REPLACING THE EXCLUSIONARY RULE: FOURTH AMENDMENT VIOLATIONS AS DIRECT CRIMINAL CONTEMPT

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INTRODUCTION

The exclusionary rule, which holds that evidence obtained in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures is inadmissible, remains highly controversial. Many American academics believe that it is the best, if not the only, way to protect citizens from unreasonable searches. Politicians and judges in other nations, however, have not adopted similar rules, and the exclusionary rule is fairly unpopular with the American general public who recognize that it sometimes permits the guilty to go free.

The Supreme Court under Chief Justice Roberts has indicated dissatisfaction with the exclusionary rule. Five justices seem prepared to rely on other means to protect Fourth Amendment rights. The question is what these other means will be if the exclusionary rule (as it is currently understood) is abandoned.

This paper proposes that an admissibility standard be adopted that is in keeping with virtually every jurisdiction around the world other than the United States. Under this standard, before ruling evidence inadmissible, the court would consider the level of the constitutional violation, the seriousness of the crime, whether the violation casts substantial doubt on the reliability of the evidence, and whether the admission of the evidence would seriously damage the integrity of the proceedings.

In addition to this admissibility standard, this paper proposes that Fourth Amendment violations be treated like direct criminal contempt of court. Thus, if a judge determines that there has been a serious Fourth Amendment violation, the offending officer could be criminally punished. Inasmuch as this punishment can be comparatively severe and is directly aimed at the officer, it should have a strong deterrent effect. Moreover, since a judge would be empowered to enforce the conviction with minimal

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process beyond that which would have already taken place, it would be a more reliable deterrent than the existing exclusionary rule.

There are, of course, some questions that remain to be addressed, primarily regarding the best way to protect the rights of officers charged with contempt and concern about over-deterrence and interference with police investigations. This approach, however, seems to satisfy the demand that Fourth Amendment rights be protected without automatically excluding relevant and material evidence of guilt. As such, it is a remedy worthy of serious consideration.

I. THE EXCLUSIONARY RULE

Perhaps no Supreme Court decisions about the criminal justice system have provoked more criticism than those involving the exclusionary rule.[1] Under it, regardless of any other consideration, evidence obtained in violation of the defendant's Fourth Amendment rights must be excluded from evidence. It does not matter whether the evidence is probative of guilt or necessary for a conviction, nor does it matter whether the crime involved is serious and the criminal is dangerous. The evidence will be suppressed in order to deter future police misconduct, premised on the assumption that police are less likely to engage in illegal searches and seizures if they know that the evidence cannot be used in court.

To the average citizen, the exclusionary rule means that criminals are being set free on a technicality. Rejecting such a rule in 1926, Judge Benjamin Cardozo famously noted: "The criminal is to go free because the constable has blundered."[2] He explained:

> No doubt the protection of the statute [against unreasonable search and seizure] would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society.[3]

Eventually, of course, the Supreme Court decided that the criminal should indeed go free because the constable had blundered.

1. *See, e.g.*, Ronald J. Rychlak, *The Judicial Assault on Criminal Law*, *in* THE MOST DANGEROUS BRANCH: THE JUDICIAL ASSAULT ON AMERICAN CULTURE 93 (Edward B. McLean, ed. 2008) ("to the average citizen, the exclusionary rule meant that criminals were being set free on a technicality"); RONALD J. RYCHLAK & MARC HARROLD, MISSISSIPPI CRIMINAL TRIAL PRACTICE (Thompson/West, 2004) ("Few rules of criminal procedure and constitutional law evoke as much passion, discussion, and debate as the exclusionary rule."). *See generally* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 111 (2003).

2. People v. Defore, 150 N.E. 585, 587 (N.Y. App. 1926), *cert. denied*, 270 U.S. 657 (1926).

3. *Id*. at 589.

