

*MAPP V. OHIO'S UNSUNG HERO: THE SUPPRESSION HEARING
AS MORALITY PLAY*

SCOTT E. SUNDBY*

INTRODUCTION

The exclusionary rule is back under the judicial magnifying glass. Recent opinions, most notably by Justice Scalia,¹ have sparked speculation that the Roberts Court may be inclined to overrule *Mapp v. Ohio*² and send Fourth Amendment disputes back to the realm of civil suits and police disciplinary actions.³ Since the exclusionary rule has had few equals in stirring up controversy over such a wide spectrum of hot-button issues, the Court will find a rich trove of scholarship and thinking to draw upon if it does reconsider *Mapp*. Constitutional scholars have quarreled over whether *Mapp* has a legitimate constitutional home or is simply an exercise of raw judicial power.⁴ Empiricists have battled over methodology in determining the rule's costs in terms of lost convictions.⁵ Students of law and human behavior have wrangled over incentives and the best way to encourage or coerce police compliance with the Fourth Amendment.⁶ In short, a brief

* Sydney and Frances Lewis Professor of Law, Washington and Lee School of Law. The author thanks all of the participants in the symposium for their insights and interesting give-and-take, and Professors Rick Bascuas, Josh Dressler and George Thomas for their helpful feedback.

1. See *Hudson v. Michigan*, 547 U.S. 586 (2006). For an overview on the prospects of the Roberts Court overruling the exclusionary rule, see Susan A. Bandes, *The Roberts Court and the Future of the Exclusionary Rule*, <http://www.acslaw.org/node/8512> (American Constitution Society Issue Brief) (Apr. 1, 2009).

2. 367 U.S. 643 (1961).

3. Cf. *Hudson*, 547 U.S. at 611 (Breyer, J., dissenting) ("To argue, as the majority does, that new remedies, such as 42 U.S.C. § 1983 actions or better trained police, make suppression unnecessary is to argue that *Wolf*, not *Mapp*, is now the law.").

4. Compare, e.g., Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983) ("[T]he exclusionary rule is constitutionally required, not as a 'right' explicitly incorporated in the fourth amendment's prohibitions, but as a remedy necessary to ensure those prohibitions are observed in fact."), with Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–87 (1994) (describing the exclusionary rule as an "awkward and embarrassing" remedy contrary to the framers' intent in the Fourth Amendment).

5. Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1019–22 (1987) (summarizing the inconsistent results of various studies of the exclusionary rule's effects).

6. For a summary of arguments for and against the exclusionary rule as a deterrent, see OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE REPORT NO. 2, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE (1986), *reprinted in* 22 U.

tour of the exclusionary rule offers a stop at almost every school of thought in the legal academy and its claim to the Rightful Mode of Legal Interpretation.

Every now and then, however, a ruling that has generated intense heat and smoke on the highest levels of doctrinal and scholarly debate also has had a serendipitous side effect that may be as important in practical terms as the ruling itself.⁷ In the case of *Miranda v. Arizona*,⁸ for instance, while lawyers and scholars in the ensuing decades clashed over the merits of *Miranda* as a constitutional ruling, law enforcement largely lined up behind retaining *Miranda*.⁹ For despite initial predictions in the wake of the ruling that confessions would become a remnant of the past in solving crime, law enforcement over time learned not only to live with *Miranda* but to largely embrace it.¹⁰ The ruling, as it turned out, brought to law enforcement a desired predictability and stability in ensuring that a confession would pass constitutional muster; indeed, the warnings often are now incorporated into the interrogation ritual itself as a way of obtaining confessions. As a result, a ruling that was inspired by the desire to provide greater protection to criminal suspects has, in the long run, benefited law enforcement as much, and possibly more. That law enforcement ultimately embraced *Miranda* helps to explain why in *Dickerson v. United States*,¹¹ Chief Justice Rehnquist, despite his lengthy history of doubting *Miranda*'s constitutional lineage, penned the opinion that allowed the ruling to stand, albeit with all the robustness of a glass of three-day-old beer.

As with *Miranda*, when it comes to the exclusionary rule, *Mapp* also has had a serendipitous effect that should be taken into account as the Roberts Court debates the rule's future. Our usual focus in debating the exclu-

MICH. J.L. REFORM 573 (1989).

7. Professor Leipold, for example, has raised an intriguing possible serendipitous effect from the adoption of the Federal Sentencing Guidelines. Noting the rise of a dramatic "conviction gap" between jury and bench trials beginning in the 1980s, with judges significantly less likely to convict than juries in federal trials, he raises the possibility that "the decrease in judicial discretion brought about by federal sentencing reform may have an impact on judges when they make the decision to convict or acquit." Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 225 (2005) (noting that "[t]he evidence is indirect" but "circumstantial evidence is strong enough . . . that the possibility should not be dismissed lightly").

8. 384 U.S. 436 (1966).

9. See generally Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1021-23 (2001) (developing reasons why "for the most part, law enforcement supports *Miranda*"); see also Eduardo Paz-Martinez, *Police Chiefs Defend Miranda Against Meese Threats*, BOSTON GLOBE, Feb. 5, 1987, Metro, at 25 (reporting that police chiefs support *Miranda* and express the desire to retain its warnings in the interests of police professionalism and the protection of individual rights).

10. See Leo, *supra* note 9, at 1021-22.

11. 530 U.S. 428, 443 (2000) (noting that "*Miranda* has become embedded in routine police practices to the point where the warnings have become a part of our national culture").

sionary rule's deterrent effect is on whether a police officer at the moment she is about to conduct a search or seizure will be deterred from taking a Fourth Amendment shortcut because of a fear that the evidence will be excluded and a possible conviction lost.¹² This essay argues, however, that this is far too narrow a focus in asking whether the exclusionary rule deters, because it overlooks one of the most beneficial effects of *Mapp*—the educational effects of the suppression hearing itself.¹³ With the advent of *Mapp*, every police action implicating the Fourth Amendment, whether in rural Montana or downtown Manhattan, instantly became subject to judicial scrutiny as a matter of course in any criminal case involving a search or seizure. By making suppression hearings necessary, therefore, the exclusionary rule provided a forum through which the importance and substance of the Fourth Amendment is reaffirmed on a daily basis in city and county courthouses across the nation. As a result, suppression hearings act much like a morality play for those involved in the nitty gritty of law enforcement—police officers, judges, prosecutors, and defense attorneys—by instructing everyone involved both as to the Fourth Amendment's rules and why those rules are of a constitutional magnitude mandating honor and respect.

