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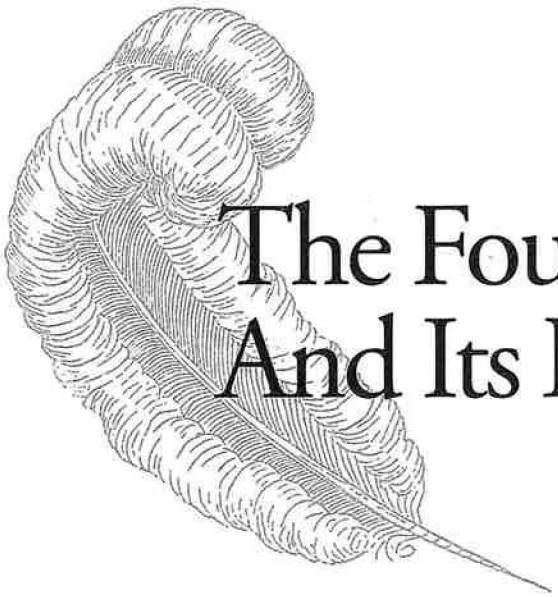

The Fourth Amendment And Its Exclusionary Rule

By Yale Kamisar

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> The comfort of Freedom's words spoken in the abstract is always disturbed by their application to a contested instance. Any rule of police regulation enforced in fact will generate pressures to weaken the rule.
>
> —*Monrad Paulsen*[1]

"The history of liberty," Justice Felix Frankfurter once noted, "has largely been the history of observance of procedural safeguards"[2] And "the history of the *destruction* of liberty," Professor Anthony Amsterdam has added, "has largely been the history of the relaxation of those safeguards in the face of plausible-sounding governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society."[3]

These plausible-sounding government claims are being heard today—and they are putting enormous pressure on the Fourth Amendment, the constitutional provision that protects "the right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures" and bans the issuance of warrants except upon "probable cause" and certain other conditions.[4]

Thus, although the requirement that the police may intrude on a person's liberty or privacy only on the basis of some "individualized suspicion" is the heart of the Fourth Amendment, by utilizing what the dissenters aptly called "a formless and unguided 'reasonableness' balancing inquiry,"[5] the Court has upheld a mass drug testing program that requires no level of individualized suspicion.[6] (A "reasonable" suspicionless search is, or at least used to be, a constitutional oxymoron.)

"There is," protested dissenting Justice Marshall, "no drug exception to the Constitution."[7] But more than a few close students of the Court might have responded: "There is *now*."

As Professor Wayne LaFave has noted,[8] the Court has alluded to "the horrors of drug trafficking"[9] and underscored the "compelling interest in detecting those who would traffic in deadly drugs for personal profit."[10] And in the aforementioned drug testing case, the majority spoke of a "veritable national crisis in law enforcement" caused by the drug problem.[11]

Judge (later Supreme Court Justice) Benjamen Cardozo once observed that "the great tides and currents which engulf the rest of [us] do not turn aside in their course and pass the judges by."[12] The danger today is that judges will be *unduly* influenced by contemporary tides and currents—so much so that these forces may engulf the Fourth Amendment itself.[13]

We should greet claims of "crisis" or "emergency" or "necessity" with considerable skepticism. For such slogans can be—and have been—a free people's most effective tranquilizers. As we mark the 200th Anniversary of the ratification of the Bill of Rights, we would do well to remember that.

"A Kind of Nuisance?"

Although the Fourth Amendment is probably one of the least popular constitutional provisions, in some respects it is uniquely important. Unfortunately, there is good reason to believe that most Americans—and too many judges—consider the Fourth Amendment "a kind of nuisance, a serious impediment to the war against crime,"[14] but I think it more accurate to view it as "[the] provision of the Bill of Rights which is central to enjoy-

ment of the other guarantees" provided by that document.[15]

The Fourth Amendment is the part of the Bill of Rights most directly concerned with protecting personal liberty and security. It is the one procedural safeguard that speaks to the police—one might say, "'polices' the police." (On their face, all the other constitutional provisions relating to accused persons, such as the right to trial by jury, the right to a public trial, the right to have compulsory process for obtaining witnesses, and even the right to counsel, seem to be concerned with the criminal trial itself, or "criminal prosecutions," not the investigation of crime.)[16]

