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“COMPARATIVE REPREHENSIBILITY” AND THE FOURTH AMENDMENT EXCLUSIONARY RULE

*Yale Kamisar**

It is not . . . easy to see what the shock-the-conscience test adds, or should be allowed to add, to the deterrent function of exclusionary rules. Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence.

So spoke Judge Robert H. Bork, concurring in a ruling that the fourth amendment exclusionary rule does not apply to foreign searches conducted exclusively by foreign officials.¹ A short time thereafter, when an interviewer read back the above statement and invited him to comment further on the subject, Judge Bork responded:

[One of the reasons] sometimes given [in support of the exclusionary rule] is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been convinced by that argu-

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In writing this article I profited from conversations with Albert Alschuler, Tom Davies, Jerry Israel, Wayne LaFave, Myron Orfield, Fred Schauer, Herman Schwartz, and Peter Westen.

1. *United States v. Mount*, 757 F.2d 1315, 1323 (D.C. Cir. 1985). Judge Bork wrote separately to address “more directly” *Mount*’s alternative argument that a federal court should use its “supervisory power” over the administration of federal criminal justice to exclude evidence “in cases where foreign law enforcement authorities secure evidence by means which ‘shock the judicial conscience.’” 757 F.2d at 1320. Bork regarded *United States v. Payner*, 447 U.S. 727 (1980) (even where government’s violation of a third party’s rights is “purposefully illegal,” the supervisory power “does not authorize” a federal court to exclude evidence that was not obtained in violation of defendant’s fourth amendment rights) as a more appealing case for applying an exclusionary rule than a case where foreign officials have engaged in misconduct, 757 F.2d at 1322, and he maintained that in light of *Payner* “we clearly lack supervisory power to create any exclusionary rule that expands the rule the Supreme Court has created under the Fourth Amendment,” 757 F.2d at 1320. I believe that *Payner* is a most unfortunate decision, see Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 636-38 (1983), but I read that case the same way Judge Bork does.

Judge Bork then went on to say that even if a federal court “had the power sometimes to exclude evidence obtained through illegal foreign searches,” he “would still disagree” with the case law and the suggestion in the *Mount* majority opinion that, in the exercise of its supervisory power, a federal court should adopt “a shock-the-conscience test to determine what evidence is to be excluded.” 757 F.2d at 1323 & n.6. It was in this setting that Judge Bork made the observation quoted in the text. For a long, hard look at the federal supervisory power generally, see Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

ment because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society.²

Judge Bork displays no affection for the exclusionary rule, but he may not be making an affirmative case against it. All he may be saying is that whatever good reasons may exist for excluding illegally seized evidence, the "judges shouldn't soil their hands" argument isn't one of them.³ On the other hand, Bork may be implying something more — or at least a reader may understandably infer something more: Where the defendant's conduct is more reprehensible than the police officer's (as, of course, it usually will be), the "judges shouldn't soil their hands" argument is a good reason for *admitting* illegally seized evidence. For "judges soil their hands" *a good deal more* by "turning a criminal loose upon society" than they do by simply ignoring an officer's violation of the fourth amendment. To put it somewhat differently, if the admissibility of illegally seized evidence turns solely on how the ruling affects the judge's "conscience," the defendant's motion to suppress should almost always fail. For a judge ought to lose a lot less sleep over admitting highly probative, albeit tainted, evidence than she should over "freeing" an apparently guilty person to "prey upon society" again.

I. VARIOUS PROPOSALS FOR TAKING A "COMPARATIVE REPREHENSIBILITY" APPROACH TO THE ADMISSIBILITY OF EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT

The course of action suggested by Judge Bork, or at least an idea lurking in his comments — what I shall call the "comparative reprehensibility" approach to the admissibility of unconstitutionally seized, but reliable evidence — can take various forms:

(a) since "turning a criminal loose" is always more shocking, or at least as shocking, as admitting relevant and reliable, albeit illegally ac-

2. McGuigan, *An Interview with Judge Robert H. Bork*, JUD. NOTICE, June 1986, at 1, 6.

3. One of the witnesses who supported Judge Bork's nomination to the Supreme Court, Mr. Dewey Stokes, National President of the Fraternal Order of Police, did Bork a disservice, I believe, by leaving out the last six words of the statement quoted in the text at note 1, thus altering the judge's meaning. "In Judge Bork's own words," Mr. Stokes told the Senate Judiciary Committee, "Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience. . . ." Statement of the Fraternal Order of Police before the Senate Judiciary Committee on the Nomination of Robert H. Bork to the Supreme Court of the United States, Sept. 22, 1987, pp. 8-9 (on file with the *Michigan Law Review*). By omitting the last portion of Judge Bork's statement, the witness failed to indicate that Bork was *responding* to a "judges shouldn't soil their hands" argument and made it appear that excluding unconstitutionally obtained evidence, when such a ruling would have no deterrent effect, struck Bork as "shocking" *in the abstract*.

quired, evidence, unless there are other good reasons for not doing so, a court should *always* admit such evidence;

(b) in ruling on the admissibility of evidence obtained in violation of the fourth amendment, a court should balance the seriousness of the officer's error against the gravity of the defendant's crime and only exclude the evidence when, if ever, the reprehensibility of the officer's illegality is greater than the defendant's;

(c) the courts should consider some crimes, *e.g.*, murder, rape, and armed robbery, so serious that their gravity will always exceed the gravity of any unreasonable search or seizure and completely eliminate these crimes from the coverage of the rule, but apply the rule as it normally would be in all remaining cases;⁴

(d) in applying the "comparative reprehensibility" test, a court might take a two-level approach, (i) *never* excluding illegally seized evidence in the "most serious" cases (because the defendant's conduct in such cases will *always* be more reprehensible than the police officer's), and (ii) freely balancing the gravity of the constitutional violation against the gravity of the defendant's crime in other cases.⁵

4. Professor John Kaplan would carve out such an exception for "treason, espionage, murder, armed robbery and kidnapping by organized groups." Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974). Cf. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 379 (1939) (footnotes omitted):

[I]f the application of the [exclusionary] rule could be divorced from popular prejudices concerning the liquor, gambling, and revenue laws, in the enforcement of which the federal rule saw its greatest growth, and if a murderer, bank robber, or kidnapper should go free in the face of evidence of his guilt, the public would surely arise and condemn the helplessness of the courts against the depredations of the outlaws:

Even in those serious cases he would exempt from the exclusionary rule, adds Kaplan, *supra*, at 1046 (footnote omitted), "some police violations would still invoke the exclusionary rule. The *Rochin v. California* standard would still survive, so that evidence would be suppressed if the violation of civil liberties were shocking enough." *Rochin v. California*, 342 U.S. 165 (1952), was not a *fourth amendment* exclusionary rule case, but what might be called a "straight due process" case. And the "conduct that shocks the conscience" test employed in that case, at least as it has since been applied by the Court, furnishes precious little protection. It did not, for example, prevent the admission of the evidence in *Irvine v. California*, 347 U.S. 128 (1952), despite the fact that "[f]ew police measures have come to [the Court's] attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment." 347 U.S. at 132 (Jackson, J., announcing the judgment of the Court). In *Irvine* the police had surreptitiously entered a home, installed a concealed microphone in a bedroom, and listened to the conversations of the occupants for over a month. See also *United States v. Kelly*, 707 F.2d 1460, 1476 (D.C. Cir. 1983) (R. Ginsburg, J., concurring) (rejecting Abscam defendant's "due process" defense): "The requisite level of outrageousness . . . is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police; the broad 'fundamental fairness' guarantee, it appears from High Court decisions, is not transgressed absent 'coercion, violence or brutality to the person.'"

5. Arizona Justice James Cameron advocates such an approach. See *State v. Bolt*, 142 Ariz. 260, 270, 689 P.2d 519, 529 (1984) (Cameron, J., specially concurring); Cameron & Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109, 142-52 (1984). Justice Cameron would expand Professor Kaplan's category of serious offenses somewhat, see 142 Ariz. at 271, 689 P.2d at 530, but if his basic reasoning is sound it is hard to see why he does not expand the category still further. See text at notes 124-25 *infra*. Indeed, it is hard to see, assuming that this is the proper question, why the gravity of *almost any* felony would not exceed the gravity of *almost any* fourth amendment violation. Surely many judges (including Justice Cameron) would think it would. For my earlier criticism of Justice Cameron's views, see Collins, *The New Federalism Is Thriving Despite Setbacks and Losses in 1984*, Natl. L.J., Apr. 29, 1985, at 32, 33.

The complaint that the exclusionary rule does not take into account the reprehensibility of a particular defendant's crime (or the gravity of crime generally) is not heard often. It is not nearly as common, for example, as the criticism that the exclusionary rule applies (or, until recently, used to apply)⁶ without regard to whether the police error is inadvertent or deliberate, minor or gross. Nevertheless, the view that evidence obtained in violation of the fourth amendment should always (or almost always) be admitted on "comparative reprehensibility" grounds, or at least that the exclusionary rule should turn on the "comparative reprehensibility" of the defendant's crime and the officer's illegality in a particular case, is not new.

This should come as no surprise. After all, as Judge (later Justice) Benjamin Cardozo admonished us long ago — hundreds of law review articles and thousands of speeches ago — in a portion of his famous *Defore* opinion that few remember and even fewer, especially law professors, take seriously: "To what [has been] written [about the exclusionary rule], little of value can be added."⁷

More than thirty years ago, Professor Edward L. Barrett, Jr., made an argument similar to Judge Bork's and, as might be expected of one who was perhaps the most formidable academic critic of the then unfolding "revolution" in American criminal procedure,⁸ he made it very well. Asked Barrett:

Is not the court which excludes illegally obtained evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant? Suppose a policeman by an illegal search has obtained evidence which establishes the defendant as a peddler of narcotics to juveniles. Where lies the duty of the judge? Can we assume from any general social point of view that the policeman's conduct is so much more reprehensible than the defendant's that the duty of the judge is to reject the evidence and free the defendant?

. . . Liberty demands that both official and private lawlessness shall be curbed. And in any specific instance it is hard to say that, put to the choice between permitting the consummation of the defendant's illegal

6. In 1984, after years of grumbling by various commentators and Justices about the "disproportionate" impact of an "automatic" or "absolute" application of the exclusionary rule, the Court in essence adopted the oft-proposed "inadvertent" or "honest police blunder" exception to the rule, at least in search warrant cases. *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). Three years later, the Court established another exception to the rule when an officer acts in objective reasonable reliance on a statute subsequently determined to be enacted in violation of the fourth amendment. *Illinois v. Krull*, 107 S. Ct. 1160 (1987).

7. *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.

8. See generally Kamisar, *Edward L. Barrett, Jr.: The Critic with "That Quality of Judiciousness Demanded of the Court Itself,"* 20 U.C. DAVIS L. REV. 191 (1987).

scheme and the policeman's illegal scheme, the court must of necessity favor the defendant.⁹

It takes no great leap of the imagination to determine how Barrett would answer his own questions (assuming for the moment that they are the right questions): The "peddler of narcotics to juveniles" is plainly a more reprehensible cuss than the officer who violates the fourth amendment. More generally, "when put to the choice between permitting the consummation of the defendant's illegal scheme and the policeman's" (again, assuming for the moment that this is an appropriate way to frame the issue), a court should rarely, if ever, favor the defendant.

Thus, Professor Barrett suggested, none too subtly, what some sixty years ago the first notable critic of the exclusionary rule, Dean John H. Wigmore, had stated bluntly:

[The exclusionary rule] puts [courts] in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.¹⁰

Arizona Supreme Court Justice James D. Cameron would not carry the "comparative reprehensibility" approach quite as far as Wigmore (although he would carry it too far to suit me). He would, for exclusionary rule purposes, distinguish the murder defendant from the embezzler and the panderer. But in certain enumerated "serious cases" he would apply "comparative reprehensibility" "with a vengeance":¹¹

[W]here the criminal conduct involved is more dangerous to society than the police misconduct, it does not make sense to sacrifice the criminal prosecution in order to deter the police.

....

... [T]he gravity of ["serious" crimes] always will by definition exceed the gravity of any Fourth Amendment violation. This is because, the rhetoric of some civil libertarians to the contrary, it *is* worse to be

9. Barrett, *Exclusion of Evidence Obtained by Illegal Searches — A Comment on People vs. Cahan*, 43 CALIF. L. REV. 565, 582 (1955).

10. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 482 (1922). The identical language appears in 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW ¶ 2184, at 637 (2d ed. 1923), and 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW ¶ 2184, at 36-37 (3d ed. 1940). Indeed, this section of the Wigmore treatise is essentially a reprint of his famous 1922 article. See also Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169, 192 (1955) ("[When courts exclude illegally seized evidence, the citizen] knows only that the activities of a dope-peddler, a notorious numbers racketeer, a score of gun-toters, a counterfeiter, or a robber have not been considered wrongful enough by the judges to justify conviction.").

11. Cf. *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting) ("The aim [of the new rules] in short is . . . voluntariness with a vengeance.").

murdered or raped than to have one's house searched without a warrant, *no matter how aggravated the latter violation.*

....

... [Under the proposed balancing approach to the exclusionary rule], [t]he accused will be allowed to invoke the rule only where the illegality committed against him is more grave than the crime he has committed against others. Thus, the accused will be "let off" only where he has suffered more than his purported victims.¹²

II. "COMPARATIVE REPREHENSIBILITY" (OR THE "SERIOUS CRIMES" EXCEPTION) AND "PROPORTIONALITY" (OR THE "INADVERTENT" OR "HONEST POLICE BLUNDER" EXCEPTION) COMPARED AND CONTRASTED

At first blush the attack on the exclusionary rule for failure to balance the magnitude of the defendant's crime against the magnitude of the officer's error (what I have called the "comparative reprehensibility" critique) looks like another and more popular criticism of the rule — its failure to distinguish between inadvertent or slight police error and deliberate or substantial police misconduct (variously called the "inadvertence" exception, the "substantiality" test, the "good faith" test, or "the idea of proportionality").¹³ The two lines of attack are conceptually distinct, but they can be easily confused or lumped together. For both criticisms are directed at the "mechanical" and "blind" application of the exclusionary rule,¹⁴ the "single, monolithic,

12. *State v. Bolt*, 142 Ariz. 260, 270-72, 689 P.2d 519, 529-31 (1984) (Cameron, J., concurring) (second emphasis added). As Justice Cameron points out, 142 Ariz. at 270 n.2, 689 P.2d at 529 n.2, "[m]uch if not most" of what he states in his concurring opinion appeared a short time earlier in Cameron & Lustiger, *supra* note 5. As he also makes plain, Justice Cameron is building on a proposal advanced in Kaplan, *supra* note 4.

13. See, e.g., *Stone v. Powell*, 428 U.S. 465, 490 (1976) (Powell, J.) ("The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the [exclusionary] rule is contrary to the idea of proportionality that is essential to the concept of justice."); 428 U.S. at 538 (White, J., dissenting) ("[T]he [exclusionary] rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief."); A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2(2) (1975) ("A motion to suppress evidence pursuant to this section shall be granted only if the court finds that the violation upon which it is based was substantial. . . ."); Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 27 (1975) (Model Code's "substantiality" test may be seen as an outgrowth of "dissatisfaction with the drastic sanction of the rule" as exclusion "came to be mandated for what were increasingly perceived to be technical and perhaps inadvertent violations by police."); Kaplan, *supra* note 4, at 1044 ("One superficially tempting modification would be to hold the [exclusionary] rule inapplicable where the constitutional violation by the police officer was inadvertent.").

14. See Burger, C.J., dissenting in *Brewer v. Williams*, 430 U.S. 387, 416 (1977) ("[The course taken by the majority] mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human

and drastic judicial response" to police error once that error is found to be of constitutional dimension.¹⁵ And both types of critics advocate a compromise position (although a different kind of compromise) between those who would retain an unmodified exclusionary rule and those who would abolish the rule altogether.

