

# RIGHTS WITHOUT REMEDIES: THE COURT THAT CRIED “WOLF”

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## I. INTRODUCTION

When I first read the majority and dissenting opinions in *Hudson v. Michigan*,<sup>1</sup> a 5-4 decision issued in June 2006, I had the odd feeling that I had read this opinion before—not just that the Justices were revisiting recurring and fundamental constitutional issues, but that I had read *these opinions* before. And I had. Because in *Hudson*, the Justices resurrected arguments seemingly settled in a series of opinions issued between 1949 and 1961.<sup>2</sup>

All of these cases involved the same set of rights—those protected by the Fourth Amendment. Those rights were recognized as fundamental by the founding generations in the eighteenth century and were imposed on the states as fundamental rights protected by the Due Process Clause of the Fourteenth Amendment in the Court’s 1949 decision in *Wolf v. Colorado*.<sup>3</sup> In *Wolf*, the dispute among the Justices was whether due process also required that the states enforce the exclusionary rule that the Court had applied in federal cases for decades.<sup>4</sup> The majority’s answer in *Wolf* was “no.” The exclusionary rule was

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<sup>1</sup> 126 S. Ct. 2159 (2006).

<sup>2</sup> Writing for three of the dissenters in *Hudson*, Justice Breyer noted that the majority’s arguments had resurrected *Wolf*. See, e.g., 126 S. Ct. at 2175 (Breyer, J., dissenting) (“To argue, as the majority does, that new remedies, such as 42 U.S.C. § 1983 actions or better trained police, make suppression unnecessary is to argue that *Wolf*, not *Mapp*, is now the law.”).

<sup>3</sup> 338 U.S. 25, 33 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>4</sup> See *Boyd v. United States*, 116 U.S. 616 (1886) (implicitly announcing an exclusionary rule); *Weeks v. United States*, 232 U.S. 383 (1914) (announcing an explicit exclusionary rule).

not an essential part of due process rights, and the states were free to ignore it.

That conclusion was reaffirmed only five years later in a long-forgotten case, *Irvine v. California*.<sup>5</sup> *Irvine* was Earl Warren's first Fourth Amendment case as the new Chief Justice of the United States, and in it he joined the majority in rejecting the claim that the states *must* adopt the exclusionary rule as one of the remedies available to those claiming that their Fourth Amendment rights had been violated. As we will see, despite its anonymity *Irvine* had a critical impact upon the development of Earl Warren's views about the need for constitutional judicial review.

*Wolf* and *Irvine* were overruled in 1961 by the Court's seminal decision in *Mapp v. Ohio*,<sup>6</sup> which required the states to employ the Fourth Amendment exclusionary rule. In recent decades, a series of Supreme Court opinions has redefined the suppression remedy's purpose and limited its impact.<sup>7</sup> Those opinions generally have focused upon the remedy's scope and application in particular settings, and not upon its survival in constitutional doctrine.

This explains why Justice Scalia's majority opinion in *Hudson* is so striking. It resurrects arguments questioning the very legitimacy of the exclusionary rule employed by opponents of suppression half a century ago. Although the narrow issue in *Hudson* was whether violation of the knock-and-announce rule should trigger the exclusionary rule, the majority and dissenting opinions crossed swords over the more fundamental issue of the exclusionary rule's continued viability. Ultimately the question they debated was nothing less than the future of constitutional judicial review of searches and seizures conducted by executive branch actors.

That issue is the subject of this paper. Part II discusses *Hudson's* provocative dicta questioning the efficacy of the exclusionary rule. In Part III, I examine the theories employed in the

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<sup>5</sup> 347 U.S. 128 (1954).

<sup>6</sup> 367 U.S. 643 (1961).

<sup>7</sup> *United States v. Leon*, 468 U.S. 897, 916-20 (1984); *United States v. Calandra*, 414 U.S. 338, 347-58 (1974).

seminal early opinions that established the remedy in federal cases. Part IV reviews the arguments made during the mid-twentieth century in *Wolf* and *Mapp*, arguments revisited only last year in *Hudson*. This discussion includes an analysis of the relationship between the exclusionary rule and the broader issue of constitutional judicial review articulated in the Supreme Court's original opinions imposing that remedy in both federal and state court litigation.

The final section examines the *Irvine* case, and explains how it affected Chief Justice Warren's views about the need for the exclusionary rule in search and seizure cases. I conclude that the factors that influenced Chief Justice Warren's conversion on these issues provide a provocative example of why the exclusionary rule is an essential element of constitutional judicial review of police practices. The majority opinion in *Hudson v. Michigan*<sup>8</sup> articulated a very different view of Fourth Amendment rights and remedies.

## II. HUDSON

The constitutional question in *Hudson* was "whether violation of the 'knock-and-announce' rule requires the suppression of all evidence found in the search."<sup>9</sup> Police officers went to Booker Hudson's home to execute a search warrant and announced their presence before entering.<sup>10</sup> Up until this point, no one could question the legality of their conduct. That question was raised by what happened next: the officers waited only "three to five seconds" before entering Hudson's home, where they found drugs, including cocaine rocks in Hudson's pocket, and a loaded gun in the chair where Hudson was sitting.<sup>11</sup> Hudson was charged with unlawful drug and firearm possession.<sup>12</sup> The state trial court granted Hudson's motion to suppress all the evidence, finding that the premature entry violated

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<sup>8</sup> 126 S. Ct. 2159 (2006).

<sup>9</sup> *Id.* at 2162.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

his Fourth Amendment rights, but the Michigan appellate courts reversed, and Hudson was convicted of drug possession.<sup>13</sup>

Justice Scalia's majority opinion reaffirmed the Court's recent knock-and-announce jurisprudence, which had held that the "common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is . . . a command of the Fourth Amendment."<sup>14</sup> This line of decisions had, however, construed the common law rule as only a weak constraint on the police. Most importantly, officers need not knock and announce their presence if they possess reasonable suspicion to believe that to do so would expose them to the "threat of physical violence,"<sup>15</sup> or "that evidence would likely be destroyed"<sup>16</sup> or suspects would escape if "notice were given,"<sup>17</sup> or that the exercise would be "futile."<sup>18</sup>

Applying this reasonableness approach, the Court had held that officers must wait only a reasonable time after knocking and announcing before entering a building.<sup>19</sup> In *Hudson*, the State conceded that the officers had violated the knock-and-announce rule by waiting only three to five seconds. The issue in the Supreme Court was whether that violation triggered the exclusionary rule. Employing a balancing methodology, the majority concluded that "the social costs of applying the exclusionary rule to knock-and-announce violations are considerable,"<sup>20</sup> while suppression for such a violation offers little deterrence to police misconduct, particularly when compared to other mechanisms for achieving that goal.<sup>21</sup> Given the majority's characteri-

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

<sup>14</sup> *Id.* (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

<sup>15</sup> *Richards v. Wisconsin*, 520 U.S. 385, 391 (1999).

<sup>16</sup> *Id.*

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

<sup>18</sup> *Id.* at 394.

<sup>19</sup> *United States v. Banks*, 540 U.S. 31, 41 (2003) (concluding that police officers acted reasonably by waiting only 15-20 seconds after knocking before entering).

<sup>20</sup> *Hudson*, 126 S. Ct. at 2168.

<sup>21</sup> The interests protected by the knock-and-announce rule also offered little support to *Hudson*. See, e.g., *id.* at 2165:

The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.

zation of the costs as “considerable” and the benefits as negligible, its conclusion that the “remedy of suppressing evidence of guilt is unjustified”<sup>22</sup> was inevitable.<sup>23</sup>

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One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who “did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . . .” The knock-and-announce rule gives individuals “the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.” And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the “opportunity to prepare themselves for” the entry of the police. “The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.” In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one’s interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

*Id.* (citations omitted).

<sup>22</sup> *Id.* at 2168.

<sup>23</sup> Perhaps the oddest part of the opinion consisted of a discussion of precedents concerning the fruit of the poisonous tree doctrine. Justice Scalia accurately noted that the doctrine focused upon the relationship between government illegality and the discovery of evidence, then tried to bolster application of that rule in the knock-and-announce context by turning to older cases. He wrote:

For this reason, cases excluding the fruits of unlawful warrantless searches, see, e.g., *Boyd v. United States*; *Weeks*; *Silverthorne Lumber Co. v. United States*; [and] *Mapp*, say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement.

