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# CRIMINAL LAW

## LIBERALS, CONSERVATIVES, AND THE EXCLUSIONARY RULE\*

LANE V. SUNDERLAND\*\*

### I. INTRODUCTION

The rule requiring exclusion of illegally seized evidence from judicial proceedings has been analyzed, litigated, and otherwise written about to such an extent that ample justification must accompany yet another treatment.<sup>1</sup> Even the most distinguished commentators and judges characteristically assess the doctrine of exclusion from a short or medium-range policy perspective. Ordinarily the policy analysis concentrates on whether or not the exclusionary rule deters unconstitutional police behavior. Considering that the doctrine as yet lacks a clear and persuasive constitutional mandate, it is understandable that courts and commentators have relied extensively on empirical studies of deterrence to buttress their respective positions.<sup>2</sup>

One of the most thorough and frequently cited articles discussing the deterrence rationale is Dallin Oaks' piece, *Studying the Exclusionary Rule in Search and Seizure*.<sup>3</sup> His analysis focuses on the "factual justification" of deterrence after summarily acknowledging the concept of judicial integrity, the doctrine that the judiciary ought not serve as an accomplice in the executive branch's disobedience of the law.<sup>4</sup> The article's abandonment of considerations of constitutional principle, the dilution of

the judicial integrity argument, and the elevation of deterrence as the dispositive consideration are characteristic of the literature and caselaw.<sup>5</sup>

Judges and commentators not relying on deterrence studies generally have advanced partisan arguments which are unsound in theory or principle. On the one hand, some opposing exclusion view it as a liberal device for coddling criminals and as an unwelcome constraint on police enforcement of the criminal law. On the other hand, as Oaks points out, the rule's supporters assert "the deterrent effect of the rule, and then have supported that effect by recourse to polemic, rhetoric, and intuition."<sup>6</sup> An attempt to go beyond the polemic, rhetoric, and intuition of both liberal and conservative quarters justifies the present inquiry.

Analysis of certain of the empirical studies in this article will reveal what they have to teach and determine how this affects the exclusion controversy. Wayne LaFave's encyclopedic treatise on search and seizure summarizes the deterrence controversy in this way: "there is some evidence available as to when the exclusionary rule does not deter and also some evidence indicating that it sometimes does deter."<sup>7</sup> Even if the studies are inconclu-

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<sup>1</sup> The exclusionary rule affects illegal activities other than those related to search and seizure, the object of this inquiry. Exemplary of other applications of the exclusionary rule are confessions, *Miranda v. Arizona*, 384 U.S. 436 (1966); counsel, *Brewer v. Williams*, 430 U.S. 387 (1977); lineups, *United States v. Wade*, 388 U.S. 218 (1967); identifications, *Gilbert v. California*, 388 U.S. 263 (1967); and a denial of due process through police methods which shock the conscience, *Rochin v. California*, 342 U.S. 165 (1952).

<sup>2</sup> See section IV *infra*.

<sup>3</sup> Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

<sup>4</sup> *Id.* at 668-72.

<sup>5</sup> In his extended treatment of search and seizure, Professor Wayne R. LaFave begins his three volume treatise on search and seizure with a chapter on the exclusionary rule. The first sentence of this chapter on exclusion characterizes the exclusionary rule as a remedy for police violations of the fourth amendment. 1 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 3 (1978).

<sup>6</sup> Oaks, *supra* note 3, at 754-55.

<sup>7</sup> 1 W. LAFAVE, *supra* note 5, at 26. Political scientist Steven R. Schlesinger argues in a recent article, for example, that "the burden is on proponents of the exclusionary rule to show that it is an effective deterrent." Because "the current Supreme Court considers deterrence to be the primary justification for the rule," Schlesinger argues that if "the rule is not an effective deterrent, then it is appropriate for the Court to reconsider its position." He attempts to show that "according to the available empirical evidence, the rule is not an effective deterrent against police misbehavior." Schlesinger, *The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?*, 62 JUDICATURE 404 (1979). In a companion article, polit-

sive, they must be examined to determine their appropriate role in deciding the exclusionary controversy.

Some analysts go beyond the issue of deterring illegal police conduct in justifying exclusion. Characteristically these commentators and judges emphasize the consideration of judicial integrity although they rarely define the concept. If they do define it, they ordinarily fail to explain the reason for its being a constitutional requirement. The most frequently adduced argument, however, is that the court must avoid tainting its integrity by participating in the illegal behavior of other branches of government.<sup>8</sup>

The caselaw, however, has supplanted the concept of judicial integrity with deterrence as the sole judicial rationale for exclusion. Having been collapsed into a deterrence rationale by a majority of the Court, the concept of judicial integrity has lost its independent potency. This interpretation of judicial integrity appears to complete the transformation of the exclusionary rule from a doctrine derived, albeit inadequately, from constitutional principle, to a rule based on the judges' assessment of the policy consideration of deterrence.

The desirability and consequences of this transformation constitute important justifications for further inquiry into the exclusionary rule. A number of other reasons justify further inquiry. The most obvious emanates from a justifiable concern over characteristics of our criminal justice system potentially contributing to an increasing crime rate. Some commentators refer to the exclusionary rule as one of the "legal technicalities" which pander to criminals and may result in the failure to convict those guilty of crimes.<sup>9</sup> The moral indignation underlying the charge of coddling criminals understandably increases both with the severity of the crime and with the technical character of the "constable's blunder."

Although recent crime statistics underscore the threat to the public safety which Thomas Hobbes

so harshly emphasizes,<sup>10</sup> it would be grossly precipitous to attack exclusion on the grounds of security, or as a liberal device to free criminals, without recognizing that the exclusionary rule may be inseparably bound to a constitutional government's effecting the great ends of freedom. As John Locke recognizes, the threat to our personal freedom and security lies not only with other individuals acting in the state of nature, but even more profoundly with tyrannical government.<sup>11</sup> Thus, the question of exclusion is not one of simply pitting rampant crime and the exclusionary rule against civic order, security, and safety.

At one level, an inquiry into the constitutional requirements of the exclusionary rule is an inquiry into the general question of government under a written constitution and the concomitant implication for a theory of constitutional interpretation. If one takes seriously a written constitution as a repository of individual rights and a grant of only limited powers to government, then it requires a systematic argument to show that the principles of this Constitution mandate the exclusionary rule. The most important aspect of this article is demonstration of constitutionally based rationales for exclusion. The entire analysis is informed by and directed toward this thesis.

The article will proceed from an examination of liberal defenses to conservative criticisms of exclusion. Although these arguments may provide a valuable perspective, they are neither dispositive nor rooted in constitutional principle. Although it is necessary and useful to analyze certain of the empirical studies used by courts and commentators in reliance on deterrence as the dispositive issue, such studies are insufficient to answer the deterrence question. This article will advance the argument that deterrence as the dispositive question must yield to constitutional principle to determine whether the exclusionary rule should be retained or abolished.

## II. LIBERALS, THE DUE PROCESS MODEL, AND EXCLUSION

### A. THE LIBERAL CREDO AND PACKER'S DUE PROCESS MODEL

The contemporary debate over the exclusionary rule is representative of a more general debate in American criminal and constitutional law. Its roots grow out of a general argument over the causes of

ical scientist Bradley Canon, who has done empirical research of his own on the deterrent effect of exclusion, is more guarded than Schlesinger. Canon concludes: "Existing data at the present time make it impossible to establish empirically a universal 'yes, it works' or a 'no, it doesn't work' conclusion—or even anything approximating such a conclusion." Canon, *The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police?* 62 JUDICATURE 398 (1979).

<sup>8</sup> See generally Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129, 1133 (1973).

<sup>9</sup> See section III *infra*.

<sup>10</sup> T. HOBBS, *LEVIATHAN* ch. XIII (London 1651).

<sup>11</sup> J. LOCKE, *Second Treatise* § 137 in *TWO TREATISES OF GOVERNMENT* (London 1690).

crime, the appropriate governmental responses to crime, and the relationship of sound governmental policy to constitutional requirements and defendants' rights. Too often, the academic and judicial commentary on exclusion is unduly narrow and does not adequately acknowledge the broader issues underlying exclusion. This neglect narrows the focus of the exclusionary argument and also makes less likely the raising of the argument beyond the poles of its ideological parents, the doctrines of liberalism and conservatism, to a higher plane of constitutionalism. In order for the argument to progress to the level of constitutional analysis, it is necessary to recognize and examine the broad ideological positions on crime and relate them to the controversy over exclusion. Recognition and clarification of exclusion's relationship to liberalism and conservatism are necessary in an attempt to transcend this bipolar partisanship and to achieve a principled analysis.

A well known spokesman for liberalism in recent years is Ramsey Clark, former Attorney General under President Lyndon Johnson.<sup>12</sup> Clark deals with several aspects of crime ranging from its nature and causes to the breakdown and reform of courts and prosecutors. In discussing the nature and causes of crime, he adopts the liberal postulate that criminals are products of the sociopolitical system:

If we are to deal meaningfully with crime, what must be seen is the dehumanizing effect on the individual of slums, racism, ignorance and violence, of corruption and impotence to fulfill rights, of poverty and unemployment and idleness, of generations of malnutrition, of congenital brain damage and prenatal neglect, of pollution, of decrepit, dirty, ugly, unsafe, overcrowded housing, of alcoholism and narcotics addiction, of avarice, anxiety, fear, hatred, hopelessness and injustice. These are the fountainheads of crime. They can be controlled. As imprecise, distorted and prejudiced as our learning is, these sources of crime and their controllability clearly emerge to any who would see.<sup>13</sup>

Social conditions produce victims who in turn violate the criminal law and are then subjected to the criminal process. It is not surprising that Clark objects to measures set forth to serve the ends of self-protection. A justice system based on self-pro-

tection is, according to Clark, a justice system based on fear, and fear is detrimental to true justice. Clark writes:

We are not yet so far from the jungle that self-preservation has ceased to be our basic instinct. Crime threatens self-preservation and stimulates age-old emotions. The most dangerous of these is fear. Reason fades as fear deprives us of any concern or compassion for others. When fear turns our concern entirely to self-protection, those who must have our help if crime is to be controlled lose that chance. Finally, fear can destroy our desire for justice itself. Then there is little hope. We are prepared to deny justice to obtain what unreasoning, overpowering emotion falsely tells us will be security. Arm yourself, suppress dissent, invade privacy, urge police to trick and deceive, force confessions, jail without trial, brutalize in prisons, execute the poor and the weak. Due process can wait—we want safety! Naked power becomes sovereign. Only force can rise to meet it. The end is violence.<sup>14</sup>

Clark argues that by exercising the requisite moral leadership, the law can make a major contribution to erasing crime and removing the false conflict between liberty and safety. Greater freedom flowing from nonrepressive law will result in greater human dignity and decreased crime. On the other hand, as Clark writes, "[m]isused, the system of criminal justice can destroy liberty and cause crime."<sup>15</sup> Implicit in this model is a general distrust of the motives and competency of the police officer. Accordingly, proponents of liberalism advocate narrowing the range of police discretion.

From this liberal perspective it is an easy step to what Professor Herbert Packer refers to as the "due process model" of criminal justice administration, a model he compares and contrasts with the "crime control model."<sup>16</sup> Packer identifies the first premise of the due process model as a distrust of the informal, nonadjudicative factfinding process resulting from its potential for error. This distrust leads to insistence that an adjudicative adversary process is necessary at the factfinding stage. An impartial tribunal would conduct the proceedings and provide an opportunity for the accused to discredit the case against him. Because of its emphasis on avoiding factual errors, the demand for finality is very low in this model.<sup>17</sup>

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* at 20, 116, 274.

<sup>16</sup> Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

<sup>17</sup> *Id.* at 14. Packer suggests that according to this model, some subsequent scrutiny or review of the formal

<sup>12</sup> R. CLARK, *CRIME IN AMERICA* (1970). I am indebted to Professor Peter Schotten for his helpful comments regarding exclusion and the development of arguments contained herein, especially those in sections II and III.

<sup>13</sup> *Id.* at 17-18.

The due process model values the individual and thus seeks to place limitations on the exercise of official power. The model views discretion in the criminal justice system as particularly subject to abuse and therefore acknowledges guilt not simply on a factual determination of probability, but only if the factual determination is made by officials carrying out duly allocated powers in a procedurally regular manner. Proponents of this model must concede that the controls and safeguards necessary to prevent such official oppression result in substantial diminution in the efficiency of the criminal process.

Among the rules safeguarding the process, the concept of presumed innocence in the due process model qualifies the use of the criminal sanction against the individual by allowing defenses which are unrelated to factual guilt. This possibility of *legal* innocence expands when viewing the criminal process as the proper forum for correction of its own abuses. This strand of the model applies specifically to exclusion because of the reliability of the evidence which is suppressed in order to vindicate the rules of the criminal process. This suppression, of course, fatally impairs the process' efficiency.<sup>18</sup>

Another important plank in Packer's due process model is equality. In a nutshell, "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>19</sup> Packer emphasizes that since the government initiates the criminal process which may result in governmentally imposed deprivations, the public has an "obligation to ensure that financial inability does not destroy the capacity of an accused to assert what may be meritorious challenges to the processes being invoked against him."<sup>20</sup> This aspect of Packer's argument relates to the presumption of innocence and the various qualifying doctrines limiting use of the criminal sanction which this presumption requires. Assuming the desirability of these doctrines, the concept of equality requires that they apply to all and thus imposes further due process requirements on government, including

pre-eminently the right to counsel.<sup>21</sup> Right to counsel makes it much more likely that the qualifying and disabling doctrines will surface in the individual case.<sup>22</sup>

Another strand of thought implicit in Packer's due process model is "a mood of skepticism about the morality and utility of the criminal sanction, taken either as a whole or in some of its applications."<sup>23</sup> One element of this skepticism is the view of criminal law as hypocritical in both adhering to the outmoded concept of an individual able to choose freely whether to obey the penal code and punishing the psychologically and economically crippled. This skepticism also casts doubt on the view of law as an agent of education and deterrence and regards the failure to rehabilitate offenders as inhuman and wasteful. This view results in pressures to curtail the discretion surrounding the exercise of the power of the criminal process.<sup>24</sup>

A final facet of Packer's due process model is its effect on the role of the judiciary: "[b]ecause the Due Process Model is basically a negative model, asserting limits on the nature of official power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the Constitution."<sup>25</sup> Thus, actualization of the due process model is ordinarily accomplished by the judiciary's invocation of the Constitution and all that judicial interpretation of our fundamental law implies.<sup>26</sup>

The foundation of what this article refers to as "the liberal position" or "the liberal defense of exclusion" is implicit in more general terms in Clark's exposition of this position and in Packer's due process model. It will be argued that the most common liberal defenses of exclusion suffer from the same defects as do the more general statements of the liberal position. They all proceed from ideological presuppositions to their proposed constitutional policy rather than basing their recommendations on constitutional principle. The relegation of the Constitution to a position subservient to

<sup>21</sup> *Id.* at 19.

<sup>22</sup> *Id.* at 20.

<sup>23</sup> *Id.*

<sup>24</sup> Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 442-43.

<sup>25</sup> Packer, *supra* note 16, at 22.

<sup>26</sup> *Id.* at 22-23. Judicial pre-eminence is a consequence of the due process model. Packer recognizes the strength of this pre-eminence as being the appeal to the Constitution as the "last and overriding word." The weakness of the judicial sanction of nullity is that there may not be a willingness of those outside the judiciary to apply its negative prescriptions generally. *Id.*

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process should be available as long as alleged factual errors have not received an adjudicative hearing in a factfinding context.

<sup>18</sup> *Id.* at 17-18. Other rules safeguarding the process cover a wide range of matters such as jurisdiction, venue, statute of limitations, double jeopardy and considerations of criminal responsibility.

<sup>19</sup> *Id.* at 18 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

<sup>20</sup> Packer, *supra* note 16, at 19.

ideological presupposition is not, of course, the peculiar defect of liberalism. Conservatives, it will be shown, share this same defect. This subordination of the Constitution and its principles to policy preferences does not show serious regard for the principles of the Constitution nor for the view that the Constitution itself settles certain policy issues. If the Constitution has settled issues in the area under discussion, then subordination of the Constitution to ideological presuppositions reverses the proper relationship between the Constitution and public policy. The results of this reversing of the proper role will become evident as the various liberal and conservative arguments regarding exclusion are examined.

#### B. SPELLING OUT THE CONTOURS OF THE FOURTH AMENDMENT

The judiciary's invocation of the Constitution in Packer's due process model reflects the liberal credo of Ramsey Clark. Clark's emphasis on the necessity for government to "understand its role and adhere to that role with absolute fidelity" leads to an argument for substantial judicial involvement in protecting defendants' rights. Clark states his view of the matter plainly: "The truth is that the courts and primarily the United States Supreme Court have done more to right wrong, to perfect the system, to speed the process and to bring equal justice than the legislative and executive branches combined."<sup>27</sup> This plank of the liberal argument applies to the exclusion controversy insofar as exclusion of unconstitutionally seized evidence provides the occasion for judicial interpretation of the fourth amendment.<sup>28</sup> This aspect of the liberal argument, then, underscores exclusion as a device to raise questions of constitutionality which otherwise would not be adjudicated. As Packer recognizes, the exclusionary rule directs judicial attention to police practices and thereby aids in the development of comprehensive and clear fourth amendment standards.