This viewpoint runs the risk of sounding like the pious musings of an academic kneeling at the altar of abstract constitutionalism. The virtues of the suppression hearing, however, are grounded in the realities of how hearings are conducted and in the interactions that they necessitate between the police and prosecutors and defense attorneys.¹⁴ In short, as this essay will demonstrate, the suppression hearing is the unsung hero of *Mapp*, and the benefits that it brings to the exclusionary rule must be taken into account if the Court undertakes a broad reexamination of the exclusionary rule.

As the Court has dealt with the exclusionary rule since *Mapp*, it has

12. See *infra* notes 15-16 and accompanying text.

13. In arguing against adoption of the good-faith exception to the exclusionary rule, Justice Brennan raised a similar concern over the loss of the "overall educational effect of the exclusionary rule" and the negative impact on the "institutional incentive" of police departments to ensure compliance. *United States v. Leon*, 468 U.S. 897, 954-55 (1984) (Brennan, J., dissenting). While this article agrees with Justice Brennan about the importance of the "educational effect" in deterrence, the emphasis on the role of the suppression hearing does not rule out a good-faith exception because for purposes of fostering individual officer compliance, it is the process that matters even more than the threat that the evidence will be excluded. See *infra* note 62 and accompanying text (discussing the possibility of alternative sanctions as consistent with maintaining the deterrence effect of the suppression hearing).

14. It was while conducting suppression hearings as a prosecutor that I came to recognize that the suppression hearing was the unsung hero of *Mapp* and to appreciate how the hearing itself furthered the Fourth Amendment and the rule's purposes.

pared the critical inquiry for the application of the exclusionary rule down to the basic question of whether “its deterrence benefits outweigh its ‘substantial social costs.’”¹⁵ When undertaking this balancing test, the Court has considered whether alternative remedies—such as civil lawsuits or police training and discipline—might lessen the need for the rule. Indeed, in *Hudson* Justice Scalia suggested that, while those alternative remedies might have been viewed as inadequate when *Mapp* was decided, advances in providing a civil remedy and in the professionalism of modern police forces may have now tipped the scales back against the exclusionary rule.¹⁶

Even if Justice Scalia’s claims are empirically correct—and reasons exist to be skeptical about their validity¹⁷—the effectiveness of other remedies must be considered in comparison to the deterrent effect of the exclusionary rule when making the cost-benefit determination. In this regard, how the suppression hearing serves to deter Fourth Amendment violations is an important “weight” to be added to the benefits side of the exclusionary rule that has not been considered before. As will be shown, once the suppression hearing is added into the balance, the exclusionary rule can be seen as deterring Fourth Amendment violations not only through the officer’s fear of losing a conviction, but also through enhancement of the offi-

15. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)). See also *Herring v. United States*, 129 S. Ct. 695 (2009); *Leon*, 468 U.S. at 907. In *Mapp* and its immediate aftermath, the Court also had invoked the idea of judicial integrity as a basis for exclusion. See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). The judicial integrity rationale, however, has since given way to an analysis focusing solely on deterrence. See *Leon*, 468 U.S. at 921 n.22 (rejecting judicial integrity as an independent basis for exclusion and concluding that whether admission of evidence “offends the integrity of the courts ‘is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.’” (quoting *United States v. Janis*, 428 U.S. 433, 459 n.35 (1976))). Justice Ginsburg in her dissent in *Herring* attempted to resurrect “a more majestic conception” of the exclusionary rule that extended beyond deterrence to include additional purposes such as judicial integrity. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting). Justice Roberts in his majority opinion, however, brusquely dismissed such an argument with the observation, “[m]ajestic or not, our cases reject this conception.” *Id.* at 700 n.2.

16. *Hudson*, 547 U.S. at 597 (“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 half a century ago.”).

17. See *id.* at 610–11 (Breyer, J., dissenting) (questioning the effectiveness of civil remedies and police training in deterring police violations of the Fourth Amendment). Indeed, one of the authors that Justice Scalia cited for how the increased professionalism of police diminished the need for an exclusionary rule later strongly protested that “[Scalia] twisted my main argument to reach a conclusion the exact opposite of what I spelled out in [the cited study] and other studies.” Samuel Walker, Op-Ed., *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5; see also Holbrook Mohr, *Some States Put Untrained Cops on Duty*, Associate Press, http://www.foxnews.com/printer_friendly_wires/2007Mar06/0,4675,UntrainedPolice,00.html (March 6, 2007) (describing lack of training in many police forces because of funding and manpower shortfalls). See generally Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2006) (examining civil and disciplinary remedies and concluding that they have generally been ineffective).

cer's knowledge, the officer's realization that she may have to justify her actions in a public adversarial venue, and the reaffirmation of the importance of the Amendment itself.

I. THE EDUCATIONAL FUNCTION OF SUPPRESSION HEARINGS

Police have a daunting task when it comes to interactions with the public. On the streets through everyday interactions they are likely to have a multitude of "Fourth Amendment moments" ranging from the routine (pulling over cars for traffic violations) to the unexpected (spotting suspicious behavior while walking a beat) to conducting surveillance. Not surprisingly, these encounters will challenge the officer in the field with what essentially is an ongoing issue-spotting exam—Do I have probable cause? Reasonable suspicion? Can I search the trunk now? Do I have consent? Is this search going to require a warrant?

Such repeated Fourth Amendment moments, of course, offer ample opportunity for a police officer to develop an understanding of the rules governing police-citizen encounters. The difficulty, though, is that without some type of objective feedback, the officer has no meaningful means of gauging whether her assessment of probable cause or whether her decision to forego obtaining a warrant in a particular situation was the legally correct one. To the extent that officers do receive guidance in the field, the feedback is likely to come from other police officers who are accompanying them in the field or who review their work at the stationhouse. Even in progressive jurisdictions that provide ongoing training, the instruction normally is conducted by individuals connected with the police or prosecution, and will not address an individual officer's actual conduct of searches and seizures in the field.

As a consequence, if an officer's Fourth Amendment understanding was left to rest at this juncture, the result would be a police-centered implementation of the Amendment based on practice, custom, and individual belief of what the Amendment requires. This is not to suggest that a police-centered understanding would reflect a bad-faith or conscious desire on the part of the police to alter or dilute the courts' interpretation of the Amendment. Indeed, as will be argued later, one of the suppression hearing's virtues is that it brings to the judiciary's attention the realities of police practice in formulating Fourth Amendment rules. Rather, the point simply is that even good-intentioned police officers without some type of feedback from neutral sources will develop their sense of Fourth Amendment norms—for example, what is probable cause or reasonable suspicion or exigency—from what they and their fellow officers do in practice through

the numerous Fourth Amendment moments they face in carrying out their duties.

