1983

Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather than an 'Empirical Proposition'?

Yale Kamisar

University of Michigan Law School, ykamisar@umich.edu

Available at: https://repository.law.umich.edu/articles/286

Follow this and additional works at: https://repository.law.umich.edu/articles

Part of the Criminal Procedure Commons, Evidence Commons, Fourth Amendment Commons, and the Supreme Court of the United States Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
DOES (DID) (SHOULD) THE EXCLUSIONARY RULE REST ON A "PRINCIPLED BASIS" RATHER THAN AN "EMPIRICAL PROPOSITION"?*

YALE KAMISAR**

[Until the [exclusionary rule] rests on a principled basis rather than an empirical proposition, [the rule] will remain in a state of unstable equilibrium.]

Mapp v. Ohio, 2 which overruled the then twelve-year-old Wolf case 3 and imposed the fourth amendment exclusionary rule (the Weeks doctrine) 4 on the states as a matter of fourteenth amendment due process, seemed to mark the end of an era. Concurring in Mapp, Justice Douglas recalled that Wolf had evoked "a storm of constitutional controversy which only today finds its end." 5 But in the two decades since Justice Douglas made this observation,
the storm of controversy has not only intensified—but engulfed the fourth amendment exclusionary rule itself.6

It is now clear that once a provision of the Bill of Rights, such as the guaranty against unreasonable searches and seizures, is deemed “fundamental to the American scheme of justice,” it applies to the states to the same extent that it has been interpreted to apply to the federal government.8 Although some members of the Court have balked at “incorporating” a specific provision of the Bill of Rights into fourteenth amendment due process “jot-for-jot” and “bag and baggage,” especially in the jury trial cases,9 this has come to be the prevailing view. Thus, critics of Mapp v. Ohio have had to direct their fire at the efficacy, validity and constitutional basis of the fourth amendment exclusionary rule as well—and they have done so with great force.10

6. As Professor Telford Taylor has pointed out:

[T]he Court's division in the [Mapp] case, sharp as it was, did not concern the merits of the exclusionary rule. The disagreement concerned only the federal dimension of the constitutional question: should the states be left free to apply or not to apply the exclusionary rule according to state law? That is the issue on which the justices divided, and there is not a word in Justice Harlan's dissenting opinion suggesting that the rule is intrinsically bad.


Although the Wolf Court, per Justice Frankfurter, had declined to impose the exclusionary rule on the states as a matter of federal constitutional law, it did say of the federal exclusionary rule: “Since [Weeks v. United States, 232 U.S. 383 (1914)] it has been frequently applied and we stoutly adhere to it.” 338 U.S. at 28. The same day Wolf was handed down, Justice Jackson, who had joined the opinion of the Court in Wolf, stressed the need for the federal exclusionary rule, untroubled by any “inconsistency” in adhering to the federal rule yet allowing the states to admit illegally seized evidence: “[F]or local excesses or invasions of liberty are more amenable to political correction, the [Fourth] Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source.” Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).


9. See id.

THE INABILITY TO OBTAIN MEANINGFUL "ADVANCE PROTECTION" AGAINST UNREASONABLE SEARCHES OR SEIZURES—AND WHAT FLOWS FROM THIS INABILITY

Why the continuing storm of controversy over the exclusionary rule? Why the deep and widespread hostility to the rule? I think a recent "law office search" case, because it arose in a setting so unlike the typical search and seizure case, furnishes a clue.

In O'Connor v. Johnson, St. Paul police obtained a warrant to search an attorney's office for "business records" of a client suspected of making false written statements in applying for a liquor license. The attorney happened to be present when the police arrived. Holding on to his "work product file," which contained some of the records sought, the attorney persuaded the police not to carry out the search. He also persuaded them to accompany him to the chambers of the municipal judge who issued the warrant, so that he could move to quash it.

When the lawyer applied to the state supreme court for a writ of prohibition to quash the search warrant, the municipal judge amended his order to the local prosecutor 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. The lawyer was not satisfied. He challenged the amended order, again by writ of prohibition, and eventually prevailed.

For me, the most remarkable feature of this extraordinary case is that the police never actually seized, let alone searched, the lawyer's work product file. Thus the courts were able to rule on the legality of the police action in an adversary proceeding before a search or seizure was carried out—before anyone other

12. 287 N.W.2d at 401.
13. Id.
14. Id.
15. 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 wrongdoing and there is no indication that the documents sought will be destroyed. See id. at 405. Under these circumstances, held the state supreme court, law enforcement officials have to proceed by subpoena duces tecum in seeking documents held by an attorney. See id. at 405.
16. O'Connor "was the first state or federal appellate decision to consider directly whether an attorney's office legally is subject to search." Bloom, supra note 11, at 4.
than O'Connor knew what was in the file. Thus Mr. O'Connor did not need an "exclusionary rule" to effectuate his rights.

But O'Connor is not a typical search and seizure case. Usually there is no way that a potential victim of unreasonable search and seizure can invoke "advance protection." In this respect, freedom from unreasonable search differs from most other constitutional rights:

For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. . . . But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. 17

In the typical case the courts do not enter the picture unless and until the challenged search has already turned up something incriminating. As a practical matter, nobody can stop the police from carrying out a search or seizure, if they are unwilling to be stopped, not even a lawyer. A good illustration is Mapp v. Ohio itself.

In Mapp, the police made two trips to the defendant's house. The first time the officers demanded entrance, Miss Mapp, after telephoning her lawyer, refused to admit them without a search warrant. 18 But twice as many officers returned three hours later—again apparently without a warrant—19 and forcibly gained admittance. 20 Miss Mapp's lawyer did arrive on the scene about this time, "but the officers, having secured their own entry, . . . would permit him neither to see Miss Mapp nor to enter the house." 21 A widespread search of Miss Mapp's home failed to produce the gambling paraphernalia the police were looking for, but did turn up alleged "lewd and lascivious" materials. 22

If Miss Mapp's attorney had persuaded the police to accom-

18. 367 U.S. at 644.
19. See id. at 644-45.
20. Id. at 644.
21. Id.
22. See id. at 643-45.
pany him to a judge's chambers, rather than carry out the search of Miss Mapp's home, the legality of the search would have been decided "in the abstract." If the judge had ruled that the police were proceeding unlawfully and had to abandon their course, we would never have known what evidence of crime, if any, the search would have uncovered. But as Mapp, and thousands of other cases, illustrate, this is not the way the system works.

Almost always the legality of a search is not contested in an adversary proceeding unless it has already produced incriminating evidence. Hence the strong need for the exclusionary rule. Almost always the court is asked to "unring the bell"—to reconstruct events as though the damaging, often damning, evidence never existed. Hence the strong resistance to the exclusionary rule. The damaging evidence "flaunts before us the price we pay for the Fourth Amendment."24

Why don't the requirements for obtaining search warrants furnish adequate "advance protection"? Because despite repeated announcements by the Supreme Court that warrantless searches are "per se" unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,25 the exceptions are neither well-delineated nor few.26 The overwhelming majority of searches are made without a warrant.27 One category alone, warrantless searches incident to arrest, "outnumber[s] manyfold searches covered by warrants."28 And the percentage of arrests made pursuant to a warrant is astonishingly small.29 Moreover, even in the unusual case where law enforcement officials do seek a warrant, the judicial officer's participation

---

23. Cf. Maness v. Meyers, 419 U.S. 449, 460 (1975) (compliance with an order to produce material which an attorney believes in good faith may tend to incriminate his client "could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released").
28. T. Taylor, supra note 6, at 48. See also Model Code, supra note 27, at 521; L. Tiffany, supra note 27, at 105.
29. In 1966, for example, of 171,288 arrests made by the New York City police, only 366 were made pursuant to an arrest warrant. See Model Code, supra note 27, at 493 n.3.
is "largely perfunctory"—it is "notoriously easy" to obtain search warrants or court orders for electronic surveillance, and even easier to obtain warrants for arrest. Thus, almost always the first and only meaningful opportunity to decide the legality of a search or seizure arises after the fact.

It may well be that "many judges are reluctant to become truly involved in what they conceive to be a relatively ministerial task of issuing process," but maintenance of "only the fiction of before-the-fact judicial control [in] practice" may stem as much, or more, from an incapacity to get "truly involved" in the warrant procedure as from an unwillingness to do so. As Dean Edward Barrett observed some fifteen years ago (and undoubtedly the caseload is even greater today), the Los Angeles Municipal Court, for example, finds itself so pressed that "in large areas of its caseload it averages but a minute per case in receiving pleas and imposing sentence." Where, asks Dean Barrett, is "the judicial

---

34. LaFave & Remington, supra note 30, at 994.
35. Id. at 993.
36. "The Los Angeles Municipal Court with annual filings of about 130,000 (excluding parking and traffic) finds itself so pressed that in large areas of its caseload it averages but a minute per case in receiving pleas and imposing sentence. How could it cope with the added burden that would be involved in the issuance of warrants to government the approximately 200,000 arrests made per year in Los Angeles for offenses other than traffic?" Barrett, Criminal Justice: The Problem of Mass
time going to be found” to devote “at least some minutes in each case to reading the affidavits . . . in support of the request for a warrant, and inquiring into the background of the conclusions stated therein?”37 And “[h]ow can a magistrate be more than a ‘rubber stamp’ in signing warrants”38 unless he finds the time to make such inquiries?

Dean Abraham Goldstein offers another reason why judges “rubber stamp” warrant applications in practice—an explanation that has “deeper roots in fundamental postulates of the accusatorial model.”39 “The American judge,” points out Goldstein, assumes that he is to react to matters presented to him and that if initiatives are to be taken, counsel will take them. . .. Even when only one side is represented, as with warrants, . . . the American judge tends in practice to be reactive. He has come to rely on the parties and their counsel to define and develop issues.40

Unfortunately, because search warrant proceedings are ex parte, there is, of course, “no defense counsel to question the state’s presentation or to share in protecting the public interest.”41

WHY THE FRAMERS PROBABLY BELIEVED THAT BY CONTROLLING SEARCH WARRANTS THEY HAD CONTROLLED SEARCHES

The framers of the fourth amendment were occupied—preoccupied—with general warrants, not warrantless searches, and they seem to have had tax collectors and customs officials more in mind than the police. They could hardly have been expected to foresee the current state of affairs—when a single police force makes tens of thousands of warrantless arrests and searches every year. Two hundred years ago the police had not yet assumed the functions of criminal investigation—indeed, no organized police forces had yet emerged. Until well into the nineteenth century, the only “police service” of any kind, even in our largest cities, was the “watch system” and “such protection as [it] afforded was provided only by night—generally between the hours of nine o’clock in the evening and sunrise” (and “sunrise” was variously interpreted as between Production, in The American Assembly, Columbia University, The Courts, the Public and the Law Explosion 85, 117-18 (H.W. Jones ed. 1965) (emphasis in original).

37. Id. at 117.
38. Id.
40. Id.
41. Id. at 1023-24.
three o'clock and five o'clock in the morning).42

Two hundred years ago—when “enforcement of criminal laws was largely confined to courts” and “the initiative was left to the complaining party to invoke criminal sanctions by gathering his proofs and presenting them at trial”43—relatively few arrests (and warrantless searches incident to) were made and probably only where there was “hot pursuit,” “hue and cry,” or an arrest warrant.44 These arrests and “arrest searches” did not trouble the framers.45 Some common law warrants for stolen goods were issued by justices of the peace, but this “hybrid criminal-civil process” did not concern the framers either.46 Indeed, because this hybrid process contained “elaborate safeguards against its Improvident or abusive use, and provision for immediate confrontation of the alleged miscreant and his accuser before the magistrate,”47 the framers sought to contain the use of general warrants along the lines of the relatively rigorous standards applicable to the old stolen goods warrants.48

What very much did concern the framers—“insofar as ‘concerned’ is used to denote the specific subject that they had under consideration”49—were the general warrants and writs of assistance.50 Striking evidence of this is provided by the seven state declarations of rights that served as precedents for the fourth amendment.51

The Virginia Bill of Rights of 1776, “[t]he first American precedent of a constitutional character for the Fourth Amendment,”52 prohibited only general warrants. So did the Maryland and North Carolina Declarations of Rights, adopted shortly thereafter. The

42. See R. Fosdick, American Police Systems 61-62 (1920). It was not until 1844 that the New York Legislature passed a law “creating ‘a day and night police,’ which forms the basis of modern police organization in America.” Id. at 66.
44. See T. Taylor, supra note 6, at 28, 39.
45. See id. at 39-41, 43.
46. See id. at 24-25.
47. Id. at 27. See also id. at 24-25.
48. See id. at 41.
49. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 410 (1974).
50. See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51-105 (1937); J. Landynski, Search and Seizure and the Supreme Court 30-48 (1966); T. Taylor, supra note 6, at 35-46; Amsterdam, supra note 49, at 366, 398, 410.
52. N. Lasson, supra note 50, at 79.
The Pennsylvania Declaration of Rights (adopted three months after the Virginia Bill of Rights and soon copied by Vermont) was the first to state the broader principle, but did so "merely as a basis for the minor premise condemning general warrants:"

"X. That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without [satisfying certain specified standards] are contrary to that right, and ought not to be granted."

The first expression of the phrase "unreasonable searches and seizures" appears in the Massachusetts Declaration of Rights of 1780 (soon duplicated by New Hampshire), but again the statement of the broader principle served only as a basis for prohibiting broadside warrants:

Art. XIV. Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if [certain enumerated conditions are not met]; and no warrants ought to be issued, but in cases, and with the formalities prescribed by the laws.

Moreover, when the time came to adopt a federal bill of rights, James Madison, who "committed his great prestige to the fight for [such a bill] and assumed the role of sponsor in pushing the amendments through Congress," proposed a search provision that "seemed to be directed against improper warrants only:"

The rights of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched or the persons or things to be seized.

The transition from Madison's "single-barreled" original proposal in the House of Representatives to the present "double-barreled" form of the fourth amendment—one clause dealing with the essentials of a valid warrant, the other giving "[t]he general right of security from unreasonable search and seizure . . . a sanction of its own"—occurred without any recorded vote of the House approv-

53. Id. at 81 n.10.
54. Id. at 81 n.11 (emphasis added).
55. Id. at 82 n.15 (emphasis added).
56. J. LANDYNISKI, supra note 50, at 41.
57. N. LASSON, supra note 50, at 100.
58. Id. at 100 n.77 (emphasis added).
59. Id. at 103.
ing the change.\textsuperscript{60}

I share the view that "the choice of the amendment’s double-barreled form was advertent"\textsuperscript{61} and that this change in the form of the search provision "intentionally [gave it] a broader scope."\textsuperscript{62} I would only add that even if the fourth amendment had emerged in Madison’s original form, \textit{i.e.}, had literally been aimed exclusively against general warrants, the courts still would have (and should have) interpreted the amendment to prohibit indiscriminate, arbitrary and unjustified \textit{warrantless} searches as well. The courts would have done so, I am confident, for the same reason they did not literally apply the self-incrimination provision as written—"early courts saw that the protection of the amendment itself would be an empty gesture if . . . literally applied."\textsuperscript{63}

The art of interpretation, to use Learned Hand’s felicitous phrase, is “the proliferation of purpose.”\textsuperscript{64} Here, as elsewhere, "our use of the history of [Jefferson’s and Madison’s] time must limit itself to broad purposes, not specific practices."\textsuperscript{65} The colonists concentrated their fire on general warrants because they "opposed leaving the power to search and seize solely in executive hands"\textsuperscript{66} and because in their immediate past experience uncontrolled executive discretion had taken \textit{this particular form}. They condemned general warrants, but they \textit{valued} "specific writs" or "special warrants."\textsuperscript{67} While they did not protest warrantless searches, the most plausible reason for not doing so is that, aside

\begin{thebibliography}{99}
\item 60. \textit{Id.} at 100-03.
\item 61. Amsterdam, \textit{supra} note 49, at 468 n.465.
\item 62. N. Lasson, \textit{supra} note 50, at 103.
\item 63. E. Griswold, \textit{The Fifth Amendment Today} 55 (1950):
\begin{quote}
Is it not clear that a legislative investigation is not a ‘criminal case’? What application, then, does the [prohibition against compelling a person ‘in any criminal case to be a witness against himself’] have in such proceedings—or in civil trials, or elsewhere, where persons may be subjected to questioning? This is a question which was raised and answered long ago, so long ago in fact that lawyers tend to take it for granted. But early courts saw that the protection of the amendment itself would be an empty gesture if it was literally applied. . . . [Thus,] courts long ago concluded that if the privilege is to be effective at all it must be granted if the basic objective of that language is to be realized.
\end{quote}
\textit{Id.} at 54-55.
\item 64. \textit{Quoted in} F. Frankfurter, \textit{The Reading of Statutes}, in \textit{Of Law and Men} 44, 47 (1956).
\item 67. \textit{See id.} at 618-21 and authorities cited therein.
\end{thebibliography}
from searches incident to arrest (and how far they could extend beyond the body of the arrestee is unclear), 68 "such searches . . . simply did not exist." 69

Can there be any doubt that the colonists would have vigorously opposed warrantless searches exhibiting the same characteristics as general warrants and writs and thus impairing privacy and freedom to the same degree? Indeed, I think it fair to say that the colonists condemned writs of assistance because such writs "no more controlled official discretion than would a statute that simply permitted warrantless searches." 70

The fact that the general warrants and writs dominated the framers' thinking about searches and seizures has, I believe, a most important bearing on the "exclusionary rule" debate. Concentration on the specific evils which brought about the fourth amendment distracted attention from the need for post-search safeguards. For when the framers prohibited overreaching warrants they had good reason to believe that the magistrates and judges would exercise vigilant pre-search control.

Even after the Townshend Act of 1767 had disposed of all technical objections to the legality of the writs of assistance 71—even "in the face of mounting pressures from the executive—which paid their salaries and could at any time remove them, or offer them preferment" 72—the judges of most of the colonies had either refused or ignored applications for the writs. 73 Surely an "independent judiciary" could be counted on to take seriously the command of the fourth amendment.

Surely it could be said especially of the people's right to be secure against unreasonable searches and seizures—"the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England" 74—what James Madison said generally of the Bill of Rights in urging its adoption:

If [a bill of rights is] incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they

68. Amsterdam, supra note 49, at 412.
69. Grano, supra note 66, at 617 and authorities cited therein. See also Amsterdam, supra note 49, at 412, 417 n.522.
70. Grano, supra note 66, at 619. See also Amsterdam, supra note 49, at 410-12 and authorities cited therein.
71. The Act authorized the superior or supreme court of each province to issue writs of assistance. See N. Lasson, supra note 50, at 69-70.
72. J. Landynski, supra note 50, at 37.
73. Id. at 36-37; N. Lasson, supra note 50, at 72-73.
74. J. Landynski, supra note 50, at 19.
will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.\(^7\)

Although the fourth amendment establishes guidelines for the issuance of search warrants, it has nothing to say specifically about warrantless searches. This seems like a colossal oversight today, but, as indicated earlier, this was quite understandable two hundred years ago.

Most of the events concerning the writs of assistance occurred in Massachusetts.\(^7\) At one point, the Governor of Massachusetts issued writs of assistance himself.\(^7\) When this practice met criticism, however, the Governor directed customs officers to apply to the Superior Court of the province for writs.\(^7\) In 1755 the Superior Court granted such a writ and thereafter continued to exercise this function.\(^7\)

As already pointed out, courts of most of the colonies resisted writs of assistance. But this was not the case in Massachusetts, apparently because "a man pliable to the wishes of the monarchy" had been appointed Chief Justice of the Superior Court in 1770.\(^8\) But if the courts of Massachusetts did not resist the writs, the people did.

In the late 1760s "it became almost impossible to enforce the writs: the populace gathered to thwart the efforts of the customs whenever they appeared."\(^8\) In 1766, after a group had forcibly recaptured goods seized under a writ,\(^8\) a Boston merchant had successfully resisted customs officials with sword and pistol\(^8\) and the seizure of John Hancock's sloop had caused a riot,\(^8\) Chief Justice

---

75. Address by James Madison, House of Representatives (June 8, 1789), reprinted in THE MIND OF THE FOUNDER 224 (M. Meyers ed. 1973). As has been pointed out, both in language and in spirit the Court's approach to interpreting the fourth and fifth amendments in Boyd v. United States, 116 U.S. 616, 635 (1886) and Weeks v. United States, 232 U.S. 383, 391-92 (1914), is much like Madison's in offering the Bill of Rights for adoption. See Mapp v. Ohio, 367 U.S. 643, 647 (1961), and the concurring opinion of Justice Black, id. at 662 n.8.

76. See N. LASSON, supra note 50, at 55.

77. See id.; J. LANDYNISKI, supra note 50, at 31-32.

78. See N. LASSON, supra note 50, at 55-56.

79. See id. at 56; J. LANDYNISKI, supra note 50, at 32.

80. J. LANDYNISKI, supra note 50, at 33 (so describing Lieutenant Governor Thomas Hutchinson).

81. Id. at 36. See also N. LASSON, supra note 50, at 68-72; T. TAYLOR, supra note 6, at 38.

82. See N. LASSON, supra note 50, at 68.

83. See id. at 68-69.

84. See id. at 72.
Hutchinson, the judge said to be "pliable to the wishes of the monarchy,"\textsuperscript{85} wrote British authorities, who were pressing for the use of the writs, that he doubted whether any customs officer would venture any more to make a seizure.\textsuperscript{86}

If customs officers, although urged on by their British superiors, although armed with warrants issued by colonial courts specifically designated by the Townshend Act as the courts of issuance, grew unwilling, or at least most reluctant, to execute searches and seizures, would they do so \textit{without} any statutory authority and \textit{without} the authority of any judge or magistrate? Surely the framers of the fourth amendment should not be faulted for thinking they would not.

In light of the events preceding the fourth amendment, the argument advanced by Justice Black that had the framers desired to exclude illegally seized evidence from criminal trials "they would have used plain appropriate language to do so"\textsuperscript{87} is hardly persuasive. Moreover, and more generally, this argument proves too much. One might as well argue, for example that—

If they had meant to authorize only judicial officers to issue warrants, not attorneys general or local prosecuting attorneys (the amendment nowhere specifies that a warrant may be issued only by a judicial officer, but the whole point of the warrant clause, the Court has told us, is that executive officers "simply cannot be asked to maintain the requisite neutrality with regard to their own investigations"),\textsuperscript{88} the framers would have used plain, appropriate language to say so. (Incredibly, Justice Black once seriously maintained, in a dissent, fortunately, that "no language in the Fourth Amendment" provided "any basis" for disqualifying a state attorney general from issuing a search warrant).\textsuperscript{89} Or—

If they had desired the police, whenever practicable, to obtain advance judicial authorization for searches (and the Court has said that they must),\textsuperscript{90} the framers would have used plain, appropriate language to do so. Or—

If they had desired to test warrantless searches by the

\textsuperscript{85}. See text accompanying note 80 supra.
\textsuperscript{86}. See N. Lasson, supra note 50, at 72.
\textsuperscript{88}. Coolidge v. New Hampshire, 403 U.S. at 450.
\textsuperscript{89}. Id. at 501.
"probable cause" standard in the warrant clause, rather than by the more general proscription against "unreasonable searches" in the opening, general clause (and the Court has gone so far as to declare that "in a doubtful or marginal case [of probable cause] a search under a warrant may be sustaina-
ble where without one it would fail"),91 the framers would have used plain, appropriate language to say so. Or—

If they had meant to allow the police to make felony ar-
rests without warrant, even when they have ample opportu-


nity to procure one; and to conduct warrantless searches incident to arrest, even when there is no evidence or fruits of the offense with which the arrestee is charged nor any reason to believe that he is armed or otherwise dangerous (and the Court has told us that the police may make warrantless arrests and searches in these situations),92 the framers would have used plain, appropriate language to say so. Or—

If they had meant to allow the police to make warrantless searches of the home on the "authority" of a third party's con-
sent, even when there is ample time to obtain a warrant (and the Court has told us that the police may make a warrantless search on such a basis),93 the framers would have used plain, appropriate language to say so.

The likely explanation for the failure of the fourth amendment to provide explicitly for an "exclusionary rule" is that the framers thought little, if at all, about after the fact judicial control. (And if they did they probably thought there would not be much illegally seized material to be offered in evidence). The framers focused on, and placed their trust in, the warrant procedure. Justice Jackson put it well when he observed that the fourth amendment "roughly indicate[s] the immunity of the citizen which must not be violated, goes on to recite how officers may be authorized, consistently with the right so declared, to make searches," and then comes to an end, "apparently because [the framers] believed that by thus control-
ning search warrants they had controlled searches."94

We know now, however, that the framers' trust in the warrant procedure was misplaced. We know now that so many searches are made without warrants that even if judges and magistrates had both the time and the desire to exercise vigilance in all of the rela-

tively few cases in which warrants are sought they simply could not control searches by controlling search warrants.

