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## Prohibition's Lingerin Shadow: Under-Regulation of Official Uses of Force

Wesley M. Oliver\*

### INTRODUCTION

Grand jury determinations that officers would face no charges in the shooting death of Michael Brown or in the choking death of Eric Garner sparked controversy and riots. This is, of course, a challenge to the ability of the criminal justice system's ability to resolve society's most contentious issues. Highly contentious racial issues have long defied resolution through deliberative processes,<sup>1</sup> even though the law strives to achieve outcomes that will be viewed as legitimate. Poorly defined rules of criminal procedure, however, have contributed to judicial resolutions that the public finds unsatisfactory. Our constitutional scheme for regulating police – which traces its history to Prohibition – lacks anything approaching clarity on the appropriate use of force by officers. With no clear rules for officers to follow, or break, officers often find sympathetic jurors and grand jurors who find themselves unable to then convince the public that their view of reasonableness was anything other than bias. By contrast, the rules regulating searches and seizures of evidence are reasonably clear as a result of the exclusionary rule, which forbids the use of illegally obtained evidence in a criminal trial. The use of this rule as the primary means of governing police is an accident of history that has left searches far better regulated than police violence – a distinction that is hard to justify in light of its historical origin and the present need to have meaningful rules on the use of police force.

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1. See, e.g., Kelly L. Cripe, *Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENTERTAINMENT L. REV. 235, 236 (1999) (observing that television coverage of high-profile cases “creates an audience that believes it has all the necessary tools to render its own verdict once closing arguments conclude”); Mattie Johnstone & Joshua M. Zachariah, *Peremptory Challenges and Racial Discrimination: The Effects of Miller-El v. Cockrell*, 17 GEO. J. LEGAL ETHICS 863, 863 n.1 (2004) (observing that public opinion was divided largely along racial lines in the O.J. Simpson and Rodney King cases).

## I. THE RELATIVE UNDER-DETERRENCE OF UNLAWFUL POLICE VIOLENCE

Rules of constitutional criminal procedure more clearly define when an officer may search a car trunk than when the officer may shoot a man dead. The exclusionary rule, which obviously deters only unlawful searches for physical evidence, has created opportunities for courts to frequently define when searches may be lawfully conducted. When courts identify unlawful searches, they impose minimal costs on society – prosecutors merely lose the evidence they would not have had but for the illegal search.<sup>2</sup> A rich body of law thus identifies lines that police may not cross in their search for evidence. No similar mechanism exists to permit judges to define the contours of the appropriate use of the state’s legitimate monopoly on force.

Unnecessary police killings may be deterred by internal department sanctions, state torts, civil rights actions, state homicide prosecutions, and federal civil rights prosecutions.<sup>3</sup> Each of these potential sanctions ultimately turns on some version of a reasonableness standard that provides little in the way of details about when police are allowed to use deadly force.<sup>4</sup> For all the possible penalties other than internal departmental sanctions, jurors or grand jurors must decide without the benefit of any sort of precedent.<sup>5</sup>

Using these mechanisms, courts have done virtually nothing to define the contours of the reasonableness standard that governs official uses of force.<sup>6</sup> Further, courts have aggressively shielded officers from civil liabil-

2. See generally William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443 (1997) (discussing the costs and benefits of the exclusionary rule).

3. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466–73 (2004).

4. Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1125–40 (2008).

5. As many instances of internal police discipline are resolved through arbitration, there is a fair amount of publicly available information about how claims of police misconduct are resolved internally. See Mark Isis, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215 (1998). And, of course, internal affairs departments and civilian review boards are permitted to examine any information they can obtain to determine how other cases have been resolved. *Id.* at 217–18. Rules of evidence expressly prohibit juries from considering how other such cases have been resolved. See FED. R. CRIM. P. 6(e). While grand jury proceedings are secret, none of the grand jury transcripts recently released have indicated an effort to compare the result in other cases of police misconduct. See Eyder Peralta & Krishnadev Calamur, *Ferguson Documents: How The Grand Jury Reached A Decision*, NPR (Nov. 25, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/25/366507379/ferguson-docs-how-the-grand-jury-reached-a-decision>. Precedent does not seem to guide decisions involving police misconduct. See *id.*

