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## Forgotten Points in the "Exclusionary Rule" Debate

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## FORGOTTEN POINTS IN THE “EXCLUSIONARY RULE” DEBATE

*James Boyd White\**

Most contemporary discussions of the “exclusionary rule” assume or assert that this “rule” is not part of the fourth amendment, nor required by its terms, but is rather a judicial “remedy” that was fashioned to protect those rights (against unreasonable search and seizure) that actually are granted by the fourth amendment.<sup>1</sup> The

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\* Professor in the Law School, the College, and the Committee on the Ancient Mediterranean World, The University of Chicago. A.B. 1960, Amherst College; A.M. 1961; LL.B. 1964, Harvard. — Ed. I wish to thank Cass Sunstein and Frank Easterbrook for helpful comments on an earlier draft, and James Scarboro for many conversations on the fourth amendment, which have no doubt much affected what I say here.

Since preparing this paper I have been shown a copy of Professor Loewy’s article which is to be published with it. Obviously I disagree with certain of Professor Loewy’s assertions — e.g., that “no reasonable method of constitutional interpretation supports Justice Douglas’s conclusion” in *Warden v. Hayden* — and I also think that his emphasis on protecting “innocent” people is somewhat misplaced. Many of those most vociferously opposed to the writs of assistance were guilty of systematic violations of the customs laws; for them and their friends the objection to those writs was not that they interfered with the rights of innocent people, but that they permitted the enforcement of certain laws they regarded as evil. From this I do not mean to suggest that we read partiality toward the criminal into the Constitution, but recognize that the fourth amendment, like the other essential rights guaranteed in the Constitution, is at its heart a political right, grounded in a fundamental mistrust of government (and governors) and intended to reserve to the people certain rights to freedom and security which they may well choose to exercise in ways disapproved of by the ruling majority. This aspect of the fourth amendment is obscured by the current academic and professional habit of talking about all legal questions as “problems” — in this case the problems of crime control and police regulation — which it is “our” object to try to solve. In this use of “we” and “our” there is both a direct identification of the speaker and his audience with the government and an objectification of the central actors in the drama, the policeman and the suspect. This is an inappropriate way to talk about Constitutional issues, for which the relevant “we” includes not only the government but those deeply opposed to it, not only the policymakers but those to be subjected to the policy. A proper fourth amendment discourse would talk about the policeman and the suspect both as people. On these points see White, *The Fourth Amendment as a Way of Talking about People: A Study of the Robinson and Matlock Cases*, 1974 SUP. CT. REV. 165; White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982).

With Professor Loewy’s conclusion that the “exclusionary rule” should be regarded as an essential part of the fourth amendment I am naturally much more sympathetic.

1. For a concise statement by advocates of this position, see the Supplemental Brief for the United States as Amicus Curiae Supporting Reversal at 2, *Illinois v. Gates*, 51 U.S.L.W. 3415 (U.S. Nov. 29, 1982) (No. 81-430):

Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials. Instead, decisions of this Court over the last decade have made it clear that the exclusionary rule first enunciated in *Weeks v. United States*, 232 U.S. 383 (1914), and later extended to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), is a judicially-created remedy, the paramount and perhaps sole purpose of which is the deterrence of unlawful police conduct. As the deterrence rationale has achieved supremacy over earlier, now discarded justifications for the rule, the Court has recognized that it makes sense to apply the rule only to those situations in which its deterrent purpose will in fact be significantly

protection is said to work by "detering" official violations; this is, however, an odd use of the word, for the rule does not punish violations but merely deprives the government of some of the benefits that might ensue from them, namely the use in the criminal case of evidence so obtained.

