Journal of Criminal Law and Criminology

Volume 84
Issue 2 *Summer*

Article 2

Summer 1993

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Lawrence Crocker

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Lawrence Crocker, Can the Exclusionary Rule Be Saved, 84 J. Crim. L. & Criminology 310 (Summer 1993)

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0091-4169/93/8402-310
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 84, No. 2
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CAN THE EXCLUSIONARY RULE BE SAVED?

LAWRENCE CROCKER*

I. THE PROBLEM

The Fourth Amendment exclusionary rule is unique to American jurisprudence. Few other countries exclude probative physical evidence of guilt on the basis of police error or misconduct in its seizure.[1] Those that do exclude such evidence do so on a limited basis.[2]

Partly for this reason the rule has become a symbol of our sys-

* Associate Professor of Law, New York University. I am grateful to Samuel Estreicher, Graham Hughes, James Jacobs, Richard Revesz and attendees at the New York University Brown Bag Workshop for comments on an earlier draft of this article and to Jeffrey L. Nagel for research assistance. I acknowledge the generous financial support of the Filomen D'Agostino and Max E. Greenberg Research Fund at the New York University School of Law.

1 *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 415 (Burger, C.J., dissenting); Judge Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Evidence?*, 62 JUDICATURE 215, 216 (1978) (Laws of British Commonwealth, Germany and Israel exhibit more lenient admissibility policies); Hans W. Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch II*, 52 TEX. L. REV. 621, 640-43 (1985). *But see* Walter Pakter, *Exclusionary Rules in France, Germany, and Italy*, 9 HASTINGS INT'L & COMP. L. REV. 1, 3 (1985).

2 For example, Section 8 of the 1982 Canadian Charter provides that "[e]veryone has the right to be secure against unreasonable searches and seizures." R.S.C. (app. 1985). Section 24(2) provides for exclusion of evidence "obtained in a manner that infringed or denied" Section 8 or other provisions of the Charter of Rights and Freedoms, but only "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." *Id.* The question is not whether the unlawful search tended to bring the administration of justice into disrepute, but whether admission of the evidence in court would itself do so. *See* Regina v. Collins, 1 S.C.R. 265, 285-86 (1987); D.C. McDonald, *The Exclusion of Evidence Obtained By Constitutionally Impermissible Means in Canada*, 9 CRIM. JUS. ETHICS 43, 47 (1990). *See generally* Donald V. MacDougal, *The Exclusionary Rule and its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. CRIM. L. & CRIMINOLOGY 608 (1985). Exclusion is automatic if admission would render the trial unfair, but admission of real evidence will generally render the trial unfair only if the Section 8 violation brought the evidence into existence or involved the defendant's making available to the police evidence that would not otherwise have been found. Regina v. Mellenthin, 3 S.C.R. 615, 630 (1992). *See* R.J. Delisle, Mellenthin: *Changing the* Collins *Test*, 16 CRIM. RPTR. 4th 286 (1993).

tem of criminal procedure. It is lauded as a crowning achievement of a free society. It is attacked as one of the chief technical loopholes through which walk the guilty on their way out of the courthouse to continue their depredations.

As a general deterrent, influencing training and review within law enforcement agencies, the exclusionary rule has undoubtedly had some success.[3] Because of the rule we are all more secure in our "persons, houses, papers and effects." The exact degree of that increased security, however, and its distribution between the guilty and the innocent are difficult to measure. Whether the cost in lost convictions and diminished public confidence in law enforcement are worth the benefit in doors not broken down has been hotly debated.[4] It is not my purpose here to enter that debate.

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[3] *See* Bradley Canon, *The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police?*, 62 JUDICATURE 398, 401 (1979) (suggesting that, although much evidence is inconclusive, some deterrence in some cities has been shown); *but cf.* James E. Spiotto, *Search and Seizure: American Empirical Studies of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243, 276-77 (1973) (asserting that no deterrent effect has been shown).

[4] *See* Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) about the "Costs" of the Exclusionary Rules: The NIJ Study and Other Studies of Lost Arrests*, 1983 AM. B. FOUND. RES. J. 611 (rule worth costs); Thomas Y. Davies, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U. L. REV. 740 (1974) (rule justified until better alternative found); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585; Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987); Spiotto, *supra* note 3, at 243 (1973); Lawrence Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 6 HASTINGS L.J. 155 (1984); Wilkey, *supra* note 1, at 221.

Researchers friendly to the exclusionary rule typically find that the rule is effective as a deterrent or that there are few lost convictions. Those hostile to the rule tend towards the opposite conclusions. *See supra* note 3. One might have thought that any significant deterrent effectiveness would have to be purchased at palpable cost. On a conceptual level, some friends of the rule argue that the cost-benefit analysis employed by the United States Supreme Court is faulty, in that the Fourth Amendment itself is the root of the cost in prosecution. Had the dictates of the amendment been followed, the evidence could not have been obtained in the first place. But this is a tricky counterfactual argument. In many cases, had the Fourth Amendment been followed, the evidence would have been obtained, for example, with a valid warrant rather than through a warrantless search. The evidence was not unobtainable because of the Fourth Amendment, it was lost due to bad police work. There are some cases, of course, including many bad stop cases, in which the evidence could not have been obtained at all without a violation of the Fourth Amendment. There is an unfairness at one level in counting these lost convictions as costs of the exclusionary rule, in that these costs are mandated by the Fourth Amendment itself. *See, e.g.*, Brown v. Illinois, 422 U.S. 590, 608-09 (1975) (Powell, J., concurring).

In an ideal world, the amendment would be scrupulously complied with, and these convictions would be lost. It is a perfectly good question, however, what the second best world is once there has been a Fourth Amendment violation in such a case. The primary substantive evil is already a fact, and cannot be undone. A purely deterrent exclusionary

My concern is a more fundamental one—constitutional authorization. The exclusionary rule, as understood by the Burger and Rehnquist Courts, presents a serious question: under what authority does the Court impose the rule upon federal and state trial courts? It has been charged that this rule, so widely advertised as a defense of constitutional values, is itself the result of an improper usurpation of power by the Supreme Court.[5]

To appreciate the dimensions of the problem it is useful first to return to the *locus classicus* of Warren Court exclusionary rule doctrine, *Mapp v. Ohio*;[6] second to examine the Burger Court cases that undercut the basis for the rule; and third to review the expressions of doubt, especially by the Reagan-Bush Department of Justice, as to the Court's present authority to impose the rule.

I will contend in this article that although there is a genuine problem, there is also a way to save the exclusionary rule that has passable support in the case law from *Mapp* to the present. It is an amplification of Professor Kaplan's theory that the exclusionary rule is a contingent consequence of the Constitution.[7] This article defends Kaplan's theory against concerns as to the logic of contingent constitutional commands and fills in a gap in his discussion regarding the constitutional source of the exclusionary rule. That source, I will argue, is best understood as an enforcement clause, sensitive to contingencies, implicit within the Fourth Amendment itself. So amplified, this theory of the exclusionary rule is superior to its major competitors and is the best candidate for saving the rule—on the continuing underlying assumption of this article that we are not free to jettison altogether the Burger and Rehnquist Courts' exclusionary rule jurisprudence.

This best hope for the exclusionary rule will save only a rule that is subject to replacement by action of either the Congress or the states.[8] Moreover, those who are cautious in their use of normative

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rule that was in fact of minimum effectiveness would not provide a second best solution because it would produce real additional cost for insufficient benefit.

[5] *See infra* notes 40-51 and accompanying text.

[6] 367 U.S. 643 (1961).

[7] John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1029-30, 1055 (1974).

[8] I do not discuss here such prophylactic rules as the *Miranda* Rule, because they seem to me to raise a different issue of constitutional authorization—even though they are sometimes considered together. *See, e.g.*, Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 891-909 (1979); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 5, THE JUDICIARY'S USE OF SUPERVISORY POWER TO CONTROL FEDERAL LAW ENFORCEMENT ACTIVITY (1986), *reprinted in* 22 U. MICH. J. L. REF. 773, 775 (1989).

Some evidence excluded through application of *Miranda* must be excluded by dint

interpretational arguments may conclude that the best way to save the exclusionary rule is still not good enough to do the job.

A. *MAPP V. OHIO*

The Fourth Amendment exclusionary rule in the federal courts is traditionally traced back to *Weeks v. United States*,[9] although there is room for doubt about whether that case held more than that illegally seized evidence could be returned to its rightful owner even if it thereby becomes unavailable for trial.[10] In *Silverthorne Lumber Co. v. United States*,[11] however, the Court unquestionably did hold that evidence procured through a search or seizure in violation of the Fourth Amendment was inadmissible in federal court.

The case that announced the application of the exclusionary rule to the states, *Mapp v. Ohio*,[12] represents the high water mark of Supreme Court regard for the constitutional credentials of the exclusionary rule. Never before nor since has an opinion of the Court so forthrightly asserted that the rule is "constitutionally necessary."[13] "All evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[14]

Unfortunately, Justice Clark's argument for the constitutional necessity of the exclusionary rule as applied to the states is to be admired more for its rhetorical elegance than for its logical and conceptual precision. Still, it is possible to distill from *Mapp* three substantial constitutional arguments for the rule. I have two purposes in sketching these three *Mapp* arguments. The first is to contrast the apparent solidity of the constitutional foundations of the rule as set out in Clark's opinion with the crumbled foundations of today. The

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of the Fifth Amendment. The rule raises the issue of whether the Court can accomplish this purpose through promulgation of a rule that is intentionally overbroad. It can be argued that the Court is implicitly authorized to do so under its judicial review authority—at least in cases where there is no effectively administrable narrower rule that would exclude an acceptable number of statements that violate the Fifth Amendment and where the number of constitutionally admissible statements that are excluded by *Miranda* is not too great. This is, then, an application of what might be called the Court's "bright line rule" authority. It is plausible that some such authority is implicit within judicial review. Whether *Miranda* is a correct application of such an authority, however, is a subject for a very different article.

9 232 U.S. 383 (1914).

10 *See id.* at 387; Gerard v. Bradley, *Present at the Creation? A Critical Guide to* Weeks v. United States *and Its Progeny*, 30 ST. LOUIS U. L.J. 1031 (1986).

11 251 U.S. 385 (1920).

12 367 U.S. 643 (1961).

13 *Id.* at 656; *see also id.* at 648 (asserting that the rule is "constitutionally required").

14 *Id.* at 655.

second is to highlight the one *Mapp* argument that may have a future as well as a past.

1. *The Three Arguments of* Mapp

a. Implied Privilege

Justice Clark concluded that there is, within the Fourth Amendment itself, an implied constitutional "privilege" embracing "the exclusion of the evidence that an accused had been forced to give by reason of the unlawful seizure."[15] To deny constitutional status to the exclusionary rule would be "to grant the right but in reality to withhold its privilege and enjoyment."[16]

If this is a sound constitutional interpretation, then the question of constitutional authority is solved. As an implicit part of the substantive guarantees of the Fourth Amendment, both the right to be free from an unreasonable search and seizure, and the exclusionary rule, are binding on the federal courts and incorporated by the Fourteenth Amendment. The exclusionary rule, then, is enforceable through ordinary judicial review.[17]

b. Extended Violation

The argument that admission of evidence in the trial court itself constitutes part of a violation of the Fourth Amendment privacy right is partially obscured by the "judicial integrity" language in which it is clothed.[18] The substantial argument that from time to

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[15] *Id.* at 656.