6. See Harmon, *supra* note 4, at 1127.

ity.<sup>7</sup> The bulk of claims against police officers for excessive force are litigated in federal civil rights actions.<sup>8</sup> Litigants must contend not only with a vague reasonableness standard when the case goes to a jury, but they must also overcome an officer's qualified immunity defense.<sup>9</sup> Qualified immunity is designed to ensure that police will not be over-deterred through the threat of a large jury verdict.<sup>10</sup> Courts ruling on this defense at the summary judgment phase have been very deferential to what courts frequently describe as the split-second decision to use force.<sup>11</sup> The vague reasonableness standard is thus only defined by courts in the context of the police-friendly qualified immunity context, which essentially leaves reasonableness to be defined by officers.<sup>12</sup>

The absence of clarity is problematic for officers attempting to comply with the law and for those who must judge officers' conduct. With little guidance, through precedent or otherwise, to define reasonableness, officers are not sure when they have a duty to de-escalate a potentially violent encounter.<sup>13</sup> Grand jurors judging officers' conduct are similarly unable to determine when an officer's course of conduct has been unreasonable. Decisions to charge or not charge officers are thus often criticized as the product of racial bias, rather than sound judgment, as only vague standards govern their considerations.<sup>14</sup>

By contrast, relatively clear standards govern police searches to discover evidence. The famed Supreme Court of California Justice Roger J. Traynor, who introduced the exclusionary rule into California jurisprudence, observed that as a result of the rule, "police now have a clearer idea than before of the restraints upon them."<sup>15</sup> The exclusionary rule has given a large number of defendants a reason to assert that police engaged in misconduct in gathering evidence.<sup>16</sup> In each of these cases, a judge is required to rule on the admissibility of the challenged evidence and provide reasons that inform future po-

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7. See Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 118 (2009).

8. 21 AM. JUR. PROOF OF FACTS 3D *Excessive Force by Police Officer* § 685 (originally published in 1993).

9. See Hassel, *supra* note 7, at 120–28.

10. See Harmon, *supra* note 4, at 1125.

11. Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 864–65 (2014).

12. *Id.*

13. *Id.* at 884–85.

14. See generally Nickolas Kaplan, "The Fire [This] Time": *Ferguson, Implicit Bias, and the Michael Brown Grand Jury*, 20 PUB. INT. L. REP. 52 (2014).

15. See Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 320, 323 (1962).

16. See generally Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 287–88 (1988) (discussing the purpose of the exclusionary rule).

lice conduct, as well as subsequent judicial decisions.<sup>17</sup> The frequency of Fourth Amendment litigation has provided courts an opportunity to address the contours of most investigative techniques.<sup>18</sup>

Until very recently, with few exceptions, the fruits of an unlawful investigation were excluded, requiring courts to rule on the legitimacy of investigatory methods.<sup>19</sup> Recently, courts have begun to radically expand the good faith exception to the exclusionary rule, making questions of good faith analogous to qualified immunity, but they are doing so after decades of precedent have defined many limits on investigations.<sup>20</sup> Even where courts have imposed no limits on investigative methods, such as when police use confidential informants,<sup>21</sup> the rules governing investigatory work by police are relatively clear. The law's clarity on appropriate police conduct ends, however, with investigations. The exclusionary rule only deters police misconduct that unearths evidence incriminating the defendant.<sup>22</sup> Police harassment or uses of excessive force do nothing to generate evidence.<sup>23</sup> It is far clearer, then, when a police officer may search a trunk than when he can shoot a suspect.

There was certainly nothing inevitable about a scheme that regulates investigatory methods with greater precision than official uses of force. In the modern world, issues of police brutality and wrongful convictions seem far more pressing than unlawful searches for evidence.<sup>24</sup> Historically, with the exception of the brief period of Prohibition, brutality has always been the greater concern. Yet the exclusionary rule – the primary mechanism for regulating police – addresses only conduct producing evidence.

In *Mapp v. Ohio*, the U.S. Supreme Court concluded that tort actions were inadequate to deter illegal searches and seizures,<sup>25</sup> yet there was a substantial lost opportunity in selecting this method of deterrence. Any effective

17. See Ruth A. Moyer, *Why and How a Lower Federal Court's Decision That a Search or Seizure Violated the Fourth Amendment Should Be Binding in a State Prosecution: Using "Good Sense" and Suppressing Unnecessary Formalism*, 36 VT. L. REV. 165, 168–69 (2011) (arguing that the precedential value of federal decisions should even extend to the same case in state cases).

18. See Traynor, *supra* note 15, at 322–23 (observing public indifference to unlawful searches).

19. See Stuntz, *supra* note 2, at 445 (observing that an advantage to the exclusionary rule is the fact that it does not over-deter).

