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The exclusionary rule in historical perspective: the struggle to make the Fourth Amendment more than ‘an empty blessing’

by Yale Kamisar

In the 65 years since the Supreme Court adopted the exclusionary rule, few critics have attacked it with as much vigor and on as many fronts as did Judge Malcolm Wilkey in his recent *Judicature* article, “The exclusionary rule: why suppress valid evidence?” (November 1978).

According to Judge Wilkey, there is virtually nothing good about the rule and a great deal bad about it. He thinks the rule is partly to blame for “the distressing rate of street crimes” (page 215). He tells us that it “discourages internal disciplinary action by the police themselves” (page 226); “actually results in encouraging highly pernicious police behavior” (e.g., perjury, harassment and corruption) (page 226); “makes it virtually impossible for any state, not only the federal government, to experiment with any methods of controlling police” (page 227); and “undermines the reputation of and destroys the respect for the entire judicial system” (page 223).

Judge Wilkey claims, too, that the rule “dooms” “every scheme of gun control . . . to be totally ineffective in preventing the habitual use of weapons in street crimes” (page 224). Until we rid ourselves of this rule, he argues, “the criminal can parade in the streets with a great bulge in his pocket or a submachine gun in a blanket under his arm” and “laugh in the face of the officer who might wish to search him for it” (page 225).

Unthinking, emotional attachment?

Why, then, has ‘the rule survived? “The greatest obstacle to replacing the exclusionary rule with a rational process,” Judge Wilkey maintains, is “the powerful, unthinking emotional attachment” to the rule (page 217). If you put the issue to a representative group of lawyers and judges, he concedes, “you would doubtless hear some support” for the rule, but only from those “heavily imbued with a mystique of the exclusionary rule as of almost divine origin” (page 223).

It is hard to believe that nothing more substantial than “unthinking emotional at-
"attachment" or mystical veneration accounts for support for the rule by Justices Holmes and Brandeis (which I discussed in my earlier article) and, more recently, by such battle-scarred veterans as Roger Traynor, Earl Warren and Tom Clark.

In the beginning, Judge Traynor was not attached to the rule, emotionally or otherwise. Indeed, in 1942 he wrote the opinion of the California Supreme Court reaffirming the admissibility of illegally-seized evidence. But by 1955, it became apparent to Traynor that illegally seized evidence "was being offered and admitted as a routine procedure" and "it became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure, subject to no effective deterrent."  

Without fear of criminal punishment or other discipline, law enforcement officers ... casually regard [illegal searches and seizures] as nothing more than the performance of their ordinary duties for which the City employs and pays them. In light of these circumstances, Traynor overruled the court's earlier decision.

And consider Earl Warren. During the 24 years he spent in state law enforcement work in California (as deputy district attorney, district attorney and attorney general), California admitted illegally seized evidence. Indeed, Warren was the California Attorney General who successfully urged Judge Traynor and his brethren to reaffirm that rule in 1942. In 1954, during his first year as Chief Justice of the United States, he heard a case involving police misconduct so outrageous as to be "almost incredible if it were not admitted" (the infamous Irvine case), but he resisted the temptation to impose the exclusionary rule.

My misgivings about (the admissibility of illegally seized evidence) grew as I observed that time after time it was being offered and admitted as a routine procedure ... It was one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States, as well as the state constitution.

Ah, but surely the guilty should still not go free? However grave the question, it seemed improperly directed at the exclusionary rule. The hard answer is in the United States Constitution as well as in state constitutions. They make it clear that the guilty would go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them.

It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine.

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Why California adopted the rule

Roger Traynor was the chief justice of California in 1955 when the state supreme court adopted the exclusionary rule. He explains his position on the rule in this excerpt from his article, "Mapp v. Ohio at Large in the Fifty States" (1962 Duke L.J. 319, 322).

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sionary rule on the states, even in such extreme cases.\textsuperscript{5} It was not until 1961 that he joined in the opinion for the Court in \textit{Mapp}, which imposed the rule on the states.