[16] *Id.*

[17] The implied privilege argument resonates in the minds of contemporary lawyers because we have come to think of the Fourth Amendment not as constitutional law but as criminal procedure. It is, then, initially plausible to say that the exclusionary rule is the most important privilege of that amendment. The Fourth Amendment does not, however, reflect any special concern for criminal defendants. It is chiefly a protection for those innocent of any wrongdoing. Those innocent of serious crimes are, after all, more numerous than the guilty. Moreover, searches and seizures of the innocent will less frequently be reasonable. With a little extra effort, one can usually procure a valid warrant to search premises where narcotics are stockpiled. It is much harder to procure a valid warrant to search the living room of a law abiding citizen picked at random. It would be odd indeed to find that the chief constitutional privilege of the Fourth Amendment is one that does not apply to that citizen.

Justice Clark's claim in *Mapp* that the exclusionary rule is "logically and constitutionally necessary" is also surely overstated. It is no feat to imagine a regime that has a Fourth Amendment but no exclusionary rule. It may not be desirable, but it is hardly like a "round square," a logical contradiction. *Mapp*, 367 U.S. at 656.

[18] Judicial integrity is introduced in *Mapp* as a counter to Judge Cardozo's aphorism that "[t]he criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 20 (1926). Justice Clark quoted from Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1962). "Our government is the potent, the omnipresent teacher. For good or

time emerges might better be called a "governmental integrity," or "extended violation" argument. The idea is that if one is concerned about the integrity of the police, the prosecution, and the courts, then one cannot see the introduction of tainted evidence at trial as separate from the original search or seizure that gave the evidence that taint. Such evidence is usually obtained in the hope of introducing it at a criminal trial. Its admission, therefore, furthers the purposes of the police officer who "chooses to suspend [the Fourth Amendment's] enjoyment."[19]

Although Justice Clark did not take express note of it, the people are surely less "secure in their persons, houses, papers, and effects" if the fruits of unreasonable searches and seizures can be introduced against them in a criminal trial.[20] Because it further diminishes the security of the victim's privacy, introduction of the improperly gathered materials into evidence may be seen as part of a single transaction which began with the police misconduct.[21] The consequence of this argument is, then, the same as that of the implicit privilege argument—the exclusionary rule is part and parcel of the Fourth Amendment itself.

c. Essential Deterrent Sanction

The third *Mapp* argument is the one that arguably survives, in

for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Id.* at 485. In the same spirit, Justice Clark concluded that "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp*, 367 U.S. at 659.

Taken at its face value, this is an argument of dubious merit. Its empirical premise is called into some question by the number of nations that lack any exclusionary rule, and yet have apparently so far withstood the inevitable fall into anarchy. *See supra* notes 2-3. For most of its history, the United States itself was governed by the common law rule that relevant evidence is admissible whatever its provenance. *See* Adams v. New York, 192 U.S. 585 (1904).

More interesting is the question of exactly how the judicial integrity justification is supposed to tie into constitutional authority to impose the rule upon the states. Although it is doubtlessly desirable for the Court to take those actions within its power to guard against the destruction of the government, with which of its Article III powers does it protect the integrity of the state judiciary?

[19] *Mapp*, 367 U.S. at 660.

[20] Of course, by this logic, the introduction of tainted material in any official proceeding, or indeed any other official publication or use of the material would constitute part of the original violation. The Court, quite clearly, has not seen things this way. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (tainted evidence may be used in civil deportation hearing); United States v. Calandra, 414 U.S. 338, 354 (1974) (tainted evidence may be used by the grand jury).

[21] *See generally* William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193; Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

an altered form, later doctrinal developments. Its central claims are that the exclusionary rule effectively deters violations of the Fourth Amendment, and that this deterrent effect is essential to the vitality of the amendment.[22] This particular "sanction" is so vital to the Fourth Amendment that without it that amendment would be only "a form of words."[23] It is, therefore, an implicit part of the Fourth Amendment itself.

This is different from the argument for the exclusionary rule as an implied privilege, although the way that Justice Clark weaves the two arguments together suggests that he was incompletely aware of their distinctness. The privilege of exclusion might be part of the Fourth Amendment even if exclusion were not an effective deterrent. Alternatively, if the exclusionary rule is an indispensable sanction giving life to the Fourth Amendment by deterring its violation, one might conclude that it is part of that amendment, even if one regarded it as a disagreeable side effect that criminal defendants thereby acquire a privilege. The privilege would not then itself be a direct implication of constitutional values. On the implied privilege argument the exclusionary rule is part of the Fourth Amendment because without it the amendment would lose its meaning for the victims of its violation (who are also criminal defendants). On the essential deterrent sanction argument, the exclusionary rule is an implicit part of the Fourth Amendment because without it there would be a level of violation that would undermine the amendment.

2. *The Precedential Value of* Mapp

Mapp thus contains three independent arguments each sufficient, if sound, to supply constitutional authority for the Court to

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[22] Deterrence was first mentioned as an effect of the exclusionary rule in Wolf v. Colorado, 338 U.S. 25 (1949). In Elkins v. United States, 364 U.S. 206, 217 (1960), the deterrence rationale was elevated to the sole purpose of the rule. "[The exclusionary rule is] calculated to prevent, not to repair. Its purpose is to deter . . . by removing the incentive to disregard [the Constitution]." *Id.* at 216.

In *Mapp*, Justice Clark quotes the second of these sentences. He presumably omitted the first because it sits uneasily with the constitutional privilege argument. In any event, deterrence cannot play the same role in the argument in *Mapp* as it did in *Elkins*. In the latter case, the Court exercised its supervisory authority over the federal courts to exclude from the federal trial court evidence unconstitutionally obtained by state agents. The importance and effectiveness of the exclusionary rule as a deterrent measure served as justification for this use of the Court's supervisory authority. Article III affords the Supreme Court no supervisory authority over state courts. *See* Smith v. Phillips, 455 U.S. 209, 221 (1982); Coolidge v. New Hampshire, 403 U.S. 443, 451 (1971) (asserting that the court has no supervisory power over the states, but that in this case there was a constitutional violation).

[23] *Mapp*, 367 U.S. at 648 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.)).

impose the exclusionary rule upon the federal and state trial courts. None of the three is without certain points of weakness, but the *Mapp* arguments are no less plausible than much of what passes for constitutional interpretation in the criminal procedure area. Moreover, *Mapp* is a precedent of enormous prestige and fecundity. It has shaped police and trial practice for over thirty years. It is an accepted fact of life.

So what is the problem? A minor problem is that none of the arguments in *Mapp* ever had the support of five justices. The major problem is that what support those arguments did have in their original form quickly eroded. I will here discuss only the minor problem, reserving the major for the next section.

The Chief Justice and Justices Black, Brennan, and Douglas joined the majority opinion in *Mapp*. Justice Black, however, made it clear in his concurrence that he did not in fact endorse any of the key arguments of the opinion.

> I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.[24]

What did persuade Black that the exclusionary rule could be imposed through the judicial review power was the force of the Fifth Amendment working in tandem with the Fourth. This position was precedented in *Boyd v. United States*,[25] the earliest of the Court's cases to exclude probative physical evidence on constitutional grounds.

However, although the majority opinion made some polite gestures toward the combination of the Fourth and Fifth Amendments as "supplementing phases of the same constitutional purpose,"[26] Justice Clark carefully avoided embracing Black's view: "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence . . . ."[27]

The arguments in *Mapp* going to the Court's constitutional authority to impose the exclusionary rule were then, in effect, those of

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24 *Id.* at 661-62.

25 116 U.S. 616, 630 (1886).

26 *Mapp*, 367 U.S. at 657 (quoting Feldman v. United States, 322 U.S. 487, 489-90 (1944)).

27 *Id.*

a plurality opinion. The issue of authority is sharpened by the subsequent reception of the *Mapp* arguments.

B. THE CASES UNDERMINING *MAPP*

The erosion of *Mapp* began almost at once. In *Linkletter v. Walker*,[28] the Court declined to apply *Mapp* retroactively on the basis that such application would have no deterrent effect. This holding is flatly inconsistent with *Mapp*'s theories that admission would compound the original violation and that exclusion was a personal privilege.[29]

The single mindedly deterrent theory of *United States v. Calandra*[30] was the death warrant for the first two *Mapp* arguments.

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim. . . . Instead, the rule's prime purpose is to deter future unlawful police conduct. . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.[31]

This is as express a repudiation as one might want of the implied privilege theory of the exclusionary rule.

The *Mapp* "extended violation" argument fared no better in *Calandra*. The Court rejected in terms any theory that the admission of evidence is so linked to the initial unconstitutional search or seizure as to constitute a single indivisible constitutional wrong.

> The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong . . . is fully accomplished by the original search without probable cause.[32]

None of this is inconsistent with the *Mapp* "essential deterrent sanction" argument. *Calandra* does, however, suggest that some alteration in that argument would be required. By characterizing the exclusionary rule as "judicially created," the Court cast doubt on the essentiality of the rule. In *Mapp* the exclusionary rule's effectively deterrent character made it part of the Fourth Amendment, a part revealed by interpretation. It was not the product of judicial creativity. What would be compatible with *Calandra*, then, is a sanc-

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[28] 381 U.S. 618 (1965).

[29] The seeds of the destruction of *Mapp's* first two arguments preceded that decision. In Elkins v. United States, 364 U.S. 206 (1960), the Court had already indicated that deterrence was the purpose of the exclusionary rule.

[30] 414 U.S. 338 (1974).

[31] *Id.* at 347-48.

[32] *Id.* at 354.

tion argument stripped of claims of essentiality and leaving room for some form of judicial conduct more "creative" than ordinary interpretation.

The *Calandra* Court's renunciation of the *Mapp* exclusionary rule justifications was forcefully emphasized by Justice White, for the Court, in 1984 in *United States v. Leon*.[33] White approvingly quoted the key passages of *Calandra* on the way to announcing the good faith exception to the exclusionary rule.[34] To underscore the deterrent character of the rule as understood by the majority, White argued that insofar as the rule serves the purpose of protecting the integrity of the courts, that purpose is strictly subordinate to deterrence, extending no further than protecting against admission of evidence, the exclusion of which would have a deterrent effect that outweighed its law enforcement costs.[35] In this fashion White ruled out any additional argument touching on constitutional authority that might be lurking in *Mapp*'s judicial integrity discussion.

To ensure that no one had missed the point of all this, Justice White explicitly rejected "language in opinions of the Court and of individual Justices [that] has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment."[36]

That exclusion is not a necessary corollary of the Fourth Amendment puts the final nail in the coffin of the personal privilege and extended violation arguments on both of which the exclusionary rule is in principle inseparable from the amendment. *Leon*'s language is, then, if anything more damning of those two *Mapp* doctrines than was *Calandra*'s. The essential deterrent sanction doctrine, however, might survive *Leon* as well as *Calandra* if the doctrine could be modified to create enough conceptual distance between the exclusionary rule and the Fourth Amendment. The rule would not then count as a "necessary corollary" of the amendment.[37]

C. THE CHALLENGE

If the exclusionary rule is neither part of nor corollary to the Fourth Amendment, how does the admission at trial of evidence seized in violation of the Fourth Amendment violate the Constitution? If such admission does not violate the Constitution, then by virtue of what power does the Court strike it down?

