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Mapp v. Ohio: The First Shot Fired in the Warren Court's Criminal Procedure 'Revolution'

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Yale Kamisar*

Although Earl Warren ascended to the Supreme Court in 1953, when we speak of the Warren Court's "revolution" in American criminal procedure we really mean the movement that got underway half-way through the Chief Justice's sixteen-year reign. It was the 1961 case of *Mapp v. Ohio*,[1] overruling *Wolf v. Colorado*[2] and holding that the state courts had to exclude illegally seized evidence as a matter of federal constitutional law, that is generally regarded as having launched the so-called criminal procedure revolution.[3]

* Shortly after this chapter went to press, I received a copy of the manuscript for Carolyn Long's *Mapp v. Ohio: The Origin and Development of the Exclusionary Rule* (University Press of Kansas, 2006). This is a lively, informative and insightful account—and the most comprehensive account I have ever read—of *Mapp v. Ohio* and its aftermath. I would have referred to it at various places if it had been available when I wrote my chapter.

[1] 367 U.S. 643 (1961).

[2] 338 U.S. 25 (1949).

[3] *See, e.g.*, Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 Wash.U.L.Q. 11, 12 (1988), observing that in the field of criminal procedure "the 'real Warren Court' " emerged with the decision in *Mapp*. Some might argue that the Warren Court's revolution in criminal procedure commenced with Griffin v. Illinois, 351 U.S. 12 (1956), establishing an indigent criminal defendant's right to a free transcript on appeal, at least under certain circumstances. *Griffin* did foreshadow some of the cases handed down by the later Warren Court, but "it was only some years after this decision that a majority of the Court consistently took positions now regarded as characteristic of the Warren Court." Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U.Ill.L.F. 518, 519 note 4.

The Obscenity Case that Wasn't

However, anyone who had read the briefs in the *Mapp* case or heard the oral argument in the Supreme Court would have thought that it was an obscenity case. The principal issue seemed to be whether an Ohio statute criminalizing the mere possession or control of obscene material, under which Dollree Mapp was convicted and sentenced to prison, violated the First and Fourteenth Amendments.[4] *Mapp* is not only the most famous search and seizure case in American history, but might also be called the stealth search and seizure case.

When the Supreme Court granted review in *Gideon*,[5] the famous right to counsel case, it asked the lawyers to discuss whether the Court's holding in *Betts v. Brady*[6] should be reconsidered.[7] As a result, many assumed that that twenty-year-old precedent would be overturned. (And it was.)[8] When the Court granted review in *Miranda* and three companion cases,[9] most Court-watchers expected the Court to dispel the uncertainty and confusion generated by *Escobedo v. Illinois*[10] (a case decided two years earlier), and to hand down a momentous decision in the police interrogation-confessions area. (And it did.) But *Mapp* was not preceded by advance publicity or discussion. The ruling must have come as a surprise to almost everyone—including Ms. Mapp's own lawyer.

As the Court pointed out during the oral argument,[11] Ms. Mapp's brief did not even cite *Wolf v. Colorado*, the precedent *Mapp* was to

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[4] *See* text at notes 16–32, 47–50 *infra*.

[5] Gideon v. Wainwright, 372 U.S. 335 (1963). *Gideon* is the subject of a separate chapter in this volume.

[6] 316 U.S. 455 (1942). Under the *Betts* rule, or the "special circumstances" rule, an indigent defendant charged with a serious non-capital offense such as armed robbery had to represent himself unless there were special circumstances, *e.g.*, the defendant was mentally deficient or the case was unusually complicated.

[7] *See Gideon*, 372 U.S. at 338.

[8] *Gideon* established a "flat" or "automatic" right to appointed counsel in all felony cases. Argersinger v. Hamlin, 407 U.S. 25 (1972), held that absent a valid waiver, no person may be *incarcerated* for any offense, whether classified as petty, misdemeanor or felony, unless represented by counsel.

[9] The "*Miranda* opinion," 384 U.S. 436 (1966), was actually an opinion in four cases: Miranda v. Arizona, California v. Stewart, Vignera v. New York and Westover v. United States. *Miranda* is the subject of a separate chapter in this volume.

[10] 378 U.S. 478 (1964). For a summary of the wide disagreement over the meaning of *Escobedo*—and over what it ought to mean—*see* YALE KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS IN LAW AND POLICY 161–62 (1980).

[11] *See* 55 LANDMARK BRIEFS AND ARGUMENTS OF THE UNITED STATES: CONSTITUTIONAL LAW 1164 (Philip Kurland & Gerhard Casper eds. 1975) (hereinafter Landmark Briefs & Arguments). It should be noted that the ACLU which had filed an *amicus* brief in the case, did ask the

overrule.[12] Moreover, when asked by one of the Justices whether "you're asking us to overrule *Wolf* against *Colorado*,"[13] the lawyer replied: "No, I don't believe we are."[14]

The *Mapp* case arose as follows:[15]

Dollree Mapp, a 28–year old black woman, and her daughter by a former marriage lived on the top floor of a two-family dwelling. One day, three Cleveland police officers arrived at the dwelling pursuant to information that (1) a suspect in a recent bombing was hiding out there; and (2) a large amount of "policy paraphernalia" was hidden in the house. The police knocked on the door and demanded entrance. However, after calling her lawyer, Miss Mapp refused to admit the police without a search warrant.

Court to "re-examine" *Wolf*. But the ACLU only devoted one paragraph of its 21–page brief to the issue, *see id.* at 1154, and one commentator aptly described it as "sort of an 'oh, by the way' " paragraph. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 196 (2000).

[12] At one point in his brief, Miss Mapp's lawyer did make an effort to bring his case within the doctrine of the infamous "stomach pumping" case, Rochin v. California, 342 U.S. 165 (1952), maintaining that the police action in *Mapp*, like the police behavior in *Rochin*, was "conduct that shocks the conscience." *See* Landmark Briefs & Arguments 1103. But the brief made no attempt to deal with, and did not even cite, Irvine v. California, 347 U.S. 128, 133 (1954), which took the position that *Rochin* was not really a search and seizure case, but one that turned on police "coercion"—"applied by a physical assault upon [the defendant's] person to compel submission to the use of a stomach pump." The failure to mention *Irvine* is quite surprising because, to quote the U.S. Supreme Court, "the [Ohio Supreme Court] found determinative the fact that the evidence had not been taken 'from defendant's person by the use of brutal or offensive physical force against defendant.' " 367 U.S. at 645.

At one point in the oral argument, in response to a direct question, Ms. Mapp's lawyer did say he thought his case "comes within the doctrine of the *Rochin* case," but when asked to specify "[w]hat particular facts" brought it within *Rochin*, he could only reply: "I can't say definitely.... I'm very sorry, but I don't have all of the facts in the case, just the conclusion that I came to on that." Landmark Briefs & Arguments 1200.

[13] *Id.* at 1165. Although the Justice who asked this question is not identified, it was probably Justice Frankfurter, the author of the majority opinion in *Wolf*. Because the lawyer had referred to him by name, we know that Frankfurter had asked the same question a few moments earlier, without getting a direct answer. *See id.* at 1164.

[14] No doubt troubled by his colleague's wrong response, or lack of response, to the question whether he was asking the Court to overrule *Wolf*, Bernard Berkman, the ACLU lawyer who followed Ms. Mapp's lawyer to the podium, told the Court at the outset that he *was* asking the Court to "reconsider" *Wolf*. *See id.* at 1170. But he devoted virtually all of his time to a discussion of the Ohio obscenity statute.

[15] This summary of the facts is based primarily on the account set forth in the *Mapp* opinion, 367 U.S. at 644–45. *See also* the discussion in Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 Sup. Ct. Rev. 20–21.

The police called for reinforcements. Several hours later, when at least four more officers had arrived on the scene, the police again sought entrance. When Miss Mapp did not come to the door immediately, the police gained admittance by breaking open one of the back doors. A short time later, Miss Mapp's attorney arrived, but the police did not allow him to enter the house or to see his client.

In the meantime, inside the house, Miss Mapp demanded to see a search warrant. One officer held up a piece of paper which was said to be a warrant. Miss Mapp grabbed the paper and put it in her blouse. A struggle broke out, in the course of which the police recovered the paper. In light of what the police called Ms. Mapp's "belligerent" behavior in seizing and trying to hold on to the "search warrant," the police handcuffed her.

(At the trial, no search warrant was produced by the prosecution. Nor was this failure ever explained. According to the Ohio Supreme Court, "considerable doubt" existed as to whether "there ever was any warrant for the search of defendant's home.")

After being handcuffed, Miss Mapp was forcibly taken upstairs to her bedroom where the dressers, the closet and some suitcases were searched. The search soon spread to the rest of the second floor (including the living room and Mapp's daughter's bedroom), and then to the basement (where a trunk found there was searched). The widespread search turned up a few "obscene" pamphlets (a far cry from the kind of porn material one hears about today) for which Miss Mapp was ultimately convicted and sentenced to prison. (She claimed she was simply storing the materials for a former roommate.)

Some twenty years after the decision in *Mapp*, Justice Potter Stewart, by this time a retired Supreme Court Justice, disclosed the following:

> At the conference following [the oral argument in *Mapp*], a majority of the Justices agreed that the Ohio statute violated the *first* and fourteenth amendments. Justice Tom Clark was assigned the job of writing the opinion of the Court. What transpired in the month following our conference on the case is really a matter of speculation on my part, but I have always suspected that the members of the soon-to-be *Mapp* majority had met in what I affectionately call a "rump caucus" to discuss a different basis for their decision. But regardless of how they reached their decision, five Justices of the Court concluded that the *fourth* and fourteenth amendments required that evidence seized in an illegal search be excluded from state trials as well as federal ones. *Wolf* was to be overruled.[16]

[16] Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1368 (1983) (second emphasis added).

A "rump caucus" did take place, but it is unclear which Justices participated in it or how many there were.

According to one account, Justice Tom Clark played a key role in transforming *Mapp* from an obscenity case to a search and seizure case.[17] Although many considered Clark a police-prosecution oriented Justice,[18] his experience as a young lawyer with blatant violations of the Fourth Amendment had made him a keen student of the law of search and seizure.[19] As Clark observed, a decade after he had retired from the Court:

> I myself think that the fourth amendment is the most valuable of all the amendments because it does not matter what you have—if you have all the money in the world—unless you have the safety of your home and the privacy of your mind and heart, you have nothing. *Nothing*. Someone can take it away, regardless of what you have.[20]

Moreover, Justice Clark had been greatly troubled by the "empty gesture" approach to the protection against unreasonable search and seizure the Court had taken in the *Wolf* case.[21] Although Clark had concurred in the result in *Irvine*, a case which upheld the admissibility of evidence produced by admittedly flagrant state police violations of the Fourth Amendment,[22] he had noted at the outset of his concurring opinion that "[h]ad [he] been here when *Wolf* was decided," he would

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According to BERNARD SCHWARTZ, SUPER CHIEF 392 (1983) (hereinafter Schwartz), "[t]he conference discussion and vote was summed up by Harlan in a letter to Clark." Justice Harlan wrote, *id.* at 392–93:

> I would have supposed that the Court would have little difficulty in agreeing (as indeed I thought the whole Court had) that a state prohibition against mere knowing possession of obscene material, without any requirement of a showing that such possession was with a purpose to disseminate the offensive matter, contravenes the Fourteenth Amendment, in that such a statute impermissibly deters freedom of belief and expression, if indeed it is not tantamount to an effort at "thought control."

[17] *See* Schwartz, *supra* note 16, at 393.

[18] This was largely a result of Clark's sharp dissents in Jencks v. United States, 353 U.S. 657 (1957) and Miranda v. Arizona, 384 U.S. 436 (1996). *See generally* Note, *Justice Tom C. Clark's Unconditional Approach to Individual Rights in the Courtroom*, 64 Tex. L. Rev. 421 (1985).

[19] *See* Paul R. Baier, *Justice Clark, the Voice of the Past, and the Exclusionary Rule*, 64 Tex. L. Rev. 415, 417, 419 (1985).

[20] Tom C. Clark, *Some Notes on the Continuing Life of the Fourth Amendment*, 5 Am. J. Crim. L. 275, 276 (1977) (based on an April, 1977 lecture delivered at the University of Texas Law School).

[21] *See* Baier, *supra* note 19, at 419.

[22] *See* the discussion of Irvine v. California, 347 U.S. 128 (1954), in the text at notes 126–48.

have imposed the exclusionary rule on the states.[23] And he had ended his *Irvine* concurrence with the thought that "[p]erhaps strict adherence to the tenor of [*Wolf*] may produce needed converts for its extinction."[24]

According to one account, no sooner had Clark left the conference room, where he had agreed to write the opinion of the Court overturning Mapp's conviction on First Amendment grounds, than he turned to Justices Black and Brennan, who were standing in the elevator with him, and asked: "[W]ouldn't this be a good case to apply the exclusionary rule and do what *Wolf* didn't do?"[25] According to this account, "[i]n his discussion with Brennan and Clark, [Justice Black] showed willingness to agree to a decision overruling Wolf. . . . though he indicated that he still had difficulty in doing it on Fourth Amendment grounds alone."[26]

However, one of Chief Justice Warren's biographers tells a different story. According to him, Chief Justice Warren and Justice Brennan agreed with Justice Douglas, the only *Wolf* dissenter still on the Court, that *Wolf* should be overruled, and they did so quite early. But because nobody else supported this position at the time, the vote in conference was to overturn Mapp's conviction on First Amendment grounds.[27]

When Clark changed his mind shortly after the conference, the foursome still needed a fifth vote to topple *Wolf*. The best bet was Hugo Black. According to this account, Chief Justice Warren and Justices Douglas and Brennan (but not Clark) then visited Justice Black in his chambers and persuaded him to join them.[28]

The author of a recent biography of Hugo Black is the only one I could find who specifically stated that *both* Clark's meeting in the elevator with Black and Brennan *and* the Warren–Douglas–Brennan meeting with Black in the latter's chambers took place.[29] In any event, it seems to be undisputed that Justice Douglas was the first to throw out the idea that *Wolf* should be overruled[30] and that Black was the last to join the anti-*Wolf* group.

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[23] 347 U.S. at 138.

[24] *Id.* at 139.

[25] *See* Schwartz, *supra* note 16, at 393.

[26] *Id.* Concurring in the judgment in *Wolf*, Justice Black had "agree[d] with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." 338 U.S. at 39–40.

[27] *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 374 (1997).

[28] *See id.* at 375.

[29] *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 555–56 (1994).

[30] *See id.* at 555; Powe, *supra* note 11, at 196; Schwartz, *supra* note 16, at 393.

