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John L. Roche

A VIABLE SUBSTITUTE FOR THE EXCLUSIONARY RULE: A CIVIL RIGHTS APPEALS BOARD

JOHN L. ROCHE*

Is the Supreme Court's judicially-created exclusionary rule to be a permanent part of our national jurisprudence? Or is there an alternative which may reasonably provide a substitute remedy, which is at the same time both more effective and more positive? That there is such an alternative is the affirmative thesis of this paper.

I

It is no longer news that the judicial activism of the Supreme Court in formulating a federal exclusionary rule,[1] and then extending its application to the states,[2] came about because of legislative inaction. The expressions of the majority of the Court implied that the Congress and the various state legislatures had failed in their duty to find a way adequately to control police invasions of the civil rights of the citizens,[3] thereby

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*Associate Professor, University of San Diego School of Law. J.D., 1965, University of San Diego; member of the California bar.

[1]Weeks v. United States, 232 U.S. 383 (1914). In *Weeks*, the federal government sought to adduce evidence consisting of letters and correspondence of the defendant, seized in his house in his absence and without his authority. The United States Marshal who effected the seizures held no warrant for the arrest of the accused and none for the search of his premises. The Court held that in a federal prosecution the fourth amendment barred the use of evidence secured through an illegal search and seizure.

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

282 U.S. at 393. Thus the *Weeks* Court indulged in two assumptions: (1) that exclusion of evidence would discourage illegal behavior, and (2) that there was no feasible alternative for controlling such behavior.

[2]Mapp v. Ohio, 367 U.S. 643 (1961).

[3]In extending the exclusionary rule to the states, the Court in *Mapp v. Ohio* focused on the lack of viable alternative measures to enforce the fourth amendment.

> The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this court since *Wolf [v. Colorado*, 338 U.S. 25 (1949)].

367 U.S. at 652-53. In another decision extending the exclusionary rule, the Court quoted with approval from People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955):

> We have been compelled to reach that conclusion (to adopt the exclusionary rule) because other remedies have completely failed to secure compliance with the constitutional provisions on the part of the police officers

leaving a void which must necessarily be judicially filled.[4]

Because of this legislative vacuum there was created, and then later extended, the judicial concept that evidence obtained in violation of the constitutional rights of the citizens was not to be admitted in the courts of the land: the exclusionary rule. What is unfortunate for our national judicial system, and deserves our attention, is that after nearly sixty years of negative experience[5] and loud public and news media complaint, the same legislative vacuum still exists,[6] albeit slightly modified. The progression in the search by the Supreme Court for an effective remedy still goes on, perhaps even at an accelerated pace. For example, dissatisfied with the exclusionary rule alone, the Court has now proceeded to invent a common law civil remedy affecting federal officers[7] and supplementing the limited rights available as to state officers in the Civil Rights Act of 1871.[8]

What occurs next in this progression is unknown, of course, but whether one speaks of the Warren Court, the Nixon Court or any other,

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> with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers . . . . Experience has demonstrated, however, that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court. 44 Cal. 2d at 445, 447, 282 P.2d at 911-12, 913.

Elkins v. United States, 364 U.S. 206, 220 (1960).

[4]*See* Mapp v. Ohio, 367 U.S. 643, 652-53 (1961); Weeks v. United States, 232 U.S. 383, 392-94 (1914).

[5]If the purpose of the exclusionary rule be regarded as deterrence, recent analysis casts considerable doubt upon the efficacy of the rule. *See* footnotes 9-14 and accompanying text *infra*. Moreoever, as Wigmore noted, the exclusionary rules "serve neither to protect the victim nor to punish the offender but rather to compensate the guilty victim by acquittal and to punish the public by unloosing the criminal in their midst. . . ." 8 WIGMORE ON EVIDENCE § 2184, at 51-52 (McNaughton ed. 1961).

[6]*See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting).

[7]In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), the Supreme Court held that a cause of action for damages against federal law enforcement officers who violate the fourth amendment could be inferred directly from constitutional provisions. 403 U.S. at 397.

[8]Civil Rights Act of 1871 § 1, 42 U.S.C. § 1983 (1970).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

it appears clear that our national trend is toward forcing a legislative-judicial confrontation which will require action by the former and which must be more than a palliative. To date, with public dissatisfaction focused on the actions of the Court, the legislature has been apparently willing to ignore the problem, but this passive attitude cannot continue much longer. The exclusionary rule is, on balance, bad. Both its detractors and its advocates have continually pointed out its weaknesses.[9] The Court's own decisions have recognized that the exclusion of relevant and probative evidence serves in the main to protect the guilty.[10] This is inherent in the rule because, *e.g.*, the innocent person whose rights have been violated rarely appears in court as a result of that violation, and therefore there is no forum in which to apply the rule.[11] Additionally, the rule can apply only in those situations where the law enforcement agency at fault has acted for the purpose of obtaining evidence for prosecution rather than for other purposes, such as harrassment of less favored segments of the society.[12]

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[9]Early in the century, Judge (later Justice) Cardozo characterized the exclusionary rule's anomalous result in the following terms:

> The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free.

People v. Defore, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587, 588 (1926). Justice Jackson catalogued the doctrine's defects for the Court in Irvine v. California, 347 U.S. 128 (1954):

> Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.