20. See Joelle Anne Morano, *Rights, Remedies, and the Quantum and Burden of Proof*, 3 VA. J. CRIM. L. 89, 99–100 (2015) (describing recent “good faith” cases).

21. See Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 WASH U. L.Q. 573, 585–86 (1996) (criticizing lack of regulation of confidential informants).

22. See Morano, *supra* note 20, at 122–23.

23. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 401–02 (1999).

24. See Wesley M. Oliver, *Prohibition, Stare Decisis, and the Lagging Ability of Science to Influence Criminal Procedure*, 105 J. CRIM. L. & CRIMINOLOGY (forthcoming 2016).

25. See *Mapp v. Ohio*, 367 U.S. 643, 651–53 (1961).

mechanism other than the exclusionary rule that empowered judges to determine whether a Fourth Amendment violation occurred would have produced a body of law governing police conduct, whether or not the remedy involved the exclusion of evidence. A liquidated damages regime,<sup>26</sup> or a scheme of injunctions against Fourth Amendment violations that permitted contempt citations,<sup>27</sup> would have had the advantage of not sacrificing reliable evidence in criminal trials. These mechanisms would have had an additional advantage. They would have provided an opportunity for judges to rule on the legitimacy of police conduct, even when it did not produce evidence that the prosecution wished to use against the defendant. Rules governing police use of violence would thus have been as robust and clear as laws governing searches and seizures.

Certainly, even with a crystal clear body of legal precedent governing police shootings, juries and grand juries would have to engage in fact finding, a process that is always subject to the biases of fact-finders. Racial biases at every phase of the criminal justice system have been thoroughly documented and are readily suspected by those objecting to particular decisions that could have been skewed by such biases.<sup>28</sup> The absence of clear standards, however, provides poor guidance to police and adds a significant hurdle to the perceived legitimacy of both police conduct and evaluations of that conduct by police departments, prosecutors, and courts.

## II. PROHIBITION USHERED IN EXCLUSIONARY RULE AS PRIMARY METHOD OF POLICE REGULATION

Looking at the historical development of police departments, it is ironic that searches are more highly regulated than the use of violence by police. As modern professional police forces began to form in the mid-nineteenth century, the public's primary fear was brutality at the hands of these new officers on the streets.<sup>29</sup> Fears of official violence continued for decades after the creation of what modern observers would recognize as police forces. Yet there were no notable successes in police reform until Prohibition,<sup>30</sup> when the worst acts of police were believed to occur in the course of efforts to obtain

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26. See Todd E. Pettys, *Instrumentizing Jurors: An Argument Against the Exclusionary Rule*, 37 *FORDHAM URB. L.J.* 837, 864 (2010) (arguing for "a schedule of fixed monetary awards, under which non-trivial sums are automatically awarded—even in the absence of physical, reputational, or mental harm").

27. See Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 *ST. LOUIS U. PUB. L. REV.* 3, 19 (2003).

28. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 7–11 (1997).

29. See MARILYNN S. JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE* 19 (2003).

30. See RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 43–44, 78 (2008).

evidence – primarily, though not exclusively, in the search for alcohol.<sup>31</sup> Exclusion of improperly obtained evidence understandably emerged from this world as the primary means of preventing police misconduct. Prohibition's structure for defining the limits on police conduct remains almost a century later, leaving the state's monopoly on the legitimate use of violence, at least by the police, under-regulated.

Police brutality was not a concern for Americans in the young Republic – during the Framing Era that is so often consulted for assistance for interpreting rules of constitutional criminal procedure. Practical circumstances, not subsequently abandoned legal regulation, explain this sanguine state of affairs – police forces did not exist in early America.<sup>32</sup> It is difficult to imagine American cities without some form of police forces, but from the Founding Era to the mid-nineteenth century, nothing akin to modern professional police existed. Constables and night watchmen in early America were largely conscripted into part-time service for which they were meagerly compensated.<sup>33</sup> As no one made a career in law enforcement, these officers had little incentive to aggressively enforce the law or take unnecessary risks against the criminal elements of society.<sup>34</sup> Making arrests was actually against an officer's pecuniary interests. Explaining the basis of the arrest to a magistrate the following day took time away from the officer's regular, and more profitable, employment.<sup>35</sup> Understandably, these early officers engaged in almost no investigative work, relying on private citizens to identify culprits and seek arrest and search warrants from magistrates.<sup>36</sup> This passive nature of early American policing meant that these officers posed little threat to individual liberty. But this very limited police authority became inconsistent with the needs of modern cities. Sensational crimes prompted calls for an invigorated police force that could, and would, conduct investigations, while the rowdiness of modern cities prompted a need for crowd control.<sup>37</sup>

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31. See Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 *BROOK. L. REV.* 1, 51 & n.162 (1996).

