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Steven R. Schlesinger

Bradford Wilson

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I. INTRODUCTION

There are few rules of criminal procedure that have stirred as much controversy both on and off the bench as has the so-called "exclusionary rule."[1] All agree that the function of the rule is to provide a legal

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*B.A., Cornell University; M.A., Claremont Graduate School; Ph.D., Claremont Graduate School. This co-author is currently an Associate Professor in the Department of Politics at The Catholic University of America.

**B.A., North Carolina State University; M.A., Northern Illinois University. This co-author is a doctoral candidate in political science at The Catholic University of America.

1. Defenses of the rule include: Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 55 (1977); Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398 (1979); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 67 (1978); 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).

Criticisms of the rule include: F. INBAU, J. THOMPSON, & C. SOWLE, CASES AND COMMENTS ON CRIMINAL JUSTICE: CRIMINAL LAW ADMINISTRATION 1-84 (1968); 8 J. WIGMORE, EVIDENCE § 2184a (McNaughton rev. 1961); S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE (1977); Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565 (1965); Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DE PAUL L. REV. 80 (1961); Cox, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 SW. U.L. REV. 68 (1972); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951-54 (1965); LaFave, *Improving Police Performance Through the Exclusionary Rule* (pts. 1 and 2), 30 MO. L. REV. 391, 566 (1965); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939); Schaefer, *The Fourteenth Amendment and the Sanctity of the Person*, 64 NW. U.L. REV. 1 (1969); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That it is a Deterrent to Police?*, 62 JUDICATURE 44 (1979); Satlin, *An Alternative to the Exclusionary Rule*, 26 JAG. J. 255 (1972); *The Exclusionary Rule Regarding Illegally Seized Evidence: An International Symposium*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 245 (1961); Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922); Wilkey, *The Exclusionary*

formula for determining the circumstances under which a violation of the search and seizure requirements of the fourth amendment renders evidence inadmissible in a criminal proceeding. Examination of the leading Supreme Court cases governing the exclusionary rule[2] reveals, however, that agreement disintegrates once the question of the specific content of, and rationale for, the rule is broached.

The scope of the rule has both expanded and contracted since its introduction in *Boyd v. United States*.[3] The rule of exclusion originally had a relatively narrow compass, the sphere of private letters and, by implication, private property. This scope was gradually broadened, a process that culminated dramatically in the landmark decision in *Mapp v. Ohio*,[4] in which the Court held that goods illegally obtained by law enforcement officials could not be used as evidence in either state or federal courts, regardless of property considerations. Yet legal development, at least American legal development, does not march in a single direction. Since its accession, the Burger Court has been pre-

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Rule: Why Suppress Valid Evidence?, 62 JUDICATURE 214 (1978); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971); *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87 (1968); Student Comments, *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 256 (1972).

2. *See* Rakas v. Illinois, 439 U.S. 128 (1978) (holding that a person subjected to a search and seizure must show a legitimate expectation of privacy in order to successfully invoke the protection of the fourth amendment); United States v. Ceccolini, 435 U.S. 268 (1978) (person's statement based on questions prompted by an illegal search does not taint later testimony by that person at another's trial); Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus relief is not required when evidence illegally obtained is introduced by the state in a criminal case and a full and fair opportunity to litigate existed); United States v. Calandra, 414 U.S. 338 (1974) (witness before a grand jury may not refuse to answer questions based on evidence obtained from an unlawful search or seizure); Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Burger, C.J., dissenting) (remedy for monetary damages recognized when federal agents conduct an illegal search); Linkletter v. Walker, 381 U.S. 618 (1965) (federal habeas corpus relief denied to one convicted in a state court on illegally seized evidence); Wong Sun v. United States, 371 U.S. 471 (1963) (physical and verbal evidence obtained during an illegal search and seizure held inadmissible); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule held to be applicable to states); Irvine v. California, 347 U.S. 128 (1954) (state conviction upheld although evidence for conviction was illegally obtained); Wolf v. Colarado, 338 U.S. 25 (1949) (exclusionary rule held not to bind state courts); Gouled v. United States, 255 U.S. 298 (1921) (if defendant did not know of fruits of an illegal search until trial, then a motion to suppress is correctly considered at that time); Weeks v. United States, 232 U.S. 383 (1914) (federal government cannot refuse a timely application for the return of evidence illegally obtained so that such evidence may be used to convict person searched); Boyd v. United States, 116 U.S. 616 (1886) (fourth and fifth amendments preclude obtaining and using at trial evidence which may lead to sanctions that are effectively criminal).