347 U.S. at 136. *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967) [hereinafter cited as TASK FORCE REPORT: THE POLICE]; Barrett, *Exclusion of Evidence Obtained by Illegal Searches: A Comment on* People v. Cahan, 43 CALIF. L. REV. 565 (1955); Barrett, *Personal Rights, Property Rights and the Fourth Amendment,* 1960 SUP. CT. REV. 46, 53-57 (1960); Wingo, *Growing Disillusionment with the Exclusionary Rule,* 25 SW. L.J. 573 (1971); Comment, *Effect of* Mapp v. Ohio *on Police Search and Seizures Practices in Narcotics Cases,* 4 COLUM. J.L. & SOC. PROB. 87 (1968); Comment, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards,* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 104 (1970).

[10]*See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971); Draper v. United States, 358 U.S. 307, 314 (1959); Wolf v. Colorado, 338 U.S. 25, 27-33 (1949).

[11]*See* Irvine v. California, 347 U.S. 128, 136 (1954); Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966); People v. Cahan, 44 Cal. 2d 434, 442, 282 P.2d 905, 913 (1955).

[12]Chief Justice Warren commented on this problem in *Terry v. Ohio:*

> Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions

If the purpose of our judicial system is to convict the guilty and to acquit the innocent, as would seem to be its proper role, the effect of the exclusionary rule is to detract from this end. Yet the rule goes on. Why? It seems apparent from the most recent statements of the Supreme Court that the rule will not be abrogated until such time as a reasonable alternative is provided.[13] The first practical requisite of any remedy for the excesses of the agents of the government is that it be effective, but the *a priori* judgments of writers and judges have for many years indicated that the exclusionary rule is not. Unfortunately, in the past these judgments could not be supported by scientifically gathered statistical information. Only recently has it come forcefully to our attention that, as stated by Chief Justice Burger in his dissent in *Bivens*, "there is no empirical evidence to support the claim that the [exclusionary] rule actually deters illegal conduct of law enforcement officials."[14] Despite this conclusion, we

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> of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

392 U.S. 1, 14 (1968). For example, 3,719 persons were arrested for investigation in Baltimore in 1964. After being held for up to 3 days, 98% were released without charge. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS at 121 (1967). *See generally* Hahn, *Ghetto Assessments of Police Protection and Authority*, 6 LAW & SOC'Y REV. 183 (1971).

[13]*See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 420-21 (1971). Moreover, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), four Justices indicated a willingness to reconsider Mapp v. Ohio, 367 U.S. 643 (1961), which applied the exclusionary rule to state trials. 403 U.S. at 490-91 (Harlan, J., concurring); *id.* at 493 (Burger, C.J., dissenting in part and concurring in part); *id.* at 510 (Blackmun, J., dissenting in part and concurring in part); *id.* at 496-500 (Black, J., concurring in part and dissenting in part).

[14]403 U.S. at 416. *See, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks]. Professor Oaks' exhaustive study was financed by a grant from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration of the United States Department of Justice. Based upon an evaluation of considerable empirical evidence, the study concludes:

> As a device for directly deterring illegal searches and seizures, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effects of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.

Id. at 755.

find that the Chief Justice is not disposed to relax the rule because of a fear of the consequences of the relaxation, *i.e.*, that it would only encourage other and greater intrusions by law enforcement officers into the private affairs of our citizens.[15]

The question thus presents itself as to why the various legislatures have not acted. The answer "politics" is not sufficiently enlightening. The operative factors, however, may well include the following: First, the public and the news media furor has, in the main, been directed at the courts. No real attempt has been made to address this public pressure to the legislature. Thus, without any constraint to act, legislators ordinarily do not; or if motivated to act, they feel that in this area they are politically impotent without the express backing of the public. Secondly, there is an organized and vocal segment of the society which perceives itself as being "pro-law enforcement." Its spokesmen asserverate that if we would cease interfering with law enforcement officers, the latter would quickly solve the crime problem. This group undoubtedly feels that proposals for legislative action will introduce other difficulties for policemen, who are only trying to perform their duties. Since this group is also likely to contain some of the stronger backers of the more conservative legislators, it has great political clout.

II

What type of remedy would be likely to provide the desired protection for the ordinary citizen, and still be economically and politically feasible? Several may be explored. For example, Justice Frankfurter, in 1949, had no compunction in remanding the injured party "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."[16]

The remedies of private action then, and in large part today, consisted of the common law tort causes of action in assault, battery, and false imprisonment.[17] Yet, as practicing lawyers know and the courts must recognize, the institution of any such law suit has always required considerable money for fees and costs in advance, or a high probability of recovery so that a contingent fee is acceptable to the attorney. Very few persons whose civil rights have been violated are likely to have either one available. Further, juries are historically sympathetic to the police. Moreover, when there is a dispute as to the facts, they tend to take the word

[15]403 U.S. at 420-21.

[16]Wolf v. Colorado, 338 U.S. 25, 31 (1949).

[17]Other possibly applicable tort causes of action include intentional or negligent infliction of mental distress, trespass to land or chattels, conversion and malicious prosecution. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971) under above headings; comments cited at note 18 *infra*.

of police officers over that of lay witnesses.[18] And even then, if recovery is obtained, the amount tends to be low, perhaps in part because the jury believes that the police officer-defendant has a limited income and that the government does not enter the financial picture.[19] The plaintiff is also frequently from a minority group, may not make a good appearance, may have a criminal record, and rarely is able to obtain a jury's sympathy.[20] The result is that most civil rights violations are not practicably and reasonably litigable under such common law tort causes of action.

