WHITE HOUSE LAW LIBRARY
ROOM 528 OEOB
(202) 395-3397

Date 4/5/83

To Bill Barr

Room No. _____

From Angie Nast

✓ To Keep

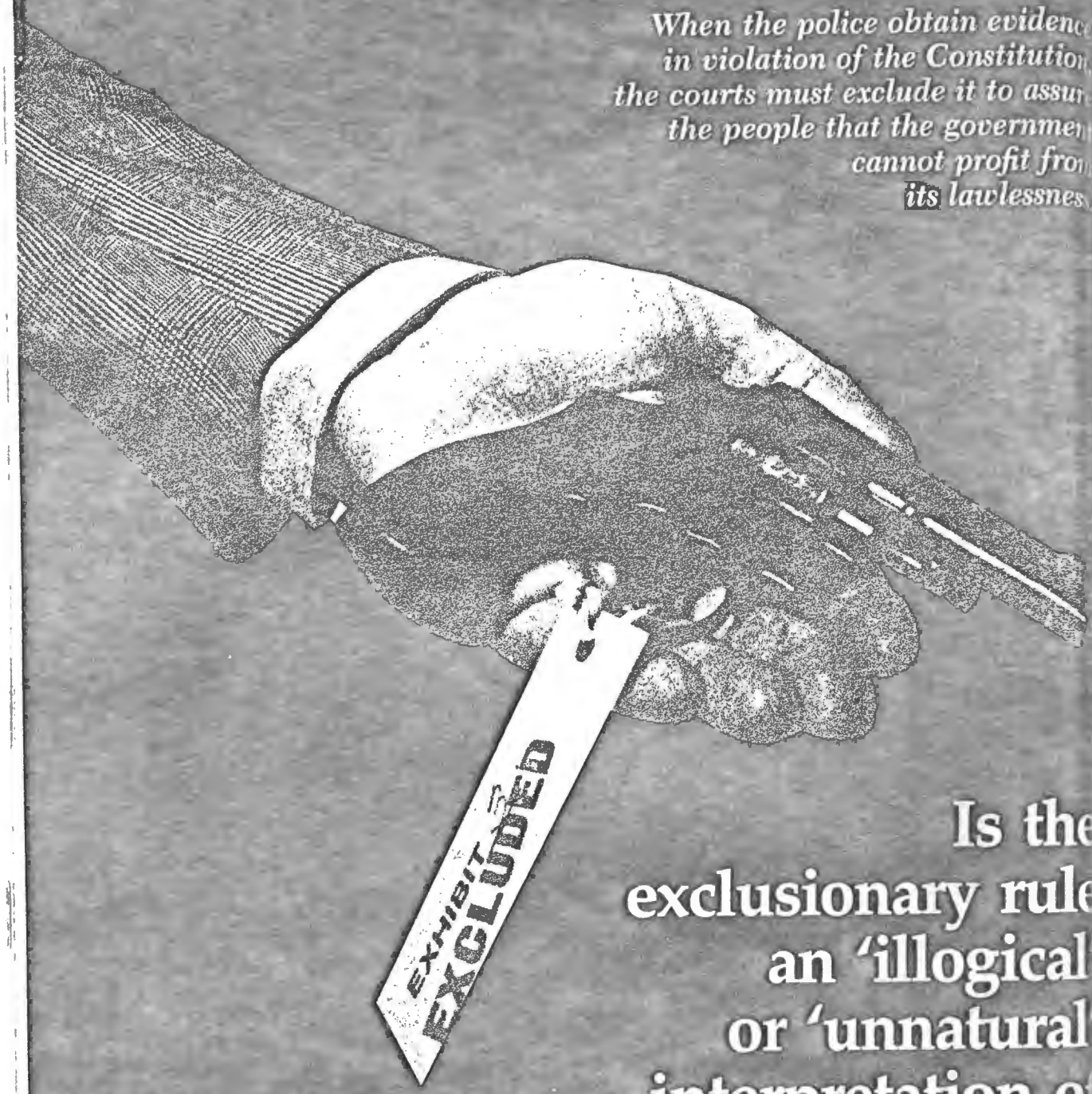
_____ To Borrow (Date Due _____)

_____ Per Your Request/Per Our Conversation

_____ FYI

Message: Included a 1982 article for your information . . .

When the police obtain evidenc
in violation of the Constitution
the courts must exclude it to assu
the people that the governmen
cannot profit fro
its lawlessnes



Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?

by Yale Kamisa

62 Judicature 66 (August 1978)

Editor's note: Over the years, critics of the exclusionary rule have called it, among other things, an "illogical," "irrational," and "unnatural" interpretation of the Fourth and Fourteenth Amendments.

Last fall, for example, U.S. Court of Appeals Judge Malcolm Wilkey, writing in the Wall Street Journal, said the rule "is not required by the Constitution. . . . The exclusionary rule is a judge-made rule of evidence which bars 'the use of evidence secured through an illegal search and seizure.' . . . The only excuse offered for this irrational rule is that there is 'no effective alternative' to make the police obey the law."

In an effort to explore this controversial question further, Judicature invited Judge Wilkey and a defender of the rule, Yale Kamisar, to express their views. Judge Wilkey will explain his opposition and suggest alternatives to the rule in a later issue.

More than 50 years have passed since the Supreme Court decided the *Weeks* case,[1] barring the use in federal prosecutions of evidence obtained in violation of the Fourth Amendment, and the *Silverthorne* case,[2] invoking what has come to be known as the "fruit of the poisonous tree" doctrine.[3] The justices who decided those cases would, I think, be quite surprised to learn that some day the value of the exclusionary rule would be measured by—and the very life of the rule might depend on—an empirical evaluation of its efficacy in deterring police misconduct.[4]

These justices were engaged in a less ambitious venture, albeit a most important one. They were interpreting the Fourth Amendment as best they could. As they saw it, the rule—now known as the federal exclusionary rule—rested on "a principled basis rather than an empirical proposition."[5]

The dissenters in *United States v. Calandra* were, I think, plainly right when they maintained that "uppermost in the minds of the framers of the [exclusionary] rule" was not "the rule's possible deterrent effect," but "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people [that] the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[6] The main purpose of this article, then, is to trace, explain and justify the original grounding of the exclusionary rule—what has come to be known as "the imperative of judicial intergrity."[7]

The *Weeks* opinion

As Professor Francis Allen recently reminded us, the *Weeks* opinion "contains no language that expressly justifies the rule by reference to a supposed deterrent effect on

1. Weeks v. United States, 232 U.S. 383 (1914).

2. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)

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

4. Space does not permit an extensive evaluation of the recent "empirical studies" of the exclusionary rule's effects (if any) on police behavior. But see "Does the exclusionary rule affect police behavior?" on page 70 of this issue.

5. *Cf.* Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL.L.F. 518, 536–37 (pointing out that, unlike the Court's understanding in the formative phases of the exclusionary rule's history, in recent years the deterrent function has prevailed as its predominant justification, and that "until the rule rests on [returns to?] a principled basis rather than an empirical proposition," *Mapp* "will remain in a state of unstable equilibrium").

6. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., joined by Douglas and Marshall, JJ., dissenting). *Calandra* held that a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from him by violating the Fourth Amendment. *See also*, Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

7. Elkins v. United States, 364 U.S. 206, 222 (1960) (Stewart, J.) (overturning the "silver platter" doctrine), quoted with approval in Mapp v. Ohio, 367 U.S. 643, 656 (1961) (Clark, J.) (imposing the exclusionary rule as to unconstitutionally seized materials on state courts as a matter of Fourteenth Amendment Due Process). *See also* United States v. Calandra, *supra* n. 6.

police officials."[8] Indeed, in the United States Supreme Court, some 35 years were to pass, as Professor Robert McKay has noted, before *Wolf v. Colorado*[9] "introduced the notion of deterrence of official illegality to the debate concerning the wisdom of the exclusionary rule."[10]

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

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

Since so many commentators lately have emphasized the efficacy (or inefficacy) of the exclusionary rule in preventing illegal searches and seizures,[11] it may be profitable to take a fresh look at the key passages in the old *Weeks* case:

> . . . The tendency of those who execute the criminal laws [to] obtain convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> . . . The efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles. . . . The United States Marshall acted without sanction of law . . . and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[12]

Ratifying illegal searches

Although the Fourth Amendment constitutes a guarantee against unreasonable searches and seizures, it does not, of course, *explicitly* state what the consequences of a violation of the guarantee should be. This "specific" of the Bill of Rights turns out, as is so often the case,[13] not to be specific about the issue which confronted the *Weeks* Court and is the subject of today's debate.

This only means that here as elsewhere—almost *everywhere*—the Court "cannot escape the demands of judging or of making . . . difficult appraisals."[14] But what is wrong with the *Weeks* Court's appraisal? Does its reading of the Fourth Amendment do violence to the language or purpose of the guarantee against unreasonable search and seizure? Does its interpretation of this constitutional provision require an active imagination? Is the interpretation strained, illogical or implausible?

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

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not

8. *Id.* at 536 n. 90.

9. 338 U.S. 25 (1949), overruled, Mapp v. Ohio, 367 U.S. 643 (1961).

10. McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZONA L. REV. 327, 330 (1973).

11. See notes 5, 6 and 7 *supra*.

12. 232 U.S. at 392–94.

13. *See, e.g.*, Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 937, 95[illegible] (1965); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 337–39 (1957); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 17–18 (1959).

14. Haynes v. Washington, 373 U.S. 503, 515 (197[illegible] (Goldberg, J.). *See also* Friendly, *supra n.* 13, at 937–38.

> 'If the government becomes a lawbreaker, it breeds contempt for law.'
>
> —*Justice Louis Brandeis*

merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.[15]

The *Olmstead* case[16] involved two questions, both answered in the negative by a 5-4 majority: (1) Are telephone messages within the protection against unreasonable search and seizure? (2) Even if they are not, should the evidence nevertheless be excluded because the federal agents who tapped the phones thereby violated a state statute?

On the second issue, Chief Justice William Taft, writing for the majority, did not challenge the *Weeks* rule, but insisted that "the exclusion of evidence should be confined to cases [such as *Weeks*] where *rights under the Constitution* would be violated by *admitting it.*"[17] In dissent, Holmes and Brandeis argued that "apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act."[18] Their arguments as to why the exclusionary rule should apply to illegal, as well as unconstitutional, police action are essentially restatements, although more famous and most eloquent ones, of the reasoning in *Weeks*.

First, Holmes:[19]

> If [the government] pays its officers for having got evidence by crime, I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government would play an ignoble part.
>
> For those who agree with me, no distinction can be taken between the government as prosecution and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such inequities to succeed. . . . I am aware of the often repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks* [and] the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

Then Brandeis:[20]

> When these unlawful acts were committed, they were crimes only of the officers individually. The government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the government, having full knowledge, sought . . . to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. . . . And if this court should permit the government by means of its officers' crimes, to effect its purpose of punishing the defendant, there would seem to be present all the elements of a ratification. . . .
>
> Will this court by sustaining the judgment below sanction such conduct on the part of the Executive?
>
> . . . The Court's aid is denied . . . in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .
>
> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Police reaction to Mapp

I never fully appreciated the force of the

15. 251 U.S. at 392.
16. Olmstead v. United States, 277 U.S. 438 (1928).
17. *Id.* at 468.
18. *Id.* at 469–70 (dissenting opinion).
19. *Id.* at 470–71 (dissenting opinion).
20. *Id.* at 483–85 (dissenting opinion).

Weeks opinion, and the Holmes-Brandeis dissents in *Olmstead*, until some 15 years ago when an incident occurred in Minnesota where I was then teaching. It helped me see the implications of the rule more clearly.

Until 1961, the Minnesota courts, as well as the courts of about half the states, had permitted the use of unconstitutionally seized evidence. But when the Court decided *Mapp* v. *Ohio* in 1961,[21] and imposed the exclusionary rule on Minnesota and other "admissibility states" as a matter of federal constitutional law, it caused much grumbling in police ranks.

This led Minnesota's young attorney general, Walter Mondale, to remind the police that "the language of the Fourth Amendment is identical to the [search and seizure provision] of the Minnesota State Constitution" and that "*Mapp* did not alter one word of either the state or national constitutions."[22] The *Mapp* case, stressed Mondale, had "not reduce[d] [lawful] police powers one iota"—"what was a reasonable search

21. 367 U.S. 643 (1961).

22. Mondale, *The Problem of Search and Seizure*, 19 BENCH & B. OF MINN. 15, 16 (Feb. 1962). *See also* Kamisar, *Mondale on Mapp*, Feb./Mar. 1977 CIV. LIB. REV. 62.

Does the exclusionary rule affect police behavior?

When Professor Dallin Oaks wrote his "empirical challenge" to the exclusionary rule, it was undeniably an important contribution to this debate. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI.L.REV. 665 (1970). *See also*, Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243, 245–48 (1973) in many respects a continuation of the Oaks study, but a less scholarly effort.

But more recent and more comprehensive studies and analyses have cast grave doubt on his conclusions about the rule's inefficacy in affecting police behavior. And these analyses have highlighted the insufficiency and inappropriateness of the Oaks' data.

See generally, Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62

John Collier for Black S

before, still is."[23]

At a subsequent panel discussion on the law of search and seizure in which I participated, proponents of the exclusionary rule quoted Mondale's remarks and made explicit what those remarks implied: If the police feared that evidence they were gathering in the customary manner would now be excluded by the courts, the police must have been violating the guarantee against unreasonable search and seizure all along. This evoked illuminating responses from the two law enforcement panelists, responses which I think underscore the need for the "exclusionary rule" and its great symbolic value.

Minneapolis City Attorney Keith Stedd:

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

St. Paul Detective Ken Anderson:

> No officer lied upon the witness stand. If you were asked how you got your evidence, you told the truth. You had broken down a door or pried a window open . . . often we picked locks. . . . The Supreme Court of Minnesota sustained this time after time after time. [The] judiciary okayed it;

23. Mondale, *supra* n. 22, at 16.

KY. L.J. 681, 697–717, 725–27 (1974). *See also,* Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels,* 5 AM. POLITICS Q. 57, 71–75 (1977); D. Horowitz, THE COURTS AND SOCIAL POLICY 220–54. Washington, D.C.: The Brookings Institute, 1976; S. Wasby, SMALL TOWN POLICE AND THE SUPREME COURT 25–34, 81–117, 217–29. Lexington, Massachusetts: D.C. Heath, 1976 (study of southern Illinois and western Massachusetts police); cf. *Critique,* 69 NW. U. L. REV. 740 (1974) a devastating criticism of the Spiotto study, *supra.*

For example, Oaks and Spiotto rely on the high frequency with which motions to suppress are granted in Chicago gambling, narcotics and weapons cases to conclude that, long after adoption of the exclusionary rule, illegal searches and seizures were commonplace in the enforcement of these offenses by the Chicago police.

Canon points out that "counting successful motions is an imperfect indicator of the rule's effectiveness for several reasons," 62 KY. L.J. at 718. He concludes that, in any event, Chicago is "a gross exception to the national norm of granting suppression motions," *id.* at 721. Canon's study of 65 cities indicates that in 60 per cent of them motions to suppress were granted one-tenth of the time or less and in 91 per cent of the cities such motions were granted one fourth of the time or less. *Id.* at 722.

Moreover, comments Canon, "judges in Chicago have long been noted for their willingness to grant motions to suppress evidence" and "it is sometimes alleged that Chicago police habitually conduct vice raids in a manner that ensures that a motion to suppress will be successful." *Id.* at 720. As Wasby explains, *supra* at 108–17, 217–23, some judges granted a substantial number of motions to suppress "during the educational process" immediately following adoption of the exclusionary rule, but "police improvement and accommodation to the rules" meant that after this transitional period few motions were granted.

To take another example (there are many in the Canon article), Oaks' study of arrest before and after *Mapp* focused on *one* city, Cincinnati. He concluded that the adoption of the exclusionary rule had had virtually no effect on the number of arrests for narcotics, weapons and gambling there. See 37 U. CHI.L.REV. at 707. But Canon gathered similar data for 14 cities (including Cincinnati) and found that only four others had the "rather minimal response pattern that Cincinnati has." See 62 KY. L.J. at 706.

At the other end of the spectrum, the Baltimore decreases in arrests following *Mapp* "were both dramatically sudden and truly spectacular," *id.* at 704. "Baltimore is probably an extreme case and is illustrated to counter Oaks' generalizations about the efficacy of the exclusionary rule from the presentation of Cincinnati's arrest figures. Buffalo is less extreme, but not necessarily

they knew what the facts were.[24]

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

For example, shortly after California adopted the exclusionary rule,[25] William Parker, then Los Angeles chief of police, warned that his department's ability to prevent the commission of crime had been greatly diminished because henceforth his officers would be unable to take "affirmative action" unless and until they possessed "sufficient information to constitute probable cause."[26] He did promise, however, that "[a]*s long as the Exclusionary Rule is the law of California,* your police will respect it and operate to the best of their ability within the *framework of limitations imposed by that rule.*"[27]

Similarly, former New York City Police Commissioner Michael Murphy recalled how, when *Mapp* v. *Ohio* imposed the exclusionary rule on New York and other "admissibility states," he "was immediately caught up in the entire problem of reevaluating our procedures . . . and modifying, amending and creating new policies and new instructions for the implementation of *Mapp.* Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function."[28]

Commissioner Murphy, no less than

24. Quoted in Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts,* 49 CORNELL L.Q. 436, 442–43 (1964).

25. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

26. W. Parker, POLICE 117. Springfield, Illinois: C. C. Thomas, (Wilson ed. 1957).

27. *Id.* at 131. (Emphasis added).

28. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments,* 44 TEXAS L. REV. 939, 941 (1966).

typical. Indeed, it is not at all clear that there is a typical response to the exclusionary rule." *Id.* at 705.

Canon also noted that political scientist Michael Ban had concluded, after an in-depth study of *Mapp's* impact in Boston and Cincinnati, that "the Cincinnati political milieu . . . permitted widespread disregard if not defiance of the Supreme Court's ruling" and that in a number of respects there was "a discernably lesser propensity for compliance in Cincinnati than in Boston." *Id.* at 689, 698 (Canon's characterization of Ban's findings, which, though unpublished, have been widely circulated among political scientists).