Before learning that Justice Clark had changed his mind in favor of deciding the *Mapp* case on search and seizure grounds, Justice Douglas had prepared a draft opinion "apply[ing] the Fourth Amendment with full force to the states, making the exclusionary rule part and parcel of the constitutional guarantee."[31] (Douglas's draft opinion was never circulated because of Clark's change of mind just after the conference.)[32]

Getting and holding Justice Black's vote was no small feat. For, as noted earlier,[33] concurring in *Wolf*, Black had taken the position that the exclusionary rule was not a command of the Fourth Amendment itself, but merely a judicially created rule of evidence. Twelve years later, he was "still not persuaded that the Fourth Amendment, standing alone, would be enough to [exclude evidence] seized from [a defendant] in violation of its commands,"[34] but by this time he had found what he considered the true basis for the exclusionary rule:

> Reflection on the problem . . . has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.[35]

One passage in Justice Clark's *Mapp* opinion seems to support Justice Black's view of the search and seizure exclusionary rule. It talks about the " 'intimate relation' " between the Fourth and Fifth Amendments and how the two Amendments "express 'supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.' "[36] Did Justice Clark really believe this or, anxious to keep Black on board, did Clark write this in order to humor Black? Many years later, Justice Clark recalled:

> Finally, in 1961 we got the five [votes] to overrule *Wolf*. . . . I had to convince Justice Black. He did not want to swallow the fourth amendment; he wanted to bring in the fifth. And so we sat down and worked in the fourth and had the fourth and fifth mentioned together. If you still do not understand it, I do not either! But we overruled *Wolf* . . .[37]

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[31] *See* Schwartz, *supra* note 16, at 393.

[32] *Id.*

[33] *See* note 26 *supra*.

[34] 367 U.S. at 661 (Black, J. concurring in *Mapp*).

[35] *Id.* at 662.

[36] *See* 367 U.S. at 656–57.

[37] *See* Clark, *supra* note 20, at 279.

Professor Lucas Powe, a commentator who rarely uses strong words, calls Justice Black's rationale for the search and seizure exclusionary rule "preposterous."[38] Black's theory does leave much to be desired, but Powe goes too far.

The famous *Boyd* case[39] viewed the compulsory production of incriminating papers as the equivalent of an unreasonable search and seizure and the use of evidence obtained in violation of the Fourth Amendment as a form of compulsory self-incrimination.[40] Moreover, in his celebrated dissent in the *Olmstead* case,[41] Justice Louis Brandeis maintained that the use in a criminal prosecution of facts ascertained by a violation of the Fourth Amendment "must be deemed a violation of the Fifth."[42]

Nevertheless, Justice Black's theory of the exclusionary rule is badly flawed and, so far as I know, nobody subscribes to it today.

First of all, at the time of *Mapp* the prevailing view had long been that the physical evidence typically excluded in search and seizure cases, *e.g.*, drugs and weapons, was beyond the scope of the protection provided by the Self-Incrimination Clause.[43] The Clause was said only to furnish protection against "testimonial compulsion."[44]

Second, although Justice Black may have believed that the privilege against self-incrimination was "incorporated" by the Fourteenth Amend-

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[38] *See* Powe, *supra* note 11, at 196–97.

[39] Boyd v. United States, 116 U.S. 616 (1886).

[40] *See id.* at 630–35. *See also* Agnello v. United States, 269 U.S. 20, 33–34 (1925).

[41] Olmstead v. United States, 277 U.S. 438 (1928).

[42] *See id.* at 478–79.

[43] *See* FRED E. INBAU, SELF-INCRIMINATION WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO, 3–8, 87 (1950); CHARLES T. MCCORMICK, EVIDENCE 263–66 (1st ed. 1954); EDMOND MORGAN, BASIC PROBLEMS OF EVIDENCE 140–42 (1957); 8 JOHN HENRY WIGMORE, EVIDENCE §§ 2263, 2265 (3d ed. 1940). Moreover, as pointed out in Allen, *supra* note 15, at 25–26, "a Fifth Amendment theory of the exclusionary rule can probably not be justified either by historical or analytical considerations." *See also* Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 Minn.L.Rev. 1083, 1088–90 (1959); Jack B. Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 Rocky Mt. L. Rev. 150, 160–61 (1962).

[44] Since the discussion in *Mapp*, the Court has made this even more clear. In Schmerber v. California, 383 U.S. 757 (1966), upholding the taking of a blood sample from an intoxicated driver, over his objection, the Court observed that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature and that the withdrawal of blood and use of the analysis in question does not involve compulsion to these ends." *Id.* at 761. United States v. Wade, 388 U.S. 2218 (1967), held that requiring a defendant to appear in a lineup and to utter the words "put the money in the bag" does not violate the privilege. *See generally* 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 7.2 (2d ed. 1999).

ment and binding on the states, a majority of the Court did not.[45] It was not until 1964 that the Court held that the Fifth Amendment's privilege against self-incrimination was to be "enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[46]

Justice Clark probably would not have needed Justice Black's vote nor have had to put up with Black's Fifth Amendment theory of the exclusionary rule if—instead of "simply 'reach[ing] out' to overrule *Wolf*"[47]—the Court had ordered reargument of the case and directed the lawyers to reexamine *Wolf*. If this step had been taken, Justice Stewart, who had been "shocked" by the Court's transformation of *Mapp* into a search and seizure case,[48] most likely would have voted to overrule *Wolf* the second time around. As he stated in a public lecture some years after he had retired from the Court:

> I believed then [at the time of *Mapp*], and I believe now, that the exclusionary rule *is* constitutionally required, not as a "right" explicitly incorporated in the fourth amendment's prohibitions, but as a remedy necessary to ensure that those prohibitions are observed in fact. Thus, although I did not join in the Court's opinion in the *Mapp* case—because it decided an issue that was not before the Court—I agree with its conclusion that the exclusionary rule *is* necessary to keep the right of privacy secured by the fourth amendment from "remain[ing] an empty promise."[49]

Justice Clark's response to the dissenters' charge that the overruling of *Wolf* was not properly before the Court is not convincing: "Although appellant . . . did not insist that *Wolf* be overruled [that is a gross understatement], the *amicus curiae* . . . did urge the Court to overrule *Wolf* [that is an overstatement of considerable proportions]."[50]

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[45] *See* Twining v. New Jersey, 211 U.S. 78 (1908); Adamson v. California, 332 U.S. 46 (1947). Both cases were overruled in Malloy v. Hogan, discussed in the next sentence.

[46] Malloy v. Hogan, 378 U.S. 1, 10 (1964).

[47] 367 U.S. at 674 (Harlan, J., dissenting).

[48] *See* Stewart, *supra* note 16, at 1368:

> I was shocked when Justice Clark's proposed Court opinion reached my desk. I immediately wrote him a note expressing my surprise and questioning the wisdom of overruling an important doctrine in a case in which the issue was not briefed, argued or discussed by the state courts, by the parties' counsel or at our conference following the oral argument. After my shock subsided, I wrote a brief memorandum concurring in the judgment on first and fourteenth amendment grounds, and agreeing with Justice Harlan's dissent that the issue which the majority decided was not properly before the Court.

[49] *Id.* at 1389.

[50] 367 U.S. at 646 note 3.

Justice Douglas tried to brush off the dissenters' protests with what one commentator5[51] called "light-hearted assurances" that the Justices already knew all the arguments for and against the exclusionary rule.5[52] I share the view that the better course would have been to order the reargument of the case directed to the issue of the *Wolf* rule.[53] Nevertheless, there is *something* to be said for Douglas's view. After all, as Judge (later Justice) Benjamin Cardozo observed *more than three decades before* the *Mapp* case was decided (in a portion of his famous *Defore* opinion that very few law professors have ever taken seriously): "To what [has been] written [about the exclusionary rule] little of value can be added."[54]

Let us now take a look at some of what had been written about the exclusionary rule prior to *Mapp*.

Historical Perspective: The Rules Governing the Admissibility of Illegally Seized Evidence Prior to Mapp

1. The *Weeks* Case and the Federal Exclusionary Rule

The 1914 *Weeks* case[55] established the federal exclusionary rule. Although this must surprise many readers of Burger Court and Rehnquist Court search and seizure opinions, nowhere in *Weeks* is the exclusionary rule called a "remedy" nor is there any discussion, or even mention, of the effectiveness of the exclusionary rule versus the effectiveness of alternatives such as tort remedies or internal self-discipline.[56]

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[51] Allen, *supra* note 15, at 22–23.

[52] *See* 367 U.S. at 671 (Douglas, J., concurring):

> [S]ubject to the sound discretion of a court, all arguments must at last come to a halt. This is especially so as to an issue about which this Court said last year that "The arguments of its antagonists and of its proponents have been so many times marshaled as to require no lengthy elaboration here." *Elkins v. United States*, [364 U.S. 206, 216 (1960)].

[53] Allen, *supra* note 15, at 22.

[54] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). Of course, in this very opinion, Judge Cardozo proceeded to write some of the most famous lines ever written on the subject. If the case against the exclusionary rule had to be reduced to one or two sound bites, it would be hard to do better than to quote from Cardozo's opinion, *id.* at 587, 588:

> [According to the search and seizure exclusionary rule], [t]he criminal is to go free because the constable has blundered.
>
> * * *
>
> [If this court adopted the exclusionary rule], the pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious.

[55] Weeks v. United States, 232 U.S. 383 (1914).

[56] Indeed the *Weeks* rule or federal exclusionary rule was never called an "exclusionary rule" until several decades after *Weeks* was decided. *See* Yale Kamisar, *Does (Did) (Should)*

As Francis Allen has pointed out, the *Weeks* opinion "contains no language that expressly justifies the [exclusionary] rule by reference to a supposed deterrent effect on police officials."[57]

Nor is the notion of deterrence expressed for the next thirty-five years—in the long interim between *Weeks* and *Wolf*. No doubt the Court that decided *Weeks* and the Court that adhered to its doctrine in subsequent decades expected, or at least hoped, that law enforcement officials would not be so ignorant of, or indifferent to, the search and seizure rules worked out in the courts as to be unaffected by them, but there is no suggestion in *Weeks* or the search and seizure cases decided during the next thiry-five years that the exclusionary rule's *survival* depended on proof that it was significantly affecting police behavior.

In excluding private papers seized from an illegal search of defendant's home, a unanimous *Weeks* Court, per Justice Day, took the position that if a federal official "acted without sanction of law" in conducting a search, a court should not—by admitting the evidence seized by the official—"affirm" or "sanction" the search or seizure *after* the event:

> The United States Marshall ... acted without sanction of law ... and under color of his office undertook to make a search of private papers in direct violation of the constitutional prohibition against such action.... To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[58]

Moreover, as Justice Brennan observed seventy years later, the *Weeks* Court "expressly recognized that the commands of the Fourth Amendment were addressed to both the courts and the Executive Branch":[59]

> The effect of the Fourth Amendment is to put *the courts* of the United States and Federal officials, in the exercise of their power

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the Exclusionary Rule Rest on a "Principled Basis" Rather than an Empirical Proposition?, 16 Creighton L.Rev. 561, 590 & note 162 (1983).

[57] Allen, *supra* note 3, at 536 note 90. Even Chief Justice Burger, one of the exclusionary rule's most severe critics, recognized, before ascending to the Supreme Court, that *Weeks* "rest[s] on the Court's unwillingness to give even tacit approval to official defiance of constitutional provisions by admitting evidence secured in violation of the Constitution. The idea of deterrence may be lurking between the lines of the opinion but is not expressed." Warren E. Burger, *Who Will Watch the Watchman?*, 14 Am. U. L. Rev. 1, 5 (1964).

[58] 232 U.S. at 393–94.

[59] Justice Brennan, joined by Marshall, J., dissenting in United States v. Leon, 468 U.S. 897, 936 (1984).

> and authority, under limitations and restraints as to the exercise of such power and authority.... [The Fourth Amendment's] protection reaches all alike, whether accused of crime or not, and *the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws.* The tendency of those who execute the criminal laws of the country ... to obtain conviction by means of unlawful seizures ... *should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution* and to which [all] people have a right to appeal for the maintenance of such fundamental rights.[60]

In the thirty-five years following *Weeks*, the Court had very little to say about the rationale for the exclusionary rule.[61] However, the stirring Holmes–Brandeis dissents in the famous wiretapping case, *Olmstead v. United States*,[62] do shed light on the original basis and purpose of the exclusionary rule. In the course of urging the Court to extend the *Weeks* doctrine to situations where the federal government had not violated the Constitution, or even federal law, but only a state wiretapping statute, Justices Holmes and Brandeis embellished the *Weeks* Court's reasoning:

> [N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business [obtaining evidence by an unlawful act], it does not permit the judge to allow such inequities to succeed.[63]
>
> The Court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for the law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.[64]
>
> To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[65]

The Holmes–Brandeis dissents underscore that the exclusionary rule, at least in the pre-*Wolf* era, was based on principle—one might also say

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[60] *Weeks*, 232 U.S. at 391–92 (emphasis added).

[61] *See* Kamisar, *supra* note 56, at 601–06.

[62] *See* Olmstead v. United States, 277 U.S. 438, 469, 471 (1928).

[63] *Id.* at 470. (Holmes, J., dissenting.)

[64] *Id.* at 484. (Brandeis, J., dissenting.)

[65] *Id.* at 485. (Brandeis, J., dissenting.)

that it had an important symbolic quality—not on estimates of how significantly the exclusion of evidence affects police conduct.

The famous dissents of Holmes and Brandeis, and the *Weeks* case itself, were based on what has been called the " 'one-government' conception" or the "unitary model of a government and a prosecution."[66] According to this view, by excluding illegally seized evidence "the court stops the entire government, of which it is a part, from consummating a wrongful course of conduct begun but by not means ended when the police invade the defendant's privacy."[67] But the *Wolf* Court took a very different view of the exclusionary rule.

2. *Wolf v. Colorado*

In *Wolf*, a 5–4 majority, per Frankfurter, J., resolved "the tension produced by the recognition of the objective of fair procedure, on the one hand, and the demands of federalism, on the other"[68] in favor of federalism. The Court had no hesitation in saying that "[t]he security of one's privacy against arbitrary invasion by the police—which is at the core of the Fourth Amendment—is basic to a free society" and thus "enforceable against the states through the Due Process Clause."[69] But "the ways of enforcing such a basic right" was another matter.[70]

According to the *Wolf* Court, excluding the illegally seized evidence was only one among a range of options. A state court could reject the

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[66] Thomas Schrock & Robert Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 255 (1974). But *see* Larry Yackle, *The Burger Court and the Fourth Amendment*, 26 Kan. L. Rev. 335, 417 (1978) maintaining that although the approach to the exclusionary rule in the Holmes–Brandeis *Olmstead* dissents is related to the approach taken in *Weeks*, it is also somewhat different.

[67] *See id.* Consider, too, Justice Brennan, joined by Marshall, J., dissenting in United States v. Leon, 468 U.S. 933, 938 (1984):

> [B]y admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single government action prohibited by the terms of the [Fourth] Amendment.
>
> * * *
>
> [The *Weeks* Court] recognized that, if the Amendment is to have any meaning, police and the courts cannot be regarded as constitutional strangers to each other; because the evidence-gathering role of the police is directly linked to the evidence-admitting function of the courts, an individual's Fourth Amendment rights may be undermined as completely by one as by the other.

In *Leon*, the majority adopted a so-called good faith (actually a "reasonable mistake") exception to the search and seizure exclusionary rule.

[68] Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DePaul L. Rev. 213, 240 (1959).

[69] 338 U.S. at 27–28.