The deterrent view of the "exclusionary rule" receives support from — perhaps it has its origins in — *Wolf v. Colorado*<sup>2</sup> which addressed the question whether the fourth amendment should be regarded as "incorporated" in the fourteenth, and hence applicable to the states. Justice Frankfurter, writing for the Court, purported to apply to the states the "security of one's privacy against arbitrary intrusion" which is "at the core of the fourth amendment"<sup>3</sup> but to withhold the "remedy" of exclusion, on the ground that principles of federalism should allow the states freedom to make remedial choices of their own. When the court overruled *Wolf* in *Mapp v. Ohio*,<sup>4</sup> the plurality opinion explicitly said that the deterrent theory was the basis of the exclusionary remedy. This belief continues<sup>5</sup> accompanied by occasional talk about the "imperative of judicial integrity."<sup>6</sup>

The origins of what we now call the "exclusionary rule" were in fact very different from what is suggested above. Far from being an incidental rule designed to enforce other standards, the right to "exclusion" was, at least in some cases, an essential part of the fourth amendment's protection. It was indeed more fully "substantive" than those procedural protections — probable cause, warrant, specificity — that may now seem to be the heart of the fourth amendment.

The historical roots of exclusion lie in a conception of property which holds that even where a search is procedurally reasonable the government simply has no right to seize the property of the citizen for use against him in a criminal proceeding. This is so whether the government uses the warrant mechanism or the milder discovery device employed in *Boyd v. United States*.<sup>7</sup> While the Supreme Court

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advanced. Accordingly, the Court now employs a cost benefit analysis whenever it considers whether the rule should be applied to particular situations. When the costs of applying the rule are found to outweigh whatever deterrent effect it might achieve, the rule will not be imposed [citations omitted].

See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974).

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

3. 338 U.S. at 27.

4. 367 U.S. 643 (1961).

5. See, e.g., *Michigan v. DeFillipo*, 443 U.S. 31, 38 (1979); *United States v. Janis*, 428 U.S. 433, 446 (1976).

6. See, e.g., *Stone v. Powell*, 428 U.S. 465, 485 (1976); *Brown v. Illinois*, 422 U.S. 590, 599 (1975); *United States v. Calandra*, 414 U.S. 338, 359 (1974) (Brennan, J., dissenting) (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

7. 116 U.S. 616 (1886) (court ordered production of an invoice describing the quantity and value of twenty-nine cases of glass).

first articulated this view in *Boyd*, it finds consistent and powerful expressions running back through *Entick v. Carrington*,<sup>8</sup> to Hale's *Pleas of the Crown*,<sup>9</sup> to Coke, and even earlier. At the time of Hale, for example, evidently the only form of the search warrant known to the law was the warrant for stolen goods.<sup>10</sup> Coke doubted even this, but Hale supported it on the ground of social necessity; *Entick* on the true owners higher right to possession. The same kind of reasoning was used in America after *Boyd* to limit expressly the power of search under warrant to those cases where "a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."<sup>11</sup> Stolen goods are obviously subject to seizure in this view, as both contraband and "instrumentalities of crime" as well: the defendant can have no right to possess the former, and by his use of the latter has lost his right to possess them and they become a kind of deodand.<sup>12</sup> This rule was explicitly reaffirmed in *United States v. Lefkowitz*<sup>13</sup> and remained the law until *Warden v. Hayden*.<sup>14</sup>

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8. 19 Howell's State Trials 1029, 95 Eng. Rep. 807 (P.C. 1765).

9. 1st Am. ed. Philadelphia (1847).

10. *Id.* at bk. II, ch. 18.

11. *Gouled v. United States*, 255 U.S. 298, 309 (1921).

12. A case like *Warden v. Hayden*, 387 U.S. 294 (1967), involving the clothes worn in the commission of a crime, would presumably be a borderline case that could go either way.

13. 285 U.S. 452, 464-65 (1932).

14. *Warden v. Hayden*, 387 U.S. 294 (1967), overruled *Gouled* on the ground that it depended on outmoded property concepts that were rationally related neither to the right to privacy the Court found in the fourth amendment nor to the countervailing governmental interest in investigating crime. In so doing, the opinion slid over the fact that the property-immunity rule of *Boyd* and *Gouled* had significant consequences for both (1) the probable cause and specificity requirements and (2) the administration of the plain view rule.