*Id.* at 2165 (citations omitted).

This statement is accurate but virtually meaningless in a judicial system in which cases are decided on their own facts and issues. None of those opinions mention knock-and-announce violations because the issue was *entirely irrelevant* to each. The Boyds complied with a judicial subpoena by bringing the requested business papers to court. The facts of *Weeks* did not raise the issue, because officers conducted an unconstitutional warrantless search of Weeks’s home while he was away. *Weeks v. United States*, 232 U.S. 383, 387-89 (1914). In *Silverthorne*, the owners of a lumber company refused to comply with a subpoena for business records. *Silverthorne Lumber Co. v. United States*, 252 U.S. 385, 390-92 (1920). Later, government agents acting without a warrant or other legal authority went to the business, searched it, and seized business papers. *Id.* at 390-91. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the officers exceeded any possible requirements of the knock-and-announce rule. They alerted Mapp from outside the home, and when she refused to consent to an entry, they waited hours for a warrant. *Id.* at 644-45. Again, the violation was a forcible warrantless search and seizure with a home. In short, had these famous opinions commented on the relationship between the

What was not inevitable was the inclusion of dicta questioning not only the costs of exclusion, but also the continued need for the exclusionary remedy. The discussion of the costs of exclusion was encompassed within the balancing methodology that has become conventional in recent decades.<sup>24</sup> After acknowledging that the Court had previously applied the exclusionary rule expansively,<sup>25</sup> Scalia's opinion asserted that suppression "has always been our last resort, not our first impulse"<sup>26</sup> because of the "substantial social costs" resulting from this remedy. The ultimate cost was, as it had been over half a century earlier in *Wolf*, that criminals would go free because the police had erred.<sup>27</sup>

This indisputable shortcoming of the exclusionary rule—that it offers aid only when incriminating evidence has been found—is neither original nor unusual in the Supreme Court's opinions construing the scope of its application. Subsequent passages went further, disputing the idea that exclusion remains necessary for deterrence of police illegality. The opinion argued first that changes in the application of 42 U.S.C. § 1983 made suits for civil damages an adequate remedy.<sup>28</sup>

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knock-and-announce rule and suppression of evidence, this would have been ill-advised and irrelevant dicta.

<sup>24</sup> *United States v. Leon*, 468 U.S. 897 (1984). See also, Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 226-47 (1993).

<sup>25</sup> *Hudson*, 126 S.Ct. at 2163 (quoting *Mapp*, 367 U.S. at 655 ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.")).

<sup>26</sup> *Id.* Citing earlier decisions, the majority recognized that at one time the Supreme Court had equated "a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Id.* at 2164. It stressed however, that subsequent decisions had rejected this approach. *Id.* (quoting *Arizona v. Evans*, 514 U.S. 1, 13 (1995)).

<sup>27</sup> 126 S.Ct. at 2166.

<sup>28</sup> *Id.* In his dissenting opinion, Justice Breyer disputed this claim. See *id.* at 2175 (Breyer, J., dissenting):

To argue that there may be few civil suits because violations may produce nothing "more than nominal injury" is to confirm, not to deny, the inability of civil suits to deter violations. And to argue without evidence (and despite myriad reported cases of violations, no reported case of civil damages, and Michigan's concession of their nonexistence) that civil suits may provide deterrence because claims *may* "have been settled" is, perhaps, to search in desperation for an argument. Rather, the majority, as it candidly admits, has simply "assumed" that, "[as] far as [it] know[s], civil liability is an effective deterrent," a

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief; *Monroe v. Pape*, 365 U.S. 167 (1961), which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities, *Monell v. Department of Social Services*. Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens v. Six Unknown Federal Narcotics Agents*.

Hudson complains that "it would be very hard to find a lawyer to take a case such as this," but 42 U.S.C. § 1988(b) answers this objection. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.<sup>29</sup>

No reasonable observer would dispute that § 1983 litigation has expanded in recent decades, in part due to the Supreme Court decisions cited by Justice Scalia. Whether these changes are sufficient to serve as an adequate Fourth Amendment remedy is far less certain than Justice Scalia suggests.<sup>30</sup> Concerns

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support-free assumption that *Mapp* and subsequent cases make clear does not embody the Court's normal approach to difficult questions of Fourth Amendment law.

<sup>29</sup> *Id.* at 2167.

<sup>30</sup> Writing in dissent, Justice Breyer raised these questions. *Id.* at 2174-75 (Breyer, J., dissenting):

about the objectivity of that conclusion can only be heightened by Justice Scalia's next argument.

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to "assume" that unlawful police behavior would "be dealt with appropriately" by the authorities, but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers." Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There

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Why is application of the exclusionary rule any the less necessary here? Without such a rule, as in *Mapp*, police know that they can ignore the Constitution's requirements without risking suppression of evidence discovered after an unreasonable entry. As in *Mapp*, some government officers will find it easier, or believe it less risky, to proceed with what they consider a necessary search immediately and without the requisite constitutional (say, warrant or knock-and-announce) compliance.

Of course, the State or the Federal Government may provide alternative remedies for knock-and-announce violations. But that circumstance was true of *Mapp* as well. What reason is there to believe that those remedies (such as private damages actions under 42 U.S.C. § 1983), which the Court found inadequate in *Mapp*, can adequately deter unconstitutional police behavior here?

The cases reporting knock-and-announce violations are legion. Yet the majority, like Michigan and the United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation. Even Michigan concedes that, "in cases like the present one . . . , damages may be virtually non-existent."

As Justice Stewart, the author of a number of significant Fourth Amendment opinions, explained, the deterrent effect of damage actions "can hardly be said to be great," as such actions are "expensive, time-consuming, not readily available, and rarely successful."

*Id.* (citations omitted).



is also evidence that the increasing use of various forms of citizen review can enhance police accountability.<sup>31</sup>

Once again, no reasonable observer would dispute that police departments in this country are more professional today than they were half a century ago; or that their training has improved over the past half century. Many observers also would conclude, however, that the Supreme Court's decisions imposing the Fourth and Fifth Amendment exclusionary rules on all law enforcement officials were irreplaceable catalysts for these improvements.

Justice Scalia's reliance upon police department training to deter constitutional rights violations will strike some readers as particularly ironic. In recent years, evidence has emerged that some police departments have trained officers how to exploit recent Supreme Court decisions—including some in which Justices in the *Hudson* majority participated—in order to avoid constitutional restraints without triggering exclusion of the evidence improperly obtained.<sup>32</sup> In the one Supreme Court case Scalia cites in this passage, *United States v. Payner*, federal agents intentionally violated the Fourth Amendment rights of one person to obtain evidence to use against another.<sup>33</sup>

Four Justices dissented in *Hudson*. Writing for three of them, Justice Breyer lamented that the majority opinion “destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement.”<sup>34</sup> The Court's decisions imposing the Fourth Amendment exclusionary rule established that “‘all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible’ [and to hold otherwise] would be ‘to grant the right but in reality to withhold its privilege and enjoyment.’”<sup>35</sup> The next two Parts of this article examine those decisions and their com-

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<sup>31</sup> *Id.* at 2168 (citations omitted).

<sup>32</sup> *See, e.g.*, *Missouri v. Seibert*, 542 U.S. 600 (2004) (police officers trained to avoid interrogation rules articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966)). *See also*, *Seibert*, 542 U.S. at 611 n.2 (discussing other examples in which police officers were trained to evade *Miranda*'s restrictions).

<sup>33</sup> 447 U.S. 727 (1980) (cited at *Hudson*, 126 S.Ct. at 2168).

<sup>34</sup> *Hudson*, 126 S.Ct. at 2171.

<sup>35</sup> *Id.* at 2173

plex views about the nature, scope, and necessity of the exclusionary remedy.