[70] *See id.* at 28:

exclusionary rule so long as it relied on some other remedy (such as a private tort action against the offending officer(s) or the internal discipline of the police) "which, if consistently enforced, would be equally effective."[71] (The Court gave no indication whether or how it would go about determining if an alternative to the exclusionary rule *was being* "consistently enforced.")

As one critic expressed it, the author of the *Wolf* opinion performed "the unusual, if not unprecedented, feat of simultaneously creating a constitutional right and denying the most effective remedy for violation of that right."[72] As another critic put it, "the *Wolf* case leaves the federal 'right' of privacy . . . more largely in the realm of wish than reality."[73]

Moreover, by "driving a wedge between [the protection against unreasonable search and seizure] and the exclusionary rules,"[74] "inject[ing] the instrumental rationale of deterrence of police misconduct into [the Court's] discussion of the exclusionary rule,"[75] and "using the empirically-based, consequentialist rationale of deterrence as support for [the Court's] refusal to apply the exclusionary rule to the states,"[76] the *Wolf* opinion not only made the result reached in that case seem more palatable, but it planted the seeds of destruction for the exclusionary rule—in federal as well as state cases.[77]

* * *

> But the ways of enforcing such a basic right raise questions of a different order. . . . [W]hat remedies against [such arbitrary conduct] should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

[71] *Id.* at 31. "We cannot . . . regard it as a departure from basic standards," maintained Frankfurter, "to remand [the victims of illegal searches], together with those who emerge scatheless from a search, [to remedies other than the exclusionary rule]." *Id.*

[72] T. S. L. Perlman, *Due Process and the Admissibility of Evidence*, 64 Harv.L.Rev. 1304 (1951).

[73] Francis A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Ill.L.Rev. 1, 30 (1950). *See also* Allen, *supra* note 15, at 5: "The basic difficulty was that in [*Wolf*] the Court's reach had exceeded its grasp . . . The federal 'right of privacy' was relegated to the tender mercies of the state for its enforcement."

[74] William J. Mertens & Silas J. Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L.J. 365, 380 (1981).

[75] *Id.* at 379.

[76] *Id.*

[77] Consider Justice Brennan, joined by Marshall, J., dissenting in *Leon*, *supra* note 67, at 931, 938–40:

Justice Frankfurter appears to have been heavily influenced by Judge (later Justice) Cardozo's famous 1926 opinion in *People v. Defore*, the New York case that had rejected the exclusionary rule when the states still had an option.[78] Cardozo had noted that there was no shortage of alternatives to the exclusionary rule: "The officer might have been resisted, or sued for damages, or even prosecuted for oppression."[79] Although Justice Frankfurter's list of other remedies was not as extensive as Cardozo's (Frankfurter did not include resisting the officer!), the *Wolf* opinion, too, "smells of the lamp."

Thus, the temptation to attack, and to defeat, Justice Frankfurter *on his own battleground* must have been strong. Justice Murphy, who wrote the principal dissent in *Wolf*, yielded to that temptation. He examined the other available remedies[80] and reached what he called the

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At bottom, the Court's decision turns on the proposition that the exclusionary rule is merely a " 'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right.' " The germ of that idea is found in *Wolf v. Colorado*, and although I had thought that such a narrow conception of that rule had been forever put to rest by our decision in *Mapp v. Ohio*, it has been revived by the present Court and reaches full flower with today's decision.

* * *

[T]he question whether the exclusion of evidence would deter future police misconduct was never considered a relevant concern in the early cases from *Weeks* to *Olmstead*.... A new phase in the history of the rule, however, opened with the Court's discussion in *Wolf*.... Notwithstanding the force of the *Weeks* doctrine that the Fourth Amendment required exclusion, a state court was free to admit illegally seized evidence, according to the Court in *Wolf*, so long as the State had devised some other "effective" means of vindicating a defendant's Fourth Amendment rights.

Twelve years later, in *Mapp* ... however, the Court restored the original understanding of the *Weeks* rule, by overturning the holding in *Wolf* and repudiating its rationale.... In the [*Mapp*] Court's view, the exclusionary rule was not one among a range of options to be selected at the discretion of judges; it was "an essential part of both the Fourth and Fourteenth Amendments"....

Despite [the statements in *Mapp*], however, the Court since *Calandra* [v. United States, 414 U.S. 338 (1974), which took into account only the deterrence rationale in holding that a grand jury witness may not decline to answer questions on the ground they were based on illegally seized evidence] has gradually pressed the deterrence rationale for the [exclusionary] rule back to center stage.

[78] 150 N.E. 585 (N.Y. 1926).

[79] *Id.* at 587.

[80] 338 U.S. at 41. (Murphy, J., joined by Rutledge, J., dissenting.) It is important to compare the exclusionary rule with "currently available" alternatives. There is no shortage of *theoretically possible* ways, aside from the exclusion of evidence, to make the Fourth Amendment viable. As I have said elsewhere, Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. Mich. J.L. Ref. 537, 564 (1990),

"inescapable" conclusion that "but one remedy exists to deter violations of the search and seizure clause"—the exclusionary rule.[81]

Justice Murphy's belittling of the available alternatives to the exclusionary rule might have been a mistake in strategy. The better course might have been to avoid attacking Frankfurter on the grounds he chose, but to underscore the "one-government" approach that pervades both *Weeks* and the *Olmstead* dissents, an approach that gives no weight to the availability of possible alternatives to the exclusionary rule. But surely Justice Murphy's disparagement of the available alternatives to the exclusionary rule was well-founded.[82]

Justice Stewart may have summed up the situation as well as anyone when, shortly after stepping down from the court, he observed:

> Taken together, the currently available alternatives to the exclusionary rule satisfactorily achieve some, but not all, of the necessary functions of a remedial measure. They punish and perhaps deter *the grossest* of violations, as well as government policies that legitimate those violations. They compensate some of the victims of *the most*

"the problem is not a lack of *imagination or intellectual capacity*. Rather, it is a lack of *political will*."

As one commentator has recently reminded us, Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. Cal. L. Rev. 1, 60 note 289 (1994), ever since the 1930s, commentators have been underscoring the inadequacy of existing tort remedies against offending police officers and proposing what are now called "fortified" tort remedies. But nothing has come of any of these proposals. Do we have any reason to expect similar proposals made in our day to fare any better?

[81] 338 U.S. at 44.

[82] By the time of *Wolf* a number of commentators had already called attention to the ineffectiveness of alternatives to the exclusionary rule. *See, e.g.,* LESTER ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 28–31 (1947); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. Chi. L. Rev. 345, 346 (1936); William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 Cornell L.Q. 337, 386–88 (1939); Comment, *Judicial Control of Illegal Search and Seizure*, 58 Yale L.J. 144, 146–56 (1948). Since then, the number of commentators deprecating the available alternatives to the exclusionary rule has grown to the point where it is fair to say that there is an overwhelming consensus that all the available alternatives are woefully inadequate. The classic article is Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955). *See also, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 378–79, 429–30 (1974); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I go Down that Wrong Road Again,"* 74 N.C.L. Rev. 1559, 1606 (1996); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum.L.Rev. 247, 284–86 (1988); Pierre J. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. Crim. L. & Criminology 875, 907–13 (1982); and William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1386–1410 (1981). *But see* Guido Calabresi, *The Exclusionary Rule,* 26 Harv. J.L. & Pub. Pol'y 111, 112 (2002); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule,* 1999 U. Ill. L. Rev. 364.

> *egregious* violations. But they do little, if anything, to reduce the vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice. For these violations, a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy—the exclusion of illegally obtained evidence.[83]

* * *

Justice Frankfurter often remarked that "[o]n the question you ask depends the answer you get."[84] He illustrated his point in the *Wolf* case by formulating one of the longest and most convoluted "questions presented for consideration" ever to appear in a Supreme Court opinion:

> The precise question for consideration is this: Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks* . . .?[85]

The question presented in *Wolf* could easily have been phrased differently. For example:

> The question for consideration is whether a state conviction resting on evidence secured in violation of a right so important as to be deemed "basic to a free society" may be allowed to stand without making the courts themselves accomplices in disobedience of the constitutional command.[86] Or—
>
> The question presented is whether we can admit evidence produced by police conduct which violates the security of one's privacy against arbitrary invasion by government officials—a right basic to a free society—without affording police lawlessness the cloak of law.[87] Or—
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> The question for consideration is whether a failure to put a curb on the use of evidence obtained by illegal state searches and seizures in state prosecutions would only invite the very police methods deemed

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[83] Stewart, *supra* note 16, at 1388–89 (emphasis added).

[84] HENRY FRIENDLY, *Mr. Justice Frankfurter*, in BENCHMARKS 318, 319 (1967).

[85] 338 U.S. at 25–26.

[86] *Cf.* McNabb v. United States, 318 U.S. 332, 345 (1943) (Frankfurter, J.).

[87] *Cf.* Rochin v. California, 342 U.S. 165, 173 (1952) (Frankfurter, J.).

inconsistent with the concept of human rights enshrined in the history and legal documents of our people.[88] Or—

In three other cases decided today,[89] we have reversed state convictions based on "involuntary" confessions without disputing the assertion that "[c]hecked with external evidence, [the] confessions in each case are inherently believable [and] not shaken by anything that occurred at the trial."[90] The question presented is whether the problem of coerced confessions and the problem of unreasonable searches or seizures can be treated separately for purposes of Fourteenth Amendment due process without establishing an indefensible double standard in defining the requirements of due process as they relate to state criminal proceedings.[91]

It might be objected that these formulations of the question are so appealing from the defendant's viewpoint that they suggest an answer in his favor. But if the alternative formulations of the question lead the reader to answer them as the writer wishes, the same may be said for the question Justice Frankfurter actually posed in *Wolf*. Moreover, the alternative formulations of the question presented I have offered are based almost entirely on how the author of the *Wolf* opinion elsewhere viewed the question of admitting unconstitutionally or illegally obtained evidence in other Supreme Court cases.[92]

In suggesting alternative ways of stating the question presented in the *Wolf* case I have assumed that the case stands for the proposition

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[88] *Cf* Nardone v. United States, 308 U.S. 338 (1939) (Frankfurter, J.).

[89] *See* Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949). All three opinions of the Court were written by Justice Frankfurter.

[90] Justice Jackson, concurring in the result in *Watts* and dissenting in the companion cases, 338 U.S. at 58. *See also* Justice Frankfurter, observing in *Rochin*, *supra* note 12, at 173: "[Coerced confessions] are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency."

[91] *Cf.* Allen, *supra* note 73, at 29:

"In both situations [coercive police interrogation and illegal searches] the perils arise primarily out of the procedures employed to acquire the evidence rather than from dangers of the incompetency of the evidence so acquired. Furthermore, if the demands of federalism are not such as to deny to the Court power to supervise the interrogating practices of state police officers in the interest of procedures most likely to preserve the integrity of basic individual immunities, such supervision of police practices in the interest of preserving basic rights of privacy seems likewise justifiable. Yet the consequence of the decision [in *Wolf*] ... is rigidly to separate the two problems [searches and confessions] and to create a dubious double standard in the definition of the requirements of due process as they relate to state criminal proceedings."

[92] *See* notes 86–90 *supra*.

that what would be a violation of the Fourth Amendment if carried out by a federal official constitutes a violation of the Fourteenth Amendment if committed by a state officer. This is not entirely clear. *Wolf* could conceivably have stood, or have come to stand, for the proposition that only certain "gross" or "aggravated" unreasonable searches or seizures—only those violations of the Fourth Amendment that strike at its very "core"[93]—offend Fourteenth Amendment Due Process.

However, if this were the meaning of *Wolf*, then whether a given search by state officers was not only unlawful but sufficiently "outrageous" to offend Fourteenth Amendment Due Process would turn on its particular facts. But no facts whatever are given about the search that occurred in *Wolf*. Not by Justice Frankfurter, writing for the majority, nor by any of the concurring or dissenting Justices.

Even if one were to read every word written by the five members of the Court who filed opinions in the case, one would have no idea who Wolf was (a practicing physician) or what crime he was convicted of (conspiracy to commit abortion) or what evidence was seized (appointment books from his office). As Justice Jackson pointed out five years later in his *Irvine* plurality opinion, "the opinions in *Wolf* were written entirely in the abstract."[94]

So far as one can tell, the *Wolf* case involved not a "shocking" or "aggravated" illegal search, but a "routine" one. If "the basic right to protection against arbitrary intrusion by the police"[95] were only violated when state police committed certain kinds of violations of the Fourth Amendment, the *Wolf* Court would have had *no need and no reason to reach the difficult question* whether a violation of "the basic right ... demands the exclusion of logically relevant evidence."[96] The first order of business would have been to decide whether the illegal search by the Colorado police constituted the *kind* of illegal search that violated "the basic right."

Although he did not address the question explicitly, Justice Frankfurter seemed to equate the *substantive* protection against unreasonable searches and seizures provided by the Fourteenth Amendment with the specific guarantee of the Fourth. He seemed to say that even though the Fourteenth Amendment does *not require the exclusion* of the resulting

[93] *Cf. Wolf*, 338 U.S. at 27 (Frankfurter, J.): "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."

[94] Irvine v. California, 347 U.S. 128, 133 (1954). Justice Jackson then proceeded to discuss the facts in *Wolf*. *See id.*

[95] *Wolf*, 338 U.S. at 28 (Frankfurter, J.).

[96] *Id.*

evidence, the Amendment is violated when state police conduct *any* unreasonable search and seizure.[97]

Moreover, while concurring and dissenting opinions do not necessarily constitute the most accurate interpretations of majority opinions, it is at least noteworthy that concurring Justice Black "agree[d] with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states,"[98] and Justice Murphy, author of the principal dissent, "agree[d] with the Court that the Fourteenth Amendment prohibits activities which are prescribed by the search and seizure clause of the Fourth Amendment."[99]

In any event, a decade later, in *Elkins v. United States*,[100] any disagreement over whether, as a result of *Wolf*, the Fourteenth Amendment had "incorporated" the *substantive* provisions of the Fourth Amendment was resolved in favor of "incorporation." Ironically, *Elkins* interpreted the *Wolf* opinion in a way that evoked strong protests from its author, Justice Frankfurter.[101]

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[97] *See* 338 U.S. at 28, 33. For the view that the best reading of *Wolf* is that it viewed the Fourteenth Amendment as "incorporating" the substantive provisions of the Fourth Amendment but not the exclusionary rule, *see* Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense*, 1993 U. Ill. L. Rev. 261, 267 note 43; Kamisar, *supra* note 43, at 1101–08. *See also* Allen, *supra* note 15, at 9, pointing out that although there is no indication that the search of Dr. Wolf's office was aggravated or egregious "the Court had apparently treated the police behavior in *Wolf* as violating the defendant's Fourteenth Amendment rights."

[98] *Id.* at 39.

[99] *Id.* at 41.

[100] 364 U.S. 206 (1960).

[101] Dissenting in *Elkins*, 364 U.S. at 206–07, Justice Frankfurter, joined by Clark, Harlan and Whittaker, JJ., maintained that the *Wolf* opinion had stated that "only what was characterized as the 'core of the Fourth Amendment,' not the Amendment itself, is enforceable against the States." But in his opinion of the Court in *Wolf* Justice Frankfurter never said that "only . . . the 'core of the Fourth Amendment,' not the Amendment itself" applies to the states. What he did say was: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society" and therefore "enforceable against the States through the Due Process Clause." 338 U.S. at 25–26. Moreover, as noted earlier, Justice Frankfurter never discussed whether the illegal search that took place in *Wolf* did violate the "core of the Fourth Amendment"; in fact, he did not discuss the search at all.

