MAPP v. OHIO, THE EXCLUSIONARY RULE AND THE RIGHT OF PRIVACY

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If the right of privacy is defined as freedom from governmental intrusion, as loosely it may be, the Constitution of the United States, federal and states statutes, and court rulings have combined to provide a measure of protection of privacy rights. Until the second half of the twentieth century, however, the protection accorded privacy ranged from ambiguous to ephemeral.

By 1965 Mr. Justice Douglas was able to find "zones of privacy" in the "penumbras" of the first, third, fourth, fifth and ninth amendments.[1] In a passage that soared above the law into the more spacious realm of rhetoric, he concluded that the privacy surrounding the marriage relationship was "older than the Bill of Rights—older than our political parties, older than our school system."[2] In the main, however, the legal perception of the right of privacy has been considerably less rhetorical and more earth-bound. Even the relatively explicit fourth amendment guarantee of the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" did not receive a generous interpretation until relatively recently. It is the purpose of these comments to note that development, particularly the exclusionary rule of *Mapp v. Ohio*,[3] as a means of enforcing the fourth amendment limitations on search and seizure, and the not always favorable reaction to that means of vindicating this aspect of the right of privacy. The focus of the discussion is thus on the purpose to be served by the exclusionary rule and not at all upon the complex body of law that surrounds the question of what conduct violates the fourth amendment. What follows is a tripartite investiga-

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1. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).
2. *Id.* at 486.
3. 367 U.S. 643 (1961).

tion of *Mapp*, first discussing its historical antecedents, second analyzing its underlying principles and finally evaluating its impact.

THE HISTORICAL ANTECEDENTS OF *Mapp v. Ohio*

Boyd v. United States,[4] in 1886, was one of the earliest Supreme Court cases that sought to explain the nature of the protection against unreasonable search and seizure. The issue was whether the defendant's failure to produce certain private papers could be construed by the trial court as a confession of a charge of fraud. The Supreme Court held that the attempted testimonial compulsion was a violation of the privilege against self-incrimination and accordingly amounted to an unreasonable search and seizure. In memorable language the Court stated that "in this respect the Fourth and Fifth Amendments run almost into each other."[5]

The *Boyd* decision did not involve the more typical issue of the reasonableness or not of the search of places of residence or business and of individuals. In these circumstances the command of the fourth amendment long served principally as an appeal to the conscience of the police officer or other public servant who might be tempted to search or seize without warrant or beyond the reasonable limits of a warrant. Evidence that was the product of an excess of zeal[6] or even outrageous police misconduct[7] was admissible in federal courts until 1914,[8] 28 years after *Boyd*, and in many state courts until 1961.[9]

Weeks v. United States[10] is the case which first fashioned the federal exclusionary rule. Weeks was convicted of the use of the mails to transport lottery coupons. State police officers had searched his home without a warrant while Weeks was at work, giving the evidence seized to a federal marshal. Aroused by what he saw, the federal

4. 116 U.S. 616 (1886).
5. *Id.* at 630.
6. The most celebrated state court decision in opposition to the exclusionary rule is People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926), in which Judge Benjamin Cardozo made his oft-quoted observation that a guilty defendant should not be released "because the constable has blundered." *Id.* at 21, 150 N.E. at 587. In 1949 Mr. Justice Frankfurter still spoke of the "weighty testimony" of *Defore*. Wolf v. Colorado, 338 U.S. 25, 31 (1949).
7. Irvine v. California, 347 U.S. 128 (1954), involved a brazen perversion of law by police officers who made a key to the home under surveillance and entered the house on several occasions to install microphones in a bedroom and a bedroom closet, having first bored a hole through the roof to bring in the necessary wires. Mr. Justice Jackson described the police action as a "trespass, and probably a burglary." He observed that the police practices would be "almost incredible" if they had not been admitted, and stated that "Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment . . . ." *Id.* at 132. The evidence was nevertheless admitted.
8. Weeks v. United States, 232 U.S. 383 (1914).
9. Mapp v. Ohio, 367 U.S. 643 (1961).
10. 232 U.S. 383 (1914).

