Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?

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in violation of the Constitution, the courts must exclude it to assure the people that the government cannot profit from its lawlessness.

Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?

-Yale Kamisar
Editor's note: Over the years, critics of the exclusionary rule have called it, among other things, an "illogical," "irrational," and "unnatural" interpretation of the Fourth and Fourteenth Amendments.

Last fall, for example, U.S. Court of Appeals Judge Malcolm Wilkey, writing in the Wall Street Journal, said the rule "is not required by the Constitution.... The exclusionary rule is a judge-made rule of evidence which bars 'the use of evidence secured through an illegal search and seizure.'... The only excuse offered for this irrational rule is that there is 'no effective alternative' to make the police obey the law."

In an effort to explore this controversial question further, Judicature invited Judge Wilkey and a defender of the rule, Yale Kamisar, to express their views. Judge Wilkey will explain his opposition and suggest alternatives to the rule in a later issue.

More than 50 years have passed since the Supreme Court decided the Weeks case, barring the use in federal prosecutions of evidence obtained in violation of the Fourth Amendment, and the Silverthorne case, invoking what has come to be known as the "fruit of the poisonous tree" doctrine. The justices who decided those cases would, I think, be quite surprised to learn that some day the value of the exclusionary rule would be measured by—and the very life of the rule might depend on—an empirical evaluation of its efficacy in deterring police misconduct.

These justices were engaged in a less ambitious venture, albeit a most important one. They were interpreting the Fourth Amendment as best they could. As they saw it, the rule—now known as the federal exclusionary rule—rested on "a principled basis rather than an empirical proposition." The dissenters in United States v. Calandra were, I think, plainly right when they maintained that "uppermost in the minds of the framers of the [exclusionary] rule" was not "the rule's possible deterrent effect," but "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people [that] the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." The main purpose of this article, then, is to trace, explain and justify the original grounding of the exclusionary rule—what has come to be known as "the imperative of judicial integrity."

The Weeks opinion

As Professor Francis Allen recently reminded us, the Weeks opinion "contains no language that expressly justifies the rule by reference to a supposed deterrent effect on

5. Cf. Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. ILL. L.F. 518, 536-37 (pointing out that, unlike the Court's understanding in the formative phases of the exclusionary rule's history, in recent years the deterrent function has prevailed as its predominant justification, and that "until the rule rests on [returns to?] a principled basis rather than an empirical proposition," Mapp "will remain in a state of unstable equilibrium").


police officials.” Indeed, in the United States Supreme Court, some 35 years were to pass, as Professor Robert McKay has noted, before Wolf v. Colorado32 “introduced the notion of deterrence of official illegality to the debate concerning the wisdom of the exclusionary rule.”

As the Weeks justices saw it, if a court could not “sanction” a search or seizure before the event—because, for example, the police lacked sufficient cause to make the search or were unable to describe the item(s) they sought with the requisite particularity—then a court could not, or at least should not, “affirm” or “sanction” the search or seizure after the event.

The courts, after all, are the specific addressees of the constitutional command that “no Warrants shall issue, but upon” certain prescribed conditions. If “not even an order of court would have justified” the police action, as it would not have had in Weeks, then “much less was it within [the officers’] authority” to proceed on their own “to bring further proof [of guilt] to the aid of the Government.” And if the government’s agents did proceed on their own, “without sanction of law,” then the government should not be permitted to use what their agents obtained. The government whose agents violated the Constitution should be in no better position than the government whose agents obeyed it; “the efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles. . . . The United States Marshall acted without sanction of law . . . and under color of his office undertook to make a seizure 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.10

**Ratifying illegal searches**

Although the Fourth Amendment constitutes a guarantee against unreasonable searches and seizures, it does not, of course, explicitly state what the consequences of a violation of the guarantee should be. This “specific” of the Bill of Rights turns out, as is so often the case,13 not to be specific about the issue which confronted the Weeks Court and is the subject of today’s debate.

This only means that here as elsewhere—almost everywhere—the Court “cannot escape the demands of judging or of making . . . difficult appraisals.”14 But what is wrong with the Weeks Court’s appraisal? Does its reading of the Fourth Amendment do violence to the language or purpose of the guarantee against unreasonable search and seizure? Does its interpretation of this constitutional provision require an active imagination? Is the interpretation strained, illogical or implausible?

It is plain that Holmes and Brandeis thought not. In the Silverthorne case, Holmes, joined by Brandeis and five other justices, observed:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not

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8. Id. at 536 n. 90.
11. See notes 5, 6 and 7 supra.
12. 232 U.S. at 392–94.
merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.\footnote{Id. at 469–70 (dissenting opinion).}

The Olmstead case\footnote{Olmstead v. United States, 277 U.S. 438 (1928).} involved two questions, both answered in the negative by a 5-4 majority: (1) Are telephone messages within the protection against unreasonable search and seizure? (2) Even if they are not, should the evidence nevertheless be excluded because the federal agents who tapped the phones thereby violated a state statute?

On the second issue, Chief Justice William Taft, writing for the majority, did not challenge the Weeks rule, but insisted that "the exclusion of evidence should be confined to cases [such as Weeks] where rights under the Constitution would be violated by admitting it."\footnote{Id. at 468.} In dissent, Holmes and Brandeis argued that "apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act."\footnote{Id. at 469–70 (dissenting opinion).} Their arguments as to why the exclusionary rule should apply to illegal, as well as unconstitutional, police action are essentially restatements, although more famous and most eloquent ones, of the reasoning in Weeks.