While the possibility exists that the norms developed in the field will coincide with the judiciary's interpretation, doubts arise since the officers' development of Fourth Amendment interpretations in the field will reflect the reality, as Justice Jackson long ago observed, that police are "engaged in the often competitive enterprise of ferreting out crime."¹⁸ Most importantly, though, without some type of oversight mechanism, it will be nearly impossible for police officers or departments to know whether their practices are, in fact, complying with Fourth Amendment law as articulated by the courts. In other words, to expect police officers to be able to intelligently and conscientiously carry out their duties in accord with the Fourth Amendment requires some type of forum in which they can see how their actions match up with the legal standards.

One critical function of a suppression hearing, therefore, is to provide the type of feedback from outside the officer's own circle that helps improve decision making and understanding of the Fourth Amendment's requirements.¹⁹ Again, this rationale need not and does not posit that police officers are bad-faith actors determined to undermine the Amendment. Rather, the use of a suppression hearing provides the type of input and transparency that improves decision making in place of a closed-loop cycling of judgment and information. The need to test one's own decision making against outside standards is especially great where the type of decisions are factually intensive and prone to subjective biases, a situation that of course describes well an officer in the field deciding whether, for example, probable cause exists as she carries out her duties of "ferreting" out crime.²⁰

18. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

19. Studies have found that when an officer is forced to articulate reasons for probable cause before a magistrate and obtains a search warrant, her success rate in recovering the evidence sought can be over 80%. Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 248-49 (2000). However, when a warrantless search is conducted by the officer on the spot, such as with an automobile search, the success rate has been found to be as low as 12%. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 7 (2007). Cf. Craig Bennell, *Improving Police Decision Making: General Principles and Practical Applications of Receiver Operating Characteristic Analysis*, 19 APPLIED COGNITIVE PSYCHOL. 1157, 1173 (2005) (explaining how a procedure that provides for measures of "hits and false alarms" can "allow the police to identify what evidence they should use to make their decisions, to determine if their choice of evidence should differ depending on their particular situation, and to compare the accuracy of different groups of decision makers").

20. Cognitive psychology has begun to develop an understanding of how individuals make choices and judgments using cognitive strategies to handle what otherwise would be an overwhelming amount of information for their brains to process. See generally Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 555-58

The critical question in these contexts, therefore, is not whether a police officer without such feedback would act only on what he or she believes is probable cause, but whether the officer's police-centered definition is in accord with the *legal* standard as developed and applied by the courts, which of course is the controlling standard.²¹ A study of Chicago Narcotics officers found that suppression hearings were for the police "not only the most important way of learning about changes in the law, but

(2002) (summarizing cognitive psychology findings on how individuals use schema and heuristics to process complex stimuli). For certain types of cognitive judgments, feedback can improve decision making by allowing the identification of situations where the individual's cognitive strategies do not produce reliable judgments. *Id.* at 559–60.

A debate currently exists as to whether concepts like probable cause or reasonable suspicion are cognitive decisions that can be articulated and assessed based on objective criteria or are more like an expert's "hunches" that should be given great (or total) judicial deference based on an officer's experience and training. Professor Craig Lerner in particular has done much to bring this topic to the fore and has argued forcefully that legal doctrines like *Terry v. Ohio*'s demand that an officer have more than an "inchoate and unparticularized suspicion or 'hunch'" to stop and frisk, *see* 392 U.S. 1, 27 (1968), are out of touch with the realities of police decision making and cognitive psychology. *See, e.g.,* Craig S. Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL'Y 25 (2007). Others have argued just as forcefully that little evidence exists to suggest that police hunches are reliable and contend, therefore, that deference to police hunches would invite or exacerbate various ills such as police perjury and racial bias. *See* Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. & POL'Y 115 (2007); *see also* James R. Acker, *Social Sciences and the Criminal Law: The Fourth Amendment, Probable Cause, and Reasonable Suspicion*, 23 CRIM. L. BULL. 49, 57–58 (1987) (citing studies finding that police tend to err in overpredicting that a crime is being committed as evidence that judges should not defer to police in assessments of probable cause and reasonable suspicion). For a superb overview of the debate from a variety of perspectives, *see* Symposium, *Rational Hunches and Policing*, 4 J.L. ECON. & POL'Y 1 (2007).

The debate over whether current Fourth Amendment legal doctrine should be changed to be more accommodating of police "hunches" is beyond this essay's scope. This essay's starting point is that current constitutional doctrine reflects a *legal* interpretation of what constitutes concepts like probable cause and reasonable suspicion in light of the Fourth Amendment's history and purposes, and officers are legally and ethically required to obey those rules. Given that starting point, suppression hearings are an effective way of communicating to officers how their behavior and judgments match up with the Court's interpretation of Fourth Amendment constitutional restraints. *See generally* Orfield, *supra* note 5, at 1037–39 (quoting various officers describing how suppression rulings changed their legal understanding of topics such as when they could stop an individual based on apparent drunkenness, how they could use time of night as a justification for a stop, what was necessary to make "street stops," and why obtaining a warrant was preferable to a warrantless search); *see also infra* notes 28–31 and accompanying text. Indeed, to the extent constitutional constraints may chafe against an officer's intuitive sense of what constitutes sufficient reason to search or detain, it is all the more important that suppression hearings serve as a vehicle for providing feedback to the police of how their sense of probable cause or reasonable suspicion may be at odds with the constitutional meaning.

21. This argument is not based on the assumption that judges throughout the United States will apply a uniform notion of standards such as probable cause or exigency. As Ron Allen and Ross Rosenberg have persuasively argued, it may well be that much of the Fourth Amendment is "local" knowledge that defies a "general" overarching theory. *See* Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998). Rather, the important point is that the "local" knowledge that develops must reflect judicial input through adversarial testing to ensure that the "local" knowledge does not become captive to a definition solely controlled by police practice. Thus, skepticism about the ability to concretely define in a general way many Fourth Amendment principles does not mean that judicial rulings cannot act as corrective measures for police in actual settings and as a means of guiding future police actions based on the judicial feedback.

also the most effective way of learning about the law of search and seizure in general.”²² As one interviewed officer noted, the suppression hearing provides the window through which to understand the legal nature of probable cause: “It is easy to read about what probable cause is, but you don’t know the reality of probable cause until you get to court. When you are in court, you find out what gets past the judge and what doesn’t.”²³ Thus, while the current cost-benefit analysis of the exclusionary rule tends to focus on deterring the bad-faith rogue cop, suppression hearings are essential because they also serve a vital educational function for the good cop who otherwise would be forced to carry out his or her duties deprived of critical outside information and assessment.²⁴

Nor can the two alternatives—civil lawsuits and internal police supervision—act as a meaningful substitute for the suppression hearing for promoting deterrence in this manner. The civil rights cases will tend to target only the most egregious cases where an attorney believes the likelihood of success is great and that the potential for damages warrants the efforts of litigation. Even with the expanded availability of attorney fees, which Justice Scalia argued in *Hudson* would lead more lawyers to take “police misconduct” cases, fees under § 1988(b) are available only if the party prevails.²⁵ The requirement that the attorney prevail will discourage attorneys from filing cases unless they have a high degree of confidence upfront that the officers were acting in bad faith and that the police behavior and client’s profile is likely to result in a favorable jury verdict (and in this latter regard even a potential claimant with a strong Fourth Amendment claim may not strike an attorney as an attractive plaintiff to present to a jury if criminal evidence was found).