### III. THE ORIGINAL RATIONALE FOR THE EXCLUSIONARY RULE

#### A. *Constitutional Judicial Review*

Those familiar with contemporary Supreme Court decisions would be justified in assuming that deterring police misconduct is the sole justification for imposing the exclusionary remedy. But the deterrence rationale that prevails in recent opinions became central to the Supreme Court's analysis only in the latter decades of the twentieth century. It was not until the 1970s and 1980s that a series of opinions would hold that deterrence was the sole justification for suppressing evidence, and this was a rationale employed not to explain the rule, but to serve as a device for limiting its application.<sup>36</sup>

Conversely, the Court's seminal opinions imposing the exclusionary remedy on the federal government (*Boyd v. United States*<sup>37</sup> and *Weeks v. United States*<sup>38</sup>) and upon the states (*Mapp v. Ohio*<sup>39</sup>) treated the rule as a form of constitutional judicial review deployed in the search and seizure context. In each of these opinions, the central objective was to craft a judicially enforceable remedy that judges could employ when government agents violated the rights of individuals. Deterring police misconduct was a peripheral concern. Just how far the Court's current doctrine has drifted from the original justifications for the exclusionary rule is apparent from an analysis of the opinions adopting the rule.

The early opinions' first and primary justification for adopting the exclusionary rule was to enforce individual rights. These opinions treated Fourth Amendment rights as essential constitutional privileges that helped define the very nature of the relationship between citizens and their government. They focused upon the nature and scope of privacy, property, and lib-

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<sup>36</sup> See *United States v. Calandra*, 414 U.S. 338, at 347 (1974).

<sup>37</sup> 116 U.S. 616 (1886).

<sup>38</sup> 232 U.S. 383, 392 (1914).

<sup>39</sup> 367 U.S. 643, 660 (1961).

erty rights; upon the means of enforcing those rights for the individual claimant; and rarely even mentioned the deterrence of police misconduct as a rationale for exclusion.

Second, the exclusionary remedy permitted constitutional judicial review in the criminal prosecutions over which judges presided.<sup>40</sup> Other available remedies required separate proceedings, and typically would be directed at police officers who were not parties to the criminal case between government and citizens. A classic example was the trespass suit seeking civil damages. This remedy was available only if the civil claimant, typically the defendant in the criminal case, maintained separate judicial proceedings in which the named defendants usually would be police officers. Suppressing illegally obtained evidence, on the other hand, was a remedy that judges controlled. They could apply the remedy within the context of cases being litigated before them without being dependent upon the actions of other private litigants or branches of government, who were gatekeepers for the use of other possible remedies.

Third, these early opinions emphasized that judges were charged specifically with the duty of preserving individual rights from improper encroachment by government action. Judicial review was not just another remedy, it was an essential mechanism for preserving democratic liberties. And the exclusionary rule was the mechanism that implemented constitutional judicial review in the Fourth Amendment context.

The first great Supreme Court opinion interpreting the Fourth Amendment employed this vigorous theory of constitutional judicial review to enforce strong individual rights at the expense of efficient law enforcement.

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<sup>40</sup> This rationale is consistent with the premise underlying the famous passage in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803): “[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.” *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*109).

*B. Boyd, Rights, and Judicial Review*

The Supreme Court laid the groundwork for a Fourth Amendment exclusionary rule in *Boyd v. United States*,<sup>41</sup> where it held that a subpoena ordering a business to produce shipping invoices and other commercial papers violated the Fourth Amendment.<sup>42</sup> The Boyds complied with the subpoena under protest, and delivered papers containing information that the government used in a civil forfeiture action to secure title to plate glass the Boyds had imported without paying federal import duties.<sup>43</sup> The controlling statute also authorized a federal criminal prosecution for this violation of tax laws, but government lawyers eschewed that tactic.<sup>44</sup> The Supreme Court held that the federal statute compelling production of these records and permitting the government to use their contents in both civil and criminal proceedings violated both the Fourth and Fifth Amendments.<sup>45</sup>

Although the Supreme Court did not describe its opinion in terms of the exclusionary rule, the decision was an implicit suppression order. It prevented the government from using the documents or their contents as evidence in a judicial proceeding.<sup>46</sup>

The constitutional theories supporting the *Boyd* decision and the Court's contemporary exclusionary rule opinions are strikingly different. The *Boyd* Court did not focus upon deterrence of police misconduct. Instead, it emphasized the rights protected by the Fourth and Fifth Amendments and the judicial duty to enforce rights against even the mildest forms of overreaching by the executive and legislative branches.<sup>47</sup> The Court acknowledged that the subpoena used to obtain the Boyds' pri-

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<sup>41</sup> 116 U.S. 616 (1886).

<sup>42</sup> *Id.* at 638.

<sup>43</sup> *Id.* at 618.

<sup>44</sup> *See id.* at 618-19. *See also*, Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 573-81 (1996).

<sup>45</sup> *Boyd*, 116 U.S. at 638.

<sup>46</sup> *See id.* at 638.

<sup>47</sup> *See id.* at 625-27.

vate papers was not a literal search and seizure.<sup>48</sup> Nonetheless, the Justices enforced what today would be called a right to privacy in the papers and their contents.<sup>49</sup>

An even greater difference appears in the conception of rights expressed in the two eras. Contemporary theory treats Fourth Amendment rights as mere interests that must be balanced against the competing government and social interests when deciding whether to exclude evidence because of government conduct—or misconduct. In contrast, the *Boyd* Court characterized these rights not just as fundamental but as indefeasible, and emphasized judges' responsibility in our constitutional system to protect these rights against even the most modest and well-intended government intrusions.

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. . . . We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.<sup>50</sup>

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<sup>48</sup> See *id.* at 624, 630.

<sup>49</sup> *Boyd* was decided four years before publication of the influential law review article that labeled issues previously defined in terms of property and liberty rights, including the protection of private papers and their contents, as issues of "privacy." See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>50</sup> *Boyd*, 116 U.S. at 635.

The Court emphasized that its inquiry focused upon the question of whether use of illegally seized evidence was an independent violation of the Fourth Amendment, and it is this analysis that forms the basis for the exclusionary rule adopted explicitly twenty-eight years later in *Weeks*:

The principal question, however, remains to be considered. Is 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 in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an “unreasonable search and seizure” within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?<sup>51</sup>

The Court's answer in *Boyd* was clear: the use of unconstitutionally seized evidence against a citizen violated his constitutional rights.

### C. *Weeks and the Exclusionary Rule*

In *Boyd*, the Supreme Court implicitly excluded evidence from use in a judicial proceeding. Nearly thirty years later, the Court relied upon *Boyd* to explicitly impose an exclusionary remedy. In *Weeks v. United States*,<sup>52</sup> federal officers carried out a warrantless search of Weeks' home and found evidence, including papers, implicating Weeks in an illegal gambling business—the numbers racket.<sup>53</sup> Weeks filed motions seeking the return of all of the property.

The Supreme Court agreed that both the warrantless search of his home and seizure of his property were unconstitutional.<sup>54</sup> In explaining why the exclusionary remedy should be applied, the Court quoted from earlier opinions, including *Boyd* and *Entick v. Carrington*, a pre-Revolutionary English case cited extensively in *Boyd*. The *Weeks* opinion ultimately rested upon a view of individual rights and the constitutional duty im-

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<sup>51</sup> *Id.* at 622.

<sup>52</sup> 232 U.S. 383 (1914).

<sup>53</sup> *Id.* at 386.

<sup>54</sup> *Id.* at 398.

posed on judges to enforce them that was entirely consistent with *Boyd*. In particular, judges were required to enforce Fourth Amendment rights and this in turn required them to exclude illegally seized evidence.

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it 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 conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.<sup>55</sup>

As it had in *Boyd*, the Supreme Court treated the individual rights articulated in the Fourth Amendment as robust enough to trump arguments for efficient law enforcement and viewed the judiciary as the branch of government particularly charged with the duty of enforcing these fundamental rights against law enforcement efforts that would diminish them. And as in *Boyd*, the Court held that the Fourth Amendment precluded the federal government from using property, particularly papers and their contents, in judicial proceedings against the citizen whose rights were violated by the search and seizure that produced the evidence.<sup>56</sup>

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<sup>55</sup> *Id.* at 391-92.