Professor LaFave is a strong supporter of this view. He emphasizes the essential stimulus that exclusion has provided in elaborating fourth amendment requirements. Abandonment of exclusion, in his view, would mean a return to the situation existing prior to the 1960s when appellate courts received search and seizure issues only in appeals of tort actions against police officers. Among the disadvantages of this type of review are

barriers which limit appeals and the tendency of the civil suit context to divert attention from the nature of the search and seizure to the fairness of subjecting the officer to personal liability. LaFave sees the exclusionary rule as providing an opportunity for more cases to reach the appellate level and for appellate tribunals to face a variety of factual situations. By facing a greater number of cases, he argues, the appellate courts can better see the specific cases as part of a more complementary and rational whole.<sup>29</sup>

Other respected commentators likewise see utility in the rule's insuring judicial attention to the fourth amendment. Dean Paulsen sees the exclusionary rule as giving

every prosecuted person an opportunity to vindicate search and seizure principles for the benefit of all, insofar as violations of these principles have resulted in the production of evidence against the accused. The accused has a motive to challenge the police overreaching. He need not resort to another proceeding or hire another lawyer. The rule assures a great deal of judicial attention to these questions.<sup>30</sup>

The difficulty with the arguments of LaFave, Paulsen, and others supporting exclusion as an occasion for spelling out the contours of the fourth amendment is their failure to address the more fundamental question of whether the Constitution requires exclusion. These arguments view exclusion as a necessary means to articulate and actualize the content of the fourth amendment, yet the constitutional basis of exclusion itself remains largely unexamined. The desirability of the Court's spelling out the contours of the fourth amendment implies the more fundamental assumption of the propriety of exclusion as a consequence of judicial review. It is thus difficult to justify the Court's appointing itself to the task of spelling out the contours of the fourth amendment without the support of a generalized argument for judicial review and the consequences of this argument for exclusion.<sup>31</sup>

<sup>29</sup> LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 Mo. L. Rev. 566, 580-82 (1965).

<sup>30</sup> Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 260 (1961). Dallin Oaks asserts that the exclusionary rule "provides an occasion for judicial review" and "gives credibility to the constitutional guarantees." Oaks, *supra* note 3, at 756. Commentators correctly modify Oaks' position by recognizing that rather than being the occasion for or the cause of judicial review, exclusion is the effect of judicial review.

<sup>31</sup> See text accompanying notes 282-88 *infra*.

<sup>27</sup> R. CLARK, *supra* note 12, at 204.

<sup>28</sup> Oaks, *supra* note 3, at 756.

It is remarkable that the relationship of judicial review to exclusion and the fourth amendment has received so little attention from the judiciary. Chief Justice Warren's majority opinion in *Terry v. Ohio*<sup>32</sup> recognized the utility of exclusion in specifying the meaning of the fourth amendment: "[T]hus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents."<sup>33</sup> Justice Brennan, dissenting in *United States v. Calandra*,<sup>34</sup> sees this practical consideration as one justification for exclusion. His opinion quotes from Dallin Oaks: "It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights."<sup>35</sup> Unfortunately, neither of these opinions goes beyond the practical necessity for a mechanism to spell out the contours of the fourth amendment to a principled, constitutional argument for the exclusionary rule. Such probing would have been extremely helpful in illuminating the constitutional foundations of the exclusionary rule.

#### C. THE MAINTENANCE OF JUDICIAL INTEGRITY AND TRUST IN GOVERNMENT

A second aspect of Clark's liberal credo which applies directly to the exclusionary controversy is his insistence that government must act with integrity. He casts the law in a role of moral leadership which in turn may "permanently influence the conduct of its citizens." For a people to be free of crime, the government must act with integrity and fairness. Constitutional rights must be redeemed at all costs if our "system is to have integrity."<sup>36</sup> Packer incorporates the theme of judicial integrity in his due process model when discussing the doctrine of legal guilt. This doctrine requires that an individual not be held guilty of crime merely because reliable evidence indicates the probability of factual guilt: "he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to safeguard the integrity of the process are not given

effect . . ."<sup>37</sup> Packer's due process model draws this judicially relevant consequence from the doctrine of legal guilt:

Wherever the competence to make adequate factual determinations lies, it is apparent that only a tribunal that is aware of these guilt-defeating doctrines and is willing to apply them can be viewed as competent to make determinations of legal guilt. The police and the prosecutors are ruled out by lack of capacity in the first instance and by lack of assurance of willingness in the second. Only an impartial tribunal can be trusted to make determinations of legal as opposed to factual guilt.<sup>38</sup>

Clark's and Packer's considerations of governmental integrity clearly apply to the exclusion controversy. Clark's emphasis on law functioning in a role of moral leadership and the due process model's pointing to the integrity of the criminal process are central to the judicial integrity rationale as initially articulated by the United States Supreme Court.<sup>39</sup>

Perhaps the clearest statement of the judicial integrity rationale for exclusion is the necessity for exclusion of illegally seized evidence to preserve the judiciary's unblemished nature and to keep its actions beyond reproach.<sup>40</sup> Professor LaFave's brief treatment of judicial integrity emphasizes the doctrine's demand that courts not be accomplices in the willful disobedience of a constitution they are bound to uphold.<sup>41</sup> Oaks stresses "the impropriety of the lawgiver's forbidding conduct on the one hand and at the same time participating in the forbidden conduct by acquiring and using the resulting evidence."<sup>42</sup> He labels this justification as *normative* and juxtaposes it to the *factual* justification of deterrence, thus giving exclusion a two-pronged rationale.<sup>43</sup> Commentators invariably include the judicial integrity rationale in their discussions of exclusion. The difficulty with these commentators is their almost inevitable failure to probe the judicial integrity rationale's relationship (or lack

<sup>37</sup> Packer, *supra* note 16, at 16.

<sup>38</sup> *Id.* at 17.

<sup>39</sup> See *Elkins v. United States*, 364 U.S. 206, 222 (1960) (quoting *Olmstead v. United States*, 277 U.S. 438 at 470, 485 (1928) (Holmes & Brandeis, JJ., dissenting)). The Court's development of this doctrine in more recent cases has departed from the reasoning of Clark, Packer, and *Elkins*. See text accompanying notes 88-95 *infra*.

<sup>40</sup> Comment, *supra* note 8, at 1133.

<sup>41</sup> 1 W. LaFave, *supra* note 5, at 17.

<sup>42</sup> Oaks, *supra* note 3, at 668.

<sup>43</sup> *Id.*

<sup>32</sup> 392 U.S. 1 (1968).

<sup>33</sup> *Id.* at 13.

<sup>34</sup> 414 U.S. 338 (1974).

<sup>35</sup> *Id.* at 366 (Brennan, Douglas & Marshall, JJ., dissenting) (quoting Oaks, *supra* note 3, at 756).

<sup>36</sup> R. CLARK, *supra* note 12, at 206, 274.

thereof) to the Constitution and to examine its relevancy to the structure of government and the separation of powers.<sup>44</sup>

In order better to understand certain difficulties of the judicial integrity rationale, it is necessary to examine the dissenting opinion of Justice Brandeis in *Olmstead v. United States*,<sup>45</sup> an opinion often identified with the origins of the judicial integrity argument. In referring to exclusion of evidence gained by unlawful actions of government officers, Brandeis stated: "And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the government itself would become a lawbreaker."<sup>46</sup> This statement would seem to open the way for a profound discussion of judicial review and the relationship between the executive and judicial branches of government. While Holmes refers to this relationship in his companion dissenting opinion,<sup>47</sup> Brandeis's opinion does not follow this potentially fruitful line of inquiry. He instead pursued two different categories of justifications for exclusion.

First, Brandeis argued that exclusion "preserve[s] the judicial process from contamination."<sup>48</sup> According to this rationale, a court preserves its unblemished nature by keeping its official actions beyond reproach.<sup>49</sup> The argument is that admission of illegally seized evidence implies judicial approval of the illegal conduct and, in effect, makes the Court an accomplice to such conduct.

Second, as two commentators have recognized, the preservation of an untarnished character is an end in itself, but those articulating the judicial integrity rationale seem "driven to augment the appeal for rectitude as an end with an appeal for rectitude as a means—a means to avoid setting 'contagious' examples of lawlessness."<sup>50</sup> For Justice Brandeis, the rectitude he speaks of is a means to these posited ends: "to maintain respect for law" and "to promote confidence in the administration of justice."<sup>51</sup> Schrock and Welsh identify a weak-

ness of the integrity rationale understood as an end in itself, for "it asks us to be guided by what seems like judicial squeamishness" and such judicial squeamishness is not likely to prevail against arguments based on fear and other deeply rooted human responses to crime.<sup>52</sup>

There are other reasons that Brandeis's judicial integrity as an end in itself will not prevail in subsequent application of the exclusionary rule. Although the judicial integrity argument has an intuitively satisfying ring (especially to liberals), the argument loses much of its persuasiveness if exclusion is neither an implicit nor an explicit constitutional requirement. If no standard other than a self-enforced judicial sensitivity requires exclusion, then one may raise profound questions about the legitimacy of judicial enforcement of this subjective sense of integrity. Why should the country suffer possible bad consequences of a doctrine having no articulated constitutional foundation? The assertion of judicial integrity as an end in itself is incomplete. Without a sustained and careful explanation going beyond the arguments of Brandeis, the judicial integrity argument is reduced to a shallow defense which gives way—both in fact and in theory—to other considerations.<sup>53</sup>

Brandeis's opinion leads to another element of Clark's and Packer's analyses, that of maintaining trust in government. Clark states that if too many Americans believe government does not obey the law and if they do not trust the police—"then there is trouble."<sup>54</sup> In such a regime where trust in government is lost, the ruling principles become those of force and fear with an accompanying denial of freedom. Unenforced constitutional rights reflect a society which is lawless. The word of the law must be fulfilled if "our people are to respect the law."<sup>55</sup> Clark sees the fidelity of government to its lawful role as necessary to restore trust in government, especially the trust of its young people who have restless doubts about whether or not America's government intends to do justice.<sup>56</sup>

Packer's due process model pursues a similar line

<sup>44</sup> Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974), is a notable exception to this statement.

<sup>45</sup> 277 U.S. 438, 471 (1928).

<sup>46</sup> *Id.* at 483 (Brandeis, J., dissenting).

<sup>47</sup> *Id.* at 470 (Holmes, J., dissenting).

<sup>48</sup> *Id.* at 484 (Brandeis, J., dissenting).

<sup>49</sup> Comment, *supra* note 8, at 1133.

<sup>50</sup> Schrock & Welsh, *supra* note 44, at 265.

<sup>51</sup> 277 U.S. at 484 (Brandeis, J., dissenting).

<sup>52</sup> Schrock & Welsh, *supra* note 44, at 265-66.

<sup>53</sup> Brandeis's argument, of course, was not intended to be of constitutional dimension. 277 U.S. at 479 (Brandeis, J., dissenting). Nonetheless, the failure to anchor his opinion in either constitutional or statutory foundations leaves Brandeis open to the criticisms treated in the text accompanying notes 54-70 & 84-85 *infra*.

<sup>54</sup> R. CLARK, *supra* note 12, at 151.

<sup>55</sup> *Id.* at 206.

<sup>56</sup> *Id.* at 116.



of argument. He recognizes a sense of injustice which is aroused as the judicial process reveals deprivations of specific constitutional rights. More specifically, he states that judicial castigation of police or prosecutorial conduct accompanied by a failure to reverse a conviction "simply breeds disrespect for the very standards it is trying to affirm."<sup>57</sup>

Brandeis pursued exclusion's necessary role in maintaining trust in government when he turned to effects of exclusion to undergird his judicial integrity argument. Lacking a constitutional basis for judicial integrity as an end in itself, Brandeis posits two desirable effects of exclusion: the maintenance of respect for law and the promotion of confidence in the administration of justice. These familiar strands of the liberal credo, previously labeled "trust in government," are contained in the much quoted passage:

If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.<sup>58</sup>

As Brandeis moves from the assertion of a "contamination" theory of exclusion to the ends he posits as effects of exclusion, his opinion assumes at least arguable merit, but still contains no evident *constitutional* basis for exclusion.

The controversy, as outlined by the quoted opinion of Brandeis, suffers from two defects. First, it is not explicitly or implicitly of constitutional origin; it is an argument based on policy considerations, considerations which are evident in the liberal credo articulated by Clark and Packer. Second, the argument does not resolve the question of exclusion. As Schrock and Welsh emphasize, "If proponents of the exclusionary rule say judicial lawlessness is a societal menace, the rejoinder is, why not risk that menace rather than the far worse danger of lawlessness in the streets?"<sup>59</sup> Lacking a constitutional basis for his argument, Brandeis turns to the justification of liberal policy considerations. These liberal policy considerations, of course, have conservative rejoinders. As a consequence, one

would expect that a subsequent court would do one of several things. It may try to establish a substantial constitutional foundation for the rule which would give it both legitimacy and conclusiveness. Or, it may move to some other potentially conclusive factor(s) to resolve the controversy. Or, the question of exclusion might simply become one which is subtly dependent on changing personnel within the Supreme Court of the United States: when a liberal majority dominates, exclusion will prevail; when a conservative majority dominates, anti-exclusionary decisions will prevail. A systematic and thorough investigation of the caselaw is not necessary in order to trace the path of the judicial integrity argument and its transformation. Nonetheless, it is necessary to examine certain doctrinal descendants of *Olmstead* in order to understand the importance and contemporary status of the judicial integrity rationale.

The argument articulated by Brandeis in *Olmstead* was adopted by the Court in *McNabb v. United States*.<sup>60</sup> Frankfurter's opinion for the Court emphasized that "[q]uite apart from the Constitution, . . . we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them."<sup>61</sup> Frankfurter required exclusion in this instance not because of a constitutional violation, but because of the "flagrant disregard of the procedure which Congress has commanded." His objection to admitting as evidence statements made in illegal circumstances rested on two bases: it would make the courts "accomplices in willful disobedience of law" and it would "stultify the policy which Congress has enacted into law."<sup>62</sup> The first basis seems to point toward the judicial integrity argument. If so, it suffers from the various defects which were articulated earlier. The second basis—the stultifying of Congressional policy—leads toward a more substantive argument. But Frankfurter does not go beyond asserting that the avoidance of such stultification requires the judiciary to exclude evidence. Unfortunately, *Elkins v. United States*,<sup>63</sup> the case first invoking the term "the imperative of judicial integrity," left the matter at the citing and quoting of *Olmstead* and *McNabb* and thereby passed an opportunity to articulate a sub-

<sup>57</sup> Packer, *supra* note 16, at 55.

<sup>58</sup> 277 U.S. at 485 (Brandeis, J., dissenting).

<sup>59</sup> Schrock & Welsh, *supra* note 44, at 266.

<sup>60</sup> 318 U.S. 332 (1943).

<sup>61</sup> *Id.* at 341-42.

<sup>62</sup> *Id.* at 345.

<sup>63</sup> 364 U.S. 206.

stantive and meaningful alternative to the deterrence rationale on which it relied so heavily.

#### D. DETERRENCE OF UNCONSTITUTIONAL POLICE ACTION

Another aspect of Clark's liberal credo is its insistence that the various actors within the criminal process avoid conduct in excess of their authority.<sup>64</sup> The judiciary may perform an important role in maintaining this limit. Professor Packer's due process model reflects this precept by accepting a substantial diminution in the efficiency of the criminal process to prevent governmental oppression of the individual and to preserve procedural regularity.<sup>65</sup> This strand of both liberalism and the due process model clearly emerges in the exclusionary rule controversy and is familiar as the posited deterrent effect of exclusion.

Deterrence of police from illegal actions is the factor most discussed in recent judicial opinions and in literature supporting the liberal position of exclusion. As articulated by an ACLU brief, the exclusion of tainted evidence is "the only practical way to prevent wholesale violations" of the fourth amendment.<sup>66</sup> Deterrence, rightly or wrongly, has become the dispositive issue in recent cases decided before the United States Supreme Court.<sup>67</sup>

In light of the Court's recent concentration on deterrence, it is ironic that the early cases of *Weeks v. United States*<sup>68</sup> and *Boyd v. United States*<sup>69</sup> did not explicitly refer to deterrence of unreasonable searches and seizures. The thrust of the *Weeks* opinion was toward rendering the fourth amendment effective as a duty "obligatory upon all entrusted under our Federal system with the enforcement of the laws." The Court emphasized that failure to exclude evidence obtained by unreasonable police action would effectively sanction such proceedings and constitute "a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."<sup>70</sup>

The constitutional argument in *Weeks* is different in kind from the considerations of deterrence which appeared in the later case of *Wolf v. Colorado*.<sup>71</sup> The question under consideration in *Wolf* was this:

Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed [sic] to be an infraction of the Fourth Amendment as applied in *Weeks v. United States* . . . ?<sup>72</sup>

The Court held that "in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."<sup>73</sup> Justice Frankfurter did not regard admission of the unconstitutionally seized evidence as affirmatively sanctioning violation of fourth amendment guarantees. Rather, he viewed exclusion in the context of enforcing a basic right, checking arbitrary conduct, and affording a remedy against such conduct.<sup>74</sup> These statements, in conjunction with Frankfurter's interpretation of *Weeks*, departed from the constitutional basis of the rule in *Weeks*. Frankfurter did not regard the *Weeks* rule as derivative from the explicit requirements of the fourth amendment. Rather, he saw the *Weeks* exclusionary rule as a matter of judicial implication.<sup>75</sup> This interpretation of *Weeks*, an interpretation which will not bear close scrutiny, set the stage for Frankfurter's conclusion that while exclusion may effectively deter unreasonable searches, "it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective . . ."<sup>76</sup>

The dispositive argument of this policy oriented opinion seems to be that the fourteenth amendment due process clause requires an effective deterrent. *Wolf* leaves states free to determine whether or not to suppress the fruits of unreasonable searches and seizures, and presumably this decision will depend on the state's judgment of exclusion's effectiveness as a deterrent. Furthermore, Frank-

<sup>64</sup> R. CLARK, *supra* note 12, at 116.

<sup>65</sup> Packer, *supra* note 16, at 15-18.

<sup>66</sup> Respondent's Brief on Appeal at 18, In the Matter of the Deportation Proceedings of Emma Sandoval, A 20 824 162 (United States Department of Justice, Board of Immigration Appeals 1976).

<sup>67</sup> See, e.g., *Michigan v. DeFillippo*, 443 U.S. 31, 38 n.3 (1979); *Stone v. Powell*, 428 U.S. 465, 484 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347 (1974).

<sup>68</sup> 232 U.S. 383 (1914).

<sup>69</sup> 116 U.S. 616 (1886).

<sup>70</sup> 232 U.S. at 392-94.

<sup>71</sup> 338 U.S. 25 (1949).

<sup>72</sup> *Id.* at 25-26.

