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Search and Seizure of America: The Case for Keeping the Exclusionary Rule

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The Search and Seizure of America

The movement to destroy the exclusionary rule is growing in momentum. Its success could cripple our system of justice

by Yale Kamisar

Twenty years ago, concurring in *Mapp v. Ohio* (1961), Justice William O. Douglas looked back on *Wolf v. Colorado* (1949) (which had held that the Fourth Amendment's substantive protection against "unreasonable search and seizure" was binding on the states through the due process clause, but that the Fourth Amendment exclusionary rule was not) and recalled that the *Wolf* case had evoked "a storm of controversy which only today finds its end." But, of course, in the twenty years since Justice Douglas made that observation the storm of controversy has only intensified, and it has engulfed the exclusionary rule in *federal* cases as well as in state.

Why this continuing storm of controversy? Why this deep and widespread hostility to the exclusionary rule? (I have no doubt that a majority of the front-line judges and even a majority of our citizens are against it.)

The reason, I think, is the one offered by Stanford Professor John Kaplan (who, incidentally, is a sharp critic of the rule). From "a public relations point of view," he points out, the exclusionary rule is "the worst possible kind of rule," because it works *after the fact* and by then we know who the criminal is and what the evidence is against him. If there were some other way to make the police obey *in advance* the commands of the Fourth Amendment, the government would lose as many cases as it does now, but we would not know what evidence the police *might have obtained* in violation of the Fourth Amendment.

If the exception proves the rule, a recent Minnesota case, *O'Connor v. Johnson* (1979), is instructive in this regard. Investigating certain violations in applying for liquor licenses, and believing that the relevant business records were in the possession of an attorney, the police obtained a search warrant to search the attorney's office for these records. But the lawyer happened to be present when the police officers arrived. He must have been a very persuasive lawyer. For, holding on to his work product file, which contained some of the records, the lawyer persuaded the police not to carry out the search. And he also persuaded the police to accompany him to the chambers of the municipal judge who issued the warrant, so that he could move to quash the warrant.

The municipal judge ordered a representative of the prosecutor's office to obtain all documents pertaining to the case from the lawyer's work product file after *the prosecutor* determined that the documents were protected neither by the attorney-client privilege nor the work product doctrine. The lawyer still resisted. He asked the state supreme court to quash the search warrant and the municipal judge then amended his order so that *the judge himself,* rather than a representative of the prosecutor's office, would determine which documents were unprotected and could be turned over to the police department. The lawyer still resisted. He challenged the amended order.

Eventually the lawyer won. A unanimous Minnesota Supreme Court held that a warrant authorizing the search of an attorney's office is invalid when the attorney himself is not suspected of any criminal wrongdoing and there is no indication that the documents sought will be

destroyed. Under these circumstances, held the state supreme court, law enforcement officers would have to proceed by subpoena *duces tecum* in seeking documents held by an attorney.

The extraordinary thing about this case, of course, is that the police never seized, let alone rummaged through, the lawyer's work product file. They were willing to let him bring the file before the court so that the court could rule on the validity of the search in an adversary proceeding before a seizure was ever made—before anyone knew what was in the file.

In the typical case, of course, the courts don't enter the picture *unless and until* the police have uncovered damaging physical evidence. Nobody can stop them, if they are unwilling to be stopped, not even a lawyer. *Mapp v. Ohio,* not the Minnesota case I just discussed, is typical.

The police approached Miss Mapp's house twice. When they first demanded entrance, after telephoning her lawyer she refused to admit them without a search warrant. But they came back three hours later—without a warrant—and forcibly gained admittance. Miss Mapp's lawyer did arrive on the scene, but the police neither allowed him to see his client nor to enter the house. And the obscene materials for possession of which she was ultimately convicted were discovered in the course of a widespread search which included her bedroom, her daughter's bedroom and the basement.

If Miss Mapp's attorney had persuaded the police to accompany him to a judge's chambers, the judge might have decided the search and seizure question "in the abstract." If the judge had ruled that the police were proceeding unlawfully, we might never know what damaging evidence, if any, an illegal search would have uncovered. But, as we all know, that isn't the way the system works.

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The way it works is that, although the police may have illegally searched five or ten homes without discovering anything, or illegally arrested five or ten people without uncovering anything the only case that gets to court is the one where they did hit paydirt. By then we know who the criminal is and what the evidence is against him and the defense lawyer, in effect, asks the court *to turn back the clock and reconstruct events as though the damaging evidence never existed.* This is very hard to do—the damaging evidence "flaunts before us the price we pay to the Fourth Amendment." (Kaplan, *Supra*).