Where an item meets the *Boyd-Gouled* requirements, the police are entitled to its possession; the only question that remains is whether they have sufficient reason to believe that it is in the place they wish to search. The warrant, if obtained, can name the item, or class of item, and the search can be tailored to its objects. If additional materials are found in the course of the search, the only question the officer must ask is whether they meet the *Boyd-Gouled* requirement. But when this requirement is abandoned an additional question must now be asked: whether the government's interest in possessing the item is sufficiently great to justify its seizure. This is a complex and highly conjectural question for which the Court in *Warden* gives no guidance. Is all "admissible" evidence seizable, as Federal Rule 41 declares? This requires a legal judgment of a new and difficult kind; in many cases of an impossible kind, for the ultimate admissibility of a particular item will depend on the way the issues have developed at trial, the duplicative nature of the evidence, and so forth.

Likewise, although the *Warden* Court claims that "testimonial" objects — such as letters or diaries — remain immune from seizure, it is easy to see how that claim can be refuted: since any statements contained in such documents exist before the seizure, and the seizure does not compel. Finally, *Warden* makes the problem of third-party searches both more difficult and more serious: under the earlier rule, the person on whose premises an item meeting the *Boyd-Gouled* requirements could be found was, however innocently, the possessor of something he was not entitled to possess, and a search of his premises for such items was therefore facially

This immunity derives from a conception of property that is larger and deeper than our own. In England, property law was directly continuous with constitutional law: the property of a landholder gave him a kind of jurisdiction over it, with which others could not interfere except through the Parliamentary process. Often, indeed, land-owning entailed rights that seem to us even more obviously jurisdictional or political in kind: the right to hold a certain court or to present a clerical living, for example, or the right to a seat in the House of Lords. These rights were themselves inheritable, and inheritable in connection with a landed estate. Liberty was conceived of in a similar way, as a kind of property in the arrangements and traditions of the law itself. In his *Reflections on the French Revolution*, for example, Burke said: "You will observe, that, from Magna Charta to the Declaration of Right, it has been the uniform policy of our constitution to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity . . ."<sup>15</sup>

In America, the Constitution became explicit, and property came to have different overtones, but it remained jurisdictional in character: Property was not what one held against a sovereign who had notionally granted it (and whom one supported in return), but was what one had not yielded to the governments one had created by the process of social contract.<sup>16</sup> In both England and America property and liberty were thus readily overlapping terms; both were ways of conceiving of rights not as grants of power or capacity, to be justified by their contribution to the general welfare, but as true entitlements. You can "exclude the universe" from your property, in Blackstone's phrase, not because it is wise or good that you should be able to do so, but because your property is yours, to dispose of as you wish.<sup>17</sup>

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reasonable. Under *Warden*, however, one who perfectly rightly possesses items of his own purchase, and even of his own manufacture, may be subject to search and seizure if those items may be of use to the police or prosecution in the investigation or prosecution of others. *See Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (police may search, pursuant to a warrant, newspaper office for evidence of crime committed by individuals not associated with newspaper).

15. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 37 (T. Mahoney ed., 1955). On the role of law, especially property law, in the life of England, see William Blackstone's inaugural lecture, "On the Study of Law," printed at the beginning of most editions of the Commentaries. 1 W. BLACKSTONE, COMMENTARIES \*3.

16. On liberty and property and their relation to popular sovereignty, see generally G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 214-22 (1969); R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 12-22 (1948). In this connection it is significant that each of the states had constitutional provisions similar both to the fourth amendment and to the fifth amendment protection against compelled self-incrimination. This gives these provisions a different standing from the first amendment's prohibition against the establishment of religion, for example, which can be read as reserving to one sovereign the power denied to the other.

17. 1 W. BLACKSTONE, COMMENTARIES \*2:

There is nothing which so generally strikes the imagination, and engages the affections of

Property was an extension of the person, indeed in some ways a definition of the person, for the relations defined by property holdings were political and social as well as economic. This is perhaps why the use of one's property in a criminal proceeding was felt to violate the fifth amendment prohibition of compulsory self-incrimination, as well as the fourth amendment prohibition of unreasonable seizures. "The fourth and fifth amendments run almost into each other," said the Court in *Boyd*.<sup>18</sup>