3. 116 U.S. 616 (1886).

4. 367 U.S. 643 (1961). (exclusionary rule binds the states also).

siding over the steady contraction of the exclusionary province initially established by the *Mapp* majority.[5] Such shifts in the scope of a legal rule are not unusual; often they are a healthy reflection of the ability of the American legal system to adjust its laws to the requirements of particular circumstances. This, however, is not the case with the history of the exclusionary rule. An examination shows that the peculiarly elastic life of the rule does not exemplify the flexible application of a general principle to specific cases; rather, it reflects a shifting consensus of the Court as to what the very foundation and rationale of the rule is.

The time is ripe for a reconsideration of the foundation of the exclusionary rule. The Burger Court, in attempting both to maintain the rule and to limit its effect, has found it necessary to resort to dubious distinctions which appear increasingly arbitrary.[6] Embarrassed by this state of affairs, the Court, while upholding the rule, has questioned whether any coherent justification actually exists.[7] It seems that a point has been reached where the confusion over the proper scope of the rule cannot possibly be resolved in a sensible manner until a clear understanding of the fundamental principle and rationale for the rule is regained.

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5. *See* Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974); Linkletter v. Walker, 381 U.S. 618 (1965).

6. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268 (1978) (admission based on questions prompted by an illegal search does not taint the admissibility of testimony at another's trial). In support of the majority decision not to suppress the testimony of a witness because of its connection with an illegal search, Justice Rehnquist argued as follows:

> The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition.

Id. at 276 (footnote omitted). This reasoning, however, as Justice Marshall explained, reversed the normal sequence of events. It ignored the obvious fact that a negligible number of cases arise in which a witness' willingness to testify is known before he is discovered. *Id.* at 286-88 (Marshall, J., dissenting).

7. As Justice Powell wrote: "[A]lthough the rule is thought to deter unlawful police activity in part through the nurturing of respect for fourth amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." Stone v. Powell, 428 U.S. 465, 491 (1976) (footnote omitted). Justice Powell maintained that the primary rationale for the rule, deterrence of illegal searches and seizures, was not supported by relevant empirical evidence. *Id.* at 492. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (Burger, C.J., dissenting). Doubts about the justification for the rule are not new. *See* Irvine v. California, 347 U.S. 128, 135-56 (1954).

The major rationales offered by the Supreme Court for the exclusionary rule emerge from an analysis of those cases in which the rationales have received their most cogent formulations. Such an analysis demonstrates the need for a fundamental reexamination by the Supreme Court of the exclusionary rule as it currently is defined and applied.

II. THE ORIGIN OF THE RULE

It is a widely held view that the current exclusionary rule has its precedential origins in *Boyd* and *Weeks v. United States*.[8] Yet the scope of, and rationale for, the exclusion of evidence in those cases differ significantly from the formulation of the exclusionary rule in post-*Weeks* cases. *Boyd v. United States* is best known for two principles: first, that "the Fourth and Fifth Amendments run almost into each other,"[9] there being an "intimate relation between the two amendments;"[10] and second, that the exclusion of certain kinds of evidence from criminal proceedings follows from the requirements of the fourth and fifth amendments and enjoys the status of a personal constitutional right.[11] It is submitted that any reading of *Boyd* that fails to see its basis in the fourth amendment right to have one's *property* secure must necessarily misunderstand the nature of the exclusionary rule asserted in *Boyd*.

In his majority opinion in *Boyd*, Justice Bradley defined an unreasonable search and seizure as follows:

> [T]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[12]

For Justice Bradley, then, an unreasonable search and seizure was any process that would compel a man to give evidence against himself. At first glance, this seems absurd. Surely material taken from an individual's home through a duly executed search warrant is a forcible seizure of evidence to be used against the individual. Justice Bradley's

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8. 232 U.S. 383 (1914) (federal government cannot refuse a timely application for return of the fruits of an illegal search in order to use such evidence in a criminal proceeding).