Freedom of speech, freedom of religion, and other freedoms, have earned much praise, and deservedly so, but the Fourth Amendment may plausibly be viewed as *the* centerpiece of a free, democratic society. All the other freedoms presuppose that lawless police action have been restrained. What good is freedom of speech or freedom of religion or any other freedom if law enforcement officers have unfettered power to violate a person's privacy and liberty when he sits in his home or drives his car or walks the streets? As the late Monrad Paulsen pointed out: "Security in one's home and person is the fundamental without which there can be no liberty."[17]

Why, then, has the protection against unreasonable search and seizure caught such heavy fire down through the years? One reason is that the Fourth Amendment is a "profoundly anti-government" constitutional provision; perhaps more so than any other safeguard in the Bill of Rights, it "den[ies] to government—worse yet, to democratic government—desired means, efficient means, and means that must inevitably appear from time to time through the course of centuries to be the absolutely necessary means, for government to obtain legitimate and laudable objectives."[18] And it denies these means to government whether their agents are pursuing petty criminals or especially dangerous ones.

Another reason for the unpopularity of the Fourth Amendment, and probably the principal reason, is the setting in which search and seizure issues usually arise. Almost always the legality of a search is not contested in an adversary proceeding unless it has already turned up incriminating evidence. Almost always a court is asked to "unring the bell"[19]—to reconstruct events as though the damaging, often damning, evidence never existed. Hence the strong resistance to the exclusionary rule, the primary means of effectuating the Fourth Amendment.[20]

It is hard to improve on the late John Kaplan's comments on the "public relations" aspect of the search and seizure exclusionary rule:

> From a public relations point of view, it is the worst possible kind of rule because it only works at the behest of a person, usually someone who is clearly guilty, who is attempting to prevent the use against himself of evidence of his own crimes....If there were some way to make the police obey, in advance, the commands of the Fourth Amendment, we would lose at least as many criminal convictions as we do today, but in that case we would not know of the evidence which the police could discover only through a violation of the Fourth Amendment. It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment.[21]

Why The Rule Seems To Make Sense

Few would deny that American courts should be able to test the legality of police conduct *some* time. Isn't the logical time to do so during the criminal process, "a process *initiated* by government for the achievement of basic governmental purposes;"[22] "a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against?"[23] After all, American criminal justice "imposes procedural regulations on the *criminal process* by constitutional command."[24] Why should the Fourth Amendment be an exception?

The time when the prosecution seeks to use the fruits of police illegality also happens to be the time when the protagonists are in place, when the defendant has the maximum incentive to challenge the police conduct and, if he is an indigent, as many criminal defendants are, the services of court-appointed counsel. It hardly seems sensible, at least if one takes the Fourth Amendment seriously, to make the victim of police lawlessness start a new proceeding in another court—if he is willing to rouse the police and able to find a lawyer willing to take on "a team of professional investigators and testifiers,"[25] often without fee, and risk the chance of earning a reputation as a "police-hating lawyer."[26]

"The survival of our system of criminal justice and the values which it advances," a distinguished Attorney General's Committee observed three decades ago, "depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process."[27] It is plain that the Committee meant the *criminal* process. If fast-developing situations and other exigencies of law enforcement work preclude meaningful challenge to unconstitutional police action at the earliest stages of the criminal process, how does it follow—*why* does it follow—that no meaningful challenge should be permitted at *any* stage of the criminal process? Challenging the legality of a search or seizure at *some* stage of the criminal process—at a point when it is practicable to do so—means the exclusionary rule. That is *all* the exclusionary rule means.

Because the danger is obvious that a criminal suspect might destroy or conceal evidence of his crime if given prior notice, a search or seizure by the police is plainly one of those extraordinary situations that justify *postponing* notice and opportunity for a hearing. But as the need for the police to move swiftly and by surprise creates the exception, so it should limit its duration. Once the suspect is in custody and once the evidence has been seized, what justifies dispensing with an adversary hearing at *every subsequent stage* of the criminal process? Yet that would be the result if the exclusionary rule were abolished.

The Arguments Against

Despite the foregoing, the search and seizure exclusionary rule has been harshly assailed for decades. It may be useful to recall—and to respond—to many of the arguments that critics of the rule have advanced.

The exclusionary rule is merely a "judge-made" rule of evidence; "a matter of judicial implication"

This does not strike me as a forceful point—not, at least, unless someone can name a famous Supreme Court decision or doctrine that is not "a matter of judicial implication," one that is *not* "judge-made."