I can understand why almost always adversary proceedings *before* the search or seizure takes place are out of the question. I can understand why the police must proceed pursuant to *ex parte* warrants—which are often "rubber stamps"—and why "exigent circumstances" often allow them to proceed without bothering to get any warrants at all. I can understand why almost always there is no meaningful way for lawyers and judges to decide *in advance* whether the police are complying with the commands of the Fourth Amendment. But what I have such great trouble understanding is why so many members of the bench and bar and so many members of the public are unwilling to let the courts decide *after the fact*—the *only time,* unfortunately, that the courts *can decide* the issue in an adversary proceeding—whether the police did comply with the commands of the Fourth Amendment.

As I have noted, from a "public relations" standpoint, deciding Fourth Amendment questions *after* the search or seizure has taken place is the worst time to do so. For now an apparently guilty person is relying on the Fourth Amendment. But from a practical standpoint, it is the *first* time we can do so. This is the so-called exclusionary rule or suppression doctrine. Critics have called it "illogical" and "unnatural" but it seems to me that it is the most "natural" and "logical" reading of the Fourth Amendment of all.

Surely it is not "unnatural" or "illogical" to conclude that if the government is supposed to honor "the right of the people to be secure . . . against unreasonable searches and seizures" and the government violates that right it should not be able to benefit from it. If the government could not have gained a conviction had it obeyed the Constitution, why should it be allowed to do so because it violated the Constitution?

As the Supreme Court, speaking through Justice Holmes, generally regarded as the greatest jurist in American history, said of the Fourth Amendment some 60 years ago: "[T]he essence of a provision forbidding the acquisition of evidence in a certain way is that [such] evidence . . . shall not be used at all." And as Holmes also said, in his famous dissent in the 1928 wiretapping case of *Olmstead v. United States,* the government's protestations of disapproval of police illegality cannot be taken seriously "if it knowingly accepts and pays [for] and announces in the future [that] it will pay for the fruits" of this illegality.

When, in the 1949 *Wolf* case, the Supreme Court declined to impose the federal exclusionary rule on the states as a matter of Fourteenth Amendment Due Process, it characterized the exclusionary rule as "a matter of judicial implication." Critics of the exclusionary rule have made this point again and again. I must say that I don't see what it adds to the debate.

Of course, the exclusionary rule is "a matter of judicial implication"—in the sense that the Fourth Amendment guarantees only that the protection "against unreasonable search and seizure shall not be violated" but does not explicitly spell out what *the consequences* of a violation are. Thus, a holding that evidence seized in violation of the Fourth Amendment guarantee is *admissible* in a criminal prosecution would *also be* "a matter of judicial implication."

I defy anyone to name a single famous constitutional decision that is *not* "a matter of judicial implication." Start with the reapportionment cases or the school prayer cases or school desegregation or the right of the press to attend criminal trials or with any one of a dozen freedom of speech doctrines. Start anywhere you want.

Forget about *Escobedo* and *Miran-*

da. Go back earlier. Consider the doctrine that a state cannot base a conviction on a coerced confession, however much the confession is verified by extrinsic evidence. That doctrine, too, is "a matter of judicial implication." Read the Constitution. It never once mentions confessions, "coerced" or otherwise. Does that mean Congress could have "negated" the old "voluntariness" doctrine by legislation? As a matter of fact, the Constitution doesn't mention lineups, or wiretapping or "stomach pumping" or the presumption of innocence, or an indigent's right to a trial transcript at state expense—or even an indigent's right to a lawyer at state expense.

Fifteen years ago the Court held that if a defendant declines to take the stand in his own defense the Fifth Amendment forbids *either* comment by the prosecution on the defendant's silence *or* instructions by the judge that such silence is evidence of guilt. Only last year, in *Carter v. Kentucky,* the Supreme Court went further and held that if a defendant does not take the stand and his lawyer requests that the jury be instructed that his client's refusal to take the stand cannot be used as an inference of guilt and should not prejudice him in any way, the trial court *must give* that instruction. These rulings are surely "matters of judicial implication." Does it follow—does anyone seriously think it follows—that Congress may "negate" these rulings by legislation?

