Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct†

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Introduction

In order to enforce the fourth amendment guaranty of freedom from unreasonable searches and seizures,[1] the Supreme Court developed the remedy of excluding evidence obtained by unconstitutional means from use in prosecuting the individual who was the object of the unlawful search or seizure.[2] Several purposes have been advanced by the Court to

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1. In relevant part, the United States Constitution guarantees: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV; "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend V; "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI; "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

2. Boyd v. United States, 116 U.S. 616, 633-35 (1886) (holding forced disclosure of papers violated both the fourth and fifth amendment privileges against self-incrimination and the papers were therefore inadmissable as evidence in a forfeiture proceeding); Weeks v. United States, 232 U.S. 383 (1914) (applying fourth amendment exclusionary rule to federal criminal prosecutions). *See also* Mapp v. Ohio, 367 U.S. 643, 650 (1961) (applying exclusionary rule to state courts by incorporation of the fourth amendment guaranty of privacy through the Due Process Clause of the Fourteenth Amendment); Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (applying exclusionary rule where state did not secure voluntary consent prior to search of suspect not in custody).

The distinction between exclusionary rule application in fourth amendment search and seizure cases as opposed to application in fourteenth amendment coerced confession cases was made by Justice Harlan, dissenting in *Mapp v. Ohio*. He said that the purpose of the fourth amendment exclusionary rule is to discipline the police whereas the purpose of excluding coerced confessions is to protect the fairness of the trial. 367 U.S. at 680-84 (Harlan, J., dissenting). *See also* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (distinguishing fourth

justify the exclusionary rule, including "the necessity for an effective deterrent to illegal police action";[3] the "imperative of judicial integrity" such that courts do not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold";[4] and the need for an assurance to "all potential victims of unlawful government conduct that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[5] In its recent attempts to clarify the scope of the exclusionary rule, however, the Court has made clear that its concern lies only with the deterrent function of the rule.[6]

Almost from its inception, courts have been reluctant to apply the exclusionary rule. This judicial ambivalence is crystallized in the statement by Judge (later Justice) Cardozo that "[t]he criminal is to go free because the constable has blundered."[7] Nonetheless, the rule remains an important feature of constitutional law, in part because courts have found no other effective alternatives for guarding against illegal searches and seizures.

Beginning in the 1970s, individual members of the Supreme Court expressed doubts about the effectiveness of deterring police misconduct by excluding illegally obtained evidence.[8] In 1984, the Court ruled that the exclusionary rule does not apply to evidence obtained by police rely-

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amendment rights from those constitutional rights that preserve a fair trial). Cases interpreting the fifth amendment privilege against self-incrimination invoked by suspects being questioned in police custody share some of the characteristics of the fourth amendment cases—a concern with deterring police from violating the privilege—but the fifth amendment cases also protect the fairness of trial by not using confessions obtained in violation of the privilege. The suspect's sixth amendment right to counsel at pretrial lineups, United States v. Wade, 388 U.S. 218 (1967), or when the police deliberately attempt to elicit a confession, Massiah v. United States, 377 U.S. 201 (1964), also implicates the fairness of the trial by protecting the adversary nature of the criminal justice system once the prosecution has begun, United States v. Ash, 413 U.S. 300 (1973). However, exclusionary rule application in the right to counsel cases also has been concerned with deterring police from violating constitutional rights. *Wade*, 388 U.S. at 236-37.

3. Linkletter v. Walker, 381 U.S. 618, 636-37 (1965).

4. Elkins v. United States, 364 U.S. 206, 222-23 (1960).

5. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

6. For example, the majority in *Calandra* held that a grand jury witness may not refuse to answer questions on grounds that they are based on illegally seized evidence because any "incremental deterrent effect which might be achieved by extending the [exclusionary] rule to grand jury proceedings is uncertain at best." *Id.* at 351.

7. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

8. *See, e.g.*, Bivens v. Six Unknown Agents, 403 U.S. 388, 415-16, 420 (1971) (Burger, C.J., dissenting) (favoring abandonment of the rule, although the Court should not eliminate the rule "until some meaningful substitute is developed. . . ."); Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J. dissenting) (The exclusionary rule "should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was

ing in good faith on an invalid search warrant.[9] More recently, the Court refused to exclude illegally obtained evidence from use in civil deportation proceedings.[10] The premise of both majority opinions was that the deterrence achieved could not, under the circumstances, justify the exclusion of the evidence.[11]

A further erosion of fourth amendment protection need not be inevitable. As an alternative to, or even as a complement of, the exclusionary rule, states can deter police misconduct by decertification of the officer, that is, by revoking the officer's state certification for constitutional violations in evidence gathering. With the exception of Hawaii, all the states have boards or commissions, commonly called Peace Officer Standards and Training (P.O.S.T.) Boards, which have the authority to set training and selection standards. Without a certificate, an individual cannot be employed as a police officer in that state.[12] In short, the P.O.S.T. Board

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seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief.").

For discussion of the effectiveness of the exclusionary rule, see Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978).

9. United States v. Leon, 468 U.S. 897, *reh'g denied*, 468 U.S. 1250 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984).

Although there has been no fifth or sixth amendment "good faith exception" case, the Court also is clearly cutting back on the scope of the protection of fifth amendment rights first given defendants in Miranda v. Arizona, 384 U.S. 436 (1966). *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (adoption of public safety exception; *Miranda* warnings are prophylactic measures, not constitutional rights.) The sixth amendment right to counsel has similarly been cut back. *Compare* United States v. Wade, 388 U.S. 218, 223-27 (1967) (Sixth Amendment guarantees right to counsel at any critical confrontation by prosecution prior to trial) *with* Kirby v. Illinois, 406 U.S. 682, 688-91 (1972) (line up without counsel pre-indictment does not violate the Sixth Amendment). The Court continues to distinguish between violations of the Fifth and Sixth Amendments and violations of the Due Process Clause of the Fourteenth Amendment, treating the latter as more deserving of concern. For example, in the Sixth Amendment, compare *Kirby, supra* with Stovall v. Denno, 388 U.S. 293, 302 (1967) (line up that is unnecessarily suggestive can violate due process); in the Fifth Amendment, compare Harris v. New York, 401 U.S. 222, 224 (1971) (*Miranda* violation can be used to impeach defendant's testimony) with Mincey v. Arizona, 437 U.S. 385, 401-02 (1978) (coerced confession in violation of due process cannot be used for impeachment purposes).

In sum, the Court may one day treat the fifth and sixth amendment exclusionary rules in a comparable way to its treatment of the fourth amendment exclusionary rule by focusing solely on the deterrence rationale. If that occurs, the Court will surely look to whether there are alternatives justifying replacement of the rule.

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

11. *Leon*, 468 U.S. at 918-19; *Lopez-Mendoza*, 468 U.S. at 1041-42.

12. *See, e.g.*, Alabama Peace Officers' Standards and Training Comm'n, ALA. CODE §§ 36-21-40 to 36-21-50 (1975 & Supp. 1986); Alaska Police Standards Council, ALASKA STAT. §§ 18.65.130-18.65.290 (1986); Arizona Law Enforcement Officer Advisory Council,

serves as the licensing agency for law enforcement personnel within the state.

ARIZ. REV. STAT. ANN. §§ 41-1821 to 14-1828 (1985 & Supp. 1985); Arkansas Comm'n on Law Enforcement Standards and Training, ARK. STAT. ANN. §§ 42-1001 to 42-1009, 42-701.1 to 42-708 (1977 & Supp. 1985); California Comm'n on Peace Officer Standards and Training, CAL. PENAL CODE §§ 13510-13519 (West 1982 & Supp. 1987); Colorado Law Enforcement Training Academy and Peace Officers, Standards and Training, COLO. REV. STAT. §§ 24 1-128.6 (Supp. 1986); Municipal Police Training Council, CONN. GEN. STAT. ANN. §§ 7-294a to 7-294g (West 1983); Delaware Council on Police Training, DEL. CODE ANN. tit. 11, §§ 8401-8410 (1974 & Supp. 1986); Florida Criminal Justice Standards and Training Comm'n, FLA. STAT. ANN. §§ 943.09-943.26 (West 1985 & Supp. 1987); Georgia Peace Officers Standards and Training Council, GA. CODE ANN. §§ 35-8-1 to 35-8-19 (Supp. 1987); Idaho Peace Officer Standards and Training Council, IDAHO CODE §§ 19-5101 to 19-5116 (1979 & Supp. 1986); Illinois Local Gov't Law Enforcement Officers Training Bd., ILL. REV. STAT. ch. 85, para. 501-512 (1987); Indiana Law Enforcement Training Bd., IND. CODE §§ 5-2-1 to 5-2-15 (1982 & Supp. 1987); Iowa Law Enforcement Academy Council, IOWA CODE §§ 80B.1-80B.15 (1984 & Supp. 1987); Kansas Law Enforcement Training Comm'n, KAN. STAT. ANN. §§ 74-5601 to 74-5610 (1985); Kentucky Law Enforcement Council, KY. REV. STAT. ANN. §§ 15.310-15.370 (Michie/Bobbs-Merrill 1985); Louisiana Peace Officers Standards and Training Council, LA. REV. STAT. ANN. §§ 2401-2406 (West 1977 & Supp. 1987); Maine Criminal Justice Academy Bd., ME. REV. STAT. ANN. tit. 25, §§ 2801-2808 (1974 & Supp. 1986); Maryland Police Training Comm'n, MD. ANN. CODE art. 41, § 70A (1957 & Supp. 1985); Massachusetts Police Training School Requirements, MASS. GEN. LAWS ANN. ch. 41, § 96B (West 1979 & Supp. 1987); Michigan Training School for Police Officers, MICH. COMP. LAWS ANN. §§ 28.221-28.225 (West 1987); Minnesota Bd. of Peace Officer Standards and Training, MINN. STAT. ANN. §§ 626.84-626.861 (West 1983 & Supp. 1987); Mississippi Bd. on Law Enforcement Officer Standards and Training, MISS. CODE ANN. §§ 45-6-1 to 45-6-17 (1983); Missouri Dep't of Pub. Safety Peace Officer Standards and Training Program, MO. ANN. STAT. §§ 590.100-590.135 (Vernon 1979 & Supp. 1987) (Director of Public Safety has powers of P.O.S.T. Board); Montana Bd. of Crime Control, MONT. CODE ANN. §§ 7-32-301 to 7-32-304 (1983); Nebraska Comm'n on Law Enforcement and Criminal Justice, NEB. REV. STAT. §§ 81-1401 to 81-1427 (1981 & Supp. 1986); Nevada Peace Officers' Standards and Training Comm'n, NEV. REV. STAT. § 481.053 (1985); New Hampshire Police Standards and Training Council, N.H. REV. STAT. ANN. §§ 188-F:22 to 188-F:32 (Supp. 1986); New Jersey Police Training Comm'n, N.J. REV. STAT. §§ 52:17B-67 to 52:17B-73 (1986 & Supp. 1987); New Mexico Law Enforcement Academy Bd., N.M. STAT. ANN. §§ 29-7-1 to 29-7-12 (1983); New York Mun. Police Training Council, N.Y. EXEC. LAW §§ 839-845 (McKinney 1982); North Carolina Criminal Justice Educ. and Training Standards Comm'n, N.C. GEN. STAT. §§ 17C-1 to 17C-12 (1983); North Dakota Criminal Justice Training and Statistics Div., N.D. CENT. CODE §§ 12-62-01 to 12-62-10 (1985); Ohio Peace Officer Training Council, OHIO REV. CODE ANN. §§ 109.71-109.80 (Anderson 1984 & Supp. 1986); Oklahoma Council on Law Enforcement and Training, OKLA. STAT. tit. 70, § 3311 (Supp. 1987); Oregon Bd. on Police Standards and Training, OR. REV. STAT. §§ 181.610-181.700 (1985); Pennsylvania Mun. Police Officers' Educ. and Training Program, 53 PA. CONS. STAT. §§ 740-750 (Supp. 1987); Rhode Island Comm'n on Standards and Training, R.I. GEN. LAWS §§ 42-28.2-1 to 42-28.2-12 (1984); South Carolina Law Enforcement Training Council, S.C. CODE ANN. §§ 23-23-10 to 23-23-80 (Law. Co-op. 1976 & Supp. 1986); South Dakota Law Enforcement Standards and Training Comm'n, S.D. CODIFIED LAWS ANN. §§ 23-3-26 to 23-3-55 (1979 & Supp. 1987); Tennessee Peace Officer Standards and Training Comm'n, TENN. CODE ANN. §§ 38-8-101 to 38-8-111 (1984); Texas Comm'n on Law Enforcement Officers and Standards and Educ., TEX. REV. CIV. STAT. ANN. art. 4413 (29aa) & art. 4413 (29aa-1 to 29aa-3) (Vernon 1976 & Supp. 1987); Utah Council on Peace Office Standards and Training, UTAH CODE ANN. §§ 67-21 to 67-51

In deterring fourth amendment violations, decertification has several advantages over traditional forms of police discipline. Revoking an officers's certification, for example, is a more effective deterrent than merely terminating his employment with the local police department because the terminated officer may be able to continue in law enforcement by working for a different department within the state. In addition to its value as a deterrent, decertification removes the offending officer from the law enforcement profession, thereby avoiding further abuses.[13]

Currently, thiry-seven states provide procedures for decertifying police officers.[14] The forms of misconduct that can lead to a loss of certifi-

(1984); Vermont Criminal Justice Training Council, VT. STAT. ANN. tit. 20, §§ 2351-2364 (Supp. 1986); Virginia Dept. of Criminal Justice Services Bd., VA. CODE ANN. §§ 9-167 to 9-183 (1985); Washington State Criminal Justice Training Comm'n, WASH. REV. CODE § 43.101.200 (1987); West Virginia Law Enforcement Training Subcomm., W. VA. CODE §§ 30-29-1 to 30-29-9 (1986); Wisconsin Law Enforcement Standards Bd., WIS. STAT. §§ 165.85-165.87 (1974 & Supp. 1987); Wyoming Peace Officer Standards and Training Comm'n, WYO. STAT. §§ 9-1-701 to 9-1-707 (1983).