<sup>73</sup> *Id.* at 33.

<sup>74</sup> *Id.* at 28.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 31.

furter asserted that *Weeks* did not derive the requirement of exclusion in federal proceedings from the explicit mandates of the fourth amendment, but rather as "a matter of judicial implication."<sup>77</sup> Despite the ambiguity of this phrase, it is clear that *Wolf's* focus on deterrence as a primary issue and its characterization of *Weeks* introduced deterrence as the pivotal concept in the debate over the merits of exclusion.

*Elkins v. United States*<sup>78</sup> subsequently required exclusion as the only effective weapon available "to compel respect for the constitutional guaranty."<sup>79</sup> The Court assumed the deterrent effect of the rule and rejected the likelihood of proving empirically either that the rule hampers law enforcement or that it deters lawless searches and seizures. Nonetheless, it asserted that neither the work of the Federal Bureau of Investigation nor that of the federal courts has been hampered by the suppression doctrine. Quoting from a California case, the Court further noted that "other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers . . ."<sup>80</sup>

Absent alternative remedies, police continue to violate the fourth amendment and courts are forced to participate in the illegal conduct and effectively "condone the lawless activities of law enforcement officers."<sup>81</sup> The failure of these other measures thus presents the need for the practicable alternative of exclusion. In this context, exclusion emerges as a practical measure. While use of the word "condone" hints at the judicial integrity rationale, which the Court discusses at the conclusion of the opinion, the context and logic in raising "considerations of reason and experience"<sup>82</sup> indicate purely pragmatic concerns.

The landmark case of *Mapp v. Ohio*<sup>83</sup> invoked "judicial integrity" in the context of applying the exclusionary rule to the states through the fourteenth amendment. Although judicial integrity is important to the constitutional (as opposed to deterrence) considerations, the Court devoted almost no effort to justifying the consideration of judicial integrity. It merely quotes the now familiar words of Brandeis that failure to exclude the evidence in

question would invite anarchy.<sup>84</sup> It is highly problematic for *Mapp* to have regarded judicial integrity as a plank in its constitutional considerations because in *Olmstead* Brandeis clearly regarded it "[i]ndependently of the constitutional question."<sup>85</sup> Transforming his words to considerations of a constitutional nature certainly requires of the Court some persuasive explanation of the link between the Constitution and exclusion. Furthermore, although the Court took pains to emphasize that the factual grounds underlying exclusion are irrelevant to determining whether or not exclusion is constitutionally required,<sup>86</sup> several pages of the opinion are devoted to deterrence wherein the Court stated "that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"<sup>87</sup>

The role of judicial integrity as a pivotal constitutional factor was short-lived. In refusing to give retroactive effect to *Mapp*, the Court stated in *Linkletter v. Walker*<sup>88</sup>

*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action.<sup>89</sup>

This statement seems clear enough, even if one disagrees with the unequivocal cast of *Linkletter's* interpretation of previous cases. The corner had been turned, and in *Linkletter* deterrence became the dispositive consideration in the exclusion controversy. Unfortunately, *Linkletter's* reading of *Mapp's* prime purpose as that of deterrence seemingly freed the *Linkletter* Court from any obligation to examine the theoretical foundations of deterrence; the Court seemed to assume this had been done in *Mapp*. As we have seen, it had not. Dispelling any doubt as to the moribund status of the judicial integrity argument, the Court, in *United States v. Calandra*,<sup>90</sup> clearly underscored the deterrence rationale for exclusion in ruling that a grand

<sup>77</sup> *Id.*

<sup>78</sup> 364 U.S. 206.

<sup>79</sup> *Id.* at 217.

<sup>80</sup> *Id.* at 220 (quoting *People v. Cahan*, 44 Cal. 2d 434, 445-47, 282 P.2d 905, 911-13 (1955)).

<sup>81</sup> *Id.*

<sup>82</sup> 364 U.S. at 222.

<sup>83</sup> 367 U.S. 643 (1961).

<sup>84</sup> *Id.* at 659.

<sup>85</sup> 277 U.S. at 479 (Brandeis, J., dissenting).

<sup>86</sup> 367 U.S. at 651, 653.

<sup>87</sup> *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. at 217).

<sup>88</sup> 381 U.S. 618 (1965).

<sup>89</sup> *Id.* at 636-37.

<sup>90</sup> 414 U.S. 338 (1974).

jury witness may not refuse to answer questions on the grounds that they are based on evidence obtained from an unlawful search and seizure. The Court characterized the exclusionary rule as "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."<sup>91</sup> One may lament, with Justices Brennan, Douglas, and Marshall who dissented, the Court's rejection of "the imperative of judicial integrity" in *Calandra*. Yet, such rejection is understandable given the failure of previous efforts (and that of Brennan and his fellow dissenters) to provide a persuasive and principled constitutional foundation for the doctrine of exclusion.<sup>92</sup>

The Court's reliance on deterrence as the sole consideration is reinforced by other recent cases. *United States v. Janis*<sup>93</sup> held that the fourth amendment exclusionary rule does not forbid the use in a federal civil proceeding of evidence seized unconstitutionally, but in good faith by a state officer. The Court emphasized the role of deterrence in deciding *Janis*: "If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted."<sup>94</sup> In a remarkable transformation of the concept of judicial integrity to a position derived from deterrence, the Court indicated that maintaining judicial integrity is coincident with determining the efficacy of exclusion as a deterrent in the case being adjudicated.<sup>95</sup> Thus, for a majority of the Court, deterrence has become not only the primary consideration in exclusion, but the basis on which judicial integrity is defined as well.<sup>96</sup>

<sup>91</sup> *Id.* at 348.

<sup>92</sup> *Id.* at 360 (Brennan, J., joined by Douglas & Marshall, JJ., dissenting).

<sup>93</sup> 428 U.S. 433 (1976).

<sup>94</sup> *Id.* at 454.

<sup>95</sup> *Id.* at 458-59 n.35.

<sup>96</sup> Other cases need not be analyzed in order to support the argument that deterrence is the dispositive question in the Court's treatment of fourth amendment exclusion. The current state of the caselaw necessitates examination of the empirical studies of deterrence. A subsequent section will be devoted to the empirical studies both because of their volume and because of the caselaw's reliance on deterrence as the sole consideration governing exclusion. Although I will argue later in my analysis that deterrence should not be the dispositive consideration in the exclusion controversy, the arguments and studies relative to deterrence must be examined for a second reason: the merits of the argument for exclusion which I will later present can best be appreciated only in the context of certain difficulties surrounding the deterrence controversy. See section IV *infra*.

The predominant liberal arguments have been distilled from scholarly commentary and the caselaw. These arguments have their theoretical foundations in the liberal credo articulated by Ramsey Clark and in the crime control model formulated by Professor Packer. It was shown that while these arguments have generally been well received in the caselaw, there has not been an adequate basis laid for this development in the Constitution itself. Resolution of the problem of exclusion increasingly revolves around the policy consideration of deterrence. Exclusion as necessary to the maintenance of trust in government is no longer an important consideration since it has been relegated to a position dependent on the Court's assessment of deterrence potential in a particular factual context. The role of exclusion in spelling out the contours of the fourth amendment has never assumed an important role in the caselaw. Thus, while the Court has in general resolved the question of exclusion in a manner consistent with the liberal credo and the due process model, this resolution has increasingly relied on only one of the considerations drawn from these sources, that of deterrence.

### III. CONSERVATIVES, THE CRIME CONTROL MODEL, AND EXCLUSION

#### A. THE CONSERVATIVE CREDO AND PACKER'S CRIME CONTROL MODEL

It is appropriate to draw a conservative perspective on crime primarily from those who are identified with a law and order perspective on the criminal process. Several planks of the conservative credo therefore will be drawn from former President Richard Nixon and his Attorney General, John Mitchell. The foundations of this position are well represented in a six-thousand-word position paper Mr. Nixon prepared during the 1968 presidential campaign. He entitled this document, "Toward Freedom From Fear."<sup>97</sup> The paper is directed toward drastically reducing crime in America, restoring safety to the streets, and removing from the nation the stigma of a lawless society. He strongly urges strengthening law enforcement machinery and attacks Supreme Court decisions which interfere with successful enforcement and prosecution. In his words, "some of our courts have gone too far in weakening the peace forces as against the criminal forces." He specifically refers to *Escobedo v.*

<sup>97</sup> R. Nixon, *Toward Freedom from Fear*, quoted in N.Y. Times, May 9, 1968, at 1, col. 2.

*Illinois*<sup>98</sup> and *Miranda v. Arizona*<sup>99</sup> as nearly precluding confessions as a tool in law enforcement and prosecution. He accuses the Johnson administration of grossly exaggerating the role of poverty in causing crime. In Nixon's view, a doubling of the conviction rate—from the roughly one arrest in eight that results in conviction—would be more effective in eliminating crime than would a quadrupling of funds in the war on poverty.<sup>100</sup>

Another explicit theme of the conservative credo is in the very title of Mr. Nixon's 1968 campaign position paper, "Toward Freedom From Fear." This thesis is persistent in the public statements of both Mr. Nixon and John Mitchell. Speaking as Attorney General of the United States in 1969, Mitchell stated: "Fear of crime—by the housewife and the school child, by merchant and the laborer—fear is forcing us, a free people, to alter our pattern of life, especially after sundown."<sup>101</sup> Whereas liberals perceive the threat to individual security and liberty coming from the state, the predominant conservative concern is of the criminal's undermining the peace of the political order. According to the conservative argument, then, fear of crime and the resulting insecurity are basic threats to civil society, threats which demand that overcoming lawlessness in America be elevated to a top priority. In contrast to Ramsey Clark's exhortation to deemphasize fear,<sup>102</sup> the conservative credo seeks to defuse this fear by eradicating crime in the streets.

The conservatives thus emphasize the necessity of meting out punishment to the guilty. President Nixon illustrates this strand of the conservative credo in his statement that "[w]hen we fail to make the criminal pay for his crime, we encourage him to think that crime will pay."<sup>103</sup> According to this view, punishment is essential to reduce the incentives for criminal conduct and to maintain respect for the law. The conservative credo also exhibits

an implicit trust in the police premised on a conviction that the officer is a well-trained, well-intended, and competent individual. Having daily contact with the criminal element, the police are viewed as better able to understand the necessities of law enforcement than judges and other participants in the criminal process. Former President Nixon expresses the matter in this way: "The time has come for soft-headed judges and probation officers to show as much concern for the rights of innocent victims of crime as they do for the rights of convicted criminals."<sup>104</sup>

As sketched above, the conservative credo is implicit in Professor Packer's crime control model. This model is in many respects simply a more comprehensive and theoretical articulation of the conservative position on crime. It is anchored in the proposition that repression of criminal conduct is the most important function of the criminal process, a status conferred in deference to the belief that unbridled criminal conduct will erode public order and thereby undermine an important condition of freedom. As the "positive guarantor of social freedom" for the ordinary citizen, the system must be highly efficient in apprehending and disposing of a high number of criminal offenders. Recognizing the limited resources available to accomplish this important task, the model emphasizes both speed and finality. Speed necessitates informality and uniformity, and finality requires minimizing the occasions for challenge. The model also leads to dependency on police interrogation, extrajudicial processes, and other informal operations.<sup>105</sup>

The presumption of guilt informs a number of tenets of the crime control model. It supposes that the screening process of police and prosecutors are reliable indicators of probable guilt and places great confidence in the police and the early stages of the criminal process. This tenet is not simply the opposite of the presumption of innocence which informs the due process model. The latter presumption is a kind of directive to authorities to ignore the factual probabilities in their treatment of the suspect. The presumption of innocence is normative and legal; the presumption of guilt is descriptive and factual. The crime control model views the formal adjudicatory process as less likely to produce reliable factfinding than the preceding expert administrative process. It will tolerate rules that forbid illegal arrests, searches, interrogations

<sup>98</sup> 378 U.S. 478 (1964), cited in R. Nixon, *supra* note 97.

<sup>99</sup> 384 U.S. 436 (1966), cited in R. Nixon, *supra* note 97.

<sup>100</sup> R. Nixon, *supra* note 97, at 32, cols. 7-8.

<sup>101</sup> Address by Attorney General John Mitchell, Delivered at Conference on Crime and the Urban Crisis of the National Emergency Committee of the National Council on Crime and Delinquency, San Francisco, Calif. (Feb. 3, 1969), quoted in 35 VITAL SPEECHES OF THE DAY 290 (1969).

<sup>102</sup> See text accompanying note 14 *supra*.

<sup>103</sup> Address by President Richard M. Nixon, Delivered on Nationwide Radio Prior to Transmitting to the Congress the Sixth in a Series of State of the Union Messages, Washington, D.C. (Mar. 10, 1973), quoted in 39 VITAL SPEECHES OF THE DAY 354 (1973).

<sup>104</sup> *Id.* at 355.

<sup>105</sup> Packer, *supra* note 16, at 9-10.

and the like, if enforcement of these prohibitions is left primarily to internal administrative sanctions rather than, as in the case of exclusion, to the less efficient formal process.

The conservative credo and the crime control model provide a useful theoretical backdrop for the various criticisms of the exclusionary rule. The criticisms discussed in the following sections are drawn both from secondary literature and the case-law.

#### B. EXCLUSION FREES CRIMINALS AND FAILS TO DETER

The most obvious and frequently articulated objection to the exclusionary rule is that it frees criminals who would otherwise be convicted on the basis of trustworthy evidence. John Mitchell asserts that acquittal of the guilty affects not only "a vague amorphous group called society," but damages us individually because that freed criminal "may assault or mug you."<sup>106</sup> Professor Packer's crime control model enumerates a similar objection that failure to apprehend and convict encourages a "general disregard for legal controls."<sup>107</sup> The secondary literature on exclusion generally agrees with Kaplan's common sense observation that "[u]ndeniably, the exclusionary rule allows some criminals to escape punishment."<sup>108</sup> One commentator laments that the *only* parties protected by operation of the exclusionary rule are the guilty. The public is the loser because it must accept less than the truth in the criminal case and suffer the release of factually guilty criminals; the erring police officer is not punished.<sup>109</sup> Stated somewhat differently, "[t]he most troublesome aspect of the rule is its direct suppression of the truth."<sup>110</sup> This argument takes on added force when fourth amendment violations are contrasted with matters such as inherently unreliable coerced confessions obtained in violation of the fifth amendment.

The additional major argument, that the rule fails to deter unlawful police conduct, makes the rule, in the view of critics such as Wingo, doubly

objectionable.<sup>111</sup> The reasons set forth to refute the deterrence rationale are manifold. In general, the core of these arguments is that exclusion lacks the characteristics necessary to a successful deterrent. More specifically, the rule operates directly against the prosecutor, not the offending policeman.<sup>112</sup> A second impediment to deterrence is potential police concern with arrest and case clearances as opposed to conviction.<sup>113</sup> In many cases involving gambling, liquor, narcotics, and drug offenses, for example, police may not even anticipate a final resolution of trial and conviction.<sup>114</sup> Additionally, a policy of deterrence cannot be effective against police who have made an honest mistake in judgment with no intentional erosion of the fourth amendment.<sup>115</sup> The rule's effectiveness as a deterrent is further questionable on the grounds that it only excludes evidence presented at one narrow stage of the criminal process.<sup>116</sup> There is also evidence that police rely on departmental standards favoring arrest and conviction to justify their actions more than on judicially formulated legal standards which favor the rights of defendants.<sup>117</sup>

The exoneration and failure to deter arguments against exclusion have been widely recognized in the caselaw. Perhaps the best known judicial objection to the exclusionary rule is that of Cardozo: "The criminal is to go free because the constable has blundered."<sup>118</sup> An early judicial recognition of exclusion's freeing the criminal is Chief Justice Taft's statement in *Olmstead v. United States* that

<sup>111</sup> A study in New York City shows an increase in dismissal rates in narcotics cases because of motions to suppress following *Mapp v. Ohio*. Note, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87, 97 (1968). Oaks notes in his analysis of motions to suppress, that "in every single one of these cases in which a motion to suppress was granted, the charges were then dismissed." Oaks, *supra* note 3, at 746 (emphasis deleted).

<sup>112</sup> Wingo, *supra* note 109, at 576, (citing Oaks, *supra* note 3, at 726); S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 57-58 (1977).

<sup>113</sup> LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 MO. L. REV. 391, 447 (1965).

<sup>114</sup> *Id.* at 429; Oaks, *supra* note 3, at 721-22.

<sup>115</sup> Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 590 (1955).

<sup>116</sup> S. SCHLESINGER, *supra* note 112, at 56.

<sup>117</sup> *Id.* at 57.

<sup>118</sup> *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926). This opinion is quoted at length in Frankfurter's opinion for the Court, *Wolf v. Colorado*, 338 U.S. 25, 31 n.2 (1949).

<sup>106</sup> Address by Attorney General John Mitchell, 92d Annual Meeting of the American Bar Association, in Dallas, Texas (Aug. 13, 1969), *quoted in* 35 VITAL SPEECHES OF THE DAY 678 (1969). A number of commentators have advanced a similar position. *See, e.g., Wright, Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

<sup>107</sup> Packer, *supra* note 16, at 9.

<sup>108</sup> Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1034 (1974).

<sup>109</sup> Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L. REV. 573, 576 (1971).