First, Holmes:\footnote{Id. at 469–70 (dissenting opinion).}

If [the government] pays its officers for having got evidence by crime, I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government would play an ignoble part.

For those who agree with me, no distinction can be taken between the government as prosecution and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such inequities to succeed... I am aware of the often repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks [and] the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

Then Brandeis:\footnote{Id. at 483–85 (dissenting opinion).}

When these unlawful acts were committed, they were crimes only of the officers individually. The government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the government, having full knowledge, sought... to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers’ crimes... And if this court should permit the government by means of its officers’ crimes, to effect its purpose of punishing the defendant, there would seem to be present all the elements of a ratification... Will this court by sustaining the judgment below sanction such conduct on the part of the Executive?

... The Court’s aid is denied... in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination....

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Police reaction to Mapp
I never fully appreciated the force of the
Weeks opinion, and the Holmes-Brandeis dissents in Olmstead, until some 15 years ago when an incident occurred in Minnesota where I was then teaching. It helped me see the implications of the rule more clearly.

Until 1961, the Minnesota courts, as well as the courts of about half the states, had permitted the use of unconstitutionally seized evidence. But when the Court decided Mapp v. Ohio in 1961, and imposed the exclusionary rule on Minnesota and other “admissibility states” as a matter of federal constitutional law, it caused much grumbling in police ranks.

This led Minnesota’s young attorney general, Walter Mondale, to remind the police 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.” The Mapp case, stressed Mondale, had “not reduc[d] [lawful] police powers one iota”—“what was a reasonable search


Does the exclusionary rule affect police behavior?

When Professor Dallin Oaks wrote his “empirical challenge” to the exclusionary rule, it was undeniably an important contribution to this debate. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). See also Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Studies 243, 245–48 (1973) in many respects a continuation of the Oaks study, but a less scholarly effort.

But more recent and more comprehensive studies and analyses have cast grave doubt on his conclusions about the rule’s inefficacy in affecting police behavior. And these analyses have highlighted the insufficiency and inappropriateness of the Oaks’ data.

See generally, Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62...
before, still is.”

At a subsequent panel discussion on the law of search and seizure in which I participated, proponents of the exclusionary rule quoted Mondale’s remarks and made explicit what those remarks implied: If the police feared that evidence they were gathering in the customary manner would now be excluded by the courts, the police must have been violating the guarantee against unreasonable search and seizure all along. This evoked illuminating responses from the two law enforcement panelists, responses which


For example, Oaks and Spiotto rely on the high frequency with which motions to suppress are granted in Chicago gambling, narcotics and weapons cases to conclude that, long after adoption of the exclusionary rule, illegal searches and seizures were commonplace in the enforcement of these offenses by the Chicago police.

Canon points out that “counting successful motions is an imperfect indicator of the rule’s effectiveness for several reasons,” 62 KY. L.J. at 718. He concludes that, in any event, Chicago is “a gross exception to the national norm of granting suppression motions,” id. at 721. Canon’s study of 65 cities indicates that in 60 per cent of them motions to suppress were granted one-tenth of the time or less and in 91 per cent of the cities such motions were granted one fourth of the time or less. Id. at 722.

Moreover, comments Canon, “judges in Chicago have long been noted for their willingness to grant motions to suppress evidence” and “it is sometimes alleged that Chicago police habitually conduct vice raids in a manner that ensures that a motion to suppress will be successful.” Id. at 720. As Wasby explains, supra at 108–17, 217–23, some judges granted a substantial number of motions to suppress “during the educational process” immediately following adoption of the exclusionary rule, but “police improvement and accommodation to the rules” meant that after this transitional period few motions were granted.

To take another example (there are many in the Canon article), Oaks’ study of arrest before and after Mapp focused on one city, Cincinnati. He concluded that the adoption of the exclusionary rule had had virtually no effect on the number of arrests for narcotics, weapons and gambling there. See 37 U. CHI. L.REV. at 707. But Canon gathered similar data for 14 cities (including Cincinnati) and found that only four others had the “rather minimal response pattern that Cincinnati has.” See 62 KY. L.J. at 706.

At the other end of the spectrum, the Baltimore decreases in arrests following Mapp “were both dramatically sudden and truly spectacular,” id. at 704. “Baltimore is probably an extreme case and is illustrated to counter Oaks’ generalizations about the efficacy of the exclusionary rule from the presentation of Cincinnati’s arrest figures. Buffalo is less extreme, but not necessarily
they knew what the facts were.24

There is no reason to think that the Minnesota experience is unique. The heads of several police departments also reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure had just been written.

For example, shortly after California adopted the exclusionary rule,25 William Parker, then Los Angeles chief of police, warned that his department’s ability to prevent the commissioner of crime had been greatly diminished because henceforth his officers would be unable to take “affirmative action” unless and until they possessed “sufficient information to constitute probable cause.”26 He did promise, however, that


typical. Indeed, it is not at all clear that there is a typical response to the exclusionary rule.” Id. at 705.

Canon also noted that political scientist Michael Ban had concluded, after an in-depth study of Mapp’s impact in Boston and Cincinnati, that “the Cincinnati political milieu . . . permitted widespread disregard if not defiance of the Supreme Court’s ruling” and that in a number of respects there was “a discernibly lesser propensity for compliance in Cincinnati than in Boston.” Id. at 689, 698 (Canon’s characterization of Ban’s findings, which, though unpublished, have been widely circulated among political scientists).