13. In the absence of decertification, the offending officer is likely to remain in the law enforcement profession. It is common practice today for an officer to be dismissed by one department and then be rehired by a different department in the same state. In those states which have minimum selection standards, an officer who fails to meet those standards cannot be hired by a new department. *See, e.g.*, MICH. ADMIN. CODE r. 28.4102 (1984). Unless the state also has decertification, however, the officer can remain with his current employer. For a listing of states with decertification authority, see *infra* note 14. In many cases, the new department is willing to hire the dismissed officer because the new department does not incur the cost of training a new recruit. Further, the officer's salary demands are low since better departments will not hire him. For discussion of the ability of such departments to secure professional liablity insurance, see *infra* note 124.

14. ALA. CODE § 36-21-45 (1975) and ALA. P.O.S.T. RULE 650 x-6.06 (1983); ALASKA STAT. § 18.65.240 (1986) and ALASKA ADMIN. CODE tit. 13, § 85.100 (July 1985); ARIZ. REV. STAT. ANN. § 41-1822 (1985) and ARIZ. COMP. ADMIN. R. & REGS. 13 4 07, 13 4 08 (1983); ARK. STAT. ANN. § 42-701.1 (Supp. 1985) and Ark. Reg. 1010(2)(a); CAL. PENAL CODE § 13510.1 (West 1982) and CAL. ADMIN. CODE tit. 11, § 1011 (1983); COLO. REV. STAT. § 24-1-128.6 (Supp. 1986); CONN. GEN. STAT. ANN. § 7-294d(c) (West 1972 & Supp. 1987); DEL. CODE ANN. tit. 11, § 8404(a)(4) (1974 & Supp. 1986); FLA. STAT. ANN. § 943.1395 (West 1985 & Supp. 1987) and FLA. ADMIN. CODE ANN. r. 11B 27.005 (1985); GA. CODE ANN. § 35-8-7(14) (Supp. 1987) and *Rules of Ga. P.O.S.T. Council*, ch. 464-4-.13 (1987); IDAHO CODE § 19-5109 (Supp. 1986) and IDAHO P.O.S.T. RULES AND REGS. 7,1,2 (1986); IOWA CODE § 80B.11.6 (Supp. 1987) and *Iowa Law Enforcement Academy Rules* § 501-6.2 (803) (1987); KAN. STAT. ANN. § 74-5607a (1985) and KAN. ADMIN. REGS. 107-2-1 (1983); LA. REV. STAT. ANN. § 2404 (West 1977) and *Louisiana P.O.S.T. Rules for Retaining P.O.S.T. Certification as a Peace Officer* (1980); ME. REV. STAT. ANN. tit. 25, § 2803(10) (Supp. 1986); MD. ANN. CODE art. 41, § 70A(d)(7) (1957 & Supp. 1985); MINN. STAT. ANN. § 626.843 (West 1983); MISS. CODE ANN. § 45-6-7 (West 1972); MO. REV. STAT. § 590.120 (1979) and MO. CODE REGS. tit. 11, 11-75-3.080 (1980); MONT. CODE ANN. § 7-32-303 (1987) and MONT. ADMIN R. 23 14.411 (1981); NEB. REV. STAT. § 81.1403.5 (Supp. 1986); NEV. REV. STAT. § 481.053 (1985); N.H. REV. STAT. ANN. § 188-F:26(IV) (Supp. 1986) and N.H. CODE ADMIN. R. Pol. 502.01 (1982); N.M. STAT. ANN. § 29-7-6 (1978) and NEW MEXICO LAW ENFORCEMENT ACADEMY RULES AND REGS. rule 12, § A.16 (1980); N.C. GEN. STAT. § 17C-10(c) (1983) and N.C. ADMIN. CODE tit. 12, r. 09A.0204 (Jan. 1983); N.D.

cation vary by state. In some states an officer can be decertified for a wide range of misconduct, such as conduct "that would tend to disrupt, diminish, or otherwise jeopardize public trust and fidelity in law enforcement."[15] Others approve much more limited grounds for decertification, requiring for example, fraud or mistake in obtaining the certificate or conviction of a felony.[16]

This Article offers the first in-depth analysis of current decertification procedures. After a general discussion of some of the other methods used to control and punish police misconduct, the Article examines more closely the practice of decertification as it has developed in Florida. The purpose of this empirical review is to enable better predictions regarding decertification's efficacy in safeguarding against fourth amendment violations. Florida, as a leading proponent of decertification,[17] is perhaps the only state with sufficient experience to support such a review.

This Article adopts the folowing typology to describe the different types of police misconduct observed in Florida. First, "private misconduct" refers to action by an officer not acting under color of authority.[18] Second, "departmental misconduct" refers to misconduct by an officer acting in his official capacity but not involving private citizens.[19] Finally, "public, official misconduct" refers to the mistreatment of private citizens by an officer acting under color of authority.

This last category, "public, official misconduct", encompasses three types of misbehavior: (1) unconstitutional police conduct that yields evidence of a crime (currently inadmissable under the exclusionary rule);

CENT. CODE § 12-62-04 (1985) and N.D. ADMIN. CODE § 10-06-02-08 (1983); OKLA. STAT. tit. 70, § 3311(K) (Supp. 1987); OR. REV. STAT. § 181.662 (1985) and OR. ADMIN. R. 259-10-060(20) (1983); 53 PA. CONS. STAT. § 745 (Supp. 1987) and 37 PA. CODE § 201.17 (1981); S.D. CODIFIED LAWS ANN. § 23-3-35 (1979) and S.D. ADMIN. R. 2:01:02:07 (1982); TENN. CODE ANN. § 38-8-107 (1982 & Supp. 1986) and TENN. COMP. R. & REGS. tit. 38, ch. 8 1110-2-04 (1983); TEX. REV. CIV. STAT. ANN. art. 4413 (29aa-1) (Vernon Supp. 1987) and TEX. ADMIN. CODE tit. 211, § 83 (1983); UTAH CODE ANN. § 67-15-10.5 (1986 & Supp. 1987); VT. STAT. ANN. tit. 20, §§ 2355(a)(11), (12) (Supp. 1987); W. VA. CODE § 30-29-6 (1986); WIS. STAT. § 165.85(3)(cm) (1974 & Supp. 1987); WYO. STAT. § 9-1-703 (1987) and WYO. P.O.S.T. RULES § 204 (1983). For a description of decertification of law enforcement officers in the states, see Puro & Goldman, *Police Decertification: A Remedy for Police Misconduct?, forthcoming in* 5 POLICE & LAW ENFORCEMENT ch. 8 (Kennedy & Homant eds. 1988).

15. UTAH CODE ANN. § 67-15-10.5(1)(e) (1986 & Supp. 1987).

16. CONN. GEN. STAT. ANN. § 7-294d(20)(c) (West 1983 & Supp. 1987).

17. In our survey of the states with decertification authority since 1980, twelve out of twenty-one responding averaged less than five decertifications in the years 1980 through 1984. Puro & Goldman, *supra* note 14. Florida, during those years, decertified a total of 112 officers. *See infra* notes 132-133 and accompanying text.

18. For example, off-duty misconduct such as burglary or drug possession.

19. For example, violations of departmental rules on use of firearms and vehicles or filing false reports.

(2) unconstitutional police conduct that does not yield any criminal evidence and may expose the officer to a federal civil suit or criminal prosecution for violation of the citizen's civil rights;[20] and (3) misconduct not recognized under the Constitution, such as bribery or negligent deprivation of property.[21]

Recent Supreme Court decisions can be read to require merely that alternative remedies exist before the exclusionary rule can be modified or eliminated, regardless of whether the existing remedies are effective. Under such a reading, decertification remedies like Florida's could justify cutting back or abolishing the exclusionary rule in fourth amendment cases. On the basis of the Florida experience, however, this Article concludes that decertification has not been applied directly to redress fourth amendment violations yielding evidence of a crime, and thus is not available as an effective alternative to the exclusionary rule. Until decertification proves an effective remedy for fourth amendment violations, it should not be used by the Court as justification for further modifications of the rule.

I. Decertification versus Traditional Methods of Controlling Police Misconduct

Before a state will adopt a decertification program, it will want to contrast decertification with the other methods for controlling police misconduct. In addition to the exclusionary rule, there are three traditional mechanisms for redressing police misconduct: civil damage suits against the offending officer, his department or municipality under section 1983 of the Civil Rights Acts;[22] criminal prosecutions;[23] and com-

20. *See infra* notes 23, 68-76 and accompanying text.

21. *See infra* note 130 and accompanying text.

22. 42 U.S.C. § 1983 (1982). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

23. 18 U.S.C. § 242 (1982). The statute provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

plaint procedures of local police departments.[24] This section addresses two questions: first, does decertification offer something which the other remedies do not offer? Second, does decertification avoid the weaknesses inherent in the other methods?

A. The Exclusionary Rule

The exclusionary rule dictates that evidence obtained in violation of the rights guaranteed by the Constitution must be excluded at a defendant's criminal trial.[25] Although the exclusionary rule most commonly applies to violations of the Fourth Amendment,[26] it also applies to evidence obtained in violation of other constitutional rights.[27]

In 1974, a majority of the Court acted to limit the exclusionary rule in fourth amendment cases.[28] Several later cases continued to weaken the rule,[29] but no significant curtailment in its application occurred until 1984. In two decisions that year, *United States v. Leon*[30] and *Massachusetts v. Sheppard*,[31] the Court refused to apply the exclusionary rule when the police relied in good faith on search warrants issued in violation of the Fourth Amendment.[32] In *INS v. Lopez-Mendoza*,[33] the Court further

24. Except in rare circumstances, as in Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (police department enjoined from conducting illegal searches of private homes), federal injunctive relief to restructure department policies is unavailable. Rizzo v. Goode, 423 U.S. 362 (1976); Los Angeles v. Lyons, 461 U.S. 95 (1983).

25. Occasionally, the rule has been applied in non-criminal cases. *See, e.g.*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (holding automobile forfeiture was quasi-criminal in nature and thus exclusionary rule applied).

26. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule used for fourth amendment violation).

27. Miranda v. Arizona, 384 U.S. 436 (1966) (exclusionary rule used for violations of the fifth amendment privilege against self-incrimination); Massiah v. United States, 377 U.S. 201 (1964) (exclusionary rule used for violation of the sixth amendment right to the assistance of counsel); Rochin v. California, 342 U.S. 165 (1954) (conviction overturned on ground that evidence obtained in violation of fourteenth amendment due process had been used at trial). For a discussion of the different purposes of the rule depending on the constitutional right at issue, see *supra* note 2.

28. United States v. Calandra, 414 U.S. 338 (1974).

29. United States v. Havens, 446 U.S. 620 (1980); Michigan v. DeFillipo, 443 U.S. 31 (1979); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976).

30. 468 U.S. 897, *reh'g denied*, 468 U.S. 1250 (1984).

31. 468 U.S. 981 (1984). *Sheppard* was decided as a companion case to *Leon*.

32. In *Leon*, the lower court had found the warrant was not supported by probable cause. The Supreme Court did not address the question of whether there was probable cause but instead held that the good faith exception should apply regardless of whether there was a fourth amendment violation. 468 U.S. at 922-23. In *Sheppard*, the warrant improperly described the evidence to be seized, but the Court upheld the search under *Leon*. 468 U.S. at 988.