The exclusionary rule comes at a high cost. It was adopted in federal courts in 1914,[4] but it was not made binding on the states until 1961.[5] That is when the exclusionary rule became the "bogey that haunts reasonable policing."[6] As one commentator explained:

> The exclusionary rule—which bars the use of evidence said to have been illegally obtained—was established in 1914 in *Weeks v. United States* but did little harm until it was applied to the states. So long as the *Weeks* rule was confined to federal cases, as Justice Rehnquist pointed out, its chief "beneficiaries . . . were smugglers, federal income tax evaders, counterfeiters, and the like." State crime is a profoundly different matter. Ninety-five per cent of the crime committed in the United States, and virtually all violent crime, comes under the jurisdiction of the states. Once the *Weeks* rule was brought to bear against the states the result was uncounted thousands of robbers, rapists, and murderers set free.[7]

The exclusionary rule has no sense of proportionality. For a small violation of Fourth Amendment rights, a dangerous and guilty criminal can obtain a tremendous benefit. As Harvard Professor Akhil Amar put it, that makes us all a little less secure in our persons, houses, papers and effects.[8]

The exclusionary rule is based on the premise that the deterrent effect on police conduct outweighs the injustice of suppressing relevant and material evidence. The Supreme Court has recognized deterrence as the principle, if not sole, justification for the rule.[9] The seriousness of the crime and the future threat posed by the criminal are irrelevant to the decision.[10] The necessity of the evidence at issue to prove guilt is irrelevant.[11] The effec-

4. Weeks v. United States, 232 U.S. 383, 398 (1914).

5. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

6. CATHERINE CRIER, THE CASE AGAINST LAWYERS 95 (2002).

7. Leon Scully, *Civil Wrongs*, NATIONAL REVIEW, May 25, 1992, at 22.

8. Statement of Akhil Amar: *The Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial*, testimony before the Senate Committee on the Judiciary, March 7, 1995; *see also* Morgan O. Reynolds, *Why Stop Halfway?*, NATIONAL REVIEW, May 15, 1995, *available at* http://findarticles.com/p/articles/mi_m1282/is_/ai_16920439 ("The irony of the exclusionary rule is that the public, not the culpable police, bears the costs of freeing the guilty criminals.").

9. *See* Stone v. Powell, 428 U.S. 465, 485 (1976) (the judicial integrity justification for exclusion plays only a limited role in the determining whether to apply the rule in a particular context); United States v. Janis, 428 U.S. 433, 446 (1976) ("[T]he 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"). The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974); *see also* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) ("[W]e have held [the 'exclusionary rule'] to be applicable only where its deterrence benefits outweigh its 'substantial social costs.'").

10. *See* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 11-29 (1987) (disputing the notion that the seriousness of the crime should be considered when determining whether to apply the exclusionary rule).

11. *Stone*, 428 U.S. at 490 ("[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.").

tiveness of other ways to influence police conduct is irrelevant.[12] In light of these "non-factors," the exclusionary rule may promote both cynicism and perjury.[13] This leads to questions about the integrity of the justice system.[14]

Deterring future police misconduct is a worthwhile goal that helps protect individual rights and serves the common good, but deterrence is far from the only value at stake.[15] What is the "social cost" of preempting retribution and other legitimate reasons to punish wrongdoers, or releasing dangerous offenders into society, or undermining confidence in the criminal justice system? [16]

Moreover, there is a real question as to whether the exclusion of evidence actually deters future police misconduct.[17] More often than not, violations of the Fourth Amendment are unintended and not malicious. Deterrence does not work with unintentional conduct. Even in the case of deliberate violations, the sanction of exclusion is too remote and attenuated to constitute a meaningful deterrent. The effectiveness of a deterrent is usually a matter of certainty of punishment (or bad consequence) and severity of punishment (or consequence).[18] From an officer's perspective, the exclusionary rule is neither certain nor severe. Even where suppression is ordered, it often occurs long after the wrongful conduct and the sanction may never even be communicated to the offending officer.

12. *See, e.g.*, Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 848 (1994) (arguing that even though remedies other than exclusion are theoretically preferred, the exclusionary rule is "the best we can realistically do").

13. *See* WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 38-39 (1999) (explaining that the exclusionary rule promotes untruthful police testimony and helps create "[a]n attitude of cynicism [that] starts to pervade courthouses as the criminal justice system comes to expect and tolerate dishonesty under oath.").

14. District of Columbia Circuit Judge Malcolm Wilkey once wrote: "If one were diabolically to attempt to invent a device designed slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule." Reynolds, *supra* note 8, at 76; *see also* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 381-83 (4th ed. 2006) (noting that to "the public . . . the sight of guilty people going free because reliable evidence that could convict them is suppressed by judges on the basis of a technicality" is repulsive).

15. *See* RONALD J. RYCHLAK, TRIAL BY FURY: RESTORING THE COMMON GOOD IN TORT LITIGATION (2004) (discussing law and the common good).