At the present time, there is much to be said for lawyer-political scientist Donald Horowitz’s analysis of Mapp and police behavior, Horowitz, supra at 224-25, 230-31, 250:

Much of the empirical support for the proposition that Mapp does not deter the police from violating the Fourth Amendment has been quite crude. . . . [T]hat illegal searches are still conducted to obtain evidence of certain kinds of crimes does not mean that they are still conducted with the same frequency for evidence of other kinds of crimes. That illegal searches are common in some cities does not mean that they are equally common in all cities. Deterrence cannot be viewed as ‘a monolithic governmental enterprise.’

Gradually, the rudiments of a more discriminating approach have begun to emerge. What it suggests is that the extent to which police behavior is modified by Mapp depends on a complex set of local conditions, including . . . the type of offense involved, the particular police unit responsible for specific enforcement tasks, and the way in which local courts and lawyers handle search-and-seizure matters. . . .

. . . [T]he fragments indicate it is a mistake to think that police behavior is never conditioned by the sanction of excluding evidence that might lead to conviction. . . . [I]n the case of serious crimes the policeman starts thinking fairly early of what is required to convict, and some of the things he thinks of are the restrictive rules of arrest and search.

. . . Concern with conviction is very much a function of locale, offense, stage of investigation, and sometimes police unit involved. Receptivity to the judicial sanction varies accordingly.

In closing these brief remarks, I cannot resist pointing out that at the same time some critics of the exclusionary rule are urging its elimination or substantial modifi-
Chief Parker, seemed to think that “the framework of limitations” restraining the police had been put there by the exclusionary rule, not the state and federal constitutional guarantees against unreasonable search and seizure. “Flowing from the Mapp case,” he said, “is the issue of defining probable cause to constitute a lawful arrest and subsequent search and seizure.”

I. Criticisms of the rule

I think it may forcefully be argued that it is not the exclusionary rule which is illogical or misdirected, but much of the criticism it has generated. As Senator Robert Wagner pointed out in the 1938 New York State Constitution Convention:

All the arguments [that the exclusionary rule will handicap law enforcement] seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself. . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation on the ground, inter alia, that it has had little if any effect on police behavior and little if any impact on the amount of pre-Mapp illegality, other critics are calling for the rule’s repeal or revision on the ground, inter alia, that in recent years the police have attained such a high incidence of compliance with Fourth Amendment requirements that “the absolute sanctions of the Exclusionary Rule are no longer necessary to ‘police’ them.” Brief of Americans for Effective Law Enforcement (A.E.L.E.) and the International Association of Chiefs of Police (I.A.C.P.) as Amici Curiae in Support of Petitioner at 12, California v. Krivda, 409 U.S. 33 (1972), discussed in Comment, 65 J. CRIM. L. & C. 373, 383 (1974).

In their amicus brief, the A.E.L.E. and the I.A.C.P. presented the Court with the results of a study they had conducted of warrantless searches and seizures (such searches and seizures were chosen because these are the ones “in which the officer is acting on his own with no assistance from a magistrate or prosecuting attorney, cases in which his activity must stand or fall based on his own judgment, knowledge of search and seizure restrictions, and his desire to abide by such restrictions,” Brief at 16).

According to this study, of more than 1000 cases involving warrantless searches and seizures decided by appellate courts nationwide during the 27-month period of January, 1970 through March, 1972, 84 per cent (1,157 of 1,371) were found to be proper—an extraordinarily high degree of police professionalism.” Brief at 17.

The amicus brief denies that this study evidences any beneficial exclusionary rule influence upon law enforcement, id. at 18, but I doubt that many will find the denial convincing. “[T]his excellent record of successful police compliance with the rules of search and seizure,” id., is attributed to “police professionalism”—an attempt by most police to learn “at least in a general way the restrictions on their search and seizure activities and a good faith desire to comport themselves properly within such restrictions,” id. at 19. But what stimulated the attempt by most officers to familiarize themselves, at least in a general way, with the law of search and seizure?

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otherwise violated? If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it violated the Constitution? And why does it generate so much popular hostility to disallow the government to reap an advantage that it secured, and might only have been able to secure, by violating the Constitution?

No one, I think, has given a better explanation than Professor John Kaplan, one of the sharpest critics of the rule:

From a public relations point of view, [the exclusionary rule] is the worst possible kind of rule because it only works at the behest of a person, usually someone who is clearly guilty, who is attempting to prevent the use against himself of evidence of his own crimes. . . . [But the] fact is that any rule which actually enforced the demands of the Fourth Amendment (whatever they may be) would prevent the conviction of those who would be caught through evidence obtained in violation of the Fourth Amendment. The problem with the exclusionary rule is that it works after the fact, so that by then we know who the criminal is, the evidence against him, and the other circumstances of the case. If there were some way to make the police obey, in advance, the commands of the Fourth Amendment, we would lose at least as many criminal convictions as we do today, but in that case we would not know of the evidence which the police could discover only through a violation of the Fourth Amendment. It is possible that the real problem with the exclusionary rule is that it flouts before us the price we pay for the Fourth Amendment.

### The 'time lag' argument

The federal exclusionary rule has been disparaged on the ground that “it was not adopted by the United States Supreme Court until 1914” and that despite the possibility that “an interpretation first made 125 years [actually 123] after a constitutional provision might nonetheless be an appropriate one, the time lag between the adoption of the fourth amendment and the first appearance of the exclusionary rule is at least some indication that it was hardly basic to the constitutional purpose.” This does not strike me as much of an argument.