The connection between the immunity principle and the "exclusionary rule" is plain enough. Where a seizure is unreasonable for the substantive reason that immune property has been taken, the defendant is constitutionally entitled not only to its "exclusion" but to its return. Its continued possession is a continuing wrong, and he is entitled to get it back. In such a case the "exclusionary rule" is thus required by the fourth amendment itself. Accordingly, *Boyd* — not, as usually said, *Weeks v. United States*<sup>19</sup> — was in fact the first exclusion case.<sup>20</sup> In *Boyd* the claimant produced the invoice under protest and objected to its admission in evidence. In holding the resulting judgment of forfeiture invalid for this reason, the Court was in fact holding that the claimant was entitled to the exclusion of the invoice. And while the Court does not expressly allude to the possibility of derivative evidence, it is hard to believe that such evidence as the testimony of the United States attorney as to what he saw during the examination, or copies made by him, would have been admitted either.

*Weeks* was the first case to apply the "exclusionary rule" to procedural defects, and it is plain that the *Weeks* court saw the rule not

mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in the total exclusion of the right of any other individual in the universe.

18. 116 U.S. at 630. The kind of identity that the *Boyd* Court sees between the person and his property, that is, makes it easy to regard the forcible production of one's property as the equivalent of compelling the individual to be a witness against himself. What is more, when the government tries, as in *Boyd* itself, to reduce the fourth amendment intrusion by requiring the cooperation of the individual, the fifth amendment comes increasingly into play.

19. 232 U.S. 383 (1914).

20. The statute under which the lower court proceeded in *Boyd* was drafted with a consciousness of the arguments that ultimately prevailed in that case, for it did not simply authorize the seizure and introduction into evidence of the invoice or other paper produced in accordance with its terms, but provided that, if the paper is produced, the United States attorney

shall be permitted, under direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid and may offer the same in evidence on behalf of the United States. But the owner of the said books and papers, his agent or attorney, shall have, subject to order of the court, custody of them, except pending their examination in court as aforesaid.

116 U.S. at 620-21 (Miller, J., concurring). In practice, however, the statute can not go so far as it claims, for under its terms the respondent must yield at least temporary possession of the documents, and it is hard to see how that is not a "seizure."

as a deterrent meant to protect others against improper invasions in the future, but as a rule designed to make the original prohibition meaningful in the particular case of the person whose rights were violated:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the fourth amendment declaring *his* right to be secure against such searches and seizures is of no value, and *as far as those thus placed are concerned*, might as well be stricken from the Constitution . . . 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>21</sup>

When the rule was extended in *Silverthorne Lumber Co. v. United*

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21. 232 U.S. at 393-94 (emphasis added). The most natural and complete remedy is to place the parties so far as possible in the situation that would have existed had the wrong never occurred. See *The Exclusionary Rule Bills: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on S.101, S.751, and S.1995*, 97th Cong., 1st & 2d Sess. 372-77 (1982) (testimony of Prof. Yale Kamisar). See also Loewy, *supra* note 1. While at private law there is often a preference for a damage remedy over specific relief of this kind, the reasons supporting that preference do not apply where one party is the government, the other an individual who holds constitutional rights of liberty and property against it. Damages would be a kind of forced exchange, and however appropriate that may be in a commercial context where all things are in principle exchangeable, it would be incompatible with the idea of a right specifically against the government, and with the reasons why such rights exist. This is especially so when the right is in large part a political, and in this sense truly a constitutional right. The right to be free from arbitrary and oppressive governmental interference with one's freedom of person and of place is an essential precondition to the exercise of all the other rights, including those of expression and association, upon which our democratic system of self-government rests. And even at private law, specific relief is often available where the wrong-doing party has a continuing advantage of a kind for which the victim cannot readily be compensated, as is the case with improperly seized evidence.