16. *See* Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299 (1990) (discussing theories of punishment).

17. Numerous articles suggest that the exclusionary rule does not and cannot function as a meaningful deterrent. *See, e.g.*, Ronald L. Akers & Lonn Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUSTON ST. U. CRIM. JUST. CENTER RES. BULL. 1, 6 (1986); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 277 (1973).

18. *See* Rychlak, *supra* note 16, at 309-10 ("The deterrence theory assumes that people are endowed with a free will and that they behave rationally. . . . That would require knowledge of the likelihood of being caught and convicted (certainty of punishment), as well as the harshness of the sentence (severity of punishment).").

Many of the most problematic searches and seizures are never judicially reviewed because the claims are bargained away as part of guilty plea arrangements. Moreover, police officers may lie to avoid suppression. Finally, some officers may intentionally violate the Fourth Amendment because they find that the incentives for conducting illegal searches and seizures—the suspect's arrest, loss of employment, deportation, and/or deprivation of privacy and liberty—outweigh the disincentive of the possible future suppression of evidence.[19]

The Court has never used persuasive empirical evidence in its opinions to support or dispute its deterrence rationale.[20] As former Chief Justice Warren Burger pointed out, "there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law-enforcement officials."[21] Modern police departments are more professional than they were fifty years ago.[22] Intra-departmental discipline of officers who engage in misconduct and recourse to civil suits against offending police officials appear more effective than in the past.[23] Even if a meaningful relationship could be established between suppression and deterrence, it is likely that the relationship would vary significantly from one police department to another, depending on a variety of factors.[24]

The police are well aware of the existence of multiple exceptions to the exclusionary rule, such as the good faith exception, public safety excep-

19. This is central to Alan Dershowitz's argument in, IS THERE A RIGHT TO REMAIN SILENT? COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11 (Oxford University Press, 2008). Dershowitz argues that as a result of terrorist attacks, the United States is changing from a "deterrent state," in which we are focused on punishing criminals, to a "preventative state," in which the principal objective is stopping crime (and terrorism). *Id.* at 19. As such, he argues that the exclusionary effect of the *Miranda* rule is an insufficient deterrent for coercive interrogation. *Id.* at 171.

20. *See* Stone v. Powell, 428 U.S. 465, 492 (1976) (noting a lack of empirical evidence that the exclusionary rule deters police misconduct).

21. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, J., dissenting). Burger filed a dissent arguing that civil sanctions or other means could be used to enforce constitutional rights. The idea of police deterrence, according to Burger, was nothing more than a "wistful dream" with no support for several reasons. *Id.* at 415. It did not apply any direct sanction to individual police officers; it wrongly assumed that law enforcement was a "monolithic governmental enterprise"; the educational value of the rule was lost because policemen could not grasp the nuances of appellate opinions which define the standards of conduct; and because of the rule's inapplicability to a large area of policy activity that does not result in police activity. *Id.* at 415-418.

22. *See* Hudson v. Michigan, 547 U.S. 586, 598 (2006) (discussing "the increasing professionalism of police" departments since the inception of the exclusionary rule).

23. *See* Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45, 47 (1987) (proposing the decertification of police officers who violate the Fourth Amendment); *see generally* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 384 (1999) (discussing civil suits and finding them inadequate to address police misconduct).

24. Professor Yale Kamisar, an exclusionary rule proponent, conceded that the rule involves "measuring imponderables and comparing incommensurables." Yale Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 613 (1984).

tion, and inevitable discovery.[25] These and other exceptions detract from the presumption that illegally obtained evidence will be suppressed and therefore erodes the rule's deterrent effect.

II. THE ROBERTS COURT

In *Hudson v. Michigan*, a majority of the Roberts Court called into question the centrality of the exclusionary rule to Fourth Amendment analysis. The Court, in a 5-4 decision that was re-argued after Justice O'Connor's departure, affirmed the Michigan State Court of Appeals' holding and refused to exclude evidence gathered in violation of the "knock and announce" rule.[26]

In an opinion authored by Justice Scalia, the Court held that the exclusionary rule should not be applied because the "knock and announce" rule exists to protect interests such as preventing "violence in supposed self-defense by the surprised resident," giving the suspect "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry," and giving residents "the 'opportunity to prepare themselves for' the entry of the police."[27] These interests, the Court reasoned, have "nothing to do with the seizure of the evidence." [28] As such, the exclusionary rule should not apply.