Consider, for example, the reapportionment cases,[28] the 1896 "separate but equal"[29] case and the 1954 school desegregation case that overruled it,[30] the school prayer cases,[31] the abortion cases,[32] the "right to die" case,[33] the recent "flag burning" cases,[34] and the earlier "symbolic speech" cases.[35]

I am perfectly willing to concede that the stork didn't bring the "exclusionary rule" *either*. Come to think of it, the stork didn't even bring *Marbury v. Madison*, [36] the case that established the principle that the Supreme Court is the ultimate or supreme interpreter of the Constitution. That principle, too, is "a matter of judicial implication."[37]

The Fourth Amendment, to be sure, does not contain a clause explicitly stating: And no evidence obtained in violation of this amendment shall be admissible in a criminal prosecution against the victim of such a violation. But neither does it say, at the end of the amendment:

> *Despite the foregoing, however,* is an unreasonable search or seizure is committed, any evidence obtained as a result may be used in any proceeding the gov-

ernment sees fit to bring against any person whose rights have been violated.

Nor does the amendment contain a proviso, and we should be slow to read one into it, stating:

> *Despite the foregoing, however,* the judgment of executive officers that a search or seizure was lawful shall be final and conclusive in all criminal prosecutions in which the products of such search or seizure is offered in evidence and in no prosecution shall any court consider or review the legality of any such executive action.

Because the Fourth Amendment has *nothing to say* about *any* consequences that flow from its violation, reading it as *permitting* the use of unconstitutionally obtained evidence strikes me as no less "creative" or "judge-made" than the conclusion the *Weeks* and *Mapp* Courts reached.

By focusing on the conduct of the police, guilt or innocence becomes immaterial.

But what is the alternative? A criminal justice system where police illegality in obtaining evidence "becomes immaterial"? A system where the constitutionality of an arrest or a search could not be challenged at any stage of the criminal process? A system in which the courts in effect "launder" dirty evidence and thereby render all reliable and relevant evidence "fungible" for judicial purposes?[38] A sort of "law of the jungle," whereby once the government gets hold of incriminating evidence, however it does (short of brutality or physical violence), it may use the evidence with impunity?

As a judge, Thomas Cooley did not have much search and seizure business, but as a commentator, he once said of the Fourth Amendment that "it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity."[39] Why is this view any less valid when one's premises *have been* invaded or one's constitutional rights otherwise violated?

The exclusionary rule impedes the search for truth.

The ascertainment of truth is not the *only* goal of American criminal procedure. As Justice Brennan pointed out in one of his last criminal procedure opinions (and, happily, one for a majority of the Court), "various constitutional rules limit the means by which the government may conduct [the] search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history."[40]

Some critics of the Warren Court look back with affection at the pre-*Miranda* "totality of the circumstances" - "voluntariness" test for the admissibility of confessions. But that test, too "impeded the search for truth."

"Even the earliest [involuntary confession] cases adumbrate an enlarged test of due process transcending the simple one of untrustworthiness."[41] As the voluntariness test developed over the years, and it became increasingly clear that the Court was applying a "police methods" as well as a "trustworthiness" rationale,[42] the concern that an "involuntary" or "coerced" confession was likely to be unreliable became less important. On the eve of *Miranda,* as Illinois Supreme Court Justice Walter Schaefer noted at the time, although the concern about unreliability "still exert[ed] some influence" in involuntary confession cases, it had "ceased to be the dominant consideration."[43]

Moreover, and more fundamentally, doesn't the Fourth Amendment *itself* impede the search for truth? I realize that the Amendment has "both the virtue of brevity and the vice of ambiguity."[44] But doesn't it mean *something*? Is not its very purpose—and that of the Bill of Rights generally—"to identify values that may not be sacrificed to expediency"?[45] And to stand in the way when "the task of combatting crime and convicting the guilty...seem of such critical and pressing concern," as it will in every era, "that we may be lured by the temptation of expediency into forsaking our commitment to protecting individual liberty and privacy"?[46]

As Justice Potter Stewart pointed out, shortly after stepping down from the Supreme Court:

> The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals...[T]hat is the price the Framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.[47]

The guilty defendant is the principal beneficiary of the exclusionary rule.

As various search and seizure commentators have advised us, this way of thinking about the exclusionary rule is flawed.