Moreover, and this is probably the greatest source of confusion, both types of critics lament that relentless application of the exclusionary rule produces "disproportionate" results (but *different kinds* of disproportionate results). And the "comparative reprehensibility" critic, no less than the proponent of proportionality, can state her case in terms of "disparity" or "disproportionality" (albeit *different kinds* of disparity or disproportionality).

When proponents of the proportionality approach (or "inadvertent" police error exception) complain that rigid application of the exclusionary rule offends the idea of proportionality, they have in mind those instances when an "honest" or "inadvertent" police blunder affords a guilty defendant — *any* guilty defendant — an unacceptable windfall.¹⁶ These critics of the exclusionary rule point to the disparity or disproportion between the police error and the "drastic" remedy of exclusion.¹⁷

When proponents of the "comparative reprehensibility" approach (or "serious crimes" exception) protest that rigid application of the exclusionary rule produces disproportionate results, they have in mind those instances where the murderer or armed robber "goes free" de-

error."). See also Burger, C.J., dissenting in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 420 (1971) ("Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should . . . acknowledge its shortcomings.").

15. See Burger, C.J., dissenting in *Bivens*, 403 U.S. at 418 ("[T]he exclusionary rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms.").

16. See, e.g., the quotation from Justice Powell, *supra* note 13, speaking for the Court in *Stone v. Powell*.

17. After decrying the exclusionary rule's "drastic judicial response" to all fourth amendment violations in his *Bivens* dissent, Chief Justice Burger continues: "Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type violations of the Fourth Amendment." 403 U.S. at 418. The *Irvine* case is discussed briefly in note 4 *supra*. See also Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736, 744-45 (1972) (referring to the defendant in *Irvine*, a "bookmaker," and the defendant in *Mapp v. Ohio*, 367 U.S. 643 (1961)):

I think it unfortunate that the conviction of the bookmaker was allowed to stand and that it would have been unfortunate if the conviction of Miss Mapp had been allowed to stand. The Exclusionary Rule is drastic medicine and I would save it for drastic cases in which the conduct of the police was outrageous, as it was in those cases. . . .

....
If the [Model Code's substantiality test] were the law, there would be no profit in deliberate police lawlessness but criminals could not claim a windfall from insignificant mistakes in the course of good faith law enforcement.

spite the fact that his misconduct is more dangerous or reprehensible than the officer's — and this is so even when the officer has committed a "deliberate" or "gross" constitutional violation.¹⁸ These critics underscore the disparity or disproportion between the officer's misconduct and the defendant's.

Both groups of critics deplore the "universal 'capital punishment' " inflicted on all evidence once constitutional error is shown in its acquisition.¹⁹ But they propose different cures. Advocates of the proportionality approach in essence want the courts to find "aggravating circumstances" (*i.e.*, "deliberate" or "gross" police error) before imposing exclusionary rule "capital punishment." Proponents of the "comparative reprehensibility" approach, on the other hand, urge the courts to take into account what they regard as "mitigating circumstances" (*i.e.*, that the constitutional error occurred in the pursuit of a dangerous criminal) and to withhold "the extreme sanction of exclusion"²⁰ when such circumstances are present.

To be sure, both criticisms (or proposed modifications) of the exclusionary rule *can be combined* in one assault on the rule. Judge Car-

18. As noted earlier, Justice Cameron would establish a flat exception to the exclusionary rule for certain serious crimes "*no matter how aggravated* the [fourth amendment] violation" (emphasis added). See text at note 12 *supra*. Later on in his concurring opinion in *Bolt*, 142 Ariz. at 272-73, 659 P.2d at 531-32, Justice Cameron observes: "Per se categories could resolve the easy ['comparative reprehensibility'] cases. . . . One such category could be established for types of crimes deemed so serious that no search or seizure violation would ever justify application of the exclusionary rule. . . ."

In his article, which treats the subject more comprehensively, Justice Cameron agrees with Professor Charles Alan Wright that the evidence should have been excluded in *Mapp* and *Irvine*, but not simply because the police illegality in those cases was flagrant — only because the gravity of the police misconduct exceeded the gravity of the defendants' *petty crimes*. See Cameron & Lustiger, *supra* note 5, at 146. Unlike Professor Wright, Justice Cameron would not save the exclusionary rule for *all* instances of "outrageous" police misconduct:

What [Professor Wright] and others who rely on *Irvine* and *Mapp* overlook, however, is that flagrantly illegal searches do not take place only against petty criminals such as bookies [Mr. Irvine] and owners of dirty pictures [Miss Mapp]; they also take place against very serious criminals such as murderers, kidnappers, rapists and foreign spies.

Id.

Professor Kaplan's "serious crimes" exception to the exclusionary rule is not as absolute as Justice Cameron's. In theory at least, a defendant whose offense fell within Kaplan's serious crime category could still exclude the evidence if he persuaded a court that the police misconduct "shocks the conscience." See note 4 *supra*. However, this does not strike me as a qualification of an otherwise flat exception to the fourth amendment exclusionary rule, but rather a recognition that a "straight due process" test would still apply, *as it did before* the *Mapp* Court imposed the fourth amendment exclusionary rule on the state courts as a matter of federal constitutional law. "But the demonstrated incapacity of [prior doctrine] to meet the problem of the egregious [police] wrong must be regarded as an important milestone on the road to *Mapp*." F. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 10.

19. See Burger, C.J., dissenting in *Bivens*, 403 U.S. at 419 ("I submit that society has . . . [a] right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition.").

20. The Court described the exclusionary rule that way in *United States v. Leon*, 468 U.S. 897, 926 (1984).

dozo did just that in a single sentence, noting that if the exclusionary rule were adopted in its present shape, "[t]he pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious."²¹

However, the "comparative reprehensibility" and proportionality approaches need not, and usually have not, been combined. For example, at least one proponent of a serious crimes exception to the exclusionary rule has emphatically rejected a proposed distinction between "inadvertent" (*i.e.*, "slight") and "deliberate" (*i.e.*, "substantial") fourth amendment violations.²² He would abolish the rule in murder, kidnapping, and other serious cases, but apply it without reserve elsewhere, however inadvertent or slight the constitutional error that crops up elsewhere.

Moreover, neither the six members of the Court who recently voted for a "good faith" (actually a "reasonable mistake") exception to the exclusionary rule,²³ nor, in the main, those on or off the bench who have decried the disproportionate impact of the exclusionary rule, have urged consideration of the gravity or reprehensibility of the defendant's misconduct *as well as* the insignificance of the transgressing officer's.²⁴ Their complaint has been that the exclusionary rule treats "vastly dissimilar cases" of *official* lawlessness "as if they were the same,"²⁵ not that it treats vastly dissimilar cases of *private* lawlessness indiscriminately.

Once the police misconduct is deemed sufficiently "serious" or "substantial" — once it is established that the transgressing officers were "dishonest" or "reckless" or "could not have harbored an objectively reasonable belief in the existence of probable cause"²⁶ exclusion of the evidence is an "appropriate" or proportionate response — regardless, it seems, whether the defendant is charged with shoplifting or skyjacking, bookmaking or bomb-throwing. What matters — and evidently what only matters — is the extent to which the police have

21. *People v. Defore*, 242 N.Y. 13, 23, 150 N.E. 585, 588 (1926).

22. See Kaplan, *supra* note 4, at 1044-45.

23. *Leon*, 468 U.S. 897.

24. See, e.g., Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); Coe, *supra* note 13; H. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*, in BENCHMARKS 260-62 (1967). Justice Cameron is an exception. He would support a "good faith" or "inadvertent" police error exception to the exclusionary rule, see 142 Ariz. at 272, 689 P.2d at 531, but he would also carve out an exception for "all cases in which the police acted with *less than good faith*, but their actions are outweighed by the egregious nature of the crime." 142 Ariz. at 272, 689 P.2d at 531 (emphasis added).

25. See *Bivens*, 403 U.S. at 419 (Burger, C.J., dissenting).

26. *Leon*, 468 U.S. at 926.

deviated from prescribed norms, not the extent to which the defendant has.

I have dwelt on the distinction between "comparative reprehensibility" and "proportionality" or "substantiality" because, for reasons I shall set forth in the next section, I consider the first approach a much more pernicious modification of the exclusionary rule than the second and because the second approach has commanded much more support than the first — until now.

But there is no guarantee that this state of affairs will continue. The idea of "proportionality" or "substantiality" percolated in the legal literature and in various concurring and dissenting opinions²⁷ for a number of years before it won wide acceptance.²⁸ The notion of "comparative reprehensibility" has been injected into the stream (or should one say, flood?) of commentary about the exclusionary rule. Some day some version of this notion may also be embraced by a majority of the Court.

The majority opinion in *United States v. Leon*²⁹ explicitly states that the cost-benefit balancing in which the Court has engaged for years "forcefully suggests" and "provides strong support" for the modification of the exclusionary rule it established in that case.³⁰ But "comparative reprehensibility" may also be viewed as a species of cost-benefit balancing.³¹ It would be regrettable, but not too surprising, if someday the Rehnquist Court viewed it this way and further narrowed the thrust of the exclusionary rule accordingly. Indeed, it is not inconceivable that someday the Court might regard the notion of "comparative reprehensibility" as a reason, or one more reason, for abolishing the exclusionary rule altogether.

Before getting to what I think is the heart of the matter, I would like to make a relatively small point, but not, I think, a trivial one. The fact that unconstitutionally obtained evidence was or should have been excluded does not necessarily "turn a criminal loose upon society." At a second trial a defendant may be (and not a few have been) reconvicted on the basis of other admissible and legally sufficient evi-

27. Most of these proposals or suggestions were made in the post-*Mapp* era, see the materials cited in notes 13-14 & 24 *supra*, but five years *before* that famous decision was handed down, Illinois Supreme Court Justice Walter Schaefer suggested that "a line may be drawn between the casual and perhaps unintentional police violation of constitutional rights and that which is studied and deliberate." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 15 (1956).

28. See note 6 *supra*.

29. 468 U.S. 897 (1984).

30. See 468 U.S. at 909, 913.

31. This is the primary thrust of Cameron & Lustiger, *supra* note 5. See *id.* at 142-54.

dence. Of course, now that it is clear that fourth amendment violations are subject to a rule of harmless error³² (which was not the case when Professor Barrett, let alone Judge Cardozo and Dean Wigmore, were writing about the exclusionary rule),³³ an appellate court may rule that, although the court below erred in admitting the challenged evidence, its introduction was "harmless beyond a reasonable doubt."³⁴

Moreover, now that the Court has expressly sanctioned the "inevitable discovery" exception to the exclusionary rule³⁵ (an exception no court had yet applied when Cardozo and Wigmore were writing about the general subject, and one the Supreme Court did not approve until long after Barrett stopped writing about the subject),³⁶ an appellate court may remand for further consideration whether, or itself determine that, the unconstitutionally acquired items or information ultimately or inevitably would have been discovered by lawful means.³⁷

III. A HARD LOOK AT "COMPARATIVE REPREHENSIBILITY" BALANCING GENERALLY AND A "SERIOUS CRIMES" EXCEPTION IN PARTICULAR

A. *At What Phase of the Criminal Process is the Seriousness of the Crime To Be Determined?*

If a "serious crimes" exception to the exclusionary rule were to be carved out, or if the admissibility of unconstitutionally seized evidence turned to a significant degree on the reprehensibility of the defendant's

32. Although the issue had been left open in earlier cases, in *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court ruled, surprisingly without discussion or dissent, that if certain evidence admitted in the case had been obtained in violation of the fourth amendment, the error was subject to a harmless-error rule. See generally, e.g., Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976); Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980); Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 1 (1988).

33. "Prior to the 1960's, it was generally assumed that constitutional violations could never be regarded as harmless error." 3 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 26.6(c) (1984).

34. *Chambers*, 399 U.S. at 53.

35. *Nix v. Williams*, 467 U.S. 431 (1984).

36. The first clear application of this exception is said to be *Somer v. United States*, 138 F.2d 790 (2d Cir. 1943). See 4 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 11.4(a), at 379 (2d ed. 1987). But the rule was not expressly sanctioned by the Supreme Court until forty years later. *Nix*, 467 U.S. 431. Although *Nix* is a sixth amendment case it is plain that it applies to the fourth amendment as well. See 4 W. LAFAVE, *supra*, § 11.4(a). Indeed, Chief Justice Burger's opinion for the Court in *Nix* "seeks to justify the adoption of the inevitable discovery exception by analogy to the independent source doctrine of the fourth amendment exclusionary rule." Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 135 (1984).

37. *Nix*, 467 U.S. at 444.

crime, it would be theoretically possible to admit the challenged evidence on a contingent basis. The judge could make an initial determination that the unconstitutionally obtained evidence was admissible and then instruct the jury that it could consider the evidence if it found the defendant guilty of certain serious charges, but not if it found him guilty of certain lesser charges.

It is unlikely that such a procedure would pass constitutional muster. Nor should it. The jury could hardly be expected to forget or ignore cogent evidence once it has been disclosed. In determining whether the defendant was guilty of a lesser included offense the jury would likely be influenced by the damning evidence it was supposed to disregard.³⁸

How, then, should a "serious crime" exception to the exclusionary rule, or, more generally, a "comparative reprehensibility" test, be administered?

Should the gravity of the defendant's lawlessness turn on the nature and magnitude of the crime *the officer believes* he is investigating? Professor Kaplan quickly rejects such a rule, and properly so, for in practice it would mean that "[o]ften the court would simply have to take the policeman's word as to what crime he was investigating."³⁹

Kaplan believes, however, that "grave problems of administrability"⁴⁰ could be avoided if the defendant's reprehensibility, for purposes of the exclusionary rule, turned on the crime *charged by the prosecutor*: "All any court need do to apply the [proposed modification of the exclusionary rule] is to look at the crime charged."⁴¹

But why isn't this approach subject to the same criticism Professor Kaplan made with respect to a test that turns on the crime the officer believes he is investigating? Why wouldn't a "serious crimes" exception based on the crime charged mean, as a practical matter, that often the court would have to take the prosecutor's word as to what crime was the appropriate one to charge?

38. Cf. *Jackson v. Denno*, 378 U.S. 368 (1964) (striking down a procedure whereby if the evidence presented a "fair question" as to the "voluntariness" of a confession, the trial judge submitted that issue, along with all others, to the jury).

39. Kaplan, *supra* note 4, at 1047.

40. *Id.*

41. *Id.* Evidently, Justice Cameron would also base reprehensibility on the severity of the crime charged by the prosecutor. See Cameron & Lustiger, *supra* note 5, at 151 n.198. But concurring in *State v. Bolt*, 142 Ariz. at 273 n.3, 689 P.2d at 532 n.3, he states that if there were no exception to the "fruit of the poisonous tree" doctrine in the instant case, "a balancing test would suggest that [the challenged] evidence be excluded because the police transgressions are both serious and systemic, and the crime *as indicated by the sentence imposed* (concurrent three year terms of probation) is neither serious nor violent" (emphasis added). Of course, a ruling on the admissibility of the evidence is made *before* sentence is imposed, indeed, before the defendant is convicted.

When the police make an arrest for a misdemeanor not committed in their presence, but lack the statutory authority to do so, they sometimes stretch or manipulate the facts in order to justify their action as a "felony arrest."⁴² If a "serious crimes" exception to the exclusionary rule were in effect, or even if a general "comparative reprehensibility" test were adopted, wouldn't the prosecutor succumb to the temptation, at least sometimes, to charge a greater crime or a higher degree of crime than the circumstances warranted so that she could "save" a case based on unconstitutionally seized evidence?

