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CRIMINAL LAW

THE EXCLUSIONARY RULE: A REQUIREMENT OF CONSTITUTIONAL PRINCIPLE

LANE V. SUNDERLAND*

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.¹

Mr. Justice Brandeis

The public has accepted—largely on faith in the judiciary—the distasteful results of the Suppression Doctrine; but the wrath of public opinion may descend alike on police and judges if we persist in the view that suppression is a solution. At best it is a necessary evil and hardly more than a manifestation of sterile judicial indignation even in the view of well motivated and well informed laymen. We can well ponder whether any community is entitled to call itself an “organized society” if it can find no way to solve this problem except by suppression of truth in the search for truth.²

Mr. Chief Justice Burger

The juxtaposition of these two statements leads us to the heart of the controversy between those who support and those who oppose the exclusionary rule. While some argue that exclusion of unconstitutionally seized evidence from judicial proceedings is desirable as a deterrent to unconstitu-

tional police behavior³ or necessary to maintain judicial integrity, others maintain that the political order cannot tolerate the freeing of individuals whose guilt would be clearly established by the introduction at trial of evidence seized unconstitutionally.⁴ Do the principles of the Constitution require the exclusionary rule, or has that rule become elevated to the status of constitutional law by virtue of being an often repeated, judicially created rule of deterrence? If the forms of the Constitution do require exclusion, must the rule be applied to all police violations, no matter how minor or non-wilful the violations may be? In addressing these questions, this inquiry first examines the Supreme Court's explication of the underlying rationale of the exclusionary rule. It next presents a theory supporting the exclusionary rule as a requirement of constitutional principle, and finally attempts to determine whether or not the theory requires exclusion in all instances of police violations, or only substantial violations of rights related to search and seizure.

I. SELECTED JUDICIAL OPINIONS

The American origins of the exclusionary rule may be traced to 1886 when *Boyd v. United States* held unconstitutional the compulsory production of business papers under the provisions of an Act of 1874.⁵ The Act authorized a court of the United States to require the defendant or claimant in

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¹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

² Burger, *Who Will Watch the Watchman*, 14 AM. U.L. REV. 1, 23 (1964).

³ *Mapp v. Ohio*, 367 U.S. 643, 651-59 (1961); for a summary of the most important literature advancing this argument, see generally Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & C. 373 (1974).

⁴ For a listing of periodical literature supporting this position, see *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388, 426-27 (1971) (Burger, C.J., appendix to dissenting opinion). Burger maintained this critical stance toward exclusion in the context of right to counsel in *Brewer v. Williams*, 430 U.S. 387, 415-29 (1977) (Burger, C.J., dissenting).

⁵ 116 U.S. 616 (1886).

revenue cases to produce in court his private books, invoices and papers, or else the allegations against the individual would be taken as confessed. Since the fifth amendment self-incrimination issue was intertwined with fourth amendment search and seizure considerations, the dispositive arguments in the case are difficult to establish. The Court simply ruled the applicable parts of the statute repugnant to the fourth and fifth amendments without giving a more specific explanation of its holding:

[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment.⁶

The peculiarly narrow issue resolved in *Boyd* might be interpreted in this way: does the assumption of guilt which follows from the failure to produce the private papers involved in the case amount to a compulsion to testify against oneself? Viewed from another perspective, this more inclusive issue emerges from *Boyd*: must the compelled evidence, the business papers, be excluded because the defendant had been compelled to incriminate himself by producing this evidence? It is significant that the issue of business papers may raise considerations different from evidence such as a murder weapon. Much of the Court's argument in *Boyd* would seem to apply with greater force to the former than to the latter type of evidence.

Although the Court in *Boyd* refused to compel production of the papers, the particular nature of the case rendered unnecessary a justification of the exclusionary rule or an explanation of its underlying rationale as it relates to fourth amendment issues. It should be emphasized that this was not a simple search and seizure question. Rather, the fact that the self-incrimination issue was so prevalent in the Court's reasoning, coupled with the actual wording of the fifth amendment privilege—"nor shall [any person] be compelled in any criminal case to be a witness against himself"—made it unnecessary for the Court to articulate the rationale underlying exclusion. That is, the wording of the fifth amendment privilege relates directly and explicitly to the compulsion of testimony. In *Boyd*, the Court saw the forced production of the papers as constituting compulsion

to be a witness against oneself, a compulsion which was complete in nature because of the involvement of an order by the district judge which constituted a positive act by the judicial branch of government. The judicial order and the assumption of guilt following the failure to produce the papers are elements which are responsible for the characteristic fifth amendment cast of the opinion.⁷ Consequently, the actual exclusion of evidence or testimony within the factual context of *Boyd* seems more deeply and apparently rooted in the fifth amendment's ban on an individual's being compelled to testify against himself than in the fourth amendment's requirements relating to searches and seizures.⁸ While fourth amendment searches of a dwelling may involve an element of compulsion even when conducted under the guidelines of the Constitution, the individual is not compelled in the same sense as was true in *Boyd*.

The absence of an explicit rationale in *Boyd* was largely a result of the peculiar facts in that case.⁹ Nonetheless, this lack of reasoned support for the exclusionary rule in *Boyd* offered little basis for the development of a coherent and deep-rooted explanation of the doctrine in constitutional law.

Several years after *Boyd*, exclusion based on fourth amendment violations was rejected.¹⁰ But in 1914, in the case of *Weeks v. United States*, a unanimous Court articulated an exclusionary rule based on fourth amendment considerations and rejected the common law view that evidence was admissible however that evidence was acquired.¹¹ The evidence on the basis of which *Weeks* was convicted was seized from his home in two warrantless searches. This evidence included private papers like those involved in *Boyd*.

Weeks presents a more nearly persuasive rationale for the exclusionary rule than that presented in *Boyd*:

[T]he duty of giving to it [the fourth amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused

⁷ Allen further develops the relationship between the fourth and fifth amendments. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 29-32.

⁸ 116 U.S. at 633-35.

⁹ *Id.* at 621-38.

¹⁰ *Adams v. New York*, 192 U.S. 585 (1904).

¹¹ 232 U.S. 383 (1914).

⁶ *Id.* at 634-35.

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.¹²

The essence of this argument is that all bodies entrusted with enforcement of the law, including the judiciary, must enforce that law as written. In the case of searches and seizures, this enforcement must be according to the commands of the fourth amendment. The second thread of the argument in *Weeks* is that the courts should not sanction any departures from the Constitution since the courts are responsible for supporting the Constitution and for maintaining fundamental constitutional rights. This argument is very similar to, although more explicit than, that made in the later cases which justify the exclusionary rule on the basis of its being necessary to maintain "judicial integrity."¹³

The emphasis on supporting particular constitutional provisions through judicial insistence on observing constitutional forms is illustrated in *Weeks*, where the Court noted:

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 Fourth 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 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.¹⁴

Both in this section of the Court's opinion and in the section quoted earlier, the reason for the exclusion is not that of deterrence. In the second excerpt, however, the rationale for exclusion shifts subtly from that of "judicial integrity" to that of preserving the great principles of the "law of the land." If the government seizes, and admits into court, evidence obtained in violation of constitutional commands, it is as if the constitutional commands or "fundamental law of the land" did not exist. While this argument may include objections

to judicial involvement in violations of the "fundamental law of the land," the Court's reference to sacrificing "great principles" also indicates its concern that if the judiciary does not follow the commands of the Constitution, these principles may become mere parchment declarations, meaningless to the fostering of a regime based on republican liberty. The second section of this article addresses the significance of *Weeks*' utilization of the concept "fundamental law of the land." At this point in the analysis, it is sufficient to recognize that the genesis of the exclusionary rule was not explicitly based on the rationale of deterrence as that term is understood in contemporary usage.

The course of later decisions, however, departed from the constitutional basis of the exclusionary rule. *Wolf v. Colorado*, while a fourteenth amendment decision, raised a question directly relevant to this departure:

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* . . . ?¹⁵

Frankfurter's majority opinion discussed the issue of applying the exclusionary rule to the states through the fourteenth amendment in terms of enforcing the right to privacy which is at the core of the fourth amendment. He asserted without persuasive argument that the *Weeks* exclusionary rule was "not derived from the explicit requirements of the Fourth Amendment. . . . The decision was a matter of judicial implication."¹⁶ He spoke of various means of enforcing the fourth amendment, only one of which is the exclusionary rule. Frankfurter later in the opinion stated that "though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine."¹⁷ Frankfurter's majority opinion does not say explicitly, as does Black's concurring opinion, that the federal exclusionary rule is simply a judicially created rule of evidence.¹⁸ Frankfurter did not see the *Weeks*

¹² *Id.* at 392.

¹³ *Elkins v. United States*, 364 U.S. 206, 222-23 (1960), cited in *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

¹⁴ 232 U.S. at 393.

¹⁵ 338 U.S. 25, 25-26 (1949).

¹⁶ *Id.* at 28.

¹⁷ *Id.* at 28-33.