9. 116 U.S. at 630.

10. *Id.* at 633.

11. *Id.* at 638.

12. *Id.* at 633.

theory, as stated, would appear to impugn *any* search and seizure as "unreasonable" and declare the fruits of such a search offered in evidence to be a violation of the fifth amendment.

However, Justice Bradley's general statement quoted above was preceded by a discussion which clarified that statement and makes it less implausible. According to Justice Bradley, the "principal question" was whether "a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him . . . is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the Fourth Amendment of the Constitution."[13] Justice Bradley's silence regarding the warrant requirements of the fourth amendment clearly indicates that he did not believe that those requirements defined whether or not a search and seizure had been "reasonable." Rather, he apparently believed that the reasonableness of a search and seizure was to be determined by the legal status of what was seized (in this case, private papers) and the use to which the seized goods were to be put (here, as evidence in a forfeiture suit). Thus, Justice Bradley deemed the *manner* in which a seizure took place to be irrelevant to the question of reasonableness.

In order to define a rule governing "reasonableness," Justice Bradley divided the kinds of seized goods into two categories—those to which an individual has a right and those to which an individual has no right:

> The search for and seizure of stolen or forfeited goods . . . are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto ceolo*. In the one case, the government is entitled to the possession of the property, in the other it is not.[14]

Justice Bradley argued that the government was not entitled to possession of "private books and letters" since one has an inviolable right to one's private letters as a particularly sacrosanct form of private property. Justice Bradley based this understanding of the sanctity of property upon the principles enunciated in the English case of *Entick v. Carrington*.[15] In that case, Lord Justice Camden had echoed John Locke in asserting that "the great end, for which men entered into society, was to secure their property."[16] As to private letters, Lord Camden had stated that "[p]apers are the owner's goods and chat-

13. *Id.* at 622.
14. *Id.* at 623.
15. 15 Howell's St. Trials 1029 (1765).
16. *Id.* at 1066.

tels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection."[17] Justice Bradley read the *Entick* decision as "expressing the true doctrine on the subject of searches and seizures, and as furnishing the true *criteria* of the reasonable and 'unreasonable' character of such seizures."[18] For Justice Bradley, then, any search and seizure of private papers and books for the purpose of using them as evidence constituted an unreasonable search and seizure, regardless of the procedures used.

Justice Bradley moved from this understanding of the search and seizure clause to the assertion of an exclusionary rule by arguing that the seizure of an individual's private books and papers, which is unreasonable by definition, is not "substantially different from compelling him to be a witness against himself."[19] Thus the exclusionary rule enunciated in *Boyd* was essentially derived from the fifth amendment. Sufficient attention, however, has not been given to Justice Bradley's argument that in a seizure of private letters the victim has undergone an illegal appropriation of his property by the government.[20] This argument implies that the use of such property in evidence would be an illegal use of goods to which the government has no right. Therefore, the exclusion of such evidence, and its return to its proper owner, would appear to be justified regardless of the fifth amendment question.

It is worth noting that Justice Bradley acknowledged the government's right to stolen goods, or more generally, to "things which it is unlawful for a person to have in his possession,"[21] and, by implication, the propriety of the government's use of such goods as evidence in court. He thereby exempted such goods from the fifth amendment exclusionary privilege. In Justice Bradley's understanding, if an accused's *own property* were to be used to incriminate him, it would be compulsory self-incrimination, but if evidence in which the accused had no property right were to be used against him, no problems of self-incrimination would exist. Thus, even Justice Bradley's fifth amendment exclusionary rule is justified only in terms of one's personal right to property. It is only when one perceives that Justice Bradley's understanding of the reasonableness question posed by the fourth amendment and the compulsory self-incrimination question posed by the fifth amendment were both based upon the right to property that one perceives the most fundamental sense in which the *Boyd* decision

17. *Id.*
18. 116 U.S. at 630 (emphasis added).
19. *Id.* at 633.
20. *Id.* at 622-30.
21. *Id.* at 624.

established an "intimate relation" between the fourth and fifth amendments.