Suppose, for example, that armed robbery were one of the specified serious crimes "exempted" from the exclusionary rule and that the police obtained evidence of the robbery by violating the fourth amendment. Suppose further that the robbery victim "didn't remember" or "wasn't sure" whether the person who robbed him had a gun or a knife and that the alleged robber was apprehended a few blocks away without a weapon. Even if the evidence only supported, and the prosecutor only expected to obtain, a conviction for a lesser degree of robbery, wouldn't a prosecutor be tempted to *charge* the defendant with armed robbery (or robbery in the first degree)? The prosecutor could maintain, at the pre-trial stage at any rate, that the defendant probably disposed of the weapon just before he was caught.⁴³

A proponent of "comparative reprehensibility" might deny that a prosecutor would ever resort to such shady tactics. But Justice Cameron maintains that "prosecuting attorneys are *forced* [evidently because they are so indignant about the prospect of a 'guilty criminal' escaping unpunished] to rely on perjured or at least highly questionable testimony to maintain the admissibility of relevant evidence."⁴⁴ If this is so and if a group of "serious crimes" were exempted from the exclusionary rule, why wouldn't prosecuting attorneys be "forced," or at least sorely tempted, to lodge the highest charge possible in order "to maintain the admissibility of relevant evidence"?

I find it hard to avoid the conclusion that *in practice* an exception to the exclusionary rule for major or dangerous offenses would mean that defendants who did not actually commit, or at least were never convicted of, serious crimes, would nevertheless be prevented from challenging unconstitutionally seized evidence because they were *accused of* committing a serious crime. Thus one could be *convicted of* a

42. See W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 30 (1965).

43. Cf. Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC. REV. 393, 402-03 (1979).

44. Cameron & Lustiger, *supra* note 5, at 138 (emphasis added).

relatively minor crime, *e.g.*, simple assault, robbery in the third degree, or burglary in the third degree, on the basis of unconstitutionally seized evidence (even evidence obtained as a result of "substantial" or "gross" police misconduct) because *and only because* he was *charged with* a serious crime, *e.g.*, aggravated assault, robbery in the first degree, or burglary in the first degree.⁴⁵

"Overcharging" already is, and has long been, a serious problem. In his classic study of the use of prosecutor's discretion in plea bargaining, Professor Albert Alschuler noted:

Defense attorneys in various jurisdictions complain that prosecutors charge robbery when they should charge larceny from the person . . . [and] that they charge assault with intent to commit murder when they should charge some form of battery. . . . In general, defense attorneys in some cities say [that] prosecutors charge "the first degree of everything" but accept a guilty plea to "the second degree of any crime" without serious negotiation.⁴⁶

Wouldn't a "comparative reprehensibility" test, to say nothing of a *per se* exception to the application of the exclusionary rule for "serious crimes," furnish the prosecutor *one more reason* to inflate the initial charge?

Justice Cameron does warn us that in applying his proposed modification of the exclusionary rule "trial judges should keep in mind that prosecutors sometimes 'overcharge' for strategic purposes."⁴⁷ "If this occurs," he continues, "the trial judge should determine whether the charge is fair for the purposes of the motion to suppress, given the facts of the particular case."⁴⁸

But how can a trial judge tell, when asked to rule on a pre-trial motion to suppress, whether "overcharging" *is occurring*? How can she tell at this early stage whether or not the charge is "fair"? "The facts of the particular case" have not yet unfolded. That is why we hold trials.

Would it suffice if the prosecutor gave the trial judge "assurances" that the charge was "fair"? Or must she produce the robbery victim or a by-stander who testifies that the defendant used a deadly weapon? May the defense lawyer then refute this testimony by putting his client on the stand? Or by producing other witnesses? Again, isn't this what

45. As I maintain at text at notes 94-123 *infra*, if it makes sense to carve out a "serious crimes" exception to the exclusionary rule, it also makes sense to include, and there will be considerable pressure to include, such crimes as "aggravated assault" or "assault in the first degree" and "aggravated burglary" or "burglary in the first degree."

46. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 89-90 (1968). See also J. EISENSTEIN, *POLITICS AND THE LEGAL PROCESS* 113 (1973).

47. Cameron & Lustiger, *supra* note 5, at 151 n.198.

48. *Id.*

the trial on the merits is all about? And would critics of the exclusionary rule, who lament "the tremendous impact that the rule has on the sheer work load of the courts,"⁴⁹ welcome a pretrial adversary proceeding on the degree of a defendant's criminality?

For purposes of the rest of the discussion, I shall assume that the administrative problems I think are raised by a "serious crimes" exception to the exclusionary rule, or by "comparative reprehensibility" balancing generally, can somehow be satisfactorily resolved.

B. *Balancing the Seriousness of the Police Misconduct Against the Gravity of the Defendant's Crime*

As already indicated,⁵⁰ Professor Kaplan rejected an "inadvertence" or "honest police blunder" exception to the exclusionary rule:

To [adopt such an exception] would add one more factfinding operation, and an especially difficult one to administer, to those already required of a lower judiciary which, to be frank, has hardly been very trustworthy in this area. . . . So long as [front-line] judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level.⁵¹

A test that turned on the "comparative reprehensibility" of the officer's and the defendant's lawlessness in a particular case would be even more vulnerable to Kaplan's criticism because such a test would be a good deal more unruly. (Perhaps that is why Kaplan eschewed "comparative reprehensibility" balancing at large and proposed only an exception to the exclusionary rule for the most serious cases.)

I can already hear the taunts: "You and Kaplan may have objected to a so-called 'good faith' exception to the exclusionary rule. But, fortunately, neither you nor Kaplan have any votes. A majority of those who do adopted just such an exception."⁵²

There would be some force in such a retort, but it would not be quite accurate. As I have noted elsewhere, ever since the so-called "good faith" exception was first suggested or proposed, "its critics have been shooting at a moving target."⁵³ Over the years, evidently in response to criticism, the proposed exception has undergone signifi-

49. Wilkey, *The Exclusionary Rule: Cost and Viable Alternatives*, 1 CRIM. JUST. ETHICS 16, 18 (Summer/Fall, 1982). This criticism of the exclusionary rule by Judge Wilkey is quoted with approval in Cameron & Lustiger, *supra* note 5, at 139.

50. See note 22 *supra* and accompanying text.

51. Kaplan, *supra* note 4, at 1045.

52. See note 6 *supra*.

53. Y. Kamisar, *The Court's Growing Hostility to the Exclusionary Rule: Leon, Sheppard, and Lopez-Mendoza*, Prepared Remarks at the U.S. Law Week's Constitutional Law Conference 20.7 (Sept. 14, 1984) (on file with the *Michigan Law Review*).

cant change. It has evolved from a subjective test to a "two-pronged" test ((a) did the officer actually believe that he was complying with the law? and (b) if so, would a reasonably trained officer have so believed?) and then, to a purely "objective" test (to the extent that a "reasonable person" test is, or can be, "purely" objective).⁵⁴

Thus, the *Leon* Court emphasized that "the standard we adopt today is an objective one"⁵⁵ and one that "requires officers to have a reasonable knowledge of what the law prohibits."⁵⁶ The Court "eschew[ed] inquiries into the subjective beliefs of law enforcement officers," believing that sending the courts "on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."⁵⁷

In short, the so-called "good faith" exception adopted in 1984 — one "confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal"⁵⁸ was not the same "especially subjective" test Professor Kaplan criticized ten years earlier.

But "comparative reprehensibility" balancing would call for "especially subjective" determinations and would constitute, to borrow Kaplan's language, "almost an open invitation to nullification [of the exclusionary rule] at the trial court level."⁵⁹ (That, some proponents of this approach might say, is the whole idea.)

"Comparative reprehensibility" balancing would be reminiscent of the pre-*Miranda* due process "voluntariness" test for admitting confessions. When that test prevailed "[n]ot only were trial judges left without guidance for resolving confession claims but they were virtually invited to give weight to their subjective preferences when performing the elusive task of balancing."⁶⁰ Furthermore — and these comments on the inadequacy of appellate review would also seem applicable to a "comparative reprehensibility" test for admitting evidence seized in violation of the fourth amendment —

The ambiguity of the due process test and its subtle mixture of factual and legal elements discouraged active review even by the most conscien-

54. See *id.* at 20.7-20.10. See also 1 W. LAFAVE, *supra* note 36, § 1.3; Wasserstrom & Mertens, *supra* note 36, at 117-18.

55. 468 U.S. at 919 n.20.

56. 468 U.S. at 920 n.20.

57. 468 U.S. at 922 n.23.

58. 468 U.S. at 922 n.23.

59. Kaplan, *supra* note 4, at 1045.

60. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869-70 (1981). See also Y. KAMISAR, *What is an "Involuntary" Confession?*, in POLICE INTERROGATION AND CONFESSIONS 1 (1980).

tious appellate judges. Moreover, when higher courts did attempt to address confessions questions, they found themselves so wholly at sea that the appearance of principled judicial decision-making inevitably suffered, whether or not they chose to hold the confession inadmissible.⁶¹

Where else will a conscientious judge who embarks on "comparative reprehensibility" balancing find herself but "wholly at sea"? How does she go about determining whether the burglary of a coin shop exceeds the gravity of a search without a warrant? Whether extortion exceeds the gravity of kicking in a door without probable cause? Whether drug dealing exceeds the gravity of surreptitiously entering a home, without a court order, to install bugging equipment?

No violation of the fourth amendment would be too serious to preclude the admissibility of the evidence. The defendant's crime might be still worse. The stain of deliberate or gross — even flagrant, *Irvine*-type — police misconduct could be bleached by the "dangerousness" or "heinousness" of the crime the police were investigating.⁶² On the other hand, no offense committed by a defendant would be too petty to assure application of the exclusionary rule. A run-of-the mill crime, even a relatively trivial one, might still exceed the gravity of a minor violation of the fourth amendment. Thus, even violators of the liquor, gambling, and revenue laws⁶³ could be convicted on the basis of unconstitutionally seized evidence if the police error were not deemed sufficiently "substantial."

I see nothing in "comparative reprehensibility" balancing that implies any inherent restraint on the erratic, indeed capricious, application of the exclusionary rule. A judge, even one acting in good faith (if I may use that term), could characterize almost any felony, certainly almost any major one, as more reprehensible than almost any fourth

61. Schulhofer, *supra* note 60, at 870. Adds Schulhofer, *id.*:

The Supreme Court, which has special reasons to guard the objectivity and perceived legitimacy of its processes, was particularly vulnerable to institutional damage on this ground. . . . Had the Court been willing to hear more confessions cases, the threat to its legitimacy and prestige probably would have been aggravated by the very actions that were at the same time necessary to exert more effective control over the lower courts.

Even if appellate courts were able, and willing, to correct erroneous trial court "comparative reprehensibility" judgments, as my colleague Frederick Schauer has noted in Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 378 n.43 (1985):

[C]orrection takes time and effort, implicating a different kind of slippage to the extent that the principles may go unprotected until the appellate process reaches its end and to the extent that the effort and expense of an appeal deters some from appealing meritorious claims. . . . When Holmes noted that "[t]he power to tax is not the power to destroy while this Court sits," *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) . . . he may not fully have appreciated the implications of the fact that "this Court sits" only about 151 times a year, at least when speaking of full decisions, with opinions, on the merits.

62. Justice Cameron leaves no doubt about this. See note 18 *supra* and accompanying text.

63. Cf. Plumb, *supra* note 4.

amendment violation.⁶⁴

Trial judges, we are advised, already "bend findings of facts to avoid the exclusion of relevant evidence."⁶⁵ Perhaps so. But trial judges can, or will, "bend the facts" only so much. "Comparative reprehensibility," however, could simply become a "catch-all" for admitting unconstitutionally obtained evidence when judges are unable, or unwilling, to bend the facts.⁶⁶ Such a test could give judges a "'chancellor's foot' veto" over the exclusionary rule.⁶⁷

To be sure, as Dean John Ely has observed, "One doesn't have to be much of a lawyer to recognize that even the clearest verbal formula can be manipulated."⁶⁸ But, he quickly added, "it's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing."⁶⁹

"While it is hard indeed for any judge to set apart the question of guilt or innocence of a particular defendant and focus solely upon the procedural aspects of the case,"⁷⁰ it is hardest of all for a trial judge to do so. For, as one such judge explained, "we have an eyewitness seat and get splattered with the blood."⁷¹

Is a trial judge who is told to take into account the gravity of the defendant's crime — indeed, to give it significant, perhaps decisive, weight — likely to focus solely upon the procedural aspects of the case or likely to "give way to the overwhelming relevance of the evidence"?⁷² Given the "counterintuitiveness" of the exclusionary rule and the "unattractiveness" of those seeking to invoke it, isn't a judge

64. *Cf. Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980), where, in the course of overturning a death sentence based on a statutory provision authorizing capital punishment for murder when the offense is "outrageously or wantonly vile, horrible or inhuman," because the state courts had failed to adopt a narrowing construction giving some discernible content to the provision, a four-Justice plurality, per Stewart, J., observed: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"

65. Cameron & Lustiger, *supra* note 5, at 139. See also Wilkey, *A Call for Alternatives to the Exclusionary Rule*, 62 JUDICATURE 351, 355-56 (1979).

66. *Cf. Godfrey*, 446 U.S. at 429.

67. *Cf. United States v. Russell*, 411 U.S. 423, 435 (1973) (entrapment defense "not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve").

68. J. ELY, DEMOCRACY AND DISTRUST 112 (1980).

69. *Id.*

70. Schaefer, *supra* note 27, at 7.

71. D. HOROWITZ, THE COURTS AND SOCIAL POLICY 243 (1977). See also Schaefer, *supra* note 27, at 7 ("The more remote the court [from the local atmosphere], the easier it is to consider the case in terms of a hypothetical defendant accused of crime, instead of a particular man whose guilt has been established.").

72. In his early years on the California Supreme Court, recalled the late Roger Traynor, "[f]ugitive misgivings about admitting illegally obtained evidence gave way to the overwhelming

who is granted great freedom to balance comparative wrongs likely to tilt the balancing heavily in favor of the government?⁷³ (Once again, that, some proponents of the "comparative reprehensibility" approach might say, is the whole idea.)

C. Carving Out a "Serious Crimes" Exception to the Exclusionary Rule

In some respects a "serious crimes" or "most serious cases" exception to the exclusionary rule seems more palatable than open-ended "comparative reprehensibility" balancing. Unlike a totality-of-the-circumstances "criminal reprehensibility" approach, a flat exception to the exclusionary rule for "the relatively small class of the most serious cases"⁷⁴ would appear to be a simple test to administer. But this test, too, is not without its problems.

"A shocking crime," Justice Frankfurter once observed, "puts law to its severest test."⁷⁵ But law would fail that test — it would bow, or at least be perceived as bowing, before the natural impulses aroused by a heinous crime — if there were a serious crimes exception to the exclusionary rule.⁷⁶

Such an exception would mean that in a criminal prosecution against a serious or dangerous offender the Court would tolerate an "open defiance" as well as a "manifest neglect" of the prohibition against unreasonable searches and seizures.⁷⁷ In such cases, the police

weight of the evidence." Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321.

73. Cf. Schauer, *supra* note 61, at 376-77 (footnote omitted):

That slippery slope arguments emerge so commonly with respect to freedom of speech is quite likely a function of the extent to which many of the principles of free speech are counterintuitive to prosecutors, jurors, the public, and even the bench. . . . [Jurors] are asked to protect those who are unpopular, such as the Hare Krishnas and the Jehovah's Witnesses, and those who are simply wicked, including the Nazis and the Ku Klux Klan. The decisionmaker's negative view of the parties is likely to lead to mistakes of a particular kind, to oversuppression rather than undersuppression, in the application of free speech principles, and these mistakes serve to create the special slippery slope danger.

These special features of many free speech cases are perhaps even more prominent in criminal procedure cases. Virtually every case involving constitutional criminal procedure involves a fairly unattractive claimant of the constitutional right. In cases involving illegal search and seizure . . . it is frequently obvious that the claimant of the right is in fact guilty of the crime charged. . . . In light of the nature of both the litigants and the issue involved, an advocate can persuasively argue that the risk of mistakes in favor of the rights of criminal defendants is much lower than the risk of mistakes to their detriment.

74. Kaplan, *supra* note 4, at 1046.

75. *Fisher v. United States*, 328 U.S. 463, 477 (1946) (Frankfurter, J., dissenting).