Chief Justice Warren knew the exclusionary rule’s limitations as a tool of judicial control,\textsuperscript{6} but at the end of an extraordinary public career—in which he had served more years as a prosecutor than any other person who has ascended to the Supreme Court—Warren observed:

\begin{quote}
[I]n our system, evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.\textsuperscript{7}
\end{quote}

The author of the \textit{Mapp} opinion, Tom Clark, was, of course, U.S. Attorney General for four years before he became a Supreme Court justice and he was assistant attorney general in charge of the criminal division before that. Evidently, nothing in his experience gave Clark reason to believe that the rule had “handcuffed” federal officials or would cripple state law enforcement. And he never changed his views about the need for the exclusionary rule during his 18 years on the Court or the 10 years he spent in the administration of justice following his retirement.\textsuperscript{8} Indeed, shortly before his death, he warmly defended \textit{Mapp} and \textit{Weeks}.\textsuperscript{9}

Moreover, nothing in Justice Clark’s career suggests that he endorsed \textit{Mapp} out of “sentimentality” or in awe of the “divine origins” of the exclusionary rule. More likely, he was impressed with the failure of \textit{Wolf} and \textit{Irvine} to stimulate any meaningful alternative to the exclusionary rule in the more than 20 states that still admitted illegally seized evidence at the time of \textit{Mapp}.\textsuperscript{10}

I do not mean to suggest that Judge Wilkey’s views on the exclusionary rule are aberrational among lawyers and judges; many members of the bench and bar share his deep distress with the rule. Indeed, when Judge Wilkey asks us to abolish the exclusionary rule now—without waiting for a meaningful alternative to emerge—he but follows the lead of Chief Justice Burger, who recently maintained:

\begin{quote}
[T]he continued existence of the rule, as presently implemented, inhibits the development of rational alternatives... It can no longer be assumed that other branches of government will act while judges cling to this Draconian, discredited device in its present absolutist form.\textsuperscript{11}
\end{quote}

Because so many share Judge Wilkey’s hostility to the exclusionary rule, it is important to examine and to evaluate Wilkey’s arguments at some length.\textsuperscript{12} Only then can we determine whether the rule is as irrational and pernicious as he and other critics maintain—and whether we can abolish it before we have developed an alternative.

\section*{Crime and the rule}

A year before the California Supreme Court adopted the exclusionary rule on its own—and years before the “revolution” in American criminal procedure began—William H. Parker, the Chief of the Los Angeles Police Department, said:

\begin{quote}
Our most accurate crime statistics indicate that crime rates rise and fall on the tides of economic, social, and political cycles with embarrassingly little attention to the most determined efforts of our police.\textsuperscript{13}
\end{quote}

\begin{itemize}
  \item[6.] See his opinion for the Court in Terry v. Ohio, 392 U.S. 1 (1968), at 13-15.
  \item[7.] \textit{Id.} at 13.
  \item[10.] See Elkins v. United States, 364 U.S. 205, 224-25 (1960) (App.).
  \item[12.] Though I discussed the empirical challenge to the exclusionary rule in my first article, I do not examine Judge Wilkey’s use of empirical data in this article because two political scientists—Bradley Canon and Steven Schlesinger—will discuss that issue in \textit{Judicature} next month.
\end{itemize}
Almost as soon as the California Supreme Court adopted the exclusionary rule, though, Chief Parker began blaming the rule for the high rate of crime in Los Angeles, calling it "catastrophic as far as efficient law enforcement is concerned," and insisting "that the imposition of the exclusionary rule has rendered the people powerless to adequately protect themselves against the criminal army."¹⁴

Such criticism of the Cahan rule was only a preview of the attack on Mapp. Chief Justice Traynor, speaking about the debate following the Mapp decision, rightly observed that: "Articulate comment about [Mapp] . . . was drowned out in the din about handcuffing the police."¹⁶

Thus, it is not surprising that Judge Wilkey would claim on his very first page that "[w]e can see [the]huge social cost [of Weeks and Mapp] most clearly in the distressing rate of street crimes . . . which flourish in no small degree simply because of the exclusionary rule." Nevertheless, it is disappointing to hear a critic repeat this charge, because after 65 years of debate, there was reason to hope that this criticism, at least, would no longer be made. As Professor James Vorenberg pointed out, shortly after he completed his two years of service as Executive Director of the President's Commission on Law Enforcement and Administration of Justice:

What the Supreme Court does has practically no effect on the amount of crime in this country, and what the police do has far less effect than is generally realized.¹⁷

Even Professor Dallin Oaks (now a university president), upon whose work Judge Wilkey relies so heavily, advised a decade ago:

The whole argument about the exclusionary rule 'handcuffing' the police should be abandoned. If this is a negative effect, then it is an effect of the constitutional rules, not an effect of the exclusionary rule as the means chosen for their enforcement.

Police officials and prosecutors should stop claiming that the exclusionary rule prevents effective law enforcement. In doing so they attribute far greater effect to the exclusionary rule than the evidence warrants, and they are also in the untenable position of urging that the sanction be abolished so that they can continue to violate the [constitutional] rules with impunity.¹⁸

A weak link

Over the years, I have written about the impact of Cahan, Mapp and other decisions on crime rates and police-prosecution efficiency.¹⁹ I will not restate my findings again, especially since Judge Wilkey has presented no statistical support for his assertion. I would, however, like to summarize a few points:

- Long before the exclusionary rule became law in the states—indeed, long before any of the procedural safeguards in the federal Constitution was held applicable to the states—invidious comparisons were made between the rate of crime in our nation and the incidence of crime in others.