In *Weeks v. United States*,[22] the Supreme Court explicitly ruled that the exclusionary rule was applicable to all federal courts. The *Weeks* decision is commonly thought to be significant for two reasons: first, it is said to be the case in which the federal exclusionary rule banning the use of any illegally obtained evidence in federal courts was first established on purely fourth amendment grounds; and second, it is said to have reaffirmed the principle that suppression at the federal level is a constitutional right of the accused.

The first view can be traced to Justice Frankfurter's statement in *Wolf v. Colorado*[23] that "in *Weeks* . . . this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914."[24] The second view owes its prominence to Justice Clark's assertion in *Mapp v. Ohio*[25] that "the Court in [*Weeks*] clearly stated that use of the seized evidence involved 'a denial of the constitutional rights of the accused.'"[26] Yet, an attentive reading of Justice Day's opinion for the unanimous Court in *Weeks* shows that both Justice Frankfurter and Justice Clark were wrong, and that most current assumptions about the *Weeks* case are therefore seriously misguided.

The first point to emphasize is that *Weeks*, like *Boyd*, concerned only private letters. As Justice Day wrote:

> The case . . . involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises.[27]

In *Weeks*, the accused person had made "timely application" to the court of first instance for an order to return to him the illegally seized letters. That application was denied and, after a further denial of a second application at the time of trial, the letters were placed in evidence. The importance of the defendant's applications for the return of his letters and the refusal of the lower court to grant their return cannot be

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22. 232 U.S. 383 (1914).

23. 338 U.S. 25 (1949) (State permitted to use fruit of an illegal search to obtain a conviction). The *Wolf* decision was expressly overruled in Mapp v. Ohio, 367 U.S. 643, 655 (1961).

24. 338 U.S. at 28.

25. 367 U.S. 643 (1961) (holding that all evidence obtained in searches and seizures in violation of the Constitution is inadmissible in a state court).

26. *Id.* at 648.

27. 232 U.S. at 393.

overstated. The applications constituted the central factor upon which the Court's decision rested, and are the key in recognizing that the foundation of the constitutional ruling in *Weeks* is the defendant's right to property.

Justice Day singled out for consideration the alleged error in the lower court's refusal to grant the petition for the return of the accused's property and in permitting the papers to be used at trial.[28] It was apparent to Justice Day that the question presented involved the adjudication of the motion made by the defendant for the return of certain letters taken without authority of process. Justice Day emphasized that this was not a case in which the court, in the midst of a criminal trial, was asked to exclude evidence because of the manner in which it had been obtained.[29] He cited with approval a doctrine which holds that a court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels which are material and properly offered into evidence.[30] In Justice Day's view, such an inquiry by a court trying a criminal case would amount to permitting "a collateral issue to be raised as to the source of competent testimony," a procedure pro-

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28. *Id.* at 389.

29. *Id.* Justice Day here implied and elsewhere explicitly stated that the government may legitimately seize private letters, if it takes care to act under "authority of process." *See id.* at 390-91, 393-94. This view, which was the crux of Justice Miller's dissent in *Boyd*, substantially revised Justice Bradley's interpretation of the meaning of the fourth amendment in a manner accepted by all later courts: it reformulated the question of the reasonableness of a search and seizure in terms of the legitimacy of the procedures by which a search and seizure is made, and not in terms of the legal status of the material seized. Thus, contrary to *Boyd*, no object, including the "dearest property" of an individual—his private papers—is immune to legal process. In Justice Day's view, the warrant procedure is a legal method by which the government may dispossess an owner of his property and thereby acquire a right to use the appropriated property in trial proceedings. We note that this understanding renders the fifth amendment exclusionary right asserted in *Boyd* inapplicable in such circumstances. For, if private property is seized through proper police procedures, it may no longer be viewed as an extension of oneself. Having been forfeited to the government for its use, such property cannot be considered self-incriminating when used in court.

