On Exorcising the Exclusionary Demons: An Essay on Rhetoric, Principle, and the Exclusionary Rule

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ON EXORCISING THE EXCLUSIONARY DEMONS: AN ESSAY ON RHETORIC, PRINCIPLE, AND THE EXCLUSIONARY RULE

Arthur G. LeFrancois*

I. Introduction

The exclusionary rule has come increasingly under attack as a perverse and unique doctrine that frees criminals for repugnant and hypertechical reasons. Discourse about the rule can be seductive in at least two ways. First, it can be simplistic in a most pernicious political fashion. Second, it can create, by virtue of sheer detail and complexity, a labyrinth for which there is no Ariadne's thread and in which one becomes lost forever, following path after path of unanswerable questions and problems that more nearly resemble mysteries for lack of solution. While the complexities surrounding the rule should not be ignored, neither should they be attended to at the expense of the very large considerations upon which the debate rests. Valuable discussion of the rule requires attention to the technical and moral complexities that the rule entails. That the problem of what to do with illegally obtained evidence is important for its own sake should be self-evident. That the solution chosen reveals much about our culture constitutes a sub-text of this Article.¹

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1. The Supreme Court presently is considering two cases that purportedly present the issue of whether the exclusionary rule should apply in cases of reasonable good faith constitutional errors. Commonwealth v. Sheppard, 387 Mass. 488, 491 N.E.2d 725 (1982), cert. granted sub nom. Massachusetts v. Sheppard 103 S. Ct. 3534 (1983) involved a warrant that failed to describe the objects sought. The police sought evidence in the home of a murder suspect, but lacked the appropriate warrant form. The judge failed to attach to the form that was used an affidavit listing the items sought. See 34 CRIM. L. REP. (BNA) 4173-74 (1984). In United States v. Leon, 701 F.2d 187 (9th Cir.), cert. granted, 103 S. Ct. 3535 (1983) argued the same day as Sheppard, a warrant was issued for the search of two residences for drugs. The United States Court of Appeals for the Ninth Circuit held that material information relevant to probable cause should not have been relied on. This information was supplied by informers whose reliability and credibility were unproven. See 34 CRIM. L. REP. (BNA) 4174-76. While the error in Sheppard may have been the officer's (for failing to perceive that the warrant did not indicate the sought-after items) the error in Leon, if any, was the magistrate's (an improper finding of probable cause).

While this Article is not about proposed good faith modifications of the exclusionary rule, the consequence of the argument contained in the Article is that it is improper to
Popular hostility to the exclusionary rule results from common perceptions of the rule's operation. This Article attempts to show that the rule's actual consequences are far different from those commonly supposed. More importantly, the Article demonstrates that an examination of consequences is not dispositive of the exclusionary issue and that an examination of hard cases shows the desirability of the rule even in the face of serious moral objections. Further, the Article claims that the meaning of integrity demands the application of the rule so that the government does not benefit from proscribed behavior and so that individuals are not punished because of illegal governmental investigative techniques. Finally, the argument is made that the Constitution itself, through the fourth amendment and through the concept of due process, mandates the exclusionary sanction. Essentially, the claim made herein is that the rule should stand, as a matter of morals, policy, and constitutional law.

concede that the Constitution (e.g. the fourth amendment) was violated in a particular case and simultaneously to maintain that exclusion should not follow. If a fourth amendment violation occurred in these cases, exclusion should follow. If no such violation occurred, and if the police conduct was in other respects lawful, suppression is not, and should not be, required. The consequence of a fourth amendment violation at the federal level must be exclusion (for fourth amendment and due process reasons) and the consequence must be identical at the state level (because the fourth amendment applies to the states).

As to the present cases specifically, if the Court is unable to determine in Sheppard that the warrant complied with fourth amendment requirements (e.g. particularity) then the evidence should be suppressed. If the Court can point to the purpose of the particularity requirement as allowing a magistrate to make a neutral, informed decision as to probable cause, and not as providing notice to suspects or residents of what is sought, the Court could conclude that the fourth amendment was not violated (so long as the police conduct was otherwise reasonable). As to Leon, the Court's own decision last term in Illinois v. Gates may indicate that no fourth amendment violation occurred, that in fact, probable cause did exist in the case. 103 S. Ct. 2317 (1983) (totality of the circumstances approach applies to cases in which the informant's information helps establish probable cause); see 52 U. Cin. L. Rev. 1103 (1983). On either theory a recognition of some good faith exception would be unnecessary and would rewrite the very meaning of the fourth amendment and its clear proscription of improper investigative conduct.

As to federal legislative moves to enact a good faith exception, the Exclusionary Rule Limitation Act (S. 1764) was passed recently by the Senate. 98th Cong., 2d Sess., 130 Cong. Rec. S1066 (daily ed. Feb. 7, 1984). The bill is as follows:

Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

II. The Rule and the Problems


The exclusionary rule has been described variously as a rule "requiring exclusion of illegally seized evidence from judicial proceedings," as providing a "formula for determining the circumstances under which a violation of the search and seizure requirements of the fourth amendment renders evidence inadmissible in a criminal proceeding," as "bar[ring] the introduction of evidence into trial if it was obtained in violation of the defendant's constitutional rights," as preventing "the use of evidence secured through an illegal search and seizure," and as prohibiting "the use of evidence or testimony obtained by government officials through means violative of the Fourth, Fifth, or Sixth Amendments." Because a precise definition of the rule is


3. Schlesinger & Wilson, Property, Privacy, and Deterrence: The Exclusionary Rule in Search of a Rationale, 18 DUQ. L. REV. 225, 226 (1980) (emphasis added); see also REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 6 n.1, April 19, 1979, GGD-79-47 (rule bars use of evidence obtained in violation of fourth amendment) [hereinafter cited as REPORT]; Note, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 UCLA L. REV. 1129, 1129 (1973) (rule is a remedy to redress fourth amendment violations) [hereinafter cited as Note, Judicial Integrity].


6. C. Whitbread, CRIMINAL PROCEDURE 14 (1980) (emphasis added). Suppression of evidence has been required as a result of a variety of violations. See, e.g., United States v. Wade, 388 U.S. 218 (1967) (sixth amendment right to counsel; post-indictment lineup); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment self-incrimination privilege; prosecution, in order to introduce statements derived from custodial interrogation, must demonstrate procedural safeguards used); Massiah v. United States, 377 U.S. 201 (1964) (sixth amendment right to counsel; incriminating statements); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment); Mallory v. United States, 354 U.S. 449 (1957) (Federal Rules of Criminal Procedure); Rochin v. California, 342 U.S. 155 (1952) (fourteenth amendment due process); McNabb v. United States, 318 U.S. 332 (1943) (federal arraignment statutes); see also United States v. Leahey, 434 F.2d 7 (1st Cir. 1970) (Internal Revenue Service procedure). Leahey was decided on a due process rationale. The court stated that the Service should be bound by its announced policies, because "[i]f this self-imposed rule of conduct could be violated without the sanction of judicial exclusion, what would be the result?" Id. at 10. But see United States v. Caceres, 440 U.S. 741 (1979) (where I.R.S. agent without authorization secretly transmitted conversations with defendant, in violation of I.R.S. regulations, evidence need not be excluded because regulations are not required by Constitution or federal law).
elusive, it will be sufficient for purposes of this Article to treat the rule as requiring, in a significant number of cases in which it is invoked successfully, the suppression of evidence that was obtained through a violation of the defendant’s constitutional rights.  

7. See Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1029 (1974). Perhaps it is the problem of definition that has caused discussion regarding the rule to fall prey to simplistic approaches and assumptions. One criticism, for example, describes the rule as one that “only aids the obviously guilty criminal at the expense of the law abiding public.” *The Exclusionary Rule Bills, Hearings on S.101, S.751, and S.1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. 140 (1981 & 1982)* (statement of George Nicholson, Assistant Attorney General, State of California) (quoting letter from President Ronald Reagan to members and friends of Laws at Work (Sept. 29, 1981)) [hereinafter cited as *Hearings*]. In popular discourse, the rule is treated either as that peculiar device by which criminals are loosed on society or as a necessary safeguard against despotism. See, e.g., Darwic, *Why Keep Good Evidence Out of Court*, Wash. Post, Mar. 22, 1983, at A17, col. 2 (“The application of the rule punishes society in the long run, for a criminal, often a dangerous one, is released to continue his unlawful behavior.”); Wall St. J., July 12, 1983, at 29, col. 2 (Letter to the Editor by Donald E. George) (“When it comes to protecting the rights of citizens, where do you draw the line on ‘trivial mistake’ as opposed to the tactics of the Nazi SS?”).

8. Cf. Kaplan, *supra* note 7, at 1029 (“in a very large category of cases, evidence in the government’s possession which may show that a defendant has committed a crime cannot be used because it has been illegally obtained by the police”). The rule is not, however, a complete bar to the use of unconstitutionally obtained evidence. Evidence that is obtained unconstitutionally may be used at trial in some circumstances. See, e.g., United States v. Havens, 446 U.S. 620 (1980) (defendant’s statements made in response to proper cross-examination that was reasonably suggested by defendant’s direct examination are subject to otherwise proper impeachment by illegally obtained evidence that would be inadmissible in the government’s case in chief); Harris v. New York, 401 U.S. 222 (1971) (voluntary confessions obtained in violation of *Miranda* may be used for impeachment). Such evidence may be used as well before grand juries, see United States v. Calandra, 414 U.S. 338 (1974); in parole revocation proceedings, see United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970); in probation revocation proceedings, see Grimsley v. Dodson, 696 F.2d 303 (4th Cir. 1982); and in sentencing proceedings. See United States v. Schipani, 435 F.2d 26 (2d Cir. 1970).

Furthermore, the harmless error doctrine operates to limit the use of the rule and the consequences of judicial failure to invoke it. See Stone v. Powell, 428 U.S. 465, 509 (1976) (Brennan, J., dissenting) (admission of evidence obtained in violation of fourth amendment can be harmless error); Chambers v. Maroney, 399 U.S. 42, 53 (1970) (if there were error in admitting certain evidence, it was harmless); Chapman v. California, 386 U.S. 18, 22, 24 (1967) (some constitutional errors may be so insignificant as not to require automatic reversal of conviction; here, prosecutorial comment on defendants’ failure to testify at trial found harmful); Fahy v. Connecticut, 375 U.S. 85 (1963) (error in introducing unconstitutionally obtained evidence found not to be harmless; question whether erroneous admission of evidence can be subject to a harmless error doctrine expressly unanswered). Professor Geller, in a post-Chambers article, claims that the harmless error doctrine “has little application in the search and seizure area.” Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 661 n.169. But see C. Whitebread, *supra* note 6, at 25 (harmless error applies to fourth amendment cases). Although Professor Geller does not say so, the alleged lack of application, if real, has more to do with the nature of fourth amendment cases and the rigors of the harmless error doctrine than with any rule that requires automatic reversals in cases of fourth amend-
As for the rule’s origins, the literature\(^9\) abounds with discussions of the familiar triumvirate—\textit{Weeks v. United States},\(^10\) \textit{Wolf...
v. Colorado,\textsuperscript{11} and \textit{Mapp v. Ohio}\textsuperscript{12}—and its spiritual ancestors—\textit{Boyd v. United States},\textsuperscript{13} \textit{Entick v. Carrington},\textsuperscript{14} and \textit{Wilkes v. Wood}.\textsuperscript{15} The case law lineage raises the question whether the rule is con-

the federal courts. Yackle, \textit{supra} note 9, at 347. He cites Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), as an example of the Court’s treatment of the \textit{Weeks} doctrine. Yackle, \textit{supra} note 9, at 347. In \textit{Silverthorne}, a case decided six years after \textit{Weeks}, the Court held that the \textit{Weeks} problem was not cured by returning the property in question and introducing copies at trial. 251 U.S. at 391-92.

11. 338 U.S. 25 (1949). Justice Frankfurter wrote the majority opinion in \textit{Wolf}, in which the Court held that while the fourth amendment applies to the states through the due process clause, it does not require the exclusion of unconstitutionally seized evidence in state courts. \textit{Id.} at 27-28, 33. Schlesinger & Wilson, \textit{supra} note 3, at 234-35, seem to claim that the privacy analysis so important to \textit{Wolf} is more relevant to fourteenth than fourth amendment analysis, and that the Court subsequently misunderstood \textit{Wolf} and its fourteenth amendment underpinnings. The Court in \textit{Wolf}, however, located the “security of one’s privacy” at “the core of the Fourth Amendment.” 338 U.S. at 27. Clearly, \textit{Wolf}’s characterization of the importance of fourth amendment privacy, in light of the Court’s refusal to require exclusion at the state level, helped to plant the seeds of discontent with nonexclusionary policy.

12. 367 U.S. 643 (1961). In \textit{Mapp}, Justice Clark’s opinion for the Court held that failure to exclude in state court evidence that was obtained by state officers in contravention of the fourth amendment violated the defendant’s fourteenth amendment due process rights. \textit{Id.} at 655-56. The case stands for the proposition that the exclusionary rule applies to the states.

13. 116 U.S. 616 (1886). \textit{Boyd} concerned a civil forfeiture proceeding regarding goods allegedly imported illegally. The trial court had ordered the defendant to produce an invoice relating to the importation. Characterizing the forfeiture proceeding as quasi-criminal, the Court held that the fourth and fifth amendments barred the compulsory production of the invoice. \textit{Id.} at 633, 634. Justice Bradley’s opinion for the Court in \textit{Boyd} emphasized the private nature of the property involved and the self-incrimination resulting from the seizure. \textit{Id.} at 622, 633.

14. 19 Howell’s State Trials 1029 (C.P. 1765), 95 Eng. Rep. 807. \textit{Entick} involved a suit for trespass stemming from the seizure of the plaintiff’s papers pursuant to a warrant. Relying largely on a property analysis, Lord Camden accepted in part the plaintiff’s trespass theory and found relevant the privilege against self-incrimination. \textit{Id.} at 1066, 1073. He also rejected an argument from utility. \textit{Id.} at 1073. The warrant at issue suffered from numerous defects. For treatments of the case, see J. Landynski, \textit{Search and Seizure and the Supreme Court} 29 (1966); N. Lasson, \textit{The History and Development of the Fourth Amendment to the United States Constitution} 47-48 (1937); T. Taylor, \textit{Two Studies in Constitutional Interpretation} 32-34 (1969); Yackle, \textit{supra} note 9, at 339-42. Landynski notes that Lord Camden probably burned his opinion, finding it unworthy of preservation, but that someone copied the original. J. Landynski, \textit{supra} at 53 n.19.

15. 19 Howell’s State Trials 1153 (C.P. 1763), 98 Eng. Rep. 489. John Wilkes had published a pamphlet series called \textit{North Briton}, the forty-fifth of which responded to a speech by George III that had defended a cider excise tax. Lord Halifax, Secretary of State, issued a warrant for the arrest of the printers and publishers of the document, and for the seizure of their papers. Wilkes sued Robert Wood, who had supervised the messengers during the search of Wilkes’ home. Charles Pratt, Lord Chief Justice of the Court of Common Pleas (later elevated to the peerage as Lord Camden), tried the case. The warrant was unsatisfactory in Pratt’s view, and the jury returned a verdict of £1,000. T. Taylor, \textit{supra} note 14, at 29-31.
stutional in stature or is merely judge-made law capable of congressional modification or abolition. Questions abound as to the nature and status of the rule. Is the rule a right, a

16. The federal exclusionary rule has . . . been disparaged as not derived from "the explicit requirements of the Fourth Amendment," but only "a matter of judicial implication." 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."

Kamisar, Is the Exclusionary Rule on "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?, 62 JUDICATURE 66, 75 (1978) (footnote omitted). "[T]he Court has interpreted both the fourth and fourteenth amendments as requiring, in themselves, the exclusion of unconstitutionally obtained evidence. Thus, as a matter of law, the exclusionary rule is a part of the Constitution." Loewenthal, Evaluating the Exclusionary Rule in Search and Seizure, 49 UMKC L. REV. 24, 25 (1980). "[T]he exclusionary rule is a rule of constitutional origin which only the Supreme Court . . . can alter." Hearings, supra note 7, at 34 (statement of Stephen Sachs, Attorney General of Maryland). Sachs claims that Chief Justice Burger acknowledges the rule’s constitutional dimension in his suggestion that Congress create a surrogate remedy that may be approved by the Court. Id. at 35 (citing Bivens v. Six Unknown Named Agents, 403 U.S. 388, 423 (1971) (Burger, C.J., dissenting)).

Professor William Greenhalgh argues that case law shows that the rule is "an essential part of the Fourth and Fourteenth Amendments." Hearings, supra note 7, at 93 (Statement of William Greenhalgh, Chairperson, Criminal Justice Section, Legislative Committee, American Bar Association) (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

17. "It is not a rule required by the Constitution. No Supreme Court has ever held that it was." Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 JUDICATURE 214, 216 (1978). Judge Wilkey quotes Justice Black’s concurrence from Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (Black, J., concurring): "[T]he Fourth Amendment does not itself contain 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." Wilkey, supra, at 216-17. Justice Black’s next words, however, indicate that he finds a constitutional basis in the fourth and fifth amendments for the rule. 367 U.S. at 662 (Black, J., concurring).

Professor William Schroeder argues that "[w]ith the single possible exception of Mapp v. Ohio, in which a plurality of the Court referred to the ‘constitutionally necessary’ exclusion doctrine, no prevailing Supreme Court opinion has ever clearly held that the fourth amendment itself forbids the use of evidence obtained in violation of its commands." Schroeder, supra note 9, at 1370-71 (footnotes omitted).

"[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally . . . rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974) (grand jury witness has no right to refuse to answer questions on grounds that they stemmed from unconstitutionally obtained evidence).

18. The argument, analyzed in part by Professor Milton Loewenthal, is simply that "since the exclusionary rule does not have constitutional standing, it can be eliminated by a simple act of Congress . . . ." Loewenthal, supra note 16, at 24-25.

19. Professor Ronald Dworkin argues that the geometry of criminal cases differs from that in civil cases in that in the former cases opposing rights are not set one against the other. He uses Linkletter v. Walker, 381 U.S. 618 (1965), and Mapp as examples, claiming that the Court’s refusal in Linkletter to apply Mapp retroactively was based on the fact that the Court did not recognize a right of the defendant in Mapp to have evidence excluded, but instead recognized a need to deter unconstitutional police conduct. Pro-
remedy,\textsuperscript{20} or a mechanism of deterrence?\textsuperscript{21} Does it have moral, constitutional, quasi-constitutional, or federal common law status? The questions are not harmlessly speculative, but are of enormous significance to the whole exclusion question. Treating the

Professor Dworkin adds that he is not convinced that such a decision is proper, or that \textit{Linkletter's} description of \textit{Mapp} is accurate. \textit{R. Dworkin, Taking Rights Seriously} 100 (1977).


Judge Traynor seemed to repudiate a remedial theory of the rule: "The objective of exclusion is certainly not to afford criminals a right to escape prosecution . . . . The objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him . . . ." Traynor, \textit{Mapp v. Ohio at Large in the Fifty States}, 1962 DUKE L.J. 319, 334-35. \textit{But see} United States v. Calandra, 414 U.S. 338, 354 (1974) ("Whether such derivative use of illegally obtained evidence by a grand jury should be proscribed presents a question, not of rights, but of remedies").

21. The Supreme Court seems increasingly so to treat the rule. \textit{But see} Sunderland, \textit{supra} note 2, at 376 ("Further abstracting exclusion from its constitutional foundations, empirical analysis concentrates predominantly on the policy consideration of deterrence, a consideration which is one overriding concern of . . . partisan arguments").

While a deterrent theory may have the effect of de-constitutionalizing the rule, it is also true that such a theory conceivably could broaden the rule's application. That is, a personal rights theory of the rule may seriously restrict standing doctrines regarding who may \textit{object} to a particular search and seizure, so that only a defendant whose rights were violated may so object. On a deterrence rationale, the standing issue may be resolved by asking, not whether \textit{this defendant's} rights were violated, but instead, whether \textit{this evidence} was obtained during a reasonable search and seizure. \textit{See} Traynor, \textit{supra} note 20, at 335.