In light of the recent work of the court, it is *almost amusing* that critics of the exclusionary rule still disparage it as "a matter of judicial implication." As Harvard Professor John Ely recently observed: "The 'right to travel' from state to state has been a favorite of both the Warren and Burger Courts. The Constitution makes no mention of any such right. By now we know that cannot be determinative, but we are entitled to some sort of explanation of why the right is appropriately attributable. In recent years the Court has been almost smug in its refusal to provide one." Various Justices have suggested *four different* provisions of the Constitution as possible sources of the right to travel and various commentators have suggested three or four *other* sources.

Well, we do know where the protection against unreasonable search and seizure is to be found. There *is* a Fourth Amendment. And the Supreme Court, in the 1914 *Weeks* case, the case which first adopted the exclusionary rule in federal cases, *did give* a pretty good explanation of why the Fourth Amendment requires an exclusionary rule.

What the Court said in *Weeks* was pretty much what the Court must have had in mind in all the cases where it overturned convictions based on "involuntary" but verifiable confessions. I quote from Justice Day's opinion in *Weeks:*

"The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions . . . *should find no sanction* in the judgements of the courts which are charged at all times with the support of the Constitution . . . . [N]ot even an order of court would have justified [the search and seizure], much less was it within the authority of the United States Marshal to thus invade the house and privacy of the accused [without a court order]. 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" (232 U.S. at 392-94, emphasis added).

The *Weeks* Court's reading of the Fourth Amendment strikes me as an eminently sensible one. If a court could not "sanction" a search or seizure *before* the event—because the police lacked sufficient grounds to make the search—then why should the court "affirm" or "sanction" the search or seizure after the event? Were it otherwise, the government could apply for a warrant, *get turned down by the court,* proceed to make the search anyhow, return to the court with the very evidence the court said it could not seize, and use it. Were it otherwise, the government, in those cases where it knew or assumed that the courts *would not permit it* to make the search, could avoid the courts altogether, make the search anyway and *then use* the evidence. The courts would look, and feel, foolish. *The courts,* after all, are *the specific addressees* of the constitutional command that "no Warrants shall issue, but upon" certain prescribed conditions. Should they roll over and play dead because the police didn't give them an opportunity to obey that command before the event?

Although one would never suspect so from the opinion in *Wolf* and from the arguments of the opponents of the exclusionary rule, there is no discussion in *Weeks* of the effectiveness of the exclusionary rule versus the effectiveness of tort remedies or other alternatives. *Nowhere* is the exclusionary rule called a remedy. The Court says that a person has *a right* to be secure against unreasonable searches and seizures and if the fruits of such searches and seizures is used against him, his *right* has been denied.

Nor is there any discussion of the deterrent effect of the exclusionary rule. Why is that surprising? Suppose twenty or thirty years after it had first started reversing state convictions based on unconstitutionally obtained confessions, the government had argued that empirical studies disclosed that police interrogators were *as lawless as ever* and that *therefore* the Court should abandon its course and start letting in "coerced" but verifiable confessions? Does anybody really believe that the Court would have been persuaded by such an argument?

I do not deny that the exclusionary rule leaves a good deal to be desired as a deterrent. That strikes me as a good reason for supplementing it, not *abolishing* it. For example, I keep hearing that the exclusionary rule has no direct effect in those large areas of police activity which do not result in criminal prosecutions—such as harassment or destruction or confiscation of property as a punitive sanction. I also keep hearing that the rule has no effect in those many instances of illegal search and seizure that turn up nothing incriminating. But there is *no conflict* between excluding unconstitutionally seized evidence in those instances where prosecutions *are brought* and suing or disciplining lawless police when their misconduct *does not* produce damaging evi-

(Please turn to page 46)

(Continued from page 17)

dence. Whatever the reasons for not disciplining or suing police officers in the latter category of cases, it cannot be the existence of the exclusionary rule. For, of course, there is no evidence to exclude.

It is not amiss to note that for quite a while now the laws against murder, rape, burglary and robbery have also left a good deal to be desired as a deterrent. Therefore *what?* Therefore we search for *additional means* to achieve the objectives of these laws. Surely we don't repeal these laws. That the Court can't do everything (or even very much in the search and seizure area, without the help of prosecutors, high-ranking police officials and an aroused and alert public) is no reason why it shouldn't try *to do something.*

The exclusionary rule is a seemingly remote and inherently limited control device. But so, it seems, is the whole criminal justice system. Some months ago *Time* magazine ran a cover story on "The Curse of Violent Crime." While thumbing through it, I came upon a passage which, I think, is quite relevant. One expert offered this thought:

"One reason the courts are so overloaded is that family, church and neighborhoods are weakened. The criminal justice system is very weak as a crime control agent. It does some good but not a lot. We've got to look and find other forms of social control than the remote, impersonal and inherently limited criminal justice system that now serves as a replacement for institutions so weakened" (*Time*, March 23, 1981, p. 29). Note, he didn't say that we should *abolish* the criminal justice system, weak and ineffective though it seems to be.