marshal returned and carried out his own search, again without a warrant. Before trial, Weeks filed a petition to have his effects returned. The petition was denied. In holding the evidence inadmissible, the Court, speaking through Justice Day, noted that a court had the power to inquire into the source of any evidence it may receive as a prerequisite to its power to exclude evidence.[11] Continuing, the opinion reasoned that evidence, seized in violation of the Constitution, was illegally obtained and therefore inadmissible. In language which illustrated that the purpose of the exclusionary rule was linked both to the disapproval of illegal activity by the government and to the maintenance of the integrity of the federal judicial system, the Court stated that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open definace, of the prohibitions of the Constitution . . . ."[12]

Since the fourth amendment did not apply to the states at the time of *Weeks*, neither did the exclusionary rule.[13] The issue lay dormant for 35 years until the decision in *Wolf v. Colorado*.[14] But there, too, the issue was not finally resolved. The majority in *Wolf* first held that the proscriptions of the fourth amendment are implicit in the concept of ordered liberty and therefore applicable to the states through the due process clause of the fourteenth amendment. In an opinion by Justice Frankfurter, however, the Court held that the exclusionary rule was not enforceable against the states—that the exclusionary rule was not "implicit in the concept of ordered liberty."[15] Looking to whether the practice of excluding illegally obtained evidence was "enshrined in the history . . . of English-speaking peoples,"[16] Justice Frankfurter cited numerous authorities, including the practices of the United Kingdom and the various states themselves, for the proposition that the exclusion of evidence, albeit illegally obtained, was not generally practiced except in the federal system.[17] Accordingly, it was not required by due process.

To buttress this finding Justice Frankfurter added two factors, seemingly unrelated to the simple test of illegality set forth in *Weeks*. First, private remedies for such illegal governmental conduct would

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11. *Id.* at 393.
12. *Id.* at 394.
13. The *Weeks* Court, also confronted with an illegal search by state officers, quickly dismissed the issue: "What remedies the defendant may have against [state officers] we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials." *Id.* at 398.
14. 338 U.S. 25 (1949).
15. *Id.* at 27. *See also* Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937). *See generally* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).
16. 338 U.S. at 28.
17. *Id.* at 29-30.

continue to remain available.[18] Second, state police officers were more susceptible to local control and pressure from irate citizens.[19] Thus, *Wolf* introduced the notion of deterrence of official illegality to the debate concerning the wisdom of the exclusionary rule. At the very least, this introduction of the deterrent effect was something of a departure from the view of the *Weeks* Court that such methods of police conduct could not be judicially sanctioned, and that a conviction could not be validly obtained through the use of unconstitutionally seized evidence.

In retrospect, it can be seen that the question whether the exclusionary rule should apply to the states was far from settled. *Wolf* itself was decided by a majority of five, with Justice Black concurring specially;[20] Justices Douglas, Murphy and Rutledge filed vehement dissents. Furthermore, from its inception *Wolf* was the source of much dissatisfaction on the Court. The first indication of this was presented in *Rochin v. California*,[21] in which the Court reversed a conviction based on a warrantless search conducted in the most abusive fashion: officers had pumped the defendant's stomach. Since *Wolf* precluded the suppression of the evidence on the basis of the exclusionary rule, the Court created another test to sustain reversal, holding that evidence that was the product of police methods which "shocked the conscience" could not constitutionally be the basis of a conviction.[22] And, in *Rea v. United States*,[23] the Court held that federal officers who had illegally obtained evidence could be enjoined from turning the evidence over to state officials. Finally, in *Elkins v. United States*,[24] the Court disposed of the "silver platter" doctrine altogether, no longer allowing state officials outside the pale of the exclusionary rule to transfer illegally seized evidence to federal officials. It was clear at this point that the blanket holding of *Wolf* had suffered serious setbacks.

The best evidence of the Court's dissatisfaction with *Wolf* was *Irvine v. California*,[25] and particularly Justice Clark's concurring opinion. *Irvine*, like *Rochin*, presented the Court with outrageous police conduct. State police officials had secretly bugged the defendant's

18. *Id.* at 30.
19. *Id.* at 32-33.
20. *Id.* at 39. Justice Black's concurrence was not based on agreement with the majority assertion that the fourth amendment was "selectively" incorporated, Adamson v. California, 332 U.S. 46 (1947) (Black, J., dissenting), but instead on his belief that the exclusionary rule was a "judicially created rule" not of constitutional dimension. 338 U.S. at 40.
21. 342 U.S. 165 (1952).
22. *Id.* at 172. *See also* Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957).
23. 350 U.S. 214 (1956).
24. 364 U.S. 206 (1960).
25. 347 U.S. 128 (1954).