It is worth noting that the Supreme Court opts for a deterrence-oriented approach to the rule and at the same time uses a personal rights view of standing. \textit{Compare} United States v. Calandra, 414 U.S. 338, 347 (1974) (exclusionary rule's purpose is to deter future unlawful police conduct) \textit{with} Rakas v. Illinois, 439 U.S. 128, 133, 138, 139 (1978) (fourth amendment rights are personal and may be enforced by exclusion of evidence only at the instance of one whose rights were infringed) \textit{and} United States v. Salvucci, 448 U.S. 83, 95 (1980) (automatic standing in cases where possession is an essential element of the offense charged abandoned in favor of a privacy analysis which determines whether defendant's own fourth amendment rights were violated). \textit{See generally} Doernberg, "The Right of the People:" Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. Rev. 239 (1983).

In an effort to resolve the apparent paradox, one could say that the exclusionary rule is \textit{not} a fourth amendment right and thus no inconsistency exists in treating standing as a personal rights issue and the rule itself as a deterrent which does not constitute a personal right. The response to such a claim is to ask just what \textit{are} fourth amendment rights, and how it is possible to separate them from their implementation or enforcement. \textit{Mapp v. Ohio}, after all, indicates that the rule is an essential part of the right to privacy and that to tolerate denial of the '"constitutional privilege' of exclusion is to '"grant the right' but '"withhold its privilege and enjoyment." 367 U.S. 643, 656 (1961). The Court held that the rule is an essential part of the fourth and fourteenth amendments. \textit{Id.} at 657.

For the Court's response to arguments for broadening standing concepts on the deterrence theory, see \textit{Salvucci}, 448 U.S. at 94 (deterrence conception of standing rejected as a "basis for allowing persons whose Fourth Amendment rights were not violated to nevertheless claim the benefits of the exclusionary rule") and \textit{Alderman v. United States}, 394 U.S. 165, 174-75 (1969) (benefits of extending the rule on a deterrence theory do not justify the costs associated with suppressing truth-relevant evidence).
rule as a remedy, for example, may cause one to take less seriously possible constitutional dimensions of the rule and to treat it, without further inquiry, as an exercise of supervisory power or as having some peculiar quasi-constitutional status. To the extent that the rule is treated as a mechanism of deterrence, the empirical data on deterrence is extraordinarily relevant to discussions of the rule's propriety. If, on the other hand, the rule is treated as constitutional in nature or as conferring some personal right, the relevance of deterrence data is minimized accordingly.

Along with such questions as to nature, there exist questions as to rationale, some of which merge with each other and with the nature questions. Does the rule stem from a property, privacy, deterrence, or integrity rationale, or some combination thereof? Again, the answers to these questions determine in great part the ultimate answer to the whole exclusionary question.

Because the issue is both technically complex and politically sensitive, it is not surprising that the literature bursts with diverse interpretations of the nature and rationale of the rule. The Supreme Court itself has been enigmatic on the issue of the proper construc-

22. For a brief discussion of the supervisory power argument, see Schrock & Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251, 290 n.109 (1974). For an argument against the quasi-constitutional view, see id. at 291 n.109. But see Kaplan, supra note 7, at 1030, 1055. Kaplan suggests that the rule is Miranda-like, in that it is protective of, but is not protected by, the Constitution. Id.

23. Schlesinger and Wilson argue that the origins of the rule, Boyd and Weeks, demonstrate its property orientation, that the Court since has strayed from the property analysis, and that we should return to the "clear and rational" property approach. Schlesinger and Wilson, supra note 3, at 228-35, 238-40. Professor James Boyd White writes that the original rule stemmed from the view that "one's property was immune from seizure" and that such a rule "is built into the fourth amendment itself." White, Forgotten Points in the "Exclusionary Rule" Debate, 81 Mich. L. Rev. 1273, 1279 (1983).

The Supreme Court analyzes the relevance of property considerations in the context of standing in Rakas v. Illinois, 449 U.S. 128, 144 n.12 (1978) (privacy is proper analytical framework, and property concepts are relevant to, but not dispositive of, privacy analysis).

24. See Traynor, supra note 20, at 320, 332-33 (understanding of exclusionary doctrine requires understanding of fourth amendment right to privacy; confusion results from preoccupation with property rights instead of focus on privacy rights).

25. "The principal and almost sole theory today is that excluding the evidence will punish the police officers . . . and thus deter policemen from committing the same violation again." Wilkey, supra note 17, at 220 (footnote omitted). It is not necessary, of course, for a deterrence-generated exclusionary theory to posit any punishment of the officer. See Traynor, supra note 20, at 335 (California emphasis is on deterrence, yet objective of rule is not to penalize police officers).

26. See Note, Judicial Integrity, supra note 3, for an argument that the subservience of the integrity rationale to deterrence distorts the meaning of the integrity rationale and conflicts with the traditional manner of constitutional interpretation.
tion of the rule. The reader of *Weeks*\textsuperscript{27} and *Mapp*\textsuperscript{28} comes away with the notion that the rule is an essential part of the right to privacy, that it is somehow based on integrity and deterrence rationales, and that it is applied to the states by virtue of its constitutional stature. The reader of *United States v. Calandra*\textsuperscript{29} comes away confused. The rule is somehow a deterrent or a remedy, not a personal right of the accused, and yet the rule continues to be imposed on the states. Surely, the Court’s supervisory power does not extend to the imposition of evidentiary rules on the state courts.\textsuperscript{30} And just as surely, *Mapp* does not include, as did *Miranda v. Arizona*, language to the effect that the rule announced is not a “constitutional straight-jacket,” and that the states are free to fashion alternative safeguards.\textsuperscript{31} Could *Mapp*, at least in retrospect, be an exercise of

\begin{itemize}
\item 29. 414 U.S. 338 (1974).
\item 31. Professor Lane Sunderland argues:

\begin{quotation}
[B]oth Kamisar and Amsterdam . . . support the rule of exclusion but seem to regard it as a kind of quasi-constitutional law that cannot be supported by reference to fundamental constitutional implications.
\end{quotation}

If the rule is not a constitutional requirement, then the entire context of the argument shifts and matters such as federalism, the proper supervisory authority of the Court, the relative authority of Congress, and the relevancy of various policy factors become the fundamental considerations: in short, without a constitutional justification, the Court has no business imposing the rule on the states. Sunderland, *supra* note 2, at 369 (footnote omitted). Irrespective of the merits of the present argument, it should be pointed out that Kamisar has indicated that the pejorative "judicial implication" describes the entire class of Supreme Court opinions which interpret the Constitution. Kamisar, *supra* note 16, at 75 (quoting Wolf v. Colorado, 338 U.S. 25, 28 (1949)). In recent testimony before Senator Mathias’s Subcommittee on Criminal Law, Kamisar argued that the rule is constitutional in nature precisely because it cannot be derived from the Court’s supervisory powers which do not extend to state courts. *Hearings*, *supra* note 7, at 379-80 (statement of Prof. Yale Kamisar, University of Michigan Law School).

The supervisory powers concept has origins in *McNabb v. United States*, 318 U.S. 332 (1943), in which the Court said that "'[q]uite apart from the Constitution . . . we are constrained to hold that the evidence . . . must be excluded. For . . . the arresting officers assumed functions which Congress has explicitly denied them.'" Id. at 341-42. *McNabb* dealt with incriminating statements made by defendants obtained in violation of acts of Congress requiring appearance of accused persons before a judicial officer. Justice Frankfurter invoked the need for nonconstitutional "'civilized standards of procedure and evidence.'" Id. at 340. Such standards, he claimed, are not satisfied by mere observance of due process safeguards. Id.

federal common law? Or does Calandra overrule at least a portion

32. Professor Max Rheinstein has stated:
Daily observation demonstrates that there indeed exists ... a general American Common Law. We teach it in our law schools, we write or read about it in our law books and law reviews, and the attempt to "restate" it has been made by the American Law Institute. Yet, we have been told by the Supreme Court of the United States, in Erie Railroad Company v. Tompkins, [304 U.S. 64 (1938)] that it does not, nay, that it cannot, exist. All law in the United States, we are told there, is the law of either a state or of the federal government. The law-making power of the latter is limited by the federal Constitution to the regulation of the topics enumerated therein. The regulation of ordinary matters of private and commercial life is not stated in the catalogue. Hence it must be state law and a general common law cannot exist. This argumentation, which was preceded by that of Mr. Justice Holmes in Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., [276 U.S. 518 (1928)] is based upon the Austinian notion that law must be the command of, i.e., created by, a sovereign. In this country, law must be created either by a state or by the federal government, hence, common law is possible only as state law, but never as a law independently to be explained and applied by federal courts. The contradiction between that notion and everyday observation and parable evaporates when we free ourselves of the idea that law must necessarily be the command of the sovereign. Law is that set of normative ideas which are (sought to be) enforced by the enforcement staff of some social group. Nothing thus stands in the way of courts of the United States enforcing rules which have not been created by the United States law-making organs, i.e., the Congress or the federal courts, but which have originated in some other way but are held to constitute part of that treasure of ideas which is common to all American or, indeed, all Anglo-American jurisdictions.

Rheinstein, Introduction, in Max Webb on Law in Economy and Society at lx (M. Rheinstein ed., M. Rheinstein & E. Shils trans. 1954). See generally Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 407 (1964) (state courts are bound by federal decisions on subjects within national legislative power at least where Congress has so directed); Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975) (idea of congressionally reversible, constitutionally based common law, binding upon states through supremacy clause, is defensible and may explain some Supreme Court opinions, including those involving supervisory power); Schrock & Walsh, Reconsidering the Constitutional Common Law, 91 Harv. L. Rev. 1117 (1978) (Monaghan's view provides for subconstitutional undermining of the Constitution and blurs the distinction between legislative and judicial competence and responsibility).

Professor Calabresi calls Calandra "the most notorious example of openly subconstitutional constitutional law." G. Calabresi, A Common Law for the Age of Statutes 196 n.3 (1982). Calandra's claim that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, United States v. Calandra, 414 U.S. 338, 348 (1974), clearly implies, says Calabresi, that "the rule, while constitutional, is subject to revision by any legislature that would design its own remedy." G. Calabresi, supra, at 196 n.3. If Calabresi is correct about the meaning of Calandra and if Monaghan is correct about the meaning and existence of a constitutional common law, then Mapp becomes a case very much like Miranda. That is, Mapp's exclusionary requirement becomes potential hostage to the legislature; the requirement becomes a suggestion that had better be followed in the absence of adequate alternatives. Should such a view prevail, the irony is apparent. The Mapp exclusionary requirement would fall by the wayside, and the explicitly non-straitjacketing Miranda rules would continue, as they do today, theoretically in full force.
of *Mapp*. If the answer to either of these questions is yes, then the rule either was never constitutional in origin, or somehow has become deconstitutionalized. If so, it is clearly subject to legislative or state court abolition or modification.

**B. The Logic of the Rule**

It is the logic of the exclusionary rule that gives rise to many of its problems. Because it is a suppression doctrine, it operates, in an important sense, after the fact. While the rule, in theory, reduces the likelihood of future constitutional violations, as applied to a particular case it results in the suppression of already obtained evidence damaging to the defendant’s case. If no evidence were found, there

33. Kamisar has characterized the term “suppression doctrine” as having “a little Madison Avenue touch” because the term sounds as though its referent must be evil. *Hearings, supra* note 7, at 364 (statement of Prof. Yale Kamisar, University of Michigan Law School).

34. The actual deterrent effect worked by the rule is the subject of considerable dispute. *See*, e.g., Canon, *The Exclusionary Rule: Have Critics Proven that It Doesn’t Deter Police?*, 62 *Judicature* 398 (1979) (evidence inconclusive); Geller, *Is the Evidence in on the Exclusionary Rule?*, 67 A.B.A. J. 1642, 1643 (1981) (empirical studies have lacked direct measures of police practice prior to *Mapp*, and so have been unable to assess rule’s deterrent utility); Oaks, *supra* note 9, at 709 (information falls short of empirical substantiation or refutation of rule’s deterrent effect); Schlesinger, *The Exclusionary Rule: Have Proponents Proven that It Is a Deterrent to Police?*, 62 *Judicature* 404, 408 (1979) (rule proponents have not proven its deterrent efficacy and empirical studies, while inclusive, indicate ineffectiveness); Spriotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 *J. Legal Stud.* 243, 276 (1973) (some data are contrary to what one would expect if the rule had a strong deterrent effect).

Discourse about deterrence involves nearly as much reference to anecdote as to empirical investigation. *See*, e.g., *Hearings, supra* note 7, at 38 (statement of Stephen H. Sachs, Attorney General of Maryland) (“I can’t offer statistical studies on the deterrent effect of the rule. What I can offer, however, is my testimony that I have watched the rule deter, routinely, throughout my years as a prosecutor.”); *id.* at 143 (statement of George Nicholson, Senior Assistant Attorney General, Department of Justice of California) (“No rule can be a good deterrent if it cannot be understood. In one California case . . . the court declared that a justice of the peace who was not a lawyer could not issue a search warrant because search and seizure law was too complex for lay judges to understand.”).

Professor Anthony Amsterdam makes a subtler point about deterrence:

The admission of unconstitutionally seized evidence is therefore not, as the critics of the exclusionary rule assume, merely something that happens after “a violation” of the fourth amendment has occurred, and when it is too late to prevent, impossible to repair, and senseless to punish the government for that violation. It is the linchpin of a functioning system of criminal law administration that produces incentives to violate the fourth amendment. Attention is distracted from that system, and the exclusionary rule is talked about as though it were an instrument for “deterring” discrete and specific episodes of unconstitutional police behavior, because of the generally prevailing atomistic conception of the fourth amendment . . . .

would be no evidence to suppress. If evidence is obtained, it can be as relevant as drugs in a drug possession case or self-incrimination in a murder case. As the rule applies to particular cases, then, it seems to provide a windfall to the factually guilty and to impede the search for truth. Indeed, it has been claimed that the criminal trial is no longer a search for truth, but is instead a search for error. As Professor John Kaplan claims:

[The rule] flaunts before us the costs we must pay for fourth amendment guarantees . . . . The problem is that the exclusionary rule rubs our noses in it. In contrast, a sanction which actually prevents police violations of the fourth amendment would permit many criminals to remain free who would be caught either in a society which had no fourth amendment rights or in a society, such as ours, where the rights are observed so imperfectly. Where guarantees of individual rights are actually obeyed by the police, criminals are not discovered and thus no shocking cases come to public consciousness. When we

35. Innocent people against whom allegedly improper police conduct occurs, are not faced with the recovery of incriminating evidence, they don't wind up in criminal court and, consequently, they can't make motions to suppress the evidence against them since none was recovered. Thus, only criminals against whom incriminating evidence was actually found can make such motions and receive the judicial largess of the exclusionary rule.

Hearings, supra note 7, at 142 (statement of George Nicholson, Senior Assistant Attorney General, Department of Justice of California). Aside from the fact that the rule and the fourth amendment are designed to protect all citizens, and without putting too fine a point on it, it should be noted that so long as our criminal guilt standard is reasonable doubt, it is not impossible to conceive of a non-criminal against whom incriminating evidence has been found.

38. See Kaplan, supra note 7, at 1036 ("The disparity in particular cases between the error committed by the police officer and the windfall given by the rule to the criminal is an affront to popular ideas of justice").
39. "In other words, the exclusionary rule's iron curtain shields criminals, not innocent citizens, at the same time as it puts judges into the 'dirty business' of frustrating the search for truth." Hearings, supra note 7, at 142 (statement of George Nicholson, Senior Assistant Attorney General, Department of Justice of California). Senator DeConcini argues that "only if all the truth is brought out can there be a fair trial." Id. at 12 (statement of Dennis DeConcini, United States Senator, Arizona). One wonders what the Senator would argue as to involuntary confessions. That they may be unreliable and so exclusion is meritorious? Not all confession rules go to reliability, however. As Justice Frankfurter pointed out (distinguishing inquisitorial from accusatorial systems), involuntary confessions are excluded "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." Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

40. Hall, The Alternatives to the Exclusionary Rule, 3 CRIM. JUST. J. 303, 308 (1980) (quoting speech by then Attorney General, now Governor, of California, George Deukmejian at the annual California State Bar meeting in October, 1979).
apply the exclusionary rule, however, we know precisely what we would have found had constitutional rights been violated (because, of course, in these cases they were violated), and we are forced to witness the full, concrete price we pay for these guarantees.41

Professor Kamisar asks the following questions:

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? 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?42

Kamisar’s answer, of course, is Kaplan’s point.43 The problem is one of public relations.

In many criminal cases involving questions of constitutionality, the political cost of a ruling of unconstitutionality is simply not that high. Justice Clark, in Mapp v. Ohio, argued that, prior to Mapp, the fourth amendment right of privacy was treated cavalierly in comparison to the first amendment right to freedom of speech.44 In fact,

41. Kaplan, supra note 7, at 1037-38; see also J. Kaplan, Criminal Justice 215-16 (1978).
42. Kamisar, supra note 16, at 74 (footnote omitted).
43. Id. Kamisar quotes a passage from Kaplan’s Criminal Justice, supra note 41, at 215-16 that is similar to the passage quoted supra text accompanying note 41. Kamisar, supra note 16, at 74. Kamisar elsewhere implicitly inquires into the propriety of the outrage that creates the public relations problem. Kamisar points out that one commentator replied to Dean Wigmore’s attack on the rule, Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A.B.A. J. 479 (1922), as follows:

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 were enforced by a return of the evidence.

Then why such anger in celestal breasts?


It is of historical interest, at least, that Dean Wigmore found the exclusionary question important and timely because, whereas the fourth amendment once had been usually invoked by “forgers, panderers, gunmen, get-rich-quick schemers, fraudulent bankrupts, and the like,” it suddenly had come into wide and frequent use. The reason was the passage of the eighteenth amendment. Wigmore, supra, at 479.
Justice Clark argued that the privacy right unjustly stood in "marked contrast to all other rights declared as 'basic to a free society.'" 45 What accounts for the pre-Mapp disparity between fourth amendment and first amendment protections? What accounts for the post-Mapp sense of outrage at the rule? Professors Thomas Schrock and Robert Welsh answer the latter question, and implicitly the former question, by pointing out that, in some sense, criminality in an exclusionary case persists despite any subsequent inability to convict, 46 while "there is nothing left to be held against a person when unconstitutional legislation is struck down." 47 Schrock and Welsh rightly point out that this "massive difference will surely affect our moral assessment of the two situations." 48 There exists, then, a public relations problem generated by something akin to moral sentiment as exemplified by Judge, later Justice, Cardozo's familiar statement regarding the blundering constable 49 and Dean Wigmore's allega-

45. Id. at 656 (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).

46. Schrock & Welsh, supra note 22, at 346. Needless to say, the application of the rule is not tantamount to inability to convict. In the event of exclusion at trial, the defendant may be convicted on other evidence. In the event of a conviction's reversal for failure to exclude certain evidence at trial, the defendant may be retried on other evidence. Typically, more harm is done to the prosecution's case when a possession offense is charged and the item or substance allegedly possessed is suppressed, than when a crime such as rape or murder is charged, since there may be other sufficient evidence of these non-possession offenses. For a somewhat more complex case, see Brewer v. Williams, 430 U.S. 387 (1976) (reversal of murder conviction on sixth amendment grounds). Defendant was found guilty of murder on retrial after his incriminating statements were suppressed. State v. Williams, 285 N.W.2d 248 (Iowa 1979). However, the United States Court of Appeals for the Eighth Circuit has held recently that Williams's subsequent conviction, based on evidence derived from suppressed statements, was improper. The court held that the state did not show an absence of bad faith. Williams v. Nix, 700 F.2d 1164 (8th Cir.), cert. granted, 103 S. Ct. 2427 (1983).

47. Schrock & Welsh, supra note 22, at 346 (footnote omitted). "After unfavorable review of the legislation, the moral ledger is decisively in the defendant's favor; he has been hurt, not the state." Id. at 346 n.236. Even so, one does encounter public hostility to, for example, a judicial determination that because of some free speech theory a particular theatre owner may not be forced to discontinue showing pornographic films. The theatre owner, the thought goes, is allowed to continue wrongdoing. But still, it must be conceded ex hypothesi that, positivistically viewed, he is not engaged in illegality.