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[33] 468 U.S. 897 (1984).
[34] *Id.* at 906.
[35] *Id.* at 906-07.
[36] *Id.* at 905-06.
[37] This article presents such an interpretation. *See infra* Part III.

The Court has frequently linked its enforcement of the exclusionary rule in the federal courts with its supervisory authority.[38] There is a serious question whether it is a legitimate exercise of supervisory authority to exclude relevant evidence for the purpose of creating incentives for executive officers with respect to matters not before the court.[39] The supervisory authority is not, however, even a candidate in the application of the exclusionary rule to the states. "[F]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."[40]

The Reagan-Bush Justice Department challenged *Mapp* in very much these terms: "The Supreme Court has never overtly asserted or defended the proposition that it possesses the authority to exclude evidence in a case in which the state court itself would not violate the Constitution by admitting it, and it is difficult to see what constitutional authority the Court could point to as the basis for the assumption of such power."[41]

The Justice Department that raised the question as to the constitutional authority for the exclusionary rule was, it hardly needs mentioning, generally hostile to the rule.[42] Professor Grano, who anticipated and endorses much of the Justice Department criticism, is similarly no uncritical supporter of the exclusion of probative evidence in criminal cases.[43] Friends of the exclusionary rule, however, also have serious doubts as to its authority or life expectancy. Justice Brennan, in his *Calandra* dissent, expressed a fear that the majority's understanding of the rule in terms of deterrence would lead the Court to "abandon altogether the exclusionary rule."[44] In his *Leon* dissent, Brennan argued that "[b]y remaining with its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy."[45] Justice

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[38] *See* Cupp v. Naughten, 414 U.S. 141, 146 (1973); Elkins v. United States, 364 U.S. 206, 216 (1960) (quoting McNabb v. United States, 318 U.S. 332, 341 (1943)); United States v. Williams, 112 S. Ct. 1735, 1741 (1992). *Williams*, which held that the supervisory authority does not require exculpatory evidence in federal grand juries, is generally deflationary of the authority. However, Justice Scalia, writing for the Court, cites Weeks v. United States, 232 U.S. 383 (1914), as an instance of the supervisory authority.

[39] *See infra* notes 125-26 and accompanying text.

[40] Smith v. Phillips, 455 U.S. 209, 221 (1982).

[41] Justice Department, *supra* note 8, at 616.

[42] *See id.* at 575.

[43] *See* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. Rev. 100 (1985) (questioning the legitimacy of judicially-created prophylactic rules).

[44] United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting).

[45] United States v. Leon, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting). In de-

Douglas worried that the Court's new understanding of the exclusionary rule "forecasts the complete demise of the exclusionary rule as fashioned by this Court in over 61 years of Fourth Amendment jurisprudence."[46]

Professor Kamisar opined that "[u]ntil the exclusionary rule rests *once again* on a principled basis rather than an empirical proposition, as *it did originally and for much of its life*, the rule will remain in a state of unstable equilibrium."[47] Professor Monaghan, as a prelude to his celebrated defense of the rule as constitutional federal common law, observed that the deterrence rationale threatens

> the very legitimacy of the rule itself, in whatever form it takes. As a matter of traditional constitutional theory, the significant issue is whether the Supreme Court has the authority to mandate the exclusionary rule if the rule is not a necessary corollary of a constitutional right.[48]

Professors Schrock and Welsh noted that "[w]hen the court acknowledges that it has no *constitutional* business excluding evidence, the suspicion naturally arises that it has *no business at all* excluding evidence."[49]

The Reagan-Bush Justice Department challenge to the constitutional authority behind the exclusionary rule was not, then, unprecedented. There had been some prior recognition of the potential conflict between the Court's understanding of the rule and its continued viability, especially for the states. Still, there is hardly the sense of crisis one might have expected at the disappearance of the constitutional foundations for one of the chief pillars of modern criminal procedure.

Why is the question of this article not on everyone's lips: Can the exclusionary rule be saved? Many academics dismiss the problem of *Mapp*'s constitutional authority with the sweeping judgment that *Calandra*, *Leon* and progeny were all wrongly decided.[50] Inas-

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nying that the rule was "part and parcel" of the Fourth Amendment, the majority rejected "the only possible predicate for the Court's conclusion [in *Mapp*] that the states were bound by the Fourteenth Amendment to honor the *Weeks* doctrine." *Id.* at 940 (quoting Mapp v. Ohio, 367 U.S. 643, 651 (1961)).

46 United States v. Peltier, 422 U.S. 531, 551 (1975) (Douglas, J., dissenting).

47 Yale Kamisar, *Does (Did)(Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?* 16 CREIGHTON L. REV. 565, 565 n.1 (1983).

48 Henry P. Monaghan, *The Supreme Court 1974 Term; Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3-4, 6 (1975).

49 Schrock & Welsh, *supra* note 21, at 269-70.

50 *See* Fletcher N. Baldwin, Jr., *Due Process and the Exclusionary Rule: Integrity and Justification*, 39 U. FLA L. REV. 505, 539 (1987); Steven Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405 (1986); Heffernan, *supra* note 21, at 1193; Kamisar, *supra* note 47, at 565; William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating*

much as there is little chance that they will soon convince the Court of that, however, it seems worth asking whether there are ways of saving the exclusionary rule consistent with current exclusionary rule doctrine. If there are not, then the Court should show courage in its own convictions and overrule *Mapp* and *Weeks*, following the longstanding suggestions of Justice Harlan[51] and Chief Justice Burger.[52]

D. A LOOK AHEAD

The task is to see if there is constitutional authority for imposing, or at least for retaining, an exclusionary rule of the sort the Court outlined in *Calandra* and *Leon*. That is, a purely instrumental, deterrent exclusionary rule. What I will do here is to sketch what seems to me to be the best theory supporting the existence of such authority.

The outline of the theory was provided by Kaplan in his "quasi-constitutional" account of the exclusionary rule.[53] Because "quasi-constitutional" is less than perspicuous, this article will call it the "contingent violation" theory. This theory denies the Reagan-Bush Justice Department's premise that there is no violation of the Constitution if the trial court admits evidence that is excludable under the rule. It grants that admission of the evidence does not violate any right of the defendant and is not *necessarily* a violation of the Constitution. It is a violation of the Constitution, however, contingent upon certain institutional and empirical facts.

Part II will outline the general structure of the contingent violation theory, and argue that it is coherent and acceptably operational. The problem with the theory as it was set out by Kaplan is that the constitutional source of the contingent obligation to enforce the Fourth Amendment through use of the exclusionary rule is somewhat mysterious. Part III will explore the most natural and plausible possibility—that the obligation is implicit in the Fourth Amendment itself. It will be argued that there is no contradiction between the existence of a contingent enforcement obligation in the Fourth Amendment and the *Leon* language to the effect that the exclusionary rule is not a corollary of the amendment.

The article will assess the acceptability of the theory, amplified

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the Police and Derailing the Law, 70 GEO. L.J. 365 (1981); Schrock & Welsh, *supra* note 21, at 254.

51 Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring).

52 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 420 (1971) (Burger, C.J., dissenting).

53 Kaplan, *supra* note 7, at 1030.

in this fashion, with respect to case law and different styles of constitutional interpretation. It concludes that even "originalist" and "textualist" interpreters might be brought into support of the theory if they are committed to a sufficiently robust concept of stare decisis. Finally, this article examines briefly three other ways to save the exclusionary rule: the constitutional federal common law theory, the remedial theory, and the supervisory authority theory. It will be argued that the implicit enforcement clause version of the contingent violation theory is superior to these other ways of saving the exclusionary rule and is in fact the best way of saving the rule consistent with retention of post-*Mapp* doctrine. Whether the best way is good enough will depend upon one's attitude towards constitutional interpretation and constitutional stare decisis.

II. THE CONTINGENT VIOLATION THEORY

A. THE LOGICAL STRUCTURE OF A CONTINGENT EXCLUSIONARY RULE

The contingency of the exclusionary rule has long been contended for by proponents of what Professor Kaplan, its principal author, called the "quasi-constitutional" theory of the rule. Kaplan accepted the then emerging Supreme Court view that the exclusionary rule is justified only in terms of its relative utility as a deterrent measure. It did not follow, he argued, that the rule is not constitutionally required. It is required, but not uniquely required except in the absence of other acceptable alternatives.

> The rule is not written into the Constitution. Rather, the Constitution demands something that works—presumably at a reasonable social cost. The content of the particular remedial or prophylactic rule is thus a pragmatic decision rather than a constitutional fiat.[54]

A proponent of the contingent violation theory must clear three hurdles to show the theory is acceptable. First, she must demonstrate that the notion of a contingent constitutional duty of this sort is coherent. Second, she must argue that the obligation to enforce the Fourth Amendment through indirect means is operational in the sense that it gives rise to directions that courts can follow. Third, she must isolate the constitutional source of the contingent obligation.

This article will argue that the first of these hurdles, coherence, is easily cleared. Operationality is a weak point of the theory, but this weakness leads to nothing worse than the sort of "balancing" that courts must routinely struggle to carry out. It is with respect to

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[54] *Id.* at 1027, 1029-30.

the third hurdle that the theory stumbles, and requires the supplementation of Part III of this article.

B. THE COHERENCE OF CONTINGENT CONSTITUTIONAL OBLIGATIONS

The most familiar constitutional demands are absolute requirements or absolute prohibitions.[55] Is the idea of a contingent constitutional demand coherent? Let me start out with some simple models to show that the sort of contingency in question here is not a problem.

Consider *A's* obligation to shovel the snow from the sidewalk in front of his house. In the typical case this obligation will arise contingently from an ordinance that requires that he keep his sidewalk clear of snow. The relevant contingencies are the triggering contingency that snow has fallen and the contingencies of means: he has no snowblower, and it would be inefficient to try to melt the snow with a hair dryer. The obligation for *A* to take shovel in hand, then, becomes absolute.

The obligation to use the exclusionary rule to enforce the Fourth Amendment is parallel. The triggering contingency is an unacceptable level of violations of the substantive provisions of the Fourth Amendment. The contingencies of means are the absence of alternative effective enforcement devices. So far then, there is no problem. Far from raising issues of coherence, contingent obligations of this sort are both common and wholly unproblematic.

