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## A Defense of the Exclusionary Rule

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# A Defense of the Exclusionary Rule

By Yale Kamisar\*

*The exclusionary rule is being flayed with increasing vigor by a number of unrelated sources and with a variety of arguments. Some critics find it unworkable and resort to empirically based arguments. Others see it as the product of a belated and unwarranted judicial interpretation.\*\* Still others, uncertain whether the rule works, are confident that in some fashion law enforcement's hands are tied.*

*Professor Yale Kamisar, long a defender of the exclusionary rule, reviews the current attacks on the rule and offers a vigorous rebuttal.† He finds it difficult to accept that there is a line for acceptable police conduct that is below the line of a constitutional violation.*

The Justices who decided the *Weeks* case,<sup>1</sup> barring the use in federal prosecutions of evidence obtained in violation of the Fourth Amendment, and those who handed down the *Silverthorne* decision,<sup>2</sup> invoking what has come to be known as the "fruit of the poisonous tree" doctrine,<sup>3</sup> would, I think, be quite surprised to learn that some day the value of the exclusionary rule would be measured by—and the very life of the rule might depend on—an empirical evaluation of its efficacy in deterring police misconduct.<sup>4</sup>

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\*\* Over the years, critics of the exclusionary rule have called it all this—and worse. See, e.g., 8 Wigmore, *Evidence* §§ 2183, 2184 (3d ed. 1940); McGarr, "The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy," 52 J. Crim. L.C. & P.S. 266 (1961); Peterson, "Restrictions in the Law of Search and Seizure," 52 Nw. U.L. Rev. 46 (1957); Plumb, "Illegal Enforcement of the Law," 24 Cornell L.Q. 337, 369-385 (1939); Wilkey, "Why Suppress Valid Evidence?" 13 Prosecutor 124 (1977).

† This is a revised and expanded version of an earlier article that appeared in 62 *Judicature* 67 (1978).

<sup>1</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>2</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

<sup>3</sup> *Nardone v. United States*, 308 U.S. 338 (1939), refusing to allow the prosecution to avoid an inquiry into its use of information gained by illegal wire-tapping, first used the phrase "fruit of the poisonous tree." See generally Pitler, "The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 Calif. L. Rev. 579 (1968).

<sup>4</sup> In the main, this article seeks to trace, explain, and justify the original grounding of the exclusionary rule, what has come to be known as "the imperative of judicial integrity," *Elkins v. United States*, 364 U.S. 206, 222 (1960) (Stewart, J.) (overturning the "silver platter" doctrine), quoted with approval in *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (Clark, J.) (imposing the exclusionary rule as

### Purpose of Rule: Principle or Deterrence?

These Justices were, I think, engaged in a less ambitious venture, albeit a most important one. They were interpreting the Fourth Amendment as best they could. As they saw it, the rule that they announced—now known as the federal “exclusionary rule”—rested on “a principled basis rather than an empirical proposition.”<sup>5</sup>

As Professor Francis Allen has recently reminded us, the *Weeks* opinion “contains no language that expressly justifies the rule by reference to a supposed deterrent effect on police officials.”<sup>6</sup> Indeed, in the U.S. Supreme Court some thirty-five years were to pass, as Professor Robert McKay has noted, before *Wolf v. Colorado*<sup>7</sup> “introduced the notion of deterrence of official illegality to the debate concerning the wisdom of the exclusionary rule.”<sup>8</sup>

to unconstitutionally seized materials on state courts as a matter of Fourteenth Amendment due process). See also Brennan, J., joined by Douglas and Marshall, JJ., dissenting in *United States v. Calandra*, 414 U.S. 338 (1974) (holding that a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from him by violating the Fourth Amendment). The *Calandra* dissenters maintained, and I think they were plainly right, that “uppermost in the minds of the framers of the [exclusionary] rule” was not “the rule’s possible deterrent effect” but “the twin goals of enabling the judiciary to avoid the taint of official lawlessness and of assuring the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.” *Id.* at 357. See also Schrock & Welsh, “Up From *Calandra*: The Exclusionary Rule as a Constitutional Requirement,” 59 Minn. L. Rev. 151 (1974).

Although I have recently learned that one of my earlier defenses of the exclusionary rule was “atypical,” at least for its time, in that it confronted critics with “substantial data to support the purported merits of the rule” as a deterrent device (see Comment, “Trends in Legal Commentary on the Exclusionary Rule,” 65 J. Crim. L. & C. 373, 381 (1974) (referring to Kamisar, “Public Safety v. Individual Liberties: Some ‘Facts’ and Theories,” 53 J. Crim. L.C. & P.S. 171 (1962), the brief compass of my remarks in the present format does not make possible an extensive evaluation of the recent “empirical studies” of the exclusionary rule’s effects (if any) on police behavior. But the editors of *Judicature* have been most cooperative in permitting me to say a few things on the subject. See text at notes 117 through 136 *infra*.

<sup>5</sup> Cf. Allen, “The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases,” 1975 U. Ill. L.F. 518, 536-537 (pointing out that, unlike the Court’s understanding in the formative phases of the exclusionary rule’s history, in recent years the deterrent function has prevailed as its predominant justification, and that “until the rule rests on [returns to?] a principled basis rather than an empirical proposition,” *Mapp* “will remain in a state of unstable equilibrium”).

<sup>6</sup> *Id.* at 536 n.90.

<sup>7</sup> 338 U.S. 25 (1949), *overruled by Mapp v. Ohio*, note 4 *supra*.

<sup>8</sup> McKay, “*Mapp v. Ohio*, The Exclusionary Rule and the Right of Privacy,” 15 Ariz. L. Rev. 327, 330 (1973).

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

The courts, after all, are the specific addressees of the constitutional command that “no Warrants shall issue, but upon” certain prescribed conditions, and if “not even an order of court would have justified” the police action, as it would not have in *Weeks*, then “much less was it within [the officers’] authority” to proceed on their own “to bring further proof [of guilt] to the aid of the Government.” And if the government’s agents did proceed on their own, “without sanction of law,” then the government should not be permitted to use what its agents obtained. The government whose agents violated the Constitution should be in no better position than the government whose agents obeyed it: “[T]he efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles.” Is any of this really so hard to follow?

### Fresh Look at Old Case

There has been such a heavy emphasis of late on the efficacy (or inefficacy) of the exclusionary rule in preventing illegal searches and seizures<sup>9</sup> that it may be profitable to take a fresh look at the key passages in the old *Weeks* case:

“The effect of the Fourth Amendment is to put the courts of the United States and Federal officials in the exercise of their power and authority, under limitations and restraint as to the exercise of such power and authority. . . . This protection [against unreasonable search and seizure] reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws [*including* the courts; indeed, especially the courts]. The tendency of those who execute the criminal laws [to] obtain convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

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<sup>9</sup> See notes 4 and 5 *supra*.

“. . . The efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles. . . . The United States Marshall acted without sanction of law . . . and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure, much less was it within the authority of the United States Marshall to thus invade the house and privacy of the accused. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.”<sup>10</sup>

Although the Fourth Amendment constitutes a guarantee against unreasonable searches and seizures, it does not, of course, *explicitly* state what the consequences of a violation of the guarantee should be. This “specific” of the Bill of Rights turns out, as is so often the case,<sup>11</sup> not to be specific about the issue that confronted the *Weeks* Court and that is the subject of today’s debate.

### **Weeks Case Not Strained**

This means only that, here as elsewhere—almost *everywhere*—the court “cannot escape the demands of judging or of making . . . difficult appraisals.”<sup>12</sup> But what is wrong with the *Weeks* Court’s appraisal? Does its reading of the Fourth Amendment do violence to the language or purpose of the guarantee against unreasonable search and seizure? Does its interpretation of this constitutional provision require an active imagination? Is the interpretation strained, illogical, or implausible?

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

“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used

<sup>10</sup> *Weeks v. United States*, note 1 *supra*, at 392-394.

<sup>11</sup> See, e.g., Friendly, “The Bill of Rights as a Code of Criminal Procedure,” 53 *Calif. L. Rev.* 929, 937, 954 (1965); Kadish, “Methodology and Criteria in Due Process Adjudication—A Survey and Criticism,” 66 *Yale L.J.* 319, 337-339 (1957); Wechsler, “Toward Neutral Principles of Constitutional Law,” 73 *Harv. L. Rev.* 1, 17-18 (1959).

<sup>12</sup> *Haynes v. Washington*, 373 U.S. 503, 515 (1973) (Goldberg, J.). See also Friendly, note 11 *supra*, at 937-938.