At the present time, there is much to be said for lawyer-political scientist Donald Horowitz's analysis of *Mapp* and police behavior, Horowitz, *supra* at 224–25, 230–31, 250:

> Much of the empirical support for the proposition that *Mapp* does not deter the police from violating the Fourth Amendment has been quite crude. . . . [T]hat illegal searches are still conducted to obtain evidence of certain kinds of crimes does not mean that they are still conducted with the same frequency for evidence of other kinds of crimes. That illegal searches are common in some cities does not mean that they are equally common in all cities. Deterrence cannot be viewed as 'a monolithic governmental enterprise.'
>
> Gradually, the rudiments of a more discriminating approach have begun to emerge. What it suggests is that the extent to which police behavior is modified by *Mapp* depends on a complex set of local conditions, including . . . the type of offense involved, the particular police unit responsible for specific enforcement tasks, and the way in which local courts and lawyers handle search-and-seizure matters. . . .
>
> . . . [T]he fragments indicate it is a mistake to think that police behavior is never conditioned by the sanction of excluding evidence that might lead to conviction. . . . [I]n the case of serious crimes the policeman starts thinking fairly early of what is required to convict, and some of the things he thinks of are the restrictive rules of arrest and search.
>
> . . . [C]oncern with conviction is very much a function of locale, offense, stage of investigation and sometimes police unit involved. Receptivity to the judicial sanction varies accordingly.

In closing these brief remarks, I cannot resist pointing out that at the same time some critics of the exclusionary rule are urging its elimination or substantial modifi-

Chief Parker, seemed to think that "the framework of limitations" restraining the police had been put there by the exclusionary rule, not the state and federal constitutional guarantees against unreasonble search and seizure. "Flowing from the *Mapp* case," he said, "is the issue of defining probable cause to constitute a lawful arrest and subsequent search and seizure."[29]

L Criticisms of the rule

I think it may forcefully be argued that it is not the exclusionary rule which is illogical or misdirected, but much of the criticism it has generated. As Senator Robert Wagner pointed out in the 1938 New York State Constitution Convention:

> All the arguments [that the exclusionary rule will handicap law enforcement] seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself. . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.
>
> It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform.[30]

Cooley said of the Fourth Amendment 110 years ago that "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."[31] Why is it no less true when the accused's premises *have been* invaded or his constitutional rights

29. *Id.* at 943.

30. 1 New York Constitutional Convention, Revised Record 560 (1938), reprinted in J. Michael and H. Wechsler, CRIMINAL LAW AND ITS ADMINISTRATION 1191–92. Mineola, New York: Foundation Press, 1940. *See also* Traynor, J., in People v. Cahan, 44 Cal. 2d 434, 450, 282 P.2d 905 (1955).

31. T. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 306. Boston: Little, Brown, 1st ed. 1868.

fation on the ground, *inter alia,* that it has had little if any effect on police behavior and little if any impact on the amount of pre-*Mapp* illegality, other critics are calling for the rule's repeal or revision on the ground, *inter alia,* that in recent years the police have attained *such a high incidence of compliance with Fourth Amendment requirements* that "the absolute sanctions of the Exclusionary Rule are no longer necessary to 'police' them." Brief of Americans for Effective Law Enforcement (A.E.L.E.) and the International Association of Chiefs of Police (I.A.C.P.) as Amici Curiai in Support of Petitioner at 12, *California v. Krivda,* 409 U.S. 33 (1972), discussed in Comment, 65 J. CRIM. L. & C. 373, 383 (1974).

In their *amicus* brief, the A.E.L.E. and the I.A.C.P. presented the Court with the results of a study they had conducted of warrantless searches and seizures (such searches and seizures were chosen because these are the ones "in which the officer is acting on his own with no assistance from a magistrate or prosecuting attorney, cases in which his activity must stand or fall based on his own judgment, knowledge of search and seizure restrictions, and his desire to abide by such restrictions," Brief at 16).

According to this study, of more than 1000 cases involving warrantless searches and seizures decided by appellate courts nationwide during the 27-month period of January, 1970 through March, 1972, 84 per cent (1,157 of 1,371) were found to be proper—"an extraordinarily high degree of police professionalism." Brief at 17.

The *amicus* brief denies that this study evidences any beneficial exclusionary rule influence upon law enforcement, *id.* at 18, but I doubt that many will find the denial convincing. "[T]his excellent record of successful police compliance with the rules of search and seizure," *id.,* is attributed to "police professionalism"—an attempt by most police to learn "at least in a general way the restrictions on their search and seizure activities and a good faith desire to comport themselves properly within such restrictions," *id.* at 19. But what stimulated the attempt by most officers to familiarize themselves, at least in a general way, with the law of search and seizure?

Y.K.

otherwise violated? If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it violated the Constitution?[32] And why does it generate so much popular hostility to disallow the government to reap an advantage that it secured, and might only have been able to secure, by violating the Constitution?

No one, I think, has given a better explanation than Professor John Kaplan, one of the sharpest critics of the rule:

> From a public relations point of view, [the exclusionary rule] is the worst possible kind of rule because it only works at the behest of a person, usually someone who is clearly guilty, who is attempting to prevent the use against himself of evidence of his own crimes. . . . [But the] fact is that any rule which actually enforced the demands of the Fourth Amendment (whatever they may be) would prevent the conviction of those who would be caught through evidence obtained in violation of the Fourth Amendment. The problem with the exclusionary rule is that it works after the fact, so that by then we know who the criminal is, the evidence against him, and the other circumstances of the case. If there were some way to make the police obey, in advance, the commands of the Fourth Amendment, we would lose at least as many criminal convictions as we do today, but in that case we would not know of the evidence which the police could discover only through a violation of the Fourth Amendment. It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment.[33]

The 'time lag' argument

The federal exclusionary rule has been disparaged on the ground that "it was not adopted by the United States Supreme Court until 1914" and that despite the possibility that "an interpretation first made 125 years [actually 123] after a constitutional provision might nonetheless be an appropriate one, the time lag between the adoption of the fourth amendment and the first appearance of the exclusionary rule is at least some indication that it was hardly basic to the constitutional purpose."[34] This does not strike me as much of an argument.

Some 160 years after the adoption of the First Amendment, the "prevention and punishment" of "the lewd and obscene, the profane [and] the libelous" were still thought to raise no constitutional problems.[35] Indeed, 128 years passed between the adoption of the First Amendment and the first articulation of the "clear and present danger" test[36]—what may fairly be called "the

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

33. J. Kaplan, CRIMINAL JUSTICE 215–16. Mineola, New York: The Foundation Press, 2d ed. 1978.

34. Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027, 1030–31 (1974). As Dean Griswold has pointed out in SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 2. Lincoln: University of Nebraska Press, 1975, "except for the *Boyd* case [Boyd v. U.S. 116 U.S. 616 (1886), virtually no search and seizure cases were decided by the Supreme Court in the first 110 years of our existence under the Constitution."

The view that illegally seized evidence should be excluded was first laid down by way of dictim in *Boyd,* which went to great lengths to assert a connection between the Fourth Amendment and the privilege against self-incrimination, though the case could have been decided on the self-incrimination clause alone. *Adams v. New York,* 192 U.S. 585 (1903), appeared, by dictum, to repudiate the *Boyd* dictum. Thus the exclusionary rule was adopted in *Weeks* "following an earlier and seemingly inconsistent start." Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?,* 25 IND.L.J. 259, 306–07 (1950). *See generally* Atkinson, *supra* n. 32, at 13–17; Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L.REV. 361, 366–72 (1921); Notes, 56 YALE L.J. 1076, 1077–78 n. 11 (1947); 58 YALE L.J. 144, 148–51 (1948).

Professor Kaplan also observes, 26 STAN. L.REV. at 1031, that "the exclusionary rule was not imposed upon the states until 1961, and then by a divided Supreme Court." But the Supreme Court never addressed the issue until 1949 in *Wolf* and that decision was also by a divided Court (6-3). Over the years, of course, *Weeks* and *Mapp* have caught heavy criticism but so, it should be remembered, did *Wolf. See* A. Beisel, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 55–59. Boston: Boston University Press, 1955; Allen, *The Wolf Case: Search and Seizure, Federalism, and Civil Liberties,* 45 ILL.L.REV. 1 (1950); Frank, *The United States Supreme Court: 1948–49,* 17 U.CHI.L.REV. 1, 32–34 (1950); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts,* 43 MINN.L.REV. 1083 (1959); Paulsen, *Safeguards in the Law of Search and Seizure,* 52 NW.U.L. REV. 65, 72–76 (1957); Reynard, *supra* at 306–313. *See also* Pollak, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment,* 67 YALE L.J. 304, 320–21 & n. 105 (1957).

35. Beauharnais v. Illinois, 343 U.S. 250, 255 (1952) (Frankfurter, J.).

36. Schenck v. United States, 249 U.S. 47, (1919); *cf.* Debs v. United States, 249 U.S. 211, (1919).

start of the law of the first amendment."[37] And, of course, the development of the important "void for vagueness" and "overbreadth" doctrines in this area—"judge-made" or "judicially-created" remedies *fortissimo*—did not come until still later.[38]

The time lag between the adoption of the Fifth Amendment and the applicability of the privilege against self-incrimination to the proceedings in the police station as well as those in the courtroom was 175 years.[39] As for the Sixth Amendment right to counsel, it was not until 1938[40]—fairly early in the development of constitutional-criminal procedure but still a quarter of a century later than *Weeks*—that "the right to counsel in federal courts meant more than that a lawyer would be permitted to appear for the defendant if the defendant could afford to hire one."[41]

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

The most celebrated constitutional-criminal procedure cases of our times are *Johnson* v. *Zerbst*[43] and *Gideon* v. *Wainwright*,[44] requiring appointment of counsel in all federal and state prosecutions respectively when a defendant is unable to pay for the services of an attorney. But one searches the language of the Sixth and Fourteenth Amendments in vain for any mention of indigent defendants or the assignment or appointment of counsel at trial—let alone at preliminary hearings,[45] at lineups,[46] in the police station[47] or on appeal[48] or in juvenile court proceedings.[49]

The right to counsel has well been called "the most pervasive right" of an accused,[50] but all the Constitution has to say about it is that "in all criminal prosecutions the accused shall . . . have the Assistance of Counsel."[51] That's all. The considerable body of constitutional law which has emerged in this important area has all been "a matter of judicial implication."[52]

'Involuntary' confessions

And what is the source of the rule—first applied in 1936,[53] but shaped and reshaped in the course of the following three decades[54]—barring the use of involuntary confessions as a matter of Fourteenth Amendment Due Process? Talk about judge-made or judicially-created rules! The Constitution has nothing to say about "confessions" or "admissions," neither "involuntary" nor any other kind.

It will not do to point to the constitutional prohibition against compelling a person to

37. Kalven, *Ernst Freund and the First Amendment Tradition*, 40 U.CHI.L.REV. 235, 236 (1973).

38. *See* W. Lockhart, Y. Kamisar & J. Choper, CONSTITUTIONAL LAW 815–22. St. Paul, Minnesota: West, 4th ed. 1975.

39. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH.L.REV. 59, 65, 77–83 (1966).

40. Johnson v. Zerbst, 304 U.S. 458 (1938).

41. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV.L.REV. 1, 2 (1956).

42. Wolf v. Colorado, 338 U.S. 25, 28 (1949). The point has been made more strongly. *See* McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 J.Crim.L., C.&P.S. 266, 269 (1961), in POLICE POWER AND INDIVIDUAL FREEDOM 99, 103. Chicago: Aldine, Sowle ed. 1961 (*Weeks* "is a piece of pure judicial legislation").

43. *See* n. 40 *supra*.

44. 372 U.S. 335 (1963).

45. *See* Coleman v. Alabama, 399 U.S. 1 (1970).

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

47. Compare Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) with Oregon v. Mathiason, 429 U.S. 492 (1977).

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

49. *See* In re Gault, 387 U.S. 1 (1967).

50. *See* Schaefer, *supra* n. 41, at 8.

51. U.S. Const. Amend. VI.

52. By "implication," too, the courts have developed limitations on the exclusionary rule, e.g., standing, the attenuation of taint from illegal searches, and the use of illegally seized evidence in grand jury proceedings or for impeachment purposes.

These limitations are said to undermine the "judicial integrity" rationale of the exclusionary rule. *See Stone* v. *Powell*, 428 U.S. 465, 485 (1976), discussed in Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1410-12 (1977). The limitations also make the rule "not 'look' like a constitutional doctrine," according to Kaplan, *supra* n. 34, at 1030.

53. Brown v. Mississippi, 297 U.S. 278 (1936).

54. *See* Kamisar, *What Is an "Involuntary" Confession?*, 17 RUTGERS L.REV. 728 (1963).

Bright

Defendants most often insist that the evidence was seized illegally in cases involving narcotics. Many defense attorneys routinely make a motion to suppress such evidence.

be "a witness against himself" in "any criminal case."[55] The privilege was not deemed applicable to the states until 1964[56] and by that time the U.S. Supreme Court had decided some 30 state confession cases. Moreover, as noted earlier, even if the privilege against self-incrimination had been deemed applicable to the states, the law pertaining to "coerced" or "involuntary" confessions still would have developed without it.

Until *Miranda*,[57] the prevailing view was that because police officers lacked legal authority to compel statements, there was no legal obligation to answer to which a privilege could apply, and thus the privilege did not extend to the police station.[58] As late as 1966, Chief Justice Roger Traynor pointed out that although "the Fifth Amendment has long been the life of the party in judicial or legislative proceedings, . . . it has had no life it could call its own in the pre-arraignment stage."[59]

Nor is it a sufficient answer to say that Fourteenth Amendment Due Process bars convictions based on inherently untrustworthy evidence (long a universally accepted view, but, incidentally, not an *explicit* requirement of the due process clause either). This does not explain why the question of the admissibility of an involuntary confession must be "answered with complete disregard of whether or not petitioner in fact spoke the truth"[60] and why "a legal standard which took into account the circumstance of probable truth or falsity . . . is not a permissible standard under the Due Process Clause."[61] It does not explain why involuntary confessions "are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true."[62]

Nor does it explain the "rule of automatic reversal"—the rule formulated by the Stone and Vinson Courts and reaffirmed by the Warren Court that the introduction of an

55. U.S. Const. Amend. V.

56. Malloy v. Hogan, 378 U.S. 1 (1964). "In extending the privilege against self-incrimination to the states and at the same time indicating that the privilege has been the unseen governing principle of the confession cases, *Malloy* forcefully brought the Fifth Amendment to bear on the interrogation problem," W. Schaefer, THE SUSPECT AND SOCIETY 16. Evanston: Northwestern University Press, 1967. The "intertwined doctrines" (the "voluntariness standard" and the privilege against self-incrimination), noted Justice Schaefer in a postscript to his 1966 Rosenthal Lectures, "were fused in *Miranda*." *Id.* at 85 n. 21.

57. Miranda v. Arizona, 384 U.S. 436 (1966).

58. See the discussion in Kamisar, *supra* n. 39, at 65, 77–83.

59. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U.CHI.L.REV. 657, 669 (1966).

60. Rogers v. Richmond, 365 U.S. 534, 544 (1961).

61. *Id.* at 543.

62. Rochin v. California, 342 U.S. 165, 173 (1952) (relying in large part on rationale of coerced confession cases to exclude evidence produced by "stomach pumping").

involuntary statement at the trial necessitates reversal, regardless of how much untainted evidence remains to support the conviction.[63]

Are confessions different?

Critics of the search and seizure exclusionary rule try to distinguish away the coerced confession cases,[64] and for good reason. For once it becomes clear that the rationale of the coerced confession cases "has been expanded beyond protect[ing] the individual from conviction on unreliable or untrustworthy evidence" to "strik[ing] down police procedures which in their general application appear to the prevailing justices as imperiling basic individual immunities,"[65] as Professor Francis Allen pointed out a quarter of a century ago, then it becomes most difficult to distinguish the problem of the admission of unconstitutionally seized "real" evidence from that of involuntary confessions. For "[i]n both situations the perils arise primarily out of the procedures employed to acquire the evidence rather than from dangers of the incompetence of the evidence so acquired."[66]

Although those unhappy with the exclusionary rule still make the claim that the admissibility of unconstitutionally seized "real" evidence and "involuntary" confessions "raise entirely different questions,"[67] the argument comes about 30 years too late.[68]

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

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.[69]

63. *See* Lyons v. Oklahoma, 322 U.S. 596, 597 n.1 (1944); Malinski v. New York, 324 U.S. 401, 404 (1945); Haley v. Ohio, 332 U.S. 596, 599 (1948); Stroble v. California, 343 U.S. 181, 190 (1952); Payne v. Arkansas 356 U.S. 560, 567–68 (1958); Spano v. New York, 360 U.S. 315, 324 (1959); Culombe v. Connecticut, 367 U.S. 568, 621 (1961); Haynes v. Washington, 373 U.S. 503, 518–19 (1963).

Apparently the "rule of automatic reversal" still applies to "coerced" or "involuntary" confessions, *see* Chapman v. California, 386 U.S. 18, 23 & n.8 (1967), but not to *Massiah* (Massiah v. United States, 377 U.S. 201 (1964) or *Miranda* violations. *See* Milton v. Wainwright, 407 U.S. 371 (1972); United States v. Sanchez, 422 F.2d 1198 (2d Cir. 1970); United States v. Jackson, 429 F.2d 1368 (7th Cir. 1970) (D.C. Cir. 1970). *See also,* Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury,* 21 U.CHI.L. REV. 317, 348 (1954).

64. Thus, in criticizing the exclusionary rule as to unconstitutionally seized materials, Professor Charles Alan Wright notes, Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L.REV. 736, 737 (1972): "[W]e are talking only of what lawyers call 'real' evidence. Involuntary confessions and other evidence of that kind raise entirely different questions. Innocent men may give false confessions if sufficient pressure is put upon them by the police. The murder weapon, the envelope of narcotics, the gambling slips, however, speak for themselves." (Don't murder weapons and narcotics obtained *as a result of* involuntary confessions "speak for themselves" too?).

See also Wilkey, *Why Suppress Valid Evidence?*, 13 THE PROSECUTOR 124 (1977): "In exclusionary rule cases involving material evidence there is never any question of reliability. Reliability is in question, for example, with a coerced confession. . . . Exclusion of evidence is then proper, because the evidence is inherently unreliable."