Thus, in 1911, the distinguished president of Cornell University, Andrew D. White, pointed out that, although London's population was two million larger than New York's, there were 10 times more murders in New York.²⁰ And in 1920, Edwin W. Sims, the first head of the Chicago Crime Commission, pointed out that "[d]uring 1919 there were more murders in Chicago (with a population of three million) than in the entire British Isles (with a population of forty

15. See, e.g., ABA, Summary of Proceedings of Section of Criminal Law 54, 58 (1956).
16. Traynor, supra n. 4, at 198.
20. See 2 J. CRIM L. & CRIMINOLOGY at 107 (1911).
American criminal procedure which began experienced anything like the "revolution" in the exclusionary rule.

- England and Wales have not experienced anything like the "revolution" in American criminal procedure which began at least as early as the 1961 Mapp case. Nevertheless, from 1955-65 (a decade which happened to be subjected to a most intensive study), the number of indictable offenses against the person in England and Wales increased 162 percent. How do opponents of the exclusionary rule explain such increases in countries which did not suffer from the wounds the Warren Court supposedly inflicted upon America?

- In the decade before Mapp, Maryland admitted illegally seized evidence in all felony prosecutions; Virginia, in all cases. District of Columbia police, on the other hand, were subject to both the exclusionary rule and the McNabb-Mallory rule, a rule which "hampered" no other police department during this period. Nevertheless, during this decade the felony rate per 100,000 population increased much more in the three Virginia and Maryland suburbs of the District (69 per cent) than in the District itself (a puny one per cent).

- The predictions and descriptions of near-disaster in California law enforcement which greeted the 1955 Cahan decision find precious little empirical support. The percentage of narcotics convictions did drop almost 10 points (to 77 per cent), but only possession cases were significantly affected. Meanwhile, both the rate of arrests and felony complaints filed for narcotics offenses actually increased! Thus, in 1959-60, 20 per cent more persons were convicted of narcotics offenses in California superior courts than in the record conviction percentage years before Cahan.

The overall felony conviction rate was 84.5 per cent for the three years before Cahan, 85.4 per cent for the Cahan year and 86.4 per cent in the three years after Cahan (even including the low narcotic percentages). Conviction rates for murder, manslaughter, felony assault, rape, robbery and burglary remained almost the same, though the number of convicted felons rose steadily.

The exclusionary rule, to be sure, does free some "guilty criminals" (as would an effective tort remedy that inhibited the police from making illegal searches and seizures in the first place), but very rarely are they robbers or murderers. Rather they are "offenders caught in the everyday world of police initiated vice and narcotics enforcement ..."

Though critics of the exclusionary rule sometimes sound as though it constitutes the main loophole in the administration of justice, the fact is that it is only a minor escape route in a system that filters out far more offenders through police, prosecutorial, and judicial discretion than it tries, convicts and sentences ... Moreover, the critics' concentration on the formal issue of conviction tends to overlook the very real sanctions that are imposed even on defendants who 'escape' via the suppression of evidence [e.g., among the poor, most suffer at least several days of imprisonment, regardless of the ultimate verdict; many lose their jobs as a result and have a hard time finding another] ...

When one considers that many convictions in the courts that deal with large numbers of motions to suppress often amount to small fines, suspended sentences, and probation, the distinction between conviction and escape becomes even more blurred.

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22. F.H. McClintock and N.H. Avison, CRIME IN ENGLAND AND WALES 37 (1968). Of course, much of the statistical increase in British crime may have been an increase in reported crime, not actual crime. But the same may be said for the statistical increase in American crime.
23. Mallory v. United States, 354 U.S. 449 (1957), reaffirming McNabb v. United States, 318 U.S. 332 (1943), excluded from federal prosecutions all confessions or admissions obtained during prolonged pre-commitment detention, regardless of whether they were "voluntarily" made, so far as the record showed.
26. Id. at 464.
27. See Kamisar, supra n. 24 at 190.
Guns and the exclusionary rule

Judge Wilkey does advance what so far as I know is a new argument: that gun control will be totally ineffective "so long as the exclusionary rule hampers the police in enforcing it." "Since [American] criminals know the difficulties of the police in making a valid search," he observes, "the criminals in America do carry guns," unlike criminals in England and other countries.