¹⁸ *Id.* at 39-40 (Black, J., concurring).

opinion or the fourth amendment as clearly requiring the exclusionary rule as a matter of constitutional principle. Unfortunately, no convincing argument was offered in support of his view.

The case of *Mapp v. Ohio*¹⁹ provides the most extended treatment of the exclusionary rule's foundations of any of the cases thus far examined. The essence of *Mapp* is that the exclusionary rule is an essential part of the fourth amendment, and the right that amendment embodies applies to the states through the due process clause of the fourteenth amendment. Or, as Francis Allen succinctly stated the case's holding: "the exclusionary rule is part of the Fourth Amendment; the Fourth Amendment is part of the Fourteenth; therefore, the exclusionary rule is part of the Fourteenth."²⁰ The rationale for the exclusionary rule presented in *Mapp* may roughly be divided into two different categories.²¹ The Court cited several earlier cases, including *Weeks v. United States*, in what appears to be an argument supporting the exclusionary rule as a constitutional requirement, independent of its efficacy as a deterrent. In the context of this discussion, however, the Court spoke of the exclusionary rule as a "deterrent safeguard." It thereby prepared the way for a discussion of the "factual grounds" of deterrence on which *Wolf* was based, even though these grounds "are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the fourth amendment as the right it embodies is vouchsafed against the States by the Due Process Clause."²² Thus, although the Court devoted a significant portion of its opinion to a discussion of factual considerations relating to the deterrent effect of the exclusionary rule, the statements quoted seem to indicate that these considerations are not the sole or perhaps even the primary basis of its judgment in *Mapp*.

At another point in the opinion, the Court embarked on a principled defense of the exclusionary rule on grounds of constitutional principle—grounds separable from considerations of deterrence.²³ This defense is disappointingly ambiguous and insubstantial, however, and concludes, by citing *Elkins v. United States*, that the purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effec-

tively available way—by removing the incentive to disregard it."²⁴ Thus, the foundation of this argument rests on considerations of deterrence. Only when the Court turns to considerations of "judicial integrity" does the defense of the exclusionary rule in terms of constitutional principle become substantial. The Court speaks of the potential for a government's being destroyed by its disregard of the charter of its own existence and of government as a teacher which, if it breaks the law, may breed contempt for that law. This principled rationale is of consequence in *Mapp*, but it is still not entirely clear what the Court intends as its primary rationale for the exclusionary rule.²⁵

Dallin Oaks succinctly summarized a part of the difficulty with the *Mapp* opinion in stating: "The discursive prevailing opinion in *Mapp v. Ohio* quoted the *Elkins* statement and otherwise characterized the exclusionary rule as a 'deterrent safeguard,' but the decision does not clearly identify the primary basis for the rule because Justice Black's reliance on a self-incrimination theory split the majority on this question."²⁶ That is, Black adopted a view that evidence seized in violation of the fourth amendment must be excluded from the judicial proceeding because that evidence constitutes a compelled self-incrimination in violation of the fifth amendment. This doctrine appeared most vividly in a passage of *Boyd v. United States* quoted by Black: "[The Court declared itself] unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."²⁷ Because of Black's reliance on this doctrine, identification of the primary basis for the exclusionary rule in *Mapp* becomes extremely difficult.

Absent a clear, persuasive, principled rationale in *Mapp*, it is little wonder that the rule should come under attack from those who object to the rule's practical consequences. This deficiency in *Mapp* also laid the groundwork for the later case of *Linkletter v. Walker*,²⁸ in which the Court held that the *Mapp* rule did not apply to state court convic-

¹⁹ 367 U.S. 643 (1961).
²⁰ Allen, *supra* note 7, at 26.
²¹ Finzen, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 KAN. L. REV. 768, 770-71 (1972).

²² 367 U.S. at 648, 651.
²³ *Id.* at 649-56.

²⁴ 364 U.S. 206, 217, cited in 367 U.S. at 656. Oaks makes a thoughtful argument that the "imperative of judicial integrity" is a consideration secondary to deterrence. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 669-70 (1970).
²⁵ 367 U.S. at 659-60.
²⁶ Oaks, *supra* note 24, at 670.
²⁷ 116 U.S. at 616, 633, quoted in 367 U.S. at 662 (Black, J., concurring).
²⁸ 381 U.S. 618 (1965).

tions which had become final before the Court decided *Mapp*. Linkletter's seven-Justice majority rested its opinion on the deterrence rationale: "In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims."²⁹ Further, the Court noted:

Mapp had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action.³⁰

With this seven-Justice majority's resting of its opinion on the policy consideration of deterrence, the way was cleared for treating the whole matter of the exclusionary rule not in terms of commands of consistent and reasoned constitutional principle, but rather in terms of the practical consideration of the efficacy of the exclusionary rule as a deterrent.³¹ Other decisions dealt with retroactivity in a way similar to that of *Linkletter v. Walker*. Oaks

²⁹ *Id.* at 637.

³⁰ *Id.* at 636-37. Mr. Justice Black, in dissent, joined by Mr. Justice Douglas, explicitly dissociated himself from reliance on deterrence as the sole rationale for the exclusionary rule. Their explicit break from the majority on this point seems to underscore the majority's reliance on deterrence as the determinative basis for the decision. *Id.* at 648-50 (Black, Douglas, JJ., dissenting).

³¹ An early empirical study of deterrence cast grave doubts on the deterrent effect of the rule. Note, 47 NW. U.L. REV. 493, (1952-53). A study supporting the merits of the exclusionary rule's effectiveness, and based on data of substance, was published shortly after the decision in *Mapp*. Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171 (1962). One widely cited and thorough study is that by Oaks which concluded, although the data neither supported nor refuted the deterrent effect of the exclusionary rule, that the rule was a failure as a deterrent. Oaks, *supra* note 24. A later empirical study concluded that the exclusionary rule did not deter police misbehavior. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973). A study by the Americans for Effective Law Enforcement during a 27 month period from 1970-72 indicated that appellate courts nationwide found police conduct in cases of warrantless search and seizure to be proper in six of every seven cases. Brief of Americans for Effective Law Enforcement, and the International Association of Chiefs of Police, as *amici curiae* in support of the Petitioners at 4, *California v. Krivda*, 409 U.S. 33 (1972) [hereinafter cited as A.E.L.E. Brief].

summarized the implications of these decisions as they relate to the rationale of the exclusionary rule:

By fixing the effective date in terms of the police conduct rather than in terms of the time at which the trial court took its action in the matter, the Court has impliedly rejected the theory of "judicial integrity" and identified the exclusionary rule's primary purpose as that of controlling police behavior. Finally, in an opinion concerning the retroactivity of its decision applying the self-incrimination privilege to the states, the Supreme Court stated that deterrence was the "single and distinct" purpose of the exclusionary rule.³²

Given this clear emphasis on deterrence in the retroactivity cases and the uncertainty surrounding the basis of the rule in *Mapp*, it is not surprising that the rule has been criticized by members of the Court. Both *Coolidge v. New Hampshire*³³ and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*³⁴ presented members of the Court with an opportunity to critique the rule.

It is not necessary to discuss the somewhat complex factual issues surrounding *Coolidge* or to examine the protracted opinions in the case. For our purposes, it is appropriate merely to note that four Justices expressed reservations of one type or another regarding the fourth amendment exclusionary rule as applied in the case through the fourteenth amendment. Harlan would have perpetuated the rule in federal court but would have overruled *Mapp*.³⁵ Justice Blackmun apparently agreed with Justice Black in the latter's rejection of the rule based on fourth amendment considerations,³⁶ and Chief Justice Burger wished the rule to be revised legislatively.³⁷

The Chief Justice's most comprehensive and critical analysis of the exclusionary rule and his proposed alternative were explicated in *Bivens*. Decided the same day as *Coolidge*, *Bivens* allowed a cause of action under the fourth amendment for damages resulting from a Federal Bureau of Narcotics entry and search of petitioner's apartment and his arrest, all without a warrant.³⁸

Burger began his dissent with a critique of the judicially created damage remedy, viewing it as an invasion of the legislative power. He very quickly

³² Oaks, *supra* note 24, at 670-71.

³³ 403 U.S. 443 (1971).

³⁴ 403 U.S. 388 (1971).

³⁵ 403 U.S. at 490 (Harlan, J., concurring).

³⁶ *Id.* at 510 (Blackmun, J., dissenting); *id.* at 496 (Black, J., concurring and dissenting).

³⁷ *Id.* at 492-93 (Burger, C.J., dissenting).