It may strike many as anomalous for a majority of the Court to interpret an earlier opinion differently than the author of that opinion. But *Elkins* was not the only time Justice Frankfurter wrote a dissent maintaining that the majority had misread one of his earlier opinions for the Court. The same thing had happened six years earlier in Irvine v. California, 347 U.S. 128 (1954). Then, too, Frankfurter had written an angry dissent insisting that the Court had misread one of his earlier opinions (*Rochin*, *supra* note 12).

Elkins overturned the "silver platter" doctrine, the rule that a federal prosecutor may use evidence illegally seized by a *state* officer in a federal case so long as the evidence "secured by state authorities is turned over to the federal authorities on a silver platter."[102]

Although Justice Stewart, writing for the majority in *Elkins*, noted that "we are not here directly concerned" with "the ultimate determination in *Wolf*"[103] (the holding that the Fourteenth Amendment does not require the state courts to exclude illegally seized evidence), "*Wolf*'s underlying constitutional doctrine"[104] was another matter:

> [N]othing could be of greater relevance to the present inquiry than the underlying constitutional doctrine which *Wolf* established. For there it was unequivocally determined by a unanimous Court [on this point] that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. . . .
>
> The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared in 1949.[105]

Not surprisingly, *Mapp* relied heavily on what might be called *Wolf*'s initial or underlying holding—that Fourteenth Amendment Due Process had "incorporated" the substantive provisions of the Fourth Amendment. *Mapp* took "incorporation" of the Fourth Amendment one step further:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. . . . [I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an es-

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Moreover, Frankfurter was not the only Justice to have this experience. In Kirby v. Illinois, 406 U.S. 682 (1972), the Court interpreted Justice Brennan's majority opinion in United States v. Wade, 388 U.S. 218 (1967) (a landmark case dealing with the right to counsel at lineups), differently than he did. Brennan dissented. The same thing happened to Brennan again in United States v. Ash, 413 U.S. 300 (1973).

[102] Lustig v. United States, 338 U.S. 74, 78–79 (1949). *See generally* Kamisar, *supra* note 97.

[103] 364 U.S. at 214.

[104] *Id.*

[105] *Id.* at 213.

sential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case.[106]

3. *Rochin v. California*

Rochin, the noisome "stomach pumping" case,[107] demonstrates that even in pre-*Mapp* days, even when the evidence seized was indisputably trustworthy (it is hard to think of any evidence more trustworthy than morphine capsules taken from a defendant's stomach), the sky was not the limit for state law enforcement officials. *Rochin* arose as follows:[108]

Three Los Angeles County deputy sheriffs broke into defendant's room. When they spotted two capsules on a night stand near defendant's bed, they asked what they were. Rochin responded by grabbing the capsules and putting them in his mouth. A struggle ensued, in the course of which the deputies tried forcibly to extract the items from Rochin's mouth. But he managed to swallow them. (The California courts found that the deputies had unlawfully assaulted and battered defendant while they were in his room.)

Rochin was then handcuffed and taken to a hospital. There, at the deputies' direction and against defendant's will, a doctor forced an emetic solution through a tube in Rochin's stomach. This "stomach pumping" caused Rochin to vomit up the two capsules, which turned out to contain morphine.

Even though *Wolf* was on the books, the police misconduct in *Rochin* was more than the Supreme Court could bear. It reversed Rochin's conviction without a dissent.[109] Justice Frankfurter delivered the opinion of the Court. Applying the "general considerations" of due process "to the circumstances of the present case,"[110] he declared:

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[106] *Mapp*, 367 U.S. at 655–56.

[107] *Rochin* is discussed briefly in note 12 *supra*.

[108] This summary of the facts is based on the account set forth in the *Rochin* opinion, 342 U.S. at 166–67.

[109] However, both Justice Black and Justice Douglas wrote concurring opinions, expressing strong disagreement with the approach taken by Justice Frankfurter, author of the majority opinion. Black rejected the majority's view that "the Due Process Clause empowers this Court to nullify any state law if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.' " *Id.* at 175. Although he realized that a majority of the Court had refused to apply the Fifth Amendment to the states, Black maintained that the "stomach pumping" had violated Rochin's privilege against self-incrimination. *See id.* Douglas also expressed the view that capsules taken from a person's stomach, over his objection were "inadmissible because of the command of the Fifth Amendment." *Id.* at 179. According to him the majority's approach (which asked whether the police had violated "the decencies of civilized conduct") made the admissibility of evidence "turn not on the Constitution but on the idiosyncrasies of the judges who sit here." *Id.*

[110] *Id.* at 172.

> This is conduct that shocks the conscience.... [T]his course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[111]

Perhaps because he wanted to put as much distance between *Wolf* and *Rochin* as he could, Justice Frankfurter's nine-page *Rochin* opinion "studiously avoided [the search-and-seizure question] and never once mentioned the *Wolf* case."[112] If *Mapp* started out as an obscenity case but became a search and seizure case along the way, it might be said that *Rochin* started out as an "aggravated" search and seizure case but wound up looking very much like a coerced confessions case:

> [The coerced confession cases] are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law [means] ... that convictions cannot be brought about by methods that offend "a sense of justice." *It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.*
>
> To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reasons for excluding coerced confessions.... [Coerced confessions] are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. *Coerced confessions offend the community's sense of fair play and decency. So here,* to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law.[113]

Although everybody I have ever talked to about the "stomach pumping" case has agreed that the Court should have overturned the defendant's conviction, it is not easy to reconcile Justice Frankfurter's majority opinion in *Rochin* with his majority opinion in *Wolf* (which may be why Frankfurter's *Rochin* opinion never mentions *Wolf*).

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[111] *Id.*

[112] Irvine v. California, 347 U.S. 128, 133 (1954) (principal opinion by Jackson, J.). Justice Jackson pointed this out in the course of rejecting dissenting Justice Frankfurter's argument that *Rochin* applied to the facts of *Irvine*. Jackson succeeded in arguing that *Rochin* did not apply to blatant or egregious illegal searches, but only to cases "involv[ing] coercion, violence or brutality to the person." *Id. See* text at notes 133–35 *infra*.

[113] 342 U.S. at 173 (emphasis added).

The *Wolf* Court was impressed by the fact that most of the state courts that had passed on the admissibility of evidence obtained by unlawful search and seizure had rejected the federal exclusionary rule.[114] But the *Rochin* Court did not consider it worth mentioning (although concurring Justice Douglas did) that "[t]he evidence obtained from the accused's stomach would be admissible in the majority of states where the question has been raised."[115]

The *Wolf* Court gave great weight to the fact that the many states that had rejected the federal exclusionary rule had "not left the right to privacy without other means of protection" (such as internal police discipline and tort actions and criminal prosecutions against offending police officers).[116] But the *Rochin* Court thought it irrelevant that the "stomach pumping" and the earlier physical struggle to retrieve the capsules from Rochin before he could swallow them constituted more than one tort and more than one crime.

Indeed, as the *Rochin* court itself informed us, "the [California] District Court of Appeal affirmed [Rochin's] conviction, despite the finding that the officers 'were guilty ... of unlawfully assaulting and battering defendant while in [his] room' and 'were guilty of unlawfully assaulting, battering, torturing, and falsely imprisoning the defendant at the alleged hospital.' "[117] Moreover, not only did the California courts make plain that the police officers had committed more than one tort and more than one crime, but, as the *Rochin* Court told us, "[a]ll the California judges who have expressed themselves in this case have condemned the conduct in the strongest language."[118]

Why, then, would upholding Rochin's conviction have amounted to "sanctioning" the police misconduct and "affording" it "the cloak of law"?[119] And if it would have had this effect, why didn't the Supreme Court's affirmance of Wolf's conviction have *the same effect*?

In overturning Rochin's conviction, the Court told us that it had been "brought about by methods that offend 'a sense of justice.' "[120] But how does this distinguish the *Wolf* case? The best reading of *Wolf* (and the reading that a majority of the Court was soon to give it),[121] is that,

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[114] *See Wolf*, 338 U.S. at 29.

[115] *Id.* at 177 (Douglas, J., concurring).

[116] *Id.* at 30.

[117] *Rochin*, 342 U.S. at 166–67.

[118] *Id.* at 174.

[119] *See* text at note 113 *supra*.

[120] *Id.*

[121] *See* text at notes 105–06 *supra*.

although *Wolf* declined to make the exclusionary rule a limitation on the states, the police conduct at issue violated Fourteenth Amendment Due Process. Doesn't *every* police action that violates due process offend a sense of justice? (If not, why is it a violation of due process?)

One way to reconcile *Rochin* with *Wolf* is to say that although searches that would have violated the Fourth Amendment if conducted by federal officers do violate Fourteenth Amendment Due Process when made by state officers, *the use of evidence* so acquired in a state prosecution does not offend due process unless the police methods involved amount to an egregious or shocking violation of due process. But this is a curious proposition.

To say that state police conduct is unconstitutional—that it violates the minimal standards of due process—would seem to be as bad a label as one can put on police behavior. Why should any more have to be required? Why must the police be found to have violated *sub-minimal* standards before the evidence they obtained has to be excluded?[122]

Was the unlawful search in *Wolf*, unlike the police misconduct in *Rochin*, only a "bare" or "mild" violation of due process? How does one "barely" or "mildly" violate what is "basic to a free society" and "implicit 'in the concept of ordered liberty' "?[123]

One might say that the rights the police violated in *Wolf* were merely rights "basic to a free society" whereas the rights flouted in *Rochin* were rights "*very* basic to a free society."[124] However, to say the least, "[t]here is a certain inelegance" in speaking of constitutional rights that way.[125]

4. *Irvine v. California*

Although *Rochin* carved out an exception to *Wolf*'s rule of admissibility for evidence obtained by lawless state police, *Irvine v. California*[126] left no doubt that the exception was quite small. Because the police misconduct was so egregious—even the Justices who voted to uphold the defendant's convictions conceded that what the police had done "would be almost incredible if it were not admitted"[127]—*Irvine* was an excellent

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[122] *See* the discussion in Kamisar, *supra* note 43, at 1121–29.

[123] *See Wolf*, 338 U.S. at 27–28: "The security of one's privacy against arbitrary intrusions by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

[124] *See* Allen, *supra* note 15, at 9.

[125] *See id.*

[126] 347 U.S. 128 (1954).

[127] *Id.* at 132.

case to test the limits of *Wolf*'s rule of admissibility. The Court's answer was clear: The latitude *Wolf* had given state courts to admit illegally seized evidence was far-reaching. (To put it another way, there might be a "shock the conscience" exception to *Wolf*, but what shocked the Court's conscience? According to *Irvine*, "not very much.")[128]

In *Irvine*, in order to overhear conversations between defendant (a suspected bookmaker) and his wife, the police made repeated illegal entries into his home, first to install a secret microphone in the hall, then to move it to the bedroom, and finally to move it to a closet. The electronic surveillance lasted for over a month. Officers were posted in a nearby garage to listen.[129]

Justice Jackson, who wrote the principal opinion,[130] did not spare the police:

> That officers of the law would break and enter a home, secrete a [microphone], even in a bedroom, and listen to the conversation for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government. . . .[131]

Nevertheless, the Court, per Justice Jackson, rejected the efforts to bring *Irvine* "under the sway" of *Rochin*:[132] The key to *Rochin*, maintained Jackson, was "coercion . . . applied by a physical assault upon [defendant's] person to compel submission to the use of a stomach pump."[133] That factor was "totally lacking here."[134] However egregious

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[128] Dale W. Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 Neb. L. Rev. 185, 191 (1961).

[129] *See* 347 U.S. at 132.

[130] Justice Jackson was joined by Chief Justice Warren and Justices Reed and Minton. The fifth vote was provided by Justice Clark, who concurred in the judgment.

Clark had no love for *Wolf* (he stated at the outset of his concurrence that he would have applied the exclusionary rule to the states if he had been in the Court when *Wolf* was decided), but he had no love for *Rochin* either (*id.* at 138):

> Of course, we could sterilize the rule announced in *Wolf* by adopting a case-by-case approach to due process, in which inchoate notions of propriety concerning local police conduct guide our decisions. But . . . the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. *Rochin* bears witness to this.

[131] *Id.* at 132.

[132] *Id.* at 133.

[133] *Id.*

[134] *Id.*

the facts in *Irvine*, "they do not involve coercion, violence or brutality to the person."[135]

Dissenting Justice Frankfurter insisted that *Rochin* called for the exclusion of the evidence at issue in *Irvine*. According to Frankfurter, the decisive factor in *Irvine* was the "aggravating" police conduct "which the Court finds repulsive."[136] Frankfurter continued:

> There was lacking here physical violence, even to the restricted extent employed in *Rochin*. We have here, however, a more powerful and offensive control over the Irvines' life than a single, limited physical trespass. Certainly the conduct here went far beyond a bare search and seizure.... Surely the Court does not propose to announce a new absolute, namely that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials.[137]

For what it is worth, I agree with Justice Frankfurter. Indeed—because the police misconduct in *Irvine* lasted for over a month—I, for one, find it more "outrageous" and more "shocking" than the police misconduct in *Rochin*. (Perhaps this just illustrates the unmanageable, unprincipled nature of the *Rochin* "shock the conscience" test.)

Although I think Justice Frankfurter's reading of *Rochin* was better than Jackson's, the latter's reading was at least plausible. Although Frankfurter gave no indication he was aware of this, his opinion in *Wolf* had come back to haunt him in *Irvine*. At times it was hard to believe that the same Justice who dissented in *Irvine* had written the opinion of the Court in *Wolf*.

Although Justice Frankfurter had emphasized in *Wolf* that the exclusion of the illegally seized evidence was *not the only way* to enforce the security of one's privacy against lawless intrusions by the police, he protested in *Irvine*:

> Nor can we dispose of this case by satisfying ourselves that the defendant's guilt was proven by trustworthy evidence and *then finding, or devising, other means* whereby the police may be discouraged from using illegal methods to acquire such evidence.[138]

But isn't this the way the Court disposed of the *Wolf* case?

In *Irvine*, dissenting Justice Frankfurter maintained that not even suspending or dismissing or prosecuting the law enforcement officials

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[135] *Id.*

[136] *Id.* at 146.

[137] *Id.* at 145–46.