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before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.”<sup>13</sup>

### The Views of Holmes and Brandeis

The *Olmstead* case<sup>14</sup> involved two questions, both answered in the negative by a 5-4 majority: (1) Are telephone messages within the protection against unreasonable search and seizure? (2) Even if they are not, should the evidence nevertheless be excluded because the federal agents who tapped the phones thereby violated a state statute? On the second issue, the majority, per Chief Justice Taft, did not challenge the *Weeks* rule but insisted that “the exclusion of evidence should be confined to cases [such as *Weeks*] where rights under the Constitution would be violated by admitting it.”<sup>15</sup> Holmes and Brandeis argued that “apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act.”<sup>16</sup> Their arguments as to why the exclusionary rule should apply to illegal, as well as unconstitutional, police action are essentially restatements, although more famous and most eloquent ones, of the reasoning in *Weeks*.

First, Holmes:

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

“For those who agree with me, no distinction can be taken between the Government as prosecution and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such inequities to succeed. . . . I am aware of the often repeated statement that in a criminal proceeding the Court will not take notice of the manner in which papers

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<sup>13</sup> *Silverthorne Lumber Co. v. United States*, note 2 *supra*.

<sup>14</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>15</sup> *Id.* at 468 (emphasis added).

<sup>16</sup> *Id.* at 469-470 (dissenting opinion).

offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks* [and] the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.”<sup>17</sup>

Then Brandeis:

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

“Will this Court by sustaining the judgment below sanction such conduct on the part of the Executive?

“. . . The court’s aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. . . . It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .

“Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”<sup>18</sup>

### Impact of Weeks and Olmstead

I doubt that I ever fully appreciated the force of the *Weeks* opinion and the Holmes-Brandeis dissents in *Olmstead* until some fifteen years ago, when an incident occurred in Minnesota, where I was then teaching. Until 1961, the Minnesota courts, as well as the courts of about half of our states, had permitted the use of

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<sup>17</sup> *Id.* at 470-471 (dissenting opinion).

<sup>18</sup> *Id.* at 483-485 (dissenting opinion).

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unconstitutionally seized evidence. The *Mapp* decision and the imposition of the exclusionary rule on Minnesota and other "admissibility states" as a matter of federal constitutional law caused much grumbling in police ranks. This led Minnesota's young attorney general, Walter Mondale, to remind the police that "the language of the Fourth Amendment is identical to the [search and seizure provision] of the Minnesota State Constitution" and that "*Mapp* did not alter one word of either the state or national constitutions."<sup>19</sup> The *Mapp* case, stressed Mondale, had "not reduce[d] [lawful] police powers one iota": "[W]hat was a reasonable search before, still is."<sup>20</sup> At a subsequent panel discussion on the law of search and seizure in which I participated, proponents of the exclusionary rule quoted Mondale's remarks and made explicit what those remarks implied: If the police feared that evidence they were gathering in the customary manner *would now be excluded* by the courts, the police must have been violating the guarantee against unreasonable search and seizure *all along*. This evoked illuminating responses from the two law enforcement panelists, responses that I think underscore the need for, and the great symbolic value of, the "exclusionary rule":

"Minneapolis City Attorney Keith Stedd: 'I don't think it [is] proper for us to [say that prior to *Mapp* the police were violating the law all along] when the courts of our state were telling the police all along that the [exclusionary rule] didn't apply in Minnesota.'

"St. Paul Detective Ken Anderson: 'No officer lied upon the witness stand. If you were asked how you got your evidence you told the truth. You had broken down a door or pried a window open . . . often we picked locks. . . . The Supreme Court of Minnesota sustained this time after time. . . . [The] judiciary okayed it; they knew what the facts were.'"<sup>21</sup>

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

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<sup>19</sup> Mondale, "The Problem of Search and Seizure," 19 Bench & B. Minn. 15, 16 (Feb. 1962). See also Kamisar, "Mondale on *Mapp*," Civ. Lib. Rev. 62 (Feb./March 1977).

<sup>20</sup> Mondale, note 19 *supra*, at 16.

<sup>21</sup> Quoted in Kamisar, "On the Tactics of Police-Prosecution Oriented Critics of the Courts," 49 Cornell L.Q. 436, 442-443 (1964).

Thus, shortly after California adopted the exclusionary rule,<sup>22</sup> William Parker, then Los Angeles Chief of Police, warned that his department's "ability to prevent the commission of crime has been greatly diminished" because henceforth his officers would be unable to take "affirmative action" unless and until they possessed "sufficient information to constitute probable cause."<sup>23</sup> He did promise, however, that "*as long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule.*"<sup>24</sup>

Similarly, former New York Police Commissioner Michael Murphy recalled how, when *Mapp v. Ohio*<sup>25</sup> imposed the exclusionary rule on New York and other heretofore "admissibility states," he,

"as the then commissioner of the largest police force in this country . . . was immediately caught up in the entire problem of reevaluating our procedures . . . and modifying, amending and creating new policies and new instructions for the implementation of *Mapp*. Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function."<sup>26</sup>

Commissioner Murphy, no less than Chief Parker, seemed to think that "the framework of limitations" restraining the police had been put there by the exclusionary rule, not by the state and federal constitutional guarantees against unreasonable search and seizure. "Flowing from the *Mapp* case," he said, "is the issue of defining probable cause to constitute a lawful arrest and subsequent search and seizure."<sup>27</sup>

### Criticism of Exclusionary Rule Illogical

I think it may forcefully be argued that it is not the exclusionary rule that is illogical or misdirected, but, rather, much of the

<sup>22</sup> *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

<sup>23</sup> Parker, *Police* 117 (Wilson, Ed., 1957).

<sup>24</sup> *Id.* at 131 (emphasis added).

<sup>25</sup> 367 U.S. 643 (1961).

<sup>26</sup> Murphy, "Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments," 44 *Texas L. Rev.* 939, 941 (1966).

<sup>27</sup> *Id.* at 943.

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criticism it has generated. As Senator Robert Wagner pointed out in the 1938 New York State Constitution Convention:

"All the arguments [that the exclusionary rule will handicap law enforcement] seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself. . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

"It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform."<sup>28</sup>

If it is true, as Cooley said of the Fourth Amendment 110 years ago, that "it is better oftentimes that crime should go unpunished than that a citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity,"<sup>29</sup> why is it no less true when the accused's premises *have been* invaded or his constitutional rights otherwise violated? If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it has violated the Constitution?<sup>30</sup> And

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<sup>28</sup> 1 *New York Constitutional Convention, Revised Record* 560 (1938), reprinted in Michael & Wechsler, *Criminal Law and Its Administration* 1191-1192 (1940). See also Traynor, J., in *People v. Cahan*, note 22 *supra*, at 450, 282 P.2d at 914:

"Cases undoubtedly arise where a violation of the privilege against self-incrimination, a coerced confession, the testimony of defendant's spouse, a violation of the attorney-client privilege or other privileges is essential to the conviction of the criminal, but the choice has been made that he go unpunished. Arguments against the wisdom of these rights and privileges, just as arguments against the wisdom of the prohibitions against unreasonable searches and seizures, should be addressed to the question whether they should exist at all, but arguments against the wisdom of the constitutional provisions may not be invoked to justify a failure to enforce them while they remain the law of the land."

<sup>29</sup> Cooley, *A Treatise on the Constitutional Limitations* 306 (1st ed. 1868).

<sup>30</sup> See Allen, "Federalism and the Fourth Amendment: A Requiem for Wolf," 1961 S. Ct. Rev. 1, 34; Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 Colum. L. Rev. 11, 25 (1925). True, in a goodly number of cases the government might still have obtained a conviction even if it *had obeyed* the Constitution, but critics of the exclusionary rule would allow the conviction to stand even if it could have been secured *only* by violating the Constitution.

why does disallowing the government to reap an advantage that it secured, and might only have been able to secure, by violating the Constitution generate so much popular hostility?

No one, I think, has supplied a more discerning and more felicitous explanation than Professor John Kaplan (one of the sharpest critics of the exclusionary rule):

“From a public relations point of view [the exclusionary rule] is the worst possible kind of rule because it only works at the behest of a person, usually someone who is clearly guilty, who is attempting to prevent the use against himself of evidence of his own crimes. . . . [But the] fact is that any rule which actually enforced the demands of the Fourth Amendment (whatever they may be) would prevent the conviction of those who would be caught through evidence obtained in violation of the Fourth Amendment. The problem with the exclusionary rule is that it works after the fact, so that by then we know who the criminal is, the evidence against him, and the other circumstances of the case. If there were some way to make the police obey, in advance, the commands of the Fourth Amendment, we would lose at least as many criminal convictions as we do today, but in that case we would not know of the evidence which the police could discover only through a violation of the Fourth Amendment. It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment.”<sup>31</sup>

### “Time Lag” Argument Also Weak

The federal exclusionary rule has been disparaged on the ground that “it was not adopted by the United States Supreme Court until 1914” and that despite the possibility that “an interpretation first made 125 years [actually 123] after a constitutional provision might nonetheless be an appropriate one, the time lag between the adoption of the Fourth Amendment and the first appearance of the exclusionary rule is at least some indication that

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Even when the use of unconstitutionally seized evidence in a criminal trial “automatically required” reversal (this no longer seems to be the case, see *Chambers v. Maroney*, 399 U.S. 42, 53 (1970)), a conviction could have been obtained on retrial on the basis of untainted evidence. Moreover, if knowledge derived from an unconstitutional search is gained from an “independent source” or undoubtedly *would have been* lawfully discovered in the normal course of events, it can be admitted into evidence. See generally Kamisar, LaFave & Israel, *Modern Criminal Procedure* 698-721 (4th ed. 1974). Cf. *Brewer v. Williams*, 430 U.S. 387, 406-407 n.12 (1977).