**KEEPING PACE WITH THE REALITIES OF THE CRIMINAL JUSTICE SYSTEM**

“The great tides and currents which engulf the rest of men,” Cardozo once observed, “do not turn aside in their course, and pass the judges by.” At least they should not. In the 1960s the Court finally arrived at the conclusion that in a world of “parabolic microphones” (capable of eavesdropping on conversations taking place in an office on the other side of the street) and laser beams (capable of picking sound waves off closed windows) the protection against unreasonable search and seizure could no longer turn on whether the challenged invasion of privacy was accomplished by a physical invasion or “trespass.” To so limit the reach of the fourth amendment would be to read that amendment “with the literalness of a country parson interpreting the first chapter of Genesis.” The fourth amendment “protects people, not places,” observed the Court in the seminal Katz case; thus the command of the fourth amendment cannot be limited by “nice distinctions turning on the kind of electronic equipment employed.”

Again in the 1960s, when police interrogators had long been carrying out the functions which historically the judiciary had performed before the emergence of organized police forces, the Court finally held that the privilege against compelled self-incrimination and the right to counsel did apply to the proceedings in the police station as well as those in the courtroom. To continue to limit constitutional rights to criminal court proceedings when police interrogators were eliciting confessions from those likely to assume, or often led to believe, that they had to answer questions or

---

97. Until Olmstead v. United States, 277 U.S. 438 (1928) and Goldman v. United States, 316 U.S. 129 (1942) were overruled, the fourth amendment applied only when electronic snooping was accomplished by a physical invasion or “trespass.”
98. A. Beisel, Control over Illegal Enforcement of the Criminal Law: Role of the Supreme Court 32 (1955) (so describing Chief Justice Taft’s interpretation of the fourth amendment in the Olmstead case).
100. Id.
102. See A. Beisel, supra note 98, at 104; see also Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich. L. Rev. 1224, 1235 (1932); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1 (1949).
it would be so much the worse for them,\textsuperscript{103} would again be to reach the relevant constitutional safeguards with the literalness of the aforementioned country parson interpreting Genesis. Thus, in the famous \textit{Miranda} case, the Court applied these constitutional safeguards to "informal compulsion exerted by law-enforcement officers during in-custody questioning."
\textsuperscript{104}

Similarly, in an era when, as pointed out earlier,\textsuperscript{105} it has become abundantly clear that the great bulk of searches and seizures are being made without any warrants (and there is ample evidence to believe that even in the relatively few instances where warrants are sought the magistrate's involvement in the process is "largely perfunctory"), the Court must keep pace with the realities of the criminal justice system. Because often, much too often, the legality of a search or seizure cannot be tested in any meaningful way before the fact, a defendant must be permitted to test it as soon as it is practicable to do so after the fact.

Otherwise a person could be convicted of a crime punishable by a long stretch in the penitentiary on the basis of a search or seizure whose legality had been judged solely by "judges of their own cause."
\textsuperscript{106} Otherwise, "[t]he awful instruments of the criminal law" would be "entrusted to a single functionary."\textsuperscript{107} Otherwise the majestic fourth amendment would look like a huge whale stranded helplessly on the beach after the tide has gone out.

If the fourth amendment's controls on the issuance of search warrants were "the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope,"\textsuperscript{108} they are not a sufficient answer today. It is


\textsuperscript{105} See text accompanying notes 28-30 supra.

\textsuperscript{106} But [law enforcement officials] should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.


\textsuperscript{107} McNabb v. United States, 318 U.S. 332, 343 (1943): Experience [has] counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication.

(Frankfurter, J., for the Court) \textit{(quoted with approval} in Gerstein v. Pugh, 420 U.S. 103, 118 (1975)).

\textsuperscript{108} United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissent-
no less true of the search provision than the freedom of speech provision that if the safeguards on which the framers relied become illusory "then the meaning of the guarantee ought to outreach the particulars that gave it birth, in order that the freedom envisaged at its core can be vindicated."109 What has well been said of the scope of the fourth amendment's protection applies with equal force to its enforcement: If the guarantees of liberty written into it are to endure as something more than "hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas"110—if the experience of the framers is to be "carried down the stream of history"111—our courts must exclude the unconstitutionally obtained evidence brought before them.

THE CONSTITUTION SAYS NOTHING ABOUT AN EXCLUSIONARY RULE—BUT IT HAS NOTHING TO SAY ABOUT A GREAT MANY THINGS

I am well aware that critics of the fourth amendment "exclusionary rule" disparage it as merely a judge-made rule of evidence. Thus, in his recent testimony before the Attorney General's Task Force on Violent Crime, Judge Malcolm Wilkey said of the exclusionary rule: "This rule of evidence did not come from on high. It's man-made, not God-given. ... It's not even in the Constitution."112

I must say this doesn't strike me as a forceful point—not, at least, unless someone can name one Supreme Court decision or doctrine that is not "a matter of judicial implication,"—that was not, to use Judge Wilkey's phrase, "man-made."

What, for example, is the source of the constitutional rule—first applied in 1936—barring the use of "involuntary" confessions, even though, as the Court made clear in the 1950s and 1960s, the confession is corroborated by physical evidence and hence trusting). Rabinowitz was overruled, and Justice Frankfurter vindicated, in Chimel v. California, 395 U.S. 752, 753 (1969).


111. Cf. Frankfurter, J., dissenting in Rabinowitz, 339 U.S. at 70.

112. Quoted in Mathias, The Exclusionary Rule Revisited, 28 LOY. L. REV. 1, 7 (1982). The author of this article is Senator Charles McC. Mathias, Chairman of the Senate Judiciary Subcommittee on Criminal Law, which recently held extensive hearings on various proposals to displace or to modify the exclusionary rule. 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. (1982) [hereinafter cited as Exclusionary Rule Hearings].
worthy? Read the Constitution. It has nothing to say about "confessions," "involuntary" or "coerced" or otherwise. Is this rule any less a constitutional rule because it is "judge-made" or "judicially-created"?

Consider the reapportionment cases, and the 1954 school desegregation case which overruled it, and the school prayer and released time cases, the "clear and present danger" test, the "symbolic speech" cases, and the recent Richmond Newspapers case, establishing the media's right of access to criminal court proceedings—even though, as Chief Justice Burger recognized in his lead opinion, this important right is not explicitly defined or articulated in the Constitution.

Some years ago, when attending (as an observer) a conference of journalists, lawyers and judges, a conference characterized by much suspicion of, and hostility towards, the courts, Justice Potter Stewart could contain himself no longer. He interrupted:

Where, ladies and gentlemen, do you think these great constitutional rights that you were so vehemently asserting, and in which you were so conspicuously wallowing yesterday, where do you think they came from? The stork didn't bring them. They came from the judges of this


country, from these villains here sitting at the table.\textsuperscript{122}

Well, I am perfectly willing to concede that the stork didn't bring the "exclusionary rule" either. But I am still waiting for someone to name one constitutional rule, one constitutional case, the stork did bring. I think it worth recalling that the stork didn't even bring the great principle established in \textit{Marbury v. Madison} that the Supreme Court of the United States is the ultimate or supreme interpreter of the Constitution. This, too, is a matter of "judicial implication."\textsuperscript{123}

Justice Black was fond of contrasting the ambiguity of the fourth amendment with what he considered to be the clarity of the fifth amendment. "In striking contrast to the Fourth Amendment," he observed, "the Fifth Amendment states in express, unambiguous terms that no person 'shall be compelled in any criminal case to be a witness against himself.'"\textsuperscript{124} The fifth amendment, he stressed, "in and of itself directly and explicitly commands its own exclusionary rule—a defendant cannot be compelled to give evidence against himself."\textsuperscript{125}

But much constitutional law pertaining to the privilege is also a matter of "judicial implication." The fifth amendment, for example, does not define "compulsion" and many judges and distinguished commentators long maintained that comment on the refusal of the accused to answer questions did not constitute "compulsion" within the meaning of the fifth amendment.\textsuperscript{126} But the

\begin{flushright}
\textsuperscript{122.} Quoted in \textit{The Media and the Law} 185 (H. Simons & J. Califano eds. 1976). See W. Lockhart, Y. Kamisar & J. Choper, \textit{Constitutional Law: Cases, Comments & Questions} 649-50 (7th ed. 1980), where the authors explain why it is generally understood that these remarks were made by Justice Stewart.

\textsuperscript{123.} One of our greatest judges, Learned Hand, insisted that there was "nothing in the United States Constitution that gave courts any authority to review the decision of Congress." L. Hand, \textit{The Bill of Rights} 10 (1958). Indeed, observed Judge Hand, it could be forcefully argued that such a view of the Supreme Court's authority "invaded that 'Separation of Powers' which, as so many then believed, was the condition of all free government." \textit{Id.} at 10-11. \textit{But see} Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 \textit{Harv. L. Rev.} 1, 3-5, 7-9 (1959).

As the noted legal historian, Leonard Levy, has pointed out, one of our most eminent authorities on constitutional law, Edward S. Corwin, once declared, "'The people who say the framers intended [judicial review over Congress] are talking nonsense'—to which he hastily added, 'and the people who say they did not intend it are talking nonsense.'" Levy, \textit{Judicial Review, History and Democracy: An Introduction}, \textit{in Judical Review and the Supreme Court} 4 (1967). Adds Professor Levy: "A close textual and contextual examination of the evidence will not result in an improvement of these propositions." \textit{Id.}


\textsuperscript{125.} \textit{Id.} at 498.

\textsuperscript{126.} As Justice Stewart, joined by Justice White, pointed out, dissenting in \textit{Griffin v. California}, 380 U.S. 609 (1965), comment by counsel and instruction by the judge on the defendant's failure to take the stand had the "sanction" of both the
Supreme Court held otherwise in 1965.\textsuperscript{127}

The fifth amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."\textsuperscript{128} It is restricted on its face to criminal cases. But long ago the Court held that the protection of the fifth amendment applies to ordinary witnesses before a grand jury or a legislative investigating committee or even to someone in a bankruptcy or other civil proceeding.\textsuperscript{129} As historian Leonard Levy, perhaps our leading student of the privilege, has said of it: "Of no other clause in the Constitution has the Court declared that it cannot mean what it seems to say."\textsuperscript{130}

The fourth amendment, to be sure, does not contain a provision explicitly stating: No evidence obtained in violation of one's right to be secure against unreasonable searches and seizures shall be admissible in a criminal prosecution against him. But neither does the amendment add:

\textit{Despite the foregoing, however, if an unreasonable search or seizure is committed, any evidence obtained as a result may be used in any trial, hearing or proceeding which the government may see fit to bring against any person whose rights have been violated.}\textsuperscript{131}

Nor does the fourth amendment contain a proviso, and we should be slow to read one into it, stating:

\textit{Despite the foregoing, however, the decision of executive officers that a search or seizure was reasonable shall be final and conclusive in all criminal prosecutions in which the produce of such search or seizure is offered in evidence and in no such prosecution shall any court consider or review the legality of any such executive action.}\textsuperscript{132}

\textsuperscript{127.} Griffin v. California, 380 U.S. 609 (1965).
\textsuperscript{128.} U.S. CONST. amend. V (emphasis added).
\textsuperscript{129.} See note 63 supra.
\textsuperscript{131.} In an effort "to expose the hypocrisy involved in a high-sounding proposal, which nevertheless permits the violation and the use of its fruits," one delegate to the New York State Constitutional Convention, the famous trial lawyer, Max Steuer, who favored an exclusionary rule, did propose such an addition to the protection against unreasonable search and seizure. See 1 NEW YORK CONSTITUTIONAL CONVENTION, REVISED RECORD 578-82 (1938).
\textsuperscript{132.} Cf. Johnson v. Robinson, 415 U.S. 361 (1974), a suit challenging the constitutionality of a statutory provision denying certain veterans' educational benefits to conscientious objectors. The government argued unsuccessfully that the courts were deprived of jurisdiction over the action by 38 U.S.C. § 211(a), which provides that "the decisions of the Administrator [of Veterans' Affairs] on any question of
Because the fourth amendment has nothing to say about any consequences that might flow from its violation, reading it as permitting the use of evidence obtained by means of an unreasonable search and seizure and remanding the victims of a violation "to the remedies of private action and such protection as the internal discipline of the police . . . may afford"\textsuperscript{133} strikes me as no less "creative" or "judge-made" than the view of the *Weeks* Court.

It is worth recalling what the great critic of the exclusionary rule, Dean Wigmore, had to offer in its place—and how he expressed it. The fourth amendment, maintained Wigmore, "implies both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials"\textsuperscript{134}—"contempt of the Constitution" he called it.\textsuperscript{135} Where does this view of the amendment come from?

"Sending for the high-handed, over-zealous marshal [and] imposing a thirty-day imprisonment for his contempt of the Constitu-


tion" may have struck Wigmore as "[t]he natural way" to do justice and to enforce the fourth amendment, but it strikes me as a bolder reading of the amendment than the one the Weeks Court gave it. After all, "[t]he sanction most frequently imposed in response to a constitutional violation is the sanction of nullification."

Moreover, if Wigmore's reading of the fourth amendment had prevailed, I venture to say that it would have caught much of the same heavy fire that the exclusionary rule has. The "contempt of the Constitution" remedy would have been criticized, for example, for "mak[ing] no distinction between [the investigation] of minor offenses and more serious crimes"—the officer would be held in contempt whether he was pursuing a teenage policy runner or a "syndicate hit man accused of first degree murder"—for treating "honest mistakes" the same way as "deliberate and flagrant... violations"; for overlooking that "[p]olicemen do not have the time, inclination, or training to read and grasp the nuances of... the standards of conduct they are to follow"—"[w]henever the rules are enforced by meaningful sanctions, our attention is drawn to their content"; for encouraging police perjury (to avoid being sent to jail); for inducing judges to "fudge the standards of probable cause" and "making hypocrites" out of them generally (to avoid sending officers to jail); and for "discourag[ing] internal disciplinary action by the police themselves." Although the pressure to limit the exclusionary rule to situations where the police have acted willfully, recklessly, in "bad faith" or "where there was no reasonable cause to believe there was reasonable cause" has been considerable, the pressure to limit Wigmore's

136. J. Wigmore, supra note 134, § 2184, at 40.
137. Id.
138. Id.
141. Id.
142. Id.
143. Id.
145. Cf. id. at 417
147. Cf. Wilkey, supra note 139, at 226.
148. See H. Freundt, The Bill of Rights as a Code of Criminal Procedure, in BENCHMARKS 235, 260-61 (1967); Ball, Good Faith and the Fourth Amendment: The
"contempt of the Constitution" remedy along the same lines would have been enormous.

In short, if Wigmore's way of reading the fourth amendment had prevailed and had become the principal means of enforcing the basic right, the great debate would have come to be known as the "contempt of the Constitution" debate rather than the "exclusionary rule" debate, but it would have been no less bitterly fought. And not a few law enforcement officials, I suspect, would have offered the exclusionary rule as an alternative to what surely would have been called Wigmore's "Draconian device" for enforc-


For recent criticism of various proposed "good faith-substantiality" modifications of the exclusionary rule, see LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U. PITT. L. REV. 307, 333-59 (1982); Mertens & Wasserstrom, Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 GEO. L.J. 365 (1981); Sachs, The Exclusionary Rule: A Prosecutor's Defense, 1 CRIMINAL JUSTICE ETHICS 28, 32-33 (Summer/Fall 1982); Schlag, Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies, 73 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 875 (1982). See also the views of John J. Cleary (Executive Director, Federal Defenders of San Diego), Professor Leon Friedman (on behalf of the ACLU), Professor William W. Greenhalgh (on behalf of the ABA), Stephen H. Sachs (Attorney General of Maryland and former U.S. Attorney for Maryland), and others in Exclusionary Rule Hearings, supra note 112.

Last November, the Supreme Court restored to the calendar for reargument Illinois v. Gates, 85 Ill. 2d 376, 423 N.E.2d 887 (1981) (search warrant should not have issued on the basis of an anonymous letter describing defendants' alleged drug dealings and some corroborating evidence produced by an independent police investigation) and requested the parties to address the question "whether the rule requiring the exclusion of evidence obtained in violation of the Fourth Amendment should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment." 103 S. Ct. at 436 (1982). The Court's action set off much speculation that the Court was about to adopt a "good faith" exception to the exclusionary rule, but the Court never used that term in its request for supplemental briefing.
ing the fourth amendment.\textsuperscript{149}

As for the civil action that Wigmore thought the fourth amend-
ment also implied, it can be argued that the purpose of the amend-
ment was to prevent Congress from abolishing existing tort
remedies against offending officers or from disallowing the defense
of “official justification” when such officers were sued.\textsuperscript{150} But such
a construction puts an inordinate burden on the language of the
amendment itself.

As Professor Thomas Atkinson pointed out more than fifty
years ago, the search provision does not, in language similar to that
used in the first amendment, merely forbid Congress to make any
law prohibiting or abridging the right to bring civil actions against
police who violate the provision.\textsuperscript{151} Nor, as Professor Walter De-
llinger noted more recently, does the amendment simply provide
that in tort actions against officers “the defense of official justifica-
tion shall not be allowed if the search or seizure was unreasona-
ble” or “the warrant was issued without probable cause.”\textsuperscript{152}

The amendment speaks affirmatively and its command that
“the right of the people to be secure . . . against unreasonable
searches and seizures shall not be violated” “suggests a corre-
sponding duty upon government officials to refrain from behavior
which would impair that right. It therefore requires an exceed-
ingly grudging exercise in construction to read that provision as
one whose sole function was to [preserve common law tort actions
against offending police or] to foreclose one kind of defense to a
tort action.”\textsuperscript{153}

Moreover, the view that the availability of compensatory reme-
dies against the offending officers (or the government itself) allows
the government to use evidence obtained in violation of the
amendment would, as Professor Dellinger has pointed out, tempt
the police and the public “to view the Constitution as Justice
Holmes’ ‘bad man’ viewed the obligation of contracts”\textsuperscript{154}—the duty
to obey the fourth amendment “means a prediction that you must
pay damages if you do not [comply with] it—and nothing else.”\textsuperscript{155}

Under such a reading of the fourth amendment, a defendant

characterizing the exclusionary rule).
\textsuperscript{150} See the discussion in Atkinson, \textit{Admissibility of Evidence Obtained
Through Unreasonable Searches and Seizures}, 25 COLUM. L. REV. 11, 21-22 (1925);
Dellinger, supra note 138, at 1537-40.
\textsuperscript{151} Atkinson, supra note 150, at 21.
\textsuperscript{152} Dellinger, supra note 138, at 1540.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 1563.
THE EXCLUSIONARY RULE

could expect no help from the Constitution in the criminal courts. At every stage of the criminal process he would have to suffer the consequences of a violation of his security against unreasonable search and seizure. Once the government got hold of incriminating evidence, however it got hold of it (short of brutality or physical violence), it could use the evidence with impunity.

There is a first amendment analogy of sorts. As the late Alexander Bickel "conceive[d] the contest established by the First Amendment, and as the Supreme Court of the United States appeared to conceive it in the Pentagon Papers case,"\textsuperscript{156} once the press gets hold of newsworthy documents, even though it is aware that they have been stolen, it may publish them "with impunity."\textsuperscript{157} As Professor Bickel read the first amendment—

\begin{quote}
[T]he presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources. Those responsibilities rest chiefly elsewhere. Within self-disciplined limits and presumptively, the press is a morally neutral, even an unconcerned, agent as regards the provenance of newsworthy material that comes to hand. . . .\textsuperscript{158}
\end{quote}

This approach has been called "the law of the jungle,"\textsuperscript{159} and if the exclusionary rule were abolished it would govern criminal prosecutions as well. This approach may be a defensible reading of the first amendment, but not, I submit, of the fourth. A criminal court is not (or at least it should not be) "a morally neutral, even an unconcerned, agent" as regards the provenance of relevant evidence that comes before it. The responsibilities do not, or at least should not, rest elsewhere.\textsuperscript{160}

\begin{notes}
\begin{enumerate}
\item A. BICKEL, supra note 156, at 79.
\item Id. at 81.
\item Of course, Wigmore, the great antagonist of the exclusionary rule, disagreed. He and other critics of the rule relied on what has been called the "fragmentary" model of a prosecution," Schrock & Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 MINN. L. REV. 251, 255 (1974). According to this model, "[t]he court acts as a neutral conduit of the evidence, its self-imposed ignorance in effect 'laudering' whatever 'taint' might have accrued from the seizure and thereby rendering all reliable and relevant evidence homogeneous for judicial purposes. In Wigmore's words, '[t]he illegality is by no means condoned; it is merely ignored." Id. at 255-56 (quoting Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A.B.A. J. 479 (1922)). For a criticism of Wigmore's "condonation"."ignorance" distinction, see Schrock & Welsh, supra this note, at 330-34.
\item The Weeks case and the famous dissents of Brandeis and Holmes were based
\end{enumerate}
\end{notes}
Although the present Court seems to regard the exclusionary rule as simply a "remedy" (or merely one of several "alternative remedies") for dealing with the problem of illegally seized evidence, a strong case can be made for the view—and Professors Thomas Schrock and Robert Welsh have made it—that, at least as originally conceived, the "exclusionary rule" (and the Court never called it that until decades after it had been firmly established) on a different view of a court's responsibilities, what has been called the "'one-government' conception" or the "'unitary model of a government and a prosecution." Id. at 257. According to this model, by excluding illegally seized evidence "the court stops the entire government, of which it is a part, from consummating a wrongful course of conduct—a course of conduct begun but by no means ended when the police invade the defendant's privacy." Id. Professors Schrock and Welsh argue at length that unlike Justice Day, author of the Weeks opinion, who found the "unitary model" implicit in the fourth amendment, Justice Powell, author of the opinion in United States v. Calandra, 414 U.S. 338 (1974) (grand jury witness may not refuse to answer questions merely because these questions are based on illegally obtained evidence), tried to read the "fragmentary model" into the fourth amendment. Schrock & Welsh, supra this note, at 289-302.


162. According to Mertens & Wasserstrom, supra note 148, at 365 n.4, Justice Frankfurter became "the first member of the Supreme Court to use the term 'exclusionary rule'" in United States v. Johnson, 319 U.S. 503, 520 (1943). But this cannot be so. Johnson, a prosecution for attempted evasion of federal income taxes, did not even raise a search and seizure issue. Defendant argued, rather, that the expert testimony of an accountant for the government regarding his income and expenditures invaded the jury's province. Rejecting this contention, the Court, per Frankfurter, J., observed that we should "not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules." 319 U.S. at 519-20 (emphasis added).

Justice Black "was responsible for popularizing [the term 'exclusionary rule'] to describe the doctrine that evidence obtained in violation of the fourth amendment was inadmissible in a criminal prosecution." Mertens & Wasserstrom, supra note 148, at 365 n.4, and in United States v. Wallace & Tiernan Co., 336 U.S. 793, 796, 798 (1949), he called the Silverthorne rule (also known as the "fruit of the poisonous tree" doctrine), an important feature of the Weeks rule, "an extraordinary sanction" and an "exclusionary rule." In context, however, Justice Black may have been describing the Weeks rule itself. For a discussion of the Wallace case, see text accompanying notes 226-30 infra.

So far as I am able to tell, Wallace not only marks the first time any member of the Court, or at least any Justice writing for the Court, used the term "exclusionary rule" to describe the Weeks doctrine or a major feature of the doctrine, but it also seems to be the first time that the Court suggested that the exclusionary rule is based primarily, if not entirely, on a "deterrence" rationale and that it may not be a command of the fourth amendment. Yet, remarkably, Wallace seems to have disappeared from search and seizure law without a trace. See text accompanying notes 249 infra.

Justice Black's opinion for the Court in Wallace was his first statement on the exclusionary rule, but hardly his last. In the course of his opinions on the subject, "Black had taken nearly every possible position on the rule's derivation: that it was required by the fifth amendment; that it was required by the fourth and fifth
is "simply another name for judicial review." Moreover, add Schrock and Welsh, the name of the rule "is misleading if it suggests that judicial review of executive search and seizure conduct is at all different from judicial review of legislative conduct." According to this view, since the fourth amendment is superior to any executive conduct, just as the Constitution is superior to "any ordinary act of the legislature," the fourth amendment, and not the executive conduct, must govern the case to which they both apply.