Some 160 years after the adoption of the First Amendment, the “prevention and punishment” of “the lewd and obscene, the profane [and] the libelous” were still thought to raise no constitutional problems. In 128 years passed between the adoption of the First Amendment and the first articulation of the “clear and present danger” test—what may fairly be called “the...
The right to counsel has well been called "the most pervasive right" of an accused, but all the Constitution has to say about it is that "in all criminal prosecutions the accused shall have the Assistance of Counsel." That's all. The considerable body of constitutional law which has emerged in this important area has all been "a matter of judicial implication."

'Involuntary' confessions

And what is the source of the rule—first applied in 1936, but shaped and reshaped in the course of the following three decades—barring the use of involuntary confessions as a matter of Fourteenth Amendment Due Process? Talk about judge-made or judicially-created rules! The Constitution has nothing to say about "confessions" or "admissions," neither "involuntary" nor any other kind.

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And, of course, the development of the important "void of vagueness" and "overbreadth" doctrines in this area—"judge-made" or "judicially-created" remedies—did not come until still later. The time lag between the adoption of the Fifth Amendment and the applicability of the privilege against self-incrimination to the proceedings in the police station as well as those in the courtroom was 175 years. As for the Sixth Amendment right to counsel, it was not until 1938—fairly early in the development of constitutional-criminal procedure but still a quarter of a century later than Weeks—that "the right to counsel in federal courts meant more than that a lawyer would be permitted to appear for the defendant if the defendant could afford to hire one."

The federal exclusionary rule has also been disparaged as not derived from "the explicit requirements of the Fourth Amendment," but only "a matter of judicial implication." This does not strike me as much of a point either—not, at least, unless somebody can cite even one Supreme Court case interpreting the Constitution which is not "a matter of judicial implication."

The most celebrated constitutional-criminal procedure cases of our times are Johnson v. Zerbst and Gideon v. Wainwright, requiring appointment of counsel in all federal and state prosecutions respectively when a defendant is unable to pay for the services of an attorney. But one searches the language of the Sixth and Fourteenth Amendments in vain for any mention of indigent defendants or the assignment or appointment of counsel at trial—let alone at preliminary hearings, at lineups, in the police station or on appeal or in juvenile court proceedings.

The limitations also make the rule "not 'look' like a constitutional doctrine," according to Kaplan, n. 34, at 1030.

By "implication," too, the courts have developed limitations on the exclusionary rule, e.g., standing, the attenuation of taint from illegal searches, and the use of illegally seized evidence in grand jury proceedings or for impeachment purposes. These limitations are said to undermine the "judicial integrity" rationale of the exclusionary rule. See Stone v. Powell, 428 U.S. 455, 485 (1976), discussed in Israel, Criminal Procedure, The Burger Court, and the Legacy of the Warren Court, 75 Mich. L. Rev. 1319, 1410-12 (1977). The limitations also make the rule "not look like a constitutional doctrine," according to Kaplan, supra n. 34, at 1030.

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It will not do to point to the constitutional prohibition against compelling a person to
Defendants most often insist that the evidence was seized illegally in cases involving narcotics. Many defense attorneys routinely make a motion to suppress such evidence.

be "a witness against himself" in "any criminal case." The privilege was not deemed applicable to the states until 1964 and by that time the U.S. Supreme Court had decided some 30 state confession cases. Moreover, as noted earlier, even if the privilege against self-incrimination had been deemed applicable to the states, the law pertaining to "coerced" or "involuntary" confessions still would have developed without it.

Until Miranda, the prevailing view was that because police officers lacked legal authority to compel statements, there was no legal obligation to answer to which a privilege could apply, and thus the privilege did not extend to the police station. As late as 1966, Chief Justice Roger Traynor pointed out that although "the Fifth Amendment has long been the life of the party in judicial or legislative proceedings... it has had no life it could call its own in the pre-arraignment stage."

Nor is it a sufficient answer to say that Fourteenth Amendment Due Process bars convictions based on inherently untrustworthy evidence (long a universally accepted view, but, incidentally, not an explicit requirement of the due process clause either). This does not explain why the question of the admissibility of an involuntary confession must be "answered with complete disregard of whether or not petitioner in fact spoke the truth" and why "a legal standard which took into account the circumstance of probable truth or falsity... is not a permissible standard under the Due Process Clause." It does not explain why involuntary confessions "are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true."

Nor does it explain the "rule of automatic reversal"—the rule formulated by the Stone and Vinson Courts and reaffirmed by the Warren Court that the introduction of an

55. U.S. Const. Amend. V.
56. Malloy v. Hogan, 378 U.S. 1 (1964). "In extending the privilege against self-incrimination to the states and at the same time indicating that the privilege has been the unseen governing principle of the confession cases, Malloy forcefully brought the Fifth Amendment to bear on the interrogation problem," W. Schaefer, The Suspect and Society 16. Evanston: Northwestern University Press, 1967. The "intertwined doctrines" (the "voluntariness standard" and the privilege against self-incrimination), noted Justice Schaefer in a postscript to his 1966 Rosenthal Lectures, "were fused in Miranda." Id. at 85 n. 21.
58. See the discussion in Kamisar, supra n. 39, at 65, 77-83.
61. Id. at 543.
62. Rochin v. California, 342 U.S. 165, 173 (1952) (relying in large part on rationale of coerced confession cases to exclude evidence produced by "stomach pumping").
involuntary statement at the trial necessitates reversal, regardless of how much untainted evidence remains to support the conviction.63

Are confessions different?