But what of the interference with one's rights to property that is routinely imposed by the obligation to produce papers and other objects for discovery purposes in civil litigation? The *Boyd* Court discussed that question, noting that the Congress that passed the original judiciary act provided for discovery orders in cases and circumstances permitted by chancery practice, and that chancery practice has always prohibited the production of papers that would incriminate the party producing them. One's property rights are absolute in the *Boyd-Gould* sense, that is, when they are performing the jurisdictional and political function described above, especially where the state is proceeding against the individual in a criminal action. The situation is obviously different where the government imposes obligations even-handedly upon all its citizens for their mutual benefit. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523 (1967), and my discussion of the civil-criminal distinction in White, *The Fourth Amendment as a Way of Talking About People: A Study of the Robinson and Matlock Cases*, 1974 SUP. CT. REV. 415, at 165, 178-80, 209-16.

The power of the government to take "private property" for "public use" upon payment of "just compensation," established by the fifth amendment, is not incompatible with my analysis: the requisite "public purposes" obviously can not include the purpose of convicting the possessor or owner of the property, but rather must involve a relationship that is essentially civil, in every sense of the term, between government and citizen. The main idea of the provision is to prevent the individual from holding up the government to obtain more than the fair market value of this property, and thus appropriate to himself the portion of the value of his property that is in fact created by the public use to which the government intends to put it. To apply this reasoning to noneconomic rights the individual has against the government, such as rights of liberty, choice, and freedom from harassment, would be inconsistent with the whole idea of such rights, whether they are found in the first, the fourth, or the fifth amendments.

*States*<sup>22</sup> to include the derivative use of improperly seized property — in this case improperly seized papers were copied — this was a natural outgrowth of the primary prohibition.

The exclusion of contraband, in which the defendant has no rightful possessory interest, rests on a different but related basis. The main idea of this exclusion is that of a remedy for a trespassory wrong, not a means of regulating police in future cases.<sup>23</sup> A major case is *Agnello v. United States*<sup>24</sup> where contraband seized during an unreasonable search of the defendant's home was excluded. Before this case, the practice had been for the defendant to petition for the return of his property, but where the item is contraband, and its possession criminal, one can understand why defendants were reluctant to do this. *Agnello* for the first time held that the fourth amendment questions could be raised at trial, as well as upon pretrial petition, and proceeded to exclude the contraband. The reason for this decision was not to deter police in other cases, but to make the original procedural protections — probable cause and the warrant requirement — meaningful in the present case.

History thus reveals not one "exclusionary rule" but several, each resting on a different basis and having a somewhat different scope. The original rule was simply an automatic consequence of the *Boyd* and *Gouled* view that one's property was immune from seizure; in such cases exclusion is built into the fourth amendment itself. The derivative evidence and contraband cases are natural extensions of the rule, designed to offer meaningful remedies for trespassory violations, and to deprive the wrongdoing government of a continuing benefit from its wrong. The idea that due process may require exclusion in certain cases of criminal or highly objectionable police conduct, discussed briefly below, has a different basis: the state must obey the law in enforcing the law. "Deterrence," now claimed to be the primary ground for exclusion, seems to have had no substantial place in any of these conceptions of the practice.

It is true both (1) that in *Wolf* and *Mapp* the "right" and the "remedy" were first separated, then rejoined, and (2) that the theory of the *Mapp* majority was deterrence. But the vote of Justice Black, essential to the result in *Mapp*, rested on a view derived from *Boyd*

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22. 251 U.S. 385 (1920).

23. In *Weeks* itself the Court ordered the return of certain letters and certificates, but was silent as to the disposition of the lottery tickets; yet in *Amos v. United States*, 255 U.S. 313 (1921), the court ordered the return of illegally seized liquor on which tax had not been paid (referring to the bottles as defendant's "property"), notwithstanding the fact that this was apparently contraband.

24. 269 U.S. 20 (1925). That exclusion was seen as a remedy for the violation of rights, rather than as a method of deterrence, is made plain by the Court's refusal to exclude the evidence from the trial of *Aguello's* codefendants, where rights had not been violated by the search and seizure.