*Marbury v. Madison* is a rather complicated case and admittedly a different case than *Weeks*, which established the federal exclusionary rule, but a theme that resounds throughout both opinions is the determination to take the constitution seriously, to see that "its commands, and above all its promises, are to be translated into practice."

In *Marbury*, John Marshall deemed the doctrine that "courts must close their eyes on the Constitution and see only" the act of Congress "subversive" of all written constitutions. "It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual."

In *Weeks* the government asked the courts, in effect, to close their eyes on the fourth amendment and consider only the probative value of the evidence gathered by the police. The *Weeks* Court, it appears, viewed such a contention as subversive of the amendment. It would mean, the *Weeks* Court seemed to think, that even though the police do what is expressly forbidden—an exclusionary rule is not expressly required, but an unreasonable amendments in combination; or conversely, that it was not required at all by the Constitution." Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453, 478 (1976). "At no time during his years on the Court did Black's fidelity to the guarantees in the fourth amendment match his devotion to other provisions in the Bill of Rights. ... Justice Black once told [Professor Landynski], in the course of a discussion of the fourth amendment, that he did not regard the method of catching a thief as very important, provided he got a fair trial afterwards." *Id.* at 495.

164. *Id.*
166. 5 U.S. (1 Cranch) 137 (1803).
168. "[L]aw ... is a practical subject, and the first principle of law is that its commands, and above all its promises, are to be translated into practice. ..." C. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 28 (1970).
169. 5 U.S. (1 Cranch) at 178.
170. *Id.*
search is “expressly forbidden”—the prohibited police conduct would be “in reality effectual.”

Because the statute struck down in Marbury pertained to the jurisdiction of the Court itself, it need not have come to stand for the great principle it has. It might have been read more narrowly as “a defensive use of constitutional review alone, acquiring considerable support from the concept of separated powers”\(^{171}\)—as a “safeguarding” of the Court’s original jurisdiction from congressional enlargement.\(^{172}\) Marbury, of course, may no longer be read that way, but Weeks still can.

The courts, after all, are the specific addresses of the constitutional command that “no Warrants shall issue, but upon” certain prescribed conditions.\(^{173}\) If the police act pursuant to a defective warrant or, as is much more often the case, act without any warrant at all, and the produce of their action is offered in evidence, the court that reviews the legality of the search or seizure may be said to be exercising “a defensive use of constitutional review alone.”

Because the courts are the specific addressees of the fourth amendment’s command, it seems to follow, and the Weeks Court seemed to think it followed, that when the police come before them with the produce of their lawless searches the courts shall defend judicial power against law enforcement encroachment. 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 [proof of

---

\(^{171}\) Van Alsytne, supra note 167, at 34.


\(^{173}\) “The amendment nowhere specifies that a warrant may be issued only by a judge, not by an executive official, but this fact has been assumed from the very beginning and is supported by its history.” Landynski, supra note 50, at 47. See generally 2 W. LaFave, Search and Seizure § 4.2, at 29-41 (1978).

As the Weeks Court put it, “[t]he 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 restraints as to the exercise of such power and authority. . . . [T]he duty of giving [the protection of the fourth amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.” 232 U.S. at 391-92.

\(^{176}\) See also United States District Court, 407 U.S. 297 (1972): “The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.” Id. at 317. See also Douglas, J., dissenting in Wilson v. Schnettler, 365 U.S. 381 (1961): “[T]he command of the Fourth Amendment implies continuous supervision by the judiciary over law enforcement officers, quite different from the passive role which courts play in some spheres.” Id. at 396.
guilt] to the aid of the Government." And if the government’s agents did proceed on their own “without sanction of law,” as they did in *Weeks*, then the government should not be permitted to use what their agents obtained. The government whose agents violated the Constitution should be in no better position than the government whose agents obeyed it; “[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.”

John Marshall to the contrary notwithstanding, a “judicial veto” of an act of Congress is not the inevitable consequence of our Constitution being a written one. The Constitution, it has been pointed out, does not say that when judges give a different interpretation of the Constitution than the Congress, the latter is bound to yield to the former. But a “judicial veto” of the police, it seems to me, is an inevitable consequence of the fourth amendment.

The “central objectionable feature” of both the general warrants and the writs of assistance was that “they provided no judicial check” on the discretion of the executing officials. The Bill of Rights, especially the fourth amendment, “reflects experience with police excesses.” A basic purpose of the Bill of rights, especially the fourth amendment, is “subordinating police action to legal restraints.” Critics of the courts, to be sure, have long criticized them for “policing the police.” But as Professor Anthony Amsterdam responded, in his famous Holmes lectures on search and seizure, “the fourth amendment is quintessentially a regulation of the police”—“in enforcing the fourth amendment, courts must police the police.”

I can hear the opponents of the exclusionary rule now. We are not against subordinating police action to legal restraints, they are saying, we are only against doing so when the government seeks to use the fruits of the police illegality. This also happens to be the occasion when the protagonists are in place, when the defendant has the maximum incentive to challenge the police conduct and, if

175. *Id.*
he is an indigent, as many criminal defendants are, the services of
court-appointed counsel. No, say the opponents of the exclusion-
ary rule, let us have no judicial check on the discretion of govern-
ment officials in a criminal prosecution against the victim of the
police illegality. Make the victim start a new proceeding in an-
other court—if he is willing to rouse the police and able to find a
lawyer willing to take on "a team of professional investigators and
testifiers,\textsuperscript{182} often without fee, and risk the chance of earning a
reputation as "a police-hating lawyer."\textsuperscript{183}

I can hear the opponents of the exclusionary rule again: We
don't want the courts to "close their eyes on the Constitution" per-
manently, they are saying—only long enough to convict a person
and send him to prison on the basis of evidence obtained in viola-
tion of the Constitution. Only long enough, I would say, to make
the expressly forbidden act "in reality effectual."

If I may quote John Marshall in \textit{Marbury v. Madison} another
time, and for the last time, "[t]he very essence of civil liberty," he
told us, "consists in the right of every individual to claim the pro-
tection of the laws, whenever he receives an injury."\textsuperscript{184} Presum-
ably he meant "claim[ing] the protection of the laws" at the first
practicable opportunity.

Moreover, although it cannot be denied that this way of think-
ing about the fourth amendment is out of favor today,\textsuperscript{185} when the
government tries to convict a person on the basis of an earlier vi-
olation of his fourth amendment rights, does it not seek to inflict a
\textit{second and distinct} injury? To put it somewhat differently, is not
the use of unconstitutionally seized evidence in a criminal prose-
cution against the victim of the police illegality "an exacerbation of
a constitutional injury"?\textsuperscript{186} Although I find the language of the

\textsuperscript{182} Id. at 430.
\textsuperscript{183} Id.
\textsuperscript{184} 5 U.S. (1 Cranch) at 163.
\textsuperscript{185} In United States v. Calandra, 414 U.S. 338 (1974), the Court, per Powell, J.,
rejected the argument that because the questions the grand jury asked respondent
were based on illegally obtained evidence, "they somehow constitute distinct viola-
tions of his Fourth Amendment rights." \textit{Id.} at 353-54. Responded the Court:
The wrong condemned [by the fourth amendment] is the unjustified
governmental invasion of [certain] areas of an individual's life. That
wrong, committed in this case, is fully accomplished by the original search
without probable cause. ... Questions based on illegally obtained evi-
dence are only a derivative use of the product of a past unlawful search and
seizure. They work no new Fourth Amendment wrong. Whether such de-
riverative use of illegally obtained evidence by a grand jury should be pro-
scribed presents a question, not of rights, but of remedies.
\textit{Id.} at 354.
\textsuperscript{186} See Comment, \textit{Forfeiture Seizures and the Warrant Requirement}, 48 U. Chi.
L. Rev. 960, 987 (1981) (describing, but not accepting, the argument that "unlike the
opinion more ambiguous than do Schrock and Welsh, at places the Weeks decision does seem to recognize "two violations [of the amendment], one by the marshal and one by the court, neither of which was regarded as 'more' or 'less' unconstitutional than the other." Moreover, although so far as I can tell his observation has been completely overlooked in the vast literature of the exclusionary rule, Justice Holmes observed, a dozen years after Weeks: "If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used."[188]

The view that the admission of unconstitutionally seized evidence is a distinct constitutional wrong (or a distinct infringement of the fourth amendment) also finds support in—of all places—Chief Justice Taft's opinion for the court in Olmstead. It is well known that the Olmstead Court, per Chief Justice Taft, held that (1) wiretapping fell outside the protection against unreasonable search and seizure and (2) that the wiretap evidence should not be excluded merely because federal agents violated a state statute in the course of gathering the evidence. It is less well known, however, that Chief Justice Taft did not challenge the Weeks rule or deny that it was a command of the fourth amendment. It is still less well known how Taft contrasted the use of evidence seized in violation of the fourth amendment with the use of evidence obtained "unethically." He rejected "the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured." And he insisted that "the exclusion of evidence should be confined to cases [such as Weeks] where rights under the Constitution would be vio-

188. Id. at 301 (emphasis in the original). The Weeks Court, per Justice Day, concluded that "there was involved in the [lower court's] order refusing [defendant's] application [for a return of the illegally seized letters] a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed." 232 U.S. at 398 (emphasis added). See also id. at 391-93 (neither the courts nor law enforcement officials may violate the fourth amendment in "bring[ing] the guilty to punishment").
191. "The striking outcome of the Weeks case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." Id. at 462.
192. Id. at 468 (emphasis added).
lated by admitting it."\(^{193}\)

Even if the use of the unconstitutionally seized evidence is not deemed a violation of the fourth amendment, the unreasonable search or seizure is. When should the courts address that issue? If the courts may test the legality of the police conduct some time, isn't the logical time to do so during the criminal process, "a process initiated by government for the achievement of basic governmental purposes";\(^ {194}\) "a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against?"\(^ {195}\) After all, American criminal procedure "imposes procedural regulations on the criminal process by constitutional command."\(^ {196}\) Why should the fourth amendment be an exception?

"The survival of our system of criminal justice and the values which it advances," observed the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice twenty years ago, "depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process."\(^ {197}\) It is plain that the Attorney General's Committee meant the criminal process. If fast-developing situations and other exigencies of law enforcement work preclude meaningful challenge at the earliest stages of the criminal process, why does it follow, how does it follow, that no meaningful challenge should be permitted at any stage of the criminal process? Challenging the legality of a search or seizure at some stage of the criminal process—when it is practicable to do so—means the exclusionary rule. That's all the exclusionary rule means.

In a number of recent non-criminal procedural due process cases, the Court has reminded us that "[t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions."\(^ {198}\) Although the Court has expressed a clear preference for pre-seizure hearings, it has recognized that there are "'extraordinary' situations”—"'truly unusual' situations”—that justify postponing notice and opportunity for a hearing."\(^ {199}\) “Only with

\(^{193}\) Id. (emphasis added).

\(^{194}\) REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 9 (1963). The Report is often called THE ALLEN REPORT, after the Chairman of the Committee, Professor Francis A. Allen.

\(^{195}\) Id.

\(^{196}\) Id. at 10 (emphasis added).

\(^{197}\) Id.


\(^{199}\) Fuentes, 407 U.S. 90 (emphasis added).
great reluctance,” however, “has [the] Court approved the seizure even of refrigerators or washing machines without notice and a prior adversary hearing.”

Because a search warrant and, as is much more often the case, the execution of a search or seizure without a warrant serve “a highly important governmental need” and because “the danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice,” a search or seizure by the police is plainly one of those “extraordinary situations” that “justify postponing notice and opportunity for a hearing.” But as the need for the police to act swiftly and by surprise creates the exception, “so it limits [or should limit] its duration.” Once the suspect is in custody and once the evidence has been seized, what justifies dispensing with an adversary hearing at every subsequent stage of the criminal process? Yet that would be the result if the “exclusionary rule” were to be abolished.

THE LATE ARRIVAL OF THE “DETERRENCE” RATIONALE

Why, Judge Richard Posner recently asked, was the exclusion-
ary rule ever adopted?205 "The answer," he asserted, "is consistent with economic analysis: the rule was adopted because until recently there was no alternative sanction for violations of the fourth amendment that did not cause severe underterrence."206 For Posner and other critics of the exclusionary rule, the urge to explain the origin of the rule this way is understandable. But, if I may borrow language used in a different context, "[t]here is only one trouble with this attractive theory—the lack of any evidence to support it."207

Nowhere in Weeks is the exclusionary rule called a "remedy" and nowhere in the opinion is there any discussion, or even mention, of the effectiveness of the exclusionary rule versus the effectiveness of tort remedies, internal self-discipline or other alternatives. Although few would suspect this from the arguments of the rule's opponents or from recent majority opinions of the Supreme Court, the Weeks opinion "contains no language that expressly justifies the rule by reference to a supposed deterrent effect on police officials."208

Indeed, no less formidable a critic of the exclusionary rule than Chief Justice Burger recognized, before ascending to his present post, that the Weeks case "rest[s] 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."209

Nor, so far as I have been able to tell, is the idea of deterrence expressed for the next thirty-five years—in the interim between Weeks and the year of the Wolf case.210 The Court that decided Weeks and the Courts that adhered to its doctrine in subsequent

decades may have expected, or at least hoped, that law enforce-
ment officials would not be so “impervious, uncaring or ignorant of
the search and seizure rules hammered out in our courts” as to be
unaffected by them211—no doubt the Court had the same expecta-
tions, or at least hopes, about local public school officials when it
decided Brown v. Board of Education212—but there is no sugges-
tion in Weeks or in the search and seizure cases handed down over

327, 330 (1973); Mertens & Wasserstrom, supra note 148, at 379-80. But the point is
worth recalling at a time when the “deterrence rationale” dominates the scene.

The commentators who have stressed the late arrival of the “deterrence” ra-
tionale, and properly so, seem to have overlooked United States v. Wallace & Tier-
nan Co., discussed in the text accompanying notes 242-48 infra. This is
understandable, because ever since it was decided every member of the Court
seems to have forgotten Wallace, including Justice Black, who wrote the opinion of
the Court in that case. See text accompanying notes 242, 248 infra. But Wallace,
handed down less than two months before Wolf was decided, appears to be the first
time the Court injected the instrumental rationale of deterrence into its discussion
of the exclusionary rule. Even so, this does not detract from the basic point that the
“deterrence” rationale is of relatively recent vintage.

Elkins v. United States, 364 U.S. 206 (1960) (overturning the “silver platter” doc-
trine), has been called “the first case to be decided explicitly on the deterrence
rationale,” Mertens & Wasserstrom, supra note 148, at 381, but deterrence was only
one of several rationales discussed in that case. See Cann & Egbert, supra this
note, at 304-05. The Elkins Court did observe that the exclusionary rule “is calcu-
lated to prevent, not to repair” and that “its purpose is to deter,” 364 U.S. at 217, but
it did so in specific response to the rule’s great critics, Cardozo and Wigmore, that
excluding illegally obtained evidence lets both the aggrieved defendant and the of-
fending officer “go free.” See id. at 216-17. The Elkins Court went on to call atten-
tion to “the imperative of judicial integrity.” Id. at 222. It recalled that the Court
had applied this principle in McNabb v. United States, 318 U.S. 332, 345 (1943),
where it had held that a conviction based on violations of federal law could not
stand “without making the courts themselves accomplices in willful disobedience
of law.” See Elkins at 223. Added the Elkins Court: “Even less should the federal
courts be accomplices in the willful disobedience of a Constitution they are sworn
to uphold.” Id. In any event, Elkins was not a “Fourth Amendment decision,” but
an invocation of “the Court’s supervisory power over the administration of criminal
justice in the federal courts.” Id. at 216.

211. Cf. Letter from Judge Herbert Stern to Senator Charles McC. Mathias, May
12, 1982:
I have spent my entire career working within the criminal justice sys-
... There is no doubt in my mind that the exclusionary rule does in
fact deter law enforcement misconduct at every level. It is simply incredi-
ble to suggest that the police, the FBI, the District Attorney and the United
States Attorney are impervious, uncaring or ignorant of the search and
seizure rules hammered out in our courts. It is, I think, a slander to suggest
that our law enforcement authorities are either so stupid or uncaring that
they are unaffected or—if you will—undeterred by what the courts say they
must do, and what they must not do.

Reprinted in Exclusionary Rule Hearings, supra note 112, at 806-08.

212. 347 U.S. 483 (1954). But ten years after Brown, precious little school deseg-
regation had been accomplished. By the 1963-1964 school year, “the eleven states of
the old Confederacy had a mere 1.17 per cent of their black students attending
schools with white students.” Carter, The Warren Court and Desegregation, 67
gation Cases in Retrospect, in THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN
the next thirty-five years that the exclusionary rule's survival depends on proof that it is significantly influencing police behavior.

The fourth amendment is not as specific and detailed as many would like, but that does not make the fundamental public values it embodies "any less real, nor any less important."213 The Weeks Court did not engage in "economic analysis." It did what courts are supposed to do—give meaning to constitutional values.214 "Interpretation is a process of generating meaning and one important (and very common) way of both understanding and expressing the meaning of a text is to render it specific and concrete."215

As the Weeks Court saw it, if a court could not "sanction" a search or seizure before the event (because, for example, the police lacked adequate grounds to make the search) then a court could not, or at least should not—by admitting the evidence gathered by the lawless police—"affirm" or "sanction" the search or seizure after the event.216 As the Weeks Court saw it, one might say the "cost-benefit analysis" had already been worked out when the fourth amendment was written—the amendment embodies the conclusion that the "benefits" of privacy, liberty and personal freedom and security outweigh the "costs" incurred when the government is unable to bring the guilty to punishment either (a) because its agents lack sufficient cause to seek evidence of crime and therefore never make the search or seizure that might have produced the evidence217 or (b) because the government cannot use the evidence its agents obtained when, lacking the requisite grounds, they carried out a search or seizure they never should have made: "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."218


214. See id.
216. See 232 U.S. at 392-94.
217. As Cooley said of the fourth amendment 115 years ago, "it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity." T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 306 (1st ed. 1868). Why is this view any less valid when the citizen's premises have been invaded or his constitutional rights otherwise violated?
218. 232 U.S. at 393.
THE EXCLUSIONARY RULE

In the thirty-five years following _Weeks_ the Court had little to say about the rationale of the exclusionary rule and absolutely nothing to say about the relative merits of the exclusionary rule and alternative methods of enforcing the fourth amendment. Often the Court remarked only that the evidence had to be excluded because it was obtained by violating rights secured to the defendant under the fourth and/or fifth amendments or because the use of the evidence would violate one or the other or both of these amendments.219 Sometimes the Court simply declared that a conviction based on evidence acquired by a violation of the fourth amendment "cannot stand"220 or that the use of such evi-


A proponent of the exclusionary rule might say of the _Boyd_ case's merger of the fourth and fifth amendments, however, that "it was less than a harmless error" for it was part of the process through which the Fourth Amendment, by means of the exclusionary rule, has become more than a dead letter in the federal courts. Certainly this putative relationship between the guarantees is not to be used as a basis for a stunting construction of either—it was the _Boyd_ case itself which set what might have been hoped to be the spirit of later construction of these Amendments by declaring that the start of abuse can 'only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.' 116 U.S. 635.


220. United States v. Di Re, 332 U.S. 581, 595 (1948). _See also_ McNabb v. United States, 318 U.S. 332 (1943). Although the Court, per Frankfurter, J., excluded the incriminating statements "quite apart from the Constitution," _id._ at 341, it agreed "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


dence in a criminal prosecution cannot be "tolerated under our constitutional system."221

In one case, the Court stated that the use of evidence obtained in violation of the fourth amendment was banned because "otherwise the policy and purpose of the amendment might be thwarted."222 The dissenters in the same case opined that as a result of Weeks and its progeny "this Court has refused to make itself a participant in lawless conduct by sanctioning the use in open court of evidence illegally secured."223 In another case the Court characterized the exclusionary rule as "a sanction against"224—and a concurring opinion viewed it as a "condemnation of"225—the flouting of the protection against unreasonable search and seizure.

Three years before Wolf, the Court summarized the Weeks doctrine as follows: "As explained in Silverthorne Lumber Co. v. United States,226 the evidence [obtained as a result of an unconstitutional search and seizure] is suppressed on the theory that the government may not profit from its own wrongdoing."227 Silverthorne, the genesis of the "fruit of the poisonous tree doctrine," as it came to be called,228 is one of the Court's very few post-Weeks, pre-1949 search and seizure cases to illuminate the thinking behind the exclusionary rule at any length. Speaking for seven members of the Court (including Brandeis, who had joined the Court since Weeks, and Day, author of the Weeks opinion), Justice Holmes observed:

The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, . . . [it] may use the knowledge that it has gained [from the unconstitutional seizure]; that the protection of the Constitution covers the physical possession but not any advantages that the Gov-

223. Id. at 128 (Murphy, J., joined by Stone, C.J., and Frankfurter, J., dissenting).
225. Id. at 457, 461 (Jackson, J., concurring). Justice Frankfurter joined in both the Court's opinion and Justice Jackson's concurring opinion.
226. 251 U.S. 385 (1920).
228. Nardone v. United States, 308 U.S. 338, 341 (1939), a wiretapping case which relied heavily on Silverthorne, first used the phrase "fruit of the poisonous tree."
ernment can gain over the object of its pursuit by doing the forbidden act . . . . [Such a contention] reduces the Fourth Amendment to a form of words.229

In Silverthorne, the Court, per Justice Holmes, also invoked what I think Holmes would call the “plain meaning” of the fourth amendment:

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 before the Court but that it shall not be used at all. . . . If knowledge of [the unconstitutionally obtained facts] 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.230

Some years later, speaking for the Court in the famous Olmstead case,231 Chief Justice Taft recognized that the meaning of the Weeks-Silverthorne doctrine—if not the fourth amendment itself—was plain. “The fourth amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment.”232 Taft did not challenge the fourth amendment exclusionary rule, he confined it. Rejecting the argument that “unethically,” as well as unconstitutionally, secured evidence should be barred,233 he concluded that “the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.”234

The Holmes-Brandeis dissents in Olmstead are more memorable than Taft's opinion for the Court. Although often invoked by proponents of the fourth amendment exclusionary rule, the most famous passages in the Holmes-Brandeis dissents, however, were actually arguments for extending the Weeks-Silverthorne doctrine to situations where the federal government had not violated the Constitution, or even federal law, but only a state anti-wiretapping statute. Holmes thought, “as Mr. Justice Brandeis says, that apart from the Constituting the Government ought not to use evidence obtained and only obtainable by a criminal act.”235 “[T]he reason for excluding evidence obtained by violating the Constitution,”

229. 251 U.S. at 391-92.
230. Id. at 392.
232. 277 U.S. at 462.
233. See id. at 468.
234. Id. at 468 (emphasis added).
235. Id. at 469-70. See also id. at 479 (Brandeis, J., dissenting).
maintained Holmes, "seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law." 236

Nevertheless, these famous dissents shed light on the original bases and purposes of the exclusionary rule. For they are essentially embellished restatements of the Weeks-Silverthorne reasoning. Thus by maintaining that it is "a less evil that some criminals should escape than that the Government should play an ignoble part," 237 that "the existing code . . . does not permit the judge to allow such inequities to succeed," 238 that the Court should not "ratify" or "sanction" the lawless conduct of the executive 239 and that the Court's aid should be denied "in order to maintain respect for law [and] to preserve the judicial process from contamination," 240 and by warning that "[t]o declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution," 241 the Holmes-Brandeis dissents underscore that the exclusionary rule is based on principle—one might also say that it has an important symbolic quality—not on estimates of how substantially the exclusion of evidence affects police behavior.