The obligation that the theory understands to be on the state courts to exclude evidence seized in violation of the Fourth Amendment is contingent in a second respect. It is the contingency of a joint obligation that can be discharged by any of the joint obligees. The Fourth Amendment speaks directly to the state or federal executive. An executive officer is obligated neither to participate in nor to authorize any conduct in violation of the amendment. If there is an obligation to take reasonable steps to protect against violations of the Fourth Amendment, it is as applicable to the executive and legislative branches as it is to the court system. The obligation of enforcement on any of the branches is contingent upon the failure of the other branches to meet their similar obligations.[56]

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[55] Some random examples from the Constitution include: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years . . . ." U.S. CONST. art. I, § 2; "[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected . . . ." U.S. CONST. art. II, § 1; "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

[56] The obligation of the executive not to conduct an unreasonable search or seizure

Is there anything troubling about a contingency of this sort? There is no problem from the standpoint of the logic of obligation. Consider a duplex house with two owners. The owners are under a joint obligation to keep the sidewalk clear. If either shovels the walk, she discharges the obligation of both. If neither shovels they have each failed in her obligation. It is as simple as that.

C. THE OPERATIONALITY OF THE CONTINGENT OBLIGATION

If there is no general logical problem with the notion of contingent constitutional obligations, this particular sort of contingent obligation may still seem a little troubling. What is required is, according to Kaplan, "something that works" at a "reasonable social cost." What is it for something to "work?" And what is a "reasonable social cost?" Kaplan simply assumed that the exclusionary rule works, but of course it does not work in the sense of preventing all Fourth Amendment violations. No one thinks that it does or could reduce them to a de minimis level. By contrast, the exclusionary rule, and presumably many other means, "work" in the weak sense of deterring some possible violations.

A more reasonable notion of "working" would be to cut violations down to a tolerable level. But tolerable to whom? Any violation may seem intolerable to its victim. The general citizenry, by contrast, might be willing to accept a fairly high level of violations, especially if those violations were largely restricted to "drug prone locations."

It makes no real progress to adopt the test of what is tolerable to the Supreme Court. Where is the Court to turn for its standard? It would look to the Constitution in vain. The language of the Fourth Amendment is absolute, "the right of the people . . . shall not be violated, and no Warrants shall issue . . . ." The Fourteenth Amendment is similarly categorical. Members of the Court may have concluded that the exclusionary rule "works" in that it deters a significant number of violations, which number is probably greater than any alternative that the states were very likely to put into place. What is a "significant" number? Enough that it is worth having the rule even given its costs.

There is, then, no real standard here, either for the rule to count as "working" or for its costs to count as "reasonable." Even if the Court knew precisely the deterrent efficiency of the rule, the problem of appropriate standards would remain. The Court must

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is not, of course, either contingent upon or discharged by anything done or undone by the other branches.

evaluate undeterred Fourth Amendment violations against lost convictions of the guilty. That is a determination that is inevitably a matter of intuition, not standard.[57]

Is this a problem? It surely means that the determination the Court must make is not operational in a sense that would be satisfactory to designers of scientific research protocols. But weighing values in this way is something that courts are from time to time properly called upon to do. It is an ineliminable part of judging in a world in which values of genuinely different sorts come into collision. The operationality objection is, then, not fatal to the contingent violation theory.

D. THE SOURCE OF THE CONTINGENT OBLIGATION

The contingent violation theory quickly solves one of the problems which must be solved to save the exclusionary rule. The Supreme Court's authority to impose the rule is simply the judicial review authority of *Marbury v. Madison*.[58] The hard question for this theory is the source of the contingent constitutional obligation of the federal and state courts to enforce the Fourth Amendment through the use of the exclusionary rule. It is a more modest version of *Mapp*'s "essential sanction" argument that provides the best answer to this question.

III. ENFORCEMENT CLAUSE IMPLICIT IN THE FOURTH AMENDMENT

A. THE NATURE OF THE ENFORCEMENT CLAUSE

The essential sanction argument as set out in *Mapp* was to the

[57] I speculate that the reason the Court for a long time was content with the exclusionary rule is that the majority of Justices concluded that the "weight" of a lost conviction is a good deal less than that of a Fourth Amendment violation. If we should be willing to forego many convictions to avoid a violation, then one is likely to be satisfied with hunches as to the actual effectiveness ratio, backed up by little, if any, data.

This relative weighing, I speculate further, was a result of the conclusion that a wrong at the hands of the state is a great deal worse than a wrong at the hands of a private individual. The invasion of one's home by the police is qualitatively different from the invasion by a burglar. This reasoning is parallel to that from which a minority on the Court concluded that capital punishment is *a priori* unjustifiable, whatever the deterrence statistics might turn out to be. The distinction between private and public wrongs is surely of substantial importance. I wonder, however, if some of the Justices might not have given too little weight to the public side of a lost conviction. It is not just that someone who may be dangerous is back out on the street. Someone whose acts deserve official and emphatic denunciation goes undenounced—indeed, is able to thumb his nose at our attempt to denounce him. The significance of the exclusionary rule's distortion of retributive justice was long reflected in public opinion before it began to have some effect on the reflections of the Court.

[58] 5 U.S. (1 Cranch) 137 (1803).

effect that the exclusionary rule is part of the Fourth Amendment because, in the absence of the rule, violations of the amendment would be so numerous that the amendment would lose its meaning. The proposition that the exclusionary rule is a deterrent sanction has gained in prominence since *Mapp*. The only aspect of *Mapp*'s essential deterrent sanction argument that is inconsistent with subsequent case law is the claim that the exclusionary rule so understood is part of the Fourth Amendment. That claim was undercut by the "judicial creativity" language of *Calandra* and the *Leon* assertion that the exclusionary rule is not a "necessary corollary" of the Fourth Amendment.[59]

The conceptual framework of the contingent violation theory provides a way of retaining the thrust of the essential deterrent sanction theory while leaving behind the claim that the exclusionary rule is a necessary corollary of the Fourth Amendment. Suppose that there is an implicit "enforcement principle" that *is* a necessary corollary of the Fourth Amendment. An enforcement principle would, in effect, create an affirmative duty upon the federal courts to take reasonable steps to insure that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." A crude statement of such a principle might run as follows:

> *E*: If in the absence of a rule of evidence or procedure in the trial courts to deter violations of the Fourth Amendment there would be an unacceptably large number of such violations, and if a given rule would be more effective than any other practicable measure for controlling violations of the amendment, and if such rule would operate at a reasonable cost, then such rule is required.

It is not wholly implausible that some of the most important guarantees of the Bill of Rights might have built in protections along these lines against becoming "mere forms of words."[60] If so, then the implicit enforcement principles would be binding upon the federal courts by the force of the amendment of which each enforcement principle is an implicit part. The enforcement principles would be incorporated against the states along with the amendments.

Does this make the exclusionary rule a necessary corollary of the Fourth Amendment? No. It is a contingent consequence of the

[59] *See* United States v. Calandra, 414 U.S. 338, 347 (1974); United States v. Leon, 468 U.S. 897 (1984). For a complete discussion of these cases, see *supra* notes 32-39 and accompanying text.

[60] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.)).

amendment, contingent on the factual satisfaction of each of the clauses of the enforcement principle. If it turns out, for example, that there are other, more effective deterrent measures that are practical, then the exclusionary rule loses its constitutional warrant. The implicit enforcement principle remains, but the exclusionary rule drops away.

Is it logic chopping to deny that the exclusionary rule is a necessary corollary of the Fourth Amendment while granting that status to an enforcement principle from which the exclusionary rule follows with the addition of empirical premises? That is to say, did Justice White and the *Leon* majority intend to place a greater distance between the exclusionary rule and the Fourth Amendment than is represented by this version of the essential sanction theory? It is, to be sure, something of a logician's point to say that the exclusionary rule is a contingent consequence rather than a necessary corollary of the Fourth Amendment. Still this theory's contention that the exclusionary rule is contingent is of more than theoretical importance, especially, if there are viable alternatives to the exclusionary rule as Chief Justice Burger suggested.[61] Moreover, a little subtlety in fitting theory to the language of the cases may not be such a bad thing if the alternative is a crisis created by a conflict between the language of the cases and the Court's continuing enforcement of the exclusionary rule.

B. ACCEPTABILITY OF THE INTERPRETATION

1. Compatibility of the Interpretation with Case Language

The Fourth Amendment implicit enforcement clause version of the contingent violation theory receives support in the 1990 case,

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61 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 420 (Burger, C.J., dissenting). *See* MALCOLM R. WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE (1982) (suggesting application of administrative discipline, tort remedy, or judicial hearing after conviction of target of search or seizure appropriate to determine legality of officer's conduct, which, if found unlawful, would require disciplinary action by the police against the officer, or a striking of the evidence from target's trial); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 969-85 (1983) (suggesting restitution); Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514-16 (1955); Gary S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065, 1100-08 (1982) (discussing administrative control of police); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 717, 755-57 (1970) (suggesting tort remedy); Virgil W. Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U. L. REV. 46, 62 (1957) (proposing that civil rights office should investigate police violations of the Constitution); William T. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 385-91 (1939) (suggesting tort remedy, criminal sanctions, new arrest procedures, and public pressure).

James v. Illinois,[62] reminiscent of the essential sanction formulation of *Mapp* and suggesting that the rule's function as a sanction affords it constitutional authority:

> "Without [the exclusionary rule] the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words.'" *Terry v. Ohio*, 392 U.S. 1, 12 (1968), quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of reserving overriding constitutional values: "There is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).[63]

The implicit enforcement clause theory has the further advantage that it saves the exclusionary rule in both the federal and state courts with a single interpretive move.[64]

Admittedly, the luster of this conceptual advantage is somewhat tarnished by the fact that the Court itself often seems to suggest that there are different sources of authority for the exclusionary rule in the state and federal courts. In 1991, Justice Scalia, for the Court, confirmed that *Weeks* (understood as promulgating the rule for the federal courts) was an exercise of the supervisory authority.[65] As already discussed, the supervisory authority is not an option for the Court with respect to the state courts. In fact, the Court has been strangely silent as to its authority for the exclusionary rule in the state courts.

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62 493 U.S. 307 (1990). There may be some doubt as to the Court's continuing support for this language, inasmuch as Justice Brennan's five person majority also included Justices Marshall and White.

63 *Id.* at 311.

64 I have given a good deal of thought to the alternative of locating the implicit enforcement clause in the Due Process Clause of the Fourteenth Amendment. The forcefulness of that amendment's intrusions upon prior state prerogatives suggested the possibility that there might be such an implicit clause in the Fourteenth Amendment Due Process Clause, yet none in the Due Process Clause of the Fifth Amendment. This would, however, have the inelegant consequence that the basis for the exclusionary rule in the state courts would be different from that (if there were any basis) in the federal courts. This inelegance is counterbalanced to some degree by the Court's language, discussed in the text, suggesting that the exclusionary rule in the state courts is a matter of the Fourth Amendment, while that in the federal courts is a matter of the supervisory authority. In the end, I concluded that if there is an implicit clause in the Fourteenth Amendment, then there is one in the Fifth Amendment as well. This is at least strongly suggested by the logic and politics of "reverse incorporation." *See* Buckley v. Valeo, 424 U.S. 93 (1976) (per curiam); Bolling v. Sharpe, 347 U.S. 497 (1954). This Fourteenth Amendment-Fifth Amendment combination is, then, a conceivable way to save the exclusionary rule. But it is a simpler and more plausible interpretation, and one more in tune with case language, to locate the implicit enforcement clause in the Fourth Amendment.