Hudson might be seen as adding just one additional exception to numerous others that already attach to the exclusionary rule.[29] Unlike previous cases, however, a majority of the Court in *Hudson* strongly implied that other remedies were viable alternatives, or even superior alternatives, to the exclusionary rule. Justice Scalia wrote for the majority that:

> We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost a half century ago.[30]

Justice Breyer, writing for the four dissenters, argued that exclusion remains the best and most reliable deterrent, but he confirmed the scope of

25. *See infra* notes 38-45 and accompanying text.

26. *Hudson*, 547 U.S. at 602.

27. *Id*. at 594.

28. *Id.* For a more complete assessment of the Roberts Court and criminal law, see Tom Gede, Kent Scheidegger, & Ron Rychlak, *The Supreme Court's 21st Century Trajectory in Criminal Cases*, 9 ENGAGE: J. OF THE FEDERALIST SOC'Y PRAC. GROUPS 44 (2008).

29. *See infra* notes 38-45 and accompanying text.

30. *Hudson*, 547 U.S. at 597. At oral argument, Justice Scalia suggested that *Mapp* was outdated. He said that "*Mapp* was a long time ago. It was before section 1983 was being used, wasn't it?" For a transcript of the first oral argument, see 2006 WL 88656 (U.S.), 74 USLW 3422.

Scalia's majority opinion. Breyer noted that the logic of the majority's objections was not limited to "knock and announce" violations but was "an argument against the Fourth Amendment's exclusionary principle itself."[31] The lingering question, of course, is whether the Fourth Amendment would still have meaning without the exclusionary rule to enforce it.[32]

III. THE COMMON ALTERNATIVES

There are cases where exclusion makes sense, but too often it fails to protect constitutional rights, it interferes with efforts to reach justice, and it makes society more dangerous by letting wrongdoers avoid punishment. That is why "[t]he United States is the only country to take the position that some police misconduct must automatically result in the suppression of physical evidence."[33]

Outside of the United States, courts have rejected what one Canadian court called "the automatic exclusionary rule familiar to American Bill of Rights jurisprudence."[34] Recently, scholars from around the world gathered to develop criminal procedure standards for the International Criminal Court (ICC).[35] They did not adopt the American model.[36] Evidence that

31. *Hudson*, 547 U.S. at 614 (Breyer, J., dissenting).

32. The attorney for the defendant in *Hudson,* David A Moran, has written:

I have found through experience that when one argues a case in the United States Supreme Court, it can be more than a bit difficult to put the resulting decision in perspective. Depending on whether one wins or loses (and I've had both experiences), it is all too easy to think of the case as either the most important breakthrough in years or the death of the law as we know it. I hope the reader will apply the appropriate degree of skepticism, therefore, when I say that my 5-4 loss in *Hudson v. Michigan* signals the end of the Fourth Amendment as we know it.

David A Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283.

33. Adam Liptak, *American Exception: U.S. Is Alone in Rejecting All Evidence if Police Err*, N.Y. TIMES, July 19, 2008, *available at* http://www.nytimes.com/2008/07/19/us/19exclude.html ("'Foreign countries have flatly rejected our approach,' said Craig M. Bradley, an expert in comparative criminal law at Indiana University. 'In every other country, it's up to the trial judge to decide whether police misconduct has risen to the level of requiring the exclusion of evidence.'").

34. *Id.* (quoting Queen v. Harrison, 233 O.A.C. 211 (Feb. 2, 2008), *available at* http://www.canlii.org/en/on/onca/doc/2008/2008onca85/2008onca85.html. Australia, for instance, uses a balancing test. It considers the seriousness of the police misconduct, whether superiors approved or tolerated it, the gravity of the crime, and the power of the evidence. *Id.* As the High Court of Australia wrote in 1995: "Any unfairness to the particular accused" in most cases, "will be of no more than peripheral importance." *Id.*

35. Since 2000, this author has served as a delegate at the Prepatory Committee meetings and the Assembly of States Parties meetings that took place at the United Nations in New York. Among the committees on which he served was "Rules and Procedures," which dealt with these matters. *See* Goran Klemencic**,** *The Admissibility of Evidence Obtained in Violation of Human Rights in the proceedings before the International Criminal Court*, National University of Ireland, Galway, http://www.nuigalway.ie/human_rights/Current/goran_klemencic.html (last visited Sept. 27, 2009) (arguing that the ICC should adopt an exclusionary rule).

