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THE EXCLUSIONARY RULE IN PROBATION AND PAROLE REVOCATION PROCEEDINGS: SOME OBSERVATIONS ON DETERRENCE AND THE "IMPERATIVE OF JUDICIAL INTEGRITY."

JEFFREY COLE*

Liability, Dewey tells us, is the beginning of responsibility. The individual is held accountable for what he has done in order that he may be responsive in what he is going to do. Only thus do people gradually "learn by dramatic imitation to hold themselves accountable, and liability becomes a voluntary deliberate acknowledgement that deeds are our own, that their consequences come from us."¹

Echoes and applications of this salutary rule of morals are also found in the law. Indeed, in the context of the criminal law, bitter experience at one time counseled that the rule of *Weeks v. United States*,² excluding evidence obtained in violation of the fourth amend-

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1. J. Dewey, *Morals and Conduct*, in MAN AND MAN: THE SOCIAL PHILOSOPHERS 484-85 (J. Cummins and R. Linscott ed. 1954).
2. 232 U.S. 383 (1914).

Throughout the first decade of this century, it had been held that the method of acquisition of tangible evidence had no bearing on the propriety of its evidential use in criminal proceedings. See *Adams v. New York*, 192 U.S. 585 (1904); 8 J. WIGMORE, EVIDENCE § 2183 (3d ed. 1940). It was not until 1914 in *Weeks* that the Supreme Court considered the impact of the fourth amendment on this evidentiary doctrine. The striking outcome of *Weeks* was the sweeping declaration that the fourth amendment, although not in terms referring to or limiting the evidentiary use of unconstitutionally obtained evidence, really forbade its introduction if obtained by federal officers through a violation of that amendment.

The *Weeks* exclusionary rule was expressly limited to federal cases, 232 U.S. at 398, in which federal officers had obtained the evidence illegally. *Lustig v. United States*, 338 U.S. 74 (1914).

In the years following *Weeks*, the Court slowly retreated from the Procrustean philosophy of *Hurtado v. California*, 110 U.S. 516 (1884), and gradually came to subscribe to the notion that those constitutional rights, spelled out in the first eight amendments, which were "implicit in the concept of ordered liberty", *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.), were applicable to the states by virtue of their selective incorporation into the due process clause of the fourteenth amendment. See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 933 et. seq. (1965); Frankfurter, *Memorandum on "Incorporation" of*

ment,³ was the only effective deterrent to police misconduct.⁴ By

the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965). See Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

Apace with this progression of doctrinal development, came repeated requests for the Supreme Court to make the fourth amendment binding on the states. It was supposed that such a holding would, perforce, make obligatory on the states the *Weeks* exclusionary rule. In 1949, in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that the security of one's privacy against arbitrary intrusion by the police was at the core of the fourth amendment and was basic to a free society; hence, it was implicit in the concept of ordered liberty and as such enforceable against the states through the due process clause of the fourteenth amendment. *Id.* at 27-28. However, the Court refused to apply the *Weeks* exclusionary rule to the states. In *Irvine v. California*, 347 U.S. 128, 139, 142, 149 (1954), the Court continued to apply the *Wolf* doctrine, but expressed the hope that states would adopt the federal exclusionary rule.

It was not until *Mapp v. Ohio*, 367 U.S. 643 (1961) that the exclusionary rule of *Weeks* was made binding on the states. Comprising the plurality were Justices Clark, Douglas, Brennan and the Chief Justice. Mr. Justice Black wrote a concurring opinion in which he stated his view that the fourth amendment did not, of its own force, compel exclusion. *Id.* at 661. Mr. Justice Stewart expressed no view on the matter. *Id.* Justices Harlan, Frankfurter and Whittaker dissented. *Id.* at 672. Although the opinion is not wholly clear on this point, the plurality seemed to state that the exclusionary rule of *Weeks* was required by the fourth amendment. Such a position ill accorded with earlier views that the rule was a judicially fashioned remedial and evidentiary device. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 39 (1949) (Black, J. concurring); *On Lee v. United States*, 343 U.S. 747 (1952); *Elkins v. United States*, 364 U.S. 206, 210, 234 (1960) (Frankfurter, Clark, Harlan and Whittaker, J.J., dissenting). See also *Coolidge v. New Hampshire*, 403 U.S. 443, 499 (1971) (Black, J. concurring).

3. The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"

Unlike the exclusionary rule of the fourth amendment, the rule excluding involuntary confessions was not from its inception recognized as the principal mode of discouraging lawless police conduct. Involuntary confessions were originally excluded because their intrinsic trustworthiness was suspect. 3 J. WIGMORE, EVIDENCE § 822 (3d ed. 1940). Gradually, however, the emphasis shifted from the trustworthiness of the confession to the methods by which it was obtained. *Spano v. New York*, 360 U.S. 318 (1959); *Ashcraft v. Tennessee*, 322 U.S. 449 (1944). The confession cases culminated in *Rogers v. Richmond*, 365 U.S. 534 (1961), in which the Court, in part, rejected the traditional concern for trustworthiness and held that an involuntary confession is excluded to deter undesirable police behavior and to maintain the accusatorial nature of our judicial system. W. SCHAEFFER, THE SUSPECT AND SOCIETY 25 (1966) [hereinafter cited as SCHAEFFER]. *But see Mapp v. Ohio*, 367 U.S. 643, 683-84 (1961) (Harlan, J., dissenting).

While the rule excluding confessions obtained in the absence of *Miranda* warnings, *Miranda v. Arizona*, 384 U.S. 436 (1966), is predicated on the fifth amendment, its *raison d'être* does not appear to differ from that announced in the later confession cases. Prior to *Miranda*, the rule excluding involuntary confessions did not trace its lineage to the fifth amendment; that the rule and the privilege had wholly distinct origins was demonstrated by Wigmore. See 3 J. WIGMORE, EVIDENCE § 2266 (McNaughton rev. ed. 1961); SCHAEFFER, *supra*, at 13-18 (1966); *Miranda v. Arizona*, 384 U.S. 436, 504 (1966) (Harlan, Stewart, White, JJ., dissenting). Indeed, both *Miranda* and *Johnson v. New Jersey*, 384 U.S. 719 (1966), indicated that *Miranda* was chiefly concerned with proscribing interrogation practices which the Court found to be "destructive of human dignity", 384 U.S. at 457, and disrespectful of "the dignity and integrity of . . . citizens", *id.* at 457-58. Since the majority believed that "[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law", *id.* at 480, it was convinced that unsupervised and unregulated interrogations were inconsistent with the boast that ours is an accusatorial and not an inquisitional system.

In conclusion, *Miranda* sought to "advance . . . proper limitation[s] upon custodial interrogation", 384 U.S. at 447, in order to insure that "protracted questioning incommunicado in order to extort confessions", *id.* at 446, and other "practices of this sort will be eradicated in the

removing the incentive to disregard constitutional guarantees, the exclusionary rule seeks to discourage police practices which are

foreseeable future." *Id.* at 447. Thus, *Miranda's* exclusionary rule, like its antecedent, *Rogers v. Richmond*, 365 U.S. 534 (1961), and its fourth amendment counterpart, is designed to discourage official misconduct by depriving the government of the fruits of its lawlessness. See *Michigan v. Tucker*, 417 U.S. 433, 446-48 (1974); *Brown v. Illinois*, 43 U.S.L.W. 4937 (U.S. June 26, 1975).

4. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 651 (1961); *Nuslein v. District of Columbia*, 115 F.2d 690, 695 (D.C. Cir. 1940); *United States v. Pugliese*, 153 F.2d 497 (2d Cir. 1945); *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955). But see *Oaks, Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). Almost fifty years ago, Professor Thomas S. Atkinson articulated the inadequacy of traditional remedies against police lawlessness:

Generally an innocent person whose rights have been invaded will not seek civil relief unless there is substantial physical or property injury. Courts and juries are not in the habit of giving substantial damages where there has been a mere violation of privacy without visible loss. Few innocent persons will lay out time and money in order to recover nominal damages for the violation of a right, no matter how fundamental and precious that right may be. Yet the soul will be rankled and the people dissatisfied. A guilty person is in even a worse position. He could not even hope to recover more than nominal damages unless the search was attended by serious personal injury or destruction of lawful property. Of course he could not recover the amount of the fine or the value of his time during imprisonment. The other alternative, a criminal action against the offending officer, seems inadequate. If mere technical violations of the Fourth Amendment are punished criminally, this would discourage an officer from doing his duty whenever there could be any doubt as to the legality of the search. On the other hand, if punishment be confined to malicious violations of the Fourth Amendment or cases in which substantial physical damages were done, the result would be that the force of the Fourth Amendment would be gradually whittled away. In addition, prosecutors are naturally loathe to proceed against the officers who have furnished them the convicting evidence. An example of this is shown by recent experience. An amendment to the National Prohibition Law provides for criminal punishment of officers who make illegal searches. About three years have elapsed and there is no reported case in which an officer has been punished under its provisions. Cases are numerous in which unreasonable searches were made. The absence of cases punishing officers criminally or giving compensation to persons whose rights are violated shows that these means are not adequate to preserve the Fourth Amendment as part of our living law.

Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925).

One of the classic judicial articulations of the impotence of civil remedies was by Chief Justice (then Circuit Judge) Vinson:

If this declaration is admissible and justice meted out on the issue of drunken driving, where is the defendant's remedy for the inexcusable entry into his home? The casuist answers—a civil action against the officers. That remedy has been found wanting. Such remedy scarcely satisfies the non-belligerent, non-legal mind of a person whose security has already been violated and who stands convicted. To follow that procedure means delay, expense, unwanted publicity; it asks the individual to stake too much, and to take too great a chance, in the hope of compensating the interference to his privacy. A criminal remedy is also possible, but it is likely to be too strict or too lax. If criminal actions are brought consistently against the enforcing officers, before long their diligence will be enervated. If no prosecutions are brought, which appears to be the case, it cannot be said that statutory criminal provisions afford any deterrent to the infringement of the IVth Amendment. Even if the criminal and civil remedies worked, the protection would not be complete. The Amendment does not outline the method by which the protection shall be afforded, but some effective method must be administered; the protection granted by constitutional provisions must not be dealt with as abstractions. A simple, effective way to assist in the realization of the security guaranteed by the IVth Amendment, in this type of case, is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home.

Nuslein v. District of Columbia, 115 F.2d 690, 695 (D.C. Cir. 1940) (footnotes omitted). See

obnoxious to a free society.⁵

From its inception, the exclusionary rule has been the subject of intense and often strident criticism.⁶ Perhaps the salient reason for this criticism stems from the dramatic impact the rule has on the enforcement of the criminal law. In its direct and immediate operation, the exclusionary rule benefits, or at least seems to benefit, "only the guilty."⁷ Counterpoised against this present, palpable, and visible effect is the seemingly speculative and intangible future benefit to be derived from the rule's invocation—a benefit which is, moreover, difficult for the average citizen to comprehend.⁸

Those who have championed the rule have not ignored the impact

also *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 421 (1971) (Burger, C.J. dissenting). In the footnotes to the *Nuslein* opinion, Judge Vinson said:

We have been able to find among the reported federal cases only one action for damages against an officer for an alleged unreasonable search. *Hunt v. Evans*, 56 App. D.C. 97, 10 F.2d 892. There was no recovery since the court held that the search warrant was good on its face and the plaintiff invited the search. The number of cases in which the courts have said that there was an unreasonable search and seizure negatives any contention that actions for damages are not brought because the IVth Amendment is never infringed.

On November 23, 1921, the following provision became law: 'That any officer . . . who shall search any private dwelling as defined in [Title 27] the National Prohibition Act . . . without a warrant directing such search . . . shall be guilty of a misdemeanor . . . ' 42 Stat. 223, 18 U.S.C.A. § 53. While the effect of this provision has been judicially recognized, (*Poulos v. United States*, 6 Cir., 8 F.2d 120, 121.) there is not one reported case where an officer has been tried for violation. This provision was repealed on August 27, 1935 (49 Stat. 872), but at the same time there was enacted a similar statute applying to the 'enforcement of any law of the United States'. 49 Stat. 877, 18 U.S.C.A. § 53a. Likewise, to date, there is not one reported case of an officer tried for violation of this provision.

115 F.2d at 695 nn. 15-16. *See also* 8 J. WIGMORE, EVIDENCE § 2184a at 53 n.46 (McNaughton rev. ed. 1961).

5. *See* *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Calandra*, 414 U.S. 338 (1974); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 411 (1971) (Burger, C. J., dissenting); *Davis v. Mississippi*, 394 U.S. 721, 724 (1969); *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Harrison v. United States*, 392 U.S. 219, 214 n.10 (1968); *Linkletter v. Walker*, 381 U.S. 618 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206, 217 (1960); *Walder v. United States*, 347 U.S. 62, 64-65 (1954); *Wolf v. Colorado*, 338 U.S. 25, (Murphy, Rutledge, J.J. dissenting); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383, 391-93 (1914); *Eleuteri v. Richman*, 26 N.J. 506, 141 A.2d 46 (1958); 8 J. WIGMORE, EVIDENCE § 2183, et seq. (McNaughton rev. ed. 1961). *See generally* J. MAGUIRE, EVIDENCE OF GUILT, 167 et seq. (1959).

6. Much of the literature in the area is collected and discussed in Note, *Trends in Legal Commentary On The Exclusionary Rule*, 65 NW. J.C.L. & C. 373 (1974) and Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE, CASES-COMMENTS-QUESTIONS 189 (4th ed. 1974).

7. *Wright, Must The Criminal Go Free If The Constable Blunders?*, 50 TEXAS L. REV. 736, 737 (1972).

8. *Burger, Who Will Watch The Watchman?*, 14 AM. U. L. REV. 1, 12 (1964):

The impact of the doctrine is dramatic and easily understood, while the important reasons underlying it are almost beyond comprehension to most laymen, including most police officers. This is one of the major causes of popular discontent with the administration of the criminal law. Additionally, it has operated and will—until explained—operate as a demoralizing element in law enforcement agencies.

its application has on law enforcement. It is simply their judgment that the immediate costs to society are more than outweighed by the long term benefits inuring from the rule's application.⁹

For a number of years, the deterrence rationale was the postulate on which the arguments in favor of the rule were bottomed. However, as empirical studies were published,¹⁰ the deterrence arguments lost much of their superficial persuasiveness. To buttress the rule's undergirding, the proponents of an expansive exclusionary rule began an attack on a different front. They asserted that the "imperative of judicial integrity" precluded any use of illegally obtained evidence in judicial proceedings.¹¹ Such a thesis had, of course, manifest advan-

9. For example, in *Nuslein v. Dist. of Columbia*, 115 F.2d 690 (D.C. Cir. 1939), the court said:

The rights given by the IVth Amendment are something quite distinct from the determination of whether the defendant was driving under the influence of liquor. The two problems must be considered together, however, in effectuating either the protection of the Constitution, or the punishment of the guilty. When two interests conflict, one must prevail. To us the interest of privacy safeguarded by the Amendment is more important than the interest of punishing all those guilty of misdemeanors. Happy would be the result if both interests could be completely protected.