In Illinois v. Krull, 107 S. Ct. 1160 (1987), the Court extended the good faith exception to reliance by law enforcement officers on the constitutionality of statutes. in *Krull*, the state

narrowed the scope of the exclusionary rule by refusing to apply the rule even to intentional violations of the Fourth Amendment. In *Lopez-Mendoza*, the illegally obtained evidence was to be used in civil deportation proceedings rather than in criminal proceedings.[34]

One factor distinguishing these recent cases from previous exclusionary rule cases such as *Mapp v. Ohio*[35] is that the Court no longer requires that there be effective alternative remedies for redressing fourth amendment violations before illegally obtained evidence can be admitted.[36] The Court has limited recent discussion of alternatives to noting the availability, but not the effectiveness, of remedies for fourth amendment violations. For example, the Court in *Leon* noted that a magistrate who approved warrant applications when probable cause was clearly absent could be disciplined or removed from office.[37] Although the Court

legislature had unconstitutionally authorized warrantless searches. The Supreme Court refused to apply the exclusionary rule, stating that the rule would apply only if the statute in question was "clearly unconstitutional." *Id.* at 1167.

33. 468 U.S. 1032 (1984). In *Lopez-Mendoza*, a Mexican citizen alleged that he was illegally arrested by an INS agent and that his admission of illegal entry was a fruit of the illegal arrest. The Supreme Court held that the court need not exclude the evidence at his deportation hearing. *Id.* at 1051.

34. *Id.* at 1035-36.

35. 367 U.S. 643 (1961). See *infra* note 36 for a discussion of the *Mapp* case.

36. Justice Murphy's dissenting opinion in *Wolf v. Colorado*, 388 U.S. 25 (1949), was one of the earliest indications that individual members of the Court were skeptical of the effectiveness of alternatives to the exclusionary rule. In *Wolf*, the Court held that fourteenth amendment due process does not require the exclusion of evidence in a state criminal trial for conduct that would have violated the Fourth Amendment if committed by federal officers. *Id.* at 33. Murphy examined the alternatives to the exclusionary rule and concluded that "[t]here is but one alternative to the rule of exclusion. That is no sanction at all." *Id.* at 41 (Murphy, J., dissenting).

In *Mapp v. Ohio*, the Court overruled *Wolf*, noting that "[t]he experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States." *Mapp*, 367 U.S. at 652. The *Mapp* Court held that the exclusionary rule applied to the states by incorporation of the fourth amendment's privacy guaranty through the Due Process Clause of the Fourteenth Amendment. *Id.* at 655.

37. *Leon*, 468 U.S. at 917 n.18. The Court cited 28 U.S.C. § 631(i) (1982), which provides that magistrates can be removed for "incompetency, misconduct, neglect of duty, or physical or mental disability." The Court went on to state that "magistrates are subject to the direct supervision of district courts. . . . If a magistrate serves as a 'rubber stamp' for the police or is unable to exercise mature judgment, closer supervision or removal provides a more effective remedy than the exclusionary rule." 468 U.S. at 917 n.18. In *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the companion case to *Leon*, there was no similar observation that judges who issue such warrants are subject to discipline. The presence of an alternative remedy therefore may not be a factor in the Court's decision to cut back on the exclusionary rule.

Compare Stringer v. State, 491 So.2d 837, 849 (Miss. 1986) (Robertson, J., concurring) ("Considering the realities of the warrant process, we perceive no vehicle for protecting these rights of our citizens and assuring that issuing magistrates take seriously their responsibilities *other than continued enforcement of this state's exclusionary rule.*" (emphasis in original)).

cited this remedy as an alternative to the exclusionary rule, it did not indicate that any magistrates had been so disciplined. In *Lopez-Mendoza*, the majority noted that the INS had a procedure for disciplining agents who violated the Fourth Amendment.[38] The Court stated that the presence of the procedure was "perhaps [the] most important" factor in reducing "the likely deterrent value of the exclusionary rule" in a civil deportation case.[39] Unlike *Leon*, where there was no indication that magistrates had ever been disciplined under the alternative remedies, INS agents had in fact been disciplined for misconduct toward aliens. The dissent was quick to note, however, that of the twenty agents who were disciplined for misconduct towards aliens, there was no showing that any were disciplined for fourth amendment violations.[40]

Opponents of the exclusionary rule claim that it does not deter police misconduct.[41] Even when they are aware a transgression has occurred, police departments normally do not punish the offending officer.[42] Furthermore, the passage of time between the violation and the exclusion of evidence at trial, not to mention the years it may take before the exclusion is upheld on appeal, diminishes the impact of the rule on police conduct. Opponents also claim that the party most harmed by application of the rule is the prosecutor and, ultimately, society, should the defendant be set free as a result of the court's exclusion of incriminating evidence.[43] Another common complaint is that the exclusionary rule "is

38. *Lopez-Mendoza*, 468 U.S. at 1044. Essentially, the INS regulations restricted stop, interrogation, and arrest practices. Reasonable suspicion of illegal alienage was required for detention, and strong evidence tantamount to an admission of illegal alienage was required before arrest. Immigration officers received ongoing instruction on fourth amendment law and the INS had a procedure for investigating and punishing officers who violated the Fourth Amendment. *Id.* at 1044-45.

39. *Id.* at 1044-45. *Lopez-Mendoza* was a civil case and thus its analysis may not be directly applicable to criminal proceedings because the exclusionary rule is rarely applied in civil suits. *See supra* note 25.

40. 468 U.S. at 1054 n.2 (White, J., dissenting). Since the majority made no mention of the fact that INS officers actually were disciplined, it may be that the mere existence of the remedy alone, as in *Leon*, rather than its use, is all that is needed to justify modifying or abandoning the exclusionary rule.

41. For contrasting views on the empirical evidence of deterrence, see authorities discussed in Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979). The authors of the Project conducted field research on § 1983 damage actions filed in federal court against police in Connecticut between 1970 and 1977. They sought to determine if juries were biased against victims of police misconduct and to analyze the effect, if any, of plaintiffs' verdicts on police departments and officers. *Id.* at 782-83.

42. *See infra* notes 77-80 and accompanying text.

43. On the costs of the exclusionary rule, compare Justice White's majority opinion in *Leon*, 468 U.S. at 907 n.6 (analyzing statistics regarding the effects of the exclusionary rule on the disposition of felony arrests and concluding the rule could not "pay its way" in situations similar to *Leon*) with Justice Brennan's dissent, *id.* at 950 n.11 (Brennan, J., dissenting) (ana-

powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal."[44]

Finally, federal court enforcement of the exclusionary rule upon the states raises problems of federalism. Dissenting in *Mapp*, Justice Harlan criticized the imposition of the exclusionary rule on the states:

> The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect . . . . In my view this Court should forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.[45]

Decertification partially addresses these problems. For instance, the exclusionary rule has an indirect, if any, effect upon a police officer's ability to pursue his chosen occupation. Decertification operates directly on the officer in the form of permanent loss of his certificate to work in law enforcement in that state. In contrast to the exclusionary rule, decertification is potentially broader in scope. Decertification applies to any misconduct specified in the decertification statute or rule, and applies whether or not the misconduct results in finding evidence. Decertification, therefore, can be a more powerful deterrent of police misconduct.[46] In addition, since self-regulating professional boards at the state level administer decertification,[47] decertification does not raise the kinds of federalism problems presented by Supreme Court enforcement of the exclusionary rule upon the states. Moreover, unlike the exclusionary rule, decertification does not frustrate the prosecution of the criminal defendant whose rights the officer violated.

Of course, the exclusionary rule and decertification can complement each other. An officer's illegal search or questioning could result in exclusion of the evidence in a criminal case and also could constitute a

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lyzing statistics regarding the effects of the exclusionary rule on the disposition of felony arrests and concluding that "the Court's past assessment of the rule's costs has generally been exaggerated").

44. Terry v. Ohio, 392 U.S. 1, 14 (1968). Among the examples cited by the Court of other goals the police might want to pursue is a dragnet search of teenage gang members for weapons. *Id.* at 13 n.9.

45. Mapp v. Ohio, 367 U.S. 643, 680-81 (1961) (Harlan, J., dissenting).

46. An officer who is decertified cannot practice his profession in the decertifying state unless the agency restores his certificate. If there is a substantial risk of decertification for specified misconduct, it is fair to assume that an officer will not engage in that conduct. Observing decertification of a colleague should heighten officers' awareness of the process and also should deter those officers from committing decertifiable misconduct.

47. *See supra* note 12.

decertifiable offense. Theoretically, either remedy could reach both intentional and unintentional police misconduct. The exclusionary rule applies to any fourth amendment violation, intentional or unintentional, unless the violation was based on an officer's good faith belief in the constitutionality of an invalid search warrant or statute.[48] Similarly, some states provide for decertification of even unintentional misconduct, such as "conduct constituting . . . incompetence."[49]

B. Damage Actions

Scholars have long disputed the effectiveness of damage actions[50] brought by victims of police misconduct as a means of deterring such behavior.[51] Some of the reasons commonly cited for this ineffectiveness are the lengthy delay between the violation and the resultant trial;[52] litigation costs;[53] problems of proof, especially when the misconduct oc-

48. *See supra* notes 30-32 and accompanying text

49. FLA. STAT. ANN. § 943.145(3) (West 1981). In 1984, Florida enacted new decertification standards which repealed this provision. FLA. STAT. ANN. § 943.1345 (West 1985 & Supp. 1987). For a discussion of the reasons for the repeal, see *infra* note 131. For an extant provision concerning unintentional misconduct, see UTAH CODE ANN. § 67-15-10.5(1)(e) (1984), which provides for decertification when the officer has engaged in conduct "that would tend to disrupt, diminish or otherwise jeopardize public trust and fidelity with regard to law enforcement."

50. Actions for which police are liable in tort under state law include "false arrest and false imprisonment, malicious prosecution, excessive force, abuse of process, and negligence." del Carmen, *An Overview of Civil and Criminal Liabilities of Police Officers and Departments*, 9 AM. J. CRIM. LAW 33, 42 (1981) (citations omitted). For an analysis of the difficulties encountered by plaintiffs in such suits, with suggestions for remedying the weaknesses, see Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). Commentators have noted plaintiffs' preference for filing in federal court. *See* Masciotti, *Police Officers' Civil Liability for Misconduct*, 6 POL. L.Q. 42, 47 (1977); Project, *supra* note 41, at 782 n.4.

51. Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct*, 58 J. URB. L. 365, 367 n.4 (1981) (collecting authorities). Compare T. Eisenberg & S. Schwab, The Reality of Constitutional Tort Litigation (Sept. 17, 1986) (unpublished manuscript) (copy available at the offices of the *Hastings Constitutional Law Quarterly*), a study of constitutional tort litigation in the Central District of California. Plaintiffs were successful in suits against the police during the three time periods studied in over half the cases in the sample, although included in the definition of "successful" cases were such unclear dispositions as voluntary dismissals by plaintiff. *Id.* at 67, 83. The authors followed up to determine from the attorneys of record whether, in fact, these unclear dispositions were favorable to plaintiffs. Of those responding, 85% indicated such dispositions were favorable. *Id.* at 70. The success rate in police suits was still lower than the average success rate of the nonconstitutional tort plaintiff, but higher than all other constitutional tort categories except employment. *Id.* at 68, 83.

52. Littlejohn, *supra* note 51, at 369.

53. AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 402, Commentary on § 150.3 (1975) [hereinafter MODEL CODE]; Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 718 (1974); Littlejohn, *supra* note 51, at 369.

curred within the police station or patrol car;[54] jury bias in favor of the officer on questions involving credibility of witnesses;[55] risk of a defamation counterclaim by the officer;[56] and the possibility of malicious prosecution actions by either the officer or the city.[57] Furthermore, police have a qualified immunity that absolves an officer of liability if he acted in the good faith belief that his actions were constitutional.[58] Even when the

54. MODEL CODE, *supra* note 53, at 402 (discussing insurmountable problems of proof); Littlejohn, *supra* note 51, at 369 (regarding conflicting testimony about disputed facts); Note, *Rethinking Federal Injunctive Relief Against Police Abuse: Picking Up the Pieces After* Rizzo v. Goode, 7 RUT.-CAM. L.J. 530, 548 (1976) (chief problem in police litigation seeking injunctive relief is evidence gathering).

55. Project, *supra* note 41, at 783. Among the reasons found for jury bias are the different racial, class, lifestyle, and age characteristics of plaintiffs and jurors, and pro-police attitudes of jurors. *Id.* at 788-802. Other causes of bias, according to the study, are the historic scarcity of black jurors and the presence of repeat jurors. *Id.* at 806-09. Juries are also reluctant to award damages when the plaintiff is a convicted criminal. MODEL CODE, *supra* note 53, at 402.