I was unaware until I reread his remarks recently that 17 years ago a certain commentator made some of the points that I have tried to make in this article. I have to admit that this commentator made some observations about the exclusionary rule that I do not like at all. But he said some other things that I like very much. He observed (emphasis added):

"Not until many years after [the Supreme Court first utilized the exclusionary rule in federal search and seizure cases] do we find utterances about supervisory powers of appellate courts, police discipline, deterrence of illegal police conduct to prevent polluting the stream of justice, [and so forth] (14 Am. U. L. Rev. 1, 5 (1964)].

"The *Weeks* holding. . . rested on the Court's unwillingness to give *even tacit* approval to official defiance of constitutional provisions by admitting evidence secured in violation of the Constitution. The idea of deterrence may be lurking between the lines of the opinion but is not expressed." *(id.* at 5).

"To challenge, as I do, the oft-repeated claim that suppression of evidence operates as a deterrent on police, is *not to attack the doctrine itself,* for courts are *bound to uphold* constitutions and statutes. But society must. . . meet the frustrated and plaintive cry that 'There *must* be a better way to do it.' *(id.* at 10).

"We must recognize suppression *as an essential tool to implement* the Constitution and nothing more, and that other and different means of deterrence must be devised" [but, as I interpret these remarks in general context, as *a supplement* to, *not* a substitute for, the exclusionary rule] *(id.* at 13).

Then the author of this 17-year-old article suggested the following basis for the exclusionary rule, one that he said had never been articulated by the Supreme Court, but one which he thought might "well be implicit in all that the Court has said on the subject" up to this point:

"It is the proud claim of a democratic society that the people are masters and all officials of the state are servants of the people. That being so, the ancient rule of *respondeat superior* furnishes us with a simple, direct and reasonable basis for refusing to admit evidence secured in violation of constitutional provisions. Since the policeman is society's servant, his acts in the execution of his duty are attributable to the master or employer. Society as a whole is thus responsible and society is 'penalized' by refusing it the benefits of evidence secured by the illegal action. This satisfies me more than the other explanations because it seems to me that society—in a country like ours—*is* involved in and *is* responsible for what is done in its name and by its agents. Unlike [the people of a totalitarian country] we cannot say 'it is all the Leader's doing. I am not responsible.' In a representative democracy we are responsible, whether we like it or not. And so each of us is involved and each is in this sense responsible when a police officer breaks rules of law established for our common protection." *(id.* at 14).

The person who made these remarks a decade and a half ago was a relatively obscure federal judge at the time (if you can call *any* federal Court of Appeals judge "obscure"). He's anything but obscure now. He is the Chief Justice of the United States, Warren E. Burger.

What I have quoted was what the Chief Justice said about the exclusionary rule the *first* time he focused on it. Of course, his thinking about the matter has changed significantly in the last decade and a half. (Some would say that his thinking has *progressed;* others would say it has *deteriorated).* The second time he dealt with the matter at length, in the 1971 *Bivens* case, he launched a powerful attack on the exclusionary rule, but balked at abandoning it "until some meaningful alternative can be developed." The *third* time he dealt with the matter at length, concurring in the 1976 case of *Stone v. Powell,* he had grown more impatient. He called for the immediate abolition of the rule, asking us to believe that such a development "would inspire a surge of activity" toward providing an effective alternative.

I submit that he was right the *first* time.

When the *Mapp* decision was handed down in 1961, I was teaching at the University of Minnesota Law School. The impact of the *Mapp* case in Minnesota, which up to then (as was true of some 20 other states) admitted illegally seized evidence, is, I think, typical, and quite revealing.

When some months after *Mapp,* a Minnesota trial court excluded, for the first time in the state's history, evidence seized in violation of the protection against unreasonable search and seizure, the prosecutor handling the case commented: "To make a search incident to an arrest,

the arrest will *now* have to be based on more than mere suspicion." Mpls. Morning Tribune, Dec. 28, 1961, p. 1. (Emphasis added.) When, a year later, burglaries increased, the police blamed it on the "tighter restrictions" imposed by *Mapp* and lamented that they would have taken many suspects into custody "if we didn't have to operate under *present* search and seizure laws." Mpls. Morning Tribune, Dec. 1, 1962, p. 1. (Emphasis added.)