<sup>110</sup> *Id.* at 583.

exclusion "would make society suffer and give criminals greater immunity than has been known heretofore."<sup>119</sup> Justice Holmes responded in dissent: "I think it a less evil that some criminals should escape than that the Government should play an ignoble part."<sup>120</sup> Neither Holmes nor Taft advanced a constitutional argument to justify his respective view, however. Stewart's opinion for the Court in *Elkins v. United States* is sympathetic to the freeing the guilty argument against exclusion, but it wrongly assumes disposition of this objection by recourse to the deterrence argument and rejection of the rule as direct punishment to the offending officer or remedy to the accused.<sup>121</sup>

The court emphasized these themes in *Linkletter v. Walker*, which decided that *Mapp* would not have retrospective application.<sup>122</sup> First, positing the intent of the exclusionary rule as deterrence, the Court stated that the purpose of deterrence would not "be advanced by making the rule retrospective,"<sup>123</sup> and such retrospective application of the exclusionary rule would result in the release of prisoners who had been found guilty of crime. The Court added that reparation comes too late to restore the "ruptured privacy of the victims' homes and effects."<sup>124</sup>

The most extensive critique of exclusion appears in Chief Justice Burger's dissenting opinion in *Bivens v. Six Unknown Named Agents*.<sup>125</sup> *Bivens* allowed an action for damage under the fourth amendment where, without a warrant, law enforcement agents entered petitioner's apartment, searched it, and arrested him. Burger's dissent is laced with references to the rule's freeing criminals. In one instance he refers to "thousands of cases in which the criminal was set free because the constable blundered."<sup>126</sup> He premised his opinion on the proposition that the cost to society of releasing guilty criminals mandates that the rule clearly demonstrate its effectiveness. Far from meeting this burden of proof, proponents of the rule can claim "no empirical evidence to support the claim that the rule actually deters illegal conduct of law en-

forcement officers."<sup>127</sup> Citing *Oaks*, Burger emphasized that the rule applies no direct sanction to the officer who committed the unreasonable search or seizure. The rule's immediate effect is upon the prosecutor whose case against the defendant is weakened or destroyed.<sup>128</sup> Burger particularly objected to the view of law enforcement as a "monolithic governmental enterprise" which leads to the erroneous assumption that a mediate effect on police will result from the disappointed prosecutor's corrective instructions to the police.<sup>129</sup> Responding to Burger's charge that exclusion does not directly sanction the individual officer, Anthony Amsterdam writes that exclusion is not supposed to deter us the same way as does the law of larceny, "by threatening punishment to him who steals a television set—a theory of deterrence, by the way, whose lack of empirical justification makes the exclusionary rule look as solid by comparison as the law of gravity."<sup>130</sup> Amsterdam sees the exclusionary rule rather as analogous to branding the purchaser's social security number into the chassis of new television sets. By reducing the resale value to anyone but the true owner, branding lessens the likelihood of theft. On the other hand, Amsterdam writes that without the exclusionary rule the criminal court system "is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality."<sup>131</sup> The subtlety of the type of deterrence associated with exclusion compounds the problem of empirically establishing it. But too often, Amsterdam tells us, the suppression doctrine is discussed as if it were an "instrument for 'detering' discrete and specific episodes of unconstitutional police behavior."<sup>132</sup>

Dallin Oaks, drawing on the work of Johannes Andenaes, Herbert Packer, and Franklin Zimring, identifies three indirect and long range effects which are relevant to the deterrent effect of exclusion and the Chief Justice's objection.<sup>133</sup> The first

<sup>127</sup> *Id.* at 416. Oaks acknowledges that an officer may experience disappointment at seeing evidence suppressed and an offender go free, and that this may influence the officer's future behavior. However, he would be much more confident of a deterrent if some individual sanction such as departmental discipline were coupled with exclusion. Oaks, *supra* note 3, at 710.

<sup>128</sup> 403 U.S. at 416 (citing Oaks, *supra* note 3).

<sup>129</sup> *Id.* at 416-17.

<sup>130</sup> Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431 (1974).

<sup>131</sup> *Id.* at 431-32.

<sup>132</sup> *Id.* at 432.

<sup>133</sup> Oaks, *supra* note 3, at 711 (citing Andenaes, *Does*

<sup>119</sup> 277 U.S. 438, 468 (1928). *Olmstead*, of course, did not involve a constitutional violation, but action that was a misdemeanor under the law of Washington. *Id.* at 466.

<sup>120</sup> *Id.* at 470 (Holmes, J., dissenting).

<sup>121</sup> *Elkins v. United States*, 364 U.S. 206, 216-17 (1960).

<sup>122</sup> 381 U.S. 618.

<sup>123</sup> *Id.* at 637.

<sup>124</sup> *Id.*

<sup>125</sup> 403 U.S. 388 (1971).

<sup>126</sup> *Id.* at 424 (Burger, C.J., dissenting).

of these is the "moral or educative influence" of the law. Society's official branding of an act as reprehensible may influence attitudes apart from the fear of sanctions. According to this theory, exclusion's visible expression of social disapproval of fourth amendment violations may affect society at large, including law enforcement officials, by visibly expressing social disapproval of fourth amendment violations. Exclusion underscores the importance attached to observing fourth amendment guarantees and thereby attaches more credibility to them.<sup>134</sup> To paraphrase Zimring, exclusion's reinforcement of the Constitution's solemn commands makes clear that the Constitution means what it says.<sup>135</sup>

Oaks identifies two additional indirect effects of legal punishment in general which likewise may attend exclusion. A threat of punishment helps in developing "habits of conforming behavior that continue to influence an individual's conduct long after he has ceased to weigh the pros and cons of observance."<sup>136</sup> Such sanctions may also provide a potential offender who is disposed to observe the rules an additional reason for doing so.<sup>137</sup> The benefit of these indirect effects would seem limited to routine police behavior rather than behavior calling for extremely complex applications of the fourth amendment doctrine which might divide an appellate court in subsequent adjudications. Furthermore, the critic of the second of these subtle arguments may respond by citing the Chief Justice's argument in *Bivens*.<sup>138</sup> If the individual officer does not perceive exclusion as a personal sanction, it seems unlikely that exclusion will influence the officer's conduct "long after he has ceased to weigh the pros and cons of observance."<sup>139</sup> On the other hand, the educative and reinforcing effects of exclusion are not so clearly dependent on the officer's perception of suppression as a personal threat. If the theories Oaks presents are otherwise sound, the Chief Justice's reservation is not such a formidable one.

A related criticism leveled by the Chief Justice

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*Punishment Deter Crime?*, 11 CRIM. L.Q. 76, 80-81 (1968); H. Packer, *THE LIMITS OF THE CRIMINAL SANCTION* 42-45 (1968); F. Zimring, *Perspectives on Deterrence* (Center for Studies of Crime and Delinquency, National Institute of Mental Health, Monograph Series, 1970).

<sup>134</sup> Oaks, *supra* note 3, at 711.

<sup>135</sup> Zimring, *supra* note 133, at pt. I, § 3, *quoted in* Oaks, *supra* note 3, at 711 n.129.

<sup>136</sup> Oaks, *supra* note 3, at 711.

<sup>137</sup> *Id.* at 712.

<sup>138</sup> 403 U.S. at 417 (Burger, C.J., dissenting).

<sup>139</sup> Oaks, *supra* note 3, at 711.

is that "[t]he suppression doctrine vaguely assumes that law enforcement is a monolithic governmental enterprise."<sup>140</sup> Burger objects to the assumption that there is sufficient prosecutorial supervision of police to achieve deterrence by means of the frustrated prosecutor's control of police. His separation of police and prosecution is understandable in the context of deterrence. It is ironic, however, that he objects to viewing the government and the individual policeman as a monolith, for this view will certainly lead to a trichotomy of government into insular branches, none of which forms a part of an organic whole. Indeed, the very approach Burger takes in *Bivens* points to an atomistic conception of government departing from the view that the judiciary, the legislature, and all parts of the executive are ultimately engaged in the same enterprise—that of governing according to the grants of and limitations on power set forth in the Constitution. Addressing this somewhat heretical view of constitutional government, Anthony Amsterdam writes that "it is unreal to treat the offending officer as a private malefactor who just happens to receive a government paycheck. It is the government that sends him out on the streets with the job of repressing crime and of gathering criminal evidence in order to repress it."<sup>141</sup>

<sup>140</sup> 403 U.S. at 416 (Burger, C.J., dissenting).

<sup>141</sup> Amsterdam, *supra* note 130, at 432. Amsterdam recognizes a weakness in Burger's formulation of the exclusionary controversy which, on its face, appears to be very damaging. It is surprising that after offering this insight, Amsterdam backs away from one direction in which the argument might lead:

I am not suggesting that the exclusionary rule is an explicit command of the Constitution, nor do I mean to make more of the fourth amendment's language than the skin of the living thought that dwells within. The rule was fashioned by judges as an expression of that thought. What the Constitution does command is that the administration of the system of criminal justice be so ordered as not to provide incentives toward unreasonable search and seizure which it is not fully capable of restraining. Unless and until a far better system of restraints is devised and put into effective operation than we now have or can soon anticipate, the exclusionary sanction is the only way to honor that command.

*Id.* at 433 (footnotes omitted). Amsterdam is an articulate and perceptive analyst of the fourth amendment. It is remarkable, given the thrust of this argument which favors the exclusionary rule and rejects Burger's atomistic division of government, that there is so little difference between the positions the two take on exclusion. While neither the validity nor the source of Amsterdam's proposition that the Constitution commands the criminal justice system be ordered so as "not to produce incentives toward unreasonable search and seizure which it is not



Chief Justice Burger's critique of exclusion in *Bivens* includes a two-pronged attack on the rule which casts doubts on its educational effect. First, police officers "do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow."<sup>142</sup> Burger properly recognized that these appellate opinions, often the product of divided courts, frequently lack helpful clarity in determining the reasonable bounds of search and seizure. These problems are compounded by the fact that search and seizure cases often raise questions which admit neither of easy nor obvious answers. A related problem is the diminution of any possible educational effect by the long time lapse between the challenged police action and its final judicial resolution. Burger regarded it as unlikely that the police officer would ever become aware of the final result after such a delay. He also saw the application of the exclusionary rule both to honest police mistakes and deliberate and flagrant *Irvine*-type violations as objectionable—a "single, monolithic, and drastic judicial response to all official violations of legal norms."<sup>143</sup> These arguments reduce to the single proposition that judicial interpretations of the fourth amendment are simply too complex and delayed to expect police comprehension and obedience. This difficulty is compounded by the nature and timing of the appellate process. A number of commentators have addressed this objection which confuses the exclusionary doctrine with the substance of fourth amendment prohibitions. More than forty years ago Senator Robert Wagner noted that exclusion is only the sanction which renders the fourth amendment effective. He cautioned that "[i]t is the rule [i.e., the fourth amendment], not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, . . . there will be no illegally obtained evidence to

fully capable of restraining," are clear, his conclusion is. Amsterdam favors the exclusionary sanction, but only because a practical and effective alternative is unavailable. Thus there are great similarities between Burger and Amsterdam's conclusions despite their different views of government. Amsterdam wants to retain exclusion until a better restraint is devised and effected; Burger, while opposing the exclusionary rule as ineffective, does not favor abandoning it until some meaningful alternative is developed.

<sup>142</sup> 403 U.S. at 417 (Burger, C.J., dissenting).

<sup>143</sup> *Id.* at 418. For a discussion of one resolution of this problem, see Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & C. 141, 150-59 (1978).

be excluded by the operation of the sanction."<sup>144</sup> Additionally, Yale Kamisar recognizes a more fundamental problem implicit in Burger's objections. Kamisar writes that,

if the officer, as Dean Griswold described it, acted in the manner that "a good, careful, conscientious police officer" is expected to act, or if, as Judge Friendly maintained in *Soyka*, the officer's error was "so miniscule and pardonable as to render the drastic sanction of exclusion . . . almost grotesquely inappropriate," then the error should not render the search or seizure "unreasonable" within the meaning of the Fourth Amendment—as the Second Circuit held on rehearing *en banc* in *Soyka* . . . After all, probable cause is supposed to turn on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act," . . . and affidavits are supposed to be interpreted in a "commonsense" rather than a "hyper-technical" manner . . . <sup>145</sup>

Burger's criticisms of the complexity of fourth amendment law which he directs at exclusion may well have merit. The above commentators make clear, however, that they are misdirected.

Burger's criticisms raise questions not only about the substance of fourth amendment law, but about the judicial process and the proper mode of constitutional interpretation as well. These are questions of interest which should be addressed by commentators and judges, but it is unfortunate that they arise in a context which obscures the issue of exclusion. As Professor LaFave points out, ineffective communication of and lack of clarity in fourth amendment rules is not sufficient reason for abandoning the exclusionary rule. Nor do these criticisms address the desire for effecting and minimizing "the risks of inadvertent and unintentional police violations of the . . . Fourth Amendment."<sup>146</sup> LaFave states: "To suggest that this objective would somehow vanish if the exclusionary rule were abandoned is to concede the force of the warning in *Weeks v. United States* that without the

<sup>144</sup> RECORD OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION 559-60 (1938), quoted in Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 19 n.56 (1954). See also Kamisar, *Mondale on Mapp*, 1977 CIV. LIB. REV. 62, cited and quoted in Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment*, 62 JUDICATURE 66, 70-71 & n.22 (1978) [hereinafter Kamisar (1978)]; Mondale, *The Problem of Search and Seizure*, 19 BENCH & B. MINN. 15, 16 (1962).

<sup>145</sup> Kamisar (1978), *supra* note 144, at 84 n.112 (citations omitted).

<sup>146</sup> 1 W. LAFAVE, *supra* note 5, at 25.

suppression doctrine the Fourth Amendment would be no more than a 'form of words.'<sup>147</sup> In other words, abolition or retention of the exclusionary rule should be undertaken independently of difficulties related to substantive fourth amendment considerations.

A final criticism leveled by the Chief Justice is that there are important police activities which do not result in criminal prosecutions and "the rule has virtually no applicability and no effect in such situations."<sup>148</sup> According to this line of argument, exclusion is not likely to achieve deterrence in those areas of police activity that do not result in prosecution or which are not directed toward acquiring evidence. Only a small portion of police behavior is directed toward such ends. Although Burger's argument may have merit when police officers are consciously weighing the pros and the cons of misconduct, certain indirect deterrent effects which Oaks identifies do not necessarily succumb to Burger's criticism.<sup>149</sup>

Objections that exclusion frees criminals coupled with reservations regarding its deterrent effect appear in majority opinions subsequent to *Bivens*. More important than the explicit statements in *United States v. Janis* is the Court's decision not to extend the rule to exclude from a federal civil proceeding evidence seized unreasonably, but in good faith, by a state law enforcement officer. The Court in *Stone v. Powell* reiterated reservations about the costs of exclusion in its statement that "[a]pplication of the rule . . . often frees the guilty."<sup>150</sup> The criticism that exclusion frees the guilty and fails to deter persists in the caselaw, notwithstanding the responses of Wagner, LaFave, and others.

### C. EXCLUSION UNDERMINES JUDICIAL INTEGRITY

A second conservative criticism of exclusion is that it interferes with justice, understood as finding truth and punishing the guilty. According to this view, such interference with justice in turn undermines the integrity of the judiciary and leads people to lose respect for the criminal justice system.

Richard Nixon expresses the matter in his view of society's relationship to the criminal: "Society is guilty of crime only when we fail to bring the criminal to justice."<sup>151</sup> His reference to "soft-

headed judges" likewise indicates a concern that the real breach of integrity occurs when the system impedes truthfinding and punishing the guilty.<sup>152</sup> This lack of integrity in the conservative sense is a contributing cause to undermining trust in government. Furthermore, the release of criminals threatens to undermine the security and liberty of the law abiding citizen. Thus, exclusion interferes with the fundamental justification for government—the maintenance of a secure arena in which the ordinary citizen exercises his freedoms. Anything interfering with meting out punishment to the guilty will disrupt fundamental judicial functions and thereby undermine trust in government.

Professor Packer's characterization of the crime control model likewise leads to the conservative claim that exclusion undermines judicial integrity and trust in government. He states the crime control model's concern that "if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process, a general disregard for legal controls tends to develop."<sup>153</sup> Other elements of the crime control model are likewise related to the conservative judicial integrity and trust in government arguments. One of these elements is the opposition to using the judicial process to correct errors in the application of the rules relating to illegal arrests, unreasonable searches, and other objectionable police practices. Such use impairs the efficiency of the process by interfering with the truthfinding function of courts and impeding the apprehension and conviction of criminals necessary to the maintenance of trust in government.<sup>154</sup>

Dean Paulsen summarizes the conservative judicial integrity and respect for law arguments in concise fashion: "The rule destroys respect for law because it provides the spectacle of the courts letting the guilty go free."<sup>155</sup> Coe stresses that exclusion distorts the factfinding process, interferes with a rational determination of guilt, and most fundamentally, exacts a "high toll in terms of loss of public respect for the judiciary, and for the law itself."<sup>156</sup>

Only recently has the caselaw paid serious attention to these conservative arguments. *Linkletter v. Walker* captures some of the flavor of the conservative judicial integrity argument. Noting the com-

<sup>147</sup> *Id.* (citing *Weeks v. United States*, 232 U.S. 383).

<sup>148</sup> 403 U.S. at 418 (Burger, C.J., dissenting).

<sup>149</sup> Oaks, *supra* note 3, at 720.

<sup>150</sup> 428 U.S. 465, 490 (1976).

<sup>151</sup> Address by President Richard M. Nixon, *supra* note 103, at 354.

<sup>152</sup> *Id.* at 355.

<sup>153</sup> Packer, *supra* note 16, at 9.

<sup>154</sup> *Id.* at 10, 18.

<sup>155</sup> Paulsen, *supra* note 30, at 256.

<sup>156</sup> Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 25 (1975).

plicated evidentiary hearings that retroactive application of *Mapp* would require, the Court stated that "to thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."<sup>157</sup> This interpretation of judicial integrity was adopted in *Stone v. Powell*,<sup>158</sup> where the Court emphasized the centrality of what it termed "the ultimate question of guilt or innocence" in a criminal proceeding. The Court objected to exclusion in the context of *Stone*, partially because "[a]pplication of the rule thus deflects the truth-finding process . . ."<sup>159</sup> It also expressed concern that indiscriminate application of the exclusionary rule might generate disrespect for the law and its administration. Although not labeled a "judicial integrity" argument, the rationale in *Stone* closely corresponds to the conservative version of the judicial integrity argument and marks a significant step beyond previous recognition of the liberal version of judicial integrity under the deterrence rationale.