56. *See, e.g.,* Meiners v. Moriarty, 563 F.2d 343 (7th Cir. 1977) (plaintiff sued federal agents for violating his fourth and fifth amendment rights in searching his house and arresting him; agents counterclaimed for defamation); Seymour v. A.S. Abell Co., 557 F. Supp. 951 (D. Md. 1983) (defamation suit brought by police officer against newspaper for reporting internal police investigation and administrative charges brought against the officer).

The courts have held that police officers are public officials under New York Times v. Sullivan, 376 U.S. 254, 283 (1964). Thus, officers must prove that the defamation was made with actual malice. *See* Roche v. Egan, 433 A.2d 757, 762 (Me. 1981) (collection of precedent). *Cf.* Berkey v. Delia, 287 Md. 302, 304, 413 A.2d 170, 180 (1980) (leaving question open). The court in Cassidy v. A.B.C., 60 Ill. App. 3d 831, 839, 377 N.E.2d 126, 131 (1977), applied the actual malice standard in an invasion of privacy suit brought by a police officer.

57. *But see* City of Long Beach v. Bozek, 31 Cal. 3d 527, 645 P.2d 137, 183 Cal. Rptr. 86 (1982), in which the California Supreme Court held that a city could not maintain a malicious prosecution action against an individual who had unsuccessfully sued the city and two police officers for police misconduct. The court reasoned that the individual's suit was an exercise of the constitutional right to petition for redress of grievances and that allowing suit by the city would "provide . . . a sharp tool for retaliation against those who pursue legal actions against [cities]. Indeed, it is not unlikely that even good faith claimants would forego suit in order to avoid the possibility of having to defend against a subsequent malicious prosecution action . . . ." *Id.* at 535-36, 645 P.2d at 141, 183 Cal. Rptr. at 91. The court noted that the major purpose of the city's action—to recover attorney's fees expended in defending the first suit—already has been recognized by two California statutes which allow recovery of attorney's fees in the same action when the suit is frivolous, CAL. CIV. PROC. CODE § 128.5 (West 1982), or when a suit against a police officer or the city is brought in bad faith and without probable cause, CAL. CIV. PROC. CODE § 1021.7 (West Supp. 1987).

The court left open the question of whether the officers were similarly barred from bringing a malicious prosecution action. It noted two possible differences between a city and its officers. First, officers could be harmed by false suits due to the emotional distress of defending the suit and the resultant damage to their reputations; second, the court felt the risk of retaliatory motives might not be as great when officers brought suit. *Bozek*, 31 Cal. 3d at 538 n.9, 645 P.2d at 143 n.9, 183 Cal. Rptr. at 92 n.9 (1982).

58. Pierson v. Ray, 386 U.S. 547 (1967). Although the authors of the Project did not find that the good faith defense played a significant role in the pro-police verdicts of the cases in their sample, they recommend abolishing the defense since the officer is already the beneficiary of jury bias in his favor. Project, *supra* note 41, at 804, 815-16.

victim of the misconduct prevails at trial, the action often provides little compensation[59] and has little deterrent effect on either the officers[60] or their departments.[61]

Decertification differs from damage actions in several respects. For example, expense is not a direct obstacle to prosecuting the misconduct because the state governmental agency bears the costs of decertification actions. Investigators employed by the local agency[62] or the state[63] investigate the charges.[64] In decertification procedings, an officer has no right to a jury trial. Finally, the victim who reports the officer's misconduct faces no possibility of a counterclaim because the state is the officer's adversary.[65]

Decertification does not compensate the victim for the officer's misconduct; rather, its sole purpose is to remove the officer from law enforcement work. In some jurisdictions, however, victims may use findings by the administrative hearing officer as proof of the underlying misconduct in a later damage suit.[66] If the victim can use these findings, he overcomes the major problem of proof facing plaintiffs in police

59. Littlejohn, *supra* note 51, at 369; Project, *supra* note 41, at 814. *See also* MODEL CODE, *supra* note 53, at 402 n.33. Where municipal immunity is removed, as in Michigan, actions result in higher awards. Littlejohn, *supra* note 51, at 409.

60. MODEL CODE, *supra* note 53, at 402; Project, *supra* note 41, at 814. The authors of the Project concluded that officers were not deterred because they were indemnified from any judgment or settlement and provided free counsel. Project, *supra* note 41, at 810-11. Professor Littlejohn reached the same conclusion as to suits in Detroit. Littlejohn, *supra* note 51, at 428-30. *See also* T. Eisenberg & S. Schwab, *supra* note 51, at 78-79 ("We found no case in which it was clear from the court records that an individual official had borne the cost of an adverse constitutional tort judgment.").

61. The Project found that departments did not discipline officers who were successfully sued, nor did municipalities pressure the departments to discipline the officers. Project, *supra* note 41, at 810-14.

62. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 11B 27.003(1) (1985).

63. ALA. P.O.S.T. RULE 650-X-5-.02 (1983); CAL. P.O.S.T. ADMIN. MANUAL, COMM'N PROCEDURE F2, § 2-4 (1980); *Rules of Ga. P.O.S.T. Council*, ch. 464-4-.11 (1987); ME. REV. STAT. ANN. tit. 25, § 2806 (1974 & Supp. 1986); N.C. ADMIN. CODE tit. 12, r. O9A-0201 (Jan. 1983); WYO. P.O.S.T. RULES § 201(a) (1983).

64. In Minnesota, a P.O.S.T. "complaint investigation committee" evaluates the sufficiency of the local department's initial investigation and has the power to "determine the appropriate agency to investigate the matter." 4 MINN. R. 13.037(D) (1982) and MINN. STAT. ANN. § 214.10(5) (West Supp. 1987). The P.O.S.T. executive director may order a designated agency to investigate and report within 30 days. 4 MINN. R. 13.037(E) (1982). Notwithstanding the above procedures, the P.O.S.T. attorney is also empowered to evaluate the facts alleged in any complaint. MINN. STAT. ANN. § 214.10(2) (West Supp. 1987).

65. Whether an officer may bring a claim for defamation against the victim is a matter of state law and turns on whether the victim's report to a governmental agency empowered to investigate law enforcement officers' activities is privileged. See *infra* note 93 for a discussion of liability for false reporting in police complaint proceedings.

66. *See infra* note 147 and accompanying text.

suits.[67] Estoppel on the misconduct claim also forecloses any possibility of a retaliatory defamation or malicious prosecution action against the victim.

C. Criminal Prosecution of Police Officers

Local prosecutors are authorized to undertake criminal prosecutions of civil rights violations under 18 U.S.C. section 242.[68] In practice, however, criminal prosecution of police officers for public, official misconduct is rare and largely ineffectual.[69] Prosecutors are reluctant to proceed against police officers, on whom they depend for making arrests and conducting investigations.[70] Furthermore, in prosecutions that proceed to trial, juries often sympathize with the officer, particularly when the prosecution is for an offense involving the denial of rights to criminal suspects.[71] These difficulties have led commentators to recommend that local prosecutors not prosecute police, and to suggest instead the establishment of a "special statewide police prosecutor whose sole function is to evaluate and, where appropriate, prosecute police cases."[72]

As with all criminal actions, the prosecutor carries the burden of proving beyond a reasonable doubt the case against the officer. Moreover, under 18 U.S.C. section 242, the prosecution must prove the officer had the specific intent to deny the victim his constitutional rights.[73]

Decertification, on the other hand, is an administrative process with

67. *See, e.g.*, Project, *supra* note 41, at 801-02 (discussion of bias in favor of police). If a court were to hold that the municipality or department was bound by findings of the decertification fact finder in a subsequent civil suit against the officer, municipality or department, cities and departments would hesitate to cooperate in the decertification process. A similar argument was made by amicus American Civil Liberties Union (ACLU) of Northern California in Peterson v. City of Long Beach, 24 Cal. 3d 238, 594 P.2d 477, 155 Cal. Rptr. 360 (1979). In that case, the California Supreme Court held that a local police department regulation on use of deadly force, which was more restrictive than the relevant state law, provided the standard of care by which the officer was to be judged in a wrongful death action brought by parents of the decedent. The ACLU argued, unsuccessfully, that adopting the regulations as the standard of care would "simply deter police departments from making rules of conduct at all because of their fear of imposing unneccessary civil liability." *Id.* at 249, 594 P.2d at 483, 155 Cal. Rptr. at 366 (Richardson, J., dissenting).

68. *See supra* note 23 and accompanying text.

69. *See* authorities collected in Littlejohn, *supra* note 51, at 367 n.4; Project, *supra* note 41, at 782 n.4.

70. Schwartz, *Complaints Against the Police: Evidence of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023, 1024-25 (1970).

71. *See* Berger, *Law Enforcement Control: Checks and Balances for the Police System*, 4 CONN. L. REV. 467, 478 (1971).

72. Emery, Letter to the Editor, N.Y. Times, Oct. 16, 1984, at A30, col. 4 (the author of the letter is an attorney for the ACLU in New York).

73. Screws v. United States, 325 U.S. 91 (1944).

a less onerous burden of proof[74] and does not depend on a citizen's willingness to initiate and pursue a complaint.[75] As in license revocation proceedings in other professions, the decertification commission itself is the moving party, and a state official, such as a member of the state attorney general's office, rather than the local prosecutor, presents the case on behalf of the state.[76]

D. Discipline by Local Departments

Traditionally, local police departments have overseen police discipline.[77] Experience indicates, however, that internal discipline by police departments is often more severe for minor departmental infractions[78] and for private criminal misconduct[79] than for abuse of citizens' rights.[80] Demands for civilian review of complaints arose in the 1950s and 1960s after allegations that officers were not being disciplined by local departments for public, official misconduct.[81] Efforts to establish civilian re-

74. The standards of proof in business and professional decertification procedures vary among the states, from preponderance of evidence, *see, e.g.*, S.D. ADMIN. R. 2:01:04:02.01 (1982), to clear and convincing evidence, Walker v. State Bd. of Optometry, 322 So.2d 612, 613 (Fla. Dist. Ct. App. 1975). The higher standard for license revocation has alternatively been stated as requiring "substantial competent evidence," a term which "takes on vigorous implications . . . that are not so clearly present on other occasions for agency action" under Florida's Administrative Hearing Act. Bowling v. Department of Ins., 394 So.2d 165, 171 (Fla. Dist. Ct. App. 1981).

75. See *infra* notes 89-90 for a discussion of the problems inherent in citizen's complaints.

76. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 4413 (Vernon 1976 & Supp. 1987). In Texas, the Commission's staff counsel presents the case. Some states, however, allow "any person" to initiate the decertification process by sending notice to the P.O.S.T. Commission. S.D. ADMIN. R. 2:01:04:03.01 (1982). *See also* ALA. P.O.S.T. RULE 650 X-5.01 (1983).

77. Littlejohn, *The Civilian Police Commission: A Deterrent of Police Misconduct*, 59 J. URB. L. 5, 36 (1981) [hereinafter Littlejohn, *Civilian Police Comm'n*]. See REPORT BY THE GOVERNOR'S COMM'N ON THE LOS ANGELES RIOTS, *Violence in the City—An End or a Beginning?* (1965), for a discussion of the activities of the Los Angeles Board of Police Commissioners. *See generally* AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS—THE CASE FOR AN INDEPENDENT POLICE REVIEW BOARD (1966).

78. Project, *supra* note 41, at 782 n.4 (collection of authority); Note, *Grievance Response Mechanisms for Police Misconduct*, 55 VA. L. REV. 909, 938 (1969).

79. Littlejohn, *supra* note 51, at 430 n.429; Littlejohn, *Civilian Police Comm'n*, *supra* note 77, at 24 n.132.

80. The one exception is for corrupt practices, that is "the exerting or withholding of police action in exchange for money or other reward." *See* Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L., CRIMINOLOGY & POL. SCI. 160, 162 n.4 (1967).

81. Littlejohn, *Civilian Police Comm'n*, *supra* note 77, at 8. For a comparison of civilian review and internal review in Philadelphia, see Hudson, *Organizational Aspects of Internal and External Review of the Police*, 63 J. CRIM. L., CRIMINOLOGY & POL. SCI. 427 (1972). Ben Holman, former Director of the Community Relations Service of the Department of Justice, argues that a "clear and firm" path for citizen complaints against police misconduct is necessary. "The feeling is pervasive in minority communities that, regardless of circumstances, the

view, however, were frustrated by police associations which claimed that no other municipal officials were required to answer to such an independent board.[82]

Furthermore, once established, civilian review boards were often unable to monitor adequately or to punish police misconduct. These boards failed for three major reasons. First, the boards often depended on the local police department to conduct the investigations, and victims of police misconduct suspected the department's sincerity in investigating its own employees.[83] Second, police viewed the civilian review board as a hostile, external force.[84] Police resented the fact that among municipal employees, they alone were governed by a special citizens' board.[85] This resentment led to massive police resistance to the civilian review.[86] Finally, the boards were typically empowered only to recommend punishment to the police chief or commissioner,[87] thereby encountering the problems inherent in internal discipline.[88]

Any citizen complaint system depends on the ability[89] and willingness[90] of citizens to file and press complaints. Therefore, the system must protect the complainant from the potential problem of retaliation by the

police always will be exonerated when accusations of misconduct are brought by minority citizens. This perception that justice will not prevail alone militates against improvement between law enforcers and minorities." 1 U.S. COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS: REPORT ON POLICE PRACTICES 2 (1981).