Pari passu, what would be the effect of a criminal sanction? Can the legislature make it a crime for its officers to violate the civil rights of the citizens? This simplistic solution may, at first, seem to have some validity. We find, however, that since 1948 the federal government has proscribed the search of a private dwelling by federal officers without a warrant, unless consented to or pursuant to a lawful arrest.[21] A federal agent making such an unlawful search is subject to a penalty of up to $1,000 fine on the first offense, and up to $1,000 fine plus imprisonment for up to one year for each subsequent offense.[22] Perhaps, understandably, federal prosecutors have shown a great lack of interest in bringing criminal proceedings against their own law enforcement agents under the statute.[23]

An early attempt to provide a statutory civil remedy is contained in the Civil Rights Act of 1871, which provides, in one of its sections, for a

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[18]*See* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955) [hereinafter cited as Foote]; Comment, *The Case Against Improper Motive and Civil Immunity of Police*, 7 SAN DIEGO L. REV. 77 (1970). *See generally* Symposium on *Police Tort Liability*, 16 CLEV.-MAR. L. REV. 397-454 (1967).

[19]*Cf.*, Lankford v. Gelston, 364 F.2d 197, 202 (4th Cir. 1966). Several commentators have proposed legislation to impose liability on political subdivisions whose officers commit an offense. 3 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 25.17, 26.03 (1958); Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889 (1965).

[20]See Chief Justice Burger's observations to this effect at 403 U.S. 421-22.

[21]*See* Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955).

[22]18 U.S.C. § 2236 (1970) provides in pertinent part:

> Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling, without a warrant directing such search, or maliciously and without probable cause searches any other building or property without a search warrant, shall be fined for a first offense not more than $1000; and for a subsequent offense, shall be fined not more than $1000 or imprisoned not more than one year, or both.

Id.

[23]*See* Irvine v. California, 347 U.S. 128, 137 (1954); Wolf v. Colorado, 338 U.S. 25, 42 (Murphy, J., dissenting).

civil action for the deprivation of civil rights.[24] This particular action is, however, still available only as against state and local officers, and makes no provision for any effective control over federal agents. Also, this form of action is subject to the same problems as applied to the common law torts. Although the 1871 statute has been in effect for over a hundred years, its inability to deter wrongful police conduct must be taken as having been established by the fact that the Supreme Court, ninety years after its passage, extended the exclusionary rule to the states because it felt that there was no effective control over the local officers.[25] More recently, Chief Justice Burger conceded that private damage actions against individual police officers have not adequately remedied the problems of error and deliberate misconduct by law enforcement officials.[26]

The remedy of injuncion against police officials to prevent repeated abuses is reasonably confined to such a narrow area as to be almost totally ineffective against the casual or one-time-only violation.[27] In the usual case there is just no opportunity for injunction, or appeal to disinterested intervention. "The citizen's choice is quietly to submit to whatever the officers undertake or to resist at the risk of arrest or immediate violence."[28] The type of case in which an injunction may be used is, perhaps, best exemplified in the Fourth Circuit opinion of *Lankford v. Gelston*.[29] There police had undertaken systematically to search whole areas of a minority community, admittedly without probable cause to do so.[30] Speaking for a unanimous court, sitting *en banc,* Judge Sobeloff

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[24]Civil Rights Act of 1871 § 1, 42 U.S.C. § 1983 (1970). For text of § 1983, see note 8 *supra. See also* District of Columbia v. Carter, ___ U.S. ___, 93 S. Ct. 602 (1973) (§ 1983 held inapplicable in the District of Columbia since it is not a "state or territory.") It is important to note that § 1983 provides no remedy against the municipal employer. Monroe v. Pape, 365 U.S. 167 (1961).

[25]Mapp v. Ohio, 367 U.S. 643 (1961).

[26]Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting).

[27]Injunction as a remedy for unconstitutional acts by the police is authorized by 42 U.S.C. § 1983 (1970). For a discussion of the injunction as a remedy for civil rights violations by police see Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

[28]Brinegar v. United States, 338 U.S. 160, 181-82 (1949) (Jackson, J., dissenting).

[29]364 F.2d 197 (4th Cir. 1966).

[30]The court stated:

> This case reveals a series of the most flagrant invasions of privacy ever to come under the scrutiny of a federal court. . . . The parties seeking redress have committed no acts warranting violation of the privacy of their homes. . . . It was not contended by the Attorney General . . . that information from an anonymous and unverifiable source is probable cause for the search of a home.

Id. at 201-2.

reversed the judgment of the trial court and remanded for a decree enjoining the police department from conduct which would, in any event, have been unlawful. Thus the effect of the injunction was merely to order the police to obey the law. There was no recovery for the persons whose rights had already been violated, nor was there any provision for reimbursement for the costs of bringing suit by the persons acting as plaintiffs for the community. In effect, then, certain individuals within the community were put to the bother and expense of litigation in order to have the police ordered to obey the law. The injustice of this could not have been more flagrant.

Still another possible remedy would be the institution of a detached and neutral official, whose duties would be to investigate the claims of wrongdoing by government agents and officials, and attempt to adjust them. Frequently called by the European title of "ombudsman," this person would be charged with insuring that governmental officials, police officers, and others act properly in the conduct of their duties. The conflict of interest is, however, quite obvious. If the ombudsman is an appointed official, holding office at the will of some elected official, and therefore beholden to him as the plans advocated seem to contemplate, pressure could be brought to bear upon him. It then could not be expected that the ombudsman would vigorously attack the administration of the very official to whom he owed his position. Within this context the ombudsman appears to be a glorified public relations officer, whose job it is to smooth over complaints and to quiet dissent and criticism. These conclusions are reinforced by the fact that, where employed and where now contemplated, the ombudsman is generally given no power to take any action whatsoever, but must rely on his persuasiveness upon, and then cooperation from, those who are the very focus of the criticism.[31] The ombudsman's staff is generally tiny in relation to the size of the government whose agents he is to criticize, and he cannot order compensation for persons wronged or take matters into court. Those who are aware of the frequent outcries at the way in which professions regulate themselves, whether they are police, physicians, or attorneys, will recognize the inherent weaknesses in this scheme.