The federal rule which we are applying to this case has been called an expression of misguided sentimentality, a rule more apropos for a fox hunt than for the catching of brutal criminals. It may be that the courts at times by giving force to the principles in the Bill of Rights have handed scheming, calculating, premeditating felons too many effective instruments in the legal battle before the penitentiary portals. The IVth Amendment, however, was not written for felons alone. It not only includes misdemeanants, but also the great bulk of the population, the innocent. Ordinarily, the individual is entitled to the privacy of his home. But when the individual through his actions becomes a suspect, the sanctity of his home is not quite so inviolable; the public interest in bringing criminals to trial cuts across that sanctity. But even then the Constitution requires an orderly procedure. While the IVth Amendment applies to the innocent, the misdemeanants, and the felons, what is an unreasonable search depends upon the nature and importance of the crime suspected, if any. That is why the rule has grown up that in felony cases officers may enter a suspect's home upon probable cause to arrest him, and then conduct a search incidental to the arrest. This defendant may have driven a taxi while under the influence of an alcoholic beverage; at least for some reason he wrinkled the fender of an unoccupied parked car, but the public interest in this case does not call for the rough and speedy conduct of officers tracking down a felon. At most, the officers could have guessed that the defendant committed some misdemeanor.

Once it is realized that the common law rule, all competent evidence is admissible no matter how secured, is no longer the law when the IVth Amendment is infringed, *this case presents one simple basic question: is it more important to effectuate the vital constitutional policy of security in the home from general investigations directed toward the hope that some evidence will turn up, or the policy that all misdemeanants be brought to task. We feel that the policy of making effective in concrete cases 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' . . . to be the more important.*

Id. at 695-96 (emphasis supplied).

10. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Note, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U. L. REV. 493 (1952-53); Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679 (1944); Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283.

11. At bottom, the argument is that by admitting illegally seized evidence, courts in effect sanction official lawlessness. Since this is contrary to precepts of judicial integrity, the evidence must be excluded.

tages over the deterrence argument, for as a theoretical and ethical abstraction, it was not susceptible to empirical refutation.

In this article, an attempt will be made to demonstrate that neither the deterrence rationale nor the "imperative of judicial integrity" necessarily requires exclusion of all unconstitutionally obtained evidence. While the arguments advanced will apply to all uses of illegally obtained evidence other than for case-in-chief purposes, they will primarily focus on probation and parole revocation proceedings.

Any assessment of the functioning of the exclusionary rule must be considered in the context of its application, for the scope and nature of competing interests will vary according to the setting in which they arise. That is, in a trial setting, courts are called on to strike a balance between the need for effective law enforcement and the need for strict allegiance to the fourth amendment. In revocation proceedings, however, an assessment must be made of another variable, namely the goals subserved by probation and parole. And, the achievement *vel non* of these goals will depend in large measure on the applicability of the exclusionary rule.

It is the thesis of this article that application of the exclusionary rule is not an automatic or mechanical process to be slavishly followed regardless of the attendant consequences. Rather, courts have both the power and the duty to make conscious value judgments giving due regard for the competing interests involved. It is submitted that neither principle nor precedent compels exclusion of illegally obtained evidence save where it is sought to be used at a criminal trial in the government's case-in-chief.

APPLICATION OF THE EXCLUSIONARY RULE DEPENDS UPON A BALANCING OF COMPETING INTERESTS.

Given a problem whether the directive force of a principle is to be expanded, it must be known how it has or will function. Professor Laski has expressed it well:

[W]e cannot run a world on the principles of formal logic. The test of our rule's worth must, in fact, be purely empirical in character. We have to study the social consequences of its application, and deduce therefrom its logic. We have to search for the mechanism of our law in life as it actually is, rather than fit the life we live to the *a priori* rules of a rigid legal system.¹²

12. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 113 (1926); see also B. CARDOZO, *THE GROWTH OF THE LAW*, 80, 112, 116 (1924).

This same sensitivity to the necessity for practical adjustments and for a balancing of competing interests in cases dealing with the applicability of the exclusionary rule pervades the Supreme Court's opinions in *Alderman v. United States*,¹³ *Calandra v. United States*,¹⁴ and *Michigan v. Tucker*.¹⁵ These decisions, while not totally dispositive of the problems raised in this article, do help to establish the backdrop for decision.

In *Alderman* it was argued that the deterrence rationale logically dictates that all unconstitutionally obtained evidence be excluded from criminal trials without regard to whether the defendant has standing, in the traditional sense, to complain of the illegal activity. After balancing the competing considerations, the Court refused to thus extend the exclusionary rule.

Neither [*Linkletter v. Walker* nor *Elkins v. United States*] nor any [other case] hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment. The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.¹⁶

Calandra presented the question whether a witness called before a grand jury may refuse to answer questions on the ground that they

13. 394 U.S. 165 (1969).

14. 414 U.S. 338 (1974).

15. 417 U.S. 433 (1974).

16. 394 U.S. at 174-175. See also *Chapman v. California*, 386 U.S. 18 (1967), where the Court promulgated a harmless constitutional error rule which recognized "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of conviction." *Id.* at 22. However once a constitutional infraction has been shown, the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24. The *Chapman* rule was designed to obviate reversal as a mandatory remedy in cases involving errors of constitutional dimension and to substitute judgment for the *a priori* application of a rule of automatic reversal which was but an unnecessary concession to technicality and thus wholly antithetical to a jurisprudence of conceptions.

It has been argued that the "harmless" error violates the deterrence rationale. The proponents contended that some police would violate constitutional standards in the hope that the trial judge would erroneously admit the evidence obtained and that an appellate court will find the error harmless. The decision in *Chapman* recognized that the increment to deterrence of improper police practices which would result from a rule of automatic reversal would be negligible, and, in any event, was far outweighed by the need for a harmless constitutional error rule.

are based on evidence obtained from an unlawful search and seizure.¹⁷ The Court of Appeals for the District of Columbia answered that question in the affirmative.¹⁸ In their view, restricting the scope of the exclusionary rule would provide incentive for police illegality. Undoubtedly recognizing the structural flaw in any *a priori* decision that police illegality would be encouraged if the rule were not applicable to grand jury proceedings, the Court of Appeals stated the problem in a more subtle way. They assumed that often police were not concerned with a particular defendant but rather with a "larger suspected criminal enterprise." "Under such circumstances, the temptation to ignore the rights of individuals not involved or thought crucial, in order to obtain knowledge useful in investigating the larger suspected illicit enterprise is natural and understandable."¹⁹ Reasoning that under such circumstances "the incentive [to disregard constitutional commands] is greatest," the Court of Appeals concluded that the exclusionary rule should be applicable to grand jury proceedings, at least when those circumstances are presented.²⁰

The Supreme Court granted the Government's petition for certiorari and reversed. The Court began by explicating the history and function of the grand jury in Anglo-American history²¹ and then turned to a detailed discussion of the goal underlying the exclusionary rule.

Speaking for the majority, Mr. Justice Powell²² pointed out that the rule is a judicially created remedy designed to safeguard fourth amendment rights through its deterrent effect,²³ and he emphasized that "the exclusionary rule has *never* been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons."²⁴ Rather, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."²⁵

What is most significant about the *Calandra* decision is the Court's awareness that underlying any application of the exclusionary

17. 414 U.S. at 339.

18. *United States v. Calandra*, 465 F.2d 1218 (D.C. Cir. 1972).

19. *Id.* at 1226.

20. *Id.*

21. 414 U.S. at 348.

22. In addition to Justice Powell, the majority was composed of the Chief Justice, and Justices Stewart, White, Blackmun and Rehnquist. Dissenting were Justices Brennan, Douglas and Marshall.

23. 414 U.S. at 348.

24. *Id.* (emphasis supplied).

25. *Id.* See also *State v. Thorsness*, 528 P.2d 692, 695 (Mont. 1974).

rule is a delicate balancing process.²⁶ In the context of *Calandra* itself this required a weighing of the potential injury to the historic role and

26. This is but a concise way of saying that a conscious, rational choice underlies any application of the exclusionary rule. The methodology employed by the Court in determining the applicability of the exclusionary rule parallels that employed in other phases of constitutional adjudication. Even in the context of first amendment cases the Court has resorted to balancing. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Communist Party v. SACB*, 367 U.S. 1, 90-91 (1961); *Breard v. Alexandria*, 341 U.S. 622, 642-44 (1951); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Cf. *United States v. Bob Lawrence Realty Inc.*, 474 F.2d 115, 122 (5th Cir. 1972) ("Any information value violative [of the "anti-blockbusting" provision of the Fair Housing Act of 1968] is clearly outweighed by the government's overriding interest in preventing blockbusting."). In *Rowan v. Post Office*, 397 U.S. 728 (1970), the Court sustained, against a first amendment attack, Title III of the Postal Revenue and Federal Salary Act of 1967 under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder. To the petitioner's contention that the statute violated his constitutional right to communicate, Mr. Chief Justice Burger responded that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." After "[w]eighing the highly important right to communicate . . . against the very basic right to be free from sighs, sounds, and tangible matter we do not want," the Court concluded that a "mailer's right to communicate must stop at the mailbox of an unrecipients addressee." *Id.* at 733-37 (emphasis supplied).

The Court's awareness that "the societal value of speech must, on occasion, be subordinated to other values and considerations," *Dennis v. United States*, 341 U.S. 494, 503 (1951); compare *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), finds expression in the decisions regarding conflicts between first amendment interests and legislative investigatory needs. In those cases, the Court has required the sacrifice of first amendment freedoms if, *on balance*, the legislative need for information is compelling. See, e.g., *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966); *Gibson v. Florida Investigation Subcommittee*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449, 460-67 (1958); *Watkins v. United States*, 354 U.S. 178 (1957); *United States v. Rumley*, 345 U.S. 41 (1953).

Not wholly unrelated to the problems encountered in the legislative investigation cases is that presented in *California v. Byers*, 402 U.S. 424 (1971). The Court was there faced with the constitutionality of a statute which required a motorist to stop at the scene of an accident and give his name and address. In response to a fifth amendment challenge, the Chief Justice, speaking for the plurality, recognized that "[t]ension between the State's demand for disclosures and the protection of the right against self-incrimination are likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly." *Id.* at 427 (emphasis supplied).

The cases dealing with a public employee's freedom of expression are also instructive. In *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), a civilian serving as a language instructor at an air force base was discharged for making two statements on "controversial" subjects to his students. Both statements pertained to matters of public importance. *Id.* at 1171. While recognizing both the right of a public employee to speak freely and the employer's interest in the efficient dispatch of its business, the court acknowledged that they could, on occasion, be "clashing interests." "Where there is tension between the two, accommodation must be sought in the balancing process which not infrequently characterizes the task of constitutional interpretation." *Id.* at 1176 (emphasis supplied). See also *Dash v. Commanding General*, 307 F. Supp. 849, 853 (D.S.C. 1969); *adopted in full and aff'd*, 429 F.2d 427 (4th Cir. 1970); *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Pred v. Board of Public Instruction*, 415 F.2d 851, 859 (5th Cir. 1969); *Blackwell v. Issaquena County Bd. of Education*, 363 F.2d 749, 753-54 (5th Cir. 1966); *United States v. Aarons*, 310 F.2d 341, 345 (2d Cir. 1962). Cf., *Proconier v. Martinez*, 416 U.S. 396 (1974); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567-70 (1972); *Machinists v. Street*, 367 U.S. 740, 733 (1961); *United*

functions of the grand jury against the potential benefits of the rule as applied in this context.²⁷ The Court posited that any extension of the exclusionary rule would seriously impede the grand jury.²⁸ "Against this potential damage . . . [must be] weigh[ed] the benefits to be derived from this proposed extension of the exclusionary rule."²⁹

The benefits of any incremental deterrent effect were found by the Court to be "uncertain at best."³⁰ The Court quite rightly noted that it was "unrealistic" to suppose that an application of the rule to grand jury proceedings would "significantly further [the] goal" of deterrence of police misconduct.³¹ Such an extension would deter only police investigation consciously directed toward the discovery of evidence

Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 227 (1969) (Harlan, J., dissenting); *Dietemann v. Time Inc.*, 284 F. Supp. 925, 929 (C.D. Cal. 1968). Compare *Central Hardware v. N.L.R.B.*, 407 U.S. 539, 543 (1972); *Stammler v. Willis*, 287 F. Supp. 734, 739 (N.D. Ill. 1968).

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court eschewed any reliance on clear and present danger in assessing the protection afforded to certain statements by an employer to his employees. Speaking for the Court, Chief Justice Warren said that "an employer's right cannot outweigh the equal rights of the employees to associate freely[,] . . . [a]nd any *balancing* of those rights must take into account the [special and unique relationship between employees and employee]." *Id.* at 617 (emphasis supplied).

In *Government of the Virgin Islands v. Brodhurst*, 285 F. Supp. 831 (D.V.I. 1968), the court sustained a conviction against an editor of a newspaper for publishing the names of certain children under the jurisdiction of the court in violation of a statute which proscribed such publication without court authorization.

Legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct active conduct are not presumptively bad because they interfere with and in some of their manifestations restrain the exercise of First Amendment rights. In essence, the problem is one of *balancing* the probable effects of the statute upon the free exercise of the right of speech and assembly against the legislative determination that certain civil conduct should be suppressed.

Id. at 838 (emphasis supplied). See also *State v. Evjue*, 253 Wis. 146, 33 N.W.2d 305 (1948); *Johnson v. Simpson*, 433 S.W.2d 644 (Ky. 1968); *Schuster v. Bowen*, 347 F. Supp. 319 (D. Nev. 1972); *Nappier v. Jefferson Standard Life Ins. Co.*, 322 F.2d 502, 505 (4th Cir. 1963). *But cf.* *Cox Broadcasting Corp. v. Cohn*, 95 S. Ct. 1029 (1975). In other contexts as well, the Court has employed a balancing device. See, e.g., *Southern Pacific v. Arizona*, 325 U.S. 761 (1945) (balancing in commerce clause area); *Procter and Gamble Co., v. Chicago*, 509 F.2d 69, 75 (7th Cir. 1975), *cert. denied*, 95 S. Ct. 1980 (1975); *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972) (balancing in first amendment context); *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967) (balancing in fourth amendment context); *United States v. United States District Court*, 407 U.S. 297, 314 (1972) (same); *Baker v. Wingo*, 407 U.S. 514 (1972) (balancing in sixth amendment context); *Roviaro v. United States*, 353 U.S. 53, 62 (1957) ("The problem is one that calls for balancing the public interest in protecting the flow of information against individual right to prepare his defense."); *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969) (same); *United States v. Liddy*, 478 F.2d 586 (D.C. Cir. 1972) (balancing in first amendment context); *Sun Company of San Bernardino v. Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873, 878 (4th Dist. App. 1973) (same).