#### D. EXCLUSION IS A LEGAL TECHNICALITY WHICH HANDCUFFS POLICE

The conservative credo articulates the additional criticism that exclusion frees criminals on mere technicalities. Like the conservative judicial integrity argument, this criticism is implicit in Richard Nixon's statement that judges are "soft-headed" and more considerate of the criminal than of the victim.<sup>160</sup> John Mitchell's *Crime Legislation: What Happened to Congress*<sup>161</sup> seeks to free the system of such technicalities by proposing both a number of bills to strengthen the enforcement tools of police officers and measures such as allowing the admission of confessions obtained in a manner not strictly adhering to *Miranda* requirements.<sup>162</sup>

Professor Packer's crime control model develops this criticism more systematically. Fundamentally, the very definition of efficiency within the crime control model is intolerant of "ceremonious rituals that do not advance the progress of a case."<sup>163</sup> This model "accepts the probability of mistakes up to

the level at which they interfere with the goal of repressing crime." This acceptance of mistakes assumes importance in instances in which they are made in good faith.

The secondary literature and the caselaw treat rather unsympathetically the objection that exclusion handcuffs the police. Frequently discussion of this criticism is coupled with discussion of other factors such as the intrinsic difficulty police officers experience in knowing what is and is not legal<sup>164</sup> and the public dissatisfaction resulting from the release of the "guilty" in such contexts as warrantless searches incident to arrest.<sup>165</sup> Generally speaking, however, the argument has not elicited sustained analysis from scholars and jurists.<sup>166</sup> One

<sup>164</sup> One commentator voices his discontent against the non-knowability of some of the technical rules of constitutional interpretation. Policemen often in good faith rely on their common sense judgment or their not-so-common sense judgment bred of experience in the streets and they do what they do without technical knowledge of the unconstitutionality of the acts prohibited.

Simon, Remarks before the 1972 Judicial Conference of the United States Court of Appeals for the Ninth Judicial Circuit, in "The Exclusionary Rule," 61 F.R.D. 259, 274 (1972). See also Wingo, *supra* note 109, at 577; Wright, *supra* note 107, at 740; Oaks, *supra* note 3, at 731.

The caselaw has paid little attention to the argument. Treating the question in summary fashion, Justice Stewart's opinion for the Court in *Elkins v. United States* referred to the rule which had required exclusion in the federal courts for nearly half a century. He noted that "it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice has thereby been disrupted." 364 U.S. 206, 218 (1960). His opinion, in a footnote, also quotes an applicable section from the FBI Law Enforcement Bulletin:

Professional standards in law enforcement provide for fighting crime with intelligence rather than force. . . . In matters of scientific crime detection, the services of our FBI Laboratory are available to every duly constituted law enforcement officer in the nation. Full use of these and other facilities should make it entirely unnecessary for any officer to feel the need to use dishonorable methods.

FBI Law Enforcement Bulletin, Sept., 1952, at 1-2, *quoted in id.* at 218 n.8.

<sup>165</sup> Finzen, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 KAN. L. REV. 768, 782 (1972). This aspect of the legal technicalities and handcuffing the police argument has direct application to the previous section's treatment of the conservative version of judicial integrity and its effects on public respect for the law. See also, Kaplan, *supra* note 108, at 1035-36 & n.52.

<sup>166</sup> One exception to this statement is Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L.C. & P.S. 85, 86 (1962); Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L.C. & P.S. 329, 332 (1962). The contention that the exclusion-

<sup>157</sup> 381 U.S. at 637-38.

<sup>158</sup> 428 U.S. 465 (1976).

<sup>159</sup> *Id.* at 490.

<sup>160</sup> Address by President Richard M. Nixon, *supra* note 103, at 355.

<sup>161</sup> Address by Attorney General John Mitchell, Annual Conference of United Press International Editors & Publishers, Hamilton, Bermuda (October 6, 1969), *quoted in* 36 VITAL SPEECHES OF THE DAY 39, 40 (1969).

<sup>162</sup> *Id.*

<sup>163</sup> Packer, *supra* note 16, at 10.

reason the argument has not been taken with great seriousness is that the statistical indications of increased crime following the rule's adoption cannot establish that the exclusionary rule causes more crime.<sup>167</sup> Second, the argument is misdirected. As Senator Robert F. Wagner observed many years before the *Mapp* decision:

It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. If these rules, defining the scope of the search which may be made without a warrant and the scope of the search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation.<sup>168</sup>

As Professor Allen recognizes in the context of this quotation from Wagner, if the courts have not given appropriate consideration to the requirements of law enforcement, abolition of the exclusionary rule will not solve the problem. Instead, substantive fourth amendment rights should be redefined.<sup>169</sup>

Professor Kaplan explains in stark terms reasons for the high political cost of exclusion, which persists despite the fact that exclusion is a function of the interpretation given substantive constitutional provisions:

[B]y definition, it operates only after incriminating evidence has already been obtained. As a result, it flaunts before us the costs we must pay for Fourth Amendment guarantees. Where guarantees of individual rights are actually obeyed by the police, criminals are not discovered and thus no shocking cases come to public consciousness. When we apply the exclusionary rule, however, we know precisely what we would have found had constitutional rights been violated (because, of course, in these cases they were violated), and we are forced to witness the full, concrete price we pay for these guarantees.<sup>170</sup>

As Kaplan recognizes, however, objections to the exclusionary rule do not always rest on opposition

ary rule handcuffs the police "was very much in vogue immediately after the *Mapp* decision." 1 W. LAFAVE, *supra* note 5, at 22.

<sup>167</sup> Kamisar, *Public Safety v. Individual Liberties: Some 'Facts' and 'Theories'*, 53 J. CRIM. L.C. & P.S. 171 (1962). Professor Kamisar demonstrates that these "crime wave" statistics do not withstand careful scrutiny.

<sup>168</sup> RECORD OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION 559-60 (1938).

<sup>169</sup> Allen, *supra* note 144, at 19-20.

<sup>170</sup> Kaplan, *supra* note 108, at 1037-38.

to substantive fourth amendment rules. There are cases in which the criminal would have been caught if the police had followed fourth amendment requirements. In some cases, Kaplan points out, "police have both the cause and opportunity to get search warrants but fail to do so"; in other instances, "police fail to knock appropriately before making an otherwise legal search." He identifies these as instances which constitute a clear windfall to the criminal.<sup>171</sup> Despite its price, Kaplan notes that exclusion serves a vital function in focusing judicial attention on the critical nature of the fourth amendment. Exclusion also contributes to the delineation of restrictions on law enforcement in a context which focuses attention on the balance which must be struck between effective law enforcement and the importance of fourth amendment concerns to liberal democracy. It is difficult to appreciate the observations Kaplan makes regarding the failure of police to obtain warrants when they have both the cause and the opportunity and the police's failure to knock before making an otherwise legal search. One simply cannot dismiss as a mere technicality failure to get a search warrant where there is cause and opportunity. No matter how the fourth amendment or its history is read, the warrant requirement is a fundamental feature. The requirement of notice is also a significant aspect of the law of search and seizure which has roots some commentators trace to seventeenth century England. As LaFave recognizes, even the legislation creating the writs of assistance required that notice be given before entry.<sup>172</sup> As early as 1813, American courts spoke of the necessity to give notice in the execution of search warrants.<sup>173</sup> Exceptions to this requirement when police act reasonably to prevent destruction or disposal of the things named in the warrant can be subtle ones; nonetheless, the requirement of notice is not a recent, liberal innovation in the law of search and seizure. Rather, the requirement has the support of both history and, subject to exceptions, sound policy considerations.<sup>174</sup>

<sup>171</sup> *Id.* at 1038.

<sup>172</sup> LaFave traces the requirement to *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194 (K.B. 1603). 2 W. LAFAVE, *supra* note 5, at 122.

<sup>173</sup> Bell v. Clapp, 10 John's R. 263 (N.Y. Sup. Ct. 1813), cited in 2 W. LAFAVE, *supra* note 5, at 123.

<sup>174</sup> LaFave recognizes that "the United States Supreme Court has not had occasion to rule specifically upon the question of whether the Fourth Amendment compels that notice ordinarily be given in the execution of a search warrant." 2 W. LAFAVE, *supra* note 5, at 123. The purposes served by the notice requirement include "decreas-

The complaint that the rule is a legal technicality which handcuffs police is properly analyzable along two different dimensions. The first pertains to the nature of the substantive rules triggering exclusion. As discussed above, such criticism should properly be directed toward the substantive rules themselves. The second dimension of this criticism is that exclusion itself is a mere technicality which actually interferes with the finding of truth and the punishment of the guilty, even when the substantive fourth amendment rules which are involved are reasonable ones. This second dimension is more difficult to dispose of. At its foundation are two assumptions regarding the criminal process. First, it limits its consideration, for purposes of exclusion at least, to the trial itself. The introduction of trustworthy evidence advances the truth-finding process; exclusion is a technicality which impedes this process. One difficulty with this view is that the Constitution clearly takes a broader view of the criminal process insofar as several provisions of the Bill of Rights clearly relate to pre-trial procedures. Thus, to narrow due process considerations to factors affecting the truthfinding function of the criminal trial ignores various safeguards which are specified in the Constitution as part of liberal democracy.<sup>175</sup>

More importantly, however, the view that exclusion is a legal technicality must be examined in light of the more fundamental question of whether or not exclusion is a bona fide constitutional requirement. While a persuasive argument that exclusion is a constitutional right or a requirement of constitutional principle may not change the position of those who object to the wisdom of the doctrine, one assumes it would change the character of their objections to one of constitutional magnitude.

#### E. ALTERNATIVE METHODS TO SPELL OUT THE CONTOURS OF THE FOURTH AMENDMENT

A final conservative objection to the exclusionary rule arises from the position that various effective alternatives to exclusion are available which are not ridden with the defects of exclusion. Although certain authors also argue that their proposals provide an alternative means of spelling out the meaning of the fourth amendment, characteristically they do not give this factor serious treatment. In

general, the suggestions of alternatives to exclusion stem from a composite of the various above-enumerated tenets of the conservative credo.<sup>176</sup> These arguments are reducible to the proposition that the costs of exclusion are too high. These same reservations about exclusion and the preference for alternatives are also attributable to the crime control model. The crime control model, seeking to maximize efficiency, puts high priorities on speed and finality in the criminal process. The model accepts the mistakes that do not interfere with the repression of crime and insists that the guilty be punished as quickly as possible. Even more directly related to the development of alternatives, however, is the model's preference for extrajudicial over judicial processes and the refusal to allow vindication of constitutional rules through the criminal process itself.<sup>177</sup>

According to Professor Schlesinger the objectives of alternatives to exclusion are "deterrence of police misbehavior through identification and discipline of offending official(s), a better system than we have at present for compensating the innocent victims of illegal searches and seizures, and conviction of the guilty . . ."<sup>178</sup> He proposes two alternatives which he believes meet these objectives. One is an independent review board to work in conjunction with the judiciary in punishing officers guilty of illegal behavior. The second is a civil remedy which would allow innocent victims a means both of pointing out official misbehavior and of collecting compensation for illegal searches and seizures.<sup>179</sup>

Schlesinger's discussion of his proposals fails to demonstrate how they would serve to delineate the fourth amendment's contours. It is difficult to construct the means by which authoritative construction of fourth amendment rules would be accomplished within the rubric of the independent review board he advocates.<sup>180</sup> This problem is not quite as serious within the context of the civil remedy, for even though he does not discuss the matter, standards would presumably be forthcoming from the trial court and be appealable through regular channels.<sup>181</sup> Amsterdam, supported by Paulsen and LaFave, has asserted that lawyers will be very hesitant to take on such police cases because of the investigative and litigative problems involved and

<sup>176</sup> See text accompanying notes 97-106 *supra*.

<sup>177</sup> Packer, *supra* note 16, at 10, 15, 17-18, 53.

<sup>178</sup> S. SCHLESINGER, *supra* note 112, at 71.

<sup>179</sup> *Id.* at 76-77. See also Mikva, *Victimless Justice*, 71 J. CRIM. L. & C. 184 (1980).

<sup>180</sup> S. SCHLESINGER, *supra* note 112, at 72.

<sup>181</sup> See Oaks, *supra* note 3, at 705.

ing the potential for violence," the "'protection of privacy,'" and "'preventing the physical destruction of property.'" Note, 80 YALE L.J. 139, 140-42 (1970), quoted in 2 W. LAFAYE, *supra* note 5, at 124.

<sup>175</sup> U.S. CONST. amends. IV, V, VI, VIII.

because of the potential for developing an adversary relationship with the police.<sup>182</sup> Quoting Amsterdam, LaFave writes:

"Where are the lawyers going to come from to handle these cases for the plaintiffs?" One of the great virtues of the exclusionary rule is that Fourth Amendment violations are regularly brought to light; the accused "has a motive to challenge the police overreaching" and he "need not resort to another proceeding or hire another lawyer." But what "would possess a lawyer to file a claim for damages ... in an ordinary search and seizure case?"<sup>183</sup>

Schlesinger believes this problem can be resolved by providing free legal counsel under existing institutional arrangements for indigents who wish to bring such an action.<sup>184</sup> If one could overcome these objections and counsel were both forthcoming and available, this would be an important step in disposing of the objection that exclusion is the only reliable means of spelling out the fourth amendment's contours.

There are a number of other objections to the traditional tort remedy as an effective alternative to exclusion.<sup>185</sup> Certain variations of this remedy, such as Chief Justice Burger's<sup>186</sup> or Schlesinger's,<sup>187</sup> attempt to meet the traditional criticisms of the tort remedy. Sovereign immunity, for example, can be waived.<sup>188</sup> Where "civil death" statutes preclude those imprisoned from suing for damages, such statutes might be modified. Among other reasons for objecting to a tort remedy or modification thereof is that a claimant who has been charged with crime is not likely to elicit a jury's sympathy. Such a scheme may also encourage police officers to lie about adherence to constitutional requirements during the search and seizure to avoid liability, and criminals' reputations, moreover, are not such that they are likely to be injured by police searches.<sup>189</sup> Furthermore, as the Second Circuit has

<sup>182</sup> Amsterdam, *supra* note 130, at 429-30.

<sup>183</sup> 1 W. LAFAVE, *supra* note 5, at 32, (quoting Amsterdam, *supra* note 130, at 430); *see also* Paulsen, *supra* note 30, at 260.

<sup>184</sup> S. SCHLESINGER, *supra* note 112, at 77.

<sup>185</sup> Wolf v. Colorado, 338 U.S. 25, 42-46 (1949) (Murphy & Rutledge, JJ., dissenting).

<sup>186</sup> Bivens v. Six Unknown Named Agents, 403 U.S. at 422 (Burger, C.J., dissenting).

<sup>187</sup> S. SCHLESINGER, *supra* note 112, at 77.

<sup>188</sup> Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621, 692-94.

<sup>189</sup> *Id.* *See also*, Comment, *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. CRIM. L.C. & P.S. 256, 263 (1972).

held on remand in *Bivens*, a police officer need not prove probable cause to establish a defense in a civil proceeding; a showing of a good faith belief in the validity of the search and arrest is sufficient.<sup>190</sup>

It is difficult to see a cause of action such as the one created in *Bivens* substituting for the role exclusion plays in developing the fourth amendment when the standard for defense to the tort claim differs from the standard defining a fourth amendment violation. If a fourth amendment tort action or some modification thereof is pursued infrequently, it will not be effective either as a deterrent or as a means of defining the reach of the fourth amendment. According to LaFave, creation of a special tribunal to adjudicate modified tort actions, such as proposed by Chief Justice Burger, would have the undesirable effect of withdrawing from the higher courts

the important function of spelling out police authority under the Fourth Amendment ... That process of giving content to the Amendment which occupies 'a place second to none in the Bill of Rights' is too important to be shunted off upon a special tribunal in the nature of a court of claims.<sup>191</sup>

LaFave appears to overstate the dangers inhering in Burger's proposal for creation of a special tribunal in light of Burger's suggestion that appellate review be made available under his scheme "on much the same basis that it is now provided as to district courts and regulatory agencies."<sup>192</sup> Nonetheless, insofar as litigants decide not to appeal decisions of a special tribunal, LaFave's criticism is valid.

The literature proposes other means besides the tort action to supplant or supplement exclusion.<sup>193</sup> Such alternatives include proposals for criminal prosecution, injunctive relief, summary court proceedings to provide criminal punishment, and the creation of an ombudsman. There are various other alternatives dealing with internal and external police discipline, incentive systems, police training, and restructured police-prosecutor relationships. Certain of these proposals such as that of criminal prosecution would seem, on their face, to present little impediment to developing fourth amendment standards, at least so long as they are regularly employed. Other proposals such as internal police

<sup>190</sup> Geller, *supra* note 188, at 694.

<sup>191</sup> 1 W. LAFAVE, *supra* note 5, at 32-34.

<sup>192</sup> Bivens v. Six Unknown Named Agents, 403 U.S. at 423 (Burger, C.J., dissenting).