It may be hypothesized that in the future an effective remedy may be devised which will not apply a negative sanction. A considerable quantity of literature, usually relating to other fields than law, asserts that the positive reinforcement of proper behavior by reward is much more effec-

[31]TASK FORCE REPORT: THE POLICE at 200-4. For a critical analysis of the effectiveness of civilian review boards see Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964).

tive and lasting than is a negative system of punishing wrongful acts.[32] This position, of course, is not unanimous. The contrary view may be illustrated by the experience gained at the time that anti-discrimination laws were first proposed. Detractors pointed out that subjective mind-sets, opinions, characters, etc. could not be changed; the family, the schools, and public opinion would have this task spread out over the years. They argued that laws could not, even with sanctions, change men's minds. Proponents of anti-discrimination laws countered that prejudices and biases were not the focal point of the legislation—these could remain. What the law struck at was the conduct, not the views, of those practicing, not thinking, discrimination. The proponents of the laws won, and anti-discrimination statutes exist in the federal and many state jurisdictions.[33] But there can be no doubt that the positive approach has its place also. Police professionalization is not just an empty term. Serious efforts are being made in many portions of the nation to upgrade the educational level of police officers, their expertise in their field, and the adequacy of the selection techniques for choosing candidates for entering into police work.[34] Perhaps in the near future some type of blueprint may emerge whereby the encouragement of proper behavior can be made an integral part of the law enforcement field. Indeed, the first steps toward this goal have already been taken.[35] But it is suggested that the process be accelerated and the future drawn near.

III

What then may be suggested as an alternative approach to the present exclusionary rule and its application? A survey of the writers who have explored the problem, some antedating *Mapp*, indicates a preference for a tort theory of liability as holding out the best immediate hope.[36] How-

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[32]One author, for example, states:

> The cardinal tenet of operant conditioning is that positive reinforcement of behavior increases the likelihood of that behavior being repeated. Higher-order animals are to a great extent self-interested and future oriented so they will conduct themselves in a manner conducive to receiving rewards. . . . Therefore, the goal of police restraint will be facilitated if the police are offered an irresistable temptation to act discreetly. By selecting powerful reinforcers and arranging reward schedules efficiently, police administrators can induce behavior that could never be ordered.

Levine, *Implementing Legal Policies through Operant Conditioning: The Case of Police Practices*, 6 LAW & SOC'Y REV. 195, 210 (1971) [hereinafter cited as Levine.]

[33]For a discussion of this development in the field of labor law see M. FORKOSCH, A TREATISE ON LABOR LAW 126-7 (2d ed. 1965).

[34]*See, e.g.*, TASK FORCE REPORT: THE POLICE.

[35]*See* Levine, *supra* note 32 at 217; TASK FORCE REPORT: THE POLICE.

[36]*See, e.g.*, Barrett, *Exclusion of Evidence Obtained by Illegal Searches: A Comment on* People v. Cahan, 43 CALIF. L. REV. 565 (1955); *Report of the Committee on Criminal*

ever, these writers also seem to agree that such theories should not fall within the classical common law of tort rules. Rather, they should be significantly modified in a number of ways. These suggestions are first examined in some depth before attempting their amalgamation into a proposed positive substitute.

1. Governmental Liability

In order that the tort remedy may be effective, it is necessary that the doctrine of sovereign immunity be abrogated, thereby removing a shroud of legal protection of the governmental employer of the offending law enforcement agent.[37] One positive result will be to make available to the plaintiff a defendant of extensive financial responsibility, thereby permitting assurance of collection where damages are found. Moreover, this would eliminate one pressure upon an aggrieved person to settle for an inadequate amount, or not to sue at all. At a time when the policies underlying the theory of sovereign immunity have been mainly discredited, and when tort liability has been extended to such eleemosynary institutions as hospitals,[38] the theory of *respondeat superior* should in all fairness be applied to municipal employers as well.

This proposed rejection of sovereign immunity would also have the salutary effect of spreading the loss evenly over the whole range of taxpayers of the affected community. This is desirable, both for the reason that it reduces the impact as to the individual police officer concerned, and also that its effect should be felt by the employer and the citizens, *i.e.*, where the pocketbook is affected by higher taxes, a taxpayer is more likely to press for proper law enforcement. There is no public policy to be served here in allowing the police officer who is over-zealous in his duties to absorb the entire impact for his error, and ignoring the fact that he may have been encouraged into this activity by those who employ him.[39] And even in those instances where the employee was not encour-

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Law and Procedure, 29 CALIF. S.B.J. 263, 264 (1964); McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J. CRIM. L.C. & P.S. 266 (1961); Paulsen, *The Exclusionary Rule and Police Misconduct*, *52 J.* CRIM. L.C. & P.S. 255 (1961); Foote, *supra* note 18.

[37]For a general discussion of the doctrine of sovereign immunity with respect to torts see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 970-92 (4th ed. 1971); Jaffe, *Suits Against Governments and Officers*, 77 HARV. L. REV. 1,209 (1963) (hereinafter cited as Jaffe).

[38]*See, e.g.*, Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958) and Rabon v. Rowan Memorial Hosp., 269 N.C. 1, 152 S.E.2d 485 (1967).