48. Id.

49. "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (evidence procured by trespass not excludable because of trespass), cert. den'd, 270 U.S. 657 (1926). Judge Cardozo raised the spectre of apparent moral inequity in a series of brief hypotheticals, including, "[t]he privacy of the home has been infringed, and the murderer goes free." Id. at 24, 150 N.E. at 588. He did not mention the possibility of suppressing an unlawfully found corpse but instead focused on the difficulties of proving the place of discovery, should the exclusionary rule be applied. Cf. Kaplan, supra note 7, at 1037 n.58 ("I personally have never known of a case where a dead body was ultimately ordered suppressed"). Live bodies (of defendants) are treated similarly. See Frisbie v. Collins, 342 U.S. 519 (1952) (power of a court to try a
tion of the rule's logical incoherence.\textsuperscript{50} It is the logic of the rule that seems to compel a sort of moral balancing act wherein the cost of freeing an identifiable criminal is weighed against the cost of sanctioning (sometimes hypertechnical) unconstitutional actions.

III. A POINT ABOUT RHETORIC\textsuperscript{51}

We have seen that the exclusionary rule occasions an outcry against it. Some of that reactive discourse is the subject of this section. To assert or imply that the rule must be abolished because it releases multitudes of guilty, violent offenders is to do an injustice to those thoughtful critics of the rule who would point to at least putatively genuine problems with the rule; it is at the same time to close one's eyes to what the consequences of the rule actually are.\textsuperscript{52}

person for crime not impaired by forcible abduction which brings person into court's jurisdiction, even when Federal Kidnapping Act may have been violated); Ker v. Illinois, 119 U.S. 436 (1886) (due process complied with when defendant properly indicted in state court and properly tried, despite irregularities in manner in which he was brought into custody). \textit{But see} United States v. Toscanino, 500 F.2d 267, 271-73 (2d Cir. 1974) (\textit{Ker-Frisbie} eroded because of "constitutional revolution" so that due process requires court to divest itself of jurisdiction over person of defendant where acquired as a result of deliberate, unnecessary and unreasonable invasion of defendant's constitutional rights). Compare United States \textit{ex rel.} Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975) (\textit{Ker-Frisbie} not eviscerated, not all irregularities in bringing defendant into court's jurisdiction vitiate the proceedings).

50. Wigmore, \textit{supra} note 43, at 484. Apart from finding the logic of the rule offensive because it punishes neither the offending officer nor the suspected, and perhaps factually guilty, defendant, Wigmore engaged in a sort of institutional psycho-history from which he criticized the genesis of the rule:

\begin{quote}
Meanwhile, the heretical influence of \textit{Weeks v. United States} spread, and evoked a contagion of sentimentality in some of the State Courts \ldots .

In this last period, much of the effect may be ascribed to the temporary recrudescence of individualistic sentimentality for freedom of speech and conscience, stimulated by the stern repressive war-measures against treason, disloyalty and anarchy, in the years 1917-19. \ldots [I]t was natural for the misguided pacificistic or semi-pro-German interests to invoke the protection of the Fourth Amendment. Thus invoked and made prominent, all its ancient prestige was revived and sentimentality misapplied. In such a situation, the forces of criminality, fraud, anarchy, and law-evasion perceived the advantage and made vigorous use of it.
\end{quote}

\textit{Id.} at 480-81.


52.

The most severe indictment of the rule \ldots is that it releases hordes of dangerous and demonstrably guilty criminals to prey upon society.

\ldots [S]uch claims are greatly exaggerated. \ldots [A] recent study done by the Comptroller General of the United States proves that the rule operates to free federal criminal suspects in only a tiny percentage of cases.

In testimony before the United States Senate Subcommittee on Criminal Law, George Nicholson, Senior Assistant Attorney General of California, exemplifies, and adds to, the hysteria generated less by the rule than by its more strident opponents.\textsuperscript{53} Mr. Nicholson, as consultant to Laws at Work, quotes a letter from President Reagan characterizing the rule as "a judge-made rule which has failed to accomplish its avowed purpose and only aids the obviously guilty criminal at the expense of the law abiding public."\textsuperscript{54} Mr. Nicholson marshals such argumentative weaponry as the phrases "destruction of justice,"\textsuperscript{55} "public acceptance,"\textsuperscript{56} and "iron curtain"\textsuperscript{57} to overcome the "eager and deceptive"\textsuperscript{58} forays of the rule's proponents.

It is noteworthy that Mr. Nicholson should use the word "deceptive" in describing some protestations of the rule's proponents. He declares that the fourth amendment prohibition is a "totally separate consideration, one we all support."\textsuperscript{59} In fact, he argues that this separation of the rule and the amendment exists \textit{despite} the "eager and deceptive protestations of the exclusionary rule's proponents."\textsuperscript{60}

But Mr. Nicholson argues earlier, through B.E. Witkin, that we became the unhappy recipients of the \textit{bloated and amorphous} law of illegally obtained evidence, now an integral part of almost every major criminal trial, in which the issue of guilt of the defendant is often subordinated to an examination of the \textit{endless technicalities} involved in the issue of how the evidence of his guilt was obtained.\textsuperscript{61}

Mr. Nicholson apparently has fallen prey to the deceptive device allegedly used by rule proponents. He has confused the rule with the amendment, just as he does when he argues that "[n]o rule can

\textsuperscript{53} \textit{See} Hearings, \textit{supra} note 7, at 140-48.

\textsuperscript{54} \textit{Id.} at 140 (statement of George Nicholson, Senior Assistant Attorney General, Department of Justice of California) (quoting letter from President Ronald Reagan to members and friends of Laws at Work (Sept. 29, 1981)).

\textsuperscript{55} \textit{Id.} at 148.

\textsuperscript{56} \textit{Id.} at 143 (quoting Calif. State Judge Robert K. Puglia).

\textsuperscript{57} In fact, Nicholson invokes the phrase "iron curtain" at least seventeen times in his eight and one-half page prepared statement. \textit{Id.} at 141, 142 (six times), 143, 144 (twice), 146, 148 (six times).

\textsuperscript{58} \textit{Id.} at 142.

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.} The allegation is interesting because Kamisar has made the same point—that the rule is not the amendment. It is not clear why Nicholson does not mention that Kamisar and other proponents make the same separation. Nicholson has at least a passing acquaintance with Kamisar's work, as shown by his reference to a "noted academician" who argues that "judicial adoption of this rule didn't change what peace officers had to do to comply with the Fourth Amendment and that it, the exclusionary rule, is really the only way to enforce the Fourth Amendment's mandates." \textit{Id.} at 143. The "academician" is doubtless Kamisar, who makes this argument in Kamisar, \textit{supra} note 16, at 70-73.

\textsuperscript{61} \textit{Id.} at 141-42 (quoting B.E. Witkin) (emphasis added by Nicholson).
be a good deterrent if it cannot be understood." The rule is simple to understand. The cases construing the fourth amendment may not be.

Just as confusingly, Mr. Nicholson quotes California State Judge Robert K. Puglia. He states that although Mr. Puglia's statements "do not refer to search and seizure rules, the thinking which prompted them does." Additionally, he argues that "[w]hen relevant and reliable evidence in a murder case is judicially secreted behind an iron curtain . . . and a killer is thereby set free, it is the public . . . which pays the penalty." Mr. Nicholson has presented a hard case. But to argue from sensational, aberrant cases (imagined or real) and to ignore the evidence of the consequences of the rule is irresponsible and misleading. Mr. Nicholson concludes that lifting the rule's iron curtain is a good thing and that, in fact, "Churchill would agree, almost surely, this would be a very good thing to do."

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62. *Id.* at 143. Professor Pierre Schlag points out that the argument that police should not be expected to understand rules about which Supreme Court justices cannot agree shows that "much of the wrath directed at the exclusionary rule by its critics is more properly addressed to the substantive rules of the fourth amendment." Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 892 n.68 (1982). Schlag cites the testimony of Nicholson and Mr. Frank Carrington. *Id.* Carrington explicitly states his thesis: "deterrence of police conduct in search and seizure cases . . . is in many cases a logical impossibility." *Hearings, supra* note 7, at 133 (statement of Frank Carrington, Executive Director of the Crime Victims Legal Advocacy Institute). Quite clearly, Carrington is criticizing fourth amendment doctrine, and not the exclusionary rule at all. Nicholson fails to recognize that his own comments are directed to the fourth amendment and its judicial interpretation instead of the exclusionary rule. After bemoaning the complexity and instability of "search and seizure" rules, he remarks that a television viewer who learns of exclusion based on a good faith mistake as to difficult rules will not "believe in" the system any longer. Nicholson then says, "I am not talking in any way about doing away with the Fourth Amendment. I am simply saying, the means of enforcing it ought to be changed." *Id.* at 127 (statement of George Nicholson, Senior Assistant Attorney General, Department of Justice of California). One wonders whether Nicholson would favor fining or firing the officer for his reasonable good faith mistake, or subjecting him to civil or criminal liability.

63. *Id.* at 143.

64. *Id.*

65. *Id.* at 148. It is impossible to gain a full appreciation for the character of the Nicholson statement by examining only the excerpts presented here. Countless passages in his statement speak for themselves, and if this point about rhetoric is worthwhile at all, that statement is worth looking at in its entirety.

Of course, the testimony criticized is just that: testimony. It is not a legal brief, a law review article, or a chapter of a book. One cannot reduce the arguments against the rule to the ill-advised emotiveness of the Nicholson testimony. And despite the critical assessment of *this* testimony, the point is not to engage in *ad hominem* or straw man argumentation. One has not come closer to defeating arguments against the rule by engaging in putatively critical analysis of noncritical, nonanalytic rhetoric. Assumedly, *somewhere* there are equally impressionistic arguments for the rule, although no such analogues appear in, for example, testimony before the Subcommittee on Criminal Law.
The point is simple and concerns itself with rhetoric and the politicization of legal issues. That the sort of bombastic charge that the California official levels before the Subcommittee is dangerous and irresponsible is as obvious as it is lamentable. What is of more import is the fact that this rhetoric represents a politically appealing position. To legislate away the rule, assuming *arguendo* the constitutional propriety of such a move, on the basis of such fevered claims is at least offensive as a moral matter.

Senators Hatch and Thurmond introduced a bill to eliminate the rule at the federal level.\(^66\) Appended to the bill is a column by Ernest Van Den Haag in which he rails against the criminal justice system generally and says little about the exclusionary rule at all.\(^67\) Van Den Haag's point appears to be that "[f]ew criminals are ever caught. And our courts seem to feel that equal protection of the laws requires that they be let go . . . ."\(^68\) This type of reliance on the popular press is pervasive in the arguments of some rule opponents. The moral point is this: there is an unacceptable winking at the facts. The fervent rhetoric clouds the eye. For example, Van Den Haag writes that Charles Silberman "blithely tells us that the exclusionary rule . . . prevents few convictions. [Silberman] reached this conclusion by looking at trial records and at research reports . . . ."\(^69\) Van Den Haag responds as follows: "I can't take these reports or Silberman's interpretation seriously. They contradict what the naked eye can see."\(^70\) He continues his assault by saying that these reports "came from the researchers who . . . got us where we are."\(^71\)

Despite *some* statistics,\(^72\) common sense, and logic that support the rule, some would argue that the rule is just plain harmful nonsense. The analysis is often journalistic. The appeal is often to

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\(^{67}\) 127 Cong. Rec. at S2402-04.

\(^{68}\) *Id.* at S2402.

\(^{69}\) *Id.* at S2403.


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 . . . .

It may well be . . . that the effect of the exclusionary rule is not readily susceptible [sic] to empirical proof. But I submit that logically we all recognize that the effects of the exclusionary rule . . . must be there in some degree in the various ways that I have described them.

\(^{71}\) 127 Cong. Rec. at S2403.

\(^{72}\) See *Report*, *supra* note 3, and *infra* text accompanying notes 95-99.
some general sense of outrage about coddled criminals. For example, Judge Malcolm Wilkey argues:

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.73

While appeals to public sentiment should not be belittled, it is also true that ‘pollsters never tire of reminding us that most Americans would reject many provisions of the Bill of Rights.’74 Constitutional decision-making is best left to the office in which the Constitution reposesthat trust. However, assuming that the exclusionary rule is simply an example of an overactive judiciary imposing its sense of nonconstitutional justice on the public,75 is the appeal to public outrage irrelevant? If, for example, the rule represents an unwarranted extension of the Court’s supervisory power, the rule is imposed improperly no matter what the public thinks. Assumedly it is not Judge Wilkey’s position that the Court should improperly impose proper rules on the state courts, any more than it is his position that public opinion polls should determine the meaning of the Constitution. His point assumedly is that because the rule is only judge-made law and has no constitutional vitality, the Congress and the state legislatures should be permitted to right the wrong on the basis of the will of the majority.76

Judge Wilkey makes other arguments. He continues the journalistic trend of some critics by quoting newspaper editorials that point to the “‘need to bolster public confidence,'”77 the “‘outrage

73. Wilkey, supra note 17, at 223 (footnote omitted); cf. Hall, supra note 40, at 309 (footnote omitted) (“The average lay person knows only that a criminal has been set free and that the judiciary is responsible for this ‘injustice’ ‘) The use in this Article of the arguments of Judge Wilkey stems from a belief that they are representative of those of many critics of the rule.
75. Nicholson seems to reverse this argument, at least in part:
Fairly constant pressure to judicially append this legal encumbrance onto state law enforcement officers was continued for several decades by academia, civil liberties activists and the criminal defense bar, until 1961, when the federal high court did as they were asked in Mapp v. Ohio.
76. This argument is considered infra text accompanying notes 246-92.
77. Wilkey, supra note 17, at 223 n.32 (quoting The Wall Street J., July 12, 1971, at 8).
to common sense [that] 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,' 78 and the ‘[freeing of] the criminal and [the harassment of] the innocent, an absurdity that would likely be sensibly ordered in a more primitive society.’ 79 The claims seem visceral rather than cerebral. Cognitive sense, even if common, is, if only by definition, a matter of intellect rather than emotion. While feelings or the responses of viscera are not to be relegated to a position of unimportance in the human experience, what is more germane to the present issue is the justification or explanation of their genesis. Although it is uninstructive to point to public outrage, it may be salutary to explain the outrage, or to show why the outrage at the rule’s consequences or very existence might be moral outrage. Some critics fall prey to the simplistic approach of pointing to outrage without saying more, or pointing to outrage and explaining it or justifying it in superficial terms.80

Simply put, it is necessary to ‘get behind’ the feelings. Pointing to public outrage is, without more, irrelevant and empirically unsound. One must do more, as does John Rawls in his treatment of envy, excusable envy, resentment,81 and moral sentiments in general.82 While Rawls’s task, unlike that of the critics of the rule, is monumental, there is no principled reason why unreflective and unexplained responses should substitute for reasoned discourse and legal analysis. Are the claims of outrage at released criminals empirically verified or justified? Does it matter if the outrage rests on a misperception? Are the claims legally or morally relevant? Do they tip the scales in constitutional analysis, or do they assume the triviality and nonconstitutional status of the rule? And assuming the rule to be connected to the Constitution in no perceptible way, are the claims dispositive as to the desirability of any exclusionary rule, however based?

Apart from such appeals to public acceptance, common sense, outrage, and intuition,83 there remain in Judge Wilkey’s and others’ rhetorical weaponry the hypothetical poll84 and the generalization from personal interviews. Judge Wilkey states that ‘[a] state court

78. Id. (quoting the Washington Star, July 7, 1975, at A16). The use of “often” here is apparently emotive rather than statistical and proponents of the rule are assumedly crime-comatose to the extent that they may view the rule as neither finicking nor trivial.
79. Id. (quoting The Houston Post, Nov. 16, 1977, at 2E).
80. See supra text accompanying note 78 and infra text accompanying note 176.
82. Id. at 479-90.
83. See supra note 70.
84. See supra text accompanying notes 72-73.
judge whom I have never met called to say that . . . he agreed completely with me . . . ,"\(^{85}\) and this caller "claimed that 90 percent of the judges would agree with you, too."\(^{86}\) Judge Wilkey is the first to point out that the ninety percent estimate might be politely hyperbolic, and explicitly asks for a poll of judges because they "apply [the rule] and live with it day by day."\(^{87}\) Although everyone lives with it, and although the request for a poll seems unobjectionable (even if public opinion is irrelevant to a disposition of the issue), what is the relevance of the caller's ninety percent claim? What inspired Judge Wilkey to include this figure in his piece on the rule? Why is there no sustained argument showing why such an imagined statistic, or actual poll, should be relevant to the issue of the rule's existence?\(^{88}\)

Judge Raymond Hall concludes an exclusionary rule article as follows:

Interviews with local San Diego County officials involved in the criminal justice system, including police officers, defense attorneys and prosecuting attorneys support the criticism of the exclusionary rule outline above.

Law enforcement officials such as San Diego Police Chief Kolander and Undersheriff Shope of the San Diego County Sheriff's Department did not feel that the exclusionary rule as an effective deterrent in that most violations are not conscious. They stressed the need for a balancing of an individual's constitutional rights with their duty to protect the public . . . .

Assistant District Attorney Bill Kennedy reiterated the views of District Attorney Ed Miller that the rule is simply not working; it can hamper police effectiveness, causes congestion of the courts, and destroys public trust in the criminal justice system.\(^{89}\)

The article from which the passage is taken is not entitled San Diego Lawyers' and Police Views on the Exclusionary Rule. It is entitled The Alternatives to the Exclusionary Rule. Assuming the nonconstitutional status of the rule, and assuming it should be modified or abandoned if it fails to comport with its job description, the quoted passage seems as useless to rule critics as does the following passage to rule proponents: "Defense attorneys, Howard Frank and Richard Muir . . . feel it is still the best solution possible and quite neces-

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85. Wilkey, supra note 70, at 355.
86. Id. at 356.
87. Id.
88. Judge Wilkey does make a brief argument against the rule's constitutional status. Wilkey, supra note 17, at 215-17.
89. Hall, supra note 40, at 318-19.
Such discourse accomplishes little. As Sunderland points out, "the most distinguished commentators and judges characteristically assess the doctrine of exclusion from a short or medium range policy perspective." Sunderland laments the "abandonment of considerations of constitutional principle, the dilution of the judicial integrity argument, and the elevation of deterrence as the dispositive consideration" and finds them characteristics of literature about the rule.

While "[t]he heart has its reasons, which reason does not know," there simply is no good reason to avoid principled discourse in considering the present issue. This is especially true if the rule is congressionally reversible. In that case, the unbridled and empirically unjustified claims from some conservative quarters may have a nearly irresistible political inertia. And, constitutional considerations aside, as a matter of sheer policy the dispute over the rule ought to be resolved on the basis of reasoned claims that comport with relevant facts. Additionally, it is not implausible to suggest that a "law and order" political appeal could have some impact on the resolution of the issue of the rule's constitutional status itself. However that issue is to be resolved, it ought not to be resolved on the basis of factually incorrect claims or in the manner of the visceral sensationalism of the popular press.

IV. CONSEQUENCES OF THE RULE

It is not contended here that empirical data resolve the exclusionary rule issue. It is contended, however, that it is miseducative to create the impression that statistical aberrations constitute the statistical norm. One need not gaze long into legislative arguments before seeing repeated references to the rule's perverse freeing of rapists, child molesters, murderers, and kidnappers. In the absence of sustained analysis or even an offer of proof, references to released hordes of vicious criminals are fictive, and references to single hard

90. Id. at 319.
91. Sunderland, supra note 2, at 343.
92. Id. The point needs to be made, and Sunderland makes it well, that these shortcomings are not restricted to critics of the rule. Proponents as well fail to address the fundamental issue of whether the rule is required by the Constitution. Id. at 347. Additionally, such argumentative techniques as personal reminiscence are not beyond proponents: "I can't offer statistical studies on the deterrent effect of the rule. What I can offer, however, is my testimony that I have watched the rule deter, routinely, throughout my years as prosecutor." Hearings, supra note 7, at 38 (statement of Stephen H. Sachs, Attorney General of Maryland).
93. B. PASCAL, PENSEES 95 (W.F. Trotter trans. 1941).
cases are, although they should not be, morally uninteresting.

