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Up from Calandra: The Exclusionary Rule as a Constitutional Requirement

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This Article is dedicated to C. Herman Pritchett.

In *United States v. Calandra*[1] the Supreme Court held that a grand jury witness may not refuse to answer questions merely because they are prompted by illegally obtained evidence.[2] The argument of Justice Powell's majority opinion is elegantly simple. His major premise is that suppression is justified if and only if it would deter "unreasonable governmental intrusions in-

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1. 414 U.S. 338 (1974).

2. Federal agents obtained a search warrant directed at Calandra's place of business and specifying discovery and seizure of bookmaking records and wagering paraphernalia as the object of the search. In the course of their search, the agents found a card indicating that a Dr. Loveland, known by one of the agents to be a loan-shark victim, had been making periodic payments to Calandra. The agents seized this card and other business records found on the premises.

Some months later a special grand jury was convened to investigate allegations of extortionate credit transactions. It subpoenaed Calandra and asked him questions based on the seized records. When Calandra invoked his fifth amendment right against self-incrimination, the Government recommended that he be granted transactional immunity pursuant to the Act of June 19, 1968, Pub. L. No. 90-351, tit. 3, § 802, 82 Stat. 216 (repealed 1970), *see* 18 U.S.C. §§ 6001-05 (1970). Calandra then moved to suppress the records on the ground (one of two argued) that the agents had exceeded the scope of the warrant. The district court granted the motion and declared that Calandra need not respond to questions based on the suppressed records. 332 F. Supp. 737 (N.D. Ohio 1971). The Court of Appeals for the Sixth Circuit affirmed the district court's ruling that a witness before a grand jury may invoke the exclusionary rule to bar questioning based on evidence obtained by illegal search and seizure. 465 F.2d 1218 (6th Cir. 1972). The Supreme Court granted certiorari and reversed, Justice Powell writing for the majority and Justice Brennan, joined by Justices Douglas and Marshall, writing a dissent.

to the privacy of one's person, house, papers, or effects,"[3] provided that the harm done to useful institutions by suppression does not outweigh the beneficial effect of the deterrence.[4] In the context of *Calandra*, his minor premise is that "any incremental deterrent effect which might be achieved by extending the [exclusionary] rule to grand jury proceedings is uncertain at best,"[5] whereas the fact and extent of harm is certain. "[T]he damage to . . .[the] institution [of the grand jury] from the . . . [enforcement in its proceedings] of the exclusionary rule . . . outweighs the benefit of any possible incremental deterrent effect."[6] Therefore, the rule should not and will not be enforced in grand jury proceedings.

Writing for the three-man minority, Justice Brennan argues that Justice Powell's major premise is faulty, and that judicial rather than police integrity is the historical and true objective of the exclusionary rule.[7] Justice Brennan also argues that *Calandra* is a classic occasion for application of Justice Holmes's derivative-use maxim that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[8] Finally, Justice Brennan bespeaks his "uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search-and-seizure cases . . . ."[9]

In this Article we shall not ask whether *Calandra* erodes the rule against derivative use of illegally obtained evidence; our interest is in the principles regulating any kind of use, direct or derivative, of illegally obtained evidence. Justice Powell tells us that "[t]he same considerations of logic and policy apply to both the fruits of an unlawful search and seizure and derivative use of that evidence, and we do not distinguish between them."[10] Our concern is with those "considerations of logic and policy," or, more precisely, the constitutional principles that govern both direct and derivative use. Justice Powell does distinguish, how-

3. 414 U.S. at 354.
4. *Id.* at 349-52.
5. *Id.* at 351.
6. *Id.* at 354.
7. *Id.* at 357, 360.
8. *Id.* at 362, quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).
9. 414 U.S. at 365.
10. *Id.* at 354-55.

ever, between the use of unlawfully seized evidence before grand juries and the use of such evidence at trial, and he makes assurances that there is no adverse implication in the grand jury case of *Calandra* for the longevity of the exclusionary rule at trial.[11] In this Article we shall assume that he takes this distinction and makes these assurances seriously. We prefer not to speculate about the ingenuousness of the distinction or about campaigns and tactics the majority may have in mind—there is more to be learned from premises than from motives. We think that it is of greater moment that Justice Powell's major premise leaves the exclusionary rule vulnerable to repeal than that a majority of the Court might actually be plotting to repeal the rule. *Calandra* deserves study less as a bellwether case or for its factual novelty than because of the clear and open doctrinal opposition in it between Justices Powell and Brennan. One can learn something about constitutionalism and the rule of law from the opinions in the case. That is why we propose to comment here, not on *Calandra* itself, but on the constitutional premises informing the theories of the exclusionary rule favored by the two Justices writing in *Calandra.* Indeed—to keep attention focused on these premises—our discussion will uniformly presuppose the simpler non-*Calandra* factual situation of a search victim as criminal defendant seeking to exclude the evidence from his trial.

Calandra was the occasion for a clear encounter between rival accounts of the exclusionary rule. Each of the opinion-writing Justices, in full awareness of the other's rationale, intransigently states his own as if it were the sole and sufficient justification for the rule. According to Justice Powell, "the [exclusionary] rule is a judically created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[12] To Justice Brennan this is "serious error," because "[t]he exclusionary rule . . . [is meant to accomplish] the twin goals of enabling the judiciary to avoid the taint of partnership

11. *Id.* at 349-52, 354. Justice Powell can consistently affirm *both* that the same *considerations* govern the use of fruits as evidence and derivatively *and* that different *results* shall obtain at trial and in grand jury questioning. There is no inconsistency because the fundamental assumption or "consideration" that governs both evidentiary and derivative use is that neither raises a constitutional issue. The fundamental assumption is that the Supreme Court is at liberty in the exercise of its supervisory discretion to require suppression of the evidence in both settings, to allow its direct and/or derivative use in both, or to suppress it in one and allow its use in the other. *See* note 108 *infra.*

12. 414 U.S. at 348.

in official lawlessness and of assuring the people . . . that the government [will] not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[13]

While Justice Brennan's way of accounting for the exclusionary rule is different from Justice Powell's, Brennan does not actually affirm what Powell denies, *i.e.*, that the aggrieved party has a personal right to suppression.[14] We think this omission is fatal to any slight hope Justice Brennan might have had of forestalling what he takes to be the Court's desire to repeal the exclusionary rule. This Article is an attempt to supply the deficiency. We begin by characterizing the different models of judicial responsibility tacitly assumed by Justices Powell and Brennan. We then probe the weaknesses of Powell's deterrence and Brennan's integrity rationales. Next we note that, though their conceptions of judicial responsibility differ, the Justices seem to employ the same supervisory theory of judicial power in accounting for the exclusionary rule. Finally, building on Justice Brennan's view of judicial *responsibility*, and opposing the Justices' shared conception of judicial *power*, we advance two reasons for the exclusionary rule—different in kind and more adequate than those urged by Powell and Brennan. Indeed, our proposals are so different that they are not really reasons *for* the rule. Rather, they are descriptions *of* the rule as the only means to accord what in opposition to both Powell and Brennan we believe are two "personal constitutional right[s] of the party aggrieved."[15]

I. JUDICIAL RESPONSIBILITY: TWO VIEWS OF A GOVERNMENT AND OF A PROSECUTION

In his *Calandra* dissent, Justice Brennan boldly juxtaposes what he takes to be the two basic justifications for the exclusionary rule, *i.e.*, the new "deterrence" rationale of Justice Powell and the old "judicial integrity" rationale of the "framers of the rule." Underlying these two rationales are two different concep-

13. *Id.* at 357.

14. Those statements in Justice Brennan's opinion that can be construed as references to a personal exclusionary right are offhand and remote from the core of the opinion. *See, e.g., id.* at 360, 364. *But see* Parts VI and VII *infra*, where we shall argue that an exclusionary right is *implied* by Justice Brennan's statements.

15. The language is Justice Powell's. *See* text accompanying note 12 *supra*. Concerning the "two rights" thesis of this Article, see text accompanying notes 138-39 *infra*.

tions of judicial responsibility—"fragmentary" and "unitary." We shall consider these opposed conceptions and signify our belief in the superiority of the "unitary" model, reserving for Part III our first sustained discussion of the defendant's constitutional right to insist that the court fulfill its responsibilities.

A. The Fragmentary Model

The deterrence theory of the exclusionary rule is a natural concomitant of what we shall call the common-law, "fragmentary" model of a prosecution. According to the fragmentary model, more widely known as the "fair trial doctrine," the court's sole task is to hold a fair trial. There is no way that a court can implicate itself in extra-courtroom executive misconduct just by performing its truth-seeking function within the adversary system. In particular, admission of reliable evidence, which is the court's duty *par excellence*, cannot properly be construed as a condonation of past, or an encouragement of future, illegal seizures. Being neither retrospectively nor prospectively a party to wrongdoing, and having an affirmative responsibility of its own to see that the jury views all extant reliable evidence and that justice is not sidetracked by collateral issues, the court not only may but *must* admit illegally obtained evidence. As Wigmore put it in his recapitulation of the common law, "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evience"[16]—and this is so even when "the party" is the government. A criminal court is morally separate from and indifferent to the conduct of the rest of the government. The court acts as a neutral conduit of the evidence, its self-imposed ignorance in effect "laundering" whatever "taint" might have accrued from

16. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922) [hereinafter cited as Wigmore]. Wigmore's is the classic nonjudicial critique of the exclusionary rule. It has been vastly influential and the gist of it should be noted in any discussion of the exclusionary controversy. In compressed form, Wigmore's position can be described in terms of the quality he most valued in a criminal judge—single-mindedness. The good judge does *not* turn aside to address collateral issues, and he *does* facilitate a pursuit of all evidence bearing immediately on guilt or innocence. The exclusionary judge on the other hand *does* turn aside to what Wigmore considered a collateral matter and he does *not* press for or accept all immediately relevant evidence. The exclusionary judge may be said to offend triply: not only does he turn aside to do incidental justice, and not only does he reject urgently relevant evidence, but he attempts to do incidental justice *by* turning away relevant evidence, thereby frustrating the truth-seeking function of the court and thwarting substantial justice.

the seizure and thereby rendering all reliable and relevant evidence homogeneous for judicial purposes. In Wigmore's words, "[t]he illegality is by no means condoned; it is merely ignored."[17]

The proposition that there is no condonation problem which cannot be overcome by ignoring it is only one interesting assumption incorporated by the fragmentary model. Another significant assumption is that the government can be treated for evidentiary purposes the same way the common law treats a private party. This assumption is potentially at odds with the precepts of constitutional government and judicial review.[18] Finally, there is the casually tendentious presupposition of the common-law or fragmentary model that there are only two constitutional wrongs possible within the search and seizure context—judicial violation of a person's fair trial rights, or police violation of his privacy. The adoption of this twofold alternative amounts to a denial that admission or use of unconstitutionally seized evidence could itself be a violation of the Constitution. Given just these two rights, a defendant cannot be regarded as having a constitutional right to exclusion because the admission of unconstitutionally seized evidence is not a violation of the judge's duty to hold a fair *trial.* Fair trial rights have to do with calm and accurate fact-finding in the accusatorial system and by the adversary method. The exclusion of competent evidence inhibits that fact-finding, as critics of the exclusionary rule never tire of telling us. We think it is simply an error to insist that any right a defendant might have to exclusion of relevant and reliable evidence would be a fair trial right. Such an exclusionary right would not be *to* a fair trial, even though it would come due *at* the trial. But, as long as a trial is understood, in the fragmentary manner, as an inquiry constitutionally and morally unrelated to the governmental conduct that preceded it, no exclusionary right *can* come due: the existence of such a right is barred by the initial twofold assumption of the fragmentary model.

Having correctly found no judicial fair trial duty to exclude unconstitutionally seized evidence, and having by implication denied that the exclusionary rule can be the expression of any other kind of constitutional duty on the courts, both the admissionists and the deterrence exclusionists conclude that the rule can only have a deterrence, or what has been called a "quasi-constitutional,"[19] purpose; it can only be a means contrived by

17. *Id. See* text accompanying notes 190-99 *infra.*
18. *See* text accompanying notes 241-48 *infra.*
19. *See* note 109 *infra.*

the judges to stop some *other* agency—the police—from violating *its* constitutional duty to respect the right of privacy.

B. THE UNITARY MODEL

A competing view of a court's responsibilities supports the judicial integrity rationale invoked by Justice Brennan in *Calandra*. The "unitary" model of a government and a prosecution tries to avoid the fatal characterization of exclusion as either a remedy for police violation of the right of privacy, or as a "fair trial" right. Within the "one-government" conception, exclusion is seen as the way the court itself avoids committing a wrong by violation of the rule of law. According to this model, exclusion is the only appropriate and timely method the court has to show its respect for the rule of law. The court does nothing gratuitous because, strictly speaking, it does nothing at all. Rather, it refrains from doing a wrong itself. And by its forbearance the court stops the entire government, of which it is a part, from consummating a wrongful course of conduct—a course of conduct begun but by no means ended when the police invade the defendant's privacy.

The unitary model is manifest in Justice Brennan's manner of speaking when he says that exclusion assures the people "that *the government* would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[20] It is also implicit in the common undifferentiating use of the third person plural pronoun in governmental contexts, as Monrad Paulsen shows in a statement supportive of the judicial integrity rationale:

> When the police themselves break the law and other agencies of government eagerly reach for the benefits which flow from the breach, it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place. In our common speech we often refer to our officials with words of "otherness." How often do we say, "they" will tax us, "they" will appoint the police chief, or "they" will pass a law. It is corrosive of the vitally necessary trust in government if we all understand that "they" do not abide by the law which "they" assert. The conviction that all government is staffed by self-seeking hypocrites is easy to instill and difficult to erase.[21]

In the eyes of those accepting the unitary model, the admissionist court stands accused of complicity in governmental wrongdoing from which the incantation of the slogan that "[t]he

20. 414 U.S. at 357 (emphasis added).

21. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 258 (1961).

illegality is by no means condoned . . . [but] merely ignored" will not exculpate it.[22] By asserting an indissoluble institutional and moral tie between the courts and the executive, the unitary model places a responsibility on the courts for the way the evidence they use is obtained—a responsibility which the fragmentary model disavows by denying the existence of the tie.[23]

Those favoring the unitary model argue that the governmental action for which a criminal court incurs responsibility is not merely the trial but the whole course of conduct called the prosecution. The trial is a part of the whole prosecution, just as the court is a part of the whole government that is investigating, charging, judging, and sentencing the individual. There is in the unitary model an incipient "fair prosecution" doctrine that is meant to challenge the responsibility-limiting "fair trial" doctrine of the fragmentary model.

The best known presentations of the unitary model are in the *Olmstead*[24] dissents of Justices Brandeis and Holmes. Their thesis is that when 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.[25] But, though they share this ultimate thesis and many presuppositions, their one-government arguments in favor of the exclusionary thesis differ in significant and interesting ways.

Justices Brandeis and Holmes begin their respective analyses on the assumption that the police are mere employees or agents; they agree that the primary impropriety occurs at the prosecutorial and judicial levels. This is in sharp contrast to the fragmentary model, where it is thought that the only impropriety is committed by the police officer. In addition, Brandeis and

22. *See* text accompanying note 17 *supra.*

23. See note 115 *infra* for some cautionary remarks about judicial responsibility.

24. Olmstead v. United States, 277 U.S. 438 (1928).

25. The paradigm from which we are working involves a violation by the "one government" of its own (usually constitutional) law in its prosecution of the defendant. It is awkward to use the *Olmstead* dissents in support of an argument based on this paradigm because the federal officers in that case violated no federal statute and were deemed by the majority of the Supreme Court not to have violated the United States Constitution. But despite the nonparadigmatic fact pattern of *Olmstead*—and the consequence that the dissents there are more vulnerable to cavil than, say, the opinion in Weeks v. United States, 232 U.S. 383 (1914), which *is* based on a paradigmatic fact pattern—we nevertheless lean unashamedly on Brandeis and Holmes. We do this not merely for the undeniable comfort of having their great authority on our side, but also because they make so vivid the unitary thinking pioneered in *Weeks.*

Holmes agree that the government, as principal, is authoritatively represented by both the prosecution and the court.[26] Their disagreement concerns the conditions that must obtain for the officer's conduct to implicate the government in his wrongdoing. According to Justice Brandeis, acceptance of the evidence by the court consummates the initial wrong as a *governmental* wrong by *retroactively* investing the officer's unauthorized act with governmental character. In Holmes's account, on the other hand, acceptance of the evidence is a virtual judicial warrant to break the law or violate the Constitution while securing evidence *in the future.*

Because officers cannot be authorized to make illegal seizures, Justice Brandeis denies that the government can be implicated, except retrospectively by "ratification,"[27] whereas Justice Holmes assumes that the government is prospectively implicated in the *practice* of illegal seizure through the tacit encouragement communicated by the prosecutor and the court when evidence illegally seized is submitted and not suppressed.[28]

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26. 277 U.S. at 470, 483.

27. When these unlawful acts were committed, they were crimes only of the officers individually. The government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. . . . And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

Id. at 483. *See also* text accompanying note 244 *infra.*

28. If [the government] pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits.

277 U.S. at 470. An eloquent recent statement of the Holmes conception is this by Professor Amsterdam:

> [S]urely it is unreal to treat the offending officer as a private malefactor who just happens to receive a government paycheck. It is the government that sends him out on the streets with the job of repressing crime and of gathering criminal evidence in order to repress it. It is the government that motivates him to conduct searches and seizures as a part of his job, empowers him and equips him to conduct them. If it also receives the products of those searches and seizures without regard to their constitutionality and uses them as the means of convicting people whom the officer conceives it to be his job to get convicted, it is not merely tolerating but inducing unconstitutional searches and seizures.

Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 432 (1974) [hereinafter cited as Amsterdam]. See note 111 *infra* for

But, differing with Holmes penultimately, Justice Brandeis comes to the same ultimate conclusion, because he insists that prosecutorial and judicial decisions to use evidence extend prosecutorial and judicial responsibility back to the misconduct of the officer.[29] Although both the prosecution and the courts commit independent wrongs in using the evidence, they are also, as it were, principals after the fact to the officer's wrong, and vicariously responsible for it.

C. The "Fair Trial" Doctrine and the Necessity for Choice

By what could have been a harmless convention, the phrase "fair trial" is invoked to protect the adversary, accusatorial, and general truth-seeking characteristics of the trial itself. It is not a harmless convention because, as employed in connection with the fragmentary model, "fair trial" has conveyed the natural impression that the court need feel responsible *only* for the conduct of the trial and that its use of evidence does not implicate it in the manner of acquisition. The error consists in trying to make the term "fair trial" solve a constitutional problem "by definition." While retaining its literal signification—referring only to the immensely important cluster of "inquiry" rights[30]—the term "fair trial" has also been allowed a connotation of constitutional definitiveness, as if the inquiry rights exhaust the universe of rights owed at the trial. But this is incorrect: the category of rights *to* a fair trial is not coterminous with the category of rights that come due *at* the trial. And therefore this whole maneuver begs the central question of the exclusionary controversy: to what extent can a judge be implicated in the misconduct of the police in the investigative stage of a prosecution that culminates in a trial over which he presides? If discussion is begun by assuming, as in the fragmentary model, that the trial is a separate, hermetically sealed occurrence, the fairness of which furthermore is the only due process concern, the question of judicial responsibility for the treatment of illegally obtained evidence is also sealed. This intellectual procedure is what Justice Holmes had in mind when he characterized the "often repeated statement that in a criminal proceeding the Court will

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comments on the way Amsterdam builds or, as the case may be, fails to build on this insight. See note 150 *infra* for a comparison of Holmes and Amsterdam on a related point.

29. *See* note 27 *supra.*

30. *E.g.*, the rights to notice, counsel, confrontation, and impartiality.

not take notice of the manner in which papers offered in evidence have been obtained" as a "somewhat rudimentary mode of disposing of the question."[31]

It will not do, however, to insinuate that fragmentary model theorists have a monopoly on the appearance of arbitrariness or circularity. As Holmes himself made a point of saying, "we are free to choose" what to do about illegally obtained evidence.[32] He also said that "[f]or those who agree with me [in this choice], no distinction can be taken between the Government as a prosecutor and the Government as judge."[33] Holmes here comes

31. Olmstead v. United States, 277 U.S. 438, 470-71 (1928).

32. *Id.* at 471.

33. *Id.* at 470. Quotation of Holmes's forceful words along with our use of the term "unitary" may suggest to some readers that we want to replace the separation of powers with a totalitarian monolith. If that is the impression our terminology leaves, we shall gladly change it, so long as the substitute language conveys the Holmesian conception of judicial responsibility for which we are arguing. Holmes assumes that the government as prosecutor is culpable for commissioning illegal procurement of evidence or for accepting evidence thus procured. He then says that he does not see any difference between the government as judge and the government as prosecutor—meaning, of course, *for the limited and well-defined purpose of assigning responsibility for traffic in illegally obtained evidence.* Neither do we, and that is all we mean to convey by the term "unitary".

If it is contended that sinister monolithicity is implicit in this one-government argument, the best answer is probably to ask which is the more reassuring or less Kafkaesque—Holmes's statement that there will not be a distinction between the prosecutor and the judge, or Wigmore's that the judge does not condone the illegality, he merely ignores it. It will not make a defendant an admirer of the separation of powers to tell him that he is its beneficiary because what is happening to him is really a series of discrete events occuring in insular governmental agencies, none of which is or should be responsible for the acts of the others. From the point of view of the defendant who has a harrowing, revealing, and significant exchange with the government, the unitary model would seem preferable because it assigns to one body—the judiciary—the responsibility for reviewing the conduct of the whole government and the whole prosecution. Only the unitary model insists that the procedural buck stops in a definite place and that an accountable agency has the last word on due process. The most dangerous kind of monolith is one that does not know or will not admit that it *is* a whole.

In this Article we argue for judicial review of executive conduct—or that exclusion of evidence is a form of judicial review. But judicial review is impossible without the separation of powers: there must be a part of the government *set apart* and independent, with the responsibility of reviewing the conduct of the other parts. This "stands to reason" and it is also vouched for by the history of the English people, who discovered judicial review and passed it along without keeping any for themselves. (See E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 51 (1955) for a crisp reference to the conceptual and practical difficulties facing Coke because he lacked the doctrine and the reality of the separation of powers.)

close to suggesting that mere preference and agreement, rather than reasoning, decide the issue; or perhaps, that the decision about illegally obtained evidence is inseparable from the decision about what institutional model to adopt. If this *is* his suggestion, it could in turn be understood as meaning that there is no independent theoretical perspective from which one can reason in a nontendentious way to the correct conclusion about admission and exclusion. And it does indeed seem to be the case that, because the opposed conclusions are so obviously contained in the opposed institutional premises, one cannot really adopt a model without prejudicing the issue of admission. Perhaps the best one can do is to work for awareness that a question exists, by making it clear that there are *two* available institutional models, and that the choice of model determines one's stand on the question of admission.

One hopes, however, that there is some nonarbitrary vantage point from which the two models or institutional premises can be judged. We suspect Justice Holmes believed that there is; for, although he wrote his *Olmstead* dissent with intellectual modesty, neither his exclusionary conclusion nor his attachment to the unitary model is declared as if it were the result of *mere* preference.[34] And we think the spirit in which Holmes wrote is the proper spirit to emulate, although, to be sure, we in our many pages no more than he in his few paragraphs manage fully to articulate a theoretical defense of the unitary model. All we have sought to do thus far is to echo the gist of the simple, but not necessarily "rudimentary," Holmes-Brandeis proposition that the government is an indivisible entity, the prosecution is a single process, and there is no honest way to give the court a moral release for wrongful conduct on the part of the executive in a prosecution made possible only by the participation of both the court and the executive.

In sum it can be said that the separation of powers is a prerequisite to judicial review but that too much or the wrong kind of separation, as in Wigmore's view, is antithetical to judicial review. For more discussion of judicial review, see Part VI *infra*, and for additional discussion of the general problem of judicial responsibility, see note 115 *infra*.

34. Holmes, curiously enough for a man whose life was so heavily influenced by the metaphor of battle, could rise above it and entertain a conception of government, in its prosecutorial aspect, which . . . did not cast government merely in the role of enemy to the criminal classes . . . .

Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 385 n.95 (1970).

II. NOTES ON THE "INTEGRITY" AND "DETERRENCE" PREMISES OF THE EXCLUSIONARY RULE

By opposing the judicial integrity rationale of the "framers of the rule" to Justice Powell's deterrence rationale, Justice Brennan in effect accuses the *Calandra* majority of initiating a departure from the "original understanding." We consider it more accurate to say that *Calandra* merely takes the last step in a movement that had nearly run its course in the Warren era.

Deploring with Justice Brennan the Court's apparent indifference to "the imperative of judicial integrity,"[35] we nevertheless do not think Justice Powell seriously violates the spirit of the Warren Court opinions on the exclusionary rule. To be sure, Brennan can truthfully say that

> [f]or the first time, the Court . . . [in *Calandra*] discounts to the point of extinction the vital function of the rule to insure that the judiciary avoids even the slightest appearance of sanctioning illegal government conduct.[36]

But this is true only because Justice Powell does not make a single favorable reference to judicial integrity, whereas in *Linkletter v. Walker*,[37] to take a Warren Court example, there is still a ritual reference to "the imperative of judicial integrity."[38] But it is *only* ritual, for as Justice Brennan mildly admits, deterrence was "a prominent consideration"[39] in *Linkletter*. From other Warren Court exclusionary cases we sense that while Powell's ruthless desertion of judicial integrity is indeed not in the spirit of those opinions, the opinions nonetheless were so indefinite about the controlling combination of rationales[40] that deterrence

35. 414 U.S. at 360, quoting Elkins v. United States, 364 U.S. 206, 222 (1960).

36. 414 U.S. at 360.

37. 381 U.S. 618 (1965).

38. *Id.* at 635, quoting Mapp v. Ohio, 367 U.S. 643, 659 (1961) and Elkins v. United States, 364 U.S. 206, 222 (1960).

39. 414 U.S. at 359. In the first place, Justice Clark is very open in *Linkletter* about the decisive role played by the deterrence rationale throughout the Warren era: "[A]ll of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." 381 U.S. at 636-37. In the second place, the concern for "judicial integrity," a rationale one would expect to support retroactive application of the exclusionary rule, undergoes a transformation in the course of Justice Clark's *Linkletter* opinion, and its successor rationale militates against retroactive application. "[T]he imperative of judicial integrity," *id.* at 635, becomes "interests in the administration of justice and the integrity of the judicial process . . . [which have to be taken into account by the Court because] [t]o make the rule of *Mapp* retrospective would tax the administration of justice to the utmost." 381 U.S. at 637.

40. For example, in Elkins v. United States, 364 U.S. 206 (1960),

could become the sole rationale by default. In *Calandra* Justice Powell simply ratifies that result.

Assuming there to have been a single "original understanding" among Justice Day in *Weeks v. United States*[41] and Justices Brandeis and Holmes in *Olmstead v. United States*[42] (a proposition we shall dispute), such "understanding" lost its hold on the judicial mind in the Warren Court cases. The Warren Court persistently relied on an unstable combination of arguments, as if suspended between the judicial integrity and the deterrence rationales or, being unsure about the strength of either, hopeful that by heaping them together a sufficient justification for the exclusionary rule would result. This indecision left the justification for the rule in doubt: nobody knew if it was judicial integrity alone, deterrence alone, or both; hence nobody knew what kind of minor premise might prove fatal to the rule.

But people could make informed guesses. For example, one influential commentator opined that, whatever the rhetorical ring of the judicial integrity rationale, "it is doubtful that this argument decides cases."[43] We shall now indicate why he is correct—why the judicial integrity argument as articulated by Justice Brennan and his doctrinal forebears, Justices Holmes and Brandeis, cannot be depended upon to "decide cases" without the

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Justice Stewart for the majority invoked both deterrence, *id.* at 217, and judicial integrity, *id.* at 222-23. In *Mapp* Justice Clark managed to rely on no less than *four* theories—deterrence, 367 U.S. at 648; judicial integrity, *id.* at 659-60; the fourth and fifth amendments in combination, *id.* at 646-47, 657-58; and the fourth amendment alone, *id.* at 648-49. On the other hand, in Ker v. California, 374 U.S. 23 (1963), Justice Clark for some reason mentions only the fourth-fifth amendment theory. *Id.* at 30; *see* note 97 *infra.*

41. 232 U.S. 383 (1914).

42. 277 U.S. 438 (1928).

43. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 669 (1970) [hereinafter cited as Oaks]. While Professor Oaks doubts that the judicial integrity rationale decides cases, he neither explains the weakness of that rationale nor accounts for the greater case-deciding power of the deterrence rationale. Instead, he is content to note that the courts themselves apparently do not take the judicial integrity rationale that seriously, or at any rate do not consistently decide cases as the rationale would seem to require:

> Despite bold pronouncements about not being a "party to lawless invasions," federal courts have not yet been forbidden from entering a valid judgment of conviction against a defendant who was brought before the court by illegal means such as kidnapping, arrest without probable cause, or arrest upon a warrant that was illegal or insufficient.

Id., citing Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886); and other cases. These cases embarrass not only the judicial integrity rationale for the exclusionary rule, but also any constitutional theory of the rule. *See* note 276 *infra.*

additional recognition of a personal constitutional exclusionary right.

The question is how we can in good conscience derive satisfaction from the shining purity of our courts when they are surrounded by squalid and frightening crime—crime the government cannot combat because of the courts' preoccupation with their own integrity. The weakness of the judicial integrity argument is that it asks us to be guided by what seems like judicial squeamishness; or, failing that, it asks us to engage in speculations about the remote consequences of judicial complicity in lawless governmental action. Although in our opinion the judicial integrity argument deserves respectful attention, we nevertheless empathize with those participants in the exclusionary rule controversy who have found it hard to take this rationale seriously.

Viewed as an end in itself, dissociated from the harsh realities of crime and punishment, judicial integrity seems a bootless and rarefied essence.[44] This explains why proponents of the integrity rationale sooner or later feel driven to augment the appeal for rectitude as an end with an appeal for rectitude as a means—a means to avoid setting "contagious" examples of lawlessness. One could illustrate this shift of emphasis from end to means by citing Justice Brandeis's *Olmstead* dissent,[45] but there is an illustration closer to hand in Justice Brennan's *Calandra* dissent. He speaks of the "twin goals" of the rule, one of which he describes as "avoid[ing] the taint of [judicial] partnership in official lawlessness."[46] This is presumably not the description of a desired effect, but rather the specification of what righteous courts do, and is thus a way of saying that exclusionist courts which understand what they are doing treat judicial integrity as an end in itself. The other use of the rule, by contrast, is instrumental, for the court is also said to suppress unconstitutionally seized evidence in order to "minimiz[e] the risk of seriously undermining popular trust in government."[47] Partisans of the integrity rationale are induced by the vulnerability of the first argument to move to the second, and to shift their

44. Indeed, to the extent that judicial integrity is a quest for "splendid isolation," it is a fragmentation of government. *See* notes 100, 115, and 288 *infra*.

45. On the one hand is Justice Brandeis's concern about "contamination." 277 U.S. at 484. On the other hand is his wish "to maintain respect for law . . . [and] to promote confidence in the administration of justice." *Id.*

46. 414 U.S. at 357. *See* text accompanying note 7 *supra*.

47. 414 U.S. at 357.

concern from intrinsic value to consequences. But in so doing they begin to play their opponents' game, which, for emotional and rhetorical reasons, they are bound to lose.

The trouble is that in any real contest between "Law and Order" or "Crime Control"[48] on the one hand, and the "Rule of Law" or "Due Process"[49] on the other, "Law and Order" has the immense advantage of appealing simultaneously to fears, to instinctive "utilitarianism," and also to instinctive "retributivism." Edward Barrett, for example, has demonstrated the weakness of the judicial integrity rationale simply by asking a question:

> Suppose a policeman by an illegal search has obtained evidence which establishes the defendant as a peddler of narcotics to juveniles. Where lies the duty of the judge? Can we assume from any general social point of view that the policeman's conduct is so much more reprehensible than the defendant's, that the duty of the judge is to reject the evidence and free the defendant?[50]

If one is not prepared to recognize a personal constitutional right in the party aggrieved, one stands exposed to Barrett's appeal to the "general social point of view." If one is also reluctant to rely on the deterrence argument, it becomes necessary to argue in effect that judicial lawlessness is contagious and threatens our institutions. We ourselves think that there is much plausibility in this latter claim, but we also feel obliged to acknowledge that it is a speculation—which, furthermore, can be countered by another claim, perhaps equally speculative, but more than equally compelling. If proponents of the exclusionary rule say judicial lawlessness is a societal menace, the rejoinder is, why not risk that menace rather than the far worse danger of lawlessness in the streets? After all, the effects of governmental lawlessness are remote and easily overlooked. Even now one may safely assume that Americans are more afraid of the corner mugger than they ever were of the entire "Watergate Gang." For every Brandeis or Brennan who sees the government "imperilled if it fails to observe the law scrupulously,"[51] or believes the repeal of the exclusionary rule would threaten "the very foundation of our peoples' trust in their Government on which our democracy

48. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968) [hereinafter cited as PACKER].

49. *Id.*

50. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 582 (1955) [hereinafter cited as Barrett].

51. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J.).

rests,"[52] one can find a Burger who speculates, at least as persuasively,

> that we may have come the full circle from the place where Brandeis stood, and that a vast number of people are losing respect for law and the administration of justice because they think that the Suppression Doctrine is *defeating* justice.[53]

Few are bold enough to deny that something serious *is* happening when "a majority—or even a substantial minority—of people in any . . . community . . . come to believe that law enforcement is being frustrated by what laymen call 'technicalities.' "[54] Few would deny that the resulting "sour and bitter feeling . . . is psychologically and sociologically unhealthy."[55]

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52. United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J.).

53. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 22 (1964).

54. *Id.*

55. *Id.* John Kaplan has more recently said:

> The solid majority of Americans rejects the idea that "[t]he criminal is to go free because the constable has blundered." Indeed, this public dissatisfaction has recently become a major political force. Public opinion polls have shown an extremely high rate of disapproval of the courts for their role in "coddling criminals," and the prototype of these complaints is enforcement of the exclusionary rule.

Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1035-36 (1974) (footnotes omitted) [hereinafter cited as Kaplan]. Kaplan makes explicit what is implicit in the Chief Justice's statement, namely, that the "need for retribution" can be the factual premise of a utilitarian argument against the rule. As Kaplan says:

> [O]ne must acknowledge that the exclusionary rule often allows a criminal to escape punishment. Though one may scoff at the need for retribution as irrational, hypocritical, and old-fashioned, it seems to lie deep within the human psyche. The frustration of a popular need for retribution is another factor that must be considered in making a utilitarian calculation of the cost of the exclusionary rule.

Id. at 1035.

We agree with Kaplan that a government ignores the punitive impulse at its peril. We are tempted to say in addition, however, that Kaplan's apology for the "need for retribution" as possibly "irrational" suggests that the phenomenon he has in mind is as much the desire for vengeance as it is the need to punish. If this is his thought, there is reason to resist a simple capitulation to the impulse and to demand that some attention be given by the government to educating the people about the rule of law and the meaning of punishment—and that the government also try to meet the conditions any government must fulfill to qualify itself as an authority dispensing punishment rather than as a mere power or enemy committing "acts of hostility." *See, e.g.*, T. HOBBES, LEVIATHAN 202-09 (Oakeshott ed. 1947). And, it might be suggested, lawful conduct by the government in its criminal prosecutions is one of those conditions. We suspect, however, that Kaplan would be impatient with the tendency of this suggestion. For, if one pursues it, it will be seen to eventuate in a call for the exclusionary rule as one of the ways courts, as part of the government, help the government to maintain its

In sum, then, when judicial integrity is promoted as an end in itself it can be made to seem like irresponsible puerility, and when an appeal to consequences is made it can be met with

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lawfulness and hence its genuine authority and right to punish. But the exclusionary rule frustrates the need for retribution and agitates public opinion, and Kaplan is more worried about public opinion than about formal "moral authoritativeness." Kaplan is concerned about real problems of politics and government—the "silent majority" and the angry police, Kaplan, *supra* at 1038, "reality on the streets," *id.*, and the long-term "political trend," *id.* at 1040-42. Given these concerns (and, one supposes, a healthy fear of the mob violence, assassination squads, and men-on-horseback that are the natural sequelae of public disquietude about crime, *see* A. Lincoln, *The Perpetuation of Our Political Institutions*, in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 76 (R. Basler ed. 1946), it is surely understandable why Kaplan and any other sensible person might be impatient with a theory of the exclusionary rule which denies courts the constitutional freedom to judiciously and prudently employ, amend, suspend, or repeal the exclusionary rule in the interest of deterring the police, if that be possible, or of avoiding political backlash. Kaplan has written his article to claim such a freedom for the courts, and to give them advice in the use of it.

