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FEEDBACK FROM THE FOURTH AMENDMENT: IS THE EXCLUSIONARY RULE AN ALBATROSS AROUND THE JUDICIAL NECK?

BY STEPHEN E. GOTTLIBE*

INTRODUCTION

The exclusionary rule, which renders illegally obtained evidence inadmissible in criminal trials, was adopted for the federal courts in 19141 and applied to the states in 1961.2 After its adoption for the federal courts, it was felt that the exclusionary rule would serve as a lesson in the cause of liberty.3 By the time it was adopted for the states, the possibility that it would poison constitutional adjudication and contribute to a general disrespect for law, order, and the Bill of Rights may have been felt but was not well articulated. Although alternatives have been suggested4 and criticism has been levied,5 the exclusionary rule persists.

This Special Comment will explore the goals of the exclusionary rule, consider the extent to which these goals have been met, discuss the effectiveness of the major alternative and suggest an improvement.

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3 Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (Olmstead was overruled in Katz v. United States, 389 U.S. 352 (1967)).
5 People v. Defore, 242 N.Y. 13, 21 (1926); WIGMORE, EVIDENCE, § 2184 (3d ed. 1940).
I. THE REASON FOR THE RULE

The fourth amendment was designed to limit the arbitrary power of government. Unrestrained government power could be abused in a variety of ways. The government might seize information about people—their politics, religion, friends, likes, dislikes, or business plans—and misuse it. The burden of bail or imprisonment might be imposed for partisan or petty personal reasons or because of prejudice and hostility. Property might unjustifiably be taken either temporarily or permanently.

The amendment requires that seizure and arrests be made reasonably and that a warrant authorizing such an action be based on information which makes it probable that the action is justified. The proper goal of the exclusionary rule is to ensure that law enforcement officers follow these requirements for searches and seizures so that they cannot use their office improperly against personal or political opponents or minorities.

Most authorities believe that police behavior has improved over the last several decades. It is by no means clear, however, that the exclusionary rule deters lawless behavior. The improvement is probably the result of factors other than the exclusionary rule, such as a general social revolution which has

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7 See Elkins v. United States, 364 U.S. 206, 217 (1960). Justice Brandeis believed that government should not condone lawless behavior by its own officers and that government should set an example for others to follow. See Olmstead v. United States 277 U.S. 438 (1928) (Brandeis, J., dissenting) (Olmstead was overruled in Katz v. United States, 389 U.S. 352 (1967)).


demanded dignity and respect for minorities and lower socioeconomic groups.\footnote{The bulk of police violence and abuse has always been directed at people in the lowest social and economic positions. See Reiss, supra note 8, at 144-56; Foote, supra note 4, at 500. To assess the conclusion that improvement in police behavior is in large part the result of changes in attitudes, compare the apparent improvement in police behavior, see note 8 supra, with the apparent marginal effect of Mapp v. Ohio, 367 U.S. 643 (1961), on fourth amendment abuses, see note 9 supra. The exclusionary rule may also have a positive effect on attitudes, partly bearing out Brandeis in Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting). In the 1960's, after decades of official denials, Attorney General Ramsey Clark and then Solicitor General Thurgood Marshall began disclosing government wiretaps in the context of motions to suppress illegally obtained evidence. Donner, Electric Surveillance, 2 Civ. Lib. R. 15, 25, 29 (Summer 1975). Since then government law enforcement practices have been subjected to continued and systematic investigation and disclosure by a series of congressional committees. See, e.g., Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, S. Rep. No. 755, Book II. 94th Cong., 2 Sess. 13 at 837-920 (1976) [hereinafter cited as Select Committee].} Also, the movement for racial equality, which spawned civil rights statutes that include tort remedies,\footnote{42 U.S.C. §§ 1981-1985.} is probably responsible for increasing public tolerance for litigation against police officers\footnote{The major cases defining the good faith defense have arisen not out of searches and seizures but out of a school dispute, Wood v. Strickland, 420 U.S. 308 (1975); confinement in a mental hospital, O'Connor v. Donaldson, 422 U.S. 563 (1974); and a college campus massacre, Scheuer v. Rhodes, 416 U.S. 232 (1974).}—which is crucial to the viability of alternate remedies.