A report by the Comptroller General published in April of 1979 discloses that of a sample federal group four-tenths of one percent of rejected cases were declined because of search and seizure problems. 95 Further, in only one and three-tenths per cent of the sampled cases was evidence excluded because of a fourth amendment suppression motion. 96 Professor William Greenhalgh, testifying before the Senate Subcommittee on Criminal Law, cited 1978 research that shows that less than one per cent of arrests studied were refused by the prosecutor for indicated due process reasons and that only two per cent of arrests were dismissed for due process reasons after initial acceptance. 97 Data from 1979 suggest a similar conclusion. 98 Drug cases accounted for most of the due process rejections. 99

Systematic search and seizure of evidence occurs most often in contraband cases and is “rarely relevant to the successful prosecution of victim crimes.” 100 The Comptroller General’s Report shows that firearm, immigration, and narcotics violations comprise the largest percentage of rule-relevant cases. 101 Kaplan, a critic of the rule as it stands, concedes that “the great majority of cases in which the exclusionary rule is considered are cases involving nonvictim crime.” 102 He claims that “in practice the exclusionary rule rarely allows dangerous defendants to go free.” 103 The available data show no hordes of violent offenders released through the operation of the rule.

If there is a statistical point to be made at all, Professor William Greenhalgh makes it nicely: “Discontent with the outcome of one or two well-publicized cases in which suppressed evidence has resulted in a criminal going free—and one can always come up with these ‘horror stories’—is no reason to tamper with constitutionally guaranteed rights.” 104 Nor is such discontent generally a reason to

96. Id. at 11.
97. Hearings, supra note 7, at 105 (statement of William W. Greenhalgh, Chairperson, Criminal Justice Section, Legislative Committee, American Bar Association).
98. Id. The National Institute of Justice has reported that in California nearly 5% of felony case rejections are attributable to search and seizure difficulties and that a larger percentage of search and seizure rejections occurs in metropolitan areas. The report also indicates that the exclusionary rule has its greatest effect in drug cases and that 90% of criminal cases are handled through state systems. 32 Crim. L. Rep. (BNA) 2327 (1983).
99. Hearings, supra note 7, at 106.
100. Loewenthal, supra note 16, at 37.
102. Kaplan, supra note 7, at 1028.
103. Id. at 1036.
104. Hearings, supra note 7, at 106 (statement of William W. Greenhalgh, Chairperson,
tamper with nonconstitutional rights. One need not claim data-dispositiveness to point out that it is, at best, insufficient to pretend that available statistics represent their opposite.

V. Hard Cases and Utilities

But the arguments and statistics discussed here do not reduce rule opposition to a plaintive cry. The data do not purge the public of discontent with the rule or the general administration of criminal justice. Some scholars take that discontent very seriously. Kaplan, for example, argues that the rule is not a moral imperative, that is, it cannot be justified as one, because the disparity in particular cases between the officer's error and the windfall to the defendant offends popular notions of justice. He cites Coolidge v. New Hampshire, a case reversing for fourth amendment reasons a murder conviction stemming from the killing of a fourteen-year-old girl. The unconstitutional search of a car in that case, he says, is compatible with a moral society, while the same is perhaps not true of freeing the defendant. Kaplan presents a hard case, indeed the sort of case that accounts for what he calls the political price of the rule. Certainly, a tragic choice is involved in such a case. As a moral matter, the fact that most rule cases involve nonvictim crime is hardly dispositive. What about those heinous cases in which the rule seems to suggest that our society, at least on occasion, does not take unjustifiable killing, for example, to be a serious moral or legal matter? Is the rule to be abandoned because of hard cases, or in hard cases, or does such reneging on the rule weaken the constitutional protection that the fourth amendment fosters? In ignoring the rule in a serious case, is society saying 'sure we'll apply it, but only when it costs nothing'? Or does the insistence on the rule in all cases constitute a peculiar obsession with procedural niceties, leaving the law a sterile but dangerous game, removed from life and moral instincts?

Kaplan proposes a serious cases exception to the exclusionary

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105. Kaplan, supra note 7, at 1036. Professor Larry Yackle argues for a model of Supreme Court adjudication in which search and seizure cases would speak meaningfully to the public generally rather than simply to the litigants in a case. His point is that the Court should breed respect for rights and interests generally instead of searching in ad hoc fashion for a sort of "rough fairness" in the particular case. Yackle, supra note 9, at 436-37.
106. 403 U.S. 449 (1971). In Coolidge evidence found in the defendant's car had been introduced at trial. The evidence had been discovered under a warrant issued by the attorney general, who was in charge of the investigation. The Supreme Court reversed the conviction, finding the warrant improper because it was not issued by a neutral magistrate. Id. at 449.
107. Kaplan, supra note 7, at 1036.
108. Id. at 1029.
rule. His reasoning proceeds from what he, probably correctly, takes to be the major present Supreme Court argument for the rule: a utilitarian argument that nothing else works. Kaplan claims that rule arguments stand on one basis only: demonstrations of utility. To those who might question that analysis on the basis of nonutilitarian constitutional principles, traditions, or universal practices, Kaplan has an answer: proponents of the rule weaken their case by such references because the rule does not look like constitutional doctrine, it allows the government to benefit at times from unconstitutionally obtained evidence, and it is only quasi-constitutional in nature. Kaplan’s point ultimately is that “the rule is not written into the Constitution, rather, the Constitution demands something that works—presumably at a reasonable social cost. The content of the particular remedial or prophylactic rule is, thus, a pragmatic decision rather than a constitutional fiat.” Might the rule, then, be dispensed with, assuming arguendo that it loses the utilitarian argument? There are at least three relevant

109. Id. at 1046-49. One is reminded of the Koran’s injunction against carnal lust, except as directed to “wives and slave girls.” Koran 58 (N.J. Dawood trans. 1980).

110. Kaplan, supra note 7, at 1032. Kaplan is concerned with a utilitarian cost calculation and argues that the frustration of society’s need for retribution must be an element of the calculus. Id. at 1035. Kaplan finds that the operative failures of the rule also must be considered: reduced crime control, increased police perjury, lack of feedback to police, lack of judicial review due to plea bargaining, the complexities of the fourth amendment itself, and the irrelevance of the rule to large areas of police conduct. Id. at 1032-33.

111. Id. at 1029.

112. Id. at 1029-30.

113. Id. But see Loewenthal, supra note 16, at 27:

Since, under the long-established doctrine of judicial review, the Constitution is what the Court says it is, the exclusionary rule cannot be eliminated by an act of Congress. Thus, as a matter of law, there are only two ways to eliminate the exclusionary rule: a constitutional amendment or an overruling of its own landmark precedents, Mapp v. Ohio and Weeks v. United States, by the United States Supreme Court.

114. Professors Schlesinger and Wilson state that as with any judicially-created remedy for a social ill, the usefulness of the rule in a particular context must be subjected to pragmatic analysis. “The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it . . . .” Under current doctrine, the utility of the rule can be measured only in terms of its deterrent effect on police misconduct . . . . [The Court has concluded that] there is an “absence of supportive empirical evidence” for the proposition that exclusion deters . . . .


Judge Posner argues that the rule imposes an “avoidable deadweight loss” (a loss not received as a gain by anyone else; in this case, the suppression of evidence) and so violates the Pareto-superiority criterion (the Pareto optimum consists of “a state in which no one can be benefited without a corresponding detriment to another”) and “produces overdeter-
areas of inquiry: the Constitution, federal common law, and the meaning of integrity.

A. The Constitution and Common Law

Critics of the exclusionary rule typically assert that the rule is not of constitutional stature.115 Proponents of the rule typically disagree.116 Before a utilitarian argument should carry the day, it must be established that the rule is in no sense demanded by the Constitution.

But how, if the rule is extra-constitutional, did the Supreme Court extend the rule to the states? If the rule is, for example, a product of the Court's supervisory power, it presumably would apply only

115. See, e.g., Hall, supra note 40, at 308; Kaplan, supra note 7, at 1030; Wilkey, supra note 17, at 216-17.
116. See Kamisar, supra note 16, at 68; Morris, supra note 114, at 647. Kamisar and Morris, of course, do not argue that the rule is written into the text of the Constitution. They argue instead that the Constitution requires the rule.
at the federal level.117 It has been claimed that in Weeks118 the Court advanced the federal rule in terms of fourth amendment requirements;119 that Wolf extended the fourth amendment requirements, but not the rule, to the states;120 and that Mapp, extending the rule to the states, overruled Wolf.121

If one assumes arguendo that Mapp’s extension of the rule to the states was nonconstitutional, perhaps the utilitarians must triumph. But at the same time, does not the premise of nonconstitutionality lead to the conclusion that the Mapp doctrine constitutes a usurpation of the legislative function? Perhaps the denial of the rule’s constitutionality can be squared with the extension of the rule to the states through the doctrine of federal common law. Perhaps that doctrine makes sense out of claims of nonconstitutionality,122 quasi-constitutionality,123 and the cases Stone v. Powell124 and

117. See Geller, supra note 8, at 657-58; Hill, supra note 30, at 193; Schrock & Welsh, Reconsidering the Constitutional Common Law, 91 HARV. L. REV. 1117, 1144-45 (1978); see also Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting) (no one would suggest that Supreme Court has any general supervisory power over state courts); Marshall v. United States, 360 U.S. 310, 313 (1959) (Court has power to formulate proper standards for enforcement of criminal law in federal courts) (citing Bruno v. United States, 308 U.S. 287 (1939)); Watts v. Indiana, 338 U.S. 49, 50 n.1 (1949) (while due process gives potentially wide range to the Supreme Court in reviewing state convictions, Court does not have same corrective power over state courts that it has over lower federal courts) (citing Bruno v. United States, 308 U.S. 287 (1939)); McNabb v. United States, 318 U.S. 322, 340 (1943) (while Supreme Court’s due process power to undo state convictions is limited, judicial supervision of criminal justice administration in federal courts implies a duty to formulate and enforce civilized standards of procedure and evidence).


119. Schlesinger & Wilson, supra note 3, at 231.

The Weeks decision is commonly thought to be significant for two reasons: first, it is said to be the case in which the federal exclusionary rule...was first established on purely fourth amendment grounds; and second, it is said to have reaffirmed the principle that suppression at the federal level is a constitutional right of the accused.

Id. Schlesinger and Wilson also argue that many assumptions about Weeks are seriously misguided. Id. The history is confusing, perhaps, because the Court refused to apply the rule to the states in Wolf v. Colorado, 338 U.S. 25 (1949).

120. Wolf v. Colorado, 338 U.S. 25 (1949). It has been said that Justice Frankfurter, writing for the Court in Wolf, found the fourth amendment but not the rule applicable to the states through the due process clause of the fourteenth amendment. See id. at 27-28, 33. Justice Harlan, however, argued that Wolf found the fourth amendment’s principle of privacy, rather than the fourth amendment, enforceable through the fourteenth Mapp v. Ohio, 367 U.S. 643, 679 (1961) (Harlan, J., dissenting).

121. Mapp v. Ohio, 367 U.S. 643, 655-56 (1961); see also Mertens & Wasserstrom, supra note 8, at 381.

122. Wilkey, supra note 17, at 215-16; Hall, supra note 40, at 308.

123. Kaplan, supra note 7, at 1030.

124. 428 U.S. 465 (1976) (federal habeas corpus not available where state has provided opportunity for full and fair litigation of fourth amendment claim). The Court in
The language of *Mapp* is not like that of *Miranda v. Arizona*.*126* The Court in *Miranda* clearly noted that it was setting out a procedure which the states may follow, but which they also could replace with any other equally protective procedure.*127* It seems the Court in *Miranda* was demanding that something work to protect fifth amendment values*128* and conceded that no particular protective device is read into the constitutional safeguard.*129* There is no such concession in *Mapp*. Even so, can the *Mapp* rule be said to constitute a federal common law remedy?

Even assuming the correctness of Rheinstein’s Austrian interpretation of *Erie,*130 it is far-fetched to apply that analysis here, that is, to infer that the rule is part of the federal common law because it is part of that “treasure of ideas” common to “all Anglo-American jurisdictions.” Although the idea of exclusion is not unknown outside of the United States,*131* the rule in its

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*Stone* weighed the utility of the rule against “the costs of extending it to collateral review.” *Id.* at 489. Justice Powell, for the Court, maintained that “Post-*Mapp* decisions have established that the rule is not a personal constitutional right.” *Id.* at 486. Justice Brennan argued that the unconstitutionality of confinement (based on the admission of unconstitutionally admitted evidence) does not somehow dissipate upon collateral attack, and claimed that *Mapp* means that the admission of unconstitutionally obtained evidence violates the Constitution, otherwise the rule of exclusion would not extend to state courts. *Id.* at 510-11 (Brennan, J., dissenting).

*125. United States v. Calandra, 914 U.S. 338 (1974) (grand jury witness could not refuse to answer questions on grounds they stemmed from unconstitutionally secured evidence). The court weighed utilities, *id.* at 349, as it had in *Stone,* and also found the exclusionary rule not to be a personal constitutional right. *Id.* at 348.


*127. *Id.* at 490 (“Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above [the *Miranda* warnings] in informing accused persons of their right to silence and in affording a continuous opportunity to exercise it”)

*128. Compare Kaplan on the exclusionary rule: “[T]he rule is not written into the Constitution. Rather, the Constitution demands something that works . . . .” Kaplan, supra note 7, at 1030.

*129. Cf. Monaghan, supra note 32, at 21-26 (such prophylactic rules as constitutional common law).

*130. See supra note 32.

*131. See Clemens, Germany, in *The Exclusionary Rule Under Foreign Law,* 52 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 277, 277-78 (1961) (German law prohibits, in some cases, use of evidence obtained in violation of legal commands or bans); Williams, England, in *The Exclusionary Rule Under Foreign Law,* 52 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 272, 274 (1961) (citing Irish case, People v. Lawlor [1955-56] IIR. JUR. REP. 38, in which fingerprints were excluded because consent was given in absence of warning that accused, who was in custody, had right to refuse consent, and Scottish case, M’Govern v. H.M. Advocate, 1950 J.C. 33, in which fingernail scrapings taken without consent were excluded because such means of evidence acquisition constituted assault). Compare Lawlor and M’Govern with Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent to search in non-custodial situation does not require that subject knew of his right to refuse con-
present form is arguably unique to this country. 132
Perhaps Judge Friendly’s Hegelian explanation of *Erie* offers a more viable basis than Rheinstein’s Austinian explanation for an argument that the rule is part of federal common law. Judge Friendly

sent) and Cupp v. Murphy, 412 U.S. 291 (1973) (where probable cause to arrest, but no arrest, and where suspect sufficiently apprised of police suspicions and so may destroy evanescent evidence—finger nail scrapings—on his person, police may subject him, absent consent, to a warrantless limited search to preserve the evidence). Clemens, discussing self-incrimination provisions of the German Code of Criminal Procedure, claims that the result of a blood test to which a suspect did not consent is inadmissible Clemens, *supra* at 178; cf. Schmerber v. California, 384 U.S. 757 (1966) (extraction of blood from objecting suspect not violative of fourth, fifth, sixth, or fourteenth amendments). For a detailed treatment of the German exclusionary rules, see Bradley, *The Exclusionary Rule in Germany*, 96 Harv. L. Rev. 1032 (1983).

132. Wilkey, *supra* note 70, at 354. On the other hand, it has been argued that other countries do not need the rule because of civilian, attorney, and legislative supervision of police. Kamisar, *supra* note 43, at 348-49. This “need” analysis may give some ammunition to pragmatic or utilitarian critics of the rule.

One could point, of course, to the cherished values of the fourth amendment and claim that the rule is a federal common law protection for those fourth amendment values. While on this view *Miranda* constitutes a rule of federal common law in the absence of sufficiently protective alternatives, *Mapp* represents a federal common law remedy. While the post-*Wolf* right-without-a-remedy argument may help proponents show a “need” for the exclusionary rule, identifying it as “a remedy” may stand as a premise in an argument that concludes that only “some remedy” is required. To be sure, the Constitution is creeping in here on this common law theory. But then, the constitutional status of the amendment is not at issue, and the claim that the rule is informed with some constitutional tradition or value is supported by cases such as *Weeks* and *Mapp*. The rule may be constitutionally informed, then, at the very least, as a federal common law protection that takes very seriously the Bill of Rights. Cf. Schrock & Welsh, *supra* note 22, at 290-91 n.109 (claiming that supervisory power can be used in the service of the Constitution and so gain quasi-constitutional legitimacy). Quite clearly, the rule has some relationship to the Constitution.

In a sense, the status of the amendment could be at issue because the amendment has a confused history. First, “the seeds of the fourth amendment, first sown in England and then transplanted to the colonies, grew out of a fear of arbitrary searches and seizures conducted pursuant to ‘general warrants,’ which authorized their bearers to search broadly and at will for evidence of crime.” Mertens & Wasserstrom, *supra* note 8, at 373 n.43. Warrants were perceived as potentially oppressive judicial mechanisms, then, and the history of the fourth amendment is largely the history of an attempt to provide protections against such abuses. Second, “[t]he most interesting thing about the passage of the Fourth Amendment to the Constitution, if we are to rely upon available records, is that the House seems never to have consciously agreed to the Amendment in its present form.” Lasson, *supra* note 14, at 101. Lasson writes that the House rejected the amendment in its present form, but that Mr. Benson, of New York, reported the Amendment in its rejected form, in which form it was accepted by the Senate, enacted by both houses, and ratified by the states. *Id.* at 101-03. It was, in fact, Mr. Benson who had proposed the (rejected) present form of the amendment. *Id.* at 101. The amendment had been originally reported as follows:

The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by Warrants issuing without probable cause, supported by Oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

*Id.* It is striking that there is no “reasonableness” clause to be placed in opposition to
notes that "the Hegelian dialectic has been here at work—with *Swift v. Tyson* the thesis, *Erie* the antithesis, and the new federal common law the synthesis." According to Judge Friendly, the Court has employed a variety of techniques in its use of federal common law. These techniques include "spontaneous generation as in the cases of government contracts or interstate controversies, implication of a private federal cause of action from a statute providing other sanctions, construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of statutory interstices." Judge Friendly notes that under the doctrine of federal common law "state courts must follow federal decisions on subjects within national legislative power where Congress has so directed . . . ." *Erie*, he claims, created the possibility of "specialized federal common law" through its pronouncement that "there is no federal general common law."

If the rule is nonconstitutional, could Judge Friendly’s thesis be used to prove that it is part of the federal common law? Do *Calandra* and *Stone v. Powell* mean that the rule is federal common law created

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a "warrant" clause. See infra text accompanying note 248 for the text of the fourth amendment. Even under Elbridge Gerry’s version which substituted the phrase "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," *id.* (emphasis deleted), there was not a pair of clauses to be placed in opposition to one another. James Boyd White writes, "It cannot be the 'intention of the framers' in any specific sense, then, that we seek to advance in analyzing and giving meaning to this language [the fourth amendment], but our own interest in the coherence and intelligibility of the fundamental instrument of our government." White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 Sup. Ct. Rev. 165, 172 n.14. For extensive treatments of the fourth amendment history, see J. Landynski, supra note 14, at 19-48; N. Lasson, supra note 14; T. Taylor, supra note 14, 23-71. For shorter treatments, see Mertens & Wasserstrom, supra note 8, at 373-74 n.43; White, supra, at 172 n.14.

133. Friendly, supra note 32, at 421.

134. *Id.*

135. *Id.* at 422.

136. *Id.* at 405.

