SIX OBSERVATIONS ON THE EXCLUSIONARY RULE

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While there may be little new to be said about the Fourth Amendment's exclusionary rule, the eternal verities are always worth exploring. This Article will offer six brief observations:

I. OBSERVATION ONE: THE CONSTITUTION

The exclusionary rule is nowhere set forth in the express language of the Constitution, and was not deemed by the Supreme Court to be compelled by the Fourth Amendment, even after that Amendment was incorporated,[1] until the *Mapp* decision in 1961.[2] This was 172 years after the Constitution first took effect. There is no evidence of a general public feeling that America was a police state during its first seventeen decades as a result of the absence of an exclusionary rule. There has been, however, a general public feeling during our country's last three decades that our streets have been intolerably crime-ridden, at least in part because of the propensity of our justice system to inflict upon the public violent and brutal criminals who belong behind bars for lengthy periods of time.

At the time of *Mapp*, a majority of the States of the Union enforced the common-law view that a court "can take no notice of how [papers or contraband] are obtained, whether lawfully or unlawfully"[3] in deciding whether to admit items into

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1. *See* Wolf v. Colorado, 338 U.S. 25 (1949) (finding that the Fourth Amendment applies to the States by virtue of being incorporated into the protections from state action guaranteed by the Fourteenth Amendment).

2. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (finding that the exclusionary rule, which had had its genesis in *Weeks v. United States*, 232 U.S. 383 (1914), was an aspect of the incorporated Fourth Amendment right).

3. Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841). *Accord* Adams v. New York, 192 U.S. 585 (1904).

evidence.[4] The exclusionary rule of *Mapp* can properly be seen as the product of a highly aberrational period in American history, one in which a considerable number of amendments from the bench were appended to James Madison's Constitution over a very brief time.[5] In common with *Mapp*, these decisions largely federalized criminal procedure and in the process severely eroded the ability of state and local governments to ensure the domestic tranquillity.[6]

II. OBSERVATION TWO: THE SUPREME COURT

Not only is the exclusionary rule not a part of James Madison's Constitution; it is not even clearly a part of the Supreme Court's Constitution. Rather, the rule appears increasingly to be the sort of "prophylactic" rule that we also see in the *Miranda* context,[7] a rule set forth by the Court only until some alternative, equally effective rule for enforcing the Fourth Amendment is implemented.

For instance, in its decision in *Lopez-Mendoza*,[8] the Court stated that "[t]here comes a point at which courts, consistent with their ability to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."[9] In *Calandra*, the rule was described as a "judicially created remedy, rather than a personal constitutional right . . . ."[10] And in *Leon*, the Court expressly rejected "[l]anguage in the opinions of this Court and of individual Justices [that has] sometimes implied

4. *See* Elkins v. United States, 364 U.S. 206, 224-25 (1960) (appendix to the Opinion of the Court).

5. For a description of these, see Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REFORM 395 (1989); Stephen J. Markman, *Foreward—The 'Truth in Criminal Justice' Series*, 22 U. MICH. J.L. REFORM 425, 431-35 (1989).

6. *See generally* OFFICE OF LEGAL POLICY, DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE, TRUTH IN CRIMINAL JUSTICE SERIES, REP. NO. 2 (1988), *reprinted in* 22 U. MICH. J.L. REFORM 573, 620-31 (1989).

7. *See* Miranda v. Arizona, 384 U.S 436 (1966); Withrow v. Williams, 507 U.S. 680, 702 (1993) ("This Court repeatedly has held that *Miranda*'s warning requirement is not a dictate of the Fifth Amendment itself, but a prophylactic rule.").

8. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding the exclusionary rule inapplicable to INS deportation proceedings).

9. *Lopez-Mendoza*, 468 U.S. at 1050 (1984) (quoting United States v. Janis, 428 U.S. 433, 459 (1976)).