65 United States v. Williams, 112 S. Ct. 1735, 1741 (1992).

The best way to impose coherence on the Court's exclusionary rule jurisprudence is to take the references to the supervisory authority to be superfluous. The supervisory authority might possibly support the rule in the federal courts, and was at various times taken to do so; but closer inspection shows that the rule's authority flows, albeit with a meander, from the Fourth Amendment itself. The Court came closest to enunciating this understanding of exclusionary rule doctrine in *United States v. Payner*.[66] The issue in that case was whether the supervisory authority could be invoked to exclude evidence seized with particularly egregious illegality from someone other than the defendant whom it was used to convict. Under established exclusionary rule doctrine, Payner lacked an expectation of privacy in these third party materials, and so could not benefit from exclusion. Both the district court and the Court of Appeals, however, had concluded that the nature of the governmental misconduct required it to use its supervisory authority to suppress the material in defense of judicial integrity.[67]

Justice Powell, for the Court, argued that the Fourth Amendment exclusionary rule and the supervisory authority serve "precisely the same purposes" in "deterring illegality and protecting judicial integrity."[68] Therefore, the supervisory authority has no greater scope than does the Fourth Amendment exclusionary rule, and the evidence should not have been excluded. I draw two conclusions from this case. First, were there no authority for the exclusionary rule derivable from the Fourth Amendment itself, there could be exclusion in the federal courts through the offices of the supervisory authority. Second, the actual authority for the exclusionary rule comes from the Fourth Amendment itself. The Court rejected the supervisory authority "as a substitute for established Fourth Amendment doctrine."[69] The doctrine that Justice Powell denominated "Fourth Amendment" was, in fact, the doctrine governing which criminal defendants are entitled to have evidence suppressed. That is to say, it was the exclusionary rule doctrine. It follows that the exclusionary rule doctrine is a part of the Fourth Amendment doctrine. It is a part even though the rule is not a corollary of the Amendment. That fits perfectly with the theory developed in this article. The exclusionary rule is a contingent consequence of the Fourth Amendment, but a consequence nonetheless.

66 447 U.S. 727 (1980).
67 *Id.* at 731.
68 *Id.* at 735-36 n.8.
69 *Id.*

A sketch of the development of the doctrine, then, goes something like this. The exclusion of evidence obtained in violation of the Fourth Amendment was first understood as an exercise of the supervisory authority. In *Mapp*, the Court concluded that exclusion was mandated, on at least three independent grounds, by the Fourth Amendment. In subsequent cases, particularly *Calandra* and *Leon*, the grounds for taking the exclusionary rule to be part and parcel of the Amendment were undermined. *Mapp*'s "essential sanction" argument, however, retained viability, stripped of its pretensions to essentiality. The exclusionary rule thus remains as a joint product of the Fourth Amendment and the Court's understanding that contingencies still support enforcement of the amendment through the exclusion of evidence in criminal cases.

It is not surprising, given this history, that the Court, looking back to the line of federal court cases initiated by *Weeks*, might sometimes fall into use of supervisory authority language. It is also not too surprising that the Court has been slow to endorse Kaplan's thesis that the exclusionary rule is constitutional but contingent and may be superseded by Congress or a state upon enactment of a satisfactory alternative. Contingency is surely foreign to the common understanding of the rule, but reflection on the case law since *Mapp* shows that this sort of contingency is inevitable on the Court's understanding of the exclusionary rule. Once the rule became an instrumental matter rather than a requirement of principle, it became vulnerable to replacement by any instrumentally better device. If Congress, with its superior factual research capacity, or a state legislature, with its greater sense of local conditions, should determine that another device more effectively or efficiently enforces the Fourth Amendment, that determination ought to receive appropriate deference from the Court. Is it lack of courage that has kept the Court from following the logic of its doctrine to this conclusion or only lack of a case that properly poses the issue?

2. *Normative Interpretation of the Text*

There is surely an argument that a key guarantee of personal privacy against the government, like the Fourth Amendment, is a *better* constitutional provision if it is accompanied by something on the order of the enforcement clause *E*, than if there is no constitutionally mandated enforcement. The values inherent in the amendment will probably be more generally realized if there is an enforcement clause. Indeed, perhaps the realization of the value is under some circumstances dependent upon the existence of an implicit enforcement clause—as reflected in the Court's suggestion

that without enforcement the rule would be in danger of becoming a "mere form of words."

It is not initially implausible that a document that structures the political life of a free and democratic people might be interpreted so as to reflect in at least a partial fashion the highest political aspirations of that people. So it has appeared to many of our most eminent constitutional interpreters:

> [Interpretation of the Constitution] must fit and justify the most basic arrangements of political power in the community, which means it must be a justification drawn from the most philosophical reaches of political theory.[70] Moral and political theory, in conjunction with interpretive history, plays a central role in American constitutional interpretation and understanding of legal tradition.[71]

Any justice who is sympathetic to a significantly normative style of constitutional adjudication and who wishes to retain as much as possible of the Court's existing exclusionary rule jurisprudence should, I think, endorse the implicit enforcement clause theory.

For certain normative interpreters of the Constitution, the resulting contingency of the exclusionary rule might even be advantageous. Separation of powers and federalism represent values in the Constitution that are entitled to some respect. Of course, the exact priority of the value of Fourth Amendment privacy in comparison to these great structural values of the Constitution will vary among interpreters. Some may see the partitioning of authority to be itself only an instrumental matter, designed to keep infections from spreading too quickly through the body politic. Others may see a positive political value in placing power in more rather than fewer hands. A contingent exclusionary rule that may be displaced by Congress or the states will not satisfy everyone's sense of the proper accommodation among these values. Perhaps privacy ought never be made to accommodate to federalism or the separation of powers. That is an intelligible normative position, but one of doubtful viability for anyone who accepts the post-*Mapp* cases. If there is to be accommodation among Fourth Amendment, separation of powers,

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[70] RONALD DWORKIN, LAW'S EMPIRE 380 (1986).

[71] DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 14 (1989); *See also* MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 91-145 (1982); Owen M. Fiss, *Groups and the Equal Protection Clause*, *in* EQUALITY AND PREFERENTIAL TREATMENT 84 (Marshall Cohen et al. eds., 1977); David A.J. Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319 (1981); Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893 (1990); Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247 (1990). *See generally* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988); HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION (1990).

and federalism values, the contingent enforcement clause interpretation represents a plausible way of forming it.

3. The Language of the Text

Not all interpreters, and in particular not all members of the Supreme Court, are drawn to the more aggressively normative styles of constitutional interpretation. "Originalist" and "textualist" interpretations are celebrated, and reviled, as the polar opposites of the more normative approaches.[72]

It seems overwhelmingly likely that within no member of this family of interpretations will it be plausible that there is an implicit enforcement clause in the Fourth Amendment. There is no language in the framing period that would suggest that anyone thought that the Fourth Amendment carried along with it a clause mandating actions be taken to deter or otherwise prevent future violations. The first exclusion of evidence based upon the Fourth Amendment did not take place until 1886.[73]

Turning to the text of the Fourth Amendment itself, could it plausibly be maintained that a sensitive reader would have understood that the words carried an implication along the lines of the enforcement clause *E*? If one sought to argue that there was such a clause implicit in the text, as a matter of ordinary, if perhaps subtle, implications of the Fourth Amendment language, the best hope would be to argue that affirmative steps to avoid violations can be inferred to be part of a command that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against un-

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[72] Textualism seems to me the more plausible expression of the conservative interpretive style. Presumably, no one believes that private and uncommunicated intents of the framers are the proper loci of constitutional interpretation. Suppose that each of the framers of the First Amendment believed that Islam was not truly a religion. Even if a collection of newly unearthed diaries were to establish this fact about the private mental lives of the founders, that ought not affect even an originalist's interpretation of the First Amendment. To have potential interpretative relevance such a belief would have to have been either communicated to the ratifiers, or so widely and publicly shared that both framers and ratifiers would have accepted it as part of the public meaning of the word "religion."

It seems to me, indeed, that the most plausible member of the originalist family of interpretations, focuses not on "intents" but upon the linguistic dispositions of the ratifiers with respect to the words and phrases of the constitutional text. The framers and ratifiers ask a good deal of us in binding us by the words that they wrote and ratified. If they had wanted us to be bound as well by additional understandings, they ought properly to have put those understandings into the text. Furthermore, they ought to have put them into the text in a way that would be accessible to a fluent speaker of their generation, which is to say, by extension, by later generations who take the time to ascertain the linguistic dispositions of their speakers.

[73] Boyd v. United States, 116 U.S. 616 (1886).

reasonable searches and seizures, shall not be violated . . . ."[74] It might be argued that to receive such a command is, simultaneously, to be placed under an obligation to take steps to see that there are no violations of the right to security. That is, along with the end, it is commanded that appropriate means to that end be put into effect.

In ordinary language a categorical command will frequently bring its recipient to an immediate focus on steps to carry out the command. If the command is one that there be no violations of some stated condition, then one thinks of steps to be taken to insure that there are no violations. If some violations seem inevitable, one thinks of steps to minimize violations. The command that a military installation be in spotless condition would bring an obedient officer to take steps to keep it clean. Even in this case, however, the recipient of the command could successfully argue that he was not in dereliction of his duty if the installation were spotless in fact—even if he had done nothing to insure that it should be so. One has not violated the Tenth Commandment if one happens to go through the day without entertaining a covetous thought, even if one has taken no affirmative precautions against covetousness. In short, it appears that in ordinary cases the relation between a command that there be no violations and steps to guard against violations is one of prudence on the side of the hearer, not an implication in the words of the speaker.

Perhaps we should find an implication in the Fourth Amendment commands that we would not find in other commands because the amendment *is* constitutional. Constitutional commands, especially if they protect important rights, might well be taken to have a richer set of implications than do ordinary commands. This is not, however, a matter of linguistic dispositions, but of political norms. It rests, once again, on the proposition that it would be a better constitution if something like *E* were part of the Fourth Amendment. It is grist for a normative interpretation of the text, but not for a narrowly textual interpretation looking to the implications of the words and phrases themselves.

Interpreting the Fourth Amendment to include an implicit enforcement clause along the lines of *E* is consistent with post-*Mapp* doctrinal developments. I conclude, however, that, as an initial matter, it is a way of saving the exclusionary rule available only to those who are willing to approach constitutional interpretation in a markedly normative spirit. Those who believe that interpreters are not free to improve upon what was ratified, ought, I think be inclined to

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[74] U.S. CONST. amend. IV.

reject *E*, and with it even a contingent exclusionary rule.[75]

I say "as an initial matter" and "inclined" for a reason. Many who reject aggressively normative styles of constitutional interpretation give at least some weight to constitutional stare decisis. Stare decisis counsels the retention of precedent even if it rests on an interpretation that would otherwise be unacceptable. The next subsection will examine whether stare decisis ought impel even interpreters of the originalist or narrowly textualist school to embrace *E* as the best way to accommodate well established holdings and doctrines.

4. *Factoring in Stare Decisis*

The joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pa. v. Casey*[76] shows the possibility of retaining a constitutional precedent for the sake of stare decisis, even though the Court believes that the case was originally decided wrongly. Part III of *Casey* was joined by Justices Blackmun and Stevens, and must be seen as setting out the Court's current understanding of constitutional stare decisis.