"While the most immediate and direct consequence of exclusion may be to benefit an individual defendant who might otherwise have been convicted,"[48] the goal of the exclusionary rule is "not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done."[49] Rather, "[t]he defendant is at best an incidental beneficiary when exclusion occurs for the purpose, as the Supreme Court stated in *Stone v. Powell,* of 'removing the incentive' to disregard the Fourth Amendment so that 'the frequency of future violations will decrease.' "[50] Application of the exclusionary rule sometimes means that an apparently guilty defendant goes unpunished, but this occurs "to protect the rest of us from unlawful police invasions of our security and to maintain the integrity of our institutions.... The innocent and society are the principal beneficiaries of the exclusionary rule."[51]

Surely there are better ways to enforce the Fourth Amendment than to exclude reliable evidence.

Critics of the exclusionary rule like to ask: Are we so intellectually impoverished that we cannot devise an effective, alternative approach to the exclusionary rule? But the problem is not a lack of *imagination* or *intellectual capacity.* Rather, it is a lack of *political will.*

There is no shortage of *theoretically possible* ways, aside from the exclusion of evidence, to make the Fourth Amendment viable. Commentators have been underscoring the inadequacies of existing tort remedies or criminal sanctions against transgressing police and *calling for studies* of the problem or *proposing* meaningful alternatives to the exclusionary rule for a long time—some as early as the 1920s and 30s.[52] But what has come of these studies and proposals?

Forty-seven years elapsed between the time the federal courts adopted the exclusionary rule (*Weeks*) and the time the rule was imposed on the states (*Mapp*). In all that time, so far as I can tell, *none* of the many states whose courts permitted the use of illegally obtained evidence developed an *effective* alternative safeguard.[53]

Is there any reason to think that today's or tomorrow's politician's are, or will be, any less fearful of crime and any more concerned about protecting people under investigation by the police than the politicians of any other generation? Is there any reason to think that the lawmakers of our day are any more willing than their predecessors to invigorate tort and criminal remedies against law enforcement officials who commit excesses in their overzealous efforts to contend with "criminals" and "suspected criminals?"

If there is any evidence of this, it has escaped me. Last fall, the *New York Times* reported: "Talking tough [about crime] is as popular as ever, but it is not enough this [election] year because virtually all politicians are doing it."[54]

There is ample cause to believe that the *Mapp* Court's view that alternatives to the

exclusionary rule "have been worthless and futile" is still valid.[55] So *far*, nothing else *has* worked. That is "good reason for maintaining a healthy skepticism about any proposal to abandon the exclusionary rule in favor of some other supposed remedy."[56]

Moreover, and more fundamentally, what if by some political miracle we *did* achieve a fully effective alternative to the exclusionary? What if a tort remedy were adopted that did make the police obey the commands of the Fourth Amendment *in advance*? Would such an alternative rule denigrate the primacy of truth as a goal of the criminal justice system any less than the exclusionary rule does now?

Wouldn't an effective tort remedy impair the government's ability to bring criminals to book just as much as the much-criticized exclusionary rule? Wouldn't a *meaningful* tort remedy—or any other *effective* means of controlling unconstitutional police activity—*impede the search for truth* and *subordinate* the goal of apprehending and punishing criminals to Fourth Amendment interests just as much as the exclusionary rule?

In a "new world," one without the exclusionary rule but with a fully effective alternative safeguard for Fourth Amendment rights, the convictions of "guilty" defendants would not be overturned because of Fourth Amendment violations—but (if the effective alternative rule were *really* effective) only because such criminals would not be illegally arrested or unlawfully searched in the first place.[57] The criminal would not be "set free" because the privacy of his home or person had been infringed—but he would remain free all along because (lacking adequate grounds to arrest him or to search his home, and restrained by an effective tort remedy), the police would not infringe his privacy in the first place.

There is much to be said for such a world—but I doubt that many law enforcement officials would have anything good to say about it. They would probably be too busy complaining about *the costs* of that newfangled "fully effective alternative safeguard for Fourth Amendment rights."[58] Once again, however, they would really be complaining about the costs of *the Fourth Amendment*.

The exclusionary rule is the enemy of the Fourth Amendment.

There is something to be said for this criticism (at least at first blush). As anyone familiar with the work of the Burger and Rehnquist Courts is painfully aware, the exclusionary rule puts strong pressure on the courts to water down the rules governing arrest, search and seizure. But so would a *meaningful* tort remedy *or any other effective* alternative safeguard to the exclusionary rule.