Kaplan dismisses arguments for the exclusionary rule based on "fundamental constitutional implications." Kaplan, *supra* at 1030. He insists that

> [t]he argument for the exclusionary rule must stand or fall simply on the basis of its demonstrated utility. . . . [T]he exclusionary rule is merely one arbitrary point on a continuum between deterrence of illegal police activity and conviction of guilty persons. As a stopping point, it can be justified solely on the ground that it achieves a better balance between these twin goals than would other points. If another stopping point does the job better, it should replace the current exclusionary rule.

Id. at 1029-30. The utility of the rule is its efficacy as a deterrent discounted by its deleterious side effects. Thus "the exclusionary rule [is worse than useless because], as structured today, its benefits in protecting the privacy of the citizen are outweighed by its associated costs in political hostility and reduced crime control." *Id.* at 1032.

But apprehension about the political repercussions of employment of the rule does not prompt Kaplan—as it does Chief Justice Burger, *see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 420 (1971) (dissenting opinion)—to call for *blanket* repeal of the rule. He proposes instead to restructure the rule to protect privacy without exacerbating political hostilities—to repeal it *selectively* and save the remainder for what he thinks can be a salutary role. He would forestall political backlash by admitting illegally obtained evidence "in the most serious cases—treason, espionage, murder, armed robbery, and kidnapping by organized groups," Kaplan, *supra* at 1046, reserving exclusion for lesser but more numerous crimes, *id.* at 1048, including those "nonvictim crimes" which most frequently provoke invasions of privacy. *Id.* at 1048-49.

The thesis of this Article is that proposals like Kaplan's are grounded on a faulty premise. We shall argue that, unless "the Constitution is what the judges say it is," it does not leave the Court at liberty to take or leave just so much of the exclusionary rule as it pragmatically chooses. We shall argue that the exclusionary rule *is* a fundamental constitutional implication and that it is therefore not susceptible of repeal—

equally damaging speculation from the other side.[56] Considering the weakness of the integrity argument as it stands, one can see why it gives way to the deterrence argument. In defense of this succession, it can be said that at least the deterrence rationale does not seem puerile, and that the evils of police misconduct it proposes to ameliorate are more palpable and less speculative than the evils addressed by the judicial integrity rationale. But it is precisely this forthright relationship of the deterrence rationale to police behavior which can turn the rationale into a threat against the exclusionary rule. *Calandra* shows that the very features of the argument which served the Warren Court in implementing the rule can serve the Burger Court in dismantling it.

The exclusionist court leaves itself vulnerable to two lines of attack by adopting the deterrence rationale. The first weakness of this rationale derives from its being a concomitant of the fragmentary model. The core implication of the fragmentary model is that courts have no constitutional duty to exclude evidence. So, to be honest and consistent with their model, deterrence theorists must acknowledge that they regard the exclusionary rule as what Justice Powell calls a "*judicially created* [deterrence] remedy."[57] But, this acknowledgment means that evidence is being excluded and prosecutions are being thwarted by something like judicial fiat. Disclaiming any constitutional *duty* to exclude unconstitutionally seized evidence, deterrence theorists like Justice Powell create a doubt about the court's *authority* to employ the remedy it has created. When the court acknowledges that it has no *constitutional* business excluding evidence, the suspicion naturally arises that it has *no business at*

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blanket or selective. In short, we shall defend a way of looking at the rule which—in contrast to the view of Kaplan, Justice Powell, and the great majority of commentators, *see* note 109 *infra*—can be characterized as rigid and impolitic.

See Part VIII *infra* for some remarks on constitutional rights and public necessities. See note 276 *infra*, where we discuss Kaplan's reasons for believing the exclusionary rule is not a "fundamental constitutional implication."

56. One can be sure that prophecies of evil consequences which sound the least bit portentous will be ridiculed by critics of the judicial integrity rationale. For example, in *Calandra* Justice Powell takes note of Justice Brennan's concern "that today's decision will betray 'the imperative of judicial integrity,' . . . and even 'imperil the very foundation of our people's trust in their Government.'" 414 U.S. at 356 n.11. Powell responds that "there is no basis for this alarum. . . . [T]he foundations of the Republic [will not be] imperilled . . . by declining to . . . [enforce] the exclusionary rule . . . [in] grand jury proceedings." *Id.*

57. *Id.* at 348 (emphasis added).

all excluding evidence. Indeed, the charge comes easily that the exclusionist court is guilty of injudicious intermeddling with what is solely the business of the executive—regulation of its employees, the police—coupled with dereliction of the court's own duty of keeping its doors open to all competent evidence. Indeed, fragmentary premises make it easy for admissionists to characterize exclusion of unconstitutionally seized, competent evidence as a gratuitous interruption of the natural flow of articles and information from the procurer to the fact finder. The court is pictured as neglecting its own job of facilitating that flow on the speculation that it can diminish evil in a realm out of its ken.[58] The seeds of the exclusionary rule's destruction are planted by everyone, opponent or proponent, who adopts the fragmentary model of a government and a prosecution.

The second line of attack on the deterrence rationale begins with the observation that the exclusionary rule simply does not deter. The deterrence rationale as an argument *for* the exclusionary rule depends upon a certain minor premise. Before *Mapp*[59] that premise was supplied by a vague hope that the rule would deter, or by the assumption that it was the most promising deterrent available. But after a decade of experience with *Mapp*, the belief of knowledgeable observers, confirmed by the results of studies, is that the rule does not deter,[60] or does not deter sufficiently to compensate for its costly side effects.[61] With deterrence minimal[62] and adverse side effects apparently substan-

58. *See, e.g.*, Burger, *supra* note 53; Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 369-85 (1939) [hereinafter cited as Plumb]; Wigmore, *supra* note 16, at 479.

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

60. *See, e.g.*, Oaks, *supra* note 43, at 672-736, and authorities cited therein.

61. The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police.

Id. at 755. Other untoward consequences mentioned by Oaks are (1) weakened substantive search and seizure rules, (2) intolerable delays in the administration of justice, (3) greater reliance on plea bargaining, (4) police immunization of criminals, (5) police imposition of extra-judicial punishment, and (6) retarded development of alternative remedies. *Id.* at 747-54. For a brief but provocative discussion of Oaks's findings, see Amsterdam, *supra* note 28, at 475 n.593.

62. We shall assume without further argument that the exclusionary rule is ineffectual as a deterrent, because our argument for the rule is not related to deterrence. We are not indifferent to deterrence; we just believe that it is not dispositive and that it has been overemphasized

tial, it remains only to draw the conclusion that the rule is not justified and must be repealed—a conclusion wished for by the Chief Justice in *Bivens*,[63] forsworn by Justice Powell in *Calandra*, but predicted by Justice Brennan.

III. THE SIGNIFICANCE OF RIGHTS AND THE TWOFOLD ORIGIN OF THE EXCLUSIONARY RULE

Both the judicial integrity and the deterrence rationales leave the exclusionary rule vulnerable to repeal. Although spokesmen for the judicial integrity rationale avoid the shortcomings of the fragmentary conception of a prosecution, they nevertheless tend to assume, as do the proponents of the deterrence rationale, that the defendant is not constitutionally entitled to suppression of evidence unconstitutionally seized by the government. They tend to assume that if the evidence is suppressed the defendant is merely the accidental beneficiary[64] of an exercise of the "supervisory power"[65] in his case; this assumption is their undoing.

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to the detriment of other urgent, indeed constitutional, considerations which *are* properly dispositive.

63. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 420 (1971) (dissenting opinion).

64. One can also refer to the defendant as a "triggering mechanism" or, with Chief Justice Burger, as a "private attorney general." The passage from which this latter characterization is taken testifies eloquently to the weakness of the judicial integrity-supervisory power theory of the exclusionary rule:

> Since the Suppression Doctrine constitutes the defendant in a criminal case as a sort of private attorney general to keep the stream of justice pure, it is easier to understand the police reaction when the defendant succeeds in turning the tables and puts the police department in the dock.

Burger, *supra* note 53, at 12. In note 171 and Part VIII *infra*, we consider the differences in police and public attitudes toward the exclusionary rule that could result from viewing the defendant as an individual demanding that the government live up to the Constitution in its prosecution of him. For additional references to the exclusionary rule understood on the basis of a private attorney general model, see Oaks, *supra* note 43, at 671 n.25.

65. We refer to *the* "supervisory power" in the singular even though the argument has correctly been made that there are two or three different judicial activities going on under this rubric. *See* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193-94 (1969) [hereinafter cited as Hill]. Provisionally, we shall mean by "supervisory power" an authority the appellate courts have claimed for themselves to review the conduct of lower courts in their own system when that conduct is challenged by a litigant, or independently questioned by the appellate court, on nonconstitutional grounds. The clearest extant discussion of the power is Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963). The most profound treatment is Hill, *supra*.

Justice Brandeis resorted to the supervisory power in his *Olmstead* deliberations only after he had looked for, and failed to find, a personal right to exclusion.[66] Justice Brennan in *Calandra*, on the other hand, seems to have assumed from the beginning that the judicial integrity-supervisory power rationale was his only serious option. He does not really seem to have considered the possibility of a constitutional exclusionary right[67] —and this omission occurs in spite of the fact that Justice Powell had sharply drawn attention to the difference between the exclusionary rule understood as a "judicially created" supervisory power phenomenon and the rule understood as a "personal constitutional right of the party aggrieved."[68] We intend, first, to mark the importance of this difference for a proponent of the exclusionary rule like Justice Brennan, who needs constitutional reinforcement in order to overcome the "balancing" approach of Justice Powell.[69] Second, we desire to correct the impression Justice Brennan leaves, intentionally or not, that all the judges he calls "the framers of the rule"[70] conceptualized the problem of improperly seized evidence the same way, or that the exclusionary rule has a single historical origin in the judicial integrity-supervisory power rationale.

A. The Difference a Right Makes

We shall argue that there is a personal constitutional right to exclusion—indeed that there are two such rights.[71] To show what the point is in so arguing, we shall begin by addressing the ideological partisan of the exclusionary rule, indicating to him why his defense of the rule will be stronger when cast in rights rather than in integrity-supervisory power language. But we shall then go on to show that brief reflection on the superiority of the appeal to rights over the appeal to the court's discretion will suggest to the proponent of exclusion how he can and

66. *See* text accompanying notes 91-102 *infra.*

67. *See* note 14 *supra.*

68. 414 U.S. at 348.

69. Justice Powell uses the balancing metaphor, *id.*, and in fact does balance the deterrence benefit likely to accrue from enforcement of the exclusionary rule in the grand jury against predictable harm to the grand jury from interruptions caused by suppression hearings. *Id.* at 349-52. But this balancing is not in service of *constitutional* adjudication, because Powell begins from the premise that no constitutional right is involved, *id.* at 348; rather, it is "*pragmatic*" balancing by the Court in the exercise of its supervisory power. *See* note 171 *infra.*

70. 414 U.S. at 357.

71. For an exposition of the two rights thesis of this Article, see text accompanying notes 138-39 *infra.*

why he must transcend the level of mere partisanship, or why he would not merely use the rights argument in the service of partisanship, but would rather be a partisan of exclusion because it is a right.

In a regime of rights consciousness, if not also in civil or law-governed life as such,[72] there is awareness that the appeal to a right is different from, if not always and in every respect stronger than, the appeal either to grace or to the general welfare. As Joel Feinberg has put it with respect to grace:

> Rights are not mere gifts or favors, motivated by love or pity, for which gratitude is the sole fitting response. A right is some-

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72. By "regime of rights consciousness" we refer to the special prominence rights—natural, moral, human, and constitutional—have had in the thought and speech of Western man since Hobbes, or at any rate since his step-grandchild, the French Revolution. Of Hobbes's political doctrine, Leo Strauss wrote as follows:

> Since the fundamental and absolute moral fact is a right and not a duty, the function as well as the limits of civil society must be defined in terms of man's natural right and not in terms of his natural duty. The state has the function, not of producing or promoting a virtuous life, but of safeguarding the natural right of each. And the power of the state finds its absolute limit in that natural right and in no other moral fact. If we may call liberalism that political doctrine which regards as the fundamental political fact the rights, as distinguished from the duties, of man and which identifies the function of the state with the protection or the safeguarding of those rights, we must say that the founder of liberalism was Hobbes.

L. STRAUSS, NATURAL RIGHT AND HISTORY 181-82 (1953) (footnotes omitted). Writing of the same phenomenon, Simone Weil referred to "[t]his bargaining spirit [which] was already implicit in the notion of rights which the men of 1789 so unwisely made the keynote of their deliberate challenge to the world." S. WEIL, SELECTED ESSAYS, 1934-43 at 18 (1962). *See also* Salkever, *Virtue, Obligation and Politics*, 68 AM. POL. SCI. REV. 78 (1974).

Our reference to "civil or law-governed life as such" is meant to suggest that assumptions about rights may necessarily underlie political and legal discourse even when that discourse is inarticulate about them, abstracts from them, or deemphasizes them in favor of duties. In commenting on the Greeks, H.L.A. Hart comes near to denying that the notion of a moral right is conceptually integral to the notion of a civil or legal order. H.L.A. Hart, *Are There Any Natural Rights?*, in POLITICAL PHILOSOPHY 54 n.2 (A. Quinton ed. 1967). Gregory Vlastos takes issue with him in Vlastos, *Justice and Happiness in the Republic*, in 2 PLATO: A COLLECTION OF CRITICAL ESSAYS 75 n.28 (G. Vlastos ed. 1971). Consider also Professor Dworkin's assertion:

> [Government officials] must show that they understand what rights are, and they must not cheat on the full implications of the doctrine [of rights]. The government will not re-establish respect for law without giving the law some claim to respect. It cannot do that if it neglects the one feature that distinguishes law from ordered brutality. . . . If the government does not take rights seriously, then it does not take law seriously either.

Dworkin, *Taking Rights Seriously*, in IS LAW DEAD? 168, 194 (E. Rostow ed. 1971). *See also* 2 *Samuel* 12:1-6.

> thing a man can *stand* on, something that can be demanded or insisted upon without embarrassment or shame.[73]

The relationship between the appeal to a right—let us now be more specific and say a constitutional right—and an appeal to the general welfare is more complicated. The right may have been acknowledged or declared in the Constitution at least partly because the framers believed that certain activity, for example political speech, is transcendently conducive to the general welfare, or part and parcel with it. Under this hypothesis, there is a utilitarian reason for giving an activity a privileged status, and that reason is precisely to prevent subsequent political suppression of the activity from being rationalized by appeals to the general welfare. Many critics of the "balancing" approach to the Bill of Rights have made this point, but none better than Justice Jackson:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[74]

Ultimately, however, the hypothesis that constitutional rights stem exclusively from utilitarian considerations is dubious.[75] For example, although freedom of expression may be regarded as a safeguard of "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"[76] or as generally indispensable to self-government,[77] this is not the

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73. J. FEINBERG, SOCIAL PHILOSOPHY 58 (1973).

74. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

75. Consider the relevance to a discussion of constitutional rights of Professor H.L.A. Hart's evaluation of Bentham's views on legal and moral rights:

> While disapproving of all talk of non-legal rights he allows . . . that it sometimes has a meaning, viz. when it is simply an obscure way of asserting that there are good utilitarian reasons for creating a legal right with its corresponding duty. But here it is important to stress that though we may often insist that certain legal rights should be created simply because we believe society in the aggregate will on the whole be better off if this is done, this is not what is meant by the assertion that someone has a moral right.

H.L.A. Hart, *Bentham*, 48 PROCEEDINGS OF THE BRITISH ACADEMY 316 (1962).

76. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

77. *See* G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 115-20 (1971); A. MEIKLEJOHN, POLITICAL FREEDOM (1960).

only reason for acknowledging a man's right to speak. Another is that he thinks he has something worth saying. And in general it can be said that the utilitarian reasons adduced for giving constitutional acknowledgment to various rights do not satisfactorily account for the reactions when those same rights are violated. When a property owner is denied fair market value in condemnation proceedings, or a Black Muslim is denied his mode of worship, or an accused is prevented from confronting his accuser or is placed repeatedly in jeopardy, the observer wants to say that wrongs have been done to the person entirely apart from the general welfare.[78]

78. There are two anti-personal rights arguments in the fourth amendment literature that cannot be classified as attempts to assimilate rights claims to utilitarian statements. One, which we shall discuss in note 85 *infra*, is that a person's right to privacy may be forfeited by criminal "abuse" of that privacy. The other is that, in the interest of securing privacy and "persons, houses, papers, and effects" against their natural enemy—the police—we should agree to treat the fourth amendment as a regulation of the police rather than as a repository of individual rights. Professor Amsterdam—the author of this latter proposal—can be said to argue for it somewhat as follows.

The fourth amendment *is* what it does. But what it does, it does through the exclusionary rule, and the exclusionary rule is administered to deter or regulate the police. Although courts pay "lip service to the view that the fourth amendment is a collection of portable little spheres of interest in which you and I and the defendants plunge about like swimmers in so many diving bells," Amsterdam, *supra* note 28, at 369, in reality they are treating the amendment (through the rule) as "a general regulation of police behavior." *Id.* What courts should do is to admit "that the regulation of police behavior is what the fourth amendment is all about," *id.*, any judicial talk of personal rights of privacy to the contrary notwithstanding. They should admit as much because "it makes a difference whether regulation [of the police] is conceived to be the primary thrust of the amendment or a mere by-product of the amendment's protection of isolated enclaves of individual interest against invasion by particular police actions." *Id.* at 371. And the difference it makes, as Amsterdam shows with a variety of examples, is that privacy would be maximized if courts would treat the amendment as a police regulation, and would take their bearings from the norm of police conduct most conducive to the privacy of the people at large ("regulatory view," *id.* at 370) rather than from the rights of a given individual search and seizure victim ("atomistic view," *id.*).

If, as we suggest, Amsterdam makes the amendment over in the image of the exclusionary rule, it is the exclusionary rule understood according to deterrence premises that is the image. To be sure, Amsterdam deprecates simpleminded deterrence notions. *Id.* at 431. But, if one uses "deterrence theory" as we have used it in this Article—to signify any theory that ascribes to the exclusionary rule the purpose of controlling the police rather than the purpose of avoiding judicial furtherance of governmental wrongdoing—then it is clear that Amsterdam's "regulatory" theory is simply a systematized species of our deterrence genus. It is also clear that Amsterdam shows how the deterrence theory of the exclusionary rule has transformed, or will be allowed to transform, the amendment itself.

Now one can do as we have done and indicate why rights are constitutionalized and allude to the way people react when

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Amsterdam does not seem to want to transform the amendment into a simple utilitarian proposition, because the good or freedom he sees it maximizing—freedom from governmental intrusion—is not necessarily coterminous with the general welfare, *and* because he seems to place a right holder in the premises to resist surrender of fourth amendment rights to the general welfare. But, paradoxically, the right holder is the people at large, whose interest is usually thought to be closely related to the general welfare. "[W]hy," asks Amsterdam, "when the fourth amendment speaks of '[t]he right of the people,' is it thought to mean the 'personal rights' of isolated individuals? Why does it not speak of 'the people' as in 'We the People' or—since I am driving at the point that the amendment's purpose may be squarely to control the police—as in 'Power to the People'?" *Id.* at 367. One possible answer to this question is that solicitude for personal rights has been ascribed to the fourth amendment because it is hard to envision public bodies like constituent assemblies exercising the right of privacy. If "We the People," who performed that most public act of ordaining a Constitution, were, in that constituent capacity, to be the holder of the right of privacy, they would be a right holder who could never exercise the right.

If, however, the right holder is not "We the People," but—leaving "Power to the People" out of consideration for a moment—"just everybody," *i.e.*, all the privacy-experiencing individuals, then in what sense if at all has Amsterdam removed the right from the individual? Is each a proxy for all, or all for each? And in what capacity does a Webster Bivens (*see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)) sue, if he still *may* sue, for violations of (whose?) constitutional rights? (The one status that the Amsterdam proposal does not alter is that of the movant for suppression, who is already assumed by many judges and commentators to be a mere triggering mechanism or "private attorney general." *See* note 64 *supra.*)

Many of the characteristics of the Amsterdam proposal are traceable to its being an extrapolation from two situations in which "the people," as in "Power to the People," clearly are set over against an occupying army—revolutionary America and today's ghettos and barrios. Amsterdam, *supra* note 28, at 400. The obvious objections that might be lodged against interpreting the fourth amendment on the basis of the occupation model are, first, that even during wartime suspected Tories, fifth columnists, and police informers may arguably have rights against unjustified search and seizure—although, to be sure, "the People" will not acknowledge those rights; and, second, that after the revolution the people may become, for example, "The People of the State of New York," as in *People v. Jones.* And then, as is an extremely old story, the erstwhile collective right holder may wish to "waive" the rights it has been holding—in view of the radically new circumstances brought about by its becoming the government.

The idea of having a right violated is frequently associated with the idea of suffering some kind of wrong, and we often think that having a right is just that—a claim not to be wronged in a certain way. But, if "the people" is the right holder, how is it wronged, and hence how is its right violated, when the door of the suspected "pusher," spy, rapist, or murderer is kicked down on mere suspicion—especially if the suspect turns out in fact to be "an enemy of the people"? And if some mistakes are made, the people as a whole will not be wronged; or at any rate they will not be harmed—they will be benefited—by a practice of hunch

these rights are violated, and then prepare to apply these general conclusions about rights to the particular claim in issue, *i.e.*, the alleged personal constitutional exclusionary right. But, this circuitous approach is not necessary, because the forcefulness of the personal exclusionary right argument has been shown more directly, by an act as it were. In Edward Barrett's well-regarded critique of the exclusionary rule,[79] he eloquently attests to the power of a personal right argument by the lengths he goes to demonstrate the invalidity of that argument.

There are, Barrett says, three conceivable arguments for the exclusionary rule—deterrence, judicial integrity, and "the defendant['s] . . . right to exclusion."[80] He is able to dispose of the first two with relative ease. The deterrence argument is bad because exclusion does not deter.[81] The judicial integrity rationale, as Barrett finds it in the literature, can be made to seem derivative from or dependent on utilitarian, general welfare arguments, and can therefore be made to seem defeasible in face of stronger arguments for more urgent utilities. As he asks in a passage which bears repetition:

> Suppose a policeman by an illegal search has obtained evidence which establishes the defendant as a peddler of narcotics to juveniles. Where lies the duty of the judge? Can we assume from any general social point of view that . . . the duty of the judge is to reject the evidence and free the defendant?[82]

The personal exclusionary right argument, on the other hand, puts Barrett to considerably more trouble. Consider, he says, two celebrated bookmaking cases:[83]

> The police acted illegally in entering the defendants' homes. The defendants acted illegally in engaging in bookmaking in

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and harrassment, up to the point where the police become the greater threat to the security of the people than are the "criminal classes." But long before that point is reached, we will have moved from a rights to a utilitarian orientation.

In short, one should hesitate to embrace the Amsterdam regulatory proposal. It is difficult to see why we should look forward to a time when, to borrow Professor Dellinger's words, "the fourth amendment is [no longer to be] read . . . as conferring . . . a personal right to be free of unwarranted searches and seizures, and . . . [when] the justice that is due [under the amendment] is [no longer] justice to individuals . . . [but is] merely justice to formless groupings of the citizenry . . . ." Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1553 (1972) [hereinafter cited as Dellinger].

79. Barrett, *supra* note 50.

80. *Id.* at 579.

81. *Id.* at 582-88.

82. *Id.* at 582.

83. *Id.* at 579-81. The cases referred to are Irvine v. California, 347 U.S. 128 (1954), and People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

> their homes. . . . [I]f one were to look only to the rights of the defendants, why would it not be reasonable to take the position that by engaging in bookmaking within their houses they had waived their constitutional right to privacy and could in no event complain of the police entries . . . ?[84]

The breathtaking possibilities implicit in this suggestion show how far one intelligent admissionist felt he had to go to undermine any appearance of an exclusionary right—or what a healthy respect he has for the forcefulness of a rights argument. In his determination to discredit the exclusionary right he annihilates the coordinate right to be free from nonprobable-cause searches.[85]

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84. Barrett, *supra* note 50, at 581.

85. The passage quoted is one of the most remarkable utterances by a responsible commentator in all of the exclusionary rule literature and accordingly should be exhibited more fully:

> This concern with the rights of the defendant, it is submitted, will not withstand closer analysis. The constitutional provisions do not guarantee a right to commit crime within the four walls of one's abode secure from police intrusion. Rather, the import of the constitutional provisions is that the police shall not engage in indiscriminate searches where probable cause has not been clearly demonstrated. Hence they expressly recognize that pursuant to a search warrant properly obtained and sufficiently precise in its definition of the scope of the search, the police may search a person's dwelling, and even if he has not committed a crime and no evidence is found he cannot complain of violation of his privacy. Where the police have reasonable grounds for believing that an individual's right to be secure in his person, house, papers, and effects is being abused for the purpose of committing a crime, they may search him or his premises by following the proper procedure.
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> Consider, for example, the situations involved in the *Irvine* and *Cahan* cases. The defendants in those cases were using the privacy of their homes for the purpose of violating the laws against bookmaking. The police, instead of following the prescribed procedures and getting search warrants, made surreptitious entries and installed dictographs for the purpose of overhearing conversations. The police acted illegally in entering the defendants' homes. The defendants acted illegally in engaging in bookmaking in their homes. Why should they have any personal right to be freed from the consequences of their own illegal acts because of illegal police intrusions upon a privacy which they were abusing? In fact, if one were to look only to the rights of the defendants, why would it not be reasonable to take the position that by engaging in bookmaking within their houses they had waived their constitutional right to privacy and could in no event complain of the police entries—reserving, of course, a civil action for damages to recover for any unnecessary damages to property or violence to the person?

Id. at 580-81. It is uncertain whether Barrett confines this waiver potency only to crimes committed in private or—a different question—why he limits the waiver to the right of privacy. There may be some poetic justice in such a limitation, but are there good logical, moral, or legal reasons for coordinating the forfeiture so rigorously with the crime? If one can so readily lose his right to be free from promiscuous police invasions because of what those invasions reveal he has done in private, what besides arbitrary prejudice is to prevent the principle of waiver from

In effect, Barrett acknowledges that recognition of a right is usually tantamount to settlement of the moral question of

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having an effect also, for example, upon his right to silence, or his right not to be placed twice in jeopardy, or, for that matter, his right to due process of law?

Barrett has followed through consistently on the forfeiture theme by denying any civil recovery for the unprovoked invasion itself: the privacy abusers "could in no event complain of the police entries." But he does not explain why one who has abused his privacy retains his right against property damage or violence to his person. As Wigmore explained, in reply to Justice Holmes's characterization of the *Olmstead* wiretapping crime as "dirty business,"

> [b]ut so is likely to be all apprehension of malefactors. Kicking a man in the stomach is "dirty business," normally viewed. But if a gunman assails you, and you know enough of the French art of "savatage" to kick him in the stomach and thus save your life, is that "dirty business" for *you*?

Wigmore, *Constitutional Law—Fourth Amendment—Telephone Wire-Tapping as a Violation*, 23 NW. U.L. REV. 377, 378 (1928). With adoption of the doctrine of forfeiture (which is presumably antithetical to what Packer called "the doctrine of legal guilt," PACKER, *supra* note 48, at 166), the burden of justification shifts: whereas the practitioners of unconstitutional police methods had been on the defensive, now the proponents of due process are; for they are no longer able to show the point of constitutionalism or law-governed response to crime (there being no such point)—nor able to supply grounds for *not* identifying suspects as potential enemies of society subject to disqualification from the law-governed practice of punishment and vulnerable to mere "acts of hostility." *See* T. HOBBES, LEVIATHAN 202-09 (Oakshott ed. 1947). For a specification of one condition necessary to punishment, see Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 387 n.99 (1970). For remarks on enmity and acts of hostility *within* American due process of law, see *id.* at 384-86. Consider, in particular, the following observation on exclusionary rules:

> [A]mong the standard arguments for the exclusionary rules attached to the Fourth and Fifth Amendments is the necessity to find effective means of protecting *the innocent*—one sometimes wonders how much remains of the idea that guilty defendants, too, are entitled to have the integrity of their persons and homes protected.

Id. at 384-85 (footnotes omitted). *See also* note 55 *supra*. *But see* Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 673 n.49 (1961) ("Arguably, neither the exclusionary rule nor the fourth amendment which it was designed to enforce has as its purpose the protection of any but the innocent.")

Upon encountering Barrett's forfeiture doctrine, one might be tempted to say that one of the more perverse effects of the exclusionary rule is the dangerous arguments it provokes. But perhaps these arguments should be viewed as fundamental rather than dangerous: there is no denying that the controversy about the exclusionary rule gets down to fundamentals. The critic of the rule says the criminal must not go free because the constable blundered. The defender, on the other hand, says a constitutional government simply does not violate fundamental constitutional rights while enforcing the law. And Barrett asks, with reference to the defendant's erstwhile right to privacy, What right?

Or take another fundamental category, the relationship between means and ends. Justice Brandeis had tried to bring things to a head

what should be done where the right is validly claimed. But this is to acknowledge that, if a person considering the exclusionary rule controversy is persuaded that there is an exclusionary right, and if he experiences the ordinary moral response to a claim of right, then he will no longer view the rule merely as a measure about which reasonable men may differ, or which he can elect to either favor or disfavor for merely utilitarian reasons. If the proponent of exclusion—or for that matter the erstwhile opponent—recognizes a right to exclusion, and if he shares the general understanding of what that recognition entails, he will thereby see that utilitarian reasons *for* the rule are redundant and that utilitarian reasons *against* the rule are ineffective unless they are of a very special order of urgency. If there is a right to exclusion, the least one can say is that the burden of persuasion has been shifted to those who would repeal the rule,[86] and that the "balancing process" candidly employed by Justice Powell[87] is simply inappropriate.

But, in *Calandra*, Justice Brennan is not thinking that there might be an exclusionary right;[88] he is not thinking about the

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by insisting, with the admission of illegally obtained evidence in mind, that

> [t]o declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1927). Interestingly enough, one of the prominent critics of the exclusionary rule honestly believed that he could consistently call for admission and at the same time echo Brandeis's sentiment. According to William Plumb:

> The fact that evidence of crime was found by a search unlawful in its inception does not purge the search of its illegality. This much must be admitted. For we cannot accept the philosophy that the end justifies the means, that the *law-violating officer is to be excused* if his offense reveals another.

Plumb, *supra* note 58, at 377 (emphasis added, footnotes omitted). But Plumb can have it both ways and be an admissionist who denies that the end justifies the means only by fragmenting the governmental relationship and letting *the officer* take all the blame. Barrett, on the other hand, at least in the passage under consideration, does not fall back on the fragmentary model—he gets down to fundamentals by choosing one of the mutually exclusive propositions. For him, finding evidence of crime *does* purge the search of its illegality because the fact that a crime had been committed has made it impossible for there to *be* an illegal search (leaving aside the matter of excessive force). When Barrett suggests that the crime constitutes a waiver of the constitutional right to privacy, he *is* excusing the officer and he *is* saying that "a search unlawful in its inception" becomes legal because "evidence of crime was found by" it.

86. *See* text accompanying note 339 *infra*.

87. 414 U.S. at 348.

88. *See* note 14 *supra*.

way rights work; he is therefore not prepared to counter Justice Powell's balancing process—not prepared to react as he would if, for example, the same kind of reasoning were commended to him in a first amendment setting. Because of both an historical error and a conceptual mistake, Brennan assumes the truth of what Powell asserts, *i.e.*, that there is no personal right to the exclusion of unconstitutionally seized evidence.

B. An Historical Error

Brennan accuses Powell of forgetting "the historical objective and purpose of the rule."[89] It turns out, however, that there is not just one, but there are three historical understandings of the rule—the two judicial integrity-supervisory power approaches of *Olmstead*, and the fourth amendment personal right thesis of *Weeks*. Although Brennan quotes from the *Weeks* opinion, he ignores its personal exclusionary right holding,[90] leaving the impression that it is just another judicial integrity case, thereby helping to perpetuate the all but total present oblivion of the *Weeks* personal right alternative, just when defenders of the rule need to be sharply reminded of it.

Our own interest in the *Weeks* case does not stem, however, from a desire to supply an argument for beleaguered partisans of the rule. Our thinking is more ambitious than that. We want to revitalize understanding of the *Weeks* opinion because we think it contains both a correct interpretation of the fourth amendment and the best extant suggestion of the conceptual linkage between seizure and use of evidence. What ultimately needs to be done, and what we shall do in Part IV of this Article, is to show how Justice Day anticipated the one-government approach of the *Olmstead* dissents, and joined it with a personal right to support a unitary interpretation of the fourth amendment. But we will be in no position to appreciate the genius of the *Weeks* combination so long as we are unaware that there are separate elements to be combined. So in the remainder of this Part we shall simply and briefly distinguish between the integrity doctrine of the *Olmstead* dissents, and the personal right aspect of *Weeks*. For that purpose we must recall the different backgrounds of the opinions in those two cases.

Writing for a unanimous Court in *Weeks v. United States*,[91]

89. 414 U.S. at 356.
90. *Id.* at 357-58.
91. 232 U.S. 383 (1914).

an indubitable fourth amendment case, Justice Day recognized a personal fourth amendment right to exclusion. Although he expressed a serious concern for judicial integrity,[92] the ultimate point and the dominant moral thrust of his opinion was precisely the constitutional exclusionary right.[93] By contrast, the portions of the *Olmstead* dissents from which Justice Brennan quotes in *Calandra* and with which we are dealing here could not, in the view of their authors, be predicated on a constitutional exclusionary right, and therefore had to be predicated on judicial integrity or some other supervisory power rationale standing alone. Brandeis and Holmes perceived such a necessity because they were on the losing side of a controversy over whether the fourth amendment applied at all to wiretapping.[94] As they understood the effect of their defeat on the coverage point, it precluded them from making constitutional arguments for exclusion because the *Olmstead* majority had held that there was no constitutional violation in the procurement.[95]

Justice Brandeis devoted a section of his dissent to disputing the majority's denial of fourth amendment coverage to wiretapping, and a part of that section dealt with the theory under which he would have excluded the evidence had the coverage issue been decided his way.[96] Brandeis invoked the doctrine of *Boyd v. United States*,[97] under which the fifth amendment becomes, as

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92. *Id.* at 391-92, 394.

93. [T]here was involved in the order refusing the application [for suppression and return of the letters] a denial of the constitutional rights of the accused . . . . [I]n holding [the letters] and permitting their use upon the trial, we think prejudicial error was committed.

Id. at 398.

94. Olmstead v. United States, 277 U.S. 438, 479 (1928).

95. *But see* note 277 *infra*.

96. 277 U.S. at 477-79.

97. 116 U.S. 616 (1886). Justice Brandeis was not the last post-*Weeks* Justice to appeal beyond *Weeks* to *Boyd*. At least three Justices writing opinions on the exclusionary rule within the last fifteen years have apparently believed the *Weeks* doctrine is either beneath mention as a personal rights rationale for exclusion, or that it is in need of moral support from the *Boyd* doctrine. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 412-13 (1971) (Burger, C.J., dissenting); Mapp v. Ohio, 367 U.S. 643, 646-47, 657 (1961) (Clark, J.); *id.* at 661-63 (Black, J., concurring). Continued vitality of the *Boyd* doctrine is thus an impediment to clear thinking about the *Weeks* constitutional exclusionary rights thesis.

An 1863 Act, "the first [of its kind] . . . in this country . . . or in England," 116 U.S. at 622, "authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property." *Id.* at 622-23. Apparently

it were, the fourth's exclusionary rule. Thus he declined to follow *Weeks* and find exclusionary potency in the unaided fourth amendment. But he then went on to argue that the evidence

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this Act and its 1867 reenactment were unpopular, for in 1874 Congress repealed the search and seizure provisions, retaining only the subpoena-like compulsory process, augmented by the provision that, should the defendant "fail or refuse to produce [the papers demanded] . . . the allegations stated in the . . . motion shall be taken as confessed, . . ." *Id.* at 620, quoting Act of June 22, 1874, ch. 391, § 5, 18 Stat. 187. The Boyds were served under this statute in a forfeiture proceeding.