36. Under the ICC's rules of procedure: Evidence obtained by means of a violation of this Statute

never would be admitted in an American trial may well be admissible at a trial conducted in the International Criminal Court.[37]

Even the United States has blunted the impact of the exclusionary rule by creating numerous exceptions. Thus, evidence which is acquired in violation of the Fourth Amendment can be used or heard by a grand jury in determining the sufficiency of an indictment;[38] in civil tax proceedings;[39] and at deportation hearings.[40] The evidence can also be admitted to *impeach* the credibility of the defendant's trial *testimony*.[41] The "inevitable discovery" doctrine allows admission of evidence on the issue of the defendant's guilt where the evidence would otherwise have been excluded.[42] Similarly, the "independent source exception" allows evidence to be admitted in court if knowledge of the evidence is gained from a separate, or independent, source that is completely unrelated to the illegality at hand.[43] If a magistrate is erroneous in granting a police officer a *warrant*, and the officer acts on the warrant in good faith, then the evidence resulting from the execution of the warrant is not suppressible.[44] There may also be a public safety exception.[45]

The most commonly proposed alternative to the exclusionary rule involves civil suits by those who have suffered an unreasonable search or seizure.[46] This, however, is not an altogether satisfying alternative. Plaintiffs who have contraband or evidence of a crime at the location of the search would not present a very sympathetic case. They are also less likely

or internationally recognized human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. Rome Statute of the International Criminal Court, Article 69(7) (2005), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm.

37. *See generally* John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55 (2003).

38. United States v. Calandra, 414 U.S. 338, 354-55 (1974); United States v. Mara, 410 U.S. 19 (1973); United States v. Dionisio, 410 U.S. 1 (1973).

39. United States v. Janis, 428 U.S. 433, 434-38, 459-60 (1976).

40. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

41. United States v. Havens, 446 U.S. 620, 626-27 (1980); United States v. Torres, 926 F.2d 321, 323 (3d Cir. 1991).

42. Nix v. Williams, 467 U.S. 431, 448 (1984).

43. People v. Arnau, 444 N.E.2d 13, 16 (N.Y. 1982).

44. United States v. Leon, 468 U.S. 897, 926 (1984).

45. In New York v. Quarles, 467 U.S. 649, 651 (1984), the Court established a public safety exception to the *Miranda* warnings requirements. It might be reasonably assumed, in the appropriate case, that the Court would recognize a similar exception for the Fourth Amendment or, at a minimum, for the exclusionary rule.

46. *See* Hudson v. Michigan, 547 U.S. 586, 597 (2006) (arguing that the changes in the application of 42 U.S.C. § 1983 (2000) make civil suits an adequate remedy); *see also* 18 U.S.C. § 242 (2006) (making it a federal crime for anyone acting under color of law to deprive a person of his constitutional rights).

to have the resources to litigate, particularly from behind bars. Moreover, plaintiffs must overcome various legal doctrines limiting the liability of police officers and their employers. In other cases, standing may be an issue[47] or the damages might be insufficient to justify filing suit.[48]

Internal disciplinary proceedings against officers who have violated the Fourth Amendment rights of citizens also present an incomplete answer. First of all, it literally is the "police policing the police." Moreover, one would assume that police officers would tend to support aggressive police action and that they would be particularly reluctant to discipline an officer who had successfully uncovered evidence of a crime.

IV. CRIMINAL CONTEMPT

If the Supreme Court were to hold that the exclusionary rule is no longer mandatory, there would still need to be some way to enforce the Fourth Amendment.[49] One possibility would be to consider a Fourth Amendment violation to be an act of direct criminal contempt of court.[50] This remedy would create a strong deterrent, and it could operate without interfering with the pursuit of truth as the exclusionary rule does.

Like the exclusionary rule, contempt is a judicially created remedy. Criminal contempt typically occurs when someone interferes with the court's functioning.[51] Disorder can undermine the court's truth-finding

47. In *United States v. Payner*, the Court allowed unconstitutionally seized evidence to be introduced against the defendant because he was not the "victim" of the unconstitutional search. 447 U.S. 727, 735 (1980). This was so even though the police deliberately conducted the unconstitutional search, knowing the defendant would not have standing to object. *Id.* at 738 (Marshall, J., dissenting).