10. United States v. Calandra, 414 U.S. 338, 347 (1974) (limiting the application of the exclusionary rule in grand jury proceedings).

that the rule is a necessary corollary of the Fourth Amendment."[11]

In other words, the Court has repeatedly held that the exclusionary rule is not a constitutional mandate but rather is an exercise of the Court's supervisory powers. As a result, a balancing of the exclusionary rule's costs and benefits can properly be taken into consideration. The absence of any principled basis for the continued imposition upon the States of a supervisory rule of criminal procedure that is not constitutionally compelled is a matter that ought to receive more concern than it does; it is surprising, for example, that it does not appear to concern many state attorneys general.[12]

III. OBSERVATION THREE: ALTERNATIVES

There are several effective alternatives to the exclusionary rule that could be used to uphold the guarantees of the Fourth Amendment. This is true, at least, if we understand the purpose of Fourth Amendment enforcement to be (a) deterring police misbehavior;[13] and (b) redressing the victims of such misbehavior.[14]

Alternatives that have been widely discussed for many years include improved training for law enforcement officers; strengthened and independent disciplinary procedures for misbehaving officers; tort claim or other causes of action against violating police departments; *Bivens* actions;[15] punitive damages; injunctive relief; and so forth. Precisely which combination of these procedures would be most effective is a matter which

11. United States v. Leon, 468 U.S. 897, 905 (1984) (holding the exclusionary rule inapplicable in situations where the police acted in good-faith reliance upon a defective warrant). *See also* Arizona v. Evans, 115 S.Ct. 1185, 1191 (1995) (acknowledging that "the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands").

12. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE JUDICIARY'S USE OF SUPERVISORY POWER TO CONTROL FEDERAL LAW ENFORCEMENT ACTIVITY, TRUTH IN CRIMINAL JUSTICE SERIES, REP. NO. 5 (1986), *reprinted in* 22 U. MICH. J.L. REFORM 773, 792-95 (1989) (failing to mention any concern by state attorneys general about the constitutional basis for the exclusionary rule).

13. It is worth mentioning that although deterrence is the primary goal of the exclusionary rule, the Supreme Court has noted that "[n]o empirical researcher . . . has yet been able to establish with any assurance whether the rule has a deterrent effect . . . ." United States v. Janis, 428 U.S. 433, 452 n.22 (1976).

14. *See generally* OFFICE OF LEGAL POLICY, *supra* note 6 at 620-631.

15. *Bivens* actions are those permitted by Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (recognizing, under limited circumstances, private rights of action against government officials).

should be left to state experimentation.

One unfortunate impact of the exclusionary rule has been the discouragement of efforts to identify alternative remedies. The development of more effective internal disciplinary procedures, for example, has been discouraged so long as the fruits of a disciplinary investigation subsequently can be used in support of a suppression motion. At the same time, internal discipline has also been discouraged where police misconduct has not been sufficiently derelict to warrant exclusion of evidence.[16]

For several reasons, some combination of these proposed alternatives would constitute a more effective means of enforcing the Fourth Amendment than would the exclusionary rule.[17] First, an appropriate combination of alternatives could deter and compensate without obstructing the conviction of the guilty. The latter objective is just as much a value of the Fourth Amendment, a value implicit in its sanctioning of "reasonable" searches and seizures, as the value that unreasonable searches and seizures should not be sustained. In addition, such alternatives would likely deter and compensate without re-imposing upon society individuals who pose a clear and present danger to the safety and security of the people.

Second, such alternatives would discourage the continued skewing of the Fourth Amendment by judges aware that any determination that an unreasonable search and seizure has occurred, however minor or inadvertent the transgression, will necessarily require the exclusion of evidence seized as a result. When something less draconian than the exclusionary rule is restored as a remedy for an unreasonable search and seizure, then the judiciary will be less inclined to interpret the Fourth Amendment in the narrowest possible fashion in an effort to avoid the application of the rule.

Third, these alternatives would also ensure relief not only for

16. In these latter situations, the standards established by courts for determining whether or not to suppress evidence are communicated effectively to police departments in the form of decisions whether or not to sanction officers for improper behavior. So long as evidence is not excluded, officers are not sanctioned and behavior does not improve.

17. For example, in *Lopez-Mendoza* the Court decided that the fruits of illegal searches were admissible in INS deportation proceedings, in large part because the INS had established "sensible and reasonable steps to deter Fourth Amendment violations by its officers," including comprehensive administrative rules and regulations and a compensation scheme. *See Lopez-Mendoza*, 468 U.S. at 1050.

the person who is the object of the unreasonable search and who has the dead body in his basement, but also for that person's innocent neighbor, who has no such evidence to be withheld at trial.[18] Currently, the latter is afforded no meaningful relief by the rule; only the manifestly guilty party benefits.