<sup>31</sup> Kaplan, *Criminal Justice* 215-216 (2d ed. 1978).

it was hardly basic to the constitutional purpose.”<sup>32</sup> This doesn’t strike me as much of an argument.

Some 160 years after the adoption of the First Amendment, the “prevention and punishment” of “the lewd and obscene, the profane [and] the libelous” were still thought to raise no constitutional problems.<sup>33</sup> Indeed, the time lag between the adoption of the First Amendment and the first articulation of the “clear and present danger” test<sup>34</sup>—what may fairly be called “the start of the law of the First Amendment”<sup>35</sup>—was 128 years. And, of course,

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<sup>32</sup> Kaplan, “The Limits of the Exclusionary Rule,” 26 *Stan. L. Rev.* 1027, 1030-1031 (1974). As Dean Griswold has pointed out, “except for the *Boyd* case [*Boyd v. United States*, 116 U.S. 616 (1886)], virtually no search and seizure cases were decided by the Supreme Court in the first 110 years of our existence under the Constitution.” Griswold, *Search and Seizure: A Dilemma of the Supreme Court* 2 (1975).

The view that illegally seized evidence should be excluded was first laid down by way of dictum in *Boyd*, which went to great lengths to assert a connection between the Fourth Amendment and the privilege against self-incrimination, although the case could have been decided on the self-incrimination clause alone. *Adams v. New York*, 192 U.S. 585 (1903), appeared, by dictum, to repudiate the *Boyd* dictum. Thus the exclusionary rule was adopted in *Weeks* “following an earlier and seemingly inconsistent start.” Reynard, “Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?” 25 *Ind. L.J.* 259, 306-307 (1950). See generally Atkinson, note 30 *supra*, at 13-17; Fraenkel, “Concerning Searches and Seizures,” 34 *Harv. L. Rev.* 361, 366-372 (1921); Notes, 56 *Yale L.J.* 1076, 1077-1078 n.11 (1947), 58 *Yale L.J.* 144, 148-151 (1948). “Apparently the first case to hold that evidence illegally seized, as distinguished from compelled in testimony, was inadmissible, was *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899), which on very different facts, cited the *Boyd* case as authority for the holding.” *Id.* at 150 n.25.

Professor Kaplan also observes that “the exclusionary rule was not imposed upon the states until 1961, and then by a divided Supreme Court.” Note 32 *supra* at 1031. But the Supreme Court never addressed the issue until 1949, in *Wolf*, and that decision was also by a divided Court (6-3). Over the years, of course, *Weeks* and *Mapp* have caught heavy criticism, but so, it should be remembered, did *Wolf*. See Beisel, *Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court* 55-59 (1955); Allen, “The Wolf Case: Search and Seizure, Federalism, and Civil Liberties,” 45 *Ill. L. Rev.* 1 (1950); Frank, “The United States Supreme Court: 1948-1949,” 17 *U. Chi. L. Rev.* 1, 32-34 (1950); Kamisar, “Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts,” 43 *Minn. L. Rev.* 1083 (1959); Paulsen, “Safeguards in the Law of Search and Seizure,” 52 *Nw. U. L. Rev.* 65, 72-76 (1957); Reynard, *supra*, at 306-313. See also Pollak, “Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment,” 67 *Yale L.J.* 304, 320-321 & n.105 (1957).

<sup>33</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (Frankfurter, J.).

<sup>34</sup> *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

<sup>35</sup> Kalven, “Ernst Freund and the First Amendment Tradition,” 40 *U. Chi. L. Rev.* 235, 236 (1973).

the development of the important "void for vagueness" and "overbreadth" doctrines in this area—"judge-made" or "judicially created" remedies *fortissimo*—did not come until still later.<sup>36</sup>

The time lag between the adoption of the Fifth Amendment and the applicability of the privilege against self-incrimination to the proceedings in the police station as well as those in the courtroom was 175 years.<sup>37</sup> As for the Sixth Amendment right to counsel, it was not until 1938<sup>38</sup>—fairly early in the development of constitutional-criminal procedure but still a quarter of a century later than *Weeks*—that "the right to counsel in federal courts meant more than that a lawyer would be permitted to appear for the defendant if the defendant could afford to hire one."<sup>39</sup> Moreover, as Justice Schaefer sadly noted in his memorable Holmes Lecture, delivered seven years before *Gideon*,<sup>40</sup> "in some states it means no more than that today."<sup>41</sup>

### All Cases Involve "Judicial Implication"

The federal exclusionary rule has also been disparaged as not derived from "the explicit requirements of the Fourth Amendment," but only "a matter of judicial implication."<sup>42</sup> This does not strike me as much of a point either—not, at least, unless somebody can cite me one Supreme Court case interpreting the Constitution that *is not* "a matter of judicial implication."

The most celebrated constitutional-criminal procedure cases of

<sup>36</sup> See Lockhart, Kamisar & Choper, *Constitutional Law* 815-822 (4th ed. 1975).

<sup>37</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966); Kamisar, "A Dissent From the *Miranda* Dissents: Some Comments on the 'New' Fifth Amendment and the Old 'Voluntariness' Test," 65 Mich. L. Rev. 59, 65, 77-83 (1966).

<sup>38</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>39</sup> Schaefer, "Federalism and State Criminal Procedure," 70 Harv. L. Rev. 1, 2 (1956).

<sup>40</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>41</sup> Schaefer, note 39 *supra*, at 2.

<sup>42</sup> *Wolf v. Colorado*, 338 U.S. 25, 28 (1949). The point has been made more strongly. See McGarr, "The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy," 52 J. Crim. L.C. & P.S. 266, 269 (1961), reprinted in *Police Power and Individual Freedom* 99, 103 (Sowle, Ed., 1962) (*Weeks* "is a piece of pure Judicial legislation").

our times are *Johnson v. Zerbst*<sup>43</sup> and *Gideon v. Wainwright*,<sup>44</sup> requiring appointment of counsel in all federal and state prosecutions, respectively, when a defendant is unable to pay for the services of an attorney. But one searches the language of the Sixth and Fourteenth Amendments in vain for any mention of *indigent* defendants or the *assignment* or *appointment* of counsel at trial—let alone at preliminary hearings,<sup>45</sup> at lineups,<sup>46</sup> in the police station,<sup>47</sup> on appeal,<sup>48</sup> or in juvenile court proceedings.<sup>49</sup> Nor does the Sixth Amendment or any other part of the Constitution have anything to say about the effective *assistance* of counsel—although the courts have had a good deal to say about it.<sup>50</sup> Nor does the Constitution have anything to say about whether a defendant who wants to represent himself can be *forced to accept a lawyer against his will*.<sup>51</sup>

The right to counsel has well been called “the most pervasive right” of an accused,<sup>52</sup> but all the Constitution has to say about it is that “in all criminal prosecutions the accused shall . . . have the Assistance of Counsel.”<sup>53</sup> That’s all. The considerable body of constitutional law that has emerged in this important area has all been “a matter of judicial implication.”<sup>54</sup>

<sup>43</sup> Note 38 *supra*.

<sup>44</sup> Note 40 *supra*.

<sup>45</sup> See *Coleman v. Alabama*, 399 U.S. 1 (1970).

<sup>46</sup> Compare *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), with *Kirby v. Illinois*, 406 U.S. 682 (1972).

<sup>47</sup> Compare *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, note 37 *supra*, with *Oregon v. Mathiason*, 429 U.S. 492 (1977).

<sup>48</sup> Compare *Douglas v. California*, 372 U.S. 353 (1963), with *Ross v. Moffit*, 417 U.S. 600 (1974).

<sup>49</sup> See *In re Gault*, 387 U.S. 1 (1967).

<sup>50</sup> See cases and authorities collected and discussed in *Kamisar, LaFave & Israel*, note 30 *supra*, at 60-63, and 1978 Supplement at 16-19.

<sup>51</sup> See *Faretta v. California*, 422 U.S. 806 (1975).

<sup>52</sup> See *Schaefer*, note 39 *supra*, at 8.