<sup>56</sup> *See, e.g., id.* at 393-94.

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as

The Court rejected unequivocally the argument that remedies for violations of the Fourth Amendment were aimed at the investigating officers. Referring to the officers who carried out the illegal intrusions, the Supreme Court emphasized that “[w]hat remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies.”<sup>57</sup>

The *Boyd* Court distinguished between the constitutional remedy available to the defendant in a criminal prosecution whose rights had been *violated by the government*, and the common law trespass action for damages that might *also be available* against the individual searchers.<sup>58</sup> This passage presages arguments made decades later by the *Mapp* majority: the exclusionary rule is essential because it is the mechanism available to judges exercising judicial review for enforcing Fourth Amendment rights.<sup>59</sup> In the context of a criminal case brought by the government against a citizen, judges must craft remedies appropriate to that dispute, and excluding evidence is the one mechanism judges can apply independent of the judgment of executive branch actors or civil juries. In *Boyd* and *Weeks*, this conclusion was buttressed by the fact that no one disputed that the Fourth Amendment, and the rest of the Bill of Rights, existed to limit the power of the national government.<sup>60</sup> Employing constitutional judicial review to limit the power of state government actors was more difficult and more controversial.

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well be stricken from the Constitution. 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. . . . To sanction such proceedings would be to affirm by judicial decision 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>57</sup> *Id.* at 398 (emphasis added) (citing *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Boyd v. United States*, 116 U.S. 616 (1886)).

<sup>58</sup> *Boyd*, 116 U.S. at 662.

<sup>59</sup> *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

<sup>60</sup> *See, e.g., Barron v. Baltimore*, 32 U.S. 243, 248 (1833).



## IV. THE EXCLUSIONARY RULE AND THE STATES

For almost half a century following *Weeks*, the Supreme Court did not impose this Fourth Amendment exclusionary rule upon the states. As the opinion in *Wolf* made clear, the traditional approach to interpreting the relationship between the Fourteenth Amendment's Due Process Clause and the rights protected by the Bill of Rights<sup>61</sup> was a barrier to applying the blanket Fourth Amendment exclusionary rule to investigations and prosecutions conducted under state law.

A. *Wolf and Alternative Remedies*

Julius Wolf was a doctor in Denver, Colorado.<sup>62</sup> He and a co-defendant were prosecuted in 1944 for conspiring to perform an illegal abortion on a specific patient.<sup>63</sup> At trial the prosecution offered Dr. Wolf's appointment book as an exhibit.<sup>64</sup> Wolf moved to suppress the appointment book because police had seized it without a warrant in violation of the Colorado constitution's analogue to the Fourth Amendment.<sup>65</sup> The trial judge

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<sup>61</sup> During the first half of the twentieth century, the Court employed a "fundamental fairness" theory to interpret the limits the Due Process Clause imposed on the states. According to this theory, only those rights deemed fundamental were imposed as part of due process, and the fact that a right was listed in the Bill of Rights did not mean that it was fundamental for these purposes. Conversely, a right might be deemed fundamental yet not appear in the Bill of Rights. In the criminal justice context, for example, the Court employed this approach in defining the right to have counsel for the defense in criminal cases: *Powell v. Alabama*, 287 U.S. 45, 73 (1932); *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963); the right not to be subjected to double jeopardy: *Palko v. Connecticut*, 302 U.S. 319, 323-24 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969); and the right to be free from unreasonable searches and seizures: *Wolf v. Colorado*, 338 U.S. 25, 32 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961). This approach required that the Court examine the specific facts of each case to see if the right asserted by that defendant in that case was so fundamental to the nature of a free society that actions by a state derogating the right violated the very notion of ordered liberty. If it did not, then the state action did not violate due process, even if similar conduct by the federal government would violate some provision of the Bill of Rights. The Court's fact-sensitive, case-by-case approach methodology precluded imposition of global rules, like those adopted in *Weeks* and *Mapp*. As a result, many state actions survived constitutional scrutiny, and this theory tended, as a practical matter, to cede authority to the states.

<sup>62</sup> *Wolf v. State*, 187 P.2d 926, 927 (Colo. 1947).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

denied the motion and admitted the book in evidence.<sup>66</sup> Dr. Wolf was convicted and sentenced to up to five years in prison.<sup>67</sup>

Justice Frankfurter's majority opinion in *Wolf v. Colorado*<sup>68</sup> addressed the following question:

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 to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*, 232 U.S. 383?<sup>69</sup>

The five-Justice majority's answer was no. It held "that in a prosecution 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>70</sup> Applying the fundamental fairness theory, Justice Frankfurter's opinion rejected the argument that the Fourteenth Amendment Due Process Clause incorporated "the specific requirements and restrictions placed by the Bill of Rights (Amendments I to VIII) upon the administration of criminal justice by federal authority . . ."<sup>71</sup>

According to the fundamental fairness approach, due process protected all fundamental rights, regardless of their inclusion in the Constitution's text.<sup>72</sup> Freedom from unreasonable

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 338 U.S. 25 (1949).

<sup>69</sup> *Id.* at 25-26.

<sup>70</sup> *Id.* at 33 (emphasis added).

<sup>71</sup> *Id.* at 26. Not surprisingly Frankfurter disparaged the "total incorporation" theories advocated by Justices Black and Douglas. ("The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight Amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See, e.g., *Hurtado v. California*, 110 U.S. 516; *Twining v. New Jersey*, 211 U.S. 78; *Brown v. Mississippi*, 297 U.S. 278; *Palko v. Connecticut*, 302 U.S. 319."). Frankfurter relied heavily on Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937) in holding that the Due Process Clause required the States to honor only those rights "implicit in the concept of ordered liberty." *Id.* 325.

<sup>72</sup> *Wolf*, 338 U.S. at 27.

searches and seizures was such a fundamental right, but not because it is protected by the Fourth Amendment.

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.<sup>73</sup>

This conclusion did not mean, however, that the federal exclusionary rule also was binding on the states. The majority argued, as would later critics, that the rule derived not from the text of the Constitution, but was merely the product of judicial decision making:

In *Weeks v. United States*, . . . 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 . . . not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.<sup>74</sup>

Noting that most of the English speaking countries and about two-thirds of the states did not enforce an exclusionary remedy,<sup>75</sup> Justice Frankfurter argued that remedies other than suppression not only were adequate to protect against unreasonable government searches and seizures, they had a critical advantage: "the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found."<sup>76</sup> The guilty and

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<sup>73</sup> *Id.* at 27-28.

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

<sup>75</sup> *Id.* at 28-29.

<sup>76</sup> *Id.* at 30-31.

innocent alike, he argued, were protected by “remedies of private action [and] the internal discipline of the police, under the eyes of an alert public opinion . . . .”<sup>77</sup>

Among these alternatives were the civil trespass suit for damages, prosecution for criminal trespass, and administrative sanctions against the searching officers. Justice Murphy’s dissent challenged the efficacy of these other remedies in terms echoed by supporters of the exclusionary rule for more than half a century. Murphy agreed “that the Fourteenth Amendment prohibits activities which are proscribed by the search and seizure clause of the Fourth Amendment,”<sup>78</sup> but reached a very different conclusion about the alternative remedies.

Murphy disputed the efficacy of each of the alternatives to suppression cited by the majority.<sup>79</sup> Prosecutors were unlikely to prosecute law enforcers except in the most extreme cases, particularly if their offices were involved in the investigations.<sup>80</sup> Civil damages actions for trespass were an “illusory remedy” because they were unlikely to succeed in any meaningful way.<sup>81</sup> Officers and governments might be protected by immunity; unless physical damages were extreme, damages awards would be too nominal to justify the costs of litigation.<sup>82</sup> The officers’ good faith in conducting the search and seizure was a defense, and jurors were more likely to be sympathetic to the law enforcers’ subjective motives.<sup>83</sup> Punitive damages might be available if actual damage to property occurred, but state rules limiting how damages could be calculated reduced the value of this remedy.<sup>84</sup> All of these barriers are increased because the criminal plaintiff’s “bad reputation” would sway the jury.<sup>85</sup> Finally, “even if the plaintiff hurdles all these obstacles, and gains a

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<sup>77</sup> *Id.* at 31.