It is worth recalling what the great critic of the exclusionary rule, Dean Wigmore, had to offer in its place—a civil action by the disturbed citizen and a process of criminal contempt against the offending officers —"contempt of the Constitution"[59] he called it.

Wigmore's proposal was to admit the illegally obtained evidence, but then send for "the high-handed, over-zealous marshal" and impose "a thirty-day imprisonment for his contempt of the Constitution."[60] If that proposal had been adopted and rigorously implemented, just imagine the kind of pressure it would have put on the content of the Fourth Amendment! Imagine how soon thereafter the police would have been begging for a return to the exclusionary rule!

It cannot be denied that the exclusionary rule puts pressure on the Fourth Amendment—but so would *any* means of enforcing the amendment that *worked*:

> Whenever the rules are enforced by meaningful sanctions, our attention is drawn to their content. The comfort of Freedom's words spoken in the abstract is always disturbed by their application to a contested instance. *Any* rule of police regulation *enforced in fact* will generate pressure to weaken the rule.[61]

Notes

Author's Note: In preparing this article, I have drawn freely on articles I have written on the general subject over the past three decades. See, e.g. Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 Mich. L. Rev. 1 (1987); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a Principled Basis" Rather than an Empirical Proposition?"*, 16 Creighton L. Rev. 565 (1983); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?* 62 Judicature 66 (August 1978); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 Minn. L. Rev. 1083 (1959).

1. *The Exclusionary Rule and Misconduct by the Police*, in Police Power and Individual Freedom 87, 88 (Sowle ed. 1962).

2. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

3. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev.349, 354 (1974). (Emphasis added.)

4. U.S. Constitution Amendment IV.

5. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 635, 639 (1989) (Marshall, J., joined by Brennan, J., dissenting). For the reasons stated in his *Skinner* dissent, Justice Marshall, again joined by Justice Brennan, also dissented in the companion case of *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding a Customs Service drug testing program).

6. *Von Raab*, note 5 *supra*. For an insightful analysis of this case and the cluster of problems presented, see Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 Sup. Ct. Rev. 87.

The *Von Raab* case dealt with provisions of a Customs Service plan that required drug testing of employees who sought transfer or promotion to positions that directly involve the interdiction of illegal drugs or that require the carrying of firearms. Speaking through newly appointed Justice Anthony Kennedy, the Court utilized a general "reasonableness" test or a general "balancing" approach. Because the program was not designed to serve ordinary law enforcement needs (or, to put it somewhat differently, the program presented special governmental needs beyond the normal needs of law enforcement), the Court deemed departure from the usual Fourth Amendment requirements justified and a general "balancing" of individual privacy expectations against government interests appropriate.

That the government interests prevailed in *Von Raab*—the Court concluded that traditional Fourth Amendment safeguards were "impractical" in this setting—is hardly surprising. This is usually the result when the Court utilizes an elusive, manipulable balancing test.

Although *Von Raab* can be read narrowly (if one strains a bit), it can also be read broadly as resting on nothing more than the government's abstract interest in the "integrity and judgment" of its employees. (Of 3600 Customs Service employees tested, only five tested positive for drugs; the Commissioner of Customs himself had stated that the service was largely drug-free.) Moreover, unlike the program sustained in the companion case of *Skinner* (where federal regulations required railroad employees involved in train accidents to submit to alcohol and drug tests and permitted railroads to administer breath or urine tests to employees who violated certain safety rules), the Customs Service testing plan did not require predicate circumstances that at least raise some suspicion about the government employees to be tested.

Justice Antonin Scalia joined the majority in *Skinner*, but dissented in *Von Raab*. There is much force in his argument that the only plausible explanation for the Customs Service drug testing program was "symbolism"—to show that the service is "clean" and that the government is serious about its war on drugs. As Justice Scalia emphasized, however, "the impairment of individual liberties cannot be the means of making a point"; "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." 489 U.S. at 686-87.

As indicated earlier, because the particular testing program upheld in *Von Raab* was heavily circumscribed, the case can be read narrowly. But I think such a reading would be an unrealistic one. *Von Raab* probably means at least this much: Concerns about public safety are sufficiently compelling to justify warrant*less*, suspicion*less* drug testing of various categories of law enforcement and corrections officials and also certain categories of other public employees whose impaired faculties would pose a clear and present danger to the public safety of coworkers or the general public.