One pre-Wolf case remains to be considered—United States v. Wallace & Tiernan Co. 242 So far as I have been able to tell, this all-but-forgotten case, decided less than two months before Wolf, marks the first time the Court indicated that the exclusionary rule is based on a "deterrence" rationale and the first time it suggested that the rule may not be a command of the fourth amendment. It is plain, however, that the Wallace Court was speaking primarily of the "Silverthorne exclusionary rule"—the "fruit of the poisonous tree" doctrine—not the Weeks rule. 243

In Wallace, the district court, relying heavily on Silverthorne, had prohibited the use of documentary evidence obtained pursuant to subpoenas issued by an illegally constituted grand jury, viewing the subpoenas as the equivalent of "unreasonable

236. Id. at 471.
237. Id. at 470 (Holmes J., dissenting).
238. Id.
239. Id. at 483 (Brandeis J., dissenting).
240. Id. at 484.
241. Id. at 485.
243. Twice the Wallace Court refers to "the Silverthorne exclusionary rule," id. at 798, and twice it refers to "the Silverthorne rule." On the other hand, the Court never refers to "the Weeks exclusionary rule," the "Weeks rule," or for that matter, the exclusionary rule. Silverthorne is discussed or quoted at considerable length; Weeks is only cited.
searches and seizures." A unanimous Court, per Justice Black, (in his first opinion on the subject of the exclusionary rule) "decline[d] to extend the Silverthorne rule to such an extent:"[244]

The rule announced [in Silverthorne] was that evidence or knowledge 'gained by the Government's own wrong' is not merely forbidden to be 'used before the Court but that it shall not be used at all.' Other cases in this Court have applied the same rule [citing numerous search and seizure cases, including Weeks]. It is an extraordinary sanction, judicially imposed, to limit searches and seizures to those conducted in strict compliance with the commands of the Fourth Amendment. . . .[245] The effect of the District Court's holding here was to add to [the] requirement for dismissal of the indictment a further extraordinary sanction devised by this Court to prevent violations of the Fourth Amendment. For here there was no official culpability in issuance or service of the subpoena duces tecum. . . .[246]

. . . The Fourth Amendment, important as it is in our society, does not call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard as they have here. We hold that dismissal of the grand jury because no women were on it is no sufficient reason for holding that the Government is barred from making use of the summoned documents.[247]

Surprisingly, the Wallace case has never been heard from again. Neither its author, Justice Black, nor any of his colleagues ever cited the case in any of the opinions in Wolf or in Mapp. Nor has Wallace once been cited, let alone quoted, in any search and seizure case decided by the Burger Court. Perhaps because it dealt with the "Silverthorne rule" rather than the "Weeks rule" or because, when all is said and done, it is not really a "search and seizure case" at all,[248] Wallace seems to have vanished without a trace.

244. 336 U.S. at 800.
245. Id. at 796 (emphasis added).
246. Id. at 798 (emphasis added).
247. Id. at 800 (emphasis added).
248. See id. at 798, 799:

The sole ultimate reason for the District Court's application of the Silverthorne rule was that no women were on the grand jury, a circumstance that bears only a remote if not wholly theoretical relationship to search and seizure. . . . There is no claim that the subpoena was obtained or served in an improper manner or that any Government officer committed a wrong in the way the documents were handled or returned. . . . That there were no women on the grand jury did not contribute to any invasion of appellee's privacy.
Not so a decision handed down the following month, *Wolf v. Colorado*. Indeed, by implicitly assuming—without citing any authority, without attempting to reconcile the language to the contrary in *Weeks, Silverthorne* and other cases—that the exclusionary rule is based exclusively on a "deterrence" rationale, and that "other methods, . . . if consistently enforced, would be equally effective," 249 *Wolf* significantly changed our way of thinking about the rule—and probably for all time.

THE SEDUCTIVE QUALITY OF THE *WOLF* OPINION

Although today it is settled that the Court does 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, 250 at the time of *Wolf* it was unclear whether or not the case stood for the proposition that every "unreasonable search or seizure" within the meaning of the fourth amendment also constituted a violation of fourteenth amendment due process. 251 Although even before *Elkins* 252 and *Mapp I* argued at considerable length to the contrary, 253 the *Wolf* case could conceivably have stood, or have come to stand, for the more limited proposition that only certain "gross" or "aggravated" or "outrageous" unreasonable searches or seizures offend due process.

In any event, all members of the *Wolf* court seemed (a) to agree that many an unreasonable search or seizure by state police ran counter to the guaranty of the fourteenth amendment and (b) to assume that the warrantless search of Dr. Wolf's office fell into this category. (If not, if the *Wolf* Court had not believed, or assumed, that the Colorado police had violated the petitioner's "basic right to protection against arbitrary intrusion by the police," 254 a right "implicit in 'the concept of ordered liberty'" and as

249. See note 274 infra.
251. A decade later, Justice Frankfurter maintained that *Wolf* did not mean that every search or seizure violative of the fourth amendment, if committed by federal officials, offended the fourteenth amendment, if carried out by state officials. See *Elkins v. United States*, 364 U.S. 206, 233, 237-40 (1960) (Frankfurter, J., joined by Clark, Harlan and Whittaker, JJ., dissenting). But a majority of the Court did read *Wolf* as equating the substantive scope of the two amendments. See Justice Stewart's opinion for the Court, id. at 212-15.
252. See note 251 supra.
253. See Kamisar, supra note 219, at 1101-08.
such enforceable against the States," why would the Court have reached the hard-fought issue of whether "the basic right . . . demands the exclusion of logically relevant evidence" when it is violated?) Thus, the crucial issue in Wolf was whether, as a matter of federal constitutional law, the Court should require the state courts to exclude evidence obtained in violation of federal constitutional law. That issue could have been framed in various ways. It might, for example, have been put as follows:

The question presented is whether "a decent regard for the duties of courts as agencies of justice and custodians of liberty" forbids that defendants should be convicted on the basis of evidence obtained in violation of rights deemed fundamental by the Constitution. Or—

The question for consideration is whether a state conviction resting on evidence secured in violation of a right so important as to be deemed "basic to a free society" and "implicit in 'the concept of ordered liberty'" may be allowed to stand without making the courts themselves "accomplices" in diso-

255. Id. at 27.
256. Id. at 28.
257. No facts about the search are given, let alone discussed, in Wolf. None of the five opinions indicates who Wolf was (a practicing physician) or the crime of which he was convicted (conspiracy to commit abortion) or what evidence was seized (appointment books from his office). As Justice Jackson later pointed out in Irvine v. California, 347 U.S. 128 (1954), "[t]he opinions in Wolf were written entirely in the abstract. . . ." Id. at 13.

This is one of the factors that led me to conclude that Wolf (which, so far as I can tell, involved not an "offensive" or "aggravated" illegal search, but a "routine" one) did stand for the proposition that every search that would have violated the fourth amendment if made by federal officers offended the fourteenth amendment when made by state officers. Otherwise, whether a state search violated due process would turn on the particular facts of the search. Otherwise, the first order of business in Wolf would have been to decide whether the illegal search by the Colorado police constituted the kind of illegal search that violates due process. See Kamisar, supra note 219, at 1101-02.
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.

Id. at 347 (Frankfurter, J., for the Court).

It will not do to dismiss McNabb as merely an instance of the Court's exercise of its supervisory power over federal criminal justice. If a court which allows the use of evidence obtained in violation of a federal statute becomes an "instrument" of such illegal law enforcement, how can it be less so when a court allows the use of evidence obtained in violation of due process? If a court's duty as an "agency of justice" or a "custodian of liberty" forbids that persons should be convicted upon evidence secured in violation of a law, how can it be less so when the evidence has been secured in violation of the Constitution?
The State of Colorado has exceeded the bounds of due process in the administration of its criminal laws. The question we must answer is whether the government whose agents have violated the Constitution may avail itself of the knowledge gained by the forbidden act or whether it should stand in no better position than the government whose agents have obeyed the Constitution.

In three other cases decided today we have reversed state convictions based on "involuntary" confessions without disputing the assertion that "[c]hecked with external evidence, [the confessions in each case] are inherently believable, [and] not shaken as to truth by anything that occurred at the trial." In these cases we have "appl[ied] the Due Process Clause to its historic function of assuring appropriate procedure before liberty or life is taken" without regard to how

---

259. Cf. McNabb, 318 U.S. at 345:

Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. 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.

260. Cf. Elkins v. United States, 364 U.S. 206, 223 (1960). If permitting the use of evidence obtained in disregard of a statute would "stultify the policy" underlying the statute, 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" embodied in the Constitution?

See also the observation in Goldstein v. United States, 316 U.S. 114 (1942), that as a result of the fourth amendment exclusionary rule "this Court has refused to make itself a participant in lawless conduct by sanctioning the use in open court of evidence illegally secured." Id. at 128 (Murphy, J., joined by Stone, C.J., and Frankfurter, J., dissenting.


262. Jackson, J., concurring in the result in Watts and dissenting in the companion cases, 338 U.S. at 58. See also id. at 60: "In these cases before us, the verification is sufficient to leave me in no doubt that the admissions of guilt were genuine and truthful." Id.

263. Id. at 55. The confessions in Watts and in many other state cases reviewed by the Supreme Court over the next twenty-five years were held to be inadmissible not because state police violated the privilege against compelled self-incrimination, but because their interrogation practices offended what might be called "straight
"relevant and credible" the evidence produced by impermissible methods might be. The question presented is whether we should regard the coerced confession cases as "sports in our constitutional law" or "only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct." Or—

As a long line of confession cases demonstrates, the demands of federalism have not been deemed sufficient to deny this Court the power to review the interrogation methods of state police officers. And when, in such cases, "the practices
due process" or the basic requirement of "fundamental fairness." The privilege was not deemed applicable to the states until Malloy v. Hogan, 378 U.S. 1 (1964). Moreover, even if the privilege had applied to the states much earlier, the law pertaining to "coerced" or "involuntary" confessions probably would have developed without it. For until Miranda v. Arizona, 384 U.S. 436 (1966), the prevailing view was that the privilege did not extend to the police station. See Y. Kamisar, A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test, in Police Interrogation and Confessions: Essays in Law and Policy 41, 46, 59-64 (1980), Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 668-69, 674 (1966).


It has long since ceased to be true that due process of law is heedless 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.

Id. at 172-73 (Frankfurter, J.).

265. Cf. Id. at 173: "[The confession decisions] are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct." Id. Continued Frankfurter:

To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency.

Id.

Do not searches which violate "[t]he security of one's privacy against arbitrary intrusion by the police," Wolf, 338 U.S. at 27, also violate "fair play and decency"? How can police conduct which violates a right "implicit 'in the concept of ordered liberty'" do anything less?


In both [the coerced confession and unreasonable search and seizure] situations the perils [to an 'accusatorial system of justice'] arise primarily out of the procedures employed to acquire the evidence rather than from dangers of the incompetency of the evidence so acquired. Furthermore, if the demands of federalism are not such as deny to the Court power to supervise the interrogatory practices of state police officers in the interest of procedures most likely to preserve the integrity of basic individual immunities, such supervision of police practices in the interest of preserving basic rights of privacy seems likewise justifiable.
of the prosecution, including the police as one of its agencies," have fallen "below the Plimsoll line of 'due process,'"267 we have not hesitated to set aside a state court's judgment of conviction. The question confronting us is whether the demands of federalism require this Court to stay its hand in a case before us when state police practices have dipped below "the Plimsoll line" not because of impermissible interrogation methods but as the result of a search or seizure that violates a right we have ranked as fundamental. Can this Court play a passive role with respect to unreasonable searches or seizures without relegating "the very essence of constitutional liberty"268—a protection "second to none in the Bill of Rights"269—to a deferred position?270 Or—

The State of Colorado has urged us, in effect, to treat separately—for purposes of fourteenth amendment due process—the problem of coerced confessions and the problem of unrea-

---

I cannot escape the conclusion [that] in combination [the circumstances surrounding the obtaining of this confession] bring the result below the Plimsoll line of 'due process.' A state court's judgment of conviction must not be set aside by this Court where the practices of the prosecution, including the police as one of its agencies, do not offend what may fairly be deemed the civilized standards of the Anglo-American world. This record reveals a course of conduct that . . . clearly falls below those standards.

268. See the oft-quoted statement in Gouled v. United States, 255 U.S. 298 (1921) that the protection against unreasonable search and seizure and the privilege against compulsory self-incrimination "are to be regarded as of the very essence of constitutional liberty." Id. at 304.

269. Justice Frankfurter made plain that he would assign the fourth amendment a place "second to none" when, two years before Wolf, he pointed out that "[a] decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment to the war against crime." Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., joined by Murphy and Rutledge, JJ., dissenting). In his Harris dissent, Justice Frankfurter also called the protection afforded by the fourth amendment "an indispensable need for a democratic society," id. at 161, and "[the] provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights," id. at 163.

270. Cf. Jackson, J., dissenting in Brinegar v. United States, 338 U.S. 160 (1949) (a case decided the same day as Wolf): "We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds. Indications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights to be relegated to a deferred position." Id. at 180.

Justice Jackson was not troubled by the inconsistency between the Wolf rule and the Weeks rule (both of which he supported), "for local excesses or invasions of liberty are more amenable to political correction, the Amendment was directed only against the new and centralized government [didn't Wolf, in effect, hold to the contrary?], and any really dangerous threat to the general liberties of the people can only come from this source." Id. at 181.
sonable searches or seizures. But the question is whether we may do so without establishing an indefensible double standard in defining the requirements of due process as they relate to state criminal proceedings.\(^\text{271}\)

It might be objected that these formulations of the question are so appealing, from the defendant’s vantage point, that they leave little doubt of the answer. But none of these formulations are the product of an inventive imagination. Indeed most are based closely on how the author of the \textit{Wolf} opinion, Justice Frankfurter (usually writing for the Court, sometimes filing a separate opinion), has on other occasions viewed the question of admitting unconstitutionally or illegally obtained evidence. And if the foregoing questions effectively impel the reader to want to answer them as the writer wished him to, that is no less true of the questions actually asked in \textit{Wolf}.\(^\text{272}\)

In the \textit{Wolf} case, the Court, speaking through Justice Frankfurter—who “often adjured as to attend well to the question: ‘On the question you ask depends the answer you get’”\(^\text{272}\)—posed very different questions than those I have suggested might (and should) have been asked. The questions Frankfurter asked in effect were:

\begin{quote}
Can we “regard it as a departure from basic standards to remand such persons [those convicted on the basis of unconstitutional searches or seizures], together with those who emerge scatheless from a search, to the remedies of private actions and such protection as the internal discipline of the police, under the eyes of an alert opinion, may afford”?\(^\text{273}\)

Is it for this Court “to condemn as falling below the minimal standards assured by the Due Process Clause a State’s reliance upon other methods [than the exclusion of evidence] which, if consistently enforced, would be equally effective”?\(^\text{274}\)
\end{quote}

\(^{271}\) Cf. Allen, \textit{supra} note 266, at 29: “[T]he consequence of the decision of the Court in the \textit{Wolf} case is rigidly to separate the two problems [searches and confessions] and to create a dubious double standard in the definition of the requirements of due process as they relate to state criminal proceedings.”

\(^{272}\) H. \textsc{Friendly}, \textit{Mr. Justice Frankfurter}, in \textit{BENCHMARKS} 318, 319 (1967). \textit{See also} Frankfurter, J., joined by Jackson, J., dissenting in United States v. Rabino-witz, 339 U.S. 56 (1950): “It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in.” \textit{Id.} at 69.

\(^{273}\) Cf. \textit{Wolf}, 338 U.S. at 31: “We cannot . . . regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, 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.” \textit{Id.}

\(^{274}\) \textit{Id.}.

Granting that in practice the exclusion of evidence may be an effective way
Can we "brush aside the experience of States which deem the incidence of [unreasonable search and seizure] too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence"?

Why assume that the states that permitted the use of illegally seized evidence did so because the incidence of illegality was too slight? According to the best available evidence, the incidence was widespread and surely at least as plausible an assumption as the one made in Wolf is that the States which admitted illegally obtained evidence did so because the incidence of illegality was too great.

Why did the Wolf Court place so much reliance on "other methods" of enforcing the protection against unreasonable search and seizure? Neither in the three confession cases decided the same day as Wolf nor in any other confession case did the Court consider it constitutionally relevant that the states whose police had obtained (and whose courts had allowed into evidence) "involuntary" but independently corroborated and hence trustworthy confessions had not left the guaranty against unconstitutional interrogation practices without other means of protection.

Various state statutes, for example, made it a crime to deny a lawyer the opportunity to meet with an arrestee or to prevent an arrestee from consulting with counsel or to fail to notify a suspect's relatives that he had been arrested. Other state laws penalized police who attempted to obtain confessions by violence, threats of violence or other impermissible means. And, of course, false imprisonment and assault are torts.

The exclusion of evidence, to be sure, "is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found." But it is no less true

275. Id. at 31-32: "We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence."


277. See notes 261, 262 and accompanying text supra.

278. For a sampling of these state statutes see Justice Frankfurter's plurality opinion in Culombe v. Connecticut, 367 U.S. 568, 586-87 n.29 (1961).

279. See id. at 586 n.28.

280. Wolf, 338 U.S. at 31 (emphasis added).
that the prohibition against the use of "involuntary" confessions directly serves only to protect the victim of police lawlessness who actually confesses. That most victims of impermissible interrogation practices never do confess (or never make a confession that leads to a prosecution) is underscored by the most careful study ever made of "arrests for investigation."281

Suppose five suspects are “brought in for questioning.” Suppose further that after each is held incommunicado overnight and subjected to a long stretch of intensive questioning, two of the suspects confess, but only one confession “checks out.” Why not admit the verifiable confession and remand the defendant—together with those who were mistreated but never confessed and the one who confessed but was released when his confession did not “check out”—“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”?

That illegal searches or seizures are typically less offensive and less dangerous than impermissible interrogation practices, at least the practices of the 1940s and 1950s, might have been a valid reason for concluding that the protection against unreasonable search and seizure is not so “basic to a free society” as to be enforceable against the states, but it is a strange reason for relying on tort actions, criminal prosecutions and internal police discipline for enforcement of this right even though it is deemed “implicit in the ‘concept of ordered liberty.’” It is precisely because (unlike more brutal or more brazen police misconduct) unreasonable searches or seizures rarely attract media attention or arouse the community—"[n]o other constitutional guarantee is so openly flouted with so little public outcry”282—that courts should not rely on “other methods” of enforcement when the search and seizure guarantee is flouted.

281. Surely there are worse police departments than those who protect the nation’s capital. But twenty years ago, a special District of Columbia committee of three distinguished lawyers, after a sixteen-month study of the problem, reported that about seventeen out of every eighteen persons “arrested for investigation” were ultimately released without charge. See District of Columbia Commissioners’ Committee on Police Arrests for Investigation, Report and Recommendations 34 (1962). (The Report is often called The Horsky Report, after the Chairman of the Committee, Charles A. Horsky). Almost always the “investigation” proceeded without benefit of counsel to the arrestee and without knowledge on the part of anyone that the suspect had been taken into custody. Id. at 40. Generally, the longer a person was held, the less likely he was to be charged. Thus, of the 1,356 persons held for eight hours or more in 1960, only sixteen, or one-and-one fifth percent were charged; of the 690 held for more than twelve hours that year, only seven—a shade under one percent—were charged. See id. at 39.

Why, three years after Wolf was handed down, did the Court bar the obviously trustworthy evidence produced by the "stomach pumping" in Rochin? Had the state court that sustained the admissibility of the morphine capsules (obtained by forcing an emetic solution into Rochin's stomach) left the constitutional guarantee against such police misconduct without other means of protection? Certainly not. It had specifically noted that those involved in the "stomach pumping" incident "were guilty of unlawfully breaking into and entering defendant's room [and] of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital." Moreover, the state court had left little doubt that discipline of the lawless deputy sheriff and physician by their respective professions seemed appropriate.

Why, then, did the Rochin Court, per Justice Frankfurter, reverse the conviction without any discussion of alternative methods of enforcement? Why, then, did violation of the constitutional right in Rochin, but not in Wolf, "demand the exclusion of logically relevant evidence"? Why would admitting the evidence in Rochin (but not in Wolf) "sanction" the police misconduct that produced it and afford that misconduct "the cloak of law"?

---

285. Id.
286. Cf. Wolf, 338 U.S. at 28: "[T]he immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded."

The inconsistency between Wolf and Rochin is discussed in Allen, Due Process and State Criminal Procedures: Another Look, 48 Nw. U.L. Rev. 16, 26-27 (1953) and, less kindly, in Kamisar, supra note 219, at 1121-24. More recently, Professor Richard Danzig has pointed out that in first amendment cases, as well as in the criminal procedure area, Justice Frankfurter "produced contradictory opinions . . . by a technique that might be called 'differential focussing'"—directing attention to different questions in each case. Danzig, How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion, 1977 Sup. Ct. Rev. 257, 258. According to Danzig, "[t]he tendency to ask a question about remedies in some cases and about rights in others is so frequently exhibited in Justice Frankfurter's opinions that differential focussing might fairly be said to be a process central to the functioning of his jurisprudence." Id. at 259.

287. See Rochin, 342 U.S. at 173: "[C]oerced confessions] are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct . . . would be to afford brutality the cloak of law."

Dissenting in Irvine v. California, 347 U.S. 128, 142, 148 (1954), Justice Frankfurter did explicitly discuss "other methods" of enforcing a basic right, but quickly dismissed them. In Irvine the police made several illegal entries into the petitioner's home to install a secret microphone, in order to listen to the conversations of the occupants—for more than a month. In upholding a conviction based on the fruits of this police misconduct, the Court, per Jackson, J., observed that "admission
Of course, Rochin's conviction had, as the Court put it, "been obtained by methods that offend the Due Process Clause." But so had Wolf's (or at least so the Wolf Court had assumed). Of course, Rochin's conviction had been "brought about by methods that offend 'a sense of justice,'" but was that any less true of Wolf's? Don't all police methods that violate due process "offend a sense of justice"?

The police conduct in Rochin may have been worse, but the police conduct in Wolf had also violated a right "basic to our free society," a right "implicit in 'the concept of ordered liberty.'" Isn't that bad enough? Isn't that the worst that a court can say, or should have to say, about police methods?

The unconstitutional police conduct in Wolf may strike many as "mild" when compared to the outrageous facts in Rochin, but if I may repeat what I asked some twenty years ago:

Can there really be such a thing as a 'bare' or 'mild' violation of due process? How do you mildly violate what is 'implicit in the concept of ordered liberty' even 'for the lowliest and the most outcast'?  

"The function of an advocate," Justice Frankfurter once observed, "is to seduce, to seize the mind for a predetermined end, not to explore paths to truths." Frankfurter was an outstanding scholar, but he could also be a skillful advocate. And none knew better than he how powerful a form of advocacy the articulation of the "questions presented" could be. By framing the issues and shaping the analysis the way he did in Wolf Frankfurter, I think, seduced many of us.

of the evidence does not exonerate the officers and their aides if they have violated defendant's constitutional rights. It was pointed out in Wolf that other remedies are available for official lawlessness. . ." Id. at 137. Dissenting Justice Frankfurter retorted:

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, '[the conviction] has been obtained by methods that offend the Due Process Clause . . .,' it is no answer to say that the offending policeman and prosecutors who utilize outrageous methods should be punished for their misconduct."

Id. at 148 (emphasis added).

288. 342 U.S. at 174.
289. Id. at 173.
292. See generally Danzig, supra note 286.
By "driving a wedge between [the protection against unreasonable search and seizure] and the exclusionary rule," inject[ing] the instrumental rationale of deterrence of police misconduct into [the Court's] discussion of the exclusionary rule," and "using the empirically-based, consequentialist rationale of deterrence as support for [the Court's] refusal to apply the exclusionary rule to the states," the Wolf opinion not only made the result reached in that case seem more palatable, but it planted the seeds of destruction for the exclusionary rule—in federal as well as state cases.

---

293. Mertens & Wasserstrom, supra note 148, at 380.
294. Id. at 379.
295. Id.
296. Although the Wolf Court said, 338 U.S. at 28, "that it 'stoutly adhere[d]' to the exclusionary rule in Weeks, it never adequately explained why, if the rule was unnecessary for the enforcement of fourth amendment rights in state courts, it was indispensable in federal courts." Mertens & Wasserstrom, supra note 148, at 380. In a federal search and seizure case decided the same day as Wolf, Brinegar v. United States, 338 U.S. 160 (1949), dissenting Justice Jackson, joined by Frankfurter and Murphy, JJ., did attempt to reconcile Wolf with Weeks: "[L]ocal excesses or invasions of liberty are more amenable to political correction, the [Fourth] Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source." Id. at 181. But Wolf had held that the protection against unreasonable search and seizure, although not the exclusionary rule, was directed against the states as well as the "centralized government," and the view that "local" violations of the search and seizure guarantee "are more amenable to political correction" had little, if any, empirical support. See Kamisar, supra note 219, at 1094-1100.

Moreover, although the Wolf Court told us that it "stoutly adhere[d]" to the federal exclusionary rule, it could not resist taking a sideswipe at the rule: [T]hough we have interpreted the Fourth Amendment to forbid the admission of [evidence obtained by unreasonable searches or seizures], a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own.