27. 414 U.S. at 349. The decision of the court of appeals likewise recognized the quite proper rôle balancing plays. See 465 F.2d at 1225-26.

28. 414 U.S. at 349.

29. *Id.* at 350.

30. *Id.* at 351.

31. *Id.*

solely for use in a grand jury investigation. Yet is not the incentive to disregard constitutional commands to obtain an indictment “substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim”?³² To ask the question is, of course, to answer it. Thus, the Court refused “to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.”³³

Two terms ago, these same themes were presented in *Michigan v. Tucker*.³⁴ At issue was the admissibility of certain statements made in the absence of complete *Miranda* warnings.³⁵ At the outset, the Court candidly acknowledged that the exclusionary rule of *Miranda* was a prophylactic rule developed to protect the right against compulsory self-incrimination.³⁶ Like its fourth amendment counterpart, its prime purpose is to deter.³⁷ Accordingly, before police error can be penalized, it must be determined whether the sanction serves a valid and useful purpose.³⁸

It is not, however, every possible or incremental deterrence that justifies application of the rule. Rather, there must be a balancing of benefit and detriment. That is, a court must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant evidence which either party seeks to adduce.³⁹ Into the equation must be figured the societal interest in the effective prosecution of criminals.⁴⁰ Admittedly, “[t]hese interests may be outweighed by the need to provide an effective sanction to a constitutional right . . . but they must in any event be valued.”⁴¹

It may be important to the welfare of society that in certain instances probative evidence, unconstitutionally obtained, be excluded in order to secure obedience to constitutional commands. It is no less vital, however, that criminals be brought “to book”,⁴² and to that end

32. *Id.*

33. *Id.* at 351-52. (footnote omitted).

34. 417 U.S. 433 (1974).

35. During the course of the interrogation, which antedated *Miranda*, the defendant was not told of his right to appointed counsel.

36. 414 U.S. at 439.

37. *Id.* at 446-47. See note 3, *supra*.

38. *Id.* at 446. See also *State v. Thorsness*, 528 P.2d 692, 695-96 (Mont. 1974).

39. *Id.* at 450.

40. *Id.*

41. *Id.* at 451.

42. Mr. Justice Cardozo phrased the problem this way: “On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office.” *People v. Defore*, 242 N.Y. 13, 17, 150 N.E. 585, 589 (1926).

all available probative evidence should be employed.⁴³ In its attempts to come to grips with this antinomy, the Court has left no doubt that the solution lies not in the insensitive invocation of obdurate rules or tests mechanical, for both objects of desire can never be fully realized. Hence, some compromise is necessary lest "in the clash of jarring rivalries the pretending absolutes will destroy themselves and ordered freedom too."⁴⁴

The principle which emerges from the cases does not admit of easy articulation, and the results of its application can never be definitely ascertained in advance of judgment.⁴⁵ At bottom, it comes down to this: When the public interest in presenting all evidence which is relevant and probative is compelling and the deterrent function served by exclusion is minimal, the exclusionary rule will not be invoked.

There can be no adequate substitute for this balancing test, anathema though it be to many.⁴⁶ In applying this test, courts sail a perilous course between dangers on either hand. But to retreat from that delicate test in favor of a rule of automatic exclusion whenever there exists the slightest possibility of police misconduct would be folly. For "it scarcely helps to give so wide a berth to Charybdis' maw that one is in danger of being impaled upon Scylla's rocks."⁴⁷

Thus even if it be conceded that an expansion of the exclusionary rule to cover non-case-in-chief use will have some deterrent effect, it does not follow that courts are compelled to adopt a rule of total

43. *Alderman v. United States*, 394 U.S. 165 (1969); *Elkins v. United States*, 364 U.S. 206, 216 (1960).

44. B. CARDOZO, *Mr. Justice Holmes*, in *MR. JUSTICE HOLMES* 12 (F. Frankfurter ed. 1931).

45. *Cf. Helvering v. Davis*, 301 U.S. 619, 640 (1937) (Cardozo, J.) "The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event."

46. See *United States v. Winsett*, 12 Cr. L. Rep. 2250 (9th Cir. 1975); *United States v. Allen*, 349 F. Supp. 749, 754 (N.D. Cal. 1974); *People v. Dowery*, 20 Ill. App. 2d 738, 312 N.E.2d 682, 685 (1974); *Washington v. Simms*, 10 Wash. App. 75, 516 P.2d 1088, 1091 (Wash. App. 1974); *State v. Thorsness*, 528 P.2d 692 (Mont. 1974). What the Court said in *Rescue Army v. United States*, 331 U.S. 549 (1947) applies here *mutatis mutandis*.

Accordingly, the policy's applicability can be determined *only by an exercise in judgment*, relative to the particular presentation, though relative also to the policy generally and to the degree in which the specific factors rendering it applicable are exemplified in the particular case. It is largely a question of enough or not enough, the sort of thing precisionists abhor but constitutional adjudication nevertheless constantly requires.

Id. at 574 (emphasis supplied).

47. *Bank and Trust Co. v. Commissioner*, 159 F.2d 167 (2d Cir.) (L. Hand, J.), *cert. denied*, 331 U.S. 836 (1947).

exclusion. The question is whether the degree of deterrence⁴⁸ is sufficiently great to justify further encroachments upon the public interest in preventing law violators from plying their trades with impunity. For as Professor Amsterdam has observed, "As it serves [the]function [of deterrence of police misconduct], the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease."⁴⁹ It is to that question we now turn.

ADMITTING UNCONSTITUTIONALLY OBTAINED EVIDENCE IN REVOCATION PROCEEDINGS WILL NOT ENCOURAGE POLICE MISCONDUCT

Those who contend that the fourth amendment's exclusionary rule should be extended to parole and probation revocation proceedings, and other non-case-in-chief purposes have contended that police misconduct will be encouraged if evidence obtained in violation of the fourth amendment is admissible in these proceedings. The argument rests on the assumption that the police will consciously violate the mandate of the fourth amendment in an attempt to obtain evidence of crime which can be used in a revocation proceeding notwithstanding their knowledge that such evidence will be inadmissible in a criminal prosecution. Illustrative is Judge Peters' dissenting opinion in *In re Martinez*:⁵⁰

I believe that to hold unconstitutionally obtained evidence admissible in [parole revocation] proceedings will furnish an incentive to government officials to violate the Fourth, Fifth, and Fourteenth Amendments, especially when the subject of their investigation is a parolee.

. . . .

[O]nce law enforcement officials are permitted to profit in any conceivable way as a direct result of unconstitutional methods of law enforcement it is to be anticipated that they will have an incentive to engage in such methods in the hope of uncovering some evidence from which they may profit.

. . . .

48. Holmes himself never waived in his judgment that all constitutional adjudication involves questions of degree of the nicest sort. *See, e.g.,* Missouri, Kansas and Tennessee R.R. v. May, 194 U.S. 267 (1904); *Adkins v. Children's Hospital*, 261 U.S. 525, 567 (1923) (Holmes, J., dissenting). This view is one shared by the Court as a body. *See, e.g.,* *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511 (1923); *Bibb v. Navajo Freight Lines Inc.*, 359 U.S. 520 (1959); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

49. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 278, 389 (1964).

50. 1 Cal. 3d 641, 83 Cal. Rptr. 382, 463 P.2d 734, *cert. denied*, 400 U.S. 851 (1970).

Faced with a situation where there might be something to gain, even where the possibility of gain is remote, and where they cannot secure evidence by legal means, the danger of the officials engaging in unconstitutional methods of law enforcement is acute. [citation omitted].

Because the laudable purpose of the exclusionary rule—to deter unconstitutional methods of law enforcement—can only be served by denying the government *any* and *all* profit from such methods *any* exception to the rule eliminates the deterrent effect of the rule and encourages law enforcement officials to engage in the unlawful conduct. When those officials have nothing to lose and something to gain by such conduct, the deterrent effect of the rule is largely if not entirely destroyed. Under today's majority decision, a law enforcement official is encouraged to engage in unconstitutional law enforcement methods in the hope that the evidence thereby secured may be profitably used should it subsequently appear that the victim of such conduct was a parolee.⁵¹

The Oklahoma Court of Criminal Appeals' *ipse dixit* in *Michaud v. State*,⁵² is even less analytical:

Evidence obtained through an unconstitutional search and seizure is incompetent to prove any fact in court, whether the proceeding be a trial or revocation hearing. Such evidence is to be excluded. The purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Mapp v. Ohio*, 367 U.S. at page 656, 81 S. Ct. at page 1692. If evidence from an unreasonable search and seizure were admissible in court at a revocation hearing, it would provide an incentive to disregard the constitutional guaranty, thus eroding the purpose of the exclusionary rule.⁵³

As will be seen, these opinions are classic examples of what can happen when careful analysis is eschewed in the mistaken assumption that an opinion's conclusions are self-evident and self-authenticating.

51. *Id.* at 649, 83 Cal. Rptr. at 390, 463 P.2d at 742 (emphasis in original). Prior to *Harris v. New York*, 401 U.S. 222 (1971) this same kind of argument was made against allowing unconstitutionally obtained evidence to be used for impeachment.

If, however, the impeaching evidence is related to the offense charged, the collateral use doctrine does undercut the policy in question by providing the police with an incentive to use illegal methods in order to acquire evidence against the defendant. In this regard it should be noted that a slight incentive is apparently sufficient to encourage the police to engage in illegal conduct.

Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 Nw. U.L. REV. 912, 926-27 (1968). Accord, Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939, 946 (1967). See also *State v. Brewton*, 247 Ore. 241, 422 P.2d 583, cert. denied, 387 U.S. 943 (1967). *Harris* was anticipated, and the logically dysgenic basis of the contrary views fully explored in Cole, *Impeachment With Unconstitutionally Obtained Evidence: Coming To Grips With The Perjurious Defendant*, 62 Nw. J.C.L. & C. 1 (1971).

52. 505 P.2d 1399 (Okla. Cr. 1973). See also *Commonwealth v. Kates*, 452 Pa. 102, 305 A.2d 701, 711 (1973) (Roberts, J., dissenting) and 305 A.2d at 713 (Manderino, J., dissenting); *United States v. Hill*, 447 F.2d 817, 819 (7th Cir. 1971) (Fairchild, J., dissenting).

53. 505 P.2d at 1402.

And they amply confirm the wisdom of Mr. Justice Frankfurter's observation that the reasoning which justifies a conclusion should be made manifest in the judicial opinion in which it is announced.⁵⁴

These opinions boldly assert that restricting the application of the exclusionary rule to criminal trials encourages police officers to engage in unconstitutional law enforcement methods "in the hope that the evidence thereby secured may be profitably used should it subsequently appear that the victim of such conduct was a parolee."⁵⁵

The weaknesses in this argument are manifest. First, the conclusion is speculative in the extreme, and it is a commonplace that tendentious speculations cannot solve problems with intractable variables such as arise under the exclusionary rule. *Calandra* and *Alderman* teach that it will not do merely to say that police officers *might* be encouraged to violate constitutional commands in the hope that evidence may be used if some remote condition subsequent is satisfied. The focus of the inquiry must be more critical and discerning if the facts are to bear that necessarily close relation to the realities of life.⁵⁶ Thus, before the exclusionary rule can come into play, it must be shown that there exists a reasonably substantial likelihood that by restricting its scope the police will be encouraged to engage in lawless conduct; mere possibilities based on refined or rarified speculation will not suffice.⁵⁷

Second, the opinions did not, in any reasoned or principled way, deal with the factors which a police officer must evaluate prior to making the decision whether to disobey constitutional commands. They merely announced a conclusion which on the surface appears plausible. But whether the police will in fact violate the fourth amendment and forego obtaining case-in-chief evidence in order to get evidence admissible

54. *Darr v. Burford*, 339 U.S. 200, 225 (1949) (Frankfurter, J., dissenting). See also note 168, *infra*.

Another safeguard [against the courts injecting their unconscious predilections into a decision] is craftsmanship—the careful articulation of the grounds of decision and a re-examination from time to time of the assumptions on which rules and doctrines rest. If the unexamined life is not worth living, the unexamined premise is not worth the implications.

P. FREUND, *Mr. Justice Frankfurter*, in FELIX FRANKFURTER: A TRIBUTE 161 (W. Mendelson ed. 1964).

55. *In re Martinez*, 1 Cal. 3d at 649, 83 Cal. Rptr. at 390, 463 P.2d at 742. (emphasis supplied).

56. *Cf. McCordle v. Indianapolis Water Co.*, 272 U.S. 400, 424 (1926) (Brandeis, Stone, JJ., dissenting).

57. *United States v. Calandra*, 414 U.S. 338 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974). *People v. Dowery*, 20 Ill. App. 3d 738, 312 N.E.2d 682 (1974). *Cf.*, *United States v. United States Steel Corp.*, 251 U.S. 417, 448 (1919); *Wright v. Denn*, 23 U.S. 204, 239 (1825); *United States v. Perlman*, 430 F.2d 22, 26 (7th Cir. 1970).

only at a revocation proceeding depends quite obviously on their rational assessment of the total situation.

At the threshold, it will be assumed, for purposes of refutation, that the ratiocinative process described in the *Martinez* dissent is one in which the police will actually engage. That is, we shall assume, *arguendo*, that even where the police have no suspicion that a suspect is a probationer or parolee, there exists the possibility that they might violate his rights in the hope that evidence secured by illegal means may be profitably used should it subsequently appear that the victim of such conduct was a parolee.⁵⁸

In order to decide whether fealty to constitutional requirements will be counterproductive in a given case, the police must, at the outset, balance the chance of possibly receiving no information if they adhere to the commands of the fourth amendment against the chance that the evidence, if any, illicitly obtained will actually be available for use at a revocation proceeding. It belabors the obvious to say that whether the evidence can be used at a revocation proceeding depends upon whether the suspect is a probationer or parolee.

