely event that an appraisal of the situation three or five years later demonstrates that the judge's system of direct punishment really *works*—that police officers are regularly punished for “the frequent infringements [of the Fourth Amendment] motivated by commendable zeal” as well as for “the grossest of violations”<sup>100</sup>—there will be time enough to abolish the exclusionary rule.

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100. I have borrowed language from the lectures on search and seizure delivered by Justice Potter Stewart shortly after he stepped down from the Supreme Court. Stewart, *supra* note 1:

Taken together, the currently available alternatives to the exclusionary rule . . . punish and perhaps deter the grossest of violations . . . . But they do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice.

*Id.* at 1388-89. See also Cloud, *supra* note 88:

Remedies aimed directly at officers who break the law . . . are rational methods for pursuing the goal of deterring misconduct. Undoubtedly, they are more likely to get the attention of individual officers than is the suppression of evidence in criminal prosecutions. The problem, of course, is that no one seriously expects that those remedies will be rigorously enforced in any but the most egregious cases. This is true, in part, because enforcing those remedies is a task for other government actors, including police departments and prosecutors. It is not a task for judges . . . .

*Id.* at 853.

**PANEL III:**

**TRUTH, THE JURY, AND THE ADVERSARIAL SYSTEM**

*PANELISTS:*

SHARI DIAMOND  
THOMAS WEIGEND  
GERALD WALPIN