338 U.S. at 33.

Concurring in Wolf, Justice Black agreed "with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." 338 U.S. at 39-40. The implication of the Court's opinion, however, is anything but plain. Less than a year later, dissenting in United States v. Rabinowitz, 339 U.S. 56 (1950), Justice Black seemed to recognize that pre-Wolf federal search and seizure cases had been "decided on the unarticulated premise that the Fourth Amendment of itself barred the use of evidence obtained by what the Court considered an 'unreasonable' search," id. at 66, but maintained that, in light of Wolf, the exclusionary rule should no longer be regarded as "a constitutional command, but rather an evidentiary policy adopted by this Court in the exercise of its supervisory powers over federal courts. Cf. McNabb v. United States, 318 U.S. 332 [1943]." Id. at 67.

As Justice Black indicated, "[w]hat is now called the supervisory power is generally regarded as having had its origin [in the McNabb case], where it was envisioned as comprehending oversight of the administration of criminal justice in the
At the time of Wolf many commentators had already called attention to the woeful inadequacy of tort remedies, criminal prosecutions and internal police discipline as checks on police misconduct. But this may only have contributed to the seduc-

The McNabb rule came within one vote of being toppled in Upshaw v. United States, 335 U.S. 410 (1948). The four Upshaw dissenters (Reed, J., joined by Vinson, C.J., and Jackson and Burton, JJ.,) again contrasted the McNabb rule with the Weeks rule (and the "coerced" confession doctrine):

[Exclusion of confessions obtained in violation of the commitment statute] is now made analogous to the exclusion of evidence obtained in violation of the Bill of Rights through unreasonable search and seizure or through compulsion or by denial of due process.

... When [evidence] is the direct result of an unconstitutional act such as a violation of the Fourth Amendment, this Court has said, in federal cases, that to permit its use would impair the protection of this major guaranty of a free country. When, as in the McNabb case, there are confessions after failure to observe statutory directions not shown to have coerced the confessions the rule as to evidence extracted in defiance of the Constitution does not apply.

Id. at 424-26.

There is not the slightest suggestion in McNabb or Upshaw (decided only a year before Wolf), or in Weeks or Silverthorne or their pre-1949 progeny, that the search and seizure exclusionary rule is merely "an evidentiary policy adopted by this Court in the exercise of its supervisory powers" (Black, J., dissenting in Rabinowitz, 339 U.S. at 677). Nor is there any suggestion in any of these cases that the Court was "forced" to resort to the exclusionary rule in "default" of Congressional action (Wolf, supra). Nevertheless, four members of the Court seem to have taken this position in Elkins v. United States, 364 U.S. 206, 240-41 (1960) (Frankfurter, J., joined by Clark, Harlan and Whittaker, JJ.,) and this may now be the prevailing view. See especially United States v. Janis, 428 U.S. 433 (1976), discussed in text at notes 425-34 infra and 507-13 infra, where a 5-3 majority, per Blackmun, J., observed: "There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." Janis, 428 U.S. at 459. Cf. Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 3-10 (1975). See also Hill, supra this note, at 182-85.

If the view that the Weeks rule is merely an exercise of the Court's supervisory power over federal courts, or otherwise a rule "which Congress might negate," now commands five votes, it proves once again "how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision." Cf. Frankfurter, J., joined by Jackson, J., dissenting in Rabinowitz, 339 U.S. 56, 75 (1950).

297. See, e.g., A. Cornelius, Search and Seizure 42-46 (2d ed. 1930); L. Orfield, Criminal Procedure from Arrest to Appeal 28-31 (1947), Hall, The Law of Arrest
tiveness of the Wolf opinion. Although Wolf's reliance on "other methods" of enforcement was not as far-reaching as Cardozo's—his list of "other remedies" in the famous Defore case had included resisting the officer! The Wolf opinion, too, "smelled of the lamp." Thus the temptation to attack, and to defeat, Justice Frankfurter on his own battleground must have been strong. Justice Murphy, who wrote the principal dissent in Wolf, yielded to that temptation. So did many commentators—and I was one of them.

I continue to believe that despite its weaknesses, the exclu-
THE EXCLUSIONARY RULE

sionary rule is a more effective means of enforcing the guarantee

of a case by arrest...is all that really matters." Inbau, The Confession Dilemma in the United States Supreme Court, 43 ILL. L. REV. 461-62 (1948).

I sought to refute this contention by pointing to statements by the then Attorney General of California and the then United States Attorney for the District of Columbia that as a result of recent judicial rulings police officers in their jurisdictions were engaging in "more intensive pre-arrest work" and "making better cases from the evidentiary standpoint." See Kamisar, supra this note, at 179-80. I also reported how the District of Columbia police had undergone "training and retraining in the field of search and seizure," id. at 181, and how, according to the U.S. Attorney for the District of Columbia, "our policemen are thinking in terms of these [recent] decisions and our lectures [lectures developed for the police by the U.S. Attorney's Office on the basis of questions about search and seizure solicited from the police], and to that extent their work has materially improved." Id. Although I had never heard of the term at the time, I now realize that I was describing how judicial rulings affect individual police officers by means of "systemic deterrence." See note 204 supra and text accompanying notes 526-36 infra.

Because I am convinced that court decisions do affect police behavior through a department's institutional compliance with judicially articulated standards, asking whether I would justify the exclusion of probative, but unconstitutionally obtained, evidence even if I did not believe that exclusion had any significant effect on the police "would be similar to asking whether 'if it snowed all summer would it then be winter?'" Cf. Matter of Storar, 52 N.Y. 363, 380, 420 N.E.2d 64, 72-73 (1981). But if I had to answer, for reasons I have already adverted to at notes 156-75, 216-18, 258-70 supra, I would answer in the affirmative. I would say that what Professor J. Patrick Green has called "the preservation of legality" is a sufficient justification for the exclusion of unconstitutionally (or unlawfully) obtained evidence. See Green, Stone v. Powell: The Hermeneutics of the Burger Court, 10 CREIGHTON L. REV. 655 (1977):

A legal rule honored only in the breach loses its character as a law. When a court rejects unlawfully seized evidence, it preserves the fourth amendment. It reannounces that the fourth amendment is part of the Constitution, and that the values contained in the fourth amendment are worth preserving. It speaks on behalf of the legal system to authoritatively disavow the unlawful act. Id. at 659 n.20.

See also Canon, Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention, 23 S. TEX. L.J. 559, 580 (1982) ("exclusionary rule should be preserved for its symbolic value, not because of any impact it might be having on society"; the rule "serves as a symbolic reassurance that the police do not behave lawlessly and that the courts do not condone such lawless behavior as occasionally occurs"). Cf. Linde, Judges, Critics, and the Realist Tradition, 82 YALE L.J. 227, 238-42 (1972) (criminal process whereby police violate a defendant's constitutionally guaranteed rights is "not the 'due process' of the Constitution"); Sunderland, The Exclusionary Rule: A Requirement of Constitutional Principle, 69 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 141, 150, 158-59 (1978) (at least where substantial violations of protection against unreasonable search and seizure occur, due process requires exclusionary rule).

For some time now, the more relevant question may be not the symbolic value of the rule, but the symbolic effect of its abolition. "How," asked Professor Lawrence Tiffany a decade ago, "would the police react if the Supreme Court overruled Mapp v. Ohio?" Tiffany, Judicial Attempts to Control the Police, CURRENT HISTORY, July, 1971, at 13, 52. See also 1 LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 29 (1978); Canon, supra this note, at 580. Recently Professor Milton Loewenthal, who teaches police officer students at John Jay College of Criminal Justice of the City University of New York, offered an answer. On the basis of many interviews with police commanders on all levels, as well as with his police
against unreasonable search and seizure than tort actions, internal self-discipline or any other presently existing method. And I think it all too plain that many law enforcement officials think so too. But I now believe it was a mistake for proponents of the exclusionary rule to assume, or to imply, that the reach of the rule—indeed its very life—depends on an empirical evaluation of the rule's efficacy in "deterring" police misconduct.

(To the extent that I have done so in the past, I can only say that when I started thinking about and writing about the exclusionary rule in the 1950s I took as my starting point the Wolf case, especially the Frankfurter-Murphy exchange in that case. I should have spent less time mulling over Wolf and more time reading and rereading Weeks and its progeny.)

The "deterrence" rationale, as I shall discuss in the next section, has spawned cost-benefit analyses of the rule in various set-
tings. But "[t]he costs of the exclusionary rule are immediately apparent; its benefits are only conjectural."302 Moreover, "it is never easy to prove a negative"303 and "[p]olice compliance with the exclusionary rule produces a non-event which is not directly observable—it consists of not conducting an illegal search."304

Moreover, and more fundamentally, how does one go about deciding whether the exclusionary rule can "pay its way" in a particular setting without giving free play to one’s own views of policy? How does one “price” the beliefs, values and ideals in the fourth amendment as if they were consumer benefits?305 Is not the point of the fourth amendment that "efficiency" in suppressing crime is only one value among several and “not a meta-value that comprehends all others”?306

DID MAPP REST THE EXCLUSIONARY RULE ON AN EMPIRICAL FOUNDATION OR DID IT REAFFIRM THE “ORIGINAL UNDERSTANDING” OF THE RULE AS SET FORTH IN WEEKS AND ITS PROGENY?

When, twelve years later, Mapp307 overruled Wolf, it seemed to repair the damage caused by the earlier case. But four of the strongest defenders of the exclusionary rule disagree. I shall discuss the views of Professors Schrock and Welsh first. They comment:

[Justice Clark, author of the plurality opinion in Mapp]308 says that the exclusionary rule is “a clear, spe-

---

304. A. Morris, The Exclusionary Rule, Deterrence and Posner’s Economic Analysis of Law, 57 Wash. L. Rev. 647, 653 (1982). Continues Professor Morris: “Although empirical research is theoretically neutral, the simple truth is that some kinds of phenomena can be measured more easily than others, which in turn means that direct observation, or its impossibility, aids only one side. And that is the case with the exclusionary rule.” Id. See also Canon, Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for this Retention, 23 S. Tex. L.J. 559, 563-64 (1982) (quoted in note 522 infra); LaFave, supra note 148, at 318-19.
308. Although Justice Clark’s opinion was denominated the “opinion of the Court” it was really only an opinion for four Justices. Justice Black remained unpersuaded that an exclusionary rule could be inferred from the fourth amendment. He concurred on the ground that “when the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amend-
specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." 309 This passage is incorrigibly ambiguous, mixing in about equal portions vague constitutional references, deterrence rationale, and empirical generalization. Justice Clark does not make clear whether the exclusionary rule is constitutionally required as such or is required only because it is a deterrent. Nor does he make clear whether, if it is constitutionally required as a deterrent, it is required because of its deterrent intention, or because it actually works as a deterrent. If the exclusionary rule is constitutionally mandated as, but only as, an actual deterrent, Justice Clark does not vouchsafe the constitutional theory that would make a requirement of the fourth amendment depend on this kind of contingency. 310

I can appreciate Schrock and Welsh's irritation. Justice Clark did scramble the analysis and cause some confusion by calling the exclusionary rule a "constitutionally required...deterrent safeguard." But Clark had not spent hundreds of hours, as had Schrock and Welsh, thinking about the exclusionary rule and pondering the different consequences that flowed from its various rationales. He was not writing the definitive article, as did Schrock and Welsh, on the constitutional bases for the rule. Rather Clark was trying to secure maximum approval for the decision overruling Wolf. 311 Evidently he thought he could do so by advancing as

309. Id. at 648.
310. Schrock & Welsh, supra note 160, at 319.
311. Mapp v. Ohio, 367 U.S. at 648. When Justice Clark observed that without the exclusionary rule "the Fourth Amendment would have been reduced to 'a form of words,'" he was quoting from Holmes's opinion in Silverthorne, 251 U.S. at 392. It is plain that Holmes was not making an "empirical generalization" but construing what he deemed "the essence of a provision forbidding the acquisition of evidence in a certain way." See text accompanying notes 229-30. Absent clear evidence to the contrary I think one is entitled to assume that a Justice who quotes language from an earlier case is not distorting its meaning. Unfortunately, there is strong evidence that Justice Clark did distort the meaning of Silverthorne when he discussed it four years later in Linkletter v. Walker, 381 U.S. 618 (1965). See the discussion in the text accompanying notes 368-69 infra. But I see no reason why what I would call the misuse of Silverthorne in Linkletter should be applied "retroactively" to Clark's discussion of Silverthorne in Mapp. A number of things said in Linkletter are inconsistent with what was said in Mapp. See text accompanying notes 360-72 infra.

I see no reason to conclude that when Clark quoted Silverthorne he was saying, or meant to say, that because the exclusionary rule is the only effective (or the most effective) deterrent against police misconduct, its absence would reduce the fourth amendment to "a form of words." Indeed, immediately after quoting from
many reasons for the exclusionary rule as he could find, whether constitutional or pragmatic—perhaps because he concurred in the view of Pliny the Younger that “since different minds may be persuaded by different arguments, the advocate ought to develop and present them all, neglecting none.” Evidently Clark also thought he could further his objective by refuting the various arguments the rule’s antagonists had made over the years—one of which, of course, was that the rule was not an effective deterrent or not markedly superior to “other methods” in this regard. Thus, Clark made numerous points in his opinion; unfortunately he did not always cleanly separate them.

If the passage quoted by Schrock and Welsh is not free from doubt, the message—in light of the totality of Clark’s opinion—is fairly clear: We reaffirm the “original understanding” of the exclusionary rule, as explained in Weeks and its progeny, that (anything to the contrary in Wolf notwithstanding) it is a constitutionally required rule, although not explicitly provided for in the text of the fourth amendment—and moreover (again, anything to the contrary in Wolf notwithstanding), it is the most effective (or the only presently available effective) means of deterring police conduct. To state the message somewhat differently, the exclusionary rule is a command of the Constitution—whether or not it is a more effective deterrent than “other means of protection” (although Clark maintained that it was), whether or not it “fetters law enforcement” (although he doubted that it did), whether or not the federal rule was “too strict or too lax” (although he contended that it no longer was “too lax”), whether or not it also makes very

---

312. The younger Pliny’s advice is so described in Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 158 n.17 (1955). Along these lines, Justice Clark’s opinion in Mapp, one might say, “ultimately fastened the exclusionary rule on the states in reliance upon all the rationales thus far proposed.” Yackle, The Burger Court and the Fourth Amendment, 26 Kan. L. Rev. 335, 426 (1978).

313. Only a year earlier, the Court had noted in Elkins v. United States, 364 U.S. 206 (1960): “The exclusionary rule has for decades been the subject of ardent controversy. The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here.” Id. at 216.

314. Indeed, this was a major premise of Wolf. See 338 U.S. at 28-29, 30-31.

315. “Original understanding” of the exclusionary rule is my phrase, not Justice Clark’s, but I think this is a fair characterization of what he said. See text accompanying notes 331-35, 372-73 infra.

316. 367 U.S. at 651-53.
317. Id. at 659-60.
318. Id. at 653.
good sense" (he maintained at some length it did, by eliminating
needless conflict between state and federal courts and removing
"inducement to evasion" by "working arrangements" between
state and federal officials), \(^{319}\) and whether or not a significant reap-
praisal of the rule's value and importance had occurred in the
states since Wolf (he claimed that it had). \(^{320}\)

The passage quoted by Schrock and Welsh appears in Part I of
Clark's opinion and the whole thrust of this part is that the exclu-
sionary rule is not a "mere rule of evidence" or an exercise of the
Court's supervisory powers over federal criminal justice, but a
command of the Constitution. \(^{321}\) Moreover, as I shall discuss be-
low, at other places in his opinion Clark states and reiterates that
the exclusionary rule is a command of the Constitution. \(^{322}\)

Professors Mertens and Wasserstrom are also unhappy with
Justice Clark's treatment of the exclusionary rule in Mapp. They
do not think Mapp healed the wound the rule received in Wolf.
They observe:

[W]here the Court had once perceived a kind of natural,
immutable affinity between the fourth amendment and
the [exclusionary] rule, since Wolf the Court has seen the
relationship between them as the product of judicial arti-
face, and the rule itself as a judicial construct requiring ex-
licit, pragmatic justification if it is to survive. Thus,
although the Court in Mapp invoked a concatenation of
normative principles to support the extension of the exclu-
sionary rule to the states, the bulk of its opinion was de-
voted to a defense of the rule on the empirical basis that it
has proved to be the only effective means of enforcing the
fourth amendment. \(^{323}\)

If I could substitute "since Linkletter v. Walker" \(^{324}\) for "since
Wolf" I would agree wholeheartedly with the first sentence in
the quoted passage. As for the second sentence, I must strongly
disagree.

---

319. Id. at 657-58.
320. Id. at 651.
321. See id. at 646-50. Clark specifically and emphatically contrasted the search
and seizure exclusionary rule, based on the notion that a conviction resting on evi-
dence obtained by violating the Constitution "cannot stand," with the Court's exer-
cise of its supervisory powers over the federal judicial system. See id. at 649-50.
322. See text accompanying notes 331-35 infra.
323. Mertens & Wasserstrom, supra note 148, at 381-82.
324. 381 U.S. 618 (1965), discussed in text accompanying notes 345-80 infra. As
Professors Mertens and Wasserstrom point out in the paragraph immediately fol-
lowing the quoted passage, in Linkletter "the Court identified deterrence as the pre-
eminent purpose of the exclusionary rule." Mertens & Wasserstrom, supra note 148,
at 382.
The only discussion of the inadequacy of "other means" of enforcing the right to privacy appears in Part II of the plurality opinion. In this part Justice Clark, as have others, yielded to the temptation to meet the author of the *Wolf* opinion on the latter's own battleground. Clark maintained that the "factual considerations" asserted in support of the *Wolf* result—one of which was "that 'other means of protection' have been afforded 'the right to privacy'"—were no longer persuasive. But he stated at the outset of his discussion of the continuing validity of these factual considerations that "they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause." All that Clark had to say about "other remedies" in Part II is the following:

Significantly, among those [states which have adopted the exclusionary rule since *Wolf*] is California, which, according to its highest court, was 'compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions. . .' In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that 'other means of protection' have been afforded 'the right to privacy.' The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States [no citation]. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*. See *Irvine v. California*.

---

325. 367 U.S. 651-52.
326. See id. at 651-53.
327. Id. at 651 (emphasis added). One of the exclusionary rule's strongest critics, Professor Steven Schlesinger, has recognized that in *Mapp*, the deterrent effect of the rule was clearly only a factual consideration as opposed to a logical deduction from constitutional language. . . . [Justice Clark] was only trying to counter *Wolf*'s claim that the exclusionary rule was bad law *from a policy standpoint*. The only reason Justice Clark engaged in that factual discussion was that he read *Wolf* to be 'bottomed on factual considerations,' as opposed to constitutional analysis, and out of respect for the precedent he was overturning, he felt obliged to meet and defeat it on its own grounds first, before moving to the basis of his own position.


Sixteen lines in an eighteen page opinion do not seem to warrant the conclusion that "the bulk" of Justice Clark’s opinion in *Mapp* was devoted to a defense of the exclusionary rule on an empirical basis. Of course, it is not simply a matter of counting lines. It is a matter, rather, of reading these lines in light of the totality of the opinion. As already indicated, Part I of the *Mapp* opinion is devoted to the proposition that the exclusionary rule is not a "mere rule of evidence" or a product of the Court’s "supervisory powers," but a "constitutionally required" doctrine. Part III concludes: "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

The main thrust of Part IV is that *Wolf* had downgraded the protection against unreasonable search and seizure by "conditioning" its "enforcement" in a manner that no other basic constitutional right’s enforcement had been, and that henceforth the right to privacy is to be enforced as "strictly against the States" as are other fundamental rights—such as "the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability." Part IV concludes with the assurance that "no man is to be convicted on unconstitutional evidence."

The fifth and last part of the opinion begins by referring to

What the Court, per Jackson, J., said in *Irvine* was: "[A]dmission of the evidence does not exonerate the officers and their aides if they have violated defendant’s constitutional rights. It was pointed out in *Wolf* that other remedies are available for official lawlessness, although too often those remedies are of no practical avail."

One might also count another short passage in *Mapp*:

To [admit the evidence] is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins v. United States*, 367 U.S. 206, 217 (1960). In extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused has been forced to give by reason of the unlawful seizure.


See note 321 and accompanying text *supra*.


"our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments.""334 It ends with the observation that "[b]ecause [the fourth amendment] is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who . . . chooses to suspend its enjoyment. Our decision . . . gives to the individual no more than that which the Constitution guarantees him. . .."335

Professors Schrock and Welsh wrote about Mapp some thirteen years after it was decided. Professors Mertens and Wasserstrom did so more than twenty years after the event. I venture to say they were operating under what in this instance might be called the handicap of hindsight. They were looking back on Mapp through the filter of post-Mapp cases that have misread or distorted that landmark case.

Justice Harlan, who dissented in Mapp, recognized that "[e]ssential to the majority's argument against Wolf is the proposition that the [fourth amendment exclusionary rule] . . . derives not from the 'supervisory power' of this Court . . . but from Constitutional requirement."336 Nor did Professor Francis Allen, who wrote a major article on the Mapp case the year it was decided, seem to have much trouble understanding the basic reasoning of the Clark opinion. Although the opinion "does not confine itself to the statement of a 'syllogism,'" Justice Clark's "essential position," reported Allen, "is that the exclusionary rule is part of the Fourth Amendment; the Fourth Amendment is part of the Fourteenth; therefore, the exclusionary rule is part of the Fourteenth."337

THE "DETERRENCE" RATIONALE, AND COST-BENEFIT ANALYSIS, COME TO THE FORE

Although the Court's refusal, in Linkletter v. Walker,338 to give Mapp full retroactive effect was "novel and totally without prece-
dent in the United States Reports"—never before had the Supreme Court decided against retroactivity for a newly adopted constitutional criminal procedure ruling—the decision should have come as no surprise. Mapp contributed nothing to the reliability of the guilt-determining process; “[a]ll that petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned. . .” Yet to apply the exclusionary rule announced in Mapp to cases which had become “final” (beyond direct review) before its rendition “would tax the administration of justice to the utmost.”

A claim that a state’s allocation of responsibility between judge and jury failed to afford a reliable determination of the voluntariness of a confession or a claim that an indigent defendant was denied the right to counsel at trial or to a transcript on appeal “usually can be tested promptly by looking at a few documents.” But the record would often be inconclusive or silent on the search and seizure issues lurking in thousands of cases “finalized” in the many states that admitted illegally seized evidence prior to Mapp.