Why, then, did so many criminals carry guns in New York and more than 20 other states that admitted illegally seized evidence until 1961? New York, for example, passed the Sullivan Act in 1911, making the ownership and carrying of pistols subject to a police permit. But a British gun control expert said recently that, if we compare New York with London in the 10 years after passage of the Sullivan Act, we would probably find.

that New York, with its strict controls on the private ownership of pistols, suffered infinitely more from the criminal use of firearms of all types than did London in a period when all firearms were freely available. In the 1966 Blessing case, only two of the seven state court justices said the proviso violated the U.S. Constitution. Most state judges thought that, despite Mapp, the Blessing case had upheld the "anti-exclusionary" proviso; as late as 1969, a unanimous panel of the court of appeals acted on this basis.

Thus, for nine years after Mapp the police of Michigan were free to search suspects for weapons for almost any reason. What happened? In six years, starting in 1964, criminal homicides in Detroit more than tripled, rising from 138 to 488. Why? Judge (and former Detroit Police Commissioner) George Edwards quotes the head of the Detroit Police Department's Homicide Bureau:

There are more homicides in the city because there are more handguns in the city. The relationship is that clear. You can't go by the increase in [gun] registration either. The bulk of handguns used in violent crime are not registered.

The National Commission on the Causes and Prevention of Violence likewise determined that handguns had caused the upsurge in crime:

Between 1965 and 1968, homicides in Detroit committed with firearms increased 400 per cent while homicides committed with other weapons increased only 30 per cent; firearms robberies increased twice as fast as robberies committed without firearms. (These rates of increase are much higher than for the nation as a whole).

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An undemonstrated connection

The availability of handguns clearly increases crime rates, but do changes in the rules of evidence? Judge Wilkey hints darkly that there is a "connection" between America's high crime rate and its "unique" exclusionary rule. So far as I am aware, no one has been able to demonstrate such a connection on the basis of the annual Uniform Crime Reports or any other statistical data. In Michigan, for example, the rate of violent crime seems to have fluctuated without regard to the life and death of the state's "anti-exclusionary" proviso.

From 1960-64, the robbery rate increased only slightly in the Detroit Metropolitan Statistical Area but it quadrupled from 1964 to 1970 (from 152.5 per 100,000 to 648.5). When the Michigan Supreme Court struck down the state's "anti-exclusionary" proviso in 1970, the robbery rate fell (to 470.3 per 100,000 in 1973), climbed (to 604.2 in 1975), then dropped again (to 454.3 in 1977, the lowest it has been since the 1960's).

From 1960-64, the murder and nonnegligent manslaughter rate remained almost the same in the Detroit area, but it rose extraordinarily the next six years (5.0 in 1964 to 14.7 in 1970). In the next four years it continued to climb (but less sharply) to 20.2 in 1974. Then it dropped to 14.1 in 1977, the lowest it has been since the 1960's.

Finally, I must take issue with Judge Wilkey's case of the criminal who "parade[s] in the streets with a great bulge in his pocket or a submachine gun in a blanket under his arm," "laugh[ing] in the face of the officer who might wish to search him for it" (page 225). If American criminals "know the difficulties of the police in making a valid search," as Judge Wilkey tells us, they know, too, that the exclusionary rule has "virtually no applicability" in "large areas of police activity which do not result in criminal prosecutions," and that confiscation of weapons is one of them. (The criminal might get back his blanket, but not the submachine gun).

Moreover, it is not at all clear that an officer who notices a "great bulge" in a person's pocket or, as in the recent Mimms case, a "large bulge" under a person's sports jacket, lacks lawful authority to conduct a limited search for weapons. Indeed, Mimms seems to say that a policeman does have the authority under such circumstances. Even if I am wrong, however, even if the Fourth Amendment does not permit an officer to make such a limited search for weapons, abolishing the exclusionary rule wouldn't change that. If an officer now lacks the lawful authority to conduct a "frisk" under these circumstances, he would still lack the lawful authority to do so if the rule were abolished. This is a basic point, one that I shall focus on in the next section.

A basic confusion

In my earlier Judicature article, I pointed out how police and prosecutors have treated the exclusionary rule as if it were itself the guaranty against unreasonable search and seizure (which is one good reason for retaining the rule). At several places Judge Wilkey's article reflects the same confusion.

He complains, for example, that if a search or frisk turns up a deadly weapon, that weapon cannot be used in evidence if the officer lacked the constitutionally required cause for making the search or frisk in the first place (page 224). But this is really an attack on the constitutional guaranty itself, not the exclusionary rule. Prohibiting the use of illegally seized evidence may be poor

37. All the data in this paragraph and the next are based on the FBI Uniform Crime Reports for the years 1960 through 1977 (the latest year available).