³⁸ 403 U.S. at 388.

turned to a critique of the exclusionary rule, describing the rule as having been based on a theory of deterrence.³⁹ His criticisms of the exclusionary rule emphasized the high price society pays for the remedy in that the criminal goes free "because the constable has blundered."⁴⁰ Burger also addressed and dismissed the argument advanced by some who justify the rule on the grounds that government must "play the game" by the rules and "cannot be allowed to profit from its own illegal acts. . . . If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule."⁴¹

Burger's argument is open to criticism, the most systematic of which will be presented in Section II. But it is necessary to recognize here that even granting the existence of alternative remedies, any individual convicted in a judicial proceeding in which the commands of the fourth amendment have not been followed is convicted outside the forms of the Constitution. Burger's argument does not adequately dispose of this objection, nor does his argument dispose of the objections raised by the case of *Weeks* to using unconstitutionally seized evidence.⁴²

Burger next turned to the argument that "the relationship between the self-incrimination clause of the fifth amendment and the fourth amendment requires the suppression of evidence seized in violation of the latter."⁴³ Referring to the decisions of the Court holding that the fifth amendment applies only to "testimonial disclosures,"⁴⁴ Burger stated:

[I]t seems clear that the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence. Mr. Justice Holmes put it succinctly, "A party is privileged from producing the evidence, but not from its production."⁴⁵

After treating these two theoretical justifications for the exclusionary rule, Burger rejected them as

the relevant considerations:

It is clear, however, that neither of these theories undergirds the decided cases in this Court. Rather the exclusionary rule has rested on the deterrent rationale—the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any benefits they might have gained from their illegal conduct.⁴⁶

After asserting that the rule rests on the rationale of deterrence, Burger turned to his critique of the exclusionary rule—a rule he regards as both "conceptually sterile" and "practically ineffective." Generally, his criticisms may be grouped into four areas. (1) "The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion in a criminal trial." The immediate sanction of the rule affects the prosecutor. (2) Whatever educational effect the rule might have in theory is diminished both by the fact that policemen are not likely to grasp the technicalities of appellate court opinions and by the time lag between police action and final judicial disposition. (3) The exclusionary rule has virtually no applicability and no effect in the large areas of police activity that do not result in criminal prosecutions. (4) The exclusionary rule is applied in like manner to both inadvertent errors of judgment and to deliberate and flagrant violations.⁴⁷

In sum, Burger described the exclusionary rule as an experimental step in the tradition of the common law—a step which has turned out to be unworkable and irrational. As an alternative to the exclusionary rule, Burger set forth the outlines of a statute he recommended to Congress, the thrust of which is the abolition of the exclusionary rule and the creation of a tribunal to adjudicate claims and award damages for violations arising under the fourth amendment or relevant statutes.⁴⁸

Prior to possible adoption of the alternative set forth above, Burger supported the narrowing of the exclusionary rule. Although he did not explicitly adopt these standards, he cited in an appendix to his opinion the tentative draft of the American Law Institute's Model Pre-Arrest Code. The thrust of this code is the narrowing of the exclusionary rule so it applies only to substantial violations, based on considerations such as the impor-

³⁹ *Id.* at 411-15.

⁴⁰ *People v. DeFore*, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587, 588 (1926), cited in *Bivens*, 403 U.S. at 413.

⁴¹ *Bivens*, 403 U.S. at 414 (Burger, C.J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 469, 471 (1928) and *Terry v. Ohio*, 392 U.S. 1, 13 (1968)).

⁴² See notes 6-15 *supra* and accompanying text.

⁴³ 403 U.S. at 414.

⁴⁴ *Id.*

⁴⁵ *Id.* at 414-15 (citing *Johnson v. United States*, 228 U.S. 457, 458 (1913)).

⁴⁶ *Id.* at 415.

⁴⁷ *Id.* at 416-18.

⁴⁸ *Id.* at 422-23.

tance of the interest involved, the magnitude and wilfulness of the violation, the extent of the invasion of privacy, and the potential in the exclusion for prevention of other violations.⁴⁹ Burger did not give a clear theoretical justification in his opinion as to why the principles of the Constitution allow or require the narrowing of the exclusionary rule, but relied on considerations of deterrence and practical matters of public policy instead.⁵⁰

Another example of the Court's reliance on the rationale of deterrence is *United States v. Calandra*,⁵¹ which held that a witness testifying before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. In emphasizing the deterrence rationale, the Court denied that exclusion of the evidence in the context of this case would have any substantial deterrent effect and argued that since the witness's privacy had already been invaded, it would not be further damaged by the grand jury inquiry. As the Court noted, "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."⁵²

More recent examples of the Court's movement toward deterrence as the sole rationale for exclusion are five search and seizure decisions handed down by the Court on July 6, 1976. Although the sub-

stantive issue of fourth amendment rights involved in these cases is intrinsically interesting, the comments which follow are limited to the cases' treatment of the exclusionary rule.

*Stone v. Powell*⁵³ is the leading case. *Stone* and a companion case⁵⁴ held that a state prisoner who has had an opportunity in state court for full and fair litigation of fourth amendment claims is not entitled to federal habeas corpus consideration of his claim that evidence obtained in an unconstitutional search or seizure was introduced at his trial.⁵⁵ Additionally, in *United States v. Janis*,⁵⁶ the Court held that the fourth amendment exclusionary rule does not forbid the use in a federal civil proceeding of evidence seized unconstitutionally but in good faith by a state officer.

These cases reiterate the increased concentration of the Court on deterrence. In *Stone*, the Court stated:

Although our decisions often have alluded to the "imperative of judicial integrity," . . . they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context. . . . While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.

. . . Post-*Mapp* decisions have established that the rule is not a personal constitutional right.⁵⁷

The Court's view of deterrence as the dispositive issue was made explicit later in the opinion when it was noted, "There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions."⁵⁸

The Court's view of deterrence as the primary criterion justifying exclusion is stressed in *Janis* as well. The Court stated, "If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then clearly, its use in the instant situation is unwarranted."⁵⁹ Moreover, the Court suggested that the concept of judicial integrity goes no

⁴⁹ ALI MODEL CODE OF PRE-ARRESTMENT PROCEDURE 8.02(2), (3) (Tentative Draft No. 4, 1971), cited in 403 U.S. at 424-25. Other criteria the draft included are "whether, but for the violation, the things seized would have been discovered; and . . . the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him."

⁵⁰ Burger cites a number of studies dealing with the concept of deterrence in an appendix to his dissenting opinion. 403 U.S. at 426-27. The Chief Justice has more recently criticized the application of the exclusionary rule outside the context of the fourth amendment. In *Brewer v. Williams*, Burger repeated his assertion that exclusion is a judicially conceived remedial device and not a personal constitutional right. In the course of arguing that the exclusionary rule is not required in all circumstances, he stated that an important factor in determining whether to require exclusion is whether the violation involved is egregious. 430 U.S. 387, 415-17 (1977) (Burger, C.J., dissenting).

⁵¹ 414 U.S. 338 (1974).

⁵² *Id.* at 348. For a useful discussion of the significance of *Calandra* for future decisions, see generally Barone, *Calandra—the Present Status of the Exclusionary Rule*, 4 CAP. U.L. REV. 95 (1974).

⁵³ 428 U.S. 465 (1976).

⁵⁴ *Wolff v. Rice*, 428 U.S. 465 (1976).

⁵⁵ *Id.* at 481-82.

⁵⁶ 428 U.S. 433, 459-60 (1976).

⁵⁷ 428 U.S. 465, 485-86.

⁵⁸ *Id.* at 493.

⁵⁹ 428 U.S. 433, 454.

further than determining the efficacy of exclusion as a deterrent in the case being adjudicated.⁶⁰

The Court's statement in *Janis* indicates that the "judicial integrity" consideration has been collapsed into the consideration of "deterrence." This interpretation completes the transformation of the exclusionary rule from a doctrine derived, albeit inadequately, from constitutional principle, to a rule based on the judges' assessment of the rule as a deterrent.

This analysis exhibits the shift from the origins of the exclusionary rule in *Boyd*⁶¹ and *Weeks*,⁶² which stress intrinsic constitutional principles, to the retroactivity cases, *Calandra*⁶³ and the 1976 cases, in which public policy considerations relating to deterrence appear as the primary, if not the sole considerations.

It is this writer's opinion that the failure of the earlier cases to clearly articulate a constitutional basis for those decisions has led to this drift. In section II, I will attempt to find such a basis.

II. A THEORY OF THE EXCLUSIONARY RULE BASED ON "DUE PROCESS OF LAW"

In the treatment of *Boyd*, we saw no clear articulation of the rationale underlying the exclusionary rule, primarily because of the importance the Court accorded fifth amendment considerations in that case.⁶⁴ *Weeks* is more helpful in constructing a reasoned, principled defense of the exclusionary rule.⁶⁵ That case argued that all bodies, including the judiciary, entrusted with enforcement of the laws, must enforce that law as written. In the case of searches and seizures, this enforcement must be according to the commands of the fourth amend-

ment.⁶⁶ This argument takes on added force where the judiciary is concerned, since courts are responsible for supporting the Constitution and for maintaining fundamental constitutional rights.

The part of *Weeks* on which this section of the paper is most firmly based is this:

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*.⁶⁷

In other words, both courts and their officials must preserve the principles embodied in the fundamental law of the land, including the law of the Constitution.