65. Allen, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties,* 45 ILL.L.REV. 1, 29 (1950).

66. *Id.*

67. *See* n. 64 *supra.*

68. *See* Watts v. Indiana, 338 U.S. 49 (1949), and companion cases, reversing convictions based on "involuntary" confessions despite dissenting Justice Jackson's undisputed assertions that "[c]hecked with external evidence, [the confessions in each case] are inherently believable, and were not shaken as to the truth by anything that occurred at the trial." 338 U.S. 57, 58.

See also Rochin v. California, 342 U.S. 165, 172–173 (1952): "It has long 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. . . . To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions."

See generally A. Beisel, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 70–86. Boston: Boston University Press, 1955; Allen, *supra* n. 65, at 26-29; Allen, *Due Process and State Criminal Procedures: Another Look,* 48 NW.U.L.REV. 16, 20–25 (1953); Meltzer, *supra* n. 63, at 326–29, 343, 347–49; Paulsen, *The Fourteenth Amendment and the Third Degree,* 6 STAN.L.REV. 411, 417–23 (1954).

69. Spano v. New York, 360 U.S. 315, 320–21 (1959).

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

> Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system. . . .
>
> To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. . . .
>
> Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.[70]

If a conviction rests in part on an independently corroborated and concededly truthful confession (albeit one found to be the product of constitutionally impermissible methods), why cannot the conviction stand? Why not remand those who have made such confessions, together with those who managed to remain silent in the face of impermissible interrogations, "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"?[71] Though the exclusion of involuntary but verified confessions may be an effective way of deterring objectionable interrogation methods, why must the court "condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods [to deter such conduct] which, if consistently enforced, would be equally effective"?[72]

Moreover, if the impermissible police methods which produce involuntary confessions are typically more offensive to the dignity of the individual and more often characterized by violence than are unconstitutional searches and seizures, are not these objectionable interrogation methods more likely to attract the interest of the press, more likely to arouse community opinion, more likely to excite the sympathy of jurors? Why, then, is the court unwilling to rely on tort actions, criminal prosecutions and internal police discipline to check impermissible police interrogation practices? Why does the "command" of the Due Process Clause "compel" the court to reverse the conviction?[73] Why can't the conviction stand?[74]

The reason is that to uphold a conviction resting in part on an involuntary confession, however much verified, would be to "sanction" the objectionable methods which produced it and to afford these methods "the cloak of law,"[75] the very insight which the *Weeks* Court and Holmes and Brandeis expressed long ago.

II. The role of the Court

It is not surprising that a majority of the Court would conclude in 1949, as it did in *Wolf* v. *Colorado*,[76] that the Fourteenth Amendment did not prevent a state court from admitting evidence obtained by an

70. 365 U.S. 534, 540–41 (1961).

71. *Cf.* Wolf v. Colorado, 338 U.S. 25, 31 (1949).

72. *Cf.* Wolf v. Colorado, *supra* n. 71.

73. *Cf.* Rogers v. Richmond, quoted in text at n. 70 *supra*.

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

75. *Cf.* Rochin v. California, 342 U.S. 165, 173–74 (1952): "Coerced confessions offend the community's sense of fair play and decency. So here, to sanction [the 'stomach pumping' which produced the morphine capsules] . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby brutalize the temper of a society.

76. 338 U.S. 25 (1949).

unreasonable search and seizure, and that Justice Frankfurter would write the opinion of the Court. Frankfurter's, and his brethren's, "notions of the obligations of federalism were a strongly limiting influence on [their] role in the criminal cases during the years before the Warren tenure."[77] The *Wolf* case "provided an important demonstration of the Court's essential fidelity to the assumptions of a federal system at a time when [the Court] was being subjected to extreme and irresponsible charges of usurpation of power."[78]

Nevertheless, one is, or ought to be, taken aback by Frankfurter's reasoning in *Wolf*: The protection against unreasonable search and seizure is "basic to a free society," is "enforceable against the States through the Due Process Clause," but a conviction resting on evidence obtained in disregard of this fundamental and constitutionally protected right can stand—that, if I may be permitted to quote what I said about the *Wolf* case 19 years ago, "this is an instance where one may be . . . imprisoned on evidence obtained in violation of due process and yet not be deprived of life or liberty without due process of law after all."[79]

Frankfurter, no less than Justice Day in *Weeks*, has assumed elsewhere that permitting evidence obtained in violation of a law to be made the basis of a conviction would "stultify the policy" manifested by the law.[80]

And perhaps no jurist since Holmes and Brandeis has balked as much as Frankfurter at the courts becoming "accomplices" in police lawlessness by sustaining a conviction resting on evidence obtained by violation of law. The cases discussed above involving "involuntary" confessions which bear the stamp of verity illustrate this point, at least implicity.

But Frankfurter has been more explicit. In the famous *McNabb* case, he observed for a 7-1 majority:

> A statute [providing that arrestees promptly be taken before the nearest judicial officer] is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.
>
> . . . Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured [no more than did the draftsmen of the Fourth Amendment]. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.
>
> . . . We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation.[81]

Court inconsistencies

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

If a federal court cannot allow a convic-

77. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U.ILL.L.F. 518, 526.

78. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 5.

79. Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN.L.REV. 1083, 1108 (1959).

A decade later, Justice Frankfurter protested that *Wolf* did not mean that the substantive scope of the Fourth Amendment as such applies to the states via Fourteenth Amendment Due Process, that *Wolf* did not mean that every search and seizure violative of the Fourth Amendment would make the same conduct on the part of the state officials a violation of the Fourteenth. See his dissent in Elkins v. United States, 364 U.S. 206, 233, 237–40 (1960).

But most members of the Court did read *Wolf* this way. See Justice Stewart's opinion for the Court in *Elkins*, 364 U.S. at 212–215; and Justice Clark's opinion for the Court in Mapp v. Ohio, 367 U.S. 643, 650–51, 654–56 (1961). For reasons spelled out in Kamisar, *supra* at 1101-08, I think the *Mapp* and *Elkins* Courts properly read *Wolf* as equating the substantive scope of the Fourth and Fourteenth Amendments.

80. *See* McNabb v. United States, quoted in text at n. 81 *infra*.

81. McNabb v. United States, 318 U.S. 332, 344–47 (1943).

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

Nor, as I see it, can the reasoning of the court, by Frankfurter, in *Wolf*, be squared with its reasoning, by Frankfurter, in *Rochin*[82] —or with Frankfurter's dissent in *Irvine*.[83]

In striking down a conviction resting on evidence produced by "stomach pumping" —and certainly the morphine capsules taken from Rochin's stomach were no less trustworthy than the materials seized from Wolf's office—the *Rochin* Court, through Frankfurter, reminded us that "due process of law" means at least that "convictions cannot be brought about by methods that offend 'a sense of justice.'"[84] But don't all convictions brought about by methods that offend due process offend "a sense of justice"?

California did not "affirmatively sanction" the police misconduct in *Rochin* anymore than did Colorado in *Wolf*. The "stomach pumping," no doubt, was a tort and a crime. Moreover, as the *Rochin* Court pointed out, the brutal conduct "naturally enough was condemned by the court whose judgment is before us."[85] Why, then, would sustaining the conviction amount to "sanctioning" the police misconduct and "affording" it "the cloak of law"? And if it would, why would it not in *Wolf*?

Nor did the *Irvine* Court "affirmatively sanction" the repeated illegal entries into petitioner's home. Justice Jackson, who wrote the principal opinion in this case, took pains to note that "there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this common gambler."[86] Indeed, Jackson went so far as to direct the clerk of court "to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States."[87]

Why, then, did Frankfurter dissent in *Irvine*? Why did he protest that the Court cannot

> . . . dispose of this case by satisfying ourselves that the defendant's guilt was proven by trustworthy evidence and then finding, or devising other means whereby the police may be discouraged from using illegal methods to acquire such evidence.
>
> . . . If, as in *Rochin*, '[o]n the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause' [wasn't this true of *Wolf*?], it is no answer to say that the offending policemen and prosecutors who utilize outrageous methods should be punished for their misconduct.
>
> That the prosecution in this case, with the sanction of the courts, flouted a legislatively declared philosophy against such miscreant conduct and made it a policy merely on paper, does not make the conduct any the less a disregard of due process.
>
> Of course it is a loss to the community when a conviction is overturned because the indefensible means by which it was obtained cannot be squared with the commands of due process. . . . But . . . [a] sturdy, self-respecting democratic

82. Rochin v. California, 342 U.S. 165 (1952).

83. Irvine v. California, 347 U.S. 128, 142 (1954). The Court affirmed Irvine's conviction for horse-race bookmaking and related offenses though based on incriminating conversations heard through a concealed microphone illegally installed in petitioner's home. Justice Jackson wrote the four-man plurality opinion. Justice Clark concurred in the result, noting that if he had been on the Court when *Wolf* was decided, he would have applied the federal exclusionary rule to the states. 347 U.S. at 138. Justice Black, joined by Douglas, J., and Justice Frankfurter, joined by Burton, J., filed separate dissents.

84. 342 U.S. at 173.

85. *Id.*

86. 347 U.S. at 137.

87. *Id.* at 138. Only Chief Justice Warren joined Justice Jackson in this regard. The chief justice was "new on the job"; indeed, his nomination had not yet been confirmed. In later years he was to recognize that the admission of unconstitutionally seized evidence "has the necessary effect of legitimizing the conduct which produced the evidence." See text at n. 106 *infra*.

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

community should not put up with lawless police and prosecutors.[88]

Reconciling the differences

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

1. Not all violations of the Fourth Amendment offend due process; only certain "outrageous" or "aggravated" types of unreasonable searches and seizures do so.

Although even before *Mapp v. Ohio* and *Ker v. California*[89] I argued at considerable length to the contrary,[90] the *Wolf* opinion could conceivably have stood for, or have come to stand for, this limited proposition.[91] But today it is plain that it does not. Although some justices have balked at "incorporating" a specific provision of the Bill of Rights into the Fourteenth "jot-for-jot" and "bag and baggage," especially in the jury trial cases, it is now clear that the Court did not apply a "watered-down" version of the Fourth Amendment to the states, but rather one which applies to the same extent it has been interpreted to apply to the federal government.[92]

2. Evidence, verbal or real, which is the product of police violence or brutality should be excluded, but not evidence which is obtained by other types of police misconduct.

This is the distinction that Justice Jackson drew in *Irvine*—and one which he sought to make even among involuntary confessions.[93] But the court has long recognized that involuntariness or coercion need not be based upon physical violence or the threat of it.[94] Why, then, should such violence or the threat of it be a prerequisite for excluding other unconstitutionally seized evidence?

Moreover, today virtually everybody would reject a rule, as did Frankfurter and the other *Irvine* dissenters, whether it be a rule for "real" evidence or for verbal, that "even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials."[95]

3. *Obtaining* evidence by searches or seizures that would have violated the Fourth Amendment if conducted by federal officers *does* violate Fourteenth Amendment Due Process when made by state officers. But the *use* of such evidence in state courts does *not* offend due process unless the police methods involved constitute an "aggravated" or "outrageous" or "shocking" violation of the Fourth Amendment.

This, it seems to me, is the doctrine which emerges from Frankfurter's majority opinions in *Wolf* and *Rochin* and his dissent in *Irvine*. I find it a difficult proposition—a most curious one. Only one step is needed for "involuntary" confessions—the use of any confession obtained in violation of due process offends due process. But two steps are required for unreasonable searches and seizures: (1) Did the police violate the Fourth and Fourteenth Amendments? (2) If so, by how much? Was it a "gross" violation or only "mild"? "Flagrant" or "routine"?

The degree of violation

Where does this "two-plimsoll mark due process" test come from?[96] Talk about judicially created rules of evidence! Where is

88. 347 U.S. at 148–149 & n.1 (Emphasis added).

89. 374 U.S. 23 (1963) ("standard of reasonableness is the same under the Fourth and Fourteenth Amendments"). *See also* Aguilar v. Texas, 378 U.S. 108 (1964) (reading *Ker* as holding that standard for obtaining a search warrant is the same).

90. *See* n. 79 *supra*.

91. *Id.*

92. *See generally*, Y. Kamisar, J. Grano & J. Haddad, CRIMINAL PROCEDURE 12–15. Los Angeles: Center for Creative Educational Services, 1977; W. Lockhart, Y. Kamisar & J. Choper, CONSTITUTIONAL LAW 577–84. St. Paul: West, 4th ed. 1975.

93. *See* Stein v. New York, 346 U.S. 156, 182 (1953); Watts v. Indiana, 338 U.S. 49, 59–60 (1949) (concurring opinion). *See also* the comments on Justice Jackson's views in Paulsen, *supra* n. 68, at 428.

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

95. 374 U.S. at 146.

96. *Cf.* Frankfurter, J., concurring in Fikes v. Alabama, 352 U.S. 191, 199 (1957): "I cannot escape the conclusion . . . that in combination [these circumstances] bring the result below the Plimsoll line of 'due process.'"

See Field, *Frankerfurter, J., Concurring*, 71 HARV.L. REV. 77 (1957); Kamisar, *supra* n. 79, at 1121–29.

this written or even implied in the Constitution? Next to this test, surely, the *Weeks* Court's reading of the Fourth Amendment and the *Mapp* Court's reading of the Fourth and Fourteenth seem like pretty straightforward interpretations of the Constitution.

To say that police conduct is unconstitutional, that it violates the minimal standards of due process, is as bad a label as one can put on police misconduct. How then can it be said that still more is required for exclusion? Why then must the police be found to have violated *sub-minimal* standards?

How does one "barely" or "mildly" violate what is "basic to a free society" or "implicit in the concept of ordered liberty"[97]? If police action which violates due process is not gross or aggravated police misconduct *per se*, then why is it a violation of due process?

My purpose in comparing the reasoning in *Wolf* with that in *McNabb, Rochin* and other cases, and with what might be called the "imperative of judicial integrity" consideration in the confession area,[98] is not to demonstrate that the Court, or Frankfurter in particular, has been inconsistent. That is to be expected; indeed, it is almost inevitable. After all, Justice Frankfurter sat on the Supreme Court for more than 20 years and few judges who have served half as long have not been inconsistent.

My purpose rather is to provide "education in the obvious":[99] Almost no sensitive judge can take seriously the implications of *Wolf*. Almost no sensitive judge can live with those implications. *At some point* he will not care about or even think about "alternatives" to the remedy of exclusion—he will exclude the evidence however logically relevant and verifiable it be or, if the court below admitted it, he simply will not let the conviction stand. At some point he will be unable to do otherwise.

When that point is reached, he will do what a majority did in *Rochin* and some would have done in *Irvine*—he will refuse "to have a hand in such dirty business."[100] This is why the *Weeks* Court's interpretation of the Fourth Amendment, Wigmore's famous criticism to the contrary notwithstanding[101], is, if not perfectly logical, quite understandable—even quite natural.

The *Weeks* Court believed this point was reached when the police violated the Fourth Amendment; the *Rochin* Court and the *Irvine* dissenters believed that it was reached when the police violated some sub-minimal standard. But the response was the same: We don't care about possible tort actions or other possible "alternative remedies"! The government obtained the conviction by "indefensible means."[102] We the judges cannot sanction this. We the judges cannot afford it "the cloak of law."[103]

A judge's threshold

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

In his decade and a half as Chief Justice of the United States, for example, Earl Warren's threshold for exclusion lowered quite a bit. In his first year on the Court, he joined in Justice Jackson's principal opinion in *Irvine*, upholding a conviction based on "incredible" police misconduct but assuring us that "admission of the evidence does not exonerate the officers . . . if they have violat-

97. *See* Allen, *supra* n. 78, at 9. *See also* Kamisar, *supra* n. 79, at 1121–24.

98. *Cf.* Elkins v. United States, *supra* n. 7.

99. Holmes, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 292. New York: Harcourt, 1920.

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

101. *See* 8 J. Wigmore, EVIDENCE §2184 at 35, 40 (3d ed. 1940).

102. See text at n. 88 *supra*. Are not all unconstitutional means of obtaining evidence to secure a conviction "indefensible"? And if not, why are they unconstitutional?

103. See text at n. 88 *supra*. If alternative means of punishing or discouraging governmental lawlessness are available (at least theoretically), as they were in *Rochin* and *Irvine*, why does admitting the evidence constitute "put[ting] up with lawless police and prosecutors"? And if it does, why did the Court put up with the governmental lawlessness in *Wolf*?

ed defendant's constitutional rights"[104]—"there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting [the] conviction."[105]

Seven years later, however, the Chief Justice joined in the opinion for the Court in *Mapp*. And another seven years later, very close to the end of his career, he observed for the Court in the "stop and frisk" cases:

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur. . . . When [unconstitutional] conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.[106]

Holmes and Brandeis seem to have had a consistently low threshold for exclusion. In Fourteenth Amendment Due Process cases at least, Justice Jackson appears to have had a consistently high one. For him unconstitutional police conduct was not enough, not even serious or aggravated unconstitutional conduct. It had to involve physical violence or brutality as well.

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

This is why—although his reasoning must seem curious to many of us who have grown up with *Wolf*, *Rochin* and *Irvine*—a leading proponent of the exclusionary rule maintained, some 50 years ago, that infringements of the Fourth Amendment which generate the *least* public outcry pose the *strongest* case for exclusion.[107] "The more violent and obvious infringement," he was willing to concede, "may be curtailed through civil or criminal actions against the guilty officers."[108]

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

III. Drawing the 'bottom line'

A court which admits the evidence in such a case manifests a willingness to tolerate the unconstitutional conduct which produced it. How can the police and the citizenry be expected "to believe that the government truly meant to forbid the conduct in the first place"?[109] Why should the police or the public accept the argument that the availability of alternative remedies permits the court to admit the evidence without sanctioning the underlying misconduct when the greater possibility of alternative remedies in the "flagrant" or "willful" case does not allow the court to do so?

A court which admits the evidence in a case involving a "run of the mill" Fourth Amendment violation demonstrates an in-

104. 347 U.S. at 137.
105. *Id.*
106. Terry v. Ohio, 392 U.S. 1, 13, 15 (1968).

107. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L.REV. 11, 24 (1925).
108. *Id.*
109. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 258 (1961), in POLICE POWER AND INDIVIDUAL FREEDOM 87, 90. Chicago: Aldine, Sowle ed. 1962.

sufficient commitment to the guarantee against unreasonable search and seizure. It demonstrates "the contrast between morality professed by society and immorality practiced on its behalf."[110] It signifies that government officials need not always "be subjected to the same rules of conduct that are commands to the citizens."[111]

Where should the threshold for exclusion be put? At what point should a judge say that the police misconduct is so indefensible or offensive as to warrant throwing out the evidence it produced? To say that this point is not reached until the police have resorted to violence or brutality or that it is not reached unless they have perpetrated some "gross" or "serious" or "aggravated" violation of the Constitution seems neither a principled nor a manageable way to go about it.

If the line must be drawn somewhere, I can think of no more logical and fitting place to draw it than at unconstitutional police conduct, however "mild," "honest" or "inadvertant" some may label it.[112] Frankfurter argued that the Court should reverse in *Irvine*, although it affirmed the conviction in *Wolf*, because the *Irvine* police misconduct was more shocking and offensive. But Jackson responded: "Actually, the search [in *Wolf*] was offensive to the law in the same respect, if not the same degree, as here."[113]

I think Jackson was right (but for the wrong reason). Once the Court identifies the police action as unconstitutional, that ought to be the end of the matter. There should be no "degrees" of "offensiveness" among different varieties of *unconstitutional* police conduct. A violation of the Constitution ought to be the "bottom line." This is where the *Weeks* and *Mapp* Courts drew the line. This is where it ought to stay. □

110. Frankfurter, J., dissenting in On Lee v. United States, 343 U.S. 747, 759 (1952).

111. Brandeis, J., dissenting in Olmstead v. United States, 277 U.S. 438, 471, 485 (1928).

112. *See Stone* v. *Powell*, 428 U.S. 465, 538 (1976) (White, J., dissenting)(evidence should not be excluded when seized by an officer "acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this [good-faith] belief"); *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part) (distinguishing between "flagrantly abusive" Fourth Amendment violations and "technical" or "good faith" violations);

Also, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 418 (1971) (Burger, C. J., dissenting) ("inadvertent" or "honest mistakes" by police should not be treated in the same way as "deliberate and flagrant *Irvine*-type violations of the Fourth Amendment"); *United States v. Soyka*, 394 F.2d 443, 451-52 (2d Cir. 1968) (Friendly, J., dissenting) (officer's error "so minuscule and pardonable" as to render exclusion of evidence inappropriate).

See also A Model Code of Pre-Arraignment Procedure § SS 290.2 (Official Draft, 1975) (evidence shall be excluded only if violation upon which it was based was "substantial"; all violations shall be deemed substantial if "gross, wilful and prejudicial to accused"; otherwise court shall consider, inter alia, "the extent of deviation from lawful conduct" and "the extent to which the violation was wilful"); E. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 58 (1975) (officer should be supported if he "acted decently" and "did what you would expect a good, careful, conscientious police officer to do under the circumstances").

If the officer, as Dean Griswold described it, acted in the manner that "a good, careful, conscientious police officer" is expected to act, or if, as Judge Friendly maintained in *Soyka, supra*, the officer's error was "so minuscule and pardonable as to render the drastic sanction of exclusion . . . almost grotesquely inappropriate," then the error should not render the search or seizure "unreasonable" within the meaning of the Fourth Amendment—as the Second Circuit held on rehearing *en banc* in *Soyka*, 394 F.2d 452. After all, probable cause is supposed to turn on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," *Brinegar v. United States*, 338 U.S. 160, 175 (1949); and affidavits are supposed to be interpreted in a "commonsense" rather than a "hypertechnical" manner, *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

In light of existing law, the proposals or suggestions to modify the exclusionary rule must mean that the challenged evidence should be admissible even when the officer acted *unreasonably*, i.e., *negligently*, so long as his misconduct was not deliberate or reckless, but "inadvertent." On this issue (although I disagree with him on a number of other points) I share Professor Kaplan's concern:

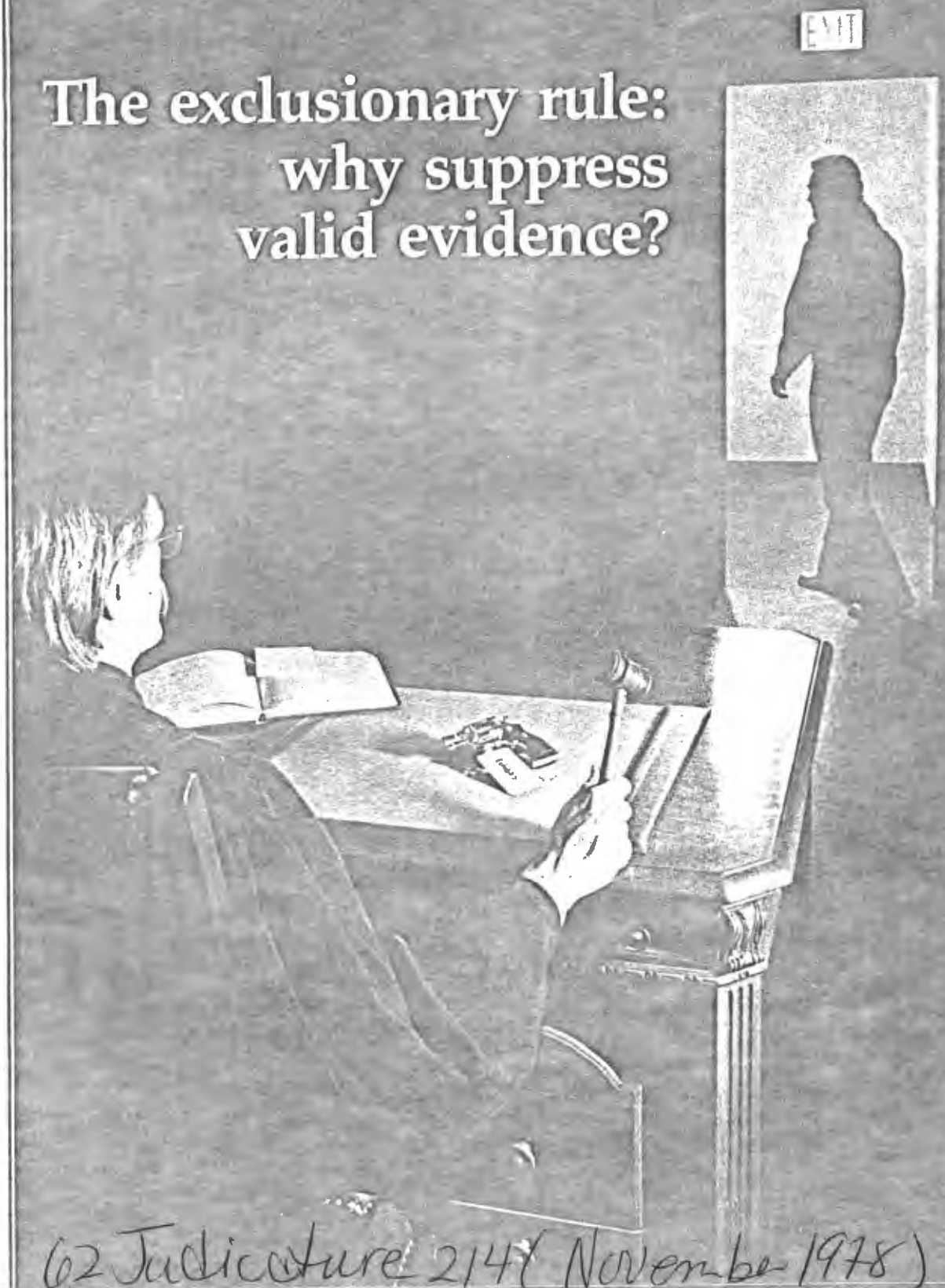
- Such a modification of the rule "would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him," Kaplan, *supra* n. 34 at 1044;
- "Would add one more factfinding operation, and an especially difficult one to administer, to those already required of a lower judiciary which, to be frank, has hardly been very trustworthy in this area," *id.* at 1045;
- So long as so many trial judges remain hostile to the exclusionary rule, "the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level," *id.*

See also Proceedings of 48th Annual Meeting of ALI 374-98 (1971) (debate on Model Pre-Arraignment Code proposal, *supra*, to exclude illegally obtained evidence only when underlying violation was "substantial").

113. 347 U.S. at 133.

YALE KAMISAR is a professor of law at the University of Michigan.

The exclusionary rule: why suppress valid evidence?



62 Judicature 214 (November 1978)

If we want to reduce crime, we ought to admit all the evidence into the trial—and punish the police later if they obtained any of it illegally.

by Malcolm Richard Wilkey

Editor's note: Last August, Judicature published Yale Kamisar's reply to critics of the exclusionary rule entitled "Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?". Kamisar maintained that the rule is necessary to ensure the constitutional guarantee against unreasonable searches and seizures.

This month, Judge Malcolm Wilkey argues that the rule should be abolished. He contends that it is simply a judge-made rule of evidence, that it unjustly frees many criminals, and that courts could find other ways to deter police from violating Fourth Amendment rights.

America is now ready to confront frankly and to examine realistically both the achievements and social costs of the policies which have been so hopefully enacted in the past 40 years. That reappraisal has made the most headlines in regard to economic and fiscal matters. It is imperative that this honest reappraisal include the huge social costs which American society—alone in the civilized world—pays as a result of our unique exclusionary rule of evidence in criminal cases.

We can see that huge social cost most clearly in the distressing rate of street crimes—assaults and robberies with deadly weapons, narcotics trafficking, gambling and prostitution—which flourish in no small degree simply because of the exclusionary rule of evidence. To this high price we can rightfully add specific, pernicious police conduct and lack of discipline—the very opposite of the objectives of the rule itself.

The questionable justification for such a rule is all the more apparent when we realize that it represents, not a constitutional mandate, but a policy choice by our Supreme Court. The wisdom of this policy has caused sharp and fundamental disagreement among the Justices: most of the decisions since *Mapp* in 1961 have been decided by only one or two votes.[1] Usually the people's representatives decide issues of public policy, especially when those decisions require a balancing of social values and the justices so sharply disagree, but the choice of the exclusionary rule as the only remedy for Fourth Amendment violations has shut out all consideration of alternatives, not only by the federal government but also by the 50 states.[2]

Though scholars have been shedding

Some of the ideas that the author expresses here were part of an earlier article he wrote for *The Wall Street Journal* entitled "Why Suppress Valid Evidence?" (October 7, 1977).

1. *Mapp v. Ohio, 367 U.S. 643, (1961).*

2. *See* "Time for a reappraisal" on page 221 of this issue.

more and more light on this problem,[3] few people have considered the enormous social cost of the exclusionary rule, and fewer still have thought about possible alternatives to the rule. I propose to do both those things in this article.

3. Chief Justice Burger's classic eloquent dissenting opinion in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971); Erwin N. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT (1975); Carl McGowan, *Rulemaking and the Police,* 70 MICH. L. REV. 659 (1972); G. Marcus, POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE, PART II, THE EXCLUSIONARY RULE. Chicago: Aldine, 1962; Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970).

Also, Albert M. and Julia Carlson Rosenblatt, *A Legal House of Cards,* HARPER'S, July 1977; Steven R. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); James E. Spiotto, *The Search and Seizure Problem-Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule,* 1 J. POLICE SCI. & AD. 36 (1973); Law Reform Commission of Canada, REPORT ON EVIDENCE (1975); and the editorial pages of THE WALL STREET JOURNAL, July 12, 1971 and October 7, 1977; THE WASHINGTON STAR, July 7, 1975; and THE HOUSTON POST, November 15, 1977.

The rule's mystique

What is the exclusionary rule? It is a judge-made rule of evidence, originated in 1914 by the Supreme Court in *Weeks* v. *United States,*[4] which bars "the use of evidence secured through an illegal search and seizure."[5] It is not a rule required by the Constitution. No Supreme Court has ever held that it was. As Justice Black once said,

> [T]he Fourth Amendment does not itself contain

4. 232 U.S. 383 (1914). For clarity of analysis, I prefer to omit Boyd v. United States, 116 U.S. 616 (1886), which had its origin in statutory compulsory self-incrimination, a violation of the Fifth Amendment, and in which there was no actual search and seizure by government agents. *Weeks* is a clear search and seizure violation of the Fourth Amendment, with a holding of exclusion of the evidence as a result.

5. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

Do other countries exclude illegally-seized evidence?

To my mind, one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it. If there were merit in any of the grounds advanced in support of the rule, at least one other country somewhere would have emulated our 65-year-old example. All have shunned it.

As Chief Justice Burger pointed out: "This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule."[1] As Justice Frankfurter found 30 years ago: "Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which passed on the question, none has held evidence obtained by an illegal search and seizure as inadmissible."[2]

1. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. at 415.

2. Wolf v. Colorado, 338 U.S. at 30.

The leading case in the British Commonwealth is *Kuruma* v. *The Queen,* which arose from Kenya.[3] In appealing the death sentence, it was argued that the search, which uncovered a knife and ammunition, was illegal. In dismissing the appeal, the Privy Council held, in the words of Lord Goddard, C.J., that

> In their Lordships' opinion, the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.[4]

A century earlier an English judge put it more laconically, "It matters not how you get it; if you steal it, it will still be admissible in evidence."[5]

3. Kuruma v. The Queen, [1955] A.C. 197, 1 All E.R. 236.

4. *Id.* at 239.

5. Crompton, J., in R. Leatham [1861] 8 Cox C.C. 498 at 501.

any provision expressly precluding the use of such evidence and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.[6]

The greatest obstacle to replacing the exclusionary rule with a rational process, which will both protect the citizenry by controlling the police and avoid rewarding the criminal, is the powerful, unthinking emotional attachment to the rule. The mystique and misunderstanding of the rule causes not only many ordinary citizens but also judges and lawyers to feel (not think) that the exclusionary rule was enshrined in the Constitution by the Founding Fathers, and that to abolish it would do violence to the whole sacred Bill of Rights.[7] They appear totally unaware that the rule was not employed in U.S. courts during the first 125 years of the Fourth Amendment, that it was devised by the judiciary in the assumed absence of any other method of controlling the police, and that no other country in the civilized world has adopted such a rule. (See "Do other countries exclude illegally seized evidence?" below.)

Realistically, the exclusionary rule can probably never be abolished until both the public and the Supreme Court are satisfied that there is available in our legal system a reasonably workable alternative. Unfortunately, the converse may also be true—we

6. Mapp v. Ohio, 367 U.S. 643, 661–662 (1961) (concurring opinion).

7. "Among some of its defenders, however, the exclusionary rule assumes the status of dogma, of constitutional holy writ, so much so that they sometimes talk as if there were no decent alternative. Yet the ancient alternative, sanctioned by most state criminal codes until 1961, was the common law practice, still in force in England and most other English speaking jurisdictions. Under common law it was not deemed the duty of the court to look into the provenance of evidence—only to weigh its relevance and accuracy." THE WASHINGTON STAR, editorial, p. 16, July 7, 1975.

"The text on evidence most universally used throughout the British Commonwealth recognizes that evidence from confessions will be excluded, but other evidence will be allowed.

It may therefore be concluded that, under English law, illegally obtained evidence is admissible, provided it does not involve a reference to an inadmissible confession of guilt, and subject to the overall exclusionary discretion enjoyed by the judge at a criminal trial.[6]

The rule in other countries—in England, Canada, Germany and Israel, for example—is that material evidence, if it is probative and authentic, comes in without regard to whether it was obtained legally or illegally. Two examples often cited in Anglo-American legal writings are illustrative.

German law does not exclude illegally obtained evidence, except if in the judge's opinion it has been obtained by a serious violation of fundamental rights. The nature of the illegality which is alleged to have been committed is thus evaluated.[7] Israeli law condemns the exclusionary rule as useless and unjustified. As a more workable alternative, if an illegal search occurs, the court can charge the responsible individual, convict him immediately, or send him to another judge for trial, in a proceeding roughly comparable to our contempt actions.[8]

Although the law as declared by the Supreme Court of Canada is binding on all courts in Canada, decisions of the English House of Lords will ordinarily be followed by the Supreme Court of Canada, and hence the British rule in *Kuruma* represents the Canadian law. The rule of *Kuruma* was reaffirmed by the Canadian Supreme Court in *Regina* v. *Wray*.[9]

The Court made it clear . . . that the trial judge's discretion does not extend to excluding evidence obtained by unfair means where the probative value of such evidence is unimpeachable; and that exclusion of evidence because unfairly

6. Cross on Evidence (3d Ed., 1967), p. 267. See discussion generally pp. 266–270. ". . . [T]he English authorities on the admissibility of evidence procured in consequence of an illegal search or other unlawful act . . . are uniformly in favor of its reception although there are not many of them." *Id.* at 266.

7. Clemens, *The Exclusionary Rule Under Foreign Law: Germany* (1961) 52 J. CRIM. L. C. & P. S. 277.

8. Cohn, *The Exclusionary Rule Under Foreign Law: Israel* (1961) 62 J. CRIM. L. C. & P. S. 282.

9. 11 C.R.N.S. 235, 248 (1970).

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 own men, and thus sabotage prosecutions by invalidating the admissibility of vital evidence.

How the rule works

The impact of the exclusionary rule may not be immediately apparent from the simple phrase of the *Wolf* decision that it bars "the use of evidence seized through an illegal search and seizure." It may help to consider three examples to see how the exclusionary rule needlessly frustrates police and prosecutors trying to do a very difficult job on the streets of our cities.

In *U.S.* v. *Montgomery,*[8] two police officers on auto patrol in a residential neighborhood at 6 p.m. on a winter day saw Montgomery driving his car in a way that suggested he was "sizing up" the area. When they stopped and identified him, they learned by radio that an arrest warrant was outstanding against him. Before taking him into custody, the officers searched him for weapons and found a .38 caliber bullet in his pants pocket, a magnum revolver loaded with six rounds and an unregistered, sawed-off shotgun with shells in the car.