house, at one time placing listening devices in his bedroom. The Court balked at overruling *Wolf*; indeed, it also refused to make inroads upon *Wolf* by coupling *Rochin* and *Wolf* together to disallow those searches by state police which produced a "serious shock"[26] to the Court, on the ground that such a rule would be "so indefinite that no state court could know what it should rule."[27] Nevertheless, Justice Clark specially concurred, making it clear that *Wolf* was under serious strain. After noting that had he been on the Court when *Wolf* was decided he would have voted for exclusion,[28] he made a statement that bears repeating: "In light of the 'incredible' activity of the police here, it is with great reluctance that I follow *Wolf*. *Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction.* Thus I merely concur in the judgment of affirmance."[29] It was this attitude which fostered the wave of petitions which sought to overrule *Wolf*. The stage was set for *Mapp v. Ohio*.

THE *Mapp* DECISION

The facts which gave rise to *Mapp v. Ohio*[30] are notable. At approximately 1:30 in the afternoon of May 23, 1957, three policemen arrived at Dollree Mapp's door and told her they had "confidential" information that a person suspected of a recent bombing was hiding in her home. Mapp, taken aback, inquired further as to the subject matter of their inquiry, but was only told they wanted to question her. Mapp had retained an attorney for a pending civil matter, and she called that attorney, asking him what to do. He told her to let the officers in only if they had a valid search warrant.

The number of officers soon increased to seven, and Mapp's attorney appeared on the scene. One of the police officers told the attorney that he had a search warrant, but refused to reveal it. The officers then began breaking into the apartment, smashing the glass in the back door to gain entry. Upon entry, an officer waved a piece of paper, purportedly a search warrant,[31] which Mapp grabbed and thrust down the front of her dress. The officer who originally held the "warrant" retrieved it and had her handcuffed to the bed. Then they thoroughly searched her entire apartment, "ransacking through every room and piece of furniture."[32] The yield for their effort, for which Mapp was

26. *Id.* at 133-34.
27. *Id.* at 134.
28. *Id.* at 138 (Clark, J., concurring).
29. *Id.* at 139 (emphasis added).
30. 367 U.S. 643 (1961).
31. At trial, the state of Ohio made no effort to produce any warrant, *id.* at 668 n.2 (Douglas, J., concurring). Presumably, the piece of paper shown to Mapp was not a warrant.
32. *Id.* at 668.

eventually tried, was "four little pamphlets, a couple of photographs and a little pencil doodle—all of which [were] alleged to be pornographic."[33] This, of course, was a far cry from the "mad bomber" they originally sought.

Dollree Mapp was subsequently convicted of possession of pornographic materials. She appealed to the Supreme Court of Ohio, principally on the grounds that the pornography statute and the search of her home violated her constitutional rights as protected by the first, fourth and fourteenth amendments. That court affirmed.[34]

On the writ of certiorari to the United States Supreme Court, the main question presented by the appellant was not whether *Wolf* should be overruled,[35] but whether the Ohio statute under which Mapp was convicted violated the first amendment.[36] Indeed, as Justice Harlan noted in his dissent, the continued vitality of *Wolf* was barely even raised, briefed or argued by the appellant.[37] Nevertheless, *Wolf v. Colorado*[38] was put to rest.

Interestingly, by the time *Mapp* was decided more than half the states had already adopted the exclusionary rule by statute or judicial decision. The most influential was the Supreme Court of California ruling in *People v. Cahan*,[39] in which the court felt "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . ."[40] In agreement, the Supreme Court of the United States announced flatly in *Mapp* that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[41] In support of its decision, the Court stated:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise . . . the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'[42]

33. *Id.*
34. State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1959).
35. 367 U.S. 672-73 n.4 (Harlan, J., dissenting).
36. *Id.* at 673 n.4.
37. *Id.* at 673 nn.4-6. The overruling of *Wolf* was, however, urged by the *amicus* brief filed by the American Civil Liberties Union. *Id.* at 646 n.3.
38. 338 U.S. 25 (1949).
39. 44 Cal. 2d 434, 282 P.2d 905 (1955).
40. *Id.* at 911.
41. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
42. *Id.*

. . . .