Concurring with the holding against the Government, Justice Miller urged a simple self-incrimination rationale for reversing the lower court's employment of this unconstitutional compulsion. 116 U.S. at 638-41. But, writing for the Court, Justice Bradley did not accept that simple, logical, and correct solution. Instead, he insisted on bringing the fourth amendment into the affair, *see, e.g., id.* at 621-22, 624-25, despite the absence, as Miller and countless commentators have pointed out, of either a search or a seizure. One repercussion of this almost inscrutable deed is especially noteworthy: Bradley does a great and revolutionary thing by getting courts to think about the exclusion of seized evidence; but in the very same motion he ties the fourth amendment so closely to the fifth, *id.* at 632-35, that, with the notable exception of *Weeks* and its progeny, judges have refrained from asking the fourth amendment to perform exclusionary labors single-handedly. In *Boyd*, Bradley seemed to be bringing the fourth to the aid of the already sufficient fifth, but the effect of what he did was to make later judges think the fifth had to be brought to the aid of the fourth. And one upshot of that prejudice is that present day opponents of the exclusionary rule think they have dispatched the constitutional personal rights basis for the exclusionary rule when they have discredited the *Boyd* fourth-fifth combination. Bradley both established and undermined the exclusionary rule in the same opinion.

Justice Black, one of the five-man majority in *Mapp*, justified his abandonment of Wolf v. Colorado, 338 U.S. 25 (1949), on his discovery, or new appreciation, of the *Boyd* fourth-fifth doctrine. Mapp v. Ohio, *supra*, at 661-63. Justice Clark, writing for the plurality in *Mapp, also* relied on the *Boyd* doctrine, along with the deterrence and judicial integrity rationales and the *Weeks* fourth amendment doctrine. *Id.* at 646-47, 657. *See also* Ker v. California, 374 U.S. 23, 30 (1963) (Clark, J.) ("In *Mapp v. Ohio* . . . we followed *Boyd v. United States* . . . which held that the Fourth Amendment, implemented by the self-incrimination clause of the Fifth, forbids the Federal Government to convict a man of crime by using testimony or papers obtained from him by unreasonable searches and seizures as defined in the Fourth Amendment. We specifically held in *Mapp* that this constitutional prohibition is enforceable against the States through the Fourteenth Amendment." (footnotes omitted)) *But see* Schmerber v. California, 384 U.S. 757 (1966); Rosenfeld, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship,"* 13 U.C.L.A.L. REV. 857 (1966). The credit Black and Clark extended to the *Boyd* doctrine provided Chief Justice Burger with an opportunity to discredit the personal rights approach to the exclusionary rule without ever having to discuss the *Weeks* fourth amendment analysis. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 414-15 (1971). *But see id.* at 412-13, where he mentions but misrepresents *Weeks*. Burger says there are three rationales for the rule: deterrence, *id.* at 413; the "sporting contest" theory, which

obtained by the Prohibition officers should have been excluded as a matter of judicial integrity, "[i]ndependently of the consti-

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is what he calls the judicial integrity theses of the Brandeis and Holmes *Olmstead* dissents, *id.* at 414; and finally:

> The exclusionary rule has also been justified on the theory that the relationship between the Self-Incrimination Clause of the Fifth Amendment and the Fourth Amendment requires the supression of evidence seized in violation of the latter. [citing opinions from *Boyd, Wolf,* and *Mapp*]
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> Even ignoring, however, the decisions of this Court that have held that the Fifth Amendment applies only to "testimonial" disclosures, . . . it seems clear that the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence. Mr. Justice Holmes once put it succinctly, "A party is privileged from producing the evidence, but not from its production." Johnson v. United States, 228 U.S. 457, 458 (1913).

Id. at 414-15. We agree with everything the Chief Justice says about *Boyd,* but we deplore the fact that he has been given an excuse by Black and Clark to even mention *Boyd,* to say nothing of deriving satisfaction from discrediting its doctrine.

Although Bradley's preoccupation with the evidentiary aspect of searches and seizures is a healthy counterpoise to the privacy preoccupation of much latter-day fourth amendment discussion, his evidentiary emphasis is clearly, even outrageously, excessive. (Indeed, Bradley's doctrine is a perfect caricature of the evidentiary transaction interpretation of the fourth amendment we offer in Part IV *infra.*) Not only is Bradley's opinion the source of the mere evidence rule, *see* Gouled v. United States, 255 U.S. 298 (1921), which has now been discarded, *see* Warden v. Hayden, 387 U.S. 294 (1967), but, because of its evidentiary preoccupation, it is shockingly casual about the invasion of privacy that is part and parcel with search and seizure. For example, trying to assimilate the subpoena characteristics of the 1874 Act to a search and seizure, Justice Bradley says:

> It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

116 U.S. at 622. One can say, indeed, that the meaning Bradley attaches to "search and seizure" in the fourth amendment is exactly coterminous with the meaning he gives to "*unreasonable* search and seizure," *id.,* because the hallmark he ascribes to each is the evidentiary "object and purpose," which is for him *per se* unreasonable. The search *is* a search for the same reason that it is unreasonable, and so "search" loses its generic quality and "unreasonable" ceases to be a term of distinction.

Although we have been critical of the Bradley opinion, perhaps there are grounds for Justice Brandeis's assessment that *Boyd* is a case that "will be remembered as long as civil liberty lives in the United States." Olmstead v. United States, 277 U.S. 438, 474 (1928). And perhaps Justice Brennan has explained why:

tutional question," because the evidence had been obtained in violation of state law.[98] And this was roughly where Justice Holmes joined him:

> While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant . . . . But I think, as Mr. Justice Brandeis says, that, apart from the Constitution, the government ought not to use evidence obtained . . . by a criminal act.[99]

> [T]he Court in *Boyd v. United States* . . . and in subsequent cases has commented upon the intimate relationship between the privilege against unlawful searches and seizures and that against self-incrimination. This has been said to be erroneous history; if it was, it was even less than a harmless error; it was part of the process through which the Fourth Amendment, by means of the exclusionary rule, has become more than a dead letter in the federal courts.

Abel v. United States, 362 U.S. 217, 255 (1960) (dissenting opinion) (footnotes omitted).

> 98. Independently of the constitutional question, I am of the opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime. . . . To prove its case, the government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue.

277 U.S. at 479-80 (footnotes omitted). Even Professor Hill, who is critical of the general pronouncements about judicial integrity-supervisory power door-closing in the *Olmstead* dissents, seems to agree that the *result* the dissenters call for is correct—because of the statutory violation by the officers:

> It was the criminal conduct, rather than distaste for wiretapping, which was the basis of the "unclean hands" contention of Justice Brandeis. The latter did indeed have strong words of condemnation for wiretapping, but this was solely in connection with the separate constitutional issue. As for Justice Holmes, he saw the Government's position as one of "pay[ing] its officers for [getting] evidence by crime," and then asking the courts in effect to act as accessories. It was this that he called "dirty business," rather than, as commonly assumed, wiretapping as such.
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> . . . . In general . . . the effect of a willful violation of state law by federal law enforcement officers would seem to be a proper subject for determination by the federal judiciary.

Hill, *supra* note 65, at 202.

99. 277 U.S. at 469-70. Justice Holmes was much closer to *Weeks* than was Justice Brandeis. Not only does he question the wisdom of Brandeis's reliance on *Boyd, see* note 97 *supra*, and the "penumbra of the Fourth and Fifth Amendments," but he also gives *Weeks* credit for overthrowing the key slogan of the fragmentary model:

> I am aware of the often repeated statement that in a criminal proceeding the Court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks v. United States . . . .

277 U.S. at 470-71. Holmes's fidelity to *Weeks* is also manifest in his opinion for the Court in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the core of which is simply a restatement of what he takes to be the *Weeks* principle, namely, that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that . . . evidence so acquired shall not be used before the Court . . . ." *Id.* at 392. *See* notes 111, 150, and 167 *infra*.

The judicial integrity argument of Justice Brandeis, being nonconstitutional, is also—or thereby—not a personal right argument. As Justice Brandeis says, the "clean hands" principle will be invoked "despite the wish to the contrary of all parties to the litigation.... The court protects itself."[100] This and the other

100. 277 U.S. at 485. This passage and its context have drawn fire from commentators, some of it justified, some not. For example, Justice Brandeis has been taken to task for invoking a private law principle—equitable at that—in a criminal law context. It has been said that he errs here because the government as prosecutor, unlike the complainant in equity, does not stand to gain personally by its unfairness or abuse of process. Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1070-71 (1965). Brandeis has also been criticized because the "criminal courts exist for the protection of society, and they fail this purpose, this duty, if they release a prisoner in the face of evidence of his guilt because another has failed the same duty." Plumb, *supra* note 58, at 378. In short, the clean-hands doctrine demands irresponsible self-indulgence from criminal courts.

But merely to quote Brandeis on the point is to show that he did not invoke the clean-hands doctrine naively. Brandeis had asked whether the Supreme Court would, "by sustaining the judgment below, sanction such conduct on the part of the Executive [as was revealed in the *Olmstead* record]," 277 U.S. at 483. His own response was that

> [t]he governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.

Id. at 483-84 (footnotes omitted). At all times cognizant of the difference between civil and criminal actions, Justice Brandeis was contending that the case for insisting on prosecutorial "clean hands" or fairness is more powerful than the counterpart case for purity of the private plaintiff—probably on two grounds. In Brandeis's words, "[o]ur government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example." *Id.* at 485. In addition, there is something about the "remedies . . . of the criminal law" that makes the "reasons . . . [for scrupulousness and fairness] compelling." If he had been of Holmes's mind about punishment, Brandeis would have insisted on a candid recognition that the criminal defendant and the state are in an openly adversary relationship because the state as plaintiff openly proposes to "profit" or "gain" at the expense of the defendant in a way that the official theory of civil litigation would deny to the private plaintiff, who is, after all, supposed only to keep or make himself whole. In a letter Holmes had said:

> If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, "I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises." I fear that the touch of sentiment that I notice in your political writing will be revolted at this, but personally I feel neither doubt nor scruple.

1 HOLMES-LASKI LETTERS 806 (M. Howe ed. 1953), quoted in J. KAPLAN,

differences we have noted or shall note between the *Weeks* opinion and the *Olmstead* dissents are not taken into account by Justice Brennan, who writes as if Justices Day, Brandeis, and

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CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 16 (1973). The inappropriateness of Brandeis's invocation of the clean-hands doctrine is not proved, then, by pointing, as do the Note writer and Plumb, to the fact that *Olmstead* was a criminal prosecution. For that is just a way of asking, not answering, what inference is to be made from the fact that it was a criminal rather than a civil case.

A more cogent objection to the clean-hands, judicial integrity exclusionary rationale is lodged by Professor Hill. It is that the courts do not have the authority to "close their doors" to, or thwart, prosecutions merely because of "Official Conduct Not Violative of Constitutional or Statutory Provisions, But Wrongful From a Judicial Perspective." Hill, *supra* note 65, at 199. Hill is arguing against a kind of governmental *fragmentation* that can result when the court goes beyond a proper unitary-model refusal to consummate unconstitutional or illegal governmental courses of conduct, and in addition makes itself unavailable for the trial of certain cases because it finds reprehensible the manner in which evidence has been obtained. *See* text accompanying note 44 *supra* and notes 115 and 288 *infra*. To be sure, Hill approves of the *result* in *Olmstead*, because the federal officers there were violating state statutes, Hill, *supra* note 65, at 202, 215; *see* note 98, *supra*; but he repudiates employment of the *Olmstead* "unclean hands" and "dirty business" *rationale* as was proposed by the dissents in On Lee v. United States, 343 U.S. 747 (1952) (a "wired informer" case), and in Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958) (entrapment cases). Hill, *supra* note 65, at 199-200, 210-12. Hill finds this kind of "the court protects itself" door-closing objectionable not merely because it thwarts the executive in the lawful exercise of its prosecutorial office, but also because it does so without "asserting judicial competence to establish standards to which the executive branch must conform." *Id.* at 204. "It is disingenuous to assert that no infringement upon executive prerogatives is involved when the courts do no more than withhold the process that is invoked by the executive in a criminal prosecution. . . . In general, enforcement of the criminal law is a responsibility of the executive branch, and judicial door closing intimately and directly affects the discharge of that responsibility." *Id.* at 203. But Hill is amenable to closing the door on an executive who violates a constitution or statute: "[U]nder our system of separation of powers it may not be within the province of the judicial branch, *aside from the construction of pertinent constitutional or statutory provisions*, to pass . . . judgments [of propriety] on the executive branch, or to impede executive programs on the basis of such judgments." *Id.* (emphasis added).

Hill's article is, among other things, a corrective to the Brandeisian-Frankfurterian "jurisprudence of avoidance": "the view of judicial authority here set forth limits the possibilities of avoiding the constitutional issue." *Id.* at 213. "In the absence of an independent judicial prerogative [the presence of which Hill denies], the courts must look to statutory or constitutional sources for rules of decision." *Id.* at 212. This means that practices like entrapment or the use of wired informers can be judicially challenged only as "denials of due process." *Id.* "The use of an appropriate adjective can introduce a constitutional issue into almost any case." *Id.*

If we understand Hill correctly, he is proposing something like the translation we shall argue for in Part VII of this Article, namely trans-

Holmes, whom he labels "the framers of the rule,"[101] cut their opinions from the same doctrinal cloth. Writing of these same three Justices, "the judges chiefly responsible for . . . [the rule's] formulation," Justice Brennan says "their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees."[102] This is meant to describe a thesis—the original thesis—to be defended against Justice Powell's innovation. The difficulty is that Justice Brennan cannot be accurately describing *the* original thesis because there was no single original thesis. As it turns out, neither does his language accurately describe the position of either Day or Holmes or Brandeis taken separately.

For Justice Day, as we shall see, the rule was not "an enforcement tool," but was *itself* a "Fourth Amendment guarantee." Or, to put it another way, the rule does not "*give* content and meaning to the Fourth Amendment guarantees," as Brennan says; it is *part* of that meaning. And, as for Justices Brandeis and Holmes, we have already noted that in the pertinent parts of their *Olmstead* dissents they were not even discussing the fourth amendment because they had conceded for purposes of the argument that the wiretaps did not violate the amendment. Accordingly, they were arguing for exclusion under the supervisory power. In short, Day's is a constitutional right holding, whereas Brandeis and Holmes made a supervisory power argument. And Brennan's inattention to this difference is detrimental to his argument because, losing sight of the difference, he never sees the right.

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lation of all concern for judicial integrity into due process language—with the corollary that if the challenged executive conduct does not fail the due process test, the courts must live with it. To the objection that compulsory constitutionalization of issues places a "great strain" on the courts in "hard cases," Hill has at least two replies: first, that in any case the nonconstitutional supervisory power does not extend to the states, *id.* at 213; and, second, that deciding cases on constitutional grounds need *not* be an intolerable strain, because, as he argues at length in his article, "[p]articularly in cases involving what may be called the procedural safeguards of the Bill of Rights, it should be recognized that alternative methods of implementation may be constitutionally acceptable." *Id.* This latter notion, which is shared by Kaplan, *supra* note 55, at 1030, is the only one of Hill's major contentions with which we disagree. It means, as Hill interprets it, that the exclusionary rule in search and seizure cases is both constitutional and yet negotiable, whereas we believe the rule is constitutional and not negotiable—rather, not negotiable *because* constitutional. *See* note 109 *infra.*

101. United States v. Calandra, 414 U.S. 338, 357-58 (1974).

102. *Id.* at 356.

IV. THE FOURTH AMENDMENT EXCLUSIONARY RIGHT

If Justice Brennan fails to articulate a fourth amendment exclusionary right, he at any rate says relatively little that would be incompatible with one. Justice Powell, on the other hand, not only denies that exclusion is "a personal constitutional right of the party aggrieved,"[103] but he also provides an interpretation of the fourth amendment which makes such a denial inevitable. In this Part, we shall contrast Powell's interpretation to Justice Day's construction of the amendment in *Weeks*, a construction which compels the claim that there is a constitutional right to exclusion.

A. Justice Powell's "Invasion" Interpretation

The idea of a fourth amendment exclusionary right is implausible if not preposterous in light of a fragmentary interpretation of the amendment.[104] The fragmentary interpretation, which can also be called the "invasion" theory of the amendment, was accepted by the Court at least as early as *Wolf v. Colorado*,[105] and it is totally in command of Justice Powell's *Calandra* opinion. According to this construction, the executive is the sole addressee of the fourth amendment: courts are addressed only as warrant-issuing magistrates. The executive is the only branch of government to which the amendment speaks because it is the only agency which is capable of violating the imperative of the amendment by unreasonably invading privacy or unreasonably violating the security of "persons, houses, papers, and effects." Such invasions occur "out in the field" where courts do not go, and where they therefore have no responsibility. Without responsibility for the search and seizure, the court cannot have a duty to exclude improperly obtained evidence from the defendant's trial. And where there is no duty, there is no corresponding right.

Justice Powell's clearest statement of the invasion theory of the fourth amendment occurs in a section of his *Calandra* opinion where he is answering the claim of Calandra's counsel that "each question asked of the Respondent before the grand jury, which question was only asked because of a past violation of the Fourth Amendment, [amounts to] a new, immediate violation of the Fourth Amendment."[106] By "new . . . violation" counsel appar-

103. *Id.* at 348.
104. *See* Part I *supra.*
105. 338 U.S. 25 (1949).
106. 414 U.S. at 353 n.9.

ently meant a fresh inroad on Calandra's privacy, for he spoke of "an additional intrusion." But, as Justice Powell observes by way of clarification, since privacy-invading grand jury questions of a witness are not as such unconstitutional, counsel's argument is coherent only if he means

> not merely that the grand jury's questions invade his [client's] privacy but that, because those questions are based on illegally obtained evidence, they somehow constitute distinct violations of his Fourth Amendment rights.[107]

Needless to say, Powell rejects the contention as he clarifies it. His reason for thinking that a use of unconstitutionally obtained evidence cannot be a distinct violation of a fourth amendment right is of special moment to us because we propose to argue precisely the contrary.

Justice Powell's answer to Calandra's counsel is that counsel has confused categories by suggesting that there is a *right* to exclusion when he should have realized that fourth amendment rights relate only to the search and seizure, leaving subsequent events in the realm of "remedies":

> Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong. Whether such derivative use of illegally obtained evidence by a grand jury should be proscribed presents a question, not of rights, but of remedies.[108]

By saying it is a question of remedies, he means it is a question of judicial discretion in the use of the Court's supervisory power.[109] As we have observed, the rationale of *Calandra* is that,

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107. *Id.* at 353-54.

108. *Id.* at 354. Justice Powell's repeated reference to "*derivative* use" might tempt one to believe he is implying that whereas derivative use, such as that before the grand jury in *Calandra*, is not constitutionally prohibited, direct (evidentiary) use would be. But that is *not* what he is implying—he is *not* suggesting that if he were faced with non-*Calandra* facts involving a more direct use of evidence in a grand jury proceeding, or at a trial, he would there recognize an exclusionary right. He makes short work of the direct/derivative distinction: "The same considerations of logic and policy apply to both the fruits of an unlawful search and seizure and derivative use of that evidence, and we do not distinguish between them." *Id.* at 354-55.

109. On the supervisory power generally, see note 65 *supra*. Here we want to draw attention to the fact that the constitutional right/supervisory power dichotomy which informs our criticism of Justice Powell's *Calandra* opinion throughout this Article is repudiated by much of the scholarly literature. The authors of this literature resist the notion that a particular rule or result must issue from *either* the Constitution *or* the supervisory power. They want to say instead that the supervisory power can be used in the service of the Constitution—or at any rate of "constitutional values"—and that when it is so used it gains legitimacy from

whatever may be said about the deterrent effect of exclusion at trial, not enough can be said for its deterrent effect in the grand jury to "outweigh" the predictable "damage to . . . [the grand jury] institution," and that therefore a grand jury exclusionary rule would be bad "policy," bad remedial law.[110]

Justice Powell asserts that the use of evidence "work[s] no new Fourth Amendment wrong," because

> [t]he purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. *That wrong . . . is fully accomplished by the original search without probable cause.*[111]

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the Constitution without, however, giving rise to rigid constitutional rules. With respect to the exclusionary rule in particular, they want to say just what Justice Powell says—that it "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 348.

Professors Kaplan and Hill, representatives of the school of thought to which we refer, reject the dichotomy from which we are working by calling the exclusionary rule "quasi-constitutional"—appropriate because "the Constitution demands something that works—presumably at a reasonable social cost," Kaplan, *supra* note 55, at 1030, but replaceable when it appears that another "remedial or prophylactic" device "does the job better." *Id.* *See* Hill, *supra* note 65, at 182-87; Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 64-66 (1968). *But see id.* at 38-39 & n.208. We are not persuaded that the exclusionary rule belongs in the class of "temporary expedients" with, for example, the "safeguards" of Miranda v. Arizona, 384 U.S. 436, 444-45, 490 (1966), which are exemplary "quasi-constitutional" rules for both Kaplan and Hill. Hill, *supra* note 65, at 185-86; Kaplan, *supra* note 55, at 1030. An alternative stated by Hill helps us briefly to articulate our conclusion: whereas we deny that "the essential purpose of the rule is to advance implementation generally by deterrence of police violations," we affirm that the exclusionary rule is "so integral an aspect of a constitutional right as not to permit of substitutes"—the Constitution "requir[ing] that persons be immune from prosecution on the basis of illegally-seized evidence . . . [and] the exclusionary rule [being] . . . constitutionally mandated in a way that hardly permits of substitutes." Hill, *supra* note 65, at 184-85. The best scholarly articulations of the thesis that the exclusionary rule is integral to the Constitution are Dellinger, *supra* note 78, at 1559-63; Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 747-52 (1966); and Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 NW. U.L. REV. 1, 20 (1950).

110. 414 U.S. at 354. *See* text accompanying notes 1-6 *supra*.

111. 414 U.S. at 354 (emphasis added). *Accord*, Plumb, *supra* note 58, at 376. *See also* note 118 *infra*. Professor Amsterdam cites this *Calandra* passage and its context in his sequel to the unitary model passage we quoted in note 28 *supra*. The sequel reads as follows:

> The admission of unconstitutionally seized evidence is therefore not, as the critics of the exclusionary rule assume, merely

This is no more than an attempt to read the fragmentary model into the fourth amendment, the barely suppressed argument being that, because the executive and not the court or grand jury

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> 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. [citing *Calandra*] 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 that I questioned in my first lecture. The atomistic conception is, I think, too narrow.

Amsterdam, *supra* note 28, at 432 (footnotes omitted). We refer to Amsterdam's contrast between the "atomistic" and the "regulatory" views of the fourth amendment in note 78 *supra*. In that note we observe that, far from being opposed to the deterrence rationale for the exclusionary rule, the regulatory view of the amendment is a radicalization of that rationale. If theories of the fourth amendment be categorized according to whether, on the one hand, they ascribe to the courts a constitutional exclusionary obligation, or, on the other, they merely expect courts to employ exclusion to induce the police to meet *their* constitutional obligations, the regulatory view belongs in the latter "remedial" or "instrumental"—or what from the beginning we have called the supervisory power-"deterrence"—category.

But in the passage just quoted, Amsterdam seems to be repudiating precisely the deterrence or instrumental theory. To complicate matters, he casts out the deterrence theory of the rule as part of what he calls the "atomistic" understanding—the understanding that attributes solicitude for personal rights to the fourth amendment. In other words, he associates the deterrence theory of the rule with what appears to be exactly the understanding of the amendment that we are opposing to the deterrence theory. Furthermore, the atomistic view as it is presented in this passage sounds very much like what we have labelled the "fragmentary" theory of a government, a prosecution, and the fourth amendment. In sum, it looks as if Amsterdam is denying the possibility of that combination of unitary and personal-rights thinking on which this Article stands or falls. At the very least, there must be some sorting out of ideas just to establish what the differences are between Amsterdam's position and our own.

The "atomistic" view of the amendment criticized by Amsterdam shares a decisive premise with the fragmentary, "invasion" theory of the amendment we are faulting: each limits an individual's fourth amendment rights to freedom from the original invasion. The "atomistic" view is held by those, like Justice Powell, who not only "atomize" "the people" into individuals with personal rights (we ourselves do that) but who also pursue the fragmentary strategy of denying the existence of a single governmental course of conduct—from procurement to use of evidence—against which persons have a right. *See* text accompanying notes 112-22 *infra*. There is, however, another personal rights thesis—one that builds on rather than destroys the unitary view. It insists that the individual has a personal right to expect the whole government—courts emphatically included—to avoid involvement in unreasonable searches and seizures. We shall discuss one version of this unitary personal rights position here in Part IV as the "*Weeks* evidentiary transac-

is the invader, and because the "invasion" is the sole fourth amendment violation, the court or grand jury is not morally or constitutionally implicated and can therefore in good conscience make use of the evidence itself.

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tion" interpretation of the fourth amendment. In anticipation of that discussion we shall merely note that Justice Holmes, the most vivid spokesman for the kind of unitary thinking Amsterdam recommends in the passages quoted in this note and in note 28 *supra*, was a faithful adherent of the *Weeks* evidentiary transaction personal exclusionary right thesis. For example, he made it the core of his opinion for the Court in Silverthorne Lumber Co. v. United States, 251 U.S. 358 (1920). When one abstracts from the derivative use aspects of that case, and focuses on Holmes's restatement of the *Weeks* paradigmatic principle, it reads as follows: "The essence of a provision forbidding the acquisition of evidence in a certain way is that . . . evidence so acquired shall not be used before the Court . . . ." *Id.* at 392. And, so far as we know, it never occurred to Justice Holmes to question, in a constitutional case like *Silverthorne* (as contrasted with a nonconstitutional case like *Olmstead*, *see* text accompanying notes 94-102 *supra*), what it did occur to Justice Day to affirm in *Weeks*, namely, that refusal to suppress is "a denial of the constitutional rights of the accused." Weeks v. United States, 232 U.S. 383, 398 (1914). (On the *Silverthorne* opinion, see note 167 *infra*).

The real puzzle that Amsterdam creates in the passage under consideration is how he can share Justice Holmes's unitary vision so thoroughly—seeing admission of unconstitutionally seized evidence as the "linchpin of a functioning system of criminal law administration that produces incentives to violate the fourth amendment"—and yet fail to move with Holmes to the *Weeks* personal exclusionary right position, or at any rate to a notion of exclusion as an irreducible constitutional requirement. We think Amsterdam's general strategy of transforming the fourth amendment into something other than a personal rights provision is only partially responsible for his failure to follow Holmes. One more cause of his failure is that he reads *Weeks*, not as it is read by Holmes, but, for example, as it is read by Justices Black and Harlan, *see* notes 126 and 164 *infra*, and by the latest pure fragmentary model-deterrence theorist, Justice Powell. According to Powell,

> [t]he exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. Weeks v. United States . . . .
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> [T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures . . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

Calandra v. United States, 414 U.S. 338, 347-48 (1974). Compare this passage with the following characterization of the rule by Amsterdam:

> [T]he primary instrument for enforcing the fourth amendment has long been the exclusionary rule—a judicially fashioned doctrine that excludes the products of unreasonable searches and seizures from admission into evidence against those whose rights have been violated.

If we correctly understand Justice Powell's thesis, it is that what we shall be calling the "evidentiary transaction"[112] does not exist for moral and constitutional purposes, and that, therefore, searches and seizures are properly viewed in isolation from the evidentiary use of their products. Although Justice Powell would no doubt acknowledge that, as a matter of nontechnical fact, there is a governmental "event" that can be called an "evidentiary transaction," the notion is not a concept of art for him; he denies it standing in contemplation of law. This is one way of explaining why Justice Powell does not think a court (or grand jury) has a constitutional duty to refrain from using improperly obtained evidence or the defendant a constitutional right to its exclusion. The conceptual unities for which such a duty and right would make sense do not commend themselves to Justice Powell. For purposes of deciding what should be done with unconstitutionally obtained evidence, the entities perceived by the unitary model theorists do not exist. There is not "one government," or "a prosecution," and neither is there an "evidentiary transaction." On the contrary, Justice Powell fragments the government as much as possible, breaks up a prosecution into a series of discrete events, and, what is of immediate interest, denies that search, seizure, and use can be a single transaction. Indeed, in a revealing slip of the pen he even says that

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Amsterdam, *supra* note 28, at 360, citing *Weeks* and Mapp v. Ohio, 367 U.S. 643 (1961). The only thing that is present in Powell's formulation and missing from Amsterdam's is a reference to "deterrence effect." Everything else is the same—the emphasis on "judicial creation" that is so alien to the *Weeks* opinion and to the constitutional exclusionary opinions of Justice Holmes, and the notion that admission itself cannot be a violation of one's fourth amendment rights. And Amsterdam does not leave his voluntaristic, supervisory power view of the exclusionary rule only partially articulate. He insists that

> there is no necessary relationship between the violation of an individual's fourth amendment rights and exclusion of evidence. The exclusionary rule is simply a tool to be employed in whatever manner is necessary to achieve the amendment's regulatory objective by reducing undesirable incentives to unconstitutional searches and seizures.

Amsterdam, *supra* note 28, at 437. That is how far Amsterdam is from Holmes's unitary, personal rights, constitutional view that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that . . . evidence so acquired shall not be used before the Court . . . ." As much as Amsterdam may sometimes sound like a unitary theorist, and as much as he may deprecate naive versions of the deterrence thesis, *see id.* at 431, in the end he *is* a deterrence theorist working from the fragmentary model of judicial responsibility: the model that denies that courts have a constitutional obligation to exclude unconstitutionally seized evidence entirely apart from the deterrence—or "regulatory"—effect of that exclusion.

112. For similar phrasing, see note 118 *infra*.

the "wrong . . . is fully accomplished" merely by the *search*. It is as if he prefers not to think of the *seizure*, and therefore not of the primary object of most seizures—*evidence*. This abstraction is quite understandable in view of the threat posed for the fragmentary model by the concept of evidence and its embodiment in the notion of an evidentiary transaction.

B. Justice Day's Evidentiary Emphasis

If Justice Powell tries to read the fragmentary model into the fourth amendment, we think Justice Day actually finds the unitary model there. He finds in the amendment a unitary conception of judicial responsibility, and, what is virtually the same thing in helpfully different language, he finds in the amendment what we are calling the "evidentiary transaction" approach to the problem of improperly obtained evidence. It is this approach that should be compared with Justice Powell's fragmenting fourth amendment jurisprudence.

One gets a sense of the unitary tendency of the *Weeks* opinion from these words:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people . . . against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws.[113]

Justice Day's interpretation does not need to be augmented by the later unitary model thinking of Holmes and Brandeis nearly as much as their argument needs to be augmented by his personal right approach. Justice Day finds the unitary model implicit in the fourth amendment. There is no fragmentation of governmental responsibility, nor any implication that the fourth amendment is addressed only to the executive. On the contrary, Justice Day thinks first of the effect of the amendment on the courts, and then of its restraint on the executive, or, in words we borrow from Chief Justice Marshall, Justice Day views the fourth amendment as "language of the constitution . . . addressed especially [though not exclusively] to the courts."[114] And when Day refers to judicial responsibility under the amendment, he is by no means thinking only of the responsibility for warrants.

113. Weeks v. United States, 232 U.S. 383, 391-92 (1914).
114. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803).

He speaks more grandly of "[t]he efforts of the courts and their officials to bring the guilty to punishment . . . [and] of those great principles . . . in the fundamental law of the land" that limit these efforts.[115]

115. 232 U.S. at 393. We quote this passage for exegetical purposes, not to subscribe unreservedly to it, for it points, intentionally or not, in the direction of a form of unity to which we object; it suggests a conception of unity brought about by judicial dominance and preemption by courts of the prosecutorial initiative. We think Justice Day has here gone beyond his own considered unitary position—from the unity that results when courts express their responsibility for the conduct of the whole government by reviewing executive action, to a kind of unity resulting when courts themselves assume an active posture toward crime. In any case, we disavow the impression left by the phrase "the courts and *their* officials."

Protest against judicial *usurpation* of the executive law enforcement prerogative is perhaps as necessary as Professor Hill's protest against judicial *frustration* of legitimate law enforcement activity. *See* note 100 *supra*. But neither is more important than recognition of the basic position shared, despite all their other differences, by Justices Day, Holmes, Brandeis, and Brennan, *i.e.*, that the courts must thwart constitutionally or statutorily invalid executive conduct when that conduct requires judicial cooperation for its consummation. (For a discussion of the difference between thwarting constitutionally and statutorily illegitimate conduct, and judicial "door-closing" to the fruits of executive conduct the only fault of which lies in the transgression of judicial notions of propriety, see note 100 *supra*.) This is the position attacked by the fragmentary model opponents of the exclusionary rule.

Indeed—and this is a truly interesting turn in the argument—fragmentary theorists have been known to argue that the reason the courts may not thwart illegitimate executive activity is that the courts themselves have a supervening responsibility to see that crime is punished. Professor Plumb was one such theorist, the effect of whose argument was to deny the existence of the unitary model for purposes of due process, but to affirm the existence of the unitary model for purposes of crime control. According to Plumb, the courts' responsibility to punish crime supersedes any responsibility they may have to help the government remain faithful to constitutional limitations. Plumb, *supra* note 58, at 376-78.

The difference between the one-government *theory* of Holmes and Brandeis and the one-government *result* of Plumb is that whereas Holmes and Brandeis insist that the government be consciously conceived of as one for purposes of due process, Plumb permits the government more or less mindlessly to be one for purposes of crime control. The fragmentary theory makes it unnecessary for the courts to notice, much less to have scruples about the means employed by the executive. The result is that all parts of the government, fragmented and not responsible for the propriety of means employed by sister branches, nevertheless join together in quest of a common end. It is a marvelous prescription for a frictionless association—an association whose governing policies are a laissez-faire eschewal of mutual censorship among the members, *and* an agreed-upon common end—to protect "organized society and its law-abiding members" from a common external enemy, "the criminal classes." *Id.* at 376, quoting with approval from Address by

As for Justice Day's interpretation of the fourth amendment so as to find a special—we do not say exclusive—concern in the amendment for unreasonable evidentiary searches, he seems in this one respect to have followed Justice Bradley's opinion for the Court in *Boyd v. United States*.[116] At any rate, he accepts Bradley's history of the amendment, which he paraphrases to the effect that general warrants and writs of assistance had sanctioned "invasions of the home and privacy of the citizens and the seizure of their private papers *in support of charges*, real or imaginary, made against them," and that these were the kinds of "unreasonable searches and seizures" against which the people sought to protect themselves through the fourth amendment.[117] Given Justice Day's acceptance of this account of the amendment's origin, and given that as a judge he would surely know that the great majority of searches of which courts take cognizance, either at the warrant or at the trial stage, are evidentiary, the "invasion" interpretation of the amendment later urged by Justice Powell would not readily have crossed his mind as an alternative to the evidentiary search interpretation. We doubt that it occurred to him that the main subject of the amendment could be privacy in general, isolated from "the efforts of the courts and their officials to bring the guilty to punishment."

Once a predominant fourth amendment concern for *evidentiary* searches and seizures is assumed, Justice Day's exclusionary result follows with relative ease, as we shall now show by articulating the kind of thinking on which we believe Justice Day's opinion depends. We do not attribute to Day all the reasoning we set forth here. We only claim that, while the reasoning is our own, it has been prompted by our reading of the *Weeks* opinion, is consistent with it, and is perhaps demanded by it. We

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Hon. Samuel Seabury, American Law Institute Annual Dinner, May 7, 1932, in 18 A.B.A.J. 371 (1932).

We believe there is a constitutional world of difference between Plumb's insistence that the court assume responsibility for punishment of criminals even when the evidence necessary to their conviction is procured unconstitutionally, Plumb, *supra* note 58, at 376-78, and Hill's insistence that the court accept all relevant and reliable evidence obtained constitutionally and legally. Plumb is making an illicit unity out of fragmentary model pieces, whereas Hill is trying to prevent the fragmentation of government that results when unitary model judicial responsibility goes beyond its proper constitutional or statutory concern and is transformed into mere fastidiousness, which then comes between the court and its duty to try the cases brought to it by the prosecutor. *See* notes 44 and 100 *supra*.

116. 116 U.S. 616 (1886). *See* note 97 *supra*.