48. *See Slobogin*, *supra* note 23, at 422 (suggesting an administrative damages remedy where Fourth Amendment violations could be brought directly against police); *see, e.g.*, L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669 (1998) (suggesting a civil administrative remedy to partially replace the exclusionary rule). Other suggested alternatives to the exclusionary rule include "criminal prosecution of the offending officer; internal discipline of the officer (including termination of employment and steps less than termination); payment of monetary damages by the officer after a lawsuit, or alternatively, after an administrative proceeding; and requiring the officer to participate in educational courses." *Id.* at 718.

49. In all likelihood, several states, including the twenty-six that had exclusion before *Mapp*, would maintain the exclusionary rule.

50. *See* Ronald J. Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power*, 14 AM. J. TRIAL ADVOC. 243 (1990). See also Rychlak & Harrold, *supra* note 1, at 477-79 (contempt law in Mississippi).

51. The typical means of differentiating between civil and criminal contempt is by the purpose of the sanction. *See* Hicks v. Feiock, 485 U.S. 624, 625 (1988); SEC v. Simpson, 885 F.2d 390, 395 (7th Cir. 1989); Varvaris v. State, 512 So. 2d 886, 887 (Miss. 1987); *see also* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911) ("It is not the fact of punishment but rather its character and purpose that often serve to distinguish between [criminal and civil contempt] cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."); State *ex rel*. Buckson v. Mancari, 223 A.2d 81, 82 (Del. 1966). The category into which the contempt is placed is important

mission and at some point could even violate the due process rights of the litigants. Accordingly, the power to punish for contempt is inherent in all courts for the purpose of enforcing judgments and orders and compelling submission to lawful mandates.[52] It is deemed necessary to enable the court to proceed with the orderly administration of justice.[53]

Like the exclusionary rule, punishment of contempt is based upon the idea of deterrence: "[W]hen contemnors are not held accountable in the halls of justice, they are encouraged to engage in additional misconduct and commit additional crimes."[54] As one commentator explained:

> [w]hen contempt is let alone, contemnors are rewarded for their misconduct, while those who act properly are severely prejudiced. This is especially troubling when perjury or other contempt is obvious and unaddressed. After all, if one can lie under oath with impunity or simply disregard the orders of the court without consequence, then such wrongdoers and others are certainly encouraged to undertake additional misconduct. Such misconduct includes both obvious disdain for the court as well as the subtle circumvention of the oath and court orders.[55]

Criminal contempt is, of course, a crime,[56] but it is of a unique character.[57]

Contempt is usually said to be "direct" when it is committed in the physical presence of the judge or within an integral part of the court while

because it will impact both the procedures used at trial and the sentence imposed. Both types of contempt, however, can be used in similar situations. *See* J. ISRAEL, Y. KAMISAR ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 372 (rev. ed. 1990).

52. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 795 (1987) ("[T]he power to punish for contempt is inherent in all courts, has been many times decided and may be regarded as settled law."); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873); Anderson v. Dunn, 19 U.S. 204, 227 (1821) ("[B]y their very creation, [courts are vested] with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates[.]"); *In re Atchison*, 284 F. 604, 606 (S.D. Fla. 1922) ("Is the power of the courts to punish for the willful violation of an order duly and properly made inherent in the court, or is it dependent upon legislation? It can scarcely be questioned in this day that such power is inherent in the courts.").

53. *See* Marshall v. Gordon, 243 U.S. 521, 540-41 (1917) (contempt power based on courts' need for self preservation); *Ex parte* Wall, 107 U.S. 265, 302 (1883) (contempt power necessary to preserve order and decorum).

54. Michael Warren, *Contempt of Court & Broken Windows: Why Ignoring Contempt of Court Severely Undermines Justice, the Rule of Law, and Republican Self-Government*, 7 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 44 (2006), *available at* http://www.fed-soc.org/publications/pubID.831/pub_detail.asp.

55. *Id.* at 45.

56. Historically, contempt of court was considered neither criminal nor civil in nature. Myers v. United States, 264 U.S. 95, 100 (1924) (classifying contempt as sui generis—neither civil nor criminal); Bessette v. W.B. Conkey Co., 194 U.S. 324, 326 (1904) (same). The Supreme Court, however, has since made it clear that "[c]riminal contempt is a crime in the ordinary sense. . . ." Bloom v. Illinois, 391 U.S. 194, 201 (1968).