Now, some might believe it desirable to drastically winnow down to the most egregious cases those that are subjected to judicial scrutiny, but this position does not make sense if one is serious about promoting police compliance with the Fourth Amendment. In fact, given the multitude of Fourth Amendment moments that officers confront, guidance and feedback is needed *least* for those cases where a lawsuit is likely, as those are the cases where officers most probably are fully aware that they are acting unconstitutionally. In other words, civil lawsuits may be a good mechanism for punishing the bad cops, but they will do little for helping the good-intentioned cops in developing a reliable sense of Fourth Amendment stan-

22. Orfield, *supra* note 5, at 1037.

23. *Id.* at 1040.

24. *Id.* at 1032–33.

25. See 42 U.S.C. § 1988(b) (2006) (“[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”).

dards and bringing their behavior into line with the legal rules. The exclusionary rule and suppression hearing, by contrast, will reach a far greater swath of actions implicating the Fourth Amendment. For although not a perfect mechanism for feedback, since only those Fourth Amendment moments resulting in prosecution will be subject to judicial review, the rule is invoked often enough to ensure that officers involved in daily law enforcement will periodically have their actions subjected to judicial review.²⁶

At first glance, police training and discipline proceedings might appear to offer a promising alternative compared to civil suits in promoting police conformity with the Fourth Amendment through education. Training would be aimed at providing the same instructional effect that the exclusionary rule furthers through suppression hearings, and disciplinary proceedings could serve as a means of providing feedback on the officers' performance in the field. Justice Scalia in his *Hudson* opinion argued, for instance, that compared to the time when *Mapp* was decided, "[n]umerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline."²⁷

The first caveat in looking at whether police training can take over the educational function of the exclusionary rule is whether the sources "now available" are actually being implemented in a systemic and comprehensive fashion throughout the United States. Justice Scalia refers to the "increasing professionalism" among police forces, but does not cite any empirical basis for the assertion, especially as to what percentage of the federal, state and local police forces are exposed to thorough training and with what frequency.²⁸ One advantage of the exclusionary rule for a country like the

26. A similar concern with the loss of guidance from the courts was raised with the adoption of the good-faith exception. A Supreme Court majority rejected the argument on the rationale that, "[a]lthough the exception might discourage presentation of insubstantial suppression motions, the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished." *United States v. Leon*, 468 U.S. 897, 924 n.25 (1984). This reply obviously would have no relevancy if the exclusionary rule were entirely eliminated and suppression hearings no longer held.

27. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

28. *See id.* at 598. One recent study using trained field observers suggests that even well-trained police departments may still be violating the Fourth Amendment at a startling high rate. Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 *CRIMINOLOGY & PUB. POL'Y* 315, 324, 331 (2004) (finding that 30% of all searches conducted by a police department ranked in the top 20% nationwide violated the Fourth Amendment). *Cf.* Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 *CRIMINOLOGY & PUB. POL'Y* 363 (2004) (exploring difficult questions about the tradeoff of allowing greater discretionary policing but with the inevitable price of more unconstitutional (and sometimes highly invasive) police

United States with a highly decentralized police force is that by reaching into every pocket of America where arrests are made and searches conducted, the rule provides some measure of uniformity in application.²⁹

A second caveat is whether the training can break through the police-centered implementation of the Fourth Amendment with the same effectiveness as the suppression hearing. This is not an inherent shortcoming in police training, because a training regime could incorporate instructors with perspectives from outside the ranks of police, and many do draw upon prosecutors and academics as teachers. Several major hurdles exist, though.

First, the training may not reach the realities of the officer in the field for providing feedback. Simulations and role playing may assist, but as anyone knows who has gone from a litigation course to an actual courtroom, conducting a cross-examination of a hypothetical witness is a far cry from the challenges of questioning an actual witness without a script. Likewise, information from the classroom may lose something in the translation when the police officer tries to use it to make judgment calls in the field, and the officer will not receive any feedback as to whether her actions are in fact conforming with what she was taught. The exclusionary rule, on the other hand, of course fills that gap, as a suppression hearing will be focused on judicial scrutiny of the officer's field actions (or as one Chicago narcotics officer put it, "[g]oing to court is more concrete than training. It is on-the-job training, and like on-the-job training it is the most useful way of learning."³⁰).

More fundamentally, in-house training sessions—even those that include critiques by neutral observers—simply cannot match an adversarial hearing for breaking out of a police-centered perspective. One of the virtues of adversarial testing is that it combats the human tendency to fall victim to "tunnel vision" and cognitive dissonance, tendencies which often preclude someone from fully seeing an alternative version of events.³¹ Defense attorneys by looking at a fact pattern through their own "tunnel vision" of the client's case are far more apt to actively seek out and point to alternative interpretations of fact patterns and the law. Again, this is not a

searches).

29. REPORT OF THE ROYAL COMMISSION ON CRIMINAL PROCEDURE § 4.126 (1981) (identifying the United States' decentralized police force as a distinguishing rationale for justifying the exclusionary rule). The *Mapp* opinion itself justified the exclusionary rule in part by the need to provide consistency among the various state courts and between the states and federal government. *Mapp v. Ohio*, 367 U.S. 643, 657–58 (1961).

30. Orfield, *supra* note 5, at 1040.

31. For a thorough overview of the susceptibility to tunnel vision in the criminal justice context, see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.

surprising psychological proposition for those in the legal field—any lawyer knows that the best preparation possible for an argument or trial is having someone aggressively think through and present the other side. This means that a suppression hearing with its active testing of the facts and law will be superior to training in giving police officers (and, indeed, all parties) a fuller understanding of the Fourth Amendment as it applies to the police actions involved.

Nor are disciplinary hearings able to produce a similar deterrence effect. As with civil litigation, such proceedings will be reserved for the more egregious cases and normally will require some triggering event such as a citizen complaint to be filed. As noted earlier, one of the exclusionary rule's advantages is that the concern is not solely with bad-faith cops but also with well-intentioned police behavior that may fall outside legal bounds because the officers' understanding of "probable cause" or "exigency" or "reasonable suspicion" has not been aligned with the courts' interpretations. For such officers, the corrective measure is not punishment but better information and understanding, which the suppression hearing can help provide.