32. See JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, at 17–18 (1970).

33. See GEORGE WILLIAM EDWARDS, *NEW YORK AS AN EIGHTEENTH CENTURY MUNICIPALITY 1731–1776*, at 123 (1917).

34. See *id.* at 124.

35. 3 I.N. PHELPS STOKES, *THE ICONOGRAPHY OF MANHATTAN ISLAND, 1498–1909*, at 643 (1918).

36. See *id.*

37. See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE PHILADELPHIA, 1800–1880*, at 119–21 (1989) (“Between 1837 and 1850, as the determination of the judiciary to intensify state prosecution and the punishment of rioters grew, support for expanding and improving the city’s police force increased.”); EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 637 (1999) (attributing the willingness of New Yorkers to accept modern police force to media coverage of an unsolved murder); JOHNSON, *supra* note 29 at 8–9 (2003); ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920*, at 56 (1981)

While the history of many of these early police forces has yet to be unearthed by historians, some generalizations can certainly be drawn from what we do know of various American police forces. The history of the New York Police Department, to the contrary, has been very thoroughly considered by academics of all sorts, and a very good image of its early interactions with the public can be constructed through specific historical figures and events that are readily accessible.<sup>38</sup> The broad strokes of this story do appear to be reflected in the experience of other cities, but our limited historical knowledge necessarily requires an over-emphasis on New York.

Public concerns about police brutality accompanied the creation of professional police forces in cities throughout the country.<sup>39</sup> Americans who feared standing armies were wary of the creation of professional police forces – paramilitary organizations employing full-time law enforcement officers – and made citizens slow to accept the authority of the men employed by these new organizations.<sup>40</sup> Challenges to the authority of these new officers were frequent. Arrests thus frequently involved considerable physical violence – arrestees were unwilling to submit to the lawful authority of a police officer.<sup>41</sup> Officers were encouraged to use their locust clubs to effect arrests and protect officers against particular individuals and to create a sense of their authority on the streets.<sup>42</sup>

Resistance to police authority was so substantial – and physical violence against the criminal element viewed as the cure – that in New York City, special “strong-arm squads” were established in the early years of the police force to respond to gangs who attacked officers.<sup>43</sup> Officers in these special units were not charged with investigating crime or keeping the peace.<sup>44</sup> Instead, they were given locust clubs – the first officers in New York to be so

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(contending that cities created police forces as a means of crowd control); AMY GILMAN SREBNICK, *THE MYSTERIOUS DEATH OF MARY ROGERS: SEX AND CULTURE IN NINETEENTH-CENTURY NEW YORK* 87 (1997) (explaining how a high-profile murder shifted “the tone and direction earlier debates over urban crime and punishment”); SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 4 (1977) (contending that modern police forces were developed as a “consequence of an unprecedented wave of civil disorders that swept the nation between the 1830s and the 1870s”); Robert Liebman & Michael Polen, *Perspectives on Policing in Nineteenth Century America*, 2 SOC. SCI. HIST. 346 (1978) (reviewing scholarship on the creation of early police forces).

38. See Jeffrey S. Adler, *Shoot to Kill: The Use of Deadly Force by the Chicago Police, 1875–1920*, 38 J. INTERDISCIPLINARY HIST. 233, 237 (2007) (stating, “[M]uch of the most influential scholarship about the history of the American police has focused on New York City”).

39. See *id.* at 238 (stating that the Haymarket bombing began as a rally by labor leaders in Chicago in 1886 protesting police attacks on workers).

40. See JOHNSON, *supra* note 29, at 15.

41. *Id.*

42. *Id.* at 15–16.

43. *Id.* at 15.

44. See *id.*



armed – and dispatched to the city’s toughest neighborhoods with orders to “beat senseless” known gang members.<sup>45</sup>

This culture of violence in the police department became quite difficult to control. Soon, all officers were armed with these eighteen-inch locust clubs, the indiscriminate use of which became quite common.<sup>46</sup> A mechanism was created with the development of the New York Municipal Police for citizen complaints, which could lead to a disciplinary hearing against officers.<sup>47</sup> Numerous complaints were filed against officers in the mid- to late-nineteenth century for a variety of misdeeds, but overwhelmingly, improper use of the club was the frequent complaint made against these officers.<sup>48</sup>