In sum, it appears that the police will take a calculated risk and violate the suspect's rights only if it can rationally be supposed that the chances of his being a probationer or parolee exceed the chances that obedience to constitutional commands will completely frustrate police endeavors. It is only if the chances of the former can realistically be said to equal or exceed those of the latter that it can be argued that the police will be spurred on to illegality. Then and only then is discussion of the invocation of the exclusionary rule meaningful.⁵⁹

Since it is highly improbable that a particular suspect is a probationer, it is abundantly clear that the likelihood that constitutional

58. In actuality, where the police have no suspicion that a suspect is a probationer or parolee, broadening the scope of the exclusionary rule to embrace probation and parole revocation proceedings can have absolutely no deterrent effect on police misconduct. *In re Martinez*, 1 Cal. 3d 641, 83 Cal. Rptr. 382, 463 P.2d 734 (1970) (en banc). And even in those situations where the police are aware of a suspect's status,

The incremental deterrent effect that will realistically be achieved by shielding [probation and parole revocation proceedings] from illegally procured evidence is slight; the bungling police officer is not likely to be halted by the thought that his unlawful conduct will prevent the termination of parole because the [authorities] cannot consider the evidence he unlawfully procures.

Id. at 647, 83 Cal. Rptr. at 389, 463 P.2d at 740. *Contra*, *United States v. Winsett*, 12 Cr. L. Rep. 2250 (9th Cir. 1975). This observation accords with the Court's statement in *Terry v. Ohio*, 392 U.S. 1, 13 (1968), that "[t]he exclusionary rule has its limitations . . . as a tool of judicial control . . . Moreover, in some contexts the rule is ineffective as a deterrent."

59. See Comment, *Fruit of the Poisonous Tree—A Plea For Relevant Criteria*, 115 U. PA. L. REV. 1136 (1967).

police conduct will be fruitful is infinitely greater than is the likelihood that unconstitutionally obtained evidence will ever actually be available for use at a revocation proceeding. Accordingly, it cannot realistically be supposed that a police officer, no matter how venal he may be, will refrain from obeying the law, thereby losing vital case-in-chief evidence, in the vain hope that in exchange he may obtain evidence which can only be used "should it subsequently appear that the victim of such conduct was a parolee."⁶⁰ The contrary arguments blink reality.⁶¹

The obvious argument against the foregoing is that the police are not so legally sophisticated that they would or could actually engage in such a cognitive process. The equally obvious answer is that the police are sufficiently knowledgeable. Indeed, if the police do not actually possess the acumen attributed to them, the whole deterrence argument crumbles under its own weight.

In conclusion, careful analysis leads irresistibly to the firm conclusion that, as in *Calandra*, *Tucker* and *Alderman*, restricting the scope of the exclusionary rule will not have any meaningful effect on police conduct. This being the case, revocation proceedings must not be brought within the rule's protective sweep.

The adherents of a broad exclusionary rule have relied on a second discrete yet interrelated justification for applying the exclusionary rule to revocation proceedings. Succinctly stated, the argument posits that admitting illegally obtained evidence violates the "imperative of judicial integrity." As will be seen, reliance on this argument is reliance on a slender reed.

ALLOWING UNCONSTITUTIONALLY OBTAINED EVIDENCE TO BE USED AT REVOCATION PROCEEDINGS DOES NOT VIOLATE THE "IMPERATIVE OF JUDICIAL INTEGRITY"

While the major function of the exclusionary rule is a deterrent one,⁶² from time to time there have been allusions in opinions that a

60. In re Martinez, 1 Cal. 3d 641, 83 Cal. Rptr. 382, 463 P.2d 734 (1970).

61. "[T]hat which makes no sense to the common understanding is not required by fictive notions of law or even by the most sentimental attitude toward criminals." *Milanovich v. United States*, 365 U.S. 551, 559-60 (1961) (Frankfurter, J., dissenting).

62. See *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Calandra*, 414 U.S. 338 (1974); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); *Davis v. Mississippi*, 394 U.S. 721, 724 (1969); *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Harrison v. United States*, 392 U.S. 219, 224, n.10 (1968); *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206, 217 (1960); *Walder v. United States*, 347 U.S. 62, 64-65 (1954); *Wolf v. Colorado*, 338 U.S. 25 (1949) and 338 U.S.

second function might be subserved by the rule. That function has come to be known as "the imperative of judicial integrity." In substance, the doctrine asserts that "[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."⁶³ While the doctrine received its first explicit enunciation in *Elkins v. United States*,⁶⁴ its roots extend back to the dissents in *Olmstead v. United States*,⁶⁵ of Justices Holmes⁶⁶ and Brandeis⁶⁷ and even beyond.⁶⁸

Relying on *Elkins*, it has been argued that the use of unconstitutionally obtained evidence in revocation proceedings violates the "imperative of judicial integrity." For example, dissenting in *Stone v. Shea*,⁶⁹ Judge Grines said:

The more often stated basis for the exclusionary rule is to deter unconstitutional police action. The use of the evidence as in this case dilutes that deterrent effect. The second *and, I believe, the more important* basis of the rule is the 'imperative of judicial integrity.' The use of evidence by the court has the necessary effect of legitimizing the police conduct which produced the evidence.

The use of such evidence obtained in violation of the fourth amendment results in a society seeking to live off violations of 'the charter of its own existence.'

Both reasons for the exclusionary rule require that such evidence not be used as was in this case.⁷⁰

With all deference, it is submitted that those who have relied on the "imperative of judicial integrity" argument have succumbed to the beguiling opportunity to evade the need for continuous thought which is offered by "[f]ormulas embodying vague and uncritical

41, 47 (Murphy, Rutledge, JJ., dissenting); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383, 391-93 (1914). See generally J. MAGUIRE, *EVIDENCE OF GUILT*, 167 et seq. (1959); Friendly, *The Bill of Rights As A Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 937 (1965).

63. *Brown v. Illinois*, 43 U.S.L.W. 4937 (U.S. June 26, 1975); *United States v. Peltier*, 43 U.S.L.W. 4918 (U.S. June 25, 1975); *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968). See also *Lee v. Florida*, 392 U.S. 378, 385-386 (1968); *Harrison v. United States*, 392 U.S. 219, 224 n.10 (1968); *Mapp v. Ohio*, 367 U.S. 643, 759 (1961); *Elkins v. United States*, 364 U.S. 206, 223 (1960). Compare *Zap v. United States*, 328 U.S. 624, 630 (1946).

64. 364 U.S. 206, 222 (1960).

65. 277 U.S. 438 (1927).

66. *Id.* at 469.

67. *Id.* at 471.

68. See text accompanying note 72, *infra*.

69. 304 A.2d 647 (N.H. 1973).

70. *Id.* at 650 (citations omitted).

generalizations”⁷¹ Moreover, the “judicial integrity” argument rests on a misconception of the doctrinal basis for exclusion. In order to appreciate the limits of the “integrity” argument, it is necessary to fully explore its use in the seminal dissents of Justices Holmes and Brandeis as well as its subsequent application and explication in later cases.

Perhaps the first intimation of the doctrine came in the dissents of Justices Holmes and Brandeis in *Burdeau v. McDowell*.⁷² There a private party had stolen papers from McDowell and turned them over to Burdeau, a government lawyer, who planned to present the records to a grand jury. The government was not in any way involved in the theft. In a 7-2 decision, the Court held that retention and use by the government did not violate the fourth amendment.

The Court noted that there was no constitutional principle which required the government to surrender the papers under such circumstances. Since the papers came into the possession of the government without governmental involvement, the Court saw no reason why they could not be used by the government.

Holmes and Brandeis dissented. Admitting that the Constitution did not compel exclusion merely because the acquisition was illicit, they suggested that exclusion was nonetheless appropriate.⁷³ Latent in the opinion was the thesis that courts, in order to insure respect for law and the judicial function, ought to exclude evidence which has been

71. *Pennekamp v. Florida*, 328 U.S. 331, 351 (1946) (Frankfurter, J., concurring). The Supreme Court has warned time and again against uncritical reliance on and slavish adherence to labels, formulas, and generalizations. See *Harris v. Nelson*, 394 U.S. 286, 293-294 (1969); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Dennis v. United States*, 341 U.S. 494 (1951); *United States v. Kahriger*, 345 U.S. 22, 38 (1952) (Frankfurter, J. dissenting); *Wickard v. Filburn*, 317 U.S. 111 (1942); *McComb v. Jacksonville Power Co.*, 336 U.S. 187, 197 (1949); *Kovacs v. Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring); *Shapiro v. United States*, 335 U.S. 1, 50 (1947) (Frankfurter, J. dissenting); *Haley v. Ohio*, 332 U.S. 596, 601 (1947); *Tiller v. Atlantic Coast Lines*, 318 U.S. 54, 68 (1942); *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 529 (1940); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 449 (1940); *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Palko v. Connecticut*, 302 U.S. 319, 323 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937); *Senior v. Braden*, 295 U.S. 422, 429 (1935); *Baldwin v. Seelig*, 294 U.S. 511 (1935); *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934); *Cooper v. Dasher*, 290 U.S. 106, 110 (1933); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *United States v. U.S. Steel Corp.*, 251 U.S. 417, 448 (1919); *Postal Telegraph Cable Co. v. Tonopah Tidewater Railroad Co.*, 248 U.S. 471, 475 (1918); *Towne v. Eisner*, 245 U.S. 418, 425 (1918); *Hyde v. United States*, 225 U.S. 347, 391 (1911) (Holmes, J., dissenting); *Donnell v. Herring Co.*, 208 U.S. 267, 273 (1907); *Lochner v. New York*, 198 U.S. 45, 74 (Holmes, J., dissenting); *Otis v. Parker*, 187 U.S. 606 (1903). See also Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 451-55, 460-61 (1899). See note 168 *infra*.

72. 256 U.S. 465, 477 (1920).

73. *Id.* at 477.

acquired by means which are viewed as unfair or unethical even though no constitutional principle requires exclusion.

This theme found further expression in a different context in *Casey v. United States*.⁷⁴ There, Justice Brandeis argued in dissent that a conviction should be overturned because the government had "entrapped" the defendant. Admitting that the conduct of the government agents was not a defense to the defendant, the dissent urged that courts need not suffer a detective-made criminal to be punished, for "[t]o permit that would be tantamount to a ratification by the Government of the officers' unauthorized and unjustifiable conduct."⁷⁵ For Brandeis, reversal was necessary in order to protect the government from illegal conduct of its officers and to preserve the purity of its courts.⁷⁶

The principles adumbrated in *Casey* and *Burdeau* found their fullest and most lambent expression in the dissents of Justices Holmes and Brandeis in *Olmstead v. United States*.⁷⁷ In *Olmstead*, the Court sanctioned the government's introduction of evidence which it had obtained by wiretapping in violation of state law. Mr. Justice Holmes dissented on the non-constitutional ground that "the government *ought* not to use evidence obtained, *and only obtainable*, by a criminal act." Holmes took pains to point out that his decision to exclude the illicitly obtained evidence was *not* governed by any "body of precedents . . . which confines us to logical deductions from established principles." Rather, for him the case involved a consideration of "two objects of desire, both of which we cannot have. . . ." ⁷⁸ As tendentiously phrased by Holmes, the choice was between the "less[er] evil that some criminals should escape" and the greater evil that would exist were "the Government [to] play an ignoble role."⁷⁹

74. 276 U.S. 413 (1926).

75. *Id.* at 423-24.

76. *Id.* at 425.

77. 277 U.S. 438 (1927).

78. *Id.* at 469-70 (emphasis supplied). *Cf. Dr. Miles Medical Co. v. Park and Sons Co.* 220 U.S. 373, 409, 412 (1911) (Holmes, J., dissenting). ("We, none of us, can have as much as we want of all the things we want. Therefore we have to choose.")

79. 277 U.S. at 470. In the intimacy of the personal correspondence of Mr. Justice Holmes, there is a glimpse of some of the factors which shaped the dissent. On June 20, 1928, Holmes wrote to his revered friend, Sir Frederick Pollock:

My dear young Frederick:

It is good to see your handwriting again and to welcome you back from your youthful larks—my time for them has gone by. The fatigue of Washington to Boston and Boston to Washington is enough for me, and I walk very little. I am interested by what you tell of Charybdis and the truant Scylla. I dissented in the case of tapping telephone wires. The C. J. who wrote the prevailing opinion, perhaps as a rhetorical device to obscure the difficulty, perhaps merely because he did not note the difference, which

The fact that the judiciary had played no affirmative role in the illegal acquisition of the evidence was of no moment to Holmes since "no distinction can be taken between the Government as prosecutor and the Government as Judge."⁸⁰ However, nowhere in the Holmes dissent is there the slightest intimation that the Constitution, *ex proprio vigore*, prohibited the use of the evidence even where the mode of obtaining it was unethical and a misdemeanor under the law of Washington.⁸¹ Indeed at the close of the dissent, Justice Holmes again repeated that "we are free to choose between two principles of policy."⁸²

Justice Brandeis wrote much more elaborately than Holmes.⁸³ In the intense fire of his own rectitude, Brandeis molded the equitable

perhaps I should have emphasized more, spoke of the objection to the evidence as based on its being obtained by 'unethical' means (horrid phrase), although he adds and by a misdemeanor under the laws of Washington. I said that the State of Washington had made it a crime and that the Government could not put itself in the position of offering to pay for a crime in order to get evidence of another crime. Brandeis wrote much more elaborately, but I didn't agree with all that he said. I should not have printed what I wrote, however, if he had not asked me to.

2 HOLMES-POLLOCK LETTERS 222 (M. Howe ed. 1942) (Editor's footnote omitted).

80. 277 U.S. at 470.

81. *Id.* at 466 (Taft, C.J.).

82. *Id.* at 471.

83. The development of Justice Brandeis' famous dissent in *Olmstead* has been described by Professor Paul Freund, who was law secretary to the Justice during the 1927-28 term of Court. See P. FREUND, *Mr. Justice Brandeis*, in MR. JUSTICE 97, 115-117 (Dunham and Kurland ed. 1956). Even in the *Olmstead* case Brandeis did not come easily to the ultimate constitutional problem. Prior to the oral argument in the case he and his law clerk labored for several weeks in drafting an opinion resting on the doctrine of unclean hands, thus avoiding the fourth amendment and placing the case squarely on the irregularity of the conduct under state law. The statutes of all the states bearing on wire tapping were duly collected and abstracted, and several drafts of an opinion went through the printer's hands. After the oral argument, when it appeared that the Court's interest centered on the fourth amendment, the draft opinion was thoroughly reorganized. The constitutional issue was given first place, developed with a wealth of learning from English constitutional history and from the evolution of the law toward the protection of intangible interests against subtler interferences than those with which the more primitive law was concerned. Even after the opinion was thus reorganized, Brandeis did not give up hope of resolving the problem on a less heroic plane. He extracted from the revised draft the portion resting on the doctrine of unclean hands, had copies of this portion made by the printer, and circulated it to his brethren with the urgent suggestion that the case be disposed of on this ground. It was only after he met with rebuff in this endeavor that he pressed the constitutional dissent.