76. Law would also fail that test in cases of "shocking crimes" if the admissibility of probative evidence turned on the "comparative reprehensibility" of the investigating officer's misconduct and the defendant's crime. For however deliberate or substantial the police illegality in pursuit of the perpetrator of a shocking crime, the illegality would almost never be more reprehensible than the defendant's crime.

77. Cf. *Weeks v. United States*, 232 U.S. 383, 394 (1914) ("To sanction such proceedings

could search without warrants and without good cause, or any cause, and yet not jeopardize the government's case. Presumably they could also tap phones and bug homes and offices free of any external restraints.⁷⁸ And once they acquired probative evidence, *however* they acquired it (short of brutality or physical violence) law enforcement officials could use it against the defendant with impunity.⁷⁹

1. *What Message Would a "Serious Crimes" Exception Send?*

Search and seizure issues do not crop up often in murder or other major non-drug cases.⁸⁰ But they do arise. And "in its concrete em-

[leading to convictions by means of unconstitutional searches] 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.").

78. If an exception to the exclusionary rule were established for *fourth amendment* violations in serious criminal cases, a similar exception would certainly seem to be in order for other trustworthy evidence that was merely the product of a *statutory* violation, *i.e.*, a violation of laws regulating police use of electronic surveillance.

79. Proponents of a "serious case" exception to the exclusionary rule maintain that in practice the courts often carve out such an exception anyway, albeit covertly, and that this is "a good reason for adopting [such an exception] straightforwardly." Kaplan, *supra* note 4, at 1046. *See also* Cameron & Lustiger, *supra* note 5, at 148-51. I wonder whether this argument convinces any but those already persuaded to adopt an exception for murder and other serious crimes.

That judges and juries have *the power* to ignore the mandate of a statutory or constitutional provision and do so with some frequency in a given area does not strike me as "a good reason" in and of itself for granting them *the right* to do so. *Cf.* B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 129 (1921), *quoted in* M. KADISH & S. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 87-88 (1973). To recognize that a judge sometimes disregards the law in the face of compelling facts

is not to say that a judge's perception of the limits upon what he can do is not an important determinant of what he in fact does. The more strongly these limits are felt, the greater the justification — or "surcharge," to use [the term of M. KADISH & S. KADISH, *supra*, at 27-28] — needed by the judge to persuade himself of the rightness of transgressing these limits. Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CALIF. L. REV. 1289, 1293 (1974). *But see* Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51 (arguing that jury nullification benefits the legal process).

No doubt some juries sentence a murderer to death on the premise that "murders most brutish and bestial" are most deserving of capital punishment, when such killings may not even be murder in the first degree. *Cf.* *Austin v. United States*, 382 F.2d 129, 137 (D.C. Cir. 1967). But this is no reason in and of itself to encourage juries to do so, or make it easier for them to do so, by telling them simply that they may do so when the murder is "outrageously or wantonly vile, horrible or inhuman." *See* *Godfrey v. Georgia*, 446 U.S. 420 (1980) (discussed in note 64 *supra*). No doubt juries sometimes, and in an earlier day frequently, invoked the doctrine of the "unwritten law" and acquitted a defendant who had killed his wife's lover. But this in itself is not sufficient cause to tell jurors explicitly that they may do so. *See, e.g.*, *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (1977). *See generally* W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 7.10 (b)(5) (1986). Nor is it good cause to amend the law of homicide so as to recognize the "honor defense" formally.

Moreover, in some areas, if "official permission [is granted] to engage in what is at least suspect . . . the fear is that this will be taken as implicit, if not explicit, permission to go one step further." Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1084 (1986). "The mere fact that courts will fold under pressure . . . does not dictate that they should be *told* that they may fold under pressure, because the effect of the message may be to increase the likelihood of folding even when the pressure is less." *Id.* at 1084 n.11.

80. *See* notes 118-23 *infra* and accompanying text.

bodiment of an individual and his struggles" the dramatic story of a single case "has the same advantage that a play or a novel has over a general discussion of ethics or political theory."⁸¹ But if a serious crimes exception to the exclusionary rule were adopted we should not like the lesson that might be taught by the dramatic story of a single case: In a murder or other serious case, acquiring evidence of guilt would be everything. How the government acquired it, so long as the evidence were relevant and reliable, would mean nothing. The court before whom the evidence was brought would be neither interested nor concerned about its provenance. There would be no point in the defendant arguing that the evidence against him was obtained by deliberately or grossly violating the fourth amendment. What if it were?

A decade ago, speaking for the Court, Justice Powell observed that the exclusion of unconstitutionally obtained evidence demonstrates that "our society attaches serious consequences to violation of constitutional rights"⁸² and that this demonstration "is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system."⁸³ What would the repeal of the exclusionary rule in certain enumerated serious cases demonstrate? How would it affect police-prosecution thinking? If the exclusionary rule is "a statement that we are serious about lowering the number of fourth amendment violations in our society,"⁸⁴ what kind of message would we be sending if we carved out a flat exception to the rule for serious cases?

According to the most comprehensive study of police attitudes toward the exclusionary rule,⁸⁵ the police "have great difficulty believing that standards can have any real meaning if the government can profit from violating them"⁸⁶ and, regardless of what "substitute remedies" may be provided, they "are bound to view the elimination of the exclusionary rule as an indication that the fourth amendment is not a seri-

81. E. CHEATHAM, *A LAWYER WHEN NEEDED* 22 (1963).

82. *Stone v. Powell*, 428 U.S. 465, 492 (1976).

83. 428 U.S. at 492. At this point, Justice Powell cites Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756 (1970). At the page cited, then Professor Oaks, a strong critic of the rule, recognizes that "entirely apart from any direct deterrent effect . . . [the exclusionary rule] gives credibility to the constitutional guarantees."

84. Kaplan, *supra* note 4, at 1055.

85. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24 (1980). Professor Loewenthal, who teaches police officer students at John Jay College of Criminal Justice of the City University of New York, conducted many interviews with police commanders on all levels, as well as with his police officer students. He was also a participant-observer on forty tours of duty concerning various phases of police work.

86. *Id.* at 39.

ous matter, if, indeed, it applies to them at all.”⁸⁷ Moreover, “[s]ince the rule has become functionally identified with the fourth amendment,”⁸⁸ police doubts about the importance and applicability of search and seizure standards “are likely to be stronger [if the rule is abolished] than they would be if the . . . rule had never been imposed.”⁸⁹ Along the same lines, a more recent study reveals that “adherence to the fourth amendment by individual officers [in this instance, Chicago narcotics officers], and the institutional reforms reinforcing that adherence, have been and are likely to remain tied to the exclusionary rule.”⁹⁰

On the basis of these studies, I think it fair to say that if an exception to the exclusionary rule were established for serious crimes, the police (and, I think, the general public as well) would *hear* the following message:

In routine criminal cases, we shall still take the fourth amendment seriously, but in the big criminal cases we no longer will. In the big cases the fourth amendment is too great an impediment in the war against crime for law enforcement officials to endure. In the big cases, the police have a license to proceed without worrying about respecting the right of the people to be secure against unreasonable searches and seizures. Violating the fourth amendment is a lesser evil than letting murderers, armed robbers, and other serious criminals go unpunished. The pursuit, apprehension, and conviction of such criminals is too important to expect or to require the police and the courts to attend to the restraints of the fourth amendment.⁹¹

87. *Id.* at 30.

88. *Id.*

89. *Id.* See also Tiffany, *Judicial Attempts to Control the Police*, CURRENT HISTORY, July 1971, at 13, 52 (“It has been traditional when discussing the exclusionary rule to [ask]: Does the rule work? But at this point that may be the wrong question. Instead, the central question may now be this: how would police react if the Supreme Court overruled *Mapp v. Ohio*?”).

90. Note, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1054 (1987). The study was based on extensive, structured interviews with Chicago narcotics officers. When asked whether the exclusionary rule should be kept as is, abolished, or modified by a “good faith” exception or in some other way, “all of the officers responded that the rule should be preserved with a good faith exception. Many of them remarked that the rule was necessary as a limit on police behavior.” *Id.* at 1051. According to one officer, “[i]f you abolished the exclusionary rule you would be turning the police department loose. . . . That situation has enormous possibility for abuse.” *Id.* According to another officer, “[w]ithout the exclusionary rule, police investigating a murder or something would be like a criminal released into the midst of society.” *Id.* See also *id.* at 1052-54.

The author of this Note, Myron Orfield, informs me that it is part of a larger empirical study. He observes:

Though the question was not specifically in my survey, I talked to 9 officers concerning the question of whether they would take the fourth amendment seriously without the exclusionary rule. Eight said they would not, one said that he would. The detailed responses are repetitive of the ones [quoted in the published Note.]

Letter from Myron Orfield to Yale Kamisar (Nov. 20, 1987) (on file with the *Michigan Law Review*) [hereinafter Orfield Letter].

91. Cf. F. Allen, *supra* note 18, at 36 (footnotes omitted):

There is another problem with withdrawing the exclusionary rule in the most serious cases. This would prevent the rule's application in the cases most likely to culminate in prosecutions and the cases in which law enforcement officials are most likely to be concerned about the admissibility of the evidence they gather — the very instances when the rule is most likely to be effective.⁹² "Since in the policeman's hierarchy of values, arrest and subsequent conviction are more important the 'bigger' the 'pinch,' compliance with the exclusionary rule seems contingent upon this factor."⁹³

2. *Is a Short List of "Serious Crimes" Likely To Stay Short?*

There is still another problem with a flat exception to the exclusionary rule for "serious" or "most serious" crimes. You can draw up a short list of such crimes, but can you *keep it* short? Professor Kaplan lists "treason, espionage, murder, armed robbery and kidnapping by organized groups."⁹⁴ But this list is too short to suit Justice

[Prior to *Mapp v. Ohio*] [s]ome states sought to avoid the heavy costs involved in complete acceptance or rejection of the exclusionary rule by holding the rule applicable only to certain categories of offenses. The consequences were predictable. The police, being of a pragmatic turn, tended to interpret the withdrawal of the rule in given offense categories as a license to proceed in those areas without legal restraint.

"Evidence of this," adds Professor Allen, "may be seen in the American Bar Foundation's Pilot Studies [of criminal justice in the United States]." *Id.* at 36 n.184.

92. See 1 W. LAFAVE, *supra* note 36, § 1.2(e), at 43.

93. J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 228 (2d ed. 1975). Myron Orfield, author of the recent study of Chicago narcotics officers described in note 90 *supra*, points out:

If there is one thing that the empirical evidence on the exclusionary rule bears out, it is the realization that the effectiveness of the exclusionary rule is closely related to the rule's effect on important cases. If the case is important to the police and the police department, the rule works very well. The smaller the case, the more trouble the police have in making the rule work. . . .

. . . Because of the loss of large numbers of cases in the 1960's, the Chicago police were forced to respond to the exclusionary rule by developing a series of programs and procedures designed to secure compliance with the fourth amendment. . . . The effectiveness of these reforms however was largely confined to the big case, the case in which the police had sufficient time to prepare in advance or in which they cared enough to spend time reviewing the incident and/or reprimanding the officer. Even though in the last several years significant progress has been made in deterring the small scale illegal search, because it does not involve a serious crime or an important investment of time and because the loss of evidence does not result in the loss of a big case, these types of violations are far more difficult to deter by means of the exclusionary rule.

Orfield Letter, *supra* note 90.

Professor Kaplan, *supra* note 4, at 1047, assumes that "[i]n investigations of the most serious offenses, unlike the ordinary instances of police invasion of the citizen's fourth amendment rights in less serious cases, remedies other than the exclusionary rule may be effective." But "the restraint of potential adverse public opinion, which generally plays a small part with respect to searches as compared to other forms of police illegality, is virtually nonexistent when the public believes the police were directing their attention to those suspected of the most serious offenses." 1 W. LAFAVE, *supra* note 36, § 1.2(e), at 44.

94. Kaplan, *supra* note 4, at 1046.

Cameron. He would add "*such crimes as rape and arson.*"⁹⁵ What crimes *other than* rape and arson are *such crimes as* rape and arson? Justice Cameron does not say. Presumably he has in mind such crimes as "burglary in the first degree"⁹⁶ and "assault in the first degree."⁹⁷ But why stop there?

When Justice Cameron plumps for a "serious crimes" exception to the exclusionary rule on the ground that certain major crimes "always will . . . exceed the gravity of any Fourth Amendment violation"⁹⁸ — one might say, always will be "dirtier business" than any fourth amendment violation — I cannot help recalling what Brooklyn District Attorney Edward Silver, a leading proponent of law enforcement wiretapping, argued a quarter of a century ago. At the time, all tapping was prohibited by federal law (at least on paper).⁹⁹ Protested Silver: "There may be those who think wiretapping is a 'dirty business,' but who will deny the fact that murderers, *narcotics peddlers*, *labor racketeers*, and *extortionists* are engaged in far dirtier businesses?"¹⁰⁰

Note that in calling for a relaxation of restraints on police and prosecutors, Mr. Silver ranked "narcotics peddlers" right behind murderers. (More people, I think it fair to say, would do so today than in Silver's day.) Note, too, that three of the four crimes Silver mentioned appear on neither Kaplan's nor Cameron's short list.

But Silver's own list was not a long one. He did not seek authority to use wiretapping as a general crime control measure, but, evidently, only as a weapon to combat organized crime and offenses associated

95. *State v. Bolt*, 142 Ariz. 260, 271; 689 P.2d 519, 530 (1984) (emphasis added); Cameron & Lustiger, *supra* note 5, at 145 (emphasis added).

96. *See, e.g.*, N.Y. PENAL LAW § 140.30 (McKinney 1975 & Supp. 1987) (defining "burglary in the first degree" as knowingly entering or remaining unlawfully in a dwelling with intent to commit a crime therein when the defendant or another participant in the crime, *inter alia*, "[i]s armed with explosives or a deadly weapon" or "[c]auses physical injury to any person who is not a participant in the crime").

97. *See, e.g.*, N.Y. PENAL LAW § 120.10 (McKinney 1975) (defining "assault in the first degree" as, *inter alia*, causing "serious physical injury to another person" with the intent to do so, "by means of a deadly weapon or a dangerous instrument," or "with intent to disfigure another person seriously and permanently," destroying, amputating, or disabling permanently a member or organ of a person's body). This provision in effect retains the old crime of "maiming."

98. 142 Ariz. at 271, 689 P.2d at 530. *See also* Cameron & Lustiger, *supra* note 5, at 145.

99. The Court so interpreted section 605 of the Federal Communications Act of 1934. *See Nardone v. United States*, 302 U.S. 379 (1937); *Nardone v. United States*, 308 U.S. 338 (1939); *Weiss v. United States*, 308 U.S. 321 (1939); *Benanti v. United States*, 355 U.S. 96 (1957). Section 605 of the 1934 Act was displaced by the electronic surveillance provisions of the Crime Control Act of 1968, often called Title III. *See* 18 U.S.C. §§ 2510-2521 (1982).

100. Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835, 854 (1960) (emphasis added). At the time he wrote this article, Mr. Silver was head of the National Association of County and Prosecuting Attorneys.

with such crime. Nevertheless, he adopted a different stance than had most of his allies in the battle to legalize tapping.

In the 1940s and 1950s most proponents of law enforcement tapping had sought such authority, or at least had dwelt on the need for such authority, only in cases of treason, espionage, sabotage, murder, and kidnapping (a group of crimes very similar to Professor Kaplan's "most serious cases") or, as they sometimes described it, only in case of crimes endangering the nation's safety or jeopardizing human life.¹⁰¹ Thus Attorney General Herbert Brownell told us that "various proposals pending in Congress [to legalize wiretapping] seek to strike a fair balance between the rights of the individual and society . . . in specific cases involving the Nation's security and defense, as well as kidnapping."¹⁰² FBI Director J. Edgar Hoover, "himself," the Attorney General assured us, "opposes wire tapping as an investigative function except in connection with crimes of the most serious character, such as offenses endangering the safety of the nation or the lives of human beings."¹⁰³

The battle to legalize wiretapping raged for decades. During most of this period, proponents of wiretapping sought permission to use this extraordinary power only in a few select cases. However, when the battle was finally resolved, federal officials had authority to use this power against "a vast number of offenses"¹⁰⁴ (e.g., interstate gambling, theft from interstate shipments, counterfeiting, and narcotics violations) and state officials possessed even broader authority to tap and bug.¹⁰⁵ In short, when the smoke had cleared, law enforcement officials could resort to electronic surveillance "almost as freely as any other standard investigative tool."¹⁰⁶

I do not claim that if the Court were to uphold legislation "exempting" a short list of crimes from the exclusionary rule that list would eventually include virtually all the felonies to be found in a typi-

101. See the historical summaries of various proposals to legalize wiretapping in Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 199-200 (1954); Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792, 794-97 (1954). At the time they wrote these articles, Herbert Brownell was Attorney General of the United States and William Rogers was Deputy Attorney General.