Former Chief Justice Traynor of the California Supreme Court argued in favor of the exclusionary rule in a similar manner, stating, "[The argument against the exclusionary rule] was rejected when those [fourth amendment] provisions were adopted. In such cases had the Constitution been obeyed, the criminal could in no event be convicted."⁶⁸

Like much of the legal argument supporting exclusion, both Traynor's insistence that the Constitution be obeyed and *Weeks*' requirement that courts be bound by the fundamental law of the land have an intuitively satisfying ring. Yet, these opinions do not present a principled and coherent argument justifying the assertion they contain, that the Constitution requires the exclusionary rule.⁶⁹ Why would an alternative remedy which obeyed the commands of the fourth amendment not be equally acceptable?⁷⁰ None of the judicial opinions relating to search and seizure adequately answers this question—a question raised most clearly by Mr. Chief Justice Burger in *Bivens*.

One answer to the question of why an alternative remedy should not simply replace the exclusionary rule is that the due process clause of the fifth amendment arguably requires the exclusionary

⁶⁰ The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court.... The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

⁶¹ 428 U.S. at 458-59 n.35.

⁶² 116 U.S. 616 (1886).

⁶³ 232 U.S. 383 (1914).

⁶⁴ 414 U.S. 338 (1974).

⁶⁵ For two useful discussions of rationales underlying the exclusionary rule see Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319 (1962); Mello, *Exclusionary Rule Under Attack*, 4 BALT. L. REV. 89 (1974).

⁶⁶ 232 U.S. 383 (1914).

⁶⁶ See notes 7-15 *supra* and accompanying text.

⁶⁷ 232 U.S. at 393 (emphasis added).

⁶⁸ *People v. Cahan*, 44 Cal. 2d 434, 449, 282 P.2d 905, 914 (1955).

⁶⁹ This characterization seems appropriate, for much of the reasoning contained in the opinions was shown to be inadequate in terms of supporting the exclusionary rule.

⁷⁰ Mr. Chief Justice Burger argues in *Bivens* that an alternative remedy would fulfill the demands of maintaining judicial integrity. 403 U.S. at 414 (Burger, C.J., dissenting).

rule, at least in certain instances of federal violations of the fourth amendment. Novelty of interpretation is not a cardinal virtue in constitutional law. However, as applied to the argument that follows, that "novelty" is diminished by three factors: (1) This interpretation has roots in the early case of *Weeks v. United States*.⁷¹ (2) The argument supporting the Court's enforcement of the exclusionary rule, as well as much of the scholarly commentary, is based to a large degree on a kind of intuition that the Constitution requires the rule—an intuition which needs supplanting by persuasive argument. (3) Although not directly supportable through explicit historical intention or precedent, the logic of principled construction and certain cases strongly support the interpretation of the exclusionary rule set forth below.

The fourth amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷²

The relevant part of the fifth amendment reads, "nor [shall any person] be deprived of life, liberty or property, without due process of law."⁷³ It seems clear from the very words of the due process clause, that whatever technical, procedural or substantive meaning may be attached to the term, it surely means at least this: the only condition under which one may be deprived of life, liberty or property is if that deprivation be in accordance with due process of law.

Due process of law, of course, is derived from the phrase "law of the land" in section 29 of the Magna Carta: "No free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."⁷⁴ The phrase, "due process of law" first appeared in 1354 in a statutory reconfirmation of this section of the Magna Carta, sometimes called the "Statute of Westminster of the Liberties of London." According to the interpretation of Rod-

ney Mott:

[T]he natural inference that the phrases "law of the land" and "due process of law" were intended to be synonymous is given additional weight by a direct implication in a statute issued by the same King (Henry III) nine years later. With the authority of Sir Edward Coke behind it, this interpretation has been very generally accepted, and is now the law in the United States.⁷⁵

That is, Coke in his *Second Institutes* argued that the term "by law of the land" was equivalent to "due process of law."⁷⁶

The equating of due process of law with law of the land has early, authoritative and continuous support from the Supreme Court of the United States as well.⁷⁷ An authoritative and often cited example of this basis in American law is the case of *Murray's Lessee v. Hoboken Land and Improvement Co.*, where the Court noted, "The words due process of law, were undoubtedly intended to convey the same meaning as the words, by the law of the land."⁷⁸ It is not surprising, given his equation of due process of law with the law of the land, that Justice Curtis identified the Constitution as the first source of the content of due process of law when he stated:

To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.⁷⁹

The argument of Mr. Justice Curtis seems eminently sensible. The Constitution is the authoritative legal declaration of the American law of the land. Thus, when determining what it is that constitutes due process of law or law of the land, one looks first, as Justice Curtis emphasized, to the provisions of the Constitution.

Due process of law is, of course, a complex

⁷¹ 232 U.S. at 393.

⁷² U.S. CONST. amend. IV.

⁷³ U.S. CONST. amend. V.

⁷⁴ CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1138 n.3 (L. Jayson ed. 1973) [hereinafter cited as CONSTITUTION ANNOTATED].

⁷⁵ R. MOTT, DUE PROCESS OF LAW 4-5 (1973).

⁷⁶ CONSTITUTION ANNOTATED 1138, *supra* note 74, (citing II E. COKE INSTITUTES OF THE LAW OF ENGLAND 50-51 (1641)).

⁷⁷ *Twining v. New Jersey*, 211 U.S. 78, 100 (1908); *Davidson v. New Orleans*, 96 U.S. 97 (1877).

⁷⁸ 59 U.S. (18 How.) 272, 276 (1855).

⁷⁹ *Id.* at 276-77.

constitutional concept which is open to a number of interpretations, both substantive and procedural. These interpretations need not be plumbed in order to make the argument that follows. The due process clause of the fifth amendment requires that no person "be deprived of life, liberty, or property, without due process of law."⁸⁰ This requirement might be paraphrased to say that any deprivation of life, liberty or property must be in accordance with the law of the land, or, at the very least, according to the commands of the authoritative legal declaration of the American law of the land, the Constitution. According to this argument, the due process clause of the fifth amendment would allow no deprivation of life, liberty or property except insofar as the commands of the Constitution are followed throughout the proceeding. Therefore, any deprivation of life, liberty or property violating the fourth amendment search and seizure provisions would seem to violate the explicit requirements of the due process clause. That is, as a matter of constitutional principle, in any proceeding which may result in the deprivation of life, liberty or property, evidence or testimony gained through violation of the fourth amendment (or any other constitutional provision) may not be used because the due process clause of the fifth amendment prohibits such use, at least in the federal judiciary.

Contrary to recent trends, the consideration of deterrence does not assume primary importance under this interpretation. Rather, the primary consideration is that of obeying the commands of the Constitution in any proceeding depriving an individual of life, liberty or property—a requirement the due process clause makes explicit and mandatory according to the above argument. Why the exclusionary rule? Simply because the due process clause requires it, independently of the efficacy of the rule as a deterrent, or independently of the comparative efficacy of alternative remedies. Exclusion is a constitutional right emanating from the due process clause.

III. APPLICATION OF THE DUE PROCESS THEORY OF EXCLUSION

Although a number of important difficulties remain to be resolved if this justification of the exclusionary rule as a mandate of the Constitution is accepted, a comprehensive analysis of each of these points is beyond the scope of the present

inquiry. However, certain observations and arguments relating to the application of the theory will follow.

The fact that this theory might be interpreted to require a perfect criminal proceeding, *i.e.*, a process in which at each step every major and minor regulation of criminal procedure is scrupulously adhered to, constitutes the most evident criticism which could be made. This criticism is most appropriate in the case of a minor police violation of the fourth amendment which requires suppression of evidence essential to prove the Government's case in a criminal proceeding. Although the theory of the exclusionary rule presented in this paper differs dramatically from that of Mr. Chief Justice Burger in *Bivens*,⁸¹ it may nonetheless satisfy certain of his legitimate reservations regarding exclusion. One of the Chief Justice's most persuasive reservations is that the exclusionary rule applies in like manner to both inadvertent errors of judgment and to deliberate and flagrant violations. Or, as Burger stated, "honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type violations of the Fourth Amendment."⁸² Burger's concern seems well placed. An important difference exists between the repeated unlawful entry of a domicile so as to conceal electronic devices, as in *Irvine*, and the merely technical, non-flagrant or otherwise insubstantial violations which may be presented by other cases.⁸³

The relevant question for this inquiry is whether or not the principled argument supporting the exclusionary rule presented above allows the admission of evidence obtained under circumstances of minor, technical or non-wilful violations. The answer is arguably yes. One may, in a manner consistent with the above arguments supporting the exclusionary rule, specify certain guidelines limiting application of the rule, guidelines supported by history, reason and case law.

While it is not possible to survey either the history or contemporary adjudication of the inclusive and problematic phrase, due process of law or law of the land, certain observations regarding its origin and a common sense analysis of its application in the theoretical framework explained above are in order. The very origin of law of the land occurred in a context in which King John conceded to the barons the right to trial by their peers

⁸¹ 403 U.S. at 411 (Burger, C.J., dissenting).