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States . . . we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.[43]

When *Mapp* was decided in 1961, the exclusionary rule as a device for the enforcement of constitutional rights was not untried. The Court had long ruled that an "involuntary" confession was inadmissible as a matter of due process. In the period when the Court was developing its standards of voluntariness, roughly between the decisions in *Brown v. Mississippi*[44] in 1936 and *Miranda v. Arizona*[45] in 1966, the criteria were not always clearly defined. But there was no doubt that where the criteria were satisfied, exclusion was the proper remedy in federal and state courts alike. Increasingly in the fifth amendment area, the Court moved toward a per se rule, as exemplified by *Miranda,* in which it denied use by the prosecution of "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[46]

The exclusionary rule has also been applied in limitation of other police practices that violate rights guaranteed by the Constitution or statute. Thus, evidence that is the product of forbidden wiretapping or other illegal eavesdropping is inadmissible in federal or state court,[47] and identification testimony of witnesses to a police lineup may not be used if the accused was exhibited to a prosecution witness before trial in the absence of his counsel.[48] The exclusionary rule has also been

43. *Id.* at 660. See *Ker v. California,* 374 U.S. 23 (1963), for further articulation of standards applicable to state and federal courts.
44. 297 U.S. 278 (1936).
45. 384 U.S. 436 (1966).
46. *Id.* at 444. *See also* Escobedo v. Illinois, 378 U.S. 478 (1964).
47. *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 4 (1967).
48. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

applied as a sanction for the violation of federal statues and even of rules of procedure. In *Lee v. Florida*[49] the Court implied an exclusionary rule from section 605 of the Federal Communications Act[50] to deny admissibility in a state trial of evidence obtained by state police in violation of section 605; and the so-called *McNabb-Mallory* rule[51] applies the exclusionary rule as a judicial sanction for violation of Rule 5(a) of the Federal Rules of Criminal Procedure, requiring that an arrested person be taken before a committing magistrate "without unnecessary delay."

In demonstration of the judicial commitment to the exclusionary rule and its effective application, the Court has, for more than half a century, extended the reach of the rule to forbid the use of secondary evidence, secured as a result of leads gained from illegally seized evidence, as well as the primary evidence that was itself the product of an unlawful search or seizure.[52]

When the Supreme Court adopted the exclusionary rule in *Mapp v. Ohio*, the overruling of *Wolf v. Colorado* was based on what might be called a doctrine of constitutional necessity. Once the applicability of the fourth amendment to the states was acknowledged, it was no longer possible to "tolerate denial of [the fourth amendment's] most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[53] Accordingly, when the Court concluded that exclusion was compelled by the logic of the fourth and fifth amendments, its ruling was based squarely on the Constitution: "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence."[54]

The Impact of Mapp

The rationale for the exclusionary rule was examined more extensively when the Court had to decide whether the principle of ex-

49. 392 U.S. 378 (1968), *overruling* Schwartz v. Texas, 344 U.S. 199 (1952).
50. 48 Stat. 1103, 47 U.S.C. § 605 (1970).
51. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).
52. For the original statement of the "fruit of the poisonous tree" doctrine, see Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The doctrine is not limited to physical evidence. Wong Sun v. United States, 371 U.S. 471 (1963).
53. Mapp v. Ohio, 367 U.S. 643, 656 (1961).
54. *Id.* at 657.

clusion should be applied retroactively to cases that arose before *Mapp*. In denying retroactivity in *Linkletter v. Walker*,[55] the Court, again through Mr. Justice Clark, concluded that "the Constitution neither prohibits nor requires retrospective effect."[56] Accordingly, the Court reviewed the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retroactive application of *Mapp*.[57] Each aspect of the examination led the Court to believe that retroactivity was not constitutionally required and would in fact be counterproductive. As to the purpose of the rule the Court referred to

> the necessity for an effective deterrent to illegal police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. . . . Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp*. Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late. . . . [Nor will the deterrence purpose of *Mapp*] at this late date be served by the wholesale release of the guilty victims.[58]

With that announcement of nonretroactivity, the Court departed from its previous practice of retroactive application of newly announced doctrines of constitutional guarantees in the area of criminal due process[59] and initiated a dialogue on retroactivity that is not yet concluded.[60] For present purposes, however, it is fortunately not necessary to examine that tangled skein, but merely to note the emphasis placed by the Court on deterrence in support of the constitutional rule of exclusion. Critics of the exclusionary rule as applied to unlawful search and seizure have focused upon the distinction drawn by the Court between cases where "pure" retroactivity was said to be required because the constitutional defect "went to the fairness of the trial—the very integrity of the fact-finding process,"[61] and those where exclusion was said to be based on the need for deterrence, even though the excluded evidence might be entirely reliable as to the facts or events for which offered.[62] Notwithstanding the *Linkletter* Court's statements to the contrary, it seems that this emphasis on deterrence is not entirely consistent