117. 232 U.S. at 390 (emphasis added).

begin by summarizing this reasoning and the conclusions to which it leads.

The unitary, "evidentiary transaction" theory implicit in Justice Day's opinion insists upon a fourth amendment exclusionary duty and right because it assumes a conceptual and moral connection between the trial court and the evidence-seizing police. This connection exists because every search for or seizure of evidence points beyond itself to use at trial. Search, seizure, and use are all part of one "evidentiary transaction," and every such transaction presupposes a court as well as a policeman. Because the court is integral to the evidentiary transaction, it cannot insulate itself from responsibility for any part of that transaction, and specifically not from responsibility for the manner in which evidence is obtained.[118] The only way the court can avoid

118. One of the most articulate formulations of this thought appears in People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955):

> When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge.

The clearest of all formulations is probably this by William Plumb:

> [When] the purpose of the search [is] to obtain evidence, it is pure sophistry to declare, as courts frequently have done, that the search and the subsequent use of the evidence are distinct transactions.

Plumb, *supra* note 58, at 374-75. Yet Plumb, who is one of the most assiduous admissionists, goes on in effect to ascribe precisely this fragmentary sophistry to the fourth amendment:

> But, distinct transaction or no, there is much room to question whether [the fourth amendment] was ever intended to impose this additional sanction [of exclusion]. The provision operates upon legislatures to bar them forever from making unreasonable searches and seizures lawful, upon executives to bar them from enforcing such laws, *and upon the courts to bind them to punish such searches and seizures whether made with or without legislative sanction. But the Constitution lays down no rule of evidence.* . . . When the invasion of the home has been effected, the violation of the Constitution is complete. It is neither the possession of property nor the use of evidence, but the sanctity of homes, that is the concern of the Constitutional guaranty.

Id. at 375 (emphasis added); *accord,* United States v. Calandra, 414 U.S. 338, 354 (1974) (Powell, J.), quoted in text accompanying note 111 *supra.*

One of the remarkable things about the early critics of exclusion was the clarity with which they could see the constitutional warrant or obligation to initiate the affirmative action of punishing the officers—warranted or obligated by the Constitution independently of what the legislature may or may not have enacted—and the equal clarity with which they saw that the negative "act" of exclusion is not required by the Constitution. Thus Wigmore assumed that

> [t]he natural way to do justice here would be to enforce the splendid and healthy principle of the Fourth Amendment directly, *i.e.*, by sending for the high-handed, over-zealous marshal

consummating an unconstitutional course of conduct in which, wittingly or unwittingly, it has been involved from the beginning, is to abort the transaction by excluding the evidence. To admit the evidence is for the court to implicate itself in the unconstitutional police misconduct and to violate the Constitution.

Contrary to what Justice Powell says, the executive "invasion" cannot be the only wrong condemned by the amendment, because the amendment condemns an entire transaction, only part of which is the invasion—the rest being a judicial act. Given the concept of evidence and the notion of an evidentiary transaction, and given the assumption that the evidentiary transaction is a special concern of the amendment, and given the further assumption that the amendment is coherent, the use of evidence in the evidentiary transaction falls under the amendment's proscription along with the invasion, and therefore the courts are, like the executive, under a direct and immediate fourth amendment duty. So, again contrary to Justice Powell, the "accomplishment" of the "original search" does not exhaust the category of constitutional wrongs that can occur in the course of the whole unconstitutional transaction. The completion of the search and seizure does not remove the episode from the cognizance of the amendment. On the contrary, the invasion activates the amendment's exclusionary potency.

As Justice Day describes *Weeks*:

> The case . . . involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence

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who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal.

Wigmore, *supra* note 16, at 484.

Present day commentators take the more sensible view that the relative difficulty of justification is the reverse of what Wigmore and Plumb supposed. For example, Professor Hill says that

> [c]onceptually, there is no difficulty about the proposition that if judicial power is to be exercized upon person or property, constitutional limitations must be observed, including rules determining the consequences of a violation of constitutional right. The constitutional character of such defensive remedies is well recognized . . . .
>
> It is when the remedies are offensive or affirmative in character that conceptual difficulties arise.
>
> To what extent is the Constitution self-executing in regard to affirmative remedies?

Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1111-12 (1969). By "affirmative" remedies, Hill has in mind primarily money damages. Presumably his question is even more acute when the "remedy" is punishment.

> without his authority, by a United States Marshal holding no warrant for . . . the search of his premises.[119]
>
> [T]he question presented involves the determination of the duty of the court with reference to the motion made by the defendant for the return of certain letters . . . taken from his room by the United States Marshal, who . . . visited the room of the defendant for the declared purpose of obtaining additional testimony to support the charge against the accused.[120]

Justice Day speaks of "a criminal prosecution" rather than merely a trial, and he refuses to regard the marshal as a remote personage whose misconduct comes under the heading of "someone else's business." The court and the marshal are not viewed as moral strangers, but as parts of the same government and parties to the same governmental course of conduct. And, indeed, neither a criminal court nor a law enforcement officer makes sense in isolation from the other. A criminal court is not an intelligible institution without the expectation that it will receive evidence from which to synthesize verdicts and judgments. By the same token, a policeman—*e.g.*, the marshal in *Weeks*—may be out in the field, but his being *out* there in a law enforcement, as opposed to some administrative, capacity is only intelligible on the expectation that he will come *in* to court.

That is not merely a contingent expectation: it is rooted in Justice Day's understanding of the fourth amendment, an understanding which, on this point, is surely not unique to Day. As he says, the marshal is limited by the fourth amendment only when he is "acting under color of his office";[121] the fourth amendment "secure[s] the people . . . against all unreasonable searches and seizures under *guise of law*."[122] But one can understand what that office is, or what the marshal does when he makes searches and seizures in lawful guise, only by reference to a court. This is so because the marshal's duty is, as Justice Day says, "to bring . . . proof to the aid of the government."[123] But bringing proof or evidence is unintelligible if there is not a court there to accept—or reject—it. And we can therefore say that concern about the judicial use of the fruit of fourth amendment violations is built into the amendment if the amendment is thematically addressed to the evidentiary transaction.

The exclusionary thrust of the amendment is not just an impersonal proscription of the use of unreasonably seized evidence;

119. 232 U.S. at 393.
120. *Id.* at 389.
121. *Id.*
122. *Id.* at 392 (emphasis added).
123. *Id.* at 397.

the amendment recognizes an exclusionary *right* in the defendant, a right that is conceptually and morally part and parcel with the right to be free from unreasonable searches and seizures. To put it as intransigently, and correctly, as we know how, the basic right is to be free from the entire transaction; the right to exclusion and the right to be free from the original invasion are coordinate components of that embracing right. Notice that in his statement of the question in *Weeks*, Justice Day is not asking whether the lower court might in the exercise of its discretion invoke the supervisory power and exclude the evidence; he is instead asking what is the "duty of the court [under the fourth amendment] with reference to . . . letters . . . taken from [the defendant's] room by the United States Marshal . . . for the declared purpose of obtaining additional testimony to support the charge against the accused"; he is asking whether a "court in a criminal prosecution" has "the right . . . to retain for the purposes of evidence the letters and correspondence of the accused . . . ."[124] Justice Day's phrasing of the question assumes what Justice Powell's denies, namely, that it makes sense only to speak of the defendant's rights and the court's rights and duties and not of mere optional "remedies."

Having ruled that "the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant,"[125] Justice Day concludes that "there was involved in the order refusing the application [for their return] a denial of the constitutional rights of the accused. . . . In holding [the letters] and permitting their use upon the trial, we think prejudicial error was committed."[126] This language is tolerably unambiguous. It makes it clear that the *Weeks* Court recognized *two* violations, one by the marshal and one by the court, neither of which was regarded as "more" or "less" unconstitutional than the other. And presumably these words leave no doubt that the reason the court does not have the right to admit the evidence is that the defendant has a fourth amendment right to its suppression.

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124. *See* text accompanying notes 119-20 *supra*.

125. *Id.* at 398.

126. *Id.* Despite this language, Justice Black once insisted "that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (concurring opinion). *But see* Linkletter v. Walker, 381 U.S. 618, 645-59 (1946) (the same Justice on the constitutional status of the rule after *Mapp*).

Justice Day affirms what Justice Powell denies, *i.e.*, that the admission of unconstitutionally seized evidence is a violation of "a personal constitutional right of the party aggrieved."[127] Our intent is not to bludgeon Justice Powell with the venerable authority of Justice Day, but first to show that Powell's proposition has not always seemed self-evident, and second to exhibit the kind of thinking that underlies the claim of right Justice Day makes. This thinking is informed by unitary model assumptions, by the assumption that the fourth amendment has a particular but not exclusive concern for evidentiary *searches*, and by the necessary consequences of the concept of evidence and the notion of an evidentiary *transaction*. This thinking, which is the fourth amendment exclusionary theory we are urging, can be recapitulated as follows: Judicial use is conceptually inseparable from evidentiary seizure because evidentiary seizures under color of law make no sense without an expectation of judicial use—make no more sense than an evidence-gathering law enforcement officer isolated from a court, or a criminal court cut off from evidence-gathering law enforcement officers. The concept of evidence—the conceptual setting of any constitutional guarantee pertaining to evidence—compels attention to the whole transaction, to use as well as acquisition. Or, in other words, fragmentation of the transaction is as arbitrary as fragmentation of the government. The fourth amendment fragments neither the transaction nor the government. Its meaning is that when any part of the government participates in an evidentiary transaction which involves an unreasonable search and seizure it commits a constitutional wrong. And for any part of the government to commit a wrong denominated as such by the fourth amendment is not just to do wrong in the abstract, but to violate a person's constitutional right. In particular, the court which admits unreasonably seized evidence participates in an unconstitutional evidentiary transaction and violates the defendant's fourth amendment exclusionary right.

C. A Caveat on the Evidentiary Emphasis

Our discussion of the "evidentiary transaction" may mislead readers into thinking we are urging a fourth amendment theory by which only *evidentiary* searches qualify for fourth amendment protection,[128] or a theory by which *administrative* searches

127. 414 U.S. at 348.

128. *See, e.g.*, Wyman v. James, 400 U.S. 309 (1971); Abel v. United States, 362 U.S. 217 (1960); Frank v. Maryland, 359 U.S. 360 (1959). For

could be legitimized under less stringent formulas of "reasonableness."[129] But we are urging neither. To clarify our meaning, we must distinguish two obviously different concerns, the responses to which can both be affected, in different ways, by the perceived presence or absence of an evidentiary search of an evidentiary transaction.

It is one thing to ask whether a particular search is fourth amendment-related activity, and if so, whether it is "reasonable" within the fourth amendment meaning of that term, and to let the evidentiary or the administrative intention of the search determine the answer to those questions. We are *not* doing that. We are instead assuming that the search or seizure is unconstitutional, and asking what the court ought to do in response to that assumed unconstitutionality. In particular, we are asking how the existence of an evidentiary transaction or an evidentiary search—they are not the same thing—should be allowed to affect the answer to the question of admissibility.

According to the evidentiary transaction interpretation, the correct answer to the question of admissibility is implied in the answer to the question of reasonableness—admission is unconstitutional when the taking is unconstitutional, whether or not the search is evidentiary or administrative. The reason the evidentiary transaction theory can treat this implication as universal is that in every case in which evidence is offered in court there *is* an evidentiary transaction—again, whether or not the search is evidentiary or administrative. This is so because an evidentiary *decision* is eventually made by the executive although there may have been no evidentiary design at the time of the search or even the seizure. A member of the executive, whether policeman or prosecutor, must make that evidentiary decision if the question of admissibility is to be posed at all. Even if both the search and seizure themselves are purely administrative and without evidentiary *intent*, the offer at trial as *evidence* of things seized is sufficient indication that at some point in the prosecution a representative of the executive has decided to use those articles as evidence. According to the evidentiary interpretation there is more to account for in a case involving introduction of

discussion of another possible caricature of our position, see note 97 *supra*.

129. *See* Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting). *See also* See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 CALIF. L. REV. 1011 (1973).

evidence obtained from an administrative search than, on the one hand, a merely administrative act undertaken with no forethought to evidentiary usage, and, on the other, a judicial use of information. These two events do not exist as unrelated fragments in the universe but are rather part of an intelligible transaction because bound together by a third event—an executive evidentiary decision, which itself is made with a court in mind and which indeed would be unintelligible without a court in mind.

But the fact that an evidentiary transaction must be perceived and a proper inference drawn from that perception must not be allowed to obscure the fact that there are still two questions here—the constitutionality of the intrusion itself and the constitutionality of the use of unconstitutionally seized items. And it will not be surprising to learn that those who do not adopt the evidentiary transaction interpretation allow the answers to these two questions to be affected differently by the presence or absence of evidentiary intent in the search. For example, the admissibility question was raised for Justice Frankfurter in *Wolf v. Colorado*,[130] a fourteenth amendment case in which the fourth amendment was discussed. There he refused to exclude the fruits of a search, giving no weight to the undisputed evidentiary purpose of the search.[131] But in *Frank v. Maryland*,[132] also a fourteenth amendment case in which the fourth amendment was discussed, the constitutionality of a search itself was questioned. Justice Frankfurter argued that the *non*evidentiary intention of that *administrative* sanitation search made *it* subject to a less rigorous set of standards—if to any constitutional standards at all.[133] And, although we think he was grievously mistaken in both cases, we would not accuse him of inconsistency; he was assigning different weight to the evidentiary intention in different contexts and in response to different questions.

In *Weeks*, Justice Day was not confronted by the *Frank* question about the propriety of the search and seizure. The *Weeks* search, having been unwarranted, was taken to be unconstitutional; Day was therefore faced only with the *Wolf* question about the use of the evidence. But it should not be denied that, even as he addresses the admission question, Justice Day leaves the impression that for him the unwarranted or otherwise unac-

130. 338 U.S. 25 (1949).
131. *Id.* at 27-28, 33.
132. 359 U.S. 360 (1959).
133. *Id.* at 365-67.

ceptable search with an evidentiary *intention* is the "core" or paradigmatic invasion proscribed by the fourth amendment (much as abridgment of political speech is regarded by many as the paradigmatic first amendment violation). This is partly because he had no occasion in *Weeks* to advert to the phenomenon of the administrative search, and thus seems to have just assumed that the fourth amendment is primarily concerned with evidentiary searches. But, if one does not choose to interpret Justice Day by reference to his inadvertences or his unconsidered assumptions, one may also plausibly suggest that he *insisted* on the centrality of the evidentiary search in the fourth amendment scheme of things, simply because he was unwilling to ignore the *intention* of searches and thereby become preoccupied with the *manner* of search. In this connection, three things can be said in Justice Day's defense.

The first is that there is nothing in Day's evidence-oriented perspective that requires him to sanction administrative searches merely because they do not have an evidentiary intention. That is, his apparent focus on the ends of searches does not commit him to a position of indifference concerning reasonableness of the means, nor to letting the objective of the search determine its reasonableness. There is no indication that Justice Day would have approved those later Supreme Court opinions that took his emphasis upon—or concern with—the object or intention of searches as a license to make the fourth amendment "fluctuate with the 'intent' of the invading officers."[134] We think Justice Day would consider that development as unfortunate as the opposite error of forgetting the evidentiary objective of the vast preponderance of searches with which courts have any connection.

Second, Day's special concern with the evidentiary objective is not part of a fifth amendment tenderness for the accused. On the contrary, Day pointedly eschews the fourth-fifth *Boyd* approach to exclusion;[135] he insists that the protection against unreasonable searches and seizures "reaches all alike, whether accused of crime or not."[136] But, third, the fact is that evidentiary

134. Abel v. United States, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting). *But see* Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting).

135. "The defendant contends that . . . [the instant] appropriation of his private correspondence was in violation of rights secured to him by the Fourth and Fifth Amendments to the Constitution of the United States. We shall deal with the Fourth Amendment . . . ." 232 U.S. at 389; *see id.* at 391. *See also* note 97 *supra.*

136. 232 U.S. at 392.

searches are necessarily crime-related in some way, and so there is a sense in which Justice Day's focus on evidentiary searches is an ascription to the *fourth* amendment of a special concern for the criminal accused. We think Justice Day indeed believed that judicial participation in the prosecution-to-court evidentiary transaction, which occurs only in the criminal case, makes the criminal case of special fourth amendment importance. The claim to superiority that can be made for Justice Day's evidentiary perspective over the contemporary preoccupation with the extent of the invasion lies precisely in the fact that Day takes cognizance of that whole transaction *as* a transaction and therefore deliberately exposes the court, as a direct addressee of the fourth amendment, to concerns about the constitutionality of its *own* participation in the transaction—concerns to which the invasion analysis is by definition impervious.

Evidentiary use is the end for which evidentiary search and seizure is the means. Five things need to be said of the evidentiary transaction as an end-means relationship: (1) Like any other means, evidentiary search and seizure is unintelligible without reference to its end. But (2) like most ends, evidentiary use is only a necessary, not a sufficient, condition to the moral or constitutional acceptability of the means to it—in this case the acceptability of any particular search and seizure. And (3) participation in the end implicates a court in the means and therefore places on it a duty of eschewing evidence obtained by unconstitutional means or makes it responsible for those means when it admits their products. But (4) denial of the evidentiary transaction and fragmentation of the end-means relationship obscures the court's responsibility for the means. Therefore (5) (the point we wish to stress) awareness of the transaction and of the relationship, and self-consciousness about the character of evidentiary use *as an end*, are needed to vitalize judicial concern about the means *as means* rather than as unrelated events involving another branch of government. By keeping the end—the court's own use of the evidence—in focus, the evidentiary interpretation turns the attention of the court back on the means by which the evidence has been obtained. That attention produces a severe reckoning with a constitutional duty—a duty with which courts informed by the invasion theory of the fourth amendment do not have to contend because they do not recognize it. Only the end-oriented evidentiary emphasis with its systematic attention to the destination of evidence prompts a court to ask not only whether the evidence has been obtained by unconsti-

tutional means, but also what constitutional responsibility the guardian of that destination has. In other words, Justice Day's evidentiary emphasis is superior to the invasion emphasis because it takes the question of the court's constitutional responsibility seriously, makes it register on the judicial sensibility, and keeps that part of the government with the greatest control over the end from ignoring the means.[137]

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137. It might be suggested that this is tendentiousness, or even outright question-begging. For, although we proceed as if we are concerned to interpret the fourth amendment objectively, and as if we believe the question of proper interpretation must therefore be settled prior to and independently of the exclusion controversy, in fact the interpretation we prefer, implying exclusion as it does, lacks the independence from the question at issue—to exclude or not to exclude—necessary to give logical support to the exclusionary conclusion we favor. Our response to this criticism might not absolve us of the charge, because it begins not with a denial of tendentiousness, but with an assertion that, given the present text of the fourth amendment, one is driven to formulate a conception of the values and the prohibitions expressed in it. But this conception is part and parcel with the meaning one ascribes to the amendment. The upshot is that a certain amount of apparent question-begging is inevitable in a controversy that touches as deeply on the fundamentals of intragovernmental relations as does the exclusionary controversy. This will be so, as we observed in Part I, *see* text accompanying notes 32-34 *supra*, at least until someone finds a point of view in political theory from which to discuss these matters.

We doubt that a significant interpretation of the fourth amendment can be articulated without compelling implications for the treatment of unconstitutionally obtained evidence. At any rate, no extant interpretation of the fourth amendment avoids clear exclusionary or admissionist implications. Surely the wish for a nontendentious interpretation is not fulfilled by the "invasion" interpretation of the amendment. That interpretation implies the *non*existence of a fourth amendment exclusionary imperative just as clearly as the evidentiary emphasis implies its existence.

The more important question, however, is not whether there is a theory that is "neutral" toward the exclusionary controversy, but whether the quest for such an interpretation might be a mistake. Consider what a truly neutral theory of the amendment would be like. Either it would be neutral because so abstract as to give no guidance at all, or it would be neutral because occupying a position not taken by the two present theories. And consider what this position might be. The evidentiary transaction theory imposes an exclusionary duty on the courts; the invasion theory denies such a duty, and it permits either exclusion or admission, as the courts, in the exercise of the supervisory power, elect. A "neutral" theory is left to occupy a position of uncertainty. But opacity or ambiguity is only neutrality by default. And we ordinarily choose constitutional interpretations not because they becloud, but because they explain, issues.

It turns out, then, that the only procedure, short of an elaborate political-theoretical analysis, from which we are likely to learn anything, is a candid confrontation between the two admittedly nonneutral interpretations of the fourth amendment. Each theory has to be its own defense. One reason we are writing this Article is that we think the evidentiary

V. "REMEDIES" AND OTHER RESPONSES TO VIOLATIONS OF THE FOURTH AMENDMENT

We think that there is a fourth amendment exclusionary imperative and that we have accurately described it in Part IV. We need hardly say, however, that ours is an unconventional way of accounting for the search and seizure exclusionary rule. The evidentiary transaction interpretation is obviously not the only possible construction of the amendment, and it may not even be the only acceptable one. It differs from the constructions placed on the amendment by both *Calandra* opinions, to each of which we would now without pause systematically compare it were we confident enough of our understanding of those interpretations to do so. Although Justice Powell's invasion interpretation and deterrence rationale are easily comprehended, Justice Brennan's understanding of the amendment and his justification for the rule are not; there is even reason to wonder if his position is coherent. What this discussion needs, therefore, is a study of Justice Brennan's thesis—and that is largely the objective of the rest of our Article.

This study will show that Justice Brennan at least points in the direction of a coherent position, and that, were he to go where he points, he would argue that the defendant has an exclusionary right. The exclusionary right we find implicit in Brennan's *Calandra* dissent—the second exclusionary right of which we have spoken[138]—is different from and additional to, but not incompatible with, the fourth amendment evidentiary transaction exclusionary right we found implicit in the *Weeks* opinion. The distinctiveness of the Brennan alternative will prove to be that, unlike Justice Day's evidentiary transaction interpretation, it does not construe the fourth amendment as one of those parts of the Constitution "addressed," as Chief Justice Marshall said of another part, "especially to the courts";[139] it rather construes the fourth amendment as primarily addressed to the executive—and finds the courts under a duty to review executive conduct in light of the amendment. This duty of judicial review is, we shall argue, the correlative of the defendant's due process right

theory is the more defensible of the two. We think it a more adequate construction of the amendment because the amendment is a limitation on government; because, as such, it should be interpreted so as to make maximum moral sense of the entire government which it limits; and because the evidentiary interpretation, being the unitary theory in the fourth amendment setting, does that.

138. *See* text accompanying notes 15 and 71 *supra*.

139. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803).

to have the law of the land applied in his case: he has a right to have the court sitting in his case consult the Constitution when executive conduct related to his case is challenged under any of its parts. And when search and seizure conduct is successfully challenged as unreasonable, he has a due process right to exclusion of the disputed evidence, because exclusion is the only concrete expression which adverse judicial review of unreasonable search and seizure can take.

Adequately articulated, Justice Brennan's theory exists on an altogether different—and superior—constitutional plane from that occupied by the Powell invasion-deterrence thesis. There is, however, no easy access to the Brennan thesis as thus articulated because the way to it is strewn with the verbal debris from that permanent terminological disaster known as the exclusionary rule controversy. The first step toward clarity will be a brief juxtaposition of the simple Day and Powell alternatives and the more complicated Brennan thesis. Gaining an appreciation for the comparative complexity of Justice Brennan's reasoning, we can then exhibit at length the refinements necessary to its full comprehension. When so refined and fully comprehended, we believe it stands as the constitutional equal of the *Weeks* evidentiary transaction interpretation. The constitutional equality of the *Weeks* thesis and the potential Brennan thesis consists in the fact that they both pay heed to the moral concerns characteristic of unitary model thinking: *Weeks* through the evidentiary transaction construction of the fourth amendment, and Brennan through judicial review and due process of law.

A. Justices Day, Powell, and Brennan on Giving "Force and Effect" to the Fourth Amendment

We may take as a bench mark Justice Day's placement of all officialdom under the duty of "giving to [the fourth amendment] force and effect."[140] According to our interpretation in Part IV, this simply means that no official—judicial, executive, or legislative—may sponsor or participate in unreasonable searches or seizures, and that in particular courts may not engage in evidentiary transactions involving unreasonable searches or seizures. But Justice Powell can use remarkably similar language to ascribe a deterrence rationale to the exclusionary rule. He says, for example, that "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guar-

140. Weeks v. United States, 232 U.S. 383, 392 (1914).

antees of the Fourth Amendment against unreasonable search and seizures."[141] He writes as though he has not seriously considered the possibility that a court could give force and effect to, or "effectuate," the amendment simply by refusing to admit unconstitutionally seized evidence. He thus begins by ignoring what we regard as a significant kind of force and effect. The alternative upon which he seems to insist is this: either one has the dramatic and palpable effect of actually deterring the police from invading privacy, or one has no effect at all. What we, following Justice Day, regard as a giving of force and effect by the courts—through their own direct and simple obedience to the rule—Justice Powell does not regard as genuine "effectuation." But *of course* he would not take seriously such judicial obedience as real effectuation, because to do so would be incongruous with his whole perspective on the fourth amendment. That perspective—the fragmenting police "invasion" theory—does not recognize the evidentiary transaction and it therefore assumes that trial courts (as opposed to warrant-issuing magistrates) are under no fourth amendment obligation.

We can recapitulate Justice Powell's understanding as follows, although he has not said it this way: The executive is the sole addressee of the fourth amendment because the executive, and not the judiciary, is the potential invader of privacy. Being the sole addressee of the amendment, the executive is the only body in a position to give force and effect to the amendment in the way that only an addressee can—by its own simple obedience to it. Courts cannot give force and effect to the fourth amendment merely by obeying it because the amendment is not addressed to them and no amount of obedience by a nonaddressee can "effectuate" a law. *Judicial* "effectuation" of the fourth amendment is not obedience on the part of the courts to some illusory exclusionary imperative, but is rather their use of the exclusionary rule or some "device" to influence *others* to conform to the sole authentic imperative of the amendment—its proscription of executive "invasion."

It is easier to identify fourth amendment duties, or lack thereof, in Day's and Powell's interpretations than in Brennan's. For Day, both the police and the courts are under a direct obligation to avoid the unreasonable or unwarranted evidentiary transaction. According to Powell only the police and not the courts are obligated by the amendment. In Powell's interpretation, po-

141. 414 U.S. at 347.

lice disregard for the fourth amendment is an occasion for the optional exercise by the courts of the supervisory power. In Justice Brennan's view the amendment of course imposes an obligation on the *police*. What cannot be so casually determined is the source and content of whatever fourth amendment obligation he believes the *courts* are under. Justice Brennan ascribes to the courts what seems to be a very great fourth amendment responsibility; he virtually asks them to create a living amendment. And yet he does not make immediately clear whether the courts *must* fill this role, and if so why. Despite his expressed distaste for Powell's deterrence rationale, he does not unambiguously rule out the possibility that he, like Powell, is working from supervisory power premises.

Justice Brennan says, "The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera."[142] Elsewhere he alludes to official misconduct that "threatened to make the Amendment a dead letter."[143] He then says, however, that the curtailment of this latter evil is not the "ultimate objective" of the exclusionary rule. Rather, the framers wanted "to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees";[144] and, because they could not "direct or control the conduct of law enforcement officers, the enforcement tool had necessarily to be one capable of administration by judges."[145] Deterrence of the police, in any case, "was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective,"[146] and "enforcement" by the "tool" was meant to be brought to bear solely on the courts themselves, *by* the courts themselves, to achieve the "twin goals" of avoiding "taint" and of "assuring the people . . . that the government would not profit from its lawless behavior."[147]

Although the profile of fourth amendment judicial responsibility, and of the exclusionary rule, emerging from these passages is blurry, we think that there is nevertheless something important to be learned from Justice Brennan's *Calandra* dissent and that time will be well spent uncovering his meaning. One plausible interpretation of his analysis is that exclusion of evi-

142. *Id.* at 361.
143. *Id.* at 356.
144. *Id.*
145. *Id.* at 357.
146. *Id.* at 356.
147. *Id.* at 357.

dence is simply classical judicial review applied to executive conduct. We think that possibility is provocative in its simplicity and eligible for exploration. But we are not yet equipped or positioned to make that exploration, or to see what is implicit in Justice Brennan's other concern, *i.e.*, judicial integrity, because we are still handicapped by the willful carelessness of the exclusionary rule discussion as it is conducted by courts and commentators. Fortunately, this malaise does not require a sophisticated "remedy." It will be enough to dwell briefly on embarrassingly ordinary distinctions—distinctions that are commonplace elsewhere in the law but all too frequently ignored in the exclusionary rule debate.

B. A Variety of Responses to a Variety of Evils

The literature of the exclusionary rule is replete with references to exclusion as one of several "alternative remedies" for the problem of illegally seized evidence.[148] The meaning of the expression is that a government has a choice of prosecuting the offending officer, facilitating tort actions by victims, excluding the evidence, or combining all or some in a "remedial mix."[149]

148. *See, e.g.*, Hill, *supra* note 65, at 182; Oaks, *supra* note 43, at 675.

149. Hill, *supra* note 65, at 185 n.17. In addition, the courts may experiment with varying doses of exclusion, as Professor Kaplan indicates they are already doing: for example, exclusion is diminished by standing requirements, Kaplan, *supra* note 55, at 1030, or, to take another of the several examples Kaplan cites, judges are more likely to find a search and seizure constitutional in the case of grave crimes than in routine cases. *Id.* at 1036-37. Kaplan urges courts to continue to be flexible, but also to be more thoughtful and systematic. Specifically, he recommends repeal of the exclusionary rule for certain "serious cases," *id.* at 1046, and conditioning admission of evidence gathered by police departments on their record of fidelity to the fourth amendment—courts should "hold the exclusionary rule inapplicable to cases where the police department in question has taken seriously its responsibility to adhere to the fourth amendment." *Id.* at 1050.

Kaplan's "prior offense" plan is somewhat like the modification of the exclusionary rule recently urged by Professor Amsterdam, at least in the respect that under both plans police conduct would be regulated by bringing the exclusionary rule to bear as a lever against police *departments*. The difference is that whereas Kaplan would in effect place departments on and off probation depending on their compliance with the amendment as it is presently interpreted, Amsterdam interprets it anew to require that legislatures or police departments promulgate rules to govern search and seizure conduct. Amsterdam, *supra* note 28, at 416-17. Amsterdam proposes that the Supreme Court tell the police, before any searches are initiated or arrests are made, that there is a step toward reasonableness which police departments can and must take: they must begin trying to govern themselves; they must strive to achieve "reasonableness" in one of its root meanings, *i.e.*, as "nonarbitrary," *id.* at 417-18, or "rule-governed." Products of searches and seizures unreasonable

The *locus classicus* of this thesis is Justice Frankfurter's *Wolf* opinion, where one finds such phrases as "the ways of enforcing . . . [the] basic right," "the means by which the right should be made effective," and "what remedies . . . should be afforded."[150] Justice Powell is writing in the *Wolf* tradition when

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in this sense—the products of unregulated police departments—would be excluded. *Id.* at 429-33.

150. Wolf v. Colorado, 338 U.S. 25, 28 (1949). Justice Murphy's trenchant dissent in that case is also based on the *notion* of "alternative remedies," even as he denies that there *is* in fact any alternative to exclusion:

> Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. . . .
>
> [But] alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.

Id. at 41. Only Justice Rutledge rejects the very idea that there *could be* an alternative to exclusion:

> Congress and this Court are, in my judgement, powerless to permit the admission in federal courts of evidence seized in defiance of the Fourth Amendment, [and] so I think state legislators and judges—if subject to the Amendment, as I believe them to be—may not lend their offices to the admission in state courts of evidence thus seized.

Id. at 48. On the position taken by Justices Black and Douglas in *Wolf*, see text accompanying notes 168-71 *infra*.

The difference between Justices Murphy and Rutledge is virtually identical to the difference between Professor Amsterdam and Justice Holmes. We have noted a "unitary" similarity between Amsterdam and Holmes in their shared concern for the actual communication going out from admissionist courts to the police as a result of the *practice* of admitting illegally obtained evidence. *See* note 28 *supra*. But there is a difference in what ultimately counts for the two men. For Amsterdam it is the kind of deterrence device or strategy that can be implemented, whereas for Holmes it is the constitutional duplicity of admissionism—what Professor Dellinger calls "the law speak[ing] with two voices." Dellinger, *supra* note 78, at 1563.

> According to Amsterdam, the Constitution commands that the administration of the system of criminal justice be so ordered as not to produce incentives toward unreasonable search and seizure which it is not fully capable of restraining. Unless and until a far better system of restraints is devised and put into effective operation than we now have or can soon anticipate, the exclusionary sanction is the only way to honor that command.

Amsterdam, *supra* note 28, at 433. It may be extremely unlikely that any system of restraints could meet this stringent criterion, but, should it happen, the court is no longer bound to exclusion. For Holmes, on the other hand, "the essence of a provision forbidding the acquisition of evidence in a certain way is that . . . evidence so acquired shall not be used before the Court . . . ." Silverthorne v. United States, 251 U.S. 385, 392 (1920). And this is so because, for Holmes, "no distinction can be taken between the Government as prosecutor [or police] and the Government as judge." Olmstead v. United States, 277 U.S. 438, 470 (1928). In short, for Holmes the requirement of exclusion is entailed by his gen-

he says of the exclusionary rule that, "as with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[151]

Two unwarranted assumptions are built into this manner of speaking: first that the obvious imprecision of the term "remedy," as habitually used in the illegal evidence context, is harmless; and second that, when properly understood, exclusion, criminal prosecution, and civil liability are all subsumable in the same way under the notion of remedy, either strictly or loosely so-called. We shall recall the two germane senses of "remedy," indicate the hazards in ignoring the difference between them, and show that the exclusionary rule fits under neither the technical notion nor the "problem solving" notion of remedy.

Leaving the evidentiary transaction interpretation aside, there are at most five actual or potential evils requiring cure, prevention, or avoidance in the matter of unconstitutionally obtained evidence. They are: (1) invasion as injury, (2) a pattern of police misconduct, (3) the fourth amendment's being rendered "meaningless," (4) the government's "affirmatively sanctioning" unconstitutional searches and seizures, and (5) a "taint" on judicial integrity. Each of these five problems presumably elicits a response appropriate to it. As we catalogue these responses, we shall see that remedy, technically understood as primarily backward-looking, is appropriate only for the first (invasion). "Remedy" in the forward-looking sense of problem solving is, on the other hand, appropriate only for the second (police misconduct). The third (meaninglessness), fourth (affirmative sanction), and fifth (taint) require neither a *past*-oriented traditional remedy for something the executive has done or specifically threatened against the individual, nor a *future*-oriented preventive measure for what the executive may do to members of the public at large. They call for the court itself to avoid an evil in the *present*.

1. *Invasion as Injury*

This is the evil in connection with which the term "remedy," strictly so-called, is historically and technically at home, and in connection with which the courts, law and equity, fulfill paradig-

uinely unitary conception of governmental responsibility, and is hence a "moral certainty," whereas for Amsterdam the longevity of the requirement is contingent on the inefficacy of present alternative remedies.

151. 414 U.S. at 348.

matic judicial, as opposed to legislative, functions. Whether the cause of action arises at common law or under a statute or the Constitution, and whether the suit can result in money damages or in some other legal or equitable remedy, the idea is to help make or keep the plaintiff-victim whole—to help him recover from or ward off a specific invasion. Any legislative-like "policy" for recognizing a particular cause of action will be expressed hesitantly, and the court will prefer the assumption that its ostensible job is also its real job, *i.e.*, to respond to the particular plaintiff's claim for redress. "The province of the Court is, solely, to decide on the rights of individuals . . . ."[152]

While it permits some latitude for the fashioning of the most appropriate remedy, the "province of the Court" thus understood is nevertheless not a broadly discretionary roving commission. A court with a "rights-remedies" attitude toward its office will feel justified neither in taking action merely because "something needs doing" nor in declining redress on the assumption that some other agency might possibly be doing something in the premises.[153] In the words of Chief Justice Marshall:

> [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[154]

Underlying this utterance there may be an unrealistic premise, namely, that the traditional law of remedies is capable of vindicating every right, or that " 'rights' and 'remedies' [are] in a 1:1

152. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.).