30. *Id.* at 396. The Court quoted from the decision of the New York Court of Appeals in People v. Adams, 176 N.Y. 351, 358, 68 N.E. 636, 638 (1903), *aff'd*, 192 U.S. 585 (1904), in which that court affirmed the conviction of the defendant for possession of gambling papers and paraphernalia, in part on the basis of papers and evidence which defendant alleged were unlawfully seized. *Id.* at 363, 68 N.E. at 640. In so ruling, the New York court ruled that in a trial of a criminal case, the trial court will not take notice of the *manner* in which evidence has been obtained. The United States Supreme Court, on appeal, upheld that ruling, stating that "the weight of authority as well as reason limits the inquiry to the competency of the proferred testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained." Adams v. New York, 192 U.S. 585, 592 (1904).

hibited by "so many state cases that it would be impracticable to cite or refer to them in detail."[31] What distinguishes the *Weeks* case from the above type of case is the source of Weeks' claim. It was grounded not upon an argument that it is a court's duty to look into the source of evidence presented at trial, but rather upon the fact that he "applied to [the court] in due season for the return of papers seized in violation of the Constitutional Amendment."[32]

Thus, the principle enunciated by Justice Day in *Weeks* was not, as asserted by Justice Frankfurter, that "in a federal prosecution the Fourth Amendment bar[s] the use of evidence secured through an illegal search and seizure,"[33] but rather was that "papers wrongfully seized should be turned over to the accused."[34] Applying this principle, the Court concluded

> that having made a seasonable application for their return, which was heard and passed upon by the court, *there was involved in the order refusing the application a denial of the constitutional rights of the accused*, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.[35]

It is important to recognize that, contrary to Justice Clark's understanding, the violation of the constitutional rights of the accused in *Weeks* occurred when application for the return of the seized property was denied. In other words, the accused's constitutional right was to have his property, which had been illegally seized, returned. What was violated was not a right not to be convicted by illegally obtained evidence but, rather, a simple property right. By holding Weeks' letters and using them in trial, the government made use of appropriated material to which it had not established a right, resulting in prejudicial error. That is, Weeks' entire case rested on the fact that he had made timely application for the return of his property. Justice Day, in holding that Weeks' application had been wrongfully refused, drew the conclusion that any use by the government of that property, including its use in trial, was necessarily unlawful.[36]

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31. 232 U.S. at 396.

32. *Id. See also* Gouled v. United States, 255 U.S. 298 (1921) (holding that a judge may entertain a motion at trial for suppression of property offered in evidence if the defendant did not know of the government's possession of the property until it was offered in evidence against him).

33. 338 U.S. at 28.

34. 232 U.S. at 398.

35. *Id.* (emphasis added).

36. This reasoning makes unnecessary any consideration of the relevance of the self-incrimination clause of the fifth amendment to this case.

Thus, the only "exclusionary rule" found in *Weeks* is that a higher court may reverse a conviction that was based upon illegally obtained property when the accused individual can point to a "seasonable application" to have his property returned and can further demonstrate that his application had been wrongly denied. A logical implication of this doctrine is that the government could legitimately introduce in evidence any material that is *not* the property of the individual, even if that material had been acquired through a violation of the search and seizure provision of the fourth amendment. One's property rights surely cannot extend to goods such as contraband.

III. From Property to Privacy: A Questionable Transition

To understand how the Court has strayed from the original property-grounded rule of exclusion, one must turn to Justice Frankfurter's majority opinion in *Wolf v. Colorado*.[37] The *Wolf* case was concerned specifically with the fourteenth amendment and not the fourth amendment. Frankfurter chose to treat the problem of arbitrary search and seizure, as it applied to the states, in terms of the "right of privacy." On this basis, he maintained that

> were a State affirmatively to sanction [arbitrary] police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.[38]

Justice Frankfurter distinguished the remedy for arbitrary search and seizure required of states by the fourteenth amendment from the remedy required of federal authorities by the fourth amendment. In particular, while leaving room for a variety of solutions at the state level, he concluded that the fourth amendment required at the federal level the exclusion of certain evidence as a matter of "judicial implication." In particular, he "stoutly adhere[d]" to the rule of exclusion laid down in *Weeks*, although, as previously mentioned, his reading of the *Weeks* holding was an inaccurate one.[39]