<sup>53</sup> U.S. Const. Amend. VI.

<sup>54</sup> So, of course, have the limitations placed on the exclusionary rule, e.g., standing, the attenuation of taint from illegal searches, and the use of illegally seized evidence in grand jury proceedings or for impeachment purposes, which limitations are said to undermine the “judicial integrity” rationale of the exclusionary rule (see *Stone v. Powell*, 428 U.S. 465, 485 (1976), discussed in *Israel*,

## Analogy to Prohibition of Involuntary Confessions

And whence came the rule—first applied in 1936<sup>55</sup> but shaped and reshaped in the course of the following three decades<sup>56</sup>—barring the use of “involuntary” confessions as a matter of Fourteenth Amendment due process? Talk about “judge-made” or “judicially created” rules! The Constitution has nothing to say about “confessions” or “admissions,” either “involuntary” or of any other kind.

It will not do to point to the constitutional prohibition against “compell[ing]” a person to be “a witness against himself” in “any criminal case.”<sup>57</sup> For the privilege was not deemed applicable to the states until 1964,<sup>58</sup> and by that time the U.S. Supreme Court had decided some thirty state confession cases. Moreover, as noted earlier, even if the privilege against self-incrimination had been deemed applicable to the states, the law pertaining to “coerced” or “involuntary” confessions still would have developed without it. For until *Miranda*,<sup>59</sup> the prevailing view was that because police officers lacked legal authority to compel statements, there was no legal obligation to answer to which a privilege could apply, and thus the privilege did not extend to the police station.<sup>60</sup> As late as April 1966, Chief Justice Roger Traynor pointed out that although “the Fifth Amendment has long been the life of the

“Criminal Procedure, The Burger Court, and the Legacy of the Warren Court,” 75 Mich. L. Rev. 1319, 1410-1412 (1977)) and make the exclusionary rule “not ‘look’ like a constitutional doctrine” (Kaplan, note 34 *supra*, at 1030).

<sup>55</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>56</sup> See Kamisar, “What Is an ‘Involuntary’ Confession?” 17 Rutgers L. Rev. 728 (1963).

<sup>57</sup> U.S. Const. Amend. V.

<sup>58</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964). “In extending the privilege against self-incrimination to the states and at the same time indicating that the privilege has been the unseen governing principle of the confession cases, *Malloy* forcefully brought the Fifth Amendment to bear on the interrogation problem.” Schaefer, *The Suspect and Society* 16 (1967). The “intertwined doctrines” (the “voluntariness standard” and the privilege against self-incrimination), noted Justice Schaefer in a postscript to his 1966 Rosenthal Lectures, “were fused in *Miranda*.” *Id.* at 85 n.31.

<sup>59</sup> *Miranda v. Arizona*, note 37 *supra*.

<sup>60</sup> See the discussion in Kamisar, note 37 *supra*, at 65, 77-83.

party in judicial or legislative proceedings, . . . it has had no life it could call its own in the pre-arraignment stage.”<sup>61</sup>

Nor is it a sufficient answer to say that Fourteenth Amendment due process bars convictions based on inherently untrustworthy evidence (long a universally accepted view but, incidentally, not an *explicit* requirement of the due process clause either). This does not explain why the question of the admissibility of an “involuntary” confession must be “answered with complete disregard of whether or not petitioner in fact spoke the truth”<sup>62</sup> and why “a legal standard which took into account the circumstance of probable truth or falsity . . . is not a permissible standard under the Due Process Clause.”<sup>63</sup> It does not explain why involuntary confessions “are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true.”<sup>64</sup>

Nor does it explain the “rule of automatic reversal”—the rule, formulated by the Stone and Vinson Courts and reaffirmed by the Warren Court, that the introduction of an “involuntary” statement at the trial necessitates reversal, regardless of how much untainted evidence remains to support the conviction.<sup>65</sup> As Professor Bernard Meltzer asked more than twenty years ago:

“If the Fourteenth Amendment is a guarantee only against conviction on inherently untrustworthy evidence, why reverse when, with the involuntary evidence aside, there is ample trustworthy evidence to support the conviction? Why not indeed recognize, as some states had, that inde-

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<sup>61</sup> Traynor, “The Devils of Due Process in Criminal Detection, Detention, and Trial,” 33 U. Chi. L. Rev. 657, 669 (1966).

<sup>62</sup> *Rogers v. Richmond*, 365 U.S. 534, 544 (1961).

<sup>63</sup> *Id.* at 543.

<sup>64</sup> *Rochin v. California*, 342 U.S. 165, 173 (1952) (relying in large part on rationale of coerced confession cases to exclude evidence produced by “stomach pumping”).

<sup>65</sup> See *Lyons v. Oklahoma*, 322 U.S. 596, 597 n.1 (1944); *Malinski v. New York*, 324 U.S. 401, 404 (1945); *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *Stroble v. California*, 343 U.S. 181, 190 (1952); *Payne v. Arkansas*, 356 U.S. 560, 567-568 (1958); *Spano v. New York*, 360 U.S. 315, 324 (1959); *Culombe v. Connecticut*, 367 U.S. 568, 621 (1961); *Haynes v. Washington*, 373 U.S. 503, 518-519 (1963).

Apparently, the “rule of automatic reversal” still applies to “coerced” or “involuntary” confessions (see *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967)), but not to *Massiah* (*Massiah v. United States*, 377 U.S. 201 (1964)) or *Miranda* violations. See *Milton v. Wainwright*, 407 U.S. 371 (1972); *United States v. Sanchez*, 422 F.2d 1198 (2d Cir. 1970); *United States v. Jackson*, 429 F.2d 1368 (7th Cir. 1970).

pendent evidence derived from, and corroborating, the coerced confession, renders it trustworthy and admissible?"<sup>66</sup>

### Attempts to Distinguish Involuntary Confession Cases

It is understandable that critics of the search and seizure exclusionary rule would try to distinguish away the coerced confession cases.<sup>67</sup> For once it becomes clear that the rationale of the coerced confession cases "has been expanded beyond protect[ing] the individual from conviction on unreliable or untrustworthy evidence" to "striking down police procedures which in their general application appear to the prevailing justices as imperiling basic individual immunities"<sup>68</sup>—and this was clear to Professor Francis Allen as far back as 1950—then it becomes most difficult to distinguish the problem of the admission of unconstitutionally seized "real" evidence from that of "involuntary" confessions. For "in both situations the perils arise primarily out of the procedures employed to acquire the evidence rather than from dangers of the incompetency of the evidence so acquired."<sup>69</sup>

Although those unhappy with the exclusionary rule still make the claim that the admissibility of unconstitutionally seized "real" evidence and "involuntary" confessions "raise[s] entirely different questions,"<sup>70</sup> the argument comes about thirty years too late.<sup>71</sup>

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<sup>66</sup> Meltzer, "Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury," 21 U. Chi. L. Rev. 317, 348 (1954).

<sup>67</sup> Thus, in criticizing the exclusionary rule as to unconstitutionally seized materials, Professor Charles Alan Wright notes: "[W]e are talking only of what lawyers call 'real' evidence. Involuntary confessions and other evidence of that kind raise entirely different questions. Innocent men may give false confessions if sufficient pressure is put upon them by the police. The murder weapon, the envelope of narcotics, the gambling slips, however, speak for themselves." Wright, "Must the Criminal Go Free if the Constable Blunders?" 50 Texas L. Rev. 736, 737 (1972). (Don't murder weapons and narcotics obtained *as a result of* involuntary confessions "speak for themselves" too?) See also Wilkey, "Why Suppress Valid Evidence?" 13 Prosecutor 124 (1977): "In exclusionary rule cases involving material evidence there is never any question of reliability. Reliability is in question, for example, with a coerced confession. . . . Exclusion of evidence is then proper, because the evidence is inherently unreliable."

<sup>68</sup> Allen, "The Wolf Case: Search and Seizure, Federalism and the Civil Liberties," 45 Ill. L. Rev. 1, 29 (1950).

<sup>69</sup> *Id.*

<sup>70</sup> See note 67 *supra*.

<sup>71</sup> See *Watts v. Indiana*, 338 U.S. 49 (1949), and companion cases, reversing convictions based on "involuntary" confessions, despite dissenting Justice Jack-

## DEFENSE OF THE EXCLUSIONARY RULE

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

"The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."<sup>72</sup>

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

"Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system. . . . To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, in-

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son's undisputed assertions that "checked with external evidence, [the confessions in each case] are inherently believable, and were not shaken as to the truth by anything that occurred at the trial." *Id.* at 57-58. See also *Rochin v. California*, note 64 *supra*, at 172-173: "It has long ceased to be true that due process of law is needless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. . . . To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions." See generally Beisel, *Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court* 70-86 (1955); Allen, note 68 *supra*, at 26-29; Allen, "Due Process and State Criminal Procedures: Another Look," 48 *Nw. U. L. Rev.* 16, 20-25 (1953); Meltzer, note 66 *supra*, at 326-329, 343, 347-349; Paulsen, "The Fourteenth Amendment and the Third Degree," 6 *Stan. L. Rev.* 411, 417-423 (1954).