153. The posture of the rights-oriented court is well described by Professor Dellinger when, in defense of the holding in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), he explains in effect why the Court ought not to wait for Congress to provide relief for victims of unreasonable searches and seizures (as the Chief Justice and Justice Black, dissenting in that case, would have preferred):

> [I]f the fourth amendment is read (as it should be) as conferring upon Webster Bivens a personal right to be free of unwarranted searches and seizures, and if the justice that is due is justice to individuals and not merely justice to formless groupings of the citizenry, then it is nevertheless wrong to turn Bivens away. Whether or not any larger social gain will result from the decision in *Bivens* in terms of the deterrence of unlawful official behavior, the decision has the virtue of establishing that the nation's courts are open to claims that an individual's federal constitutional rights have been violated under the authority of the federal government and are ready to find a remedy that will at least provide compensation for the individual wrong that has been done.

Dellinger, *supra* note 78, at 1553-54.

154. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

correlation."[155] It does seem clear, however, that if traditional remedies are available, the court is in no sense an officious intermeddler to invoke them and would be in dereliction of office if it declined. Justice Harlan puts the matter concisely when he says:

> [A] court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies.[156]

But, going on without pause to indicate the problematical character of our next subject, he observes:

> Whether special prophylactic measures—which at least arguably the exclusionary rule exemplifies . . . are supportable on grounds other than a court's competence to select among traditional judicial remedies to make good the wrong done, . . . is a separate question.[157]

It is to this separate question that we now turn, observing as we do that we are moving from remedies strictly understood to remedies as "special prophylactic measures" and to the question of the supportability of the exclusionary rule on grounds *other than* a court's traditional remedial competence. We should note that there is presumably also a question of the supportability of the rule *on the ground of that competence itself,* because, as must be remembered, exclusion does not "make good the wrong done."[158] Finally, we note that Justice Harlan is commendably cautious in qualifying his characterization of the exclusionary rule as "arguably" a "special prophylactic measure," because that is precisely one of the questions in issue. We, for example, want to say it is *neither* a traditional remedy *nor* a preventive measure, but a different thing altogether—a recognition of the defendant's due process right to the exercise of judicial review.

2. *"Special Prophylactic Measures" for Police Misconduct*

One cannot helpfully discuss deterrent, supervisory measures in the illegal evidence context without being prepared to compare

155. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring).

156. *Id.* at 408 n.8.

157. *Id.*

158. *Id.* The fact that the exclusionary rule helps only the guilty is of course frequently cited as still another perverse characteristic of the rule. And yet critics properly scorn any attempt to justify exclusion as *compensation* for unreasonable search and seizure. *See* Oaks, *supra* note 43, at 671 n.25. But if exclusion is not compensation, then the undeniable "help" that accrues to the guilty by virtue of suppression ought to be regarded merely as an unavoidable consequence of giving the defendant his fourth amendment or due process rights. One would have

these measures both with traditional remedies and with judicial review. But comparison cannot be made unless it is appreciated that there are different things to compare—hence the value of Justice Harlan's intimation that we should be more terminologically precise. Everyone knows, but not everyone remembers to say, for example, that the exclusionary rule is not a remedy, except (and even then only "arguably") in the nonjudicial sense appropriate to handymen, troubleshooters, legislators, and other "problem solvers" whose job it is to "remedy situations" or otherwise "fix up" things that have broken down, gotten out of hand, or gone awry. Judicial contact with this legislative function normally occurs on occasions of statutory interpretation, when the court needs to know "[w]hat remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth."[159] Exceptionally, however, courts are expected or expect themselves to act like legislatures, because they have or claim to have supervisory power.[160] And in this legislative capacity they do not treat the movant, *e.g.*, the victim of an illegal seizure, primarily as a right holder with a claim on the remedy or with a right to judicial review of the executive conduct in his case, but merely as a triggering mechanism to put supervisory measures in motion.[161] This is the case in suppression hearings

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to say that Chief Justice Traynor slipped into error when, in People v. Cahan, 44 Cal. 2d 434, 447, 282 P.2d 905, 913 (1955), he spoke of "a particular criminal . . . [being] redressed for a past violation of his rights by excluding the evidence against him."

159. Heydon's Case, 76 Eng. Rep. 637 (K.B. 1584), quoted in L. FULLER, THE MORALITY OF LAW 83 (1964).

160. Professor Hill might take issue with our characterization of judicial legislation as an "exceptional" function. At least he would object to this characterization if under "judicial legislation" we were to include judicially developed limitations on government, and if "exceptional" were meant to connote anything like "recent innovation." For, under the heading "Judicial Activism in the Tradition of the English Common Law," Hill, *supra* note 65, at 207, he observes that "the Bill of Rights is in large part the constitutional expression of liberties won by the people of England in the course of centuries of struggle against the royal prerogative." He acknowledges that "the role of the English judiciary in shaping this development was a complex one," but he thinks it plausible to say that "at stages of English history, the common law judges assumed the task of expanding the liberties of the subject . . ." and he speaks of "lawmaking in the tradition of English judicial activism." *Id.* at 207-08. *See also* Grant, *Our Common Law Constitution*, 40 BOSTON U.L. REV. 1 (1960). But by "exceptionally" we mean "nonparadigmatically" rather than "nontraditionally." Even in the England of the formative rulemaking period of the common law, the concept of judicial legislation, if it was articulated at all, must have been recognized as parasitic on the notion of *legislative* legislation.

161. *See* note 64 *supra*.

under the deterrence theory, where the movant is thought to be *sans* personal right to suppression, and in the largely hypothetical criminal prosecution of the police, where the victim is the complaining witness.

The distinction between remedies strictly and loosely so-called is not an idle semantic observation. It can have consequences. With only a little hyperbole, we can say that the fate of the exclusionary rule could be determined by reference to that distinction. For, whereas the court is authorized, indeed duty-bound, "to make [and implement] principled choices" among traditional remedies, there is some doubt—Justice Harlan saw it as "a . . . question" anyway[162]—about a court's authority to improvise legislative-type "remedies" for diseases of the commonwealth. If one shares this doubt, and also believes that the exclusionary rule is such a remedy—an exercise of the supervisory power directed at remedying a pattern of police misconduct—one may well doubt the legitimacy of the rule in *any* forum. But reference to that kind of generalized doubt is not necessary to account for Justice Harlan's blithe and peremptory call in *Coolidge v. New Hampshire*[163] for repeal of the exclusionary rule *in the state courts.* One sees how vulnerable the *Mapp* rule is to repeal, and why Harlan could be peremptory with it, when one recalls, with the help of Harlan's dissent in that case, that the Supreme Court's supervisory writ does not run to the states:

> Essential to the majority's argument against *Wolf* is the proposition that the rule of *Weeks v. United States* . . . derives not from the "supervisory power" of this Court over the federal judicial system, but from constitutional requirements. *This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts.*[164]

162. *See* text accompanying note 157 *supra.*

163. 403 U.S. 443 (1971). Concurring in *Coolidge,* Justice Harlan voiced his feeling "that the law of search and seizure is due for an overhauling," *id.* at 490, and without pause he then said he "would begin this process of re-evaluation by over-ruling *Mapp v. Ohio* . . . and *Ker v. California* . . . [which] made the federal 'exclusionary rule' applicable to the States . . . [and] forced the States to follow all the ins and outs of this Court's Fourth Amendment decisions, handed down in federal cases." *Id.*

164. Mapp v. Ohio, 367 U.S. 643, 678 (1961) (emphasis added). *See also* Watts v. Indiana, 338 U.S. 49, 50 n.1 (1949): "Of course this Court does not have the corrective power over State courts that it has over the lower federal courts." *But see* Lee v. Florida, 392 U.S. 378 (1969), which may negate Harlan's disclaimer. *See also* note 277 *infra.*

At first, Justice Harlan is willing "to assume, for present purposes, that the *Weeks* rule 'is of constitutional origin.'" 367 U.S. at 678. Shortly, however, his "considerable doubt as to the soundness of this

To meet Justice Harlan's strictures, then, and to legitimize enforcement of the exclusionary rule against the states, one must either deny that the exclusionary rule has a deterrence purpose, or deny that, having such a purpose, it is a mere product of the supervisory power. Justice Clark, author of the plurality opinion in *Mapp*, sensed the difficulty and chose the latter alternative, *i.e.*, to affirm the deterrence purpose and yet to deny the supervisory power source. He says that the exclusionary rule is "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been 'reduced to a form of words.' "[165] This passage is incorrigibly ambiguous, mixing in about equal portions vague constitutional references, deterrence rationale, and empirical generalization. Justice Clark does not make clear whether the exclusionary rule is constitutionally required as such or is required only because it is a deterrent. Nor does he make clear whether, if it is constitutionally required as a deterrent, it is required because of its deterrent *intention*, or because it actually *works* as a deterrent. If the exclusionary rule is constitutionally mandated as, but only as, an *actual* deterrent, Justice Clark does not vouchsafe the constitutional theory that would make a requirement of the fourth amendment depend on this kind of contingency. But Clark's position is not dubious merely because of his tortured prose. Rather, that prose perfectly reflects the difficulty of his undertaking, or the undertaking of any person who attempts to harbor simultaneously a constitutional and a deterrence view of the exclusionary rule.[166]

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foundational proposition" surfaces when he says that, as far as he is concerned, "it is entirely clear that the *Weeks* exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future." *Id.* at 680. Future-oriented deterrence remedies would seem to issue from, and only from, the supervisory power.

165. *Id.* at 648.

166. As Professor Hill says, "Justice Clark's [*Mapp*] opinion is not easily parsed." Hill, *supra* note 65, at 183 n.14. One simply cannot tell from the quoted passage whether Clark is in agreement with Kaplan, who says that all that is demanded from the Constitution is "something that works," Kaplan, *supra* note 55, at 1030, and that if and when a more effective deterrent is found "it should replace the current exclusionary rule," *id.*, or whether Clark deems the exclusionary rule "to be so integral an aspect of a constitutional right as not to permit of substitutes . . . ." Hill, *supra* note 65, at 185.

It might be thought that Justice Clark is saying something like what Professor Hill says about the status of what he calls "matters of implemental detail":

Even when, in the apparent absence of alternatives, a procedural

3. *Judicial Review as Avoidance of Fourth Amendment "Meaninglessness"—The Due Process Exclusionary Right*

When words like "meaninglessness" and "ineffectuality" are used by proponents of the exclusionary rule they are meant to suggest that the rule must be promulgated or maintained to avoid rendering the fourth amendment fatuous or futile. What is left indefinite, always by the words themselves and sometimes by the context, is what the necessary and sufficient conditions of meaningfulness and effectuality are. If one hears it said without elucidation that the exclusionary rule gives "force and effect" or "content and meaning," one does not know whether exclusion is thought to be a supplier of effect and meaning immediately itself, or only mediately by its effect on the police. And, when taken out of context, the same is true of Justice Holmes's characterization of the hazard as "reduc[ing] the Fourth Amendment to a form of words."[167] It cannot be said

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> rule is held to be constitutionally required, it may cease to be so if suitable alternatives are developed, or if other measures have eliminated or brought under control the evil at which it is aimed. In short, constitutional holdings in some matters of implemental detail may not be immutable.

Id. at 181. But even if the passage from Clark's opinion were susceptible of construction along the lines of the Hill thesis, the *Mapp* opinion would not be free from logomachy, because, as Hill notes, Justice Clark seems also to have adopted the thesis "that there is a constitutional right not to be convicted on the basis of illegally-seized evidence." *Id.* at 183.

167. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). Of course, one must hasten to add that the *Silverthorne* opinion as a whole leaves absolutely no doubt about Holmes's meaning. That opinion is informed by the unitary model of a government and a prosecution—indeed, by the *Weeks* evidentiary transaction interpretation of the fourth amendment—and there is, accordingly, no mention in it of deterrence of executive misconduct.

The Silverthorne business records were seized without warrant, and photographs and copies were made of them. The district court ordered the originals returned, but impounded the copies. Subpoenas to produce the originals were then served, "and on the refusal of [Silverthorne] to produce them the Court made an order that the subpoenas should be complied with, although it had found that all the papers had been seized in violation of the parties' constitutional rights. The refusal to obey this order is the contempt alleged." *Id.* at 391. "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Id.* This is what Justice Holmes says about the Government's theory of the case:

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Govern-

whether the amendment becomes mere verbiage because courts do not discourage the police from unreasonable searches and seizures, or because the courts encourage the police to make unreasonable searches and seizures, or simply because the courts are taken to signify their indifference to the amendment when they admit illegally seized evidence.

Sometimes a Justice will indicate what he wants to happen, but will not succeed in explaining exactly why his wish should be the command of others. For example, the Justice may try to embrace simultaneously the notion that there is in the premises a genuine imperative binding on the Court, *and* the notion that the exclusionary rule is a product of the supervisory power. The chief difficulty with this approach is that the only imperative existing in supervisory power situations is not *imposed upon* the Supreme Court, but is rather the *result of* that Court's fiat in the exercise of the supervisory power. The other difficulty is that in state cases the Supreme Court may not *have* supervisory jurisdiction.

Justice Douglas's dissent in *Wolf*[168] is an illustration of these difficulties. He associates himself with Justice Black's supervisory power understanding of the source of the exclusionary rule; and yet, in opposition to Black, he would exclude the *Wolf* evidence. But his statement of opposition to admission is not cast as if it were part of a mere disagreement about how a discretionary power should be exercised. It is written with a determination that seems to assume that the Supreme Court is under some kind of moral or constitutional imperative existing independently of its own fiat. In his *Wolf* concurrence, Justice Black goes out of his way to speak for the supervisory power conception when he says that "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created

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ment can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States* . . . to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words . . . . The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's wrong cannot be used by it in the way proposed.

Id. at 391-92.

168. 338 U.S. at 40.

rule of evidence which Congress might negate."[169] For Black any question of extending the rule to the states is settled by that assumption. By contrast, the assumption of judicial creation settles nothing for Justice Douglas because he cannot rid himself of the notion that the fourth amendment places the Court under some kind of duty. He insists that "evidence obtained [by unreasonable search and seizure] *must* be excluded . . . since in the absence of that rule of evidence the Amendment would have no effective sanction."[170] But Justice Douglas is more successful in expressing his concern and his exclusionary wish than in explaining *why* the Court must give the amendment a sanction—why, if the amendment is addressed to the executive, and if therefore the Court can only make evidentiary rulings in the premises, the Court has the responsibility to rescue the amendment from nullification by the executive. Douglas's "must" is presumably not intended to be merely hortatory, and yet he does not explain how the exclusionary rule can at once be the product of a constitutional imperative, binding on the Court, and yet also be a nonconstitutional, congressionally negatable "rule of evidence." The answer is surely that the "must" is not genuine, but is instead an exhortation not binding on the states, nor on Congress, nor on the Supreme Court itself.[171]

169. *Id.* at 39-40.

170. *Id.* at 40.

171. The more or less articulate assumption of Justice Douglas (and of Professor Kaplan, *see* note 55 *supra* and note 276 *infra*) is that the Court may, or must, adopt a *policy* toward the fourth amendment. We assume, of course, that the amendment *has* a "policy" in the sense of "purpose" or "rationale"—a policy in light of which the courts interpret the amendment to determine the constitutional rules of search and seizure. Our qualms are not about the notion of the amendment *having* a policy, but about the courts or the Supreme Court being free or not free to *adopt* policies *toward or in the implementation of* the amendment. In particular, we think it may be important to discover the relationship between judicial freedom or obligation with respect to policy formulation and the obligation of police to obey the fourth amendment or to respect Supreme Court policy toward it.

Consider the difficulties one encounters in trying to understand the hypothesis of a constitutional *compulsion* to adopt a policy supportive of the amendment. *Either* the Court thinks it clearly must adopt a certain policy, in which case it will not be "adopting" a policy but will rather be interpreting and following the *rules* of the amendment; *or* it will not know what policy it should adopt, in which case it will indeed be "adopting"—perhaps even "originating"—but, by the terms of the example, it will not know whether it has complied with the constitutional imperative, supposing there is one. This latter problem is one of the difficulties with Professor Kaplan's formulation of the matter—the other difficulty being how and in what form that which he calls the constitu-

Although Justice Douglas tries to move away from the totally discretionary, "creative," "improvisational" understanding

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tional "demand" impinges on the police:

> [T]he exclusionary rule is merely one arbitrary point on a continuum between deterrence of illegal police activity and conviction of guilty persons. As a stopping point, it can be justified solely on the ground that it achieves a better balance between these twin goals than would other points. If another stopping point does the job better, it should replace the current exclusionary rule . . . .
>
> In other words, 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.

Kaplan, *supra* note 55, at 1030. If we read this correctly, Kaplan is not treating the fourth amendment as a rule or set of rules that *has* a policy, *i.e.*, a purpose or rationale, but as itself *being* a kind of *policy statement.* What we seem to be given is a "first order" policy statement, in response to which the Court must come up with "second order" "policies" or "particular remedial or prophylactic rule[s]." But it is difficult if not impossible, in such a scheme, to find an obligation. It is uncertain whether a constitutional provision, understood as a policy statement, can also be understood as imposing an obligation, or whether it is merely hortatory. Furthermore, in the case of Kaplan's formulation, there is not only a question about the origin and the force of the phrase "the Constitution demands," but also about the addressees. We are not told how one infers such a demand from the Constitution, nor whether it has the force of obligation, nor, if so, *on whom* it is obligatory. We do not know why the Court is bound to do what is "demanded" of it, nor why, if the measures taken by the Court are merely in response to a policy statement, they bind *the police* to compliance with them.

We shall assume that the Court will know when it has tried hard enough to find the remedial mix that works. Perhaps there is nothing more mysterious about an "arbitrary point on a continuum," which is supposed to be "something that works—presumably at a reasonable social cost," than there is about any balancing metaphor. But if that language and that metaphor are not mysterious, they nevertheless fail to specify how vigorous the Court must be in meeting the constitutional "demand," and what efforts and sacrifices it is entitled to ask of society, and especially of the police, before it can satisfy itself and those to whom it is accountable that it has something that "works" *well* enough and yet without *un*reasonable "social cost." Supposing this question can be passed over as it relates to the Court's own constitutional duty, we do not think it can be passed over in dealing with police obligations under the fourth amendment. We can understand the police having obligations under the fourth amendment, viewed as a rule or set of rules, but we have trouble understanding police obligations under the amendment understood as a policy statement.

Perhaps, however, we have been laboring under a misapprehension insofar as we have even thought of a police obligation. Perhaps the police are merely to be deterred and/or manipulated in pursuance of the policy. If this is so, as on reflection it seems to be, we can then shift our concerns radically from conceptual enigma to doubt about the soundness of a compliance strategy that abstracts from obligation. The statements, "You police must refrain from violating privacy because we courts have a policy of deterring you from violating privacy," or "Refrain, be

of the exclusionary rule articulated by Justice Black, he simply finds no solid conceptual ground to move to. By contrast, it seems to us, Justice Brennan in *Calandra* has at least a divination of where that ground does *not* lie, as is shown by his reluctance to look for support in the deterrence rationale: deterrence of the police "was at best only a hoped for effect of the exclusionary rule, not its ultimate objective."[172] To be sure, when Brennan tries to say positively what the objective is, he lapses into vague references to meaningfulness, as when he says that the rule properly understood is "an enforcement tool to give content and meaning to the Fourth Amendment's guarantees."[173] This is not only vague, but it also suggests that Justice Brennan is working from a voluntaristic, supervisory conception of the rule after all.

There are, however, other passages in Brennan's *Calandra* dissent in which one can hear something of a constitutional ring, as if the practice of classical judicial review were being invoked. For example, Justice Brennan states that "the vital function of the [exclusionary] rule [is] to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct."[174] This passage can be interpreted three ways: *First*, it can be taken as a judicial integrity, "the court protects itself" utterance; we shall discuss it and like passages under that interpretation in Part VII. But, *second*, if "sanctioning" were taken as a synonym for "validating," one could plausibly follow up on Brennan's language by insisting that the exclusionary rule is not

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cause we have settled at one 'arbitrary point on a continuum' "—these statements are not good rhetoric, to say nothing of good constitutionalism. (Some help on the strategy question will be found in Oaks, *supra* note 43, at 705-06, 711, 724-25. ("A legal sanction is most likely to be an effective deterrent when it is reinforced by a sense of moral obligation or an appeal to conscience." *Id.* at 724.)

It will be apparent that we do not think anything is gained, and that much is lost, by treating the amendment as a policy rather than as a rule. (On the notion of "policy," and what one can call the voluntaristic qualities it has by contrast with both "rule" and "principle," see Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624, 631 (1963); and *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967).)

We do not deny that this conclusion is supportive of the argument we shall be making in the remainder of this Article. That argument is that exclusion is one indispensable expression of the defendant's constitutional right to have the fourth amendment, understood as a "rule of recognition" and therefore as part of "the law of the land," applied in his case—the right he has to judicial review where the government has violated constitutional laws in its prosecution of him.

172. 414 U.S. at 356.

173. *Id.*

174. *Id.* at 360.

a separate "rule" at all, but is simply another name for judicial review—a name, moreover, which is misleading if it suggests that judicial review of executive search and seizure conduct is at all different from judicial review of legislative conduct. To the extent that "sanctioning" is synonymous with "validation" in Justice Brennan's *Calandra* opinion, he is giving the fourth amendment "meaning," or saving it from "meaninglessness," in the same way the judicial review doctrine of *Marbury v. Madison*[175] purports to give meaning and force and effect to the whole Constitution, *i.e.*, by *not* giving judicial force and effect to governmental conduct that violates the Constitution.[176] But, if this is what Justice Brennan has in mind, he has taken us away from the notion of remedy, whether strictly or loosely understood—away from both the traditional remedial canon *and* the supervisory power—into the realm of constitutionalism and judicial review. Exclusion *qua* judicial review is neither compensation for harm done by another branch of government, nor deterrence of harm threatened, nor judicial self-protection. It is rather the court's method of avoiding a wrong it might do to the defendant by ignoring, in his case, what we shall be calling a constitutional "rule of recognition." Exclusion as judicial review is the court's affirmation of the defendant's personal due process right to have *this* rule of recognition—the fourth amendment—observed in his case. The judicial review approach to unconstitutionally seized evidence is a repudiation of the fragment-

175. 5 U.S. (1 Cranch) 137 (1803).

176. If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of the judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Id. at 177-78.

ary model, an uncloistering of the court, an acknowledgment by the court that it must attend to fourth amendment matters—even if that amendment is primarily addressed to the executive—because the court is part of the government that has allegedly violated the fourth amendment, and because it is being asked to validate that violation by using its product to jeopardize a person's life, liberty, or property. If the court cannot ignore the manner in which the evidence has been obtained (and we shall presently argue that it cannot), then it is faced with the alternatives of excluding the evidence and thereby rendering the fourth amendment meaningful as a "rule of recognition," or making it meaningless by admission. That is, it is faced with the alternative of respecting or violating the defendant's "due process" right to have the "law" of the fourth amendment observed in the government's prosecution of him.

In Part VI we shall discuss the judicial review account of the exclusionary rule, and the possibility that Justice Brennan has it in mind when he refers to the avoidance of "sanctioning illegal conduct." In the meantime, however, we want to turn to a *third* possible meaning of this phrase and to a hazard closely related to, if not indistinguishable from, fourth amendment "meaninglessness." We are going to ask if there is a difference between "meaninglessness" by omission and something called "affirmative sanction."

4. "Authoritative Disavowal" of "Affirmative Sanction"

We have discussed the senses in which the term "remedy" can be used in connection with the problem of illegally seized evidence.[177] Then, by taking up the problem of fourth amendment "meaninglessness," we were led out of the realm of remedy into that of judicial review.[178] But admission may be more than failure to review; in order to understand what takes place in an admissionist jurisdiction, the emphasis may have to be placed on the *act* of admission rather than on the *failure* to review. If that shift in emphasis is made, it may be concluded that the court as part of the government has *itself created* a problem which cries for solution by some "remedy" in the looser sense of "repairing a situation" that is morally awry. Admissionist courts have been accused not merely of rendering the fourth amendment and similar protections "meaningless" by passive

177. *See* text accompanying note 151 *supra.*
178. *See* text accompanying notes 175-76 *supra.*

"condonation," but also of affirmatively commissioning illegal conduct. It is with that allegation in mind that we now turn, first, to Justice Frankfurter, who did not believe that admission constituted affirmative sanction, and to Justice Holmes, who believed that it did.

Writing for the Court in *Wolf*, Justice Frankfurter felt "no hesitation in saying that were a State affirmatively to sanction . . . [unreasonable] police incursion into privacy" it would be acting unconstitutionally,[179] the implication being that there is nothing "affirmative" about admission. During the *Olmstead* litigation the Department of Justice had expressed its disapproval of the criminal wiretapping done there.[180] To this Justice Holmes responded that he could "attach no importance to protestations of disapproval if . . . [the government] knowingly accepts and pays and announces that in the future it will pay for the fruits."[181] Now, for Holmes, "no distinction can be taken between the Government as prosecutor and the Government as judge."[182] This presumably means that judicial expostulation against unconstitutional police activity is no more credible than executive "disapproval" if it is accompanied by admission. This is so at least if acceptance of the evidence is tantamount to an "announcement" that the court wants the fruits and will accept them in the future. In short, Holmes is saying that admissionist courts do exactly what Justice Frankfurter said in *Wolf* "would run counter to the guaranty of the [Constitution]" namely, they "affirmatively . . . sanction . . . [unreasonable] police incursion into privacy . . . ." Or, to put it another way, Justice Holmes sees no difference between rendering the fourth amendment "meaningless"—"a form of words"—and affirmatively sanctioning executive conduct violative of the amendment.

179. Wolf v. Colorado, 338 U.S. 25, 28 (1949). Aside from the question whether admission should be taken to constitute affirmative sanction, there is the separate question of what kind of governmental conduct Justice Frankfurter thought would amount to the forbidden sanction. Dissenting in Monroe v. Pape, 365 U.S. 167, 211 (1961), he said that if victims of fourth amendment violations were denied redress in state courts "on the ground that the official character of the [policemen] clothed them with civil immunity," this would be affirmative sanction of the violation. *See* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1151 (1969).

180. "According to the Government's brief . . . '[t]he Prohibition Unit of the Treasury disclaims [wiretapping] and the Department of Justice has frowned on it.'" Olmstead v. United States, 277 U.S. 438, 483 n.15 (1928). The Government was thus repeating a pattern of behavior previously noted by Holmes in his *Silverthorne* opinion. *See* note 167 *supra*.

181. 277 U.S. at 470.

182. *Id.*

One wonders whether Justice Holmes would have been mollified if the government had also sought to have the wiretapping agents prosecuted by the state of Washington. It is doubtful that Holmes would have "attached importance" to that—or that such action would have spoken loudly enough to constitute for him a convincing disavowal of the wiretapping, given the Government's simultaneous use of the wiretapping evidence and its readiness to use more of the same. If we are not mistaken, the implication of Holmes's statement is that *any* form of disapproval, no matter how strenuous, is vitiated and neutralized by introduction and admission into evidence.[183] For presumably the more deserving of punishment the conduct of the officers is, the less comprehensible will be the court's admission of their work product. To say the least, doubts exist as to whether punishment can redress the moral imbalance created by admission of illegally obtained evidence; and if as to punishment, then more so as to civil awards.

These doubts exist because, however innocuously judges would like to have admission interpreted, it will be taken as a revelation of the court's fundamental attitude toward the rule of law. The evidentiary decision is taken to be so revealing because it is so exclusively and intimately within the court's control—so fundamental to the court's own business of deciding how it will synthesize its own peculiar product. By admitting the evidence, the court says that so far as it, a court of law, is concerned in the conduct of its own business, the manner in which evidence is obtained will not be allowed to make any difference.[184]

Wigmore, Holmes's great antagonist in the early days of the exclusionary controversy, acted as if he thought he had made an adequate defense of admission by saying that when a court lets evidence in "the illegality is by no means condoned; it is merely ignored."[185] This is a significant disclaimer, and we shall comment on it in proportion to its importance. It is important not merely for what is said, or for who says it, but also for the moral impulse it bespeaks. The archetypal admissionist, like many of his successors,[186] felt the need to absolve the admission-

183. See our consideration of Justice Holmes in note 150 *supra.*

184. The admissionist court signals what is of greatest consequence to it when it adopts a principle according to which it presumably must admit illegally obtained evidence in the prosecution of officers for illegally obtaining evidence, and so on *ad infinitum.*

185. Wigmore, *supra* note 16, at 479.

186. *See, e.g.,* United States v. Calandra, 414 U.S. 338, 356 n.11 (1974)

ist court of complicity in executive misconduct. Indeed, the question has never been whether courts are constitutionally at liberty to condone unconstitutional searches and seizures, but whether, by admitting the evidence, they *do* condone a violation of the fourth amendment. And it is noteworthy that the question has been similarly circumscribed in the debate over judicial review of legislation. Indeed, we think it would be useful to recur momentarily from the exclusionary controversy to the older debate and to the jurist in whose vineyard Wigmore can be said to have labored.

In the debate provoked by *Marbury v. Madison*, the fragmentary model was used to deny judicial condonation of unconstitutional legislation, much as, we are arguing, that same model has been used by Wigmore and others to deny condonation of executive misconduct. Justice Gibson's dissenting opinion in *Eakin v. Raub*[187] is generally cited as the classic response to *Marbury*. On the point of interest here, Gibson briskly answered his own question—whether "the judges do a positive act in violation of the constitution, when they give effect to an unconstitutional law"—by responding "[n]ot if the law has been passed according to the forms established in the constitution."[188] He went on to find "the fallacy of the question" in its

> supposing that the judiciary adopts the acts of the legislature as its own; whereas the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the constitution which may be the consequence of the enactment. The fault is imputable to the legislature, and on it the responsibility exclusively rests.[189]

(Powell, J.) ("'Illegal conduct' is hardly sanctioned, . . . by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings . . . ."); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting) ("Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government."); People v. Cahan, 44 Cal. 2d 434, 453, 282 P.2d 905, 916 (1955) (Spence, J., dissenting) ("The expression of . . . [the admissionist] view does not signify that I condone any illegal search or seizure by any enforcement officer . . . ."); Barrett, *supra* note 50 ("It should be noted that the exclusion of the evidence usually results in the defendant's completely escaping punishment for his act, while the admission of the evidence does not constitute a judicial approval of the officer's conduct, and that [the] officer is still, at least in theory, subject to some form of civil or criminal liability."). *But see* note 85 *supra*, on the question of whether the officer is civilly liable according to Barrett's theory.

187. 12 S. & R. *330, *344 (Pa. 1825).

188. *Id.* at *354.

189. *Id.*

We think the intent of these words is similar to that of Wigmore's noncondonation remark, and that they could be used as well to justify use of evidence as to justify enforcement of a statute. And, because almost all present-day admissionists are loyal to *Marbury*, it is perhaps healthy to draw attention to Wigmore's kinship with Gibson, precisely so contemporary admissionists will be prompted to reexamine the doctrinal consistency of their admissionism on the one hand and their loyalty to judicial review on the other.

Justice Gibson does not imply that a constitution is a merely subjective charter, nor deny that it provides the criteria by which a legislative enactment can be shown to be unconstitutional. But, having granted objective status to constitutions, he denies that courts "do a positive act in violation of the constitution," or that the "judiciary adopts the acts of the legislature as its own" when it "give[s] effect to an unconstitutional law." Because the judges do not "concur" in the passage of the act, Justice Gibson does not believe they can be held to have concurred in the violence the act does to a constitution. And the reason the enforcing judges do not concur and are therefore without "fault" or "responsibility" is that "the enactment of a law and the interpretation of it are not concurrent acts." Now, the fact of timing to which Gibson points is indubitable. The doubtful premise is his assumption that moral "concurrence" is contingent on temporal "concurring." The question at its narrowest is the vitality in our public law of the notion of "ratification." At its broadest, the question is a confrontation between the unitary and fragmentary models, with Marshall stressing unitary "transactions" or "courses of conduct" and Gibson fragmenting the government along the temporal lines that can be drawn between various acts.

It might be complained, however, that this digression has not advanced the inquiry, because the paragraph from Gibson's opinion is a feeble specimen of fragmentary thinking, and that Wigmore, for example, does not rely for his disclaimer on the mere absence of temporal concurrency. We must try to establish what Wigmore means by saying that "illegality is by no means condoned; it is merely ignored."[190]

190. Wigmore, *supra* note 16, at 479. *See* text accompanying note 185 *supra*. *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803):

> Those . . . who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

We assume that the relationship between the clauses is conceptually intimate and that Wigmore is saying that illegality is not condoned precisely *because* it is ignored. Now, this interpretation can in turn be construed in either one of two ways, depending on how "ignored" is understood—depending, that is, on whether one emphasizes the current or the obsolete sense of that word.

"To ignore" currently means, "to refuse to take notice of . . . to disregard intentionally . . . [to] shut 'one's eyes to.' "[191] This is surely the sense Wigmore has primarily in mind. Indeed, in his gloss on the proposition under discussion, he includes a dictum from an English case to the effect that "the Court [could not] take notice in what manner [the evidence] was obtained."[192] But, this sense does not serve Wigmore because it begs the main question, which is whether the court is at liberty *not* to take notice of, or is free *to* shut its eyes to, the manner of obtaining evidence.

In order to avoid question-begging, one must resort to the archaic sense, "not to know, to be ignorant of."[193] If Wigmore is saying anything responsive to the condonation problem, he must be saying that in some respect the court is ignorant of the officers' misconduct. Wigmore must be trying to undermine the condonation innuendo by finding the court somehow aloof from the illegality. And, even though courts are logically incapable of "ignoring" that of which they are honestly not aware—conscious inadvertance presupposing prior advertance—ignoring nevertheless may, and perhaps must, have as its objective the *simulation* of genuine ignorance. To put it another way, just as the current sense of "to ignore" is parasitic on the obsolete sense, so also must Wigmore's reference to ignoring be ultimately concerned with ignorance and knowledge, because guilty *knowledge* is precisely what leads to the charge of condonation.

The implication of Wigmore's precept would seem to be that if the ignoring does not succeed there will be condonation, or that if there *is* knowledge there *is* condonation. So, presumably, the court cannot morally afford to know how the evidence was obtained. Nor, presumably, can it feign ignorance, for, one would assume, if the problem for which a solution is sought is

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This doctrine would subvert the very foundation of all written constitutions.

191. 5 OXFORD ENGLISH DICTIONARY 33 (1933).

192. Wigmore, *supra* note 16, at 479 n.1, citing Jordan v. Lewis, 93 Eng. Rep. 1072 (K.B. 1740).

193. 5 OXFORD ENGLISH DICTIONARY 33 (1933).

a *moral* problem, bad faith would be contrary to purpose. And yet ignoring, even as it is parasitic on the concept of ignorance, at the same time presupposes both knowledge and willfulness. At any rate, under Wigmore's account the court's ignorance is contrived; the court does not know because it will not allow itself to be told.

As might be expected, Wigmore does not even try to pursue the "ignorance" tack; his final recommendations are that the court should send for "the high-handed, overzealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution and then [the court should proceed] to affirm the sentence of the convicted criminal."[194] But the court cannot fairly sentence the marshal without hearing what he has done. So, in the very act of doing justice, the court would lose its cover of willful ignorance, and, by Wigmore's hypothesis, condone that which, also by his hypothesis, it cannot in justice afford to condone. Either the court keeps up the sham of ignorance, and therefore acts in bad faith, or it listens to what the defendant is trying to tell it; if it persists even then in admitting the evidence, it condones the "means through which . . . [the government] has been enabled to obtain the evidence."[195]

The court will be chargeable with condonation unless it can find a way to disavow the "high-handed" conduct of the officer. Wigmore may have thought he had found a disavowal mechanism in punishment. To be sure, he never in so many words claims to cancel admission by punishment; he only says that "the natural way to do justice here would be [on the one hand] to enforce the splendid and healthy principle of the Fourth Amendment directly, *i.e.*, by . . . imposing a thirty-day imprisonment" on the officer, and, on the other, to admit the evidence and convict and sentence the defendant.[196] But, if we have correctly understood the implications of Wigmore's whole argument, punishment of the officer, *and that by the admitting court*, is not merely what good judicial administration would suggest, but is what any admissionist court *must* do. The admissionist court must *itself* try to avoid condoning the officer's invasion—it cannot morally afford to gamble on the contingency that some other agency might vindicate the moral and constitutional integrity of the court. Yet the only instrument of disclaimer the admission-

194. Wigmore, *supra* note 16, at 484.
195. *Id.* at 479.
196. *Id.* at 484.

ist court has kept at its disposal is punishment. So the court must punish, if that will do any good, *i.e.*, if punishment is a sufficiently eloquent disclaimer. This brings us back to the question of what can be accomplished by punishment as a disavowal mechanism when it is coupled with admission.