55. 381 U.S. 618 (1965).
56. *Id.* at 629.
57. *Id.* at 629-38.
58. *Id.* at 636-37.
59. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) and Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Griffin v. Illinois, 351 U.S. 12 (1956) and Eskridge v. Washington, 357 U.S. 214 (1958).
60. *See, e.g.*, Loper v. Beto, 405 U.S. 473 (1972); United States v. Tucker, 404 U.S. 443 (1972).
61. Linkletter v. Walker, 381 U.S. 618, 639 (1965).
62. 318 U.S. at 638-39.

with the announced purpose of the exclusionary rule as it originated in *Weeks*.[63] The inquiry should be more directed to whether courts may sanction police conduct in violation of the Constitution by admitting evidence seized in violation of the fourth amendment than to whether deterrence is in fact accomplished.

Predictably, the adoption of the exclusionary rule was praised as a bulwark of individual liberty—and condemned as another step toward a lawless society. But even those who were most skeptical assumed that it would remain the law of the land. Doubtless, some police officials and prosecutors more or less consciously disregarded the new command. They may have assumed—perhaps not without reason—that innocent victims of lawless police behavior would seldom complain and that ways could be found to avoid suppression where the unlawfully seized evidence pointed to guilty activity.[64] Some police departments made altogether honest efforts to comply with the spirit as well as letter of the exclusionary rule.[65] But most law enforcement officials remained unconvinced.

Supporters of the exclusionary rule came principally from the academic arena and from defenders of civil liberties.[66] Critics, on the other hand, were by no means confined to the world of law enforcement, but included as well high public officials, prominent judges and influential scholars.

Significant attacks continue to be leveled at *Mapp* and the other exclusionary rules by all three branches of the national government. President Richard M. Nixon, who campaigned against the Supreme Court in 1968, and promised to appoint "strict constructionists" to the Court, still complained in 1973 about "soft-headed" judges who fail "to show as much concern for the rights of innocent victims of crime as they do for the rights of convicted criminals."[67] Congress was sus-

63. *See* text accompanying notes 10-13 *supra*.

64. In a surprising number of narcotics offenses the arresting officer testifies that the defendant discarded the narcotic in the presence of the officer. Where there was only the evidence of officer and defendant, what court would not credit the "dropsy testimony" of the officer over the word of the defendant? *See, e.g.*, People v. McMurtry, 614 Misc. 2d 63, 314 N.Y.S.2d 194 (Crim. Ct., N.Y. County 1970); Younger, *The Perjury Routine*, THE NATION 596 (May 8, 1967). Unfortunately, the "blundering constable" often turns to perjury to secure what he regards as a proper conviction.

65. *See, e.g.*, Murphy, *The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941-43 (1966). *See also* Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW AND CONTEMP. PROB. 500 (1971); Hudson, *Police Review Boards and Police Accountability*, 36 LAW AND CONTEMP. PROB. 515 (1971); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

66. *See, e.g.*, CHEVIGNY, POLICE POWER (1969); Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements*, 1961 U. ILL. L.F. 78.

67. Radio address of President Nixon on "Law Enforcement and Drug Abuse Prevention," delivered on March 10, 1973, 9 PRESIDENTIAL DOCUMENTS 246, 247 (March 12, 1973).

picious of all exclusionary rules and legislated some modifications.[68] Respected members of the judiciary doubted the workability of suppression and argued for modification of the absolute requirement of exclusion. Judge Henry Friendly stated the argument against the rule with characteristic forthrightness:

> The basis for excluding real evidence obtained by an unconstitutional search is not at all that use of the evidence may result in unreliable factfinding. The evidence is likely to be the most reliable that could possibly be obtained; exclusion rather than admission creates the danger of a verdict erroneous on the true facts. The sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution.[69]