The use of the club was so common that one officer, who came to epitomize the corruption and violence of the nineteenth century New York Police Force, came to be known as Captain Alexander “Clubber” Williams.<sup>49</sup> Williams bragged that he instructed his men “not to spare the locust on the heads of their prisoners.”<sup>50</sup> He was reported to have boasted that “[t]here is more law in the end of policeman’s nightstick than in a decision of the Supreme Court.”<sup>51</sup>

Frequent claims of police brutality led to proposals to limit the powers of police. One proposal to reduce police violence in the late-nineteenth century came from an unlikely source, Thomas Byrnes.<sup>52</sup> As a detective, Inspector Byrnes had been credited with making third-degree tactics commonplace in interrogation rooms in New York.<sup>53</sup> A visit to the Columbian Exposition – the precursor to the world’s fair – had, however, introduced him to a club-free Chicago police force.<sup>54</sup> The visit did not, however, inspire him to propose a club-free New York force, but merely to propose rules to reduce the incidence and harm of police clubbing.<sup>55</sup> He proposed that officers only be allowed to carry fourteen-inch clubs and only be permitted to use these weapons in self-defense.<sup>56</sup> The eighteen-inch clubs would quite frequently crack a

45. *Id.*

46. *Id.* at 15–16.

47. *Id.* at 18.

48. *Id.*

49. LINCOLN STEFFANS, *THE AUTOBIOGRAPHY OF LINCOLN STEFFANS* 208 (Heydey Books 2005) (1931).

50. Jerald Elliot Levine, *Police, Parties, and Polity: The Bureaucratization, Unionization, and Professionalization of the New York City Police 1870–1917*, at 108 (1971) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with the University of Wisconsin).

51. HERBERT ASBURY, *THE GANGS OF NEW YORK: AN INFORMAL HISTORY OF THE UNDERWORLD* 219 (1928).

52. JOHNSON, *supra* note 29, at 88–89.

53. *Id.* at 88.

54. *Id.* 89.

55. *Id.*

56. *Id.*

man's skull, a risk that was substantially reduced with the fourteen-inch club.<sup>57</sup>

Some reformers in the early twentieth century, reflecting society's concerns about these new police officers, would call for limits on the use of force by police. New York Assemblyman Timothy "Dry Dollar" Sullivan introduced a bill in the legislature in 1909 to forbid officers from using blackjacks, brass knuckles, and other weapons capable of inflicting considerable physical harm.<sup>58</sup> A New York state trial judge, William J. Gaynor, was a strong critic of police brutality and was elected mayor in 1910 in no small part because he was able to tap into the outrage over police brutality.<sup>59</sup>

None of these late-nineteenth and early-twentieth century efforts to impose limits on police powers proved successful. Those who sought to limit police power were countered by another type of activist, the good-government reformers. The most famous example of this sort of reformer was New York Police Commissioner Teddy Roosevelt, who saw police abuses as a symptom of official corruption, but not as a disease itself.<sup>60</sup> Roosevelt was certainly not alone; a number of influential New Yorkers advocated a better-trained, better-disciplined police force, rather than a less powerful police force.<sup>61</sup> In the mind of these reformers, police violence was not a bad thing when it was directed at the criminal element.<sup>62</sup> They criticized efforts to limit when officers could use their clubs and proposals to require officers to carry smaller and less lethal clubs, as pro-criminal, anti-police measures.<sup>63</sup> As historian Marilyn Johnson has described, for these reformers, "police violence was only a problem if used against innocent civilians . . . ; when directed against hardened criminals, rough tactics were [regarded as] essential to efficient and effective law enforcement."<sup>64</sup>

The success of these good government reformers meant that the police hiring policies and command structure changed to prevent the influence of patronage and political protection from internal discipline.<sup>65</sup> Few constraints, however, were placed on the powers of the officers hired under these new policies. In Chicago and New Orleans, for instance, officers were permitted to shoot to kill fleeing felons regardless of whether the felons presented a danger to the officer or others.<sup>66</sup> Practically, officers were almost never con-

57. *Id.*

58. TIMOTHY J. GILFOYLE, *A PICKPOCKET'S TALE: THE UNDERWORLD OF NINETEENTH-CENTURY NEW YORK* 252 (2006); JOHNSON, *supra* note 29, at 99–100.

59. JOHNSON, *supra* note 29, at 100–05.

60. *Id.* at 88.

61. *See id.* at 88–89.

62. *Id.* at 90.

63. *See id.* at 89–90.

64. *Id.* at 121.

65. *See id.* at 88.