Such an approach carries a considerable distance, but at least it has a stopping point. I do not believe the same can be said for the argument—one made by the government in *Von Raab* and in a goodly number of lower court cases—that the need to maintain the "integrity" and the "public image" of various government agencies and their employees also justifies suspicion*less* drug testing.

If such an argument prevails—if mass, random

drug testing may rest simply on the premise that government employees serve as "role models" — the liberty and privacy of millions of federal, state and city workers, regardless of the nature of their jobs, will be significantly diminished. Nor is that all. What about lawyers, doctors and accountants? Aren't *we all* role models?

7. 489 U.S. at 602.

8. See LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. Crim. L. & C. 1171, 1223-24 (1983). See also Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illusstrated by the Open Fields Doctrine)*, 48 U. Pitt. L. Rev., 1, 4, 23 (1986) (courts have been "turning their backs" on Fourth Amendment principles "in order to aid the war against illicit drugs")).

9. *Illinois v. Gates*, 462 U.S. 213, 241 (1983).

10. *United States v. Place*, 462 U.S. 696, 703 (1983) (O'Connor, J.) (quoting Powell, J., concurring in *United States v. Mendenhall*, 446 U.S. 544, 561 (1980)).

11. 489 U.S. at 688 (Kennedy, J.) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985)).

12. B.Cardozo, *The Nature of the Judicial Process* 168 (1921).

13. Professor LaFave has voiced concern that "the maleficent trafficking in drugs" may produce "atrophy of the Fourth Amendment." LaFave, *supra* note 8 at 1124.

14. Justice Frankfurter recognized that some so regard the Amendment, but he emphatically rejected this view. See *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., joined by Murphy and Rutledge, JJ., dissenting).

15. *Id.* at 163.

16. See H. Friendly, *The Bill of Rights As A Code of Criminal Procedure*, in Benchmarks 235, 254-55 (1967).

17. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, in Police Power and Individual Freedom 87, 97 (Sowle ed. 1962). See also Amsterdam, *supra* note 3 at 377-78.

18. Amsterdam, *supra* note 3 at 353.

19. *Cf. Mannes v. Meyers*, 419 U.S. 449, 460 (1975) (compliance with an order to produce material which an attorney believes in good faith may tend to incriminate his client "could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released").

20. Today, few critics of the exclusionary rule, which bars the use of illegally obtained evidence in criminal prosecutions, attack only *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949) and imposing the exclusionary rule on the states as a matter of Fourteenth Amendment Due Process). They also direct their fire at the 75-year-old "Fourth Amendment exclusionary rule" (or "federal exclusionary rule"), established in *Weeks v. United States*, 232 U.S. 383 (1914). But the Fourth Amendment exclusionary rule was not an "innovation" of the Warren Court. Rather, it was a rule established by the White Court and reaffirmed by the Taft, Hughes, Stone and Vincent Courts. Among its supporters were such luminaries as Holmes, Brandeis, and Frankfurter. See, e.g., *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall be used before the Court but that it shall not be used at all.")

Although the *Wolf* Court, per Frankfurter, J., declined to impose the exclusionary rule on the states as a matter of constitutional law, it did say of the federal exclusionary rule: "Since [*Weeks*] it has been frequently applied and we stoutly adhere to it." *Id.* at 28. Moreover, although Justice Jackson sided with Frankfurter in *Wolf*, in another case decided the same day he underscored the need for the federal exclusionary rule, seeing no "inconsistency" in adhering to the federal rule, yet leaving the states free to adopt or reject the rule. See *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

Although the *Mapp* Court, the Court that overruled *Wolf*, was a divided one, that division "did not concern the merits of the exclusionary rule. The disagreement concerned only the [Fourteenth Amendment] question: should the states be left free to apply or not to apply the exclusionary rule according to state law? [T]here is not a word [in Justice Harlan's dissenting opinion] suggesting that the rule in intrinsically bad." T. Taylor, *Two Studies in Constitutional Interpretation* 20-21 (1969).

21. J. Kaplan, *Criminal Justice* 215-16 (2d ed. 1978).

22. Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 9 (1963). The Report is often called *The Allen Report*, after the Chair of the Committee, Professor Francis A. Allen.

23. *Id.*

24. *Id.* at 10 (emphasis added).

25. Amsterdam, *supra* note 3 at 430.

26. *Id.*

27. *The Allen Report, supra* note 22 at 10.