[138] Id. at 148 (emphasis added).

responsible for the invasion of the Irvines' privacy could justify the use of the resulting evidence in a state prosecution:

> If, as in *Rochin*, "[o]n the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause," *it is no answer to say* that the offending policemen and prosecutors who utilize outrageous methods should be punished for their misconduct.[139]

But why *was it* an answer to say that in *Wolf*? Wasn't Wolf's conviction, no less than Irvine's, brought about by police methods that offended due process? Why was the availability (or at least possibility) of alternative ways of enforcing the protection against unreasonable search and seizure so important in *Wolf* but so insignificant (indeed, according to Frankfurter, irrelevant) in *Irvine*?[140]

Unlike his dissenting colleague, Justice Jackson thought *it was* a good answer to say that the offending police officers whose "almost incredible" conduct brought about Irvine's conviction should be punished. It appeared that the California police had committed a federal crime, *i.e.*, "under color" of law, they had deprived the Irvines of "rights, privileges or immunities secured or protected by the Constitution of the United States."[141] Therefore, announced Justice Jackson, he was directing "the Clerk of this Court ... to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States."[142]

Only the newest member of the Court, Chief Justice Warren, shared Justice Jackson's view that the case should be sent to the Attorney General for possible prosecution.[143] Would Jackson have picked up War-

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[139] *Id.* (emphasis added).

[140] One who supported Frankfurter's position might say courts are content to rely on alternatives to the exclusionary rule when the police violations of due process are "ordinary" or "routine," but *not* when they are flagrant and deliberate. In these latter cases, and *Rochin* and *Irvine* are good examples, the courts must exclude the evidence to show their strong disapproval; alternative remedies simply will not suffice.

It strikes me, however, that the egregiousness of the police misconduct cuts the other way. The *need to exclude the evidence* is *greater* in ordinary or routine cases of police misconduct because the alternatives to excluding the evidence are much less likely to be effective. "Routine" or "ordinary" cases of police lawlessness are *less likely* to attract the attention of the press, *less likely* to lead to discipline of or prosecutions against the offending officers and *less likely* to excite the sympathy of jurors when those mistreated by the police seek damages. In short, if the courts cannot rely on alternatives to the exclusionary rule in outrageous cases such as *Rochin* and *Irvine*, then they certainly cannot and should not rely on such alternatives in less flagrant cases.

[141] *See id.* at 137–38.

[142] *Id.* at 138.

[143] *See id.* at 137.

ren's vote if he had not taken this step? We shall probably never know. But we do know that Jackson's move backfired.

It turned out that the police officers who had concealed the microphone in the Irvines' home had been acting under the order of the local chief of police and with the full knowledge of the local prosecutor. Therefore, concluded the Justice Department, "it would be both useless and inadvisable to present [the] matter to the Federal grand jury."[144]

All the Justices who sat on the *Mapp* Court probably knew that the pursuit of alternatives to the exclusionary rule in *Irvine*, one of the most outrageous cases of police behavior ever to reach the Supreme Court, had ended with a whimper. Chief Justice Warren certainly knew about it. The Justice Department official who had concluded that there was no point prosecuting the police involved in *Irvine* had been one of Warren's former deputies and remained one of his closest friends.[145]

According to one of his biographers, later in his career Warren repeatedly told the story of the *Irvine* case.[146] One of the lessons he drew from that case *and its aftermath* was that the Court could not rely on alternative remedies to the exclusionary rule.[147]

Two years before *Mapp* was handed down, I wrote:

> [F]or better or worse, [the *Wolf*] doctrine seems more firmly imbedded in the law today than when first promulgated. For on its facts, *Irvine* goes much further. Yet, while *Irvine* well illustrates "the tendency of a principle to expand itself to the limits of its logic," there is also precedent for the view that a principle is never so vulnerable as when it is so expanded.[148]

In retrospect, "the demonstrated incapacity of the *Wolf* doctrine to meet the problem of the egregious wrong must be regarded as an important milestone on the road to *Mapp*."[149]

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[144] *See* Comment, *State Police, Unconstitutionally Obtained Evidence and Section 242 of the Civil Rights Statute*, 7 Stan. L. Rev. 76, 94 note 75 (1954).

[145] *See* Cray, *supra* note 27, at 181, 270–71; JOHN D. WEAVER, WARREN THE MAN, THE COURT, THE ERA 196, 198 (1967). The Justice official was Warren Olney, III, the assistant attorney general in charge of the criminal division.

[146] *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 266 (1982).

[147] *See id. See also* Cray, *supra* note 27, at 374.

[148] Kamisar, *supra* note 43, at 1198. The quotation about the tendency of a principle to expand is from BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1925).

[149] Allen, *supra* note 15, at 10.

5. *People v. Cahan*

Although it was only a state supreme case, *People v. Cahan*[150] (which saw California adopt the exclusionary rule on its own initiative) may be viewed as another milestone on the road to *Mapp*. In *Defore*, Cardozo had warned that the exclusionary rule could free a dangerous criminal simply because the constable had blundered.[151] But *Cahan* illustrated (as had *Irvine* only a year earlier) that the rule of admissibility could permit the use of evidence obtained by the most flagrant and deliberate police misconduct.

As one contemporary observer said of the police conduct involved in *Cahan*: The police illegality in this case "is illegality elaborately planned with the connivance of the Los Angeles Chief of Police. It is not the case of the over-eager rookie misjudging the fine lines of the law of arrest. It is constitutional violation as a matter of policy."[152]

"Cardozo's statements [in *Defore*] and his prestige have often been relied upon by opponents of the [exclusionary] rule."[153]

This is hardly surprising. After all, Cardozo was undoubtedly the most respected state judge of his generation. But Roger Traynor, author of the *Cahan* opinion, was widely regarded as the most respected state judge of *his* generation.[154] Moreover, when it came to the exclusionary rule, Traynor had a special credibility. In 1942, when he was a new judge, he had written the opinion of the California Supreme Court *reaffirming the admissibility* of illegally-seized evidence.[155] By 1955, however, it had become apparent to Traynor, as he later explained, that illegally seized evidence "was being offered and admitted as a routine procedure" and it had become "impossible to ignore the corollary that

[150] 44 Cal. 2d 434, 282 P.2d 905 (1955).

[151] *See* note 54 *supra*.

[152] Monrad G. Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. U. L. Rev. 65, 75–76 (1957). In *Cahan*, Los Angeles police officers, with the approval of their chief of police, had surreptitiously installed microphones in two houses occupied by some of the defendants. Then, after making forcible entries into the houses, the police had made various warrantless arrests, searches and seizures. The California Supreme Court called the police action a "flagrant violation" of both the federal and state constitutions. *See* 44 Cal. 2d at 436, 282 P.2d at 906.

[153] Weinstein, supra note 43 at 155–56.

[154] *See* Powe, *supra* note 11, at 199; Walter V. Schaefer, *Chief Justice Traynor and the Judicial Process*, 53 Calif. L. Rev. 11, 24 (1965).

[155] People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942). Ironically, Earl Warren was the California Attorney General who had successfully urged Traynor and his colleagues to take this position.

illegal searches and seizures were also a routine procedure, subject to no effective deterrent."[156]

Justice Traynor wrote a balanced, scholarly opinion. Indeed, the arguments of scholars and judges *in favor* of admitting illegally seized evidence "have seldom been stated more forcefully" than in the *Cahan* opinion.[157] But his opinion was also quite powerful:

> [W]ithout fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted therein. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the City employs and pays them.
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> * * *
>
> We have been compelled to [overrule our precedents permitting the use of illegally seized evidence] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law-enforcement officers.[158]

In *Elkins*,[159] decided only a year before *Mapp*, the Court noted that "[t]he experience in California has been most illuminating,"[160] and proceeded to quote thirteen lines from Justice Traynor's *Cahan* opinion. (It also quoted, not approvingly, one sentence from Cardozo's opinion in *Defore*, the only other state case quoted in *Elkins*.)[161]

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[156] Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L.J. 319, 321–22.

[157] Monrad G. Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 Calif.L.Rev. 103, 107 (1965). Paulsen considered the *Cahan* opinion "a great achievement" because "[a]ll voices are heard and we are told why Reason chooses to follow one set of arguments rather than another." *Id.*

[158] 282 P.2d at 907, 911–12. As the quotation from the opinion in the text indicates, Justice Traynor was a proponent of the "one-government" approach to the admission of illegally seized evidence. *See also id.* at 912–13.

[159] *See* text at notes 100–05 *supra* and accompanying footnotes.

[160] 364 U.S. at 220.

[161] The *Mapp* Court thought it "significant" that California is "now following [the] exclusionary rule," 367 U.S. at 651, and noted that its highest court had declared in *Cahan* that it had been "compelled to reach that conclusion because other remedies have completely failed . . ." *Id.* At another point, the *Mapp* Court observed that "[t]he experi-

The *Elkins* Court quoted something else, something that may have influenced some members of the Supreme Court as much, or even more than, the *Cahan* opinion itself—a statement by the California Attorney General that since *Cahan* was decided things were working out well:

> The over-all effects of the *Cahan* decision, particularly in view of the [search and seizure] rules now worked out by the [California] Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice.[162]

The Police–Prosecution Criticism of *Mapp*

The reaction of law enforcement officials when the Court finally imposed the exclusionary rule on all the states may well be the best evidence of the need for the rule. Many in law enforcement reacted as if the Fourth Amendment or its state constitutional counterpart had just been adopted.

New York City Police Commissioner Michael Murphy likened the *Mapp* case to a "tidal wave" and an "earthquake."[163] As the commissioner recalled some years later:

> I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as [*Mapp*]. . . . As the then commissioner of the largest police force in this country, I was immediately caught up in the entire problem of reevaluating our procedures, which had followed the *Defore* rule, and . . . creating new polices and new restrictions for the implementation of *Mapp*. . . . [Decisions such as *Mapp*] create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their very foundations upward. Retraining sessions had to be

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ence of California that . . . other remedies [than the exclusionary rule] have been worthless and futile is buttressed by the experience of other States." *Id.* at 652. (Once again, *Defore* was the only other state case bearing on the exclusionary rule quoted by the Court.)

[162] *Id.* at 220–21. The Court was quoting a letter from then Attorney General Edmund G. Brown to the *Stanford Law Review*, quoted in part in Note, Stan. L. Rev. 515, 538 (1957). For other extracts from this letter *see* Kamisar, *supra* note 43, at 1198.

Chief Justice Warren must have been impressed by both Justice Traynor's opinion in *Cahan* and the state attorney general's assessment of how the police were adjusting to it. Warren knew Traynor personally and, on the basis of his own dealings with him, respected him. *See* Weaver, *supra* note 144, at 74. As for the state attorney general's optimistic evaluation of how the police were adjusting to *Cahan*, this probably corroborated the Chief Justice's view that rulings criticized for "handcuffing the police" actually encouraged the police to work harder and to prepare their cases more carefully and thoroughly. *See* White, *supra* note 145, at 272, 277–78.

[163] *See* the quotation from Commissioner Michael Murphy set forth immediately below.

held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function.[164]

Why did *Mapp* have "such a dramatic and traumatic effect"? Why did it necessitate "retraining" from top to bottom? What was the *old* search and seizure training like? *Was there any?* How does one "implement" *Mapp*, a case that simply imposed *a remedy* for a violation of a body of law the police were supposed to be obeying all along?

What did the commissioner mean when he tried to defend his department's disinterest in the law of search and seizure prior to *Mapp* by noting that his department "had followed the *Defore* rule"? To be sure, *Defore* permitted New York prosecutors to *use* illegally seized evidence, but it did not—as the commissioner evidently believed—allow the police to *commit illegal searches.*

As Donald Dripps has observed, "[i]f effective civil remedies carried the political appeal that would commend them to legislators, those remedies would have forced the police to comply with the Amendment in the [years before] *Mapp* [and] *Mapp* would have discomfited the police but little."[165]

It appears that, prior to *Mapp*, the police were not the only New York law enforcement officials unfamiliar with and unconcerned about the law of search and seizure. Professor Richard Uviller, a New York prosecuting attorney when *Mapp* was handed down, recalled that he quickly "cranked out a crude summary" of federal search and seizure law just before the next state convention of district attorneys took place and that he "had an instant runaway best seller. It was as though we had made a belated discovery that the fourth amendment applied in the State of New York."[166] Uviller's last comment, I believe, sums up the situation in New York before and after *Mapp* quite well.

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[164] Michael Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 Tex. L. Rev. 939, 941 (1966).

Those who believed or assumed that various alternatives to the search and seizure exclusionary rule were adequate may have suffered an even greater blow when, unaware that there was a reporter in the audience, New York City Deputy Police Commissioner Leonard Reisman explained to a large group of detectives at a post-*Mapp* training session why they had to learn the law of search and seizure at this late date in their careers: "[In the past] nobody bothered to take out search warrants. . . . [T]he Supreme Court had ruled that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?" Sidney Zion, *Detectives Get a Course in Law*, N.Y. Times, Apr. 28, 1965, at 50, col. 1 (nat'l ed.).

[165] Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. Rev. 1559, 1606 (1996).

[166] H. Richard Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, 35 Vand. L. Rev. 501, 502 (1982).

The response of New York law enforcement officials to the imposition of the search and seizure exclusionary rule was hardly unique. When, six years earlier, in the *Cahan* case, the California Supreme Court adopted the exclusionary rule on its own initiative, the reaction of the Los Angeles Chief of Police, William Parker, was quite similar to the reaction his New York City counterpart would have when *Mapp* came down.

Chief Parker warned that as a result of *Cahan* his officers' "ability to prevent the commission of crimes has been greatly reduced."[167] But he promised that "[a]s long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule."[168]

However, the Exclusionary Rule does not impose any limitations on the police; the law of search and seizure does. And Chief Parker seemed to be saying that his officers would work within the "framework of limitations" imposed by the law of search and seizure *only so long as* "the Exclusionary Rule is the law of California."

In Pennsylvania, a young Philadelphia assistant district attorney (and a future U.S. Senator), Arlen Specter, made it clear that in his state, too, tort remedies, criminal prosecutions and internal police discipline had had little or no effect. He announced that *Mapp* had "*revolutionized*" police practice and prosecution procedures in the many states that had been admitting illegally seized evidence.[169] Indeed, he went so far as to call *Mapp* "the most significant event in criminal law since the adoption of the fourteenth amendment."[170]

Mr. Specter, too, seemed to confuse the *content* of the law of search and seizure (which proponents of the exclusionary rule need not, and have not always, defended) with the *exclusionary* rule—a *remedy*, a rule that "merely states the consequences of a breach of whatever principles might be adopted to control law enforcement officers."[171]

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[167] WILLIAM H. PARKER, PARKER ON POLICE 117 (O.W. Wilson ed. 1957).

[168] *Id.* at 131.

[169] Arlen Specter, *Mapp v. Ohio: Pandora's Problems for the Prosecutor*, 111 U. Pa. L. Rev. 4 (1962) (emphasis added). As the New York City Police Commissioner had done, one Pennsylvania judge likened *Mapp* to a natural disaster—a "hurricane" which "swept over our fair land last June." *Id.* at 4. Another Pennsylvania judge "was so surprised by the *Mapp* holding that he said it applied only to Ohio so far as he was concerned until the Pennsylvania appellate courts told him otherwise." *Id.* at 4–5.

[170] *Id.* at 4.

[171] Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. Crim. L. & Criminology & Police Sci. 255 (1961) (written on the eve of *Mapp*).