that the exclusionary rule was constitutionally required because the use of improperly seized evidence involved testimonial compulsion. And in *Wolf* the Court was led into the error of splitting the "right" from the "remedy" by accepting the formulation of the issue before it as the "incorporation" of the fourth amendment into the fourteenth. The question thus framed, it was natural for the federalist Frankfurter to "incorporate" the substantive "core" but not the "remedial" — and presumably less important — fringe. Actually, of course, the fourteenth amendment itself, without reference to the fourth, speaks directly to every case in which a state officer interferes with the liberty or property of an individual, and does so whether the alleged interference takes the form of a search or seizure made by a police officer or a fine or imprisonment imposed by a judge after criminal trial. It thus explicitly requires the Court to make a body of constitutional law governing state searches and seizures, a law that might easily have been no less protective of the individual than the fourth amendment, especially in its incorporated form, has proved to be.<sup>25</sup> When Frankfurter in *Wolf* holds that the "security . . . against arbitrary intrusion"<sup>26</sup> which is at the "core" of the fourth amendment applies to the states, he thus really holds nothing at all; when he holds that the "remedy" does *not* apply to the states, he evades the major thrust of the "due process of law" standard by which he is plainly bound, for this standard is more obviously concerned with remedy and procedure than with "substantive" rules. It would indeed have been more consistent with his stated federalist values to reverse the holding in *Wolf*: to provide that the states are free to set widely varying standards of police conduct, but to hold that due process — if it is to mean anything at all — means that the state must comply with its own law when it seeks to prosecute the citizen. This is not the kind of discretionary skirt-cleaning that is usually meant by talk about "judicial integrity"; it is an insistence upon a fundamental element of due process of law itself.<sup>27</sup> Holmes saw this, for example, in his dissent in *Olmstead v. United States*,<sup>28</sup> and Frankfurter himself, in *Rochin v. California*,<sup>29</sup> was compelled to recognize

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25. It seems clear, indeed, that the "incorporation" of the fourth amendment into the fourteenth has resulted not in raising the standards applicable to the states to the federal level but in the deterioration of what had been a highly protective and fairly well-elaborated body of law into a kind of due process interest-balancing. For a brief history of incorporation, see the note by James E. Scarborough in J. SCARBORO & J. WHITE, *CONSTITUTIONAL CRIMINAL PROCEDURE*, 67-82 (1976).

26. 338 U.S. at 27.

27. For an elaboration of this view, see Schrock & Welsh, *Up From Calandra: the Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974). But see Monaghan, *Foreword: Constitutional Common Law, The Supreme Court 1974 Term*, 89 HARV. L. REV. 1 (1975).

28. 277 U.S. 438, 469-71 (1928).

29. 342 U.S. 165 (1952).

that the only appropriate response to the blatant brutality and illegality of the case was to hold that due process was violated when the evidence (obtained by an emetic) was admitted in a criminal trial. In *Rochin* exclusion was imposed not to deter police from behaving badly in other cases, but to insist upon the right of the individual to be treated by officers and the courts in a way that accords with the rule of law, which means in a fundamentally decent way.<sup>30</sup>

There is an additional difficulty with *Wolf* that reaches deeply into our own time. In holding that the states should be free to choose among various remedies to find the one that worked best in local circumstances, Frankfurter made no allusion to the nature of the remedies in fact adopted by Colorado. (Indeed, he made no allusion of any kind to the particular facts of that case, which for all the reader knows are as bad as or worse than those of *Rochin*.) This failure to address the quality of Colorado's remedies is in a sense understandable, for on such a question the Court cannot function at a very high level, to say the least. What, after all, does the Court know about the social effects of various alternative rules, and how can it learn what it does not know? But Frankfurter's own reasoning should have required him to address it, and to fail to do so at all makes a hash of his claim to take seriously the rights he supposedly asserts.

The "workability" or "deterrence" feature of the "exclusionary rule" discourse in fact has three unfortunate consequences. First is that already alluded to, that it is not a rule the courts can sensibly apply or administer. Second, when deterrence — rather than the protection of the defendant's right to due process at the hand of the state that seeks to convict him — becomes the basis for exclusion, that shift generates an enormous pressure for reduction of the scope of the rule: in each case the real cost of the possible release of a guilty defendant is weighed against the merely contingent advantage of the marginal deterrent impact of exclusion in a diffuse and unknown future.<sup>31</sup> The decisions cutting back on the rule in a wide variety of situations thus flow directly from the Court's ideology of deterrence; that fact may indeed go far to explain the Court's resist-

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30. See *Rochin v. California*, 342 U.S. 165, 173 (1952) (states must "respect certain decencies of civilized conduct"). But see *United States v. Payner*, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977), *aff'd*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980). The District Court in *Payner* granted standing to insure that police practices as "outrageously illegal" as in *Rochin* would be deterred in the future.