The FBI reports crime nationally, by region, by state and by "standard metropolitan statistical area." The Detroit area includes five adjoining counties. From 1960-1977, the statewide homicide and robbery fluctuations were consistent with the Detroit area's.


"public relations" because by then we know who the criminal is, but an after-the-fact prohibition prevents convictions in no greater degree than would effective prior direction to police to search only by legal means . . . [T]he maintenance of existing standards by means of exclusion is not open to attack unless it can be doubted whether the standards themselves are necessary.43

If we replace the exclusionary rule with "disciplinary punishment and civil penalties directly against the erring officer involved," as Judge Wilkey proposes (page 231), and if these alternatives "would certainly provide a far more effective deterrent than . . . the exclusionary rule," as the judge assures us (page 231), the weapon still would not be brought in as evidence in the case he poses because the officer would not make the search or frisk if he lacked the requisite cause to do so.

Judge Wilkey points enviably to England, where "the criminals know that the police have a right to search them on the slightest suspicion, and they know that if a weapon is found they will be prosecuted" (page 225, emphasis added). But what is the relevance of this point in an article discussing the exclusionary rule and its alternatives? Abolishing the rule would not confer a right on our police to search "on the slightest suspicion"; it would not affect lawful police practices in any way. Only a change in the substantive law of search and seizure can do that. (See the accompanying insert, "Liberalizing the law of search and seizure can do that. (See the accompanying insert at p. 338, supra.)"

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

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

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

. . . If punishment of the officer is effective to prevent unlawful searches, then equally by this is justice rendered inefficient and criminals coddled. It is only by violations that the great god Efficiency can thrive.46

45. Paulsen, supra n. 44, at 87.
47. C. Hall, Evidence and the Fourth Amendment, 8 A.B.A.J. 646 (1922). See also insert at p. 338, supra; Francis Allen, The Wolf Case: Search and Seizure, Federalism and the Civil Liberties, 45 ILL. L. REV. 1, 19-20; Paulsen, supra n. 4, at 88.
Waiting for alternatives
Judge Wilkey makes plain his agreement with Chief Justice Burger that "the continued existence of [the exclusionary rule] . . . inhibits the development of rational alternatives" and that "incentives for developing new procedures or remedies will remain minimal or nonexistent so long as the exclusionary rule is retained in its present form." 48

48. Stone v. Powell, 428 U.S. 465, 496, 500 (1976) (Burger, C.J., concurring). Earlier, the Chief Justice had balked at abandoning the exclusionary rule "until some meaningful alternative can be developed" because "a flat overruling" of Weeks and Mapp might give law enforcement officials "the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411, 420-21 (1971) (dissenting).

Thus, Judge Wilkey warns that "we will never have any alternative in operation until the rule is abolished. So long as we keep the rule, the police are not going to investigate and discipline their men, and thus sabotage prosecutions by invalidating the admissibility of vital evidence . . ." (pages 217-18). He argues that Mapp "removed from the states both the incentive and the opportunity to deal with illegal search and seizure by means other than suppression" (page 227). And he concludes his first article with these words:

[Let us . . . by abolishing the rule permit in the laboratories of our fifty-one jurisdictions the experimentation with the various possible alternatives promising far more than the now discredited exclusionary rule.

Liberalizing the law of search and seizure: a separate issue

As Professor (now Dean) Monrad Paulsen has noted, and as his own writings illustrate, supporters of the exclusionary rule need not, and have not always, defended the content of the law of search and seizure. Thus, more than 20 years ago, Paulsen maintained that in several respects the law of search and seizure was "too restrictive of police work and ought to be liberalized." 1 I share his view that if the substantive rules of search and seizure "make sense in the light of a policeman's task, we will be in a stronger position to insist that he obey them." 2

In the early 1960's, Professor Fred Inbau criticized the Court for handing down Mapp v. Ohio, warning state prosecutors "You'll experience some real jolts" if such federal doctrines as the ban against seizing items of "evidentiary value only" (first articulated in Gouled v. United States, 255 U.S. 298, 309-11 [1921]) "are applied to your own cases." 3

In my response, I said that the Gouled rule (which put objects of "evidentiary value only" beyond the reach of the police even when they act on the basis of "probable cause" or pursuant to an otherwise valid warrant) "is unsound and undesirable . . . [It] is wrong because it departs from the fundamental principles pervading search and seizure law." 4

If the Fourth Amendment had indeed carved out a "zone" that the police could never enter, abolition of the exclusionary rule, either across the board or along this particular front, would not have authorized the police to enter the zone. The proper response, if criticism of the Gouled rule was valid (and it was), was not to overrule Mapp or Weeks but to abolish the Gouled rule—which the Court subsequently did.5