<sup>72</sup> *Spano v. New York*, note 65 *supra*, at 320-321.

dependent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verifications, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.”<sup>73</sup>

### **Tort Remedies Not Suggested for Involuntary Confessions**

If a conviction rests in part on an independently corroborated and concededly truthful confession (albeit one found to be the product of constitutionally impermissible methods), *why* can't the conviction stand? Why not remand those who have made such confessions, together with those who were subjected to, but managed to remain silent in the face of, impermissible interrogation methods, “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”?<sup>74</sup> Granting that in practice the exclusion of involuntary but verified confessions may be an effective way of deterring objectionable interrogation methods, why must the Court “condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective”?<sup>75</sup>

Moreover, if the impermissible police methods that produce involuntary confessions are typically more offensive to the dignity of the individual and more often characterized by violence than are unconstitutional searches and seizures, are not these objectionable interrogation methods *more likely* to attract the interest of the press, *more likely* to arouse community opinion, *more likely* to excite the sympathy of jurors? Why, then, is the Court unwilling to rely on tort actions, criminal prosecutions, and internal police discipline to check impermissible police interrogation practices? *Why* does the “command” of the due process clause “compel” the

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<sup>73</sup> Note 62 *supra* at 540-541.

<sup>74</sup> Cf. *Wolf v. Colorado*, 338 U.S. 25, 31 (1949).

<sup>75</sup> Cf. *id.*

Court to reverse the conviction?<sup>76</sup> Why can't the conviction stand?<sup>77</sup>

If the reason is—and, at a time when the privilege against self-incrimination was deemed inapplicable, it is difficult to see what else the reason might have been—that to uphold a conviction resting in part on an “involuntary” confession, however much verified, would be to “sanction” the objectionable methods that produced it and to afford these methods “the cloak of law,”<sup>78</sup> then we have merely arrived at the insight that the *Weeks* Court and Justices Holmes and Brandeis expressed long ago.

### Examination of Wolf Case

That a majority of the Court would conclude in 1949, as it did in *Wolf v. Colorado*,<sup>79</sup> that the Fourteenth Amendment did not prevent a state court from admitting evidence obtained by an unreasonable search and seizure, and that Justice Frankfurter would write the opinion of the Court, is not surprising. For Justice Frankfurter's and his brethren's “notions of the obligations of federalism were a strongly limiting influence on [their] role in the criminal cases during the years before the Warren tenure,”<sup>80</sup> and the *Wolf* case “provided an important demonstration of the Court's essential fidelity to the assumptions of a federal system at a time when [the Court] was being subjected to extreme and irresponsible charges of usurpation of power.”<sup>81</sup> Nevertheless, one is (or ought

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<sup>76</sup> Cf. *Rogers v. Richmond*, note 62 *supra*, quoted in text at note 73 *supra*.

<sup>77</sup> *Id.* See also *McNabb v. United States*, 318 U.S. 332, 339 (1943), where, before putting aside constitutional issues and invoking its supervisory powers over federal criminal justice, the Court noted, per Justice Frankfurter: “It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. *Boyd v. United States*; *Weeks v. United States*. . . .” (Emphasis added.)

<sup>78</sup> Cf. *Rochin v. California*, note 64 *supra*, at 173-174: “Coerced confessions offend the community's sense of fair play and decency. So here, to sanction [the ‘stomach pumping’ which produced the morphine capsules] . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby brutalize the temper of a society.”

<sup>79</sup> Note 74 *supra*.

<sup>80</sup> Allen, “The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases,” 1975 U. Ill. L.F. 518, 526.

<sup>81</sup> Allen, “Federalism and the Fourth Amendment: A Requiem for Wolf,” 1961 S. Ct. Rev. 1, 5.

to be) taken aback by Justice Frankfurter's *reasoning* in *Wolf*: The protection against unreasonable search and seizure is "basic to a free society," is "enforceable against the States through the Due Process Clause," *but* a conviction resting on evidence obtained in disregard of this fundamental and constitutionally protected right *can stand*—that, if I may be permitted to quote what I said about the *Wolf* case nineteen years ago, "this is an instance where one may be . . . imprisoned on evidence *obtained* in violation of due process *and yet not be deprived* of life or liberty without due process of law after all."<sup>82</sup>

### Justice Frankfurter and the McNabb Case

Justice Frankfurter, no less than Justice Day in *Weeks*, assumed elsewhere that permitting evidence obtained in violation of a law to be made the basis of a conviction would "stultify the policy" manifested by the law.<sup>83</sup> And perhaps no jurist since Holmes and Brandeis balked as much as Frankfurter at the courts' becoming "accomplices" in police lawlessness by sustaining a conviction resting on evidence obtained by violation of law. The cases discussed above involving "involuntary" confessions that bear the stamp of verity illustrate this point, at least implicitly. But Justice Frankfurter was more explicit. In the famous *McNabb* case, he observed, for a 7-1 majority:

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

". . . Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded

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<sup>82</sup> Kamisar, "Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts," 43 Minn. L. Rev. 1083, 1108 (1959).

A decade later, Justice Frankfurter protested that *Wolf* did not mean that the substantive scope of the Fourth Amendment *as such* applies to the states via Fourteenth Amendment due process, that *Wolf* did not mean that every search and seizure violative of the Fourth Amendment would make the same conduct on the part of state officials a violation of the Fourteenth. See his dissent in *Elkins v. United States*, 364 U.S. 206, 233, 237-240 (1960). But most members of the Court did read *Wolf* this way. See Justice Stewart's opinion for the Court in *id.* at 212-215; and Justice Clark's opinion for the Court in *Mapp v. Ohio*, 367 U.S. 643, 650-651, 654-656 (1961). For reasons spelled out at length in Kamisar, *supra*, at 1101-1108, I think the *Mapp* and *Elkins* Courts properly read *Wolf* as equating the substantive scope of the Fourth and Fourteenth Amendments.

<sup>83</sup> See *McNabb v. United States*, note 77 *supra*, quoted in text at note 84 *infra*.

## DEFENSE OF THE EXCLUSIONARY RULE

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

“. . . We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation.”<sup>84</sup>

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

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

### Irreconcilable Decisions?

Nor, as I see it, can the reasoning of the Court, per Justice Frankfurter, in *Wolf* be squared with its reasoning, per Justice Frankfurter, in *Rochin*<sup>85</sup>—or with Frankfurter's dissent in *Irvine*.<sup>86</sup>

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<sup>84</sup> *Id.* at 344-347.

<sup>85</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>86</sup> *Irvine v. California*, 347 U.S. 128, 142 (1954). The Court affirmed Irvine's conviction for horse-race bookmaking and related offenses, even though based on incriminating conversations heard through a concealed microphone illegally in-

In striking down a conviction resting on evidence produced by “stomach pumping”—and certainly the morphine capsules taken from Rochin’s stomach were no less trustworthy than the materials seized from Wolf’s office—the *Rochin* Court, per Justice Frankfurter, reminded us that “due process of law” means at least that “convictions cannot be brought about by methods that offend ‘a sense of justice.’”<sup>87</sup> But don’t *all* convictions brought about by methods that offend due process offend “a sense of justice”?

California did not “affirmatively sanction” the police misconduct in *Rochin* any more than did Colorado in *Wolf*. The “stomach pumping,” no doubt, was a tort and a crime. Moreover, as the *Rochin* Court pointed out, the brutal conduct “naturally enough was condemned by the court whose judgment is before us.”<sup>88</sup> Why, then, would sustaining the conviction amount to “sanctioning” the police misconduct and “affording” it “the cloak of law”? And if it would, why would it not in *Wolf*?

Nor did the *Irvine* Court “affirmatively sanction” the repeated illegal entries into the petitioner’s home. Justice Jackson, who wrote the principal opinion in this case, took pains to note that “there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this common gambler.”<sup>89</sup> Indeed, he went so far as to direct the Clerk of Court “to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States.”<sup>90</sup>

stalled in petitioner’s home. Justice Jackson wrote the four-man plurality opinion. Justice Clark concurred in the result, noting that if he had been on the Court when *Wolf* was decided, he would have applied the federal exclusionary rule to the states. *Id.* at 138. Justice Black, joined by Justice Douglas, and Justice Frankfurter, joined by Justice Burton, filed separate dissents.

<sup>87</sup> *Rochin v. California*, note 85 *supra*, at 173.

<sup>88</sup> *Id.*

<sup>89</sup> *Irvine v. California*, note 86 *supra*, at 137.