<sup>78</sup> *Id.* at 41 (Murphy, J., dissenting).

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

<sup>80</sup> *Id.*

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

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

<sup>85</sup> *Id.*

substantial verdict, the individual officer's finances may well make the judgment useless . . . ."<sup>86</sup>

Only the exclusionary rule was a reliable remedy. It war-rants comment here that unlike the earlier pro-exclusion argu-ments in *Boyd* and *Weeks*, Justice Murphy described the com-parative advantage of the exclusionary remedy not in terms of strong individual rights but in terms of the capacity to deter government misconduct. In this sense, he anticipated the ra-tionale for exclusion adopted two decades later.

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by ex-clusion can we impress upon the zealous prosecutor that viola-tion of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.<sup>87</sup>

Nonetheless, Murphy cited *Weeks* to emphasize the judici-ary's special role in protecting against unreasonable searches and seizures, because "without judicial action, there are simply no effective sanctions presently available."<sup>88</sup> Murphy's argu-ments did not carry the day. A contrary view of remedies pre-vailed; the majority in *Wolf* concluded that states were free to employ other remedies instead of suppressing illegally seized evidence.<sup>89</sup> In response, Murphy discussed one example eerily prescient of the facts of the case that would overrule *Wolf* twelve years later:

In Cleveland, recruits and other officers are told of the rules of search and seizure, but "instructed that it is admissible in the courts of Ohio. The Ohio Supreme Court has indicated very definitely and clearly that Ohio belongs to the 'admission-

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<sup>86</sup> *Id.* at 44.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 46.

<sup>89</sup> *Id.* at 33.

ist' group of states when evidence obtained by an illegal search is presented to the court."<sup>90</sup>

### B. Mapp and the Exclusionary Rule

In 1957, Cleveland police officers relied upon this Ohio rule when they illegally entered Dollree Mapp's apartment. When officers initially sought entry into the building, Mapp demanded that they produce a search warrant.<sup>91</sup> After waiting fruitlessly for hours while a young officer went to obtain a warrant, the officers forced their way into the house where Mapp rented a second floor apartment.<sup>92</sup> Although they were searching for a suspect in a bombing, the officers rummaged through Mapp's possessions including dresser drawers, and then searched her storage area in the home's basement.<sup>93</sup> They did not find the suspected bomber (he was hiding in another apartment in the building),<sup>94</sup> but they did find sexually explicit pictures and writings.<sup>95</sup> Mapp was convicted of possessing obscene materials. State and federal judges hearing the case assumed that the police did not have a warrant; this assumption was correct.<sup>96</sup> They also concluded that this warrantless physical invasion of Mapp's home violated her right to be free from unreasonable searches and seizures protected by both the federal and state constitutions.<sup>97</sup>

Applying *Wolf*, the Ohio Supreme Court concluded that because the state had not adopted the exclusionary rule, admission of the illegally seized evidence violated neither the state constitution nor Fourteenth Amendment due process.<sup>98</sup> In a five-to-four decision, the United States Supreme Court reversed,

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<sup>90</sup> *Id.* at 46.

<sup>91</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 644-45.

<sup>94</sup> *See, e.g.*, FRED W. FRIENDLY & MARTHA J.H. ELLIOT, *THE CONSTITUTION: THAT DELICATE BALANCE* 132 (1984).

<sup>95</sup> *Mapp*, 367 U.S. at 643.

<sup>96</sup> *See, e.g., id.* at 645 ("At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for.")

<sup>97</sup> *Id.* at 645.

<sup>98</sup> *Id.* at 669 (Douglas, J., concurring).

overruled *Wolf*, and imposed the Fourth Amendment exclusionary rule upon the states.<sup>99</sup>

The police misconduct was egregious. Although Mapp had done no more than demand a warrant, the officers ran “roughshod” over her; they grabbed her, twisted her hand, locked her in handcuffs, and “forcibly [took Mapp] upstairs to her bedroom.”<sup>100</sup> The officers were searching for a bombing suspect, yet once inside Mapp’s home they “searched a dresser, a chest of drawers, a closet and some suitcases. . . . [and] looked into a photo album and through personal papers belonging to the appellant.”<sup>101</sup> Although the apartment was on the second floor of the house, officers also searched a trunk stored in the basement and “[t]he obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.”<sup>102</sup>

The State urged the Court to apply *Wolf*, which had established that “even if the search were made without authority, or otherwise unreasonably, [Ohio] is not prevented from using the unconstitutionally seized evidence at trial.”<sup>103</sup> Instead the majority held that the states now must exclude evidence seized in violation of the Fourth Amendment.<sup>104</sup> The Court’s analysis relied heavily on early exclusionary rule decisions, including *Weeks*, and frequently echoed Justice Murphy’s dissent in *Wolf*, particularly his argument that exclusion is not merely a remedy, but is an essential element of Fourth Amendment rights.

Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be “a form of words,” valueless and undeserving of mention in a perpetual charter of inestimable human liber-

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<sup>99</sup> *Id.* at 653-56.

<sup>100</sup> *Id.* at 645.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 655.

ties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty . . ." in 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. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.<sup>105</sup>

The Court also recognized that the exclusionary rule was the mechanism by which judges fulfilled their duty to enforce the Constitution. Like *Weeks*, *Boyd*, and other early opinions, *Mapp* described this obligation in terms of enforcing constitutional judicial review.<sup>106</sup> In addition, it described this function as necessary for preserving the integrity of government institutions:

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result. But, as was

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<sup>105</sup> *Id.* at 655-56.

<sup>106</sup> *See, e.g., id.* at 647 (quoting *Boyd v. United States*, 116 U.S. 616, 638 (1886); I ANNALS OF CONG. 439 (Joseph Gales ed., 1834)):

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional."

*See also, id.* at 649 ("There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.")



said in *Elkins*, “there is another consideration—the imperative of judicial integrity.” The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*: “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. \* \* \* If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”<sup>107</sup>

Justice Clark also deployed two practical arguments. First, in the five decades since *Weeks* had imposed the exclusionary rule in federal cases, “it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.”<sup>108</sup> Second, the “movement towards the rule of exclusion has been halting but seemingly inexorable.”<sup>109</sup> Since the decision in *Wolf*, more states had adopted the exclusionary rule. In 1949, “almost two-thirds of the States were opposed to the use of the exclusionary rule,” but in the ensuing years “more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule.”<sup>110</sup>

Of particular importance, Justice Clark wrote, was California’s adoption of the exclusionary remedy:

*Significantly, among those now following the rule is California, which, according to its highest court, was “compelled to reach that conclusion because other remedies have completely*

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<sup>107</sup> *Id.* at 659 (citations omitted).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 660 (quoting *Elkins v. United States*, 364 U.S. 206, 218-19 (1960)).

<sup>110</sup> *Id.* at 651. Other vexing shortcomings of the doctrine as it existed in 1949 had been corrected by 1961. See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960) (jettisoning the “silver platter doctrine” that allowed federal judicial use of evidence seized in violation of the Constitution by state agents); *Jones v. United States*, 362 U.S. 257, 266-67 (1960) (relaxing “the formerly strict requirements as to standing to challenge the use of evidence thus seized”), *overruled by United States v. Salvucci*, 448 U.S. 83 (1980); *Rea v. United States*, 350 U.S. 214 (1956) (preventing states from using evidence unconstitutionally seized by federal agents).

*failed to secure compliance with the constitutional provisions . . .*” In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that “other means of protection” have been afforded “the right to privacy.” *The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.* The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*. See *Irvine v. California*, 347 U.S. 128, 137 (1954).<sup>111</sup>

Contemporary readers may well wonder why the adoption of the exclusionary rule in just one of the fifty states was particularly important, and why the *Mapp* opinion cited the obscure *Irvine* case that originated in that state, California. In the final section of this article I propose that both questions can be answered with two words: Earl Warren.