The evolution of this dissenting opinion illustrates the judicial methods of Brandeis. He drew on his own experience, on his legal learning and intensive study, on contemporary facts, and on his intuition verified by these personal and vicarious experiences and by the critical analysis of his law clerk. In the *Olmstead* dissent of 1928 the essay of 1890 on "The Right to Privacy" furnished useful and relevant matter. It may be of interest to set out in sequence excerpts from that article, then from a draft opinion of February 16, 1928, and finally from the opinion as it was delivered.

The essay of 1890 contained the following passages:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.' Instantaneous photographs and newspaper

doctrine of clean hands to fit within the framework of the criminal law. He also brought the theory of ratification from the law of agency into play, a theory to which he had first alluded in *Casey*.⁸⁴ And then followed the passage which will live as long as speech has the power to move men's minds:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good

enterprise have invaded the sacred precincts of private and domestic life: and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' . . .

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.

The memorandum of February 16, 1928, held the following passage:

Since those days, subtler means of invading privacy and of curtailing personal liberty have been made available to the Government. The advances in science—discovery and invention—have made it possible for the Government to effect disclosure in court of 'what is whispered in the closet'—by means far more effective than stretching the defendant upon the rack. By means of television, radium and photography, there may some day be developed ways by which the Government could, without removing papers from secret drawers, reproduce them in court and lay before the jury the most intimate occurrences of the home. It is conceivable, also, that advances in the psychic and related sciences may afford means of exploring a man's unexpressed beliefs, thoughts and emotions. Can it be that the Constitution affords no protection against such invasion by the Government of personal liberty? As has been said of much lesser intrusions, that would 'place the liberty of every man in the hands of every petty officer.' It would 'destroy all the comforts of society.' And 'no man could endure to live longer in this country.'

It is obvious that the opinion grew in strength and eloquence as it was hammered out and as it evolved, from a response to the unpleasantness in which Samuel Warren found himself, through the ethical principle of unclean hands to the ultimate philosophy of man's spiritual nature which Brandeis found embodied in our Constitution. The crescendo of feeling rises from stage to stage as Brandeis is driven to explore ever more deeply the foundations of individual security.

One distinction of the draft memorandum, it will be observed in passing, was lost in the final version. The reference to television would doubtless have been the first notice of that discovery in a judicial opinion, since the working papers of the Justice show that he was relying on a newspaper account of what was then a current experiment. Unhappily, the reference was deleted in deference to the scientific skepticism of his law clerk, who strongly doubted that the new device could be adapted to the uses of espionage. *Id.* at 115-118 (footnotes omitted).

84. 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.

Will this court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The 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 ever more persuasive. Where the remedies invoked are those of criminal law, the reasons are compelling.

or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. 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 should resolutely set its face.⁸⁵

What is perhaps most significant about the dissents is what Holmes and Brandeis did not say. Nowhere in either decision is there the slightest hint that the exclusionary rule of *Weeks* is bottomed on ethical considerations, or that *Weeks* mandates exclusion in order to promote confidence in the administration of justice or in order to preserve the judicial process from contamination. Rather the opinions make it indisputable that such considerations are non-constitutional in origin. “The governing principle”, as articulated by Mr. Justice Brandeis, 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.”⁸⁶ Justice Holmes likewise was at pains to underscore the fact that the ethical considerations which he and Brandeis believed justified exclusion differed, *toto coelo*, from those which mandated exclusion in *Weeks*. Indeed at the conclusion of his opinion, Holmes reiterated that the Court was free to choose between two principles of policy.

In sum, the *Olmstead* dissents demonstrate that the considerations which later cases compendiously called the “imperative of judicial integrity” have a non-constitutional etiology and do not mandate exclusion but only may counsel exclusion *as a matter of policy* and as the lesser of two social evils. That is, Justices Holmes and Brandeis believed that the Supreme Court was free to fashion exclusionary rules to effectuate certain policy judgments made by the Court itself. One such judgment was that the tangible fruits of official illegality could and should be excluded in federal criminal trials.

The next significant decision was *McNabb v. United States*.⁸⁷ There a conviction was reversed because federal agents had flagrantly disregarded a Congressional mandate that required that accused prisoners be taken promptly before a United States Commissioner. In outlining the scope of the Court’s reviewing power over convictions brought from the lower federal courts, Mr. Justice Frankfurter noted

85. *Id.* at 485.

86. *Id.* at 483-84.

87. 318 U.S. 332 (1943).

that the ambit of review were not confined to ascertainment of constitutional validity. Rather, judicial supervision of the administration of criminal justice in the federal courts implied the duty of establishing "civilized standards of procedure and evidence" which were not limited to "strict canons of evidentiary relevance."⁸⁸ One such standard required the exclusion of evidence secured by virtue of a "flagrant disregard" of Congressional commands. To do less would make "the courts themselves accomplices in willful disobedience of law" and would "stultify the policy which Congress ha[d] enacted into law."⁸⁹

There is, to be sure, a similarity between *McNabb* and the *Olmstead* dissents. However, nowhere in the Frankfurter majority opinion is either the Brandeis or Holmes dissent mentioned. Yet, if the lynchpin in the opinions was the proposition that illegally obtained evidence *must* always be excluded to "preserve the judicial process from contamination,"⁹⁰ why were they not cited? Surely it cannot be argued that this omission was an oversight. *McNabb* thus seems to stand for the proposition that exclusion of evidence obtained by federal officers in violation of a federal statute is necessary, *not* to protect the purity of courts, but rather to effectuate a declared policy of the Congress.

That this was indeed the basis of *McNabb* was made clear in *On Lee v. United States*.⁹¹ There the Court refused to exclude, on constitutional grounds, evidence obtained by the use of a secret radio transmitter strapped to the body of a government informant. Additionally, the Court rejected the argument that under its supervisory powers⁹² the evidence should have been excluded.

While recognizing that exclusion may be required to prevent the undermining of a constitutional right as in *Weeks*, or a statutory right, as in *McNabb*, the Court pointed out that "[s]uch departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy."⁹³ Finding no good policy reason

88. *Id.* at 341.

89. *Id.* at 345.

90. *Olmstead v. United States*, 277 U.S. 438, 484 (1927) (Brandeis, J., dissenting).

91. 343 U.S. 747 (1952).

92. *McNabb v. United States*, 318 U.S. 332 (1943). See generally Hill, *The Bill of Rights and The Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Judge-Made Supervisory Power of The Federal Courts*, 53 GEO. L.J. 1050 (1965); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

93. 343 U.S. at 755.

why the government should be deprived of the benefit of the defendant's admissions, the Court refused to reverse the conviction.

*Wolf v. Colorado*⁹⁴ is also instructive. As noted earlier, *Wolf* held that the security of one's privacy against arbitrary intrusion by the police is at the core of the fourth amendment and thus is "implicit in the concept of ordered liberty." As such it is enforceable against the states through the Due Process Clause of the fourteenth amendment. However, the Court declined the invitation to impose the exclusionary rule of *Weeks* on the states. Noting that the *Weeks* rule of exclusion was "not derived from the explicit requirements of the Fourth Amendment," the Court found that the rule "was a matter of judicial implication."⁹⁵ Phrased differently, "in default of [a legislative] judgment"⁹⁶ as to the effectiveness of exclusion as a "deterrent remedy,"⁹⁷ the Court was "forced to depend upon [a judgment of its] own."⁹⁸

Justices Douglas, Murphy, and Rutledge each filed dissenting opinions.⁹⁹ Yet in none of the three opinions was there mention of or reliance on the *Olmstead* dissents as a basis for their view that unconstitutionally obtained evidence was inadmissible in state as well as federal prosecutions. Their opinions, like the Frankfurter majority opinion, stressed the deterrent sanction exclusion imposed on police misconduct. The absence of reliance on *Olmstead* by the *Wolf* dissenters supports the thesis already advanced; namely that the concept of judicial integrity enunciated in the Holmes-Brandeis opinions does not mandate that illegally obtained evidence be excluded. Rather, a judicial decision to exclude evidence is the product of a subtle and complicated process of adjudication, sensitive to competing social interests.

This is the unquestionable teaching of *Elkins v. United States*,¹⁰⁰ the decision in which the phrase "imperative of judicial integrity" was first uttered. At issue was the question whether evidence unconstitutionally obtained by state officers acting alone could be used in a federal prosecution. At the outset, the majority candidly acknowledged that any limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which

94. 338 U.S. 25 (1949).

95. *Id.* at 28.

96. *Id.* at 33.

97. *Id.* at 32.

98. *Id.* at 33.

99. *Id.* at 40, 41, 47.

100. 364 U.S. 206 (1960).

outweigh the general need for untrammelled disclosure of competent and relevant evidence in a court of justice.¹⁰¹

Finding that there were "considerations of reason and experience" which outweighed the need for disclosure of all probative evidence, the Court, acting pursuant to its supervisory powers, rejected the doctrine which had theretofore admitted into federal trials evidence seized by state agents in violation of a defendant's constitutional rights.¹⁰² The manifold value judgments which comprised that ultimate decision not to give sanction to illegality by admitting into federal trials evidence illegally obtained by state officers was summarized by the phrase the "imperative of judicial integrity."¹⁰³

The "imperative of judicial integrity" is an excellent example of the extent to which uncritical reliance on tidy formulas bedevils the law. The phrase began in *Elkins* as a literary expression. Its very felicity soon threatened to establish it as a dogma. However, it is clear that the Court "did not conceive of the cunningly wrought phrase as a shibboleth to be inflexibly applied as though it contained its own meaning;"¹⁰⁴ it is neither an absolutist test nor a substitute for the weighing of values; it does not dictate decision—it is rather the result of a judicial value-judgment. What Professor Freund has said of the clear and present danger test applies here *pari passu*:

[The imperative of judicial integrity] is an oversimplified judgment unless it takes account also of a number of other factors. . . . No matter how rapidly we utter the phrase [the imperative of judicial integrity, it] is not a substitute for the weighing of values. [It] tend[s] to convey a delusion of certainty when what is most certain is the complexity of the strands in the web of freedom that the just must disentangle.¹⁰⁵

One need go no further than *Alderman v. United States*¹⁰⁶ to demonstrate that the "imperative of judicial integrity" does not

101. *Id.* at 216.

102. *Id.* at 222.

103. *Id.* at 22-23. It would be a mistake to draw from *Elkins* the notion that illegally obtained evidence is always inadmissible in federal cases. *Elkins* was dictated by considerations of federalism, 364 U.S. at 206, and by the Court's view that a contrary holding would encourage illegality by state officers, since they would know that they need only turn over unconstitutionally obtained evidence to federal officials to escape the exclusionary rule imposed in their own states. *Id.* at 221-22.

104. *United States v. Hill*, 447 F.2d 817, 819 (7th Cir. 1971). The Seventh Circuit's characterization of the phrase was taken, *in haec verba*, from the Government's brief at 23 in *United States v. Hill*, 447 F.2d 817.

105. P. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28; quoted in L. HAND, THE BILL OF RIGHTS 60-61 (1958).

106. 394 U.S. 165 (1969).

inexorably preclude the use of unlawfully obtained evidence. In *Alderman*, the Court refused to expand the rules relating to standing. The necessary effect was to allow the government to make use of unconstitutionally obtained evidence.

Later, in *Harris v. New York*,¹⁰⁷ the Supreme Court held that evidence obtained in violation of *Miranda* could be used for impeachment purposes even though it could not be used in the government's case-in-chief. Moreover, the reporters are replete with instances in which illegally obtained evidence has been admitted by courts notwithstanding the "imperative of judicial integrity."¹⁰⁸

Lingering doubts that the "imperative of judicial integrity" is a separate discrete basis for exclusion have been laid to rest by two recent decisions of the Supreme Court. The first is *United States v. Calandra*.¹⁰⁹ There the Court held that the exclusionary rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the fourth amendment against unreasonable searches and seizures.¹¹⁰ It is a "judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect, rather than a personal constitutional right of the party aggrieved."¹¹¹

107. 401 U.S. 222 (1971).

108. *United States v. Calandra*, 414 U.S. 338 (1974) (evidence illegally obtained used in grand jury); *Costello v. United States*, 350 U.S. 359, (1956) (evidence illegally obtained used in grand jury); *Olmstead v. United States*, 277 U.S. 438 (1927) (evidence obtained in violation of state law admissible at trial); *United States v. Teller*, 411 F.2d 374 (7th Cir. 1969) (same); *United States v. Scolnick*, 392 F.2d 320 (3rd Cir. 1968) (same); *United States v. Martin*, 372 F.2d 63 (7th Cir. 1967), *cert. denied*, 387 U.S. 919 (1967) (same); *United States v. Melancon*, 462 F.2d 82, 92 (5th Cir. 1972) (same); *Lewis v. Insurance Co. of North America*, 416 F.2d 1077 (5th Cir. 1969) (admissible in civil case); *United States v. Schipani*, 315 F. Supp. 253 (E.D.N.Y. 1970), *aff'd*, 435 F.2d 26 (2d Cir. 1970) (illegally obtained evidence used at sentencing); *Brill v. State*, 159 Fla. 682, 32 So. 2d 607 (1947) (same); *Burdeau v. McDowell*, 256 U.S. 465 (1921) (evidence illegally obtained by private party admissible in criminal proceedings); *Sackler v. Sackler*, 15 N.Y.2d 40, 203 N.E.2d 481 (1964) (same as applied to divorce action). *Cf.* *Frisbie v. Collins*, 342 U.S. 519 (1952) (violation of federal kidnapping statute by federal agents does not justify release of the kidnapped defendant.). *Compare* *Toohey v. United States*, 404 F.2d 907 (9th Cir. 1968) with *Bynum v. United States*, 262 F.2d 465, 468-69 (D.C. Cir. 1958). *United States v. Callaway*, 446 F.2d 753 (3d Cir. 1971) (evidence illegally obtained by foreign police admissible at trial); *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967) (same); *United States v. Antonelli*, 434 F.2d 335 (2d Cir. 1970) (same). *See also* *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971) (even if evidence is illegally obtained, suppression is not warranted if discovery was inevitable); *United States v. Ganter*, 435 F.2d 364 (7th Cir. 1972) (same); *Toohey v. United States*, 404 F.2d 907, 909 (9th Cir. 1968) (same); *Helligman v. United States*, 407 F.2d 448, 452 (8th Cir. 1969) (same); *United States v. Cole*, 463 F.2d 163, 173-74 (2d Cir. 1972) (same); *Zap v. United States*, 328 U.S. 624, 629 (1945). *See also* *Pitler*, "The Fruit of The Poisonous Tree" Revisited and Shepardized, 56 CALIF. L. REV. 579, 627 (1968).