<sup>90</sup> *Id.* at 138. Only Chief Justice Warren joined Justice Jackson in this regard. The Chief Justice was “new on the job”; indeed, his nomination had not yet been confirmed. In later years, he was to recognize that the admission of unconstitutionally seized evidence “has the necessary effect of legitimizing the conduct which produced the evidence.” See text at note 108 *infra*.

Incidentally, nothing came of the federal investigation suggested by Justice Jackson, in large part because the transgressing officers were acting under orders of the chief of police and with the full knowledge of the local prosecutor. See Comment, 7 *Stan. L. Rev.* 76, 94 n.75 (1954).

Why, then, did Justice Frankfurter dissent in *Irvine*? Why did he protest:

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

“. . . If, as in *Rochin*, [o]n the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause’ [wasn’t this true of *Wolf*?], *it is no answer to say* that the offending policemen and prosecutors who utilize outrageous methods *should be punished for their misconduct*.

“That the prosecution in this case, with the sanction of the courts, flouted a legislatively declared philosophy against such miscreant conduct and made it a policy merely on paper, *does not make the conduct any the less a disregard of due process*.

“Of course it is a loss to the community when a conviction is overturned because the indefensible means by which it was obtained cannot be squared with the commands of due process. . . . But . . . [a] sturdy, self-respecting democratic community should not put up with lawless police and prosecutors.”<sup>91</sup>

### Three Attempts to Reconcile Cases

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

(1) *Not all violations of the Fourth Amendment offend due process; only certain “outrageous” or “aggravated” types of unreasonable searches and seizures do so.* Although even before *Mapp v. Ohio* and *Ker v. California*<sup>92</sup> I argued at considerable length to the contrary,<sup>93</sup> the *Wolf* opinion could conceivably have stood for, or have come to stand for, this limited proposition.<sup>94</sup>

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<sup>91</sup> *Irvine v. California*, note 86 *supra*, at 148-149 & n.1 (emphasis added).

<sup>92</sup> 374 U.S. 23 (1963) (“standard of reasonableness is the same under the Fourth and Fourteenth Amendments”). See also *Aguilar v. Texas*, 378 U.S. 108 (1964) (reading *Ker* as holding that standard for obtaining a search warrant is the same).

<sup>93</sup> See note 82 *supra*.

<sup>94</sup> See *id.*

But today it is plain that it does not. Although some Justices have balked at "incorporating" a specific provision of the Bill of Rights into the Fourteenth "jot-for-jot" and "bag and baggage," especially in the jury trial cases, it is now clear that the Court did not apply a "watered-down" version of the Fourth Amendment to the states but rather one that applies *to the same extent* it has been interpreted to apply to the federal government.<sup>95</sup>

(2) *Evidence, verbal or real, that is the product of police violence or brutality should be excluded, but not evidence that is obtained by other types of police misconduct.* This is the distinction that Justice Jackson drew in *Irvine*—and one that he sought to make even among "involuntary" confessions.<sup>96</sup> But the Court has long recognized that "involuntariness" or "coercion" need not be based on physical violence or the threat of it.<sup>97</sup> Why, then, should such violence or the threat of it be a prerequisite for excluding other unconstitutionally seized evidence? Moreover, I think it may be confidently said that today virtually everybody would reject a rule, as did Frankfurter and the other *Irvine* dissenters, whether it be a rule for "real" or verbal evidence, that "even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials."<sup>98</sup>

(3) *Obtaining evidence by searches or seizures that would have violated the Fourth Amendment if conducted by federal officers does violate Fourteenth Amendment due process when made by state officers, but the use of such evidence in state courts does not offend due process unless the police methods involved constitute an "aggravated" or "outrageous" or "shocking" violation of the Fourth Amendment.* This, it seems to me, is the doctrine that

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<sup>95</sup> See generally Kamisar, Grano & Haddad, *Criminal Procedure* 12-15 (1977); Lockhart, Kamisar & Choper, *Constitutional Law* 577-584 (4th ed. 1975).

<sup>96</sup> See *Stein v. New York*, 346 U.S. 156, 182 (1953); *Watts v. Indiana*, 338 U.S. 49, 59-60 (1949) (concurring opinion). See also the comments on Justice Jackson's views in Paulsen, "The Fourteenth Amendment and the Third Degree," 6 *Stan. L. Rev.* 411, 428 (1954).

<sup>97</sup> Thus the Court threw out the confession in *Fikes v. Alabama*, 352 U.S. 191 (1957), although "concededly, there was no brutality or physical coercion" and "psychological coercion is by no means manifest." *Id.* at 200 (Harlan, J., dissenting). See also *Leyra v. Denno*, 347 U.S. 556 (1954); *Spano v. New York*, 360 U.S. 315 (1959).

<sup>98</sup> *Irvine v. California*, note 86 *supra*, at 146.

emerges from Justice Frankfurter's majority opinions in *Wolf* and *Rochin* and his dissent in *Irvine*. I find it—and I hope I am not alone—a difficult proposition, and a most curious one. It is not easy to grasp why only one step is needed for “involuntary” confessions—whether or not secured by violence or threat of it, whether or not independently established as true, the *use* of any confession *obtained* in violation of due process offends due process—but two steps are required for unreasonable searches and seizures: (1) Did the police violate the Fourth and Fourteenth Amendments? (2) If so, by *how much*? Was it a “gross” violation or only a “mild” one? A “flagrant” violation or only a “routine” one?

### “Minimally” Violating Rights: A Bad Proposal

Where does this “two-plimsoll mark due process” test<sup>99</sup> come from? Talk about “judicially created rules of evidence”! Where is this written—indeed, even *implied*—in the Constitution? Next to this test, surely, the *Weeks* Court's reading of the Fourth Amendment and the *Mapp* Court's reading of the Fourth and Fourteenth seem like pretty straightforward interpretations of the Constitution.

To say that police conduct is unconstitutional, that it violates the minimal standards of due process, is as bad a label as one can put on police misconduct, is it not? How then can it be said that still more is required for exclusion? Why then must the police be found to have violated *subminimal* standards?

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

“To label a right ‘basic to a free society’ is to say about as much as can be said. Yet *Wolf* refused to vindicate these rights by reversal of the conviction. Given *Wolf*, how are the rights flouted by the Los Angeles

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<sup>99</sup> Cf. Frankfurter, J., concurring in *Fikes v. Alabama*, note 97 *supra*, at 199: “I cannot escape the conclusion . . . that in combination [these circumstances] bring the result below the Plimsoll line of ‘due process.’” See Field, “Frankfurter, J., Concurring,” 71 *Harv. L. Rev.* 77 (1957); Kamisar, note 82 *supra*, at 1121-1129.

police in *Irvine* to be characterized? There is a certain inelegance in speaking of rights 'very basic to a free society' or in indulging in what appears to be almost a comparison of superlatives."<sup>100</sup>

My purpose in comparing the reasoning in *Wolf* with that in *McNabb*, *Rochin*, and other cases, and with what might be called the "imperative of judicial integrity" consideration in the confession area,<sup>101</sup> is not to demonstrate that the Court, or Justice Frankfurter in particular, was inconsistent. That is to be expected. Indeed, that is almost inevitable. After all, Justice Frankfurter sat on the Supreme Court for more than twenty years, and few judges, if any, who have served half as long have not been inconsistent. I hasten to add that the same may be said for those who contribute to the law reviews over any substantial stretch of time. (I am the first to admit that there are inconsistencies in what I am saying about the exclusionary rule today and in what I have written about the same subject on other occasions.)

### The Judge's Job: Drawing the Line

My purpose, rather, is to provide "education in the obvious"<sup>102</sup>: Almost no sensitive judge can take seriously or live with the implications of *Wolf*. At some point, he will not care about or even think about "alternatives" to the remedy of exclusion; he will exclude the evidence however logically relevant and verifiable it be, or, if the court below admitted it, he simply will not let the conviction stand. At some point he will be *unable* to do otherwise. When that point is reached, he will do what a majority did in *Rochin* and some would have done in *Irvine*: He will refuse "to have a hand in such dirty business."<sup>103</sup> This is why the *Weeks* Court's interpretation of the Fourth Amendment, Wigmore's famous criticism to the contrary notwithstanding,<sup>104</sup> is, if not perfectly logical, quite understandable—one might even say quite natural.

<sup>100</sup> Allen, note 81 *supra*, at 9. See also Kamisar, note 82 *supra*, at 1121-1124.

<sup>101</sup> Cf. *Elkins v. United States*, 364 U.S. 206 (1960).

<sup>102</sup> Holmes, "Law and the Court," in *Collected Legal Papers* 291, 292 (1920).