A trial court convicted him of illegal possession of firearms, but the Court of Appeals (2-1) reversed, holding that no probable cause existed for stopping Montgomery in the first place, and that all evidence discovered thereafter was the product of an illegal search and seizure. Applying the exclusionary rule, the court suppressed as evidence the revolver and the sawed-off shotgun,

8. 561 F. 2d 875 (D.C. Cir. 1977).

obtained has nothing to do with securing a fair trial for the accused.[10]

The proposed Evidence Code of the Law Reform Commission of Canada contains a proposed section "Exclusion Because of Manner Evidence Obtained," which provides:

> 15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute. (2) In determing whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, . . . [11]

There follows an enumeration of the factors for the court. If adopted, this would in part, but in part only, change the rule of *Regina* v. *Wray* toward what some consider the older English common law rule.

But the proposed Canadian change would be by no means an adoption of the U.S. exclusionary rule. The commentary on the proposed rule states flatly:

> Section 15: Rules of Evidence are unlikely to prove very effective in controlling police behavior. . . . The extent of the section is not to incorporate an absolute exclusionary rule into Canadian evidence law, but to give judges the right in exceptional cases to exclude evidence unfairly obtained, and thus restore what many believe to be the English common law discretionary rule. . . . [12]

The general rule of Section 15 governs statements as well as material evidence. The following section of the proposed code excludes statements obtained in a manner which renders them unreliable. Where circumstances render a *statement* unreliable but do not meet the strict standard of bringing 'the administration of justice in disrepute,' *real evidence* found as a result of this statement is not 'tainted,' and may not be suppressed at trial.

Proposed Section 16 would be a codification of present Canadian law and is directly contrary to the decision of the United States Supreme Court in *Brewer* v. *Williams,*[13] just as Section 15 as well as present Canadian law is directly contrary to *Coolidge* v. *New Hampshire.*[14]

M. R. W.

10. James Spiotto, *The Search and Seizure* Problem—*Two Approaches; The Canadian Tort Remedy and the U.S. Exclusionary Rule,* 1 J. POLICE SCI. & A .43(1973).

11. Law Reform Commission of Canada, REPORT ON EVIDENCE 22 (1975).

12. *Id.* at 61–63.

13. 430 U.S. 387 (1977).

14. 403 U.S. 443 (1971).

'Our way of supporting the Constitution is not to strike at the policeman who breaks it but to let off somebody else who broke something else.'

John H. Wigmore

which made it impossible to convict Montgomery or to retry the case.

Montgomery is an example of typical routine police work, which many citizens would think of as needed reasonable effort to prevent crime.[9] But now look at *U.S.* v. *Willie Robinson,*[10] a similar case with a different result. A policeman stopped Robinson for a minor traffic violation and discovered that license bureau records indicated his license was probably a forgery. Four days later, the same officer spotted Robinson about 2 a.m. and arrested him for driving with a forged credential.

Since police regulations required him to take Robinson into custody, the officer began a pat down or frisk for dangerous weapons. Close inspection of the cigarette package in the outer pocket of the man's jacket revealed heroin. Robinson was convicted of heroin possession but the Court of Appeals held 5-4 that, in light of the exclusionary rule, the search of Robinson was illegal and the heroin evidence must be suppressed. The Supreme Court reversed, holding that probable cause existed for the search, the evidence was legally obtained, and it could be offered in evidence. The High Court reinstated the original conviction.

This is one search and seizure case which turned out, in my view, correctly. But it took a U.S. District Court suppression hearing, a 2-1 panel decision in the Court of Appeals, a 5-4 decision in the court *en banc,* and a 6-3 decision of the Supreme Court to confirm the validity of the on-the-spot judgment of a lone police officer exercised at 2 a.m. on a Washington Street—five years and eight months earlier.

In *Coolidge* v. *New Hampshire,*[11] a 14-year old girl was found with her throat slit and a bullet in her head eight days after she had disappeared. Police contacted the wife of a suspect whose car was like one seen near the crime, and she gave them her husband's guns. Tests proved that one of the weapons had fired the fatal bullet.

Invoking his statutory authority, the attorney general of the state issued a warrant for the arrest of the suspect and the seizure of his car. Coolidge was captured and convicted. But the Supreme Court reversed the conviction on the grounds that the warrant was defective, the search of the auto unreasonable and vacuum sweepings from the auto (which matched the victim's clothing) were inadmissible. Why? Because the attorney general who issued the warrant had personally assumed direction of the investigation and thus was not a "neutral and detached magistrate."

Observe that here the conviction was reversed because of a defect in the warrant, not because of any blunder. Errors of law by either the attorney preparing the affidavit and application for the warrant or the magistrate in issuing the warrant frequently invalidate the entire search that the police officers make, relying in good faith on the

9. Compare former Solicitor General Griswold's principle on seeking certiorari: "If the police officer acted decently, and if he did what you would expect a good careful conscientious police officer to do under the circumstances, then he should be supported." Griswold, *supra* n. 3, at 57–58.

10. 414 U.S. 218 (1973), *reversing* 471 F.2d 1082 (1972). *See* comments by Griswold, *supra* n. 3, at 64–67.

11. 403 U.S. 443 (1971). *Compare Coolidge* with the more recent Brewer v. Williams, 430 U.S. 387 (1977), which was an exclusionary rule case under the Sixth Amendment right to counsel. The Supreme Court held 5-4 that the prisoner's Sixth Amendment right to counsel was violated, the confession was thus illegally obtained, the evidence of location of the murdered girl's body was thus tainted because it was derived from the illegal confession, and the exclusionary rule would exclude the evidence of the prisoner's statements and the location of the body.

warrant; those errors cause the suppression of the evidence and the reversal of the conviction. How does the exclusionary rule improve police conduct in such cases?

The Court's rationale

Deterrence: During the rule's development, the Supreme Court has offered three main reasons for the rule. The principal and almost sole theory today is that excluding the evidence will punish the police officers who made the illegal search and seizure or otherwise violated the constitutional rights of the defendant, and thus deter policemen from committing the same violation again.[12] The flaw in this theory is that there is absolutely no empirical data that excluding evidence against a defendant has anything to do with either punishing police officers or thereby deterring them from future violations.

Chief Justice Burger has flatly asserted ". . . there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials,"[13] and the Supreme Court has never sought to adduce such empirical evidence in support of the rule. Probably such a connection can never be proved, for as a matter of logical analysis "the exclusionary rule is well tailored to deter the prosecutor from illegal conduct. But the prosecutor is not the guilty party in an illegal arrest or search and seizure, and he rarely has any measure of control over the police who are responsible."[14]

Privacy: From *Weeks* (1914) to *Mapp* (1961) the rule was also justified as protecting the privacy of the individual against illegal searches and seizures as guaranteed by the Fourth Amendment.[15] The Supreme Court later downgraded the protection of privacy rationale,[16] perhaps because of the obvious defect that the rule purports to do nothing to recompense innocent victims of Fourth Amendment violations, and the gnawing doubt as to just what right of privacy guilty individuals have in illegal firearms, contraband narcotics and policy betting slips—the frequent objects of search and seizure![17]

Judicial integrity: A third theme of the Supreme Court's justifying rationale, now somewhat muted, is that the use of illegally obtained evidence brings the court system into disrepute. In *Mapp* Justice Clark referred to "that judicial integrity so necessary in the true administration of justice,"[18] which was reminiscent of Justice Brandeis dissenting in *Burdeau* v. *McDowell*," . . . respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."[19]

The impact of the rule

It is undeniable that, as a result of the rule, the most valid, conclusive, and irrefutable factual evidence is excluded from the knowledge of the jury or consideration by

12. "[T]he rule's prime purpose is to deter future unlawful police conduct," Justice Powell in United States v. Calandra, 414 U.S. 338, 347 (1974); "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," Justice Stewart in Elkins v. United States, 364 U.S. 206, 217 (1960); ". . . 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," Justice Clark in Linkletter v. Walker, 381 U.S. 618, 636–37 (1965).

13. Chief Justice Burger, dissenting in Bivens, 403 U.S. at 416.

14. Oaks, *supra* n. 3, at 726.

15. "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." Justice Clark in Mapp, 367 U.S. at 655.

16. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: 'the ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965)." Justice Powell in United States v. Calandra, 414 U.S. 338, 347 (1974). No one suggests, of course, that the Fourth Amendment purpose of protecting privacy is itself downgraded; the downgrading is of the exclusionary rule as a method of protecting that privacy.

17. Schlesinger, *supra* n. 3, at 47–50.

18. Mapp, 367 U.S. at 660.

19. 256 U.S. 465, 477 (1921). Cf. Olmstead v. United States, 277 U.S. 438, 485 (1928). (Holmes, J., dissenting) ("[F]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.") Since Justice Holmes, an admirer of the common law, also said, "The life of the common law has not been logic, but experience," I have always wished he could review America's experience with the exclusionary rule since 1928, and tell us his updated opinion.

Time for a reappraisal

Citizens from many different quarters have recently begun to question anew the wisdom of the exclusionary rule.

"Surely a rule of such profound social dimensions should spring from something closer to social consensus than to judicial or legal dialectic," wrote Albert M. and Julia Carlson Rosenblatt in "A Legal House of Cards," *Harper's* (July 1977). "It is mistakenly assumed that these results are somehow mandated by the Constitution. The Fourth Amendment condemns unreasonable searches, but it does not decree that insult be added to injury, that the public be affronted first by the crime and then by the release of the acknowledged malefactor. Lacking an efficient legislative scheme by which citizens could be guaranteed their Fourth Amendment rights, the Supreme Court chose the exclusionary rule."

Only 10 years after *Mapp,* Mr. Justice Harlan called for a thorough-going reappraisal of the rule in a concurring opinion in *Coolidge* v. *New Hampshire,* 403 U.S. 443, 490–91 (1971). "From the several opinions that have been filed in this case, it is apparent that the law of search and seizure is due for an overhauling. . . . I would begin this process of reevaluation by overruling *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and *Ker* v. *California,* 374 U.S. 23 (1963). . . . In combination *Mapp* and *Ker* have been primarily responsible for bringing about serious distortions and incongruities in this field of constitutional law. . . . The states have been put in a federal mold with respect to this aspect of criminal law enforcement, thus depriving the country of the opportunity to observe the effects of different procedures in similar settings. (Oaks suggested) that the assumed 'deterrent value' of the exclusionary rule has never been adequately demonstrated or disproved, and point(ed) out that because of *Mapp* all comparative statistics are 10 years old and no new ones can be obtained."

Justice Harlan's disillusionment 10 years after *Mapp* was reflected in the *Wall Street Journal.* On June 21, 1961, at the close of the Supreme Court term, the *Journal* ran a lead editorial, "The Right to be Secure," generally praising the *Mapp* decision. Ten years later, on July 12, 1971, at the close of the Supreme Court term, the *Journal* ran a lead editorial, "An Alternative Needed," calling for a reexamination of the rule and endorsing Chief Justice Burger's dissents in *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 411 (1971), and *Coolidge* v. *New Hampshire, supra,* at 492. *M. R. W.*

the judge. As Justice Cardozo predicted in 1926, in describing the complete irrationality of the exclusionary rule:

> The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free.[20]

20. People v. DeFore, 242 N.Y. 13, 21, 23–24, 150 N.E. 585, 587–588 (1926).

Fifty years later Justice Powell wrote for the Court:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: . . . the physical evidence sought to be excluded is typically reliable and often the most probative evidence bearing on the guilt or innocence of the defendant. . . . Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police

officer and the windfall afforded the guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.[21]

I submit that justice is, or should be, a truth-seeking process. The court has a duty to the accused to see that he receives a fair trial; the court also has a duty to society to see that all the truth is brought out; only if all the truth is brought out can there be a fair trial.[22] The exclusionary rule results in a complete distortion of the truth. Undeniable facts, of the greatest importance, are forever barred—facts such as Robinson's heroin, Montgomery's sawed-off shotgun and pistol, the bullet fired from Coolidge's gun and the sweepings from his car which contained items from the dead girl's clothes.

If justice is a truth-seeking process, it is all important that *there is never any question of reliability* in exclusionary rule cases involving material evidence, as the three examples illustrate. We rightly exclude evidence whenever its reliability is questionable—a coerced or induced confession,[23] for example, or a faulty line-up for identification of the suspect.[24] We exclude it because it is inherently unreliable, not because of the illegality of obtaining it.[25] An illegal search in no way reduces the reliability of the evidence.

There have been several empirical studies on the effects of the exclusionary rule in five major American cities—Boston, Chicago, Cincinnati, New York and Washington, D.C.—during the period from 1950 to 1971. These have been recently collected and analyzed, along with other aspects of the exclusionary rule and its alternatives, by Professor Steven Schlesinger in his book, *Exclusionary Injustice: The Problem of Illegally Obtained Evidence.*[26]

Three of these studies concluded that the exclusionary rule was a total failure in its primary task of deterring illegal police activity and that it also produced other highly undesirable side effects. The fourth study, which said the first three were too harsh in concluding that the rule was totally ineffective, still said: "Nonetheless, the inconclusiveness of our findings is real enough; they do not nail down an argument that the exclusionary rule has accomplished its task."[27]

Schlesinger and others regard the study by Dallin Oakes as perhaps the most comprehensive ever undertaken, both in terms of data and the breadth of analysis of the rule's effects. Oakes concluded:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. . . . The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.[28]

Spiotto made a comparative study of both the American exclusionary rule and the existing Canadian tort alternative, taking Chicago and Toronto as comparable metropolitan areas. He found that an

> empirical study [of narcotics and weapons cases] indicates that, over a 20-year period in Chicago, the proportion of cases in which there were motions to suppress evidence allegedly obtained illegally increased significantly. This is the oppo-

21. Stone v. Powell, 428 U.S. 465, 489–90 (1976). (footnotes omitted).

22. "In a free society, the government owes its citizens freedom from crime as well as freedom from governmental intrusion." Rosenblatt, *supra* n. 3.

23. Miranda v. Arizona, 384 U.S. 436 (1966).

24. U.S. v. Wade, 388 U.S. 218 (1967); Gilbert v. California 388 U.S. 263 (1967).

25. One type case in which the evidence in some circumstances may be reliable, but where the exclusionary rule may be justified, is that exemplified by Rochin v. California, 342 U.S. 165 (1952), in which the police measures employed were said to shock the conscience. On the facts graphically described by Justice Frankfurter, application of the exclusionary rule was approved on the basis of these extraordinary circumstances.

While he did not draw the analogy, Justice Frankfurter (who wrote *Wolf*, which refused to apply the exclusionary rule to the states; dissented in *Elkins*, which abolished the Silver Platter doctrine, and joined in the dissent in *Mapp*, which reversed *Wolf*) probably approved *Rochin* on what is said to be the older English rationale giving judges the right in exceptional cases to exclude evidence which would tend to bring the administration of justice into disrepute. That discretion still exists in English law, Kuruma v. The Queen, [1955] A.C. 197, 1 All E.R. 236, but it is rarely exercised and then only in truly exceptional cases.

26. S. Schlesinger, *supra* n. 4.

27. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. J. 681, 726 (1973–74).

28. Oakes, *supra* n. 3, at 755.

site result of what would be expected if the rule had been efficacious in deterring police misconduct.[29]

Three studies conducted between 1950 and 1971 show a substantial increase in motions to suppress in both narcotics and gun offenses.[30] The increase from 1950 to 1971 can fairly be attributed to the impact of *Mapp* (1961) on search and seizure in the state courts.

Criticisms of the rule

By this point, we should be able to see that the exclusionary rule actually produces many effects opposite from those that the Court intended to produce. No matter what rationale we consider, the rule in its indiscriminate workings does far more harm than good and, in many respects, it actually prevents us from dealing with the real problems of Fourth Amendment violations in the course of criminal investigations.

In the eyes of the Supreme Court, the first and primary rationale of the exclusionary rule is deterrence. I submit that all available facts and logic show that excluding the most reliable evidence does absolutely nothing to punish and thus deter the official wrongdoer.,[31] but the inevitable and certain result is that the guilty criminal defendant goes free.

The second—now rather distant second—rationale in the eyes of the Court has been the protection of privacy. I submit a policy of excluding incriminating evidence can never protect an innocent victim of an illegal search against whom no incriminating evidence is discovered. The only persons protected by the rule are the guilty against whom the most serious reliable evidence should be offered. It cannot be separately argued that the innocent person is protected *in the future* by excluding evidence against the criminal *now*, for this is only the deterrent argument all over again.

The third rationale found in the past opinions of the Court is that the use of illegally obtained evidence brings our court system into disrepute. I submit that the exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system.

Ask any group of laymen if they can understand why a pistol found on a man when he is searched by an officer should not be received in evidence when the man is charged with illegal possession of a weapon, or why a heroin package found under similar circumstances should not be always received in evidence when he is prosecuted for a narcotics possession, and I believe you will receive a lecture that these are outrageous technicalities of the law which the American people should not tolerate.[32] If you put the same issue to a representative group of lawyers and judges, I predict you would receive a strong preponderance of opinions supporting the lay view, although from those heavily imbued with a mystique of the exclusionary rule as of almost divine origin you would doubtless hear some support.[33]

The rationale of protecting judicial integrity is also inconsistent with the behavior of the courts in other areas of the criminal law. For example, it is well settled that courts

29. Spiotto, *supra* n. 3, at 36, 37.

30. Schlesinger, *supra* n. 3, at 50–51.

31. "With supreme irony, those who pooh-pooh the deterrent effect of punishment on criminal activity are the first to exalt it as a device to curb police misconduct. But if the threat of prison does not deter thieves, how may police misconduct be stemmed by such impersonal penalties as the judicial dismissal of cases? Both failures have a point in common: the sanction is either absent or blunted (in the case of the police) or, in the case of criminals, delayed, diminished, or denied." Rosenblatt, *supra* n. 3.

32. "Given the decisions this rule tends to produce and the obvious need to bolster public confidence that courts do dispense justice, it is scarcely unreasonable to ask that it be reexamined." THE WALL STREET JOURNAL, Editorial, p. 8, July 12, 1971.

". . . from the point of view of laymen unversed in refinements of constitutional theory, [the American exclusionary rule] is sometimes an outrage to common sense. It often results in the freeing of someone convicted of a vicious criminal act for what strikes the crime-conscious public as finicking or trivial reasons." THE WASHINGTON STAR, editorial, p. A16, July 7, 1975.

"Through a bizarre sense of achieving justice, we have come to free the criminal and harass the innocent, an absurdity that would likely be sensibly ordered in a more primitive society." THE HOUSTON POST, editorial, p. 2E, November 16, 1977.