Finally, the exclusionary rule yields an additional instructional avenue that is important but easily overlooked. Because suppression motions are a frequent part of a criminal prosecution, the prosecutor will need to review with the officers the nature of the search or seizure and the circumstances surrounding it. Especially with large metropolitan police forces, this is likely to be one of the few points (other than applying for warrants³²) in which prosecutors will talk with police officers about how they are carrying out searches and seizures. Given that the prosecutor must defend the police behavior, the discussion can be an invaluable process for prosecutors to give feedback on police procedures. Moreover, the process can be especially productive since the discussion will revolve around a concrete fact pattern in which the prosecutor will be pointing to specific ways that certain decisions and procedures made the officer's actions either more or less likely to hold up in court.³³

32. A study of search warrant practices in San Diego, for instance, found that 98.4% of search warrant affidavits had been reviewed by a Deputy District Attorney before submission to a judge. Benner & Samarkos, *supra* note 19, at 225.

33. See Orfield, *supra* note 5, at 1033 ("The preparation for [a suppression hearing] appears to reinforce lessons so strongly that months and even years later some officers can remember exactly what happened and why evidence was suppressed.").

II. THE COST OF ELIMINATING SUPPRESSION HEARINGS: CREATING FOURTH AMENDMENT DEAD-ZONES AND LOSING THE DETERRENCE BENEFITS OF RATIONALE ARTICULATION

Being required to justify one's judgment and actions is not an experience to be relished and often can be misunderstood as a challenge to one's integrity. Yet our legal system has to rely on such inquiries as the primary means of obtaining the information necessary to determine if a particular actor's actions and judgments are in accord with the law. Where the courts are charged with ensuring trial processes and rights, a forum to develop the underlying facts is unavoidable. Potential jurors must answer questions in voir dire to determine if they can fairly sit in judgment of a case. Prosecutors and defense attorneys can be required to justify their exercise of a peremptory challenge to ensure the rationale is non-discriminatory. And, because of the exclusionary rule, law enforcement agents can be required to testify as to their reasoning and judgment to see if they acted in accord with the Fourth Amendment.

Because the elimination of the exclusionary rule would also abolish the suppression hearing, it is important to realize the consequences of taking away this judicial forum. One of the most immediate, and indeed dramatic, consequences of eliminating suppression hearings would be the almost complete disengagement of the courts from the development and defining of Fourth Amendment law.³⁴ Civil suits would still be a possibility, but, as noted earlier, because of good-faith immunity and the limited possibility of damages, such suits would likely focus only on the most egregious cases. A "dead-zone" of Fourth Amendment law in terms of judicial involvement, therefore, would grow up around the multitude of Fourth Amendment moments where police may or may not be violating the Amendment's standards, but no mechanism or incentive would exist to get the police behavior before a judicial forum. Judges would still be involved in the issuance of warrants, but warrantless searches and seizures would largely go without judicial scrutiny and a police-centered interpretation of

34. Professor Cloud has convincingly argued that the Supreme Court's embracing of the exclusionary rule is best understood as a reaction to the need for judicial review. He maintains that past experience ultimately led the Court to conclude that if enforcement of the Fourth Amendment was left to the political branches, it effectively meant that Fourth Amendment rights would be left without remedy or vindication. Morgan Cloud, *Rights Without Remedies: The Court that Cried "Wolf,"* 77 MISS. L.J. 467 (2007) (examining the Court's view of the exclusionary rule as a question of judicial review, and especially tracing Chief Justice Warren's changing view on the need for the exclusionary rule as he became convinced that the political branches would not curb police misbehavior).

the Fourth Amendment would prevail. And since the vast majority of searches are warrantless³⁵ the impact of removing these searches and seizures from judicial review would be massive, with the impact amplified even more if Justice Scalia's argument to curtail the warrant preference prevails in the future.³⁶

Beyond the loss of judicial input, the elimination of suppression hearings also would undermine police deterrence by taking away a forum that requires officers to articulate their rationale before undertaking a search. In the Fourth Amendment context, this articulation process ideally occurs prior to the search or seizure in the form of applying to a judge for a warrant. Indeed, although the warrant requirement is sometimes criticized as a rubber stamp because of the high percentage of search warrant applications which are granted, the criticism overlooks the value of requiring police officers to articulate to a judge (or to a prosecutor if the prosecutor is to apply for the warrant) their rationale as to why probable cause exists. Thus while 98% of all warrants *applied for* might be approved, the more important figures may be how many searches are not performed when an officer realizes that she is not likely to obtain a warrant, or how many investigations are taken a step further because the officer realizes she does not have sufficient facts to convince a magistrate of probable cause. While such data does not exist, it is reasonable to assume that the warrant requirement is in fact eliminating searches and arrests where officers (and prosecutors), when forced to articulate their rationale in anticipation of applying for a warrant, realize they do not have the facts to justify the warrant and so do not apply for one. (This winnowing out process also helps explain studies finding that search warrants yield high hit rates in finding evidence.³⁷)

The value of the warrant requirement, therefore, may not just be the independent review of the magistrate, but also the prophylactic effect of requiring would-be warrant applicants to articulate their rationale in advance and, through the articulation process, discouraging searches where the would-be applicant realizes she does not have probable cause without more. (Indeed, many legal doctrines may have a prophylactic effect that

35. See Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1050 n.62 (1996) ("The vast majority of searches are conducted without a warrant. . . ." (quoting RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS* 19 (1985))).

36. See *California v. Acevedo*, 500 U.S. 565, 581–82 (1991) (Scalia, J., concurring) (contending that, based on historical practice, the Fourth Amendment should not be seen as preferring warrants but as limiting their use). See generally Amar, *supra* note 4, at 759 (arguing that properly understood historically, the Fourth Amendment's words do "not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable").

37. See, e.g., Benner & Samarkos, *supra* note 19, at 248–49 (study of search warrant practices in San Diego finding search warrants produced a high hit rate (80%)).

would demonstrate the doctrine to be more effective than first believed. *Batson v. Kentucky*,³⁸ for instance, is often critiqued because of the reported challenges that are denied on apparently flimsy excuses. *Batson*, however, undoubtedly has discouraged many lawyers from making strikes that they otherwise would have if they did not think they would be forced to justify it to a judge; in this sense, *Batson* has deterred improperly motivated strikes far beyond the *Batson* challenges that judges have upheld.³⁹)

The exclusionary rule and the prospect of a suppression hearing also help in several ways to reinforce the Court's preference that searches be conducted pursuant to a warrant. First, some officers will prefer obtaining a warrant if possible to diminish the possibility of having to later testify in the adversarial and sometimes hostile setting of a suppression hearing (cross-examination is not an experience relished by many). Officers, moreover, soon learn that in a post-*Leon* world obtaining a warrant redirects the focus of the Fourth Amendment scrutiny onto the magistrate's determination and often means that the search will go unchallenged.⁴⁰ In this sense, the preference for a warrant becomes roughly comparable to how police came to prefer giving *Miranda* warnings because they provided a relatively safe harbor from judicial reversal.⁴¹ To the extent the exclusionary rule and

38. 476 U.S. 79 (1986).