Could the exclusionary rule be saved in this way? The similarities between *Roe v. Wade*[77] and *Mapp* are sufficiently strong that the application of this somewhat new and certainly more detailed theory of stare decisis to *Roe* might well presage its application to *Mapp* as well.

Like *Roe*, *Mapp* is founded on the substantive side of the Fourteenth Amendment Due Process Clause. Both cases are of the first magnitude. *Mapp* does not quite rise to the level of prominence and "intensely divisive" controversiality that the Court ascribes "in our lifetime" only to *Brown v. Board of Education*[78] and *Roe v. Wade*.[79] *Mapp*, however, is surely only a step down from the eminence, controversiality, and precedential importance of *Brown* and *Roe*. If there have been fewer demonstrations against *Mapp* than against *Roe*, there are nonetheless many Americans who are deeply disturbed that criminal defendants are freed on the "technicality" of a flawed search or seizure. A smaller, but substantial, number of Americans

[75] An interpreter of originalist or textualist stripe would presumably be no more inclined to find an implied enforcement clause in the Fourth Amendment than in the Third Amendment. Is it just the historical happenstance that there has been so little illegal quartering of soldiers that has stood in the way of the development of a Third Amendment Exclusionary Rule?

[76] 112 S. Ct. 2791 (1992).

[77] 410 U.S. 113 (1973).

[78] 347 U.S. 483 (1954).

[79] 410 U.S. 113 (1973). *See Casey*, 112 S. Ct. at 2815.

feel as fervently that the search and seizure exclusionary rule is essential to our liberty. So the Court's "watershed case" branch of its stare decisis argument fairly applies to *Mapp*.

If either *Roe* or *Mapp* were wrongly decided its mandate constitutes an unwarranted usurpation by the Court of state prerogatives, in sharp conflict with principles of federalism. If either case was wrongly decided, the Court lacks the constitutional authority to impose the federal rule upon the states. In short, the joint opinion suggests that the Court has the authority to keep in place a rule not constitutionally authorized in the first place.

What is the constitutional source of this extraordinary authority? Presumably it is implicit in the Article III judicial power. Without acknowledging this, the joint opinion argues that stare decisis is required for the Court's continued legitimacy.[80] Its necessity is supposed to be particularly clear for the watershed cases, the overruling of which would cause the perception that the Court was influenced by political pressure.[81]

To bind itself to its past decisions is one way for a court to appear principled and above the battles of public opinion. Other things being equal, devotion to principle should be conducive to the popular perception of a court's legitimacy. A wrongly decided Fourteenth Amendment case, however, is by its nature a breach in the Court's legitimacy. Thus, it is not clear that it is conducive to legitimacy in the final analysis for the Court to say: "We understand that in our original decision we arrogated to ourselves a power that the Constitution denies to us, and gives to you, the states. Recognizing our original mistake, we have nonetheless determined for reasons of our own institutional legitimacy to retain the authority over your affairs that we wrongly took from you."

Even if this were, all things considered, conducive to legitimacy or perceived legitimacy, it is unclear that either actual or perceived legitimacy of the Supreme Court is a constitutional value of more weight than the principles of separation of powers and federalism around which the Constitution is structured.

With these caveats as to the correctness of the stare decisis doctrine of *Casey*, it nonetheless represents a tool that the Court currently has available for retaining the exclusionary rule. *Mapp*'s retention is suggested by several of *Casey*'s "prudential and pragmatic considerations designed to test the consistency of overruling

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[80] *Id.* at 2816; *see also* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748-755 (1988).

[81] *Casey*, 112 S. Ct. at 2815.

the holding [of a prior decision] with the ideal of the rule of law . . . ."[82] *Mapp* has not "proved to be intolerable simply in defying practical workability . . . ."[83] The exclusionary rule works. It is administrable. The facts have not "so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification . . . ."[84] The state of our knowledge as to the deterrent effects of the exclusionary rule and its costs in terms of lost convictions is not a great deal better than it was when *Mapp* was decided. The data are insufficient to undermine *Mapp*.[85]

On the other side of the ledger, *Mapp* has not engendered any "reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . . ."[86] Perhaps certain criminals take the exclusionary rule into account in structuring aspects of the way they do business, but it is safe to say that this is not the kind of reliance the Court had in mind. No more would it count here that defense lawyers, prosecutors, and judges would be required to make alterations in the way they bargain or try certain cases.

The pivotal consideration is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[87] The Court answered in the negative the question whether "the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society . . . ."[88] The same answer could probably be given for *Mapp*. There is no *social consensus* that there is a fatal doctrinal infirmity in *Mapp*, but that is not surprising. Only rarely does the general society come to have views on the doctrinal bona fides of case law.

The Court also concluded, however, that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking."[89] Indeed *Roe*, the joint *Casey* opinion concluded, had substantial constitutional merit. The opinion argued in detail that the right to choose an abortion was a central part of Fourteenth Amendment liberty. Stare decisis played

82 *Id.* at 2797.
83 *Id.* at 2808.
84 *Id.*
85 *See supra* note 4.
86 *Casey*, 112 S. Ct. at 2808.
87 *Id.*
88 *Id.* at 2809.
89 *Id.* at 2810.

its role only in the conclusion that the states' "interests in protecting pre-natal life" did not outweigh that liberty.[90]

Stare decisis in *Casey*, then, worked in concert with a substantive theory that was at least very nearly sufficient on its own to have made *Roe* rightly decided in the first place. Perhaps on the new view of stare decisis it is very little stronger than a tie breaker. If the precedent's being "nearly right" is a condition of the new stare decisis, that diminishes substantially its pretensions—as well as the force of the criticisms made here of the new stare decisis. It may not, however, substantially lessen the utility of stare decisis for saving the exclusionary rule.

Mapp does have a certain vulnerability on this analysis. As discussed above, *Mapp*'s doctrinal footings, always fragile, were largely undermined by *Calandra* and *Leon*.[91] If one were to understand the subsequent cases to be flatly inconsistent with all of the *Mapp* theories, then *Casey* stare decisis would not save the exclusionary rule. As I have argued, however, *Mapp*'s essential deterrent sanction argument does survive subsequent doctrinal development, albeit in a significantly modified form. The rule is not an essential but a contingent sanction, as recognized by Kaplan, and as represented by the postulation of an implicit enforcement clause E in the Fourth Amendment.

To save *Mapp* in this way is, of course, not to save *Mapp* as it was originally conceived. An exclusionary rule that might be overthrown by a re-weighing of costs against benefits is not the sort of exclusionary rule that its friends will admire. This is especially true in that Congress or individual states would have some leeway in conducting the re-weighing. But *Casey* stare decisis preserved only part of the substance of *Roe* as well. If *Mapp* is to be preserved through an exercise of the new stare decisis, it is most plausibly preserved as understood in terms of a contingent enforcement clause implicit in the Fourth Amendment. Anything else would be in too great a conflict with subsequent doctrine.

What is the upshot of all this? An interpreter of a more originalist or textualist bent might well follow the new stare decisis to join in support of the theory developed here with those who are more aggressively normative in interpreting the Constitution. The theory that the Fourth Amendment has an implicit contingent enforcement clause might, however, remain an unacceptable way of saving the rule for those whose style of interpretation is originalist

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[90] *Id.* at 2808.

[91] *See supra* notes 28-37 and accompanying text.

or textualist and who are uncomfortable with the proposition that the Court may come to have a power by virtue of wrongly insisting in a past case that it had such a power.

IV. Other Ways to Save the Exclusionary Rule

The Court could save the exclusionary rule by returning to *Mapp*'s personal right or continuing violation arguments. These are coherent and in many respects appealing theories of the rule. They are, however, thoroughly out of step with the Court's exclusionary rule jurisprudence since *Mapp*. There are three major alternatives to the theory elaborated in this article if the Court wishes to retain that jurisprudence.

Under the first alternative theory the trial court would violate, in admitting the tainted evidence, not the Constitution as such, but constitutionally inspired federal common law. This theory was set out in its most detailed form by Professor Monaghan in 1975.[92] Monaghan contended that the judicial power of Article III gives the Supreme Court authority to create a body of subconstitutional common law of individual liberties. A federal common law exclusionary rule applies to the states via the Supremacy Clause.[93]

A second theory, argued by Professor Beale among others,[94] is that the Court's constitutional authority to promulgate the exclusionary rule is the same as that authority by which the Court directs that injunctions shall issue[95] or damages be available[96] in cases involving violations of the Constitution. This is, then, a remedial authority theory.

The third possibility is the supervisory authority theory, touched upon in Part I. It has the advantage that the supervisory authority is frequently referred to in cases applying the exclusionary rule in the federal courts. It has the striking disadvantage that it is at most capable of saving the rule in the federal courts.[97]

It will be argued that none of these alternatives is an attractive way to save the exclusionary rule. If the rule is to be saved in any fashion reasonably consistent with current Supreme Court doctrine,

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92 Monaghan, *supra* note 48.

93 U.S. Const. art. VI, § 2.

94 *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1475 (1984).

95 *See generally* Owen Fiss, The Civil Rights Injunction (1978); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

96 *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971).

97 *See supra* note 40 and accompanying text.

it can only be through the inference that there is a contingent enforcement clause implicit in the Fourth Amendment.

A. CONSTITUTIONAL COMMON LAW

Monaghan contended that the Fourth Amendment exclusionary rule is part of "a substructure of substantive, procedural and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress."[98]

The first problem this theory faces is that a federal common law exclusionary rule would have already been reversed as to the federal courts by Congress.[99] As proposed by the Advisory Committee, Federal Rule of Evidence 402 provided as follows:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court.[100]

The Committee on the Judiciary amended the proposed rule by adding at the end "or by other rules prescribed by the Supreme Court pursuant to statutory authority."[101] It is in this form that the rule was enacted. Congress has not granted authority to the Court by statute to promulgate a common law exclusionary rule. Therefore a common law exclusionary rule is consistent with Rule 402 only if it is "provided" by the Constitution. But if the exclusionary rule were *provided* by the Constitution, then there would be no necessity to regard it as common law. It would simply be a matter of constitutional interpretation and judicial review.

There is an argument from the legislative history that it was not the intent of Congress in amending Rule 402 to have any effect upon the Fourth Amendment exclusionary rule or other established rules of criminal procedure. Congress was simply concerned that it "should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence . . . ."[102] Because Congress did not intend to

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98 Monaghan, *supra* note 48, at 2-3.

99 The same would be true of the *Miranda* rule if it were only federal common law. *See* 18 U.S.C. § 3501(a) (1988) (all voluntary confessions are admissible). But *Miranda* warnings are not conclusive of "voluntariness." 18 U.S.C. § 3501(b) (1988). *See also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES NO. 1, THE LAW OF PRE-TRIAL INTERROGATION (1986) (urging overruling of *Miranda* and constitutional test of § 3501).

100 FED. R. EVID. 402.

101 H.R. REP. No. 650, 93d Cong., 1st Sess. 7 (1973).

102 *Id.*

repeal the Fourth Amendment exclusionary rule, Rule 402 should not be read as having done so, whether the rule is constitutionally provided or is a matter of federal common law.