102. Brownell, *supra* note 101, at 209.

103. *Id.* at 207-08.

104. H. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455, 481 (1969) (describing Title III of the Crime Control Act of 1968). Section 2516 of Title III was recently amended to authorize electronic surveillance for such crimes as the laundering of monetary instruments; fraud by wire, radio, or television; and crimes relating to trafficking in certain motor vehicles or motor vehicle parts.

105. H. Schwartz, *supra* note 104, at 482.

106. *Id.*

cal criminal code. I do maintain that the pressure to lengthen that short list would be enormous and that what started out as an exception to the exclusionary rule for "the relatively small class of the most serious cases"¹⁰⁷ would likely end up as an exception for a rather sizeable class of cases.

"What dictates legislation," the Chief Reporter of the Model Penal Code and a close student of the "'politics' of crime" once observed, "is the simple point of politics that reelection demands voting against sin, whenever ballots on the question must be cast."¹⁰⁸ And when legislators start amending an exception to the exclusionary rule, no less than when they start amending sentencing ranges, "they are voting against sin. . . . Armed with emotion, intuition, pencil and paper, they seek [legislation] that will function as symbolic denunciations of the crimes to which they apply."¹⁰⁹

Is there any substantial doubt that if a "serious crimes" exception to the exclusionary rule were adopted, that exception would soon include some drug offenses? It is worth noting that recently, when upholding the "preventive detention" provisions of the Bail Reform Act,¹¹⁰ the Court observed that the Act "carefully limits the circumstances under which detention may be sought to *the most serious of crimes*,"¹¹¹ such as "crimes of violence" and "*serious drug offenses*."¹¹²

If, as seems probable, the legislature would soon expand an espionage-murder-kidnapping exception to the exclusionary rule to include, *inter alia*, drug trafficking,¹¹³ the Court is not likely to offer much

107. Kaplan, *supra* note 4, at 1046.

108. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 473 (1961).

109. Zimring & Hawkins, *Murder, the Model Code, and the Multiple Agendas of Reform*, in A CONFERENCE CELEBRATING THE 25TH ANNIVERSARY OF THE MODEL PENAL CODE 267, 290 (Nov. 6, 1987) (discussing the amendment of sentencing provisions) (on file with the *Michigan Law Review*).

110. 18 U.S.C. §§ 3141-3150, 3152-3156 (West 1985 & Supp. 1987).

111. *United States v. Salerno*, 107 S. Ct. 2095, 2101 (1987) (emphasis added).

112. 107 S. Ct. at 2101 (emphasis added).

113. Theoretically one could exclude "nonvictim" crimes from the "serious crimes" category, but few legislators, if any (or judges, for that matter), are likely to so belittle the sale of cocaine or heroin. Nor should they. *Cf.* Kaplan, *supra* note 4, at 1048-49 (discussion of whether exclusionary rule should be applied more vigorously in nonvictim than in victim crimes):

There are, however, two major problems with dividing crimes into nonvictim and victim categories. First, some nonvictim crimes, such as pornography, may cause great public indignation. Second, although everyone can distinguish the seriousness of the most dangerous crimes from the rest of criminal activity, it may be very difficult for courts rationally to differentiate between at least some nonvictim crimes and fairly serious offenses with victims. One generally might tend to regard nonvictim crime as less serious, but certain victimless crimes such as sale of heroin may be quite dangerous.

Id. at 1049.

resistance. As Professor Wayne LaFave has noted,¹¹⁴ the Court has alluded to "the horrors of drug trafficking"¹¹⁵ and underscored the "compelling interest in detecting those who would traffic in deadly drugs for personal profit."¹¹⁶ The Court has also expressed the view that "the obstacles to detection of illegal [drug traffic] may be unmatched in any other area of law enforcement."¹¹⁷

Whether, once the basic notion was accepted, a "narrow exception" to the exclusionary rule for "serious offenses" would soon embrace at least a few drug offenses is a matter of some importance. While "[a] growing body of [empirical] data . . . indicates that few persons arrested are able to use the [exclusionary] rule to escape conviction,"¹¹⁸ the impact of the rule is greater for particular crimes, such as felony drug offenses, "the prosecution of which depends heavily on physical evidence."¹¹⁹ Indeed, "[t]he most striking feature of the data 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."¹²⁰ For example, "[t]he

114. See LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1223-24 (1983). Professor LaFave voices concern that "the maleficent trafficking in drugs" may produce "atrophy of the fourth amendment." *Id.* at 1224. See also Saltzburg, *Another View of Illegal Narcotics (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 4, 23 (1986) (courts have been "turning their backs" on fourth amendment principles "in order to aid the war against illicit drugs").

115. *Illinois v. Gates*, 462 U.S. 213, 241 (1983).

116. *United States v. Place*, 462 U.S. 696, 703 (1983) (O'Connor, J.) (quoting Powell, J., concurring in *United States v. Mendenhall*, 446 U.S. 544, 561 (1980)).

117. 462 U.S. at 704 n.5 (again quoting Justice Powell's concurrence in *Mendenhall*, 446 U.S. at 561-62).

118. Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 560 (1982). Various empirical studies of the impact of the exclusionary rule are discussed or summarized in the majority opinion in *United States v. Leon*, 468 U.S. at 907 n.6, in Justice Brennan's dissenting opinion, 468 U.S. at 950 n.11, and in 1 W. LAFAVE, *supra* note 36, at 22 n.6.

119. *Leon*, 468 U.S. at 907 n.6.

120. Davies, *A Hard Look at What We Know (and Still Need To Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 680. A study of suppression motions in nine mid-sized counties in three states also found that the effects of illegal searches are concentrated in drug and weapons cases. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 599 (Table 10).

Although the percentage of felony drug cases "lost" because of the exclusionary rule is not high, it is much larger than the percentage of other felony cases "lost" because of the rule. See text at notes 121-22 *infra*. According to statewide California data, prosecutors reject 2.4% of felony drug arrests because of illegal searches. See Davies, *supra*, at 619. Elsewhere in his article, Davies estimates, on the basis of available data, that "the cumulative loss of drug arrests at all stages of felony processing in California is around 7.1%." *Id.* at 681. See also *id.* at 655. In *Leon*, referring to Davies' article, the Court states 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%," 468 U.S. at 907 n.6. The Court may have taken the 2.8% figure from Nardulli, *supra*. In Nardulli's study, motions to suppress were granted in 2.8% of the drug cases studied,

statewide California data shows that less than 0.3% (fewer than 3 in 1000) of arrests for all nondrug offenses are rejected by prosecutors because of illegal searches, and there are even smaller effects for the most serious violent crimes."¹²¹

If a "serious crimes" exception to the exclusionary rule were limited, and remained limited, to the most serious violent crimes, its significance would be largely symbolic. For the fourth amendment rarely stymies law enforcement in this area. According to a recent five-year study, for example, illegal search problems were given as the reason for the rejection of only 117 of more than 68,000 robbery arrests, only thirteen of more than 14,000 forcible rape arrests, and only eight of approximately 12,000 homicide arrests.¹²²

But if, as I think would be the case, murder, forcible rape, and armed robbery would function as "loss leaders" for drug offenses, at least serious ones,¹²³ the exception to the exclusionary rule could no longer be called a narrow one. It would do away with the exclusionary rule where it has its greatest impact on the processing of felony cases. (Of course, this may be why some opponents of the exclusionary rule would like to see the notion of a "serious crimes" exception to the rule win acceptance.)

This is still not the worst (or, depending upon one's viewpoint, the best) that can be said for a "serious crimes" exception. As I shall discuss in the next subsection, Justice Cameron's reasoning seems to outrun his proposal. If one carries his reasoning to its ultimate con-

but in only 0.3% of cases involving offenses against persons and property. See Nardulli, *supra*, at 599.

121. Davies, *supra* note 120, at 619. See also Nardulli, *supra* note 120, at 599.

122. See Davies, *supra* note 120, at 640, 645. The impact of the exclusionary rule may be negligible in robbery, rape, and homicide cases because fourth amendment problems rarely arise in such cases or because the police take special pains to satisfy prescribed standards in such cases. But to a considerable, but unknown, extent, the negligible effects of the exclusionary rule in these types of cases may reflect the reluctance of judges to grant the suppression motions of "serious criminals." See Duke, *Making Leon Worse*, 95 YALE L.J. 1405, 1408 n.33 (1986).

123. There are many drug offenses. A goodly number carry light penalties, but some carry extremely heavy ones. For example, under New York law there are seven degrees of "[c]riminal possession of a controlled substance," N.Y. PENAL LAW §§ 220.03, 220.05, 220.06, 220.09, 220.16, 220.18, 220.21 (McKinney 1980); five degrees of "[c]riminal sale of a controlled substance," N.Y. PENAL LAW §§ 220.31, 220.34, 220.39, 220.41, 220.43 (McKinney 1980); and a crime known as "[c]riminal sale of a controlled substance in or near school grounds," N.Y. PENAL LAW § 220.44 (Supp. 1987). "Criminal sale of a controlled substance in the first degree," § 220.43, and "[c]riminal possession of a controlled substance in the first degree," § 220.21, are class A-I felonies, punishable by not less than fifteen years nor more than twenty-five years imprisonment. See N.Y. PENAL LAW § 70.00 (3)(a)(i) (McKinney 1980). "Criminal sale of a controlled substance in the second degree," § 220.41, and "[c]riminal possession of a controlled substance in the second degree," § 220.18, are class A-II felonies, punishable by not less than three years nor more than eight years and four months imprisonment. See N.Y. PENAL LAW § 70.00 (3)(a)(ii) (McKinney 1980 & Supp. 1987).

clusion, a "serious crimes" exception would not be limited to serious crimes at all. The exception would almost completely engulf the rule.

3. *Is Whether It Is Worse To Be Murdered or Raped Than To Have One's House Searched Illegally the Right Question?*

Justice Cameron favors a "serious case" exception to the exclusionary rule "because, the rhetoric of some civil libertarians to the contrary, it *is* worse to be murdered or raped than to have one's house searched without a warrant, no matter how aggravated the latter violation."¹²⁴ If my own safety, comfort, and convenience were the only interests at stake, I would not only agree with Justice Cameron but go further. I would say it is worse to have *my* wife mugged, *my* children sold drugs, or *my* office burglarized than to have my house searched without a warrant or probable cause, no matter how gross the violation. Indeed, if the only relevant question were whether the crime someone commits against me or my family or property is likely to be more distressing than the police entering my house without a warrant or probable cause, I would have to say that it would be worse to steal my car or poison my dog.

Justice Cameron also favors this "serious case" exception (and a general balancing test that weighs the gravity of the defendant's crime against the magnitude of the officer's illegality) because then a defendant will be "let off" only when he has "suffered more" from the police illegality involved in obtaining evidence against him than his victims have suffered from the crimes he has perpetrated against them.¹²⁵ (Presumably the victims of police lawlessness who turn out to be innocent will not be before the court as criminal defendants.)

Even if we look only at crimes that cannot be called "serious" or "most serious," when can it ever be said that a criminal whose fourth amendment rights have been violated has "suffered more" than his victims — the victims, say, of assault, burglary, theft by extortion, or even theft by deception? Can it even be said that a credit card thief whose fourth amendment rights have been violated has "suffered more" from that violation than the person whose credit card he has stolen and used?

In short, Justice Cameron's way of thinking about the exclusionary

124. Cameron & Lustiger, *supra* note 5, at 145 (emphasis in original).

125. See *id.* at 151:

[T]he balancing approach is also justified in terms of the fundamental fairness of its results. The accused will be allowed to invoke the rule only where the illegality committed against him is more grave than the crime he has committed against others. Thus, the accused will be "let off" only where he has suffered more than his purported victims.

rule takes us very far — very far away from exclusion. As various search and seizure commentators have advised us, however, Justice Cameron's way of thinking about the exclusionary rule is flawed.

"While the most immediate and direct consequence of exclusion may be to benefit an individual defendant who might otherwise have been convicted,"¹²⁶ the goal of the exclusionary rule is "not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done."¹²⁷ Rather, "[t]he defendant is at best an incidental beneficiary when exclusion occurs for the purpose, as the Supreme Court stated in *Stone v. Powell*, of 'removing the incentive' to disregard the Fourth Amendment so that 'the frequency of future violations will decrease.'"¹²⁸ Application of the exclusionary rule sometimes means that an apparently guilty defendant goes unpunished, but this occurs "to protect the rest of us from unlawful police invasions of our security and to maintain the integrity of our institutions. . . . The innocent and society are the principal beneficiaries of the exclusionary rule."¹²⁹

126. 1 W. LAFAVE, *supra* note 36, § 1.2(a), at 24.

127. Traynor, *supra* note 72, at 335.

128. 1 W. LAFAVE, *supra* note 36, at 40 (quoting *Stone v. Powell*, 428 U.S. 465, 492 (1976)). See also 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, 1396 (1983):

[The exclusionary rule] has been criticized for benefiting defendants in a manner often disproportionate to the degree to which their fourth amendment rights were violated. . . . However, this disproportionality is significant only if one conceives the purpose of the rule as compensation for the victim. Because I view the exclusionary rule as necessary to preserve fourth amendment guarantees, I do not find this criticism persuasive.

129. Roger Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 330-31 (1973). See also Oaks, *supra* note 83, at 709-10 (quoted in *United States v. Peltier*, 422 U.S. 531, 556-57 (1975) (Brennan, J., dissenting)):

The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule. . . . [It] is aimed at affecting the wider audience of all law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them.

Consider, too, Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1266-67 (1983):

The exclusionary rule protects innocent people by eliminating the incentive to search and seize unreasonably. So long as a policeman knows that any evidence he obtains in violation of the fourth amendment will not help secure a conviction he has less reason to violate the amendment and more reason to try to understand it. . . . [I]t defies logic to believe that a policeman's willingness to search without probable cause or a warrant (and thereby possibly subject an innocent person to an unjustifiable intrusion of privacy) is unrelated to whether he can gain any admissible evidence from conducting the search.

See also Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 390 (1981):

The probable cause requirement compels society to pay a cost in the apprehension of criminals, or in the recovery of evidence of crime, for the sake of people's privacy. It is surely legitimate for courts to suppress evidence if the lost evidence is counterbalanced by greater security for our "persons, houses, papers, and effects," to the same extent as when, at the same cost, the police comply with the mandate of the fourth amendment not to seize or search without probable cause.