2. Id.
In light of our history, these comments (both the Chief Justice's and Judge Wilkey's) are simply baffling. First, the fear of "sabotaging" prosecutions has never inhibited law enforcement administrators from disciplining officers for committing the "many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear."49

Second, both defenders of the rule and its critics recognize that there are large areas of police activity which do not result in criminal prosecutions [e.g., arrest or confiscation as a punitive sanction, (common in gambling and liquor law violations), illegal detentions which do not result in the acquisition of evidence, unnecessary destruction of property]—hence the rule has virtually no applicability and no effect in such situations.50

Whatever the reason for the failure to discipline officers for "mistakes" in these "large areas of police activities," it cannot be the existence of the exclusionary rule.

Finally, and most importantly, for many decades a majority of the states had no exclusionary rule but none of them developed any meaningful alternative. Thirty-five years passed between the time the federal courts adopted the exclusionary rule and the time Wolf was decided in 1949, but none of the 31 states which still admitted illegally seized evidence51 had established an alternative method of controlling the police. Twelve more years passed before Mapp imposed the rule on the state courts, but none of the 24 states which still rejected the exclusionary rule52 had instituted an alternative remedy. This half-century of post-Weeks "freedom to experiment" did not produce any meaningful alternative to the exclusionary rule anywhere.

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**Disparity between fact and theory**

Of course, few critics of the exclusionary rule have failed to suggest alternative remedies that might be devised or that warranted study. None of them has become a reality. In 1922, for example, Dean Wigmore maintained that "the natural way to do justice" would be to enforce the Fourth Amendment directly by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a 30-day imprisonment for his contempt of the Constitution, and then preceeding to affirm the sentence of the convicted criminal.53 Nothing ever came of that proposal. Another critic of the rule suggested that a civil rights office be established, independent of the regular prosecutor, "charged solely with the responsibility of investigating and prosecuting alleged violations of the Constitution by law-enforcement officials.54 Nothing came of that proposal either.

Judge Wilkey recognizes that "policemen traditionally are not wealthy," but "[t]he government has a deep purse." Thus, as did Chief Justice Burger in his Bivens dissent,55 Judge Wilkey proposes that in lieu of the exclusion of illegally seized evidence there be a statutory remedy against the government itself to afford meaningful compensa- tion and restitution for the victims of police illegality. Two leading commentators, Caleb Foote and Edward Barrett, Jr. made the same suggestion 20 years ago,56 but none of the many states that admitted illegally seized evidence at the time seemed interested in experimenting along these lines.

Indeed, the need for, and the desirability

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53. Wigmore, supra n. 46, at 484. To the same effect is 8 Wigmore, EVIDENCE §2184, at 40 (3d ed. 1940). But see Hall, supra n. 47, at 647, doubting "whether the marshal would ever be compelled to live upon jail fare."
54. Peterson, Restrictions in the Law of Search and Seizure, 52 N. U.L.REv. 46, 62 (1957). The disadvantages of this proposal are discussed in Paulsen, supra n. 44, at 94.
of, a statutory remedy against the government itself was pointed out at least as long ago as 1936. In a famous article published that year, Jerome Hall noted that the prospects of satisfying a judgment against a police officer were so poor that the tort remedy in the books "collapses at its initial application to fact." Said Hall:

[Where there is liability (as in the case of the policeman), the fact of financial irresponsibility is operative and, presumably, conclusive; while, where financial responsibility exists (as in the case of a city), there is no liability. 5

"This disparity between theory and fact, between an empty shell of relief and substantial compensation," observed Professor Hall—43 years ago—"could not remain unnoticed."58

This disparity—no longer unnoticed, but still uncorrected—has troubled even the strongest critics of the rule. Thus, more than 35 years ago, J.A.C. Grant suggested "implement[ing] the law covering actions for trespass, even going so far as to hold the government liable in damages for the torts of its agents. 59 And, William Plumb, Jr., accompanied his powerful attack on the rule with a similar suggestion.60

Mapp's traumatic effects

At the time of Plumb's article, the admissibility of illegally-seized evidence had "once more become a burning question in New York."61 Delegates to the 1938 constitutional convention had defeated an effort to write the exclusionary rule into the constitution, but only after a long and bitter debate.62 The battle then moved to the legislature, where bills were pending to exclude illegally obtained, or at least illegally wiretapped, evidence.63

Against this background, Plumb offered a whole basketful of alternatives to the rule and he said the state legislature "should make a thorough study of the problem of devising effective direct remedies [such as those he had outlined] to make the constitutional guarantee 'a real, not an empty blessing.'"65 But nothing happened.