39. See generally Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1940-41 & n.52 (2006) (arguing that the prophylactic effect of *Batson* has been a factor in reducing the number of death sentences).

The grand jury requirement may also have a prophylactic effect that makes the right more valuable than is often appreciated. At first glance, the statistics would suggest that a grand jury could indeed be persuaded to indict a ham sandwich. See, e.g., DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE *passim* (1996) (true bill rates are close to 100%); see also Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1050 n.16 (1984). A prosecutor in anticipation of having to present her case before the grand jury, though, will evaluate the witnesses and evidence with a more careful eye, a process that likely leads in some cases to a lowering of charges or even a dismissal. Likewise, the grand jury itself may improve prosecutorial efficiency by acting as a "sounding board" for the prosecutor in ways that may not be reflected in the statistics. See Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 756-58 (2008).

40. Benner & Samarkos, *supra* note 19, at 264-66 (noting a high conviction rate and an absence of suppression motions where warrants were obtained); see also *id.* at 221 (quoting officer as saying "[s]earch warrants are so easy and they can't argue with you once you do them"); Orfield, *supra* note 5, at 1039 (quoting various officers explaining how suppression rulings led them to develop a preference for obtaining a warrant as a means of insulating the search from challenge).

41. The parallel is not exact as one would not predict that the law enforcement community would advocate against the abolition of the exclusionary rule in the same way that it did against abolishing *Miranda*. The difference is that if *Miranda* had been abolished, every confession still could have been challenged in court as a violation of due process, so judicial scrutiny could still be expected but without the predictability of *Miranda*. Abolishing the exclusionary rule, on the other hand, would dramatically curtail judicial scrutiny altogether, a prospect that might be more appealing as few actors are anxious to have their actions scrutinized and questioned by others.

suppression hearings encourage officers to seek warrants, therefore, they help ensure that searches and seizures are being constitutionally conducted.⁴²

Even in cases where police conduct a warrantless search or seizure, however, the prospect of a suppression hearing will foster better constitutional compliance in the field. In deciding to undertake a search or seizure without a warrant, the prospect of having to articulate the rationale later in open court will influence both the decision to conduct the search or seizure and how it is conducted. While not formally articulated as in a warrant application, an officer, especially one who has been through a suppression hearing before, will still ask herself, “can I legally justify this if on the stand?”⁴³ Requiring someone to articulate a rationale and think critically about her initial judgment can improve decision making, especially in areas of decision making that are susceptible to confirmation bias (the tendency to interpret evidence in accord with preexisting beliefs and expectations).⁴⁴

The realization that one may have to later justify one’s actions under cross-examination before a judge, therefore, will cause an officer to take a careful second look, a process that may lead the officer to either forego the search, do more investigation, or seek a prosecutor’s advice if she then has doubts.⁴⁵ This process is not unlike the attorney who before striking a venire person asks herself, “how will I justify this peremptory challenge to the judge if opposing counsel raises *Batson?*,” a question to one’s self that both spawns a careful second look and may deter the challenge altogether if the attorney realizes she has no viable non-discriminatory justification. A

42. While finding in their study of search warrant practices in San Diego that warrants on balance were currently serving their constitutional purposes, Benner and Samarkos also warned of an “increasing use of boilerplate in affidavits” with an attendant danger that it would turn the search warrant process into a “mere ritual” or “game” based on “cookie cutter affidavits.” Benner & Samarkos, *supra* note 19, at 265–66.

43. As noted earlier, a debate is ongoing over the desirability of requiring articulation of objective facts and an objective rationale for a search, beyond an officer’s hunch. *See supra* note 20. But as also noted before, because under current constitutional law hunches are not a sufficient Fourth Amendment justification, the critical question is whether suppression hearings will promote police compliance with the Court’s legal standards that govern the officer’s pending search. Therefore, to the extent the prospect of a suppression hearing encourages an officer to take a careful second look to see if the search can be justified apart from his or her hunch, Fourth Amendment compliance will be furthered.

44. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 211 (1998) (citing evidence that forcing an individual to provide reasons for and, more importantly, against a judgment can help to overcome cognitive biases).

45. The police in the study of Chicago narcotics officers gave a number of examples where lessons learned from prior suppression hearings led them to ask themselves later in the field how a search or seizure would be legally assessed before deciding to undertake it. Orfield, *supra* note 5, at 1038. The study’s author concluded that “testifying in court before a hostile adversary and an impatient and possibly skeptical judge has salutary effects: the officer must carefully consider whether he had a legally acceptable basis for his action; and whether this action might be questioned.” *Id.* at 1032–33.

similar effect can be seen in how *Brady v. Maryland* will cause a prosecutor debating whether to turn over evidence to the defense to ask herself, “how would I later justify to a judge not turning over this evidence?,” a self-inquiry that promotes greater compliance with *Brady*.⁴⁶

It would be naïve, of course, to suggest that the prospect of appearing in a judicial forum will deter all police misbehavior (or *Batson* and *Brady* violations). Some might even argue that it leads to creative post-hoc rationalizations or creates more police lying (“testilying”).⁴⁷ These incidents undoubtedly will occur, but it would be the height of perverseness to reward perjury in a particular setting by adopting a remedy of eliminating the setting all together. The remedy, rather, is to more aggressively use the tools available to curtail it. This includes all the actors living up to their duties—prosecutors not turning a blind eye, judges evaluating officer testimony with a critical eye,⁴⁸ and defense lawyers sufficiently prepared to fully cross-examine an officer (the deterrence effect of effective cross-examination by competent defense counsel is often underestimated—lying is not as easy as it may first appear when being questioned by a lawyer who

46. See *Brady v. Maryland*, 373 U.S. 83 (1963). Using *Brady* as an example may not inspire great confidence as many have argued that *Brady* largely has been a failure in prompting prosecutors to turn over exculpatory evidence. See, e.g., Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 306–15 (2008); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 902 (1997). While a valid general critique, *Brady* still undoubtedly has led prosecutors to hand over more evidence because they have asked themselves this question (indeed, discovery may be more forthcoming in part based on whether the judge assigned to the case has a reputation for strictly enforcing discovery). More importantly, the primary problem with enforcing *Brady* is that because *Brady* places the decision largely in the prosecutor’s hands, the likelihood of a *Brady* hearing is minimal because the defense will probably never know about the evidence if not revealed. And because prosecutors will not face adversarial testing of their decision to not disclose, they are far more likely to fall prey to their own tunnel vision of the case. See generally Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002). One would suspect, on the other hand, that far more potential *Brady* material would be disclosed if a prosecutor’s decision was likely to be subjected to judicial scrutiny. The shortcomings of *Brady*, therefore, in fact highlight the desirability of having decisions made where a significant likelihood exists that any one decision will be subjected to adversarial testing in open court.