The Court might have given Mapp full retroactive effect, but denied relief to a prisoner simply because his lawyer—“relying on contemporaneous decisions of the Supreme Court unambiguously indicating the constitutional issue to be frivolous and unsubstantial”—had failed to raise the search and seizure claim at trial or on direct review. I share Professor Francis Allen’s view, however, that “[i]t would surely be better frankly to restrict the Mapp holding to prospective application than to select those who may assert the right on any such capricious and inequitable basis.” Even if the record in a case prosecuted in a pre-Mapp “admissibility” jurisdiction did contain some reference to an alleged illegal search or seizure it is unlikely that the point would have been pressed or developed (or that the court would have permitted defense coun-

340. See id. at 424-26.
341. Linkletter, 381 U.S. at 639.
342. Id. at 637.
343. As the Linkletter Court noted, Jackson v. Denno, 378 U.S. 368 (1964), was “applied to the petitioner who was here on a collateral attack.” 381 U.S. at 628-29 n.13.
344. As the Linkletter Court also noted, Gideon v. Wainwright, 372 U.S. 335 (1963) and Griffin v. Illinois, 351 U.S. 12 (1956) were given full retroactive effect. 381 U.S. at 628-29 n.13.
346. Allen, supra note 337, at 45.
347. Id. Cf. Weinstein, supra note 337, at 172.
sel to do so). Why bother? If *Mapp* had been given full retroactive effect, therefore, evidentiary hearings as to the merits of the search and seizure claim “frequently would produce unreliable results. In many cases, passage of time fades memories, renders witnesses and tangible evidence unavailable, and therefore precludes accurate assessment of Fourth Amendment claims, which usually turn on closely contested questions of fact.”346

*Linkletter* may be viewed as an effort to curtail the impact of *Mapp*349 and to dampen the criticism that the Court was “turning loose” too many “criminals”350—*Mapp*, after all, “had overturned an important and often fiercely defended policy, a policy that the Court had explicitly validated only a dozen years earlier. . . .”351 But *Linkletter* may also be viewed as “a liberating force that allowed a majority of the Court to render decisions effecting fundamental changes in criminal procedure without concern that the prison doors would be opened as a result.”352 “[T]he final laugh,” maintains Professor James Haddad, “is at the expense of the District Attorneys”—who, perhaps “with tongue-in-cheek,” had argued in *Linkletter* that reform in constitutional-criminal procedure would be slowed down unless the prospective-only technique were adopted.353 The District Attorneys “may, if they wish,” observes Haddad, “boast that their success in *Linkletter* played an important part in making possible the *Miranda* and *Wade* decisions.”354

It is by no means clear, therefore, which “side” really “won” in *Linkletter*. It is plain, however, that the exclusionary rule “lost.” My quarrel is not with the result in *Linkletter*, a subject of vigorous debate,355 but with the manner in which the Court dispar-

---

349. Cf. Harlan, J., dissenting in Jenkins v. Delaware, 395 U.S. 213, 222 (1969): “As one who has never agreed with the *Miranda* case but nonetheless felt bound by it, I now find myself in the uncomfortable position of having to dissent from a holding which actually serves to curtail the impact of that decision.” Id. at 222. *Jenkins* declined to apply *Miranda* to a retrial of a defendant whose first trial commenced prior to the date of that landmark decision.
353. Haddad, supra note 301, at 439.
355. Compare, e.g., Mallamud, Prospective Limitation and the Rights of the Accused, 58 Iowa L. Rev. 321 (1970) and Mishkin, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965) with, e.g.,
aged the exclusionary rule in reaching the result it did. The Linkletter Court might, for example, have recalled Holmes's view in Silverthorne that "the essence of a provision forbidding the acquisition of evidence in a certain way" is that evidence so acquired shall not be used to convict a person— but added that state prosecutors and judges could hardly be blamed for rejecting this view when they had been told by the highest authority that the exclusion of such evidence was not "an essential ingredient of the right." Or the Linkletter Court might have recognized that a primary basis for the exclusionary rule was the notion that violations of the protection against unreasonable search and seizure "should find no sanction in the judgments of the courts," that permitting the use of evidence so obtained "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution"— but added that state courts could hardly be faulted for admitting unconstitutional evidence when the Supreme Court had explicitly "sanctioned" such a course.

Instead, the Linkletter Court passed over the notion that a court should not ratify or make itself a participant in lawless conduct— thereby loosenig, if not breaking, the "link between exclusion and the rule of law"— and rested the exclusionary rule almost entirely on an empirical basis. One might say that Linkletter applied Wolf's way of thinking about the exclusionary rule "retroactively" to Mapp. One might also say that Linkletter did to Mapp what subsequent decisions were to do to Griffin v. California, Miranda and the 1967 lineup cases— "undermine the

---


356. See text accompanying note 230 supra.
357. Wolf, 338 U.S. at 29.
359. Id. at 394.
361. 380 U.S. 609 (1965). Griffin held that the fifth and fourteenth amendments banned comment by either the prosecution or the court on a defendant's failure to take the stand at a state trial. Id. at 615. Tehan v. United States ex rel. Shott, 382 U.S. 406, 419 (1966), declined to give Griffin full retroactive effect.
362. Miranda v. Arizona, 384 U.S. 436 (1966). Johnson v. New Jersey, 384 U.S. 719 (1966), not only denied general retroactivity to Miranda, but refused to apply it to cases still on direct appeal if the trials had begun before Miranda had been handed down.
363. United States v. Wade, 388 U.S. 218, 242-43 (1967) and Gilbert v. California, 388 U.S. 263, 272-74 (1967) held inadmissible testimony relating to pre-trial identifications made at a lineup where the defendant was not represented by counsel and also barred any courtroom identifications based on observations made at such a lineup. Stovall v. Denno, 388 U.S. 293, 300 (1967), held that the new rules affect only cases involving confrontations that took place after the date on which both Wade and Gilbert were decided.
original decision by depriving it of the supporting reasons that are minimized in the retroactivity decisions.\textsuperscript{364}

The \textit{Linkletter} Court recalled that in \textit{Mapp} it had re-examined the factual grounds upon which \textit{Wolf} was based and had concluded that they were no longer persuasive, \textit{e.g.}, other means of enforcing the fourth amendment had proved "worthless and futile."\textsuperscript{365} But the \textit{Linkletter} Court, per Justice Clark, neglected to mention, as the \textit{Mapp} Court, per Justice Clark, had been quick to point out, that the continuing validity of the factual considerations asserted in support of the \textit{Wolf} result "are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment."\textsuperscript{366} Indeed, the \textit{Linkletter} Court strongly implied that nothing could be more relevant—that the exclusionary rule is "an essential ingredient" of the fourth amendment only

\textsuperscript{364} The Supreme Court, 1965 Term, 80 Harv. L. Rev. 123, 139 (1966):

[T]he Court's professed inability in \textit{Shott} to define clearly the values served by the privilege against self-incrimination is in striking contrast to the self-confident opinion in \textit{Griffin}, which relied almost exclusively on the many reasons why an innocent person might not wish to take the stand as grounds for condemning an inference of guilt from silence.


In declining to give \textit{Escobedo v. Illinois}, 378 U.S. 478 (1964) and \textit{Miranda} retroactive effect, the court in \textit{Johnson}, made the remarkable statement that "while \textit{Escobedo} and \textit{Miranda} provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim." 384 U.S. at 730 (emphasis added). But \textit{Escobedo} and \textit{Miranda} provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim.

\textsuperscript{365} See text accompanying note 328 supra.

\textsuperscript{366} \textit{Mapp v. Ohio}, 367 U.S. at 651 (emphasis added). See text accompanying note 327 supra.
because, and only so long as, it is "the only effective deterrent to lawless police action." 367

Justice Clark's opinion for the Court in Linkletter leaves much to be desired, but perhaps the most confusing sentence of all is the following:

[J]ust as other cases had found the exclusionary rule to be a deterrent safeguard necessary to the enforcement of the Amendment, Silverthorne, Mapp bottomed its rule on its necessity as 'a sanction upon which [the Fourth Amendment's] protection and enjoyment had always been deemed dependent under the Boyd, Weeks and Silverthorne cases. 368

First of all, Silverthorne had not found the exclusionary rule to be "a deterrent safeguard necessary to the enforcement of the Amendment"; at no point did it even discuss whether the exclusionary rule was the only effective deterrent or a more effective deterrent than other methods. Silverthorne, rather, regarded the government's refusal to "avail itself of the knowledge obtained by [unconstitutional] means" as the only meaningful way for the government to "repudiate" or "condemn" the unconstitutional means. 369

As for the second half of the sentence quoted above, what rationale(s) Mapp "bottomed its rule on" is not as clear as it ought to be, but the exclusionary rule's "necessity as a sanction," i.e., the rule's necessity as the most effective (or the only effective) "penalty" or "remedy," 370 can hardly be regarded as the dominant rationale. More prominent, surely, is the notion that the exclusionary rule is an indispensable and inseparable part of the fourth and fourteenth amendments' protection against unreasonable

367. Mapp had as its prime purpose the enforcement of the fourth amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since Wolf requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action.


368. 381 U.S. at 635. For the context in which this quotation from Mapp appears see text accompanying note 373 infra.

369. See text accompanying note 229 supra.

370. Of course, "sanction" has several meanings. Justice Clark used the term to signify a "penalty" or "remedy" for noncompliance with a rule. But the Weeks Court used the term to mean "approval" or "authorization." See text accompanying notes 358-59 supra. In the Weeks sense, exclusion of the evidence is not a "sanction" but its negative; exclusion is the necessary consequence of refusing to "sanction" a violation of the fourth amendment by admitting evidence so obtained.
ble search and seizure, just as an “exclusionary rule” is an essential and integral part of the protection against “coerced” or “involuntary” confessions— and thus the “right of privacy” could not be declared enforceable against the states without declaring the exclusionary rule enforceable against them as well. “Were it otherwise,” pointed out Justice Clark in *Mapp*—

then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be ‘a form of words,’ valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom ‘implicit in the concept of ordered liberty.’ . . . The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence. . .

How the *Linkletter* Court looked back on the exclusionary rule is not as important as how it looked forward. Whatever one thinks of the manner in which *Linkletter* read *Mapp* and the *Weeks* line of cases, one must consider the way it has affected the future of the exclusionary rule.

Long before the Supreme Court got around to the question, the lower courts had developed the doctrine that a defendant lack-

---

371. *See* text accompanying notes 331-32 *supra*. After relying on the analogy to coerced confessions in *Mapp*, however, the Court disparaged that analogy in *Linkletter*: “[T]here is no likelihood of unreliability or coercion in a search-and-seizure case.” 381 U.S. at 638.

372. “Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.” *Mapp*, 367 U.S. at 655.

373. *Id.* at 655-56 (emphasis added).
ed "standing" to challenge evidence seized in violation of a third party's constitutional rights. Since the rule was early based on the joint foundation of the Fourth Amendment and the self-incrimination clause of the Fifth, its protection was said to be limited to the accused. The rule was also "based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and that accordingly, if the defendant has not been wronged he is entitled to no remedy." Thus, this seemed to be one occasion when the "deterrence" rationale favored the defendant. As Judge Traynor pointed out:

The emphasis in our state on the deterrence of lawless law enforcement has given direction to our rules. As a result we have departed from long-entrenched federal rules on standing to object to illegally obtained evidence. Those rules have rested on property concepts, with an admixture of tort concepts.

The United States Supreme Court, however, was unmoved by the ascendancy of the deterrence rationale. "The necessity" for the limitation, it told us, "was not eliminated by recognizing and acknowledging the deterrent aim of the rule." Why not? Because "we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." One can just as easily assert, I submit, that "we are not convinced that the benefits of applying the exclusionary rule to anybody justifies encroachment upon the public interest. . . ."

How does one convince the Court that the additional benefits of extending the exclusionary rule to other defendants justifies further encroachment upon the public interest? Dissenting in Goldstein v. United States, which had tacitly accepted the "standing" limitation, Justice Murphy, joined by Chief Justice Stone and Justice Frankfurter, thought it "evident that to allow the

377. Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 DUKE L.J. 319, 335 (referring to People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955), and other cases cited therein).
379. Id. at 174-75.
380. 316 U.S. 114 (1942).
THE EXCLUSIONARY RULE

Government to use evidence obtained in violation of the Fourth Amendment against parties not victims of the unconstitutional search and seizure is to allow the Government to profit by its wrong and to reduce in large measure the protection of the Amendment. The California Supreme Court, which had scrapped the “standing” requirement six years before Mapp, stressed that “such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them.

California’s abolition of the “standing” requirement was “enthusiastically endorsed by most commentators.” Francis Allen had called the requirement “[p]erhaps the least justifiable of the limits on the scope of the exclusionary rule.” Albert Beisel had regarded it “an effective and practical means by which the harvest of an illegal search and seizure (or illegal wiretap) can be reaped.” To the extent that the police and the prosecutors are familiar with the [standing] rule,” the Yale Law Journal had observed, “they will then know that they may rummage everywhere for evidence concerning a suspect except among his belongings or in his house. No motion to suppress at the trial stage need be feared, there being no one who can successfully make the motion.” Convinced that there are recurring situations when “the police can often predict which searches will turn up evidence against persons other than the victim” and that “[a] system of classification based on ‘victimness’ provides no deterrence against these searches,” the Chicago Law Review had concluded, two years after Linkletter, that “the standing requirement is inconsistent with the presently accepted general deterrence theory of the exclusionary rule.”

---

381. Id. at 127 n.4.
382. People v. Martin, 45 Cal. 2d at 760, 290 P.2d at 857.
383. 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, 609 (1978) (citing thirteen commentators). See also ALI Model Code of Pre-Arraignment Procedures §§290.1(5) (Official Draft, 1975). Commentary at 561: “The logic of the exclusionary rule, and the deterrence objectives on which it is based, apply equally whether or not the search itself ‘aggrieved’ the defendant.” Although the Reporters for the Pre-Arraignment Code favored complete abolition of “standing,” the ALI Council was unwilling to go quite so far. The matter was resolved by “greatly relax[ing] the present standing requirements, without completely abandoning them.” Id. at 562.
384. Allen, supra note 375, at 22.
386. Comment, supra note 374, at 158.
387. Note, Standing to Object to an Unreasonable Search and Seizure, 34 U. Chi. L. Rev. 342, 358 (1967). For illustrative situations where the police can often predict
As we have seen, however, the Alderman Court reached a different conclusion: When an unlawful search or seizure does not violate the defendant's own constitutional rights the exclusionary rule has reached the point of diminishing returns. But it is no difficult feat to assert or to assume that this is so at any point. One need only say that the additional "benefits" of any extension of the exclusionary rule are too marginal or speculative to justify the "costs" (or that the "benefits" of any curtailment of the rule are worth the "costs"). It is especially easy to do when one is skeptical about the benefits of the rule in the first place, but convinced that it "exacts a costly toll" upon the search for truth.\footnote{388 United States v. Payner, 447 U.S. 727, 734 (1980).}

Even accepting the primacy of the "deterrence" rationale and the need to balance additional deterrence against the competing interest in trying defendants on the basis of all relevant evidence, "the standing requirement seems unrelated to the factors relevant in such a balancing process, such as the relative egregiousness of police infractions of privacy, the relative susceptibility of police practices to judicial deterrence [and] the relative ease of acquiring evidence by other means. . .\footnote{389 The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 169 (1969).} A decade later, in the face of a shocking case, United States v. Payner,\footnote{390 447 U.S. 727 (1980) (6-3 majority, per Powell, J.)} the standing requirement remained unrelated to the factors relevant in a balancing process.

Payner arose as follows: The IRS launched an investigation into the financial activities of American citizens in the Bahamas. Suspicion focused on a certain Bahamian bank. When an official of that bank visited the United States, IRS agents stole his locked briefcase for a time. More than 400 documents were removed from the briefcase and photographed. On the basis of evidence ac-
required as a result of this "briefcase caper," defendant Payner was convicted of federal income tax violations. Payner, of course, was precisely the kind of violator the IRS agents were seeking when they violated the bank official's rights.

Hemmed in by the standing requirement (although an effort might have been made to carve out an exception on the basis of these special circumstances), the federal district court invoked its supervisory power to exclude the tainted evidence. The district court found, and these findings were undisturbed by the higher courts, that—

[I]n its desire to apprehend tax evaders . . . the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel. Such governmental conduct compels the conclusion that [the IRS agents] transacted the 'briefcase caper' with a purposeful, bad faith hostility toward the Fourth Amendment rights of [the bank official] in order to obtain evidence against persons like Payner.

In holding the "briefcase caper" evidence admissible, a 6-3 majority, per Justice Powell, cautioned that exclusion of evidence in every case of illegality must “be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule” and that “unbending application of the exclusionary sanction . . . would impede unacceptably the truthfinding functions of judge and jury.” What case was the majority talking about?

As the Payner dissenters pointed out, the district court had deemed it proper to use its supervisory power to exclude evidence obtained by violating a third party's rights only where there had

---

391. Cf. Model Code, supra note 383, §§290.1(5) (1975), specifying five categories of defendants, in addition to the defendant whose own rights have been violated, who have "standing" to move to suppress evidence. The categories include family members, co-conspirators and "targets" of police investigations. As the Commentary to the Model Code notes, the "target" provision is in accord with the proposal in White & Greenspan, supra note 387, at 349-54 that those defendants who were the "targets" of third party searches should have standing to challenge the legality of the evidence so obtained. Id. at 562 n.19.


393. 447 U.S. at 734 (emphasis added).

394. Id. (emphasis added).
been “purposefully illegal” conduct by the government or where the government conduct was “motivated by an intentional bad faith hostility” toward the constitutional rights of the third party.\(^{395}\) The relevant question in \textit{Payner}, then, was not whether the exclusionary rule should always be applied when police illegality is somewhere in the picture, but whether it should ever be applied—taking into account the seriousness or flagrancy of the illegality—when the defendant lacks “standing.” The question was not whether the exclusionary rule should be given “unbending application,” but whether the “standing” requirement should be. By deciding that even in a case like \textit{Payner} a federal court is unable to exercise its supervisory powers to bar the evidence—by holding that “judicial impotency is \textit{compelled} in the face of such scandalous conduct”\(^{396}\)—the Court gave us its answer.

Even assuming that \textit{Payner} should have been decided solely on the basis of interest-balancing,\(^{397}\) the majority opinion leaves a good deal to be desired. The \textit{Payner} Court seemed content to recall, and to rely on, the balance it had struck in the early standing cases.\(^{398}\) But because it grew out of special and outrageous circumstances, the interests to be balanced in \textit{Payner} were different. The question presented was not the one raised in \textit{Alderman} but a different and more pointed one: When the government has \textit{intentionally manipulated} the standing requirement of the fourth amendment—when it has \textit{deliberately and patently} violated the constitutional rights of a third party in order to obtain evidence against its real targets, and defendant is one of those targets, does the interest in discouraging (or reducing the incentive) to make \textit{such} searches justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practice? The \textit{Payner} Court never really spoke to this issue because it never really asked this question.

The “deterrence” rationale and its concomitant “interest-bal-

---

\(^{395}\) \textit{Id.} at 750 (Marshall, J., dissenting).

\(^{396}\) The Court’s holding that judicial impotency is \textit{compelled} in the face of such scandalous conduct is almost beyond belief, especially when it is considered that the responsible governmental agency manifested little interest in deterring such actions. It took a congressional investigation to force the IRS to ‘call off’ the entire enterprise; even then the IRS responded with half-hearted measures; and apparently no action was ever taken against any IRS agent who was knowingly involved in the criminal and unconstitutional actions.

\(^{397}\) \textit{LaFave, supra} note 383, at 1983 Pocket Part 216.

\(^{398}\) The \textit{Payner} dissenters stressed the imperative of “judicial integrity”—the need for the federal court to avoid becoming “the accomplice of the Government lawbreaker.” See \textit{447 U.S.} at 747-48. \textit{See generally id.} at 744-50.

\(^{399}\) \textit{See 447 U.S.} at 731, 735-36 & n.8.
ancing" bloomed in *United States v. Calandra*. The Weeks rule and the famous Brandeis-Holmes *Olmstead* dissents, which illuminated the rationales for the Weeks rule (although they did not succeed in extending the rule to police behavior that was merely unlawful or "unethical," not unconstitutional), appear to have been based on what has been called the "'one-government' conception" or the "'unitary' model of a government and a prosecution." This model "sees all the events in a criminal prosecution as parts of a single transaction for which government is ultimately responsible." According to this model, "[i]t is just as important to the fourth amendment whether a court takes account of the fruits of a search as it is whether the intrusion that discovered the evidence was lawful." But in ruling that a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained in violation of the fourth amendment, the *Calandra* Court embraced what has been called the "'fragmentary' model of a prosecution." This model "separates the police intrusion against which the individual has a fourth amendment right from the proceedings at trial in which the question is merely one of remedy—not a personal remedy for the victim but a collective remedy for the broader social problem." According to this model, a court acts as "a neutral conduit of the evidence"; it is under no duty to exclude evidence merely because it has been unlawfully, or even unconstitutionally, obtained.

Thus, the *Calandra* majority, per Justice Powell, characterized the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party

---


400. See note 160 supra. See also the discussion of, and the quotations from, the *Olmstead* dissents in text accompanying notes 235-41 supra.

401. Yackle, supra note 312, at 417. As Professor Yackle is quick to point out, his comments are based on the models identified by Professors Schrock and Welsh. See note 160 supra.


403. *Calandra* built on the view taken in earlier cases that the validity of an indictment is not affected by the competency or the legality of the evidence considered. For a crisp discussion of *Calandra*’s antecedents, see Areneila, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463, 487-94 (1980).

404. See note 160 supra.

405. Yackle, supra note 312, at 418 (emphasis in original).

406. See note 160 supra. See also Yackle, supra note 312, at 418.
As is the case with any remedial device, pointed out Justice Powell, the rule’s application “has been restricted to those areas where its remedial objectives are thought most efficaciously served” (referring to the “standing” cases). Grand jury questions based on evidence seized in violation of the fourth amendment, maintained Powell, “work no new Fourth Amendment wrong. Whether [they] should be proscribed presents a question, not of rights, but of remedies—a question to be answered by weighing the “potential injury” to the functions of the grand jury against the “potential benefits” of the exclusionary rule in this context.

Not surprisingly, upon reading Calandra two of the exclusionary rule’s staunchest friends lamented that the process of “deconstitutionalizing” the rule had been completed.

As is no secret to the reader who has come with me this far, I share the Calandra dissenters’ way of thinking about the exclusionary rule. I believe that the goals “uppermost in the minds of the framers of the rule” were “enabling the judiciary to avoid the taint of partnership in official lawlessness” and “assuring the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”

I think, too, that curtailment of fourth amendment violations “was at best only a hoped-for effect of the exclusionary rule,” not (nor should it be) its raison d’être. But even if one accepts the Calandra majority’s way of thinking about the exclusionary rule—even if one agrees that the case should have been decided solely on the basis of interest-balancing—one may strongly challenge the Calandra majority on its own battlefield. For Calandra’s interest-balancing is based on a shaky—one might even say “nonexistent”—empirical foundation.

It was “evident” to the Calandra Court that applying the exclusionary rule to grand jury proceedings would “seriously impede” that body’s historic role and functions. But the Court

407. 414 U.S. at 348.
408. Id.
409. Id. at 354.
410. See id. at 349.
411. See Schrock & Welsh, Reconsidering the Constitutional Common Law, 91 Harvard L. Rev. 1117, 1119 (1978). See also Mertens & Wasserstrom, supra note 148, at 384-88. But the Court may have “‘constitutionaliz[e] deterrence,” i.e., there may now be “a constitutional requirement to impose the exclusionary rule in cases where the failure to do so would demonstrably encourage unconstitutional police conduct.” Id. at 386 n.100.
412. 414 U.S. at 357 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting).
413. Id. at 356.
414. 414 U.S. at 349.
disparaged any benefits that might have been achieved by applying (or extending) the rule to such proceedings—any benefits would be “uncertain at best” or “speculative and undoubtedly minimal.” Why? Because banning grand jury use of unconstitutionally obtained evidence would add little, if anything, to the disincentive already provided by the inadmissibility of such evidence at the trial. But, retorts lawyer-political scientist Donald Horowitz, “What trial?”

For the overwhelming majority of defendants who plead guilty to some offense and hence are punished without going to trial, indictment may be tantamount to conviction. There may be, therefore, a very strong incentive for the police to obtain evidence illegally which can be used in grand jury proceedings, even if that evidence would be inadmissible at a trial if one were ever held. Most of the time, indictment leads to a plea of guilty. Because the deterrence reasoning in Calandra is based on the criminal trial as the implicit norm, ignoring the way in which most criminal cases are actually disposed of, the opinion takes as given a structure of police and prosecution incentives that may prove to be purely fictitious.

To be sure, if he is in a jurisdiction that has a procedure for filing a pre-trial motion to suppress illegally obtained evidence (not all states provide such a procedure), a defendant can seek an “advance evaluation” of the admissibility of the evidence on which his indictment was based. But if the defendant files and loses the pre-trial motion, “his problems may just be beginning.”

The prosecutor’s offer of leniency may itself have been based on his uncertainty about the admissibility of the evi-

415. Id. at 351-52.
416. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained.
418. Id. at 240. See also Arenella, supra note 403:
In a system of justice where guilty pleas are the norm and trials are the exception, we can no longer view the prosecutor’s and grand jury’s decisions to indict as mere interim screening decisions. Since guilty pleas have supplanted trials as our primary method of securing convictions, we cannot assume that the trial will necessarily deter prosecutors from seeking indictments against defendants whom they could not convict at trial.
420. Id. at 240.
dence. Once the uncertainty is cleared away, the prosecutor may become much less disposed to negotiate. Perhaps filing the motion is not such a good idea after all. Perhaps it is better to accept the prosecutor's offer and plead guilty now.421

For those defendants who do plead guilty to some charge, the admissibility of the illegally obtained evidence before the grand jury counts for a good deal more than the inadmissibility of the evidence at trial. And if this is how the exclusionary rule works in practice, and it appears to be, the incentive for police officers to gather evidence illegally, "even when their purpose is prosecution and conviction,"422 is not "substantially negated"423 by the inadmissibility of the evidence at the trial. Calandra to the contrary notwithstanding—

Given the prevalence of guilty pleas, the only sure way to prevent illegally obtained evidence from forming the basis of a conviction [it will often be a conviction of a lesser crime than the defendant is believed guilty, but it is still more than should have been obtained under Mapp] is to prevent it from being used to secure an indictment.424

Does interest-balancing, at least when applying the exclusionary rule, turn largely, if not entirely, on how one identifies the competing interests and how one "weighs" them? How does one go about doing this? How, for example, does one "quantify" the "privacy" or "individual liberty" the fourth amendment is supposed to protect and the exclusionary rule is supposed to effectuate? Is interest-balancing the "real" basis for judgment in the exclusionary rule cases or is it merely a stylish way to write an opinion once a

421. Id.
422. Id.
423. See note 416 supra.
424. D. Horowitz, supra note 417, at 241. Nor is that all:

[P]rosecutorial screening may be the most effective way of enforcing the Mapp rule. The causal connection between the illegal search and the decision not to prosecute is as clear as it is when dismissal of an indictment follows the granting of a motion to suppress evidence. Equally important, the exact grounds of the decision not to prosecute are likely to be explained to police officers somewhat more often, more fully, more informally, and in more understandable terms than they are by judges granting motions and dismissing the indictments.