82. *See supra* note 81; *see also* S. Halpern, POLICE ASSOCIATION AND DEPARTMENT LEADERS, THE POLITICS OF COOPERATION (1974).

83. Littlejohn, *Civilian Police Comm'n*, *supra* note 77, at 17 n.75; Schwartz, *supra* note 70, at 1025.

84. Littlejohn, *Civilian Police Comm'n*, *supra* note 77, at 11.

85. Note, *supra* note 78, at 943; Gelhorn, *Police Review Boards: Hoax or Hope?*, 9 COLUM. UNIV. F. 1, 8-9 (1966).

86. Gelhorn, *supra* note 85, at 11, 22-23, 59.

87. Littlejohn, *Civilian Police Comm'n, supra* note 77, at 10. Professor Littlejohn states that the Detroit civilian police commission addresses these problems by having its own independent investigative unit. Further, the commission establishes policy rather than merely reviewing disciplinary cases. Finally, the commission has the ultimate power to discipline. *Id.* at 45. He predicts that civilian review boards without these characteristics "will surely fail." *Id.* at 59.

88. *See supra* notes 78-81 and accompanying text.

89. Ignorance of the complaint process often prevents citizens from filing complaints. Goldstein, *supra* note 80, at 167.

90. [The complainant] must seek out the procedure by which complaints are to be filed. He must identify himself and provide sufficient information to enable the initiation of an investigation. He must be prepared to assist in the investigation, to identify alleged wrongdoers, and to participate in any formal disciplinary proceeding or any criminal prosecution which may result. Involvement becomes costly in terms of time, travel, and days lost from work. A common awareness of the inconvenience one is caused and the degree to which one is placed in an accusatory position serves as a major deterrent.

Id. at 168.

police.[91] Police have sued complainants for defamation[92] or charged them with filing a false report[93] in sufficient numbers to deter citizen complaints. In the past, police have commonly offered to drop charges such as resisting arrest in exchange for citizens' dropping their complaints.[94] In certain cases, the police have made arrests solely for the purpose of obtaining a bargaining chip in the event of a complaint.[95] Finally, citizens who do pursue complaints despite these obstacles are usually disappointed at the light punishment imposed on the officer.[96]

Decertification commissions, though generally controlled by law enforcement officials,[97] are independent of the local police departments. This feature helps ensure objectivity and professionalism in disciplining

91. *See* Niederhoffer, *Restraint of the Force: A Recurrent Problem*, 1 CONN. L. REV. 288, 296 (1968).

92. Note, *Police Defamation Suits Against Citizens Complaining of Police Misconduct*, 22 ST. LOUIS U.L.J. 676 (1978); Note, *Defamation of a Police Officer in a Citizen Complaint: Vindicating the Rights of "the Blue" in Arizona*, 24 ARIZ. L. REV. 611, 612-13 (1982) (success rate of police officers suing citizens for filing allegedly false complaints is low).

California courts have given absolute immunity to individuals sued for defamation for filing a complaint with a local department. Imig v. Ferrar, 70 Cal. App. 3d 48, 57, 138 Cal. Rptr. 540, 544 (1977). The court in *Imig* read California's immunity statute, CAL. CIV. CODE § 47(2) (West 1982), which gives an absolute privilege for publication made "in any legislative, judicial, or other official proceeding authorized by law," to include police complaint proceedings. In 1983, California amended § 47 to permit defamation suits by police against individuals who file a complaint with knowledge of its falsity and with "spite, hatred, or ill will." CAL. CIV. CODE § 47.5 (West 1983). A superior court judge dismissed a suit by police officers under § 47.5 because it violated a complainant's right to petition the government for redress of grievances under the First Amendment. Janese v. Letona, No. 815871 (Cal. Super. Ct. Feb. 15, 1984), *aff'd on other grounds*, Janese v. Letona, No. A027244 (Cal. Ct. App. Mar. 21, 1986).

93. *See* Note, *supra* note 78, at 936. A California Court of Appeal, avoiding "more complex constitutional arguments," held that California's false reporting law, CAL. PENAL CODE § 148.5 (West 1970), did not include citizen complaints alleging police misconduct. Pena v. Municipal Court, 96 Cal. App. 3d 77, 83, 157 Cal. Rptr. 584, 587 (1979). "Allowing police officials to prosecute a citizen for filing a complaint against an officer . . . would have the tendency to 'chill' the willingness of citizens to file complaints, particularly on weak evidence and when the same entity against which the complaint is made will be investigating the accusations." *Id.*

94. Note, *supra* note 78, at 936.

95. *Id.*

96. *Id.* at 938; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 197 (1967). For example, in Philadelphia an officer found to have committed an aggravated assault and battery would receive a reprimand letter in his or her official file. In Houston, an officer who received stolen goods or committed larcency would be suspended for ten days.

97. In three states, the majority of P.O.S.T. commission members are not required to be law enforcement officials. *See* ALA. CODE § 36-21-41 (1975) (four out of seven members need not be law enforcement officials); N.M. STAT. ANN. § 29-7-1 (1978) (six out of seven members); NEV. REV. STAT. § 481.053.2 (1985) (none of the three members are law enforcement officials). Several other states provide for representation by members of the public.

police misconduct. It also insulates the commission from the pressures applied by local police associations.

In contrast to the duties of citizen review boards, review of police misconduct is but one of the responsibilities of decertification commissions. The commissions' most important responsibility is to establish standards for the selection and training of officers. The establishment of standards predates by several years the commissions' decertification authority.[98] The police cannot fairly view legislative creation of decertification power as an unfair singling out of police since virtually every other profession has long been subject to license revocation for misconduct.[99]

Decertification commissions are free from other weaknesses inherent in civilian review boards. In some decertification states, for example, investigation of the alleged misconduct is the responsibility of the state, usually the state attorney general's office.[100] Even in those jurisdictions where the local department conducts the initial investigation, failure to investigate adequately may trigger an independent investigation.[101] In addition, the state may require that the local department give the commission all records concerning citizen complaint proceedings; some states have freedom of information acts which preclude public access to information regarding the identity of the officer and witnesses if a complaint is not sustained.[102] Ultimately, unlike many citizen review boards, the com-

98. In Florida, for example, training and selection standards were enacted in 1967, 1967 Fla. Laws ch. 67-230, but the first legislative authority for decertification was enacted in 1980. FLA. STAT. ANN. § 943.145 (West 1980) (repealed in 1984 and replaced by FLA. STAT. ANN. § 943.1395 (West Supp. 1987). *See infra* note 131.).

99. *See* Brodie v. State Bd. of Medical Examiners, 177 N.J. Super. 523, 427 A.2d 104 (App. Div. 1981) (license revocation of radiologists and chiropractors). For information on nursing license revocation, see the activities of the Joint Practices Commission of the American Medical Association and American Nurses Association, discussed in V. HALL, STATUTORY REGULATION OF THE SCOPE OF NURSING PRACTICE: A CRITICAL SURVEY (1975). For a general overview of the regulation of professions, see Paper by Susan Schneider, Administrative Regulation of the Professions: Determinants of Occupational Licensure Policymaking in Centralized and Decentralized Systems, Midwestern Political Science Convention, Chicago, Ill., Apr. 6-8, 1985.

100. *See supra* note 63.

101. During the second half of the period of our study, Florida's law provided that the local agency make the initial investigation, FLA. STAT. ANN. § 943.145(4) (West 1980), but if the investigation was inadequate, the commission could request further inquiry or the Governor could direct an appropriate agency to make further investigation, FLA. STAT. ANN. § 943.145(6) (West 1980). Currently, the law provides that the commission shall "cause to be investigated" any ground for revocation, or may itself investigate. FLA. STAT. ANN. § 943.1395 (West Supp. 1987).

102. FLA. STAT. ANN. § 119.07(3) (West 1982); FLA. STAT. ANN. § 112.533(2)(a) (West Supp. 1982).

mission itself imposes the sanctions for misconduct.[103]

II. Incentives to Adopt Decertification

Thirteen states currently have no decertification authority.[104] Police officers in those states may be fired from one department for serious misconduct, but are in most instances still free to seek employment in other departments within the state.[105] In some states, however, other provisions of state law, such as civil service regulations[106] or forfeiture of office statutes,[107] bar their reemployment.

It is likely that all states will eventually enact decertification laws[108] and use that authority aggressively.[109] There are two reasons for this prediction: increasing fear of municipal liability for misconduct of police[110]

103. In California, a hearing officer submits a "proposed decision" to the commission, which renders a final decision. CAL. P.O.S.T. ADMIN. MANUAL, COMM'N PROCEDURE F2, § 2-6 (1980). *See also* 4 MINN. R. 13.037(I) (1982) (P.O.S.T. board executive director functions as a hearing officer); N.M. LAW ENFORCEMENT ACADEMY RULES AND REGS. rule 12, § A.15 (1980) (board may designate a hearing officer).

104. See *supra* note 14 for a list of states with decertification authority.

105. *See supra* note 13. One law enforcement official testified that in his experience, 90% of the officers fired or resigning for misconduct seek employment with another department in a neighboring municipality within the same state. Authors' notes taken from *Hearings Before the Missouri House Comm. on Government Organization on HB 150*, Jefferson City, Mo., Feb. 12, 1986 (Clarence Harmon, Commander, Internal Affairs, St. Louis, Mo. Police Department).

Some states, like Missouri, have regulatory, not statutory, authority to decertify. The lack of statutory authority may account for the few number of officers decertified—in Missouri, only three officers since 1980. In Florida, the change from regulatory to statutory authority increased the number of decertifications. *See infra* Table III and notes 132-134.

106. *See, e.g.*, MASS. GEN. ANN. LAWS ch. 31, 41 (West 1979). The Massachusetts civil service system extends its coverage to local law enforcement officials and sets forth procedures and circumstances under which police officers may be disciplined or removed. *See also* N.Y. CIV. SERV. LAW § 75 (McKinney 1983).

107. These laws may apply only to elected or appointed officials, not to public employees such as police officers. *See, e.g.*, MO. REV. STAT. § 561.021 (1978). Furthermore, these laws may not be effective without enforcement mechanisms to prevent a fired official from being rehired later. Occasionally, local prosecutors agree not to prosecute an officer in exchange for an agreement to stay out of law enforcement for life. *See, e.g., County Drug Officer Quits, Avoids Charges, Westfall Says*, St. Louis Post-Dispatch, Mar. 13, 1985, at A1, col. 5.

108. Most of the decertification statutes have been enacted within the last 10 years. Several states without decertification authority are considering decertificiaton legislation. Missouri legislators, for example, are trying to pass decertification legislation to replace the existing regulatory authority. *See supra* note 105. The House passed legislation in 1987 but the session ended before the Senate took action. HB 407, HB 492, & HB 649, 84th Leg., 1st Sess. (1987). A bill has been prefiled in the South Carolina legislature for the 1988 legislative session.

109. Florida, for example, decertified an increasing number of officers each year from 1979 through 1983 (1983 data are inclusive only through October). *See* Table 1 and discussion *infra* notes 130-133 and accompanying text.

110. *See infra* notes 112-124 and accompanying text.

and establishment of higher standards of police professionalization.[111]

A. Municipal Liability

In 1978, the United States Supreme Court extended liability for police misconduct to cities and police departments in *Monell v. Department of Social Services.*[112] Although an officer who in good faith commits an unconstitutional act can claim immunity,[113] his municipal employer is not so protected.[114] Thus, it appears that the continued employment of an officer prone to unconstitutional actions exposes the state or local department to liability.

To recover damages from the city or police department, a plaintiff must prove that "a policy statement or decision officially adopted and promulgated"[115] by the city or department was the "moving force"[116] behind the officer's unconstitutional action. The parameters of this requirement are still unclear. The Court in *Oklahoma City v. Tuttle*[117] left open the question of whether a policy not itself unconstitutional would support a recovery against the city.[118] In *Brandon v. Holt,*[119] it was the practice of the chief of police to ignore citizen complaints against an officer whose misconduct was well known to other officers. The Court remanded without addressing the issue whether this was even a "policy" under *Monell.*[120]

The threat of municipal liability is likely to spur states to adopt decertification procedures.[121] Even if damage awards are relatively low,

111. *See infra* notes 125-129.