137. *Id.* (quoting *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938)). For Judge Friendly’s position on the exclusionary rule, see Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929 (1965). Judge Friendly warns against reducing the Constitution to a code, *id.* at 954, and, focusing on deterrence and reliability, argues for limiting the exclusionary rule to cases of "intentionally or flagrantly illegal" police conduct. *Id.* at 952. As an alternative to "forgiving" technical violations, he considers eliminating them by reduction of search and seizure law to manageable proportions. *Id.* at 952 n.117. The weakness in this argument is the dependence on deterrence and reliability concerns Judge Friendly does not advocate ignoring hard or extreme cases but suggests that an individualized due process approach might be a better method of handling them than a method that results in a complex set of specific, universalized rules. *Id.* at 955 n.135. The strength of his argument is its perception that one can affect the operation of the rule through substantive fourth amendment doctrine.
by the Court and applicable to the states but not mandated by the Constitution? Or is the Court in those cases simply saying that Congress and the states are free to abolish or modify the rule? If the fourth amendment is seen as constitutive of a federal right, perhaps the Court, in its cases interpreting the amendment and the consequences of violating it, is in some sense creating federal decisional law (interpretive of a federal right) which binds the states but is not strictly required by the Constitution. If Bivens is understood as an example of the federal common law of remedies, as a case in which the Court created a damage remedy for federal violations of the fourth amendment, perhaps the Mapp/Calandra tandem is explainable. To the extent that the exclusionary rule is viewed as remedial, the argument exists that it is not required by the Constitution, but exists as part of federal decisional law based on policy considerations lying outside of the area circumscribed by the Constitution. Critics of the rule must have some such view of its stature if their policy claims against the rule and their assertions of the rule's nonconstitutional nature are to make sense. To make clearer the form of such argumentation, it is necessary to consider the common law explanation in its specific constitutional context, that is, the idea of constitutional common law.

Professor Monaghan examines the nature of exclusionary doctrine and argues: "If the Supreme Court is not mistaken in its insistence on the application of the exclusionary rule in state cases—and it seems too late in the day to conclude that it is—I think we are driven to conclude that the Court has a common law power." Further, Monaghan claims, "The Constitution is no less susceptible to interpretation through a consideration of its text, structure and purposes than are statutes. There is accordingly no a priori reason to suppose that it should differ from statutes in providing a basis for the generation of federal common law." Professor Monaghan argues the case for a constitutional common law, claiming that it is descriptive of what the court has done in commerce clause, admiralty, interstate boundary, foreign affairs, criminal procedure, and procedural due process cases. Monaghan seems to make a prescriptive case for subconstitutional lawmaking by the

139. Monaghan, supra note 32, at 10.
140. Id. at 13 (footnotes omitted).
141. Id. at 17, 20, 24.
Court in the civil liberties area, ultimately concluding that an openly experimental Court will precipitate a productive dialogue with Congress, the Court giving impetus to civil liberties and Congress acting as a check. One upshot of Monaghan’s analysis is obvious. If Mapp, Miranda, and the lineup cases are indeed examples of constitutional common law, there is no constitutional device that prevents Congress from “reversing” or “overruling” these decisions. By explaining the constitutional logic of Mapp and Calandra, Monaghan invites a safeguarding Congress to determine whether the Court has gone too far. While Congress has attempted unsuccessfully to legislate away more than one of the Court’s criminal procedure decisions,

142. Id. at 29; cf. Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1, 2 (1950) (in protecting “basic individual freedoms” the Court carries out its “most vital function” and is justified in abandoning many self-imposed restrictions applicable to other kinds of constitutional adjudication).

143. Monaghan, supra note 32, at 29. The doctrine of constitutional common law explains, for Monaghan, cases such as Mapp and Miranda: although a subconstitutional case may be “reversed” by Congress, id. at 11, if it is not, it remains binding on the states. While typical constitutional common law cases involve state interests that are “subordinate to plenary national legislative power,” the authority for such decision making should run to the individual liberties area because of the Court’s “traditional role in defining the constitutionally permissible scope of both state and federal power.” Id. at 18. Additionally, argues Monaghan, the need for uniform “dimensions” of federal rights calls for constitutional common law. Id. at 19.

144. See, e.g., Gilbert v. California, 388 U.S. 263, 273 (1967) (per se exclusionary rule applicable to testimony about out-of-court identification that did not comport with Wade requirements); United States v. Wade, 388 U.S. 218, 227 (1967) (sixth amendment rights to counsel and confrontation violated by post-indictment lineup conducted in absence of counsel, and government must purge the taint of subsequent in-court identification). Wade contains the following Miranda-like disclaimer: “Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as ‘critical.’” 388 U.S. at 239 (footnote omitted). A non-critical stage is one to which the right to counsel does not attach. 388 U.S. at 227-28. Kirby v. Illinois, 406 U.S. 682 (1972) makes clear that Wade-Gilbert does not apply to pre-indictment, or pre-formal charge, identification procedures.

and while it has been claimed that the Chief Justice has indicated that the exclusionary rule has constitutional stature,\footnote{146} the point remains that Monaghan’s invitation represents a real threat to the rule. It is accordingly appropriate to ask whether he carries the day. Before answering that question, two points should be made. First, it is unclear why some cost-benefit analysis should be dispositive even in a subconstitutional area. For example, if the exclusionary rule were to be loosed from its Clandord moorings in deterrence, one would be freer to take seriously the integrity rationale for the rule, a rationale that has nothing to do with deterrence. While Congress might have the authority to undercut the rule, wisdom might counsel retention.

Second, the role of Congress as watchdog over a Court making subconstitutional decisions presents a minoritarian problem of the first magnitude.\footnote{147} Who will safeguard the rights of alleged or convicted criminals, especially in an election year? A safeguarding Congress, responsive to the wishes of the states, is hardly the body to look to for protection of civil liberties.

But such arguments do not answer the question whether Monaghan is correct that the exclusionary rule represents congressionally reversible constitutional common law. Schrock and Welsh attack Monaghan’s thesis on nearly all points. They first claim there is no constitutional authority for the constitutional common law function.\footnote{148} Arguing that Monaghan finds authority in utility,\footnote{149} they attempt to show the serious disutilities of the doctrine of constitutioanl common law, such as its encouragement of disputes between the Court and Congress,\footnote{150} the problem of defining constitutional common law itself,\footnote{151} the lack of judicial competence to create subconstitutional law,\footnote{152} the public perception of judicial

\footnote{\textit{Hearings}, supra note 7, at 35 (statement of Stephen H. Sachs, Attorney General of Maryland). Mr. Sachs argues that the Chief Justice recognizes “that the rule is of constitutional dimension,” \textit{id.}, because the Chief Justice said in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting) that a congressional substitute for the rule would require Supreme Court approval. \textit{id.} at 423. That sort of “constitutional dimension” seems precarious indeed.}

\footnote{\textit{Schrock & Welsh}, supra note 117, at 1152.}

\footnote{\textit{Id.} at 1124.}

\footnote{\textit{Id.} at 1124, 1131.}

\footnote{\textit{Id.} at 1152-53.}

\footnote{\textit{Id.} at 1146-49.}

\footnote{\textit{Id.} at 1149-50.}
overactivism,¹⁵³ and the erosion of individual rights.¹⁵⁴ Accusing Monaghan of providing an example of Court-centered realism¹⁵⁵ rather than Constitution-centered constitutionalism, Schrock and Welsh complain that the doctrine of constitutional common law "is neither constitutional nor common law but pragmatism without either precedent or principle—judicial realism radicalized and rampant."¹⁵⁶ While Schrock and Welsh describe Monaghan’s project as legal utilitarianism, realism, pragmatism, and instrumentalism, they could just as well have called it fallacious naturalism.¹⁵⁷ Professor Harvey Wingo observes that the constitutional common law turns out to be "nothing more than supervisory power" and that

¹⁵³ Id. at 1155. This criticism (concern about public acceptance of the doctrine) is probably the weakest of the arguments made by Schrock and Welsh. In determining the parameters of the Court’s competence, a poll of the public would not be germane.

¹⁵⁴ Id. at 1158-71.

¹⁵⁵ Id. at 1124, 1172.

¹⁵⁶ Id. at 1124. Professor Yackle suggests that in constitutional cases "it makes no sense whatever to conceive of the judicial task ... as doing justice—to the particular parties fortunate enough to appear in Washington." Yackle, supra note 9, at 435 (footnote omitted). He asserts that we have "put to one side the silly notion that the Supreme Court does not make law," arguing that "[i]f this realist sense of Supreme Court decisionmaking does violence to Article III, then so be it. There is quite simply no way to avoid it ... ." Id. (footnote omitted).

¹⁵⁷ See Schrock & Welsh, supra note 32, at 1126 n.59.

Suppose . . . undeniably subconstitutional decisions are too tightly woven into the fabric of law and society to be called into question. It does not follow from their existence that the mode of decision which produced these holdings should become standard operating procedure in the future.

Id. (emphasis deleted and added). Compare Monaghan, supra note 32, at 10 (because it seems too late to conclude that Supreme Court is incorrect in its application of the exclusionary rule to the states, one must conclude that Supreme Court has common law power) with Yackle, supra note 9, at 435 (desirable mode of Supreme Court adjudication may necessarily contravene Article III principles).

The use in the text of the term "fallacious naturalism" is intended to refer to arguments that assert that what is ought to be, or that equate judgments of fact with judgments of value. G.E. Moore generally is credited with the discovery of the philosophic naturalistic fallacy, see, e.g., R. Olson, A SHORT INTRODUCTION TO PHILOSOPHY 101 (1967), although W.D. Hudson has argued that the eighteenth century philosopher Richard Price anticipated Moore's later work. W.D. Hudson, MODERN MORAL PHILOSOPHY 72-73 (1970). The essence of the naturalistic fallacy, for Moore, consists in failing to recognize that goodness is a non-natural property that is "simple and indefinable." G.E. Moore, PRINCIPIA ETHICA 6-21 (1903). It may be of interest to some readers that Moore accused John Stuart Mill, in regard to the latter’s Utilitarianism, of a "naive and artless" use of the fallacy. G.E. Moore, supra, at 66. To question the propriety of Professor Monaghan’s thesis by invoking the fallacy is simply to point out that even in the "real world" of Supreme Court adjudication it may be insufficient to identify what is (the alleged practice of constitutional common law) with what ought to be. The reader is referred to PRINCIPIA ETHICA, supra, for a detailed treatment of the fallacy in its full philosophic context.
application of that power to state criminal cases "is antithetical to principles of federalism." Monaghan's claim is provocative. He does a better job than the Court in explaining the Mapp/Calandra enigma. But it appears safe to say that Schrock and Welsh have shown, if nothing else, that a clearly successful case for explaining the exclusionary rule in terms of constitutional common law has yet to be made.

In an area such as criminal procedure, in which constitutional analysis is required (given the values at stake and the risks attendant to delegating to the legislature the task of protecting those values), the burden is great on those who would construe the devices of protection as congressionally reversible. Perhaps the Court is free to invite such an inference, although it is unclear whether the Court has such authority. In any case, Professor Monaghan's descriptive success is no greater than that of Judge Posner, who argues that the origin of the exclusionary rule is consistent with economic analysis. Under traditional theories of judicial review, cases construing the Constitution should be understood as just that: cases construing the Constitution.

On some realist view, the Court may be free to say whatever it wants. However, should it choose the route of constitutional common law, it may have "solve[d] Monaghan's 'problem'" by "dissolv[ing] our constitutionalism." Assuming away the constitutional status of the exclusionary rule in favor of subconstitutionalism does not explain the rule, especially given the importance with which fourth amendment rights, at least recently, have been regarded. And the argument from utility has not emerged as clearly dispositive, even conceding the nonconstitutional status of the rule. First, it is unclear why utilitarian considerations should control the analysis of a constitutionally informed federal common law rule or a subconstitutional rule of constitutional common law. Second, it is also unclear why utilitarian concerns should dominate if we adopt a supervisory power view of the rule. Whether one adheres to a common law or supervisory power view of the rule, or to some other theory propounding the rule's nonconstitutionality, it is possible to put forth all sorts of nonutilitarian defenses of the rule. These defenses include arguments based on judicial integrity, or fidelity to some deon-

159. Posner, supra note 8, at 638.
160. Schrock & Welsh, supra note 32, at 1176.
ological or nonutilitarian moral principle. Such defenses could raise the need to enforce the proscription against governmental wrongdoing by enjoining the government's ability to benefit from such wrongdoing. Again, it must be remembered that the rule, whether constitutional or not, typically is invoked subsequent to a violation of the Constitution and is in this sense inescapably linked to the Constitution. Finally, it is not at all clear that an examination of the utilities dictates abolition or modification of the rule. While utilitarianism can stand as a code word or symbol for deterrence analysis, it need not. If the category of utilities is restricted to deterrence, it, of course, remains possible to support the rule based on such analysis. Additionally, the rule symbolizes in a very real way the values that are at stake and society's commitment to them; it serves as a forceful mandate that the government obey the law; it affects law enforcement expectations and realities; it provides the occasions for defining the substantive contours of constitutional values; it may increase police effectiveness; it may pro-

161. "[Deontological theories] assert that there are, at least, other considerations which may make an action or rule right or obligatory besides the goodness or badness of its consequences . . . ." W. Frankena, Ethics 14 (1963).

162. The data are equivocal. See supra note 34; Morris, supra note 114, at 653-56.

163. See, e.g., Kamisar, supra note 16, at 71-72 (police reaction to rule shows its value as symbol of fourth amendment protections); Oaks, supra note 9, at 756 (rule magnifies moral educative force of law by demonstrating that serious consequences attend constitutional violations); Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L., Criminology, & Police Sci. 255, 263 (1961) (while rule interferes with truth ascertainment, other social values receive expression in the courtroom, and truth may have to bow to some of these).

164. See, e.g., Kamisar, supra note 16, at 72 (police department heads reacted to Mapp as though fourth amendment had just been written); Loewenthal, supra note 16, at 29 (police officers don't understand or respect the imposition of constitutional restrictions in the absence of exclusion).

165. See, e.g., Oaks, supra note 9, at 756; Paulsen, supra note 163, at 260; Sunderland, supra note 2, at 347; Yackle, supra note 9, at 426-27. By pointing to the function of the rule of providing occasions for fleshing out the fourth amendment, it is not suggested that appellate courts should disregard the justiciability requirements of Article III. The point is simply that the exclusionary rule provides chances for interpreting constitutional doctrine in cases or controversies regarding evidence acquisition. See generally Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297 (1979).

As to federal judicial review before Mapp, Professor Francis Allen posits a case where a state had accepted the rule and the defendant claimed error in the state court's interpretation of his privacy rights. Arguing that under Wolf the Supreme Court should be able to review the interpretation, Professor Allen points to a federal appellate decision to the contrary. Allen, The Exclusionary Rule in the American Law of Search and Seizure, 52 J. Crim. L., Criminology, & Police Sci. 246, 252-53 & n.61 (1961) (citing Sisk v. Overlade, 220 F.2d 68 (7th Cir. 1955)).

166. But see supra note 110.
vide feedback to police; and it may protect privacy. Finally, some perceived disutilities are not present in fact.167

B. Integrity

The argument that "judicial integrity" demands application of the rule has been invoked traditionally by proponents of the rule.168 While the argument apparently has lost force with the Supreme Court,169 it continues to be examined with some regularity by commentators.170 Essentially, the argument claims that judicial integrity is reduced to the extent that a court sanctions the use of unconstitutionally seized evidence; the court has tainted itself by condoning, and arguably encouraging, violations of the Constitution.171 It has been argued, however, that the integrity claim is a two-edged sword in that the integrity of a court is diminished by utilizing the exclusionary rule in some cases to allow a "guilty" defendant to go free.172 But what is the sense of "integrity" as used here? Does the argument really show, or can it logically hope to show, that the integrity arguments for and against the rule cancel each other out or, in fact, result in a balance against the exclusionary rule?

167. See, e.g., Report, supra note 3.
168. The integrity rationale, or at least variations of it, appears in Mapp v. Ohio, 367 U.S. 643, 659 (1961) (imperative of integrity outweighs the concern that a criminal goes free, because government must not disregard its laws or Constitution); see also Elkins v. United States, 364 U.S. 206, 222-23 (1960) (doctrine that would allow at federal trial evidence seized by state agents in violation of Constitution rejected on grounds, inter alia, of judicial integrity; Justices Holmes' and Brandeis' dissents in Olmstead categorized as integrity arguments; and McNabb cited as accepting the integrity principle); McNabb v. United States, 318 U.S. 332, 345 (1943) (upholding conviction dependent upon evidence secured through disregard of congressionally mandated duty to take arrestee before judicial officer would make courts accomplices in willful disobedience, despite absence of any express congressional forbidding of such evidence use); Olmstead v. United States, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting) (admission of evidence obtained through illegal wiretap makes court an accomplice to such illegality); id. at 469-70 (Holmes, J., dissenting) (government should not use evidence obtained through criminal act, judges should not allow such "iniquities"); Weeks v. United States, 232 U.S. 383, 391-92 (1914) (courts, charged with upholding Constitution, should not sanction unlawful seizures).
170. See, e.g., Kamisar, supra note 16; Schrock & Welsh, supra note 22.
171. See cases cited supra note 168.
172. See, e.g., Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting) (some exclusionary results incomprehensible to public); Kaplan, supra note 7, at 1035-36 (popular hostility toward rule and courts that apply it); Wilkey, supra note 17, at 223 (exclusion undermines reputation of judicial system).
The putative claim of integrity that seeks to undercut the rule is not a claim of integrity at all. The argument is really ostensive and simply points to public outrage; it is the public relations problem all over again. A genuine claim of integrity concerns what is, not what appears to be. Indeed, in common parlance "integrity" indicates a moral achievement or disposition (ordinarily indicated by former achievements) despite appearances. To argue that a court loses integrity by sanctioning unconstitutional governmental conduct is to argue that the court ought not to partake of constitutionally offensive behavior because that participation is simply wrong in itself. If the court-as-participator theory is rejected because the court is not the principal wrongdoer, it can be claimed nevertheless that the court should not reward such wrongdoing, should not allow it, and should not encourage that it be done again. The rule becomes a moral imperative because the behavior that triggers it should not be engaged in and is constitutionally proscribed no matter what the public relations consequences.

The "inverse" integrity argument unabashedly claims that "exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system." The discourse shifts from integrity to image, from moral imperative to public relations. Commentators consistently translate the language of integrity into the language of appearance. Judge Wilkey, for example, claims that if a group of laymen were asked about particular exclusionary rule cases

[the questioner would] receive a lecture that these are outrageous technicalities of the law which the American people should not tolerate. 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.

Were it not for the fact that the context makes it clear that Judge

173. See supra text accompanying notes 33-50.
174. An additional aspect of the moral meaning of integrity is given by Professors Schrock and Welsh: "[T]he concept of integrity . . . is not instrumentalist but, of all moral concepts, [is] perhaps the least 'future' or 'consequence' oriented." Schrock & Welsh, supra note 22, at 370.
175. Wilkey, supra note 17, at 223; accord Kaplan, supra note 7, at 1036 n.53 (the rule "injure[s] judicial integrity far more than it serves that end").
176. Wilkey, supra note 17, at 223 (footnotes omitted). Judge Wilkey apparently finds compelling the thought that "abolishing the exclusionary rule and punishing those who carry deadly weapons would receive widespread public acclaim." Id. at 229.
Wilkey is talking about integrity,\textsuperscript{177} one might have guessed that whatever he was addressing, it assuredly was not judicial integrity.

Professor Kaplan makes a similar point but labels it the "political price of the rule.\textsuperscript{178} Arguing from a feeling\textsuperscript{179} of justice and from popular opinion, Kaplan asserts that the solid majority of Americans rejects the idea that the "criminal is to go free because the constable has blundered."\textsuperscript{180} Terming the rule's effect a "windfall," Kaplan argues that it affronts "popular ideas of justice" and claims that the disproportionality inherent in the windfall proves that the rule "cannot be justified as a moral imperative preventing the courts from soil[ing] themselves with tainted evidence."\textsuperscript{181}

Kaplan attempts to go beyond the more common assertion of public impatience. After all, constitutional and moral restraints on government, it might be thought, should not be as vulnerable to public whim as some of the critics of the rule suggest. Kaplan translates that claimed phenomenon (public impatience) into the principled language of justice, even if the justice is a "feeling"\textsuperscript{182} or "popular idea."\textsuperscript{183} Further, Kaplan argues that "any moral end that is served in the name of judicial integrity must be balanced against our sense of injustice, not only at letting a serious criminal go free, but at letting him go free because of what may be a trivial error by the police."\textsuperscript{184} Kaplan thus conjoins the public outcry argument with a point about our sense of justice. Judicial integrity conceived as an argument for the rule can be outweighed, apparently, by the sense of justice that militates on the other side.