The most important judicial criticism has come from the Supreme Court itself. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[70] Chief Justice Burger stated his objections to the exclusionary rule and outlined an alternative remedy to be accomplished by congressional legislation. He asserted that justification of the exclusionary rule ordinarily rested on one or more of three arguments, none of which he found persuasive. First, he rejected the notion that the rule was supportable to ensure that governments "play the game fairly," at least "if an effective remedy is provided against the government by Congress."[71] Second, he found no support in the fifth amendment because "the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence."[72] Finally, he rejected the deterrence rationale, which he described as "the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any benefits they might have gained from their illegal conduct."[73] While recognizing the need for "some

68. *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197 (1968). Title II provides for some relaxation in the rules for admissibility of confession and eye witness testimony in federal courts. 18 U.S.C. §§ 3501, 3502 (1970). Title III provides standards for the authorization of wiretapping and electronic surveillance. 18 U.S.C. §§ 2510-20 (1970). For an interpretation of Title III, see United States v. United States District Court, 407 U.S. 297 (1972).

69. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965). *See also* the argument of Judge Carl McGowan that the exclusionary rule might be discarded if the police could develop an effective system of self-regulation of police misconduct. McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 676-94 (1972).

70. 403 U.S. 388 (1971). *See also* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

71. 403 U.S. at 414.

72. *Id.*

73. *Id.* at 415.

effective sanction" against illegal conduct, thereby evoking a glimpse of *Weeks*, the Chief Justice asserted that "there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials."[74] For this failure he found several reasons:

> The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. . . . The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case is either weakened or destroyed. . . .
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> . . . But the prosecutor who loses his case because of police misconduct is not an official in the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches or seizures so that he can guide police action.
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> Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. . . .[75]

The sanction Chief Justice Burger would erect in substitution for the exclusionary rule would be possible, in his judgment, by action of Congress. His solution would involve a statutory waiver of sovereign immunity and the creation of a cause of action for damages to be administered by a quasi-judicial body. Finally, in a statement more hopeful than supportable, he concluded that the states would be likely to "develop their own remedial systems on the federal model."[76]

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74. *Id.* at 416, *citing* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970). In that article Professor Oaks summarized his conclusions as follows:

> As a device for directly deterring illegal searches and seizures by the police, 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 effect 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.

75. 403 U.S. at 416-17.

76. *Id.* at 423. The separate dissents of Justices Black and Blackmun expressed no view on the Burger opinion; rather they stated disagreement with the majority holding in *Bivens* that found a federal cause of action for damages against federal officials who violated the fourth amendment.

Chief Justice Burger noted indebtedness for his ideas in *Bivens* in part to the work of the American Law Institute which had since 1966 been working toward *A Model Code of Pre-Arraignment Procedure*.[77] By 1972 the portions on search and seizure were completed and were in that year approved by the Council and Members of the ALI. Those provisions, which are likely to provide the principal focus of the challenge to *Mapp*, seek a middle ground that would limit suppression to stated circumstances of grievous offense by police officials, while continuing the civil remedy in damages for all victims of illegal search and seizure that was established in *Bivens*.

Article 290 of the proposed Model Code deals comprehensively with the question of evidentiary exclusion. For present purposes the most important provision is section 290.2, Determination of Motions to Suppress Evidence.[78] The grounds for a motion to suppress evidence are set forth in detail in section 290.2(1). The essence of the change appears in section 290.2(2) as follows:

> *Determination*. A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this State. In determining whether a violation is substantial the court shall consider all the circumstances, including:
>
> (a) the importance of the particular interest violated;
>
> (b) the extent of the deviation from lawful conduct;
>
> (c) the extent to which the violation was willful;
>
> (d) the extent to which privacy was invaded;
>
> (e) the extent to which exclusion will tend to prevent violations of this Code;
>
> (f) whether, but for the violation, the things seized would have been discovered; and
>
> (g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in

77. 403 U.S. at 419, 424-26. See also in the appendix to the *Bivens* opinion the listing of other scholarly writing expressing dissatisfaction, in varying degrees, with the exclusionary rule. *Id.* at 425-27.

78. Section 290.1 (Motions to Suppress Evidence) provides standards for the time and place of motions to suppress; interlocutory appellate review of an order of suppression and appellate review of the denial of a motion to suppress at the instance of a convicted defendant regardless of whether defendant pleaded guilty or not after the adverse ruling on his motion; and a relaxed rule on the standing required for a motion to suppress.

Section 290.3 (Challenge to Evidence of Reasonable Cause) provides standards to test the sufficiency of the reasonable cause for issuance of a warrant for arrest or seizure and for a search incidental to an arrest or search without warrant.