33. Dean Wigmore was not a believer in the rule: "Our way of supporting the constitution is not to strike at the police officer who breaks it but to let off somebody else who broke something else," quoted in Rosenblatt, *supra* n. 3.

How the exclusionary rule hampers gun control

A striking feature of the motion to suppress for illegal search and seizure is that it is a defense weapon peculiarly suited to narcotic, gun, and gambling crimes, and only incidentally to other felony charges. Complete data on three branches of the circuit court in Chicago for three months in 1971 confirms that these kinds of cases are most likely to generate motions to suppress: narcotics—878 such motions; guns—335; gambling—255; and all other felony offenses—84.[1]

One of the best illustrations of the social cost of the exclusionary rule—and one that wasn't suggested until recently—is the relationship of the rule to effective gun control in these United States. There are varying degrees of gun control—complete ban, registration, registration of some weapons, or no restrictions at all—on which I take no position. The common, fatal flaw in every scheme of gun control about which I have read is that it is doomed to be totally ineffective in preventing the habitual use of weapons in street crimes so long as the exclusionary rule hampers the police in enforcing it.

Has it ever struck our national consciousness that the United States is unique in two ways—among the civilized nations, we have the most extraordinary crime rate involving firearms *and* a rule which excludes the most convincing evidence available, a rule which exists in no other country in the civilized world? These two unique features of our daily lives—crimes with firearms and a rule barring the use of perfectly valid evidence—are not unconnected.

No matter how rigid the gun control law, no matter how illegal the possession—whether sawed-off shotgun, automatic pistol, or submachine gun—if the officer does not have what the American law calls "probable cause" to make a reasonable search under the Fourth Amendment, if he goes ahead and makes the search, finds and confiscates the weapon, the evidence of that search and that weapon cannot be introduced as evidence at the trial.[2] The result is, of course, that the man *cannot* be convicted of carrying a weapon illegally. "The criminal is to go free because the constable has blundered."

Since criminals know the difficulties of the police in making a valid search which will stand up under challenge at trial, a further result is apparent—the criminals in

1. Steven R. Schlesinger, EXCLUSIONARY INJUSTICE; THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 51. 1977.

2. I am not suggesting that abolishing the rule would result in a wholesale abandonment of any standard of probable cause for a valid search. Not at all. The standard of probable cause required is a totally different issue, one that I do not specifically address in this article. Whatever the standard of probable cause, with an effective, alternative method of disciplining the police, they may well make fewer illegal searches and yet prosecutors may bring more prosecutions (and more successful prosecutions) for gun and narcotic violations than they do today.

Why fewer illegal searches? A strict disciplinary mechanism for police who violate Fourth Amendment rights should curtail the more flagrant violations. Why more prosecutions? Realistically, we must recognize that there will always be instances of police in good faith overstepping the line, making a search without probable cause. Without the exclusionary rule, prosecutors could introduce the evidence from such searches and convict more defendants.

One might argue that, under an alternative mechanism, gun control laws would depend upon the illegal searches and seizures that we anticipate. But that argument shouldn't prevent us from abolishing the exclusionary rule, which itself produces an extraordinary number of illegal searches and seizures (some for pure harassment purposes). Rather, that argument should encourage us to draft better gun control laws and to improve police training so officers make only valid searches and seizures.

erica *do* carry guns. Knowing that they ll not be stopped on the street and rched unless they do something drastiy suspicious—more suspicious than ntgomery or Robinson in the cases I cribed in the text—the criminal will carry un and laugh in the face of the officer who ght wish to search him for it. So long as criminal can avoid misbehavior which ould give the officer the right to arrest him Willie Robinson did) the criminal can ade in the streets with a great bulge in his cket or a submachine gun in a blanket der his arm.

Compare the results in other countries—in gland neither the police nor the criminals ry guns. Why? The criminals know that police have a right to search them on the ghtest suspicion, and they know that if a apon is found, they will be prosecuted.[3] henever a man is caught with a gun or rcotics in his possession in England or nada, conviction is virtually automatic—ere is no denying the fact of possession, here is no exclusion of the evidence, no tter how obtained.

The rule in other countries produces anher salutary result: there is no widespread rching by the police. It is not necessary, long as the police have *power* to do it, th resulting automatic conviction—and the criminals *know* the police have such wer.

Under our unique exclusionary rule, the erican people have the worst of it both ays: (1) criminals do carry guns—and use em; (2) police know this, so they engage in more searches and seizures, some of which are blatantly illegal. Thus, the American people are harassed more by *both* criminals *and* police than in other civilized untries.[4] *M. R. W.*

Of course, I do not exclude other causes for this erence, such as historical tradition, racial factors, graphy and environment. But surely the factor I am cussing has a powerful effect in aggravating the blem.

Spiotto, *The Search and Seizure Problem—Two proaches: The Canadian Tort Remedy and the U.S. clusionary Rule,* 1 J. POLICE SCI. & AD. 36, 37 73); Spiotto, *Search and Seizure: An Empirical udy of the Exclusionary Rule and its Alternatives,* 2 J. GAL STUDIES 243 (1973); Schlesinger, *supra* n. 1, at

will try defendants who have been illegally seized and brought before them. In *Ker* v. *Illinois,*[34] a defendant kidnapped in Peru was brought by force to Illinois for trial; in *Mahon* v. *Justice*[35] the accused was forcibly abducted from West Virginia for trial in Kentucky; and in *Frisbie* v. *Collins,*[36] the defendant was forcibly seized in Illinois for trial in Michigan.

Said the *Frisbie* court:

> This court has never departed from the rule announced in *Ker* v. *Illinois* . . . that the power of the court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of 'forcible abduction.'[37]

Why should there be an exclusionary rule for illegally seized evidence when there is no such exclusionary rule for illegally seized people? Why should a court be concerned about the circumstances under which the murder weapon has been obtained, while it remains unconcerned about the circumstances under which the murderer himself has been apprehended? It makes no sense to argue that the admission of illegally seized evidence somehow signals the judiciary's condonation of the violation of rights when the judiciary's trial of an illegally-seized *person* is not perceived as signaling such condonation.

Other defects of the rule

The rule does not simply fail to meet its declared objectives; it suffers from five other defects, too. One of those defects is that it uses an undiscriminating, meat-ax approach in the most sensitive areas of the administration of justice.[38] It totally fails to discrimi-

meat ax

34. 119 U.S. 436 (1886).
35. 127 U.S. 700 (1888).
36. 342 U.S. 519 (1952).
37. *Id. See also* Gerstein v. Pugh, 420 U.S. 103, 119 (1975).
38. Neither this criticism, nor the other objection to the undiscriminating manner in which the exclusionary rule operates, is intended to suggest that a more discriminating application of the exclusionary rule—as via some form of balancing—would be tolerable. Given the weakness of the rationale for any exclusionary rule whatsoever, the rule should be discarded. The textual discussion was intended merely to illustrate the exceedingly poor fit between the exclusionary rule and the values relevant to any Fourth Amendment remedial scheme.

nate between the degrees of culpability of the officer or the degrees of harm to the victim of the illegal search and seizure.

It does not matter whether the action of the officer was grossly willful and flagrant or whether he was conscientiously using his very best judgment under difficult circumstances; the result is the same: the evidence is out. The rule likewise fails to distinguish errors of judgment which cause no harm or inconvenience to the individual whose person or premises are searched, except for the discovery of valid incriminating evidence, from flagrant violations of the Fourth Amendment as in *Mapp* or *Rochin*.[39] Chief Justice Burger's point in *Bivens* is undeniable:

> . . . society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition.[40]

When police know that describing the search truthfully will taint the evidence, they may perjure themselves to convict the defendant.

Another defect is that the rule makes no distinction between minor offenses and more serious crimes. The teenage runner caught with policy slips in his pocket and the syndicate hit man accused of first degree murder are each automatically set free by operation of the exclusionary rule, without any consideration of the impact on the community. Customarily, however, we apply different standards to crimes which vary as to seriousness, both in granting bail before trial and in imposing sentence afterwards.

A third problem is that, strangely, a rule which is supposed to discipline and improve police conduct actually results in encouraging highly pernicious police behavior. A policeman is supposed to tell the truth, but when he knows that describing the search truthfully will taint the evidence and free the suspect, the policeman is apt to feel that he has a "higher duty" than the truth. He may perjure himself to convict the defendant.[41]

Similarly, knowing that evidence of gambling, narcotics or prostitution is hard to obtain under the present rules of search and seizure, the policeman may feel that he can best enforce the law by stepping up the incidence of searches and seizures, making them frequent enough to be harassing, with no idea of ultimate prosecution. Or, for those policemen inclined *ab initio* to corruption, the exclusionary rule provides a fine opportunity to make phony raids on establishments, deliberately violating the standards of the Fourth Amendment and immunizing the persons and premises raided—while making good newspaper headlines for active law enforcement.

Fourth, the rule discourages internal disciplinary action by the police themselves. Even if police officials know that an officer violated Fourth Amendment standards in a particular case, few of them will charge the erring officer with a Fourth Amendment violation: it would sabotage the case for the prosecution before it even begins. The prosecutor hopes the defendant will plea bargain and thus receive some punishment, even if the full rigor of the law cannot be imposed because of the dubious validity of the search. Even after the defendant has been

39. Schlesinger, *supra* n. 3, at 62.
40. Bivens, 403 U.S. at 419.
41. Judge Rosenblatt has written: "While intended to curb abuse of police power, the exclusionary rule has opened up a whole new field of police misconduct, perjury. Police officers who testify at suppression hearings have sometimes shown a remarkable facility for adjusting facts to fit the court's constitutional sensibilities. . . . Moreover, the rule has tarnished the repufation of the conscientious, honest policeman in the eyes of the public, while eroding self-respect within the profession. . . . Because the public does not fully understand the exclusionary rule, a victim will see only the outrageous release of his assailant, and may very well assume that someone was paid off." Rosenblatt, *supra* n. 3.

convicted or has pleaded guilty, it would be dangerous to discipline the officer—months or years later—because the offender might come back seeking one of the now popular post-conviction remedies.

Finally, the existence of the federally imposed exclusionary rule makes it virtually impossible for any state, not only the federal government, to experiment with any other methods of controlling police. One unfortunate consequence of *Mapp* was that it removed from the states both the incentive and the opportunity to deal with illegal search and seizure by means other than suppression.[42] Justice Harlan, in commenting on the evil impact of the federal imposition of the exclusionary rule on the states, observed:

> Another [state], though equally solicitous of constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with constitutional infractions by other means.[43]

Alternatives to the rule

The excuse given for the persistence of the exclusionary rule in this country is that there is no effective alternative to make the police obey the law in regard to unreasonable searches and seizures. If this excuse did not come from such respected sources, one would be tempted to term it an expression of intellectual bankruptcy.

"No effective alternative"? How do all the other civilized countries control their police? By disciplinary measures against the erring policeman, by effective civil damage action against both the policeman and the government—not by freeing the criminal. Judging by police conduct in England, Canada and other nations, these measures work very well. Why does the United States alone rely upon the irrational exclusionary rule?

It isn't necessary. Justice Frankfurter in *Wolf* (1949) noted that none of the 10 jurisdictions in the British Commonwealth had held evidence obtained by an illegal search and seizure inadmissible, and "the jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. . . ."[44] Justice Harlan in his dissent in *Mapp* noted the wisdom of allowing all evidence to be brought in and "dealing with constitutional infractions by other means."[45] Justice Black, concurring in *Mapp,* noted that the Fourth Amendment did not itself preclude the use of illegally obtained evidence.[46]

In his dissent in *Bivens,* Chief Justice Burger suggested that Congress provide that Fourth Amendment violations be made actionable under the Federal Tort Claims Act,[47] or something similar. Senator Lloyd Bentsen and other members of Congress have put forward proposals to abolish the rule and substitute the liability of the federal government toward the victims of illegal searches and seizures, both those innocent and those guilty of crimes.[48]

The purposes of an alternative

Before examining what mechanism we might adopt in place of the exclusionary rule as a tool for enforcing the rights guaranteed by the Fourth Amendment, let us see clearly what objectives we desire to achieve by such alternatives.

The *first* objective, in sequence and perhaps in the public consciousness of those who are aware of the shortcomings of the rule, is to prevent the unquestionably guilty from going free from all punishment for their crime—to put an end to the ridiculous situation that the murderer goes free because the constable has blundered. Let me reiterate: the exclusionary rule, as applied to tangible evidence, has never prevented an innocent person from being convicted.[49]

Second, the system should provide effective guidance to the police as to proper conduct under the Fourth Amendment. When appellate courts rule several years

42. Schleslinger, *supra* n. 3, at 85; Oaks, *supra* n. 3, at 753.

43. Mapp, 367 U.S. at 681 (Harlan, J., dissenting).

44. Wolf, 338 U.S. at 29–30.

45. Mapp, 367 U.S. at 680–81.

46. 367 U.S. at 661–62.

47. Bivens, 403 U.S. at 421–22.

48. S. 881, 93rd Cong., 1st Sess. (1973). *See* Schlesinger, *supra* n. 3, at 89.

49. This is in contrast to the exclusionary rule as applied to coerced confessions or faulty lineups, in which instances the evidence is properly excluded because of its inherent unreliability.

after the violation, their decisions are not only years too late, but usually far too obscure for the average policeman to understand. They are remote in both time and impact on the policeman at fault. Immediate guidance to the policeman as to his error, with an appropriate penalty, is obviously more effective, in contrast to simply rewarding the criminal.

Third sequentially, but first in value, the mechanism should protect citizens from Fourth Amendment violations by law enforcement officers. (I say sequentially, because it is necessary first to abolish the exclusionary rule and then to provide guidance to the police). If police receive immediate and meaningful rulings, accompanied by prompt disciplinary penalties, they will be effectively deterred from future wrongful action and citizens will thus be effectively protected.

Under the present rule, the guilty go free as a result of an illegal search, but the innocent are never compensated for the injuries they suffered.

Fourth, the procedure should provide effective and meaningful compensation to those citizens, particularly innocent victims of illegal searches and seizures. This the present exclusionary rule totally fails to do. Only the guilty person who has suffered an illegal search and seizure receives some form of compensation—an acquittal, which is usually in gross disproportion to the injury inflicted on him by an illegal search and seizure. Thus, under the present irrational exclusionary rule system, the guilty are over-rewarded by a commutation of all penalties for crimes they did commit and the innocent are never compensated for the injuries they suffered.

The magnitude of the offense

Fifth, it should be an objective of any substitute for the exclusionary rule to introduce comparative values into what is now a totally arbitrary process and inflexible penalty. Under the exclusionary rule, the "penalty" is the same irrespective of the offense. If an officer barely oversteps the line on probable cause and seizes five ounces of heroin from a peddler on the street corner, or an officer without a warrant and without probable cause barges into a home and seizes private papers, the result is automatic—the evidence is barred, the accused is freed, and this is all the "punishment" the officer receives.

Surely the societal values involved in the two incidents are of a totally different magnitude. The error of the officer in dealing with narcotics peddlers should not be overlooked, his misapprehension of the requirement of probable cause should be called to his attention quickly in a way which he will remember, but actual punishment should be relatively minimal. In the instance of an invalid seizure of private papers in the home, the officer should be severely punished for such a gross infraction of Fourth Amendment rights.

The exclusionary rule is applied automatically now when there is no illegal action by investigative officers and hence no possible deterrence to future police misconduct. For example, where government agents have dutifully applied to a judge or magistrate for a search warrant, and executed the warrant in strict conformity with its terms, a warrant which later proves defective will force the judge later to exclude the evidence illegally seized.[50] All that is involved in these instances is a legal error on the part of the judge, magistrate, or perhaps the attorney

50. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Aguilar v. Texas, 378 U.S. 108 (1964); Franks v. Delaware (No. 77-5176) (U.S. Sup. Ct., June 26, 1978) slip op. 617, dissent 5.

who drew the papers. It is absurd to say that the court subsequently is "punishing" or attempting to "deter" the judge, magistrate, or attorney who made the legal error by suppressing the evidence and letting the accused go free, but this is what happens now.

If these are valid objectives in seeking a substitute procedure for the exclusionary rule as a method of enforcing Fourth Amendment rights, there seem to be two general approaches which might well be combined in one statute—internal discipline by the law enforcement authorities themselves, and external control by the courts or an independent review board.

COMPIX

Do people object to airport searches?

The American people have accepted and supported the fairly rigorous search for dangerous weapons at airports. Several years ago hijackers made flying so dangerous that citizens acquiesced to an invasion of their right to privacy and non-molestation. They accepted logical measures of control over weapons, even though it was inconvenient. Only a small percentage of Americans travels by air. But all of us use our streets, shopping centers, and other public places where armed robberies and assaults happen every day. If the people are willing to accept strong measures of gun control by more effective searches and seizures at the airports, I submit that they are not only willing but eager to see more effective searches and seizures of deadly weapons on the streets. It is apparent, if one reflects a moment, that the exclusionary rule prevents effective gun control. Abolishing the exclusionary rule and punishing those who carry deadly weapons would receive widespread acclaim.

It is significant that, whatever the original misgivings of a few civil libertarians, no court has ruled that the law enacted by Congress providing for airport searches authorized an unreasonable search and there-

Internal discipline

Disciplinary action against the offending law enforcement officer could be initiated by the law enforcement organization itself or by the person whose Fourth Amendment rights had been allegedly violated. The police could initiate action either within the regular command structure or by an overall disciplinary board outside the hierarchy of command. Many law enforcement organizations have such disciplinary boards now and they could be made mandatory by statute in all federal law enforcement agencies. Wherever they may be located, the organization would require action to be taken following the seizure of material evidence, if the criminal trial or an independent investigation showed a violation of the Fourth Amendment standards.

The person injured could also initiate action leading to internal discipline of the offending officer by complaint to the agency disciplinary board. Each enforcement agency or department could establish a process to hear and decide the complaint, providing both a penalty for the offending officer (if the violation were proved) and government compensation to the injured party.

This procedure would cover numerous cases in which citizens suffer violations of Fourth Amendment rights, but in which no court action results. The injured party could choose this administrative remedy in lieu of court action, but any award in the administrative proceedings would be taken into account by a court later if a citizen, dissatisfied with the award, instituted further legal action.