31. There is another possible view: that the deterrent rationale requires exclusion of improperly seized evidence in all cases, under all circumstances, for the police must be deprived of every possible benefit of their wrong if the deterrence is to work. See, e.g., *People v. Martin*, 45 Cal. 2d 755, 759-61, 290 P.2d 855, 857 (1955). How is a responsible choice to be made between these views? The fact that the choice between them cannot really be reasoned, but must remain attitudinal, itself reflects the institutional defectiveness of the deterrence ideology itself.

ance to taking any other view of the matter.<sup>32</sup>

Third, and perhaps most important, in so conceiving of the rule, the Court is not operating on the idea that its task is to be faithful to judgments that the Constitution has authoritatively expressed in more or less intelligible language, which the Court must interpret against the twin backgrounds of historical context and present life, but is instead regarding the Constitution as a general warrant for the judicial determination of the "reasonableness" of government action in the light of the costs and benefits of alternative classifications and programs. This at a blow destroys the ethical basis upon which judicial authority rests, namely, fidelity to the authoritative judgments of others; its intellectual basis, namely, that this authority is to be defined and exercised by informed inquiry into the legal traditions that underlie the Constitution and our own past;<sup>33</sup> and its political basis, for the Court can no longer be regarded as the servant of our Constitution, but as an agency to be staffed with people who share certain dispositions that shall guide conduct when the facts are less than perfectly clear. And the rhetoric of "deterrence" actually ensures that the class of cases so governed will be very large indeed: while the simple structure of that rhetoric is scientific — it is an inquiry into those facts that define the costs and benefits that determine the result — the inquiry can never be performed in an adequate way, and the reality thus is that the decision must rest not upon those grounds, but upon prior dispositions or unarticulated intuitions that are never justified.<sup>34</sup> The language of "workability" and social planning obscures

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32. The idea of deterrence also leads naturally to the present nostrum, that the sanction should not be applied to "good faith and reasonable" conduct, for many of the same reasons that strict liability deterrent measures are thought irrational or unfair in the criminal law. This exemption may be harmless enough if the standard of "reasonableness" is that applied in criminal law (*i.e.*, that of one who knows and understands the law), which already makes allowance for reasonable errors (in the definition of probable cause, for example, or of the kind of exigency that excuses a search warrant). If, however, as its proponents evidently wish, a lower standard is applied, ignorance will be encouraged, and the courts will become involved in impossible efforts to determine double layers of reasonableness. Another possibility for limiting the exclusionary rule now under consideration in *Illinois v. Gates*, 51 U.S.L.W. 3415 (U.S. Nov. 29, 1982) (No. 81430), is to hold that the exclusionary rule does not apply where the officer obtains a warrant, on the ground that he had done all he could or should, and that the error is a judicial one, to be corrected as judicial errors are. Proponents of such a position often look for support to *Michigan v. DeFilippo*, 443 U.S. 31 (1979), holding an arrest under a statute later held invalid not to call for the remedy of exclusion. But the two cases are wholly inapposite: the improper statute can be held invalid, and destroyed as a ground for further unconstitutional action; each warrant by contrast stands on its own feet, and the invalidation of one will have no effect in other cases. And in any event, without the exclusionary (or other as yet unspecified) remedy, the judicial errors will remain wholly uncorrected. It is also to some degree unrealistic to speak of magistrates as if they were automatically independent and neutral; those qualities are in fact ensured only by the kind of review of their judgments that the exclusionary rule makes possible.

33. *See, e.g.*, Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1054-55 (1981).

34. Even when employed by a legislature or a legislative commission, of course, cost-benefit analysis rests on weak and largely unexamined foundations. For an amusing instance of

or denies the responsibility of the individual judge for the decision he or she is making in the case, by giving it a false scientific form; this, in turn, denies all of us the benefits of a judicial process in which judges acknowledge their ultimately personal responsibility for their decision, which they are obliged to justify in their opinions, and for which it is their duty to educate their minds by the experience of argument and thought.