[39]Commenting on the policy considerations favoring states' acceptance of financial responsibility in this area, one authority argues:

> If the award is in favor of the plaintiff, the state should, as New York has, accept financial responsibility for the injury, whether mere false arrest or

aged, there does not seem to be any overriding reason for taking the position that a governmental employer should be any the less responsible for the acts of its employees than is any other type of employer. Another planned effect of this approach will be to bring to the attention of the governmental officials the undesirability of having their agents engaged in unlawful activity, with a consequent effort by those governmental officials to bring the offending officer into line or else suffer the consequences at the polls when burdened taxpayers react.

2. *Insulation of the Police Officer*

A necessary concomitant to imposing liability on the municipal corporation is to provide some effective financial shielding of the individual officer. Otherwise, the desirable act of imposing the liability on the government may be lost through the use of indemnity actions, or other procedures by which the officer must pay the bulk of the judgment. If the governmental employer does not feel the sting of the monetary loss, one could not expect much from the officials of that government in the way of control of their agents, nor would there be any particular feedback from the taxpayers, creating pressure upon those officials.

It seems to be a matter of choice whether this financial shielding of the individual officer should be done by making this proposed cause of action the sole remedy, or whether the presently existing remedies would continue to be available at the option of the plaintiff. In the latter case, of course, the possibility arises that a judgment against the individual officer obtained in a common law action could co-exist with a judgment against the governmental employer under this new cause of action being here proposed. There could be only one recovery, and if the damages assessed against the employer are reasonable, it would seem that the advantages of bringing suit under this new remedy would, in almost all

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> gross brutality. It is, after all, the state which puts the officer in a position to employ force and which benefits from its use. There is something to the argument that if the treasury pays, the deterrent effect of the judgment on the police officer is dulled. But perhaps the weight of the argument as to deterrence is the other way. If recovery can be had only against the officer and he is judgment proof, deterrence is at a minimum. If a judgment is collected against the state, the state may in outrageous cases have recourse against the officer either out of his funds or in the form of discipline. Furthermore, police tactics are often institutional and awards against the state may modify institutional practices.

Jaffe, *supra* note 37 at 227-28. Additional reasons for imposing liability on the municipal employer include (1) the injustice of penalizing the officer required to exercise discretion, and (2) the public's need of his uninhibited action. *Cf.*, Gregoire v. Biddle, 177 F.2d 579, 580-81 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

cases, result in a conscious choice of the action against the employer and an abandonment of any action against the individual officer. Another possibility would be to require that the prospective plaintiff choose between the statutory action against the government and the common law action against the officer. The election of one form of action would effectively preclude the other. Again, in this situation it would appear that in most cases the statutory action against the government would be chosen.

The inclusion of a financial shield for the police officer would also have the very practical and political advantage of enlisting the help of the police, their supporting organizations, and police-oriented segments of the community in the initiation of this plan. It would appear that this aspect of a direct suit against the governmental employer, insulating the officer, would result in a positive reaction both from police officers and from those political elements which are regarded as "pro-law enforcement." Thus by including a financial shield this segment of the community may be enlisted to support the proposed substitute, a practical consideration which, on the scales, balances out any prior disadvantages.

3. Administrative Procedure

This remedy is a statutory one, and contemplates that the respondent will be a governmental unit. On a federal level, this narrows itself down to only one possible defendant, the United States. If applied on a state level, the respondent might be either the state or a political subdivision thereof, *e.g.*, a county or a city. It should, therefore, be unnecessary to provide the full panoply of court procedures in arranging for the remedy. This would be especially true in a situation where the choice of remedy would exist, permitting the plaintiff to have the option of proceeding in an ordinary court action against the law enforcement agent, but thereby surrendering any possibility of collecting directly from the government.

Having elected the administrative remedy, the plaintiff could not be heard to complain that no right of jury trial or of judicial due process was provided. Furthermore, the defendant being a governmental unit, and the remedy having been provided by that sovereign, there could be no defense complaint. It would be necessary to provide only the minimum constitutional administrative due process to each party. It would then be possible, within well known principles, to provide a summary remedy which would give the desired deterrent effect and at the same time provide for considerably lowered cost. In this way the cost of establishing the entire procedure should be substantially less than the present cost of defending ordinary tort law suits in the state and federal trial court sys-

tems. This cost is presently borne by either the federal government or by the state or its subdivisions in that the daily costs of operating the courts are a charge upon the government. In many jurisdictions, moreover, there are additional costs where the governmental unit provides legal defense for its law enforcement officers when they are sued by tort claimants.[40]

Much as the preceding suggestion of a financial shield is felt to be popular with police, this aspect of a contemplated lowering of costs to the government should make the plan attractive to appointive and elective officials, as well as the taxpayers. For those governmental bodies which provide tort liability insurance protection for their employees, the reduced number of tort law suits brought directly against the employees in the trial courts should effect a further reduction in costs to the governmental agency, thereby offsetting to some degree the awards given successful claimants under the new procedure.

4. *Abrogation of Common Law Defenses*

Since the basic purpose of initiating the new statutory remedy is to deter the police officers from those actions which have been so condemned by our courts over the years, thereby giving rise to the exclusionary rule, it cannot be made a prerequisite to recovery that the person wronged be a high-minded or leading member of the community. It is obvious that this is not the type of person who is usually the recipient of that police conduct which, hopefully, will be deterred by this procedure. On the contrary, the person who is most likely to be victimized by police errors or deliberate misconduct is the person least likely to be heard to complain, namely, the oppressed, the person with a criminal record, and the outcast of society.[41] To eliminate this large group from a remedy by permitting a "clean hands" defense would emasculate the entire plan, and no doubt the Supreme Court would refuse to find that an effective substitute for the exclusionary rule had been obtained.