Interestingly, Kaplan frankly concedes that the rule does not have the effect that popular opinion assumes it has. "It is undeniably true," he says, 'that in practice the exclusionary rule rarely allows dangerous

\textsuperscript{177} Id. at 223.
\textsuperscript{178} Kaplan, supra note 7, at 1035.
\textsuperscript{179} Id. "Feeling" is a word that is particularly appropriate here, to the extent that its meaning is distinguished from that of deliberation or reflection.
\textsuperscript{180} Kaplan, supra note 7, at 1035 (quoting People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926)). Kaplan cites a 1969 Gallup Poll that shows that 7% of those sampled thought that courts are "not harsh enough" with criminals Id. at 1036 n.52.
\textsuperscript{181} Id. at 1036 (footnote omitted).
\textsuperscript{182} Id. at 1035.
\textsuperscript{183} Id. at 1036.
\textsuperscript{184} Id. at 1036 n.53; cf. Hearings, supra note 7, at 143 (statement of George Nicholson, Senior Assistant Attorney General, Department of Justice of California) (quoting California State Judge Robert K. Puglia: "'Certainly the maintenance of public acceptance of a system largely responsible for the protection of individual rights is no less important than the rights themselves.'")
defendants to go free." Kaplan has elevated the dialogue from the level of common misconception to the level of a "sense" of justice. This sense of justice depends on the public conception that the rule requires that crucial evidence be suppressed "no matter how slight the police error in seizing it (providing the error is of a constitutional dimension) and no matter how crucial it is to conviction." In fact, the common view of the exclusionary rule may well be that it frees guilty defendants because of hypertechnical violations by police officers of unimportant and incomprehensible rules that have nothing whatever to do with the Constitution. The political cost of the rule may well be based on a lack of awareness of the difference between suppression and "freeing" defendants, possibilities of conviction on other evidence, the typical use of the rule in nonvictim crime cases, and the fact that violations of the Constitution, as interpreted by the Court, trigger the rule’s application. The political costs probably are based on a hyperbolic distortion of real social costs that Judge Posner, for example, seeks to identify. Arguments about political costs, like arguments about utility, have their limits when used as tools for legal or moral persuasion. Judge Wilkey’s integrity argument becomes the unilluminating observation that the public sometimes thinks that criminals are being coddled and that the legal system is inefficient in removing malefactors from the streets. For Kaplan, the argument regarding political costs purports to depend on a sense of justice that might rest in part on factual misconceptions and is in any case unabashedly utilitarian. Discourse regarding even putative moral and legal imperatives should have as little to do with popular mistakes as integrity principles have to do with opinion polls or appearances.

Two more observations should be made regarding the integrity argument against the rule. The first is that purported goals of the integrity argument for the rule seem to include a public relations

185. Kaplan, supra note 7, at 1036. Judge Wilkey makes a similar concession: "A striking feature of the motion to suppress for illegal search and seizure is that it is a defense weapon peculiarly suited to narcotics, gun, and gambling crimes, and only incidentally to other felony charges." Wilkey, supra note 17, at 224.
186. Kaplan, supra note 7, at 1037.
187. Posner, supra note 8, at 638 (suppression of valuable evidence, discouraging some lawful searches and seizures, loss of potentially valid convictions).
188. See supra text accompanying notes 51-52, 67-81.
189. By analogy, while the Code of Professional Responsibility concerns itself with appearances (Canon 9), it also concerns itself with substance (Canon 1) insofar as integrity is concerned. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 1, 9 (1981). The MODEL RULES OF PROFESSIONAL CONDUCT (1981) contains no general "appearance" provision.
aspect. It has been claimed that judicial integrity as an argument for the rule, while perhaps an end in itself, "serves the ends of avoiding bad examples, of maintaining respect for law, and of promoting confidence in the administration of justice." Sunderland argues that judicial integrity is incomplete as an end in itself. It is even necessary, he says, to go beyond Brandeis's argument of promoting "'confidence and respect in the administration of justice'" if the argument is to have stronger, particularly constitutional, footing. It could be argued, then, that because the integrity argument for the rule is insufficient when stated as an end in itself, and because one identifiable goal of integrity is the promotion of public respect for and confidence in the judiciary, it is only symmetrical and natural to talk about the potential of the rule for promoting disrespect.

The argument has two flaws. First, it is unclear that judicial integrity as an end in itself is not a worthwhile conception. Integrity principles assumedly include notions of acting free from corruption and of uprightness in regard to matters of fair dealing. It is offensive to suggest that a court should act consistently with integrity principles only when it is easy to do so or when the political cost is slight. Second, it simply has not been demonstrated that the disrespect generated by the rule outweighs the substantive harm and disrespect generated by a court's utilization of the products of a constitutional violation. Perhaps the "rule-generated" disrespect is really disrespect generated by fourth amendment jurisprudence. Perhaps some of the rights that are resented are not exclusionary rights at all but are those bound up with the substantive contours of the Bill of Rights itself.

One commentator suggests that the integrity argument has been cast in terms of its "ulterior goals" rather than in terms of the "duty"

190. See Sunderland, supra note 2, at 349 (quoting Olmstead v. United States, 227 U.S. 438, 484 (1928) (Brandeis, J., dissenting). See id. at 265-66; Sunderland, supra note 2, at 349 for criticisms of the end-in-itself conception. See also Schroeder, supra note 9, at 1372 n.72 (general treatment of ends of integrity); Note, Judicial Integrity, supra note 3, at 1134-35 (Justice Brandeis in Olmstead articulated the goals of the integrity rationale as prompting public respect for law and discouraging totalitarianism); id. at 1144 (integrity rationale indicates Court should interpret liberally the fourth amendment).

191. Sunderland, supra note 2, at 349. See also, Schrock & Welsh, supra note 22, at 265 & n.44 (integrity as end is "bootless and rarefied essence" and could lead to a "fragmentation of government").

192. Id. (citing Olmstead v. United States, 227 U.S. 438, 484 (1928) (Brandeis, J., dissenting)).


194. See supra text accompanying note 74.
courts have to protect fourth amendment rights.¹⁹⁵ The implicit post-
Mapp redefinition of judicial integrity allows the conception to be
tossed into the stew of other policy considerations such as deter-
rence of police misconduct and clearing the streets of criminals.¹⁹⁶
So transformed, integrity becomes one more policy, one more goal,
every bit as unprincipled as deterrence. The court’s integrity is un-
tainted under this redefinition if “in its view, admission of the un-
constitutionally obtained evidence neither diminishes public respect
for law nor encourages the development of totalitarian government.”¹⁹⁷
It may be inappropriate, then, to identify judicial
integrity in terms of its goals or to assume that judicial integrity
cannot stand coherently as an end in itself. Quite simply, it would
be difficult to find in any single case a non-exclusionary outcome
that would measurably diminish public respect or encourage
totalitarianism.

The Court itself has confused the integrity issue. The integrity
argument makes an appearance in Olmstead v. United States¹⁹⁸ and
Weeks,¹⁹⁹ is clearly present in Mapp,²⁰⁰ and thereafter has a mudd-
dled history. The Court in United States v. Peltier conceded that the
integrity rationale constitutes a part of the history of the rule but
argued that the Court previously had relied principally upon deter-
rence analysis.²⁰¹ In United States v. Janis the Court actually iden-
tified the “primary meaning” of judicial integrity with deterrence.²⁰²

¹⁹⁵. Note, Judicial Integrity, supra note 3, at 1153.
¹⁹⁶. Id.
¹⁹⁷. Id. at 1154 (footnote omitted).
¹⁹⁸. 277 U.S. 438, 484-85 (1928) (Brandeis, J., dissenting). Justice Brandeis argued
that a court should not be an accomplice in illegal governmental conduct and identified
two goals of the integrity rationale as breeding respect for law and discouraging anarchy.
Id.; see Note, Judicial Integrity, supra note 3, at 1134-35 (Brandeis’ rationale described as encouraging respect for law and discouraging totalitarianism).
²⁰⁰. Mapp v. Ohio, 367 U.S. 643, 659 (1961). It has been claimed that the rationale
was accepted first in McNabb v. United States, 318 U.S. 332, 345 (1943). Note, Judicial
Integrity, supra note 3, at 1130 n.4. It also has been claimed that not until 1960, in Elkins
v. United States, 364 U.S. 206, 222-23 (1960), was the phrase “imperative of judicial
integrity” used and accepted as a basis for exclusion of evidence. Schroeder, supra note
9, at 1373 n.74.
²⁰¹. 422 U.S. 531, 536 (1975).
(1979). Dunaway involved an unconstitutional detention of a suspect who was given Miranda
warnings prior to making inculpatory statements and sketches. Id. at 200. In deciding that
the confession should have been suppressed, the Court said, “When there is a close causal
connection between the illegal seizure and the confession, not only is exclusion of the
evidence more likely to deter similar police misconduct in the future, but use of the evidence
is more likely to compromise the integrity of the courts.” Id. at 218.
However, even assuming a means-oriented operation of integrity (assuming, for example, that respect for law is somehow a quid pro quo of the rule, that arguable accidents or consequences of the rationale of integrity are necessary to justify it), rule critics have not shown that more harm is done by the rule than would be done in its absence.

The second observation about the arguments of Wilkey and Kaplan is that implicit in their claims is a possible integrity argument against the rule. Wilkey says that the rule corrupts judges by forcing them to interpret tortuously the fourth amendment’s substantive provisions in order to avoid the application of the rule.\textsuperscript{203} Such corruption stems from judges’ “righteous indignation against a proven law violator.”\textsuperscript{204} Kaplan writes that the courts have demonstrated “remarkable ability in the most serious cases to stretch legal doctrine to hold doubtful searches and seizures legal.”\textsuperscript{205} He says that such stretching stems from a judicial sense of proportionality and a judicial perception of the limits of public tolerance.\textsuperscript{206} Is there not a problem, then, in the fact that the rule encourages judicial corruption by prompting judges to wink at the law and the facts in order to avoid the ravages of the rule? Is this not a claim of principle rather than simply an allegation of unpopularity?

To the extent that the argument depends on judicial perceptions of public intolerance\textsuperscript{207} it is indistinguishable from the unilluminating “the public hates it” claim; except that, it is possibly even less appealing because of its suggestion that the judiciary should find, or even understandably does find, the law in opinion polls. To the extent that the argument depends on a judicial sense of proportionality or judicial righteous indignation, the appropriate response is judicial education—letting judges know that their job is to work with the law as it is;\textsuperscript{208} even if good faith interpretation sometimes is required. It should not take a Herculean judge to apply the rule as the law dictates.\textsuperscript{209} Further, appellate courts serve as a check on overreaching trial judges. But given the world that Kaplan and Wilkey see, it clearly is not salutary that the rule may encourage

\textsuperscript{203} Wilkey, supra note 70, at 356.
\textsuperscript{204} Id.
\textsuperscript{205} Kaplan, supra note 7, at 1036.
\textsuperscript{206} Id. at 1036-37.
\textsuperscript{207} Id.
\textsuperscript{208} Given the function of the exclusionary rule to protect the rights of even the criminally accused, it is to be hoped that this argument from “what is” would not serve as any positivistic apologia for the behavior of some members of the bench under, say, the Third Reich.
\textsuperscript{209} Dworkin describes the judge “Hercules” as “a lawyer of superhuman skill, learning, patience, and acumen.” R. DWORKIN, supra note 19, at 105.
retrenchment on the issue of the substance of the fourth amendment or failure to assess accurately constitutionality in a particular case. Nevertheless, that invocation of the naturalistic fallacy should not have moral, legal, or constitutional dimension, nor should it mandate the wholesale revision or abolition of the rule. Accordingly, this last integrity argument ultimately must fail in its attempt to undercut the rule. That the rule requires hard choices hardly can be said to be fatal. It might be hoped that one function of the integrity argument for the rule, properly conceived, is to elevate the dialogue regarding the rule above a fetishistic interest in hypothetical polls, public hostility, irrelevant empiricism, fear of crime, and a particular notion of common sense.  

VI. VICTIMS' RIGHTS

It is sometimes said that pragmatic or policy considerations constitute the main argumentative weaponry of critics who assault the rule. Conjoined with this assertion is the argument that "justice" somehow squarely locates itself in the camp of those who support the rule. The "principle" arguments of proponents involve judicial integrity, the Constitution, the rights of the accused, and the right of society as a whole to be free from unconstitutional interference. It is plausible, however, to treat a naive "victims' rights" argument as a genuine argument based on principle.

Arguing from a Platonic, social contractarian, or Rawlsian

211. See Henderson, supra note 4, at 360. Integrity analysis also provides one way, among others, of seeing the constitutional issue as a moral issue. Regarding constitutional restraints on government, Dworkin claims that the framers "assumed that these restraints could be justified by appeal to moral rights which individuals possess against the majority, and which the constitutional provisions, both 'vague' and precise, might be said to recognize and protect." R. Dworkin, supra note 19, at 133.
212. See Henderson, supra note 4, at 360 (proposals calling for elimination of rule threaten justice by refusing to treat integrity rationale seriously).
213. Plato, Crilo, in The Collected Dialogues of Plato 35-39 (E. Hamilton & H. Cairns eds. 1961). Socrates argues in this dialogue that by accepting the benefits that the state gives one is duty bound to obey its dictates. Id.
214. J. Rousseau, The Social Contract 15, 18, 34 (C. Frankel ed. 1947) (men place themselves under direction of the general will; social compact includes understanding that obedience to the general will shall be compelled; and laws are the "conditions of civil association" to which people submit).

Compare Kant:

If men deliberately and intentionally resolve to be in and to remain in this state of external lawless freedom, then they cannot wrong each other by fighting among themselves . . . . Nevertheless, in general they act in the highest degree wrongly by wanting to be in and to remain in a state that is not juridical, that is, a state of affairs in which no one is secure in what belongs to him against deeds of violence.

I. Kant, The Metaphysical Elements of Justice 72 (J. Ladd trans. 1965) (footnote
original position perspective,\textsuperscript{215} it might be said that the right to seek self-help\textsuperscript{216} or to achieve justified revenge\textsuperscript{217} ceases upon one's belonging to and accepting the benefits of ordered society. The idea is simply commonsensical and recognizes the preemption by the state, through its criminal machinery, of the field of prosecuting certain classes of wrongdoers (criminals) for certain alleged delicts (crimes). To the extent that the state has monopolized the field of punishing criminal behavior, so too has the citizen lost the liberty to enact his own revenge.\textsuperscript{218} In a case of victim criminality, then, the victim

omitted). For Kant, the state of nature is nonjuridical, because there is no distributive legal justice in such a state. \textit{Id.} at 70.

\text{[T]he first decision that he must make, if he does not wish to renounce all concepts of justice, is to accept the principle that one must quit the state of nature, in which everyone follows his own judgment, and must unite with everyone else (with whom he comes in contact and whom he cannot avoid), subjecting himself to a public lawful external coercion . . . .} That is, before anything else, he ought to enter a civil society.

\textit{Id.} at 76.

\textsuperscript{215} J. Rawls, \textit{supra} note 81, at 17-22, 136-50.

\textsuperscript{216} “Self-help” does not refer to doctrines such as the traditional defenses of self-defense, defense of others, or apprehending a fleeing felon but instead refers to aggressive criminal behavior occurring in response to the initial crime. Such behavior need not always be considered as seeking revenge and thus the general category of self-help is added.

\textsuperscript{217} “From the definition of punishment, I infer, first, that neither private revenges, nor injuries of private men, can properly be styled punishment; because they proceed not from public authority.” T. Hobbes, \textit{Leviathan} 230-31 (M. Oakeshott ed. 1975). Private acts of revenge in a state of nature are not, in one sense for Kant, wrongs; but neither are the acts which precipitated them. See I. Kant, \textit{supra} note 214, at 72. Such acts are, however, in another, deeper sense, wrongs against mankind in general. \textit{Id.} at 72 n.9. The point is that a state of nature is one “in which justice is absent.” \textit{Id.} at 76. It is possible to claim that an act of revenge, for Kant, involves \textit{no wrong at all} in a state of nature (even as to the object of the revenge) because Kant’s punishment principle is that of \textit{justi talionis}. “All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice.” \textit{Id.} at 101. It is clear that “public legal justice,” \textit{id.}, is a conception far afield from a state of nature and that the claim remains open that a general wrong against mankind is perpetrated by an act of revenge in a state of nature. Kant does provide, however, that

In the state of nature among states, the right to go to war . . . constitutes the permitted means by which one state prosecutes its right against another. In other words, a state is permitted to employ violent measures to secure redress when it believes that it has been injured by another state, insomuch as, in the state of nature, this cannot be accomplished through a judicial process (which is the only means by which such disputes are settled under a juridical condition of affairs).

\textit{Id.} at 118-19.

Hobbes distinguishes between sins and crimes, making the point that “when the sovereign power ceaseth, crime also ceaseth.” T. Hobbes, \textit{supra}, at 217.

\textsuperscript{218} This argument, which assumes some governmental duty, gains some support from compensation theorists who argue that the state, through taxing citizens for police forces and correctional institutions, and through limiting the ability of citizens to arm and defend themselves, takes on a duty to reimburse those it has failed to protect. See Lamborn,
and perhaps the family219 of the victim have a right to, or at least a moral and legal expectation of, punishment of the malefactor by the state.220 The argument concludes with the assertion that the operation of the exclusionary rule in a particular case violates the right of the victim, and perhaps his family, to the punishment that otherwise would have been extended and that the victim is foreclosed from pursuing. It is unjust, that is, to let an offender go free, not simply because he should be punished, but because a right lying in the victim has gone without a remedy.

So stated, the argument at least appears to be a principled claim from morals and the nature of democratic American government. It is not simply a crime control or law and order argument, but is instead a proposition of fundamental principle.221 The argument, however, is not without serious shortcomings.

The Propriety of Governmental Compensation of Victims of Crime, 41 Geo. Wash. L. Rev. 446, 462-64 (1973) for a treatment of this claim. The argument consists, in part, of the claim that because "the state forbids a victim to take the law into his own hands, it fails to the state to compensate him when the state has failed in its protection." Schafer, Compensation of Victims of Criminal Offenses, 10 Crim. L. Bull. 605, 618 (1974). The claim has been answered with the assertion that, in 1973, none of the 22 jurisdictions that had established victim compensation schemes accepted the duty argument and that while the state may have some moral obligation, the idea of a duty to protect and compensate is fallacious and dangerous because all that a state can hope to do, and all that its citizens can expect of it, is to provide a general condition of civil peace. Lamborn, supra, at 463; Yarborough, The Battle for a Federal Violent Crimes Compensation Act: The Genesis of S.9, 43 S. Cal. L. Rev. 93, 95-96 (1970) (both citing Compensation for Victims of Crimes of Violence, Cmd. No. 1406 (1961) (English Command Paper putting into operation The Criminal Injuries Compensation Scheme)).

219. Judge Posner treats a curious inversion of this idea in his discussion of "pollution" and punishment. Pollution in this context refers to the "belief that punishment is visited through supernatural agency on the neighbors or descendants of the offender when he himself manages to escape punishment." R. Posner, The Economics of Justice 208 (1981); see also Posner, Retribution and Related Concepts of Punishment, 9 J. Legal Stud. 71 (1980).

220. Pennsylvania provides for private prosecution:

If any district attorney shall neglect or refuse to prosecute in due form of law any criminal charge regularly returned to him or to the court of the proper county, or if at any stage of the proceedings the district attorney of the proper county and the private counsel employed by the prosecutor shall differ as to the manner of conducting the trial, the prosecutor may present his petition to the court of the proper county, setting forth the character of the complaint, and verify the same by affidavit. If the court shall be of the opinion that it is a proper case for a criminal proceeding or prosecution, it may direct any private counsel employed by such prosecutor to conduct the entire proceeding, and where an indictment is necessary, to verify the same by his own signature, as fully as the same could be done by the district attorney.