109. 414 U.S. 338 (1974).

110. *Id.* at 347.

111. *Id.* at 348 (footnote omitted).

The Court concluded that the benefits to be gained by extending the exclusionary rule to embrace grand jury proceedings would only result in an uncertain "incremental deterrent,"¹¹² and it expressly rejected the argument that the decision violated the "imperative of judicial integrity."

The dissent also voices concern that today's decision will betray 'the imperative of judicial integrity,' sanction 'illegal government conduct,' and even 'imperil the very foundation of our people's trust in their Government.' Post, at 360. There is no basis for this alarm. 'Illegal conduct' is hardly sanctioned, nor are the foundations of the Republic imperiled, by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings where the rule's objectives would not be effectively served and where other important and historic values would be unduly prejudiced. [citation omitted].¹¹³

*Michigan v. Tucker*¹¹⁴ has made it luminously clear that any application of the exclusionary rule must serve a valid and useful purpose and that the prime purpose to be served is deterrence of future police illegality.¹¹⁵ There the Court labored to demonstrate that the imperative of judicial integrity "is really an assimilation of the [deterrence and trustworthiness] rationales discussed in the text of [the] opinion and does not in their absence provide an independent basis for excluding challenged evidence."¹¹⁶

The treatment of the "imperative of judicial integrity" doctrine by the Supreme Court demonstrates an awareness that any attempt to apply the doctrine as a mechanistic test without regard to the context of its application mistakes the form in which *Elkins* cast the ideas of the Holmes-Brandeis *Olmstead* dissents for the substance of the ideas. But it is the considerations that gave birth to the phrase "imperative of judicial integrity", not the phrase itself, that is vital in deciding questions involving application of the exclusionary rule. For, a great

112. *Id.* at 351.

113. *Id.* at 355-56 n.11. See also *People v. Dowery*, 20 Ill. App. 3d 738, 741, 312 N.E.2d 682, 685 (1974).

114. 417 U.S. 433 (1974).

115. *Id.* at 446.

116. *Id.* at 450 n.25 (emphasis supplied). But see *Brown v. Illinois*, 43 U.S.L.W. 4937 (U.S. June 26, 1975). The Court of Appeals decision in *Calandra* recognized that courts must weigh "the importance which society attaches to the protection of the fourth amendment guarantee of privacy which is afforded by access to the exclusionary rule. . . ." 465 F.2d at 1225-26. Moreover, although the opinion referred to the Brandeis dissent in *Olmstead*, it is clear that the latter was not seen as a basis for suppression independent of the deterrence rationale. See 465 F.2d at 1226. The same holds true for Chief Judge Traynor's opinion in *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

principle of either law or morals is not susceptible of comprehensive statement in a phrase.¹¹⁷

As we have seen, the Holmes-Brandeis dissents enunciated a non-constitutional basis for exclusion resting on the Justices' assessment of relative social values. Notwithstanding their careful delineation of the judgmental basis of decision, later, less discerning judges have mistakenly resorted to the synthesizing phrase used by Justice Stewart in *Elkins* as a basis for decision.¹¹⁸

But to do so is manifest error, for there is nothing imperative about *Elkins*' formulation of the "imperative of judicial integrity." Rather, as the *Olmstead* dissents so forcefully point out, courts "are free to choose between two principles of policy."¹¹⁹ Thus, what is imperative is that courts today re-examine the assumptions undergirding the *Olmstead* dissents.

Without articulating the basis of judgment in *Olmstead*, Holmes simply floated a wonderful epigram, "I think it less evil that some criminals should escape than that the Government should play an ignoble role."¹²⁰ The essence of the Brandeis opinion is found in those sonorous pronouncements which determined exclusion to be the

117. *Cf.*, *Carter v. Carter Coal Co.*, 298 U.S. 327, 338 (1936) (Cardozo, J., dissenting).

118. There is a curious irony in this, for Holmes himself regarded it as "one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. United States*, 225 U.S. 347, 391 (1912) (dissenting opinion). Indeed three quarters of a century ago, the Justice said:

It is not the first use but the tiresome repetition of inadequate catchwords upon which I am observing—phrases which originally were contributions, but which by their very felicity, delay further analysis for fifty years. That comes from the same source as dislike of novelty,—intellectual indolence or weakness—a slackness in the external pursuit of the more exact.

Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 455 (1899).

119. 277 U.S. at 471 (Holmes, J., dissenting).

120. *Id.* at 470. Care must be taken lest too much be read into this generalization, for as Holmes himself warned, that there exists a "danger [in] reasoning from generalizations unless you have the particulars which they embrace in mind", for "[a] generalization is empty so far as it is general." Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 461 (1899). See also *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases."); *Donnell v. Herring-Hale-Marvin Safe Co.*, 208 U.S. 267, 273 (1908) ("to generalize is to omit.") In the context of the opinion, the almost insouciant remark about governmental ignobility surely did not mean that whenever the government obtained evidence which had been acquired by illegal means it was *a fortiori* inadmissible. For in *Byars v. United States*, 273 U.S. 28 (1927), a unanimous Court, on which sat both Holmes and Brandeis, upheld the right of the federal government to use evidence improperly seized by state officials. *Id.* at 33. Nor was the mere fact alone that the evidence had been illegally obtained by federal officers decisive for Holmes. What was decisive was that fact coupled with the further fact that the evidence was "only obtainable by a criminal act." 277 U.S. at 470 (Holmes, J., dissenting) (emphasis supplied). This same thesis weaves its way through part of the fabric of the Brandeis dissent. *Id.* at 482.

necessary prerequisite for popular respect for law and confidence in the administration of justice.

Whatever their validity in 1927, it is quixotic to suggest that these assumptions have the same vitality in today's society, plagued by geometrically spiralling crime rates. Citizens today are not concerned with lofty moral generalities with which they can scarcely identify; they are searching for a measure of tangible protection from the tyranny and brutality of the lawless elements in our society which more and more are coming to characterize modern urban life. And, neither Justice Holmes' exhilarating prose nor Justice Brandeis' powerful exposition will give succor to the vast majority of citizens who see the exclusionary rule operating to release a law violator whose guilt is undenied. Rather than fostering respect for law, the exclusionary rule puts courts "in the position of assisting to undermine the foundations of the institutions they are set there to protect."¹²¹

To suggest that Justice Brandeis' assumptions in *Olmstead* are not so universally compelling today is not to detract in the slightest from the trenchance and power of either the opinion or its author. Such criticism is rather in the finest tradition of both Holmes and Brandeis, neither of whom ever waived in their belief that reconsideration of the bases upon which rules and doctrines rest was the life's blood of the law, and that the courts must always "bow to the lessons of experience and the force of better reasoning."¹²² When experience refutes those assumptions and generalizations on which legal doctrines rest, courts disserve their great role as vindicators of liberty if they obdurately adhere to those assumptions.

One of the great causes of popular discontent with the administration of criminal justice in this country has been the exclusionary rule. For when the truth is suppressed and the criminal is set free, the awful pain of suppression is felt not by the inanimate state or some penitent policeman, but by the offender's next victim for whose protection judges hold office.¹²³ In this direct way, and perhaps in this direct way

121. McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, 52 NW. J.C.L. & C. 266, 267 (1961) (quoting 8 J. WIGMORE, EVIDENCE § 2184 at 36 (3d ed. 1940)).

122. *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting). And it was Holmes who sagely pointed out "[o]ne of his favorite paradoxes—everything is dead in twenty-five (or fifty) years. The author no longer says to you what he meant to say. If he is original, his new truths have been developed and become familiar in improved form—his errors exploded. If he is not a philosopher but an artist, the emotional basis has changed." Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682 (1931).

123. *State v. Bisaccia*, 58 N.J. 586, 588, 279 A.2d 675, 677 (1971).

only, the exclusionary rule manifests itself to a hapless and uncomprehending society.

If there be "contempt for law" and a dissatisfaction with the administration of justice it surely has not resulted from lack of judicial allegiance to the *Olmstead* dissents. It is rather the proximate result of an atavistic sanction whose inflexibility¹²⁴ makes it worthy of the

124. Much of the professional criticism levelled against the exclusionary rule is its all or nothing character. Illustrative is Judge Friendly's characteristically masterful statement of the problem:

The sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution. A defendant is allowed to prevent the reception of evidence proving his guilt not primarily to vindicate his right of privacy, since the benefit received is wholly disproportionate to the wrong suffered, but so that citizens generally, in the words of the amendment, may be 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .'

The very use of the word 'deter' suggests the analogy of the criminal law. But to achieve its end the criminal law does not usually impose punishment on one whose violation has come from mistake rather than evil motive, and, at least in its modern development, it leaves latitude to the judge as to the degree of punishment to be exacted. It does not seem consistent with the objective of deterrence that the maximum penalty of exclusions should be enforced for an error of judgment by a policeman necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court. At least in cases of this sort, where, in contrast to confessions of dubious reliability, the evidence cannot impair any proper defense on the merits, the object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause.

I can already hear the taunts that I am saying a little unconstitutionality is alright, am rewriting the fourth amendment to read 'searches and seizures not reasonably believed to be reasonable,' and am proposing a different application of the amendment in state and federal courts. I will deal with the last straightaway; although the prospect of such difference would not shock me, I suggest an identical good-sense rule for both. My response to the two former accusations is that the same authority that empowered the Court to supplement the amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience may teach.' To me it trivializes Lord Camden's judgment in *Carrington* and James Otis' argument against writs of assistance when these are involved to reverse convictions where the worst that can be said is that a policeman placed a bit too much credence on the reliability of an informer or erred in thinking he lacked time to get a search warrant that would and should have been his for the asking.

There is still solid sense in Chief Judge Cardozo's doubt whether the criminal should 'go free because the constable has blundered,' if only we would have the grace to read him as meaning exactly what he said. The beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice, such as that in Scotland, outlawing evidence obtained by flagrant or deliberate violation of rights. It is no sufficient objection that such a rule would require courts to make still another determination; rather, the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve them of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one. Even if there were an added burden, most judges would prefer to discharge it than have to perform the distasteful duty of allowing a dangerous criminal to go free because of a slight and unintentional miscalculation by the police.

Friendly, *The Bill of Rights As A Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951-53 (1965). See also *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting); Wright, *Must The Criminal Go Free If The Constable Blunders?*, 50 TEXAS L. REV. 736, 744 (1972); Wingo, *Growing Disillusionment With The Exclusionary Rule*, 25 SW. L.J. 573, 584 (1971).

appellation conferred on the law itself so long ago by Mr. Dickens.

Whether this popular dissatisfaction bespeaks a shortsighted view of practicality and morality need not be decided. For, as Mr. Justice Holmes himself reminds us, "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."¹²⁵

CONSIDERATIONS OF POLICY DEMAND THAT THE EXCLUSIONARY RULE NOT BE EXTENDED TO PROBATION OR PAROLE REVOCATION PROCEEDINGS

It has been demonstrated that application of the exclusionary rule to revocation proceedings would have, at best, only a marginal deterrent effect. It remains, however, to analyze the impact application of the rule will have on the parole and probation process. For only then can it be determined if the potential benefits of application of the rule outweigh the potential injury to the functioning of the probation and parole systems.¹²⁶ Happily, we are not wholly without Supreme Court guidance.

In *Morrissey v. Brewer*,¹²⁷ the Court was called upon to decide the question whether the due process clause of the fourteenth amendment requires that a state afford an individual some opportunity to be heard prior to revoking his parole. The Court noted that parole is an established variation on imprisonment of convicted criminals and that its purpose is to help persons reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. The essence of parole is release from prison on the condition that the prisoner abide by certain rules during the balance of the sentence.

To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions allowable and imposed by law on an individual citizen. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior that is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is

125. HOLMES, *THE COMMON LAW* 36 (M. Howe ed. 1963).

126. *Cf. Michigan v. Tucker*, 417 U.S. 433 (1974); *Calandra v. United States*, 414 U.S. 338 (1974).

127. 408 U.S. 471 (1972).

provided with information about the parolee and an opportunity to advise him.¹²⁸ This combination puts the supervising officer into the position in which he can assist the parolee into constructive development.

The Court stressed that the revocation of parole "is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."¹²⁹ The Court also expressed the view that the "[r]evocation process should be flexible enough to consider evidence . . . that would not be admissible in an adversary proceeding."¹³⁰ Since parole arises after the end of the criminal prosecution, including imposition of sentence, revocation deprives an individual not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observation of special parole restrictions. This is not to suggest, however, that the requirements of due process do not apply to parole revocations.

Rather, it is to suggest that consideration of what procedures due process requires under any given set of circumstances must begin with the determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. In *Brewer*, the Court stressed the fact that the liberty of a parolee, although indeterminate, "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." Thus, a termination calls for some orderly process, however, informal.¹³¹

Highly pertinent is the Court's explication of the interests which are involved in a revocation proceeding. The Court unhesitatingly avowed that the state has an overwhelming interest in being able to return the individual who has violated the conditions of his parole to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.¹³²

After considering the varying interests at stake, the Court concluded that the minimum requirements of due process demand written

128. *Id.* at 478.

129. *Id.* at 480. *See also* *Brown v. Warden*, 351 F.2d 564, 567 (7th Cir. 1965). "It appears clearly from these decisions that the federal constitutional rights of an accused in a criminal prosecution and the rights of an offender in proceedings on revocation of conditional liberty under parole or probation are not co-extensive." *Accord Colorado v. Atencio*, 525 P.2d 461, 462 (Colo. 1974); *People v. Dowery*, 20 Ill. App. 3d 738, 742, 312 N.E.2d 682, 686 (1974).

130. 408 U.S. at 489.

131. *Id.* at 482.

132. *Id.*

notice of the claimed violation of probation or parole, disclosure to the probationer or parolee of evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses unless the hearing officers specifically find good cause for not allowing confrontation, a neutral and detached hearing body, and a written statement by the fact-finders as to the evidence relied on and reasons for revoking probation and parole.¹³³ The question of whether a probationer or parolee was entitled to counsel at a revocation proceeding was expressly left open in *Morrissey*.¹³⁴

That question was answered in *Gagnon v. Scarpelli*,¹³⁵ a case involving a probation rather than a parole revocation proceeding. At the outset of the opinion, the Court noted that "probation revocation, like parole revocation is not a stage of a criminal prosecution, but does result in a loss of liberty."¹³⁶ Like parole, the purpose of probation "is to help individuals reintegrate into society as constructive individuals as soon as they are able."¹³⁷ And like a parole revocation proceeding, a probation revocation proceeding is informal and does not require the presence of "technical rules of procedure or evidence . . ."¹³⁸

The *Scarpelli* opinion pointed out the rehabilitative rather than the punitive focus of the probation/parole system. It was in this context, with due regard for the right of the probationer or the parolee to insure that his liberty has not unjustifiably taken away and the right of the state to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community, that the Supreme Court decided that due process did not inflexibly require the appointment of counsel at probation and parole revocation proceedings.