Punishment is sometimes the only way a government can put moral distance between itself and the acts of its agents. This kind of exigency has instructively been called an occasion for the "expressive function" of punishment[197]—an occasion for the use of punishment as "authoritative disavowal"[198] of improper or embarrassing agent conduct. Something like this is probably what Wigmore had in mind, or what he should have had in mind. But the problem with punishment is that, whereas it is sometimes a necessary condition to the regaining of a moral equilibrium, and sometimes a necessary and sufficient condition, it is sometimes neither necessary nor sufficient. The case of improperly obtained evidence would seem to be one where even if punishment is necessary it is certainly not sufficient to accomplish disavowal in the face of the court's willingness to use the evidence. A court can refrain from taking the initiative to facilitate criminal or damage actions against invading officers and yet maintain the credibility of its stated opposition to those invasions, *if* it excludes the evidence. But the reverse may not be true.[199] At the very least, one has to admit that there is a

197. In order to distinguish between governmental impositions that might truly be called "part of the price of doing business" (which he calls "penalties") and those which have to be called *punishment*, Joel Feinberg argues that punishments have an identifying characteristic that differentiates them from mere penalties:

> That characteristic, or specific difference . . . is a certain expressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.

J. FEINBERG, DOING AND DESERVING 98 (1970).

198. *Id.* at 101. Feinberg explains this phenomenon as follows:

> Consider the standard international practice of demanding that a nation whose agent has unlawfully violated the complaining nation's rights should punish the offending agent. . . . Punishing [say, a transgressive pilot] is an emphatic, dramatic, and well-understood way of *condemning* and thereby *disavowing* his act. It tells the world that the pilot had no right to do what he did, that he was on his own in doing it, that his government does not condone that sort of thing. . . . In quite parallel ways punishment enables employers to disavow the acts of their employees (though not civil liability for those acts), and fathers the destructive acts of their sons.

Id. at 101-02.

199. We surely do not wish to convey the impression that we are

question whether credibility on the point can be maintained if the court facilitates criminal or tort actions and yet welcomes the improperly obtained evidence. Is there any way other than exclusion to avoid condonation? Punishment (or a damage award) would seem to be an additional desideratum. But more should not be asked of it than it can give.

5. Exclusion as Protection of Judicial Integrity

We have discussed four responses to four respective perceived problems: (1) personal remedies for unconstitutional invasions, (2) preventive measures for patterns of police misconduct, (3) exclusion *qua* judicial review to avoid "meaninglessness" of the fourth amendment as a rule of recognition, and (4) exclusion and punishment as possible alternative responses to the allegedly separate phenomenon of "affirmative sanction." Finally, we are adding exclusion as a way judges keep themselves "untainted." We think, however, that almost everything that needs saying about judicial integrity can and should be said in our discussion of the constitutional right of the defendant to have the government act legally throughout its prosecution of him. That discussion, which we shall present in Parts VI and VII, will show

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hostile to the tort (or the penal) response to unconstitutional search and seizure. We simply think, with Justice Brennan, the author of the Court's opinion in *Bivens* and of the dissent in *Calandra*, that damages are awarded and motions to suppress granted for entirely different reasons, and are hence not fungible "alternative remedies." Professor Dellinger's statement of the matter cannot be improved on:

> [I]n his *Bivens* dissent, the Chief Justice denied that fourth amendment violations would be endorsed by permitting the introduction of illegally seized evidence as long as an effective damage remedy against the government was provided. But availability of an alternative compensatory remedy only reduces and does not eliminate the legitimizing effect of the official use in court of evidence seized in violation of the fourth amendment.
>
> In essence, by disallowing in all cases the use of the exclusionary rule to suppress evidence gathered in violation of the fourth amendment, the Chief Justice's proposal would permit the government to buy itself out of having to comply with constitutional commands. To abolish the exclusionary rule and replace it with an action for damages against the governmental treasury is to have the law speak with two voices.

Dellinger, *supra* note 78, at 1562-63.

On the entirely separate question of the genuine "availability of an alternative compensatory remedy," see Professor Amsterdam's assessment of Chief Justice Burger's plan for quasi-judicial compensation tribunals in Amsterdam, *supra* note 28, at 429-30.

For a forthright attempt to deal with some of the difficulties courts and legislatures would encounter in an attempt to fashion a viable compensatory remedy for fourth amendment violations, see Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 75 (1974).

how and why most extant judicial integrity arguments, those of Justices Brandeis and Brennan included, are truncated when left in isolation and make sense only when consciously recognized as partial statements of the more comprehensive argument for a personal right to legality and due process.

VI. EXCLUSION AS JUDICIAL REVIEW

Having canvassed the evils possibly attendant on unreasonable searches and seizures, and having briefly viewed the exclusionary rule as a response to some of those evils, we are now in a position to say with some precision and confidence what functions the rule does *not* perform when it is understood as Justice Brennan understands it. He does not view it as a "remedy" in either sense of the term;[200] nor does he see "affirmative sanction" as a separate evil requiring a different response from that appropriate for "meaninglessness."[201] Thus, according to Justice Brennan, the exclusionary rule must be either an exercise of judicial review[202] or a supervisory power protection of judicial integrity. In this Part we shall discuss the judicial review hypothesis, in the next that of judicial integrity.

We previously singled out Justice Brennan's statement that "the vital function of the [exclusionary] rule [is] to insure that the judiciary avoids even the slightest appearance of sanctioning illegal government conduct."[203] Although this declaration was intended by Brennan as an expression of the judicial integrity rationale, we have suggested that it might also be subject to a judicial review interpretation. It could be recast, for example, to read "the vital function of the exclusionary rule is to ensure that the judiciary avoids validating unconstitutional conduct." We shall now briefly exhibit the indications in the *Calandra* dissent that Justice Brennan might accept this judicial review emendation.[204] We think there are at least two now familiar passages that might be employed to support the hypothesis that there is an inchoate judicial review thesis in that dissent: first, the claim that the exclusionary rule "give[s] content and meaning to the Fourth Amendment's guarantees"[205] and, second, the statement that

200. *See* text accompanying notes 152-66 *supra.*
201. *See* text accompanying notes 177-99 *supra.*
202. *See* text accompanying notes 167-76 *supra.*
203. United States v. Calandra, 414 U.S. 338, 360 (1974), discussed in text accompanying notes 174-76 *supra.*
204. *See also* text accompanying notes 249-52 *infra.*
205. 414 U.S. at 356.

> [t]he exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.[206]

It is plausible to suggest that Justice Brennan believes that the fourth amendment binds the courts because it is part of the Constitution and because, by virtue of the reasoning and holding of *Marbury v. Madison*,[207] the courts are obligated to review governmental conduct alleged to be at variance with any part of the Constitution invoked in litigation. One can indeed say that the intent of *Marbury* is precisely to prevent the Constitution from becoming "a chimera"—an eventuality that Chief Justice Marshall seemed to have in mind when characterizing as a "solemn mockery" the anti-review theory that a "constitution forms no rule for [a judge's] government."[208]

It could perhaps also be said that according to Brennan the judiciary's obligation to review searches and seizures is especially acute because they affect personal rights. At any rate we know he places great stock in Madison's anticipation that

> [i]f they [the rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive.[209]

Indeed, it is Justice Brennan's opinion that

> [t]he exclusionary rule gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[210]

But, if Justice Brennan thinks the exclusionary rule is a specimen of judicial review—an especially eligible specimen—it is notorious that some of his brethren, otherwise committed to judicial review, ignore or deny its pertinence to searches and seizures. Justice Harlan, for example, wrote an extended critique of the exclusionary rule in *Mapp*,[211] in which he barely nodded at the possibility that the rule could be considered an exercise of judicial review.[212] For him, the exclusion of evidence and the doctrine of *Marbury v. Madison* are simply not in the same realm of discourse. Justice Harlan assumes that the only way exclusion could even conceivably come under the constitu-

206. *Id.* at 361.
207. 5 U.S. (1 Cranch) 137 (1803).
208. *Id.* at 180.
209. 414 U.S. at 356-57, quoting 1 ANNALS OF CONG. 439 (1789).
210. *Id.* at 366, quoting 1 ANNALS OF CONG. 439 (1789).
211. Mapp v. Ohio, 367 U.S. 643, 672-86 (1961) (dissenting opinion).
212. *See id.* at 678.

tional umbrella would be as a defendant's claim immediately on the court, as a "fair trial"—or what he calls "procedural"—right. According to Harlan, exclusion must be either a fair trial right or a mere supervisory power-deterrence remedy. Denying the former, he affirms the latter. At no point does he consider the possibility that exclusion could be the court's response to its own duty to review the constitutionality of the executive's search and seizure.

A. The Fourth Amendment as a Constitutional Stepchild

In his *Mapp* plurality opinion, Justice Clark remonstrated with the *Wolf* Court—much as Brennan remonstrates with the *Calandra* Court—for making the fourth amendment a constitutional stepchild[213] by withholding judicial review from governmental acts challenged under it. "[W]e are aware of no restraint," Justice Clark said,

> similar to that rejected today [*i.e.*, similar to the ultimate anti-exclusionary holding of *Wolf*], conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would [if *Wolf* remained the law] stand in marked contrast to all other rights declared as "basic to a free society." . . . This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability.[214]

We shall discuss two of these heretofore more favored constitutional rights, pursuant to Justice Clark's implicit suggestion that the treatment they have received provides analogies by which to justify the exclusionary rule in search and seizure cases as a constitutional requirement. In the course of this discussion we shall be concerned with one of Justice Harlan's arguments in rejoinder to Clark's opinion.

1. *The Confessions Analogy*

There are at least three ways to respond to the proposition that unconstitutionally seized evidence is for constitutional purposes an analogue of coerced but reliable confessions. Two of these approaches assume or assert the analogy, and the third, whose spokesman in *Mapp* is Justice Harlan, denies it. With

213. The phrase is Professor Amsterdam's. Amsterdam, *supra* note 28, at 363.

214. 367 U.S. at 656 (footnotes omitted).

Dean Wigmore, one assumes that any argument from analogy would obviously call for admission of both confessions and seized evidence because both are reliable evidence.[215] Wigmore's fragmentary model position is simple and consistent: both the *Weeks* rule and any confessions rules not having to do with reliability are "extrinsic policy" proposals whose "policies" are simply not eligible, and which therefore obviously do not override the commanding common-law principle that all reliable and relevant evidence must be admitted.[216] With Justice Clark, on the other hand, one asserts the analogy with a view to supporting exclusion. "[N]othing," he says, "could be more certain than that when a coerced confession is involved, 'the relevant rules of evidence' are overridden . . . . Why should not the same rule apply to . . . unconstitutional seizure of goods, papers, effects, documents, etc.?"[217]

There are two reasons why the analogy *as* an analogy does not support Justice Clark's plea for exclusion of unconstitutionally seized evidence. But, as we shall see, precisely these reasons for failure of the confessions/search and seizure analogy bring to

215. One can indeed say that, for Wigmore, analogizing is redundant because it is obvious on the face of each "analogue" that it should be admitted. *See* 3 J. WIGMORE, EVIDENCE § 856 (1940) and 8 *id.* § 2184.

With respect to coerced confessions, Wigmore adhered to what he called the doctrine of "Confirmation by Subsequent Facts":

> That theory is that where, in consequence of a confession otherwise inadmissible, *search is made and facts are discovered which confirm it* in material points, the possible influence which through caution had been attributed to the improper inducement is seen to have been nil, and the confession may be accepted without hesitation.

3 *id.* § 856. *See also id.* § 857. (And consider *id.* § 856 n.1: "A subsequent confirmation by the *accused's own acknowledgment* of the correctness of the confession should also relieve from any inquiry into the influence of the inducement, or into the voluntariness in general of the confession . . . .")

216. The fragmentary model is built into the very phrase "extrinsic policy"—the barely suppressed premise underlying the expression being that policies which interfere with truth-seeking are extrinsic to a court's concerns because truth-seeking exhausts a court's proper concern. Hence, Wigmore's enormous impatience with exclusionary rules and hence also the threshold of resistance that "extrinsic policies" had to overcome to be accepted by him:

> [The rules of extrinsic policy] forbid the admission of various sorts of evidence because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering.
>
> The rules of this . . . class . . . obstruct . . . [rather than] facilitate the search for truth . . . . It follows that no limitation of the present nature ought to be recognized unless it is clearly demanded by some specific important extrinsic policy.

8 *id.* § 2175.

217. 367 U.S. at 656.

the sharpest possible light the judicial review rationale for exclusion of unconstitutionally seized evidence. The first reason for the failure of the analogy, as Clark attempts to draw it, stems from his gratuitous subsumption of the confessions rule under the "fair trial" rubric. The second reason stems from the doubt Justice Harlan creates as to whether a coerced confession *is* a subject *for judicial review*—a doubt as to whether in the coerced confessions case as such there is actually presented any conduct by another branch of government requiring validation or invalidation by the judiciary.

a. The "Fair Trial" Mistake

Unlike both Wigmore and Clark, Justice Harlan denies the analogy. It "is not a true one";[218] "I think the coerced confession analogy works strongly *against* what the Court does today."[219] He believes the analogy is faulty because, whereas the confessions rule has to do "with something which is regarded as going to the heart of our concepts of fairness in judicial procedure"[220]—is in short a "procedural right"[221]—the search and seizure exclusionary rule has nothing to do with a fair trial and is indeed "an incidental means [by which a court may pursue] other ends than the correct resolution of the controversies before it."[222] In particular, the exclusionary rule in search and seizure cases is "but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future."[223] To be sure, these are bare assertions, which, *as* assertions, beg the question. For the issue is precisely whether the exclusionary rule in search and seizure *is* a mere deterrence remedy, and therefore *not* "something . . . going to the heart . . . of fairness in judicial procedure."[224] But, even as mere assertions, Harlan's

218. *Id.* at 683.
219. *Id.* at 685.
220. *Id.* at 684.
221. *Id.* at 685.
222. *Id.* at 683.
223. *Id.* at 680.
224. Justice Harlan uses some legerdemain to render the exclusion of reliable confessions into a fair trial provision. At the beginning of his argument, when he is still focusing solely on seized evidence, his pronouncements have a distinctly Wigmorian cast:

> I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused.

Id. at 683. At this point in the argument it does not appear that the *accusatorial* emphasis in the system would be a fundamental or fair trial

characterizations help us get our bearings by indicating that he adheres to the now familiar fragmentary propositions that there

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consideration. At the most, one might see it as one of the negotiable "specifics of trial procedure, which in every mature legal system will vary greatly in detail . . . ." *Id.* But, as Harlan begins to deal with the confessions analogy in earnest and therefore to account for the confessions rule, he departs from his initial Wigmorian exclusive preoccupation with relevance and reliability and concludes by making the accusatorial emphasis the key fair trial indicator. Indeed, he has to make this departure because it would be impossible to rationalize the exclusion of reliable, coerced confessions on Wigmorian premises. Upon reading Harlan's argument, one is prompted to think how much simpler his job would have been had it been open for him to follow Wigmore's lead and admit both illegally obtained evidence *and* confessions. But in *Mapp* Harlan was faced with the fact that the Court had already departed from the Wigmore position and introduced values other than reliability into its decisions about confessions. *See generally Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954-84 (1966) [hereinafter cited as *Developments*]. Had Harlan not been confronted with this confessions *fait accompli*, one could see him making his *Mapp* dissent into a manifesto against Supreme Court imposition of any and all exclusionary rules on the states. What we get instead is Harlan's attempt to keep this break in the simple Wigmorian orthodoxy from carrying the whole position away. One finds Harlan defending, so to speak, the Supreme Court's confessions precedents against Wigmore and trying to give reasons why that defense does not apply as well to illegally seized evidence.

Harlan's principal problem is to find a rationale for the confessions rule—something legitimate for the rule to do. He abandons the Wigmore reliability criterion and eschews a deterrence or judicial review role for the rule—a role designed one way or another to confront "independent Constitutional violations." 367 U.S. at 685. *See* text accompanying notes 231-33 *infra*. Harlan is therefore driven, albeit willingly, to assign the confessions rule the office of protecting the *accusatorial* nature of our criminal procedure. The unpleasantness of the fact that this analysis of the rule involves a departure from the Wigmorian orthodoxy is offset for Harlan both by the fact that he has found something for the rule to do, and because what he has it do is to enhance the fairness of the trial—as that fairness has been redefined along non-Wigmorian lines. As a fair trial phenomenon, the confessions rule is clearly disanalogized from the search and seizure exclusionary rule. *See* text accompanying notes 225-28 *infra*.

The irony of the confessions rule, as Harlan reconstructs it, is that it is indistinguishable from the privilege against self-incrimination. Not only does Harlan completely ignore the Wigmorian rationale for the confessions rule, and hence collapse the distinction that Wigmore had labored to maintain ("[T]he confession-rule aims to exclude self-incriminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*." 3 J. WIGMORE, EVIDENCE § 823 (1940)), but he also asks his colleagues to accept the confessions rule *as* the privilege against self-incrimination in this very *Mapp* dissent where he emphatically reminds them that the privilege is not applicable to the states. 367 U.S. at 686. In his eagerness to disallow the confessions analogy, Harlan makes the argument of Miranda v. Arizona, 384 U.S. 436 (1966), five years before it is made by Chief Justice Warren—with the difference that Harlan seems more concerned to protect the trial than

are only two kinds of rights in the premises—fair trial and privacy; that the only way for courts to honor the right of privacy

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the defendant, more concerned for the accusatorial system than for the accused.

Harlan's initial statement on the accusatorial theme is borrowed from Justice Frankfurter, writing in a coerced confession case:

> The operative assumption of our procedural system is that "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby the accused was interrogated in secret for hours on end."

367 U.S. at 684, quoting Watts v. Indiana, 338 U.S. 49, 54 (1949). But this statement is not ideal from Harlan's point of view because by mentioning secret interrogation it reminds too much of the police, who, someone may argue, are committing "independent Constitutional violations" by eliciting confessions through coercive interrogation. And this recollection might then make one wonder why the submission of that confession in evidence would not be a case of "the way evidence was obtained, and not just its relevance . . . [being] Constitutionally significant . . . ." 367 U.S. at 683. *See* text accompanying note 299 *infra*. To avoid that thought, Justice Harlan, in the most tortuous turn of his argument, now directs attention away from the police and toward the trial:

> What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by reason of statements wrung from him, for then "a prisoner . . . [has been] made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown . . . .

367 U.S. at 685. It is convenient for Justice Harlan to quote Hawkins on this point because most American expressions of the same sentiment would be from cases or commentaries involving the privilege against self-incrimination; and, as we have seen, Justice Harlan is in no position to invoke the privilege because in this very *Mapp* dissent, *id.* at 686, he finds it expedient to reiterate his contention that the privilege is not enforceable against the states. Harlan makes the confessions rule, as surrogate for the privilege against self-incrimination, integral to any trial—and therefore to state trials—by labeling it a "fair trial" right, a right cognizable under the fragmentary model in that it has strictly to do with the court's own "proper" or "intrinsic" function:

> That this is a *procedural right*, and that its violation occurs at the time [the defendant's] improperly obtained statement is admitted at trial, is manifest. For without this right all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities, in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.
>
> This, and not the disciplining of the police, as with illegally seized evidence, is surely the true basis for excluding a statement of the accused which was unconstitutionally obtained. In sum, I think the coerced confession analogy works strongly *against* what the Court does today.

Id. at 685. This passage is a good illustration of Harlan's unexamined assumption that disciplining the police is of course what the search and seizure exclusionary rule is for. It is easy for the reader to forget that this fundamental *ipse dixit* of the *Mapp* dissent *is* unexamined, because it is so easy to get caught up in Harlan's anxiety to find an acceptable rationale for the confessions rule.

is to deter the police; and that, since the exclusionary rule in search and seizure is obviously not related to a fair trial right, it must be a deterrent remedy.

Although we disagree with Harlan's characterization of the exclusionary rule as a deterrent, we just as emphatically *agree* with him that it is not a fair *trial* right. Indeed, the beginning of wisdom about the search and seizure exclusionary rule is the realization that it is *not* a fair trial requirement,[225] as are, for example, two guarantees mentioned by Justice Clark—the requirement that notice be given and the provision that the trial be public.[226] Correctly understood, the exclusionary rule in search and seizure cases is rather the expression of the right to a fair *prosecution*, which means, at a minimum, constitutional behavior throughout the whole course of governmental conduct, which in turn means, for example, observance of the fourth amendment by the executive and review of executive conduct in light of that amendment at trial. Justice Clark does not insist on this point; he fails to fully articulate and then consistently dwell on the connection between the right of privacy and the proper judicial review function of the exclusionary rule.[227] Like Justice Harlan, he assumes that the only rights enforceable *at* trial are rights *to* a fair trial.

But the failure properly to characterize the exclusionary rule in search and seizure cases is not Clark's only mistake. For his immediate purpose of asserting the confessions analogy, his characterization of the confessions rule is the more disastrous. The analogy is ruptured before it leaves Clark's hands; he ruins it in the very statement of the stepchild argument, when he lists only *two* classes of rights possibly analogous to fourth amendment rights—first amendment rights of expression and the right to a fair trial, "including, as it does, the right not to be convicted by use of a coerced confession . . ."[228] By making the confessions exclusionary rule a fair trial rule, he virtually destroys any possibility of drawing an analogy between the confessions and the search and seizure exclusionary rules, because it is very hard to maintain that the fairness of *the trial*, understood as an isolated truth-seeking event according to the fragmentary fair trial doctrine, could be vitiated by admission of un-

225. *See* text accompanying notes 30-31 *supra*.
226. *See* text accompanying note 214 *supra*.
227. It must be said in Justice Clark's defense that the connection is made implicitly and intermittently throughout his opinion. *E.g.*, 367 U.S. at 655-57, 660.
228. *Id.* at 656, quoted in text accompanying note 214 *supra*.

constitutionally obtained *reliable* evidence. Clark's error is in saying that the confessions right is "included" in the fair trial right. What he should have done—what he had to do to retain any hope of sustaining the analogy—was to *deny* that the confessions rule is a fair trial rule and to follow that denial with the assertion that both the confessions and the search and seizure exclusionary rules are species of judicial review of executive misconduct. He needed to say that one has a right not to be convicted by use of unconstitutionally seized evidence, just as one has "the right not to be convicted by use of a coerced confession"—*but* that *neither* of these rights is an element of the right to a *fair trial.* Rather, they are expressions of the right one has to a fair prosecution, or to constitutional conduct by the government in its entire criminal proceeding. To succeed in making exclusion of either seized or confessional evidence a constitutional requirement, Clark had to rid himself of the *idee fixe* that the motion to suppress reliable evidence invokes a fair trial right, and to realize instead that the trial is simply *the time when* the court is asked to validate executive conduct by accepting its fruits, and hence is *the time when* one invokes the right to judicial invalidation of executive misconduct.

But that correction would have been only a necessary and not a sufficient condition to success with the confessions/seizure analogy, because for judicial review to be appropriate in a case it must be possible to allege some unconstitutional nonjudicial governmental conduct. At this point Justice Clark's analogy is confronted by Justice Harlan's insistence that coercion per se is *not* prohibited by the Constitution.

b. The Constitutional Status of Coercion

The exclusionary argument from the alleged confession analogy is, as rephrased by Justice Harlan, that because by "established doctrine . . . the admission in evidence of an involuntary confession renders a state conviction Constitutionally invalid," it should follow that "[s]ince such a confession may often be entirely reliable, and therefore of the greatest relevance to the issue of the trial," the confessions doctrine "is ample warrant in precedent that the way evidence was obtained, and not just its relevance, is Constitutionally significant to the fairness of a trial."[229] But Harlan believes "this analogy is not a true one."[230]

229. *Id.* at 683.
230. *Id.*

For one thing, he thinks that "[t]he pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent Constitutional violations."[231] Our tentative response to Harlan's suggestion is that it is mistaken. Indeed, we suspect studies would show that those confessions Justice Harlan himself actually voted to exclude did "involve independent Constitutional violations," or what Justice Frankfurter, in an opinion concurred in by Harlan, described as "constitutionally impermissible methods in their inducement."[232] But, for purposes of the present argument, we think it should be granted that Justice Harlan has proven that coercive interrogation as such is not an "independent Constitutional violation" or "unconstitutional primary activity"[233]—"apart from the use of the confession at trial." This proposition should be granted because to do so liberates one from Justice Clark's faulty analogy.

The mistake committed in tying the fate of seized evidence to that of confessional evidence is that it makes a strong independent candidate for judicial review dependent by analogy on a weak candidate. If one says that "as confessions go, so should seized evidence go," and then is presented, as we are by Justice Harlan, with an argument militating against the exclusion of confessions on judicial review grounds, one has gratuitously thrown away the case for excluding seized evidence. In fact, if Justice Harlan is correct in asserting the *weakness* of the case for excluding confessions on judicial review grounds, the very argument he employs ought to demonstrate the *strength* of the case for excluding seized evidence. The case for excluding seized evidence is strong because, as all—including Justice Harlan—emphatically agree, the seizure is an "independent Constitutional violation"; but, supposing Justice Harlan is correct, the case for excluding confessions is weak, because the coercive inducement of the confession is *not* necessarily an "independent Constitutional violation." If Justice Harlan is correct, the confessions

231. *Id.* at 684-85.

232. Rogers v. Richmond, 365 U.S. 534, 541 (1960).

233. The emphasis in cases such as *Rogers* on the presence in the record of claims of "coercion" has led many courts and commentators to interpret the exclusionary rule of the Supreme Court confession cases as analogous to the rule excluding the products of an unlawful search or seizure. The Court has been seen as treating "outrageous" or "illegal" conduct during interrogation as the unconstitutional primary activity of the police . . . .

Developments, *supra* note 224, at 969 (footnotes omitted).

doctrine does not supply "warrant in precedent that the way evidence was obtained . . . is Constitutionally significant," because —if he is correct—the manner of obtaining evidence in the confessions cases is not necessarily unconstitutional. But what the confessions doctrine lacks in precedential value, it makes up in heuristic value. Reflecting on the reason why a coerced confession does not qualify for judicial review, we see why an unreasonable search and seizure does qualify, namely, that it *is* an "independent Constitutional violation" by the executive—one which, furthermore, the court is asked to validate. Precisely by the way it fails to serve as a precedent for judicial review of unconstitutionally seized evidence does the defunct confessions analogy point to the reason why judicial review and exclusion are constitutionally necessary in the case of unconstitutionally seized evidence.

Although Justice Harlan's admissionist thesis is not strengthened by his successful attack on the analogy between confessions and seized evidence, neither is his inadvertent vindication of the judicial review ground for exclusion of seized evidence necessarily a setback for that thesis. For what we perceive as damage to his argument he need not from his perspective even acknowledge as a germane consideration. This is so because our perception of damage to his argument is predicated on our assumption that judicial review of executive misconduct in criminal proceedings is legitimate. Harlan cannot be said to concede the legitimacy of judicial review at the trial, because, in *Mapp* at least, he barely adverts to the possibility that the exclusionary rules could be examples of judicial review. But the possibility that they are not legitimate specimens of judicial review—that judicial review does *not* belong in criminal proceedings—should be systematically confronted. We shall consider that possibility by comparing judicial review in a criminal proceeding to the way it looks in the legislative setting, where all agree it is appropriate. At this point Justice Clark's other question is pertinent.

2. *The First Amendment Analogy*

Justice Clark cannot understand why the pre-*Mapp* Court treated the right of privacy and the rights to free expression differently. Why, he asks, when "[t]his Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press," and when it agrees that "[t]he right to privacy [is] no less important than any other right carefully and particularly

reserved to the people,"[234] has the Court nevertheless given the right of privacy second-class treatment? Why should the "right to privacy . . . stand in marked contrast to all other rights declared as 'basic to a free society' "?[235]

It cannot be denied that a prosecution under, say, a new Smith Act would be different from a prosecution for burglary involving introduction of unconstitutionally seized evidence. The unconstitutional actions are perpetrated by different branches at different stages of the criminal process. In the fourth amendment case the defendant's criminality persists despite the state's inability to convict him; the evidence of the burglary is a "real thing" in the world, which is not used against the burglar only because the court will not admit it—whereas there is nothing left to be held against a person when unconstitutional legislation is struck down.[236] The question is whether these undeniable differences place suppression hearings in a realm of conduct and discourse so different from a *Marbury*-like review of a Smith Act prosecution that two fundamentally different kinds of requests are being made when the judiciary is asked to pass on first and fourth amendment violations.

In support of the proposition that they *are* different—that there is *no* analogy—one can point to an awkward linguistic fact. Whereas it can be said of the first and fourth amendments and of the Smith Act that courts give them "force and effect" or "implement" them, we cannot idiomatically say of searches and seizures that the government asks the court to give *them* "force and effect." Consider, for example, Chief Justice Marshall's question in *Marbury*: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?"[237] To frame the corresponding question about search and seizure using this question as a strict model would be neither accurate nor idiomatic. For example, granted the "repugnancy" of an illegal search or seizure to the Constitution, it may not be "void" in

234. 367 U.S. at 656.

235. *Id.*

236. This massive difference will surely affect our moral assessment of the two situations and may even threaten to destroy the analogy. In the Smith Act case the "criminality" of the defendant's conduct depends on an unconstitutional legislative act, and judicial review in his favor totally absolves him of such criminality—indeed makes it impossible even to suspect him of this "crime" because there is no crime. After unfavorable review of the legislation, the moral ledger is decisively in the defendant's favor; *he* has been hurt, not the state.

237. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

the sense that a new Smith Act would be, or that section 13 of the Judiciary Act of 1789[238] was declared to be. Admission of evidence seems like quite a different kind of "giving of effect" to a governmental act, because, even if the search and seizure is "invalid," its product does not "go away" as a void statute does.

But, conceding that somewhat different language must be used to describe congressional violations of the first amendment and executive violations of the fourth amendment, we nevertheless think there is enough substantive similarity between the two situations to compel application of classical judicial review to searches and seizures, even if not all its terminology is comfortable. Indeed, in the case of search and seizure, just as in the unconstitutional legislation situation, one speaks of "invalidity": it *is* accurate and idiomatic to characterize a search as either "valid" or "invalid." As for substance, whether it be Congress abridging the freedom of speech or police officers making unreasonable searches and seizures, the fact is that governmental actors are doing something repugnant to the Constitution, and in each case the courts are being asked to cooperate and therefore condone that repugnant act. What is at stake in each case is the meaningfulness of the Constitution; the tendency of judicial acceptance of either kind of act is to make the Constitution meaningless.

Thus, the issue is not whether the introduction of unconstitutionally seized evidence makes an occasion discussable in quite the same terms as *Marbury* or a new Smith Act, but whether courts are derelict in their duty to uphold the Constitution if they do not review executive conduct and, where appropriate, exclude evidence. Various grounds for denial of such a duty have been suggested by fragmentary theorists, some of which, like the "nonconcurrency" argument of Justice Gibson[239] and the "ignoring" advice of Dean Wigmore,[240] we have already examined. Perhaps the most important disclaimer, however, is that the court is not responsible for the way evidence is gathered, either because the government as litigant is like any other party, *i.e.*, like any *private* party, or because the offending officer cannot be understood as an officer but must be seen as a private burglar.

238. Ch. 20, § 13, 1 Stat. 80 (1789), *as amended* 28 U.S.C. § 1651 (1970).

239. *See* text accompanying notes 187-90 *supra.*

240. *See* text accompanying notes 190-99 *supra.*

3. *The Government as Private Party or the Officer as Free-Lance Burglar*

Wigmore put his imprimatur on the government-as-private-party approach when he repeated the common-law rule to the effect that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence."[241] In Wigmore's view the fact that "the party" is the government makes no difference—an opinion shared by Justice Cardozo, who made the point more explicitly:

> Evidence is not excluded because the private litigant who offers it has gathered it by lawless force. By the same token, the State, when prosecuting an offender against the peace and order of society, incurs no heavier liability.[242]

Comparing the government to a private party is one way of absolving the court of responsibility for the way evidence is gathered; treating the law-breaking officer as a private person is another possible way to accomplish the same objective; for, so it could be argued, if the government as executive is not responsible for the unauthorized conduct of the officers it hires, then *a fortiori* the courts are not responsible for acts committed in violation of the terms of those officers' employment. Surprisingly, Justice Brandeis gives some aid and comfort to this argument—at least he momentarily gives way to the temptation of treating the officer as a private person. At one point he says that the "unlawful acts [perpetrated in *Olmstead*] . . . [were] crimes only of the officers individually . . . [because] no federal official is authorized to commit a crime on [the government's] behalf."[243] But Justice Brandeis's one-government motive for saying this is precisely the opposite of the fragmenting motive Wigmore and Cardozo have for treating the government as a private party. Whereas they wish to *absolve* the judge of responsibility, he relegates the officers to the status of private persons in order to *ascribe* final responsibility for the evidentiary transaction to those *higher* in the government—the prosecutor and especially the judge.[244] Nevertheless, whatever Brandeis's motive, his analysis could have had mischievous effects if taken literally.[245] Yet Brandeis did not take it literally. He did not

241. Wigmore, *supra* note 16, at 479.
242. People v. Defore, 242 N.Y. 13, 22, 150 N.E. 585, 588 (1926).
243. Olmstead v. United States, 277 U.S. 438, 483 (1928).
244. *Id.*
245. For example, Brandeis's analysis has a certain affinity with the argument of the offending officers in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), as characterized and refuted by Justice Brennan:

mean after all to treat the officers as if they were not officers when violating anti-wiretapping statutes. Their illegal acts, unlike those of private parties, had the potential of being "ratified" and made the government's own through prosecutorial and judicial action.[246] More simply, it is of the utmost significance to Justice Brandeis that the persons in question just were *not* private persons:

> [T]he evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf: . . . the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. . . . As Judge Rudkin said below: "Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. . . . We are concerned only with the acts of federal agents whose powers are limited and controlled by the Constitution of the United States."[247]

Although these words were written by judges—Brandeis and Rudkin—in a case that Justice Brandeis eventually treated as nonconstitutional,[248] they were clearly written by judges working from a constitutional perspective wherein the government is *not* just another party, and wherein the acts of governmental agents are subject to judicial review. If all one can do in the end to support the conclusion that the exclusionary rule is a species of judicial review is to say one is adopting the perspective of Brandeis and Rudkin, then that is what we are saying and doing here. And in that perspective there are no salient differences between review of a prosecution brought under unconstitutional legislation and review of an unconstitutional procurement of evidence. If the concerns are governmental disregard of the Constitution and judicial condonation of that disregard, it does not matter whether the governmental actor being challenged is the legislature expecting the judge to participate in an unconstitutional prosecution, or the executive asking the judge to accept unconstitutional evidence.

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used.

Id. at 391-92.

246. 277 U.S. at 483.

247. *Id.* at 482. Even if Rudkin was thinking primarily of the eighteenth amendment when he referred to the "Constitution of the United States," we believe that the general applicability of the proposition for which we have quoted Brandeis and Rudkin is not diminished.

248. *See* text accompanying notes 94-99 *supra.*

B. THE FOURTH AMENDMENT AS A RULE OF RECOGNITION

> We have been following up Justice Brennan's statement that [t]he exclusionary rule is needed to make the Fourth Amendment something real; [because] a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.[249]

We have also assumed that he endorses the remark he quotes that "[t]he advantage of the exclusionary rule . . . is that it provides an occasion for judicial review . . . ."[250] On reflection, however, he might come to see that these statements are misleading to the extent that they suggest that the exclusionary rule is some kind of separate legal entity. For that is not so. "Exclusionary rule" is just a term of convenience by which we refer to the fact, and the way, that judges practice constitutionalism and show their fidelity to the rule of law by observing the fourth amendment. But even this characterization will mislead if it suggests that the fourth amendment has a singular status among constitutional rules.[251] It does not, for Justice Brennan at any

249. United States v. Calandra, 414 U.S. 338, 361 (1974).

250. *Id.* at 366, quoting Oaks, *supra* note 43, at 756. It is an indication of the poverty of the literature on exclusion as judicial review that Justice Brennan should have to quote Professor Oaks, who is one of the best known critics of the rule. In his evenhanded way, Oaks, as it were, looks for some good things to say about the rule, and one he finds is that it provides an "occasion" for what he calls judicial review—an occasion which he nevertheless intends to do away with by revoking the rule. Oaks, *supra* note 43, at 755-56.