First, it might be asked why the expectation of punishment is describable as a right. What right exists of one individual to the punishment of another? Is the right the embodiment of some personalized *jus talionis* sense of justice? Or is the right a general social right (whatever that might mean) that vests in society the interest in bringing criminals to book, clearing them off the streets, and giving them their just deserts? Such a general right might be categorized more accurately as a collective goal, and so the argument, reformed in social terms, becomes a claim based on policy rather than principle. Further, if the idea of a general right to have punishment meted out to wrongdoers is recognized, it would be possible to recognize a countervailing general right to privacy and freedom from unlawful governmental interference.

It is difficult to determine, on this victims’ rights thesis, exactly what punishment fits exactly what crime. Such a difficulty, of course, is not unique to this thesis; but having conceded *arguendo* a victim’s right to punishment of the wrongdoer by the state, it would appear necessary to delimit the nature and severity of the punishment that the victim is entitled to see enacted. Perhaps the problem of sentencing disparity itself constitutes an affront to the victims’ rights thesis. In any case, very real problems, including problems of standing, would be created by the recognition of a right in a victim to the punishment of the wrongdoer. It would be difficult to delimit just what a victim’s entitlement is and to balance such entitlements against other generally held rights such as privacy and freedom from governmental lawlessness.

222. See I. Kant, supra note 214, at 101.


224. See R. Dworkin, supra note 19, at 81-130.

225. In fact, if a collective rights argument exists at all relative to the fourth amendment, such an argument likely would point to the collective rights of society against unreasonable searches and seizures. Professor Donald Doernberg makes the point that the Court uses a collective interest theory in its deterrence analysis and an individual interest theory in its standing analysis, and that the theories have not been reconciled by the Court. The result is an erosion of fourth amendment protections. Doernberg, supra note 21, at 282-83.

Doernberg’s analysis rests in part on the Court’s “collective” view of deterrence, a view that he seeks to apply to standing concepts. Whether or not standing concepts should be broadened, the stronger argument is in favor of an individual rights view of the fourth amendment because of the uncertain constitutional stature of a rule through which an individual claims a right on the theory that the claim might deter certain future conduct targeted toward others. Deterrence, that is, is not the most useful tool of exclusionary jurisprudence, and the concept of collective rights is somewhat enigmatic.

226. Additional questions arise, such as whether a victim can waive the right to prosecute an alleged offender, and whether Dworkin is correct that in criminal cases rights
However, the use of such a rights thesis entails a difficulty of greater magnitude. To the extent that the operation of the exclusionary rule in releasing a "guilty" defendant in a case of victim criminality represents an affront to, and a violation of, victims' rights, whether conceived as individual or group rights, and to the extent that such an argument dictates a modification227 or abolition228 of the rule to right the scales of justice, one wonders what harm is done and what remedy is required in a non-exclusionary-rule case in which, because of bad prosecutorial work, superior defense work, the sympathies of the jury, or the reasonable doubt standard, a 'factually guilty' defendant is acquitted. Why is there not an affront to justice every time the criminal law's machinery fails to mete out a deserved punishment to a wrongdoer? What is the effect on the adversarial process of the victims' rights thesis? Proponents of the thesis and critics of the rule may respond that the sort of acquittals just pointed to are accidents—the necessary, if regrettable, imperfections of any system of criminal justice—and that the exclusionary rule is a sort of officially sanctioned, systemic device that encourages, indeed demands, inappropriate acquittals. Such a response shifts the discourse from an individual, or even collective, rights thesis to an observation of institutional imperfection. At the same time, it fails to distinguish sufficiently between "accidental" and "designed" inequities. Surely the purpose of adversarial rules such as the rights to counsel and confrontation is not to increase the occurrence of inappropriate acquittals, although the Anglo-American preference may be to incur the social cost of inappropriate acquittals as a safeguard against inappropriate convictions. Just as certainly, the purpose of the exclusionary rule is not to inure a greater

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227. See, e.g., United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981) (suppression not required where reasonable good faith); S.1764, 98th Cong., 2d Sess. (1984) (proposal to limit application of rule in federal courts to bad faith violations of fourth amendment); Attorney General's Task Force on Violent Crime, Final Report 55-56 (1981) (proposal to admit evidence obtained in reasonable good faith belief that fourth amendment adhered to); A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 150.3(1), 150.3(2)(a), 160.7(1), 160.7(2)(a), 290.2(2), 290.2(3) (Proposed Official Draft 1975) (suppression requires substantial violation); Kaplan, supra note 7, at 1046-49 (serious case exception); id. at 1050-55 (exception when police department has taken fourth amendment responsibilities seriously).

likelihood of inappropriate acquittals. And it is not bizarre to suggest that if the Constitution proscribes unreasonable searches and seizures, a conviction based on a violation of that protection is inappropriate.

It is easier to locate fourth amendment rights in the Constitution than it is to locate victims' rights in the same document, and courts arguably have a constitutional as well as moral duty not to allow or encourage convictions obtained through the use of unconstitutionally gathered evidence. Finally, the state action requirement is not satisfied on the victims' rights thesis, even through the logic of preemption.

The attempt to make a principled claim from the theory of victims' rights does not seem tenable enough to require either the limiting or abolition of the exclusionary rule. Even if the victims' rights argument were stronger than it is, one would have to consider it in light of the substantive commands of the Constitution. Those substantive commands may be the real target of some rule opponents and may be largely responsible for the generation of public hostility against the coddling of criminals.

VII. HARD CASES AND THE RULE

If law in general, and perhaps constitutional law in particular, ought to make moral sense, ought not typically to require iniquitous results, it will be instructive as well as necessary to examine the operation of the exclusionary rule in serious or hard cases. To say that such cases are rare as a statistical matter it not to establish their moral irrelevance. It well might be offensive to moral first principles to free a responsible actor who kills unjustifiably and inexcusably because of some collateral impropriety in the means of investigating the case.

From a utilitarian point of view, one might question the propriety of punishing a poor person who steals from a rich victim. If a beggar burgles the house of a vacationing millionaire and dispossesses the latter of a television which he fences for meal money, one

229. This is not surprising, because the Bill of Rights provides for protections against government abuses.
230. See Kamisar, supra note 43, at 344.
231. A serious or hard case here is, for example, a case in which the defendant has done significant physical violence to another person, and in which that same defendant may claim advantageous that the rule should be applied, resulting in the loss of evidence necessary to the prosecution’s case.
232. See supra text accompanying notes 95-103.
reasonably might conclude that the beggar's gain is great and the victim's loss is miniscule. If the psychic trauma induced by the knowledge that the home was invaded thwarts that calculus, then one simply can hypothesize a nonburglarious and nonviolent taking—an underpaid clerk, for example, who embezzles $100.00 from a wealthy corporation. Without subscribing to a radical wealth redistribution theory, one can conclude that as an economic matter the dispossession is legitimized and does not amount to much, except perhaps the improved diet of the burglar or embezzler. A balancing of factors in such a case, then, results in the conclusion that the taker ought not to be punished. But surely that conclusion seems strange and perhaps in some way inequitable.

The inequity arises as a matter of principle and as a matter of institutional coherence. As a matter of principle, it is tempting at the very least to point to received traditions and the reasons behind them and to say, "The improper dispossession of another's property is wrong; it should not be done and should be punished if it is."

As a matter of institutional analysis one wants to say, "While the economic harm in this case may be minimal, we simply cannot have private unilateral wealth maximization caused by unlawful transfers."

The system cannot tolerate the encouragement of such transfers, if only for economic reasons. To the extent that such takings are decriminalized or deregulated, no incentives exist for the rightful acquisition of property, for production or savings.233 This ""institutional"" analysis seems utilitarian, and indeed it probably constitutes a type of rule-utilitarian analysis.234

Finally, giving some note to the understandable unease caused by the knowledge that one's home has been invaded, it is tempting to say that the privacy invasion involved in such cases is a serious matter, and not simply because a crime such as common law burglary creates risks for perpetrators and victims. The invasion itself, even assuming an absent victim, is unsettling precisely because of its consequences on expectations of privacy and security.

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233. This is not to say that Judge Posner would not apply economic analysis to such problems to determine optimal fines or other punishments.

234. [Rule-utilitarianism] emphasizes the centrality of rules in morality and insists that we are generally, if not always, to tell what to do in particular situations by appeal to a rule... rather than by asking what particular action will have the best consequences in the situation in question. But... it adds that we are always to determine our rules by asking which rules will promote the greatest general good for everyone. That is, the question is not which action has the greatest utility, but which rule has.

W. Frankena, supra note 161, at 30 (emphasis in original).
burglary or robbery, and perhaps even an embezzlement, may have the effect of destroying the comfortable expectations of victims.

Consider a case of alleged governmental wrongdoing in crime investigation. To take a hard case such as a child molester who is to be freed because of the operation of the exclusionary rule directly, and of the fourth amendment indirectly, is in the first instance to take an exceptional case, far afield from the kinds of cases where the rule ordinarily makes a difference. But because a hard case should be morally interesting, and because the hard cases make most strongly the point against the rule, it is useful to consider one. Further, assume that a substantive rule of fourth amendment law handed down by the Supreme Court is that all evidence must be suppressed that stems from a search executed pursuant to a warrant for which the supporting affidavit contains misrepresentations by the police. To be sure, no such rule exists, but because it is the kind of "technically" typically thought to be involved in rule cases, we will pretend, for the sake of argument, the existence of the rule.

Defendant is alleged to have molested sexually and raped a four-year-old girl. The police swear out a warrant to arrest the defendant and claim incorrectly in the warrant affidavit that the defendant has been investigated for similar offenses. The police enter his home, arrest him, and in a search incident to the arrest they discover a video tape of the crime. The misrepresentation makes the warrant invalid, and so the subsequent search is tainted, and the video tape is held inadmissible. Further, no scientific evidence is garnered that implicates the defendant, and the prosecutor believes that problems of proof regarding the testimony of a four-year-old victim are insurmountable. Consequently, a criminal is freed to prey upon society once again, and an injustice, the crime, has occurred. The court, by not punishing the offender, has compounded the injustice

235. See Franks v. Delaware, 438 U.S. 154, 155-56 (1978) (substantial preliminary showing by defendant that a knowing, intentional, or reckless false statement was made by affiant in warrant affidavit, where such statement is necessary to probable cause, requires hearing; if no such hearing defendant shows by preponderance such misstatement, and remaining content of affidavit is insufficient to establish probable cause, warrant is voided and fruits excluded). Franks makes clear that there is a presumption of affidavit validity, that the defendant's claim must be well-grounded to require a hearing, and that only the affiant’s statements are subject to such challenge (and not those upon which he might rely; those of an informant, for example). Id. at 171.

236. Searches incident to arrest comprise one of several exceptions to the warrant requirement. See Weeks v. United States, 232 U.S. 383, 392 (1914) for an early recognition of the long-standing doctrine. Searches incident to arrest are ordinarily limited to the arrestee’s person and the area in which he could reach a weapon or evidence. Chimel v. California, 395 U.S. 752 (1969).
and simultaneously has made it known that it is more concerned for the welfare of criminals than for the welfare of victims, and that acts such as those perpetrated by the defendant are to be done, at least in some circumstances, with impunity.\textsuperscript{237}

Why suppress? Why free the guilty? The answer must lie in the importance of the values that inhere in the fourth amendment and in the value of principle. In the burglary hypothetical,\textsuperscript{238} concerns of principle, institutional coherence (even if rule-utilitarian in orientation), and privacy militate in favor of conceding that a burglary occurred, even if the 'motive' for the burglary was in some sense understandable and the harm minimal.\textsuperscript{239} In the child rape case, concerns relative to governmental conduct exist. Additionally, the special concerns of security as it relates to governmental interference with privacy expectations militate in favor of application of the rule. Indeed, it is this governmental component that generates the \textit{constitutional} stature of the substantive protections. A governmental imposed insecurity is worse than a privately imposed insecurity because it is more threatening. The rule of exclusion simply applies the protections of the amendment in the most real sense possible. While we punish a burglar, we do not punish the government, but instead make real the constitutional proscription against, for example, unreasonable searches and seizures.\textsuperscript{240} It would not make sense to proscribe constitutionally certain investigative tactics and to say at the same time that they are acceptable means of obtaining convictions. The rule makes the proscription coherent and meaningful,

\textsuperscript{237} Apart from presuming a non-existent rule, the hypothetical fails to consider a number of possible claims that could legitimize the police conduct here, such as consent, exigent circumstances, and plain view. The application of these doctrines to the present case would of course depend upon the case's precise factual setting. \textit{See}, \textit{e.g.}, Texas v. Brown, 103 S. Ct. 1535 (1983) (plain view); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (consent); Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971) (plain view); Warden v. Hayden, 387 U.S. 294, 298-300 (1967) (hot pursuit exigency); Dorman v. United States, 435 F.2d 385, 391-96 (D.C. Cir. 1970) (en banc) (warrantless entry exigence). A hot pursuit exigency might negate the need for a warrant, and a plain view or search incident theory might then operate to permit the seizure in the instant case. If the plain view theory were used, the tape would have to bear some indicia of a relationship to criminality, for example that the defendant was viewing at the time the tape on his television, or that it bore a label indicating its contents. Additionally, such evidence, even if unconstitutionally obtained, could be used to secure a grand jury indictment, United States v. Calandra, 414 U.S. 338, 349-52 (1974), or in an appropriate case for impeachment at trial. United States v. Havens, 446 U.S. 620, 627 (1980).

\textsuperscript{238} \textit{See supra} \textit{text accompanying notes} 232-33.

\textsuperscript{239} \textit{See G. Williams, The Mental Element in Crime} 10, 14 (1965), for a treatment of motive and intent as two kinds of intentions.

\textsuperscript{240} This is not to deny the ability to sue civilly or to bring a criminal action against the offending officer.
serves as a symbol\textsuperscript{241} of society’s commitment to the amendment, and creates the occasions for construing the substantive contours of the amendment.\textsuperscript{242} Although one need not deny the very real sense of injustice or outrage at such cases, to except hard cases from the application of the rule is to fail in the commitment precisely where it counts the most. To fail to apply the rule because of the seriousness of the criminality is to destroy constitutional protections in such cases. If a particular police department is good enough, that destruction might, in a particular case, affect “only” a criminal. Luckily, by their very nature, such cases are, and will remain, rare—although this statistical rarity is not essential to the argument.

There is a real moral cost in such cases. But such costs are precisely those that our system is willing to pay. The reasonable doubt standard, the doctrine of double jeopardy, the right to counsel, the privilege against self-incrimination, and other protections exist only by means of incurring such costs. Not all wrongdoers are punished. Our system is not maximally efficient in that sense. The argument that police or state correction budgets should be increased to effectuate the punishment of more wrongdoers is of a completely different category from the argument that the exclusionary rule should be abandoned or modified to decrease associated economic or moral costs.\textsuperscript{243} If the real claim is that substantive constitutional protections are too costly, then that argument should be made directly and without pretense.\textsuperscript{244} If a mistake is made in the recognition of a substantive constitutional right, the exclusionary rule, which gives meaning to such rights, should not be forced to pay the penalty. If the Court has \textit{not} misinterpreted the Constitution, perhaps victims’ rights advocates would like the fourth amendment abolished or modified. If the Court \textit{has} misinterpreted the Constitution, that misinterpretation should be recognized.

There are, then, far stronger arguments for the rule than its utility as a deterrent or even as providing the occasions for increasing our

\textsuperscript{241} See Oaks, \textit{supra} note 9, at 756; Yackle, \textit{supra} note 9, at 426. By “symbol” I refer to a working symbol, one that, for example, makes clear that there are real consequences which attend improper evidence acquisition.

\textsuperscript{242} See \textit{supra} note 165 and accompanying text.

\textsuperscript{243} Of course, punishment is itself costly. While it may be economically inefficient to punish a murderer with life imprisonment (or in fact any imprisonment at all), there may be real moral costs associated with \textit{not} imprisoning him.

\textsuperscript{244} \textit{Cf.} Oaks, \textit{supra} note 9, at 754 (“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”).
understanding of the underlying constitutional proscriptions. Reasons of principle, institutional coherence (perhaps a brand of rule-utilitarianism), integrity, privacy, and proof of our commitment to constitutional values strongly militate in favor of the rule. Such reasons outweigh the concerns on the other side that "there is no way in the world we can tell the public we want a rule that will let criminals go loose because we are worried about the constitutional precepts."\(^{245}\)

VIII. THE RULE AND THE CONSTITUTION

It is clear that the exclusionary rule is linked to the Constitution, in the sense that a violation of, for example, the fourth amendment's reasonableness requirement in a search and seizure requires suppression of evidence obtained because of that violation. The contravention of fourth amendment rights triggers the application of the rule. But even proponents of the rule seek for some purpose to distinguish the rule from the fourth amendment.\(^{246}\) They point out that the amendment and the rule are different things, and that some attacks on the rule are really attacks on the amendment itself. Having insisted on this separation, can these same proponents successfully argue that the rule somehow is required constitutionally, is in some sense a part of the Constitution? The answer is yes, largely because there is no logical infirmity in arguing that the substantive dictates of the amendment (oath, warrant, probable cause, particularity, reasonableness) are not identical to a constitutionally mandated rule that makes the protections real, that disenables the government to benefit from unconstitutional investigative techniques, and that shows that the Constitution means what it says.\(^{247}\)

The claim that the rule has constitutional stature consists of arguments based on the fourth amendment, fifth and fourteenth

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245. Fla. Bar News, Oct. 1, 1982, at 1, col. 1 (statement of Phyllis Shampianer regarding Florida's exclusionary rule, taken to be more protective than the rule imposed on the states by Mapp).

246. See, e.g., Mertens & Wasserstrom, supra note 8, at 398 (police confusion relates to fourth amendment jurisprudence, not to exclusionary rule); Traynor, supra note 20, at 322 (questions about freeing guilty persons should not be directed at exclusionary rule, because United States Constitution and state constitutions mandate that "the guilty would go free if the evidence necessary to convict could only have been obtained illegally").

247. Professor White argues that the rule's origins show that exclusion, in some cases, was a substantive part of the fourth amendment (even more so than "procedural" protections like particularity) because of the property rational that the government "simply has no right to seize the property of the citizen for use against him in a criminal proceeding." White, supra note 23, at 1274.
amendment due process, fifth amendment self-incrimination protections, principles of judicial review, and at least some logical and moral analysis.

The fourth amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^\text{248}\)

Despite some confusing history,\(^\text{249}\) the amendment as we have it seems to proscribe governmental conduct of certain types. It seems to say that unreasonable searches shall not occur and that warrants shall not issue unless certain conditions are met. To one unfamiliar with crime control rhetoric, it might seem strange to suggest that the amendment has an unwritten clause that reads, "But if the government violates these provisions, it may convict a defendant through the use of evidence so obtained."\(^\text{250}\) Such a reading would suggest that general warrants,\(^\text{251}\) a chief evil against which the amendment was directed, could issue and that defendants properly could be convicted as a result of evidence so obtained, or that an unreasonable search and seizure could supply evidence necessary

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\(^{248}\) U.S. Const. amend 4.

\(^{249}\) See supra note 132.

\(^{250}\) See Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 584 (1983).

\(^{251}\) Briefly, general warrants might be described as having no particularity or (in some cases) probable cause requirements. Such warrants are traceable at least to early Roman history, where criminal prosecutions were largely private and the accuser, after having shown the court that substantial cause for the complaint existed, was given a "warrant" that essentially allowed him to search anywhere for documentary evidence. N. Lasson, supra note 14, at 15-17. As to searches for stolen goods, the situation was different. The accuser in such a case had to meet a particularity requirement. Id. at 17. A later English example will suffice to show the nature of general warrants. The Stationer’s Company was established in 1557 as an aid in administering state censorship and required all publications to be licensed. J. Landynski, supra note 14, at 21. The Company was granted authority "to make search wherever it shall please them in any place . . . within our kingdom of England . . . and to seize, take hold, burn . . . those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation . . . ." Id. (quoting 1 E. Arber, A Transcript of the Registers of the Company of Stationers of London, 1554-1640 xxi (1875)). For a recent case where a broad warrant was held not to be a general warrant, see United States v. Christine, 687 F.2d 749, 752-53 (3d Cir. 1982).