<sup>193</sup> For a summary of these alternatives, *see* Geller, *supra* note 188, at 689-722.

discipline are not so promising in this regard, even if regularly employed. In general, however, discussion of these proposals does not take seriously enough the necessity to fulfill the role of developing fourth amendment standards if exclusion is discarded.<sup>194</sup>

In spite of the development of several alternatives to exclusion in the scholarly literature, the caselaw has neither discussed these alternatives at length nor critically pursued the question of exclusion or its alternatives as a means of defining the reach of the fourth amendment. One well known reference to these alternatives is that of Justice Frankfurter in *Wolf v. Colorado*. One primary reason for the Court's rejecting application of the exclusionary rule to the states is the availability of other remedies protecting the right of privacy. Alternatives he suggests as serving this function are "the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford."<sup>195</sup> Murphy's dissenting opinion, joined by Rutledge, is critical of these alternatives, preferring exclusion to Frankfurter's alternatives: "Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available."<sup>196</sup> *Wolf's* facts presented an excellent context for relating exclusion and its alternatives to the problem of formulating fourth amendment standards. Neither the opinion of the Court nor Murphy's dissent, however, pursued this line of inquiry.<sup>197</sup>

*Mapp v. Ohio* also provided a context potentially conducive to careful examination of alternatives to exclusion and their suitability for defining fourth amendment rights. In the course of excluding evidence obtained through the state violation, however, the Court simply dismissed other remedies as "worthless and futile" in securing compliance with constitutional provisions. The Court asserted but failed to analyze the relative ineffectiveness of the alternative remedies as deterrents. Nor did the Court discuss the likely contribution of these alternatives to defining the content of the amendment.<sup>198</sup>

It is remarkable that the literature advocating alternatives to exclusion has paid so little attention to the consideration of providing a means for ju-

dicial articulation of fourth amendment standards.<sup>199</sup> Perhaps one important reason for this omission is that the conservative arguments tend to respond to the primary rationales of the liberal arguments, arguments which in general have been received more sympathetically by the United States Supreme Court than have their conservative counterparts. Alternatives to exclusion tend to emphasize the goals of deterrence, protecting the innocent against fourth amendment violations and removing obstacles to punishing those guilty of crime.<sup>200</sup> The fact that the literature concerning alternatives is cast in this manner is, at least to some extent, a consequence of the shift to deterrence as the primary consideration in the exclusion controversy. The importance of the judicial role in protecting fourth amendment rights is minimized in the conservative arguments.<sup>201</sup> Perhaps even more importantly, when exclusion is not considered either as a constitutional right or as a logical outcome of the judicial review function, the perceived importance of exclusion as a means to spell out the contours of the fourth amendment is further minimized.

Various reformers have suggested a number of alternatives to replace or supplement the exclusionary rule. All such proposals, however, share the defect which Dellinger attributes to the Chief Justice's proposal:

[B]y disallowing in all cases the use of the exclusionary rule to suppress evidence gathered in violation of the fourth amendment, the Chief Justice's proposal would permit the government to buy itself out of having to comply with constitutional commands. To abolish the exclusionary rule and replace it with an action for damages against the governmental treasury is to have the law speak with two voices.<sup>202</sup>

Dellinger's observation is an insightful one, but it falls somewhat short of its mark. His observation is

<sup>199</sup> Justice Brennan expresses concern for the potential of the Court's decision in *Peltier* to "stop dead in its tracks judicial development of Fourth Amendment rights." This objection did not come in the context of alternative remedies for fourth amendment violations, but rather in his objection to the Court's decision to deny retroactive application to the Court's decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). Nonetheless, his opinion indicates the concern of two Justices for preserving the avenue for judicial articulation of fourth amendment standards. *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan & Marshall, JJ., dissenting).

<sup>200</sup> See, e.g., S. SCHLESINGER, *supra* note 112, at 71.

<sup>201</sup> See text accompanying note 105 *supra*.

<sup>202</sup> Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1562-63 (1972).

<sup>194</sup> *Id.* at 713-22.

<sup>195</sup> 338 U.S. at 31.

<sup>196</sup> *Id.* at 41. (Murphy & Rutledge, JJ., dissenting).

<sup>197</sup> *Id.* at 25, 41.

<sup>198</sup> 367 U.S. at 651-52.

valid only if exclusion is a constitutional requirement in which case the replacement of exclusion by any alternative remedy is objectionable because it violates constitutional principle and denies a constitutional right.

The discussion of alternatives is rich with interesting and important considerations. These various policy considerations such as judicial integrity and deterrence contain inconclusive claims by partisans of both liberal and conservative persuasions. The competing claims regarding deterrence are the dominant considerations in the literature and caselaw. Because of their importance to the debate, these claims have been subjected to a number of empirical studies, studies which are the object of the next section of this analysis.

#### IV. EMPIRICAL STUDIES, DETERRENCE, AND EXCLUSION

The arguments supporting and opposing exclusion have been examined. It was discovered that these arguments are specific outgrowths of the liberal credo and the due process model on the one hand and the conservative credo and the crime control model on the other. Many of the arguments supporting and opposing exclusion are of a speculative nature and can be refuted by those who approach the problem from the other ideological perspective. Central to each of the opposing positions is whether or not exclusion deters unlawful police behavior. The question of deterrence has also emerged as the primary rationale underlying Supreme Court pronouncements.

Commentators have tried to resolve the exclusion controversy on empirical grounds. The empirical studies have concentrated on the consideration of deterrence, not only because of its central place in the exclusion controversy, but one suspects because whatever difficulties are intrinsic to measuring deterrence, they pale in comparison to problems involved in examining empirically certain other conservative and liberal rationales. Even the most talented empirical social scientist would undertake the measurement and causal analysis of judicial integrity or trust in government with trepidation.

This section will not attempt a systematic critique of the empirical studies, for such a critique can be found in a number of other sources and is not necessary to advancing the argument of this article.<sup>203</sup> Rather, the focus will be on demonstrat-

ing the inconclusiveness of the major empirical studies in answering whether the exclusionary rule is an effective deterrent and the larger question of whether the rule ought to be abandoned.

Two early attempts at empirical examination of the effects of exclusion are that of Professor John Barker Waite and Justice Murphy. Professor Waite's study, originally published in 1933, concludes that at least one fourth of those in his sample of "gun-toters discovered and arrested during that year escaped any penalty, not because they were innocent, but solely because of the judge-made rule that evidence of their guilt could not be used."<sup>204</sup> Waite also observes that "not one shred of evidence" indicates that police in two states which permitted use of evidence gained through illegal searches and seizures were worse behaved than the police in two states which employed the exclusionary rule.<sup>205</sup> One need hardly enumerate the difficulties of relying on such a study for contemporary use, but it does illustrate an early concern for the policy questions which currently dominate the debate over exclusion.

Justice Murphy's dissent in *Wolf v. Colorado* contains a summary of eleven replies he received in response to a questionnaire he sent to thirty-eight randomly selected large cities.<sup>206</sup> Of six cities operating with the exclusionary rule, five reported extensive police training, whereas only one of five cities operating without the exclusionary rule reported extensive training. From these responses, Murphy inferred a "positive demonstration" of the rule's efficacy.<sup>207</sup> Apart from the small sample, Murphy's statement does not demonstrate that the police training had significant deterrent effects on police behavior.<sup>208</sup>

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*Data and a Plea against a Precipitous Conclusion*, 62 Ky. L.J. 681 (1974); Geller, *supra* note 188; Kaplan, *supra* note 108; Oaks, *supra* note 3; Wright, *supra* note 107; Comment, *Critique, 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).

<sup>204</sup> Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 688 (1944).

<sup>205</sup> *Id.* at 685.

<sup>206</sup> 338 U.S. at 44-46, *quoted in* Oaks, *supra* note 3, at 678-79.

<sup>207</sup> *Id.*

<sup>208</sup> Oaks, *supra* note 3, at 679. A later, post-*Mapp* study of opinion of various participants in the criminal process indicates greater educational efforts in those states that were compelled by *Mapp* to adopt the exclusionary rule. This study also indicates a comparative decrease in police effectiveness in searches following *Mapp*. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 Wis. L. REV. 283, 283-86. A study of the opinions of police chiefs,

<sup>203</sup> See, e.g., D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 220-54 (1977); S. SCHLESINGER, *supra* note 112; Canon, *Is the Exclusionary Rule in Failing Health? Some New*



An important study of exclusion prior to *Mapp v. Ohio* is a student inquiry of motions to suppress during 1950 in the Chicago Municipal Court. This study focuses on gambling, narcotics and certain weapons violations.<sup>209</sup> In the gambling cases, seventy-seven percent of the defendants moved to suppress; ninety-nine percent of these motions were granted. There were no convictions after suppression. The students conclude that the exclusionary rule was not a significant deterrent. They also infer that their study

may indicate that the exclusionary rule is most effective in discouraging illegal searches in cases involving serious offenses, where conviction is important. Conversely, where the police believe that a policy of harassment is an effective means of law enforcement, the exclusionary rule will not deter their use of unlawful methods.<sup>210</sup>

While these figures do not prove the absence of any deterrent effect in gambling cases, they do indicate a remarkable failure of police to observe search and seizure rules. Although lower, the figures in narcotics and weapons cases lead to the same conclusions.<sup>211</sup> It is necessary to remember, of course, that these results were obtained for specific types of violations in one city.

In 1970, Dallin Oaks conducted an ambitious study of exclusion, a study which the Supreme Court and analysts of the exclusion controversy have cited frequently. He utilized data from other studies, including the Chicago student study conducted in 1950. He also adds data of his own which were gathered in 1969 from extensive work in Cincinnati and from less extensive study of police records in Chicago and Washington, D.C.<sup>212</sup> Oaks

employs three research methods to obtain his data. He compares law enforcement conduct and the operation of the criminal justice system before and after adoption of the exclusionary rule in his "before-after" method. He compares these factors in a jurisdiction that has the exclusionary rule with a jurisdiction that does not in his "multiple area" method. His third method, "field observation," attempts to determine the rule's effect during a single period of time by such means as drawing inferences from the percentage of motions to suppress granted in particular types of crime.<sup>213</sup> Oaks sets out his findings in summary fashion. This summary includes the Chicago student study discussed above as well as an analysis of the evidentiary grounds for arrest and disposition of narcotics cases in New York City before and after *Mapp*.<sup>214</sup>

Oaks' first conclusion is that "[m]ore than half the motions to suppress . . . concerned narcotics and weapons offenses." Most of the other motions involved gambling in Chicago and offenses against property in the District of Columbia. He finds this a persuasive indication that the search and seizure practices affected by exclusion are concentrated in the enforcement of these crimes.<sup>215</sup> The 1969 figures for Chicago indicate no deterrence of illegal searches in the enforcement of a large number of gambling, narcotics, and weapons offenses. Oaks recognizes that great care must be exercised in comparing law enforcement statistics from different jurisdictions since, for example, District of Columbia figures reflect a screening function and failure to file some cases when evidence is likely to be suppressed.<sup>216</sup>

Oaks' study of Cincinnati law enforcement statistics shows that adoption of the exclusionary rule apparently did not affect the number of convictions or arrests in gambling, narcotics, or weapons offenses. The decision in *Mapp* had no immediate effect on the amount of stolen property recovered, but there was a gradual decrease beginning several years after the decision. The quantity of property seized in Cincinnati during eighteen-month periods immediately before and after *Mapp* shows dramatic decreases in seizure of gambling appara-

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sheriffs, prosecutors, and defense counsel in North Carolina shows that about 75 percent of them regarded exclusion as an effective deterrent. Katz, *Supreme Court and the State: An Inquiry into Mapp v. Ohio in North Carolina*, 45 N.C. L. REV. 119 (1966). It should be emphasized that these studies are reflections of the *opinions* of those involved in the criminal process. Both studies are included in Oaks' discussion of measurement of the effects of exclusion. Oaks, *supra* note 3, at 678-81.

<sup>209</sup> It should be emphasized that Illinois adopted the exclusionary rule in 1924, some 37 years prior to *Mapp*, in *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924). See Canon, *supra* note 7, at 402.

<sup>210</sup> Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 Nw. U.L. REV. 493, 497-98 (1952).

<sup>211</sup> Oaks, *supra* note 3, at 684-85. For a discussion of why exclusion is not likely to deter in gambling and prostitution cases, see W. LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 411-27 (1965).

<sup>212</sup> Oaks, *supra* note 3, at 678-709.

<sup>213</sup> *Id.* at 678.

<sup>214</sup> Note, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. & SOC. PROB. 87 (1968).

<sup>215</sup> Oaks, *supra* note 3, at 706.

<sup>216</sup> In 1969, approximately 45 percent of all persons charged with gambling offenses in Chicago were being dismissed after successful motions to suppress. This figure was 33 percent for narcotics offenses and 24 percent for carrying a concealed weapon. *Id.*

tus, but no change in seizure of narcotics or weapons. Although the *Mapp* decision may have contributed to the decrease in seizure of gambling apparatus, the decrease may also be wholly or partially attributable to changes in law enforcement techniques begun two years prior to *Mapp*.<sup>217</sup>

Oaks' study suggests that police training in search and seizure is more extensive where there is an exclusionary rule. In addition, the proportionate incidence of legal searches and seizures seems generally to have increased after *Mapp*. States having an exclusionary rule prior to *Mapp* exhibited smaller increases than did states forced by *Mapp* to adopt the rule. Not surprisingly, effectiveness apparently was perceived to have decreased, and less so in states having their own exclusionary rule prior to *Mapp*.<sup>218</sup> The conclusiveness of these findings is questionable. Oaks' research consists primarily of inferences drawn from Cincinnati arrest records of those crimes most often associated with search and seizure. Also, his results may well be dated some ten to fifteen years after the fact.<sup>219</sup>

Michael Ban conducted two studies of the rule's impact in the mid-1960s. His assessment of the number of search warrants and motions to suppress includes periods prior and subsequent to *Mapp*. Based on an increase in search warrants from one hundred to one thousand in Boston and from zero to one hundred in Cincinnati between 1960 and 1963, opposing inferences can be drawn. Whether one infers from these figures "that the rule is not an effective deterrent"<sup>220</sup> or that "the Boston figures imply considerable if begrudging police compliance,"<sup>221</sup> this much is clear: these figures do not dispose of the question whether or not the exclusionary rule is an effective deterrent.

In the early 1970s Professor Bradley Canon replicated Oaks' Cincinnati study for nineteen other American cities.<sup>222</sup> He reported that ten of these cities exhibited minimal or no variance in statistics on arrests for most search and seizure crimes following *Mapp*; nine cities showed a statistically significant decrease in arrests for these crimes.<sup>223</sup> One difficulty with Canon's conclusion is that a stable level of arrests for a given crime does not necessarily indicate whether exclusion is changing search and

seizure practices.<sup>224</sup> Oaks' study suffers from the same flaw.<sup>225</sup> No decrease in arrests following *Mapp*, for example, may indicate either a disregard for the decision or an adherence to it with no detrimental effect on number of arrests. In addition, Canon's study does not indicate whether the percentage of illegal arrests has declined because he groups legal and illegal arrests together; he also fails to examine unlawful searches and seizures which did not result in arrests.<sup>226</sup> Such statistics may be helpful in determining whether *Mapp* interferes with arrest rates only if the number of crimes and other factors are held constant.

A second part of Canon's study was based on a questionnaire sent to public defenders, prosecutors, and police departments in American cities with a population of over 100,000.<sup>227</sup> The questionnaire was designed to determine if the effectiveness of the exclusionary rule has increased with the passage of time. Examining respondents' comparison of current search and seizure practices with those of 1967, Canon found that two-thirds of the departments reported more restrictive rules governing searches; fifty percent of the cities reported that motions to suppress were granted less than ten percent of the time (only a modest change from 1967).<sup>228</sup> Canon concludes that the exclusionary rule is currently more effective than in the immediate post-*Mapp* years.<sup>229</sup>

Canon's findings have not gone unchallenged. Schlesinger argues that the sample of respondents was neither random nor representative, and that the questionnaires may not have been answered candidly because of attempts to put the police in a favorable light.<sup>230</sup> Schlesinger also objects to the inferences drawn by Canon from the data. Because of other possible causes for these changes, "they hardly make a case for a substantial deterrent effect."<sup>231</sup>

The last significant study is that of James Spiotto published in 1973.<sup>232</sup> Spiotto compared the results of a study of motions to suppress in search and

<sup>224</sup> Canon, *supra* note 7, at 400.

<sup>225</sup> Oaks, *supra* note 3, at 689-93.

<sup>226</sup> D. HOROWITZ, *supra* note 203, at 232.

<sup>227</sup> Canon, *supra* note 203.

<sup>228</sup> *Id.* at 712, Table 6; 715, Table 8; 722, Table 10.

<sup>229</sup> Canon, *supra* note 7, at 401.

<sup>230</sup> Schlesinger, *supra* note 7, at 406-07. It is difficult to understand what motive defense lawyers would have to "give the police a favorable image." Schlesinger's reservation is valid in the case of police-respondents.

<sup>231</sup> *Id.* at 407.

<sup>232</sup> Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973).

<sup>217</sup> *Id.* at 707.

<sup>218</sup> *Id.* at 708.

<sup>219</sup> Canon, *supra* note 7, at 400.

<sup>220</sup> S. SCHLESINGER, *supra* note 112, at 54.

<sup>221</sup> Canon, *supra* note 7, at 401.

<sup>222</sup> Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57 (1977).

<sup>223</sup> *Id.* at 72, Table 2.

seizure crimes in Chicago for 1950, 1969, and 1971. He found that from 1950 to 1970, during which time the exclusionary rule was introduced into Illinois, there was a proportional increase in motions to suppress for narcotics and guns. He concluded that if the exclusionary rule had a strong deterrent effect on the police, the proportional number of motions to suppress would have decreased.<sup>233</sup> However, Illinois had adopted a state exclusionary rule in 1924; thus, what his data prove is not clear, but surely they do not support Spiotto's conclusion.

Professor Kamisar summarizes the inconclusiveness of the empirical studies in the context of noting disagreement in rationales among those who would abolish the rule:

I cannot resist pointing out that at the same time some critics of the exclusionary rule are urging its elimination or substantial modification on the ground, *inter alia*, that it has had little if any impact on the amount of pre-*Mapp* illegality, other critics are calling for the rule's repeal or revision on the ground, *inter alia*, that in recent years the police have attained such a high incidence of compliance with Fourth Amendment requirements that "the absolute sanctions of the Exclusionary Rule are no longer necessary to 'police' them."<sup>234</sup>

The data giving rise to the latter argument come from a national study of more than one thousand cases of warrantless searches and seizures decided by appellate courts from 1970-72. Eighty-four percent of these searches and seizures were found proper by the appellate courts.<sup>235</sup> The argument denies that the exclusionary rule is responsible for this remarkable record of police compliance and instead attributes it to "police professionalism." This justification, without more, is unpersuasive.<sup>236</sup> As Professor Kamisar's observation makes clear, not only do proponents and opponents of exclusion differ in their interpretations of exclusion, but critics of the rule cannot agree which conclusions of the empirical studies best support their cases. Almost all the empirical studies have been subjected

to severe criticism; none can claim to conclusively answer the questions of exclusion's effects. Any conclusion drawn from these studies must be tentative and qualified.