#### V. IRVINE, EARL WARREN, AND CONSTITUTIONAL JUDICIAL REVIEW

##### A. *Irvine v. California*

Justice Clark’s opinion in *Mapp* attracted a bare majority of five Justices. One of the five was Chief Justice Earl Warren. This vote embodied a dramatic change in Warren’s attitudes about constitutional judicial review of state law enforcement activities by federal courts. Only seven years earlier, Warren was one of five Justices voting to affirm *Wolf* and not to impose the exclusionary remedy upon the states. *Irvine v. California* was the first search and seizure opinion issued by the new Warren Court,<sup>112</sup> and only a plurality actually endorsed *Wolf*’s reasoning.<sup>113</sup>

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<sup>111</sup> *Mapp*, 367 U.S. at 651-52 (citation omitted) (emphasis added).

<sup>112</sup> *Irvine* was argued in Warren’s second month on the Court. To place it in historical perspective, *Irvine* was argued only nine days before re-argument in *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>113</sup> Justice Clark concurred in the decision only. Chief Justice Warren and Justices Reed and Minton joined in Jackson’s plurality opinion. See also *infra* note 116 (discussing Justice Clark’s concurring opinion).

The plurality opinion was written by Justice Jackson. The four-Justice plurality objected vehemently to the police methods employed in the investigation:

Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government . . . . The decision in *Wolf v. People of the State of Colorado*, for the first time established that “[t]he security of one’s privacy against arbitrary intrusion by the police” is embodied in the concept of due process found in the Fourteenth Amendment.<sup>114</sup>

But *Wolf* also held “that in a prosecution 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>115</sup> Five Justices agreed that *Wolf* was controlling,<sup>116</sup> and voted to affirm Patrick Irvine’s conviction, although none of the Justices endorsed the illegal police actions that produced evidence essential for the prosecution’s case against him.

Irvine had been convicted in a California court of various illegal gambling activities prohibited under state law.<sup>117</sup> Police officers acting without a search warrant repeatedly trespassed into Irvine’s home to install electronic listening devices that permitted them to overhear conversations and other sounds made in the home.<sup>118</sup> They first installed a hidden microphone in a hallway.<sup>119</sup> They bored a hole “in the roof of the house and

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<sup>114</sup> *Irvine v. California*, 347 U.S. 128, 132 (1954).

<sup>115</sup> *Id.* (quoting *Wolf v. Colorado*, 338 U.S. 25, 33 (1949)).

<sup>116</sup> Chief Justice Warren and Justices Reed and Minton joined in Justice Jackson’s plurality opinion. Justice Clark concurred in the judgment, but wrote that had he been on the Court when it decided *Wolf*, he would have voted to impose the exclusionary rule on the states in that case. *Id.* at 138 (Clark, J., concurring). Nonetheless, Justice Clark concluded that “*Wolf* remains the law and, as such, is entitled to the respect of this Court’s membership.” *Id.* (Clark, J., concurring). The decision to affirm *Wolf* did not please him: “In light of the ‘incredible’ activity of the police here it is with great reluctance that I follow *Wolf*. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance.” *Id.* at 139. Only seven years later, Justice Clark would write the majority opinion in *Mapp* that overruled *Wolf* on the exclusionary rule issue.

<sup>117</sup> *Id.* at 129.

<sup>118</sup> *Id.* at 130-31.

<sup>119</sup> *Id.* at 131.

wires were strung to transmit to a neighboring garage whatever sounds the microphone might pick up. Officers were posted in the garage to listen."<sup>120</sup> One week later, "police again made surreptitious entry and moved the microphone, this time hiding it in the bedroom. Twenty days later they again entered and placed the microphone in a closet, where the device remained until its purpose of enabling the officers to overhear incriminating statements was accomplished."<sup>121</sup>

The trial judge allowed the officers to testify about the conversations they overheard, rejecting Irvine's arguments for exclusion. The United States Supreme Court acknowledged that each of the illegal entries "was a trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished."<sup>122</sup> Echoing Justice Brandeis's famous dissent in *Olmstead*,<sup>123</sup> Jackson's plurality opinion concluded that

[s]cience has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted.<sup>124</sup>

But the principles articulated in *Wolf* carried the day in *Irvine*, particularly their deference to state authority in matters of criminal justice. Most criminal cases are prosecuted by the states, and the plurality concluded that "it is for them to determine which rule best serves them."<sup>125</sup> Jackson's plurality opinion emphasized that the Supreme Court had first declared that freedom from unreasonable searches and seizures was a fundamental right imposed on the states by the Fourteenth Amend-

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 132.

<sup>123</sup> *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

<sup>124</sup> These egregious violations also failed to justify suppression under the due process "shock the conscience" standard announced in *Rochin v. California*, 342 U.S. 165 (1952).

<sup>125</sup> *Irvine*, 347 U.S. at 136.

ment only five years earlier.<sup>126</sup> A supermajority of the states had not adopted the exclusionary rule in 1949, and they should have ample time to decide whether to

reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to *Wolf* as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.<sup>127</sup>

Jackson also stressed the absence of evidence demonstrating that the exclusionary remedy was an effective deterrent of police illegality. This is an early example of what has become a critical argument used by suppression's opponents: "There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it."<sup>128</sup> Even in federal courts, where suppression had been in place since 1914, the remedy had not "put an end to illegal search and seizure by federal officers."<sup>129</sup> This may result from the reality that "[t]he disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best."<sup>130</sup>

Because the Supreme Court simply reaffirmed its more important decision in *Wolf*, it is not surprising that *Irvine* has long been relegated to the backwaters of constitutional history. This

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<sup>126</sup> *Id.* at 134.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 136.

<sup>129</sup> *Id.* at 135.

<sup>130</sup> *Id.* at 136-37. See also, Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835 (1999) (explaining how exclusion of evidence was adopted as a mechanism of constitutional judicial review designed to enforce individual rights in specific criminal prosecutions and not as a device for deterring police misconduct—a goal for which exclusion is not well-suited).

is unfortunate because *Irvine* set in motion events that have influenced constitutional history for more than half a century.<sup>131</sup>

It is only in the final paragraph of Jackson's opinion that we find the language that makes *Irvine* a case of note. Here we find a direct call for the use of an alternative to exclusion: prosecution of the law breakers by the relevant members of the executive branch. Only Chief Justice Warren joined Jackson in urging Justice Department action against the officers who had violated *Irvine's* rights. After noting that *Wolf* rested upon the theory that remedies other than suppression were adequate to protect against unreasonable searches and seizures, these two Justices asserted that one such remedy was prosecution under federal civil rights statutes. Here is the relevant language from that long-forgotten paragraph:

*It appears to the writer, in which view he is supported by THE CHIEF JUSTICE, that there is no lack of remedy if an unconstitutional wrong has been done in this instance without upsetting a justifiable conviction of this common gambler. If the officials have willfully deprived a citizen of the United States of a right or privilege secured to him by the Fourteenth Amendment, that being the right to be secure in his home against unreasonable searches, as defined in Wolf v. Colorado, supra, their conduct may constitute a federal crime under . . . 18 U.S.C. Supp. III § 242. This section provides that whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution of the United States shall be fined or imprisoned. . . . We believe the Clerk of this Court should be directed to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General*

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<sup>131</sup> This article discusses the *Irvine* decision's role in producing the majority opinion in *Mapp*, an opinion still central in the debate about the constitutional limits on searches and seizures. Another important byproduct of *Irvine* is less well-known. In response to the message from Jackson and Warren requesting an investigation (and prosecution), Attorney General Brownell issued a memorandum authorizing illegal electronic surveillance by the FBI in national security cases. This memorandum continues to play a role in the constitutional debate about the legality of electronic surveillance methods used by government agencies in the twenty-first century. See Morgan Cloud, *The Bugs in Our System*, N.Y. TIMES, JAN. 13, 2006, at A1.

of the United States. However, MR. JUSTICE REED and MR. JUSTICE MINTON do not join in this paragraph.<sup>132</sup>

Writing in dissent, Justice Douglas also resurrected *Wolf*, quoting from Justice Murphy's dissent and concluding that "[e]xclusion of evidence is indeed the only effective sanction."<sup>133</sup> He scoffed at the solution pressed by Jackson and Warren in *Irvine* "that the remedy for lawless conduct by the local police is through federal prosecution under the civil rights laws," in part because an "already overburdened Department of Justice, busily engaged in law enforcement, cannot be expected to devote its energies to supervising local police activities and prosecuting police officers, except in rare and occasional instances."<sup>134</sup> Subsequent developments seemed to confirm Douglas's arguments, and undercut those who relied upon remedies other than exclusion.