Id. at 247. But—

Calandra makes it more difficult for a prosecutor to say 'No' to the police. He can no longer blame his inability to predicate a prosecution on illegally seized evidence on the exclusionary rule, for that rule does not come into play unless and until there is a trial—an event the rarity of which the police may be presumed to understand, even if they do not understand all of the nuances of Fourth Amendment doctrine.

Id. at 249.
judgment has already been reached on the basis of individual, subjective values? If the answers to these questions are not yet evident, one more case should suffice—United States v. Janis. 425

Janis arose as follows: Acting pursuant to a warrant (which turned out to be invalid), Los Angeles police seized from defendant some $5,000 in cash and certain wagering records. The police then contacted IRS agents, who, based solely on their examination of the illegally seized records, made an assessment against defendant for wagering taxes under federal law in the amount of some $90,000. In a subsequent state criminal proceeding, the search warrant was quashed because it was based on a defective affidavit. But the IRS levied upon the $5,000 in cash in partial satisfaction of the assessment against defendant. The defendant then brought a federal action for refund of the cash. The government counter-claimed for the unpaid balance of the assessment. The lower federal courts ruled that defendant was entitled to the refund and that the tax assessment should be quashed because based on illegally obtained evidence. A 5-3 majority, per Justice Blackmun, disagreed. 426

Justice Blackmun reiterated that “the ‘prime purpose’ of the [exclusionary] rule, if not the sole one, ‘is to deter future unlawful police conduct.’” 427 He also reiterated that the rule “imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence.” 428 He then reasoned that whether or not the rule is an efficient deterrent, its application was not justified in the federal civil proceeding:

Assuming [the rule is a substantial and efficient deterrent], the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted. Under either assumption, therefore, the ex-

426. At the outset, Justice Blackmun stated that the case presented the question whether “evidence seized by a state criminal law enforcement officer in good faith, but nonetheless unconstitutionally, [was] inadmissible in a civil proceeding by or against the United States?” Id. at 434 (emphasis added). See also id. at 447. But the Court never explained what it meant by “good faith” and it dropped this qualification in articulating its “conclusion” and its “holding.” See id. at 454, 459-60. Moreover, its reasoning seems to apply whether or not the state police acted in good faith.
427. Id. at 446.
428. Id. at 448-49.
tension of the rule is unjustified.\textsuperscript{429}  
In short, Justice Blackmun thought \textit{Janis} was a very easy interest-balancing case. So did Justice Stewart—the other way.

Justices Brennan and Marshall adhered to their earlier views that “the exclusionary rule is a necessary and inherent constitutional ingredient of the protections of the Fourth Amendment,”\textsuperscript{430} but, in a separate dissent, Justice Stewart joined battle with the \textit{Janis} majority on its own “cost-benefit” grounds. As he had done a decade and a half earlier, when writing the opinion of the Court overturning the “silver platter” doctrine,\textsuperscript{431} Stewart underscored the close relationship between federal and state authorities in law enforcement and auxiliary matters. “The pattern,” he observed “is one of mutual cooperation and coordination, with the federal waging tax provisions buttressing state and federal criminal sanctions.”\textsuperscript{432} That the old “silver platter” doctrine had involved state and federal \textit{criminal} proceedings “is irrelevant,” maintained Stewart, “where, as here, the civil proceeding serves as an adjunct to the enforcement of the criminal law.”\textsuperscript{433}

According to the \textit{Janis} Court, per Justice Blackmun, the illegally obtained state evidence should be admissible in a federal civil proceeding because the “costs” of excluding it from such a proceeding would clearly outweigh whatever marginal deterrent “benefits” might be gained by keeping it out. According to Justice Stewart, however, the evidence should have been excluded because one of the “costs” of admitting it in the federal proceeding was \textit{the wiping out} of whatever deterrent “benefits” had been achieved by excluding it from \textit{the state prosecution}. Where Blackmun deemed the exclusion of the evidence in the federal proceeding not worth the “costs,” Stewart blamed the Court for rendering the exclusion of the evidence in \textit{the state prosecution} all “costs” and no “benefits”:

[U]nder the Court’s ruling, society must not only continue to pay the high cost of the exclusionary rule (by foregoing criminal convictions which can be obtained only on the basis of illegally seized evidence) but it must also for-fet the benefit for which it has paid so dearly.

\textsuperscript{429} \textit{Id.} at 453-54.  
\textsuperscript{430} \textit{Id.} at 460 (Brennan, J., joined by Marshall, J., dissenting).  
\textsuperscript{431} Elkins \textit{v.} United States, 364 U.S. 206 (1960). The “silver platter” doctrine stated that evidence of a federal crime obtained by state police in the course of an illegal search while investigating a state crime could be turned over to federal authorities and used in a federal prosecution so long as federal agents had not participated in the state search, but had simply received the evidence on a “silver platter.”  
\textsuperscript{432} 428 U.S. at 462.  
\textsuperscript{433} \textit{Id.} at 463.
THE EXCLUSIONARY RULE

If state police officials can effectively crack down on gambling law violators by the simple expedient of violating their constitutional rights and turning the illegally seized evidence over to Internal Revenue Service agents on the proverbial 'silver platter,' then the deterrent purpose of the exclusionary rule is wholly frustrated. 'If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation.'

As suggested in the next, and last, section of this article, Justice Stewart's point may be made somewhat differently. It may be stated in terms of "incentives" and "disincentives" rather than "deterrence": By ruling that evidence obtained unconstitutionally by state police is admissible in a federal civil proceeding in Janis-type circumstances, the Court failed to eliminate a significant incentive to violate the fourth amendment when state and federal authorities are working closely together. The failure negates the force of the exclusionary rule as a "disincentive" to violate the Constitution in these kinds of cases, i.e., it ruins any chance that excluding the evidence in the state prosecution will significantly discourage unreasonable searches and seizures. The only way to prevent the exclusion of evidence in the state prosecution from becoming "wasted effort" is to bar the evidence from the federal civil proceeding as well. Otherwise, the "benefits" of the exclusionary rule as a disincentive (in the state prosecution) are reduced to the vanishing point and thus easily "outweighed" by the rule's "societal costs."

Whether or not Justice Stewart's views should have prevailed in Janis (and, as might be expected, I believe they should have), he certainly demonstrated that one who would exclude illegally seized evidence can play the "'cost-benefit' game" too. Indeed, anyone can play it. Anyone can convert the process into something that merely gives him back whatever answer he feeds into it.

SOME FINAL THOUGHTS

In a number of recent search and seizure cases the Court has

434. Id. at 463-64 (emphasis added), quoting from Elkins v. United States, 364 U.S. at 222.
435. See text accompanying notes 539-51 infra. See also note 204 supra.
'narrow[ed] the thrust' of the exclusionary rule" by "balancing the competing interests" and concluding that the "benefits" of the rule's application in various settings are "outweighed" by the "costs" it imposes on society. It is very difficult to come away from these cases, however, without the impression that the Court is "balancing by assumption" or "intuition," or worse, "balancing by predisposition.

If one is supposed to "balance" the "competing interests" before deciding whether to apply the exclusionary rule, how does one do so without measuring imponderables or comparing incommensurables? How does one balance "privacy" (or "individual liberty" or "personal dignity," or call it what you will) against the interest in suppressing crime (or "law and order" or the "general welfare," or call it what you will)?

How does one "balance" the interests in furthering an important governmental objective "against a constitutional statement that the government may not employ a certain means for the attainment of any of its objectives"? Inasmuch as "privacy" (or "individual liberty") and "efficiency" in the suppression of crime are different kinds of interests, how can they be compared quantitatively unless the judge has "some standard independent of both to which they can be referred"? If the standard is not to be

437. C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 20 (1980). In addition to Alderman, Payner, Calandra and Janis, discussed in text accompanying notes 378-79, 390-416 and 425-34 supra, see United States v. Havens, 446 U.S. 620 (1980) (illegally obtained evidence may impeach not only direct testimony of defendant but also statements first elicited from him on cross-examination, if prosecutor's questions were "reasonably suggested" by the direct testimony); United States v. Ceccolini, 435 U.S. 268 (1978) (exclusionary rule "should be invoked with much greater reluctance" where defense seeks to suppress live-witness testimony rather than an inanimate object); Stone v. Powell, 428 U.S. 465 (1976) (state prisoner may not be granted federal habeas corpus relief on search-and-seizure grounds unless he has been denied an opportunity for "full and fair litigation" of his claim in the state courts). See also the "standing" cases discussed in note 548 infra.


439. Cf. Frantz, supra note 436, at 749. See also R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978), at, e.g., 13, 133, 139-40, 191-95, 200.
the fourth amendment—which embodies the judgment that securing all citizens "in their persons, houses, papers, and effects, against unreasonable searches and seizures" 440 "outweighs" society's interest in apprehending and convicting criminals—then what is it to be?441

Many proponents of the exclusionary rule, of course, would argue that the rule is an essential ingredient of the right against unreasonable search and seizure—and "[t]here would be no point in the boast that we respect individual rights unless that involved some sacrifice"442—that "[t]he Bill of Rights and the fourth amendment in particular" deny to government "desired means, efficient means, and means that must inevitably appear from time to time throughout the course of centuries to be the absolutely necessary means, for government to obtain legitimate and laudable objectives."443 They would argue that "law and order" are no more to be preserved by depriving criminal suspects of their constitutional rights than "by depriving the Negro children of their constitutional rights."444 But a proponent of the exclusionary rule may also argue that "on balance" the public does "benefit" from the rule.

The suppression of crime contributes to "individual security," but, of course, the effectuation of the protection against unreasonable search and seizure also contributes to "[s]ecurity in one's home and person."445 A police department that achieves a "high clearance" rate is "efficient" in one sense, but in a democracy "police efficiency" is, or ought to be, "measured even more by what the police do not do than by their positive accomplishments."446 Thus,

440. U.S. CONST. amend. IV.
442. R. Dworkin, supra note 439, at 193.
444. Cooper v. Aaron, 358 U.S. 1, 16 (1958).
445. "The vice of a system of criminal justice that relies upon a professional police and admits evidence they obtain by unreasonable searches and seizures is precisely that we are all thereby made less secure in our persons, houses and effects against unreasonable searches and seizures." Amsterdam, supra note 443, at 433. See also Canon, Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for Its Retention, 23 S. TEX. L.J. 559, 579-80 (1982); Roger Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 IND. L.J. 329, 330-31 (1973); Paulsen, The Exclusionary Rule and Misconduct by the Police, in POLICE POWER AND INDIVIDUAL FREEDOM 87, 97 (C. Sowle ed. 1962).
a police department that scrupulously honors individual rights may be regarded as more "efficient" than a department that "catches more crooks" but breaks more rules. It all depends against what standard one measures "police efficiency."

The exclusion of reliable evidence does impose a "cost" on society, but so do unreasonable searches and seizures—and the perception, by the public and the police alike, that our courts do not take seriously the constitutional protection against such police misconduct. A basic problem of any society, to be sure, is the problem of controlling crime, but "[t]he basic political problem of a free society," it has well been said, "is the problem of controlling the public monopoly of force."

Thus, when one goes about balancing interests in order to determine whether the exclusionary rule should be applied, it is not only far from clear how the competing interests are to be "weighed," but in which scale they should be placed. Depending upon how one defines the term, the exclusionary rule either impairs "police efficiency" or furthers it. Depending upon what kind of "security" one has in mind, the exclusionary rule either contributes to "individual security" or diminishes it. Depending on what "problem" one is concerned about, the exclusionary rule either ameliorates a basic problem of society or exacerbates one.

Even if one is persuaded that the exclusionary rule imposes a substantial cost on society, how one measures the "net cost" turns on whether one considers the fourth amendment "on the whole a kind of nuisance, a serious impediment in the war against crime" or "that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights," or what value one assigns the amendment on the spectrum between these two poles. It also depends on whether one believes that law en-

---

447. Paulsen, supra note 445, at 97. Continues Professor Paulsen: "All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty." Id. See also note 449 and accompanying text infra; Amsterdam, supra note 443, at 377-78.

448. Frankfurter, J., joined by Murphy and Rutledge, JJ., dissenting in Harris v. United States, 331 U.S. 145, 157 (1947) (of course, rejecting this notion).

449. Id. at 163. Continues Justice Frankfurter: "How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your home and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up?" Id. See also Amsterdam, supra note 443, at 377-78; Landynski, In Search of Justice Black's Fourth Amendment, 45 Fordham L. Rev. 453-54 (1976).
forensics are not doing a satisfactory job unless the rate of crimes solved and offenders convicted approaches 100% or whether one accepts the fact that a very substantial portion of all crimes cannot be solved and is persuaded that it is not "necessary that they be solved in order to maintain reasonably orderly and secure communities." Thus, here, perhaps even more so than in the first amendment area, because the crime may be so heinous and the relevance of the evidence so overwhelming, interest-balancing "almost requires the judge to intrude his individual values into the case." Here, perhaps even more so than in the first amendment area, when the government seeks power in the name of the "public interest" or the "general welfare" or "the good of society," balancing tests "inevitably become intertwined with the ideological predispositions of those doing the balancing—or if not that, at least with

450. I know of no reason to revise the conclusion I reached a decade ago, on the basis of the Rand Institute Study (see Greenwood, AN ANALYSIS OF THE APPREHENSION ACTIVITIES OF THE NEW YORK CITY POLICE DEPARTMENT (1970)) and earlier studies conducted for the National Crime Commission (see THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT (1967)), that, standard, "absent personal observations of the offense by a police officer or personal identification by a victim or witness, the great bulk of crimes are not, never have been, and (at least for the foreseeable future) are not going to be solved—in most of these cases no arrests are ever made." Kamisar, How to Use, Abuse—and Fight Back with—Crime Statistics, 25 OKLA. L. REV. 239, 254 (1972).

Indeed, the former Executive Director of the National Crime Commission, James Vorenberg, now Dean of the Harvard Law School, testified, on the basis of data gathered by the commission, that "[a]bout three-fourths of the crime committed in this country is not reported and only one-fourth or one-fifth of the crime that is reported leads to an arrest" (quoted in Kamisar, supra this note, at 254). See also P. Murphy & T. Plate, supra note 446, at 183-88 (discussion of astonishingly low percentage of crimes referred to the detective bureau that are ever "solved"); Bazelon, The Crime Controversy: Avoiding Realities, 35 VAND. L. REV. 487, 493 (1982) (criminal justice system prosecutes, convicts and imprisons a larger proportion of those arrested for felonies than it did sixty years ago, but only about six percent of serious crimes result in arrest); Vorenberg, Is the Court Handcuffing the Cops?, N.Y. Times, May 1, 1969 (Magazine) in CRIME AND CRIMINAL JUSTICE 82 (D. Cressey ed. 1971).

451. Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, in POLICE POWER, supra note 445, at 153, 171. See also L. Schwartz, On Current Proposals to Legalize Wire Tapping, 103 U. PA. L. REV. 157 (1954): "A penal system gives us about all we can get out of it if apprehension and punishment are pursued and inflicted with sufficient determination that a would-be law violator must count them as substantial risks." Id. at 158.

452. In his early years on the California Supreme Court, recalls Judge Traynor, "[t]ugitive misgivings about admitting illegally obtained evidence gave way to the overwhelming relevance of the evidence." Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 DUKE L.J. 319, 321.

the relative confidence or paranoia of the age in which they are doing it." \[454\]

"One doesn't have to be much of a lawyer," concedes Dean John Ely, "to recognize that even the clearest verbal formula can be manipulated." \[455\] But, he hastens to add, "it's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing." \[456\]

Forty-three years ago, in what is now known as "the first flag-salute case," \[457\] the Court denied relief to the children of Jehovah's Witnesses who had been expelled from the public schools for refusing to salute the national flag, a ceremony they conscientiously believed to be forbidden by command of Scripture. How did the Court purport to justify the result it reached? It is worth recalling that it did so by utilizing what may fairly be called an interest-balancing test. An 8-1 majority held in effect that the children's freedom from compulsory violation of religious faith was "outweighed" by "an interest inferior to none in the hierarchy of legal values." \[458\] And, pray tell, what was that? "National unity," said the Court, "the basis of national security." \[459\] "The ultimate foundation of a free society," we were reminded, "is the binding tie of cohesive sentiment"; \[460\] without it, we were admonished, "there can ultimately be no liberties, civil or religious." \[461\]

It is worth recalling, too, that the same year the first flag-salute case was handed down, a leading criminal procedure expert, Sam Bass Warner, \[462\] suggested how we might "balance" "interests" in


\[455\] J. ELY, DEMOCRACY AND DISTRUST 112 (1980).

\[456\] Id.


\[458\] 310 U.S. at 595 (Frankfurter, J.). The term "outweighed" is mine, not the Court's, but I think it is a fair description of the Court's reasoning. Only Justice Stone dissented, but he was vindicated three years later in Barnette, 319 U.S. 624 (1943).

\[459\] 310 U.S. at 595. Justice Frankfurter's opinion for the Court in Gobitis "was written against the backdrop of his perceptions of the need to mobilize America for war and of the psychological problems in doing so. ... To Frankfurter it was apparent that America would have to fight Germany. But in May of 1940 Americans were neither united nor prepared to fight." Danzig, How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion, 1977 Sup. Ct. Rev. 257, 266-67.

\[460\] 310 U.S. at 596.

\[461\] Id. at 597.

\[462\] Professor Warner was the principal draftsman of the Uniform Arrest Act. He was said to be one of the few professors who had "accompanied the police on their tours of duty in order to learn and report the true facts." Wilson, Police Arrest
the police interrogation room. If the fifth amendment (and presumably its state constitutional counterparts) prohibits "a two or three hour examination during which several police officers urge [a suspect] to confess and do their best to confuse and entrap him into a confession," then, conceded Professor Warner, "the Fifth Amendment is violated in every city in the United States." But he suggested a way out: "[I]t may well be that a proper balance between the individual interest in freedom from compulsory self-incrimination and the social interest in the discovery of crime requires that suspects be subjected to such a cross-examination." This of course was the "balance" that had been struck in the interrogation room—one that was to persist until the 1960s. So long as the "cross-examination" stopped short of "the third degree" and constituted only "a severe grilling for a few hours," the "benefits" of the judgment embodied in the fifth amendment, one might say, were deemed "outweighed" by the "costs" that society would suffer if it were applied to police questioning. Among the forces at work, of course, was "one of society's most effective analgesics—necessity, real or apparent." "Necessity," real or apparent, seems to be the mother of interest-balancing.

It is also worth recalling that twenty-five years ago, when a federal district court suspended the Little Rock School Board's desegregation plan for two and one-half years, returning black children to segregated public schools for that stretch of time, the court did so by "balancing" competing interests. The black children's right to equal protection of the laws was characterized as "a personal interest in being admitted to the public schools on a non-discriminatory basis"—an interest to be "balanced against the public interest, including the interest of all students and potential students in the district, in having a smoothly functioning educa-

464. Id. (emphasis added).
466. Warner, supra note 463, at 25.
467. Y. KAMISAR, supra note 103, at 60. See also Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 CORNELL L.Q. 436, 446-54 (1964) (discussion of claims of "necessity" by the military and law enforcement that turn out to be more "convenient" than "necessary").
469. 163 F. Supp. at 27 (emphasis added).
tional system" and the interest in "eliminating, or at least ameliorating, the unfortunate racial strife and tension [existing] in Little Rock."\footnote{470} The public interest—"the larger interests of both races"\footnote{471}—concluded the district court, should prevail.

Of course, constitutional provisions are not self-defining. But the "defining" approach "narrows and structures the issue for the courts"\footnote{472} it "emphasiz[es] that the entire question of reconciling social values and objectives is not reopened."\footnote{473} The "definer" gives the constitutional provision at issue "a certain amount of content which he regards as being obligatory on the court"\footnote{474} his task is different than "balancing" the "interest" represented by the provision against "law and order" or other "societal interests."\footnote{475} The "balancer's" constitutional guarantee "is empty until the court decides what to put into it"\footnote{476} it "does not speak until the court speaks for it."\footnote{477}

"A right against the government," points out Ronald Dworkin, "must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."\footnote{478} Adds Professor Dworkin:

It cannot be an argument for curtailing a right, once granted, simply that society would pay a further price for extending it. There must be something special about that further cost, or there must be some other feature of the case, that makes it sensible to say that although great social cost is warranted to protect the original right, this particular cost is not necessary. Otherwise, the Government's failure to extend the right will show that its recognition of the right in the original case is a sham, a promise that it intends to keep only until that becomes inconvenient.\footnote{479}

That individual rights can be "annihilated" by being made to yield to the purported needs of the government or the purported "'rights' of the majority,"\footnote{480} a.k.a., the "general welfare," "the public interest" or "the interests of society," did not escape the Court
THE EXCLUSIONARY RULE

that decided the second flag-salute case. If "the strength of government to maintain itself" were to prevail over the freedom asserted by the Jehovah's Witnesses' children, the asserted governmental interest, observed Justice Jackson in Barnette, "would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies."\(^1\)

"The very purpose of the Bill of Rights," added Jackson, in an oft-quoted passage, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."\(^2\) The purpose of the Bill of Rights, I would add, was to place certain subjects beyond the reach of cost-benefit analysis (except for the most extraordinary circumstances).

I can already hear the howls of protest: You have grossly exaggerated the impact of the Court's recent decisions. True, the present Court no longer regards the exclusionary rule "a personal constitutional right of the party aggrieved"\(^3\)—only a "judicially created" "remedial device"\(^4\) whose application turns on a "pragmatic analysis of [its] usefulness in a particular context."\(^5\) But this "deconstitutionalization" of the rule,\(^6\) if you want to call it that, has worked no new substantial injury to the rule, let alone "annihilated" it or the fourth amendment guarantee it is supposed to effectuate. The only consequence of the Court's current way of thinking about the rule has been its nonapplication (or nonextension) in "peripheral" or "collateral" areas where "the deterrent effect of the exclusion of evidence is highly attenuated."\(^7\) But the Court has not "abandon[ed] the rule in its central application."\(^8\) Quite the contrary, although Stone v. Powell restricted the rule's application in federal habeas corpus review of a state conviction,\(^9\) Justice Powell's opinion for the Court "contains a startling reaffirmation of Mapp—a reaffirmation so powerful that it elicited a separate opinion from the Chief Justice, perhaps the Court's most

\(^{1}\) Board of Education v. Barnette, 319 U.S. at 636.
\(^{2}\) Id. at 638.
\(^{3}\) See text accompanying note 407 supra.
\(^{4}\) United States v. Calandra, 414 U.S. at 348.
\(^{6}\) See text accompanying notes 407-11 supra.
\(^{8}\) Mertens & Wasserstrom, supra note 148, at 387 n.104.
\(^{9}\) See note 436 supra.
ardent critic of the exclusionary rule."490

The Chief Justice may have found the Stone Court's "reaffirmation" of Mapp a bit disquieting, but I must say that I find it something less than exhilarating.491 Observed Justice Powell:

Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.492

We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions.493

I welcome the Court's reaffirmation of the exclusionary rule as applied to criminal trials, but I share the Chief Justice's view that the Court did so "somewhat hesitantly"494—especially when one takes into account what else the Court had to say that day.495 The second sentence in the passage quoted above is particularly welcome, because it seems to be a rare recognition by the present Court of the "systemic deterrence" worked by the rule, i.e., its "effect on individual police officers through a police department's institutional compliance with judicially articulated fourth amendment standards."496 But at this point, Justice Powell refers, and refers only, to the "postscript" to Dallin Oaks's famous article, in which Professor (now Judge) Oaks argues that "[t]he exclusionary rule should be abolished, but not quite yet."497—not "until

491. But I took into account what else was said in the opinion and what was said in United States v. Janis (see text accompanying notes 425-35 supra), decided the same day. See text accompanying notes 503-13 infra.
493. 428 U.S. at 492-93.
494. 428 U.S. at 496 (Burger, C.J., concurring). See also Note, Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments, 90 HARV. L. REV. 945, 982 n.233 (1977).
495. See text accompanying notes 503-13 infra.
496. Mertens & Wasserstrom, supra note 148, at 394.
497. Oaks, supra note 492, at 755. Now a member of the Utah Supreme Court, Judge Oaks, whose name is often misspelled "Oakes," is not to be confused with
there is something to take its place." 498

Oaks does recognize that by "magnifying the moral and educative force of the law" the rule "may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies." 499 He goes on to say, however, that the exclusionary rule is not the only way, nor even a good way, to do so. 500 It "should be replaced," therefore, "by an effective tort remedy against the offending officer or his employer." 501

In his opinion for the Court in Stone, Justice Powell alludes to the "hope" and the "assumption" that the exclusionary rule will discourage fourth amendment violations. 502 He is a good deal more explicit about the "costs" of the rule. 503 These are "well known" and "long-recognized"—"even at trial and on direct review." 504 Application of the rule "deflects the truthfinding process and often frees the guilty." 505 Moreover, "[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." 506

Some proponents of the exclusionary rule may be more heartened than I by the passage in the Stone opinion reaffirming the rule in its basic setting. And it may well be that I have made too much of Powell's citation to the Oaks article. But, however one reads that passage in splendid isolation, Powell's opinion, in its entirety, is hardly a ringing endorsement of the exclusionary rule in its central application.