47. See generally Slobogin, *supra* note 35, at 1058–59 (suggesting that abolishing the exclusionary rule might reduce incidents of police perjury). See also Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994); Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693 (1996); Amir Efrati, *Legal System Struggles with How to React when Police Officers Lie*, WALL ST. J., Jan. 29, 2009, at A12, available at <http://online.wsj.com/article/SB123319367364627211.html> (suggesting that the Supreme Court is loosening the exclusionary rule to reduce police incentives to lie); Frederic N. Tulsky et al., *Charges of Police Lying Haunt Cases*, L.A. TIMES, Dec. 6, 1996, at A1 (giving examples of different situations in which police perjury can affect cases).

48. See Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008 (describing instances where judges found officers lying at suppression hearings), available at <http://www.nytimes.com/2008/05/12/nyregion/12guns.html>.

knows her case). Observers have suggested additional measures worth considering, such as expanded use of warrants,⁴⁹ increased use of videotaping police actions,⁵⁰ a better accounting for the realities of police behavior in judicial decision making,⁵¹ and the use of sanctions other than exclusion of evidence.⁵²

More fundamentally, the concern with perjury, though a serious one, should not be allowed to undermine the broader goal of enhancing Fourth Amendment compliance not only for the bad-faith cop (the individual most likely to lie), but for the police force as a whole by triggering the careful second look. And, in this regard not only are civil suits and police disciplinary proceedings no less likely to confront problems with perjury, but they have the inherent flaw noted earlier of being poor substitutes because they will not reach the vast bulk of Fourth Amendment moments that officers face on a daily basis. Nor can better training, even assuming widespread availability, have the same psychological effect on the police officer as the knowledge that he or she may have to justify her actions in open court while being cross-examined.

A danger exists that this argument for suppression hearings may sound as if it doubts the professionalism or integrity of the police. It does not. Explaining one's factual assumptions and reasoning in open court under questioning may feel at times like a challenge to one's integrity, but it is integral to our legal system's method of enforcing legal rules. A suppression hearing by itself no more impugns a police officer's integrity than a *Batson* hearing means that a lawyer is racist, a *Brady* hearing that a prosecutor is corrupt, or an evidentiary hearing on ineffective assistance that a defense attorney is incompetent. Rather, in a system that values transparency and obedience to the rule of law, adversarial hearings are simply the most effective means of vindicating those values. Indeed, even where suppression is ordered because of a constitutional violation, it would be a mistake to understand the ruling as a condemnation of the officers involved—rules are often broken not through nefarious intent but through errors of judgment, errors that can then be corrected.

49. See Cloud, *supra* note 47, at 1345–48.

50. See Dripps, *supra* note 47, at 715–16.

51. See Slobogin, *supra* note 35 at 1056–58.

52. See *id.* at 1058–59. Professor Slobogin suggests, for instance, replacing exclusion of evidence with liquidated damages based on a proposal by Professor Davidow. *Id.*; see Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939 (1982). The use of an alternative sanction to exclusion would not necessarily be in conflict with the arguments made in this article so long as the mechanism reached all cases (not just egregious ones) and involved the type of hearing and police articulation found in suppression hearings. See *infra* notes 61–62 and accompanying text.

To see it otherwise would be to take a mistaken view of thinking of the Fourth Amendment's requirements as standards entrusted to the police rather than as rules which we rely on the police to faithfully implement. There are times where we do defer to an actor because the very act called upon is an exercise of professional judgment; thus, with prosecutorial discretion, a prosecutor's files need be opened only where credible evidence exists that a prosecutor is abusing her discretion for bad-faith reasons.⁵³ But the Fourth Amendment is not of this nature—it does not ban “unreasonable searches and seizures” as determined by the police, but “unreasonable searches and seizures” as measured against a constitutional standard defined by the courts. Thus, just as a prosecutor could not defeat a *Brady* claim by stating, “but judge I honestly thought the evidence was not exculpatory” if the judge finds the evidence to in fact be exculpatory, a search or seizure does not become “reasonable” even if an officer mistakenly believed she was obeying the Fourth Amendment. And as has been shown, if we want the legal system to deter Fourth Amendment violations, suppression hearings diminish the likelihood of future mistakes of judgment because officers will see the law applied to their actions and internalize the notion that future searches and seizures will need to be justified in court.

III. THE EXPRESSIVE FUNCTION OF SUPPRESSION HEARINGS

A final attribute of suppression hearings that promotes police compliance is the expressive value that results from judicial hearings. The general symbolic value of the exclusionary rule has been noted by others. Justice Stevens, for instance, argued for the application of the exclusionary rule to school searches because of the importance of the message that it sends:

Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that “our society attaches serious consequences to a violation of constitutional rights,” and that this is a principle of “liberty and justice for all.”⁵⁴

Some scholars have similarly noted that “[t]he exclusionary rule has an

53. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that prosecutorial discretion is a “special province” charged to the executive branch and thus “in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.” (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15 (1926))).

54. *New Jersey v. T. L. O.*, 469 U.S. 325, 373–74 (1985) (Stevens, J., concurring in part and dissenting in part) (citations omitted).

important symbolic significance. It is a statement that we are serious about lowering the number of Fourth Amendment violations in our society.”⁵⁵

Once considered in conjunction with the suppression hearing, however, the exclusionary rule offers more than just a symbolic exclamation point to the importance of the Fourth Amendment. As psychologists have documented, the willingness to conform one's behaviors to rules and standards is affected in part by whether she perceives society as placing a high value on the rules.⁵⁶ The convening of a suppression hearing communicates the importance with which society views both the officer's actions and the Fourth Amendment. Moreover, the value that is communicated goes to the full multitude of Fourth Amendment moments rather than only to those instances where an officer faces discipline or a lawsuit. Nor does the message depend on the evidence actually being excluded, as the importance of the message is that police knowledge and obedience to the Fourth Amendment are so important to the courts and criminal justice system that we will subject them to judicial scrutiny.