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[40]*See, e.g.*, CAL. GOV'T. CODE § 995 (West 1961). This statute was construed and applied in Sinclair v. Arnebergh, 224 Cal. App. 2d 595, 36 Cal. Rptr. 810 (1964). For statutes dealing with indemnification of police officers for damages see TENN. CODE ANN. § 6-640 (Repl. vol. 1971) and WIS. STAT. § 285.06 (1961).

[41]For a potential plaintiff who lacks the minimum elements of respectability, there is little chance of success in court. His prior reputation, moreover, can usually be shown for three purposes; (1) to impeach his credibility as a witness; (2) to mitigate damages by showing that his reputation was such that it would not have been damaged by an arrest or by showing that his prior record of arrests or imprisonment negated the inference that he suffered mental anguish; and (3) to mitigate damages by showing probable cause for the arrest, thereby negating the inference that the defendant acted wantonly or maliciously. *See, e.g.*, Butcher v. Adams, 310 Ky. 205, 220 S.W.2d 398 (1959); Odinetz v. Budds, 315 Mich. 512, 24 N.W.2d 193 (1946).

In the same manner, it cannot be expected that much deterrent value will result if a "good faith" defense is permitted. The issue of the good faith of the officer should be irrelevant where the underlying purpose of the remedy is to obtain a deterrent effect. If this remedy were designed as punishment, good faith might be a proper criterion. However, it has long been recognized that where a deterrent effect is desired, and where the penalty has a relatively minor impact upon the defendant, even a penal sanction is possible.[42] Thus we do have "strict liability" criminal statutes. Also, in other areas of tort law such as the product liability, the public interest has been advanced by imposing strict liability.[43]

In structuring this remedy, therefore, with deterrence the underlying policy, strict liability should be imposed. The only issues then before the tribunal would be whether the civil rights of the plaintiff were infringed, and whether such infringement occurred as a result of official law enforcement activity. Questions of intent, negligence, or accident should not be relevant.

5. Damages

Because of the peculiar nature of the remedy here proposed, it is believed necessary that certain consequences, expected to flow from wrongful activities of the officers, should not be taken into consideration in determining damages. Thus, even though it can be foreseen by the officer that his violation of a person's civil rights will likely result in conviction of a crime, the fact of that conviction or subsequent punishment should not be included as an item of damages. Otherwise the unfortunate result, often criticized in the press, would be a rewarding of the criminal for his wrongdoing. The government would then find itself in the unenviable position of saying, on the one hand, that it was punishing the individual for his actions and, on the other hand, that we would have to compensate that person *because* we were punishing him. It thus follows that the question of damages should be directly related to the enormity of the wrong done by the officer rather than to the consequences which may flow therefrom.[44]

To illustrate this in a common situation, hypothesize the wrongful

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[42]Smith v. California, 361 U.S. 147 (1959); Lambert v. California, 355 U.S. 225 (1957). *See generally* W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 218-33 (1972) for a discussion of liability without fault in criminal cases.

[43]*See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). California is particularly advanced in this field. Two very recent cases have gone far toward removing the few limitations which had crept into the law, further diminishing the plaintiff's burden. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 434, ___ P.2d ___ (1972); Luque v. McLean, 8 Cal. 3d 136, 104 Cal. Rptr. 443, ___ P.2d ___ (1972).

[44]*See* Foote, *supra* note 18 at 512-16; Oaks, *supra* note 14 at 718.

stopping of a vehicle by an officer, which then produces probable cause for search and seizure and may eventually result in a prison sentence for a serious crime. In this case the wrongful conduct of the officer which would be compensated for is merely the improper stopping of the vehicle. This would result in a minimal recovery. On the other hand a physical beating of an accused by officers, though it might result in nothing more than a temporary detention, would be heavily compensated. The balancing to be performed would be very similar to that which is done in determining what is "probable cause."[45] In other words, the severity of the intrusion is the key factor.

The remedy being evaluated is, as stated, not primarily designed to compensate the victim but to deter misconduct. It should nevertheless be flexible enough as a system to serve both purposes, where proper. In order to be effective as a remedy, a sufficient proportion of those wronged would have to be encouraged to complain so the bulk of wrongful conduct would be detected and brought before a competent hearing officer. To accomplish this, it would be necessary to establish minimum damages[46] of a size sufficient to attract not only plaintiffs but also competent legal counsel with, perhaps, legal specialization resulting if a sufficient volume of complaints were generated.

This specialization might even be encouraged, as it may result in the development of an expertise and of office procedures which would facilitate the handling of thse actions, eventually resulting in a reduction in the minimum amount of damages which would have to be awarded in order to make the remedy attractive to attorneys. At first, however, a "reasonable attorney's fee" should be provided for, so as to recompense the attorney in handling even small cases. If the agreed compensation for the attorney were a percentage of the recovery (ordinarily the method utilized in personal injury cases), then it might be higher in small recovery cases, *i.e.*, those which involve situations where the intrusion by the officer was relatively slight. This scheme simultaneously makes it feasible for attorneys to handle even the smallest cases, and to do so economically. One major advantage of thus encouraging the bringing of case into the statu-

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[45]The Supreme Court, in Camara v. Municipal Court, 387 U.S. 523 (1967), stated:

> In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . [But there is] no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.

387 U.S. at 536-37. This rationale was accepted by the Court and extended to seizure as well as search in Terry v. Ohio, 392 U.S. 1 (1968).