Critics of the search and seizure exclusionary rule try to distinguish away the coerced confession cases,64 and for good reason. For once it becomes clear that the rationale of the coerced confession cases "has been expanded beyond protect[ing] the individual from conviction on unreliable or untrustworthy evidence" to "stri[b]ing] down police procedures which in their general application appear to the prevailing justices as imperiling basic individual immunities,"65 as Professor Francis Allen pointed out a quarter of a century ago, then it becomes most difficult to distinguish the problem of

the admission of unconstitutionally seized "real" evidence from that of involuntary confessions. For "[i]n both situations the perils arise primarily out of the procedures employed to acquire the evidence rather than from dangers of the incompetence of the evidence so acquired."66

Although those unhappy with the exclusionary rule still make the claim that the admissibility of unconstitutionally seized "real" evidence and "involuntary" confessions "raise entirely different questions,"67 the argument comes about 30 years too late.68

It is interesting to note that at one point Chief Justice Warren’s opinion for the Court in the famous Spano case reads like a re-statement of the reasoning in Weeks and the Holmes-Brandeis dissents in Olmstead:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.69

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64. Thus, in criticizing the exclusionary rule as to unconstitutionally seized materials, Professor Charles Alan Wright notes, Wright, Must the Criminal Go Free if the Constable Blunders?, 50 TEXAS L.REV. 736, 737 (1972): "[W]e are talking only of what lawyers call ‘real’ evidence. Involuntary confessions and other evidence of that kind raise entirely different questions. Innocent men may give false confessions if sufficient pressure is put upon them by the police. The murder weapon, the envelope of narcotics, the gambling slips, however, speak for themselves.” (Don’t murder weapons and narcotics obtained as a result of involuntary confessions “speak for themselves” too?).

See also Wilkey, Why Suppress Valid Evidence?, 13 THE PROSECUTOR 124 (1977): “In exclusionary rule cases involving material evidence there is never any question of reliability. Reliability is in question, for example, with a coerced confession. . . . Exclusion of evidence is then proper, because the evidence is inherently unreliable.”


66. Id.

67. See n. 64 supra.


One of Justice Frankfurter's last opinions on the subject—and I confess that I find it rather mystifying that the author of Wolf would write this in the same term he dissented in Mapp—perhaps best suggests the close affinity between the Weeks rule and the coerced confession rationale. Speaking for a 7-2 majority, in Rogers v. Richmond, Frankfurter observed:

Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary... cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system....

To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed... .

Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.

If a conviction rests in part on an independently corroborated and concededly truthful confession (albeit one found to be the product of constitutionally impermissible methods), why cannot the conviction stand? Why not remand those who have made such confessions, together with those who managed to remain silent in the face of impermissible interrogations, "to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford"? Though the exclusion of involuntary but verified confessions may be an effective way of deterring objectionable interrogation methods, why must the court "condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods [to deter such conduct] which, if consistently enforced, would be equally effective"?

Moreover, if the impermissible police methods which produce involuntary confessions are typically more offensive to the dignity of the individual and more often characterized by violence than are unconstitutional searches and seizures, are not these objectionable interrogation methods more likely to attract the interest of the press, more likely to arouse community opinion, more likely to excite the sympathy of jurors? Why, then, is the court unwilling to rely on tort actions, criminal prosecutions and internal police discipline to check impermissible police interrogation practices? Why does the "command" of the Due Process Clause "compel" the court to reverse the conviction? Why can't the conviction stand?

The reason is that to uphold a conviction resting in part on an involuntary confession, however much verified, would be to "sanction" the objectionable methods which produced it and to afford these methods "the cloak of law," the very insight which the Weeks Court and Holmes and Brandeis expressed long ago.

II. The role of the Court

It is not surprising that a majority of the Court would conclude in 1949, as it did in Wolf v. Colorado, that the Fourteenth Amendment did not prevent a state court from admitting evidence obtained by an

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73. Cf. Rogers v. Richmond, supra in text at n. 70 supra.
74. Id. See also McNabb v. United States, 318 U.S. 332, 339 (1943), where, before putting aside constitutional issues and invoking its supervisory powers over federal criminal justice, the Court noted, per Frankfurter, J.: "It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. Boyd v. United States; Weeks v. United States...."
75. Cf. Rochin v. California, 342 U.S. 165, 173-74 (1952): "Coerced confessions offend the community's sense of fair play and decency. So here, to sanction [the 'stomach pumping' which produced the morphine capsules]... would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby brutalize the temper of a society.
76. 338 U.S. 25 (1949).
unreasonable search and seizure, and that Justice Frankfurter would write the opinion of the Court. Frankfurter's, and his brethren's, "notions of the obligations of federalism were a strongly limiting influence on [their] role in the criminal cases during the years before the Warren tenure." The Wolf case "provided an important demonstration of the Court's essential fidelity to the assumptions of a federal system at a time when [the Court] was being subjected to extreme and irresponsible charges of usurpation of power."77

Nevertheless, one is, or ought to be, taken aback by Frankfurter's reasoning in Wolf. The protection against unreasonable search and seizure is "basic to a free society," is "enforceable against the States through the Due Process Clause," but a conviction resting on evidence obtained in disregard of this fundamental and constitutionally protected right can stand—that, if I may be permitted to quote what I said about the Wolf case 19 years ago, "this is an instance where one may be... imprisoned on evidence obtained in violation of due process and yet not be deprived of life or liberty without due process of law after all."79

Frankfurter, no less than Justice Day in Weeks, has assumed elsewhere that permitting evidence obtained in violation of a law to be made the basis of a conviction would "stultify the policy" manifested by the law.80 And perhaps no jurist since Holmes and Brandeis has balked as much as Frankfurter at the courts becoming "accomplices" in police lawlessness by sustaining a conviction resting on evidence obtained by violation of law. The cases discussed above involving "involuntary" confessions which bear the stamp of verity illustrate this point, at least implicitly.