In Minnesota, however, the pattern of law enforcement responses to imposition of the exclusionary rule was broken. Another future U.S. Senator, and a future Vice President as well, Minnesota's young Attorney General, Walter Mondale, reminded an assemblage of distressed Minnesota officers that "the language of the Fourth Amendment is identical to the [search and seizure provision] of the Minnesota State Constitution" and that "*Mapp* did not alter one word of either the state or national constitutions."[172] Continued Mondale:

> [*Mapp*] does not reduce police powers one iota. It only reduces potential *abuses* of power. The adoption of the so-called "exclusionary rule" does not affect authorized police practices in any way. What was a legal arrest before, still is. What was a reasonable search before still is. . . .[173]

What Mondale said, in effect, was that if the police feared that the evidence they were acquiring in their customary manner would now be excluded by the courts, they must have been unmindful of the so-called alternative remedies to the exclusionary rule all these years and they must have been violating the guarantee against unreasonable search and seizure all along. That, I think, is the hard truth.

The "Original Understanding" of *Mapp*

A number of commentators have had great difficulty figuring out exactly what Justice Clark's rationale(s) for *Mapp* were. Thus, Thomas Schrock and Robert Welsh call Clark's statement that the exclusionary rule is "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a form of words"[174] an "incorrigibly ambiguous" passage, "mixing in about equal portions vague constitutional references, deterrence rationale, and empirical generalization."[175] Larry Yackle similarly observes that *Mapp* "ultimately fastened the exclusionary rule on the states in reliance upon *all* the rationales thus far imposed."[176]

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[172] Walter Mondale, *The Problem of Search and Seizure*, 19 Bench & B. Minn. 15, 16 (Feb. 1962).

[173] *Id.*

[174] 367 U.S. at 648.

[175] Schrock & Welsh, *supra* note 66, at 319, quoting 367 U.S. at 648.

[176] Yackle, *supra* note 66, at 418. Professor Yackle continues, *id.* at 418–19: "Thus the Court said that the exclusionary rule is 'an essential part' of the individual's personal rights under the Fourth and Fourteenth Amendments [367 U.S. at 657], that it gives to the courts 'that judicial integrity so necessary in the true administration of justice' [*id.* at 660], and also that its purpose 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way by removing the incentive to disregard it' [*id.* at 656]."

William Mertens and Silas Wasserstrom are also unhappy with Justice Clark's treatment of the exclusionary rule in *Mapp*. They do not think *Mapp* did what it should have—mark a return to the days when the Court "perceived a kind of natural, immutable affinity between the fourth amendment and the exclusionary rule":[177]

> [A]lthough the Court in *Mapp* invoked a concatenation of normative principles to support the extension of the exclusionary rule to the states, the bulk of its opinion was devoted to a defense of the rule on the empirical basis that it has proved to be the only effective means of enforcing the fourth amendment.[178]

I have to disagree. The only discussion of the inadequacy of "other means" of enforcing the right to privacy appears in Part II of Clark's opinion where he yielded, as have others, to the temptation to meet the author of the *Wolf* opinion on the latter's own battleground. However, all that Clark had to say in his opinion about "other remedies" is contained in sixteen lines.[179] So few lines in an eighteen page opinion does not seem to warrant the conclusion that "the bulk" of Clark's opinion was devoted to a defense of the exclusionary rule on an empirical basis.

Of course, it is not simply a matter of counting lines. Rather, it is a matter of reading those lines in light of the totality of the opinion. A quick look at the opinion follows:

- Part I of the *Mapp* opinion makes plain that it views the exclusionary rule as neither "a mere rule of evidence" or a product of the Court's "supervisory powers," but as *a "constitutionally required" doctrine.*[180]

- Part II tells us that the *Wolf* Court's reasons for not considering the exclusionary rule "essential to the right of privacy" "were bottomed on factual considerations."[181] *"[W]hile not basically relevant to the constitutional consideration"*[182]—these factual matters "could not, in any analysis, now be deemed controlling."[183]

- Part III concludes: "We hold that all evidence obtained by searches and seizure in violation of the Constitution is, *by that same authority*, inadmissible in a state court."[184]

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[177] Mertens & Wasserstrom, *supra* note 74, at 381.

[178] *Id.* at 382.

[179] *See* 367 U.S. at 651–53.

[180] *See id.* at 646–50 (emphasis added).

[181] *Id.* at 655 (emphasis added).

[182] *Id.* at 650–51.

[183] *Id.* at 653 (emphasis added).

[184] *Id.*

• The main thrust of Part IV is that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States," "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."[185] "[I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—*it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy*— be also insisted upon as an essential element of the right newly recognized by the *Wolf* case."[186]

The *Wolf* case had downgraded the protection against unreasonable search and seizure by "conditioning" its "enforcement" in a way that no other basic constitutional right's enforcement had been restricted.[187] But from this point on, those days are over. The Fourth Amendment is going to be enforced as "strictly against the States" as are other fundamental rights—such as "the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability."[188] This part of the opinion ends with the assurance that "*no man is to be convicted on unconstitutional evidence.*"[189]

• The fifth and last part of the Clark opinion begins by referring to "our holding that *the exclusionary rule is an essential part* of both the Fourth and Fourteenth Amendments."[190] It ends with the observation that "[b]ecause [the Fourth Amendment] *is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause*, we can no longer permit it to be revocable at the whim of any police officer who . . . chooses to suspend its enjoyment. Our decision . . . gives to the individual no more than that which the Constitution guarantees him. . . ."[191]

I do not deny that Justice Clark scrambled the analysis somewhat and caused some confusion by, for example, calling the exclusionary rule "a constitutionally required . . . deterrent safeguard."[192] The trouble, I believe, was that Justice Clark was trying to get maximum approval for the overruling of *Wolf*. Evidently he thought he could do so by advancing as many reasons (or arguments) for the exclusionary rule he could find.

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[185] *Id.* at 655.

[186] *Id.* at 656 (emphasis added).

[187] *Id.* at 656.

[188] *Id.*

[189] *Id.* at 657 (emphasis added).

[190] *Id.* (emphasis added).

[191] *Id.* (emphasis added).

[192] *See* text at note 174 *supra.*

Evidently Clark also thought he could do so by refuting all the arguments the rule's critics had ever made. (One of those, of course, was the claim that the exclusionary rule was not an effective deterrent or that it was not any better than "other methods" of enforcing the protection against unreasonable search and seizure.)

I agree with Steven Schlesinger and Bradford Wilson:

> It is true that Justice Clark discussed deterrence and concluded that "other remedies ... have been worthless and futile." ... Yet it is clear that he was only trying to counter *Wolf*'s claim that the exclusionary rule was bad law *from a* policy *standpoint*. The *only* reason Justice Clark engaged in that factual discussion was that he read *Wolf* to be "bottomed on factual considerations" [367 U.S. at 651] as opposed to constitutional analysis or deduction, and out of respect for the precedent he was overturning, he felt obliged to meet and defeat it on its own grounds first, before moving to the basis of his own position.[193]

It may well be that the Justices who voted to overrule *Wolf* were heavily influenced by the belief that all the alternatives to the exclusionary rule had turned out to be woefully inadequate. *But that is not the way Clark's opinion is written.* The way it is written, the exclusionary rule does not rest on an empirical proposition.[194] Rather, it is a command of the Constitution.

As I noted earlier, a number of commentators have read *Mapp* differently than I do. But they did so many years after *Mapp* was handed down. I cannot help wondering whether they were operating under what in this instance might be called the *handicap* of hindsight. They were looking back on the landmark search and seizure case through the filter of subsequent cases that have downgraded the exclusionary rule and misread or distorted Clark's opinion in *Mapp*.[195]

Professor Francis Allen, who wrote a major article on the *Mapp* case *the year it was decided*, seemed to have little trouble understanding the basic reasoning of the Clark opinion. Although the opinion "does not confine itself to the statement of a 'syllogism,' " Justice Clark's "essen-

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[193] Steven R. Schlesinger & Bradford Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 Duquesne L. Rev. 225, 235–36 (1980). Immediately after observing that *Wolf*'s rejection of the *Weeks* doctrine was "bottomed on factual considerations," 367 U.S. at 651, Clark said his opinion was going to consider "the factual grounds upon which *Wolf* was based" even though these factual considerations "are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment." *Id.* A short time later, *see id.* at 653, Clark made this point again.

[194] *Cf.* Allen, *supra* note 3, at 537.

[195] *See* text at notes 200–233 *infra*.

tial position," reported Professor Allen, "is that the exclusionary rule is part of the Fourth Amendment; the Fourth Amendment is part of the Fourteenth; therefore, the exclusionary rule is part of the Fourteenth."[196]

Post-*Warren* Court Developments

Concurring in *Mapp*, Justice Douglas commented that the overruled *Wolf* case had evoked "a storm of constitutional controversy which only today finds its end."[197] He could not have been more wrong. The controversy was not only to intensify but to engulf the *Weeks* or *federal* exclusionary rule itself.[198]

Since *Mapp* relied to a significant extent on the premise that the exclusionary rule was an essential part of the Fourth Amendment and took the position that "in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary" to extend the exclusionary rule as well,[199] critics of *Mapp* soon began directing their fire at the efficacy, validity and constitutional basis of the *Weeks* or federal exclusionary rule itself. And they did so with great force and much success.

1. *The "Deterrence" Rationale and "Cost-Benefit" Analysis Gain Ascendancy—and the Thrust of the Exclusionary Rule Narrows*

In the post-Warren Court era, the "deterrence" rationale and "cost-benefit" analysis came to the fore.[200] This approach bloomed in *United*

[196] Allen, *supra* note 15, at 26. *See also id.* at 23–24. *Cf.* Weinstein, *supra* note 153, at 150. Francis Allen was not only a leading commentator on *Mapp*, but the earliest critic, and the most redoubtable critic, of *Wolf*. *See* Allen, *supra* note 73.

[197] 367 U.S. at 670.

[198] As Telford Taylor has noted, the Court's division in the *Mapp* case "did not concern the merits of the [federal or Fourth Amendment] exclusionary rule," but only the application of the rule to the states. "That is the issue on which the justices divided, and there is not a word in [Justice Harlan's dissenting opinion] suggesting that the rule is intrinsically bad," TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 20–21 (1969).

[199] 367 U.S. at 655–56.

[200] One might say that the deterrence rationale came to the fore even before the Warren Court disbanded. Although the case could have been limited to its special facts, the deterrence rationale for the exclusionary rule is the dominant theme in Linkletter v. Walker, 381 U.S. 618 (1965), which declined to give *Mapp* full retroactive effect. The Court was under tremendous pressure to reach this result because applying the exclusionary rule announced in *Mapp* to cases which had become "final" (beyond direct review) before *Mapp* was decided "would tax the administration of justice to the utmost." *Id.* at 637. It is highly unlikely that in a case prosecuted in a pre-*Mapp* "admissibility" jurisdiction the defendant would have dwelt on the illegality of a search or seizure or that the court would even have allowed him to develop this point. But the understandably strong pressure to limit the

States v. Calandra,[201] the most important exclusionary rule case of the 1970s. In the course of ruling that grand jury witnesses may not refuse to answer questions on the ground that the questions were based on the fruits of an unlawful search, the *Calandra* Court did not treat the exclusionary rule with the constitutional respect *Mapp* had.

The *Calandra* majority, per Justice Powell, characterized the rule—one might say disparaged it—as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved."[202] Thus, whether the exclusionary rule should be applied "presents a question not of rights but of remedies"—a question to be answered by weighing the "likely 'costs' " of the rules against the "likely 'benefits.' "[203]

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impact of *Mapp* led the *Linkletter* Court (per Clark, J.) to rest the exclusionary rule almost entirely on an empirical basis.

As I have observed elsewhere, Kamisar, *supra* note 56, at 630, 631–32, "[o]ne might say that *Linkletter* applied *Wolf*'s way of thinking about the exclusionary rule 'retroactively' to *Mapp*.... [T]he *Linkletter* Court strongly implied ... that the exclusionary rule is 'an essential ingredient' of the fourth amendment only *because*, and only *so long as*, it is 'the only effective deterrent to lawless police action' " (quoting 381 U.S. at 636–37). *See generally* Kamisar, *supra*, at 627–33 and the authorities quoted and cited therein.

Despite their popularity in judicial opinions and the legal literature, the terms "deterrence" or "deterrent effects" in the search and seizure context are quite misleading. "Deterrence" suggests that the exclusionary rule is supposed to influence the police the way the criminal law is supposed to affect the general public. But the rule does not, and cannot be expected to, "deter" the police the way the criminal law is supposed to work. The rule does not inflict a "punishment" on police who violate the Fourth Amendment; exclusion does not leave the police in a worse position than if they had never violated the Constitution in the first place.

However, because the police are members of a structural governmental entity, the rule influences them, or is supposed to influence them, by "systemic deterrence," *i.e.*, through a department's institutional compliance with Fourth Amendment standards. *See* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. Pitt. L. Rev. 307, 319–20, 350–51 (1982); Mertens & Wasserstrom, *supra* note 74, at 394, 399; Pierre Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. Crim. L. Criminology & P.S. 875, 882–83; Yackle, *supra* note 66, at 426.

Despite the widespread use of the "deterrence" terminology, it seems more accurate to view the exclusionary rule as a "disincentive" or "counterweight"—a means of eliminating significant incentives for making illegal searches, at least where the police contemplate prosecution and conviction. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 431 (1974).

[201] 414 U.S. 338 (1974).

[202] *Id.* at 348.

[203] *Id.* at 348, 354, 349.

The post-*Mapp* way of thinking about the exclusionary rule enabled critics of the rule to gain some important victories. This is hardly surprising. The "costs" of the exclusionary rule are immediately apparent—the "freeing," for example, of a drug dealer—but the "benefits" of the rule are hard to grasp.

One *could* say that the benefits "involve safeguarding a zone of dignity and privacy for every citizen, controlling abuses of power [and] preserving checks and balances."[204] And one *could* regard these goals as "pretty weighty benefits, perhaps even invaluable ones."[205] But the Burger and Rehnquist Courts have not done so. Instead, they have characterized the benefits of the rule "as abstract [and] speculative."[206]

On the other hand, the Court has underscored what it thinks are the severe *costs* of the rule.[207] Thus, it has called the rule a "drastic

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[204] Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 Wash. U. L.Q. 11, 19 (1988).

[205] *Id.*

[206] *Id.*

[207] However, a five-year empirical study of California data by Thomas Davies, called "[t]he most careful and balanced assessment conducted to date of all available empirical data," 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 58 (3d ed. 1996), reveals that the exclusion of evidence in murder, rape, and other violent cases is extremely rare. *See* Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the Costs of the Exclusionary Rule*, 1983 Am. B. Found. Res. J. 611, 640, 645. "The most striking feature of the data," reports Professor Davies, "is the concentration of illegal searches in drug arrests (and possibly weapons possession arrests) and the extremely small effects in arrests for other offenses, including violent crimes." *Id.* at 680.

The California data reveals that less than 0.3% (fewer than three in 1,000) of arrests for all non-drug offenses are rejected by prosecutors because of illegal searches. *Id.* at 619. Davies estimates that "the cumulative loss of drug arrests at all stages of felony processing in California is around 7.1%." *Id.* at 681. In United States v. Leon, 468 U.S. 897, 907 note 6 (1984), the Court, per Justice White, estimated that "the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%."