It would appear, however, that the statutory language here is sufficiently unambiguous that it should be regarded as conclusive absent "a clearly expressed legislative intent to the contrary. . . ."[103] Common law rule making to exclude relevant evidence is surely not rule making "pursuant to statutory authority." Even if we were to turn to the legislative history, it is unclear how it should cut. The Congress was probably proceeding on the widely held view that the Fourth Amendment exclusionary rule *is* provided by the Constitution. It is not, then, surprising that the statute as written should be inconsistent with the survival of a common law exclusionary rule and that there should be no note in the legislative history of that consequence. I conclude that Rule 402 is a substantial obstacle to the current plausibility of Monaghan's constitutional common law theory.[104]

There are additional and more fundamental considerations that press against the acceptance of the common law theory even if it were to survive Rule 402. The constitutional common law theory would contribute to saving the exclusionary rule only if it could supply a rational and principled explanation of the proposed status of constitutional common law. What is needed is a foundation for such law in a specific implied power of the federal courts to make common law. For that to be the case, in turn, constitutional common law must have significant similarities to traditional categories of common law. That is, the constitutional foundations for the federal courts to make such common law as they are authorized to make must extend far enough to underlie this new species of common law.

The Court's discussions of its common law authority, post-

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103 Reves v. Ernst & Young, 113 S. Ct. 1163, 1169 (1993) (quoting United States v. Turkette, 452 U.S. 576, 580 (1981) and Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

104 It should be noted that Monaghan was unable to consider the effects of Rule 402 on this theory at the time he set it out. The Federal Rules of Evidence were enacted, with the crucial amendment, after the publication of his article. It could be argued that constitutional common law is "provided" by the Constitution, after all, not in the sense of being "required," but rather of being "inspired" and "authorized." *See* Monaghan, *supra* note 48, at 2-3. But if the Court is constitutionally authorized to make a rule or rules in support of the Fourth Amendment, then the Constitution provides no specific rule. The logic of Rule 402, as amended by Congress, was to cut off precisely the sort of independent rule making initiative that would be represented by reading "provided" broadly to include the making of federal common law inspired and authorized by the Constitution. FED. R. EVID. 402.

Erie,[105] do not suggest that the authority is expansive. The Court insists that "instances where we have created federal common law are few and restricted."[106]

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.[107]
>
> The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.[108]

Can the exclusionary rule be put into, or near, the traditional categories of federal common law? Congress clearly did not authorize the making of federal common law in the instance of the exclusionary rule. In fact, Rule 402,[109] at the very least, narrowed the Court's authority to exclude relevant evidence.

The other category of traditional federal common law is the common law of "uniquely federal interest."[110] Clearly the exclusionary rule is not a matter of admiralty, international disputes, or disputes between states. These categories are not quite exhaustive of traditional uniquely federal interest cases, however. There are also cases where "the authority and duties of the United States as sovereign are intimately involved,"[111] among them contracts to which the United States is a party,[112] and matters affecting military procurement or other government projects, and civil liability of federal officials arising from their duties.[113]

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105 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

106 Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

107 Texas Industries v. Radcliff Materials, 451 U.S. 630, 640 (1981) (footnotes omitted).

108 City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981).

109 *See supra* notes 100-101 and accompanying text.

110 *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (water apportionment of interstate stream is a question of federal common law); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal common law governs issuance of commercial paper by the federal government).

111 Texas Industries, 451 U.S. at 641.

112 Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

113 Carlson v. Green, 446 U.S. 14, 24 (1980); Wheeldin v. Wheeler, 373 U.S. 647, 664 (1963).

There is surely a respect in which deterring violations of the Fourth Amendment is a federal interest, indeed a federal interest of the most pressing sort. It is not however *uniquely* federal within the meaning of these cases.[114] It is not an interest in carrying on the business of federal governance.

If the proposed constitutional common law fails to fit the existing federal common law categories, perhaps it at least shares certain broader characteristics with federal common law. The best arguments that Monaghan makes that rules such as the exclusionary rule are similar to recognized exercises of the federal common law authority are first, that such rules fall within a special institutional competence of the Supreme Court and, second, that there is an overriding need for national uniformity with respect to the mechanisms of enforcement of constitutional rights. These arguments do track aspects of the traditional bases for identifying a rule of decision as appropriately one of federal common law.[115]

As Monaghan rightly observes, as a final and frequent interpreter of the Fourth Amendment, the Supreme Court has a special competence to establish supporting law that is congruent with Fourth Amendment doctrine. There is, however, another side to the exclusionary rule. Whether a *Calandra-Leon* exclusionary rule is desirable is a highly empirical question of costs and benefits.

To determine how a deterrent rule fares against its competitors, one must determine how much conduct would be deterred by the rule, how serious the conduct is, what an adequate level of deterrence is, what the costs of achieving that level of deterrence would be, what alternative control devices there are, and what their relative costs would be. All of these matters can be expected to differ from state to state.

It seems difficult to argue that the Supreme Court could better perform this empirical analysis than the particular state legislature or even the state courts. It would be especially hard to argue with respect to a state that took the pure deterrence account of the exclusionary rule seriously, and fashioned alternative devices for controlling Fourth Amendment violations. The special competence of the Supreme Court when it comes to constitutional values pales into insignificance upon a close look at the empirical side of a rule in-

[114] The values of the Fourth Amendment are values of the states, as well as the national government, both through the Fourteenth Amendment and because most or all of the states have parallel provisions in their own constitutions. *See, e.g.*, ALASKA CONST. art. I, § 14; CAL. CONST. art. I, § 13; LA. CONST. art. I, § 5; N.Y. CONST. art. I. § 12; WIS. CONST. art. I, § 11.

[115] *See generally* Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1530-31 (1969).

tended to deter local misconduct. The implicit contingent enforcement clause theory also requires the Court to consider these empirical matters. My theory parts ways with the common law theory, however, in that it would give deference to, rather than automatically displacing, state law.

Monaghan also argued that concern for national uniformity supports the common law theory.

> As a general matter, it does not appear appropriate that federally guaranteed rights, particularly when their basis is constitutional, should have materially different dimensions in each of the states when both the source of the right and any ultimate interpretation is unitary.[116]

A purely deterrent exclusionary rule, however, does not define the "dimensions" of the rights guaranteed in the Fourth Amendment. What would be a matter of the dimension of the rights would be an exclusionary rule understood as a corollary of those rights or as a remedy personal to the rights holder. As understood by the Court, the exclusionary rule is merely a means to encourage executive compliance. The only relevant "dimension" of the Fourth Amendment rights in question, then, is how well they are enforced. It is desirable that measures be put into place to protect against Fourth Amendment violations. But why is it important that the measures everywhere be the same? If one measure works better in one state and a second in another state, what gain outweighs the loss of imposing the less effective measure on one of the two? What is required is uniformity of effectiveness, not uniformity of means.

The federal common law theory, then, even if it were compatible with Federal Rule of Evidence 402, would have little to recommend it. The exclusionary rule does not fit into any of the traditional categories for which the post-*Erie* Court has found a constitutional authority to make federal common law. Moreover, the exclusionary rule is not a good functional fit with federal common law. In a conflict between the states and the Courts as to which is better equipped to make the factual determinations involved in structuring a purely instrumental enforcement policy for the Fourth Amendment, the states seem better positioned. That different states employ different methods is unproblematic so long as an acceptable minimum level of compliance with the amendment is uniformly maintained.

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[116] Monaghan, *supra* note 48, at 19.

B. THE REMEDIAL AUTHORITY THEORY

As Professor Beale notes, the exclusionary rule is remedial "in the sense that it comes into play only where there has been a violation of the Fourth Amendment."[117] She argues from the line of cases initiated by *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*[118] that "when the Constitution has been violated, the constitutional and statutory authority of the federal courts authorizes the formulation of an appropriate judicial remedy."[119] She concludes that the exclusionary rule is an instance of the Court's judicial power as conferred by Article III and statutes.

On this theory the exclusionary rule may well still count as federal common law. It surely will in a sufficiently broad sense of "common law." The explanatory power of the theory, however, lies not in the common law authority, the general conditions on which it is appropriate for a federal court to make common law, but upon a specific authority to supply remedies.

This theory also should be distinguished from *Mapp*'s essential deterrent sanction argument, and the variant of that argument that I have developed in this article. On those arguments, the Court's power to enforce the Fourth Amendment flows not from the general provisions of Article III, but from the Fourth Amendment itself.

As a defense of the exclusionary rule, the remedial authority argument has two areas of vulnerability. First, it may conflict with Rule 402 in the same way that the common law theory does. Second, although the exclusionary rule is remedial in Beale's broad sense, it is, on the *Calandra-Leon* view, not remedial in the sense of *Bivens*.

There is no statutory authority to exclude evidence gathered in violation of the Fourth Amendment as a remedy for such violations. The Court's promulgation of a rule to create such a remedy, then, would appear to run counter to Rule 402—on the assumption that the Constitution does not itself provide for exclusion. Suppose that the grant of the Article III judicial power included a grant of a remedial authority broad enough to encompass the exclusionary rule as a Court-created remedy. Even then it is doubtful that the authority could survive Congress's attempt to withdraw it in amending and enacting Rule 402. Congress has the power pursuant to Article III, Section 2 to regulate the Court's appellate jurisdiction.[120]

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[117] Beale, *supra* note 94, at 1495.

[118] 403 U.S. 388 (1971).

[119] Beale, *supra* note 94 at 1495.

[120] U.S. CONST. art. III, § 2 ("the supreme Court shall have appellate Jurisdiction,

If it could survive the challenge of Rule 402, the remedial authority theory would run into a deeper problem. Although the Court surely has some remedial authority, there is no very good reason to believe that it has the authority to fashion the sort of remedy that the exclusionary rule is on the post-*Calandra* understanding of that rule.

Bivens provided money damages for a victim of a Fourth Amendment violation. Its progeny extend the availability of that remedy.[121] There is language in these cases that suggests that damages are just one of the remedies that a federal court might order in an appropriate case.[122] Making the questionable assumption that *Bivens* itself is still doctrinally sound,[123] its extension to the remedy of exclusion of evidence does not seem an enormous leap.[124]

What does require a good deal of spring in the legs is crossing the gulf from a remedy sought by a plaintiff who is before the court to a remedy sought as a matter of systemic deterrence. The teaching of *Calandra* and *Leon* is that the criminal defendant has no personal right to the exclusion of the evidence. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . ."[125] This was, of course, precisely the purpose of the remedy in *Bivens*.

Redressing the injuries of litigants is traditionally within the power of courts in the common law tradition. It does not follow from that fact that it is within the Article III judicial power. It is, however, not an extravagant proposition that such authority was within the judicial power or that it was granted by Congress along with the authority to decide federal question cases. To have the

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both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make").

121 *See* Bush v. Lucas, 462 U.S. 367 (1983) (First Amendment clause discussed in dictum); Carlson v. Green, 446 U.S. 14 (1980) (Due Process/Equal Protection Clause, Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment Due Process Clause).