Justice Frankfurter's overly broad formulation of the *Weeks* rule followed from his failure to recognize, or at least to articulate, the fact that the "judicial implication" performed in *Weeks* was one drawn

37. 338 U.S. 25 (1949).
38. *Id.* at 28.
39. *Id. See* notes 22-37 and accompanying text *supra*.

from the *property* right secured in the fourth amendment. The "dogmatic" answer given in *Weeks* to the question of the proper remedy for an arbitrary search and seizure was limited to the case of an illegal appropriation of private property. In that instance, the property must be returned to its lawful owner upon his timely application. By failing to differentiate clearly between the property right basis of fourth amendment evidentiary adjudication, as manifested in *Boyd* and *Weeks*, and the right to privacy basis of fourteenth amendment evidentiary adjudication outlined in *Wolf*, Justice Frankfurter opened the door to later decisions which relied upon his analysis of the fourteenth amendment in interpreting the meaning of the fourth amendment. By looking at the fourth amendment only in terms of privacy, the Court in later cases was compelled to view the exclusionary rule in like terms. The question became whether the rule did or did not effect reparations of the violation of the right to privacy. In this new posture, the Court tended to lose sight of the original justification for, and limited nature of, the "exclusionary rule"—a right to have one's property returned when illegally seized—and instead turned to questions of deterrence.

IV. THE EXCLUSIONARY RULE AS GROUNDED IN THE RIGHT TO PRIVACY

In *Mapp v. Ohio*,[40] the Court imposed the exclusionary rule on state courts by way of the fourteenth amendment. There is language in Justice Clark's majority opinion which has convinced some readers that the decision was based upon the rule's deterrent effect, but the deterrent effect of the exclusionary rule was clearly only a factual consideration as opposed to a logical deduction from constitutional language.[41] It is true that Justice Clark discussed deterrence and concluded that "other remedies [against invasions of the 'right of privacy'] have been worthless and futile."[42] He thereby pointed to his own belief that the exclusionary rule was a superior form of deterrence; at least, he believed that it was not any worse than the other means of protection referred to in *Wolf*. Yet it is clear that he was only trying to counter *Wolf*'s claim that the exclusionary rule was bad law *from a policy standpoint*. The only reason Justice Clark engaged in that factual discussion was that he read *Wolf* to be "bottomed on factual considerations,"[43] as opposed to constitutional analysis or deduction, and out of

40. 367 U.S. 643 (1967).

41. *Id.* at 651. Justice Clark stated that factual considerations "are not an essential ingredient of the fourth amendment as the right it embodies is vouchsafed against the states by the Due Process Clause." *Id.*

42. *Id.* at 652.

43. *Id.* at 651.

respect for the precedent he was overturning, he felt obliged to meet and defeat it on its own grounds first, before moving to the basis of his own position.

According to Justice Clark, the imposition of the rule was justified primarily by the following:

> [I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was *logically and constitutionally necessary* that the exclusion doctrine—*an essential part of the right to privacy*—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important *constitutional privilege*, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure.[44]

The question this language raises is: what is it about the exclusionary rule that makes it a constitutional requirement? Although Justice Clark initially asserted that the purpose of the exclusionary rule was to deter, this surely cannot be the foundation of the *constitutional* right he asserted, for he repeatedly stated that factual considerations were not determinative of the constitutional question. Justice Clark, perhaps in an attempt to bring forth all the arguments he could marshall, momentarily lapsed by bringing back into the constitutional discussion this factual consideration, which is a policy, not a constitutional, matter.

Although this digression temporarily derailed his train of thought, Justice Clark immediately returned to a pure constitutional analysis, grounding the exclusionary rule upon the following constitutional right:

> We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty . . . ." The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—*the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.*[45]

Thus, according to Justice Clark, it is "principles of humanity and civil liberty," implicit in the concept of ordered liberty which require the exclusion of evidence. The specific principle asserted is that "no man is to be convicted on unconstitutional evidence." It is this concern for the

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44. *Id.* at 655-56 (emphasis added).
45. *Id.* at 656-57 (emphasis added and footnote omitted).

dignity and priority of the individual and his privacy, together with the concern with maintaining the integrity of a civil order dedicated to "principles of humanity and civil liberty," not the problem of deterrence, which provided the fundamental constitutional foundation for Justice Clark's opinion in *Mapp*.