28. See generally McKay, *Reapportionment: Success Story of the Warren Court*, 67 Mich. L. Rev. 223 (1968).

29. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

30. *Brown v. Board of Education*, 347 U.S. 483 (1954).

31. *School District v. Schempp*, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

32. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

33. *Cruzan v. Director, Missouri Dept. of Health*, 110 S. Ct. 2841 (1990).

34. *United States v. Eichman*, 110 S.Ct. 2404 (1990); *Texas v. Johnson*, 109 S.Ct. 2533 (1989).

35. *Compare United States v. O'Brien*, 391 U.S. 367 (1986) *with Tinker v. Des Moines School District*, 393 U.S. 503 (1969) *and Spence v. Washington*, 418 U.S. 405 (1974).

36. 5 U.S. (1 Cranch) 137 (1803).

37. One of our greatest judges, Learned Hand, maintained that there was "nothing in the United States Constitution that gave courts any authority to review the decision of Congress." L. Hand, *The Bill of Rights* 10 (1958). But see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 3-5, 7-9 (1959.)

38. *Cf.* Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 255 (1974).

39. T. Cooley, *A Treatise on the Constitutional Limitations* 306 (1st ed. 1868).

40. *James v. Illinois*, 110 S. Ct. 648, 651 (1990).

41. Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial*, 33 U. Chi. L. Rev. 657, 665 (1966) (pre-*Miranda*); see also Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 De Paul L. Rev. 213, 235 (1959); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411, 418-19 (1954).

In *Watts v. Indiana*, 388 U.S. 49 (1949) and two companion cases, the Court, per Frankfurter, J., reversed three convictions without disputing the accuracy of Justice Jackson's protest that "[c]hecked with external evidence, they [the confessions in each case] are inherently believable, and were not shaken as to truth by anything that occurred at the trial." *Id.* at 58. And three years later, in *Rochin v. California*, 342 U.S. 165 (1952), relying heavily on the rationale of the coerced confession cases to exclude evidence produced by "stomach pumping," the Court, per Frankfurter, J., emphasized that involuntary confessions "are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true." *Id.* at 173.

42. See Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 423-25 (7th ed. 1990) (collecting authorities).

43. W. Schaeffer, *The Suspect and Society* 10 (1967) (based on lecture delivered before *Miranda*). "Indeed," added Justice Schaefer, "the Supreme Court has sometimes insisted upon the exclusion of confessions whose reliability was not at all in doubt." *Id.* at 10-11 (footnote omitted).

Perhaps the most emphatic statement of the point that the untrustworthiness of an "involuntary" confession is not (or was no longer) the principal reason for excluding it may be found in one of Justice Frankfurter's last opinions of the subject, *Rogers v. Richmond*, 365 U.S. 534 (1961). In that case, the Court informed us that the admissibility of an involuntary confession must be determined "with complete disregard of whether or not petitioner in fact spoke the truth" and that "a legal standard which took into account the circumstances of probable truth or falsity...is not a permissible standard under the Due Process Clause...." *Id.* at 543-44.

44. J. Landynski, *Search and Seizure in the Supreme Court* 42 (1966).

45. *United States v. Leon*, 468 U.S. 897, 980 (1984) (Stevens, J., dissenting).

46. *Id.* at 929-30 (Brennan and Marshall, JJ., dissenting).

47. Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1393 (1983) (quoted in *Leon*, 468 U.S. at 941-42 n.8 (Brennan and Marshall, JJ., dissenting)).

48. 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.2 (a), at 24 (2d ed. 1987).

49. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 335.

50. 1 W. LaFave, *supra* note 48, at 40 (quoting *Stone v. Powell*, 428 US. 465, 492 (1976)). See also Stewart, *supra* note 47, at 1396:

> [The exclusionary rule] has been criticized for benefiting defendants in a manner often disproportionate to the degree to which their Fourth Amendment rights were violated....However, this disproportionality is significant only if one conceives the purpose of the rule as compensation for the victim. Because I view the exclusionary rule as necessary to preserve Fourth Amendment guarantees, I do not find this criticism persuasive.

51. Roger Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L. J. 329, 330-31 (1973). See also Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709-10 (1970) (quoted in *United States v. Peltier*, 422 U.s. 531, 556-57 (1975) (Brennan, J., Dissenting)):

> The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule.... [It] is aimed at affecting the wider audience of all law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them.