Moreover, the hearings are a two-way street in terms of information. The hearings allow judges who come to the bench without a criminal law background to quickly gain an understanding of the realities of law enforcement, and for all judges to keep a pulse on how law enforcement is adapting and changing on the streets. Thus, while the judges' rulings are part of the feedback loop aimed at ensuring that police act upon legal standards rather than self-developed (police-centered) norms, suppression hearings also allow judges to craft Fourth Amendment rules that foster police compliance and respect. As Chief Justice Rehnquist noted in writing about review standards for probable cause, Fourth Amendment rules must reflect realistic expectations about police work to encourage compliance: “If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search.”⁵⁷

Thus, while at first it may sound starry eyed to speak of the suppres-

55. See, e.g., John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1055 (1974) (also arguing, however, that the rule should be modified to work more effectively).

56. See Arnold S. Rosenberg, *Motivational Law*, 56 CLEV. ST. L. REV. 111, 135–36 (2008) (citing studies showing people are more likely to adhere to rules that they believe are valued by their peers); see also Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004) (discussing correlation between individuals' willingness to follow rules and their perception of society's valuing of the rules).

57. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). See also Slobogin, *supra* note 35, at 1055–57 (arguing that greater sensitivity to the realities of police work in defining “probable cause” may help reduce incidents of police perjury).

sion hearing as having intrinsic value as a ritual that confirms for all the actors the importance of the Fourth Amendment, the value is not an abstract one. As anyone who has worked in the criminal justice system can attest, it is relatively easy for the “big picture” to get lost amidst the daily grind and demands. Suppression hearings are often the pause in the stream of Fourth Amendment moments that remind everyone—police officers, judges, prosecutors, and defense attorneys—that the rules and standards are part of a larger fabric that society values.

IV. REVISITING THE COST-BENEFIT ANALYSIS OF *MAPP V. OHIO*

When all is said and done, it may be that one of the most beneficial effects from the Court’s adoption of the exclusionary rule was that it led to the suppression hearing becoming a standard feature of the legal landscape. With the rise of the suppression hearing, the entire range of police-citizen encounters in every city and burg became subject to judicial review. And even if serendipitous, the effect has been a strengthening of compliance with the Amendment, a deterrent effect that could be achieved only through a mechanism that reaches not only bad-faith acts, but the entire range of Fourth Amendment moments that comprise an officer’s enforcement duties. By providing a public forum with adversarial testing, the suppression hearing enhances Fourth Amendment compliance through avenues well-known from common experience: by providing outside feedback on judgment, necessitating articulation of one’s justifications, and reinforcing the importance of the Fourth Amendment in guiding law enforcement.

Recognizing the independent contribution of the suppression hearing to the deterrence effect of the exclusionary rule allows a fuller understanding of the cost-benefit analysis that attaches to the rule. Despite Justice Scalia’s reference in *Hudson* to the exclusionary rule as a “massive remedy” (he uses the word “massive” four times in reference to the rule),⁵⁸ others have argued just the opposite, that “[i]t is doubtful that the exclusionary rule was ever more than a symbolic remedy” because of the rarity of exclusion and the numerous exceptions that now surround the rule.⁵⁹ But, as we have seen, even if “symbolic” in the sense that relatively few

58. *Hudson v. Michigan*, 547 U.S. 586, 595–96, 599 (2006).

59. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 738 (1996). Studies of the exclusionary rule have generally found very low rates of exclusion and lost convictions. See generally Donald Dripps, *Living With Leon*, 95 YALE L.J. 906, 915 n.63 (1986) (summarizing empirical studies); but see *United States v. Leon*, 468 U.S. 897, 908 n.6 (1984) (arguing that the studies are misleading because “the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures”).

cases are affected by exclusion, holding the suppression hearing and subjecting the officer's judgment to judicial review and adversarial testing has its own deterrent effect.⁶⁰

Moreover, identifying the suppression hearing's independent value in deterring Fourth Amendment violations allows greater flexibility in thinking about the future of the exclusionary rule itself. To point out that better police training and discipline cannot have the equivalent positive effect on police compliance as a suppression hearing is not to downplay the great gains to be made through better training. Indeed, it may be that if much of the exclusionary rule's deterrence effect comes not from the officer's fear of exclusion itself, but because the process (especially the suppression hearing) makes her a better Fourth Amendment decision maker, alternative configurations are possible that may be more palatable to critics of the exclusionary rule. It could be worthwhile, for instance, to revisit Professor Kaplan's proposal that the exclusionary rule be coupled with giving a judge the power to avoid ordering exclusion if the judge finds at the suppression hearing that the department has implemented regulations and procedures so that the violation was an exception (this proposal would arguably enhance even further many of the virtues earlier identified, because now the entire police department would essentially be "articulating" to the court, while still keeping the individual officer's actions subject to review).⁶¹ Similarly, if it is largely the process of the exclusionary rule rather than the exclusion itself that matters, then alternative remedies such as monetary damages in lieu of exclusion become more desirable as alternatives.⁶²

60. One of the critiques of the exclusionary rule that is often cited is the judicial "cost in time and resources" spent on suppression motions. See OFFICE OF LEGAL POL'Y, DEP'T OF JUSTICE, *supra* note 6, at 28–29. In fact, the greatest problem may be that an insufficient number of searches are ever subjected to suppression hearings. Current estimates are that only 15% of all cases involve the filing of suppression motions. Gould & Mastrofski, *supra* note 28, at 332 n.13 (summarizing studies). Of even greater concern is Gould & Mastrofski's finding that "[a] search was more likely to be unconstitutional when suspects were released than when they were arrested or cited" so that "few of the unconstitutional searches ever reach the inside of a courtroom." *Id.* at 332, 334. The broader challenge is how to gain greater oversight, judicial or otherwise, over police actions in a world of expanding discretionary policing. See Harcourt, *supra* note 28.

61. See Kaplan, *supra* note 55, at 1050–52.

62. Professor Dripps's proposal for a "contingent exclusionary rule" has strong appeal in providing the type of flexibility not possible under the current rule but which also would maintain the educational benefits of the suppression hearing. See Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001). Cf. Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45 (1994) (undertaking a comparative law examination of the exclusionary rule and examining possible replacements or modifications).

CONCLUSION

In the end, no matter what future shape the exclusionary rule takes, the essential point is the need to recognize that the very process of the suppression hearing has important values that promote Fourth Amendment compliance. Like the morality plays of the Middle Ages, the suppression hearing serves as a forum for both instructing and reinforcing the obligations of those charged with carrying out law enforcement duties as part of their everyday duties. The virtues of the suppression hearing may not have been where the Justices thought they would be finding deterrence when they decided *Mapp*, but they now are an important part of the legal fabric that enables police officers to better fulfill both their constitutional and law enforcement duties.