One may argue, as the Court did in *Leon*, that the small percentage of cases lost "mask a large absolute number." *Id.* As Davies points out, however, "raw numbers are not as useful for policy evaluation as percentages. In a system as large as the American criminal justice system ... almost any nationwide measurement or estimate will look larger if expressed in raw numbers" Davies, *supra* at 670.

A proponent of the exclusionary rule could hardly resist the temptation to ask: What is all this talk about the "costs" of *the exclusionary rule*? Are the costs any different than those that would be exacted by *any* equally effective remedy? Doesn't a society whose police *comply with the Fourth Amendment in the first place* (because of an effective tort remedy or internal discipline or some other reason) "pay the same price" as the society whose law enforcement officials cannot use the evidence they obtained because they violated the Fourth Amendment? Don't both societies convict fewer criminals?

measure,"[208] an "extreme sanction,"[209] a rule that "exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case,"[210] and one whose application is "contrary to the idea of proportionality that is essential to the concept of justice."[211]

Given the Court's characterization of the "costs" and "benefits" to be balanced, the outcome is quite predictable. Indeed, although cost-benefit analysis sounds objective, even scientific, it is hard to avoid the conclusion that in search-and-seizure cases, at least, it simply gives back the values and assumptions the Court feeds into it.

During the cost-benefit analysis era, the Court failed to apply the exclusionary rule to various settings. In the aforementioned *Calandra* case, it declined to apply the rule in grand jury proceedings. In *Stone v. Powell*,[212] it greatly limited the circumstances under which search-and-seizure claims could be raised on federal habeas corpus proceedings. In *United States v. Janis*,[213] it found the rule inapplicable in federal civil tax proceedings. And in *I.N.S. v. Lopez-Mendoza*,[214] the Court deemed the rule inappropriate in civil deportation proceedings.

The cost-benefit approach to the exclusionary rule culminated in *United States v. Leon*,[215] the case that adopted a so-called good-faith exception (actually a "reasonable mistake" exception) to the exclusionary rule. As the *Leon* majority saw it, the "marginal or nonexistent benefits" produced by the exclusionary rule when the police reasonably but mistakenly rely on a search warrant that turns out to be invalid "cannot justify the costs of exclusion."[216]

Although *Leon* may appear to be little more than a routine application of the "cost-benefit" approach utilized in earlier cases, such as *Calandra*, it is not. The earlier cases were based on the assumption that the exclusionary rule—fully applicable in a criminal prosecution against the direct victim of an illegal search or seizure—*need not also be applied*

[208] United States v. Janis, 428 U.S. 433, 459 (1976).

[209] United States v. Leon, 468 U.S. 897, 926 (1984).

[210] United States v. Payner, 447 U.S. 727, 734 (1980).

[211] Stone v. Powell, 428 U.S. 465, 489 (1976).

[212] *See* note 211 *supra*.

[213] *See* note 208 *supra*.

[214] 468 U.S. 1032 (1984).

[215] 468 U.S. 897 (1984).

[216] *Id.* at 922.

in certain "collateral" or "peripheral" contexts "where no significant *additional* increment of deterrence [was] deemed likely."[217]

Until *Leon* was handed down, one could still say that the post-Warren Court's "deconstitutionalization" of the exclusionary rule—its view that the rule is only a "judicially created" remedial device whose application turns on a "pragmatic analysis of [its] usefulness in a particular context"[218]—had not affected the rule in its central application: the prosecutor's case-in-chief against the direct victim of an unreasonable search and seizure. But *Leon* made clear that here, too, the rule would be subjected to "interest-balancing" or "cost-benefit" analysis. In this setting, too, the Court would ask whether the rule could "pay its way."

The fact that the Court carved out an exception to the exclusionary rule in its central application and the cost-benefit balancing it used to reach that result renders the exclusionary rule almost defenseless against "legislative repeal," for example, legislation that offers in its place what its proponents will undoubtedly assure us is an "effective" tort remedy. As Justice Brennan, who dissented in *Leon*, observed:

> By remaining within the redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics.... Rather than seeking to give effect to the liberties secured by the Fourth Amendment through guesswork about deterrence, the Court should restore to its proper place the principle framed ... in *Weeks* that an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained.[219]

So far the Court has not applied the "good faith" exception to all searches; it has confined *Leon* to those occasions where the police have acted pursuant to a warrant.[220] However, by applying "*Leon*-type reason-

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[217] 1 LaFave, *supra* note 207, at 56.

[218] Stone v. Powell, 428 U.S. at 488.

[219] 468 U.S. at 943 (Brennan, J., joined by Marshall, J., dissenting in *Leon* and the companion case of Massachusetts v. Sheppard, 468 U.S. 981 (1984)).

[220] Nevertheless, warns Professor LaFave, "the possibility" that *Leon* and its companion case "will serve as stepping stones to a more comprehensive good faith exception to the Fourth Amendment exclusionary rule cannot be discounted.... Particularly noteworthy is the *Leon* majority's broad assertion that whenever the police officer's conduct was objectively reasonable the deterrence function of the exclusionary rule is not served and

ing" to instances where the police have relied on legislative and clerical action or inaction, the Court "has held admissible on 'good faith' grounds evidence obtained in warrantless police activity."[221]

Thus, *Illinois v. Krull* applied *Leon*'s rationale to a case where the police had acted in reliance on a state law authorizing the search in question even though the statute turned out to be in violation of the Fourth Amendment.[222] However, as the four dissenters protested, "[s]tatutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment."[223] Moreover, whereas a judicial officer's authorization of a search only "authorizes a single search under particular circumstances,"[224] "a legislature's unreasonable authorization of searches may affect thousands or millions" and therefore surely "poses a greater threat to liberty."[225]

The Court also applied the reasoning of *Leon* (and *Krull*) to the facts in *Arizona v. Evans*.[226] Defendant had been taken into custody because a patrol car's computer indicated he had an outstanding arrest warrant. In fact, the arrest warrant had been quashed several weeks earlier because of defendant's voluntary appearance in court. Evidently the court clerk had not notified the sheriff's department so that the warrant could be removed from the computer records.

The Court ruled the evidence admissible: "[T]here is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed."[227] But dissenting Justice Ginsburg argued that "[w]hether particular records are maintained by the police or the courts should not be dispositive where a single computer database can answer all calls."[228] Moreover, not only is the

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that 'when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.' " 1 LaFave, *supra* note 207, at 93, quoting 468 U.S. at 908 (opinion of the Court by White, J.).

[221] 1 LaFave, *supra* note 207, at 93.

[222] 480 U.S. 340 (1987). The invalid statute had authorized warrantless inspections of the records of licensed motor vehicles and vehicular parts sellers.

[223] *Id.* at 362 (O'Connor, J., joined by Brennan, Marshall and Stevens, J. dissenting).

[224] *Id.* at 365.

[225] *Id.*

[226] 514 U.S. 1 (1995).

[227] *Id.* at 15.

[228] *Id.* at 29 (Ginsburg, J., joined by Stevens, J., dissenting).

distinction between court clerk and police clerk "artificial," in practice it is difficult to tell which official "caused the error to exist or to persist."[229]

As *Pennsylvania Board of Probation v. Scott*[230] illustrates, the Rehnquist Court has also continued to decline to apply the exclusionary rule to proceedings other than criminal prosecutions. But the reasoning of the Court leaves a good deal to be desired.

The officers who conducted the warrantless and apparently suspicionless search of Scott's home did so because they thought he might be keeping firearms there, a violation of one of the conditions of his parole as well as a crime. The officers *knew* that Scottt was a parolee. They themselves were parole officers. If Scott did turn out to possess firearms (and he did), the officers probably contemplated a revocation proceeding rather than a criminal prosecution. For, as the Supreme Court observed some thirty years ago, a parole revocation "is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."[231]

The *Scott* majority declined to apply the exclusionary rule, reminding us that the rule need not apply "in every instance in which it might provide marginal deterrence."[232] As Justice Souter pointed out for the dissenters, however, when the searching officers know, as these officers did, that the subject of their search is a parolee (or probationer), there is *nothing* "marginal" or "incremental" about application of the exclusionary rule. For the officers most likely assumed (and correctly so) that the revocation hearing would be *the only proceeding* in which the evidence would ever be offered.[233]

2. *The Fourth Amendment Is Subjected to a Prolonged Campaign of "Guerilla Warfare"*[234]

Narrowing the thrust of the exclusionary rule, that is, restricting the circumstances in which evidence obtained in violation of the Fourth Amendment must be excluded, is only one way to reduce the impact of *Weeks* and of *Mapp*. Another way is to shrink the scope of the Amendment itself, *e.g.*, to dilute what amounts to "probable cause" to arrest or to search; to take a grudging view of what constitutes a "search" or "seizure"; and to make it easy to establish "consent" to what otherwise would be an illegal search. These developments, too, give the police more

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[229] *Id.*

[230] 524 U.S. 357 (1998).

[231] Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

[232] *Id.* at 368.

[233] *Id.* at 374 (Souter, J., joined by Ginsburg and Breyer, J J., dissenting). Justice Stevens also wrote a separate dissenting opinion.

[234] *See* text at note 236 *infra* and accompanying footnote.

leeway to investigate crime and the defendant fewer opportunities to invoke the exclusionary rule.

On a few occasions the post-Warren Court did decide some search-and-seizure cases in favor of the defense,[235] but in the main it substantially reduced the impact of the exclusionary rule *both* by cutting back on the application of the rule itself *and by* downsizing the scope of the protection against unreasonable search and seizure.

What Albert Alschuler said of the Burger Court when it came to an end applies to the Rehnquist Court as well. And Professor Alschuler's observation applies with special force to the law of search and seizure:

> In place of the expected counterrevolution, the Burger Court waged a prolonged and rather bloody campaign of guerilla warfare. It typically left the facade of Warren Court decisions standing while it attacked those decisions from the sides and underneath.[236]

A few examples follow:

The heart of the Fourth Amendment is "probable cause." *Illinois v. Gates*[237] dismantled the existing probable cause structure[238] in favor of a

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[235] *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) (holding that the use of a thermal imager or, more generally, any "sense-enhancing" technology to obtain "any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least where (as here) the technology in question is not in general public use"); Tennessee v. Garner, 471 U.S. 1 (1985) (police slaying of an unarmed, nondangerous felon in order to prevent his escape constitutes an "unreasonable seizure" within meaning of the Fourth Amendment); Payton v. New York, 445 U.S. 573 (1980) (police must be armed with a warrant before entering a suspect's home to make a routine arrest); Gerstein v. Pugh, 420 U.S. 103 (1975) (with some exceptions, the Fourth Amendment requires a prompt judicial determination of probable cause as a condition for any significant pretrial restraint on a suspect's liberty).

[236] Albert Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 Harv. L.Rev. 1436, 1442 (1987). *Cf.* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2527–28 (1996) (not only have the Burger and Rehnquist Courts "promulgat[ed] 'inclusionary rules' that made possible the admission of evidence that has been obtained through unconstitutional conduct of law enforcement agents," but by changing rules governing the standard of review on appeal and on federal habeas corpus it has made it harder for the erroneous admission of unconstitutionally obtained evidence at trial to lead to the overturning of convictions).

[237] 462 U.S. 213 (1983), criticized in Yale Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 Iowa L. Rev. 557 (1984); Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. Crim. L. & Criminology 1171, 1188–89 (1983); and Silas Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 329–40 (1984).

[238] The existing structure was known as the "two-pronged test," which consisted of the "veracity" prong and the "basis of knowledge" prong. Concurring in the judgment in

mushy "totality of the circumstances" test. The Court emphasized that it viewed "probable cause" as "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[239] The *Gates* Court made it fairly clear that "probable cause" is *something less* than "more probable than not" (although how much less is anything but clear). At one point the Court told us that "probable cause requires only a probability or *substantial chance* of criminal activity."[240]

Moreover, because the rulings of magistrates are entitled to considerable deference, the issuing magistrate does not have to be right. It is enough that the magistrate had a "substantial basis" for believing probable cause existed.[241] When one combines *Gates* with *Leon*, decided a year later, the result is that "[u]nlawfully seized evidence [becomes] admissible when a police officer could have reasonably believed that a magistrate could have reasonably believed that a person could have reasonably believed that a search would uncover evidence of a crime."[242]

Police activity is not subject to any constitutional restraints if the activity does not amount to a "search" or "seizure." Both the Burger and Rehnquist Courts have taken a narrow, stingy view of these key terms.

Consider *California v. Greenwood*.[243] A garbage bag is a common repository for personal effects and a search of such bags can reveal intimate details about one's business dealings, political activities, sexual practices and personal hygiene. Yet *Greenwood* held that the police may tear open the sealed opaque trash bags people place at the curb for garbage pick-up and examine their contents for evidence of crime without engaging in a "search."[244]

Gates, Justice White summed up the two-pronged test as follows: "First, an affidavit based on an informant's tip, standing alone, cannot provide probable cause for issuance of a warrant unless the tip includes information that apprises the magistrate of the informant's basis for concluding that the contraband is where he claims it is (the 'basis of knowledge' prong) *and* the affiant informs the magistrate that the informant is credible (the 'veracity' prong)." *Id.* at 267.

[239] *Id.* at 232.

[240] *Id.* at 244 note 13 (emphasis added).

[241] *See id.* at 238–39.

[242] Alschuler, *supra* note 236, at 1445. *See also* Kamisar, *supra* note 237, at 589.

[243] 486 U.S. 35 (1988).

[244] It is unclear to what extent *Greenwood* is grounded on the notion that one has no legitimate expectation of privacy in materials one voluntarily turns over to a third person or to what extent the decision turns on the fact that Mr. Greenwood left his garbage bags for collection on the curb—outside the curtilage of his home.

To say that the use of a police investigating technique, *e.g.*, police examination of a person's garbage or police aerial surveillance of a fenced-in backyard[245] or police use of a pen register[246] is not a "search" is a drastic move. For it means the police activity is completely uncontrolled by the Fourth Amendment. On the other hand, to conclude that a particular investigatory technique *is* a "search" is not a drastic move. For such a conclusion does not ban the investigative technique at issue altogether.[247]

The Court has not only taken a cramped view of what constitutes a "search." It has also given the crucial term "seizure" a narrow reading. According to *Florida v. Bostick*,[248] if armed police board an interstate bus at a scheduled intermediate stop, announce their mission is to detect drug traffickers, randomly approach a passenger, ask to see his bus ticket and driver's license, and then ask permission to search his luggage, no "seizure" has taken place. Under these circumstances, with two armed officers filling the aisle and towering over him, we are supposed to believe that a reasonable person would feel free to terminate the encounter or to ignore the police presence and to return to what he was doing—for example, go back to reading his newspaper or working on his crossword puzzle.

Although the post-Warren Court has taken a grudging view of what amounts to a "search" or "seizure," it has taken a very relaxed view of what constitutes a consent to an otherwise illegal search or seizure. "Consent" is law enforcement's trump card. It is the easiest and most propitious way for the police to avoid the problems presented by the Fourth Amendment. Thus, the protection afforded by the Amendment will vary greatly depending on how difficult or easy it is for the police to establish consent. *Schneckloth v. Bustamonte*[249] made it all too easy.