Lasson traces the writs of assistance to the reign of James I. N. Lasson, supra note 14, at 28. This warrant to search and seize smuggled goods was general as well, and "charged all officers of the Crown with assisting those executing the warrant." J. Landynski, supra note 14, at 22. James Otis, Jr., was later to argue in America against the use of the writs. Id. at 33-37.
to a proper conviction, or that subsequent, necessarily more detailed protections recognized in case law also could be ignored in the convicting process. It seems just as strange to suggest that the amendment's unwritten clause might read, "However, an aggrieved party can sue the offending official in tort," and the government can proceed criminally against the officer."

It does not seem so strained to suggest that the unwritten clause, if there must be one (and by the clear language of the amendment, such a clause seems unnecessary), read, "And if the government violates these provisions, a defendant cannot be convicted on the basis of evidence garnered through the violation." This seems no more awkward than the exclusionary principle that springs from the requirement that the government shall not force a confession from a defendant because of the fifth amendment right against self-incrimination. Nor does it seem strange that case law refines and fleshes out the contours of the fifth amendment right. Surely the right not to be convicted on the basis of a self-incrimination violation is part and parcel of the fifth amendment right even where a coerced confession is obtained outside of a courtroom.

The very kinship of the fourth and fifth amendments led the Court in Boyd v. United States\textsuperscript{253} and Justice Black in Mapp\textsuperscript{254} to recognize the rule of exclusion. While the "fourth and fifth" formulation of the exclusionary rule has received much criticism,\textsuperscript{255} it nevertheless remains true that a fourth amendment rationale for the rule, independent of self-incrimination concerns, can draw on the confession cases.\textsuperscript{256} In response to the claim that confession rules relate to reliability and that typical search and seizure evidence has, ex hypothesi, no associated reliability problem, commentators have pointed out that the exclusion of coerced confessions "does not depend upon any explicit finding or even any specific likelihood that the confession is unreliable."\textsuperscript{257} The Court itself has said that the

\textsuperscript{252} See Kamisar, supra note 250, at 585. Compare the English cases, supra notes 14-15 (trespass theory in civil claim) with Boyd v. United States, 116 U.S. 616 (1886) (fourth and fifth amendment claim in quasi-criminal civil forfeiture proceeding).

\textsuperscript{253} 116 U.S. 616, 630 (1886).


\textsuperscript{255} Allen, supra note 142, at 16.

\textsuperscript{256} "There are strong parallels between the unconstitutionally obtained evidence of involuntary confessions and the unconstitutionally obtained evidence of unreasonable searches and seizures." Traynor, supra note 20, at 326; see also Kamisar, supra note 16, at 75-78.

\textsuperscript{257} Schwartz, Retractivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 725 (1966) (quoting Mishkin, Foreword: The High Court, The Great Writ and The Due Process of Time and Law, 79 Harv. L. Rev. 56, 83 (1965)); see also Allen,
“abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness,” but that it turns as well on the “deep-rooted feeling that the police must obey the law.”

As early as 1941, the Court stated that the “aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.” Finally, in a due process case involving tangible evidence, the Court rejected a reliability argument by saying, “To attempt in this case to distinguish what lawyers call ‘real evidence’ from verbal evidence is to ignore the reasons for excluding coerced confessions.”

The argument is rather simple, then, in claiming that if due process requires the suppression of involuntary (often reliable) confessions, it also requires the suppression of evidence garnered through a violation of the fourth amendment. As Professors Kamisar and Allen point out, the problem in confession and search and seizure cases is not one of unreliability, but is instead one of unconstitutional police procedures. Professor Glanville Williams, discussing the English rule that does not require suppression of evidence that is obtained illegally, asks...

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supra note 142, at 29; Geller, supra note 8, at 646-47; Kamisar, supra note 16, at 77; Traynor, supra note 20, at 325.


259. Lisenba v. California, 314 U.S. 219, 236 (1941). The point has been made that Justice Roberts, writing for the Court in Lisenba, also said that “[t]he aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence.” Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 665 n.38 (1966) (quoting 314 U.S. at 236). Judge Traynor, putting the two statements together, concluded that Justice Roberts “apparently envisaged two confession rules: a rule of evidence excluding untrustworthy confessions and a constitutional rule banning unfair pressures even if the resulting confession is reliable.” Id. The notion of barring unfairness is central to the argument for the exclusionary rule.

260. Rochin v. California, 342 U.S. 165, 173 (1952) (stomach pumping shocks conscience, and evidence so obtained should be suppressed for due process reasons). One need not assume that a due process rule of exclusion that stems from fourth amendment concerns must include a “conscience shocking” test. The Court in Rochin had no alternative means of suppression available, having held in Wolf that while the fourth amendment applied to the states, the exclusionary rule did not. The Rochin case itself constitutes a compelling argument for a fourth amendment exclusionary rule and right.

As to the reliability point in issue, Rochin makes clear that 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.” Id. at 172. Justice Frankfurter, writing for the Court, made the point that “[u]se of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true.” Id. at 173.


262. Allen, supra note 142, at 29.
whether English law is consistent with itself, because it requires exclusion of induced confessions.\textsuperscript{263} Williams fails to find a satisfactory principle of distinction. In any case, a simple reading of the fourth amendment, and a recognition of due process and the confession cases, provides strong support for the theory that the rule is constitutional in nature.

There are further constitutional arguments that can be made. One form of such argumentation is to claim that the rule is suggested naturally by the Constitution,\textsuperscript{264} that it is a natural consequence of our system of law.\textsuperscript{265} Another way to put the point is to ask what sense it makes to allow a conviction based on unconstitutionally obtained evidence. Walter Clemens, writing about German statutory proscriptions against certain uses of evidence, argues against the application of a balancing test by claiming that the approach "has no sufficient foundation in the statute and might result in a dangerous undermining of the statutory prohibitions."\textsuperscript{266} Kamisar, discussing McNabb,\textsuperscript{267} asks, "If a federal court cannot allow a conviction 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?"\textsuperscript{268}

How is such a conviction consonant with the meaning of due process?

As to the fifth and fourteenth amendment meanings of due process, the argument exists that due process cannot allow a deprivation of life, liberty, or property except insofar as the Constitution has been obeyed,\textsuperscript{269} or at least except insofar as rights as central as fourth amendment rights have been protected. Regardless of whether a substantive constitutional right has been recognized recently, such rights in the criminal procedure area are "constitutional rights, reflecting fundamental norms of the process by which a con-

\textsuperscript{263} Williams, supra note 131, at 273.
\textsuperscript{264} Paulsen, supra note 163, at 257.
\textsuperscript{265} Sunderland, supra note 2, at 375.
\textsuperscript{266} Clemens, supra note 131, at 279. Professor Craig Bradley notes that provisions regarding evidence exclusion in the West German Code of Criminal Procedure are founded on constitutional principles. Bradley, supra note 131, at 1034.
\textsuperscript{267} McNabb v. United States, 318 U.S. 332 (1943).
\textsuperscript{268} Kamisar, supra note 16, at 79-80 (emphasis in original).
\textsuperscript{269} Sunderland, supra note 2, at 372-73. "The due process provisions of the Constitution explicitly require that such deprivations must be in accordance with the Constitution." Id. at 375 (footnote omitted). Disavowing a "total incorporationist" theory of fourteenth amendment due process, Sunderland claims only that "whatever the content of these rights which are a part of the law of the land, substantial violations of these rights cannot be a part of the process by which an individual is deprived of life, liberty or property." Id. at 373 n.279; cf. Schrock & Welsh, supra note 22, at 364 (due process requires "at a minimum, application of constitutional rules of recognition").
stitutional democracy goes about the grave and unhappy business of depriving one of its members of his life, his liberty, or his property."270 While due process clearly does not entail every sort of conceivable protection, "criminal due process principles are no less essential to 'ordered liberty' merely because the trials in which they should have applied occurred some years ago."271

Thus some general claims have been asserted regarding the due process status of fourth amendment rights and of the exclusionary rule. Given the due process analysis relative to some criminal procedure rights generally and fourth amendment rights in particular, how does one include the exclusionary rule in the category of such

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270. Schwartz, supra note 257, at 748.
271. Id. A problem with Rochin-like due process claims, which are abstracted from constitutional concerns such as those informing the fourth amendment, is that exclusion is required on such theories only when fundamental fairness so requires. A due process theory could supplement a fourth amendment exclusionary rule by requiring that police conduct by circumscribed by concerns within and without the fourth amendment, but the thrust of Rochin seems to be that exclusion requires a higher degree of police misbehavior. Another danger of a general due process approach is that it is likely to lose a contest with law and order approaches which appeal to "fears," "instinctive utilitarianism," and "retributionism." Schrock & Welsh, supra note 22, at 266.

Professor Wingo has made the argument, in a recent article, that proponents of a due process model for the rule fail to take into account the flexible nature of due process. Given the balancing of interests inherent in due process analysis, the due process rule might be considerably different from the fourth amendment rule. Wingo, supra note 158, at 239-40. Professor Yackle claims that the Burger Court's fact-oriented balancing approach to the rule is indistinguishable from such a "flexible due process" approach. Yackle, supra note 9, at 427. But Professor White argues that the fourteenth amendment itself mandates constitutional law regarding state criminal investigations, which law "might easily have been no less protective of the individual than the fourth amendment, especially in its incorporated form, has proved to be." White, supra note 23, at 1280 (footnotes omitted). White's point is that "due process . . . means that the State must comply with its own law when it seeks to prosecute the citizen. This is . . . an insistence upon a fundamental element of due process of law itself." Id.

If Wingo is correct, and if he means that the due process model is less defendant protective than a fourth amendment model, the point is worth the attention of rule proponents. But a Court that seeks to limit the rule can do so by altering its interpretations of the fourth amendment. The Court could face the issue squarely and determine that a number of its holdings simply misinterpreted the requirements of the fourth amendment. The exclusionary rule accordingly would be limited in its application because of a retrenchment in substantive fourth amendment analysis. See Illinois v. Gates, 103 S. Ct. 2317, 2328 n.6 (1983) (totality of the circumstances approach adopted in assessing probable cause in former cases; two-pronged approach of Spinelli v. United States, 393 U.S. 410 (1969) and Aguilar v. Texas, 378 U.S. 108 (1969) treated as a guide rather than an inflexible requirement). Such a procedure would set out very clearly the project in which the court was engaged. The approach through the fourth amendment strikes me as more forthright than a due process approach which assumes away the substantive contours of the fourth amendment. This is not to say, of course, that a due process approach must inherently disregard the values of the fourth amendment.
rights? A link between the rule and the Constitution may exist in the concept of a court’s duty to avoid ratification of unconstitutional conduct, to avoid, in some sense, “becom[ing] a lawbreaker” itself.\(^{272}\) That argument is substantially similar to the claim that a court is under the “obligation to see that the defendant is not ‘deprived of life, liberty, or property, without due process of law.’ ”\(^{273}\) The argument claims that “in a constitutional democracy of limited powers, a government agency has no authority over an individual except that which is conferred upon it by law; if such authority is exceeded, the fruits of such excess should not be recognized by any branch of government.”\(^{274}\) If Wolf means that the protections of the fourth amendment are basic to a free society for due process purposes,\(^{275}\) and if the simple meaning of the fourth amendment imposes a duty to make only valid searches and seizures,\(^{276}\) then considerable credence is given to the notion of a due process and fourth amendment duty to exclude. Indeed, in Weeks itself, the Court said that the protection against unreasonable searches and seizures reaches all, and that “the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.”\(^{277}\) The Court additionally stated that courts should not sanction official lawlessness, because they are charged with supporting the Constitution.\(^{278}\) The Court was later to find that in the absence of exclusion, the assurance against unreasonable searches and seizures would be reduced to “‘a form of words,’ valueless and undeserving of mention in a perpetual charter of inestimable human liberties.”\(^{279}\)

\(^{272}\) Schwartz, supra note 257, at 751.

\(^{273}\) Schrock & Welsh, supra note 22, at 361 (emphasis in original).

\(^{274}\) Schwartz, supra note 257, at 751. As Professor Allen forcefully argued in 1950:

The moral incongruity of permitting the public force to be brought to bear upon an individual charged with violation of the penal law where the government, to prove guilt, relies on evidence secured by the lawless conduct of its own officials is both disturbing and obvious. . . . Any process of law which sanctions the imposition of penalties upon an individual through the utilization of the fruits of official lawlessness tends to the destruction, not only of the rights of privacy, but of the whole system of restraints on the exercise of the public force which would seem to be inherent in the concept of civil liberty.

Allen, supra note 142, at 20.


\(^{276}\) Schrock & Welsh, supra note 22, at 352.

\(^{277}\) Weeks v. United States, 222 U.S. 383, 392 (1914).

\(^{278}\) Id.

\(^{279}\) Mapp v. United States, 367 U.S. 643, 655 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).
Indeed, the "form of words" problem arose as soon as the Court had decided *Wolf*. That case failed to apply the exclusionary rule to the states, while it simultaneously recognized the applicability of fourth amendment protections. Justice Frankfurter’s opinion for the Court in *Wolf* recognized that the privacy core of the fourth amendment is basic to a free society for due process purposes, but somehow declined to require exclusion. Perhaps fundamental fairness required *something*, but not exclusion. The issue was made more confusing in the subsequent case of *Rochin*, in which Justice Frankfurter, for the Court, seemed to require exclusion of evidence obtained by the state through methods that shock the conscience. And in *Irvine v. California*, Justice Frankfurter dissented from a decision that repeated trests by state officers for the purpose of planting bugs did not require exclusion of evidence so obtained. As Professor Allen observes:

Mr. Justice Frankfurter had become entoiled in a semantic mesh of his own making. To label a right as one ‘basic to a free society’ is to say about as much as one can say of a constitutional protection. The right of petitionor *Wolf* had been so labelled; and yet, Mr. Justice Frankfurter for the Court had ruled in *Wolf v. Colorado* that the state need not exclude the evidence from the criminal trial. But if in *Irvine*, as Mr. Justice Frankfurter insists, exclusion of the illegally obtained evidence should be enforced by federal power, how is defendant’s violated right to be characterized? Is Irvine’s right one ‘very, very’ basic to a free society?

The problem led to *Mapp’s* overruling of *Wolf*, to the recognition that judicial integrity, along with deterrence, requires exclusion.

Tracing the integrity principle to Justices Brandeis and Holmes, Professor Herman Schwartz argues that the fruits of governmental lawlessness should not be recognized "by any branch of government, especially that branch which has the foremost role in furthering the rule of law." Justices Brandeis and Holmes, dissenting in *Olmstead v. United States*, argued that the government should not use evidence

283. Allen, supra note 142, at 252 (footnote omitted). "Nor, as I see it, can the reasoning of the court, by Frankfurter, in *Wolf*, be squared with its reasoning, by Frankfurter, in *Rochin*—or with Frankfurter’s dissent in *Irvine*." Kamisar, supra note 16, at 80 (footnotes omitted).
286. 277 U.S. 438 (1928).
obtained in violation of a penal statute. Justice Brandeis was concerned with wiretapping that violated state law and with the government's assumption of moral responsibility for lawlessness through its use of the products of the lawlessness.\textsuperscript{287} The duty of the government and the duty of the court stem from what Schrock and Welsh call the unitary model of government and prosecution, a model that sees exclusion "as the way the court itself avoids committing a wrong by violation of the rule of law."\textsuperscript{288} Calling the dissents of Brandeis and Holmes in\textit{ Olmstead} the best-known presentations of the model, Schrock and Welsh characterize the position of the justices as follows: "[W]hen a court adequately understands its place in the government and its role in a prosecution it will feel obligated to exclude evidence illegally seized by the government."\textsuperscript{289} Through the use of a unitary model, "an indissoluble institutional and moral tie between the courts and the executive" is asserted that "places a responsibility on the courts for the way the evidence they use is obtained."\textsuperscript{290} On this view courts may not disavow a breach by the executive branch by claiming some special separateness. The courts have a duty to avoid joining in the lawlessness (this surely is one sense of integrity) and are responsible as well for not encouraging it.

A morality of fourth amendment duty is distinguishable from a morality of deterrence and a consequentialist balancing of utilities or interests. The morality of duty and the logical analysis stemming from the duty conception seem consonant with the language of the fourth amendment itself and with signal cases such as\textit{ Weeks} and\textit{ Mapp}.\textsuperscript{291} A court should not permit a conviction based on unconstitutionally obtained evidence to stand because the Constitution proscribes the means of evidence acquisition. While political pressures, hard cases, and the experiences of civilized countries throughout the rest of the world may subject that claim to some criticism, the claim remains strong and is not at all startling. If a conviction would not have been obtained absent the violation, what constitutional, logical, or moral sense does it make to allow the conviction\textit{ because} of the violation?\textsuperscript{292}

\textsuperscript{287} Id. at 483 (Brandeis, J., dissenting).
\textsuperscript{288} Schrock & Welsh, supra note 22, at 257.
\textsuperscript{289} Id. at 258 (footnote omitted). Schrock and Welsh do locate a difference in the justices' positions, arguing that for Brandeis judicial acceptance of the evidence works backward to give the individual officer's act governmental quality, whereas for Holmes judicial acceptance operates prospectively to encourage future lawlessness. Id. at 259.
\textsuperscript{290} Id. at 258.
\textsuperscript{291} Note, Judicial Integrity, supra note 3, at 1137-38 n.29.
\textsuperscript{292} See supra note 43 and text accompanying note 42. It is insufficient to provide for
IX. Conclusion

Despite fervent rhetoric to the contrary, the exclusionary rule withstands careful analysis. Its effects on cases are far different from what appears to be the public perception. Its subtler effects, such as proving society’s commitment to constitutional values and providing a mechanism for interpreting constitutional doctrine, are salutary. The argument from integrity demonstrates the simple logic and moral force of the rule. The claims from the fourth amendment and due process show that it is not at all strange that the Court in the exercise of its review power saw fit to recognize the constitutional necessity of exclusion. Claims from victims’ rights and hard cases present important legal and moral questions but do not at all compel recognition of the rule’s undesirability, let alone its non-constitutionality. Even a utilitarian calculus fails to demonstrate the rule’s undesirability as a matter of policy. Wisdom, as well as the Constitution, appears to counsel against the abolition or modification of the exclusionary rule and requires the members of the branches of government maturely and deliberately to attempt to understand the reasons for, and operation of, the exclusionary rule.

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fines imposed against the government. Police departments and federal agencies would simply make budgetary provisions for the projected costs of constitutional transgressions. See Geller, supra note 8, at 694-95; Paulsen, supra note 163, at 261. A law enforcement free market should not dictate which constitutional protections in which cases are worth upholding. A system of civil or criminal actions against individual officers does not stand as a realistic possibility as a complete alternative to the rule, and if it did, it would likely chill constitutional behavior because of fear of liability. See Geller, supra note 8, at 695-96 (tort actions might deter proper conduct); id. at 715 (criminal sanctions might deter proper conduct); Schroeder, supra note 8, at 1394-95 (individual liability might compromise fulfillment of duties); id. at 1398 (criminal prosecution might profoundly chill proper conduct); cf. Posner, supra note 8, at 640 (tort remedy creates imbalance through placing on officers the full social costs of mistakes, while they do not receive the full social benefits of their proper, successful conduct).

As to the ineffectiveness of civil and criminal claims against the police, see Geller, supra note 8, at 690-91 (traditional tort actions and § 1983 claims ineffective); id. at 714 (criminal laws have remained dormant); Schroeder, supra note 9, at 1388 (many legal and practical difficulties stand in way of civil recovery); id. at 1397 (criminal prosecution ordinarily unrealistic). But see Posner, supra note 8, at 639-40 (feasible tort alternative exists today).