But Frankfurter has been more explicit. In the famous McNabb case, he observed for a 7-1 majority:

A statute [providing that arrestees promptly be taken before the nearest judicial officer] is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.

... Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured [no more than did the draftsmen of the Fourth Amendment]. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

... We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation.81

**Court inconsistencies**

It will not do to dismiss McNabb as an instance of the Court's exercise of its supervisory powers over federal criminal justice. Either courts which permit illegally obtained evidence to be used or allow convictions resting on such evidence to stand "become instruments" of such law enforcement or they do not. Either the courts' duty "as agencies of justice and custodians of liberty" forbids that persons should be convicted upon evidence secured in violation of law or it does not.

If a federal court cannot allow a convic...
tion resting on a federal statutory violation to stand without making itself an "accomplice" in the police lawlessness, then how can any court allow a conviction resting on a federal constitutional violation to stand? If permitting the use of evidence secured in disregard of statutory law would "stultify the policy which Congress has enacted into law," then how can it be maintained that permitting the use of evidence obtained by violating the Fourth and Fourteenth Amendments does not "stultify the policy" which the Constitution has enacted into law?

Nor, as I see it, can the reasoning of the court, by Frankfurter, in Wolf, be squared with its reasoning, by Frankfurter, in Rochin— or with Frankfurter's dissent in Irvine. In striking down a conviction resting on evidence produced by "stomach pumping"— and certainly the morphee capsules taken from Rochin's stomach were no less trustworthy than the materials seized from Wolf's office— the Rochin Court, through Frankfurter, reminded us that "due process of law" means at least that "convictions cannot be brought about by methods that offend 'a sense of justice.'" But don't all convictions brought about by methods that offend due process offend "a sense of justice"?

California did not "affirmatively sanction" the police misconduct in Rochin anymore than did Colorado in Wolf. The "stomach pumping," no doubt, was a tort and a crime. Moreover, as the Rochin Court pointed out, the brutal conduct "naturally enough was condemned by the court whose judgment is before us." Why, then, would sustaining the conviction amount to "sanctioning" the police misconduct and "affording" it "the cloak of law"? And if it would, why would it not in Wolf?

Nor did the Irvine Court "affirmatively sanction" the repeated illegal entries into petitioner's home. Justice Jackson, who wrote the principal opinion in this case, took pains to note that "there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this common gambler." Indeed, Jackson went so far as to direct the clerk of 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.

Why, then, did Frankfurter dissent in Irvine? Why did he protest that the Court cannot 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.

But 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' [wasn't this true of Wolf?], it is no answer to say that the offending policemen and prosecutors who utilize outrageous methods should be punished for their misconduct. That the prosecution in this case, with the sanction of the courts, flouted a legislatively declared philosophy against such miscreant conduct and made it a policy merely on paper, does not make the conduct any the less a disregard of due process.

Of course it is a loss to the community when a conviction is overturned because the indefensible means by which it was obtained cannot be squared with the commands of due process. But...[a] sturdy, self-respecting democratic

83. Irvine v. California, 347 U.S. 128, 142 (1954). The Court affirmed Irvine's conviction for horse-race bookmaking and related offenses though based on inculminating conversations heard through a concealed microphone illegally installed in petitioner's home. Justice Jackson wrote the four-man plurality opinion. Justice Clark concurred in the result, noting that if he had been on the Court when Wolf was decided, he would have applied the federal exclusionary rule to the states.
84. 347 U.S. at 137.
85. Id.
86. 347 U.S. at 138. Only Chief Justice Warren joined Justice Jackson in this regard. The chief justice was "new on the job"; indeed, his nomination had not yet been confirmed. In later years he was to recognize that the admission of unconstitutionally seized evidence "has the necessary effect of legitimizing the conduct which produced the evidence." See text at n. 106 infra.
87. Id. at 138.
88. STAN. L.REV. 76, 94 n.75 (1954).
community should not put up with lawless police and prosecutors. 88

Reconciling the differences
I can think of only three possible ways to reconcile Wolf with the majority opinion in Rochin, the dissents in Irvine and the rationale of the involuntary confession cases. None of them is satisfactory:

1. Not all violations of the Fourth Amendment offend due process; only certain "outrageous" or "aggravated" types of unreasonable searches and seizures do so.

Although even before Mapp v. Ohio and Ker v. California 89 I argued at considerable length to the contrary, 90 the Wolf opinion could conceivably have stood for, or have come to stand for, this limited proposition. 91 But today it is plain that it does not. Although some justices have balked at "incorporating" a specific provision of the Bill of Rights into the Fourteenth "jot-for-jot" and "bag and baggage," especially in the jury trial cases, it is now clear that the Court did not apply a "watered-down" version of the Fourth Amendment to the states, but rather one which applies to the same extent it has been interpreted to apply to the federal government. 92

2. Evidence, verbal or real, which is the product of police violence or brutality should be excluded, but not evidence which is obtained by other types of police misconduct.