Thus, the present empirical evidence on the deterrent effect of exclusion is not adequate to dispose of the controversy.<sup>237</sup> This deficiency is exacerbated by the age of *Mapp*: pre-*Mapp* data have become dated. Methods dependent upon subjective evidence such as questionnaires are particularly subject to this defect. In short, "it presently appears to be impossible to design any single test or group of tests that would give a reliable measure of the overall deterrent effect of the exclusionary rule on law enforcement behavior."<sup>238</sup>

The question of exclusion has generally been narrowed to that of whether the rule deters unlawful police conduct. But even this narrowing of the inquiry has failed to provide a conclusive answer when put to empirical tests. We must turn to yet another field of inquiry to answer the question of exclusion.

## V. EXCLUSION AS A CONSTITUTIONAL REQUIREMENT

### A. EXCLUSION AS A REQUIREMENT OF DUE PROCESS OF LAW OR LAW OF THE LAND

The liberal and conservative arguments have been examined. Each of the arguments from these opposing camps is a particular manifestation both of its parent ideology and a competing model of the criminal process. Characteristically, the arguments are policy analyses detached from considerations of constitutionalism. In addition, empirical analysts focusing on the policy of deterrence have constructed studies to test the deterrent impact of exclusion. The remainder of this article attempts

<sup>237</sup> One commentator asserts that a "heavy burden" of proof is necessary to justify the rule because of the high price it exacts. S. SCHLESINGER, *supra* note 7, at 408. He is certainly right that no such heavy burden of proof has been met. But, as Dworkin recognizes, "the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative. The Chief Justice's assignment of the burden is merely a way of announcing a predetermined conclusion." Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332-33 (1973). This assertion regarding burden of proof is radically altered if exclusion is accepted as a constitutional right. See section V *infra*.

<sup>238</sup> Oaks, *supra* note 3, at 716. Certain difficulties involved in empirical measurement of issues related to law and deterrence in another context are discussed in L. SUNDERLAND, *OBSCENITY: THE COURT, THE CONGRESS, AND THE PRESIDENT'S COMMISSION* 71-84 (1974).

<sup>233</sup> *Id.* at 276.

<sup>234</sup> Kamisar (1978), *supra* note 144, at 72-73 (quoting Brief of Americans for Effective Law Enforcement (A.E.L.E.) and the International Association of Chiefs of Police (I.A.C.P.) as *amica curiae* in Support of Petitioner at 12, *California v. Krivda*, 409 U.S. 33 (1972) [hereinafter cited as A.E.L.E. Brief]).

<sup>235</sup> *Id.* (quoting the A.E.L.E. Brief at 17).

<sup>236</sup> A.E.L.E. Brief at 17-18 (citing *Bivens v. Six Unknown Named Agents*, 403 U.S. at 416 (Burger, C.J., dissenting)).

to transcend ideological and empirical considerations and concentrate on considerations of constitutional principle.<sup>239</sup>

Amsterdam favors exclusion as a necessary evil because "the supposed alternatives to it are pie in the sky":<sup>240</sup>

I am not suggesting that the exclusionary rule is an explicit command of the Constitution, nor do I mean to make more of the Fourth Amendment's language than the skin of the living thought that dwells within. The rule was fashioned by judges as an expression of that thought. What the Constitution does command is that the administration of the system of criminal justice be so ordered as not to produce incentives toward unreasonable search and seizure which it is not fully capable of restraining. Unless and until a far better system of restraints is devised and put into effective operation than we now have or can soon anticipate, the exclusionary sanction is the only way to honor that command.<sup>241</sup>

No one can disagree with Amsterdam's contention that exclusion is not an explicit command of the Constitution if he means by this that exclusion is not spelled out in the Constitution. However, according to Amsterdam, the Constitution *does* command that the criminal justice system be ordered so as not to produce incentives toward unconstitutional searches and seizures the system is not capable of restraining. He does not indicate which constitutional provision contains this latter command.

Professor Kamisar, in a recent article, emphasizes the judicial integrity argument in his defense of exclusion:

The courts, after all, are the specific addressees of the constitutional command that "no warrants shall issue, but upon" certain prescribed conditions. . . . The government whose agents violated the Constitution should be in no better position than the government whose agents obeyed it; "the efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles." Is any of this really so hard to follow?<sup>242</sup>

Kamisar's logic appeals to some; it does not appeal to all.<sup>243</sup> His position lacks both the conviction and

<sup>239</sup> This section will draw on arguments which appeared in Sunderland, *supra* note 143, and in Schrock & Welsh, *supra* note 44.

<sup>240</sup> Amsterdam, *supra* note 130.

<sup>241</sup> *Id.* at 433.

<sup>242</sup> Kamisar (1978), *supra* note 144, at 68.

<sup>243</sup> See, e.g., Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 JUDICATURE 214 (1978).

support that the exclusionary rule is as much a part of the Constitution as is the warrant requirement. In this sense, both Kamisar and Amsterdam reflect positions similar to that of the literature and caselaw discussed above which support the rule of exclusion but seem to regard it as a kind of quasi-constitutional law that cannot be supported by reference to fundamental constitutional implications.<sup>244</sup>

A reluctance exists among commentators and jurists to treat exclusion as a right or requirement of constitutional principle. Professor LaFave excludes such consideration from the rationales for exclusion in his three-volume treatise.<sup>245</sup> Professor Wingo raises some interesting objections to the argument that exclusion is constitutionally based:

The Fourth Amendment prohibits unreasonable searches and seizures and requires that warrants be issued only upon a showing of probable cause, but there is no statement concerning enforcement of these guarantees. It is certainly reasonable to assume that had the Fourth Amendment been designed to require exclusion of evidence seized in violation of its provisions, it would have been drafted so as to make this purpose explicit.<sup>246</sup>

In certain respects, Wingo goes to the heart of the matter. If the rule is not a constitutional requirement, then the entire context of the argument shifts and matters such as federalism, the proper supervisory authority of the Court, the relative authority of Congress, and the relevancy of various policy factors become the fundamental considerations: in short, without a constitutional justification, the Court has no business imposing the rule on the states. On the other hand, one must question the criterion of constitutionality advocated by Wingo—the explicit language in the Constitution. By this standard, Wingo would have great difficulty justifying either the doctrine of judicial review or the application of important Bill of Rights freedoms to the states through the fourteenth amendment.

There are, however, commentators and jurists who take seriously exclusion as an intrinsic constitutional requirement or constitutional right. Paulsen has described exclusion as a "rule naturally suggested by the Constitution itself."<sup>247</sup> Coe presents three rationales for exclusion, the first of

<sup>244</sup> Kaplan, *supra* note 108, at 1030.

<sup>245</sup> 1 W. LAFAVE, *supra* note 5, at 17-20.

<sup>246</sup> Wingo, *supra* note 109, at 585.

<sup>247</sup> Paulsen, *supra* note 30, at 257.

which is exclusion as a remedial or personal right:<sup>248</sup> "The notion underlying this view of the exclusionary rule is that the Fourth Amendment freedom from unreasonable search and seizure is a personal right, and that exclusion of evidence is somehow inherent in that right."<sup>249</sup> But Coe's "somehow" remains equivocal. The caselaw also refers to exclusion as a constitutional right, although as we have seen, the Court's majority does not hold this view.<sup>250</sup> Where the caselaw does gloss exclusion with constitutionalism, it generally suffers the same shortcomings as the analysis of the commentators discussed above: both merely assert that exclusion is a constitutional requirement without adequately supporting the assertion through constitutional argument.

Such an argument, however, can be developed from suggestions in Supreme Court decisions. *Boyd v. United States* held unconstitutional the compulsory production of business papers under the provisions of an Act of 1874.<sup>251</sup> The Act authorized a court of the United States to require the defendant or claimant in revenue cases to produce his private books, invoices and papers in court, or the allegations against the individual would be taken as confessed. The Court obscured the rationale for its holding the applicable parts of the statute repugnant to the fourth and fifth amendments without giving an adequate rationale for this coupling:

[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment.<sup>252</sup>

Justice Bradley began his analysis with the proposition that a violation of the fourth amendment's ban on unreasonable searches and seizures does not require actual entry upon the premises. A compulsory production of books and papers such as that authorized by this Act "is within the spirit and meaning of the Amendment."<sup>253</sup> The Act's making the nonproduction of such papers a confession of

allegations is equivalent to compulsory production. Furthermore, the compulsory production of the private papers runs counter to the prohibition against self-incrimination of the fifth amendment. Finally, Bradley joins the fourth and fifth amendments in characterizing them as both relating to the personal security of the citizen.<sup>254</sup>

Various criticisms may be leveled at the Court's opinion in *Boyd* although it has been praised as being "a case which will be remembered as long as civil liberty lives in the United States"<sup>255</sup> and "the leading case on the subject of search and seizure."<sup>256</sup> Justice Miller articulated certain of these criticisms in a separate opinion.<sup>257</sup> Although Miller showed concern that the Act compelled the party to be a witness against himself in violation of the fifth amendment, he did not regard the Act as violating the fourth amendment.<sup>258</sup> A number of commentators likewise criticize Bradley's reliance on the fourth-fifth amendment nexus given the "clear" violation of the fifth amendment right against self-incrimination.<sup>259</sup> The result of *Boyd* is the creation of a fourth amendment exclusionary rule in what is generally agreed to be a fifth amendment case. This interpretation of the fourth amendment exclusionary rule through the fifth amendment has the unfortunate consequence of obscuring the necessity for addressing the issue of exclusion for fourth amendment violations on its own merits. This legacy of *Boyd* was to be reflected in later decisions. A principal example is Justice Black's reliance on a self-incrimination theory in *Mapp v. Ohio*, a reliance which split the majority in *Mapp* on the important issue of the rationale underlying the exclusionary rule.<sup>260</sup> Black's reliance on a self-incrimination rationale for exclusion of evidence obtained in violation of the fourth amendment is illustrative of the criticism Schrock and Welsh make of *Boyd*:

In *Boyd*, Bradley seemed to be bringing the fourth to the aid of the already sufficient fifth, but the effect of what he did was to make later judges think the

<sup>254</sup> *Id.* at 627-30.

<sup>255</sup> *Olmstead v. United States*, 277 U.S. at 474 (Brandeis, J., dissenting).

<sup>256</sup> 1 W. LAFAVE, *supra* note 5, at 6 (quoting *One 1958 Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *Carroll v. United States*, 267 U.S. 132 (1925)).

<sup>257</sup> 116 U.S. at 639 (Miller, J., concurring).

<sup>258</sup> *Id.*

<sup>259</sup> Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 191 (1930); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479 (1922).

<sup>260</sup> 367 U.S. at 662-66 (Black, J., concurring).

<sup>248</sup> Coe, *supra* note 156, at 14-15. The other rationales he discusses are those of judicial integrity and deterrence. *Id.* at 15-24.

<sup>249</sup> *Id.* at 14. See also Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. L. REV. 507 (1975).

<sup>250</sup> *United States v. Calandra*, 414 U.S. at 348.

<sup>251</sup> 116 U.S. 616 (1886).

<sup>252</sup> *Id.* at 634-35.

<sup>253</sup> *Id.* at 620-22.

fifth had to be brought to the aid of the fourth. And one upshot of that prejudice is that present day opponents of the exclusionary rule think they have dispatched the constitutional personal rights basis for the exclusionary rule when they have discredited the *Boyd* fourth-fifth combination. Bradley both established and undermined the exclusionary rule in the same opinion.<sup>261</sup>

The linking of the fourth amendment with the fifth amendment's self-incrimination provisions is also objectionable from the perspective of history. Wigmore and Chafee, for example, agree that the two provisions grew out of different contexts and different historical periods in England.<sup>262</sup> Thus, *Boyd v. United States* provides a shallow foundation for fourth amendment exclusion.

Several years after *Boyd*, exclusion based on fourth amendment violations was rejected in *Adams v. New York*.<sup>263</sup> Although the Court might have disposed of the issue on other grounds, Justice Day's opinion of the Court adhered to the common-law rule of admissibility, under which "the courts do not stop to inquire as to the means by which the evidence was obtained."<sup>264</sup> Only ten years later, in the case of *Weeks v. United States*, the Court in turn, rejected the doctrine of the *Adams* case. In *Weeks*, a unanimous Court articulated an exclusionary rule based on fourth amendment considerations and clearly rejected the common law view that evidence was admissible regardless of how it was obtained. The evidence on the basis of which *Weeks* was convicted and which the Su-

preme Court ordered excluded was seized from his home in two warrantless searches. This evidence included private papers like those involved in *Boyd*.

*Weeks* contains elements which seem to be precursors of the current judicial integrity argument, one example of which follows:

[T]he duty of giving to it [the Fourth Amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions . . . finds no sanction in the judgments of the courts. . . .<sup>265</sup>

The essence of this argument is that all governmental bodies exercising power under the Constitution, including the judiciary, must function in accordance with that law. In the case of searches and seizures, this enforcement must follow the commands of the fourth amendment. The second aspect of this argument in *Weeks* is that the courts should not sanction any departures from the Constitution because the courts are responsible for supporting the Constitution and for maintaining fundamental constitutional rights. This argument is similar to that made in later cases which justify the exclusionary rule on the basis of its being necessary to maintain judicial integrity.<sup>266</sup> Clearly, however, *Weeks* did not regard exclusion as simply a discretionary act of judicial integrity. Rather, exclusion itself is a constitutional requirement, the denial of which *Weeks* characterized as "a denial of the constitutional rights of the accused."<sup>267</sup>

Although *Weeks* indicates that exclusion is rooted in the Constitution, it does not clearly demonstrate how it arrived at this conclusion. Thus, it is necessary to construct such an argument, an argument which begins with yet another passage from the *Weeks* opinion.<sup>268</sup>

<sup>265</sup> 232 U.S. at 392 (1914).

<sup>266</sup> *Elkins v. United States*, 364 U.S. at 222, cited in *Mapp v. Ohio*, 367 U.S. at 659.

<sup>267</sup> 232 U.S. at 398.

<sup>268</sup> The argument presented herein requiring exclusion as a consequence of the Constitution's due process provisions is drawn from an earlier article in which it was presented in a different context. Sunderland, *supra* note 143. Geller and Kamisar present arguments in their work which hint at such an interpretation. Kamisar raises this rationale in the context of discussing the application of the fourth amendment to the states through the fourteenth amendment's due process clause. Geller raises this rhetorical question: "What does the due process clause mean if it does not mean that a defendant cannot be convicted on evidence obtained in violation of due process

<sup>261</sup> Schrock & Welsh, *supra* note 44, at 283 n.97. Chief Justice Burger raises another objection to the fourth-fifth amendment logic:

Even ignoring, however, the decisions of this Court that have held that the Fifth Amendment applies only to "testimonial" disclosures, . . . it seems clear that the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence. Mr. Justice Holmes once put it succinctly, "A party is privileged from producing the evidence, but not from its production."

*Bivens v. Six Unknown Named Agents*, 403 U.S. at 414-15.

<sup>262</sup> J. WIGMORE, TREATISE ON EVIDENCE § 2184, at 31 (1904); Chafee, *The Progress of The Law, 1919-1922*, 35 HARV. L. REV. 673, 697-98 (1922), cited in J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 58 n.40 (1966). See also Sunderland, *Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond*, 15 WAKE FOREST L. REV. 171, 171-88 (1979).

<sup>263</sup> *Adams v. New York*, 192 U.S. 585 (1904).

<sup>264</sup> *Id.* at 594.

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the *fundamental law of the land*.<sup>269</sup>

In other words, both courts and other governmental officials must preserve the principles embodied in the fundamental law of the land, including the law of the Constitution. Former Chief Justice Traynor of the California Supreme Court argued in favor of the exclusionary rule in a similar manner: "[The argument against the exclusionary rule] was rejected when those [fourth amendment] provisions were adopted. In such cases had the Constitution been obeyed, the criminal could in no event be convicted."<sup>270</sup>

Like much of the legal argument supporting exclusion, both Traynor's insistence that the Constitution be obeyed and *Weeks*' requirement that courts be bound by the fundamental law of the land have an intuitively satisfying ring. Yet, these opinions do not present a principled and coherent argument justifying their assertion that the Constitution requires the exclusionary rule.<sup>271</sup> Why would an alternative remedy which obeys the commands of the fourth amendment not be equally acceptable? The judicial opinions do not adequately answer this question—a question raised most clearly by Chief Justice Burger in *Bivens*.<sup>272</sup>

One reason why an alternative remedy should not replace the exclusionary rule is that the due process clause of the fifth amendment requires the exclusionary rule in instances of federal violations of the fourth amendment. The relevant part of the fifth amendment reads "nor [shall any person] be

of law?" Kamisar's observation does not apply to the federal government since the fourteenth amendment applies only to the states. Geller merely hints at a due process argument through raising this rhetorical question and does not pursue it or its implications. Kamisar, *supra* note 144, at 79; Geller, *supra* note 188, at 641. Schrock and Welsh make an argument which is developed differently but is similar to mine. Schrock & Welsh, *supra* note 44, at 326, 335, 364.

<sup>269</sup> 232 U.S. at 393 (emphasis added).

<sup>270</sup> *People v. Cahan*, 44 Cal. 2d 434, 444, 282 P.2d 905, 914 (1955).

<sup>271</sup> This characterization seems appropriate, for much of the reasoning contained in opinions discussed in previous sections was shown inadequate in terms of supporting the exclusionary rule.