There are several situations in which the exclusionary rule is totally ineffective to control police behavior. For example, "[w]here police, neither intending nor undertaking to prosecute, take the law in their own hands for purposes of harassment, threat, or revenge, the courts have no means of control at all."\footnote{Note, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 163 (1948).} This frequently happens in poor or high crime areas where young men are often stopped, searched, or arrested as a kind of display of authority,\footnote{Oaks, supra note 9, at 721-22.} or on the assumption that by virtue of their status they are likely to have some form of contraband on their persons.\footnote{Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 438 (1974).} The policeman's objective in such instances is satisfied at the time of the encounter, as the harassed subject is duly impressed with the presence and zeal of
the police. Any contraband that is found may be seized and the person detained—with little thought of gaining convictions. Since conviction is not a goal in this situation, the police will lose nothing by the application of the exclusionary rule. The possibility of a public official acting as a petty tyrant, or as the instrument of a major tyrant, does not depend on his ability to use evidence seized to convict someone. When the improper motive yields a purpose to convict, it is usually more convenient to charge those minor crimes which depend on the officer's word — breach of the peace, interfering with a police officer, resisting arrest.

The exclusionary rule is similarly impotent to control police behavior when the illegal search or seizure is conducted with the intention of injuring a reputation or controlling political activity. Some unfortunate recent examples have been tax investigations of those who are critical of government officials, the dispersal and detention of protesting crowds, and the public exposure of unpopular ideas or confidential information. Even if no conviction results from a baseless arrest, one's reputation or employment prospects may be damaged. In addition,

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16 This kind of law enforcement is one of the major sources of anger in the black community. Reiss argues that this is a combination of class discrimination with public sensitivity to racial mistreatment. Reiss, supra note 8, at 144-56. See also Rights Unit Says Police Misconduct is Among South's Major Problems, N.Y. Times, May 1, 1978, § D at 8, col. 1.

A variable that may determine the behavior of the police in this type of situation is the manner in which the person stopped speaks to the police. Amsterdam, supra note 15, at 416; Chevigny, supra note 8, at 137-38; A. Reiss, supra note 8.

17 P. Chevigny, supra note 8, at 136-46.

18 Select Committee, supra note 10, at 837-920.


20 See Caughey, McCarthyism Rampant, in A. Reitman, The Pulse of Freedom, 155-60 (1975). Cf. Greene v. McElroy, 360 U.S. 474 (1959). Patterns of FBI contact with the media are described in 2 Select Committee, supra note 10, at 225-32. Purely political material has also been obtained and supplied to incumbent candidates. Id. at 33, 51-54, 225; N.Y. Times, June 2, 1978, § A at 12, col. 1. The gathering and abuse of information about sexual relations is described in Dorsen, Bender & Neuborne, supra note 19, at 194; N.Y. Times, Jan. 6, 1977, § A, at 1, col. 5. Political animus among law enforcement agencies has also led to official incitement to violence. See Select Committee supra note 10, at 10-12; Improper Police Intelligence Activities, A Report by the Extended March 1975 Cook County Grand Jury, Part IV (A) and (B).
the fourth amendment does not protect against abuses of prosecutorial discretion.

In addition to its ineffectiveness in controlling police behavior, the exclusionary rule provides no remedy for an innocent victim of police misconduct. The exclusionary rule deals only with an investigation aimed at conviction:

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

The exclusionary rule was supposed to prevent that discomfort of the innocent by making mistakes useless to the police and therefore encouraging them to be careful. This is the only way in which the exclusionary rule could work to protect the innocent. As noted earlier, it is difficult to tell whether the exclusionary rule has caused an improvement in police behavior; however, it is certain that the rule has caused a number of accused—and probably guilty—criminals to be released.

The exclusionary rule is only effective when an illegal search yields evidence that would lead to a conviction. The rule may not work well even in that situation. For the rule to re-

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21 Bivens v. Six Unknown Named Agents 403 U.S. 388, 398, 410 (1971) (Harlan, J., concurring). It is of course possible that incriminating evidence may be seized improperly in an effort to use it against an innocent person. In that instance the rule makes it easier to establish innocence.

Justice Harlan made the relation between the exclusionary rule and the interests of the innocent clear in his dissent in United States v. White, 401 U.S. 745, 789 (1971), noting that the prevailing opinion's focus on the expectations and risks of "wrongdoers" "misses the mark entirely" because the result subjects "each and every law-abiding member of society" to the risk that secret agents will record or transmit their most intimate conversations.


strain the officer, it would be necessary that it prevent conviction in an otherwise solid case, that the officer be made aware of the results of the case and the relationship of his actions in investigating it to that result, and that he or his department care not about arrests but about convictions. On a broader level, the reasons why defendants are released are only partly related to the conduct of the officer. The greater the number of these independent causes, the less responsible a policeman feels for the releases or lost convictions.