⁸² *Irvine v. California*, 347 U.S. 128 (1954), cited in 403 U.S. at 418.

⁸³ 347 U.S. 128 (1953).

⁸⁰ U.S. CONST. amend. V.

according to the laws of the kingdom. According to Rodney Mott, "the desire to prevent forfeitures and exactions except by a recognized legal procedure was one of the elements of Magna Carta chapter thirty-nine as it was sealed at Runnymede."⁸⁴ In another passage, Mott refers to the fact that "[t]he protest was rather against the use of brute force in a flagrant and unusual manner by the king or the violation of the law by his subordinates."⁸⁵

William S. McKechnie described the admonition that "[n]o freeman could be punished except 'in accordance with the law of the land,'" as follows: "Their [freemen's] persons and property were protected from the King's arbitrary will by the rule that execution should be preceded by a judgment—by a judgment of peers—by a judgment according to the appropriate time-honoured 'test,' battle, compurgation, or ordeal."⁸⁶ The instructive aspect of McKechnie's commentary is his emphasis on the substitution of the King's arbitrary will for the forms which were honored by time.

George Burton Adams addressed the purpose of Magna Carta's "law of the land" provision. In his view, the barons' primary concern was John's tyrannical treatment of his vassals without regard for any process of law.⁸⁷ Bruce Lyon also emphasized the prevention of "arbitrary judgment," "tyranny," "brute force" and "royal whim" as lying at the core of this provision of Magna Carta.⁸⁸

Mott has recorded instances in later English development of the phrase "law of the land," in which the questions at issue were those of the King's power to order arbitrary arrest and the power of judges to keep one so arrested in custody without probable cause. In examining the Petition of Right, he emphasized the revival of the idea "that due process of law granted protection from arbitrary, extraordinary, or illegal arrests."⁸⁹ These analysts of English history point to a meaning of due process which requires government to act in accordance with established legal forms and which prohibits tyrannical courses of governmental action violating these forms. It is no novel interpretation that central to the meaning of due process of law is the requirement that government be bound by

established legal proceedings. What stands out in the brief excerpts from these analyses of due process of law is the degree to which terms like "flagrant," "arbitrary," "extraordinary," "royal whim" and "brute force," are associated with what were regarded as violations of law of the land in the early English history of that concept. While I am not arguing that due process of law must be frozen in its early English meaning or that there is no room for expansion of its meaning, reflection on these admittedly fragmentary comments regarding the origins of the concept is useful in making sober judgments regarding contemporary application of the doctrine.

More directly applicable to this inquiry is the meaning of and justification for due process in American constitutional history. Mr. Justice Frankfurter saw due process as embodying "a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."⁹⁰ Another expression of the American equivalent of the law of the land is that of *Snyder v. Massachusetts*,⁹¹ that a practice or rule is invalid if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Twining v. New Jersey*'s⁹² formulation, "a fundamental principle of liberty and justice which inheres in the very idea of free government," *Palko v. Connecticut*'s⁹³ characterization of due process as requiring those protections "implicit in the concept of ordered liberty," and *Duncan v. Louisiana*'s⁹⁴ reiteration of due process as requiring those things "fundamental to the American scheme of justice" have a common basis. Each of these statements emphasizes the profound and non-trivial character of the protections associated with due process of law. Like the great English purposes associated with the origin and development of the law of the land, these American formulations lead us to a clearer understanding of the purposes of this great protection of life, liberty and property and guide us in contemporary application of due process. Such guidance indicates that it is the fundamental character of the right in question which requires it be included under the protection of due process of law.

⁸⁴ R. MOTT, *supra* note 75, at 3.

⁸⁵ *Id.* at 71-73.

⁸⁶ W. MCKECHNIE, *MAGNA CARTA* 379 (1914).

⁸⁷ G. ADAMS, *THE ORIGIN OF THE ENGLISH CONSTITUTION* 272 (1920).

⁸⁸ B. LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 312-21 (1960).

⁸⁹ R. MOTT, *supra* note 75, at 81.

⁹⁰ *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

⁹¹ 291 U.S. 97, 105 (1934).

⁹² 211 U.S. 78, 106 (1908).

⁹³ 302 U.S. 319, 325 (1937).

⁹⁴ 391 U.S. 145, 149 (1968).

There are certain examples of searches and seizures in American constitutional law which also emphasize "brute force," "flagrancy," the "extraordinary character" or the "fundamental" nature of the government official's misconduct. One of these cases which was decided on the basis of the due process clause of the fourteenth amendment is *Rochin v. California*.⁹⁵ This case had elements of both illegal search and seizure and self-incrimination. Mr. Justice Frankfurter, writing for the majority, disposed of the case on due process grounds. He emphasized that the judgment was based on the question of whether "the whole course of the proceedings" offended "those canons of decency and fairness which express the notions of justice of English speaking peoples."⁹⁶ Rochin was convicted after three officers, who had information he was selling drugs, entered his house and forced open his bedroom door. Rochin, who was sitting on the bed partly dressed, and whose common-law wife was in bed beside him, seized two capsules which were on a night stand and put them in his mouth. After an unsuccessful attempt to extricate the capsules, the officers took him to a hospital where a doctor pumped Rochin's stomach and produced the capsules which contained morphine. The capsules were the chief evidence on which Rochin was convicted of illegal possession of narcotics.⁹⁷

The opinion of the Court in *Rochin* is replete with descriptions such as "unlawfully assaulting, battering, torturing and falsely imprisoning the defendant," a "shocking series of violations of constitutional rights," "lawless acts," "physical abuse," "conduct that shocks the conscience" and "brutal conduct."⁹⁸ One thread of Frankfurter's opinion for the Court is the character of the police departure from established constitutional practices. There is no question that the Court regarded the violation of constitutional rights as a violation of an important interest, a major deviation from lawful conduct and an extensive invasion of privacy. A major point of concern for the Court was that this violation was more than a mere technicality and that it constituted a side-stepping of established forms of police conduct.⁹⁹ The nature of the violation, not merely the fact that there was a violation of certain forms, required suppression of the evidence. In other words, the very character of

due process, according to the implications of *Rochin*, requires consideration of the nature of the departure from the law of the land or the Constitution's forms in order to determine the necessity for exclusion. The flaunting or flagrant disregard of constitutional forms cannot be a part of the process by which an individual is deprived of life, liberty or property.

While Frankfurter's discussion concentrates on due process of law as requiring the imposition of "canons of decency and fairness" on the "whole course of the proceedings" and is not directed toward the theory advanced in Section II, his analysis of the police conduct as it relates to due process of law is instructive.¹⁰⁰ That analysis illuminates the meaning of "due process" as it developed in American constitutional law and illustrates an interpretation of and historical authority for the view that due process of law requires the exclusionary rule but not in response to all police violations of constitutional requirements.¹⁰¹

More directly related to the contemporary doctrine of exclusion is the application of the exclusionary rule to the states through the fourteenth amendment which was effected in the case of *Mapp v. Ohio*.¹⁰² Although the rationale underlying the opinion was treated earlier, the specific factual context of the case deserves comment. Cleveland police officers forcibly opened a door to Mapp's residence and denied Mapp's attorney admittance to the dwelling. A paper, claimed to be a warrant, was grabbed by Mapp and placed in her bosom. Officers recovered the piece of paper in the course of a struggle, handcuffed her and manhandled her. The officers then conducted a widespread search of both the upstairs and basement of the dwelling, including drawers, personal papers and a trunk containing the obscene materials for which Mapp was ultimately convicted.¹⁰³

Although the Court's opinion supports the exclusionary rule in its broad application to various types of police violations, the particular factual context out of which *Mapp* arose is noteworthy.

¹⁰⁰ *Id.* at 169.

¹⁰¹ The *Rochin* doctrine of due process of law has, of course, been supplanted by subsequent interpretations which have simply incorporated the fourth amendment and the exclusionary rule through the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). It is useful to reflect on the factual context of *Irvine v. California*, 347 U.S. 128 (1954), in regard to substantial violations of constitutional rights; however, the Court did not suppress the evidence.

¹⁰² 367 U.S. 643 (1961).

¹⁰³ *Id.* at 644-45.

⁹⁵ 342 U.S. 165 (1952).

⁹⁶ *Id.* at 169.

⁹⁷ *Id.* at 166.

⁹⁸ *Id.* at 167-72.

⁹⁹ *Id.* at 172-73.

The Court's recital of the facts makes clear that the police conduct involved substantial, wilful and flagrant violations of constitutional forms in which there were major deviations from lawful conduct and extensive invasions of privacy. We see phrases in the opinion such as "defiance of the law," "high-handed manner," and "[a policeman] running roughshod over appellant."¹⁰⁴ These characterizations together with the other actions of the police described by the Court require exclusion according to the theory and arguments advanced herein. That is, the facts of *Mapp* present an extremely strong case for exclusion when one compares the character of the police conduct there to the circumstances surrounding English development of law of the land and to the type of police actions judged to violate due process of law in *Rochin v. California*.¹⁰⁵ The police violations in *Mapp* were wilful, substantial and flagrant in a sense that flaunts the law of the land and in this regard go to the core of due process considerations as understood both by the doctrine of *Rochin* and by the rationale of the theory advanced herein.