Nor is Justice Blackmun's opinion for the Court in United States v. Janis, 507 handed down the same day. "No empirical re-

---

499. Id. In the body of his article, however, Judge Oaks does not discuss what might be called "systemic deterrence," but relies chiefly on the analogy between the deterrent effect of criminal law and the deterrent effect of the exclusionary rule to discredit the exclusionary rule, an analogy that fails, maintain Mertens and Wasserstrom, supra note 148, at 399, "because the exclusionary rule operates through mechanisms that simply have no analogy in the penal law." Id.
501. Id.
502. 428 U.S. at 492.
504. Id. at 489.
505. Id. at 490.
506. Id.
507. See text accompanying notes 425-35 supra.

HeinOnline -- 16 Creighton L. Rev. 655 1982-1983
searcher, proponent or opponent of the rule," notes Blackmun, "has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied."\(^{508}\) On the other hand, observes Blackmun, there is unanimity that the rule "imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence."\(^{509}\) "In the past this Court has opted for exclusion in the anticipation that law enforcement officers would be deterred from violating Fourth Amendment rights,"\(^{510}\) but "[t]hen, as now," it has "acted in the absence of convincing empirical evidence."\(^{511}\) In the case before the Court—the use of evidence obtained illegally by state officers in a federal tax proceeding—"we do not find sufficient justification for the drastic measure of an exclusionary rule."\(^{512}\) Continues Justice Blackmun: "There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."\(^{513}\)

If the Court is pursuing "a supervisory role that is properly the duty of the [other branches]," why should it "balance" the "costs" and "benefits" of the exclusionary rule in any context? Why shouldn't the other branches do so everywhere? In Janis, Justice Blackmun comes close to articulating what is implicit in the Court's cost-benefit analysis of the exclusionary rule in settings other than the trial.

If not even the victim of an unconstitutional search or seizure has a "constitutional right" to exclude the evidence—if the use of such evidence "presents a question, not of rights, but of remedies"\(^{514}\)—does not our system of government "provide a good reason for leaving that decision to more democratic institutions than courts"?\(^{515}\) If the rule's application turns on a "pragmatic analy-
siss" of its usefulness in a particular setting. When the Court acknowledges, as it seems to have done, that "it has no constitutional business excluding evidence" obtained in violation of the protection against unreasonable search and seizure, why does it have any business at all doing so?

After all, "[t]he balancing of conflicting interests would seem to be inherently a legislative question for which the judicial process is very ill-adapted. It requires evaluating vast arrays of facts of a kind which are not to be found in the ordinary judicial record—and which will be extremely difficult for the litigants to put there."

Indeed, in Janis, after a careful examination of the relevant literature, the Court concluded that "each empirical study on the subject [of the rule's deterrent effect], in its own way, appears to be flawed." Thus, the Court found itself "in no better position" than it had been sixteen years earlier, when it had observed: "Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled.

The Court's pessimism seems well-founded. Only last year, after discussing various strategies of (and obstacles to) gathering information about the extent to which the exclusionary rule inhibits police misconduct, one of the leading empiricists in the area, political scientist Bradley Canon, concluded:

All the methods discussed have their drawbacks, whether in logistics, reliability of the data or in the inability to connect the data with the events in which we are interested. There is no way to demonstrate that the rule works or that it does not work . . . or even that it works 35% of the time or 68% of the time or whatever. . . . We have bits and pieces of evidence and we will probably add to them over time, but I do not foresee any dramatic breakthrough in the next few years that will come anywhere close to convincing us all beyond a reasonable doubt. Those who want rigorous proof must be disappointed, unless, of course, they have assigned the burden of proof to their opponents. Then they will be delighted.

516. See note 485 and accompanying text supra.
518. See Schrock & Welsh, supra note 160, at 269-70.
519. Frantz, supra note 438, at 1443-44.
520. 428 U.S. at 449-50.
521. Id. at 453 (quoting from Elkins v. United States, 364 U.S. 206, 218 (1960)).
522. Canon, supra note 445, at 572. Oaks had noted similarly, a decade earlier,
I do not think the life of the exclusionary rule should depend on an empirical demonstration of its effects on police behavior anymore than the continued vitality of Brown v. Board of Education should depend on empirical data concerning the harmful effects of school segregation on black children. Nor do I think that Weeks or Mapp—any more than Brown—"can be defeated simply by the relevant official's refusal to be deterred." But even if one agrees that the exclusionary rule should be retained or abolished on the basis of its effects on police behavior, whether or not the rule "works" or has ever "really worked" depends on how one thinks it is supposed to work.

In a "postscript" to his study of the exclusionary rule, Oaks asserts (and he is careful to note that his assertion is "an argument, not a conclusion") that "[a]s a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." That is hardly surprising. Indeed, it would be that "it presently appears to be impossible to design any single test or group of tests that would give a reliable measure of the overall deterrent effect of the exclusionary rule on law enforcement behavior." Oaks, supra note 492, at 716. See also A. Morris, The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law, 57 Wash. L. Rev. 647, 652-56 (1982); Sunderland, Liberals, Conservatives, and the Exclusionary Rule, 71 J. Crim. L., Criminology & Police Sci. 343, 365-68 (1980); Critique, On the Limitations of Empirical Evaluations of the Exclusionary Rule, 69 Nw. U.L. Rev. 740, 758-64 (1974). It should not be forgotten, however, that critics of the exclusionary rule can always find evidence of police misconduct. It is inherent in any successful motion to suppress. What is more, incidences of police misconduct are more visible—dramatically so—than are incidences of police compliance with the fourth amendment, even though the latter behavior might be by far the more frequent form of behavior.

Canon, supra note 445, at 564. Thus, on the empirical battlefield, "the terrain favors the [exclusionary rule's] critics, who through the guerilla warfare of pointing to sporadic incidents, can create the dataless impression that the rule fails to deter police misconduct." Id. See also A. Morris, supra this note, at 653 (quoted in note 394 supra). Moreover, requiring the exclusionary rule's proponents to make a "clear demonstration" of the rule's effectiveness, see Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting), seems like "little more than the adoption of an old 'debater's trick' where when nothing can be proven either way, the first debater vigorously asserts that it is incumbent upon the second debater to prove his arguments." Canon, supra note 445, at 564. See also Roger Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind. L.J. 329, 332-33 (1973).
startling if the rule were a great success as a direct deterrent. As a device for directly deterring burglaries a rule that burglars only had to give up their ill-gotten gains on those occasions when they were caught would be a failure, too. Burglars and would-be burglars would not desist for fear of punishment because there would not be any "punishment" to fear. They would soon realize they were in a "no-lose" situation. They would have nothing to lose to which they were entitled and much to gain to which they were not entitled.

If the primary purpose of the exclusionary rule were to influence police behavior (and I have maintained at length that this was not the rule's basis nor, for much of its life, its principal purpose), surely it was not "designed" to do so this way. Surely the Justices who sat on the Weeks and Silverthorne Courts, among them Day, Holmes, Hughes and Brandeis, and their many successors who adhered to the rule, were not that shallow-minded.

How, then, does the rule influence the police? Fortunately, whatever may be said for burglars and many other criminals, police officers are not independent entrepreneurs. Rather, they are obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule" and "also fall short of demonstrating a research method by which that important question could be determined." Id. at 709. For thoughtful criticism of both Oaks, supra, and Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. LEGAL STUD. 243 (1973), in many respects a conclusion of the Oaks study, but a less scholarly effort, see e.g., D. Horowitz, The Courts and Social Policy 220-54 (1977); Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681 (1974); Canon, The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police? 62 JUDICATURE 398 (1979); Critique, 69 NW. U.L. REV. 740 (1974).

See Amsterdam, supra note 443, at 431-32; Note, Standing to Object to an Unreasonable Search and Seizure, 34 U. CHI. L. REV. 342, 357 (1967).

As Professor Phillip Johnson has observed, New Approaches to Enforcing the Fourth Amendment 4 (Working Paper, Sept. 1978) (on file in the University of Michigan Law Library), the exclusionary rule does not deter the police from making a search . . . because suppression does not leave them in a worse position than if they had never searched in the first place. The exclusionary rule is a disincentive because excluding the evidence removes one of the incentives for making illegal searches. Put another way, enforcing the exclusionary rule does not deter the police from making unconstitutional searches, but repealing the rule would positively encourage such unconstitutional activity.


members of a law enforcement agency, a structural governmental entity. Thus, the rule controls police behavior not the way the criminal law seeks to control the behavior of the general public, e.g., by "special deterrence" or "general deterrence," but "through a police department's institutional compliance with judicially articulated fourth amendment standards," i.e., by "systemic deterrence." Consequently—even if a particular constable is indifferent to whether his arrests and seizures result in convictions, those who run the police department are concerned with successful prosecutions. Further, although individual officers might entertain hostility toward fourth amendment rights, police departments are not likely to share such a view, at least officially. Thus, at least the more professional police forces can be expected to encourage fourth amendment compliance through training and such guidelines as the department provides for conducting searches, seizures, and arrests. .. Even if prosecutors cannot always find the time to explain the fourth amendment to the police, many of the larger police departments hire legal counsel to make legal standards intelligible to the policeman on patrol.

A good example of "systemic deterrence" is the swift reaction of at least two police departments (and presumably many more not surveyed) to the recent ruling in Delaware v. Prouse, striking down "random stops" of cars for license or registration checks in the absence of articulable suspicion to believe that criminal activity was afoot. Although District of Columbia Metropolitan Police had been conducting such stops on the basis of a local court decision, when the Supreme Court handed down its ruling "[t]he Chief of Police issued an immediate telex message to his officers,

531. "Special deterrence" is the effect of a sanction on an individual who has already experienced it. The exclusionary rule is not aimed at this kind of deterrence, Oaks readily admits, because "it does not impose any direct punishment on a law enforcement official who has broken the rule." Oaks, supra note 492, at 709-10. "The exclusionary rule is aimed at affecting the wider audience of all law enforcement officials and society at large" and is thus aimed at "general deterrence." Id. at 710. One "kind of effect" of "general deterrence" is "direct deterrence," which is "the compliance induced by the threat of the sanction. It is of course dependent upon effectively communicating the rule and the nature of the sanction to the individuals supposed to be affected by it." Id. According to Mertens and Wasserstrom, supra note 148, at 394, 399, Oaks "overlooks" a third form of deterrence, "systemic deterrence." See text accompanying notes 532-33 infra. But Oaks does not overlook it completely. I would say he underplays it.

532. Mertens & Wasserstrom, supra note 148, at 394. See also id. at 399; LaFave, supra note 529, at 319-20, 350-51; Schlag, supra note 529, at 882-83.

533. Mertens & Wasserstrom, supra note 148, at 399.

advising them to desist from the practice" and then "in-
corporat[ed] the change in procedures in the Department’s Gen-
eral Orders, a set of regulations issued to each officer and with
which each officer must be familiar." Moreover, even before the
ultimate Supreme Court decision in Prouse, the Delaware State
Police Legal Officer, in response to the trial court’s invalidation of
"random stops," "had disseminated a memorandum to all troops
and units within the State Police describing the decision, explain-
ing the conduct it prohibited, . . . advising that it did not affect
stops based on articulable suspicion," and "provid[ing] several ex-
amples of facts that could provide sufficient articulable suspicion
for a stop.""536

Although "systemic deterrence" is an important concept, one
often overlooked in discussions of the "deterrence" rationale or
the "deterrent" effects of the exclusionary rule, there is a good deal
to be said for removing the term "deterrence" (whatever the kind),
from the search and seizure vocabulary altogether. It is a popular
term, of course, but it has been so abused and misused in so many
judicial opinions and law review articles that it has become one of
those words that “needlessly obstruct clear thinking.”537

[The term] suggests that the police have a God-given incli-
nation to commit unconstitutional searches and seizures
unless they are ‘deterred’ from that behavior. Once this
assumption is indulged, it is easy enough to criticize the
[exclusionary rule] on the ground that it ‘does not apply
any direct sanction to the individual officer whose illegal
conduct results in the exclusion,’ and so cannot ‘deter’
him.538

But as we have seen, the rule could not, need not, and does not
“deter” that way. It does not work the way the criminal law is sup-
posed to operate.

Even if one accepts the notion that the purpose of the exclu-
sionary rule is to influence police behavior, and that its continued
existence depends on its ability to do so, the term “deterrence” is
awkward and misleading. It is more accurate and more useful to
view the rule as “a counterweight within the criminal justice sys-
tem,”539 or as a “disincentive.”540 It is not a “deterrent” because
application of the rule does not leave the police “in a worse posi-

535. Mertens & Wasserstrom, supra note 148, at 400.
536. Id.
537. J. FRANK, FATE AND FREEDOM 139 (1945).
538. Amsterdam, supra note 443, at 431, quoting Chief Justice Burger, dissent-
ing in Bivens, 403 U.S. at 416.
539. Amsterdam, supra note 443, at 431. It prevents the criminal justice system
“from functioning as an unmitigated inducement to policemen to violate the fourth
tion than if they had never searched in the first place." 541 Indeed, they can still use the knowledge they gained from the illegal search if they can obtain it from an "independent source." 542 Enforcing the rule does not deter the police from violating the search and seizure guarantee, "but repealing the rule would positively encourage such unconstitutional activity." 543

Viewing the exclusionary rule in this light, the Court's recent decisions declining to apply the rule in settings other than its central application appear more ominous. If "[t]he rule encourages police to refrain from unreasonable searches not for fear of punishment, but simply because there is no reason for making them," 544 every time "the courts allow some violations of the fourth amendment to reap rewards, the removal of incentives . . . is undermined." 545

The Court seems to think that it can decline to apply the exclusionary rule in settings other than the criminal trial (and, even in the criminal trial, only when a defendant has "standing" and is objecting to evidence being offered in the prosecution's case-in-chief) without affecting the vitality of the rule in its central application. But "changing the law is like making a change in the intricate part of a highly organized drama, you cannot change one part without other parts being affected in unexpected ways." 546

Every time the Court fails to avail itself of an opportunity to remove another police incentive for violating the fourth amendment—by authorizing its use in grand jury proceedings or civil tax proceedings tied closely to a criminal prosecution, by expanding its use for impeachment purposes 547 or by establishing and stiffen-

540. See note 529 supra.
541. See id.
542. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).
543. See note 529 supra. The Court, per Stewart, J., scrambled the "deterrence" and "disincentive" notions somewhat in Elkins v. United States, 364 U.S. 205 (1960): "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Id. at 217. The Court, per Powell, J., said it more cleanly in Stone v. Powell, 428 U.S. 465 (1976): "[W]e have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." Id. at 492. But elsewhere in the Stone opinion the Court talked about the "deterrent effect" of the rule.
544. Note, supra note 528, at 357.
545. Id. See also Dershowitz & Ely, supra note 529, at 1219.
ing "standing" requirements—it invites police officers with a "nothing-to-lose-and-everything-to-gain philosophy" to engage in unreasonable searches or seizures. There is little, if anything, a court can do, of course, when "the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." But every time a judge permits unconstitutional searches to yield benefits in her courtroom, she "encourages" the police to "proceed in an irregular manner on the chance that all will end well," even when their purpose is prosecution and conviction.

I have no doubt that some judges sincerely believe that "selective enforcement" of the rule will "prune" it, "make it more acceptable and hence more lasting." But I think not. I think "selective enforcement" only serves to undermine the rule. Even assuming that the damage caused by any one exception is tolerable, the cumulative effect of all the exceptions may be too great:

If, for example, the police unlawfully stop and search a car and its occupants, it is likely that some of the passengers would not have standing to challenge admission of unlaw-


Rawlings, supra, the Court's latest major pronouncement on the subject, evidently rejects the long-settled principle that a possessory interest in the items seized is sufficient to establish "standing." See 448 U.S. at 118 (Marshall, J., joined by Brennan, J., dissenting). Moreover, the case suggests that one may invoke the protection against unreasonable search and seizure "only if his expectation of privacy in the premises searched is so strong that he may exclude all others from that place"—"a harsh threshold requirement . . . not imposed even in the heyday of a property rights oriented Fourth Amendment." Id. at 119-20.

It may be, as the leading search-and-seizure commentator hopes, that because Justice Rehnquist's opinion for the Court "is based upon a series of notions which, if taken seriously, would reduce the fourth amendment to nothing more than 'a form of words,'" 3 LAFAVE, supra note 383, § 11.3(c) at 196 (1983 Pocket Part), Rawlings "will have a short life" or be limited to its peculiar facts. Id. In the meantime, however, the case has generated much confusion, a state of affairs not likely to eliminate significant incentives for police violations of the fourth amendment or prosecution use of such violations.

549. Note, supra note 528, at 357.


551. As Judge (later Chief Justice) Vinson expressed it in Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940): "Officers should not be encouraged to proceed in an irregular manner on the chance that all will end well." Id. at 694.

fully-seized evidence, or that the evidence will be admitted either to impeach the testimony of a defendant, or to secure an indictment in a grand jury proceeding. Although the police may not be thinking about any particular one of these permissible collateral uses of unlawfully-seized evidence, they may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off.\footnote{553}

The point Justice Stewart made dissenting in Janis\footnote{554} seems to have even greater force when applied to a cluster of exceptions to the exclusionary rule. At some point the combined impact of authorizing the use of illegally seized evidence in various "collateral" or "peripheral" settings negates whatever benefits are achieved by excluding the evidence in its central setting; at some point so many incentives for acquiring evidence illegally have been made available (or not eliminated) that the exclusionary rule, where it does apply, cannot be expected to serve as a meaningful disincentive. A plausible case can be made for the proposition that we have already reached that point, or that at the very least we are rapidly approaching it.

In recent years the Court has told us again and again in various contexts that the "incremental" or "marginal benefits" of the rule are outweighed by its "substantial" or "well-known costs." But every time the "costs" of exclusion are held to outweigh the rule's benefits in a collateral setting, it diminishes the "benefits" of the rule in its central application. The "benefits" of the rule \textit{where it still applies} may have been so reduced that it no longer outweighs the costs of exclusion. This may yet turn out to be the ultimate "cost" or, depending upon one's viewpoint, the ultimate "benefit" of the cost-benefit analysis.

If and when the exclusionary rule, which has been subjected to a "war of attrition," is toppled in its last stronghold (more likely replaced by legislation providing what we shall be assured is an "effective" tort remedy, rather than abolished outright), not a few will see it as the culmination of a campaign launched by Chief Justice Burger in the \textit{American University Law Review}\footnote{555} almost twenty years ago. Thus, a close student of the subject has noted that "[b]efore his appointment, our present Chief Justice had publicly called for the restriction and eventual abolition of the exclu-

\footnote{553. Mertens \& Wasserstrom, \textit{supra} note 148, at 388. \textit{See also} Dershowitz \& Ely, \textit{supra} note 529, at 1221 n.93.}

\footnote{554. \textit{See text accompanying notes 431-35 supra.}}

sionary rule." I would have agreed if I had not reread the Chief Justice's 19-year-old law review article quite recently.

Judge Burger (as he was at the time) did disparage the exclusionary rule as a "deterrent"—at one point he called the notion that the exclusionary rule effectively deters the police "never more than wishful thinking on the part of the courts"—and he did propose an independent Review Board as a means of "eliminat[ing] the practices leading to the exclusion"—but as a supplement to, not a substitute for, the exclusionary rule.

Of course, some supporters of Weeks and Mapp would challenge Judge Burger's view of the rule's effects on the police as "never more than wishful thinking." They would say that one can reach such a conclusion only by proceeding on the erroneous premise that the rule is supposed to influence the police the way the criminal law is supposed to restrain the general public. But no supporter of Weeks and Mapp would quarrel with Burger for seeking a supplement to the rule. "No proponent of the exclusionary rule has suggested that it should act in isolation."

"To challenge, as I do, the oft-repeated claim that suppression of evidence operates as a deterrent on police," pointed out the present Chief Justice in his 1964 article, "is not to attack the doctrine itself, for courts are bound to uphold constitutions and statutes. But society must inquire whether the Suppression Doctrine has in fact accomplished its stated purpose of deterrence and meet the frustrated and plaintive cry that 'There must be a better way to do it.'"

As I read the article, however, a better way to influence police behavior did not mean scrapping the exclusionary rule because it was a poor way to do it:

We must recognize suppression as an essential tool to implement the Constitution and nothing more, and that other

556. Kaplan, supra note 552, at 1040.
557. Burger, supra note 555, at 12.
558. Id. at 15.
559. The matter is not entirely free from doubt. One portion of the article, see id. at 23, can be read as a plea to abolish the rule, but at a number of other places Judge Burger seemed to make it plain that this is not his intention. See text accompanying notes 562-66 infra.
560. See text accompanying notes 526-36 supra.
561. Pye, Charles Fahy and the Criminal Law, 54 GEO. L.J. 1055, 1072 (1966). Continues Dean Pye: "Nothing prevents the use of internal sanctions within the police department or pressure upon the department from prosecutors and city officials simultaneously with the use of the exclusionary rule. It is because such devices are by themselves ineffective that the occasion for the invocation of the exclusionary rule continues to exist." Id.
562. Burger, supra note 555, at 10 (first emphasis added).
and different means of deterrence must be devised. . . .

I suggest judges had a right to assume that other branches of government, and police in particular, would recognize that this mechanism of suppression was not an end in itself but a means, which needed implementation from the legislative and the executive branches. Those branches of government, not the courts, have the jurisdiction and power to make the [suppression] doctrine a positive force. Courts cannot conduct post-mortem examination of police action or conduct training courses for the police. That is the responsibility of others.

In the course of presenting his proposal, Judge Burger suggested the following basis for the exclusionary rule, one that, "although never articulated by the Supreme Court, may 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 or statutory 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 benefit 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 Germans of the 1930's and early '40's, 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.

What I have quoted is what the present Chief Justice said about the exclusionary rule the first time he focused on the sub-

563. Id. at 13 (emphasis added).
564. Id. at 22 (emphasis added).
565. Id. at 14.
566. Id. (emphasis in original). Cf. Chafee, The Progress of the Law, 1919-1922: Evidence, III, 35 Harv. L. Rev. 673, 694-95 (1922). The view that unconstitutionally obtained evidence is admissible and that the injured person's only remedy is a civil action against the offending official, commented Professor Chafee, a proponent of the exclusionary rule, "would place the penalty for the violation of the Constitution upon the official and not upon society." Id.
ject. Of course, his thinking about the matter has changed significantly since ascending to his present post. 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 "hesitate[d] to abandon it until some meaningful substitute is developed."567 The third time he addressed the issue at length, concurring in the 1976 Stone case, the Chief Justice had grown more impatient. He called for the rule's immediate abolition, asking us to believe that such a development "would inspire a surge of activity" toward providing an effective alternative.568

I submit he was right the first time.