The Court held that due process is not so rigid as to require that the significant interest in informality, flexibility and economy must always be sacrificed.¹³⁹ Thus, a case by case approach to furnishing counsel is not inadequate to protect constitutional rights asserted in varying types of proceedings and that the critical differences between criminal trials and revocation proceedings justify an *ad hoc* approach

133. *Id.* at 489.

134. *Id.*

135. 411 U.S. 338 (1974).

136. *Id.* at 782.

137. *Id.* at 783.

138. *Id.* at 786-87.

139. *Id.* at 788.

to the problem of determining what due process requires in such proceedings.

For example, a criminal trial under our system is an adversary proceeding with its own unique characteristics: the state is represented by a prosecutor; formal rules of evidence are enforced; a defendant enjoys a number of procedural rights which may be lost if not raised in a timely fashion; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In a revocation proceeding, on the other hand, the state is represented not by a prosecutor but by a parole officer; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.¹⁴⁰

The differences between revocation proceedings and an actual criminal trial warrant differing applications of the due process clause. It is one thing to say that the exclusionary rule must be applied when the government seeks in its case-in-chief to introduce illegally obtained evidence at trial. It is quite another thing to suggest that the same rule must apply in its full vigor long after the criminal process has reached its termination and evidence is sought to be suppressed which demonstrates that the probationer or parolee is not abiding by the conditions of his release. Under such circumstances only the guilty can possibly be the winners. The individual who has committed a crime is manifestly not a rehabilitated individual and thus poses a danger to society.

To suppress evidence of this fact is subversive of the goals of probation and parole, for it allows, indeed it encourages, a probationer or parolee to continue his illicit course of conduct secure in the knowledge that the system may be impotent to deal with his perfidy. The result would be that both the rehabilitative and protective functions of probation and parole would materially suffer from an application of the exclusionary rule to revocation proceedings.

The observations of the Second Circuit in *United States ex. rel. Sperling v. Fitzpatrick*¹⁴¹ put the problem in proper perspective.

A parole revocation proceeding is not an adversarial proceeding. A parolee remains, 'while on parole, in the legal custody and under the control of the Attorney General.' [citations omitted]. A parole revocation proceeding is concerned not only with protecting society, but also, and most importantly, with rehabilitating and

140. *Id.* at 789.

141. 426 F.2d 1161 (2d Cir. 1970).

restoring to useful lives those placed in the custody of the Parole Board. To apply the exclusionary rule to parole revocation proceedings would tend to obstruct the parole system in accomplishing its remedial purposes.

There is no need for double application of the exclusionary rule, using it first as it was used here in preventing criminal prosecution of the parolee and a second time at a parole revocation hearing. The deterrent purpose of the exclusionary rule is adequately served by the exclusion of the unlawfully seized evidence in the criminal prosecution.¹⁴²

Concurring in the result, Chief Judge Lumbard observed:

To apply the exclusionary rule in the context of parole revocation hearings at the present time would merely exacerbate the problems discussed above; to import fourth amendment suppression law into this process would in fact be counterproductive. Parole officers would be forced to spend more of their time personally gathering admissible proof concerning those parolees who cannot or will not accept rehabilitation. Time devoted to such field work necessarily detracts from time available to encourage those parolees with a sincere desire to avoid the all-too-familiar cycle of recidivism. An even greater potential loss would be in the time available to counsel and supervise—particularly in the early months—those who leave confinement with the question of rehabilitation in real doubt.

Although I am somewhat skeptical about the effectiveness of 'other remedies' to deter police misconduct, I must agree with Judge Hays that a double application of the exclusionary rule is not warranted at the present time. I draw this conclusion by balancing the interests of all parolees in securing administration of the parole system which is as nearly consonant with its dual goals as is possible at present levels of staffing and funding against the interest of individual parolees not being subjected to [unconstitutional] search[es].¹⁴³

It is submitted that application of the fourth amendment to probation revocation proceedings would not substantially further any valid interest. Its deterrent value would be either minimal, or where the police are unaware of the defendant's status, non-existent. Its restrictive application does not violate the "imperative of judicial integrity." The practical necessities of the probation and parole systems demand that the rule not be employed in revocation proceedings.¹⁴⁴

142. *Id.* at 1163-64 (footnote omitted).

143. *Id.* at 1164-66. *Accord*, *United States v. Johnson*, 455 F.2d 932, 933 (5th Cir. 1972) ("An injection of the *Miranda* protection here could be toxic and produce a paresis in the probation process."); *Montana v. Thorsness*, 528 P.2d 692, 696 (Mont. 1974); *People v. Dowery*, 20 Ill. App. 3d 738, 312 N.E.2d 682, 685 (1974); *State v. Simms*, 516 P.2d 1088, 1091 (Wash. App. 1974).

144. "[T]o say that the argument *ex necessitate* is not the short answer to every situation in which it is invoked is not to dismiss it altogether." *Culombe v. Connecticut*, 367 U.S. 568, 587-88 (1961). Indeed, courts have recognized, on numerous occasions, either explicitly or implicitly, that the felt necessities of the times do play a part in constitutional adjudication. *Cf. Barber v.*

THERE IS NO EMPIRICAL BASIS WARRANTING EXPANSION OF THE EXCLUSIONARY RULE TO PROBATION REVOCATION PROCEEDINGS

Empirical statistics are not available to show that the inhabitants of jurisdictions which apply the exclusionary rule to revocation proceedings suffer no greater number of lawless searches and seizures than do those of states which do not. Since, as a practical matter it is difficult to prove a negative, it is unlikely that conclusive data could be assembled. But pragmatic evidence of a sort is not wanting.

The exclusionary rule of *Weeks* has been binding on the states since 1961 and on the federal government since 1914; yet there are but a handful of state and federal cases which have dealt with the problem discussed in this article.¹⁴⁵ Surely had the police been engaging in lawless conduct and exploiting their ill-gotten gains in revocation proceedings, the courts long ago would have been flooded with cases in which such claims were raised. That they have not been called upon earlier indicates that the arguments based on the deterrence rationale which have prophesied dire consequences, simply do not withstand the test of experience, "of all teachers the most dependable."¹⁴⁶

Page, 390 U.S. 719, 722 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967); *Warden v. Hayden*, 387 U.S. 294, 298 (1966); *Schmerber v. California*, 384 U.S. 757 (1966); *Sacher v. United States*, 343 U.S. 1, 36 (1951) (Frankfurter, J., dissenting); *McDonald v. United States*, 335 U.S. 451 (1947); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1923); *United Mine Workers v. Coronado Co.*, 259 U.S. 344, 387 (1921); *Mattox v. United States*, 156 U.S. 237, 243 (1894); *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972).

145. The cases finding the exclusionary rule of *Miranda* and/or the fourth amendment inapplicable to revocation proceedings are: *United States v. Winsett*, 12 Cr. L. Rep. 2250 (9th Cir. 1975); *United States v. Brown*, 488 F.2d 94 (5th Cir. 1973); *United States v. Johnson*, 455 F.2d 932 (5th Cir. 1972) (*Miranda* violation); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *United States v. Allen*, 349 F. Supp. 749 (N.D. Cal. 1972); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970); *People v. Atencio*, 525 P.2d 461 (Colo. 1974); *State v. Thorsness*, 528 P.2d 692 (Mont. 1974); *People v. Dowery*, 20 Ill. App. 3d 738, 312 N.E.2d 682 (1974); *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088, 1091 (1974) (dicta); *People v. Calais*, 36 Cal. App. 3d 584, 111 Cal. Rptr. 654, 657-58 (1974); *Bernhardt v. Florida*, 288 So. 2d 490, 500 (Fla. 1974) (dicta); *Commonwealth v. Kates*, 452 Pa. 102, 111, 305 A.2d 701, 710 (1973) (*Miranda* violation); *Oregon v. Davis*, 496 P.2d 923, 925 (Ore. 1972) (by implication); *Stone v. Shea*, 304 A.2d 647 (N. H. 1973); *In re Martinez*, 1 Cal. 3d 641, 83 Cal. Rptr. 382, 463 P.2d 734 (1970). *Contra*, *United States v. Hill*, 447 F.2d 817, 819 (7th Cir. 1971) (Fairchild, J., dissenting); *Michaud v. State*, 505 P.2d 1399, 1402 (Okla. 1973) (*Michaud* may be read as compelled by state statutes); *Commonwealth v. Kates*, 452 Pa. 102, 112, 114, 305 A.2d 701, 711, 713 (1973) (Roberts, Manderino, JJ., dissenting); *People v. Atencio*, 525 P.2d 461, 463 (Colo. 1974) (Erickson, J., dissenting without opinion); *In re Martinez*, 1 Cal. 3d 641, 648, 463 P.2d 734, 741 (1971) (Peters, J., dissenting). One court has held that the fifth amendment has no application in a revocation proceeding. *Barker v. Tennessee*, 483 S.W.2d 586 (Tenn. App. 1972).

146. *Funk v. United States*, 290 U.S. 371, 381 (1933). Mr. Justice Cardozo's matchless prose cannot be too often repeated: "Often a liberal antidote of experience supplies a sovereign cure for a paralyzing abstraction built upon a theory." B. CARDOZO, *PARADOXES OF LEGAL SCIENCE* 125 (1928). See also Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952-953 (1965).

The Supreme Court has left no doubt that it is to such experience that the courts must look in determining the propriety of a proposed application of the exclusionary rule. In 1949, in *Wolf v. Colorado*,¹⁴⁷ the Court held that the right of privacy vouchsafed by the fourth amendment was binding on the states through the due process clause of the fourteenth amendment. It was not until 1961, after experience seemed to have proved that all other means of protecting the right to privacy were worthless, that the Court finally imposed the federal exclusionary rule upon the states:

[W]e note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary rule against the States was that 'other means of protection' have been afforded 'the right to privacy.' The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other states.¹⁴⁸

Then came *Elkins v. United States*.¹⁴⁹ The issue before the Court was whether evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the fourth amendment's ban on unreasonable searches and seizures, was admissible in a federal criminal trial. Aware that resolution of the issues was not to be dictated by "[m]ere logical symmetry and abstract reasoning,"¹⁵⁰ the Court first examined the experience of the federal courts, which since 1914 had operated under the exclusionary rule of *Weeks v. United States*. It then passed to the "impressive experience of the states."¹⁵¹ The Court finally turned to considerations which brought into focus the working of our federalism. It was only after an exhaustive examination of the problem that the Court announced its judgment.

These then are the considerations of reason and *experience* which point to the rejection of a doctrine that would freely admit in a federal trial evidence seized by state agents in violation of the defendant's constitutional rights.¹⁵²

In 1952, in *Schwartz v. Texas*¹⁵³ the Court held that evidence obtained in violation of Section 605 of the Federal Communications Act¹⁵⁴ was admissible in state proceedings. The hope was expressed in *Schwartz* that "[e]nforcement of the statutory prohibition in §605 can

147. 338 U.S. 25 (1949).

148. *Mapp v. Ohio*, 367 U.S. 643, 652 (1961).

149. 364 U.S. 206 (1960).

150. *Id.* at 216.

151. *Id.* at 219.

152. *Id.*

153. 344 U.S. 199 (1952).

154. 47 U.S.C. § 605 (1970).

be achieved under the penal provisions” of the Act.¹⁵⁵ Again, it was not until sixteen years’ experience “proved [it] to be a vain hope”¹⁵⁶ that the federal exclusionary rule of *Nardone v. United States*¹⁵⁷ was made applicable to state criminal proceedings:

*Finally, our decision today is counseled by experience. The hope was expressed in Schwartz v. Texas that “[e]nforcement of the statutory prohibition in §605 can be achieved under the penal provisions’ of the Communications Act. (citation omitted). That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of §605 since the statute was enacted. We conclude, as we concluded in Elkins and in Mapp, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law ‘in the only effective available way—by removing the incentive to disregard it.’*¹⁵⁸

The Court’s opinion in *Alderman v. United States*¹⁵⁹ underscores the salience of the role played by experience in fashioning and applying exclusionary rules. To the contention that the violation of the fourth amendment be excluded regardless of whether the evidence was seized in violation of the defendant’s constitutional rights,¹⁶⁰ the Court responded:

Neither [*Linkletter* or *Elkins*] nor any [other case] hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment. . . .

*Without experience showing the contrary, we should not assume that this new statute [outlawing unauthorized electronic surveillance] will be cavalierly disregarded or will not be enforced against transgressors.*¹⁶¹

In the probation or parole revocation situation, there is nothing which indicates that the police will consciously violate constitutional strictures to gain evidence for use at revocation proceedings. Indeed, as noted earlier, the inferences point in a different direction. Police officers who violate the constitutional rights of citizens are subject to both state and federal penalties.¹⁶²

155. 344 U.S. at 201. See also J. MAGUIRE, EVIDENCE OF GUILT 200 et. seq. (1959).

156. *Lee v. Florida*, 392 U.S. 378, 386-387 (1968).

157. 302 U.S. 379 (1937).

158. *Lee v. Florida*, 392 U.S. at 386 (emphasis supplied).

159. 394 U.S. 165 (1969).

160. In substance, what the defendants asserted was an independent constitutional right of their own to exclude evidence because it was seized in violation of another’s fourth amendment rights. The Court reaffirmed its rules relating to “standing”, see *Simmons v. United States*, 390 U.S. 377 (1968); *Jones v. United States*, 362 U.S. 257 (1960), and ruled that before one can move to exclude evidence he must establish that his fourth amendment rights were violated.

161. 394 U.S. at 174-75 (emphasis supplied).

162. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1970); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2d Cir. 1970).

While *Mapp* found these remedies an ineffectual safeguard in the context of criminal proceedings, there is no apparent reason why they may not prove effective in circumstances such as those presented in revocation proceedings.¹⁶³ Of course, the time may come when the balance will shift. Proof of widespread police harassment of parolees or probationers would cause such a shift since the exclusionary rule is a deterrent remedy to be used when the need for deterrence is clearly shown.¹⁶⁴ That time, however, is not yet at hand.¹⁶⁵

CONCLUSION

Long ago, Mr. Justice Cardozo warned of the insidious tendency whereby particular precedents are carried to conclusions which are thought to be logically compelled. The end is not foreseen, and every new decision brings the judge further than he would like. Before long the self-imposed dilemma becomes obvious. Yet, he is unwilling or unable to retreat from the spot in which he finds himself.¹⁶⁶ To combat this tendency "[w]e must have the courage to unmask pretense if we are to reach a peace that will abide beyond the fleeting hour."¹⁶⁷

The tendency of which Mr. Justice Cardozo spoke is mirrored in decisions involving application of the exclusionary rule. Unwilling to recognize the judgmental facts which must precede application of the rule, some judges have automatically invoked the deterrence rationale or the "imperative of judicial integrity" to support their decisions.¹⁶⁸

163. *Id.*

164. *Id.* at 1166 (Lumbard, C.J., concurring). *Accord*, *People v. Atencio*, 525 P.2d 461, 463 (Colo. 1974); *United States v. Winsett*, 12 Cr. L. Rep. 2250 (9th Cir. 1975).