In addition to its inability to control police behavior and to provide a remedy for innocent parties, the exclusionary rule has also been one of the major sources of objection by the general public to the way our courts operate. The reason is plain: the rule requires judges to exclude testimony from criminal trials about evidence that was obtained in violation of the Constitution even if that evidence would help to convict a guilty person. That hostility has caused a weakening of the rule, and, by engendering sympathy for the police, may have limited the growth of other remedies. Such hostility has probably also led to regressive tendencies in other areas. For example, the right to resist an illegal arrest has been substantially restricted. The innocent protests of distraught citizens have

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24 Oaks, supra note 9, at 710.
25 See, e.g., United States v. Ceccolini, 98 S. Ct. 1954 (1978); Horowitz, supra note 9, at 239. On the dilution of the rule by lower courts, see id. at 243.
thus been criminalized. Other regressive tendencies are apparent in the decreasing protection allowed to persons in automobiles and in "stop and frisk" laws. Another significant development that may be the result of hostility toward the exclusionary rule is the subjugation of the press to law enforcement—first in holding newsmen to be fair game for fact-gathering, then in holding the press at the mercy of ex parte decisions about probable cause. This hostility toward the exclusionary rule has directed more attention toward the need to convict criminals than the need to protect privacy.

The Bill of Rights was designed to override popular judgments in favor of more enduring interests; things will not necessarily be better and may be much worse if the public is offended less. Thus it is dangerous and often illegitimate to make constitutional decisions on the basis of public reactions. Nevertheless, the question of alternatives naturally arises in the face of severe public reaction, particularly where that reaction undermines enforcement.

II. TORT LIABILITY AS AN ALTERNATIVE

A number of alternatives to the exclusionary rule have been proposed. Ultimately, however, only one remedy properly protects civil liberties: the traditional, ordinary tort suit. Also, the tort remedy may provide a healthier environ-

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29 See City of St. Louis v. Treece, 502 S.W.2d 432 (Mo. 1973).
31 Horowitz, supra note 9, at 234; Reiss, supra note 8, at 393.
34 By analogy, unhappiness with judicial doctrines in the area of sovereign immunity during the early nineteenth century gave impetus to the development of relatively harsh rules of personal liability by governmental officers. See Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 Colo. L. Rev. 1, 19-20 (1972). Similarly, the recent expansion of governmental immunity doctrines should encourage a reexamination of rules of personal liability. See generally id.
36 Richard A. Posner urges the substitution of tort liability for the exclusionary rule. His analysis is based on general principles without examining the impact of the defenses available or the effects of insurance on the results. In general his approach prefers allocation of damages by fault both to a rule of strict liability and to a rule of no liability. R. Posner, ECONOMIC ANALYSIS OF LAW 384-85 (1972). The approach outlined in this article is generally consistent with Posner's views.
ment for doctrinal development than suppression hearings. To understand the degree to which a tort suit may substitute for the exclusionary rule, it is necessary to turn to a consideration of the good faith defense that is available to public officials.

The good faith defense stands as the primary doctrinal obstacle that prevents placement of tort liability on policemen. This good faith standard for police misconduct was articulated by the Supreme Court in *Pierson v. Ray.* The courts are in agreement that good faith is less than probable cause and that it must reflect some objective standard of reasonableness: "[T]he policeman [must have] a reasonable, good faith belief in the existence of probable cause." To the extent that good faith requires less than probable cause, searches and seizures will be uncontrolled — even searches and seizures that would have been penalized under the exclusionary rule.

Thus, abrogation of the defense is necessary to prevent conduct that would have been penalized under the exclusionary rule. However, such an abrogation would have extremely harsh results if law enforcement officers were held personally liable in fourth amendment suits. Officers would be liable for all unreasonable acts regardless of their beliefs. The trend in the law has clearly been away from that kind of liability in public servants, partly because public officials required to make difficult decisions under stress occasionally make unreasonable ones. To the degree that errors are inevitable, placing the burden directly on police officers will deter nothing.

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37 Another obstacle is public reluctance to hold police liable, an attitude fanned by the exclusionary rule itself.

38 386 U.S. 547 (1967).


42 See G. Calabresi, *The Costs of Accidents* 109-11. In addition, it is sometimes assumed that placing the burden on the officer will force him to struggle between his own instinct for self-protection and a department whose rules need not take account of the results though moderated by collective bargaining or pressure from the ranks. In the case of direct orders to act improperly, however, liability will be softened by sympathetic juries and the legal right to implead responsible superiors. See Gray, *supra* note 41, at 322 n.116, 326.
In addition, such liability may make the burdens of serving on the police force unreasonable in comparison to the benefits. Another pragmatic consideration is that, to the extent that the public believes that the burden of liability falls on the officers, juries may be unwilling to impose liabilities on police officers. Thus, if officers are ever to be held personally liable in any case, retention of the good faith defense may be the necessary price of having a police force.\(^43\)

This position, however, sacrifices deterrence of unreasonable behavior because of the burden of unavoidable error on the policeman.\(^44\) The intentional abuses described above\(^45\) would be minimally deterred because of the difficulty of proving bad faith. No sanction would exist for negligence or abuse predictably found improper but arguably within the law, whether it be arrests of demonstrators or searches of prison mail.\(^48\) Departments would be undeterred from employing practices that generated abuse\(^47\) if personal liability could be avoided.