The historical point made here may be thought by some to be irrelevant, especially since *Boyd* in all its aspects has been overruled,<sup>35</sup> and since it is now commonly said that the fourth amendment is concerned not with property but with privacy. But if this history is to be disregarded, the decision ought at least to be knowingly made. As for the other point — that the language of deterrence involves the Court in a set of judgments that it is incompetent to make, and avoids those more particular judgments that it is its duty to make — the difficulty, of course, extends far beyond the exclusionary rule, for this is just one instance of a modern judicial tendency that has become so deeply settled in the contemporary mind as to determine the very structure, for some people, of what is meant by the judicial function, the legal process, and rationality itself. The temporary dominance of this tendency does not mean, however, that it is not to be deplored.

To return to *Boyd*, that Court can be seen to have identified two themes — property and the distinction between civil and criminal proceedings — upon which one could construct what might be called a pure theory of the fourth amendment, reading something like this: one's property is constitutionally immune from seizure, for the reasons stated, and the government must forgo any benefits it acquires by the violation of such property rights. This would lead to the exclusion of contraband seized in a search without probable cause, for

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cost-benefit analysis running itself into the ground, see COMMISSION ON THE THIRD LONDON AIRPORT, REPORT (1971), reprinted in J. WHITE, *THE LEGAL IMAGINATION*, 700-06 (1973). For an illuminating analysis of the ways in which risks — and benefits as well — are not objectively determined but culturally constituted, see M. DOUGLAS & A. WILDAVSKY, *RISK AND CULTURE* (1982). The Brief for the United States in *Illinois v. Gates*, 51 U.S.L.W. 3415 (U.S. Nov. 29, 1982) (No. 81430), is a good representative of the kind of argument generated by the deterrent rationale and the judicial cost-benefit method.

35. See *Fisher v. United States*, 425 U.S. 391, 407-08 (1976):

Several of *Boyd's* express or implicit declarations have not stood the test of time. The application of the fourth amendment to subpoenas was limited by *Hale v. Henkel*, 201 U.S. 43 (1906), and more recent cases. See, e.g., *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946). Purely evidentiary (but "nontestimonial") materials, as well as contraband and fruits and instrumentalities of crime, may now be searched for and seized under proper circumstances, *Warden v. Hayden*, 387 U.S. 294 (1967). Also, any notion that "testimonial" evidence may never be seized and used in evidence is inconsistent with *Katz v. United States*, 389 U.S. 347 (1967); *Osburn v. United States*, 385 U.S. 323 (1966); and *Berger v. New York*, 388 U.S. 41 (1967), approving the seizure under appropriate circumstances of conversations of a person suspected of crime. See also *Marron v. United States*, 275 U.S. 192 (1927) (footnote omitted). See also *Andresen v. Maryland*, 427 U.S. 463 (1976).

example, and of conversations overheard through a bug planted by trespass. Mere words, being intangible, cannot themselves be the object of an impermissible seizure — *Olmstead* is right so far — and no fourth amendment question is presented by eavesdropping in a public place. But, by the same token, words are not “persons or things” within the requirement that a warrant particularly describe “the persons or things to be seized”; therefore no warrant could properly issue for trespassory bugging. (*Olmstead* could be regarded either as trespassory or as nontrespassory under this rule, as could *Katz*.)

For different reasons exclusion should be required in two other kinds of cases as well, of which *Olmstead* represents one: where evidence is obtained by official crime, due process should forbid its use. The other is related to the “civil search” power which, as *Boyd* recognized, is greater than the power to search for evidence of crime: one thinks of civil discovery, administrative inspections, frisks compelled by considerations of safety, quarantine roadblocks, and the like, where extensive intrusions are justified by their civil and even-handed character. Such intrusions should be kept to their ostensible purpose, by excluding evidence of crime obtained thereby.<sup>36</sup>

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36. On this point *see* note 21 *supra*.