Like any good advocate's wording of the question, Justice Cameron's wording suggests the desired answer. But there are other ways to frame the question. For example, is it better to let a few wicked persons go free than to furnish the police an incentive to violate many people's rights? Or, is it better to let an occasional criminal go unpunished¹³⁰ than to encourage the police to go about their business without regard to the fourth amendment, thus diminishing privacy and freedom to a degree inconsistent with a free and open society?¹³¹ Or, to borrow Justice Holmes' famous language, is it "a less evil that some criminals should escape than that the Government should play an ignoble part"?¹³² Balancing expediency against values or principles is not an endeavor that lends itself to cost-benefit analysis.¹³³ It is not unlike balancing one's need for a new car against "Thou shalt not steal."¹³⁴

But doesn't the fourth amendment have something to say about expediency versus principle? I realize that the amendment has "both the virtue of brevity and the vice of ambiguity."¹³⁵ But doesn't it mean *something*? Is not its very purpose — and that of the Bill of Rights generally — "to identify values that may not be sacrificed to expediency"?¹³⁶ And to stand in the way when "the task of combating crime and convicting the guilty . . . seem of such critical and pressing concern," as it will in every era, "that we may be lured by the temptations of expediency into forsaking our commitment to protecting indi-

130. When I say occasional criminal, I do mean *occasional*. As already pointed out, see text at notes 121-22 *supra*, according to a recent study, less than *three-tenths of one percent* (0.3%) of California arrests for non-drug offenses were rejected because of the exclusionary rule and only *seven-hundredths of one percent* (0.07%) of homicide arrests. One may retort, as Justice White did for the Court in *Leon*, that although many researchers have concluded that "the impact of the exclusionary rule is insubstantial, . . . the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures." 468 U.S. at 908 n.6. But "raw numbers are not as useful for policy evaluation as percentages. In a system as large as the American criminal justice system, in which there were 10 million felony and misdemeanor arrests in 1979, almost any nationwide measurement or estimate will look large if expressed in raw numbers." Davies, *supra* note 120, at 670 (footnote omitted).

131. Cf. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974).

132. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

133. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 194-200 (1978); Kamisar, *supra* note 1, at 646-50; A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 656-63 (1982); Wasserstrom & Mertens, *supra* note 36, at 87-89; Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 316-18 (1984); J.B. White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1281-83 (1983).

134. Cf. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1440 (1962).

135. J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 42 (1966).

136. *United States v. Leon*, 468 U.S. 897, 980 (1984) (Stevens, J., dissenting).

vidual liberty and privacy"?¹³⁷

IV. DOES A COURT THAT EXCLUDES UNCONSTITUTIONALLY OBTAINED EVIDENCE TO AVOID CONDONING POLICE LAWLESSNESS BY THE SAME TOKEN CONDONE THE DEFENDANT'S LAWLESSNESS?

There remains to be considered what might be called the culmination of the "comparative reprehensibility" approach — virtual abolition of the fourth amendment exclusionary rule (but not the back-up due process "shock the conscience" test). As I read Professor Barrett, one of the most forceful and persuasive critics of the exclusionary rule, this is the position he advocates, at least by implication.¹³⁸ Therefore I shall spell out the "comparative reprehensibility" argument for abolishing the exclusionary rule by using, and reworking, his language:

The judge who is confronted with unconstitutionally obtained, but cogent, evidence of guilt faces a dilemma. If he excludes the evidence "to avoid condoning the acts of the officer" he only winds up "condoning the illegal acts of the defendant." Whichever way he turns, he permits the "consummation" of somebody's "illegal scheme" — either the police officer's (if he admits the evidence) or the defendant's (if he excludes it). But why resolve the dilemma in favor of the defendant? The judge need not and should not do so except when — and this would rarely if ever be the case — the officer's misconduct is plainly more, or "much more," reprehensible than the defendant's.¹³⁹ It is hard to conceive of a case where the police illegality would be "so much more reprehensible" than, say, a drug dealer's or a burglar's or an extortionist's that the judge's duty would be to reject the evidence and free the defendant. (If such a case were to arise the police misconduct would be "shocking" and the *Rochin* due process test would afford the defendant ample protection.)¹⁴⁰

This argument has a certain allure. It makes, or ought to make, proponents of the exclusionary rule reexamine basic premises. But I shall not leave the reader in suspense. I do not find the argument persuasive.

When courts admit unconstitutionally seized evidence I do believe it is likely that significant numbers of police officers, as well as large

137. *Leon*, 468 U.S. at 929-30 (Brennan and Marshall, JJ., dissenting).

138. See the lengthy quotation from Barrett in the text at note 9 *supra*.

139. Thus Professor Barrett asks, text at note 9 *supra*, "Can we assume from any general social point of view that the policeman's conduct is so much more reprehensible than the defendant's that the duty of the judge is to reject the evidence and free the defendant?"

140. In short, where Professor Kaplan would admit unconstitutionally seized evidence in all *serious* cases except when the violation of the defendant's rights was so shocking as to invoke *Rochin*, see note 4 *supra*, Professor Barrett, at least by implication, would admit unconstitutionally seized evidence in virtually *all* cases except where the defendant could avail himself of *Rochin*.

segments of the public, will regard the official lawlessness as "not so bad," else the courts would not have permitted the evidence to be used. Until recently, there was only anecdotal evidence to support this view.¹⁴¹ Thus, one officer at the time of *Mapp* insisted that his prior unconstitutional conduct had been proper because the courts of his state had accepted the evidence — had "okayed" what he had done.¹⁴² And at least two of the nation's leading police chiefs, William Parker of Los Angeles and Michael Murphy of New York, had viewed the exclusionary rule (which, of course, has nothing to say about the *content* of the law governing the police) as imposing *new substantive restrictions* on searches and seizures¹⁴³ — "dramatic testimony to the hollowness of the Fourth Amendment in the absence of the rule."¹⁴⁴

But now we have something more substantial than scattered anecdotal evidence. A recent study of the attitudes of New York police toward the exclusionary rule¹⁴⁵ found

strong evidence that, regardless of the effectiveness of direct sanctions, police officers could neither understand nor respect a Court which purported to impose constitutional standards on the police without excluding evidence obtained in violation of those standards.

. . . When the *Mapp* decision imposed the exclusionary rule on [New York and other states whose courts admitted evidence obtained in violation of the fourth amendment], the police were confused because they had never been made aware of the constitutional standards for searching. However, once the police realized what had happened, they assumed that the exclusionary rule was an absolute necessity. Indeed, most police officers interpret the *Wolf* case as not having imposed any legal obligation on the police since, under that decision, the evidence would still be admissible no matter how it was obtained.

. . . .

. . . No matter what sanctions may be imposed in its stead, police officers are bound to view the elimination of the exclusionary rule as an indication that the fourth amendment is not a serious matter, if indeed it applies to them at all.

. . . Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the fourth and fourteenth amendments,

141. See *Leon*, 468 U.S. at 954 n.13 (Brennan, J., dissenting); Davies, *supra* note 120, at 629-30 & n.112; Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 440-46 (1964); Stewart, *supra* note 128, at 1386.

142. See Kamisar, *supra* note 141, at 442-43.

143. See *Leon*, 468 U.S. at 954 n.13 (Brennan, J., dissenting); Davies, *supra* note 120, at 629-30. See also Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 72-73 (1978).

144. Davies, *supra* note 120, at 630 n.112.

145. Loewenthal, *supra* note 85. For a description of the study, see note 85 *supra*.

no matter what substitute remedies may be applied.¹⁴⁶

On the other hand, I find it difficult to believe that the exclusion of evidence in a robbery or burglary or narcotics case could convey a comparable message to the police and the public that robbery or burglary or drug trafficking is "not so bad." I can readily see how the judicial reception of unconstitutionally acquired evidence may foster police misconduct, for the exclusionary rule is a "disincentive" — it removes a significant incentive for making unconstitutional searches, at least where the police contemplate prosecution and conviction. Thus, no matter whether and to what extent the exclusionary rule "deters" police illegality, abolishing the rule, as Professor Phillip Johnson has observed, "would positively *encourage*" such illegality.¹⁴⁷ But it is

146. *Id.* at 29-30. Although a very recent study of Chicago narcotics officers did not focus primarily on police attitudes toward the exclusionary rule, its findings are consistent with Professor Loewenthal's study. See note 90 *supra*.

Wolf v. Colorado, 338 U.S. 25 (1949) (overruled twelve years later by *Mapp v. Ohio*, 367 U.S. 643 (1961)), held that "[t]he security of one's privacy against arbitrary intrusion by the police" was "enforceable against the States through the Due Process Clause," 338 U.S. at 27-28, but that the exclusionary rule was not "an essential ingredient of the right." 338 U.S. at 29. Thus, those convicted on the basis of evidence obtained in violation of that right, "together with those who emerge scatheless from a search," were "remand[ed]" 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." 338 U.S. at 31.

There is some anecdotal evidence confirming Professor Loewenthal's findings that the New York police did not view *Wolf* as imposing any legal obligation on them and "had never been made aware of the constitutional standards for searching" until *Wolf* was overruled. Loewenthal, *supra* note 85, at 29. Some years after *Mapp*, Leonard Reisman, the former New York City Deputy Police Commissioner in charge of legal matters, explained why New York officers had not been instructed in the law of search and seizure during the reign of *Wolf*: "Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [in *Wolf*] that evidence obtained without a warrant — illegally if you will — was admissible in state courts. So the feeling was, why bother?" Quoted in Stewart, *supra* note 128, at 1386.

Evidently the police were not the only New York law enforcement officials unfamiliar with and uninterested in the law of search and seizure prior to *Mapp*. Professor Richard Uviller, a state prosecuting attorney at the time *Mapp* was handed down, recalls:

I cranked out a crude summary of federal search and seizure and suppression law just before the State District Attorney's Association convened . . . I 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 . . .

Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, 35 VAND. L. REV. 501, 502 (1982).

147. Johnson, *New Approaches to Enforcing the Fourth Amendment* 4 (Working paper, Sept. 1978) (emphasis in the original).

As I have suggested elsewhere, see Kamisar, *supra* note 1, at 597 n.204, 661-62, despite its popularity in judicial opinions and the legal literature, there is a good deal to be said for removing the term "deterrence" from the search and seizure vocabulary altogether:

"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 of the evidence does not leave the police in a worse position than if they had never violated the Constitution in the first place. Because the police are members of a structural governmental entity, however, 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.

not easy (for me, at any rate) to see how the exclusion of evidence in a particular kidnapping or counterfeiting or narcotics case could operate to promote future acts of kidnapping, counterfeiting, or dope peddling.

To be sure, the exclusionary rule is not the only *imaginable* way to demonstrate to the police and the public alike that we take the fourth amendment seriously. There is not, and for many years there has not been, a shortage of *theoretically possible* ways to give the amendment real meaning. (I have *heard* a good deal about them in each of the dozens of exclusionary rule debates and panel discussions I have participated in over the past thirty years, but I have yet to *see* them in operation.) As the late Justice Potter Stewart concluded, after examining the various *presently available* alternatives to the exclusionary rule:

They punish and perhaps deter the grossest of violations, as well as governmental policies that legitimate these violations. They compensate some of the victims of the most egregious violations. But they do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations — the frequent infringements motivated by commendable zeal, not condemnable malice. For those 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.¹⁴⁸

Id. at 597 n.204. Although "systemic deterrence" is a definite improvement over such terms as "deterrence" or "deterrent" effects," it seems more useful to call the rule a "disincentive" or, as Professor Anthony Amsterdam does, "a counterweight within the criminal justice system that prevents the system from functioning as an unmitigated inducement to policemen to violate the fourth amendment." Amsterdam, *supra* note 131, at 431.

148. Stewart, *supra* note 128, at 1388-89. Adds Stewart, *id.* at 1389 (emphasis in original) (footnotes omitted): "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.'"

The adequacies (or inadequacies) of alternatives to the exclusionary rule have been the subject of a vast literature. The general consensus is that civil suits, criminal prosecution, injunctions, review boards, and internal police discipline are sadly ineffective. A tort action against the offending police or the government entities that employ them seems the most promising alternative to the exclusionary rule. But

potential tort plaintiffs are likely to be unaware of their rights, unable to afford a lawyer, and afraid of retribution if they sue the police. . . . Moreover, juries are likely to be unsympathetic to their claims, for those who are most likely to be victimized by police misconduct belong in disproportionate numbers to insular and unpopular minority groups.

Wasserstrom, *supra* note 133, at 292 n.187. Moreover, "[a]ny damages remedy for fourth amendment violations is bound to be ineffective as a deterrent because of the difficulty of valuing the impairment of the interests which the fourth amendment is designed to protect." Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 909 (1982). Establishing a minimum level of damages

is not likely to work because of political and practical considerations. Five hundred or even \$1,000 in minimum damages is clearly not a sufficient quantity to induce a client or his lawyer to institute suit, incur expenses, and draw the wrath of the police department. . . . On the other hand, if the minimum scheduled damages are too high, the proposal will be politi-

So long as the exclusionary rule remains the only *presently available* meaningful sanction or counterweight against unconstitutional searches or seizures¹⁴⁹ — so long as “such limits as there are on [police powers to search and seize] are . . . both defined and enforced almost exclusively in exclusionary rule litigation”¹⁵⁰ — I think it may fairly be said that abolition of the rule and the court’s use of unconstitutionally obtained evidence would condone, or would likely be viewed as condoning, the underlying police lawlessness.

Surely, however, violating the fourth amendment is not the only effective way or the only feasible means presently available to bring a private malefactor to justice. We need not look at Wayne LaFave’s treatise. (He advises us that the “costs” of the exclusionary rule are “much lower . . . than is commonly assumed.”)¹⁵¹ Nor need we examine Thomas Davies’ long article on the subject, “the most careful and balanced assessment of all available empirical data.”¹⁵² (Davies informs us that the evidence “consistently indicates that *the general*

cally unacceptable to Congress [or a state legislature] because it will allow the filing of spurious suits simply for the settlement value.

Id. at 910 n.126.

Although the Court has recently ruled that “municipalities do not enjoy the same good-faith immunity afforded to individual police officers” a local governmental body may be held liable only when its *policies* give rise to the constitutional violation. Since most fourth amendment violations are the result of wrongful actions by individual law enforcement officials, not of unlawful governmental policies, the circumstances under which a governmental body will be held liable for a fourth amendment violation are likely to be rare, indeed.

Stewart, *supra*, at 1388 (emphasis in original) (footnote omitted).

The classic article on the general subject is Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). See also, e.g., Amsterdam, *supra* note 131, at 429-30; Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U. L.Q. 621; Schroeder, *Detering Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361 (1981); Schlag, *supra*, at 907-13; Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979).

149. As Professor Silas Wasserstrom has noted, Wasserstrom, *supra* note 133, at 293 n.187 (quoting Judge Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 62, 68):

Even those who think tort remedies could be made to work as an effective deterrent, and that rationalized tort remedies should replace the exclusionary rule, admit that there are substantial difficulties in “formulating tort remedies that will deter violations of the Fourth Amendment effectively,” . . . and that important changes in existing doctrines are required if those remedies are to be effective.

150. Wasserstrom, *supra* note 133, at 293-94.

151. 1 W. LAFAVE, *supra* note 36, § 1.2(a), at 22. I put the “costs” of the rule in quotation marks because, along with many other commentators, I believe that when we talk about costs we are really talking about the costs of the fourth amendment itself. The costs said to be exacted by the exclusionary rule “would also be exacted by any other means of eliminating significant incentives for making illegal searches — by any other means of enforcing the Fourth Amendment that worked.” Kamisar, *The “Police Practice” Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1961-1986*, at 143, 163 (H. Schwartz ed. 1987). See generally text at notes 207-15 *infra*.

152. Professor LaFave so describes the Davies article, LaFave, “*The Seductive Call of Expediency*”: *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 904. I share his view.

level of the rule's effects on criminal prosecutions is marginal at most.")¹⁵³ If we want to find out whether "apprehension and punishment [have been] pursued and inflicted with sufficient determination" in the exclusionary rule age "that a would-be law violator must count them as substantial risks,"¹⁵⁴ we need only read our morning newspapers. The following items should suffice:

New Prisoners Are Barred by Crowded Texas Prisons: The beleaguered Texas prison system today was forced to temporarily stop admitting new prisoners after its population crept above levels mandated by a federal court order.

....

There are now 32 different states . . . under court order because of overcrowding or related problems. Ten others are in the midst of litigation. . . .

From 1977 to 1985 the population of the nation's state and federal prisons rose 68 percent to a record 503,601, and the result has been severe overcrowding nationwide, officials say.¹⁵⁵

* * * *

Michigan Prison Populace Rises 16.8%: The U.S. prison population increased 8.6 percent in 1986, and the number of inmates reached an all-time high of more than a half million [546,659, to be precise], the Justice Department reported Sunday. Michigan was cited as recording one of the largest increases.