57. United States v. Eichhorst, 544 F.2d 1383, 1387 (7th Cir. 1976); *In re* Dodson, 572 A.2d 328, 339 (Conn. 1990).

the court is performing its judicial functions.[58] Because the judge typically has seen the contemptuous behavior take place, direct contempt may be punished in a summary manner.[59] In other words, with direct criminal contempt, the judge need not hear evidence, call witnesses, give the defendant notice, or generally provide the defendant with the procedural safeguards that typically accompany a criminal trial.[60] The Supreme Court has explained this summary contempt procedure as:

> a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial.[61]

Delaying the proceeding or transferring it to another judge for a hearing would be an inefficient use of judicial resources. When the circumstances justify it, the judge has the inherent authority to proceed immediately and pass judgment without violating Fourteenth Amendment due process rights.[62]

While an unreasonable search or seizure is not precisely the same as an immediate interruption of trial, it does have the effect of interfering with the administration of justice. The Supreme Court, in *Young v. United States ex rel. Vuitton et Fils S.A.*,[63] stated "[t]he underlying concern that gave rise to the contempt power was not. . . merely the disruption of court proceed-

58. *See, e.g.*, Farmer v. Strickland, 652 F.2d 427, 434 (5th Cir. 1981) ("When the contempt occurs totally in presence of the judge, there is no necessity for the production of evidence."); People v. Sheahan, 502 N.E.2d 48, 50 (Ill. App. Ct. 1986) ("in the physical presence of the judge"); People v. Carr, 278 N.E.2d 839, 840 (Ill. App. Ct. 1971) (defendant punching assistant state's attorney in the nose constituted direct contempt of court); *but see In re* Stanley, 114 Cal. App. 3d 588, 591 (1981) (attorney's failure to appear for scheduled court appearance is direct contempt and may be punished summarily, but due process requires court to afford an opportunity for the attorney to present a valid excuse); Welch v. State, 359 So. 2d 508 (Fla. Dist. Ct. App. 1978) (attorney who deliberately and without permission left the court to keep a bowling date was guilty of contempt).

59. *See In re* Chaplain, 621 F.2d 1272, 1275 (4th. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980) ("The power [to summarily punish] rests on the proposition that a hearing to determine guilt is not necessary when conduct occurs in the presence of a judge who observes it, and when immediate, action is required to preserve order in the proceedings and appropriate respect for the tribunal.").

60. Sacher v. United States, 343 U.S. 1, 9 (1952); *In re* Dodson 350, 572 A.2d 328 (Conn. 1990), *cert. denied* 498 U.S. 896 (1990) (discussing summary contempt proceedings). Indirect contempt is similar to a statutory crime: the defendant has violated a rule set down by a branch of government and if caught the defendant will be prosecuted by the government's attorney (the prosecutor), but will be afforded all of the rights typically associated with criminal trials (the right to have an attorney, to receive notice, to present evidence, etc.). Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. at 798-99 (1987).

61. *Sacher*, 343 U.S. at 9.

62. *In re* Oliver, 333 U.S. 257, 275 (1948) (basing that authority on the judge's personal knowledge from having witnessed the conduct in the open courtroom); *Sheahan*, 502 N.E.2d at 51 ("[D]ue process rights are not applicable in cases of direct criminal contempt.").

63. 481 U.S. at 787.

ings. Rather, it was disobedience to the orders of the judiciary, regardless of whether such disobedience interfered with the conduct of trials."[64] Is it too far of a stretch to say that disobedience to the Court's interpretation of the Fourth Amendment is comparable to disobedience to a court order?

One of the original justifications for the exclusionary rule was the "imperative of judicial integrity."[65]

> In a government of laws . . ., existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[66]

In other words, when a police officer violated the defendant's constitutional rights to obtain evidence that was later introduced at trial, the court had to reject that evidence or risk putting its integrity on the line. Of course, if presenting tainted evidence jeopardizes the court's integrity, the officers who create this situation are potentially interfering with the administration of justice.

In the case where police officers have seriously violated constitutional rights[67] and evidence obtained from their illegal search or seizure is introduced into evidence, direct criminal contempt of court is a reasonable sanction. In such a case, the police action has hindered trial and the cause of justice. Officers would or should be on notice about these risks, and the court would have had the opportunity to explore the issues of relevance during the criminal trial at which the evidence was offered.[68]

When an issue has been fully litigated in the underlying criminal trial, the judge should be empowered to decide that summary proceedings are

64. *Id.* at 798.