Finally, some combination of alternative sanctions could also more readily be calibrated to the precise nature of the constitutional violation and to the particular criminal offense. In contrast, the all-or-nothing character of the exclusionary rule's sanction equates petty thieves with serial killers and equates truly rogue cops with law-enforcement officers miscalculating their interpretation of sophisticated and nuanced constitutional interpretations.

It remains only for a determined State to enact a bona fide alternative remedy, abolish the exclusionary rule and defend itself against the inevitable legal challenges.

IV. OBSERVATION FOUR: HUMAN TOLL

The costs of the present rule in terms of human suffering are enormous. One study suggests that the rule results in the loss of evidence in anywhere from one percent to eight percent of all criminal prosecutions.[19] If we accept a figure of two percent, which reflects a conservative compromise, we are left with 55,000 cases every year of violent crime, serious property crime and drug crime in which the rule has an impact.[20] In the overwhelming majority of these 55,000 cases, the case is dismissed because the rule has caused the justice system to lose the most compelling and inculpatory criminal evidence.

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18. *Compare* Alderman v. United States, 394 U.S. 165, 173 (1969) ("In order to qualify as a 'person aggrieved' by an unlawful search or seizure, one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure.") (quoting Jones v. United States, 362 U.S. 257, 261 (1960)).

19. *See, e.g.*, NAT'L INSTITUTE OF JUSTICE, UNITED STATES DEP'T OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982) (reporting that in California, "4.8 percent of all felony arrests rejected for prosecution from 1976 through 1979 . . . were rejected because of search and seizure problems"). Higher proportions of cases were rejected for such problems in urban areas. *See id.*

20. For 1993, the FBI's *Uniform Crime Reports* identify 754,110 arrests for violent crime and 2,094,300 arrests for property crimes. *See* FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1993, at 217 tbl.29 (1994).

The result is, to quote Justice White's *Miranda* dissent, that some "unknown number of killers, rapists and other criminals will go free."[21] However, unlike those who avoid prosecution because of *Miranda*, whose numbers are necessarily speculative, the number of "killers, rapists and other criminals" who go free as a result of *Mapp* is not an "unknown" number. The overwhelming majority of the estimated 55,000 beneficiaries of *Mapp* fit this description. Compounding the damage is that, according to the National Institute of Justice, most beneficiaries of *Mapp* (as with most criminals generally) are recidivists and that nearly half of them are re-arrested for new crimes within two years.[22]

Also contributing to the problem is the fact that for every individual who avoids successful prosecution because of *Mapp*, many more are able to strike more advantageous plea bargains with prosecutors. It is routine for defense counsel to negotiate on the basis of leverage afforded by the exclusionary rule, often making a quite rational case that the terms of a plea should be adjusted downward in order to reflect the possibility that evidence will be suppressed.[23]

V. OBSERVATION FIVE: INTEGRITY

The exclusionary rule has sometimes been justified on the grounds that it is necessary to maintain the "integrity" of the criminal justice process. As stated in *Mapp*, "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[24] In other words, a court that accepts such evidence is itself effectively an accessory to a constitutional violation.

There are two responses to this. First, the moral foundation of this argument has been considerably diluted by the various exceptions attached to the exclusionary rule: for example, the use of such allegedly tainted evidence is permitted both in civil

21. *Miranda*, 384 U.S. at 542 (White, J., dissenting).

22. *See* NATIONAL INSTITUTE OF JUSTICE, *supra* note 19.

23. *Cf.* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting) (referring to the "universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition.").

24. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

proceedings and for the impeachment of defendants.[25] Second, the argument casts aspersions, not shared by most of the American people, not only on the manner in which most courts operated for the first 172 years of our country's history, but also on the manner in which virtually every other democracy in the world currently administers its system of criminal justice.[26] Finally, in the real world, the integrity of the justice system has been far more greatly undermined by its current penchant for releasing the obviously guilty, by permitting juries to be misled by incomplete evidence, and by its tolerance of false testimony of defense witnesses who cannot be impeached on cross-examination by suppressed evidence.[27] The devastating impact of "crummy technicalities"[28]—namely, the release of violent criminals—is the real cause of the contemporary decline in respect for the American justice system.

If any genuine erosion of civil liberties ever occurs in America, it is far less likely to be the result of occasional instances of police misbehavior than the result of widespread public dissatisfaction with government's inability to preserve the people's first civil right to be free from domestic criminal predators.