Consider, too, Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229, 1266-67 (1983):

> The exclusionary rule protects innocent people by eliminating the incentive to *search and seize unreasonably*. So long as a policeman knows that any evidence he obtains in violation of the Fourth Amendment will not help secure a conviction he has less reason to violate the amendment and more reason to try to understand it....[I]t defies logic to believe that a policeman's willingness to search without probable cause or a warrant (and thereby possibly subject an innocent person to an unjustifiable intrusion of privacy) is unrelated to whether he can gain any admissible evidence from conducting the search.

See also Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 79 Geo. L. J. 365, 390 (1981):

> The probable cause requirement compels society to pay a cost in the apprehension of criminals, or in the recovery of evidence of crime, for the sake of people's privacy. It is greater security for our "persons, houses, papers, and effects," to the same extent as when, at the same cost, the police comply with the mandate of the Fourth Amendment not to seize or search without probable cause.

52. A notable example is Professor Jerome Hall's famous 1936 article, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. Chi. L. Rev. 345 (1936). Hall plumped for an effective statutory remedy against the governmental unit that employed the misbehaving officer. Twenty years later, Professors Edward Barrett and Caleb Foote made similar proposals. See Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 Calif. L. Rev. 565, 592-95 (1955); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955).

Away back in 1922, Dean Wigmore, perhaps the leading critic of the exclusionary rule, offered alternatives: "both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials." Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479, 484 (1922). In 1939, William Plumb also accompanied his attack on the exclusionary rule with suggested alternatives. He emphasized the need to "devise more effective means of enforcing civil judgments against the [lawless] officers, by garnishment or otherwise" and the need to "translate" the "paper" criminal penalties against misbehaving police "into effective actuality," suggesting "some summary proceeding in the nature of contempt, in which the court would take the initiative...without the intervention of the prosecutor." Plumb, *Illegal Enforcement of the Law*, 24 Cornell L.Q. 337, 386-88 (1939). In 1957, still another critic of the exclusionary rule, Virgil Peterson, offered still another alternative—that in each jurisdiction a civil rights office be established, independent of the regular prosecutor, "charged solely with the responsibility of investigating and prosecuting allegedviolations of the Constitution by law enforcement officials." Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U. L. Rev. 46, 62 (1957).

53. In 1949, the time *Wolf* was decided, 31 states admitted illegally seized evidence. See *Wolf v. Colorado*, 338 U.S. 25, 38 (1949). A decade later, 24 states still did. See *Elkins v. United States*, 364 U.S. 206, 224-25 (1960).

One reason the California Supreme Court adopted the exclusionary rule in 1955 was the failure of any effective alternative safeguard to emerge and the unlikelihood that it ever would. Consider Traynor, supra note 49, at 324:

> In California six years elapsed between *Wolf v. Colorado* and [California's adoption of the exclusionary rule], and all during that time we were painfully aware of the right begging in our midst. We remained mindful of the cogent reasons for the admission of illegally obtained evidence and clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule....[But] it became all too clear in our state that there was no recourse but to the exclusionary rule....[A] like reflection of nation-wide import must also have been developing in the Supreme Court of the United States.

54. Suro, *An Old Refrain, Crime, Sounded in New Contests*, N.Y. Times, Oct. 16, 1990 at A22, col. 1 (late ed. final)

55. The classic article on the general subject is Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Min. L. Rev. 493 (1955). For the more recent literature, see Amsterdam, supra note 3, at 378-79, 429-30; Dripps, *Beyond the Warren Court and Its Conservative Critics*, 23 U. Mich. J. L. Ref. 591, 628-30 (1990); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 Wash. U. L. Q. 621; D. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum. L. Rev. 247, 284-86 (1988); Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. Crim. L. & Criminology 875, 907-13 (1982); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L. J. 1361 (1981); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 292-94 (1984);

56. 1 W. LaFave, *Search and Seizure, supra* Note 48, at § 1.2(c).

57. See Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency* 98 Harv. L. Rev. 592, 609-10 (1985); see also Dripps, *supra* note 55, at 622, 628.

58. Cf. Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. Chi. L. Rev. 1016, 1018 (1987) (officers "believed an alternative tort remedy would 'overdeter' the police in their search and seizure activities"). This study was authored by Myron W. Orfield, Jr.

59. 8 J. Wigmore, *Evidence* § 2814, at 40 (3d ed. 1940).

60. *Id.*

61. Paulsen, *supra* note 17 at 88 (emphasis added).