Section 290.4 (Identity of Informants) establishes the grounds for the disclosure or the withholding of the names of informants who provide information essential to the establishment of reasonable cause.

the proceeding in which the things seized are sought to be offered in evidence against him.[79]

The Model Code apparently proceeds on the premise that the exclusionary rule cannot be substantially modified by statute without Supreme Court initiative and that the Court is likely to hold firm on the point (despite the Burger dissent in *Bivens*).[80] Accordingly, the grounds for exclusion in section 290.2(1) remain those where the defect in the seizure is of constitutional dimension under present decisions. But where existing interpretations do not mandate exclusion as a constitutional necessity, the Code would not provide for suppression.[81] Section 290.2(2) thus constitutes an attempt to reduce the evidentiary exclusion to the constitutional minimum by providing that all nonconstitutional defects shall result in suppression only if the violation is "substantial" as tested by the above-recited standards.[82]

CONCLUSION

The exclusionary rule of *Mapp v. Ohio* is a concededly blunt and somewhat imprecise instrument for the protection of individual privacy

79. Section 290.2(3) (Fruits of Prior Unlawful Search) continues the "fruit of the poisonous tree" requirement initially stated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

Section 290.2(4) (Evidence of Reasonable Cause Unlawfully Obtained) excludes unlawfully secured evidence from the determination of probable cause.

80. The Commentary to Section 290.2(2) of the Model Code quotes from Davis v. Mississippi, 394 U.S. 721, 723 (1969) as follows: "Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trials," which in turn cites *Mapp*. ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, PROPOSED OFFICIAL DRAFT No. 1 at 219 (1972).

81. MODEL CODE at 219-21.

82. The Commentary on this subsection is puzzling; it seems to subject fourth amendment rights to the test of substantiality of the violation in the same way as it does nonconstituional violations. The entire text of the Commentary on this subject follows:

> The criteria of Subsection (2) relate to *the extent of violation of Fourth Amendment or other constitutional rights* (clauses (a) and (d)), the flagrancy of the officer's violative conduct (clauses (b) and (c)), furtherance of the deterrent policy (clause (e)), casual connection between the violation and the discovery of the evidence (clause (f)), and the extent to which the violation has damaged the defendant's case (clause (g)). Model Code at 221. (Emphasis supplied.)

Apparently the Model Code proceeds on the somewhat novel premise that it is possible to be just a little bit unconstitutional without rising to the level of forbidden unconstitutionality. The Commentary also notes: "If exclusion is constitutionally required, as often will be the case, that is the end of the matter. *But the constitutional issue itself may be affected by the factor of substantiality*, and the presence or absence of the criteria set forth in Subsection (2)." MODEL CODE at 220-21. (Emphasis supplied.) This dubious suggestion was picked up in a bill introduced by Senator Lloyd M. Bentsen in the 1st session of the Ninety-third Congress. S. 881, introduced on February 15, 1973, would have provided that evidence not be excluded from any federal criminal proceeding "solely because that evidence was obtained in violation of the Constitution, unless the court finds, as a matter of law, that such violation was substantial" (using the Model Code standard of substaniality). However, the Criminal Law Section of the American Bar Association opposed the bill and the ABA House of Delegates expressed its oposition as well. 59 A.B.A.J. 387 (1973). Although the bill is unlikely to be enacted in 1973, similar proposals will surely be offered in the future.

against official lawlessness. It is of course easier for law enforcement officers to proceed directly against the homes, the businesses, the telephones and the persons of those suspected of wrongdoing. But the United States Constitution forecloses that route in its emphasis upon the higher call of privacy of person and effects.

We may anticipate further attacks upon the exclusionary rule, not only in connection with *Mapp*, but as well in all the other circumstances in which the Supreme Court has mandated suppression of evidence unlawfully secured. The difficulty is that the issue continues to be misstated. To emphasize the fact that an individual wrongdoer may sometimes escape punishment is to miss the more important question of failing to punish, almost condoning, the wrongdoing of those charged with enforcement of law. If the argument is made that police officials cannot be deterred from unlawful activity when the exclusionary rule is likely to prevent conviction of those arrested, it is hard to believe that a loosening of the suppression sanction would lead to more lawful police conduct. Is it not reasonable instead to insist upon more effective enforcement of standards for the conduct of law enforcement officials so that the exclusionary rule becomes no longer necessary? How else in a Watergate society can any of us feel secure?