In a report, the department's Bureau of Justice Statistics also said that last year state prisons were operating at between 127 percent and 159 percent of their capacity.¹⁵⁶

* * * *

There Can Never Be Enough Prisons (Editorial): Having just spent \$657 million in a dramatic expansion of prisons, New York State faces a rising crisis: not enough prison space. . . .

The population runup began in the 1970's when there were about 13,000 prisoners. Construction in the 1980's brought capacity to 36,304. Even that wasn't enough. Today the prison population exceeds 39,000, and officials have been staring at a projected overflow of 2,000.¹⁵⁷

One may retort: These news items do not focus on particular crimes and criminals. At most they only confirm that "illegal searches very rarely happen in *nondrug* arrests."¹⁵⁸ They tell us nothing specif-

153. Davies, *supra* note 120, at 622 (emphasis in the original). See also notes 120-21 & 130 *supra*, and accompanying text.

154. Cf. L.B. Schwartz, *On Current Proposals To Legalize Wire Tapping*, 103 U. PA. L. REV. 157, 158 (1954) ("A penal system gives us about all we can get out of it if apprehension and punishment are pursued and inflicted with sufficient determination that a would-be law violator must count them as substantial risks.").

155. N.Y. Times, Jan. 17, 1987, at 1, col. 1 (natl. ed.).

156. Detroit Free Press, May 11, 1987, at 1A, col. 3.

157. N.Y. Times, May 26, 1987, at 22, col. 1 (natl. ed.).

158. Davies, *supra* note 120, at 622-23 (emphasis added).

ically about the extent to which the fourth amendment exclusionary rule has impaired the effort to put drug offenders behind bars. Permit me to quote one more news item:

War on Drugs Puts Strain on Prisons, U.S. Officials Say. The national effort against the illegal use of drugs has sent a new wave of offenders into the federal prisons, overwhelming facilities that are already crowded, Justice Department officials say.

As a result, the Federal Government needs to more than double its prison capacity to prevent an intolerable backup in the criminal justice system, department officials concluded at a meeting this week.

....

The federal prison system, with the capacity to hold 28,000 prisoners, now has 44,000. Just six years ago the federal prisons held 26,000 inmates

....

Last year 37 percent of the people sentenced to federal prisons had been arrested on drug charges, as against 25 percent in 1980 and 17 percent in 1970. Officials estimate that by the end of the decade half the new prisoners will have been arrested on drug offenses.¹⁵⁹

So long as many *lawful means* are available to combat crime (including drug offenses) and to convict criminals (including drug dealers),¹⁶⁰ how can it be seriously maintained that excluding the fruits of official illegality in a particular case condones the "private lawlessness" involved in that case?

Two additional points need to be made. In the first place, Professor Barrett's argument (or suggested argument) that the court that excludes illegally obtained evidence to avoid condoning the acts of the transgressing officer only succeeds in condoning the illegal acts of the defendant was made in a different era — six years before *Mapp* and at a time when the states were free to admit unconstitutionally obtained evidence (as many of them did).¹⁶¹ As the late Justice Stewart recently pointed out, however,

the exclusionary rule is now part of our legal culture. Realistic appraisals of the effectiveness of the rule must, therefore, take into account the inevitable misperceptions that will arise in the minds of many that "repealing the rule" would signal a weakening of our resolve to enforce the dictates of the fourth amendment.¹⁶²

159. N.Y. Times, Sept. 25, 1987, at 1, col. 2 (natl. ed.).

160. Cf. *Malinski v. New York*, 324 U.S. 401, 419 (1945) (Frankfurter, J., concurring).

161. But the California Supreme Court had just overturned its long-standing rule permitting the use of illegally seized evidence. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955) (Traynor, J.). Although Barrett "launched a powerful attack against the exclusionary rule, advancing arguments that many critics of the rule have used since," Kamisar, *supra* note 8, at 194, he also "articulated some of the justifications for the *Cahan* decision better than any of its *proponents*." *Id.* at 193 (emphasis in original).

162. Stewart, *supra* note 128, at 1386. See also Loewenthal, *supra* note 85, at 30 ("Since the

Secondly, assuming arguendo that thirty years ago, when Barrett commented on California's adoption of the exclusionary rule on its own initiative,¹⁶³ the police were hemmed in at many turns (at least theoretically) by unrealistic and out-of date *substantive* search and seizure rules, it is hard to see how anyone can so describe the law of search and seizure today. For, as I have noted elsewhere —

Not only has the Court weakened the remedies for proven violations of the fourth amendment, but it has also — and how one puts this depends on one's viewpoint — (a) significantly lightened the heavy burden that the fourth amendment once imposed on police officers who want to proceed lawfully or (b) substantially diminished the security against unreasonable search and seizure guaranteed by the fourth amendment.¹⁶⁴

Two and a half decades ago, Barrett urged the Court to replace the then monolithic "probable cause" standard with a more flexible "reasonableness" approach for "[t]he result of this [then existing] all-or-nothing approach is to place too little restraint on some investigative techniques and too great restraint on others."¹⁶⁵ And he maintained specifically that "reasonable latitude" must be given for such investigative techniques as stopping and questioning suspicious persons on the street.¹⁶⁶

The Court has gone a long way in the direction Barrett sought. Not only did it uphold "stops" and "frisks" on less than traditional probable cause in *Terry v. Ohio*,¹⁶⁷ but in recent years it has expanded *Terry* well beyond its facts.¹⁶⁸ And it now calls the need to "balance the nature and quality of the [police] intrusion . . . against the impor-

[exclusionary] rule has become functionally identified with the fourth amendment," "police doubts [that the amendment is to be taken seriously] are likely to be stronger [if the rule were abolished than] if the exclusionary rule had never been imposed."). Consider, too, notes 89-90 *supra*.

163. See generally Kamisar, *supra* note 8 (citing Barrett, *supra* note 9).

164. *Id.* at 198. A critic of the exclusionary rule might say that this was to be expected, because the rule puts strong pressure on the courts to water down the rules governing arrest, search, and seizure. I cannot improve on the late Monrad Paulsen's response, Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 255, 256 (1961) (emphasis added):

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 application to a contested instance. Any rule of police regulation enforced in fact will generate pressure to weaken the rule.

165. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 59.

166. *Id.* at 58.

167. 392 U.S. 1 (1968).

168. See, e.g., *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *United States v. Place*, 462 U.S. 696 (1983); *Michigan v. Summers*, 452 U.S. 692 (1981). For criticism of this important development, see Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REF. 551, 594-624 (1984); Wasserstrom, *supra* note 133, at 355-74.

tance of the governmental interests alleged to justify the intrusion"¹⁶⁹ "the key principle of the Fourth Amendment."¹⁷⁰

Even when traditional probable cause is still required, the Court has made it fairly clear, I think, that *something less* than "more-probable-than-not" suffices (although how much less is anything but clear).¹⁷¹ Indeed, at one point in its opinion in *Illinois v. Gates*,¹⁷² which emphasized that probable cause is "a practical, common-sense decision,"¹⁷³ a "fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules,"¹⁷⁴ the Court informed us that "probable cause requires only a probability or *substantial chance* of criminal activity."¹⁷⁵

Any commentary, however summary, on the Court's performance in the search and seizure field for the past twenty years should take into account its treatment of the *Carroll* doctrine,¹⁷⁶ often called the "automobile exception" to the search warrant requirement.¹⁷⁷ As understood originally and for most of its life, the *Carroll* doctrine permitted the police to search a car without a warrant on the basis of *both* probable cause to believe the car contained evidence of crime *and* the presence of exigent circumstances making it impractical to obtain a warrant.¹⁷⁸ But in the 1970s the Court virtually eliminated the exigent

169. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *Place*, 462 U.S. at 703).

170. *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 219 (1978) (White, J., concurring)).

171. See Kamisar, *Gates*, "Probable Cause," "Good Faith," and *Beyond*, 69 IOWA L. REV. 551, 558-89 & n.250 (1984).

172. 462 U.S. 213 (1983).

173. 462 U.S. at 238.

174. 462 U.S. at 232.

175. 462 U.S. at 244 n.13 (emphasis added). For the view that "[f]air probability can only mean 'some possibility,' which, in turn, translates to 'reason to suspect,'" see Wasserstrom, *supra* note 133, at 338. *Gates* has been widely criticized. See Kamisar, *supra* note 171; LaFave, *supra* note 114, at 1186-99; Loewy, *Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretations of the Fourth Amendment During the 1982 Term*, 62 N.C. L. REV. 329, 336-45 (1984); Wasserstrom, *supra* note 133, at 274-75, 329-40. Cf. Moylan, *Illinois v. Gates: What It Did and Did Not Do*, 20 CRIM. L. BULL. 93 (1984). But the decision has also been ably defended. See Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465 (1984).

The relationship between *Gates* and *Leon* (see note 6 *supra* and text at notes 52-58 *supra*) is unclear. Because the question had not been briefed or argued in *Leon*, the Court declined to consider whether probable cause existed under the relaxed standard announced a year earlier in *Gates* and thus shed little light on the extent to which the so-called good faith exception furnishes the police greater leeway than that already provided by *Gates*. See *Leon*, 468 U.S. at 958-59 (Brennan and Marshall, JJ., dissenting). See also Dripps, *Living With Leon*, 95 YALE L.J. 906, 912 (1986).

176. The genesis of this doctrine was *Carroll v. United States*, 267 U.S. 132 (1925).

177. The use of this term is criticized in Moylan, *The Automobile Exception: What It Is and What It Is Not — A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1012-15 (1976).

178. See generally *id.*

circumstances requirement.¹⁷⁹ Thus, although such an approach had once been stoutly resisted,¹⁸⁰ the word "automobile" has become a "talisman in whose presence the [search warrant requirement] fades away and disappears."¹⁸¹

In the 1970s the Court also narrowed the protection against unreasonable search and seizure in another important respect — by taking a relaxed view of what constitutes a consent to an otherwise impermissible search or seizure. "Consent" is the "trump card" in the law of search and seizure. For it is "[t]he easiest, most propitious way for the police to avoid the myriad problems presented by the Fourth Amendment."¹⁸² In *Schneekloth v. Bustamonte*,¹⁸³ the Court made it easy (in my judgment, too easy). The Court told us that a suspect may effectively consent to a search even though she was never informed — and the government has failed to demonstrate that she was aware — that she had the right to refuse the officer's request. In short, a person can lose her protection against unreasonable search and seizure through *ignorance or confusion*; her rights are preserved only from loss through *coercion*.

Although the Court has taken an expansive view of what constitutes "consent," it has taken a grudging view of what constitutes a "search" or "seizure." According to the Court, a depositor who reveals her affairs to a bank "assumes the risk" that they will be conveyed to the government. Thus she has no legitimate expectation of privacy as to the checks and deposit slips she exposes to bank employ-

179. See *Texas v. White*, 423 U.S. 67 (1975) (per curiam); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Chambers v. Maroney*, 399 U.S. 42 (1970). For strong criticism of this development, see Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982); L. Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557 (1982); Moylan, *supra* note 177. *United States v. Ross*, 456 U.S. 798 (1982), further extended the *Carroll* doctrine, using it to sustain the warrantless search of a "movable container" found in a locked car trunk.

180. See *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971) (plurality opinion).

181. 403 U.S. at 461. Moreover, even though the police lack any belief that a car contains contraband or other evidence of crime, if they have adequate grounds to make a lawful custodial arrest, they may conduct a warrantless search of the entire passenger compartment of the car including closed containers found within that zone, even if the occupant is handcuffed and standing outside the car. *New York v. Belton*, 453 U.S. 454 (1981). Furthermore, if they proceed on an inventory search theory (i.e., if pursuant to routine "community caretaking functions" they itemize property in an impounded car or one otherwise in their lawful custody), the police need neither a search warrant *nor* probable cause to search the vehicle or to arrest anyone. *South Dakota v. Opperman*, 428 U.S. 364 (1976). Cf. *Illinois v. Lafayette*, 462 U.S. 640 (1983) (police may go through person's shoulder bag during an at-the-station inventory of his effects following his arrest for disturbing the peace).

182. Zion, *A Decade of Constitutional Revision*, N.Y. Times, Nov. 11, 1979, § 6 (Magazine), at 26, 106. See also 3 W. LAFAYE, *supra* note 36, § 8.1; Duke, *supra* note 122, at 1417.

183. 412 U.S. 218 (1973).

ees in the ordinary course of business.¹⁸⁴ Similarly, because, we are told, one who uses the phone "assumes the risk" that the telephone company will reveal the numbers she dialed to the police, the government's use of a pen register (a device that records all numbers dialed from a given phone and the times they were dialed, but does not overhear oral communications) is not a "search" or "seizure" either.¹⁸⁵ Continuing further down this path, the monitoring of a suspect for many miles by means of a "beeper" (an electronic tracking device) until the suspect's car is stopped at a certain cabin in a secluded area, the Court has informed us, is neither a "search" nor a "seizure."¹⁸⁶

Nor is that all. Although one takes sufficient precautions (for example, erects a fence, posts warning signs) to render entry on his private land a criminal trespass under state law, his efforts will be of no avail if the land is beyond the curtilage and the police enter on and examine it.¹⁸⁷ Moreover, even land admittedly within the curtilage (for example, a fenced-in backyard) may not be subject to fourth amendment protection. Thus, the Court recently informed a marijuana-growing defendant that the Constitution failed to protect him against police aerial surveillance because, despite the fact he had completely enclosed his backyard with *two* high fences, he had "knowingly exposed" his yard to the public.¹⁸⁸

For the reasons indicated above, the police have ample room to maneuver under the fourth amendment today, certainly a great deal more flexibility than they had when the California Supreme Court handed down *Cahan* or when the United States Supreme Court decided *Mapp*. There might have been a time, say, twenty or thirty years ago when they were first entering the world of the exclusionary rule, that the police, plagued by out-of-date, ill-defined or yet unarticulated rules governing their conduct, could not comply with the fourth

184. *United States v. Miller*, 425 U.S. 435, 442-43 (1976).

185. *Smith v. Maryland*, 442 U.S. 735 (1979).

186. *United States v. Knotts*, 460 U.S. 276 (1983). *But cf.* *United States v. Karo*, 468 U.S. 705 (1984) (monitoring a beeper in a private residence not open to visual surveillance does violate the fourth amendment).

The *Miller-Smith-Knotts* line of cases is criticized at length in 1 W. LAFAVE, *supra* note 36, § 2.7, at 503-38.

187. *Oliver v. United States*, 466 U.S. 170 (1984) (expansively reading the "open fields" exception to fourth amendment restraints). *See also* *United States v. Dunn*, 107 S. Ct. 1134 (1987) (taking into account various factors, barn was not within the curtilage). The Court's application (or misapplication) of the "open fields" doctrine is criticized in Saltzburg, *supra* note 114.

188. *California v. Ciraolo*, 476 U.S. 207 (1986). *See also* *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (aerial photography of industrial manufacturing complex not fourth amendment "search"). *Ciraolo* and *Dow* are criticized extensively in LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 295-308 (1986).

amendment and still do an effective job of law enforcement. There is hardly cause for such concern today.

SOME FINAL THOUGHTS

I began this article by calling attention to Judge Bork's comment¹⁸⁹ that "the conscience of the court ought to be at least equally shaken" by the idea of excluding reliable, albeit unconstitutionally obtained evidence, thereby "turning a criminal loose upon society" (or to use Barrett's language, thereby "permitting the consummation of the defendant's illegal scheme")¹⁹⁰ as by the idea of admitting unconstitutionally acquired evidence, thereby "soil[ing] their hands" (or to use Barrett's language, thereby "permitting the consummation of [the] policeman's illegal scheme").¹⁹¹ I think not.

Not at least when there is no *presently available* meaningful alternative to the exclusionary rule. Not when there is no necessity to resort to unconstitutional methods in order to check crime or to convict criminals. Not when the lawful avenues open to the pursuers of criminals appear to be a good deal wider today than ever before.