This is the distinction that Justice Jackson drew in Irvine—and one which he sought to make even among involuntary confessions. 93 But the court has long recognized that voluntariness or coercion need not be based upon physical violence or the threat of it. 94 Why, then, should such violence or the threat of it be a prerequisite for excluding other unconstitutionally seized evidence?

Moreover, today virtually everybody would reject a rule, as did Frankfurter and the other Irvine dissenters, whether it be a rule for "real" evidence or for verbal, 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." 95

3. Obtaining evidence by searches or seizures that would have violated the Fourth Amendment if conducted by federal officers does violate Fourteenth Amendment Due Process when made by state officers. But the use of such evidence in state courts does not offend due process unless the police methods involved constitute an "aggravated" or "outrageous" or "shocking" violation of the Fourth Amendment.

This, it seems to me, is the doctrine which emerges from Frankfurter's majority opinions in Wolf and Rochin and his dissent in Irvine. I find it a difficult proposition—a most curious one. Only one step is needed for "involuntary" confessions—the use of any confession obtained in violation of due process offends due process. But two steps are required for unreasonable searches and seizures: (1) Did the police violate the Fourth and Fourteenth Amendments? (2) If so, by how much? Was it a "gross" violation or only "mild"? "Flagrant" or "routine"?

The degree of violation
Where does this "two-plimsoll mark due process" test come from? 96 Talk about judicially created rules of evidence! Where is

88. 347 U.S. at 148-149 & n.1 (Emphasis added).
89. 374 U.S. 23 (1963) ("standard of reasonableness is the same under the Fourth and Fourteenth Amendments"). See also Aguilar v. Texas, 378 U.S. 108 (1964) (reading Ker as holding that standard for obtaining a search warrant is the same).
90. See n. 79 supra.
91. Id.
94. Thus, the Court threw out the confession in Fikes v. Alabama, 352 U.S. 191 (1957), although "concededly, there was no brutality or physical coercion" and "psychological coercion is by no means manifest." Id. at 200 (Harlan, J., dissenting). See also Leyra v. Denno, 347 U.S. 556 (1954); Spano v. New York 360 U.S. 315 (1959).
95. 374 U.S. at 146.
96. Cf. Frankfurter, J., concurring in Fikes v. Alabama, 352 U.S. 191, 199 (1957): "I cannot escape the conclusion . . . that in combination [these circumstances] bring the result below the Plimsoll line of "due process."

See Field, Frankfurter, J., Concurring, 71 HARv.L. REV. 77 (1957); Kamisar, supra n. 79, at 1121-29.
this written or even implied in the Constitution? Next to this test, surely, the Weeks Court’s reading of the Fourth Amendment and the Mapp Court’s reading of the Fourth and Fourteenth seem like pretty straightforward interpretations of the Constitution.

To say that police conduct is unconstitutional, that it violates the minimal standards of due process, is as bad a label as one can put on police misconduct. How then can it be said that still more is required for exclusion? Why then must the police be found to have violated sub-minimal standards?

How does one “barely” or “mildly” violate what is “basic to a free society” or “implicit in the concept of ordered liberty”? If police action which violates due process is not gross or aggravated police misconduct per se, then why is it a violation of due process?

My purpose rather is to provide “education in the obvious.” Almost no sensitive judge can live with those implications. At some point he will not care about or even think about “alternatives” to the remedy of exclusion—he will exclude the evidence however logically relevant and verifiable it be or, if the court below admitted it, he simply will not let the conviction stand. At some point he will be unable to do otherwise.

When that point is reached, he will do what a majority did in Rochin and some would have done in Irvine—he will refuse “to have a hand in such dirty business.”

This is why the Weeks Court’s famous criticism to the contrary notwithstanding, is, if not perfectly logical, quite understandable—even quite natural.

The Weeks Court believed this point was reached when the police violated the Fourth Amendment; the Rochin Court and the Irvine dissenters believed that it was reached when the police violated some sub-minimal standard. But the response was the same: We don’t care about possible tort actions or other possible “alternative remedies”! The government obtained the conviction by “indefensible means.” We the judges cannot sanction this. We the judges cannot afford it “the cloak of law.”

A judge’s threshold

To say that most judges have what might be called a threshold for excluding trustworthy evidence is not to deny that the threshold varies considerably among them—or even that over the years it may shift significantly in the mind or heart of an individual judge.

In his decade and a half as Chief Justice of the United States, for example, Earl Warren’s threshold for exclusion lowered quite a bit. In his first year on the Court, he joined in Justice Jackson’s principal opinion in Irvine, upholding a conviction based on “incredible” police misconduct but assuring us that “admission of the evidence does not exonerate the officers . . . if they have violat-

100. Holmes, J., dissenting in Olmstead v. United States, 277 U.S. 438, 470 (1928). As I read Holmes’ dissent, he did not, as many seem to think, regard wiretapping as inherently “ignoble” or “immoral,” but only wiretapping—or for that matter, any other means of obtaining evidence by the government—which constituted a specific violation of the law. This was the “dirty business.”

101. See 8 J. Wigmore, EVIDENCE §2184 at 35, 40 (3d ed. 1940).

102. See text at n. 88 supra. Are not all unconstitutional means of obtaining evidence to secure a conviction “indefensible”? And if not, why are they unconstitutional?