<sup>272</sup> Chief Justice Burger argues in *Bivens* that if an alternative remedy is available, it would fulfill the demands of maintaining judicial integrity. 403 U.S. at 414 (Burger, C.J., dissenting).

deprived of life, liberty or property, without due process of law."<sup>273</sup> Due process of law is derived from the phrase "law of the land" in section 29 of the Magna Carta: "No free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."<sup>274</sup> The phrase, "due process of law" first appeared in 1354 in a statutory reconfirmation of this section of the Magna Carta, sometimes called the "Statute of Westminster of the Liberties of London," which, as Coke argued, equated this term to "by the law of the land."<sup>275</sup>

This equation has early, authoritative, and continuous support from the Supreme Court of the United States as well.<sup>276</sup> An often cited example of this basis in American law is the case of *Murray's Lessee v. Hoboken Land and Improvement Co.*, where the Court noted, "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land.'"<sup>277</sup> Justice Curtis went on to ask how a court is to determine whether "process, enacted by Congress, is due process?" Sustaining this identity between law of the land and due process, Justice Curtis properly identified the Constitution as the first source of the content of due process: "We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England. . . ."<sup>278</sup>

The due process requirement thus might be paraphrased to say that any deprivation of life, liberty, or property must be in accordance with the law of the land, or, at the very least, according to the commands of the authoritative legal declaration of the American law of the land, the Constitution. According to this argument, the due process clause of the fifth amendment would allow no deprivation of life, liberty, or property except insofar as the commands of the Constitution are followed throughout the proceedings. Therefore,

<sup>273</sup> U.S. CONST. amend. V.

<sup>274</sup> CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1138 n.3 (L. Jayson ed. 1973) [hereinafter cited as CONSTITUTION ANNOTATED].

<sup>275</sup> *Id.* at 1138 (citing 2 E. COKE, INSTITUTES 50-51 (1641)); see R. MOTT, DUE PROCESS OF LAW 4-5 (1923).

<sup>276</sup> *Twining v. New Jersey*, 211 U.S. 78, 100 (1908); *Davidson v. New Orleans*, 96 U.S. 97, 101 (1877).

<sup>277</sup> 59 U.S. (18 How.) 272, 276 (1855).

<sup>278</sup> *Id.* at 277. For a restrictive interpretation of the "law of the land" concept, see Berger, "Law of the Land" Reconsidered, 74 Nw. U.L. REV. 1 (1979).

any deprivation of life, liberty, or property violating the fourth amendment search and seizure provisions violates the explicit requirements of the due process clause. As a matter of constitutional principle, in any proceeding which may result in the deprivation of life, liberty or property, evidence or testimony gained through violation of the fourth amendment (or any other constitutional provision) may not be used because the due process clause of the fifth amendment prohibits such use.

At the *state* level, the argument for exclusion here presented applies as follows: the search and seizure provisions applicable to the states through the fourteenth amendment are a part of that law of the land which binds the actions of the states; no state may deprive any person of life, liberty, or property unless that deprivation be in accordance with this law of the land; evidence gained in violation of these forms must be suppressed.<sup>279</sup> If one accepts, *arguendo*, the "absorption" of the fourth amendment by the fourteenth, then there is no difference between what the fourth amendment and the fourteenth amendment require relating to search and seizure. Under this "absorption" interpretation, the theory of exclusion would operate at both the state and federal levels.<sup>280</sup>

<sup>279</sup> The interpretation of due process contained herein does not necessarily imply a total incorporationist theory of the due process clause of the fourteenth amendment. Since the fifth amendment due process clause relates to the national government and the fourteenth amendment due process clause relates to the states, the particular rights each guarantees to the individual need not be identical. That is, the rights which are a part of the law of the land that governs the relationship of the individual to the national government need not be identical to the rights that are a part of the law of the land which governs the relationship of the individual to state governments. It is not within the scope of this article to treat at length either the substantive constitutional law of search and seizure required by the fourth amendment or the problematic theory of incorporation. The mandate of the theory contained herein is simply this: whatever the content of these rights which are a part of the law of the land, substantial violations of these rights cannot be a part of the process by which an individual is deprived of life, liberty or property.

<sup>280</sup> The standard of reasonableness is currently the same as it relates to search and seizure under both the fourth and fourteenth amendments, but the Court has emphasized that the demands of the federal system compel a distinction between evidence held inadmissible because of the Court's supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. Differences could conceivably arise in which conduct would constitute a substantial violation of the rules of evidence to be applied in federal criminal prosecutions but would not constitute a

Novelty of interpretation is not a cardinal virtue in constitutional law. However, as applied to a due process rationale for the exclusionary rule, that novelty is counterbalanced by three factors: (1) this interpretation has roots in the early case of *Weeks v. United States*;<sup>281</sup> (2) the argument supporting the Court's enforcement of the exclusionary rule, as well as much of the scholarly commentary, is based to a large degree on a kind of intuition that the Constitution requires the rule; (3) although not directly supportable through explicit historical intention or precedent, the logic of principled construction and certain cases strongly support this interpretation of the exclusionary rule.

#### B. EXCLUSION AS A REQUIREMENT OF JUDICIAL REVIEW

A second constitutionally based argument supporting the exclusionary rule justifies exclusion as a consequence of judicial review.<sup>282</sup> Paulsen states that whereas most constitutional or statutory restrictions on police conduct are abstract decisions, the exclusionary rule applies the decision to the particular case. He then states that "the use of the rule is a natural consequence of the *restrictive principle*. The rule is needed to make the constitutional or statutory safeguards something real."<sup>283</sup> Paulsen intimates a relationship between judicial review and exclusion without articulating or justifying it. Similarly, Coe leads the analysis in the proper direction—toward a nondiscretionary role for the courts that fulfill their constitutional function. He writes that the judicial integrity rationale, rooted in institutional considerations, "seeks to allow the judiciary to fulfill its constitutional responsibilities by declining to 'legitimize unconstitutional conduct.'"<sup>284</sup> However, he does not attempt to justify this assertion.

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substantial violation of fourteenth amendment standards. *Ker v. California*, 374 U.S. 23, 33 (1963).

I am grateful to Professor Richard G. Stevens for his helpful suggestions regarding this section and the article as a whole.

<sup>281</sup> 232 U.S. at 393.

<sup>282</sup> A number of sources suggest or explicitly mention a judicial review rationale for exclusion, certain of which are cited or discussed herein. The most comprehensive and profound discussion of exclusion as it relates to judicial review from which this section of the present article draws is Schrock & Welsh, *supra* note 44.

<sup>283</sup> Paulsen, *supra* note 30, at 259 (emphasis added).

<sup>284</sup> Coe, *supra* note 156, at 16-17 (quoting Note, *supra* note 249, at 510-11). The analysis from which Coe draws his reference to legitimizing unconstitutional conduct



In order to make the argument that exclusion is a required consequence of judicial review, it is necessary to recall the familiar principle of *Marbury v. Madison*: “[i]t is, emphatically, the province and duty of the judicial department, to say what the law is.”<sup>285</sup> This law binds all three branches of government, branches which derive their very powers and authority from the Constitution. The Court enters the governmental process at a particular time in the context of the controversy between the parties before it. In the case of a legislative enactment, the constitutionality of which is challenged, the Court will not be a party to the governmental action against an individual that results from such an unconstitutional legislative enactment. For the Court to validate the application of the unconstitutional statute to the individual would subordinate the Constitution to an ordinary legislative act.

This same reasoning applies to an executive act which, in violation of the fourth amendment, produces evidence of crime for use in court. Schrock and Welsh note that in a fourth amendment case the defendant’s criminality persists despite the state’s inability to obtain a conviction; on the other hand, striking down a statute eradicates the attending culpability. Schrock and Welsh ask whether this distinction accords exclusion proceedings a status different from the “*Marbury*-like review” of statutes. They conclude that there is sufficient “similarity between the two situations to compel application of classical judicial review to searches and seizures. . . .” They explain that

in the case of search and seizure, just as in the unconstitutional legislation situation, one speaks of “invalidity”: it is accurate and idiomatic to characterize a search as either “valid” or “invalid.” As for substance, whether it be Congress abridging the freedom of speech or police officers making unrea-

expresses the important distinction between constitutional duty and mere judicial discretion:

The concerns expressed by Justice Brandeis in *Olmstead* have been described variously as “the imperative of judicial integrity,” “the normative theory,” and the “sporting contest theory.” These labels unfortunately imply a mere desire by the judiciary to avoid complicity with the government’s unconstitutional practices. In order to have a constitutional basis, of course, the exclusionary rule cannot serve as a mere defensive shield preserving the judiciary’s constitutional chastity. And, indeed, this rationale does have an affirmative aspect insofar as it enables the courts to fulfill their institutional role of upholding the Constitution.

Note, *supra*, at 511.

<sup>285</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

sonable searches and seizures, the fact is that governmental actors are doing something repugnant to the Constitution, and in each case the courts are being asked to cooperate and therefore condone that repugnant act. What is at stake in each case is the meaningfulness of the Constitution; the tendency of judicial acceptance of either kind of act is to make the Constitution meaningless.<sup>286</sup>

There is no significant difference between judicial review of an unconstitutional search and seizure producing evidence in a prosecution and judicial review of a prosecution based on an unconstitutional statute. The government is bound by the Constitution throughout the entire prosecution of the individual, and this imperative applies to actions on the part of all three branches of government. Addressing this point in *Marbury v. Madison*, Chief Justice Marshall stated that inherent in the Constitution is the principle “that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.”<sup>287</sup> The term “other departments” used by Marshall applies to the executive branch as well as to the legislature, and the policeman is as much a part of that government whose departments are bound by the Constitution as are members of the other branches of government.<sup>288</sup> The Court’s con-

<sup>286</sup> Schrock & Welsh, *supra* note 44, at 346-47.

<sup>287</sup> 5 U.S. (1 Cranch) at 180.

<sup>288</sup> Professor Amsterdam addresses the relationships between the police officer and the government:

Chief Justice Burger complains that the exclusionary rule treats the government as one piece with the offending officer. But surely it is unreal to treat the offending officer as a private malefactor who just happens to receive a government paycheck. It is the government that sends him out on the streets with the job of repressing crime and of gathering criminal evidence in order to repress it. It is the government that motivates him to conduct searches and seizures as a part of his job, empowers him and equips him to conduct them.

Amsterdam, *supra* note 130, at 432. Both Chief Justice Burger and Amsterdam are writing in the context of the deterrent effect of exclusion, but Amsterdam’s observations nonetheless apply to the judicial review function.

In *Olmstead v. United States* Justice Holmes expressed his view that the separation of powers not be allowed to obscure the fact that the executive branch and the judicial branch are both branches of the same government. 277 U.S. at 470 (Holmes, J., dissenting). In this passage, Holmes objects to distinguishing the government as prosecutor and the government as judge. For an extensive and thoughtful treatment of this “unitary” as opposed to “fragmented” view of government, see Schrock & Welsh, *supra* note 44, at 257-60, a section of their article which they summarize at 262:

All we have sought to do thus far is to echo the gist of the simple, but not necessarily “rudimentary,”

stitutional duty to review the action of the police is not less than its duty to review actions of the legislature. Stated somewhat differently, it does not matter whether a statute is unconstitutional or whether a constitutional statute is executed and enforced in an unconstitutional manner. When the government acts unconstitutionally, the judicial duty is the same: it must not, according to the principle of judicial review, validate unconstitutional governmental action by allowing it to be used in the prosecution and punishment of an individual.

Exclusion of unconstitutionally seized evidence is thus a natural consequence of constitutionalism, the rule of law, and the exercise of judicial review in our system of government.<sup>289</sup> The principle underlying such exclusion is a venerable one, the ordinary exercise of judicial review as it validates or invalidates action of another branch of government in determining whether or not to exclude evidence used in the prosecution of an individual for crime. The issues of deterrence and judicial integrity are subordinate to the constitutional argument that exclusion is required by our system of constitutional government and the exercise of judicial review within that system.

The constitutional argument based on judicial review assumes greater force when considered in conjunction with the due process clauses of both the fifth and fourteenth amendments. Beyond the consideration of ordinary judicial review is the fact that our Constitution provides specifically that no person shall "be deprived of life, liberty or property without due process of law."<sup>290</sup> The judiciary's place in the system of separated powers puts it in the position to review legislative and executive action as it goes about its business of authoritatively and lawfully depriving persons of life, liberty, or property. The due process provisions of the Constitution explicitly require that such deprivations must be in accordance with the Constitution.<sup>291</sup> If the judiciary finds a person guilty in a proceeding

in which unconstitutionally seized evidence is used, it is allowing what the due process clauses prohibit.

## VI. CONCLUSION: EXCLUSION AND CONSTITUTIONALISM

The liberal arguments favoring exclusion have been examined. It was demonstrated that these arguments are outgrowths of a liberal credo, exemplified in the work of Ramsey Clark, and of Packer's due process model. Ramsey Clark's arguments and the due process model have two characteristics in common: Neither is based on a well-reasoned or substantial constitutional footing. Secondly, each manifests a parent ideology and model of the criminal process and a consequential partisan understanding of the Constitution. The due process model is skeptical about the morality and utility of the criminal sanction. It regards the concept of a free will enabling an individual to choose whether or not to obey the criminal code as outmoded and unscientific. Thus, this model exerts pressures "to expand and liberalize those of its processes and doctrines which serve to make more tentative its judgments or limit its powers."<sup>292</sup> Packer's due process model supports both exclusion and a judicial broadening of substantive fourth amendment provisions as a means of limiting discretionary justice. Supporters of limiting official discretion urge adoption of this policy as a matter of constitutional law.

Like its liberal counterpart, each of the conservative arguments opposing exclusion is a product of its parent ideology, an ideology espoused by the Nixon administration and inhering in Professor Packer's crime control model. Accepting the notion of free will, the crime control model emphasizes the threat crime poses to public order and thus to an important condition of human freedom. Because of this threat, the model focuses on the system's efficiency in apprehending and convicting a high number of criminal offenders. Efficiency dictates that informality, uniformity, and finality be maximized. The presumption of guilt also informs this model just as the presumption of innocence informs the due process model. Although the crime control model tolerates rules forbidding illegal arrests and searches, efficiency requires that enforcement of these prohibitions be left primarily to internal administrative sanctions.<sup>293</sup>

The conservative credo supplies the theoretical underpinnings for a number of criticisms of exclu-

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Holmes-Brandeis proposition that the government is an indivisible entity, the prosecution is a single process, and there is no honest way to give the court a moral release for wrongful conduct on the part of the executive in a prosecution made possible only by the participation of both the court and the executive.

<sup>289</sup> Schrock & Welsh, *supra* note 44, at 371.

<sup>290</sup> U.S. CONST. amend. V. For the corresponding protection against state governments, *see* U.S. CONST. amend. XIV.

<sup>291</sup> Appellate courts, of course, review the proceedings of the trial court as well.

<sup>292</sup> *See* text accompanying notes 16-26 *supra*.

<sup>293</sup> *See* text accompanying notes 104-05 *supra*.

sion.<sup>294</sup> The dictates of its ideological presuppositions would in fact lead the crime control model to abolish the exclusionary rule as well as to narrow the scope of the fourth amendment in order to minimize interference with the apprehension and disposition of criminal offenders. Like their liberal counterparts, followers of this conservative position translate their own ideological presuppositions into recommendations for constitutional interpretations. But, as is also the case with the liberal position, conservative conclusions lack a coherent supporting constitutional foundation. Each of the conservative arguments has a liberal refutation.

The empirical literature on exclusion suffers from similar defects.<sup>295</sup> Further abstracting exclusion from its constitutional foundations, empirical analysis concentrates predominantly on the policy consideration of deterrence, a consideration which is one overriding concern of the partisan arguments discussed above. The above survey of the empirical research, however, reveals no conclusive answer to the exclusion controversy, even as narrowed to the question of deterrence. The complexity of the question gives no cause for optimistic expectations of conclusive results from any forthcoming empirical studies.

A deficiency of the liberal and conservative arguments and Packer's constructs is that they derive an interpretation of constitutional policy from a preconceived conception of the goals of the criminal process and the role of the judiciary.<sup>296</sup> The central defect of this approach is that conservatives, liberals and empiricists make the Constitution derivative rather than primary. The due process and judicial review arguments for exclusion do not share this defect. Both proceed from the Constitution and derive the exclusionary rule from its provisions and principles.

Furthermore, unlike Packer's due process model which likewise requires exclusion, these arguments do not approach the fourth amendment with a fundamental opposition to the criminal sanction and other elements of the model. Rather, they accept the lines seemingly drawn by the text of the Constitution. Although the Constitution requires exclusion, it does not suggest or require a maximization of restrictions on the exercise of official

power as does Packer's liberal model. On its face, the fourth amendment seems to adopt neither a liberal obstructionist position relative to law enforcement nor the conservative goal of apprehension and punishment of criminals as its primary concern. The fourth amendment provides that searches and seizures will be reasonable and that warrants must meet specified requirements. There appears to be sufficient room in the amendment to accommodate both considerations of individual freedom and effective law enforcement.<sup>297</sup> These competing goods should be given careful consideration in the course of fashioning substantive rules of the fourth amendment in judicial rulings on exclusion.

The case advanced herein to support exclusion is essentially that the rule derives from the constitutional provisions requiring that deprivations of life, liberty, and property be in accordance with due process of law. Exclusion, furthermore, is a natural consequence of the constitutional doctrine of judicial review. These are matters of constitutional magnitude which lie beyond ordinary partisanship. Chief Justice Marshall addressed the significance of constitutional law in *Marbury v. Madison*:

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.<sup>298</sup>

The argument advanced herein is that exclusion is one of these principles. Although it may be attractive to some to dismiss such concern as limiting our charter of government to "a flintlock constitution," it is a course fraught with danger to

<sup>297</sup> For one accommodation of these competing goods, see Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965). Judge Friendly and others have suggested the possibility that the exclusionary rule could be maintained as it is now enforced if the constitutional law of search and seizure were made much less complex and reduced to rules more appropriate to a constitution than to a code of criminal procedure—rules which would also be more easily comprehensible to law enforcement officers.

<sup>298</sup> 5 U.S. (1 Cranch) at 176.

<sup>294</sup> See section III *supra*.

<sup>295</sup> See section IV *supra*.

<sup>296</sup> This is not necessarily intended as a criticism of Professor Packer, but rather of the substance of the due process and crime control models he constructs. See text accompanying notes 16-26 & 104-05 *supra*.

set the Constitution adrift in a sea of partisan policy considerations without an anchor in constitutional intent or principle.<sup>299</sup> The maintenance of

a limiting constitution will restrain the Court from adopting the mere policy preferences of the Justices and ensure that justice be administered according to the Constitution's demands.

<sup>299</sup> Amsterdam, *supra* note 130, at 416.