But, of course, Oaks cannot have classical *Marbury* judicial review in mind anyway—because the only "occasion" for it is a "case or controversy" in which there is an allegation that a governmental act, sought to be given "force and effect" or to be "recognized," is unconstitutional. And the denial of the recognition, or the exercise of judicial review, when prompted by the fourth amendment, is just *called* the "exclusionary rule." The exclusionary rule is not the occasion for, or cause of, the review—it is the effect of it. Oaks is not talking about judicial review in the strict sense, then, but about a kind of supervisory power oversight, which, while nice, is not mandatory.

251. Beginning at least with *Wolf*, there has been a pronounced reluctance to accept the proposition that the fourth amendment should be treated like any other constitutional rule, no more and no less, and that exclusion is that treatment. Consider, as illustrative of this reluctance, the fact that Justice Frankfurter and Professor Kaplan have found it pertinent to note that, in Frankfurter's words, the exclusionary rule is "not derived from the explicit requirements of the Fourth Amendment . . . . The [*Weeks*] decision was a matter of judicial implication," Wolf v. Colorado, 338 U.S. 25, 28 (1949); or, as Kaplan says, "the rule is not written into the Constitution." Kaplan, *supra* note 55, at 1030. Now, what are some of the assumptions on which these observations might make sense? Perhaps the fifth amendment, with its exclusionary explicitness, is the model with which the fourth is to be compared—and the fourth is thereby found wanting. Or perhaps the assumption is that there are other occa-

rate, because he does not subscribe to the evidentiary transaction interpretation and therefore does not think of the fourth amendment as "language of the constitution . . . addressed especially to the courts."[252] Under the judicial review interpretation we are ascribing to Brennan, the fourth amendment is one among many constitutional rules addressed to other branches. The courts observe it the way they must observe any constitutional rule, and their observance is called the "exclusionary rule." We are assuming that according to Justice Brennan the term "exclusionary rule" simply denotes the refusal by the courts to "sanction" or "validate" unreasonable searches and seizures—that it denotes a response to unconstitutional *executive* behavior of the same nature as Chief Justice Marshall's response to unconstitutional *legislative* behavior in *Marbury*.

If that is what Justice Brennan means, then he also means that *Marbury*'s characteristic language of "repugnancy" and "invalidity" is appropriate to search and seizure. We are assuming, in other words, that whatever else Justice Brennan thinks the amendment is, he regards it as what H.L.A. Hart has called a "rule of recognition"[253]—a statement of validity criteria[254] that must be met before the courts are empowered to allow legal consequences to flow from searches and seizures. Viewed thus, giving force and effect to the fourth amendment would be coterminous with the decision whether to give "force and effect" to the fruits of particular searches and seizures.

But, as Justice Brennan would be the first to insist, the fourth amendment is not *merely* a statement of validity criteria —it is that and something more. It is a *constitutional* validity criterion, and a constitutional validity criterion of *a peculiar*

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sions than the motion to suppress on which alleged governmental violations of the fourth amendment can more dependably be subjected to judicial review. Or, perhaps again, the assumption is that the fourth amendment is simply a part of the Constitution that does not contemplate that there be judicial review in its name. If these assumptions are not supportable—and we think they are not—then the observation that the exclusionary rule is not written in the amendment in so many words assumes the absurdity that conduct challenged under *any* clause of the Constitution must be impervious to judicial review unless there is a proviso attached to that clause authorizing the Court to invalidate or nullify governmental conduct in violation of it. The kind of objection Justice Frankfurter and Professor Kaplan are making would thus seem to be nothing less than a challenge to the institution of judicial review itself.

252. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803).

253. H.L.A. HART, THE CONCEPT OF LAW 92 (1961) [hereinafter cited as HART].

254. *Id.* at 103.

sort; it performs a function additional to those performed by such rules of recognition as, for example, the requirement of two witnesses to a will, or a minimum age to be eligible for elective office, or different majorities for different legislative, constituent, or forensic purposes. In contrast to those rules, the fourth amendment not only serves as a criterion of validity, but it also imposes a *duty*. The fourth amendment not only tells officials what conditions they must meet to make valid, constitutional, "admissible" seizures—it also imposes an obligation on officials to make *only* valid seizures.

Because the interpretation of exclusion as judicial review is so widely disregarded, and because the little acknowledgment it has received has been so cursory, we will pay it some systematic attention here. Our discussion will rely heavily on distinctions articulated by Hart.

Hart has tried to make sense of a legal system by seeing it as a union of "power-conferring," "validity" rules and "duty-imposing," "obligation" rules.[255] His effort is meant as a counterpoise to what he takes to be a more or less permanent jurisprudential temptation to reduce all legal rules to a single type. We find that his own dichotomization makes the mistake of regarding all rules as *either* power-conferring *or* duty-imposing—an error leading those who make it to miss the complexity of a rule like the fourth amendment. But that error is corrected by simply speaking of two kinds of functions—which there are—rather than of two mutually exclusive classes of rules—which there are not—and of acknowledging that some rules—the fourth amendment for example—perform both functions. We shall proceed first by exhibiting Hart's correction of the major mistakes he found in the jurisprudential literature, and second by suggesting the adjustments that would be required in his analysis to account fully for the fourth amendment.

We turn, then, to the power-conferring, validity criterion type of rule or, as we prefer to say, function. Hart explains this type of rule by contrasting it with the obligation-imposing, conduct-guiding rule found paradigmatically in the criminal law. The mistakes he is concerned to criticize both have to do with sanction—one an overemphasis on sanction, the other a misplacement of it. He wants to say, *first*, that the jurisprudential literature has made too much of the phenomenon of sanction in the criminal law: conceding that sanction is a natural auxiliary of

255. *Id.* at 27-33.

conduct-guiding, duty-imposing rules—indeed insisting that sanction is logically possible only in connection with duty-imposing rules—he nevertheless insists that sanctionless rules can also guide conduct and impose obligations. *Second*, he says that any mention of sanction in connection with power-conferring rules reveals a misconception of what those rules are about. His second assertion is our concern here, but since its thrust is to expose the mistake in trying to assimilate power-conferring, validity rules to the criminal law or duty-imposing rules, clarity requires comprehension of the properties of a criminal-law rule and hence an awareness of Hart's first point as well. The most vivid sign of the prevalence in the literature of the second mistake is the frequent use found there of the phrase "nullity as a sanction."[256]

Hart's analysis of the duty-imposing rule contains an implicit critique of the first mistake:

> In the case of the rules of the criminal law, it is logically possible . . . that there should be such rules even though no punishment or other evil were threatened. . . . [W]e can distinguish clearly the rule prohibiting certain behaviour from the provision for penalties to be exacted if the rule is broken, and suppose the first to exist without the latter. We can, in a sense, subtract the sanction and still leave an intelligible standard of behaviour which it was designed to maintain.[257]

Hart then states his understanding of power-conferring rules, as he continues, without pause, to draw the contrast:

> [W]e cannot [however] logically make such a distinction between the rule requiring compliance with certain conditions, e.g. attestation for a valid will, and the so-called sanction of 'nullity.' . . . [Rather,] [t]he provision for nullity is *part* of this type of rule itself in a way which punishment attached to a rule imposing duties is not.[258]

Hart's discussion eventually involves him in an analogy to games, which is at once informative about, and yet against the grain of, American constitutionalism:

> In the case of a rule of criminal law we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it. But how could we consider in this light such desirable social activities as men making each other promises which do not satisfy legal requirements as to form? This is not like the conduct discouraged by the criminal law, something which the legal rules stipulating legal forms for contracts are designed to suppress. The rules merely withhold legal recognition from them. Even more absurd is it to regard as a sanction the fact that a legislative measure, if it does not obtain the required majority, fails

256. *Id.* at 33. *See generally id.* at 32-35.
257. *Id.* at 34.
258. *Id.* at 34-35.

> to attain the status of a law. To assimilate this fact to the sanctions of the criminal law would be like thinking of the scoring rules of a game as designed to eliminate all moves except the kicking of goals . . . . [The point of the scoring rules is solely to tell the referee what counts:] [i]f failure to get the ball between the posts did not mean the "nullity" of not scoring, the scoring rules could not be said to exist.[259]

It will be objected, of course, that whatever the similarities between scoring a game and passing on the validity of contracts, wills, and gifts, it is a sacrilege to speak of the grand public institution of judicial review in the same breath with games, or to call a valid search a "score." But, as disagreeable as the game reference may be, we think a different kind of outrage might be felt if the connection between invalidity and nullity, which the analogy is meant to clarify, were eliminated from our constitutional practice.

The "point" of the game analogy is that duties and sanctions simply are not part of the picture in the case of one kind of law-related conduct. To be sure, the coach may tell his team that it is their duty to score and threaten them with his displeasure should they go scoreless, and the district attorney may say there is a law against point shaving, but *the official scorer* does not impose a duty upon players to score or a sanction for not scoring; he just counts the points. Similarly with a legislature, there is a duty not to proceed in defiance of quorum requirements, but there is no duty to achieve the "required majority"—any more than there is a duty to have two witnesses for a will. There is just the fact—as Justice Gibson would put it, for even he allows a modicum of judicial review—that the court, as the scorer, has nothing to observe or enforce because no "law has been passed according to the forms established in the constitution."[260] And when Chief Justice Marshall wanted to move from concern with forms to concern for substantive consistency, he spoke the language of "invalidity" and "voidness."[261]

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259. *Id.*

260. Eakin v. Raub, 12 S. & R. *330, *354 (Pa. 1825) (Gibson, J., dissenting).

261. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

. . . .

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?

. . . .

Thus, the particular phraseology of the constitution of the

Similarly now, when the Supreme Court finds a legislative act repugnant to the governing rule of recognition, the Court, as Hart phrases it, "withhold[s] legal recognition from [the act],"[262] saying in effect, as barbarous as it sounds, "you didn't score"; "the ball, as it were, went wide and it is as if you had never kicked it."

Our misgiving about Hart's analysis is that his harsh dichotomization of rules suggests that invalidity is *all* that obtains in the case of unconstitutional legislation. Writing about American constitutional practice, Hart says merely that legislation "inconsistent with the federal division of powers or with the individual rights protected . . . is liable to be treated as *ultra vires*, and declared legally invalid by the courts to the extent that it conflicts with the constitutional provisions."[263] We know of no place in his main presentation where Hart allows that by voting for what they believe to be legislation abridging, say, freedom of the press, legislators violate a duty to uphold the Constitution.[264] But in defense of Hart, we suggest that in neglecting constitutional duty he is simply imitating what a court does when it exercises judicial review. He is led to ignore the duty-imposing side of the Bill of Rights, for example, because in constitutional adjudication the Court ignores that side. While the Court may sometimes lecture another branch on its duty, or otherwise show its indignation, its *holding* amounts only to an invalidation. There is a duty in the premises, we believe, but we have to concede that it is not made visible by the practice of judicial review; this low profile of the constitutional duty is due to the fact that the duty is not *enforced* by the constitutional court—although,

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United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 180 (1803).

262. HART, *supra* note 253, at 34, quoted in text accompanying note 259 *supra*.

263. *Id.* at 70.

264. By "main presentation" we mean *The Concept of Law*. The fact that Hart could write that book without having to confront thematically the prospect that officials have duties is perhaps owing in part to the fact that there is very little in *The Concept of Law* about the individual's rights—rights that would seem to be correlative to the official duties for whose existence we are contending. Needless to say, however, Hart is not oblivious of rights, for even in the passage quoted he mentions "individual rights." Elsewhere he has written extensively on rights. One of his most illuminating discussions is H.L.A. Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE, 2d ser. 171, 198-201 (A Simpson ed. 1973). *See also* H.L.A. Hart, *Are There Any Natural Rights?*, in POLITICAL PHILOSOPHY 53 (A. Quinton ed. 1967).

to be sure, the Constitution itself is being given force and effect. When the Supreme Court strikes down an act for violating the first amendment it is not punishing congressmen for violating their duty to uphold the Constitution but is simply declaring the statute invalid—thereby itself upholding the Constitution.

Yet, although few will say that congressmen are being punished by adverse judicial review of their handiwork, many seem to think that the policeman is being punished or "sanctioned" by exclusion. Indeed, this view is so prevalent that one could say it prevents entertainment of the hypothesis that exclusion is judicial review. The correct understanding of judicial review as something other than punishment is confronted in the minds of commentators by the incorrect view that exclusion *is* punishment; the resulting assumption is that exclusion cannot be judicial review. One of the first things we must understand is why it is so easily assumed that exclusion is punishment or a sanction rather than mere nullification.

That exclusion *is* regarded as punishment or sanction by Justice Powell and other deterrence theorists is obvious. One such theorist, the late Professor Herbert Packer, even used in reference to the exclusionary rule exactly the term that Hart had been at pains to call a mistake. Packer spoke of "courts . . . interven[ing] in the criminal process . . . to impose the sanction of nullity . . . ."[265] "[B]ut," he went on to say, "the sanction of nullity has its limitations. A court cannot ordain, administer, and finance [a criminal justice system] . . . . It can only refuse to validate criminal proceedings that are the product of inadequate systems or of no systems at all."[266] Although Professor Packer would presumably not have thought of judicial review primarily, if at all, as a deterrent to legislative violation of the first amendment, it was easy for him to think of the exclusionary rule as a "sanction of nullity," *i.e.*, as a deterrent. Our concern here is to try to account for these disparate reactions to the two examples of judicial review.

One factor which may account for these different reactions is that Wigmore and others have repeatedly called exclusion punishment.[267] Another and more influential factor is that the

265. PACKER, *supra* note 48, at 240. *See also id.* at 171 ("the rules and the sanctions for their breach").

266. *Id.*

267. Wigmore appears to have viewed exclusion *literally* as punishment of the policeman, for he complains that

> [n]ecessity does not require, and the spirit of our law does forbid, the attempt to do justice incidentally and to enforce penal-

fourth amendment duty the police are under has always been more visible than the first amendment duty imposed on legislators, because imprisonment of the policeman has always been conceivable,[268] whereas no one has suggested jailing congressmen. Perhaps the punishability of fourth amendment violations affects our view of exclusion and makes us think of it merely as an alternative to, say, incarceration. But no amount of explaining why we are led to think of exclusion as punishment will make it punishment if it is not. And if it is not punishment or some other deterrent sanction, it is judicial review. That is the dominant and sufficient constitutional fact. If it is also a fact that exclusion deters, then whatever deterrence there is, as Justice Brennan says, is "only a hoped-for effect of the exclusionary rule, not its ultimate objective."[269]

But that is not yet the whole story. We believe Hart is mistaken to deny that "power-conferring rules [might be] designed

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> ties by indirect methods . . . . [A] judge does not hold court in a street-car to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offences which incidentally cross the path of that litigation. Such a practice might be consistent with the primitive system of justice under an Arabian sheikh; but it does not comport with our own system of law . . . . The judicial rules of Evidence were never meant to be an indirect process of punishment. It is . . . improper . . . to enlarge the fixed penalty of the law, that of fine or imprisonment, by adding to it the forfeiture of some civil right through loss of the means of proving it. The illegality is by no means condoned; it is merely ignored.

Wigmore, *supra* note 16, at 479. We do not claim fully to understand everything Wigmore says here. We repeat it as much because it is part of the core argument of a classic (rather, *the* classic) admissionist essay. Indeed, the passage is from the very essay in which Wigmore addresses Titus and Flavius:

> Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction.

Id. at 484. As careful a thinker as Justice Harlan has said that the "exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future." Mapp v. Ohio, 367 U.S. 643, 680 (1961) (dissenting opinion).

268. "The natural way to do justice here would be to . . . [impose] a thirty-day imprisonment [on the marshal who had searched without a warrant]." Wigmore, *supra* note 16, at 484. This, of course, would seem to be an obvious example of what, at the beginning of his article, Wigmore had characterized and condemned as "punish[ing] all offences which incidentally cross the path of that litigation." *Id.* at 479, quoted in note 267 *supra*.

269. United States v. Calandra, 414 U.S. 338, 356 (1974).

to make people behave in certain ways and [have] 'nullity' [added] as a motive for obedience . . . ."[270] We think on the contrary that precisely such a design is obviously behind many power-conferring rules of private law;[271] and we think it plaus-

270. HART, *supra* note 253, at 34.

271. One source of difficulty in the quoted passage is the way it runs two thoughts together—"behavior" and "obedience"—forgetful that "nullity" can work as a motive for one, but not for the other. The only kind of utterance a person can *obey* is one which, like a duty-imposing rule, prescribes categorically what to do or forbear. This is just a fact about the concept of obedience. In contrast, power-conferring rules—or rules performing a power-conferring function—are not categorical but hypothetical: they say only, "Have two witnesses *if* you want to make a valid will," or "Reduce that agreement to writing *if* you want it to be enforceable." Nullity is not employed to secure obedience—and the "nullity" that ensues upon failure to exercise, or exercise correctly, the power conferred is not a sanction for disobedience—because the actor has not been told to do or omit anything. But molding *behavior* is another thing. The fact that the legislature is conceptually barred from using nullity to secure obedience does not stop it from using nullity to induce people to behave in ways it thinks desirable—as do those legislatures which adopt the attestation requirements of wills acts or the writing requirement of the Statute of Frauds. In short, the fact that no duty attaches in connection with private-law rules of recognition does not forbid the conclusion that legislatures can, without violating the logic of those rules, use them, and use nullity as a motive, to encourage people to behave in ways the legislatures wish them to behave. And, indeed, Hart does make brief if somewhat grudging acknowledgment of the fact that nullity could be a "lever" if not a sanction:

> No one could deny that there are, in some cases . . . associations between nullity and such psychological factors as disappointment of the hope that a transaction will be valid. Nonetheless the extension of the idea of a sanction to include nullity is a source (and a sign) of confusion.

Id. at 33.

Professor Fuller might have made a similar objection in his criticism of what he characterizes as Hart's basically Hohfeldian analysis. Having lived through the disillusionment that followed the initial claims made for the analytical power of Hohfeld's categories, Fuller reacts rather dourly to Hart's attempt to renew enthusiasm for them. It seems to us, however, that he overreacts when—to cite one of his major counter-examples—he finds a *duty* to mitigate damages on repudiation of a contract. For surely the Hohfeldians have been correct to deny such a duty and to insist instead that, after the notice of repudiation, the plaintiff has simply lacked power to aggravate the defendant's obligation. Nevertheless, there is a sound instinct behind Fuller's impulse to speak of a duty to mitigate. Ascription of such a duty is a confused way of drawing attention to a fact which the Hohfeldians may have ignored and of which Fuller is acutely mindful, namely, that the promulgators of the mitigation rule wish to influence the behavior of potential plaintiffs. The promulgators of the rule prefer one form of plaintiff behavior over another and are endeavoring to bring behavior into conformance with that preference by withholding power from the plaintiff to aggravate the defendant's obligation. Promulgators of the rule wish to discourage waste of society's resources on undesired objects; but instead of imposing a duty and seeking *obedience*, they have sought to induce non-wasteful

ible to assume that many parts of the United States Constitution were designed, among other purposes, to encourage people to behave in certain ways. Furthermore, we do not see why concern about nullity might not be an incentive built into that scheme.[272] What we deny is that influencing people to behave in certain ways is a necessary or sufficient ground for declaring either an act of a legislature or a search and seizure invalid—we deny that influencing people is part of the practice of judicial review. Whatever were John Marshall's motives for supporting the Constitution in the Virginia Convention and whatever were his motives as judicial statesman for establishing the practice of judicial review, the Constitution as "given force and effect" by the Marshall of *Marbury v. Madison* in his role as judge requires only that unconstitutional behavior of a governmental actor be declared invalid and void if brought before a court. The Supreme Court, *qua* reviewer of governmental action, is neither designer nor manipulator of the "sanction of nullity," but is only a steward of a rule of recognition.[273]

The fact is, as Hart says, that "the provision for nullity is *part* of this [power-conferring, validity criterion] type of rule itself in a way which punishment attached to a rule imposing duties is not."[274] And this is true in cases both where, as with the fourth amendment, a single rule performs the dual function of providing the criteria of validity and of imposing duties, and where a rule merely confers powers, as is the case with rules governing the making of wills or gifts. It is ludicrous to think that the legislature meant to place the would-be testator under a duty of having two witnesses. It is not ludicrous to think that the framers intended by the fourth amendment to put the executive under a duty of respecting privacy. But, in both cases, the sole duty of the *court* is to validate or invalidate.

We have discussed the exclusionary rule as a "provision for nullity . . . [and therefore as] *part* of" the fourth amendment—

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plaintiff *behavior* by employing the "nullity" called for by the mitigation rule. *See* L. FULLER, MORALITY OF LAW 135-37 (1964).

272. There is this much, but no more, truth in the deterrence theory of the exclusionary rule. As Justice Brennan says, deterrence is "only a hoped-for effect of the exclusionary rule, not its ultimate objective." Calandra v. United States, 414 U.S. 338, 356 (1974).

273. One can even say that the *motive* of the reviewing court is to coerce, manipulate, or deter another branch—if that happens to be so in a particular case—provided one also says that the only germane *reason* the reviewing court can give is that the governmental action is unconstitutional.

274. HART, *supra* note 253, at 34-35.

with the amendment understood as a power-conferring (and power-limiting) rule of recognition. And we have seen that, although this is a sufficient account of the rule, it is not an adequate account of the amendment, because the fourth amendment does more than state conditions of validity—it also places the executive under a solemn duty to respect the rights of the people. To the extent that Hart means to suggest that rules must be *either* obligation-imposing *or* power-conferring, his proposition is undone by the example of the fourth amendment itself. This amendment, and much of the rest of the Constitution, not only states conditions of validity but also ascribes rights and duties. These constitutional rules vindicate our suggestion that, instead of there being two kinds of *rules*, there are two *functions* that rules can perform.

One of those functions—"recognition"—accounts for the similarity between the testator, the congressman, and the evidence-gathering policeman: they all aspire to perform a valid, judicially cognizable act. Beyond that, however, the situations of the testator on the one hand and the government officials on the other are dissimilar because the testastor is not, and the officials are, affected by the other function rules may perform —imposition of a duty. Whereas the testator strives to make a valid will because he *wants* to determine the devolution of his property, the legislator and the policeman act in response to a set of expectations in addition to their private desires. Not only do public officials presumably want to perform valid governmental acts, they are also charged with the constitutional duty of performing such acts, and *only* such acts, whether they want to or not.

For example, we have said that a congressman is placed under an obligation by the first amendment not to vote for legislation he thinks abridges freedom of speech. Although the Supreme Court has indeed taken upon itself a special stewardship of the Constitution, the fact is that the congressman also takes an oath to support the Constitution. This presumably means that he has obligated himself not to subvert the Constitution—not, for example, to condemn and defy it by voting for a law he knows the first amendment states "Congress shall [not] make." And there is a similar dualism in the fourth amendment. The fact that the amendment operates as a rule of recognition for the courts does not preclude its serving another function for the police and imposing a duty on them to conduct only reasonable searches. As for the courts, every account but the prevail-

ing fragmentary understanding of judicial responsibility, with its corollary, the "invasion" theory of the amendment, places them under a fourth amendment imperative of some kind. And, according to the thesis of this Article, not only do courts have a direct and immediate obligation to abstain from evidentiary transactions involving unreasonable searches and seizures, but they are also under an obligation to apply faithfully the fourth amendment as a rule of recognition, and not to validate invalid governmental action.

This latter obligation may seem indistinguishable from a court's duty, for example, not to probate an unattested will—and for some purposes of analysis the two obligations are indeed indistinguishable. But there are differences, one being that the fourth amendment is a constitutional rule of recognition whereas the wills rule is an ordinary statutory provision. Another is that an invalid search and seizure is itself a violation of a person's right and of an officer's duty, whereas the unsuccessful testator infringes no legal rights and violates no legal duties. A third difference is that the invalid seizure occurs in the government's prosecution of a defendant, whereas the invalid will is made by a person who simply fails to use correctly the facilities afforded by the government.[275] A fourth difference involves the burden on the court in the two cases: in the will case the court is standing between those who would take under the will and those who would take under the law of intestacy. In the search and seizure case, on the other hand, the court indeed stands between the defendant and the government—but it is also a *part* of the government that is prosecuting him. In the case of the will the stakes are inheritable wealth, whereas in the search and seizure case the stakes are not just property but guilt or innocence, life perhaps, or liberty, reputation, happiness, and the defendant's right to a fair prosecution. In the will case the court has the duty of observing the law of wills, and the litigants have a right that it should do so. But in the search and seizure case the court has an additional, more acute, obligation. In addition to the rule-of-law *assumption* that the judge will observe and apply the relevant rules of recognition and only those rules, there is imposed on the court in criminal cases the *obligation* to see that the defendant is not "deprived of life, liberty, or property, without due process of law." At the very least, this means that a court shall not facilitate such deprivations by itself disregarding the law, which is to say that it shall scrupulously follow all applicable

275. *Id.* at 27.

rules of recognition, prominent among which is the fourth amendment.[276] The court, then, is under a due process exclusionary

276. Having said why we think exclusion is a constitutional requirement, we now might profitably consider a recent explanation of why it is not. We shall here discuss Professor Kaplan's argument, certain aspects of which we touched on in notes 55 and 171 *supra*.

It will be recalled that Kaplan urges a restructuring of the exclusionary rule, and that one of the innovations he proposes is to admit unconstitutionally seized evidence in certain serious cases. Kaplan, *supra* note 55, at 1046. Part of his defense of this suggestion consists of the assertion that "[e]ntirely apart from the [utilitarian] case that may be made for or against the exclusionary rule [as it now stands], its restriction is hardly a radical step." *Id.* at 1030. He means that whereas "[c]ourts *could* make a direct connection to fourth amendment values by holding that the government is not permitted to benefit from the fruits of an unconstitutional search and seizure," *id.* (emphasis added), in fact they *have not*—"the exclusionary rule does not fully adhere to this tenet." *Id.* Because the exclusionary rule does not "look" like a constitutional doctrine, Kaplan concludes that it is *not* a constitutional doctrine, but at most a " 'quasi-constitutional' law." From the fact that the exclusionary rule does not "fully adhere" to the "no governmental benefit" tenet, Kaplan infers "that the exclusionary rule is merely one arbitrary point on a continuum between deterrence of illegal police activity and conviction of guilty persons." *Id.* More generally, "the Constitution demands something that works—presumably at a reasonable cost. The content of the particular remedial or prophylactic rule is thus a pragmatic decision rather than a constitutional fiat." *Id.*

The text of this Article is principally a disputation with just this way of looking at the exclusionary rule, so we shall not in this note try to say everything that can be said against it. But a useful purpose will perhaps be served if we examine some of the observations Kaplan makes to support his contention that one more "restriction [of the rule] is hardly a radical step," *id.*—observations of lacunae that have never been filled and inroads and limitations on the rule that have already been permitted. Let us first note the most egregious limitation he mentions—the personal jurisdiction and bad arrest exception. *Id.* at 1030 n.24. Professor Oaks describes this limitation more fully than does Kaplan when he notes that "federal courts have not yet been forbidden from entering a valid judgment of conviction against a defendant who was brought before the court by illegal means such as kidnapping, arrest without probable cause, or arrest upon a warrant that was illegal or insufficient." Oaks, *supra* note 43, at 669. That this is shocking cannot be gainsaid—the person is fair game for any form of body-snatching while the courts occupy themselves with chattels!

It seems to us, however, that Kaplan is on somewhat weaker ground when he considers one kind of chattel, namely contraband. He says that "if courts strictly enforced the notion that the government could not benefit from an illegal search and seizure by its police officers, we would return to persons subjected to an illegal search the contraband seized from them—presumably giving them a head-start with their heroin, sawed-off shotguns, or stolen property." Kaplan, *supra* note 55, at 1030 n.24. Wigmore also supposed that a constitutional exclusionary doctrine necessarily calls for the return of contraband, and he came up with a scenario—incalculably more frightening now than when he wrote it—to illustrate the grotesqueness of the rule understood as a rule of restitution:

obligation—an obligation one discovers (a) by taking seriously the notion of judicial review, (b) by acknowledging the fourth amendment as a rule of recognition, (c) by comprehending that exclusion is simply the appropriate form for unfavorable review

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> If the officials, illegally searching, came across an infernal machine, planned for the city's destruction, and impounded it, shall we say that the diabolical owner of it may appear in court, brazenly demand process for its return, and be supinely accorded by the Court a writ of restitution, with perhaps an apology for the "outrage"? Such is the logical consequence of the doctrine of Weeks v. U.S. . . .

Wigmore, note 16 *supra*, at 481.

Wigmore and Kaplan seem to believe that, to the extent the exclusionary rule is really treated as a constitutional doctrine, courts will necessarily become accessories before the fact to the commission of crime. Their belief is instructive, for it shows the degree to which a constitutional exclusionary rule is subject to misconception. According to Kaplan, a *constitutional* exclusionary rule would deny to the government all "benefits" accruing from the illegal seizure of evidence, and since the rule as presently enforced does *not* deny every conceivable benefit (pecuniary, crime preventive, etc.), it therefore must not be a constitutional rule. But the consequences of the exclusionary rule when *properly* interpreted as a constitutional requirement are unpalatable enough, without ascribing absurd consequences to it. The exclusionary rule is *not* a specification of some general "no benefit" principle. It is rather judicial review of executive conduct, prompted *only* when the fruits of that conduct are sought to be validated and incorporated into the process *of conviction.*

Justice Day speaks of the return of seized items in Weeks v. United States, 232 U.S. 383, 398 (1914), but the items in issue there were letters the prosecutor proposed to introduce in evidence. Whether or not the law of property puts letters and infernal machines in the same category, Justice Day would have been astounded to see someone try to justify Wigmore's writ of restitution by invoking the *Weeks* opinion—an opinion which is based on the notion of an "*evidentiary* transaction" between the executive and the court. *See* Part IV *supra.* So far as we can see, there is nothing in the Weeks opinion inconsistent with the rule that "[i]f the motion [for return of property] is granted the property shall be restored *unless otherwise subject to lawful detention* and it shall not be admissible in evidence at any hearing or trial." FED. R. CRIM. P. 41(e) (emphasis added).

From a legitimate crime control perspective it is regrettable enough that the "owner" of the "infernal machine" or the former possessors of the "heroin, sawed-off shotguns, or stolen property" cannot be tried for possession when the possession is discovered through an unconstitutional search. This serious and unpalatable consequence the constitutional doctrine *does* require. But we are not clear why it should *also* require return of contraband, for the gravamen of the exclusionary rule is *exclusion,* not restitution. The criminal court is not responsible to see that the government does not "benefit" from its illegality in every possible way, but only that it does not benefit through the peculiar processes of the criminal court.

As for the other restrictions mentioned by Kaplan—"[t]he rule is limited by such constructs as standing, the attenuation of taint from illegal searches, and the admissibility of illegally seized evidence for impeachment," Kaplan, *supra* note 55, at 1030—do these vitiate the rule as

to take under this rule of recognition, and (d) by recalling the fundamental meaning of "deprivation by due process of law," *i.e.*, deprivation by and only by the law of the land, which in turn requires, at a minimum, application of constitutional rules of recognition.[277]

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a constitutional doctrine? The issue is not whether the courts have been steadfast enough to apply the rule systematically across the board on the "neutral principle" model, *see* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), but whether, according to the best understanding of the Constitution, that instrument contains or gives rise to a rule calling for such application.

Kaplan seems to argue that when a rule logically covers two cases, and the Supreme Court refrains from applying it to one case, the Court must be deemed not to be invoking the rule as a constitutional rule when it applies it to the other. But this does not follow. The failure of the Court to apply the exclusionary doctrine to nonparadigmatic cases arguably included in the constitutional rationale is not ground for denying that the Court is enforcing the Constitution when—in paradigmatic evidentiary cases—it *does* invoke the exclusionary rule as a constitutional requirement.

277. We say "at a minimum" because we do not wish to preclude the possibility that a defendant has a due process constitutional right to application of *statutory* as well as constitutional rules of recognition. Consider in this connection our favorable reference to Professor Hill's proposal for the "constitutionalization" of certain issues heretofore unsatisfactorily handled under the rubric of judicial integrity. *See* Hill, *supra* note 65, at 199-200, 210-12, discussed in note 100 *supra*. If Hill's suggestion were adopted, and a conviction were presented for review in which, for example, the state trial court had admitted evidence gained through violation by state officers of section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1970), any reversal would be predicated on fourteenth amendment due process grounds, rather than on the "imperative of judicial integrity," which was the actual rationale employed when this fact pattern was presented. Lee v. Florida, 392 U.S. 378, 385 (1968). Likewise, the Hill proposal would dictate that reversal of a federal conviction because of a violation of prompt arraignment legislation would be based on the force of the legislation itself and on the fifth amendment due process clause, rather than, as in McNabb v. United States, 318 U.S. 332, 341 (1943), on the Supreme Court's "supervisory authority over the administration of criminal justice in the federal courts" or on the "judicial integrity" rationale also invoked in that case. *Id.* at 345, 347.

The move from the "supervisory power" and "judicial integrity" to due process is advisable, not only for the reasons Hill gives, *see* note 100 *supra*, but also because of the destructive impact invocation of the supervisory power can have on the conception of due process—an impact vividly illustrated by Justice Frankfurter's opinion in *McNabb*. In that case, petitioners urged reversal of their convictions because the incriminating statements used against them were elicited during an extended period of intensive questioning (in violation, it must be added, of congressional prompt-arraignment legislation). It is impossible to tell from Justice Frankfurter's description precisely what constitutional claim the petitioners made: he said that they were "[r]elying upon the guaranties of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

Rejection of the evidentiary transaction interpretation does not necessitate adherence to the deterrence-supervisory power understanding of the exclusionary rule, for one finds an exclusionary imperative in the fourth amendment treated as a rule of recognition. One may hold that the fourth amendment does not speak directly to the courts and yet find the courts under an exclusionary obligation, because the courts are under an obligation to apply the fourth amendment and all constitutional rules of recognition faithfully, especially in a criminal prosecution. However he would phrase it, we think Justice Brennan would agree to as much, indeed insist upon it. What is not clear is

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or property, without due process of law' . . . ." 318 U.S. at 338-39. But what *is* clear is that any straight due process argument they might have been making was futile, given the peculiar conception of due process from which Justice Frankfurter worked in writing the *McNabb* opinion.

As is well known, Frankfurter found it "unnecessary to reach the Constitutional issue," *id.* at 340, finding it possible instead to dispose of the case through the supervisory power. Or perhaps it should be said that his confidence in the availability of the supervisory power encouraged him to assume a heedless attitude toward at least one constitutional protection—the due process provision. Frankfurter's reliance in *McNabb* on the supervisory power has the effect of rating due process standards at a shockingly elemental level—as will be seen by considering the implications of the following passage from the opinion:

> [T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.

Id.

Justice Frankfurter thus reduces due process to an echelon just above trial by force and, in the same motion, assigns to the supervisory power the higher office of "establishing and maintaining civilized standards of procedure and evidence." The implications of this passage for the Supreme Court's concern about civilized standards *in the states*, where the Court has no supervisory power (*but see* Lee v. Florida, *supra*), is something to reflect on. It is on the basis of this reflection, and because we are persuaded by Professor Hill of the illegitimacy of judicial "door-closing" on supervisory "integrity" grounds, *see* note 100 *supra*, that we follow Hill in favoring disposition of cases of statutory violation like *McNabb* on (more generously conceived) due process grounds alone. The Hill position is, to repeat, that if the conviction cannot be faulted on due process—or at any rate on statutory—grounds, it must be allowed to stand. *See id.* In seconding Hill's proposition, we are in fact urging a return to the stance Justice Frankfurter had taken earlier, in the "second" *Nardone* case, when writing for the Court he had said that "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an overriding public policy expressed in the Constitution or the law of the land." Nardone v. United States, 308 U.S. 338, 340 (1939).

whether he would go a step further and acknowledge *not only* that judges are obligated to observe the fourth amendment as a rule of recognition *but also* that the defendant has a personal constitutional right that they do so.