An alternative would be to abrogate the good faith defense and transfer liability away from the officer through the use of insurance or governmental reimbursement.\(^48\) Placed in this

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\(^42\) See G. Calabresi, supra note 42, at 69.

\(^43\) It should be noted that some states have permitted liability for some time but the effect on law enforcement and efficiency of administration has been negligible. See Engdahl, supra note 34, at 59. Perhaps this limited effect is the result of the impact of the exclusionary rule on the public.

\(^44\) See text at notes 13-20, supra.


\(^47\) See Horwitz, supra note 9, at 229-32.

\(^48\) Prior to the recent decision in Monell v. Dep't of Social Serv., 98 S. Ct. 2018 (1978), damages could not be collected from municipalities for constitutional violations. They were collectible from individual officers, but that remedy was, as a practical matter, inadequate. Perhaps the hostility of the present Court to the exclusionary rule prompted this holding in Monell: the availability of a remedy against a municipality provides an alternative sanction from that provided by the exclusionary rule. See also Carey v. Pipus, 435 U.S. 247 (1978), outlining the availability of substantial damages for humiliation in distress but limiting such recovery to cases establishing actual injury.

Other proposals that would aid fourth amendment tort litigation are the award of attorney fees and the establishment of a fixed minimum recovery. Such proposals would make these suits more attractive by providing a financial floor. See Geller, supra note 27, at 697, 702, 710-11. Despite the importance of awarding attorney fees to private "attorneys general," the Supreme Court held in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), that attorney fees could not be awarded to the winning party except as specified by statute or pursuant to certain historic exceptions.
manner, the burden of liability for unreasonable searches and seizures appears more manageable. If they can gain an advantage from experience ratings, insurance companies should be able to adjust their rates according, ultimately, to the quality of police work. Although police departments will pass the costs along to the public, they will have a political incentive to minimize those costs whenever possible. Thus, whether liability is covered by insurance or governmental reimbursement, the costs would be placed on those who have control over the practices which create them. To that degree the damage awards might function as a deterrent. The tradition of imposing liability for fault does not change the picture. To limit liability to bad faith when liability is placed on the government further exempts from liability the fault of the agency in the light of its knowledge of the problems and probable outcomes of its rules and supervisory practices. The harsh results that would obtain from elimination of the good faith defense when liability is placed on individuals would not be present if liability were spread through insurance or governmental reimbursement.

The Court specifically disapproved the award of attorney fees to those charging government officials with violation of constitutional rights via their disapproval of the private "attorneys general" theory. Id. at 269. But see 42 U.S.C. § 1988 (1976), providing counsel fees.

Injunctive relief is another alternative method of combating police misbehavior. However, in Rizzo v. Goode, 423 U.S. 362 (1976), the Supreme Court reversed the district court, which had granted an injunction ordering certain improvements to be made in the operation of the Philadelphia police department. The Court held that injunctive relief will not be available unless plaintiffs can show not merely carelessness, poor practices, and lax supervision, but an actual conspiracy on the part of several specifically identified officials to deny constitutional rights. Rulemaking had prominent advocates, see Amsterdam, supra note 15, but was rejected as too meddlesome. See also Boyle v. Landry, 401 U.S. 77 (1971).

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Commentators have urged parallel expansion of “enterprise liability” when
This analysis suggests that the good faith defense is inconsistent with the assumption of liability coverage by the government or an insurance company since the goal of the fourth amendment is deterrence. Since a unitary rule is probably both wise and necessary, it would be better to eliminate the defense and encourage reimbursement.

**Conclusion**

Doubts about the utility of the tort remedy rest on the fear that a hostile public would make recovery against police all but impossible. Nevertheless, the argument that public hostility is the reason to prefer the exclusionary rule to a tort remedy is circular. The exclusionary rule has caused much of the public hostility that would favor the police in tort actions. It would surely be better to have a few wronged and innocent people recover than to entrust the development of law in this area to the criminal bar and thus perpetuate this hostility.

Basic to libertarian jurisprudence is acceptance of the reality that public sentiment is a factor to be considered. The court may have to resist popular opinion but, as Hamilton argued, such resistance should be temporary; one can hardly expect it to be permanent. Since a resolution is possible, one can be a civil libertarian and still take account of the public’s fears.

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However, one court has allowed the good faith defense to the government. See Norton v. United States, 581 F.2d 390 (4th Cir. 1978), cert. denied, 99 S. Ct. 613 (1978). See also Bertot v. School District No. 1, 47 U.S.L.W. 2336 (10th Cir., Nov. 15 1978). See text accompanying notes 6-7 supra.