The penalty against the officer would be tailored to fit his own culpability; it might be a reprimand, a fine, a delay in promotion, a suspension, or discharge. Factors bearing upon the extent of the penalty would include the extent to which the violation was willful, the manner in which it deviated from approved conduct, the degree to which it invaded the privacy of the injured party, and the extent to which human dignity and societal values were breached.

Providing compensation to the injured party from the government is necessary, for it is simply realistic to make the government liable for the wrongful acts of its agent in order to make the prospect of compensation

fore was invalid under the Fourth Amendment. Some people mistakenly objected that the Constitution bars *all* searches but, in fact, the Fourth Amendment only bars "unreasonable" searches and seizures. What is an unreasonable search and seizure is certainly, in the first instance, the duty of Congress to declare.

The danger of armed hijacking of an airplane provided a perfectly reasonable basis in law to insist upon searches of possessions and persons as a condition to boarding an aircraft. Furthermore, police sometimes spotted people who, seeing the rigor of the check, turned back from the search at the gate.

It is undeniable that the rigorous search and seizure procedure at airports has been successful. In the calendar year 1977, no fewer than 2034 handguns and other firearms were seized from passengers boarding airplanes.[1] It is impossible to estimate the number of passengers who otherwise would have carried handguns on an aircraft, absent the effective search methods at U.S. airports, but surely it is much larger than the number of weapons actually found.

And the new procedures have drastically reduced successful airplane hijackings in the United States and even the number of attempts in the last seven years. In other words, effective search and seizure has been proved to reduce crime with handguns. In contrast, the exclusionary rule as a deterrent to police illegal searches is a demonstrated failure; the number of crimes and the number of searches ruled invalid are steadily increasing. *M. R. W.*

1. Federal Aviation Administration, SEMI-ANNUAL REPORT TO CONGRESS ON EFFECTIVENESS OF THE CIVIL AVIATION SECURITY PROGRAM (1978) (Exhibit II).

meaningful. Policemen traditionally are not wealthy and the government has a deep purse. Moreover, higher administrative officials and irate taxpayers may be expected to react adversely to losses resulting from the misconduct of policemen and to do something about their training and exercise of responsibilities.

External control

When a prosecutor tries a defendant in the wake of a violation of Fourth Amendment rights, the court could conduct a "mini-trial" of the offending officer after the violation is alleged and proof outlined in the principal criminal case. This mini-trial would be similar to a hearing on a motion to suppress now, but it would be conducted after the main criminal case. The burden would be on the injured party to prove, by preponderance of the evidence, that the officer violated his Fourth Amendment rights. The policeman could submit his case to either the judge or the jury who heard the main criminal case.

By initiating the "trial" of the officer immediately following the criminal case in which he was charged with misconduct, the court could determine the question of his violation speedily and economically. Presumably both the judge and jury have been thoroughly familiarized with the facts of the main case and are able to put the conduct of the officer in perspective.

Such a mini-trial would provide an outside disciplinary force that the injured party could utilize in lieu of internal discipline by the agency. Any previous administrative action taken against the officer would be considered by the judge and jury, if a penalty were to be assessed as a result of the mini-trial. The same factors bearing on the penalty to the officer and compensation to the injured party as discussed under the administrative remedy would be relevant in the "mini-trial."

In those instances where police violate Fourth Amendment rights but the prosecutor does not bring charges against the suspect, the wronged party should be able to bring a statutory civil action against the government and the officer. Both would be named as defendants: the officer to defend against any individual penalty, the government to be able to respond adequately in damages to the injured party if such were found. Many instances of Fourth Amendment violation now go unnoticed because no criminal charge is brought and the injured party is not in position to bring a *Bivens*-type suit for the alleged constitutional violation. The burden of proof on the factors in regard to penalty and compensation would be the same as in a mini-trial following the principal criminal case, as discussed above.

Once the main trial is over, the court could conduct a second inquiry to discover whether the police had violated the defendant's rights.

The creation of this civil remedy could be accomplished by simple amendment to the present Federal Tort Claims Act. This is the procedure followed in many other countries, among them Canada.

> . . . the remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of the police and to express that resentment by a proportionate judgment for damages.[51]

Disciplinary punishment and civil penalties directly against the erring officer involved would certainly provide a far more effective deterrent than the Supreme Court has created in the exclusionary rule. The creation of a civil remedy for violations of privacy, whether or not the invasion resulted in a criminal prosecution, would provide a

51. Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L.C. AND P.S. 271 (1961), in POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE, Part II, THE EXCLUSIONARY RULE, *supra* n. 3, at 105.

remedy for the innocent victims of Fourth Amendment violations which the exclusionary rule has never pretended to give. And the rationale that the "government should not 'profit' from its own agent's misconduct" would disappear completely if erring officers were punished and injured parties compensated when there was a Fourth Amendment violation.[52] If such a law and procedure were enforced, there would be no remaining objection to the subject of search and seizure still receiving his appropriate punishment for his crime.

Both judges who favor the rule and those who oppose it have said that the rule itself is not mandated by the Constitution.

Conclusion

All of the above was written before I read Professor Kamisar's "Reply to critics of the exclusionary rule" in the August issue [Yale Kamisar, "Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?" 62 Judicature 66.] It is apparent that our respective positions are widely divergent. After pondering his statement, I believe it fair to say that he must attempt to defend his position on one of two grounds, and that on analysis neither is defensible.

First, if Professor Kamisar believes that the Fourth Amendment necessarily mandates the exclusionary rule, then he ought to cite Supreme Court authority for this position. Nowhere in his article does he do so. It is undeniable that at no time in the Court's history has a majority in any case ever so held, and I do not believe that any more than two individual justices in the court's history have so expressed themselves. In contrast, numerous justices, both favoring and opposing the rule, have stated that the rule itself is *not* mandated by the Fourth Amendment.

Second, if Professor Kamisar's article is intended only to say that under the Constitution we have a choice of methods to enforce the ban against "unreasonable searches and seizures," and that the exclusionary rule is a good choice only because of "the imperative of judicial integrity," then I submit both logic and experience in this country and all other countries refutes this. If the Supreme Court or the Congress has a choice of methods under the Constitution, then it simply will not do to rest the choice of the exclusionary rule solely on the high principle of "judicial integrity" and to ignore the pragmatic result, the failure to achieve the objective of enforcement and the other pernicious side effects discussed above, which themselves strongly discredit judicial integrity.

If we have a choice, to attempt to justify the continuation of the exclusionary rule on this basis is to be stubbornly blind to 65 years of experience. If we have a choice, to insist on continuing a method of enforcement with as many demonstrated faults as the exclusionary rule is to be blindly stubborn. If we have a choice, let us calmly and carefully consider the available alternatives, draw upon the experience of other nations with systems of justice similar to our own, and by abolishing the rule permit in the laboratories of our 51 jurisdictions the experimentation with various possible alternatives promising far more than the now discredited exclusionary rule. □

52. McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659, 692 (1972). "What Linkletter does appear to establish is that, at least when the cornerstone of deterrence is removed, the Fourth Amendment exclusionary rule does not rest upon an unshakeable foundation. . . . What does seem clear is that so ethereal a concept as the 'imperative of judicial integrity' does not, without more, mandate either admission or exclusion of reliable evidence improperly come by."

MALCOLM RICHARD WILKEY is a judge of the U.S. Court of Appeals for the District of Columbia Circuit.

Closing arguments in the debate over the exclusionary rule

Last fall Judicature invited Yale Kamisar and Malcolm Wilkey to debate the merits of the exclusionary rule, first applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

Kamisar, a professor of law at the University of Michigan, defended the rule on the ground that it prevents government from profiting from its own misconduct ("Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?", August 1978).

Wilkey, a judge on the U.S. Court of Appeals for the District of Columbia Circuit, urged that the rule be abolished. He said trial courts should admit illegally-seized evidence but they should punish police officers who have wrongly seized it ("The exclusionary rule: why suppress valid evidence?", November 1978).

Here are the closing arguments in their debate. Next month, two social scientists, Bradley Canon and Steven Schlesinger, will discuss empirical studies of the rule's effect on police officers.

We invite your comments.

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-

tachment" 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 battlescarred 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.[1] 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."[2]

> [W]ithout 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.[3]

In light of these circumstances, Traynor overruled the court's earlier decision.[4]

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 exclu-

1. People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44 (1942).

2. Roger Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321, 322.

3. People v. Cahan, 44 Cal.2d. 434, 282 p.2d 905, 907 (1955) (Traynor, J.).

4. Roger Traynor, *Lawbreakers, Courts and Law-Abiders*, 31 MO.L.REV. 181, 201 (1966). *See also* Monrad Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CALIF. L.REV. 103, 107 (1965).

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).

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.

sionary rule on the states, even in such extreme cases.[5] It was not until 1961 that he joined in the opinion for the Court in *Mapp*, which imposed the rule on the states.

Chief Justice Warren knew the exclusionary rule's limitations as a tool of judicial control,[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:

> [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.[7]

The author of the *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.[8] Indeed, shortly before his death, he warmly defended *Mapp* and *Weeks*.[9]

Moreover, nothing in Justice Clark's career suggests that he endorsed *Mapp* out of "sentimentality" or in awe of the "divine origins" of the exclusionary rule. More likely, he was impressed with the failure of *Wolf* and *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 *Mapp*.[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:

> [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.[11]

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.[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.

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:

> [O]ur 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.[13]

5. Irvine v. California, 347 U.S. 128, 132 (1954). Perhaps he was confident that at least in such a flagrant case the transgressing officers would be prosecuted or otherwise disciplined. If so, his confidence was misplaced. *See* Comment, 7 STAN. L.REV. 76, 94n. 75 (1954).

6. See his opinion for the Court in Terry v. Ohio, 392 U.S. 1 (1968), at 13-15.

7. *Id.* at 13.

8. *See* Larry Temple, *Mr. Justice Clark: A Tribute*, 5 AM. J. CRIM. L. 271, 272–73 (1977).

9. *See* Tom Clark, *Some Notes on the Continuing Life of the Fourth Amendment*, 5 AM. J. CRIM. L. 275 (1977).

10. *See* Elkins v. United States, 364 U.S. 205, 224–25 (1960) (App.)

11. *See* Stone v. Powell, 428 U.S. 465, 496, 500 (1976) (Burger, C.J., concurring); and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

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 *Judicature* next month.

13. William Parker, *The Police Challenge in Our Great Cities*, Annals, Jan. 1954, pp. 5, 11-12.

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[15] 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 ex-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

14. W. Parker, POLICE 117, 120–21, 114, 118 (O. Wilson ed. 1957).

15. See, e.g., ABA, Summary of Proceedings of Section of Criminal Law 54, 58 (1956).

16. Traynor, *supra* n. 4, at 198.

17. James Vorenberg, *Is the Court Handcuffing the Cops?*, N.Y. TIMES MAG., May 1, 1969, in CRIME AND CRIMINAL JUSTICE 82. Chicago: Quadrangle Books, D. Cressey ed. 1971.

18. Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.CHI.L.REV. 665, 754 (1970).

19. *See* Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. &P.S. 171 (1962); Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436 (1964); Kamisar, *How to Use, Abuse—and Fight Back with—Crime Statistics*, 25 OKLA. L. REV. 239 (1972).

See also Kamisar, *When the Cops Were Not "Handcuffed,"* N.Y. TIMES MAG., Nov. 7, 1965, reprinted in A. Niederhoffer & A. Blumberg, eds., THE AMBIVALENT FORCE: PERSPECTIVES ON THE POLICE 319. Hinsdale, Ill: Dryden Press, 2d ed. 1976; and in CRIME AND CRIMINAL JUSTICE 46. Chicago: Quadrangle Books, D. Cressey ed. 1971.

20. See 2 J. CRIM L. & CRIMINOLOGY at 107 (1911).

million)."[21] This history ought to raise some doubts about the alleged causal link between the high rate of crime in America and 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.[22] 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.'[23] 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).[24]

• 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*.[25]

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).[26] Conviction rates for murder, manslaughter, felony assault, rape, robbery and burglary remained almost the same, though the number of convicted felons rose steadily.[27]

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.[28]

21. See 10 J. CRIM L. & CRIMINOLOGY at 327 (1919).

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 precommitment detention, regardless of whether they were "voluntarily" made, so far as the record showed.

24. *See* Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM L. C. & P.S. 171, 185 (1962).

During this same decade the national crime rate for the seven major offenses rose 66 per cent and the overall national crime rate soared 98 per cent. *See id.* at 184 & n. 100.

25. *See* Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 437, 463 (1964).

26. *Id.* at 464.

27. *See* Kamisar, *supra* n. 24 at 190.

28. Critique, 69 NW. U.L. REV. 740, 774–76 (1975).

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.[29]

Evidently, short of abolishing the exclusionary rule across the board, Judge Wilkey would welcome an amendment to the Fourth Amendment that read something like this:

> The guaranty against unreasonable search and seizure shall not be construed to bar from evidence in any criminal proceeding any dangerous weapon seized by a peace officer outside the curtilage of any dwelling house.

It may be surprising, but the 1963 Michigan Constitution (as well as its predecessor) contained just such a provision. Whenever it was challenged after *Mapp*, the Michigan Supreme Court managed to avoid invalidating it by finding that the search in question had been reasonably conducted.[30] In the 1966 *Blessing* case, only two of the seven state court justices said the proviso violated the U.S. Constitution.[31] Most state judges thought that, despite *Mapp*, the *Blessing* case had upheld the "anti-exclusionary" proviso[32]; as late as 1969, a unanimous panel of the court of appeals acted on this basis.[33]

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.[34] 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.[35]

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).[36]

29. Colin Greenwood, FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES 3-4 (Introduction). London: Routledge & Kegan Paul Ltd., 1972.

30. *See* Edward Wise, *Criminal Law and Procedure, 1971 Annual Survey of Michigan Law*, 17 WAYNE L.REV. 381–83 (1971).

31. People v. Blessing, 378 Mich. 51, 142 N.W.2d 709 (1966). *See also* Wise, *Criminal Law and Evidence, 1966 Annual Survey of Michigan Law*, 13 WAYNE L.REV. 114, 133–36 (1966).

32. See Wise, *supra* n. 30 at 382–83.

33. People v. Pennington, 17 Mich. App. 398, N.W. 2d (1969), rev'd 383 Mich. 611, N.W.2d (1970).

34. *See* Edwards, *Commentary: Murder and Gun Control*, 13 WAYNE L. REV. 1335, 1341 (1972).

35. *Id.* at 1341. "[A] sample of 113 handguns confiscated by police during shootings in the City of Detroit during 1968 showed that only 25 per cent of the confiscated weapons had been recorded previously in connection with a gun permit application." G. Newton and Franklin Zimring, Staff Report to the National Commission on the Causes and Prevention of Violence in America, FIREARMS AND VIOLENCE IN AMERICAN LIFE 51 (1969).

36. NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 171 (1969).

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).[37] When the Michigan Supreme Court struck down the state's "anti-exclusionary" proviso in 1970,[38] 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"[39] and that confiscation of weapons is one of them.[40] (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,[41] 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.[42] 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.

38. People v. Pennington, 383 Mich. 611, 178 N.W. 2d 471 (1970).

39. Burger, C.J., dissenting in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 418 (1971).

40. See Jerome Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 220. London: John Wiley & Sons, 2d ed. 1975. *Cf.* F. Miller, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 247–48 (confiscation of automobiles). Boston: Little, Brown & Co., F. Remington ed. 1969.

41. Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977) (per curiam). *See also* Terry v. Ohio, 392 U.S. 1 (1968).

42. Pennsylvania v. Mimms, 434 U.S. 106, 111–12 (1977) (per curiam).

"public relations" because by then we know who the criminal is,[43] 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.[44]

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 enviously 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: a separate issue.") And replacing the exclusionary rule with a statutory remedy against the government would not bring about an increase in unlawful police activity if the alternative were equally effective—and Judge Wilkey expects it to be "a far more effective deterrent."

I venture to say that Judge Wilkey has confused the *content* of the law of search seizure (which proponents of the exclusionary rule need not, and have not always, defended, as the accompanying insert shows) with the *exclusionary rule*—which "merely states the consequences of a breach of whatever principles might be adopted to control law enforcement officers."[45] The confusion was pointed out more than 50 years ago by one who had the temerity to reply to the great Wigmore's famous criticism of the rule.[46] Every student of the problem knows Wigmore's views on this subject, but very few are familiar with Connor Hall's reply. It is worth recalling:

> 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.[47]

43. See J. Kaplan, CRIMINAL JUSTICE 215–16. Mineola, New York: The Foundation Press, 2d ed. 1978.

44. Note, 58 YALE L.J. 161–62 (1948). (Emphasis added.) *See also* Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 225–26, in POLICE POWER AND INDIVIDUAL FREEDOM 87-88. Chicago: Aldine, Sowle ed. 1962.

45. Paulsen, *supra* n. 44, at 87.

46. John Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

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]

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:

> [L]et 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.

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).

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] □

—Y.K.

1. Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 66 (1957).

2. *Id.*

3. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand* 53 J. CRIM. L.C. & P.S. 85, 87 (1962) (keynote address at 1961 annual meeting of National District Attorney's Association).

4. Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171, 177 (1962).

5. See Warden v. Hayden, 387 U.S. 294 (1967) (Brennan, J.) (Distinction between "mere evidence" and instrumentalities, fruits of crime or contraband finds no support in Fourth Amendment). *See also* Berger v. New York, 388 U.S. 41, 44 & n. 2 (1967).

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 evidence[51] 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 rule[52] 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.

49. Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., joined by Frankfurter and Murphy, JJ. dissenting) (self-styled prologue). But *cf.* Jackson, J., in Irvine v. California, 347 U.S. 128, 135–37 (1954).

50. See note 39 *supra* and accompanying text.

51. See Wolf v. Colorado, 338 U.S. 25, 29, 38 (1949).

52. See Elkins v. United States, 364 U.S. 205, 224–25 (1960).

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 compensation 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

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.

55. Biven vs. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411, 422–23 (1971).

56. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN.L.REV. 493 (1955). Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan*, 43 CALIF. L.REV. 565, 592–95 (1955).