165. *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 652 (E.D. La. 1970).

166. B. CARDOZO, *THE GROWTH OF THE LAW* 17-18 (1924).

167. *Id.* at 18.

168. A classic example of the unwillingness of some judges to properly analyze the problems involved in applying the exclusionary rule is provided by Judge Manderino's dissenting opinion in *Commonwealth v. Kates*, 452 Pa. 2d 102, 112, 305 A.2d 701, 713 (1973).

I dissent. Constitutional protections apply to all persons at all times. There is no exception. The majority, however, holds that an individual who is at liberty in our society with the status of probationer has less constitutional rights than a member of our society who is not a probationer. I can find no basis for two classes of citizens in our scheme of constitutional protections.

A person who has been convicted of a crime and placed on probation cannot, because of such *status*, be deprived of his constitutional rights. Regardless of his status, he is entitled to all of the normal constitutional protections when he *is accused of committing a crime*.

The majority, in effect, deprives a person on probation of constitutional protections which are not taken away from *any person* by the Pennsylvania Constitution or the federal Constitution and which have not been taken away by the legislature from persons on parole. The majority's attempt to take away the normal constitutional protections from persons on probation has no support except 'silent statutes.'

Id. at 112-13 (emphasis in original). The argument is defective in three significant ways. First, it incorrectly assumes that exclusion of unconstitutionally obtained evidence is a constitutional right. In reality, however, exclusion is "a judicially created remedy designed to safeguard Fourth

The time has come to recognize that due process is sufficiently flexible to allow judges to mold the exclusionary rule to fit the exigencies and

Amendment rights through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974) (footnote omitted). Second, such absolutist pronouncements ignore the monolithic holdings of the Supreme Court that constitutional rights are measured by the context of their application. Cases arising under the first amendment are instructive. While no one can deny that freedom of speech must be nurtured if a democratic society is fairly to aspire to continued vitality, it is equally beyond dispute that that privilege, like all others, is not irrecusable; it has its seasons. *United Public Workers v. Mitchell*, 330 U.S. 75, 95 (1947); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). "It is a relative right that may be modified in its interplay with the rights of others . . ." *In re George F. Nord Building Corp.*, 129 F.2d 173 (7th Cir.), *cert. denied*, 317 U.S. 670 (1942). And the "fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others." *Curtis Publishing Company v. Butts*, 388 U.S. 130, 150 (1967). See also *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Healy v. James*, 408 U.S. 169 (1972); *Rowan v. Post Office*, 397 U.S. 728 (1970); *Waltz v. Tax Commission*, 397 U.S. 664 (1970); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387 (1969); *Tinker v. Des Moines School District*, 393 U.S. 503, 507 (1969); *Breard v. Alexandria*, 341 U.S. 622, 642 (1951); *Dennis v. United States*, 341 U.S. 494 (1951); *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 546 (1949) (Frankfurter, J., concurring); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946); *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944).

On the contrary, even allowing the broadest scope to the language and purpose of the first amendment would not warrant treating its principles as a promise that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law [has been] vigorously and forthrightly rejected" time and again. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 577 (1972). *Cf. Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

Rather, time and setting determine the parameters of first amendment freedoms. Thus, differences in the characteristics of news media justify differences in the first amendment standards applied to them. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). See also *Burstyn Inc. v. Wilson*, 343 U.S. 495, 502-503 (1952). The nature of one's employment may properly justify and encompass limitations upon speech that would not survive constitutional scrutiny if directed against a private citizen. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). *Cf. Healy v. James*, 408 U.S. 169, 180 (1972).

Finally, Judge Manderino's opinion also sedulously overlooks the uniform body of case law which holds that a person's "status" does indeed define the parameters of constitutional rights. Thus, one's status may justify the imposition of regulations which would be unconstitutional if applied in other settings. For example, it has been held that requiring grand jurors to take an oath of secrecy does not violate their first amendment rights. *Goodman v. United States*, 108 F.2d 516, 520 (9th Cir. 1939). Nor has it ever been held violative of the first amendment for a court to order jurors not to read newspapers or watch television. Nor is it unconstitutional to impose restrictions on prisoners, *Procunier v. Martinez*, 416 U.S. 396 (1974); *Brooks v. Wainwright*, 428 F.2d 652 (5th Cir. 1970); *Diehl v. Wainwright*, 419 F.2d 1309 (5th Cir. 1970), or servicemen, *Dash v. Commanding General*, 307 F. Supp. 849 (D.S.C. 1969), *adopted in full and aff'd*, 429 F.2d 427 (4th Cir. 1970). *Cf., Parker v. Levey*, 417 U.S. 733 (1974), which would not pass constitutional muster if applied to private citizens. One's status may even determine whether state libel laws can be properly applied. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). *Gertz v. Welch Inc.*, 418 U.S. 323 (1974); *Letter Carriers v. Austin*, 418 U.S. 264 (1974).

The dramatic differences between children and adults justify restrictions which would be otherwise unconstitutional. Thus, limitations on movies which drive-in theatres can show may be imposed because of children's accessibility to the surrounding area, *Rabe v. Washington*, 405

demands of particular situations. And the time has come to reassess the soundness of the worth of a rule which equates constabulary blundering with insensate displays of naked power and brute force.¹⁶⁹

U.S. 313, 316 (1972) (Burger, C.J., concurring); *Chemline Inc. v. City of Grand Prairie*, 364 F.2d 721, 724 (5th Cir. 1966). *But see* *Cinecom Theatres Inc. v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973), and direct restrictions may be placed on the press in reporting juvenile proceedings, *Government of Virgin Islands v. Broadhurst*, 285 F. Supp. 831 (D.V.I. 1968); *Johnson v. Simpson*, 433 S.W.2d 644, 647 (Ky. 1968); *Cf. In re Gault*, 387 U.S. 1, 25 (1967). *The Sun Company of San Bernardino v. Superior Court*, 29 Cal. App. 3d 815, 105 Cal. Rptr. 873 (4th Dist. App. 1973).

Notwithstanding the law's proper solicitude for the right of association guaranteed by the first amendment, it is clear that the extent of that right depends on the status of the individual asserting it. Hence, while a private citizen's associational rights may not normally be infringed, a probationer may be validly restrained from associating with "known homosexuals", *United States v. Kohlberg*, 472 F.2d 1189 (9th Cir. 1973), or with members of Students for a Democratic Society. *United States v. Smith*, 414 F.2d 630 (5th Cir. 1969), *reversed on other grounds*, *Schacht v. United States*, 398 U.S. 58 (1970). Likewise, a probationer's right to travel, to speak, and to engage in gainful employment and even to marry are markedly different from that enjoyed by other citizens. *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972); *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971); *Whaley v. United States*, 324 F.2d 356 (10th Cir. 1963); *cert. denied*, 376 U.S. 911 (1964); *In re Mannino*, 14 Cal. App. 3rd 953, 92 Cal. Rptr. 880 (1st Dist. 1971).

While the Constitution guarantees citizens the right to bear arms, it is not an unconstitutional abridgment of that right to prohibit convicted felons from receiving or possessing firearms. *United States v. Bass*, 404 U.S. 336 (1971). While freedom of speech and religion may be the hallmarks of a vibrant society, they cannot be exercised in a courtroom, *In re Portland Electric Company*, 97 F. Supp. 909, (D. Ore. 1947), or in a school, *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965), to the same extent as on a street or in a place of worship. Equally, the nature of a given organization may justify imposition of regulations which would encounter difficulties if applied elsewhere. *Communist Party v. SACB*, 367 U.S. 1, 97-103 (1961).

Even a lawyer's past associations and employment justify prohibitions on future conduct. *Cf. United States v. Brewster*, 408 U.S. 501, 517 (1972); *United States v. Nasser*, 476 F.2d 1111 (7th Cir. 1973) (federal conflict of interest statute precludes a lawyer from being involved in a proceeding if, while he was a government employee, he was involved with same). *And cf. United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (secrecy agreement executed by government employee not violative of first amendment).

In cases dealing with the free speech rights of public employees, it has been rightly said that it is the status of the employee that defines the extent to which the otherwise protected publications of employees may be constrained. The less likely it is that the public will attach special importance to the statements made by someone in a particular position, the weaker is the argument that the state needs special restrictions. *Donovan v. Reinbold*, 433 F.2d 738, 742-43 (9th Cir. 1970). *See also* *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), where the court stressed the "uniqueness" of appellant's position in its disposition of the case. *Accord, Meehan v. Macy*, 392 F.2d 822, 834 (D.C. Cir. 1968). The concept that the status of the speaker and the status of his audience helps to locate the parameters of the first amendment has been long recognized. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *NLRB v. Federbush Co.*, 121 F.2d 954 (2d Cir. 1971) (L. Hand, J.).

169. The need for flexibility in the application of the exclusionary rule was pointed out by Judge Friendly in *United States v. Soyka*, 394 F.2d 443, 451 (2d Cir. 1968) (dissenting opinion).

To me it degrades the Fourth Amendment when as judges we condemn him for making an arrest that, as he reasonably believed, his duty as a federal officer compelled. The spectre of the consequences of a contrary decision conjured up by the majority is unreal; innocent persons emerging from their apartments do not normally jump back on encountering a single stranger in the hall. Agent Waters did not have time to consult a set of the *United States Reports*, and, as indicated by the fact that three federal judges have made the same supposed mistake, would not have benefited overmuch if he had. Rather he was obliged to make the best decision he could on the spot. While the point is

“So let us hope, as true friends of the [courts,] that in the fullness of time [they] will escape from the ‘ . . . prison’ [they have] been building for [themselves] by [an inflexible exclusionary rule] and will regain the sovereign prerogative of choice”¹⁷⁰—mindful that in criminal and quasi-criminal proceedings there are rights of public justice which must be respected.¹⁷¹

doubtless foreclosed for us, I cannot refrain from adding, with all respect, that if Waters erred at all, the error was so minuscule and pardonable as to render the drastic sanction of exclusion, intended primarily as a deterrent to outrageous police conduct, see *Linkletter v. Walker*, 381 U.S. 618, 631-637 (1965), almost grotesquely inappropriate.

It is interesting to speculate how my brothers would dispose of a case precisely like this except that the information was that the occupant of Apartment 54 was purveying government secrets to a foreign power, as in *Abel v. United States*, 362 U.S. 217, (1960). I have too much regard for their good sense to believe they would hold on such facts that the arrest was invalid and a code book found in the apartment must be returned. But I should not crave the task of writing the opinion in light of today's decision, and we can hardly expect—indeed we should not want—law enforcement officers to indulge in what we tell them violates the Constitution. Apparent disfavor for certain felonies seems to be leading courts to elevate the standards for search and seizure to unrealistic levels, and without saying so, to move in the direction of the stricter standards governing arrests for misdemeanors. If decision were mine to make, I would not be at all averse to straightforward recognition that the gravity of the suspected crime and the utility of the police action for purposes other than securing a conviction are factors bearing on the validity of the search or arrest decision, or at least on application of the exclusionary rule.

Id. at 451-52. Based on Judge Friendly's dissent, a rehearing en banc was ordered, and the panel's decision was reversed. Judge Friendly was the majority's spokesman in the second opinion. See 394 F.2d 452 (2d Cir. 1968).

The pleas for a more flexible approach have been made by courts: *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 411 (1971) (Burger, C.J. dissenting); *Cf. Michigan v. Tucker*, 417 U.S. 433, 447 (1974), and commentators alike. See also A.L.I. MODEL CODE OF PREARRAIGNMENT PROCEDURE, (1975 Draft).

170. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 937-38 (1965).

171. No principle has commanded more passionate and undeviating loyalty by American courts than the notion that “justice, though due the accused, is due the accuser also.” Indeed, from the atmosphere and emanations of countless opinions, there emerges with unmistakable clarity a recognition and reaffirmation of the oft-forgotten truth that in criminal prosecutions there are also rights of public justice which are no less dear and which are entitled to no less protection than a defendant's constitutional or statutory rights. See *Gagnon v. Scarpelli*, 411 U.S. 338 (1974); *Morrisey v. Brewer*, 408 U.S. 471 (1972); *Wardius v. Oregon*, 412 U.S. 470 (1973); *Williams v. Florida*, 399 U.S. 78, 82 (1970); *North Carolina v. Pearce*, 395 U.S. 711, 721 n.18 (1969); *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966); *United States v. Ewell*, 383 U.S. 116, 120 (1966); *Stein v. New York*, 346 U.S. 156, 197 (1953); *Sacher v. United States*, 343 U.S. 1, 8, 24 (1952); *Wade v. Hunter*, 336 U.S. 684, 689 (1949); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934); *United States v. Wood*, 299 U.S. 123, 149 (1936); *Beavers v. Haubert*, 198 U.S. 77, 87 (1905); *Reagan v. United States*, 157 U.S. 301, 310-11 (1895); *Mattox v. United States*, 156 U.S. 237, 243 (1895); *Thompson v. United States*, 155 U.S. 271, 274 (1894). Even civil proceedings between “private” litigants are affected with a public interest. *New York Central Railroad v. Johnson*, 279 U.S. 310, 318 (1929). See also *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1972); *United States v. Cartano*, 420 F.2d 362, 365 (1st Cir.), *cert. denied*, 397 U.S. 1054 (1970); *United States v. Tjerina*, 412 F.2d 661, 666 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, 231 (1968); *Matzner v. Brown*, 288 F. Supp. 608, 611-12 (D.N.J. 1968), *aff'd*, 410 F.2d 1376 (3d Cir. 1969), *cert. denied*, 396 U.S. 1015 (1970). *Matzner v. Davenport*, 288 F. Supp. 636, 639 (D.N.J. 1968); *Johnson v. Simpson*, 433 S.W.2d 644, 646 (Ky. Ct. of App. 1968); *Sun Oil Co. of San Bernardino v. Superior Court*, 29 Cal. App. 3d 815, 822, 105 Cal. Rptr. 873, 878 (1973); *Chicago Council of Lawyers v. Bauer*, 371 F. Supp. 689 (N.D. Ill. 1974).