It is defensible for two reasons to use the example of *Mapp*'s factual context and holding to support the theory of due process and exclusion presented above, despite the fact that the Court used a different rationale to support its holding in *Mapp*. First, in spite of Professor Allen's accurate description of *Mapp*'s holding,¹⁰⁶ the case was at bottom a fourteenth amendment due process clause case. Second, a fair reading of the Court's opinion in *Mapp* suggests the view that, apart from the consideration of deterrence, the flagrancy of the violations contributed to the way in which the Court disposed of the case.

One consequence of *Mapp* was the creation of a broad constitutional rule of exclusion applicable to flagrant police violations such as those presented in *Mapp* as well as to much less substantial violations. The exclusionary rule appears in a different and more favorable light when applied to suppress obscene materials in the context of the flagrant violations of *Mapp* than it does in the suppression of needed evidence in a murder case for a minor police violation. It is unfortunate that this case of flagrant police violations became the instrument for requiring the exclusionary rule in all cases when *Mapp* lent itself so appropriately to requiring exclusion only in cases of substantial violations of the fourteenth amendment.

In addition to the formation of a broad constitutional rule in *Mapp*, there is yet another difficulty with the decision. Its concentration on the criterion of deterrence seems to obscure treatment of considerations relating to whether or not exclusion is required as a response to all violations. By shifting the grounds of the argument to a question of due process of law or adherence to the law of the land and away from the policy question of deterrence, one is better able to adapt or limit that theory on the basis of constitutional principle.

A brief examination of certain other cases involving the exclusionary rule is extremely useful in illuminating the qualitative differences between the type of flagrant police violations described in *Mapp* and *Rochin* and certain other technical, insubstantial police violations which, nevertheless, have been held to require exclusion of evidence. The first of these cases is *United States v. Davis*,¹⁰⁷ the facts of which are as follows:

FBI agents in a rural area of Alabama arrested Davis and his son pursuant to warrants charging them with the unlawful flight to avoid prosecution for the larceny of an automobile. Before the arrest procedures were completed, the defendant bolted from the house. He ran towards his house with the agents and his son in hot pursuit. He stopped at the steps, turned, and brandished a .38 caliber [sic] pistol. In the gunfire that followed, the defendant's son was wounded. When order was finally restored, the agents cared for the son until an ambulance arrived. They then took Davis to Montgomery.

About three and one half hours later the agents returned to the scene to retrieve Davis' weapon. Although it was after dark, they discovered the pistol immediately upon alighting from the car because of the reflection of the porch light on the surface of the gun. The gun was recovered from the yard, and the agents left.

The court held that the entry into the yard without a warrant was unreasonable.¹⁰⁸

This search and seizure does not present a case of a substantial deviation from lawful conduct or a substantial invasion of privacy. Nor do the facts of *United States v. Davis* indicate that the police were guilty of a wilful violation of the law of the land. A similar criticism can be made of *United States v. Soriano*,¹⁰⁹ where the failure to insert an agent's name on the search warrant was fatal error although the search was otherwise sound.

¹⁰⁷ 423 F.2d 974 (5th Cir 1970).

¹⁰⁸ *Id.* at 978, quoted in A.E.L.E. Brief, *supra* note 31, at 29-30.

¹⁰⁹ Case No. 72-25-CR-JE (S.D. Fla.).

¹⁰⁴ *Id.*

¹⁰⁵ 342 U.S. 165 (1952).

¹⁰⁶ See notes 16-20 *supra* and accompanying text.

On December 23, 1971 a reliable informant advised agents of the Bureau of Narcotics and Dangerous Drugs that one Anna Betancourt . . . was expecting the delivery of a large quantity of narcotics. Previously, on December 16, 1971, the informant and Anna Betancourt had purchased a large amount of milk sugar and Christmas wrapping which were to be used to cut and wrap the narcotics. On January 4, 1972, the informant went to the Betancourt residence and was asked to leave because narcotics were on the premises. Surveilling agents then observed a white male and female enter the house empty-handed and exit a short time later with a large paper shopping bag. They then drove to another location, deposited the shopping bag in a trash receptacle, and drove off. The bag, which was retrieved by BNDD agents, contained numerous glassine bags and Christmas wrapping paper which by chemical analysis proved to contain traces of heroin.

The agents prepared an affidavit which recited these facts. The affidavit was then presented under oath to United States Magistrate who issued the search warrant and handed it to the BNDD agent who had presented the sworn testimony. Unfortunately, the magistrate had failed to insert the name of the agent to whom it was directed.¹¹⁰

The result of this ruling was the suppression of 238 pounds of pure heroin.¹¹¹

A final example is that of *People v. Trudeau*.¹¹²

During an attempted burglary of a vault at a synagogue in Southfield, Michigan, the night watchman was killed by blows to his head from a crowbar. One of the few leads was a heel print left at the scene. [A few days later] the defendant was arrested inside a United States Post Office where he had attempted to break and enter a vault.

Because of the similarity between the two jobs, the detective assigned to the murder case attended a preliminary hearing on the Post Office case in order to view the defendant's shoes. His shoes were subsequently removed by two police officers without a warrant and given to the detective.¹¹³

The court held that the removal of the shoes without a warrant violated the fourth amendment. The conviction was reversed and the case remanded for a new trial.¹¹⁴

The cases presented here could be dissected at

great length and the admitted complexity of subtleties of search and seizure could be examined. This would not appreciably advance or illuminate the argument being presented, however. For our purposes, it is appropriate simply to compare these violations with those of *Rochin* or *Mapp* and reflect on the degree to which they are different in kind. The substantial and flagrant character of the extreme violations in *Rochin*, *Mapp* or *Irvine* stand in sharp contrast to the types of violations presented in *People v. Trudeau*,¹¹⁵ *United States v. Davis*¹¹⁶ and *United States v. Soriano*.¹¹⁷

Adoption of the view that the due process clause prohibits deprivations of life, liberty or property which are not in accordance with the law of the land—and, therefore, that the exclusionary rule is required as a matter of constitutional principle—raises the question of when exclusion is required. I suggest that limiting exclusion to instances of substantial violations of the law of the land or due process of law is consistent with the theory presented herein.

In tracing the concept of due process to its origin in the Magna Carta's law of the land provision, it was argued that the purpose of requiring adherence to the law of the land was to avoid "governmental tyranny," "the use of brute force in a flagrant manner," "arbitrary will" and "royal whim." The American judicial interpretations of due process of law have been based on the "fundamental" character of the procedure or other right in question. "Fundamental," "implicit in the concept of ordered liberty" or "a fundamental principle of liberty and justice which inheres in the very idea of free government," suggest ends similar to those the English concept of law of the land was designed to achieve.¹¹⁸ That is, both the English antecedents and the American formulations emphasize a standard of governmental conduct necessary to deprive one of life, liberty or property. Whether this standard is associated with English history or with American usage, both indicate that requirements of governmental conduct are founded in the avoidance of "arbitrary," "flagrant" or "fundamental" violations of an individual's rights. The types of violations involved in *Davis*, *Soriano* or *Trudeau* are not "arbitrary," "flagrant" or "fundamental" in any meaningful sense of these terms. These insubstantial violations, if indeed they be clear violations

¹¹⁰ *Id.*, quoted in A.E.L.E. Brief *supra* note 31, at 343-44.

¹¹¹ *Id.*

¹¹² 385 Mich. 276, 187 N.W.2d 890 (1971).

¹¹³ A.E.L.E. Brief, *supra* note 31, at 28-29.

¹¹⁴ *Id.* For examples of 13 additional cases involving suppression for arguably non-substantial violations, see A.E.L.E. Brief, *supra* note 31, at 27-38.

¹¹⁵ 385 Mich. 276, 187 N.W. 2d 890 (1971).

¹¹⁶ 423 F.2d 974 (5th Cir. 1970).

¹¹⁷ Case No. 72-25-CR-JE (S.D. Fla.).

¹¹⁸ See notes 85-95 *supra* and accompany text.

of the fourth and fourteenth amendments in any objective sense, do not threaten republican liberty. Unlike the violations in *Rochin*, *Mapp* or *Irvine*, these insubstantial violations do not threaten the very values of political life toward which this great protection of liberty—due process of law (or law of the land)—is directed. Exclusion as a requirement of due process of law need not be extended to insubstantial violations which do not offend those great purposes which give the concept of due process its fundamental justification.