[46]For a discussion of the use of minimum liquidated damages where deterrence is a goal see Foote, *supra* note 18 at 496-97, 514-16.

tory procedure would be the salutary effect it should have on the police officer. Further, the governmental unit, which would have to pay the actual judgments, would be more likely to exercise its supervisory control and demand that its agents conform to a reasonable standard, thereby reducing the number of cases in which a successful recovery may be had. Thus the procedure is both self-enforcing and, hopefully, self-diminishing.

Another considerable advantage under this plan is that the governmental body could also protect itself and its subdivisions from excessive judgments. That is, so long as recoveries were reasonable, the government should be able to set the maximum amount to be awarded in various types of cases. This would tend to equalize the situation we now find, where the plaintiff who demonstrates only a minor injury may frequently go without remedy while the plaintiff who demonstrates serious injury may receive an award of punitive damages unrelated to the severity of the intrusion. Thus, by statute, the governmental unit could compress the range of damages to a reasonable degree.

In order to further insure the availability of effective counsel to plaintiffs in these actions, there should be a procedural requirement that payment of the compensation be made or forwarded to the successful litigant through his attorney's office. Alternatively it might be required that the percentage of the recovery awarded to the successful litigant's attorney be approved by the tribunal. In this way, it may be possible for the governmental body to issue two checks, one to the litigant and one to his attorney. This would greatly increase the attractiveness of the procedure to the practicing bar and, perhaps, reduce the cost of representation to successful plaintiffs.

IV

As has perhaps been foreseen in the foregoing discussion, the procedure advocated is one which is in many ways similar to that which has been established by most states as workmen's compensation legislation. California's Workmen's Compensation Act is one example.[47] Under this state constitutionally-mandated and legislatively-implemented scheme, California has created a whole apparatus designed specifically to handle this type of compensation. It is based upon a no-fault concept and liability is established by the employer-employee relationship. The purpose is to rehabilitate the employee and to compensate him for his injury.[48] Employers are required to carry insurance, which guarantees that the employee

[47]CAL. LABOR CODE §§ 3201-6002 (West 1971).

[48]*See, e.g.*, Davison v. Industrial Accident Comm'n, 241 Cal. App. 2d 15, 50 Cal. Rptr. 76 (1966).

will have a financially sound source from which to receive recovery.[49]

In the civil rights area, however, it would be undesirable to permit the governmental body to insure itself against liability since the major purpose of this plan is that the cost of paying compensation will have a deterrent effect. If the government can insulate itself from the expense consequent upon an award for the wrongful acts of its employees, then the possibility of such a deterrent effect would become so remote as to be negligible, and thereby destroy the plan. In addition, the no-fault aspects of workmen's compensation are inapplicable since, in the civil rights area, necessity of there having been a wrongful act by the government's servant is a proper and necessary prerequisite.

The aspects of workmen's compensation which are useful are those relating to the procedures by which enforcement is obtained. In general, California's plan sets up a State Division of Industrial Accidents, within which there is a Workmen's Compensation Appeals Board.[50] Local offices of WCAB are located at various population centers throughout the state so as to service applicants easily. Referees are available to hear contested matters in quasi-judicial administrative proceedings, with witnesses being heard, arguments given, and a decision rendered. Eventual appellate channels to the courts are also available, with complete stenographic record of the proceedings in the WCAB being provided.

Other aspects of workmen's compensation proceedings may be useful in creating a new remedy in civil rights violations. Thus the type of evidence to be received might be limited to that which is relevant to the issues and purposes at hand. At the same time, strict judicial rules of evidence may be relaxed to admit hearsay where this would further rather than impede the hearing. In addition, there is no right to jury trial, and computation of damages is based upon a mandated, rigid scheme relating to the injury received and its effect.

The applicant is favored in workmen's compensation cases, and he is further protected by the requirement that the attorney's fee be subject to the referee's discretion. This has favored the creation of de facto specialists in workmen's compensation cases to whom others, not so well informed, generally refer their clients.

This, then, is the type of tribunal which may be utilized as, for example, a Civil Rights Appeal Board. Under the contemplated statutory enactment, centers of population would be provided with local offices in which would be located referees to hear claims against the government. These referees by study and experience would become experts in this specialized field. As is usual in the case of referees, their compensation

[49]CAL. LABOR CODE §§ 3600, 3700, 3706 (West 1971).

[50]CAL. LABOR CODE §§ 5300-17 (West 1971).

would be significantly less than that of judges of even courts of limited jurisdiction. No right of jury trial would be allowed. Since the major purpose of the legislation would be to provide a deterrent effect upon the agents of the government, rather than the mere compensation of the applicant, the referee would be instructed to provide compensation in those cases where the government had in fact acted wrongly. He would not identify with the government or its law enforcement agents, but see himself as a person whose job is to control misuse of the power of the government.

All of the desirable elements heretofore set forth (see III *supra*) could be implemented in this type of statutory scheme. In order to maintain a control or check on the costs of the awards given in these tribunals, the legislature (Congress) might enact enabling statutes which would specify the types of civil injuries which could be expected to come before the tribunals and set minimum and maximum limits for each type of injury. The referee would have discretion to operate within these limits, depending upon the aggravating or mitigating circumstances in each fact situation. As a further control, it might be specified in the enabling legislation that the only injuries compensable would be those which would be recognized as injuries at the time of the occurrence. Although the state and federal Supreme Courts can and do apply their rulings retroactively, this should not here be a ground for recognizing a wrong. The overriding purpose of this legislation being deterrence, it is inconsistent to reward applicants for acts done by the government's agents which were, at the time of their occurrence, apparently legitimate.[51]

V

It is salutary to concede that the implementation of a plan such as this faces serious problems. The most obvious, probably the greatest, is the political aspect. Legislators are, by their very nature, politically motivated: they will not move to implement such a state or national scheme unless the political climate is right. Undoubtedly it will be necessary that there be a consensus that this plan is beneficial to almost everyone before passage can be expected. The primary danger is that which will arise if some considerable segment of the population sees it as an attack on the

[51]The Supreme Court, in Person v. Ray, 386 U.S. 547 (1967) stated:

> We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983. . . . We agree that a police officer is not charged with predicting the future course of constitutional law.