V. FROM PRIVACY TO DETERRENCE

Only four years after *Mapp*, the majority of the Court had reconsidered its reasoning and was marching to a different drummer. In *Linkletter v. Walker*,[46] the Court announced that deterrence of police misbehavior, not enforcement of the constitutional right to privacy, was the primary justification for the exclusionary rule. Curiously, it was Justice Clark who, writing for the majority, asserted that "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."[47] In light of his own opinion in *Mapp*, this statement is patently false. But it served its purpose. It effectively put an end to the short-lived attempt to ground the exclusionary rule in a "logically and constitutionally necessary" deduction from a fourth amendment "right to privacy." As the *Linkletter* majority recognized, "the ruptured privacy of the victims' homes and effects cannot be restored" by means of the exclusionary rule. "Reparation comes too late."[48]

And so it has gone since *Linkletter*. In *United States v. Calandra*,[49] the Court, citing *Linkletter*, repeated that the primary purpose of the rule is to effectuate the guarantees of the fourth amendment by deterring unlawful police conduct, rather than to "redress the injury to the privacy of the search victim."[50] In *Stone v. Powell*,[51] the Court continued the new "deterrence" tradition and, through Justice Powell, spelled out its constitutional implications by stating that "[p]ost-*Mapp* decisions have established that the rule is not a personal constitutional right."[52] Thus, as with any judicially-created remedy for a social ill, the usefulness of the rule in a particular context must be subjected to pragmatic analysis. "The answer is to be found by weighing the utility

46. 381 U.S. 618 (1965) (federal habeas corpus relief denied to one convicted in state court, partially on the fruits of illegally obtained evidence; Court refused to apply *Mapp* retrospectively).

47. *Id.* at 636.

48. *Id.* at 637.

49. 414 U.S. 338 (1974) (witness before a grand jury may not refuse to answer questions based on illegally seized evidence).

50. *Id.* at 347.

51. 428 U.S. 465 (1976) (federal habeas corpus not constitutionally required when state proceeding provided fair opportunity to litigate).

52. *Id.* at 486.

of the exclusionary rule against the costs of extending it . . . ."[53] Under current doctrine, the utility of the rule can be measured only in terms of its deterrent effect on police misconduct. Considering the fact that the Court's reading of the scholarly research on deterrence has led it to conclude that there is an "absence of supportive empirical evidence"[54] for the proposition that exclusion deters future violations of the fourth amendment by police officers, it is not surprising that nearly all major exclusionary rule cases since *Mapp* have either refused to extend or have in effect contracted the scope of the rule.[55] The hey-day of the deterrence rationale, and with it, that of the doctrine of exclusion, appears to have passed.

VI. The Need for a Return to a Property-Based Rationale for the Exclusionary Rule

The history of the exclusionary rule has been traced from its foundation in the personal right to property protected by the fourth amendment, to its later foundation in the right to privacy secured by the fourth and fourteenth amendments, and finally to its current foundation in the non-constitutional policy doctrine of deterrence. Prior to Justice Frankfurter's erroneous dictum in *Wolf* regarding the federal doctrine of exclusion laid down in *Weeks*, the question of the validity of hard evidence offered in court was easily and precisely determined through traditional property concepts. After *Wolf*, however, things were never again as simple. In *Mapp*, Justice Clark attempted to place Justice Frankfurter's over-extended characterization of the federal exclusionary rule upon solid ground, as well as to apply it to the states, by neglecting property considerations and by deriving the rule from the constitutional right to privacy. While accepting Justice Clark's preference for recasting the fourth amendment in terms of privacy rather than property, the Burger Court, in *Linkletter* and *Calandra*, rejected *Mapp's* logic of deducing an across-the-board exclusionary rule from the fourth amendment right to privacy, and therefore was able to view the question of exclusion as turning entirely on the question of deterrence. As things now stand, the Supreme Court, skeptical of any deterrent benefits offered by the rule, continues to pay lip service to the deterrence rationale while at the same time narrowing the rule's field of operation.