122 Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") (footnote omitted). *See also* Dooley v. United States, 182 U.S. 222 (1901).

123 *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 50 n.213 (1985) ("[B]oth *Bivens* itself and the academic commentary on *Bivens* rely heavily on the Court's presumption in favor of implied statutory remedies evidenced in [*J. I. Case Co. v.*] *Borak* [377 U.S. 426 (1964)]. The Court's subsequent disavowal of *Borak* thus would seem to call into question the doctrinal underpinnings of *Bivens*.").

124 Bush, 462 U.S. at 374 n.12 (citing Weeks v. United States, 232 U.S. 383, 398 (1914), as authority for the proposition that the Court has power to fashion nonstatutory remedies for constitutional violations).

125 United States v. Calandra, 414 U.S. 338, 347 (1974).

power to decide cases is to have the power to provide at least some reasonable menu of remedies to litigants.

Enforcing a federal right by deterring future violations is, however, a different matter. The point of the *Calandra-Leon* exclusionary rule is to affect future police activity by punishing the prosecution in the case before the court. The criminal defendant is the beneficiary only because his benefit is the obverse of the prosecution's punishment. This is enforcement of the Fourth Amendment, but it is not intended to remedy the instant violation.[126]

No reasonable inference can be drawn from the language of Article III for the proposition that the Court possesses the broader enforcement power necessary for promulgating an instrumental exclusionary rule. Nothing in the case law requires that there be such an Article III enforcement power.

Civil rights cases sometimes give rise to particularly broad and detailed injunctions. These "structural injunctions" are intended to

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126 It might be objected, on behalf of the remedial theory, that I have created too great a gulf between the exclusionary rule and more ordinary remedies. If the sole purpose of criminal punishment were deterrence it would still be the defendant before the court who was being punished. Similarly, the deterrent purpose of the exclusionary rule is served by giving the defendant the remedy of suppression. It is, as *Calandra*, 414 U.S. at 338, and United States v. Leon, 468 U.S. 897 (1984) teach, not a remedy to which the defendant is constitutionally entitled, but, once established, it is a remedy to which the defendant has a clear legal claim.

The fact that the Court has retained the successor notion to Fourth Amendment "standing" arguably shows that the exclusionary rule did not lose touch with the ordinary logic of a judicial remedy when interpreted in *Calandra* to have a deterrent function. Suppression is not available to a defendant unless the "disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Rakas v. Illinois, 439 U.S. 128, 140 (1978). *See* United States v. Padilla, 113 S. Ct. 1936 (1993). The fruits of even egregious government misconduct may be used against a third party. United States v. Payner, 447 U.S. 727 (1980). From this it would appear that the Court understands its authority to exclude evidence to be limited to those cases in which it provides a remedy to a litigant who has been aggrieved by the constitutional violation.

In fact, however, it is the treatment of exclusionary rule "standing" that makes it clear just how far the rule is from being an ordinary remedy for the defendant. The rule precluding a third party from suppressing evidence is itself understood by the Court as an epiphenomenon of deterrence. Because the victim of the unlawful search is almost always a criminal target as well, there is sufficient deterrence, according to the Court, so long as the evidence is excluded from the criminal trial of victims. Any broader exclusion would bring costs for which there would be insufficient additional deterrent benefit. *See* Rakas, 439 U.S. at 137-38; Alderman v. United States 394 U.S. 165, 174-75 (1969). By implication, the Court thinks that whatever its authority to exclude, that authority would extend to third party cases if the contingencies of deterrence so dictated.

The defendant does have a legal right to exclusion, but nothing associated with his rights—redress, restitution, compensation, future protection—is a controlling variable. The controlling variable is utilitarian: the deterrence of future violations. Its intended beneficiary is the public at large. That the defendant incidentally benefits does not convert the exclusionary rule into a remedy strictly so called.

benefit a large class of persons injured by the effects of a constitutional deprivation, in particular by the vestiges of segregation. Even in these cases, however, it is the plaintiff class for whom the injunction serves as a remedy. If the court is looking to a wider population, it can still justify its action in terms of a remedy for parties before the court.

Moreover, in these structural injunction cases the Court has not located its remedial authority exclusively in Article III. States that are in violation of the Fourteenth Amendment Equal Protection Clause have affirmative duties to correct the violations and their consequences.[127] The court substitutes itself for the state to take the affirmative steps that the state has failed to take. It is, in effect, an implicit enforcement clause in the Equal Protection Clause of the Fourteenth Amendment that accounts for the special nature of the broadest civil rights injunctions. The existence of these cases does not, then, illustrate an Article III authority that goes beyond *Bivens* remediation. Even if there were an Article III or statutory authority to provide in the federal courts a "remedy" in the interest of nonlitigants, such authority would surely not extend to the state courts.

C. THE SUPERVISORY AUTHORITY THEORY

Because it will not support the exclusionary rule in the state courts, few friends of the exclusionary rule are satisfied with the supervisory authority theory. As is the case with the other theories considered in this part, the supervisory authority theory appears to run afoul of Rule 402. More fundamentally, there is reason to doubt that the supervisory authority could extend as far as the exclusionary rule.

It is uncontroversial that the Congress can override the Court's exercise of its supervisory authority. If the exclusionary rule is such an exercise, then Rule 402 would amount to an override. The authority in question was not itself the subject of a statutory grant, as it would have to be for a supervisory authority exclusionary rule to survive Rule 402.

Looking to the core of the supervisory authority theory, it is plausible that courts empowered to decide cases in law and equity should have some authority to promulgate rules for the fair and effi-

[127] Bazemore v. Friday, 478 U.S. 385, 417-18 (1986) (per curiam) (state has obligation to eradicate salary disparities based on race); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) ("Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment."); Green v. County Sch. Bd., 391 U.S. 430, 437-38 (1968) (referring to affirmative duty announced in Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II)).

cient adjudication of cases. The question is whether this implicit judicial power extends so far as to support rules intended to deter executive agents from misconduct. Professor Beale has argued that it does not:

> [T]he federal courts' implied constitutional authority encompasses the power to formulate procedural rules only in a narrow sense: that is, technical details and policies intrinsic to the litigation process, not the regulation of primary behavior and policies extrinsic to the litigation process. . . . [I]t does not encompass the authority to suppress evidence because of extrajudicial misconduct by the government.[128]

The Reagan-Bush Justice Department echoed Beale's language, arguing that, if there is any constitutionally authorized supervisory authority, it is limited to rules "that regulate technical details and policies intrinsic to the litigation process, in the interest of enhancing the fairness, reliability and efficiency of that process."[129]

Case law does not, however, foreclose the possibility that the supervisory authority extends to the regulation of primary behavior in support of the Fourth Amendment. The Court has simply never found the occasion to address the boundaries of the authority. This author would pose the issue as how much is implicated by a "necessary and proper" clause implicit in Article III. Supervisory authority that extends as far as a purely instrumental exclusionary rule would result from placing more emphasis upon "proper" than "necessary." In the end, the more aggressively normative school of constitutional interpretation will have less trouble finding a strong supervisory authority in Article III than will more cautious modes of interpretation. This author concludes that if the supervisory authority theory could survive the Rule 402 challenge, then it is an available option on some modes of constitutional interpretation, so long as the interpreter is content with an exclusionary rule limited to the federal courts and vulnerable to Congressional veto. Most interpreters for whom the supervisory authority remains an option should, I think, find it more appealing to conclude that there is an enforcement clause implicit in the Fourth Amendment that gives rise, under the right conditions, to an exclusionary rule in both the federal and state courts.

V. CONCLUSION

In announcing the application of the exclusionary rule to the states in *Mapp,* Justice Clark set out three independent bases of con-

[128] Beale, *supra* note 94, at 1465.
[129] Justice Department, *supra* note 8, at 811.

stitutional authority in support of the rule. The rule was implicitly part of the Fourth Amendment because: (1) it was a personal privilege essential to the meaning of the amendment to the victim of its violation, (2) admission of unconstitutionally seized evidence against the victim of that seizure was itself an assault on the privacy interests protected by the amendment, and (3) the rule was a deterrent sanction essential to the amendment's meaning for society as a whole.

These theories in their original form never enjoyed the support of more than four justices. The first two theories, the personal privilege and extended violation theories, were wholly undermined by the Burger Court opinions in *Calandra* and *Leon*. The new exclusionary rule was functionally a purely instrumental and purely deterrent rule. It was not a part of the Fourth Amendment nor even a "corollary" of that amendment.

The Reagan-Bush Justice Department threw down the gauntlet to the Court over the Court's constitutional authority to promulgate an instrumental exclusionary rule for either the federal or state courts. This article is devoted to finding the best answer to that challenge, and to assessing its merits.

My starting point is the only *Mapp* argument that survives the later case developments. The "essential deterrent sanction" argument survives only in a domesticated form. Exclusion is essential only in that there must be some effective means of controlling violations of the Fourth Amendment. If, under the circumstances in which we find ourselves, the exclusionary rule does so effectively and efficiently, and if violations would otherwise be intolerable, then the exclusionary rule is constitutionally required.

In short, the post-*Mapp* doctrine transforms the essential sanction argument into a form consistent with Professor Kaplan's vision of a contingent exclusionary rule. It has been shown that there is nothing logically objectionable in this contingent violation theory of the exclusionary rule. This article has also filled in the gap in Kaplan's theory by detailing how it is that the Constitution gives rise to a contingent exclusionary rule. The most natural possibility, and the one most nearly congruent with *Mapp*, is that there is a contingent enforcement clause implicit in the Fourth Amendment itself.

This implicit enforcement clause version of Kaplan's contingent violation theory is reasonably consistent with existing case law. Its soundness as an interpretation of the constitutional text is more open to differences of opinion. Most aggressively normative interpreters should find the implicit enforcement clause theory appeal-

ing. Originalist and more narrowly textualist interpreters are not as likely to believe that there is such a clause implicit within the amendment. Stare decisis might, however, be sufficient to bring many of these more cautious interpreters on board. It is arguable that stare decisis of the *Casey* type would preserve just so much of *Mapp* as coincides with the implicit contingent enforcement clause theory.

There are three other candidates for saving the exclusionary rule. Closer inspection reveals that the constitutional common law theory, remedial authority theory, and supervisory authority theory are unacceptable or at least less appealing than the implicit enforcement clause theory. The version of Kaplan's contingent violation theory detailed in this article, then, is the best way of saving the exclusionary rule without entirely rejecting the Court's post-*Mapp* exclusionary rule jurisprudence. It may be jolting to the usual lawyerly conception of criminal procedure that the exclusionary rule should be subject to replacement by adequate substitutes through congressional or state action. On reflection, however, its replaceability by a superior cost-benefit approach is a defining virtue of a utilitarian rule, and the Court has been telling us at least since *Calandra* that this is just what the exclusionary rule is.

As the reader will have sensed, I am less than enthusiastic about my own best solution. I have doubts as to both *Casey* stare decisis and those approaches to constitutional interpretation sufficiently normative to find an enforcement clause implicit in the Fourth Amendment. This is not the place to expand upon those doubts. For those who have similar doubts, this article raises the possibility that the best way of saving the exclusionary rule consistent with current Supreme Court doctrine is not good enough.