386 U.S. at 557.

police. It is not. On the contrary, one of the major effects of this legislation will be to insulate financially the individual police officer. Indeed, recovery under this plan can easily be made the sole remedy for injuries of this type.

As earlier discussed, with a friendly forum it will be a very exceptional case that will be taken to some other tribunal or jurisdiction where the advantages afforded the complainant will not be as great. In this way the police officer on the beat, the man who endangers himself for the protection of the public, will no longer, for the most part, be subjected to tort liability. Only in a very aggravated situation, where multiple actions of the same officer have made it obvious that he is not fit for this type of duty, will the officer be in any fear of losing his employment. Properly, he should be in such a case. Occasional errors of judgment, on the other hand, will be very unlikely to have such a result since it can be expected that most officers will accumulate a few such incidents over an extended period of time. Early detection of the officer likely to have multiple complaints of this sort would also permit administrative action by his superiors to move him to a less sensitive assignment, and in that way retain him as a useful member of the agency.

The next greatest problem foreseen is that of finances. The establishment of a separate system of tribunals to process this type of claim will obviously cost money. How much depends upon the jurisdiction, salaries paid, rent, and other factors far beyond the scope of this analysis, although it will undoubtedly be considerable. Opponents of the plan taking a superficial view may point to these costs as an overriding factor. More careful analysts will note, however, that there are balancing factors at work. At present, claims against police officers are handled in the ordinary courts where the expenses of operation must be several times more than in this suggested administrative tribunal. The factor of the right to jury trial alone adds greatly to the court costs, as jury trials take longer and require judges of a higher salary. They also require more courtroom personnel and larger courtrooms. All of these costs are presently borne by the taxpayers. Additional costs may include provision of a defense counsel who is on the public payroll. This is already the practice in many jurisdictions where police officers who are sued civilly under common law tort remedies are frequently defended by government attorneys at the taxpayers' expense.[52] In addition, when those actions result in a recovery by the plaintiff, it is quite frequently the government which pays the judgment, especially where sovereign immunity has been abrogated. Such judgments may be many times larger than those which could be recovered under this suggested administrative system. One further result, already

[52]See note 40 *supra.*

related, will be that to the degree this system succeeds the deterrent effect sought will gradually reduce the numbers of such incidents, and hopefully their magnitude. Thus, in the long run, the cost to the government will be reduced.

Another problem factor is that, with the high percentage of the members of our legislatures who are lawyers, some may be so enamored of the exclusionary rule as a defense weapon that they will resist any attempt to dispose of it. Many of our younger lawyers will have attended law school and entered into practice since *Mapp v. Ohio*.[53] To them, and perhaps to others as well, the exclusionary rule may have acquired a halo. The rule itself may be seen as a constitutional imperative, rather than a judicially created remedy. If so, they may naturally be expected to resist an attempt to dispose of the rule. For them, however, the aspects of this plan which provide for the compensation of victims of government misuse of power should be emphasized. This plan does not benefit only the wrongdoer. Unlike the exclusionary rule, it reaches out to spread its protection over all those who may have been wronged. For that reason, if no other, it should be preferred.

Will the United States Supreme Court abrogate the exclusionary rule if this plan is implemented? Can the exclusionary rule be applied in some states (those which have not implemented the suggested administrative tribunal) and not in others? Is it necessary that this plan be adopted nationally, by the Congress, or is it possible that each state can solve its own problem? The answers to these questions seem to lie with the Supreme Court, and any attempt to predict can only be speculative.

The most prominent position against abrogation of the exclusionary rule upon adoption of a reasonable alternative seems to be the "judicial integrity" argument.[54] In those cases where it has been considered, however, it would appear that the argument that the court should not lend its *imprimatur* to the use of illegally obtained evidence has always seemed to be a secondary and less weighty argument. As compared to the practical effect of the exclusionary rule, it appears to be on a higher and more theoretical plane, less in line with the practicalities of human behavior.

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[53]367 U.S. 643 (1961).

[54]The "judicial integrity" theory was articulated in Terry v. Ohio, 392 U.S. 1 (1968):

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . . A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

392 U.S. at 13.

It can be hoped that when actually faced with the situation in which a viable alternative has been instituted, the Court will not allow the argument of judicial integrity to outweigh the obvious inequities in the continued use of the exclusionary rule. In his dissent in *Mapp,* Justice Harlan indicated that the states should be free to institute their own, perhaps more effective, restraints.[55] But if the rule is abrogated as to those states where a more effective plan exists, what results as to the other jurisdictions? Will the Court accept only a national plan? These and other questions remain unanswered. However, any inability now to resolve these questions must not act as an anchor to bind us fast to the outmoded exclusionary rule.

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[55]Mr. Justice Harlan stated:

> The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the states in this respect. . . . One state . . . may conclude that the need for embracing [the exclusionary] rule is pressing because other remedies are unavailable or inadequate. . . . Another . . . may choose to . . . [allow] all evidence relevant to guilt to be brought into a criminal trial, and [deal] with Constitutional infractions by other means.

367 U.S. at 381-2 (Harlan, J., dissenting).

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