112. 485 U.S. 700 (1978).

113. *See supra* text accompanying note 58.

114. Owen v. City of Independence, 445 U.S. 622 (1980).

115. Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978).

116. Polk County v. Dobson, 454 U.S. 312, 326 (1981).

117. 471 U.S. 808, 824 n.7 (1985) (plurality opinion).

118. The dissent in *Tuttle* did not distinguish "between policies that are themselves unconstitutional and those that cause constitutional violations." *Id.* at 833 n.8 (Brennan, J., dissenting).

119. 469 U.S. 464 (1985).

120. *Id.* at 473. The court granted certiorari to decide *inter alia,* whether inadequate training constitutes a "policy" under *Monell.* City of Springfield v. Kibbe, 106 S. Ct. 1374 (1986) (grant of certiorari). The writ was dismissed as improvidently granted, 107 S. Ct. 1114 (1987), but Justice O'Connor, dissenting for four members of the Court, would hold that there may be municipal liability under *Monell* "only where failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain." *Id.* at 1121 (O'Connor, J., dissenting).

121. Although the municipalities, not the states, are liable under § 1983, the state has an interest in making sure that its cities do not become insolvent. Once a state has adopted decertification, it may be necessary to provide incentives to ensure compliance by local departments which might resent state intrusion into local affairs. Under Florida's revenue sharing act, the

attorneys' fees in damage actions can be high. For example, in *City of Riverside v. Rivera*,[122] the Court upheld a federal district court's award of $245,000 in attorneys' fees for a jury verdict of only $33,350.[123] In addition, insurance companies may refuse to insure municipalities, in part, because they fear exposure to claims arising from police misconduct.[124] To the extent that decertification removes high-risk officers from law enforcement, it makes the municipality a more attractive insurance risk.

B. Professionalization

Law enforcement professionals and a few state legislators have taken the lead in sponsoring decertification legislation. A survey we conducted in 1984 revealed that the law enforcement community provided the impetus for the legislation or regulations in seventeen of the thirty-seven states with decertification authority.[125] In most of these states, individual police professionals sought the cooperation of several key state legislators to enact laws and regulations governing police misconduct.

Many chiefs of police welcome state decertification. First, decertification prevents clearly unfit officers from getting hired by so-called "last chance agencies."[126] Second, decertification helps chiefs counter pressures from local politicians, police associations, and citizens who might wish that the misconduct be ignored.[127] The decertification commission could serve as the "external critic" available to protect and support a police administrator in his efforts to attain proper goals.[128] Third, like

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local government unit must certify its law enforcement officers meet qualifications set by the commission to receive its share of funds beyond the minimum entitlement. FLA. STAT. ANN. § 218.23(1)(d) (West Supp. 1987).

122. 106 S. Ct. 2686, 2698 (1986) (plurality opinion).

123. *Id.* at 2698.

124. Some professional liability insurance companies now refuse to insure police departments if the responses to the following questions are unsatisfactory: does the department rely on the fact the officer is decertified? Are there previous judgments against the officer for misconduct or against the department for negligent hiring or retention? Telephone interview with G. Patrick Gallagher, Director, Institute for Liability Management, Vienna, Virginia, Former Director, Criminal Justice Standards and Training Division, Florida Department of Law Enforcement (Dec. 11, 1987) (on file at St. Louis University School of Law). A recent study questions whether insurers' fears are justified. The authors found that less than .02% of Los Angeles' 1981 revenues were spent on constitutional tort litigation in the same year. T. Eisenberg & S. Schwab, *supra* note 51, at 76-77.

125. Data on file with authors at St. Louis University School of Law.

126. "Last chance agencies" are police departments that will hire officers regardless of the officers' prior record of misconduct. These agencies are so designated by informal communications among police officers. *See* Puro & Goldman, *supra* note 14.

127. *See* J. GILSINAN, DOING JUSTICE chs. 2 & 3 (1982). Gilsinan argues that police deny or hide misconduct because its disclosure leads the public to assume that all police are engaged in deviant behavior.

128. Goldstein, *supra* note 80, at 171.

members of most occupations, police strive to be recognized as professionals. Thus, some form of self-regulation to expel unfit members would increase police professionalism.[129]

IV. Decertification and Public, Official Misconduct—The Florida Example

This section describes Florida's experience with decertification of officers for public, official misconduct. As stated previously, public, official misconduct, which is the focus of this Article, includes constitutional violations of individual rights as well as negligent deprivations of liberty or property which do not implicate constitutional rights.[130] We analyzed the files of officers decertified by the Florida Criminal Justice Standards and Training Commission ("Commission") from October 1976 through October 1983.[131] These files contain detailed descriptions of the conduct leading to decertification. This information was used to categorize various forms of police misconduct.

Our study found that the Commission took action against 148 peace officers between October 1976 and October 1983. Through 1980, the Commission decertified officers by administrative rule.[132] As Table I indicates, the Commission decertified 132 officers, suspended fourteen, and placed two on probation.

Between October 1976 and July 1980, the Commission decertified or suspended thirty-four officers, two of whom were suspended for public, official misconduct. Between July 1980 and October 1983, the Commis-

129. Initial certification alone is insufficient. See MINN. STAT. ANN. § 626.845(d) (West Supp. 1987), which requires a licensing examination after completion of training. Minnesota also requires periodic continuing education to maintain a license. MINN. STAT. ANN. § 214.12 (West Supp. 1987); 4 MINN. R. § 13.029 (1982).

130. For a discussion of the different typologies used for this Article, see *supra* notes 18-21 and accompanying text. In Daniels v. Williams, 106 S. Ct. 663 (1986), and Davidson v. Cannon, 106 S. Ct. 668 (1986), the Court held that negligent acts by state officials causing unintended loss or injury to prison inmates did not constitute a violation of due process under the Fourteenth Amendment. Justice Blackmun, dissenting in *Davidson*, noted that in some circumstances negligence may violate other constitutional provisions, such as the Fourth Amendment. *Id.* at 674 n.6 (Blackmun, J., dissenting).

131. In 1984, the Florida legislature reduced the Commission's decertification authority by, *inter alia*, eliminating several grounds for decertification. FLA. STAT. ANN. § 943.1395 (West Supp. 1987). The former law was repealed so the Commission could spend less time on decertification and devote more attention to certification. Telephone interview with A. Leon Lowry II, Bureau Chief, Division of Criminal Justice Standards and Training, Florida Department of Law Enforcement, Oct. 4, 1987 (on file with the authors at St. Louis University School of Law).

132. FLA. ADMIN. CODE ANN. r. 11A-16.01 (current version at FLA. ADMIN. CODE ANN. r. 11B-16.05. (1982)).

TABLE I
FLORIDA CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION'S ACTIONS AGAINST PEACE OFFICERS 1976-1983

	Decertification	Suspension	Probation
1976 n=1	1	0	0
1977 n=9	8	1	0
1978 n=10	10	0	0
1979 n=6	6	0	0
1980 n=9	9	0	0
1981 n=34	28	4	2
1982 n=47	44	3	0
1983 n=32	26	6	0
Total n=148	132	14	2

sion decertified, suspended, or placed on probation 112 officers, twenty of whom were decertified for public, official misconduct.

The probable reason for the increase in decertifications after July 1980 was the enactment of legislation explicitly authorizing the Commission to decertify for the following reasons:

> (a) Failure to maintain qualifications established in [the Act] or specific standards promulgated thereunder as rules;[133]
>
> (b) Falsification or a willful material misrepresentation of information in an employment application to an employing agency;
>
> (c) The commission of conduct by the certificate holder constituting gross insubordination, gross immorality, habitual drunkenness, willful neglect of duty, incompetence, or gross misconduct which seriously reduces the certificate holder's effectiveness to function as a law enforcement . . . officer.[134]

Under Florida law, therefore, a criminal conviction is not a prerequisite to decertifying an officer for any of the three forms of police misconduct—public, official misconduct, departmental misconduct, or private misconduct. Indeed, a majority of decertification states authorize decertification for reasons other than a criminal conviction. Nonetheless,

133. Qualifications for employment under FLA. STAT. ANN. §§ 943.13(4), (7) (West 1985 & Supp. 1987) provide, *inter alia*, that the person "not have been convicted of a felony or of a misdemeanor involving perjury or false statement" and that the person have "a good moral character" as determined by investigation under procedures established by the Commission.

134. FLA. STAT. ANN. § 943.145 (West 1981), *repealed by* 1984 Fla. Laws ch. 834-258, § 25. The statutory provision currently authorizing decertification reads: "The commission shall revoke the certification of any officer not in compliance with the provisions of § 943.13(1)-(1) and shall, by rule, adopt revocation of certification procedures pursuant to chapter 120." FLA. STAT. ANN. § 943.1395 (West Supp. 1987). See *supra* note 133 for discussion of the primary grounds for decertification. An officer who commits public, official misconduct not resulting in conviction would be decertified under the "good moral character" provision.

police officers commonly face both criminal prosecution and decertification for the same transgression. In Florida, the percentage of decertified officers convicted for public, official misconduct is almost the same as the percentage of decertified officers convicted for departmental and private misconduct. Roughly one-third of the decertifications for public, official misconduct followed criminal convictions of the offending officer.[135] Thirty-eight percent of the decertifications for departmental or private misconduct were based on criminal convictions. The legislation may also have accounted for the Commission's increased willingness to investigate charges of public, official misconduct.[136]

Unlawful searches and seizures were not a significant part of public, official misconduct cases.[137] Only two cases were found in the Florida sample. Neither involved gathering evidence for a criminal investigation and thus neither would have been subject to the exclusionary rule. In

135. Thirty-six percent (8 of 22) of the decertifications for public, official misconduct were based on criminal convictions (five felonies and three misdemeanors).

136. *See supra* note 131.

137. As Tables 4 and 4A indicate, the major kinds of public, official misconduct were theft, extortion, bribery (cases in which the officer requested sex or money in exchange for not arresting the citizen) and obtaining sexual favors (cases in which the officer demanded sex, without offering not to arrest) during the course of an investigation. Only one assault case resulted in decertification by the Commission.

TABLE 4
TYPE OF PUBLIC, OFFICIAL MISCONDUCT PUNISHED, 1976-1983

Theft	7
Bribery/Extortion	6
Sex	6
Assault	1
Miscellaneous	2
Total	22

TABLE 4A
PUBLIC, OFFICIAL MISCONDUCT, BY YEAR, 1976-1983

	Type of Conduct				
	Sex	Theft	Extortion/ Bribery	Assault	Misc.
1976 n=0	0	0	0	0	0
1977 n=1	0	1	0	0	0
1978 n=0	0	0	0	0	0
1979 n=0	0	0	0	0	0
1980 n=2	0	1mc	1fc	0	0
1981 n=9	4	2fc	1fc	1fc	1
1982 n=5	1	2	1fc	0	1
1983 n=5	1	1	3fc	0	0
Total n=22	6	7	6	1	2

mc = misdemeanor conviction in one case
fc = felony conviction in one case

TABLE 2
TYPE OF POLICE CONDUCT RULED ON BY FLORIDA-CRIMINAL JUSTICE STANDARDS AND TRAINING COMMISSION, 1976-1983

	Departmental and Private Misconduct	Public, Official Misconduct
1976 n=1	1	0
1977 n=9	8	1
1978 n=10	10	0
1979 n=6	6	0
1980 n=9	7	2
1981 n=34	25	9
1982 n=47	42	5
1983 n=32	27	5
Total n=148	126	22

one case a deputy sheriff removed a pocket calculator and adapter from a private residence while evicting a tenant pursuant to legal process. In the second case, a police officer shined his flashlight into a truck, briefly

TABLE 3
PUBLIC, OFFICAL MISCONDUCT CASES, 1976-1983

Commission Action	Conduct Before 7/80	Conduct After 7/80
Before 7/80	2	0
After 7/80	7	13

awakening the occupant. The occupant, seeing a uniformed officer looking inside, went back to sleep. The officer then stole material from the truck.[138]

V. Decertification and Public, Official Misconduct

As discussed, the clear majority of decertifications in Florida in-

138. Excessive use of force in arresting and detaining suspects raises fourth amendment issues. At its October 1987 meeting, the Commission decertified an officer who pushed the head of a handcuffed detainee into the bars of his cell, after earlier slamming the suspect's head into the booking desk for verbally abusing the officer. The Commission has found probable cause to decertify another officer for putting his gun down the throat of a robbery suspect at the scene of the crime, after the suspect was subdued. Telephone interview with Joseph Kendrick, Case Manager of Decertification, Division of Criminal Justice Standards and Training, Florida Department of Law Enforcement (Dec. 2, 1987) (on file with the authors at St. Louis University School of Law).

volved private or departmental misconduct.[139] None was for public, official misconduct of the constitutional, evidentiary type.[140] This section suggests several reasons why this type of public, official misconduct is less likely to result in decertification than other types of misconduct.