After the Supreme Court Clerk had complied with the two Justices' request and had forwarded the case file to the Attorney General, the Justice Department took no action against the officers. There was no prosecution. There was no investigation. The Department failed even to open a file on the matter.<sup>135</sup> The failure of the executive branch to act to enforce the law and Irvine's rights had a profound effect on Earl Warren's views about the need for a remedy—like exclusion—that could be enforced by judges engaged in the process of constitutional judicial review.<sup>136</sup> There seems to be little doubt that the Justice Department's inaction influenced Warren's judicial philosophy, and led him to conclude that the exclusionary rule was necessary to protect individuals from illegal police actions.<sup>137</sup> To understand Warren's reaction, it is necessary to understand his career *before* the Supreme Court.

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<sup>132</sup> *Irvine*, 347 U.S. at 137-38 (emphasis added).

<sup>133</sup> *Id.* at 151 (Douglas, J., dissenting).

<sup>134</sup> *Id.* at 152.

<sup>135</sup> See, e.g., BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 137 (1983).

<sup>136</sup> See *infra* Part V.B-C.

<sup>137</sup> See *infra* Part V.B-C.

*B. Career Prosecutor and Republican Politician*

Earl Warren's tenure as Chief Justice has overshadowed his earlier career. Even a quick summary of his professional life illustrates why it is not surprising that early in his career on the Supreme Court Warren both deferred to the State of California in matters of criminal justice and why he believed that the Republicans in the Executive Branch could be trusted to protect individual rights. Warren was a lifetime resident of California, a longtime state prosecutor, a former Attorney General and Governor of that state, and one of the most prominent career Republican politicians of his era. He was the Republican Party's nominee for Vice-President in 1948 and a leading contender for the presidential nomination four years later. Many of the details of his overlapping careers as prosecutor and a Republican politician seem to contradict his later reputation as a liberal Chief Justice who led the Supreme Court through its most progressive era.

Earl Warren grew up in northern California. He was a mediocre student in high school, college, and law school, but earned bachelors and law degrees from the University of California in Berkeley.<sup>138</sup> Several years after graduating from law school, he was hired as a deputy district attorney in Alameda County, California. From 1925 to 1938 he was District Attorney of that county. Warren earned a national reputation as a prosecutor who got results, but who played by the rules (as they were defined in the 1920s and 1930s). He was known for running a clean, efficient office that secured conviction rates above both state and national averages, yet his deputy district attorneys were nicknamed "Boy Scouts."<sup>139</sup> He demanded that prosecutors and police officers follow legal rules, even if it meant that suspects went free.<sup>140</sup> As a prosecutor, he declared that "[w]e don't break the law to enforce the law."<sup>141</sup>

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<sup>138</sup> ED CRAY, CHIEF JUSTICE 15-29 (1997).

<sup>139</sup> CRAY, *supra* note 138, at 48, 58-60.

<sup>140</sup> JOHN D. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 236-37 (1967); CRAY, *supra* note 138, at 67.

<sup>141</sup> WEAVER, *supra* note 140, at 237; CRAY *supra* note 138, at 67.



In the political spectrum of the era, Warren was a moderate conservative, not a likely candidate for becoming a progressive judicial reformer and the namesake for the “liberal Warren Court.” During one political fight over California court appointments, a prominent liberal called him “a compound of Ku Klux, anti-semitism, witch hunting, Republican partisanship . . . [and] a thoroughly unreliable and slippery politician.”<sup>142</sup> In fact, Warren ultimately was a partisan Republican. Although he often received support from Democrats as well as Republicans in his election campaigns,<sup>143</sup> he was an early and outspoken critic of the New Deal legislation. For example, he called the controversial National Industrial Recovery Act (NIRA) “the first major effort to change by stealth the greatest free government of all time into a totalitarian state wherein men are but the pawns of a dictator.”<sup>144</sup>

Those familiar with Warren’s central role in the Supreme Court’s civil rights decisions of the 1950s and 1960s, beginning with his irreplaceable contributions to the unanimous opinion in *Brown v. Board of Education*,<sup>145</sup> will be surprised by his central role in the internment of 110,000 Japanese-Americans during World War II. First as California’s Attorney General and then as its Governor, Warren was an early supporter of the plan to imprison Japanese Americans. He argued that they supported Japan in the war, and would act as spies and saboteurs. He asked, for example, “who, I ask you, could tell the difference between a loyal Japanese on our coast line and a saboteur?”<sup>146</sup>

Perhaps most surprising is that little more than a decade before he wrote the opinion in *Brown*, Warren made statements expressing what can only be seen as anti-Japanese racial animus. He admonished critics of the internment policy that the military has the authority in time of war “to tell me to get back 200 miles if it wants to do it, and as a good American citizen I

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<sup>142</sup> EDWARD G. WHITE, *EARL WARREN: A PUBLIC LIFE* 65 (1987).

<sup>143</sup> JACK HARRISON POLLUCK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 65 (1979).

<sup>144</sup> CRAY, *supra* note 138, at 70.

<sup>145</sup> 347 U.S. 483 (1954).

<sup>146</sup> CRAY, *supra* note 138, at 158.

have no right to complain. Now, if a good American citizen cannot complain, I don't see why the Japanese should complain."<sup>147</sup>

In 1946, Warren won re-election as Governor. Two years later, he was his party's vice-presidential nominee.<sup>148</sup> At the beginning of the campaign, it was conventional wisdom that "only a miracle or a series of political blunders . . . can save Truman . . . from overwhelming defeat" by the Dewey-Warren Republican ticket.<sup>149</sup> Of course, the Republican Tom Dewey ran a hapless presidential campaign, and Truman won an improbable victory. The vote totals were so close that a change of only 29,292 votes in three states (Ohio, Illinois, and California) would have meant a Republican victory.<sup>150</sup> Warren would have been Vice President—and the front runner for the party's nomination for President at the end of the Dewey term(s). Had Dewey and his campaign manager, Herbert Brownell, been more effective, Earl Warren might have been President instead of being appointed Chief Justice by Dwight Eisenhower, his Republican rival for the party's nomination in 1952.

Although biographers have offered different versions of the events, it is undisputed that at some point during the election year of 1952 Eisenhower promised Warren the next seat on the Supreme Court. To the surprise of the principals, that vacancy was created when Chief Justice Fred Vinson died on September 8, 1953, only a month before the Court's new term would begin.<sup>151</sup> Eisenhower honored his commitment, although not without some conflict over whether Warren should be appointed chief, or should wait for the next opening for an associate justice.<sup>152</sup> Politically motivated delays in the confirmation process forced a recess appointment so that Warren could join the Court for the start of the term in October 1953.<sup>153</sup>

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<sup>147</sup> CRAY, *supra* note 138, at 119.

<sup>148</sup> CRAY, *supra* note 138, at 189.

<sup>149</sup> CRAY, *supra* note 138, at 189.

<sup>150</sup> CRAY, *supra* note 138, at 193.

<sup>151</sup> HERBERT BROWNELL & JOHN P. BURKE, *ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL* (1993).

<sup>152</sup> *See, e.g.*, CRAY, *supra* note 138, at 246-53.

<sup>153</sup> *See, e.g.*, SCHWARTZ, *supra* note 135, at 22-24.