Impatience with the present law of exclusion requiring suppression in instances of both substantial and insubstantial violations of fourth and fourteenth amendment rights need not and should not lead to rejection of the doctrine in instances such as those presented by *Rochin*, *Mapp* or *Irvine*. Arguments such as those of Brandeis and Traynor,¹¹⁹ and the opinions of the Court in cases such as *Weeks*, *Rochin* and *Mapp* are persuasive when viewed in the context of substantial constitutional violations; but, they lose their persuasiveness when viewed in the context of insubstantial violations illustrated by *Davis*, *Soriano* or *Trudeau*.

We are not without assistance in articulating standards to aid determination of what constitutes a substantial violation of constitutional requirements relating to search and seizure. The American Law Institute's Model Code of Pre-Arrest Procedure,¹²⁰ cited by Burger in *Bivens*,¹²¹ specifies criteria for determining substantial violations of rights relating to search and seizure. Certain of these criteria, clearly relevant to the argument advanced in this article, are (a) the extent of deviation from lawful conduct, (b) the extent to which the violation was wilful, (c) the extent to which privacy was invaded.¹²² This is not the appropriate forum for extended discussion of the several criteria set forth by the American Law Institute, valuable commentary about which is contained in the Model Code of Pre-Arrest Procedure and its tentative drafts.¹²³ Anyone familiar with criminal

and constitutional law is aware that adequate treatment of even one of the above criteria, that of wilfulness, for example, would require lengthy analysis. I utilize these three criteria simply to

moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him. ALI CODE, *supra* note 120, at § 290.2.

The consideration of deterrence, (d), or the extent to which exclusion will tend to prevent violations, while it may be relevant to justifying the requirement that deprivations be in accordance with the law of the land, is not according to my theory of exclusion, a determinative factor in the decision to suppress evidence. It was argued earlier that a constitutional requirement of exclusion rests on grounds independent of deterrence. Of course unless the Court rejects deterrence as the primary rationale, the degree to which exclusion will deter must remain a primary consideration in decisions to suppress; therefore, the ALI tailors its recommendations around "what is constitutionally possible in the present state of the law." ALI CODE § 290.2, *supra* note 120. Development of my argument has not been constrained by this consideration. The difference between present law and my theory is that the former gives the exclusionary rule much broader application than is required by the latter.

Criterion (e), whether but for the violation, the things seized would have been discovered, seems consistent with the requirements that in any deprivation of life, liberty or property, the forms of the "law of the land" be followed. If the things seized would have been discovered, notwithstanding the violation, it is difficult to see the violation as a part of that process by which the person is deprived of life, liberty or property. This, of course, does not mean that such violations should not be punished or compensated for in some other way, simply because the theory of due process does not require suppression. For useful discussion and criticism of amending the Federal Tort Claims Act, an apparent response to Burger's proposal in *Bivens*, see generally, Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & C 1 (1975). For discussion of an alternative of fining the governmental unit employing the errant police officers, see generally La Prade, *An Alternative to the Exclusionary Rule Presently Administered Under the Fourth Amendment*, 48 CONN. B.J. 100 (1974). For a helpful study of procedural rule-making, see generally Wilson & Alprin, *Controlling Police Conduct*, 36 L. & CONTEMP. PROB. 488 (1971). For other useful studies treating rule-making, see generally K. DAVIS, *POLICE DISCRETION* (1975); Gowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972). The point to be made is this: within the framework of the theory presented above, exclusion is not required if the things seized would have been discovered even had the violation not occurred.

Point (f) of the ALI's criteria also merits comment because it fits into the paper's theory of exclusion. Insofar as a violation appears to prejudice a party's ability to support his motion to suppress and thereby interferes with the party's ability to seek proceedings in accordance with the law of the land, the theory would require suppression; suppression would likewise seem to be required in instances in which violations extensively inter-

¹¹⁹ See notes 1, 68 *supra* and accompanying text.

¹²⁰ ALI MODEL CODE OF PRE-ARREST PROCEDURE (1975) [hereinafter cited ALI CODE].

¹²¹ 403 U.S. at 424-25 (Burger, C.J., dissenting) (citing ALI MODEL CODE OF PRE-ARREST PROCEDURE §§ 8.02(2), (3) at 23-24 (Tentative Draft No. 4) (1971)).

¹²² ALI CODE, *supra* note 120, at § 290.2.

¹²³ Other of the Institute's criteria are instructive, although not of the central importance that (a), (b), and (c) are: (d) the extent to which exclusion will tend to prevent violations of this code; (e) whether, but for the violation, the things seized would have been discovered; (f) the extent to which the violation prejudiced the

indicate general directions in which the judiciary might proceed. The abbreviated remarks that follow are included to show the consistency of the criteria with the theory of exclusion presented above.

The extent of deviation from lawful conduct, point (a), is a valid criterion for determining substantiality. The factual circumstances of *Rochin* are just one example of instances in which there was an extensive deviation from lawful conduct. The facts of *Rochin*, including the forced entry, the violence employed and the forced stomach pumping, contrast sharply with the violation in the case of *People v. Trudeau*,¹²⁴ where the individual's shoes were taken during the course of a preliminary hearing, or that of *United States v. Davis*,¹²⁵ in which a gun used against FBI agents was recovered from the yard of a house.

Criterion (b) is that of wilfulness. While this element does not constitute the sole consideration in determining substantiality, it is a highly significant one. Its importance derives both from the references to English history and American case law, where purposeful disregard of established legal forms—that is, the government officer's intentionally overreaching or side-stepping the requirements of the law—illustrates the most obvious instance of an official's attempting to become a law unto himself in defiance of the established law of the land. The facts as recorded in *Rochin v. California* and *Mapp v. Ohio* seem to illustrate wilful violations of this type. Once again, they differ sharply from the cases in which evidence was suppressed as a result of non-substantial violations.¹²⁶

The extent to which privacy is invaded, point (c), also constitutes a valid criterion by which to judge substantiality. The degree of the invasion in *Mapp*, for example, raises fundamental issues of privacy. The apparently bogus warrant, the manner in which the officers invaded the privacy of Miss Mapp's person and the widespread and non-specific nature of the search contribute to the

substantial character of the violation in *Mapp*. These invasions of privacy seem even more extensive when compared with the illustrations of the minor invasions of privacy in *United States v. Davis*¹²⁷ or *People v. Trudeau*.¹²⁸

While certain of the Institute's criteria are appropriate to the theory set forth in this paper and help clarify what constitutes a substantial violation of rights relating to search and seizure, one important difference distinguishes their proposal from the theory espoused herein. The latter theory, unlike the former proposal, does not require exclusion in all instances of governmental conduct interpreted by the judiciary to be violations of the Constitution. Examples of cases involving insubstantial violations given above exemplify possible instances in which the theory of this article would not require suppression.

The Institute's criteria do not, of course, constitute litmus paper tests of exclusion. It is evident that the three primary criteria must be balanced in light of some more nearly comprehensive standard. According to my argument, this standard consists of those ends toward which the Magna Carta's law of the land provision was aimed and which have justified due process in its American context. Any violation of fundamental liberties, any action which threatens the principles justifying our political order, should not be sanctioned by the judiciary and should not be a part of that process which deprives an individual of life, liberty or property. By utilizing the Institute's criteria with a view toward the historical purposes of due process of law, the judiciary may achieve two important objectives. First, the principled objectives of due process will be served; second, it will be possible to avoid the present absolute view of exclusion where the violations involved are insubstantial and the result supports neither principle nor policy. Some critics may respond that this approach invites judicial uncertainty and misapplication. Such criticisms are, however, applicable to the judicial process generally and are not sufficient reason for rejecting the theory.

The argument made in Section II raises questions regarding the possible differences between applying the exclusionary rule through the fourteenth amendment as that rule involves state proceedings and the application of the doctrine at the

ferre with the party's ability to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him. In the latter instance, the evidence seized unconstitutionally would seem to become a significant aspect of the proceedings by which the individual is deprived of life, liberty or property and would therefore require suppression under this article's theory.

¹²⁴ 385 Mich. 276, 187 N.W.2d 870 (1971). See notes 112-14 *supra* and accompanying text.

¹²⁵ 423 F.2d 974 (5th Cir. 1970). See notes 107-08 *supra* and accompanying text.

¹²⁶ See notes 102-07 *supra* and accompanying text.

¹²⁷ 423 F.2d 974. See notes 107-08 *supra* and accompanying text.

¹²⁸ 385 Mich. 276, 187 N.W.2d 870. See notes 112-14 *supra* and accompanying text.

federal level through the search and seizure provisions of the fourth amendment.¹²⁹ At the *federal* level, the theory presented in this article in support of the exclusionary rule is as follows: certain types of violations of the fourth amendment require exclusion of unconstitutionally obtained evidence because of the explicit statement in the fifth amendment that no person shall be deprived of life, liberty or property unless that deprivation be in accordance with "due process of law" or "the law of the land"; following the forms of the "law of the land" requires that any deprivation of life, liberty or property must be in accordance with the forms of the Constitution, or more specifically, in accordance with the requirements of the fourth amendment; evidence seized in substantial violation of these requirements must be suppressed. At the *state* level, the argument for exclusion here presented applies as follows: the search and seizure provisions applicable to the states through the fourteenth amendment are a part of that law of the land which binds the actions of the states; no state may deprive any person of life, liberty or property unless that deprivation be in accordance with this law of the land; evidence gained in substantial violation of these forms must be suppressed.¹³⁰

The substantive law of search and seizure is interpreted by the Court to be identical in regard to both the state and the federal systems. Since there is no difference between what the fourth and fourteenth amendments require relating to search and seizure, my theory of exclusion would operate with equal force and be governed by the same considerations of substantiality in its application at

¹²⁹ See Section II *supra*.