Otherwise why would a New York City Police Commissioner say of Mapp some 20 years later:

I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this... I was immediately caught up in the entire problem of reevaluating our procedures which had followed the Defore rule, and modifying, amending, and creating new policies and new instructions for the implementation of Mapp. The problems were manifold. [Supreme Court decisions such as Mapp] create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their very foundations upward. Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen...

In theory, Defore, which rejected the exclusionary rule in New York, had not expanded lawful police powers one iota. Nor, in theory, had Mapp reduced these powers. What was an illegal search before Defore was still an illegal search. What was an unlawful arrest before Defore was still an unlawful arrest.

The Defore rule, of course, was based largely upon the premise that New York did not need to adopt the exclusionary rule because existing remedies were adequate to effectuate the guaranty against illegal search and seizure. Cardozo said that:

The officer might have been resisted[!], or sued for damages or even prosecuted for oppression. He was subject to removal or other discipline at the hands of his superiors.68

Why, then, did Mapp have such a "dramatic-

58. Id. at 348.
59. J.A.C. Grant, Search and Seizure in California, 15 So. CALIF. L.REV. 139, 154 (1942).
61. Id. at 349.
62. 1 NEW YORK CONSTITUTIONAL CONVENTION, Revised Record 358-594 (1938).
63. Plumb, supra n. 60, at 349 n. 40 and 357 n. 94.
64. Id. at 387-389.
65. Id. at 385.
68. Id. at 586-587.
ic” and “traumatic” effect? Why did it necessitate “creating new policies?” What were the old policies like? Why did it necessitate retraining sessions from top to bottom? What was the old training like? What did the commissioner mean when he said that before Mapp his department had “followed the Defore rule”?

On behalf of the New York City Police Department as well as law enforcement in general, I state unequivocally that every effort was directed and is still being directed at compliance with and implementation of Mapp . . . 69

Isn’t it peculiar to talk about police “compliance with” and “implementation of” a remedy for a violation of a body of law the police were supposed to be complying with and implementing all along? Why did the police have to make such strenuous efforts to comply with Mapp unless they had not been complying with the Fourth Amendment?

69. Murphy, supra n. 66, at 941.

Are comparisons with other countries meaningful?

Though it may be tempting to think that the serious defects of our criminal justice system are the result of our failure to adopt European models of investigation and trial, it may be that the faults of our system are better explained by such factors as our ethnic and racial differences, the traditional lawlessness of our people and our officials, and our insistence on using the criminal law to combat every form of socially disapproved conduct . . . We can no more import our solutions than we can export our problems.1

Nevertheless, it is plain to Judge Wilkey that “one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it.” “How do all the other civilized countries control their police?” he asks. “Why does the United States, alone, rely on the irrational exclusionary rule?”

In his reliance on comparisons with other countries to attack the exclusionary rule, Judge Wilkey parts company with the two academicians he has chiefly leaned on, Steven Schlesinger and Dallin Oaks. Schlesinger saw little point in making comparisons between Canada and the United States.2 He recognized that there may be no comparable need for the exclusionary rule in Canada (and Western European countries) for several reasons:

• Their police “are simply better disciplined than their American counterparts.”3
• Canada’s crime rate, “especially that of violent crime, is substantially less than that of the United States, thus putting less pressure on the police to deal with crimes by illegal methods.”4
• Canada’s problem with crime is not exacerbated by the level of racial tension experienced in the United States.5

Finally, Schlesinger noted, “it would seem that these factors which differentiate the Canadian law enforcement situation from the American are likewise present in the nations of Western Europe.”6

Legislative oversight

Some 20 years ago, Justice Jackson suggested another possible factor when he said:

I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition, but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it . . . [T]o transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so.7

3. Id.
4. Id. at 107-08.
5. Id. at 108.
6. Id.
Flowing from the Mapp case is the issue of defining probable cause to constitute a lawful arrest and subsequent search and seizure.70

Doesn’t this issue flow from the Fourth Amendment itself? Isn’t that what the Fourth Amendment is all about?

The police reaction to Mapp demonstrates

70. Id. at 943. For similar reaction to Mapp by other law enforcement officials, see Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 CORNELL L.Q. 436, 440–43 (1964).

More recently, an American political scientist furnished examples of “zealous legislative oversight” of the police.of Scotland, Sweden, West Germany and France, indicating that it is still “good politics” in many European countries to observe civil liberties.8 It was noted, too, that “[c]ivilians do not just oversee but actually run most European police departments”9; that several European countries reserve hundreds of positions for lawyers who are recruited directly into the upper ranks;10; that “European police departments place much more emphasis on education”;11; and that some European countries actually encourage complaints against police and, not infrequently, sustain them.12

Canada’s differences

How do other countries control their police without the exclusionary rule? At least with respect to Canada, Professor Oaks offers explicit answers,13 but his answers do not demonstrate the “irrationality” of the rule in the American setting. Rather, they indicate why Canada may not need an exclusionary rule, but why the United States still does.