VI. OBSERVATION SIX: ABOLITION

The exclusionary rule should be abolished altogether. While the establishment of a "good-faith" defense to both warranted

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25. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that the exclusionary rule does not apply in a deportation proceeding); United States v. Havens, 446 U.S. 620 (1980) (holding that a defendant's statements are subject to impeachment by illegally obtained evidence); Stone v. Powell, 428 U.S. 465 (1976) (holding that a state prisoner may not be granted federal habeas relief on the ground that illegally obtained evidence was introduced at trial); United States v. Janis, 428 U.S. 433 (1976) (holding that the exclusionary rule should not be extended to forbid the use of illegally seized evidence in civil proceeding); United States v. Calandra, 414 U.S. 338 (1974) (holding that the exclusionary rule does not proscribe use of illegally seized evidence in all proceedings or against all persons); Linkletter v. Walker, 381 U.S. 618 (1965) (holding that the exclusionary rule is not applied retroactively).

26. *See* OFFICE OF LEGAL POLICY, *supra* note 6, at 617-20.

27. Although defendants who choose to testify may be impeached by otherwise inadmissible evidence, *see* Walder v. U.S., 347 U.S. 62 (1954) (stating that prosecutors may use inadmissible evidence for impeachment purposes against defendants who have opened the door in direct examination), other witnesses may not be so impeached. *See* James v. Illinois, 493 U.S. 307 (1990) (refusing to extend *Walder* to permit impeachment of defense witnesses).

28. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV 757, 799 (1994).

and unwarranted searches[29] would address the most significant aspects of the exclusionary rule problem, full abolition is preferable for a number of reasons. First, there is an enormous expenditure of criminal justice resources on motions to suppress.[30] Very little of this expenditure would be reduced by the establishment of a good-faith defense, which would merely refocus the suppression hearing upon the issue of whether the seizing police officer did or did not act in an "objectively reasonable" manner. The costs of these hearings include both a less efficient utilization of limited law enforcement resources, and a diminished opportunity for other defendants with more meritorious defenses—including alleged innocence—to have their claims fully considered by the system.

Second, and most significantly, relying solely on a good-faith defense would maintain intact the faulty premises of the rule—namely that reliable, credible evidence should be withheld from the factfinder at trial because of problems with the search that produced such evidence. Strong sanctions for abusive police behavior must be established, and money damages should be available for the victim of the behavior for reasons of the constitutional violation. However, the truth-seeking function of the criminal trial should not continue to be distorted by the exclusionary rule. Defendants have no entitlement to be compensated by having the criminal evidence restored to their possession. They have no right to the evidence and no right to be made whole in its possession. Indeed, the public has a superior and compelling interest in the evidence to the extent that it helps identify the perpetrators of criminal activity. Redress for violations of the Fourth Amendment should be transferred from the criminal to the civil forum.

VII. CONCLUSION

It is indisputable that considerable numbers of people have

29. Currently, a good-faith defense exists only for police acting in good-faith reliance on warrants that turn out to have been improperly granted. *See* United States v. Leon, 468 U.S. 897, 905 (1984) (holding the exclusionary rule inapplicable in situations where the police acted in good-faith reliance upon a defective warrant).

30. *See* Terence C. Gill, *Regulating the Police In Investigatory Stops: A Practical Alternative to Bright Line Rules*, 59 S. CAL. L. REV. 183, 202 (1985) (stating that the exclusionary rule clogs the courts with numerous claims) (citing empirical study). *See also* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 453-54 (1997) (arguing that suppression motions are overused by defense counsel).

been murdered, raped, assaulted and terrorized as a direct result of the exclusionary rule. In view of this tragic reality, and in view of what ought to be the strong presumption that the truth-seeking function of the criminal trial not be compromised, there should be few higher domestic priorities than finding alternatives to the rule. That it has not been a higher priority is a testament to how badly our government has lost sight of its proper responsibilities amidst the profusion of improper responsibilities that modern government has undertaken. As one philosopher of jurisprudence has written, "[e]vidence is the basis of justice: to exclude evidence is to exclude justice."[31] For the reasons briefly set forth in these remarks, the tragically misguided reign of *Mapp* and its exclusionary rule should be brought to an end.

31. 5 JEREMY BENTHAM, A RATIONALE OF JUDICIAL EVIDENCE, bk. 9, ch. 3 at 490 (1827).