In most states authorizing decertification, a felony conviction of a police officer is a ground for decertification.[141] Criminal prosecutions of police for private misconduct such as burglary and drug possession are relatively common, while prosecutions for public, official misconduct of a constitutional, evidentiary nature are rare.[142] Therefore, it is not surprising that none of the decertifications in Florida involved a felony conviction for constitutional, evidentiary misconduct. In the absence of a conviction, evidence must be presented to a hearing officer, with the burden of proof on the state.[143] These cases typically involve a criminal suspect who has been the victim of the unconstitutional action, the ac-

139. Eighty-five percent of the decertifications involved private or departmental misconduct.

140. Because the Division makes available only those files of officers who have been decertified or otherwise disciplined by the Commission, we were unable to analyze cases that were screened out at an earlier stage. Thus, cases in which probable cause was found but the officer was exonerated after a hearing, or cases dismissed because of a Commission finding of no probable cause might have involved constitutional, evidentiary misconduct. It may be that such cases were never sent to the Commission from local departments which had the initial responsibility to investigate and report under § 943.145 (repealed).

141. *See, e.g.*, FLA. STAT. ANN. §§ 943.13(4), 943.1395(5) (West 1985 & Supp. 1987) (the Commission shall revoke the certification of any officer convicted of any felony); *Rules of Ga. P.O.S.T. Council*, ch. 464-4-.13 (1987) (council may suspend or revoke certification of officer convicted by any state or by federal government of a felony); *Iowa Law Enforcement Academy Rules* § 501-6.2(808) (1987) (mandatory revocation if the officer has been convicted of a felony); N.M. LAW ENFORCEMENT ACADEMY RULES AND REGS. rule 12, § A.16 (1980) (grounds for decertification include conviction of felony or misdemeanor involving moral turpitude); OKLA. STAT. tit. 70, § 3311(K) (Supp. 1987) (council shall revoke the certification of any person convicted of a felony); VT. STAT. ANN. tit. 20, § 2355(a)(11) (Supp. 1987) (decertification of persons convicted of felony subsequent to their certification as law enforcement officers). In states without decertification, an officer convicted of a felony may be permitted to remain in law enforcement. Even if the local department terminates the officer, another department within the state may hire him. However, hiring such officers would be a violation of federal firearms law prohibiting possession of firearms by convicted felons who have not been pardoned and explicitly permitted to carry firearms. 18 U.S.C. app. § 1202(a) (1985). The hiring also may be in violation of state laws which prohibit carrying of weapons by persons indicted for, or convicted of, certain felonies. *See, e.g.*, OHIO REV. CODE ANN. § 2923.13 (Baldwin 1974). These laws are not self-enforcing and application depends on the willingness of the local prosecutor or United States government attorney to second guess the hiring decision of the chief of police. *See supra* notes 68-76 and accompanying text.

142. *See supra* note 69 and accompanying text. In some decertification states a felony conviction is not a per se ground for decertification. *See, e.g., Louisiana P.O.S.T. Rules for Retaining P.O.S.T. Certification as a Peace Officer* (1980); MO. CODE REGS. tit. 11, § 75-3.080 (1980).

143. *See supra* note 74.

cused police officer, and, sometimes, police officer witnesses.[144] The decertification factfinder will have difficulty believing the victim in any proceeding in which the police and the victim of police misconduct present conflicting versions of what happened in the privacy of the police station, each police officer tells the same story,[145] and the sole other witness is the victim with a criminal record.

Public, official misconduct cases also may be infrequent because there is little incentive for citizens to participate in the process. Citizens have nothing to gain from decertification except the personal satisfaction derived from the offending officer's loss of his license. Citizen interest would undoubtedly increase if the commission were able to redress grievances directly.[146] Even without compensatory authority, however, decertification can indirectly assist victims of police misconduct. For example,

144. The Fifth and Fourteenth Amendments would not be violated by firing an officer who refused to testify at the decertification proceeding, as long as the desired testimony would not be used against him or her in a criminal case. Boxter v. Palmigiano, 425 U.S. 308, 316 (1976). In Allen v. Illinois, 106 S. Ct. 2988 (1986), the Court held that a proceeding to commit an individual to a maximum security institution under Illinois' Sexually Dangerous Offender Act, ILL. ANN. STAT. ch. 38, para. 105-1.01 to 105-12 (Smith-Hurd 1963), was not a criminal proceeding and therefore the fifth amendment privilege against self-incrimination did not apply. The fact that the accused was given procedural protections analogous to those given a criminal defendant, including the right not to be committed unless the state proved its case beyond a reasonable doubt, did not make the proceeding criminal. 106 S. Ct. at 2992. Decertification is a civil proceeding; thus, even when the police officer witnesses are themselves participants in the misconduct, they do not have a right under the Fifth or Fourteenth Amendments to refuse to testify on the grounds that their testimony could be used against them in another decertification proceeding.

State law, however, might prohibit the use of the officer's testimony in any future proceeding, civil or criminal. Florida's immunity statute prohibits the use of compelled testimony in criminal cases or in any proceeding which constitutes a penalty or forfeiture. FLA. STAT. ANN. § 914.04 (West Supp. 1987). The Florida Supreme Court has most recently interpreted this provision to mean that such testimony cannot be used in a license revocation proceeding. Lurie v. Florida State Bd. of Dentistry, 288 So.2d 223 (Fla. 1973). *Lurie* was decided by a 4-3 vote, however, and it overruled an earlier case which permitted the use of such testimony in a license revocation proceeding. Headley v. Baron, 228 So.2d 281 (Fla. 1969). In such cases, police could, nevertheless, be induced to testify if given immunity from use of their testimony or from any evidence derived from such testimony in a subsequent criminal prosecution consistent with the Fifth and Fourteenth Amendments. Kastigar v. United States, 406 U.S. 441 (1972).

145. "A strong police subculture and a 'blue curtain' make the testimony of other police officers and co-conspirators difficult to obtain." del Carmen, *supra* note 50, at 37. *See also* Note, *supra* note 78, at 913 n.23. Professor Goldstein points out, "In fairness, it must be recognized that the tendency on the part of police officers to close ranks in defense of a fellow officer is a characteristic common to many other fields of endeavor, *e.g.*, the notorious difficulty in establishing malpractice in the medical field." Goldstein, *supra* note 80, at 165 n.11.

146. The Minnesota Board of Peace Officer Standards and Training, MINN. STAT. ANN. § 626.84 (West 1983 & Supp. 1987), receives citizens' complaints and negotiates settlements between the citizen and the officer, 4 MINN. R. § 13.037 (1982). *See also* MINN. ADVISORY COMM. TO THE UNITED STATES CIVIL RIGHTS COMM'N, POLICE PRACTICES IN THE TWIN

the victim may be able to collaterally estop the defendant police officer, based on the factual findings at the decertification hearing, in a subsequent civil action for damages.[147]

CITIES, July, 1981, at 59-61; Levinson, *Should Licensing Commissions Put Police on Trial?*, 6 POLICE MAG. 23, 28 (1983).

Bar grievance proceedings could serve as a useful model. In those proceedings, a committee can order removal of a license and can remedy the complaints by, for example, issuing an order for restitution of money wrongfully taken.

147. The Supreme Court has held that collateral estoppel barred relitigation in a 42 U.S.C. § 1983 suit, when the victim's motion to suppress had been denied during his state criminal trial. Allen v. McCurry, 449 U.S. 90 (1980). The Court reasoned that § 1983 does not override 28 U.S.C. § 1738 which provides: "[J]udicial proceedings [of a state court] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ." *Id.* at 97-98.

Following *McCurry*, the Supreme Court held that a state court affirmance of a decision by a state administrative agency barred relitigation of the issue in an action in federal court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1983). Kremer v. Chemical Construction Corp., 456 U.S. 461, 481 (1982). So long as the state proceeding meets minimum standards of due process, the Title VII plaintiff cannot relitigate the issue in federal court if he could not do so in state court. *Id.* at 473-76.

Even when the agency decision has not been subjected to judicial review, the ruling may be given preclusive effect. University of Tennessee v. Elliott, 106 S. Ct. 3220 (1986), unlike *McCurry* and *Kremer*, involved an unreviewed state agency determination. The issue was what effect the agency decision could have on a subsequent federal suit alleging violation of various civil rights acts, including Title VII and § 1983. The Court considered whether federal common law would require federal courts to give preclusive effect to such unreviewed state administrative decisions. *Id.* at 3224. As to the Title VII claim, the Court held that Congress did not intend such proceedings to have preclusive effect. *Id.* at 3224-25. As to a subsequent § 1983 suit, the Court held: "[W]hen a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate' federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Id.* at 3227 (citation omitted).

Although federal courts no longer require mutuality of estoppel, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), Florida courts require that there be an identity of parties before collateral estoppel can be asserted. Lorf v. Indiana Ins. Co., 426 So.2d 1225, 1226 (Fla. App. 1983). Since the state is the moving party in a decertification proceeding, in a later suit in a Florida state court by the victim of the conduct for which the officer was decertified, the officer would not be precluded from relitigating the issue. Therefore, the officer also would not be barred from relitigating the issue in a federal § 1983 suit.

A similar problem would arise if a state court would not permit the use of "offensive" collateral estoppel. Offensive collateral estoppel permits the plaintiff (*e.g.*, the victim of police misconduct bringing a damage action) to prevent the defendant (the police officer) from relitigating an issue previously lost to a different plaintiff in the first action (the commission successfully decertifying the officer). Federal courts do allow offensive collateral estoppel for federal issues, unless it is unfair to the defendant. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979). What should a federal court do in a § 1983 suit brought by the victim of police misconduct who seeks to use the issues determined in a decertification proceeding in a state which does not recognize offensive collateral estoppel? For a discussion of whether a federal court in a § 1983 case should give more preclusive effect to the issues determined in a state court proceeding than a state court would, see Shapiro, *The Application of State Claim Preclusion Rules in a Federal Civil Rights Action*, 10 OHIO N.U.L. REV. 223, 235-39 (1983).

In public, official misconduct cases, the statutory grounds for decertification in the absence of a conviction tend to be vague. The Florida statute authorized decertification for "unfitness, gross immorality or gross misconduct which seriously reduces the officer's effectiveness as a law enforcement official."[148] Such a catchall provision is subject to attack for violation of due process on grounds of vagueness.[149] Even if the language meets constitutional standards, the Commission might believe that only the most outrageous public, official misconduct should come within it. Thus, new statutory language or commission rules should be approved which expressly make certain misconduct, such as illegal searches and seizures, arrests, or interrogations, decertifiable. The legislature or commission also should limit decertification to officers with a pattern of such misconduct, unless the first incident is clearly intentional.

The Supreme Court's adoption of the good faith exception to the exclusionary rule for the "reasonably well trained officer"[150] gives incentive to police departments to increase the training their personnel receive with respect to constitutional rights. Under such circumstances, a commission may be more willing to exercise its decertification authority for constitutional violations because the police received specific instruction on those rights during training. However, the intricacies and fluidity of constitutional law are not easily understood or taught.[151]

Even when it is not required by statute or rule, a commission may decide that public, official misconduct does not merit decertification unless the conduct results in a felony conviction or is otherwise outra-

148. FLA. STAT. ANN. § 943.145(3)(c) (West 1981), *repealed by* 1984 Fla. Laws ch. 87-258, § 25. The current provision under which officers are decertified for public, official misconduct not resulting in a conviction is no less problematic: conduct indicating the officer does not have "good moral character." FLA. STAT. ANN. § 943.13(7) (West 1985 & Supp. 1987).

149. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1926). Local police department regulations which punish conduct "unbecoming to the service" have been successfully challenged as vague when the officer's conduct involved speech activities. Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974) (officers, leaders of the labor union, sent a letter of protest to their labor negotiator and posted the letter at various union bulletin boards located at various police locations). However, challenges to the regulations have failed when the conduct was not related to speech activity. Allen v. City of Greensboro, 452 F.2d 489 (4th Cir. 1971) (officer made sexual advances while conducting a criminal investigation).