At this juncture we could summarize Justice Brennan's options as follows: rejecting the deterrence rationale and not picking up the evidentiary transaction interpretation, he might either develop the personal exclusionary right we think is implicit in the notion of the fourth amendment as a rule of recognition, or he could try to occupy one or another of two *non*personal-right exclusionary imperative positions that might tempt him. Both positions are ultimately illusory and untenable. One is simply the first half of the thought we have just canvassed—namely, that the exclusionist court would be understood as *im*personally engaging in judicial review by applying the fourth amendment as a rule of recognition in a way that acknowledges a judicial duty of exclusion without any corresponding right. The other position invokes the judicial integrity rationale, according to which the court protects itself and the moving party is a mere triggering mechanism. These two nonpersonal approaches make the same mistake: they fail to attach significance to the fact that the violation of the Constitution or the threat to the court's integrity is occurring in *the defendant's case.*

The integrity rationale makes the additional mistake of basing itself on the supervisory power. Since it is more in error, and since, by his quotations from the *Olmstead* dissents and by his own remarks, Justice Brennan indicates that the integrity rationale was more on his mind when he wrote the *Calandra* dissent, we shall now turn our attention entirely in that direction. By criticizing that rationale, we shall arrive at a fuller statement of the personal exclusionary right for which we are arguing.

VII. JUDICIAL INTEGRITY, THE SUPERVISORY POWER, AND A DUE PROCESS PERSONAL RIGHT TO EXCLUSION OF UNCONSTITUTIONALLY SEIZED EVIDENCE

We began this Article by first commending and then criticizing the judicial integrity rationale, and we have repeatedly taken our bearings by Justice Brennan's statement that "the vital function of the [exclusionary] rule [is] to insure that the judiciary avoid . . . sanctioning illegal government conduct."[278] We find

278. United States v. Calandra, 414 U.S. 338, 360 (1974).

the integrity rationale commendable because, being based on "one-government" or unitary thinking, it is not, in Holmes's word, "rudimentary."[279] But our enthusiasm for the rationale is tempered by the fact that, although it does not necessarily fragment the government,[280] it severs another moral—indeed constitutional—connection: the right/duty relationship between the defendant and the court. Instead of concern for the defendant's right to have the government proceed constitutionally throughout the whole prosecution, we find concern for the court's own integrity. "[T]he Court protects itself";[281] and it does so, moreover, by invoking not the power of judicial review, but the "supervisory power"—or at any rate some "remedial"[282] or "quasi-constitutional"[283] power to the exercise of which the defendant has no right. The judicial integrity rationale relies on the very same supervisory power that gives rise to the "judicially created remedy"[284] discussed by deterrence theorists like Justice Powell. This is one reason to doubt that the exclusionary rule is given much real support by the judicial integrity rationale,[285] for the point of many references to the supervisory power in discussions of the exclusionary rule is to remind that what the court has given the court, or the legislature, can take away.[286] The supervisory power is one of the less rooted branches of our

279. Olmstead v. United States, 277 U.S. 438, 470-71 (1928).
280. *But see* notes 44, 100, and 115 *supra*.
281. Olmstead v. United States, 277 U.S. 438, 485 (1928).
282. *See* text accompanying notes 157-66 *supra*.
283. *See* notes 109 and 276 *supra*.
284. United States v. Calandra, 414 U.S. 338, 348 (1974).
285. Another reason is discussed in Part II *supra*; *see* text accompanying notes 43-56 *supra*.
286. *See, e.g.*, 414 U.S. at 348 (Powell, J.) ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."); Mapp v. Ohio, 367 U.S. 643, 679-80 (1961) (Harlan, J., dissenting) ("[W]hat the Court is now doing is to impose upon the States not only federal substantive standards of 'search and seizure' but also the basic federal remedy for violation of those standards. For I think it entirely clear that the Weeks exclusionary rule is but a remedy . . . ."); Wolf v. Colorado, 338 U.S. 25, 33 (1949) (Frankfurter, J.) ("And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend on our own."); *id.* at 39-40 (Black, J., concurring) ("I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.").

jurisprudence; mysterious in origin, sudden in appearance or at least in recognition, ill-defined[287] and unpredictable, it is simply an ineligible recourse when a sturdier alternative is available, as it is in the unconstitutionally seized evidence situation, where a judicial wrong against a particular person is threatened. Indeed, the very incoherence of the supervisory power approach used, for example, by Justice Brandeis points beyond that approach to the more promising personal rights argument.[288]

Some of the problems inherent in Justice Brandeis's reasoning are revealed if we think of the motion to suppress as a convenient triggering mechanism enabling the court "to maintain respect for law . . . [and] to preserve the judicial process from contamination,"[289] without having frequently to take the unseemly initiative of excluding evidence on its own motion. The two situations Brandeis envisages in his opinion are suppression of the fruits of illegality on the motion of the defendant, and suppression by the court on its own motion "despite the wish to the contrary of all the parties to the litigation."[290] But another possibility is of interest here: the court may deny the defendant's motion to suppress. And—supposing the evidence has indeed been seized unconstitutionally—the question is whether to characterize denial of the motion as merely refusal by the court to allow itself to be "triggered," or as a denial of the defendant's exclusionary right: whether, in other words, to view the defendant as merely a "private attorney general,"[291] or instead as a holder of a right. If he has a right, the court's recognition of it will not be an exercise of the supervisory power—the supervisory power is redundant in the presence of a right.

Two connections have to be exhibited and kept clear to make plausible the existence of what we are calling in this Article the due process exclusionary right.[292] (Or, one could say, these two connections had to be severed in the fragmentary model to make the exclusionary rule seem an unnatural interference with the proper administration of justice.) The *first* is the tie of respon-

287. *See* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

288. The argument we shall be making here against the uncorrected Brandeis judicial integrity thesis is different from, but compatible with, Professor Hill's cogent argument that judicial "door-closing" on grounds other than a constitutional or statutory violation is illegitimate. *See* notes 44, 100, and 115 *supra*.

289. 277 U.S. at 484. *See* note 64 *supra*.

290. *Id.* at 485.

291. *See* note 64 *supra*.

292. *See* text accompanying notes 15, 71, and 138 *supra*.

sibility that makes the government an indivisible whole and the court part of it, or the prosecution a whole and the trial part of *it*. We have already said enough on this subject.[293] The *second* connection is the one Justice Brandeis neglects, and which deserves the closest attention. It occurs at a juncture between, on the one hand, the wrong seen by Justice Brandeis to be committed by the admissionist court and, on the other hand, the defendant to whom that wrong may be said to have been done. We characterize this connection as a personal constitutional right of the defendant—a due process right not to have the judicial wrong of admission committed in the government's prosecution of *him*. In short, we are saying there is a personal right waiting to be articulated out of the interstices of the judicial integrity argument, a right that Justice Brandeis passes over.

Our argument in this Part is addressed to those who, like Justice Brennan, are attached to the judicial integrity way of phrasing the exclusionary imperative. This argument is not a defense of every possible application of the integrity rationale; it simply brings to light the veiled affinity between the integrity concern and a rights analysis. It is not a defense of indiscriminate judicial "door-closing,"[294] but is rather a defense of the proposition that there is a near equivalence between the personal right to try one's case before a law-abiding judge and a personal right to the exclusion of evidence—where that evidence has been obtained by illegal means.

The right of which we speak is perhaps easier to see in Holmes's idiom of "dirty business" and of "not . . . allow[ing] such iniquities to succeed"[295] than in Brandeis's metaphor of "contamination."[296] The apparent implication of the latter is, as Brandeis says, that "the court protects itself."[297] But a Brandeis-instructed court must be protecting itself from something—presumably from an actual or apparent loss of integrity. Now either that integrity is intrinsically valuable, or it is instrumental, or it is both. If it has intrinsic worth, the court is protecting itself from doing wrong in the present moment just for the sake of being righteous in the present moment. But a court's present moments are always in present *cases* and related to present *parties*. If integrity is instrumental, on the other hand, then presumably the present concern is to ensure that the court can

293. *See, e.g.*, Part I *supra*.
294. *See* notes 44, 100, 115, and 288 *supra*.
295. 277 U.S. at 470.
296. *Id.* at 484.
297. *Id.* at 485.

do its job in the future. But its future job is the same as its present job—to do justice to parties. Courts do not make sense without parties, and whether one thinks about judicial integrity in connection with the present case or a future case, it always reduces, or rises, to doing justice to parties. But, that being granted, why must integrity be preserved solely, or primarily, with a view to future parties—why must preservation of integrity be understood primarily as instrumental? We question the implication that the court must be concerned for the rule of law in the present defendant's case only for the sake of future defendants, because that would mean the court would never be obligated to have regard for integrity and the rule of law in the case of *any present* defendant, just for the sake of being righteous in that case. This is not only preposterous, it is entirely alien to the concept of integrity, which is not instrumentalist but, of all moral concepts, perhaps the least "future" or "consequence" oriented.

We are suggesting, then, that the main concern of the Brandeis-educated court cannot be the court's future, but must be its present. Yet, its present is the defendant's case. And so there is after all a vast difference between the deterrence-supervisory power approach of Justice Powell and the integrity-supervisory approach of a Brandeis or Brennan. Whereas the deterrence rationale is necessarily future-oriented and must issue from the supervisory power, the logic of the integrity rationale orients it to the present and provides the self-corrective by which that rationale frees itself from its ties to the supervisory power. This is just another way of saying that the deterrence theory is not, and the integrity rationale is, fundamentally rights-oriented.

It might be objected that a court in the present instance could jeopardize its integrity in a way that does no harm to the present defendant, and yet cripples the court for the future. For example, in a trial eventually resulting in acquittal, the court might be so unfair that it irreparably damages its reputation for impartiality. We do not deny that departures from judicial integrity can occur in the defendant's case without violation of the defendant's rights. But where the defendant is the victim of unconstitutional searches and seizures perpetrated by the government, we think there is good reason for a unitary model theorist like Brandeis to find the court's "ratification" of that paradigmatic misconduct[298] to be not only judicial sanction of

298. Here we are talking about a search and seizure that is by hypothesis unconstitutional; that is, we are talking about a situation in

a "doctrine [against which a court] should resolutely set its face,"[299] but also a concrete constitutional wrong to the defendant—the denial of a due process right to have the government in all its parts obey and respect its own constitutional laws in its prosecution of him.

We have tried to bring out the meaning of Justice Brennan's declaration in *Calandra* that "the vital function of the [exclusionary] rule [is] to insure that the judiciary avoids . . . sanctioning illegal government conduct." In Part VI we glossed the passage as if it were a judicial review statement to the effect that "the vital function of the rule is to insure that the judiciary avoids validating unconstitutional governmental conduct." Here in Part VII we have read it as it was undoubtedly intended by Justice Brennan, *i.e.*, as a simple repetition of the Brandeis judicial integrity rationale. We think the judicial review and judicial integrity arguments as we have followed them out in these two discussions do compel the claims we make at the end of each, namely, that the defendant has a due process personal right to have the government observe its own laws, at any rate its own constitution, in its prosecution of him—and therefore to have the court exclude unconstitutionally seized evidence from his trial.

That result can be stated in the two ways appropriate to the emphases of the two discussions. One can say that the court, as part of the government, and because of its special office in that government and its special function in a prosecution, must enforce constitutional rules of recognition, one of which is the fourth amendment; one can say that this is simply what the rule of law and the practice of constitutionalism require, and that anything short of this is a denial to the defendant of due process of law. Or one can say that if judicial integrity means anything, it *must* mean judicial observance of the law and a fortiori of

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which the constitutional grounds for exclusion are presumably more evident than they were in *Olmstead*, where, on the understanding of the case the majority drove Brandeis to adopt, the search and seizure was not unconstitutional but merely illegal. *See* text accompanying notes 94-99 *supra*. But see notes 100 and 277 *supra*, for a fledgling argument that there is a constitutional ground for excluding evidence obtained through mere violation of a statute.

299. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court [*i.e.*, the United States Supreme Court] should resolutely set its face.
277 U.S. at 485.

the Constitution; and, since judging is a party-related activity, judicial integrity means law observance in the defendant's case, which means in turn that the defendant has a due process right to law observance. Whatever the starting point, then, the conclusion is the same—the defendant has a due process right to exclusion as an expression of both judicial review and judicial integrity.

VIII. CONCLUDING THOUGHTS

Our thesis is that the defendant has both an immediate, evidentiary transaction, fourth amendment exclusionary right, described in Part IV; and a mediated, due process exclusionary right, described in Parts VI and VII. We are therefore leaving ourselves vulnerable to a complaint we made against the Warren Court. That Court betrayed, it seemed to us, a lack of confidence in either the deterrence or the integrity rationale by its tendency to rely indiscriminately on both without indicating how much weight either could bear, or was being asked to bear, individually.[300] There is probably something to saying, "The more, the less": there is unquestionably something to the proposition that two or more insufficient arguments aggregated do not necessarily amount to sufficiency. Recollection of the impression left by the Warren Court should, then, give pause to those like us who attempt a plural justification of the exclusionary rule.

But there are differences. We ground the rule in two personal rights, whereas the Warren Court—or Justice Clark speaking for it—made a heterogeneous appeal, relying on deterrence, integrity, and even, if obscurely, on a personal right.[301] And when Clark did recognize a personal right to exclusion, he did not seriously consider the possibility that the right itself might entirely account for the rule. Justice Clark did not place due reliance on the fact that the rights rationale stands in a logical and constitutional relationship with the exclusionary rule for which utilitarian rationales are not eligible. But, as readers of this Article are by now aware, we *do* place that reliance—we *do* take seriously the rights we claim to perceive.[302] Indeed, we assert that *either* the fourth amendment *or* the due process exclusionary right is itself a sufficient reason for the rule. And our presentation is not influenced by such considerations as the

300. *See* text accompanying notes 35-42 *supra.*
301. *See* note 40 *supra.*
302. *See* Dworkin, *Taking Rights Seriously*, in IS LAW DEAD? 168 (E. Rostow ed. 1971).

appearance of redundancy or the *persuasiveness* of the argument. If there is one right, it will be a sufficient reason for the rule. If there are two, there is not *more* sufficiency of argument; there are rather two individually sufficient reasons for the rule, neither of which can be denied or ignored because the other will suffice. These riches are not an embarrassment, and our presentation is not, after all, guilty of the kind of self-defeating multiplicity of appeal we think characterized the Warren Court exclusionary opinions.

Each right we have described is a sufficient reason for the rule because enforcement of the rule is simply the only way to give expression to the right. The rule is one with each of the rights. They are rights *to* the rule only in a manner of speaking —only because "the rule" is just another term for (1) having the court in one's case respect the security of one's person, house, papers, effects, and privacy, by declining to participate in an illicit evidentiary transaction—the fourth amendment here understood as performing its duty-imposing function of obligating the courts to eschew that transaction; and (2) having the court, in recognition of its duty to sanction only valid governmental acts, invalidate executive misconduct by excluding the products of that misconduct from one's trial—the fourth amendment *here* understood as one among many power-conferring and power-limiting rules of recognition. At stake *here* is the individual's right to have the court apply the relevant rules of recognition, which is, in turn, a specification of his more general right to have the government obey its own laws in its prosecution of him. The subject is the individual's right to enjoy the rule of law, and the government's duty to afford it—a right and duty presumably guaranteed by the due process clauses[303] and not to be

303. Professor Herman Schwartz has shown a "link between exclusion and the rule of law," by uncovering the rule of law, due process concern that lies behind the Brandeis-Holmes judicial integrity doctrine. Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 751 (1966). Schwartz is not persuaded by either the "contagion" or the "contamination" arguments of the *Olmstead* dissents. *Id.* Instead, he says,

> [t]he real reason for the Brandeis-Holmes notion seems to rest on a broad and fundamental principle: 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, especially that branch which has the foremost role in furthering the rule of law. The law sets limits to the state's exercise of power over the individual, and, regardless of mitigating circumstances, a substantial overstepping of those limits should not be legally cognizable. A court sworn to uphold and promote ob-

neglected because of the more fashionable preoccupation with privacy.

Given either right, the rule cannot be a "remedy" *for* a violation of privacy, or *for* a departure from the rule of law and constitutionalism. It *is* the rule of law and constitutionalism in action. Of course, even the faintest suggestion of the kind we are making, that the exclusionary rule is a manifestation of the rule of law, will be greeted with scorn and derision. But when we say that the exclusionary requirement is part of the rule of law, we do not mean that the rule of law is destined to share the fate of the exclusionary rule. We mean rather that the constitutional exclusionary rights are *conceptually* part of the rule of law, and that for a court to admit unconstitutionally obtained evidence is to do violence to the *concept* of the rule of law.[304] As for *empirical* consequences, on the other hand, the course of least resistance for us would be, *first*, simply to note that reasonable men—such as Brandeis and Burger,[305] or Brennan and Powell—have differed about what is likely to happen to the

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servance of the law cannot adequately perform its function if it ignores illegality in the enforcement of the law.

Id. at 751-52 (footnotes omitted).

304. Professor Allen's comment seems as appropriate as when he wrote it 25 years ago:

> [P]erhaps it may be urged that 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, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 NW. U.L. REV. 1, 20 (1950). When Professor Oaks quotes this passage, he says it is Professor Allen giving "modern voice" to the Brandeisian concern that the government as lawbreaker "breeds contempt for law; . . . it invites anarchy." Oaks, *supra* note 43, at 669 n.11, quoting Olmstead v. United States, 277 U.S. 438, 485 (1928). If we are not mistaken, however, Allen bespeaks at least as much concern for the conceptual state of an admissionist legal system as he exhibits for the effects on law-abidingness of an admissionist policy.

Professor Dellinger also presumably addresses the following statement at least in part to the *idea* of constitutionalism and the rule of law:

> To abolish the exclusionary rule and replace it with an action for damages against the governmental treasury is to have the law speak with two voices. In the absence of the exclusionary rule, the law enforcement officer and the public generally are enticed to view the Constitution as Justice Holmes' "bad man" viewed the obligation of contracts. However one resolves the question of whether a valid contract creates a normative duty or merely presents an option to breach and pay damages, it is inconsistent with a constitutional system to view duties imposed by basic guarantees in the latter way.

Dellinger, *supra* note 78, at 1563 (footnotes omitted).

305. *See* text accompanying notes 48-55 *supra*.

administration of justice as a result of admission or exclusion; and, *second*, to correct any misapprehension that this Article has been written as a treatment of consequences, salutary or pernicious. But, though our argument is indeed a construction of the Constitution and is therefore conceptual rather than utilitarian, and though until now we have almost totally eschewed the appeal to consequences, we must nevertheless mention the possible consequences of one particular act—our own.

Writers are not free of responsibility for the possible consequences of an utterance merely because it is based on nonutilitarian premises. One surely does not evade that responsibility merely by incantation of those premises. So if it were said that an argument like our own tends to fasten a rigid and impolitic view of the exclusionary rule[306] on the courts and therefore on the country, it would not be sufficient to reply—though we think it is true—that the Constitution itself is "rigid and impolitic" with respect to unconstitutionally seized evidence. That would not be a sufficient disclaimer because the existence of a true argument may not be adequate grounds for stating it. The constitutional argument for the exclusionary rule might—and, from a utilitarian point of view, perhaps should—be allowed to fade from memory for lack of repetition. Or, to make the matter personal, we might have decided that, had we any intellectual or rhetorical influence, we would not mobilize it. We could have been content to see the exclusionary rights remain in or fall into the oblivion that seems to be their inevitable habitat or destination.

In defense of our contrary decision, however, it must be said that one may also bear responsibility or take credit for the state of affairs that results from his omissions. Discredit and oblivion for the rights rationale would be as much a consequence of the option exercised by this generation of scholars as would use of that rationale to "decide cases."[307] The significant question is

306. *See* note 55 *supra*.

307. Oaks, *supra* note 43. *See also* note 276 *supra*. The question of scholarly responsibility can be posed economically by asking whether we really want Professor Oaks's characterization of and epitaph for the personal right rationale to be the last word. In a footnote, he mentions three rights-related theories of the exclusionary rule as possible alternatives to the deterrence theory. We have criticized two of them. One is the notion that exclusion is compensation. Oaks, *supra* note 43, at 671 n.25; *see* note 158 *supra*. Another is the *Boyd* type fourth and fifth amendment rationale. Oaks, *supra* note 43, at 671 n.25; *see* note 97 *supra*. Oaks's third alternative is the theory we propound in this Article—that "a defendant [has] a personal right not to be convicted by means of il-

not whether there would be responsibility for the failure to state the rights argument—there would be—but whether the consequences of the omission would be good or bad. There is no doubt in the minds of critics like Chief Justice Burger and Professor Kaplan that the country is or would be better off without the rights rationale, because acceptance of it would fix in our jurisprudence a rule that is in their opinion an insupportable social and political burden. As the Chief Justice has put it, the exclusionary rule has left "a sour and bitter feeling that is psychologically and sociologically unhealthy."[308] Or, as Professor Kaplan has more recently said, in computing "the political price of the exclusionary rule":[309]

> The solid majority of Americans rejects the idea that "[t]he criminal is to go free because the constable has blundered." Indeed, this public dissatisfaction has recently become a major political force. Public opinion polls have shown an extremely high rate of disapproval of the courts for their role in "coddling criminals," and the prototype of these complaints is enforcement of the exclusionary rule.[310]

The facts marshalled here need not and for the most part cannot be disputed; and we do not deny the importance of the opinions of our fellow citizens. We do think, however, that some other considerations must be brought into the picture to make an adequate "utilitarian calculation of the cost [or, as the case may be, the benefit] of the exclusionary rule."[311] In what follows we shall not be theoretically discussing anything about the rule other than its effect on the opinions and habits of the public[312]—not its rightness and only this one aspect of its badness or goodness. Yet, as we shall see, it is hard to keep the rightness of the rule out of the discussion, because belief or disbelief in the existence of an exclusionary right will influence the way the rule lodges itself in the public mind and affects the public character; reflection on the fact may lead us to consider more reasons than Burger and Kaplan mention for taking an interest in the public's opinion of the exclusionary rule.

The argument we are considering here is not that the rule

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legally obtained evidence." Oaks, *supra* note 43, at 671 n.25. According to Oaks, "[a]ll these alternative explanations have now been discredited." *Id.*

308. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 22 (1964).

309. Kaplan, *supra* note 55, at 1035.

310. *Id.* at 1035-36.

311. *Id.* at 1035.

312. For a list of other dysfunctional aspects of the rule, see note 61 *supra.*

"handcuffs" the police,[313] or that it frequently lets dangerous defendants go free,[314] or finally, as Wigmore alleged, that "the direct and immediate result . . . [of the rule is to make] Justice inefficient, and . . . [to coddle] the criminal classes of the population."[315] The argument under consideration is rather that, because the rule is *perceived by the public* as doing one or more of these things, it must be repealed or drastically modified[316] —and therefore that, at all costs, exclusion must not be characterized as a right. Since we are no more indifferent to consequences than the next person, and since we can conceive of circumstances not so remote from the present in which something would have to be done about the exclusion of evidence to placate popular passions, we cannot reject the argument out of hand. We can even understand why sensible persons might counsel anticipatory concessions to "a popular need for retribution"[317] or to "political hostility."[318] But what we want noted is that

313. The clearest repudiation of the "handcuff" argument is by Professor Oaks:

> The whole argument about the exclusionary rule "handcuffing" the police should be abandoned. If this is a negative effect, then it is an effect of the constitutional rules, not an effect of the exclusionary rule as the means chosen for their enforcement. Police officials and prosecutors should stop claiming that the exclusionary rule prevents effective law enforcement. In doing so they attribute far greater effect to the exclusionary rule than the evidence warrants, and they are also in the untenable position of urging that the sanction be abolished so that they can continue to violate the rules with impunity. If the constitutional rules concerning arrest and search and seizure really prevent effective law enforcement, then law enforcement officers should demonstrate that fact and forthrightly attempt to have those rules changed by appropriate authority.

Oaks, *supra* note 43, at 754.

314. "It is undeniably true," Professor Kaplan says,

> that in practice the exclusionary rule rarely allows dangerous defendants to go free. In serious cases, there are often other charges not weakened by the exclusionary rule, or sufficient evidence of the crime charged apart from that unconstitutionally seized. Moreover, the courts have shown a remarkable ability in the most serious cases to stretch legal doctrine to hold doubtful searches and seizures legal. The courts have often avoided applying the exclusionary rule in situations in which the consequences of so doing would offend their own sense of proportionality or reach beyond their view of what the public would tolerate.

Kaplan, *supra* note 55, at 1036. He then adds, however, that although "[s]uch decisions may actually lower any adverse impact of the exclusionary rule on crime control," they do not lower the "political price" of the rule: "since the reasoning behind . . . [these decisions] is unacknowledged, covert, and usually disingenuous, public dissatisfaction with the rule is not reduced." *Id.* at 1037.

315. Wigmore, *supra* note 16, at 482.

316. *See* note 55 *supra.*

317. *Id.*

318. *Id.*

this would be a concession to an impulse that does not necessarily do a people credit, that is hard to distinguish from an appetite for vengeance that grows by what it feeds on.[319] To this objection the response will no doubt be that a repressed or "frustrated"[320] need is more likely to seek release in savage behavior than is a need that is routinely satisfied. Without taking a position on the factual accuracy of this contention, we shall only note that relief from the frustration through routine satisfaction of the need would also be a denial to the American people of what has been an important opportunity for them to learn and practice moderation.

The exclusionary rule has been misrepresented. Labelled by Wigmore as "misguided sentimentality,"[321] it is condemned as the emotional indulgence of persons "soft on crime" when in fact it is old-fashioned self-denial. And it is this—its refusal to cater and gratify—that gives the rule its impolitic look, because contemporary politics—the only politics we know—is the politics of gratification. But, other conceptions of politics are available, and political ends beyond bare institutional survival are conceivable —ends to be sought by means other than gratification of the people.[322] Whoever can bring himself to believe there could be a "long run" in store for our institutions might wish to consider these alternative forms of politics and, as an earnest of commitment to the politics of modest self-restraint, might wish to ask the American people to continue practicing procedural justice. We mean literally to *practice—i.e.*, to perform acts of procedural justice, and hence of exclusion—and to practice often, *to keep up proficiency.*[323] We commend this as a course of *action* that could be at least as important to the long-term quality of our lives as would be the *passivity* of having substantive justice done

319. *Id.*

320. *Id.*

321. Wigmore, *supra* note 16, at 482. *See also* Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 673 n.49 (1961).

322. A convenient and authoritative introduction to some of the alternatives is H. CLOR, OBSCENITY AND PUBLIC MORALITY 182-202 (1969). For those dissatisfied with the raw political pragmatism of Professor Kaplan's argument, but nevertheless persuaded by him that the political dimension cannot be ignored, we would recommend Professor Clor's recent contribution to political and legal philosophy. Clor, *On the Moral Authority and Value of Law: The Province of Jurisprudence Undetermined*, 58 MINN. L. REV. 569 (1974).

323. On the "substantive" and "educational" effects of criminal procedure, see Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 365-67, 385 n.95, 388-91, 401, 409. *But see id.* at 416.

for us in accord with our "need for retribution."[324]

But we cannot expect the public any more than the police to regard a procedural requirement as worthy of the effort of self-restraint it entails, when the specific self-denial requested is justified only by the "arbitrary [positioning of a] point on a continuum."[325] Pragmatic experiment does not compel respect. If people are to accept exclusion, they must be approached neither as witnesses to judicial manipulation of the police,[326] nor as incipient vigilantes whose favor must be curried by the courts, but as fellow citizens ready to consider and perhaps to accept and respect an exclusionary holding—as long as the ground of decision is more than the court's own fiat. As we have argued, that ground is the defendant's exclusionary right. Invocation of the defendant's right, nothing grand or awesome to be sure, is nevertheless an occasion for respect because it is not a self-seeking claim by the citizenry, but is rather a denial by them of their own impulses in favor of someone else's due.[327]

The difficulty may be described as follows: either we are serious about exclusion and want to request a commitment of self-restraint from the public, in which case we shall have to appeal to it in terms of the defendant's rights—which after all *are* the principal reasons for being serious about exclusion; or we are pragmatic exclusionists, in which case our reasons for appeal to either the public or the police have minimal moral content and therefore are likely to have minimal impact.

When a discussion moves, as ours has in this concluding section, from the relatively firm ground of rights and principle to the shifting and contingent ground of good and bad consequences, it necessarily becomes speculative. And, though we can correctly say that the "political price" argument is also speculative, the response might reasonably be that the stakes are so high that doubts must be resolved in favor of safety and survival. When the issue is thus joined, we have gone beyond the competence of either the rights proponent or the pragmatic "social engineer":[328] we have gone beyond the place in the discussion where one becomes qualified by knowing about rights and the rule of law or by mastering a manipulative technique—or, for that matter, by experiencing fears of anarchy. In short, discursive

324. Kaplan, *supra* note 55, at 1035.
325. Kaplan, *supra* note 55, at 1030, quoted in note 171 *supra*.
326. *See* note 171 *supra*.
327. In short, it is an occasion for the people to recover their sense of duty. *See* note 72 *supra*.
328. Kaplan, *supra* note 55, at 1055.

argumentation has exhausted itself and statesmanship or judgment is now required.

An appeal to statesmanship and judgment, rarely enough openly made in our time, will be taken as either a muddled reference to the very pragmatism it is supposed to transcend, or as a pretentious way to evade taking either of the stands that retain respectability in our time: the unbudging stand of the sincere moralist or the budging flux of the realistic politician. And, pretentiousness aside, that is indeed what the appeal to statesmanship and judgment is: a recognition that neither doctrinaire insistence on rights[329] nor concerned preoccupation with what people will put up with is sufficient. There is no formula or litmus by which to tell whether exclusion is a reasonable risk in the cause of justice and moderation or a reckless gamble with the nation's future. It is because formulas are not available at this juncture that it is necessary to hope that we have extraordinarily reasonable men in positions to make the judgment.[330]

The office of the scholar is not to play at statesmanship, but to keep all the relevant considerations before the public and before the potential statesman—and, in particular, not to let a consideration like justice, defendant's rights, or the rule of law, be annihilated by neglect. Of course it is not out of place for scholars to point out that people frequently surprise those who sell them short, by responding to a higher appeal when it is made to them. Nor are we exceeding the limits of our competence if we note that how a matter is discussed may make a considerable difference in how it is received and understood. At any rate, the acceptability of an imposition like the exclusionary rule will depend in considerable part on how it is presented—whether, for example, it is presented as a right that accrues as a matter

329. Persons like ourselves, who make rights a central constitutional concern, must recur periodically to the corrective language of Justice Jackson:

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (dissenting opinion). *But see* text accompanying note 74 *supra*.

330. By all standards, the most elevating—and liberating—discussion of the relationship between principle and public necessity is from the pen of the late Professor Leo Strauss. L. STRAUSS, NATURAL RIGHTS AND HISTORY 159-63 (1953).

On the place of judgment in constitutional law, see the excellent remarks of Professor Snowiss. Snowiss, *The Legacy of Justice Black*, 1973 SUP. CT. REV. 187, 238-52.

of course, or as a remedial device that "works."[331] That acceptability will be affected by the attitude that influential jurists like the Chief Justice of the United States and influential commentators like Professor Kaplan take toward the rule. There is a considerable amount of self-fulfillment in the prophecies made about the rule. It is one thing simply to tell people what the rights are in the premises and to expect them to understand that the according of rights is ordinarily the proper thing to do; it is another to approach people through a sophisticated apologetics that obscures the existence and meaning of rights and gives people every excuse to violate rights by obliging their passions.[332]

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331. Kaplan, *supra* note 55, at 1030.

332. Consider, as illustrations of different types of discourse, the differing ways two men of the law have responded to the invocation of "technicalities" in criminal procedure. First, this from an off-the-bench address by Chief Justice Burger:

> If a majority . . . come to believe that law enforcement is being frustrated by what laymen call "technicalities," there develops a sour and bitter feeling that is psychologically and sociologically unhealthy . . . .
>
> I do not challenge these rules of law. But I do suggest that . . . a vast number of people are losing respect for law and the administration of justice because they think that the Supression Doctrine is *defeating* justice. That much of this reaction is due to lack of understanding does not mean we can ignore it . . . .
>
> . . . I suggest judges had a right to assume that other branches of government, and police in particular, would recognize that this mechanism of suppression was not an end in itself but a means . . . .
>
> . . . .
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> The public has accepted—largely on faith in the Judiciary—the distasteful results of the Suppression Doctrine; but the wrath of public opinion may descend alike on police and judges if we persist in the view that suppression is a solution. At best it is a necessary evil and hardly more than a manifestation of sterile judicial indignation even in the view of well motivated and well informed laymen.

Burger, *supra* note 308, at 22-23. Then, this from an out-of-court statement by a prosecutor, who had been asked whether lawyers who "get defendants off on technicalities" serve the cause of justice:

> Every time I hear a report like that, I look to see what the technicality was. Usually, it was that some police officers violated the Constitution in gathering evidence. Then the defense lawyer quite properly filed a motion to suppress this evidence and the judge upheld it. Nothing was left to support the case, so the defendant had to be ruled not guilty.
>
> I don't think that man was freed on a technicality. He got off because his constitutional rights were violated.
>
> It's true that our legal system sometimes goes awry and a defendant escapes his just desserts because of a true technicality. A misspelled word in an indictment, say. But, if everything is on the up-and-up, a prosecutor has his remedies. He can appeal, or he can bring a new indictment. The chances of somebody escaping justice on a genuine technicality are mighty slim.

Robinson, *How Well Do Lawyers Serve the Cause of Justice?*, PARADE,

We do not find it a matter for despair that "arguments are constructed in one way, and governments in another,"[333] or that, as Macaulay goes on to say,

> [whereas in] logic, none but an idiot admits the premises and denies the legitimate conclusion . . . in practice, we see that great and enlightened communities often persist, generation after generation, in asserting principles, and refusing to act upon those principles. It may be doubted whether any real polity that ever existed has exactly corresponded to the pure idea of that polity.[334]

And, although what the historian says may be preeminently true of his own country—or at least of the judges in it[335]—there are ample indications, noted by Professor Kaplan[336] and others and visible in the exclusionary cases, that American judges are also capable of "asserting principles, and refusing to act upon those principles." That there are problems with this kind of judicial inconsistency, we do not deny.[337] That these problems are anywhere near as serious as attacks on "those principles" in their established and paradigmatic applications, we *do* deny. It is one thing to be innocent of the principle,[338] or, realizing the principle, to refuse "exactly" to fulfill its "pure idea"; it is quite another to have made the principle a part of the polity's jurisprudence, and to have routinized application of the principle to paradigmatic cases, and *then* to announce that there is no principle

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Aug. 11, 1974, at 11 (quoting James R. Thompson, United States Attorney for the Northern District of Illinois).

333. T. MACAULAY, 4 THE HISTORY OF ENGLAND 124 (1879).

334. *Id.* at 124-25.

335. Professor Williams has made the following comments on the English practice of excluding coerced confessions and admitting the products of illegal searches:

> [O]ne would like to know the reason for not applying the general rule of admissibility to the special case of induced confessions. There must be some reason why an induced confession is excluded, though relevant, while evidence obtained by an illegal search is admitted. Some consideration other than that of relevancy must create this distinction . . . . In the absence of an explanation, one does not know whether English law is fundamentally consistent with itself. . . .
>
> There are other grounds for dissatisfaction with the . . . [English decisions on illegally seized evidence]. *The American decisions which hold the contrary were not properly considered, and their basis was quite possibly misunderstood* . . . .

Williams, *The Exclusionary Rule Under Foreign Law: England*, 52 J. CRIM. L.C. & P.S. 272, 273 (1961) (emphasis added). *See* text accompanying notes 215-33 *supra*.

336. *See* notes 276 and 314 *supra*.

337. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

338. Professor Williams may be saying that this is the state of the English judges. *See* note 335 *supra*.

after all. That is especially disturbing when, as we claim to have shown about the exclusionary requirement, the principle in question is inseparable from two constitutional rights and from the rule of law.

If in this Article we have convincingly stated either or both claims of right for which we have argued, we have shifted the burden of argument to the critics of the exclusionary rule. To describe the argument they might make to justify repeal or modification of the rule despite the defendant's constitutional exclusionary rights would be nothing less than to discourse on the concept of a constitutional right[339] and the rule of law; to master the doctrines of public necessity and the general welfare; and to discuss in detail and with statesmanlike comprehension the circumstances and needs of our civilization. This Article is meant only to shift that burden, not carry it.

339. *See generally* J. FEINBERG, SOCIAL PHILOSOPHY 55-83 (1973); Dworkin, *supra* note 302; Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1425 (1962); Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).