If an officer lacks authority to conduct a search, he may request permission to search, but he cannot *demand* it. To many people who confront the police, however, the distinction is very thin—or nonexis-

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[245] *See* California v. Ciraolo, 476 U.S. 207 (1986).

[246] Smith v. Maryland, 442 U.S. 735 (1979). The ruling that the government's use of a pen register, a device that records all numbers dialed from a given phone and the time they were dialed, is not a "search" or "seizure" was based on the ground that one who uses a phone "assumes the risk" the phone company will tell the government the numbers a person dialed.

[247] For example, one might conclude that the examination of the contents of sealed trash bags is a "search," but that it is not bounded by the same limitations applicable to a search of one's dwelling. Thus, although classified as a "search," police examination of sealed trash might not require traditional probable cause.

[248] 501 U.S. 429 (1991).

[249] 412 U.S. 218 (1973).

tent. "[W]hat on their face are merely words of request take on color from the officer's uniform, badge, gun and demeanor."[250]

All the police need do to make the distinction between "request" and "demand" meaningful is to advise a person that she has the right to refuse an officer's "request" and that such a refusal will be respected. But the *Schneckloth* Court dismissed such a requirement as "thoroughly impractical."[251] That such a warning would undermine what the Court called "the legitimate need for [consent] searches"[252] is quite clear; that such a warning would be "impractical" (as that word is normally defined) is not at all clear.

Now that *Schneckloth* is on the books, a person may effectively consent to a search even though she was never informed—and the government has failed to demonstrate that she was ever aware—that she had the right to refuse the officer's "request" to search her person, automobile, or home. After *Schneckloth*, the criminal justice system, in one important respect at least, does (to borrow a phrase from the *Escobedo* case) "depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."[253]

The *Schneckloth* approach to consent searches reappeared in *Ohio v. Robinette*.[254] After stopping the defendant for speeding, issuing a verbal warning, and returning his license, Deputy Sheriff Newsome—who has enjoyed remarkable success in getting motorists to consent to searches of their cars[255]—added "One question before you get gone. Are you carrying any illegal contraband in your car? Any weapon of any kind, drugs, anything like that?"[256]

When the defendant replied in the negative, the deputy asked whether he could search the car. The defendant said he could. The search turned up a small amount of drugs. The Ohio Supreme Court held that the evidence should have been excluded because the defen-

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[250] Caleb Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest* 51 J. Crim. L. and Criminology and Police Sci., 402, 403 (1960).

[251] 412 U.S. at 231.

[252] *Id.* at 227.

[253] *Cf.* Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

[254] 519 U.S. 33 (1996).

[255] Newsome testified that it was his routine practice to ask permission to search a motorist's car during a traffic stop. When asked in another case why he did so, he replied: "I need the practice." State v. Retherford, 639 N.E.2d 498, 502 (Ohio Ct. App. 1994). He has had a lot of practice. In one year alone he requested, and obtained consent to, a search incident to a traffic stop more than 750 times. *See id.* at 503 note 3.

[256] *Robinette*, 519 U.S. at 35–36.

dant's consent was obtained during an illegal detention (*after* every aspect of the traffic stop had been brought to a conclusion) and the drugs found were a product of that unlawful detention.[257] In order to prevent the police from turning a routine stop "into a fishing expedition for unrelated criminal activity," and to assure that the encounter immediately following the completion of the business relating to the traffic stop would be truly consensual, the Ohio court required the following: *When the police have completed the business of the traffic stop*, any attempt to search a vehicle about an unrelated crime must be preceded by a police warning: "At this time you are legally free to go" (or words to this effect).[258]

It strikes me that the Ohio Supreme Court made a valiant effort to deal with a practice that is hard to square with the Fourth Amendment. However, to almost no one's surprise, the U.S. Supreme Court reversed. Chief Justice Rehnquist, who wrote the majority opinion, thought it would be "unrealistic" to require police officers to tell motorists detained for traffic violations that they were "free to go" before asking them whether they would consent to a search of their cars.[259]

Why would it be unrealistic? Keep in mind that Deputy Newsome, and many other officers as well, routinely ask motorists who have been stopped for a traffic violation and are about to leave, a series of questions before asking whether they will consent to a search of their cars. It is hard to see why advising a once-detained motorist that he is free to leave is any more time-consuming or burdensome than the technique Newsome and his colleagues use in *working their way up* to asking a motorist to consent to a search.

There is also the matter of third-party consent searches. *Illinois v. Rodriguez*[260] tells us that a warrantless entry of one's home is valid when the police reasonably, but mistakenly, believe that a third party (in this case, a girlfriend of defendant who had in fact moved out of his apartment) possesses common authority over the premises. Thus, even though (a) no magistrate authorizes the search, (b) no probable cause supports the search, and (c) no exigency requires quick action, the police may enter a person's home on the basis of the "seeming consent" of a third party.

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[257] State v. Robinette, 653 N.E.2d 695, 698–99 (Ohio 1995).

[258] *Id.* at 696, quoted in *Robinette*, 519 U.S. at 36.

[259] *See Robinette*, 519 U.S. at 40.

[260] 497 U.S. 177 (1990). For extensive criticism of this case, *see* Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 Tenn. L. Rev. 1 (1991). *See also* Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 Cornell L. Rev. 723, 796–99 (1992).

The *Rodriguez* dissenters forcefully argued that when confronted with the choice of either relying on the consent of a third party or obtaining a warrant, the police "should secure a warrant and must therefore accept the risk of error should they instead choose to rely on consent."[261] But the majority was not impressed. "What [a person] is assured by the Fourth Amendment," observed Justice Scalia, "is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable' "[262]—and a search is not unreasonable when the police "reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises."[263]

New York Times columnist William Safire once said that "a strong reason must exist for commuters to go into hock to buy a car, to sweat out traffic jams [and] to groan over repair bills" and the reason is "the blessed orneriness called privacy."[264] Evidently, the post-Warren Court does not agree. For in the thirty-five years since Chief Justice Warren stepped down from the Court, the privacy the Fourth Amendment affords motorists has greatly diminished.

A goodly number of Supreme Court cases can be cited in support of this statement.[265] Ironically, the best case may be one where the police

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[261] 497 U.S. at 193 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

[262] *Id.* at 183.

[263] *Id.* at 187.

[264] Quoted in Lewis Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 Am. Crim. L. Rev. 557, 571 note 79 (1982). *See also* the discussion of how private automobile transportation has shaped American society in David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 Geo. Wash. L. Rev. 556, 576–78 (1998).

[265] *See, e.g.*, California v. Acevedo, 500 U.S. 565 (1991) (whether the police have probable cause to believe that drugs are somewhere in a car and come upon a closed container that just happens to be there, or whether the probable cause has focused on a container that just happens to be in the vehicle, the police may make a warrantless search of the container, even if found in the locked car trunk); New York v. Belton, 453 U.S. 454 (1981) (even though police lack any reason to believe that a car contains evidence of crime, if they have adequate grounds to make a custodial arrest of driver they may make a warrantless search of the entire interior or passenger compartment of the car, including closed containers, whether or not the driver has been removed from the car and handcuffed); Thornton v. United States, 541 U.S. 615 (2004) (*Belton* rule, *supra*, applies even when an officer does not make contact with the arrestee until he has already left the vehicle); Maryland v. Pringle, 540 U.S. 366 (2003) (finding of drugs in backseat armrest of car validly stopped for traffic offense gives police probable cause to believe that front-seat passenger (and apparently all passengers in car) is guilty of possessing a controlled substance); Maryland v. Wilson, 519 U.S. 408 (1997) (police may order all passengers, as well as the driver, out of a lawfully stopped car absent any particularized suspicion that any occupant of the car is armed or dangerous).

undeniably had lawful grounds to stop the car. (*e.g.*, there is no question the police had probable cause to believe that various provisions of the traffic code, such as speeding and turning without signaling, had been violated.)[266]

The *Whren* defendants conceded they had violated certain provisions of the local traffic code. But they maintained that, given the enormous multitude of traffic and vehicular equipment regulations and the ease with which the police may find *anybody* violating one or more of them, allowing mere observation of a minor traffic offense automatically to justify a stop or arrest gives the police a great temptation to use traffic enforcement as a means of investigating other more serious violations as to which *no individual suspicion exists*. Probable cause as to a minor traffic violation can be so easily come by, argued the defendants, that its existence provides no effective protection against arbitrary police action.[267]

Therefore, contended the defendants, the Court should adopt a *"would have"* test, under which a traffic stop or arrest satisfies the Fourth Amendment *only if* a reasonable police officer *would have* been motivated to stop the car or arrest the motorist by a desire to enforce the traffic laws or—to put it another way—police action violates the Fourth Amendment if a reasonable officer would not have taken the action she did but for an underlying purpose or motivation that, *standing alone*, could not provide a lawful basis for the police action.

Applying this test to the facts of the *Whren* case would have been easy. The arresting officers were *plainclothes vice squad officers* in unmarked cars, patrolling what they call a "high drug area" of Washington, D.C.[268] District of Columbia police regulations permit plainclothes officers in unmarked cars to enforce traffic law *only when* the violation is "so grave as to pose an *immediate threat* to the safety of others"[269]—and that is a far cry from the violations that occurred in *Whren*.

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[266] Whren v. United States, 517 U.S. 806 (1996).

[267] Moreover, there is reason to think that the police use *the pretext* of traffic enforcement to harass motorists because of the length of their hair, the style of their clothing, or the color of their skin. *See* Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. Miami L. Rev. 425 (1997); David A Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544 (1997); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 Va. U. L. Rev. 243 (1991); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup.Ct.Rev. 271.

[268] *Whren*, 517 U.S. at 808.

[269] *Id.* at 815 (quoting the Metropolitan Police Department, Washington, D.C., General Order).

But the Court, per Justice Scalia, rejected this approach (and, surprisingly, without a dissent). It held that a traffic stop or arrest is permissible so long as an officer in the same circumstances *could have* made the stop or arrest (because the officer had observed a traffic violation) *regardless* of whether a reasonable officer *would have* made the stop or arrest *had there not been* some reason or motivation beyond the traffic offense (such as a hunch that the driver or a passenger had drugs or guns in his possession).

After *Whren*, a traffic stop supported by adequate grounds to believe that a violation occurred satisfies the Fourth Amendment *whatever* the motives of the police, *whatever* internal police regulations may have to say about enforcing the traffic laws and *whatever* the usual or routine practice of the police department. In short, after *Whren* there is *no such thing* as a pretextual traffic stop.

As William Stuntz has observed:

> In a world where trivial crimes stay on the books, or one where routine traffic offenses count as crimes, the requirement of probable cause to arrest may mean almost nothing. Officers can arrest for a minor offense—everyone violates the traffic rules—in order to search or question a suspect on a major one. This allows arrests and searches of suspected drug dealers without any ex ante support for the suspicion, the very thing the probable cause standard is supposed to forbid.[270]

3. *Revising Cardozo's Famous Epigram*

More than three-quarters of a century ago, when Cardozo delivered his memorable one liner about the criminal "go[ing] free because the constable has blundered,"[271] and even in 1961, when the Court imposed the exclusionary rule on the states as a matter of Fourteenth Amendment Due Process, the law of search and seizure probably did unduly restrict the police—*on paper*. But this is no longer true.

Mapp has had a large impact. Whether or not the Warren Court intended this result or foresaw it, *Mapp* and its progeny have greatly clarified and simplified the law of search and seizure—especially in favor of the police. Because the thrust of the exclusionary rule and the scope of the protection provided by the Fourth Amendment have been so narrowed, and the room the police have to maneuver safely so enlarged, Cardozo's famous epigram is outdated. Nowadays, the criminal rarely, if ever, "goes free" because the constable has made an honest blunder or a

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[270] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 7 (1997). *See also* Harris, *supra* note 264, at 559–60.

[271] *See* note 54 *supra*.

technical one. If the criminal does go free it is most likely because the constable has *flouted* the Fourth Amendment—has blundered *badly*.

A Final Comment

A critic of *Mapp* might take all the search-and-seizure cases I have discussed in the previous section (as well as others I have not) and throw them back at proponents of the exclusionary rule. These cases demonstrate, she might say, that the rule puts tremendous pressure on the courts to avoid "freeing a guilty defendant." If *Mapp* had never imposed the rule on the states, she might argue, the Fourth Amendment would never have been construed as narrowly as it has been.

Thus, Judge Guido Calabresi recently observed:

> [L]iberals ought to hate the exclusionary rule because the exclusionary rule, in my experience, is most responsible for the deep decline in privacy rights in the United States. Indeed, the existence of the exclusionary rule has been the reason for more diminutions in privacy protection than anything else going on today.
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> Judges—politicians' claim to the contrary notwithstanding—are not in the business of letting people out on technicalities. If anything, judges are in the business of keeping people who are guilty *in* on technicalities. . . .
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> This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. That case then becomes the precedent for the next case. The next close case comes up and the precedent is applied: same thing, same thumb on the scale, same decision. The hydraulic effect, . . . or the slippery slope means that courts keep expanding what is deemed a *reasonable* search or seizure.[272]

But critics of the exclusionary rule overlook that *any effective alternative* to the exclusionary rule, such as a meaningful tort remedy or administrative sanction, would also exert strong pressure to make the rules governing search and seizure more "police-friendly."[273]

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[272] *See* Calabresi, *supra* note 82; Slobogin, *supra* note 82.

[273] If civil law suits against offending police officers were the primary means of enforcing the Fourth Amendment, there would be great pressure to find the challenged search "reasonable." The same would be true if the primary means of enforcement were departmental discipline. The reason is that if damages were awarded with some regularity against officers who violated the Fourth Amendment or if they were suspended without pay or required to pay substantial fines, the police "would be afraid to conduct the searches they should make." Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. Chi. L. Rev. 1016, 1053

As Monrad Paulsen noted on the eve of the *Mapp* case:

> Whenever the rules are enforced by meaningful sanctions, our attention is drawn to their content. The comfort of Freedom's words spoken in the abstract is always disturbed by their applications to a contested instance. Any rule of police regulation enforced in fact will generate pressure to weaken the rule.[274]

There is no denying that one of the effects of the exclusionary rule has been to diminish the protection the Fourth Amendment once provided—*on paper*. But a down-sized Fourth Amendment that is taken seriously is still a good deal better than an expansive, majestic Fourth Amendment that exists only in a theoretical world. Moreover, diminution of the Fourth Amendment's scope is undoubtedly the price we would have to pay for *any* means of enforcing the Amendment that had a bite—for *any* remedy that actually worked.

As the previous section of this paper spells out at some length, that price *has been* paid. However unrealistic search and seizure requirements may once have been, to a greater degree than ever before, they are no longer "obstacle[s] in a game but only a protection against arbitrary and capricious police action."[275] That is why the case for retaining the exclusionary rule today is even stronger than the case for adopting it was in 1914 or 1961.

(1987). *See also* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv. J.L. & Pub. Pol'y 443, 445 (1997): "[T]he usual legal tools [for enforcing the Fourth Amendment]—damages, fines, criminal punishment—are likely to cause more harm than good. If an officer faces serious loss whenever he makes a bad arrest, he will make fewer bad arrests, but also many fewer good ones."

[274] Paulsen, *supra* note 171, at 256.

[275] Paulsen, *supra* note 152, at 66.

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