150. United States v. Leon, 468 U.S. 897, 923, 926 (1984), *reh'g denied*, 468 U.S. 1250 (1984).

151. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 232 (1983). After discussing the great variation in the value and reliability of informants' tips, the Court concluded: "[r]igid legal rules are ill-suited to an area of such diversity." *See also infra* note 154 and accompanying text.

geous.[152] It might well conclude that as long as the Supreme Court is so closely divided on what constitutes unconstitutional conduct under the Fourth, Fifth, Sixth, and Fourteenth Amendments, it is inappropriate to decertify an officer who violates a suspect's rights unless the conduct is blatantly unconstitutional.[153] Should the Court succeed in developing clearer guidelines on what is unconstitutional so that "a policeman [can] know the scope of his authority,"[154] a commission might be more willing to decertify for the offending conduct.

Since local police departments have not acted effectively on citizen complaints of public, official misconduct,[155] the effectiveness of a state decertification commission controlled by the same law enforcement community undoubtedly will be called into question. Some critics have argued, as a result, that a commission can effectively deal with public, official misconduct only if it is under civilian control.[156] This comparison may not be fair; there are significant differences between a local police department and a state decertification commission. Foremost among them is the fact that the commission is an independent body and thus removed from intradepartmental forces. Placing the commission under civilian control, moreover, may repeat the unsatisfactory experience of civilian review boards in local departments[157]

Prudence counsels that the commission membership be carefully balanced to fulfill its sensitive function. Current procedures typically require the appointment of sheriffs and police personnel from both rural and urban jurisdictions and representing both command and line author-

152. The commissioners might adopt a type of "shock the conscience" test similar to that used by the Supreme Court for determining when police conduct violates due process. Rochin v. California, 342 U.S. 165, 172 (1952). If police officers believe that the use of force towards citizens to encourage respect is legitimate, commissioners who share this view will not likely decertify for illegal use of force. Note, *supra* note 78, at 912 n.16.

153. "A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.' " LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1972) (citing United States v. Robinson, 471 F.2d 1082, 1122 (1972)). Whether the new rules in fact give the police "bright lines" is open to question. New York v. Belton, 453 U.S. 454, 470 (1981) (Brennan, J., dissenting).

154. New York v. Belton, 453 U.S. 454, 460 (1981).

155. *See supra* notes 78-81 and accompanying text.

156. A few states have decertification boards which are not controlled by law enforcement officials. *See supra* note 97. After these states have decertified larger numbers of officers over a period of several years, it would be useful to compare such decertification to the Florida data to see if these state boards are more willing to decertify for constitutional misconduct of an evidentiary nature.

157. *See supra* note 86 and accompanying text.

ity.[158] Control of a commission by a single law enforcement constituency might prejudice the commission against decertifying members of the controlling constituency.[159] Such control may account for the relatively few decertifications in some states with decertification authority.

Taken at face value, the Florida experience suggests that constitutional, evidentiary misconduct cannot be reached by decertification. However, interviews with Florida Commission members revealed that they were willing to decertify for fourth amendment violations.[160] Whether they would do so if actually faced with a case may be another question altogether.

Decertification may have an indirect impact on constitutional misconduct. An officer who is removed for nonconstitutional misconduct may have committed fourth amendment violations. For example, an officer who is decertified for extorting money or sexual favors in exchange for not arresting a criminal suspect demonstrates a willingness to disregard the law which may extend to constitutional protections.[161] Files of some officers decertified in Florida for private or departmental misconduct contained allegations of public, official misconduct of both a constitutional and nonconstitutional nature.[162]

VI. State Versus National Decertification Programs

Can decertification work state by state, or is a national program needed? Upon request, Florida's Criminal Justice Standards and Training Division staff will respond to out-of-state inquiries concerning the status of an officer's certificate. In Florida, decertified officers or those whose decertifications were pending were nonetheless able to find employment as police officers in other states.

This situation calls for the creation of an information network accessible to all states. The network could be similar to that employed by the legal profesion, the National Discipline Data Bank, which makes certain

158. FLA. STAT. ANN. § 943.11 (West 1985). Police officers who have regular, direct contact with the public are the line authority in police departments. In Florida, sergeants and patrolmen are the main line authority components.

159. The Florida Commission has been able to avoid this problem through an independent Division which staffs the Commission as well as a dispersal of power among the various law enforcement and other constituencies which make up the Commission. FLA. STAT. ANN. § 943.11 (West 1985).

160. Interviews on file with authors at St. Louis University School of Law.

161. Clarence Harmon, Commander, Internal Affairs, St. Louis Police Department, stated that in his experience, officers who engage in such extortion are the same officers who ignore suspects' rights. Interview in St. Louis, Missouri, July 16, 1986 (interview on file with authors at St. Louis University School of Law.)

162. Materials on file with the authors at St. Louis University School of Law.

professional information available to all state bar admission committees.[163]

It may be that aggressively administered decertification programs, state or national, could have the effect of shrinking the pool of available officers willing to work for low pay.[164] Some small departments may not be able to afford to pay higher salaries. In this event, the municipality will have to consider alternative ways to get police protection, such as merging with neighboring municipalities or contracting with the county department.[165]

Decertification offers perhaps the best chance for states to take responsibility for removing unfit police officers from the profession. Florida's beginning suggests that states can fairly and firmly regulate at least

163. The American Bar Association National Center for Professional Responsibility sponsors The National Discipline Data Bank. The Data Bank collects voluntary information from federal and state courts and administrative agencies in the United States. The courts and agencies give information "on lawyers who have been publicly disciplined by court action, have been transferred to inactive status, or who have resigned from the Bar while their conduct was under investigation." The Data Bank maintains a computer-based information system for requests about specific lawyers. The Data Bank also conducts research on the underlying bases for disciplinary action. AMERICAN BAR ASS'N NAT'L CENTER FOR PROFESSIONAL RESPONSIBILITY, PAMPHLET ON NATIONAL DISCIPLINE DATA BANK SERVICES 2 (copy on file with the *Hastings Constitutional Law Quarterly*).

164. *See supra* note 13.

165. Most local police departments in the United States are made up of 10 or fewer officers. THE AMERICAN POLICE: TEXT AND READING 29 (H. Marc, ed. 1976). The 1973 National Advisory Commission on Criminal Justice Standards and Goals recommended that departments of less than 10 officers be eliminated. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 36 n.m (1986). For a discussion of the minimum acceptable size for United States police services, see E. OSTROM, R. PARKS & G. WHITAKER, DECISION-RELATED RESEARCH ON THE ORGANIZATION OF SERVICE DELIVERY SYSTEMS IN METROPOLITAN AREAS: POLICE PROTECTION (1979). Since 1946, the English Secretary of State has had the power to order an amalgamation of police forces in towns of less than 100,000. The Police Act, 1946, 9 & 10 Geo. 6, ch. 46, § 4. A Royal Commission on the Police recommended increased powers in the Secretary of State to order amalgamations of police forces without regard to population of the areas affected. ROYAL COMMISSION ON THE POLICE, FINAL REPORT, 1962, CMND. NO. 1728, para. 289. The Commission believed that the minimum acceptable size of a police force was 350 officers, with 500 being the optimum. *Id.* para. 280. Among the problems with smaller forces are:

> [D]iscipline is difficult to enforce impartially and unpleasant in its effects, because the disciplined man is too well known to his chief constable, to his fellows, and to the public. The risk of undesirable pressure being brought to bear on members of the force by local people, whether members of the local authority or others, is greater. And, not least important, it is no easy matter to find for such a force a chief constable with all the qualities which ought to go with that responsible and semiautonomous office.

Id. para. 279. For empirical research on the ability of small departments to achieve efficiencies through cooperative efforts on a regional basis rather than through consolidation, see E. OSTROM, R. PARKS & G. WHITAKER, POLICING METROPOLITAN AMERICA (1978); E. OSTROM, R. PARKS & G. WHITAKER, PATTERNS OF METROPOLITAN POLICING (1978).

some kinds of public, official misconduct of police. If states do not accept this responsibility, Congress could legislate national standards.[166] However, such legislation may be constitutionally infirm because it interferes with the traditional state prerogative of regulating police.[167] In consideration of such concerns, states should be encouraged to do the job themselves.

Conclusion

The major concern of this Article is whether decertification of police officers offers a viable method for curbing public, official misconduct of an evidentiary nature. Because the United States Supreme Court has recently limited the use of the exclusionary rule,[168] the debate on alternative means to deter illegal police conduct is significant. At first glance, decertification commissions would seem to be ineffective in dealing with public, official misconduct, at least when the investigation is left in the hands of the local agency for whom the officer works[169] and the commissions are composed largely of law enforcement personnel.[170]

Although decertification addresses many serious aspects of police misconduct, the Florida model and the present nature of the decertification process indicate that decertification is ineffective to deter unconstitutional police actions aimed at obtaining evidence. In Florida, the Commission disciplined no unconstitutional police conduct of an eviden-

166. Congress undoubtedly has the power to enact such legislation under § 5 of the Fourteenth Amendment and the Commerce Clause. Section 5 reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Under the Enforcement Clauses of various constitutional amendments, the Supreme Court has upheld congressional remedies for discrimination in voting, Oregon v. Mitchell, 400 U.S. 112 (1970) (section 2 of the Fifteenth Amendment); Katzenbach v. Morgan, 384 U.S. 641 (1966) (section 5 of the Fourteenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (section 2 of the Fifteenth Amendment), and employment, Fullilove v. Klutznick, 448 U.S. 448 (1980) (Commerce Clause for private employers, section five of the Fourteenth Amendment for public employers). So long as Congress is using the Enforcement Clause to expand rather than cut back on constitutional protections of due process and equal protection, the Court will defer to Congress' judgment. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Thus, as a remedy for violations of suspects' constitutional rights, Congress could provide for federal decertifications under § 5.

167. Under present case law, the Tenth Amendment would not forbid such a statute. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). However, *Garcia* was a 5-4 decision and some of the dissenters suggested that a change in Supreme Court personnel could cause a return to National League of Cities v. Usery, 426 U.S. 833 (1976), and a reinvigorated Tenth Amendment. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting); *id.* at 589 (O'Connor, J., dissenting).

168. *See supra* notes 28-40 and accompanying text.

169. Littlejohn, *Civilian Police Comm'n*, *supra* note 77, at 17 n.75.

170. Gelhorn, *supra* note 86, at 7.

tiary nature from October 1976 to October 1983.[171] The nature of the decertification process in Florida is not conducive to the filing of victims' complaints by criminal suspects[172] nor to the success of those complaints once filed.[173] The language of the Florida statute during the period of our study leads to the interpretation that only gross misconduct is decertifiable.[174] Also, the complicated nature of constitutional criminal procedure law renders it inadequate to teach to law enforcement officers, not to mention the non-legal decertification commissions.[175] Because the commissions may be reluctant to punish unintentional misconduct, only blatant unconstitutional actions may be decertifiable.[176] Although some officers who habitually violate the constitutional rights of criminal suspects may be decertified for other misconduct, this will not deter constitutional, evidentiary wrongs by the remaining police community. To set an effective deterrent example, there must be a causal link between the unconstitutional, evidentiary misconduct and the decertification. The failure of decertification to deter unconstitutional, evidentiary police misconduct leaves, for the most part, only the exclusionary rule to remedy illegal searches and seizures, and interrogations which violate the constitutional rights of suspects. As the Supreme Court further limits this remedy, effective procedures for state protection of these rights become more important.

Our purpose in analyzing the files of decertified officers in Florida was to determine whether the kind of misconduct for which officers were decertified would have triggered the exclusionary rule remedy. We conclude that officers during the period of the study were not decertified for such misconduct, although it is reasonable to assume that officers who were decertified for seriously abusing citizens are the same officers who would unconstitutionally obtain evidence from suspects.[177] Even if decertification does not work, directly or indirectly, to remove officers who violate constitutional rights of suspects in obtaining evidence, the mere existence of statutes or regulations authorizing decertification for such misconduct may be sufficient for the Supreme Court to extend further the good faith exception to the exclusionary rule as it did in *Leon*. In *Lopez-Mendoza*, INS agents had been disciplined for misconduct towards aliens not involving fourth amendment violations. Nonetheless,

171. *See supra* notes 132-139 and accompanying text.
172. *See supra* note 145 and accompanying text.
173. *See supra* notes 143-144 and accompanying text.
174. *See supra* note 148.
175. *See supra* notes 151-153 and accompanying text.
176. *See supra* notes 152-154 and accompanying text.
177. *See supra* note 161-162.

the Court found the INS procedures to be an alternative to the exclusionary rule which justified its abandonment in deportation cases. Therefore, the fact that Florida officers have been decertified, albeit not for fourth amendment exclusionary rule violations, might be sufficient for the Court to abandon the exclusionary rule in a state like Florida which potentially could decertify for constitutional violations of an evidentiary nature and which has decertified for other kinds of misconduct. Such a result would be inadvisable given the failure of current decertification procedures to provide an effective remedy for public, official police misconduct of the constitutional, evidentiary type.