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:

> [W]here 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.[57]

"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[64] 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 . . . [66]

In theory, *Defore*,[67] 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 *Mapp* 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 "dramat-

57. Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U.CHI. L.REV. 345, 346 (1936).
58. *Id.* at 348.
59. J.A.C. Grant, *Search and Seizure in California*, 15 SO. CALIF. L.REV. 139, 154 (1942).
60. William Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L. Q. 337, 387 (1939).
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.
66. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEXAS L.REV. 939, 941 (1966).
67. People v. Defore, 242 N.Y. 13, 19, 150 N.E. 585 (1926).
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]

1. P. Johnson, Book Review, 87 YALE L.J. 406, 410, 414 (1977).
2. S. Schlesinger, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 107 (App. II). New York: Marcel Dekker, 1977.
3. *Id.*
4. *Id.* at 107–08.
5. *Id.* at 108.
6. *Id.*
7. R. Jackson, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 81-82. New York: Harper Torchbooks, 1963 (originally published in 1955 by Harvard University Press).

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 the unsoundness of the underlying premise of *Defore*. Otherwise why, at a post-Mapp training session on the law of search and seizure, would Leonard Reisman, then the New York City Deputy Police Commissioner in charge of legal matters, comment:

> The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a

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. —*Y.K.*

8. Berkley, *Europe and America: How the Police Work*, THE NEW RUPUBLIC, Aug. 2, 1969, in A. Niederhoffer & A. Blumberg, eds., THE AMBIVALENT FORCE: PERSPECTIVES ON THE POLICE 51. Hindale, Ill: Dryden Press, 2d ed. 1976.

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.

13. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 702–03, 705–06 (1970). Canada, of course, "has no written law comparable to the fourth amendment prohibition against unreasonable searches and seizures." *Id.* at 704.

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.
>
> . . . [I]n 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"! □

71. N.Y. TIMES, April 28, 1965, p. 50.

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 592-595.

73. Traynor, *supra* n. 2, at 324.

74. Elkins v. United States, 364 U.S. 206, 213 (1960) (the Court, per Stewart, J., describing *Wolf*).

75. Traynor, *supra* n. 2, at 324.

76. Allen, *supra* n. 47 at 11, 12-13.

77. Stone v. Powell, 428 U.S. 465, 496, 501 (1976) (dissenting).

A call for alternatives to the exclusionary rule: let Congress and the trial courts speak

by Malcolm Richard Wilkey

In comparison with Professor Kamisar's response to my criticisms of the exclusionary rule, my comments will be brief. Essentially, I am content to rest on the affirmative case for reform stated in my original article.

It is obvious, although he does not specifically say so, that Professor Kamisar chooses to defend his position on the second of the two grounds which I posited as his inevitable choices. Thus, he does not claim that the Fourth Amendment necessarily mandates the exclusionary rule; he says only that, under the Constitution, we have a choice of methods to enforce the ban against unreasonable searches and seizures and that the exclusionary rule is the best choice.

If there is to be a choice, however, there must be grounds for a choice. Indisputably valid and convincing evidence cannot be excluded on whim, fancy, or unproven theory. The burden of proof is on those like Professor Kamisar, who would exclude such evidence. No one, not even Professor Kamisar, has come forward with such proof.

Oaks' conclusion of 1970 is still uncontradicted:

> [T]oday, more than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed upon the state courts, there is still no convincing evidence to verify the actual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness.[1]

At the same time, however, Oaks did refute Professor Kamisar:

> Kamisar is merely saying what the Supreme Court and a considerable number of scholars have said over and over again, that in the absence of any better alternative, we are willing to take the deterrent effect of the exclusionary rule solely on the basis of assumption.
>
> In sum, the rhetoric concerning the factual basis for the exclusionary rule amounts to no more than 'fig-leaf phrases used to cover naked ignorance.'[2]

I submit that whatever the merits of his second article in emphasizing the complexities of the problem, Kamisar has not made a case for deliberately choosing the exclusionary rule over the available alternatives.

1. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 672 (1970).
2. *Id.* at 678.

62 Judicature 351 (February 1979)

Moving toward alternatives

It is the downplaying of available alternatives that I find most distressing in Professor Kamisar's position. He argues that "*for many decades* a majority of the states had no exclusionary rule but *none of them* developed any meaningful alternative" (page 346). He even dredges up an ancient dilemma—the policeman is liable but financially irresponsible while the state or municipality has financial responsibility but no liability. This ignores the great erosion in the law of sovereign immunity which has occurred, and the capacity of Congress to speak effectively about it.

I do not really know whether any "meaningful" alternative to the exclusionary rule emerged in any of the states prior to *Mapp*, but I do suggest that, wherever we have been and wherever we want to go, we start from where we are now. I propose Congressional action to provide meaningful alternatives to the exclusionary rule. Congress could directly provide federal remedies, and indirectly permit and encourage the states to provide the same or alternative remedies. In other words, the exclusionary rule could be abolished now, conditioned on the enactment of acceptable alternatives.

I would prefer to see the exclusionary rule abolished conditionally with alternatives provided simultaneously, but I urge abolition in any case. I do so because the rule is pernicious in its present form, and I am confident that more attractive alternatives would speedily emerge.

At the outset of my original article (pages 217–218), I discussed the question of who should act first, the Supreme Court or Congress. If Congress seizes the initiative, it could simultaneously provide a federal alternative and condition abolition of the rule in the states on their providing an equal remedy. If the Supreme Court acted first, I believe Congress would act speedily to fill the gap with a federal remedy.

Therefore, I respectfully suggest to Professor Kamisar that he has not met the issue squarely: he has given us some history; quotations from almost everyone of prominence who has endorsed the rule; and some crime statistics whose current or past relevance is not immediately apparent.[3] But he has not analyzed the practical working of the present exclusionary rule as compared to the excellent possibilities for logical reform inherent in the proposals I made.

The multiple causes of crime and the empirical data

In his discussions of the crime rate and the exclusionary rule and guns and the exclusionary rule, Professor Kamisar generally indicates that I attribute all crime, or all crime with handguns, or all crime rate differences, to the presence or absence of the exclusionary rule. Such a position appears easy to refute by statistics, which necessarily embrace the effect of many factors.

Congress could provide alternatives to the exclusionary rule and encourage the states to do the same.

For example, it is no surprise to me that crime did not decrease in Michigan from 1963 to 1970—a period in which the state, in effect, abolished the exclusionary rule. The fact is that crime increased *everywhere* during the turbulent 60s, and no one could expect that abolishing the rule would give Michigan immunity from the nationwide epidemic.

Actually, as Professor Kamisar quoted but failed to recognize, I referred to the "huge social cost . . . of street crimes . . . which flourish *in no small degree* simply because of the exclusionary rule . . ." (page 215). I

3. On the pitfalls of statistics in this field, *see* Oaks, *supra* n. 1, at 687–89, 712–16.

did not rule out other factors here, as I did not rule out other factors in the comparison of the United States and other countries. It may well be, as Chief Justice Burger has suggested, that the effect of the exclusionary rule is not readily susceptiable to empirical proof.[4] But I submit that logically we all recognize that the effects of the exclusionary rule, by its presence or absence, must be there in some degree in the various ways that I have described them. The available empirical data tends strongly to support this idea,[5] but obviously selective opposing arguments can be made.

Even if abolishing the rule resulted in minimal effect on the number of illegal searches, and even if the presence or absence of the rule has no discernible effect on the overall crime rate, is this an argument in support of an irrational system of freeing criminals from punishment? This is the most visible, undeniable effect of the exclusionary rule, and one which brings the entire system of justice into disrepute.

Unreasonable searches—the level of probable cause

Whether Professor Kamisar's question—"Are we talking about the impact of the exclusionary rule or the impact of the Fourth Amendment itself?"—reflects confusion in my mind or his, I leave to the reader. But by all means, let us try to set the matter straight. Professor Kamisar asserts, "Abolishing the rule would not confer a right on our police to search 'on the slightest suspicion'—or affect lawful police practices in any way. Only a change in the substantive laws of search and seizure can do that." And, earlier, he maintains that I have made "really an attack on the constitutional guaranty itself, not the exclusionary rule."

I thought I had made it perfectly clear (page 224, note 2) in "How the exclusionary rule hampers gun control" that there were two separate issues: (1) the exclusionary rule as an enforcement tool for the Fourth Amendment, and (2) the standard of probable cause for a valid search and seizure. As I said in that footnote,

> I am not suggesting that abolishing the rule will result in a wholesale abandonment of any standard of probable cause for a valid search. Not at all. The standard of probable cause required is a totally different issue, one that I do not specifically address in this article.

I went on to explain why, even without a change in the standard of probable cause, but after the abolition of the exclusionary rule, we may expect fewer illegal searches but more successful prosecutions.

But since Professor Kamisar has raised the second issue by implying that I included it in the one which I addressed, I must ask: what is the "constitutional guaranty itself"? (which I have not attacked, but rather, seek to implement more effectively). That guaranty is "the right of the people to be secure . . . against unreasonable searches and seizures." What makes a search unreasonable is the absence of sufficient probable cause to justify the search. Therefore, the level of probable cause required determines the permissible conduct of the police.

I made and make no effort to cite literally hundreds of cases in which the standard of probable cause required by the courts, particularly the appellate courts, was so high and unreasonable as to appear absurd, silly, and fatuous to layman and lawyer alike. I do not make that effort because I am firmly

4. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). *Cf.* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 667 (1970) (available data inconclusive on proposition that exclusionary rule discourages illegal searches and seizures).

5. My position is congruent with that set forth in Oaks' article, *supra* n. 1 at 755–56. Recognizing the limitations of the available empirical data, he labelled his final section "Postscript" (not "Conclusion") and carefully stated:

"This postscript draws upon that evidence, but it brushes past the uncertainties identified in the discussion of the data and makes some assertions that are not fully supported by it. What follows is an argument, not a conclusion. The exclusionary rule should be abolished, but not quite yet. [It fails in] deterring illegal searches and seizures by the police. . . . [It] imposes excessive costs on the criminal justice system . . .

"Despite these weaknesses and disadvantages, the exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. [It] should be replaced by an effective tort remedy against the offending officer or his employer. . . ."

(Two political scientists—Bradley Canon and Steven Schlesinger—will discuss empirical studies on the effects of the exclusionary rule in *Judicature* next month.)

convinced that, whatever standard of probable cause is employed, the exclusionary rule is both an ineffective and pernicious remedy for any violation of the constitutional right, no matter how defined.

The need for a new standard

Having taken the time to make this dichotomy of issues clear, I want to emphasize that the definition of "unreasonable searches and seizures" is nowhere found in the Constitution. It has been a matter for the courts to decide, and it could be a matter for Congress. I go back to former Solicitor General Griswold's principle on seeking certiorari: "If the police officer acted decently, and if he did what you would expect a good, careful, conscientious police officer to do under the circumstances, then he should be supported."[6]

Dean Griswold did not assert, and neither do I, that this would be sufficient for a judicial standard, but it surely is not beyond the realm of possibility for Congress to define a standard of reasonable search and seizure, i.e., the level of probable cause required, in terms which would meet more common sense standards than what we find in many appellate decisions. Such a definition by Congress of what is a reasonable and an unreasonable search and seizure might be buttressed in the legislative history by a recital of some representative cases which

6. Erwin N. Griswold, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT (1975). I cited Griswold in my first article at 219 n. 9.

Comparisons with other countries

Why is everyone out of step except my Uncle Sam?

In his effort to validate the unique American rule by the uniqueness of America, Professor Kamisar inadvertently gives the reforms I advocate a strong push forward. Far from parting company with Professors Schlesinger and Oaks, I can certainly agree "that there may be no comparable need for the exclusionary rule in Canada and Western European countries." The fundamental question is why.

I would say that any "need" for the exclusionary rule arises because of our failure intelligently and vigorously to pursue other methods of enforcing the Fourth Amendment to protect the privacy of individuals and to control the police. That "need" arises in the same way the need for sleeping pills frequently arises—the neglect of proper exercise, a moderate diet, and regular hours of work, eating, and sleeping—and the rule is about as ineffective and habit-forming as those pills.

In regard to Canada, Kamisar repeats Oaks' answer to my question: "How do other countries manage to control their police without relying on the exclusionary rule?". Oaks' answer—which Kamisar quotes in his article and which I discuss below—reinforces the very points I made in my article. Kamisar underlines "the American setting" as being different. He is right. But why is it different? One vital reason is that Canada never went the route of the exclusionary rule. It has relied on other methods of controlling police and protecting the privacy of individuals—precisely the methods I advocated in my article.

- Canada pursues police discipline seriously, as Kamisar says. Police discipline will never be pursued seriously in the United States so long as disciplining officers for infractions will inevitably prove the Fourth Amendment violation and bar the use of the evidence in a prosecution. (See pages 226–227 of my first article).
- Canada prosecutes police officers for criminal misconduct, as Kamisar notes. This is exactly what I propose should happen, not

have required utterly absurd levels of probable cause and which no longer could be considered as governing precedent in light of the new statutory standard. In determining such a statutory standard of "reasonableness," which is always Congress's prerogative, Congress might look at our own experience and mores as well as the standards of probable cause for search and seizure used in other civilized nations with cultures similar to our own.

As the Court said only a few years ago, "It is clear, of course, that no Act of Congress can authorize a violation of the Constitution.[7] It is equally apparent that Congress may, in the first instance, describe for purposes of law enforcement such things as what may give rise to "probable cause" and when a warrant may be dispensed with.[8] Statutory characterizations of constitutional provisions will be subject to judicial review, of course, to assure harmony with the judicial understanding of the constitutional requirements, but a prior legislative determination might appropriately inform the content of such open-ended language as "unreasonable" and "probable cause."[9]

Let me emphasize, though, that this review of the standard of reasonableness, i.e., the requisite level of probable cause, should not be made, if at all, until after we have abolished the exclusionary rule and gained some experience with alternative methods of protecting the privacy of individuals and controlling the police. What is "reasonable" is always a function of past experience applied to present time, place, and circumstances. We need to see how the police operate under a new dispensation and how the courts construe "probable cause" without the overhanging distortion of the exclusionary rule threatening to free undeniably guilty criminals. Only then can we, if need be, evaluate the standard of reasonableness and probable cause.

7. Almeida Sanchez v. United States, 413 U.S. 266, 272 (1973).

occasionally but every time, with the punishment meted out to equate with the seriousness of the offense (pages 230–32).

- Canada makes an aggrieved person's tort cause of action a real remedy, not a theoretical one, as Kamisar writes. This is exactly what I advocate (page 231).
- Canadian prosecutors are part of the Ministry of Justice, which exercises direct command authority over most of the police organizations, as Kamisar tells us. Again, as I pointed out before (page 220), this illustrates the total illogic of an exclusionary rule in the United States where the "punishment" of excluding the evidence really affects the prosecutor, not the police officer or his own separate command organization. Obviously, it would be more logical to employ the exclusionary rule in Canada, where the exclusion of evidence theoretically might have an impact on the command organization which controls both the prosecutor and the police.

All in all, while granting whatever historical and ethnic differences there are between Canada (and the other British Commonwealth countries) and the United States, the differences in this area of law enforcement basically result from our having chosen methods of enforcement different from Canada and the rest of the civilized world. □

—M.R.W.

Making hypocrites of judges

The suggestion for a possible later examination of the level of probable cause to constitute a reasonable search and seizure is, as I have painfully tried to make clear, an issue separate and distinct from retaining or abolishing the exclusionary rule itself. But, while adding to thoughts for reform previously expressed, I should convey the first reaction I received to my original article. A state court judge whom I have never met called to say that, although he agreed completely with me, I had overlooked one most salient vice of the exclusionary rule—that not only the police but also the judges are

8. *See* 18 U.S.C. §2518(7) (authorizing warrantless wiretaps in specific circumstances).

9. *Cf.* Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483, 4486 (U.S. 23 May 1978) (probable cause to conduct an administrative search may be based on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].").

corrupted by the exclusionary rule. Another state court trial judge made this same point in a letter.

Time and time again, we are told, trial judges are blatantly hypocritical in construing the Fourth Amendment's definition of an unreasonable search and seizure because they know full well that the illogical penalty of total exclusion of evidence is damaging to the cause of justice. If the evidence were to be admitted anyway, the trial judge would not hesitate to point out the errors of the police, and if penalties were authorized, to impose such penalties on the erring officer. But he does not do it because, conscious of the safety and welfare of the community, and sharing a very righteous indignation against a proven law violator, the trial judge thinks the criminal should not escape unpunished.

It is an illogical penalty to exclude the evidence totally, and it is damaging to the cause of justice.

Not only is this a corruptive influence on trial judges, and an unnecessary burden on the appellate court to correct these errors, but it demonstrates that the number of illegal searches, accurately analyzed, is greater than those recorded in the case books. If the disproportionate penalty of exclusion and bar to prosecution were not the inevitable result of declaring that the police had erred, trial judges would have no motive to call it other than it is, and the police would be criticized—we hope contructively—more than they are now. Abolishing the exclusionary rule as a penalty would make possible a truer measurement of the short-comings of the police, and the proper measures could be taken to correct them.

That trial judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community, I have no doubt. It is regrettable, and we should rid ourselves of this hypocrisy. The only way to do so is to get rid of the exclusionary rule and its baneful influence, and to set up a system which will permit the courts to deal honestly and separately with both the criminal and the police.

Polling the trial judges

My first caller about the original article claimed that "90 per cent of the judges would agree with you, too." I don't know if his estimate is correct—it would appear a polite, if hopeful, exaggeration—but I would expect and hope that a majority of judges would find themselves in general agreement with my views. In any case, I think we should find out—not what judges think about my views, but what judges think about the exclusionary rule.

Reliable empirical data is very hard to come by, and, indeed, final conclusions on empirical data may be logically impossible. Therefore, informed opinion assumes greater importance, and the most reliable opinions as to the efficacy and desirability of the exclusionary rule would be those of state and federal trial judges. The Federal Judicial Center, the National Center for State Courts or some other impartial research body should seek the views of each and every trial judge of general jurisdiction about the exclusionary rule, its impact, its applicability, its merits and demerits, its retention or abolition, and the viable alternatives of enforcing the Fourth Amendment.

While the views of academicians, police commissioners, appellate judges and laymen are entitled to respect, I know of no body of Americans more qualified to define and describe the role of the exclusionary rule in the administration of justice in our country than trial judges. They apply it and live with it day by day. They must know intimately the good and the bad features of the exclusionary rule as it exists in reality, not theory. They should be consulted. □