¹³⁰ The interpretation of due process contained herein does not necessarily imply a total incorporationist theory of the due process clause of the fourteenth amendment. Since the fifth amendment due process clause relates to the national government and the fourteenth amendment due process clause relates to the states, the particular rights each guarantees to the individual need not be identical. That is, the rights which are a part of the law of the land that governs the relationship of the individual to the national government need not be identical to the rights that are a part of the law of the land which governs the relationship of the individual to state governments. It is not within the scope of this article to treat at length either the substantive constitutional law of search and seizure required by the fourth amendment or the problematic theory of incorporation. The mandate of the theory contained herein is simply this: whatever the content of these rights which are a part of the law of the land, substantial violations of these rights cannot be a part of the process by which an individual is deprived of life, liberty or property.

both the state and federal levels.¹³¹ Only substantial constitutional violations as determined by judicial interpretation would require exclusion. This theory, of course, runs counter to the proposals of the American Law Institute's Official Draft of A Model Code of Pre-Arrestment Procedure which would exclude evidence in *any* instance of constitutional violations. Examples of relatively minor violations of the Constitution's search and seizure provisions were given earlier, and grave doubts were expressed as to whether or not these cases warranted suppression under the criteria set forth to determine substantial violations.¹³² These doubts would hold true in the case of both state and federal proceedings.

Another possible criticism of my theory of the exclusionary rule is that, under its operation, the criminal justice system would continue to be distracted from its primary truth-finding function by the necessity to determine whether or not police conduct within a particular factual context constitutes a *substantial* constitutional violation. There are at least two responses to this criticism. First, according to the theory presented herein, because the very principles of the Constitution require suppression under certain circumstances, the exclusionary rule cannot be viewed as merely a judicially imposed deterrent, justified by considerations of public policy. This position does not, however, preclude supplementing the exclusionary rule with other means of enforcing rights against unlawful searches and seizures such as those which might emanate from within the police department itself or from the appropriate legislative body.¹³³ Rather, the Constitution requires exclusion from a judicial proceeding of evidence obtained as a result of substantial violations of constitutional rights, not

¹³¹ The standard of reasonableness is currently the same as it relates to search and seizure under both the fourth and fourteenth amendments, but the Court has emphasized that the demands of the federal system compel a distinction between evidence held inadmissible because of the Court's supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. Differences could conceivably arise in which conduct would constitute a substantial violation of the rules of evidence to be applied in federal criminal prosecutions but would not constitute a substantial violation of fourteenth amendment standards. *Ker v. California*, 374 U.S. 23, 31, 33 (1963).

¹³² A.L.I. CODE § 290.2 (2), *supra* note 120. For an argument similar to the one developed in this paper, see generally Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

¹³³ See note 123 *supra*.

withstanding the existence of other possible remedies or deterrents.

A second response to the criticism that the theory espoused would distract the criminal justice system from its primary function is that articulated by Judge Henry J. Friendly:

The beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice, such as that in Scotland, outlawing evidence obtained by flagrant or deliberate violation of rights. It is no sufficient objection that such a rule would require courts to make still another determination; rather, the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve them of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one. Even if there were an added burden, most judges would prefer to discharge it than have to perform the distasteful duty of allowing a dangerous criminal go free because of a slight and unintentional miscalculation by the police.¹³⁴

While Judge Friendly's primary consideration in this passage is deterrence, the thrust of his argument is applicable to the due process argument presented herein. "Slight and unintentional miscalculation by the police" seems unrelated to the concern for preserving those great and enduring constitutional forms which are important to maintaining the rule of law and civil liberty and to avoiding tyrannical governmental conduct. While the exclusionary rule is required as a matter of principle where both the federal and state governments are concerned, the rule need not be extended to all conceivable interpretations the Court may append to the rather complex law of search and seizure. The law will undoubtedly continue to present complex and technical instances of searches and seizures which beg for legal resolution; however, it is not clear that any purpose of principle or policy is served by the exclusion of evidence in instances of insubstantial violations.¹³⁵ An argument might be made in another forum that "the law of search and seizure should be reduced to a more manageable set of rules with which law enforcement officers can live."¹³⁶ It is not necessary

to the argument of this article to resolve that question, for the considerations relating to the constitutional necessity for exclusion may rest on a basis independent from the substantive law of search and seizure established through the fourth and fourteenth amendments. That basis is, of course, the due process clauses of the fifth and fourteenth amendments.

It has been argued that the exclusionary rule is a requirement of constitutional principle in instances in which constitutional rights of search and seizure are violated in a substantial manner. The present case law, resting its rationale primarily on deterrence, has neglected the development of a principled, constitutional argument. If one accepts deterrence as the sole criterion for exclusion, it follows that if exclusion does not deter, the rule should be abandoned. But, I have argued that the exclusionary rule has roots in the Constitution itself and, where substantial violations are concerned, the exclusionary rule is required, irrespective of the degree to which that rule may operate as a deterrent. While questions of deterrence may support the argument elaborated thus far, in that they may constitute a means of habituating government officers to obey the law of the land, the reasons supporting the exclusionary rule go beyond this limited justification. When the exclusionary rule is limited to substantial violations (those in which the law should be relatively clear and protective of important aspects of privacy) it is most easily defended and expresses the sense of the due process clauses that no person will be deprived of life, liberty or property unless that deprivation be in accordance with the law of the land. In this limited application, the exclusionary rule stands for the proposition that the law means what its framers said, and that in instances of substantial violations, evidence will be suppressed. Viewed from this per-

¹³⁴ Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965).

¹³⁵ One suggestion of a means to rule on the content of constitutional rights absent the exclusionary rule is discussed by Oaks, *supra* note 24, at 704-06.

¹³⁶ Friendly, *supra* note 134, at 952 n.117. Judge

Friendly and others have suggested the possibility that the exclusionary rule could be maintained as it is now enforced if the constitutional law of search and seizure were made much less complex and reduced to rules more appropriate to a *constitution* than to a code of criminal procedure—rules which would also be more easily comprehensible to law enforcement officers. In the event this suggestion was to become an actuality and the substantive law of search and seizure were more modestly interpreted, applying the exclusionary rule to all constitutional violations would be much less subject to criticism. Given the unlikelihood of such an occurrence, however, my limiting of exclusion to instances of substantial constitutional violations accomplishes much the same objective in a manner which remains consistent with the principles of due process of law.

spective, the rule becomes more than a deterrent—it has the potential to reinforce the role of the law as a formative, civilizing influence on the police, the judicial system, the legislature and the political order as a whole.¹³⁷ These arguments apply with great force to substantial violations of fourth amendment rights. But, it is extremely difficult to see a parallel between prevention of arbitrary governmental action and preservation of fundamental rights at the root of due process and the insubstantial violations of fourth amendment rights which I would except from exclusion. The purposes of the rule of law and the requirements of the law of the land are not served in instances in which the violations are the result of the impossibility of knowing law which may not be pronounced until years after the search, are non-wilful and constitute insignificant invasions of privacy. Exclusion as a requirement of due process of law need not be extended to insubstantial violations because they do not offend those great purposes which give the concept of due process its fundamental justification.

The interpretation of due process and the exclusionary rule explicated herein is a part of the more general argument that the Constitution contains

principles and that these principles impose certain requirements on governmental action, among which is the command that government be bound by the law of the land. This principled interpretation of exclusion will secure the cause of a regime based on the rule of law and a fundamental law of the land better than will a mere rule of expeditious public policy. The former is rooted in the Constitution itself—in a principle which is consistent with the requirements of criminal justice administration and the preservation of civil liberty. The latter is subject to the changing views of Justices regarding the efficacy of the exclusionary rule as a deterrent. The exclusionary rule, though long a constitutional doctrine, has not found in the case law an adequate theoretical or principled justification. The interpretation contained herein provides such justification.¹³⁸

¹³⁸ This article has not addressed the difficult considerations relating to exclusion under other constitutional provisions, primarily the self-incrimination clause of the fifth amendment. Treatment of the fifth amendment question would require systematic treatment of matters necessitating another extended inquiry. It is appropriate to add, however, that certain of the arguments presented herein would apply to fifth amendment violations with even greater force, since certain fifth amendment violations may affect the credibility of confessions or other statements.

¹³⁷ See notes 1, 2 *supra*.