66. *See* Adler, *supra* note 38, at 238–39; Dennis C. Rousey, *Cops and Guns: Police Use of Deadly Force in Nineteenth Century New Orleans*, *AM. J. LEGAL HIST.* 41, 44 (1984).

victed for killings in the line of duty.<sup>67</sup> Tort claims appear to be similarly rare.<sup>68</sup> In New York, where clubs were a greater concern than guns, no limits were placed on how and when an officer could use his club, except that truly innocent citizens who had been the subject of police brutality could, and did, file administrative complaints against officers.<sup>69</sup>

Despite frequently-raised concerns about police violence, efforts by Progressive reformers like Roosevelt prevented the development of any sort of external check on the power of police officers. Progressives advocated a vision of a perfectible police force that largely came to be accepted.<sup>70</sup> With the right training, discipline, and independence, police departments could be trusted to identify and deal ruthlessly with the criminal element. This model of the police required the public's trust, something that the public was increasingly willing to give early police forces. Not only was official violence at the officer's discretion largely tolerated on the street, third-degree interrogation practices were ignored while police were trusted to wiretap without any judicial oversight.<sup>71</sup>

The public's growing faith in police forces was shattered as they joined in the national effort to enforce Prohibition. A marked increase in police violence and corruption accompanied efforts to enforce federal and state liquor laws. Unlike during the Progressive Era, promises of efforts to root out corruption would not suffice to address the concerns raised by Prohibition enforcement. While police violence re-emerged as a concern, the invasion of privacy and personal security involved in physical searches was in many ways a new concern. Police had little reason to engage in searches in a world largely without vice crime. Overnight, Prohibition criminalized a very commonly-possessed substance. Officers went from rarely having any reason to conduct searches to having some basis for searching a large percentage of homes and businesses. As an Assistant U.S. Attorney who handled liquor searches in New York City observed in 1923:

For a time after the Volstead Act went into effect . . . few persons, even among lawyers, conceived the idea of questioning any Federal Government agent's right to search for and seize contraband liquor as he felt inclined or as his suspicions directed. The agents themselves,

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67. See Adler, *supra* note 38, at 236, 250.

68. See Rousey, *supra* note 66, at 60 & n.51.

69. JOHNSON, *supra* note 29, at 100–01.

70. See generally JAY STUART BERMAN, POLICE ADMINISTRATION AND PROGRESSIVE REFORM: THEODORE ROOSEVELT AS POLICE COMMISSIONER OF NEW YORK (1987).

71. Oliver, *supra* note 24. See also Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 461 (2010).

and many of their superiors, felt secure in their right to do so as Government officials.<sup>72</sup>

Along with this new concern about searches came a renewed concern about police brutality, which frequently accompanied liquor searches.<sup>73</sup> Police brutality in the Progressive Era could not be traced to any particular investigatory goal.<sup>74</sup> The uptick in police violence during Prohibition was, to the contrary, attributed to liquor searches.<sup>75</sup> The Wickersham Commission, empaneled to consider the lack of respect for law enforcement, concluded that Prohibition had gotten off to a “bad start” because:

High-handed methods, shootings and killings, even when justified, alienated thoughtful citizens, believers in law and order. Unfortunate public expressions by advocates of the law, approving killings and promiscuous shootings and lawless raids and seizures and deprecating the constitutional guarantees involved, aggravated this effort. Pressure for lawless enforcement, encouragement of bad methods and agencies of obtaining evidence, and crude methods of investigation and seizures on the part of badly chosen agents started a current of adverse opinion in many parts of the land.<sup>76</sup>

The exclusionary rule – first developed in mid-nineteenth century Maine to curb the excesses of Temperance Watchmen who volunteered to enforce the nation’s first statewide prohibitory law<sup>77</sup> – gained great support in the states as a means to deter both the hated liquor searches and the violence that accompanied efforts to discover liquor. The linkage between Prohibition and the exclusionary rule is under-appreciated. The majority of states to adopt the exclusionary rule did so during Prohibition;<sup>78</sup> the rule was overwhelmingly adopted in these states in court cases involving liquor searches.<sup>79</sup>

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72. Victor House, *Search and Seizure Limits Under the Prohibition Act*, N.Y. TIMES, Feb. 11, 1923, at X14.

73. See JOHNSON, *supra* note 29, at 114–15.

74. See *id.* at 86–87 (explaining how many Progressive Era reformers linked police brutality to “moral and political corruption”).