First, “police discipline is relatively common... Second, police officers are occasionally prosecuted for criminal misconduct occurring in the course of their official duties.” Oaks considers a third factor perhaps most important of all: “an aggrieved person’s tort cause of action against an offending police officer is a real rather than just a theoretical remedy...” But he suggests that the difference is more than simply the remedies. “[P]olice are greatly concerned about obeying the rules and very sensitive to and quick to be influenced by judicial criticism of their conduct,” he writes. And Canadian prosecutors play a different role from that of American prosecutors. A prosecutor there “will sometimes exercise what he considers to be his teaching function with the police by refusing to introduce evidence that he considers to have been improperly obtained.” Moreover, “Canadian prosecutors are part of the Ministry of Justice, which has... command authority over most of the police organizations...” and channels by which to correct offensive practices.

9. Id. at 50.
10. Id. at 49.
11. Id.
12. “German police departments set up special booths at public events, asking visitors to make complaints. The number of complaints against policemen in such cities as London and Berlin far exceeds the number filed against policemen in New York City. And a much higher ratio of complaints is sustained, nearly 20 per cent in West Berlin.” Id. at 51.

warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?71

No incentive for change

As I have already indicated, critics of the exclusionary rule have often made proposals for effectuating the Fourth Amendment by means other than the exclusionary rule—but almost always as a quid pro quo for rejecting or repealing the rule. Who has ever heard of a police-prosecution spokesman urging—or a law enforcement group supporting—an effective “direct remedy” for illegal searches and seizures in a jurisdiction which admitted illegally seized evidence?72 Abandoning the exclusionary rule without waiting for a meaningful alternative (as Judge Wilkey and Chief Justice Burger would have us do) will not furnish an incentive for devising an alternative, but relieve whatever pressure there now exists for doing so.

I spoke in my earlier article of the great symbolic value of the exclusionary rule (pages 69-72, 83-84). Abolition of the exclusionary rule, after the long, bitter struggle to attain it, would be even more important as a symbol.

During the 12-year reign of Wolf, some state judges remained mindful of the cogent reasons for the admission of illegally obtained evidence and clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule.73

Their hope proved to be in vain. Wolf established the “underlying constitutional doctrine” that “the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers”74 (though it did not require exclusion of the resulting evidence); Irvine warned that if the states “defaulted and there were no demonstrably effective deterrents to unreasonable searches and seizures in lieu of the exclusionary rule, the Supreme Court might yet decide that they had not complied with ‘minimal standards’ of due process.”75 But neither Wolf nor Irvine stimulated a single state legislature or a single law enforcement agency to demonstrate that the problem could be handled in other ways.

The disappointing 12 years between Wolf and Mapp give added weight to Francis Allen’s thoughtful commentary on the Wolf case at the time it was handed down:

This deference to local authority revealed in the Wolf case stands in marked contrast to the position of the court in other cases arising within the last decade involving rights ‘basic to a free society.’ It seems safe to assert that in no other area of civil liberties litigation is there evidence that the court has construed the obligations of federalism to require so high a degree of judicial self-abnegation.

... In no other area in the civil liberties has the court felt justified in trusting to public protest for protection of basic personal rights. Indeed, since the rights of privacy are usually asserted by those charged with crime and since the demands of efficient law enforcement are so insistent, it would seem that reliance on public opinion in these cases can be less justified than in almost any other ... 76

Now Judge Wilkey asks us to believe that the resurrection of Wolf (and evidently the overruling of the 65-year-old Weeks case as well) will permit “the laboratories of our 51 jurisdictions” to produce meaningful alternatives to the exclusionary rule. (Again, see text following note 48). His ideological ally, Chief Justice Burger, is even more optimistic. He asks us to believe that a return to the pre-exclusionary rule days “would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistakes or misconduct.”77

And to think that Judge Wilkey (on page 232) accuses defenders of the exclusionary rule of being “stubbornly blind to 65 years of experience”!

72. Before the Cahan decision “[l]aw enforcement groups preferred the ambiguity of seldom-litigated rules and had no real incentive to take the risks involved in seeking legislative action. And there was little evidence that other groups would take the initiative to force the police to come before the legislature.” Barrett, supra n. 56, at 592-593.
73. Traynor, supra n. 2, at 324.
75. Traynor, supra n. 2, at 324.
76. Allen, supra n. 47 at 11, 12-13.