65. Elkins v. United States, 364 U.S. 206, 222 (1960); *see also* Stone v. Powell, 428 U.S. 465, 485 (1976); Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '[t]he criminal is to go free because the constable has blundered.' In some cases this will undoubtedly be the result. But, as was said in *Elkins*, 'there is another consideration—the imperative of judicial integrity.' The 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.") (internal citations omitted).

66. *Elkins*, 364 U.S. at 223 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J, dissenting)).

67. In most cases, this would probably be the criminal defendant. With this remedy, however, unlike the exclusionary rule, the court can impose sanctions even if the offended party is not the criminal defendant.

68. One of the advantages of this situation is that judges operating in a given area probably have the chance to develop knowledge about the local officers and to put those who are overly-aggressive on notice. This could help avoid the risk of over-deterrence that might interfere with police investigative work.

appropriate.[69] In some cases, the judge may order that the officer is entitled to more process or even a full trial.[70] In other cases, where the court has already examined the issues and provided the police department with the opportunity to litigate the issues, considerations of efficiency and collateral estoppel suggest that a summary proceeding for direct criminal contempt would be reasonable.[71]

With some alternatives to the exclusionary rule, there is a concern about whether the Fourth Amendment issues would still be litigated. That is not a problem with the solution proposed herein. The Fourth Amendment is always there, and since evidence would be suppressed in some cases, there would be sufficient incentive to litigate the issue at trial. Indeed, as some have argued, abolishing the mandatory exclusion of evidence might make judges more willing to find Fourth Amendment violations if they know a criminal defendant will not necessarily walk free as a result.

Another problem that would have to be evaluated is whether police would be over-deterred and reluctant to engage in needed investigative work. This is a legitimate concern with the proposed new remedy. One would have to assume that courts will protect the officers' constitutional rights and assure that serious sanctions will only be imposed in appropriate cases.

CONCLUSION

Justice William O. Douglas reportedly explained at a public forum in the 1960s that his support for the Warren Court's "criminal law revolution" was undergirded by his fear that the nation's police stations were staffed in no small part by "crypto-fascists."[72] When that is the mindset, the exclu-

69. The trial judge has great discretion in deciding whether summary proceedings are appropriate. *See In re* Gustafson, 650 F.2d 1017, 1023 (9th Cir. 1981) (en banc) ("[We] give great deference to a trial judge's explicit determination that plenary procedures are inadequate and summary procedures are necessary.").

70. In *Bloom v. Illinois*, the Supreme Court extended the constitutional guarantee of a jury trial to state prosecutions for serious criminal contempt. 391 U.S. 194, 201-02 (1968). One of the Court's primary concerns was that, in the absence of a required jury trial, judges would abuse their power due to a personal affront. *Id.* at 202 (stating that "[c]ontemptous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament."). As such, the Court concluded that a jury trial would help to avoid any possible abuse of power. *Id.* That risk, however, would not seem to be a serious concern in a case where the contemptuous behavior related to a pre-trial search or seizure.

71. Defendants in non-summary cases are entitled to assistance of counsel, the right to present a defense, the presumption of innocence, a public trial, and the right to have the prosecution prove each element beyond a reasonable doubt. United States v. Seale, 461 F.2d 345, 372 (7th Cir. 1972) (citing Cooke v. United States, 267 U.S. 517 (1925)).

72. Stephen J. Fortunato Jr., *Supreme Court Inc. The Roberts Court unravels a generation of progress*, IN THESE TIMES, December 5, 2007,

sionary rule makes perfect sense. Once we move past that vision of the police, it makes much less sense.

The exclusionary rule has never been a perfect remedy for a Fourth Amendment violation. Its main advantage is that it has been a better deterrent than the alternatives. Treating Fourth Amendment violations as criminal contempt of court, however, is an even better deterrent and, when coupled with an admissibility standard typical of those found around the world, it better protects society and provides a better remedy for Fourth Amendment violations.

Treating Fourth Amendment violations as acts of criminal contempt is within the judiciary's power and it is superior to other remedies. It provides an extraordinarily strong motivation for officers to respect the Fourth Amendment, and it permits an admissibility standard that serves the common good by taking factors such as the dangerousness of the defendant, the severity of the crime, and the intent of police officers into consideration before deciding that potentially critical evidence must be excluded regardless of the impact on the community.

http://www.inthesetimes.com/article/3422/supreme_court_inc/.