<sup>103</sup> Holmes, J., dissenting in *Olmstead v. United States*, 277 U.S. 438, 470 (1928). As I read Holmes' dissent, he did not, as many seem to think, regard wiretapping as inherently "ignoble" or "immoral," but only wiretapping—or for that matter, *any other means of obtaining evidence by the government*—that constituted a specific violation of the law. This was the "dirty business."

<sup>104</sup> See 8 Wigmore, *Evidence* § 2184, at 35, 40 (3d ed. 1940).

The *Weeks* Court believed, or felt, this point was reached when the police violated the Fourth Amendment; the *Rochin* Court and the *Irvine* dissenters believed, or felt, that it was reached when the police violated some *subminimal* standard. But the response was the same: We don't care about possible tort actions or other possible "alternative remedies"! The government obtained the conviction by "indefensible means."<sup>105</sup> *We, the judges*, cannot "sanction" this. *We, the judges*, cannot afford it "the cloak of law" and "should not [and will not] put up" with this.<sup>106</sup>

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

### "Threshold for Exclusion"

In his decade and a half as Chief Justice of the United States, for example, Earl Warren's "threshold for exclusion" lowered quite a bit. In his first year on the Court, he joined in Justice Jackson's principal opinion in *Irvine*, upholding a conviction based on "incredible" police misconduct but assuring us that "admission of the evidence does not exonerate the officers . . . if they have violated defendant's Constitutional rights"<sup>107</sup>—"there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting [the] conviction."<sup>108</sup> Seven years later, however, the Chief justice joined in the opinion for the Court in *Mapp*. And another seven years later, very close to the end of his career, he observed for the Court in the "stop and frisk" cases:

"Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by per-

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<sup>105</sup> See text at note 91 *supra*. Are not *all* unconstitutional means of obtaining evidence to secure a conviction "indefensible"? And if not, why are they unconstitutional?

<sup>106</sup> See text at note 91 *supra*. If alternative means of punishing or discouraging governmental lawlessness are available (at least theoretically), as they were in *Rochin* and *Irvine*, why does admitting the evidence constitute "put[ting] up with lawless police and prosecutors"? And if it does, why did the Court "put up" with the governmental lawlessness in *Wolf*?

<sup>107</sup> *Irvine v. California*, 347 U.S. 128 (1954).

<sup>108</sup> *Id.*

mitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

“. . . When [unconstitutional] conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.”<sup>109</sup>

Justices Holmes and Brandeis seem to have had a consistently low “threshold for exclusion.” In Fourteenth Amendment due process cases, at least, Justice Jackson seems to have had a consistently high one. For him, unconstitutional police conduct was not enough. Nor even “serious” or “aggravated” unconstitutional conduct. It had to involve physical violence or brutality as well.

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

### **Rule Needed More Where Other Remedies Nonexistent**

This is why—although his reasoning must seem curious to many of us who have grown up with *Wolf*, *Rochin*, and *Irvine*—a leading proponent of the exclusionary rule maintained, some fifty years ago, that infringements of the Fourth Amendment that generate the least public outcry pose *the strongest case* for exclusion.<sup>110</sup> “The *more violent and obvious* infringement,” he was willing to concede, “may be curtailed through civil or criminal actions against the guilty officers.”<sup>111</sup>

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<sup>109</sup> *Terry v. Ohio*, 392 U.S. 1, 13, 15 (1968).

<sup>110</sup> Atkinson, “Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures,” 25 *Colum. L. Rev.* 11, 24 (1925).

<sup>111</sup> *Id.*

## DEFENSE OF THE EXCLUSIONARY RULE

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

Does a court that admits the evidence in such a case not manifest a willingness to "put up with" the unconstitutional conduct that produced it? If so, how can the police and the citizenry be expected "to believe that the government truly meant to forbid the conduct in the first place"?<sup>112</sup> Why should the police or the public accept the argument that the availability of "alternative remedies" permits the court to admit the evidence without "sanctioning" the underlying misconduct when the *greater possibility* of alternative remedies in the "flagrant" or "willful" case does not allow the court to do so?

Does a court that admits the evidence, then, in a case involving a "run of the mill" Fourth Amendment violation not demonstrate an insufficient commitment to the guaranty against unreasonable search and seizure, not demonstrate "the contrast between morality professed by society and immorality practiced on its behalf,"<sup>113</sup> not signify that government officials need not, or at least need not always, "be subjected to the same rules of conduct that are commands to the citizen"?<sup>114</sup>

Where should the "threshold for exclusion" be put? At what point should a judge say that the police misconduct is so "indefensible" or "offensive" as to warrant throwing out the evidence it

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<sup>112</sup> Paulsen, "The Exclusionary Rule and Misconduct by the Police," 52 J. Crim. L.C. & P.S. 255, 258 (1961), reprinted in *Police Power and Individual Freedom* 87, 90 (Sowle, Ed., 1962).

<sup>113</sup> Frankfurter, J., dissenting in *On Lee v. United States*, 343 U.S. 747, 759 (1952).

<sup>114</sup> Brandeis, J., dissenting in *Olmstead v. United States*, 277 U.S. 438, 471, 485 (1928).

produced? To say that this point is not reached until the police have resorted to violence or brutality or that it is not reached unless they have perpetrated some "gross" or "serious" or "aggravated" violation of the Constitution seems neither a principled nor a manageable way to go about it.

### **Conclusion: Exclude All Unconstitutional Police Conduct**

If the line must be drawn somewhere (and I believe most judges rightly think that it must—or will feel that it must when the appropriate case arises), I can think of no more logical and fitting place to draw it than at *unconstitutional* police conduct (however "mild," "technical," or "inadvertent" some may label that unconstitutional conduct).<sup>115</sup>

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<sup>115</sup> See *Stone v. Powell*, 428 U.S. 465, 538 (1976) (White, J., dissenting) (evidence should not be excluded when seized by an officer "acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this [good-faith] belief"); *Brown v. Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part) (distinguishing between "flagrantly abusive" Fourth Amendment violations and "technical" or "good faith" violations); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting) ("inadvertent" or "honest mistakes" by police should not be treated in the same way as "deliberate and flagrant *Irvine*-type violations of the Fourth Amendment"); *United States v. Soyka*, 394 F.2d 443, 451-452 (2d Cir. 1968) (Friendly, J., dissenting) (officer's error "so minuscule and pardonable" as to render exclusion of evidence inappropriate); Model Code of Prearrestment Procedure § SS 290.2 (Official Draft 1975) (evidence shall be excluded only if violation upon which it was based was "substantial"; all violations shall be deemed substantial if "gross, wilful and prejudicial to accused"; otherwise, court shall consider, inter alia, "the extent of deviation from lawful conduct" and "the extent to which the violation was wilful"); Griswold, *Search and Seizure: A Dilemma of the Supreme Court* 58 (1975) (officer should be supported if he "acted decently" and "did what you would expect a good, careful, conscientious police officer to do under the circumstances").

If the officer, as Dean Griswold described it, acted in the manner that "a good, careful, conscientious police officer" is expected to act, or if, as Judge Friendly maintained in *Soyka*, *supra*, the officer's error was "so minuscule and pardonable as to render the drastic sanction of exclusion . . . almost grotesquely inappropriate," then the error should not render the search or seizure "unreasonable" within the meaning of the Fourth Amendment, as the Second Circuit held on rehearing en banc in *Soyka*, *supra*, at 452. After all, probable cause is supposed to turn on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (*Brinegar v. United States*, 338 U.S. 160, 175 (1949)); and affidavits are supposed to be interpreted in a "commonsense" rather than a "hypertechnical" manner (*United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

In light of existing law, the proposals or suggestions to modify the exclusionary rule must mean that the challenged evidence should be admissible even when the

When Justice Frankfurter argued that the Court should reverse in *Irvine*, although it affirmed the conviction in *Wolf*, because the *Irvine* police misconduct was more shocking and offensive, Justice Jackson responded: "Actually, the search [in *Wolf*] was offensive to the law in the same respect, if not the same degree, as here."<sup>116</sup> I think Justice Jackson was right (but for the wrong reason). Once the Court identifies the police action as *unconstitutional*, that ought to be the end of the matter. There should be no "degrees" of "offensiveness" among different varieties of *unconstitutional* police conduct. A violation of the Constitution ought to be the "bottom line." This, I always thought, is supposed to be the "bottom line." This is where the *Weeks* and *Mapp* Courts drew the line. This is where it ought to stay drawn.