*C. Irvine's Impact on Warren*

Only weeks later, the Court heard oral arguments in *Irvine*, the first search and seizure case decided by the Warren Court.<sup>154</sup> As one might expect, Warren approached the case both with the hesitancy of a new Justice and with the attitudes of a career prosecutor who had spent much of his adult life on the side of California law enforcers. Warren himself explained that although the police conduct had “shocked” him, he “went along” with reaffirmation of *Wolf* because as a “new Justice of the Court [he was] still groping around in the field of due process.”<sup>155</sup> Others have concluded that during his first term his votes in criminal justice cases reflected personal views developed during almost two decades in law enforcement.<sup>156</sup>

A prominent constitutional law scholar who served as a Warren law clerk during his early years on the Court recounted how Warren changed his support for one defendant's certiorari petition after learning that the petitioner was a Chicago mobster. “No bad guy was going to get help from Earl Warren,” the former clerk concluded.<sup>157</sup> Warren's own comments confirmed his anathema for criminals. Referring to cases involving obscenity and white slavery, Warren has been quoted as saying: “I've got three daughters, and [one] is still at home. As long as I sit, I'm never going to vote for any of those pimps.”<sup>158</sup>

Two aspects of Warren's law enforcement experience help explain his arguably inconsistent responses to the *Irvine* case. Eighteen years as a local prosecutor left him instinctively in favor of police and prosecutors—especially if they were from California. Yet he had been a prosecutor who “demanded his men follow the law rather than cut corners to secure convic-

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<sup>154</sup> The arguments in *Irvine* were held on November 30, 1953, only seven weeks after Warren's first term on the Court began. See, e.g., SCHWARTZ, *supra* note 135, at 22-23 (noting that the Supreme Court term began on October 5, 1953).

<sup>155</sup> Anthony Lewis, *A Talk with Warren on Crime, the Court, The Country*, N.Y. TIMES MAGAZINE, Oct. 19, 1969, at 128. See also, SCHWARTZ, *supra* note 135, at 24.

<sup>156</sup> See, e.g., SCHWARTZ *supra* note 135, at 135; CRAY, *supra* note 138, at 302-03; WHITE, *supra* note 142, at 266.

<sup>157</sup> CRAY, *supra* note 138, at 302-03 (quoting Professor Gerald Gunther, who was a Warren clerk during the October 1954 term).

<sup>158</sup> CRAY, *supra* note 138, at 303.

tions.”<sup>159</sup> In 1954, fresh from more than two decades as a California law enforcement officer, he rejected the idea that the exclusionary rule was necessary to protect individual liberties. He expected that other executive branch actors, including the Attorney General, also would enforce the law against police officers who had broken the law.

Thus Warren voted to affirm *Wolf*, leaving California free to reject the exclusionary rule because he believed—based on his own practices as a public prosecutor—that other remedies were in fact adequate to protect constitutional rights. Given his vote’s consistency with his performance as a prosecutor, it is noteworthy that “Warren himself once told Edward Bennett Williams that if there was any vote he had cast as Chief Justice that he could change [*Irvine*] would be it.”<sup>160</sup>

Warren’s tenure as Chief Justice spanned fifteen years in which the Court addressed some of the most controversial issues of a tumultuous era. During those years, the Warren Court often decided twice as many cases as have the Rehnquist and Roberts Courts in recent years. Yet *Irvine* was the case that stood out among hundreds as the vote he would change. One must ask what made this case so memorable to Warren? The answer is that it changed his long-held views about the need for constitutional judicial review over police searches and seizures, and therefore the need for the exclusionary rule.

In later years, Warren told his law clerks about the aftermath of the case. The impact of the Justice Department’s inaction even after the Court had forwarded the record and opinion to Attorney General Brownell taught him a fundamental lesson:

Warren repeatedly told the story of the *Irvine* case later in his career: Among the conclusions he drew was that the Court could not rely on other branches of government to remedy abuses that came to the Court’s attention. After *Irvine*, Warren rarely sustained a conviction that he thought had been unfairly obtained and never relied on law enforcement bodies to

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<sup>159</sup> CRAY, *supra* note 138, at 328 (quoting Warren as saying that all he asked of the “police forces” was that they not be too lazy to do their jobs correctly)

<sup>160</sup> SCHWARTZ, *supra* note 135, at 134 (quoting Edward Bennett Williams, *Address*, 64 CAL. L. REV. 5, 8 (1976)).

discipline themselves. Seven years after *Irvine* he voted to overrule *Wolf v. Colorado*.<sup>161</sup>

Warren reiterated this point in an interview given soon after he retired from the Court. He had concluded after *Irvine* that if the courts failed to enforce individual constitutional rights in criminal cases, "we let them go and sweep them under the rug, only to leave them for future generations."<sup>162</sup>

The lesson Warren apparently took from *Irvine* was that the judges must be vigilant to identify cases brought before their courts in which the political branches had failed to vindicate constitutional rights or to remedy constitutional abuses. Judicial restraint in such cases relegated these constitutional provisions to nothing more than a "form of words," as Justice Murphy and others had worried in earlier cases. The exclusionary rule was an essential of Fourth Amendment doctrine because it was the one remedy judges could apply regardless of the action, or inaction, of the other branches.

This does not mean, however, that the exclusionary rule is an optimally efficient device for shaping police behavior.<sup>163</sup> Of course it is not. Remedies aimed directly at officers who break the law seem, at least in theory, more suited to the task of deterring police misconduct. Justices Jackson and Warren were sensible in proposing that the officers in *Irvine* be subjected to criminal prosecution if the facts confirmed gross violations of Irvine's rights. Criminal prosecution of officers who break the law, civil suits for damages brought by the victims of illegal police conduct, and the other "alternative" remedies proposed in

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<sup>161</sup> WHITE, *supra* note 142, at 266 (citation omitted). See also SCHWARTZ, *supra* note 135, at 136-38.

<sup>162</sup> SCHWARTZ, *supra* note 135, at 138 (quoting TIME, July 4, 1969, at 62-63).

<sup>163</sup> I have argued elsewhere that:

It is axiomatic that the judicial function is to resolve disputes properly raised in litigation. Sometimes these disputes involve claims that an individual's constitutional rights were violated, and then the courts must deal with those individual claims. But those claims properly arise within the context of litigated cases. The judicial task is to resolve the claims of the parties to the litigation, not to manage how executive branch departments train their employees.

Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835, 850 (1999).

*Wolf* and *Hudson* alike are rational methods for deterring police misconduct. I personally believe that if enforced rigorously, they would be more likely than the exclusion of evidence to get the attention of individual officers.

The problem is, as Justices Murphy and Breyer argued in their respective dissents in *Wolf* and *Hudson*, that one must doubt that those remedies will be rigorously enforced in any but the most egregious cases. This is true, in part, because enforcing those remedies is a task for other government actors, including police departments and prosecutors. It is not a task for judges, and it is not the reason Supreme Court Justices adopted the exclusionary rule in its seminal decisions in *Boyd*, *Weeks*, and *Mapp*.

Deterring police misconduct was not the fundamental justification for excluding evidence offered by the majorities in any of these cases. Undoubtedly, the Justices in those majorities recognized that suppression of illegally seized evidence might have the desirable side effect of educating police officers about the nature of constitutional rights and encouraging them to respect those rights. But education and deterrence were only peripheral concerns for those Justices voting to impose the exclusionary rule upon federal and state law enforcers. The fundamental purpose of exclusion was, instead, to protect individual constitutional rights by effecting judicial review within the contours of criminal litigation brought by the government against individual citizens—in courts where judges had the power to enforce these rights in disputes litigated before them.

The Court's decisions adopting the exclusionary rule in *Boyd* and *Weeks* did not claim that judges should undertake the task of deterring police misconduct. These opinions left this task where it belonged, within the elected branches of government and the administrative hierarchies of law enforcement agencies. Instead, both opinions defined the nature of rights protected by the Constitution and determined that in cases where government actors violated those rights, the exclusionary rule provided a remedy appropriate to the parties and issues involved in the litigation.

*Irvine* and its aftermath led Earl Warren to similar conclusions about the importance of constitutional judicial review of

police searches and seizures, as well as the need for *the* judicially enforceable remedy—exclusion of evidence. It may be that he was wrong; perhaps we can rely on the executive branch to act vigorously, conscientiously, and consistently to enforce our rights to privacy and liberty. Unfortunately, executive branch behavior in recent years, particularly since September 11, hardly supports that premise. Like Patrick Irvine more than fifty years ago, twenty-first century Americans have found that an independent judiciary remains as the irreplaceable guardian of individual rights.