75. See *id.* at 114–15.

76. NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 82 (1931).

77. The origins of the exclusionary rule are traditionally identified in the Supreme Court case *Boyd v. United States*. See 116 U.S. 616 (1886). See also 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, 1372 (1983). The Supreme Judicial Court of Maine was, however, the first court in the United States to exclude reliable evidence because of the manner in which the evidence was obtained. See *State v. Staples*, 37 Me. 228, 230 (1854); *State v. Spirituous Liquors*, 39 Me. 262, 263 (1855); Oliver, *supra* note 71, at 504 n.313.

78. See Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 246, 250 (1961) (“[M]ost of

Prohibition would make the exclusionary rule the all-purpose cure for police misconduct. Even as Prohibition destroyed the Progressive vision that anti-corruption measures could prevent unwanted police violence, it repackaged the public's concerns. As police violence was linked in the public's mind to searches for liquor, denying police the opportunity to use the fruits of illegal searches meant discouraging police misconduct.

### III. THE WARREN COURT CONSTITUTIONALIZED PROHIBITION'S UNDER-REGULATION OF POLICE VIOLENCE

Prohibition's remedy would outlive its cause. The concerns about police in the 1950s and 1960s were very different than they were in the Roaring Twenties, but nevertheless, the Supreme Court turned to a Prohibition-era remedy to sanction police misconduct. The end of Prohibition did not end illegal searches and courts continued to see violations of the Fourth Amendment. Though, with the end of Prohibition, the public had very little concern about police practices that demonstrated the guilt of criminal suspects.<sup>80</sup> The public, however, came to be aroused by police practices in a way that it had been prior to Prohibition and prior to the Progressive Era. Police violence re-emerged as a concern in the aftermath of World War II as population shifts, social unrest, and the Civil Rights Movement raised tensions between citizens

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the states that accepted the 'Weeks Rule' did so in the period of national prohibition.").

79. See, e.g., *Atz v. Andrews*, 94 So. 329 (Fla. 1922); *State v. Arregui*, 254 P. 788 (Idaho 1927); *People v. Castree*, 143 N.E. 112 (Ill. 1924); *Flum v. State*, 141 N.E. 353 (Ind. 1923); *Youman v. Commonwealth*, 224 S.W. 860 (Ky. 1920); *People v. Marxhausen*, 171 N.W. 557 (Mich. 1919); *Tucker v. State*, 90 So. 845 (Miss. 1922); *State v. Owens*, 259 S.W. 100 (Mo. 1924) (en banc); *State ex rel. King v. District Court*, 224 P. 862 (Mont. 1924); *Gore v. State*, 218 P. 545 (Okla. Crim. App. 1923); *State v. Gooder*, 234 N.W. 610 (S.D. 1930); *Hughes v. State*, 238 S.W. 588 (Tenn. 1922); *State v. Gibbons*, 203 P. 390 (Wash. 1922); *State v. Wills*, 114 S.E. 261 (W. Va. 1922); *Hoyer v. State*, 193 N.W. 89 (Wisc. 1923). Interestingly, the Texas Legislature enacted a statute creating the exclusionary rule after the Texas Court of Criminal Appeals rejected the exclusionary rule in a liquor case. Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 195-99 (1981). Alabama even adopted a liquor-specific statute. See ALA. CODE § 29-210 (1940).

80. See *People v. Cahan*, 282 P.2d 905, 913 (Cal. 1955) (in banc) ("[E]ven when it becomes generally known that the police conduct illegal searches and seizures, public opinion is not aroused as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer.").

and the police. Those tensions were typically the greatest between police and African American communities.<sup>81</sup>

Just as Prohibition-era searches had prompted courts to create an exclusionary rule, one could have imagined mid-twentieth century courts imposing limits on police brutality. Teddy Roosevelt's vision of the virtues of police violence had not survived the first half of the twentieth century. No longer were police describing violence as a positive good, even if it was directed against the criminal element. George Edwards, the Detroit Police Commissioner from 1962 to 1963, condemned the very sort of police practices Teddy Roosevelt had celebrated, describing an abuse he knew as "alley court," which he said was often directed against African Americans:

[A] few police officers are sincerely convinced that they are unable to maintain peace and order unless they are allowed to bolster their authority in the streets by the use of a fist or billy when they feel it is necessary. . . . "Alley court" is ordinarily used against minority groups. It is easy to see how such a practice can inflame the attitude of such a group—in this case, the Negro population. It produces cries of "police brutality," and it deprives the police department of its most important weapon against crime—the support of the law-abiding populace residing in the core areas of our big cities.<sup>82</sup>