### **Addendum: Empirical Studies and Deterrence**

Professor Dallin Oaks' much-cited "empirical challenge" to the exclusionary rule<sup>117</sup> was undeniably an important contribution in its time, but more recent and more comprehensive studies and analyses have cast grave doubt on his conclusions and inferences about the rule's inefficacy in affecting police behavior. Moreover, these more recent analyses have highlighted the insufficiency and inappropriateness of the Oaks data.<sup>118</sup>

officer acted unreasonably (i.e., *negligently*), so long as his misconduct was not deliberate or reckless but "inadvertent." On this issue (although I disagree with him on a number of other points), I share Professor Kaplan's concern that such a modification of the rule "would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him." Kaplan "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," and he states that so long as so many trial judges remain hostile to the exclusionary rule, "the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level" (Kaplan, "The Limits of the Exclusionary Rule," 26 *Stan. L. Rev.* 1027, 1044, 1045 (1974)). See also *Proceedings of 48th Annual Meeting of ALI* 374-398 (1971) (debate on Model Prearrest Code proposal, *supra*, to exclude illegally obtained evidence only when underlying violation was "substantial").

<sup>116</sup> *Irvine v. California*, note 107 *supra*, at 133.

<sup>117</sup> See Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 *U. Chi. L. Rev.* 665-667 (1970).

<sup>118</sup> See generally Canon, "Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion," 62 *Ky. L.J.* 681, 697-717, 725-727 (1974). See also Canon, "Testing the Effectiveness of Civil Liber-

For example, Oaks<sup>119</sup> and Spiotto<sup>120</sup> rely on the high frequency with which motions to suppress are granted in Chicago gambling, narcotics, and weapons cases to conclude that, long after adoption of the exclusionary rule, illegal searches and seizures are commonplace in the enforcement of these offenses by the Chicago police. Canon points out why "counting successful motions is an imperfect indicator [of the rule's effectiveness] for several reasons" and concludes that, in any event, Chicago is "a gross exception to the national norm of granting suppression motions."<sup>121</sup> Canon's study of sixty-five cities indicates that in 60 percent the motions to suppress were granted one-tenth of the time or less and in 91 percent such motions were granted one-fourth of the time or less.<sup>122</sup> Moreover, comments Canon, "judges in Chicago have long been noted for their willingness to grant motions to suppress evidence," and "it is sometimes alleged that Chicago police habitually conduct vice raids in a manner that ensures that a motion to suppress will be successful."<sup>123</sup>

To take another example (the reader will find many more in the Canon article), Oaks' study of arrest before and after *Mapp* focused on *one* city, Cincinnati. He concluded that the adoption of the exclusionary rule had had virtually no effect on the number of arrests for narcotics, weapons, and gambling in that city.<sup>124</sup> But Canon gathered similar data for *fourteen* cities (including Cincinnati) and found that only four others had the "rather minimal

ties Policies at the State and Federal Levels," 5 Am. Politics Q. 57, 71-75 (1977); Horowitz, *The Courts and Social Policy* 220-254 (1976); Wasby, *Small Town Police and the Supreme Court* 25-34, 81-117, 217-229 (1976) (study of southern Illinois and western Massachusetts police); cf. "Critique," 69 Nw. U.L. Rev. 740 (1974) (devastating criticism of the Spiotto study, *infra*).

<sup>119</sup> See Oaks, note 117 *supra*, at 681-689, 706-707.

<sup>120</sup> Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," 2 J. Legal Stud. 243, 245-248 (1973) (in many respects a continuation of the Oaks study, but a less scholarly effort).

<sup>121</sup> Canon, "Exclusionary Rule," note 118 *supra*, at 718, 721.

<sup>122</sup> *Id.* at 722.

<sup>123</sup> *Id.* at 720. See also Wasby, note 118 *supra*, at 108-117, 217-223 (some judges granted a substantial number of motions to suppress "during the educational process" immediately following adoption of the exclusionary rule, but "police improvement and accommodation to the rules" meant that after this transitional period few motions were granted).

<sup>124</sup> See Oaks, note 117 *supra*, at 707.

response pattern that Cincinnati has.”<sup>125</sup> At the other end of the spectrum, the Baltimore decreases in arrests following *Mapp* “were both dramatically sudden and truly spectacular.”<sup>126</sup> “Baltimore is probably an extreme case and is illustrated to counter Oaks’ generalizations about the efficacy of the exclusionary rule from the presentation of Cincinnati’s arrest figures. Buffalo is less extreme but not necessarily typical. Indeed, it is not at all clear that there is a typical response to the exclusionary rule.”<sup>127</sup>

Canon also noted that political scientist Michael Ban had concluded, after an in-depth study of *Mapp*’s impact in Boston and Cincinnati, that “the Cincinnati political milieu . . . permitted widespread disregard if not defiance of the Supreme Court’s ruling,” and that in a number of respects there was “a discernably lesser propensity for compliance in Cincinnati than in Boston.”<sup>128</sup>

At the present time, there is much to be said for lawyer-political scientist Donald Horowitz’s analysis of *Mapp* and police behavior<sup>129</sup>:

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

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

“. . . [T]he fragments indicate it is a mistake to think that police behavior is never conditioned by the sanction of excluding evidence that might lead to conviction. . . . [I]n the case of serious crimes the police-

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<sup>125</sup> See Canon, “Exclusionary Rule,” note 121 *supra*, at 706.

<sup>126</sup> *Id.* at 704.

<sup>127</sup> *Id.* at 705.

<sup>128</sup> *Id.* at 689, 698 (Canon’s characterization of Ban’s findings, which, although unpublished, have been widely circulated among political scientists).

<sup>129</sup> Horowitz, note 118 *supra*, at 224-225, 230-231, 250.

man starts thinking fairly early of what is required to convict, and some of the things he thinks of are the restrictive rules of arrest and search. Even in less serious cases, there is some evidence of officers' disappointment with their inability to get Fourth Amendment requirements straight, when motions to suppress evidence have been granted.<sup>130</sup> Policemen often debate with prosecutors the appropriate charges to be lodged against suspects the police have apprehended. . . . Sample surveys of police attitudes toward the courts repeatedly show profound police disappointment with the courts for imposing little or no punishment on so many criminals. . . .

" . . . Blanket assertions that the police generally are unconcerned about conviction fail to account for many aspects of police behavior. . . . [C]oncern with conviction is very much a function of locale, offense, stage of investigation, and sometimes police unit involved. Receptivity to the judicial sanction varies accordingly."

In closing these necessarily brief remarks on the "empirical challenge" to the exclusionary rule, I cannot resist pointing out that at the same time some critics of the rule are urging its elimination or substantial modification on the ground, *inter alia*, that it has had little if any effect on police behavior and little if any impact on the amount of pre-*Mapp* illegality, other critics are calling for the rule's repeal or revision on the ground, *inter alia*, that in recent years the police have attained *such a high incidence of compliance with Fourth Amendment requirements* that "the absolute sanctions of the Exclusionary Rule are no longer necessary to 'police' them."<sup>131</sup> In an *amicus* brief, the Supreme Court was presented with the results of a study of *warrantless* searches and seizures. Such searches and seizures were chosen because they are the ones "in which the officer is acting on his own with no assistance from a magistrate or prosecuting attorney, cases in which his activity must stand or fall based on his own judgment, knowledge of search and seizure restrictions, and his desire to abide by such restrictions."<sup>132</sup> According to this study, of more than a thousand cases involving warrantless searches and seizures decided by appellate courts nationwide during the twenty-seven-month period of

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<sup>130</sup> On this point, see also Wasby, note 118 *supra*, at 112-114, 217-218.

<sup>131</sup> Brief of Americans for Effective Law Enforcement (AELE) and the International Association of Chiefs of Police (IACP) as *Amici Curiae* in Support of Petitioner at 12, *California v. Krivda*, 409 U.S. 33 (1972), discussed in Comment, 65 J. Crim. L. & C. 373, 383 (1974).

<sup>132</sup> *Id.* at 16.

January 1970 through March 1972, 84 percent (1,157 of 1,371) were found to be proper—"an extraordinary high degree of police professionalism."<sup>133</sup>

The *amicus* brief denies that this study evidences any beneficial exclusionary-rule influence on law enforcement,<sup>134</sup> but I doubt that many will find the denial convincing. "[T]his excellent record of successful police compliance with the rules of search and seizure"<sup>135</sup> is attributed to "police professionalism"—an attempt by most police to learn "at least in a general way the restrictions on their search and seizure activities and a good faith desire to comport themselves properly within such restrictions."<sup>136</sup>

But what *stimulated* the attempt by most officers to familiarize themselves, at least in a general way, with the law of search and seizure? Perhaps, just perhaps, it was the exclusionary rule.

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<sup>133</sup> *Id.* at 17.

<sup>134</sup> *Id.* at 18.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 19.

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### CLIENT CONFIDENCE IN COUNSEL SURVEYED

A recent survey conducted for the Law Enforcement Assistance Administration showed that 49 percent of indigent criminal suspects surveyed had no faith in their government-funded lawyers. The respondents felt the lawyers were "on the side of the state."

As for private practitioners, only 6 percent of the respondents didn't trust their attorneys. The survey found that these clients saw their counsel as real-life Perry Masons.