103. See text at n. 88 supra. If alternative means of punishing or discouraging governmental lawlessness are available (at least theoretically), as they were in Rochin and Irvine, why does admitting the evidence constitute “putting up with lawless police and prosecutors”? And if it does, why did the Court put up with the governmental lawlessness in Wolf?
ed defendant's constitutional rights"—"there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting [the] conviction."  

Seven years later, however, the Chief Justice joined in the opinion for the Court in Mapp. And another seven years later, very close to the end of his career, he observed for the Court in the "stop and frisk" cases:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.  

... When [unconstitutional] conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.  

Holmes and Brandeis seem to have had a consistently low threshold for exclusion. In Fourteenth Amendment Due Process cases at least, Justice Jackson appears to have had a consistently high one. For him unconstitutional police conduct was not enough, not even serious or aggravated unconstitutional conduct. It had to involve physical violence or brutality as well.

That a judge is more likely to give short shrift to alternatives to the remedy of exclusion in a shocking case of police misconduct than in a routine one is hardly surprising. But is it logical? If police misconduct is ever going to attract the interest of the press, arouse community opinion and excite the sympathy of jurors, it is going to do so in the sensational or shocking case (such as Rochin and Irvine)—not the "routine" or "mild" unconstitutional search and seizure case (such as Wolf).

This is why—although his reasoning must seem curious to many of us who have grown up with Wolf, Rochin and Irvine—a leading proponent of the exclusionary rule maintained, some 50 years ago, that infringements of the Fourth Amendment which generate the least public outcry pose the strongest case for exclusion. "The more violent and obvious infringement," he was willing to concede, "may be curtailed through civil or criminal actions against the guilty officers."

It would be hard to deny that a court's refusal to permit the use of evidence obtained by "obvious" or "shocking" police misconduct is, at least in some measure, symbolic. It signifies to the police officer and to the general public alike the court's unwillingness to tolerate the underlying police lawlessness. But if this is true in a case where the alternative remedies of tort actions, criminal prosecutions and internal discipline are most likely to be effective, how can it be any less so when the court allows the evidence to be used in a not-so-shocking case of unconstitutional police conduct—and thus one where alternatives to the remedy of exclusion are unlikely, or at least less likely, to amount to anything?

**III. Drawing the 'bottom line'**

A court which admits the evidence in such a case manifests a willingness to tolerate the unconstitutional conduct which produced it. How can the police and the citizenry be expected "to believe that the government truly meant to forbid the conduct in the first place"? Why should the police or the public accept the argument that the availability of alternative remedies permits the court to admit the evidence without sanctioning the underlying misconduct when the greater possibility of alternative remedies in the "flagrant" or "willful" case does not allow the court to do so?

A court which admits the evidence in a case involving a "run of the mill" Fourth Amendment violation demonstrates an in-
sufficient commitment to the guarantee against unreasonable search and seizure. It demonstrates "the contrast between morality professed by society and immorality practiced on its behalf." 110 It signifies that government officials need not always "be subjected to the same rules of conduct that are commands to the citizens." 111

Where should the threshold for exclusion be put? At what point should a judge say that the police misconduct is so indefensible or offensive as to warrant throwing out the evidence it produced? To say that this point is not reached until the police have resorted to violence or brutality or that it is not reached unless they have perpetrated some "gross" or "serious" or "aggravated" violation of the Constitution seems neither a principled nor a manageable way to go about it.

If the line must be drawn somewhere, I can think of no more logical and fitting place to draw it than at unconstitutional police conduct, however "mild," "honest" or "inadvertent" some may label it. 112 Frankfurter argued that the Court should reverse in Irvine, although it affirmed the conviction in Wolf, because the Irvine police misconduct was more shocking and offensive. But Jackson responded: "Actually, the search [in Wolf] was offensive to the law in the same respect, if not the same degree, as here." 113

I think Jackson was right (but for the wrong reason). Once the Court identifies the police action as unconstitutional, that ought to be the end of the matter. There should be no "degrees" of "offensiveness" among different varieties of unconstitutional police conduct. A violation of the Constitution ought to be the "bottom line." This is where the Weeks and Mapp Courts drew the line. This is where it ought to stay.

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112. See Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting) (evidence should not be excluded when seized by an officer "acting in the good-faith belief that his conduct conformed with existing law and having reasonable grounds for this [good-faith] belief"); Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part) (distinguishing between "flagrantly abusive" Fourth Amendment violations and "technical" or "good faith" violations);
Also, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 418 (1971) (Burger, C. J., dissenting) ("inadvertent" or "honest mistakes" by police should not be treated in the same way as "deliberate and flagrant Irvine-type violations of the Fourth Amendment"); United States v. Soysa, 394 F.2d 443, 451-52 (2d Cir. 1968) (Friendly, J., dissenting) (officer's error "so minuscule and pardonable" as to render exclusion of evidence inappropriate).

See also A Model Code of Pre-Arraignment Procedure § SS 290.2 (Official Draft, 1975) (evidence shall be excluded only if violation upon which it was based was "substantial"; all violations shall be deemed substantial if "gross, wilful and prejudicial to accused"; otherwise court shall consider, inter alia, "the extent of deviation from lawful conduct and "the extent to which the violation was wilful"); E. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 38 (1975) (officer should be supported if he "acted decently" and "did what you would expect a good, careful, conscientious police officer to do under the circumstances").

If the officer, as Dean Griswold described it, acted in the manner that "a good, careful, conscientious police officer" is expected to act, or if, as Judge Friendly maintained in Soysa, supra, the officer's error was "so minuscule and pardonable as to render the drastic sanction of exclusion... almost grotesquely inappro-