Of course, the police *always* had to make an arrest on more than "mere suspicion." Of course, *Mapp* did not, at least not in theory, impose "tighter restrictions" on the police. What was a legal arrest before *Mapp* still was. What was a reasonable search before, still was. The exclusionary rule says nothing about *the content* of the law governing the police. The rule merely states the consequences of a breach of *whatever principles* control law enforcement. One can support the exclusionary rule and still attack *the law* of arrest and search and seizure as inadequate for police needs.

If the Minnesota police had reasonable grounds to arrest certain burglary suspects, *Mapp* didn't prevent them from doing so. If, on the other hand, the police lacked the authority to arrest these suspects, not *Mapp* but the very same state and federal constitutional provisions which had been on the books long before *Mapp* was decided prevented them from making the arrests. The police never had the authority to violate the law, only the incentive to do so. And the *Mapp* case was not an effort to reduce that incentive.

At a post-*Mapp* Minnesota panel discussion on the subject, proponents of the exclusionary rule pointed out that police-prosecution fears that evidence they were gathering in the customary manner would *now* be excluded by the courts implied that they had been violating the guarantee against unreasonable search and seizure *all along*. The Minneapolis City Attorney protested that the state courts had been "telling the police all along that the [exclusionary rule] didn't apply in Minnesota."

There is no reason to think that the Minnesota experience is unique. For example, shortly after the California Supreme Court adopted the exclusionary rule on its own initiative in the 1955 *Cahan* case, William Parker, then Los Angeles chief of police, warned that his department's ability to prevent crime had been greatly diminished because henceforth his officers could not arrest or search unless they had "probable cause." W. Parker, *Police* 117 (1957). He did promise, however, that *"as long as the Exclusionary Rule is the law of California," his officers* would act *"within the framework of limitations imposed by that rule."* (*id.* at 131, emphasis added.)

Of course, the exclusionary rule didn't impose any "framework of limitations" on the police. Nor did it change the existing "framework." The "framework" had been imposed by the state and federal guarantees against unreasonable search and seizure long before the exclusionary rule was adopted.

Similarly, former New York City Police Commissioner Michael Murphy recalled how, when *Mapp* imposed the exclusionary rule in his state, he "was immediately caught up in the entire problem of reevaluating our procedures [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" (44 Texas L. Rev. 939, 941 (1966)).

Back in 1926, in a famous Cardozo opinion, *People v. Defore,* New York had rejected the exclusionary rule. The decision, of course, was based largely on the premise that New York did not need to adopt the exclusionary rule because *other remedies* were adequate to effectuate the guarantee against illegal search and seizure.

But when the exclusionary rule was imposed on New York as a matter of federal constitutional law 35 years after the *Defore* case, it had, said Commissioner Murphy, a "dramatic" and "traumatic" effect. It "create[d] tidal waves and earthquakes." *Why?* In theory, the old *Defore* case had only rejected the exclusionary rule, not expanded lawful police powers one iota. What was an illegal search before *Defore* was still an illegal search. What was a lawful arrest before *Mapp* imposed the exclusionary rule on New York was still a lawful arrest.

Why then did *Mapp* have such an enormous impact? Why did it necessitate "creating new policies"? What were the old policies like? Why did it necessitate holding retraining sessions from top administrators to patrolmen? What was the *old* training like?

The answers, I think, were supplied by Leonard Reisman, then the New York City Deputy Police Commissioner in charge of legal matters, who, several years after *Mapp,* told a group of grumbling detectives why the police department was instructing them on the "niceties" of search and seizure law at a late date in their careers. Explained the Deputy Police Commissioner (N.Y. Times, April 28, 1965, p. 50):

"The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?"

This disclosure must have jarred the good citizens of New York who had been led to believe for many years that there was *no need* to exclude illegally seized evidence in order to effectuate the constitutional guaranty because other remedies (such as private tort actions or criminal prosecutions against transgressing police, "the internal discipline of the police," and "the eyes of an alert public opinion") amply sufficed.

If many in law enforcement responded to the adoption of the "exclusionary rule" as if the guarantees against unreasonable search and seizure *had just been written,* aren't they likely to react to the scrapping of the rule as if the guarantees *had just been deleted?* Aren't they likely to feel, once again, that the "judiciary is 'okaying' it"? If law enforcement officials talk as if and act as if the exclusionary rule *were* the protection against unreasonable search and seizure, *why shouldn't the courts?* **hr**