I wince when I hear a law enforcement official protest: "We [the police] are forced to fight by Marquis of Queensberry rules while the criminals are permitted to gouge and bite."¹⁹² If criminals didn't gouge and bite they wouldn't be criminals. And if police officers *did* gouge and bite they wouldn't be (or at least shouldn't be) police officers.¹⁹³

Moreover, the "Marquis of Queensberry rules" have been relaxed a good deal in the last twenty years.¹⁹⁴ For example, it should be no great feat for a police officer to satisfy a "probable cause" standard that "requires only a fair probability or substantial chance of criminal activity."¹⁹⁵ Nor should it be difficult for a prosecutor to prevail now

189. See text at note 2 *supra*.

190. See text at note 9 *supra*.

191. *Id.*

192. Former New York City Police Commissioner Michael J. Murphy, *quoted in* Kamisar, *When the Cops Were Not "Handcuffed,"* in CRIME & CRIMINAL JUSTICE 46, 47 (D. Cressey ed. 1971).

193. In an era when plagiarism is not unknown, I hasten to add that I seem to remember someone saying something like this, but I cannot remember who.

194. See text at notes 164-88 *supra*.

195. See note 175 *supra* and accompanying text. *Gates* was a search warrant case and some of the reasons the Court gave for abandoning the existing probable cause structure in favor of a less demanding "totality of the circumstances" test apply only to warrant cases. But most of the reasons "have equal force in the without-warrant setting as well" and thus "the chances are that *Gates* will receive unquestioned acceptance as a probable cause benchmark even when the police have acted without a warrant." 1 W. LAFAVE, *supra* note 36, at 551. See also Kamisar, *supra*

that the question presented, when the admissibility of physical evidence is challenged, is "whether a reasonably well-trained officer would have known that the search was illegal."¹⁹⁶

Justice Cameron protests that "one of the main defects of the [exclusionary] rule is that by the very action of focusing upon the rule rather than the evidence, guilt becomes immaterial."¹⁹⁷ But what is the alternative? A criminal justice system where police illegality in obtaining evidence of guilt "becomes immaterial"? A system where the constitutionality of a search or seizure could not be challenged at any stage of the criminal process?

"The survival of our system of criminal justice and the values which it advances," a distinguished Attorney General's Committee observed twenty-five years ago, "depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process."¹⁹⁸ It is plain that the Committee meant the *criminal* process. Why should official decisions and assertions of authority with respect to searches and seizures be an exception?

Moreover, and more fundamentally, why blame search and seizure restraints on the exclusionary rule? To be sure, if there were no exclusionary rule, unconstitutionally obtained, but "perfectly valid, good and material evidence" would not be suppressed.¹⁹⁹ But if the fourth amendment were enforced by meaningful sanctions other than the exclusionary rule, the same "perfectly valid, good and material evidence" would not be offered to the court. It would not have been unconstitutionally obtained in the first place.

note 171, at 581-84; Wasserstrom & Mertens, *supra* note 133, at 125; Wasserstrom, *supra* note 133, at 339 n.425.

196. See note 58 *supra* and accompanying text. *Leon* was a search warrant case and arguably the "reasonable good faith" exception to the exclusionary rule adopted in that case will be limited to the warrant setting. There is a good deal to be said for doing so, and some language in *Leon* supports this limited reading of the case. See Dripps, *supra* note 175, at 944-48; LaFave, *supra* note 152, at 927-29. But *Leon* must be read against the backdrop of the previous ten years, which saw the Court become increasingly hostile to the exclusionary rule and voice growing doubts that "the extreme sanction of exclusion," as the Court twice called it in *Leon*, 468 U.S. at 916, 926, can "pay its way" in any setting, let alone one in which fourth amendment violations are neither deliberate nor substantial. I find it hard to believe that, after many years of talk about a "good faith" or "reasonable mistake" exception to the exclusionary rule, the Court would finally adopt such an exception only to limit it to the small percentage of searches conducted pursuant to warrants. See Kamisar, *supra* note 151, at 164-65. See also Kamisar, *supra* note 53, at 45-53.

197. *State v. Bolt*, 142 Ariz. 260, 270, 689 P.2d 519, 529 (1984) (Cameron, J., concurring).

198. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 10 (1963). The report is often called *The Allen Report*, after the Chairman of the Committee, Professor Francis A. Allen.

199. *Bolt*, 142 Ariz. at 270, 689 P.2d at 529 (Cameron, J., concurring).

As a judge, Thomas Cooley did not have much search and seizure business, but as a commentator, he once said of the fourth amendment that "it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity."²⁰⁰ Why is this view any less valid when one's premises *have been* invaded or one's constitutional rights otherwise violated?

Justice Cameron is not impressed with all this talk about it being "better oftentimes that crime should go unpunished. . . ." Indeed, he maintains that the release of *one* dangerous criminal is too great a price for society to pay.²⁰¹ This is perhaps a plausible point of view. But it is surely not the premise of the fourth amendment:

The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. . . . [T]hat is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.²⁰²

Next to an outright abolition of the exclusionary rule there could be nothing worse (or better, depending upon one's viewpoint) than a "serious crimes" exception to the rule or "comparative reprehensibility" balancing in applying the rule. It *is* frustrating to see an "apparently guilty" dangerous criminal go unpunished because the police have violated his rights. It *is* tempting to argue that the need to enforce the criminal law should justify a search that turned up damning evidence. But it is worth recalling that "Jeremiah Gridley, the attorney general of Massachusetts Bay Colony who represented the customs officers, argued that writs of assistance were justified by their necessity in enforcing the customs laws."²⁰³

"The Bill of Rights in general and the fourth amendment in particular . . . deny to government — worse yet, to democratic government — desired means, efficient means, and means that must inevitably appear from time to time throughout the course of centuries to be the absolutely necessary means, for government to obtain legitimate and laudable objectives."²⁰⁴ And they deny these means to government

200. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 306 (1st ed. 1868).

201. See Cameron & Lustiger, *supra* note 5, at 132.

202. Stewart, *supra* note 128, at 1393 (quoted in *Leon*, 468 U.S. at 941-42 n.8 (Brennan and Marshall, JJ., dissenting)).

203. Wasserstrom, *supra* note 133, at 317 n.282 (referring to N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 58 (1937)).

204. Amstersdam, *supra* note 131, at 353.

whether their agents are pursuing petty criminals or especially dangerous ones. If the fourth amendment does not embody the judgment that "[t]he right of the people to be secure in their persons, houses, papers, and effects" against unlawful searches and seizures *outweighs* society's interest in apprehending and convicting as many criminals as possible, criminals of whatever variety, then what *does* the amendment mean?

So long as the exclusionary rule continues to be the only *presently available* effective sanction or counterweight against unconstitutional searches or seizures,²⁰⁵ Justice Cameron's proposal would, in effect, make the fourth amendment read as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated *except when the police are investigating espionage, murder, kidnapping, rape, arson, armed robbery, and other serious crimes — in which event this Amendment does not apply.*

Or —

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. *Despite the foregoing, however, when an officer of the law is pursuing murderers, kidnappers, armed robbers, or other dangerous criminals, he or she may violate the right of the people to be secure against unreasonable searches and seizures. Moreover, when in cases of nonserious crimes the gravity of the crime outweighs the gravity of the officer's failure to follow prescribed standards, he or she may also violate the right of the people to be secure against unreasonable searches or seizures.*

I may be doing Justice Cameron an injustice. Nowhere in his concurring opinion in the *Bolt* case, where he sets forth his criticism of the exclusionary rule and his proposals for change, does he discuss the need to develop or to strengthen alternative remedies. But in his more extensive treatment of the same general subject — in the course of discussing the desirability of abolishing the exclusionary rule *entirely* — Justice Cameron does talk about the need, both as a matter of policy and constitutional law, to "develop" or to "implement" alternative remedies.²⁰⁶ It is far from clear (to me, at any rate) that Justice Cam-

205. See text at notes 141-50 *supra*. Even Justice Cameron appears to concede that no viable alternative to the exclusionary rule presently exists. See note 206 *infra*.

206. See Cameron & Lustiger, *supra* note 5, at 152-59. Justice Cameron observes that although the Court once described the exclusionary rule as "constitutionally necessary" and "an essential ingredient of the right," *Mapp v. Ohio*, 367 U.S. at 656, a majority of the present Court no longer views the rule this way; it now appears that "although *some* effective remedy is constitutionally required, no *particular* remedy is mandated," Cameron & Lustiger, *supra* note 5, at 157 (emphasis in original). I have to agree. See Kamisar, *supra* note 151, at 161-68. See also Kaplan, *supra* note 4, at 1030; Stewart, *supra* note 128, at 1383-85, 1389. But see Schlag, *supra* note 148, at 886-91.

Justice Cameron seems to concede that no effective alternative to the exclusionary rule *presently exists*. Thus he comments: "If effective alternative remedies *are introduced* to control po-

eron believes that the development of an effective tort remedy or some other viable alternative to the exclusionary rule should, or must, go hand in hand with a "serious crimes" exception or a general "comparative reprehensibility" approach to the rule. However, he may mean that and for the rest of the discussion I shall assume that he does.

If as Justice Cameron informs us, "[t]he deterrence obtained by the [exclusionary] rule is indirect and weak, and better obtained by more direct methods";²⁰⁷ and if, as he assures us, "all of the suggested direct alternative remedies are likely to produce a more reliable deterrent effect on police behaviour than does the exclusionary rule";²⁰⁸ and if he intends at least one of these more effective direct alternatives to the exclusionary rule to accompany his proposed revision of the rule; what would be accomplished by establishing a "serious crimes" exception to the rule or otherwise narrowing its thrust?

We would not know the names of the hoodlums who skipped out of jail on the basis of a fourth amendment violation because they would not be jailed on the basis of such violations.²⁰⁹ We would not know precisely what evidence the police wrongfully acquired because they would not have obtained evidence in violation of constitutional rights.²¹⁰ In short, an effective "direct alternative remedy" would not "rub our noses" in the fourth amendment the way the exclusionary rule does.²¹¹ And perhaps we would start talking about *the costs of the direct remedy* or, better yet, *the costs of the fourth amendment*, rather than the costs of the exclusionary rule. But beyond that, what would really change?

A society whose officials obey the fourth amendment in the first place (because of an effective tort or other "direct alternative" remedy) "pays the same 'price' " as the society whose officials cannot use the

lice behavior," Cameron & Lustiger, *supra* note 5, at 152 (emphasis added); "[a] number of viable alternatives *have been suggested* in recent years," *id.* (emphasis added); "direct remedies *should be developed* for protecting the Fourth Amendment rights," *id.* at 154 (emphasis added); "it is further *recommended* that state and federal legislatures *develop* direct alternatives for controlling police behavior," *id.* at 159 (emphasis added); "[w]hen substitute remedies are *finally implemented* . . . [the exclusionary rule] can finally be abolished," *id.* (emphasis added).

207. Cameron & Lustiger, *supra* note 5, at 159.

208. *Id.* at 158.

209. Cf. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 609-10 (1985).

210. Cf. Kaplan, *supra* note 4, at 1037-38.

211. *See id.*:

[The exclusionary rule] flaunts before us the costs we must pay for fourth amendment guarantees. Of course, the command of the fourth amendment itself contemplates less than complete efficiency in criminal law enforcement. The problem is that the exclusionary rule rubs our noses in it. . . . Where guarantees of individual rights are actually obeyed by the police, criminals are not discovered and thus no shocking cases come to public consciousness.

evidence they acquired because they obtained it in violation of the fourth amendment. *Both* societies convict fewer criminals.

If a society relies on the exclusionary rule to enforce the guarantee against unreasonable search and seizure, the convictions of some "guilty" defendants will indeed be overturned (or never realized). But if a society relies on an equally effective alternative means of enforcing the guarantee, then "'guilty' defendants will not be set free — but only because they will not be arrested [or searched unlawfully] in the first place."²¹²

Justice Cameron maintains that "where the criminal conduct involved is more dangerous to society than the police misconduct, it does not make sense to sacrifice the criminal prosecution in order to deter the police."²¹³ But in the world Justice Cameron contemplates (if, as I am assuming, a robust "direct alternative remedy" would accompany the severe restrictions on the exclusionary rule he proposes), the criminal prosecution would still be "sacrificed" because the police would be deterred from engaging in the misconduct necessary to gather evidence for the prosecution. The accused would not be "let off" even though he has suffered less from the police illegality committed against him than his purported victims have suffered from the crime(s) he has perpetrated against them.²¹⁴ But he would *not be* "the accused," because the police illegality *would not have been* committed against him. The murderer would not "go free" because the privacy of the home has been infringed.²¹⁵ But he would remain free because the police would not have infringed the privacy of the home.

Few commentators, if any, have criticized the fourth amendment exclusionary rule more harshly than Dean Wigmore:

[T]he forces of criminality, fraud, anarchy, and law-evasion perceived the advantage [of the rule] and made vigorous use of it. . . . [T]he judicial excesses of many Courts in sanctioning its use give an impression of maudlin complaisance which would be ludicrous if it were not so dangerous to the general respect for law and order in the community.

. . . .

. . . For the sake of indirectly and contingently protecting the Fourth Amendment, a Court appears indifferent to what is the direct and immediate result, viz., of making Justice inefficient, and of coddling the crimi-

212. Tribe, *supra* note 209, at 609.

213. Cameron & Lustiger, *supra* note 5, at 142.

214. *See id.* at 151.

215. *See id.* at 154.

nal classes of the population.²¹⁶

Wigmore urged abolition of the rule, but, as successor critics of the rule were to do, he offered alternatives: "both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials" — "contempt of the Constitution," he called it.²¹⁷ "The natural way to do justice," he maintained, "would be to enforce the splendid and healthy principle of the Fourth Amendment directly, *i.e.*, by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal."²¹⁸

It is worth recalling what one who had the temerity to reply to Wigmore's famous criticism of the exclusionary rule had to say about the rule and its alternatives:

When it is proposed to secure the citizen his constitutional rights by the direct punishment of the violating officer, we must assume that the proposer is honest, and that he would have such consistent prosecution and such heavy punishment of the offending officer as would cause violations to cease and thus put a stop to the seizure of papers and other tangible evidence through unlawful search.

If this, then, is to be the result, no evidence in any appreciable number of cases would be obtained through unlawful searches, and the result would be the same, so far as the conviction of criminals goes, as if the constitutional right was enforced by a return of the evidence.

Then why such anger in celestial breasts? Justice can be rendered inefficient and the criminal classes coddled by the [exclusionary rule] only upon the assumption that the officer will not be directly punished, but that the court will receive the fruits of his lawful acts, will do no more than denounce and threaten him with jail or the penitentiary and, at the same time, with its tongue in its cheek, give him to understand how fearful a thing it is to violate the Constitution. This has been the result previous to the rule adopted by the Supreme Court, and that is what the courts are asked to continue.

. . . If punishment of the officer is effective to prevent unlawful searches, then equally by this is justice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive.²¹⁹

216. Wigmore, *supra* note 10, at 480-82. See also text at note 10 *supra*.

217. Wigmore, *supra* note 10, at 481, 484.

218. *Id.* at 484.

219. C. Hall, *Evidence and the Fourth Amendment*, 8 A.B.A. J. 646 (1922). Of course, if one believes that "[t]he basic political problem of a free society is the problem of controlling the public monopoly on force," Paulsen, *supra* note 164, at 265, then the exclusionary rule does not impair "police efficiency" but furthers it.

Connor Hall wrote that sixty-five years ago.²²⁰ Perhaps Cardozo was right — to what has been written about the exclusionary rule “little of value can be added.”²²¹ But *so much* has been written about the exclusionary rule that it may be useful to recall what has been written that is of value.

220. Hall's response to Wigmore appeared in a section of the *A.B.A. Journal* called “Letters of Interest to the Profession.” Evidently an editor of the *Journal* gave Hall's letter its title.

221. See note 7 *supra* and accompanying text.