The Prohibition Era's concerns about police re-emerged, but in a different form. It was not searches for evidence that were troubling, but use of police power to intimidate or harm individuals. As a 1968 note in the *Yale Law Journal* observed, "[t]he vast majority of police transgressions are acts of harassment and bullying which never lead to prosecutions . . . ."<sup>83</sup>

As the Supreme Court turned its eye toward police regulation, however, it adopted the remedy that Prohibition produced. The Warren Court's first decision as part of its criminal procedure revolution was *Mapp v. Ohio*, which required state courts to exclude illegally obtained evidence as a means of deterring unreasonable searches and seizures.<sup>84</sup> Noting the number of state courts then embracing the exclusionary rule – most of which adopted the rule during Prohibition – the Supreme Court in *Mapp* required state courts to exclude unlawfully obtained evidence to deter unlawful searches and seizures.<sup>85</sup>

While the system of tort damages had not adequately deterred unlawful searches, the exclusionary rule was not the only option available to the Court,

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81. See, e.g., MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POST WAR NEW YORK CITY* (2003) (observing that ten African American men were killed by police in one month in New York City in 1951).

82. ARTHUR F. BRANDSTATTER, *POLICE AND COMMUNITY RELATIONS: A SOURCEBOOK* 32 (1968).

83. Note and Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 *YALE L. J.* 143, 143–44 (1968).

84. *Mapp v. Ohio*, 367 U.S. 643, 652 (1961).

85. *Id.* at 651.

or the states, in 1961. Certainly, few tort cases were likely to be brought against officers for illegal searches and seizures, and juries were unlikely to provide large awards for illegal searches, particularly those uncovering criminal activity. The exclusionary rule overcame these limitations of a tort regime of deterrence, but this was not the only possible solution to this problem. As commentators noted at the time and subsequently, injunctions prohibiting Fourth Amendment violations would have given courts contempt power over police misconduct.<sup>86</sup> Damage regimes with liquidated damages, or judicially assessed liability and damages, have also been proposed as a means of deterring misconduct without sacrificing illegally obtained evidence.

An effective remedy, decoupled from the admissibility of reliable evidence, would not have created two police rules: one for officers looking for evidence and another for officers who harass, seize, maim, or kill suspects. As the Supreme Court itself recognized in *Terry v. Ohio*:

Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.<sup>87</sup>

In *Terry*, the Court specifically noted that “wholesale harassment by certain elements of the police community, of which minority groups . . . frequently complain” will not be remedied by the exclusionary rule.<sup>88</sup>

Tort and civil rights actions, driven by the vague reasonableness standard and qualified immunity’s insulation of officers from suit for actions that are not clearly illegal, have failed to produce adequate guidance. As police academies use court opinions to develop training for officers about the legal limits on their conduct, this deference to officers is particularly problematic. It is not clear what it means to train officers to be “reasonable” when they decide to use deadly force, and it is not clear that jurors or grand jurors are to decide whether the use of force was “reasonable.”

By contrast, judges who review suppression motions have a vast body of case law to review and can often support their decisions with multiple layers of precedent. Officers are easily trained on when a trunk may be lawfully searched. A regime which required judges to rule on police misconduct, regardless of whether it produced evidence against an accused, would have

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86. John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922); see generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 538 n.134 (suggesting that a 1994 federal statute permitting injunctions against a police department held the great possibility to limit police misconduct).

87. 392 U.S. 1, 14 (1968).

88. *Id.* at 14–15.

produced a body of precedent covering police shootings as well as the body of law on police searches produced by the exclusionary rule.

### CONCLUSION

An accident of – or intentional error in – American history has left police brutality and even harassment under-regulated. Police brutality was the public's primary concern with America's earliest police forces and has remained a concern through much of American history. For a brief period, Americans were more afraid of crime than rampant police brutality, and the Progressive vision of the right kind of police violence was embraced. For an even briefer period, Americans came to see Prohibition as the root of most of their concerns with police, and the exclusionary rule was adopted to address these concerns.

In imposing this rule on state courts, by embracing the rule that Prohibition created, the Supreme Court missed an opportunity to address the search and seizure issues that were troubling courts and the police brutality issues that were the subject of enormous public concern. By adopting the Prohibition-era remedy for police misconduct, the Court stunted the development of rules regulating police violence and harassment that do not lead to the discovery of evidence. As a result, police violence is governed by the tort mechanisms that California's Chief Justice Traynor and the U.S. Supreme Court in *Mapp v. Ohio* found to be inadequate to deter even unlawful searches.