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53. *Id.* at 489.

54. *Id.* at 492.

55. *See* Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974); Linkletter v. Walker, 381 U.S. 618 (1965). *But see* Wong Sun v. United States, 371 U.S. 471 (1963).

Thus, the movement away from a property-based understanding of the question of exclusion, apparently inspired by the desire to broaden the scope of the exclusionary rule beyond the limits of private property, has led to the very real possibility of the Court's abandoning the rule altogether.[56] Nonetheless, the most recent pronouncement of the Supreme Court regarding the exclusionary rule indicates that the Court may again be moving toward a property-based approach. In *Rakas v. Illinois*,[57] the defendants had been convicted of armed robbery based in part upon the state's introduction into evidence of a sawed-off rifle and rifle shells which had been seized by police during a search of the automobile in which the defendants had been passengers. The rifle was found under the front passenger seat and the shells were found in the glove compartment. The automobile was not owned by the defendants and the defendants did not claim ownership of the rifle or shells. The *Rakas* Court upheld the defendant's conviction by finding that the trial court's denial of defendant's motion to suppress the evidence, derived from the search of the automobile, was proper.[58]

The Court in *Rakas*, with Justice Rehnquist writing for the majority, held that a person subjected to a search and seizure must show a "legitimate expectation of privacy in the invaded place" in order to claim the protection of the fourth amendment.[59] The majority stressed that "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by the Amendment."[60] The Court then proceeded to affirm the denial of defendant's motion to suppress the seized evidence which was based upon a fourth amendment claim because "[t]hey asserted neither a property nor a possessory interest in the [place searched], nor an interest in the property seized."[61]

This case, in its recognition of the large role which property plays in protecting personal privacy, succeeded in establishing the relevance of property considerations for determining whether a search and seizure brings into play fourth amendment rights. The Supreme Court's willingness to undertake a reconsideration of the use of property concepts in facilitating fourth amendment adjudication is a welcome development. However, the Court failed to entertain the possibility that prop-

56. *See* United States v. Peltier, 422 U.S. 531 (1975) (Brennan, J., dissenting); United States v. Calandra, 414 U.S. 338 (1974) (Brennan, J., dissenting).

57. 439 U.S. 128 (1978).

58. *Id.* at 129-30, 148.

59. *Id.* at 143.

60. *Id.* at 143-44 n.12.

61. *Id.* at 148.

erty considerations, although *relevant* to the question of the legality of a search and seizure (as an indicator of the presence of privacy interests), are *determinative* of the question of exclusion. More specifically, the *Rakas* Court failed to consider the possibility that a search and seizure may be an unlawful violation of the "privacy interests" protected by the fourth amendment, while the fruits of the search and seizure may nonetheless be admissible in court as evidence, *i.e.*, in cases where the defendant has no "property interest" in the items seized. As the Court was aware, remedies do exist for the victim of an illegal search and seizure in addition to suppression of evidence. One may be able to recover damages for the violation of his fourth amendment rights or seek redress under state invasion of privacy or trespass laws.[62]

In conclusion, unless or until the Court chooses abandonment over reform of the exclusionary rule, it must continue to search for rational distinctions governing the disposition of the rule in concrete cases. Whatever else one might think of the property-based approach taken by the early architects of exclusionary doctrine, it must be admitted that it rested upon distinctions that were clear and rational. It is not clear whether the same can be said for the path taken by the Court since then. In light of the erratic and confused history of the exclusionary doctrine since the time of *Weeks*, perhaps we should remain open to the lesson of simpler times—times when the exclusion of evidence was seen, not as a remedy for violations of "legitimate expectations of privacy," nor as a deterrent for unlawful police conduct, but rather as an obvious consequence of the government's illegal appropriation of privately owned goods.

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62. *Id.* at 134 (citing Monroe v. Pape, 365 U.S. 365, 367 (1961)).