THE EXCLUSIONARY RULE: A CASE STUDY IN JUDICIAL USURPATION*

*William Gangi***

TABLE OF CONTENTS

* The author would like to express appreciation to the Earhart Foundation for supporting the research involved in this article; Paul Mullin and Nunzio DeGreco, who served as research assistants; Dr. Frank LeVeness, Chairman, and John Saiz, former St. John's Law Librarian; and my colleague Henry Paolucci, St. John's University, New York. Appreciation must also be extended to Professors Thomas Schrock, University of California, Santa Barbara and Christopher Wolfe, Marquette University; and last, but first in my life, my wife Pat.

** Ph.D., Notre Dame, 1971. Associate Professor, Department of Government and Politics, St. John's University, New York.

Prologue

The exclusionary rule prohibits the introduction of illegally obtained evidence in federal and state trials. This author contends, however, that Supreme Court imposition of the rule lacks legitimacy. The task of overseeing and remedying Bill of Rights violations ultimately is a legislative one, and no legal obstacle exists today to prevent the rule's legislative repeal or modification.

Those who suggest that the exclusionary rule is a personal, constitutional right, adopt one or more unsupportable premises. They either define Bill of Rights provisions in a fashion that cannot be attributable to the Framers, substitute their judgment of good public policy measures for those put forth by the Framers and or contemporary legislators, or claim for the Supreme Court a judicial power inconsistent with the views of the Framers and contrary to our legal traditions.

By invoking the exclusionary rule, the Supreme Court indulges in the

same practices as did its laissez-faire predecessors: the substitution of judicial for legislative judgment under the rubric of constitutional interpretation. In doing so, the Court not only embarrasses legal scholars, but, more importantly, denies the people of the United States their most precious right, that of self-government.

This analysis is divided into four parts. Part I offers an introduction to both the scope and limits of this article. Part II provides background on the exclusionary rule's development and rationale, and also reviews the two chronologically distinguishable phases of the debate. Part III offers a critique of those arguing that the rule is constitutionally mandated, and Part IV is reserved for conclusions.

I. Introduction

Analysis of almost any area of recent Supreme Court decisions forces a scholar to acknowledge judicial usurpation of legislative powers. Selection of the exclusionary rule for study, therefore, is arbitrary in the sense that almost any other area would have served equally well.[1] The selection is principled, however, because the exclusionary rule has plainly provided the linchpin upon which rests the Supreme Court's current role in the administration of criminal justice.

Before exploring in more systematic and formal fashion the relationship between the exclusionary rule and the contemporary role of the Supreme Court, it is necessary to aquaint the reader with the breadth of the debate by constructing an imaginary dialogue between an exclusionary rule proponent (P) and myself (G). It would proceed as follows:

P: The personal right to exclusion is mandated by the Constitution. The Supreme Court did not put it there — the Framers did.

G: Where, specifically?

P: Actually, it's attached to violations of all criminal defendant rights, but in a sense it is specifically in the fourth amendment.

G: How do we know that? I mean, where? The Bill of Rights initially applied only against the Federal Government, and not to the states, until 1961.[2] Even in federal courts no exclusionary rule as such existed until 1914.[3] In both instances, exclusion under common law was not required.

P. Look, we are talking about personal rights, not ancient history. Exclusion is a personal right — a right specified in the Bill of Rights,

---

1. In the words of Professor Perry: "[M]ost political practices banned by the Supreme Court in human rights cases, including freedom of expression and equal protection cases, cannot plausibly be characterized as simply modern analogues of past, constitutionally banned practices." Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 Ohio St. L.J. 261, 301 (1981) (emphasis in original). *See also* Gangi, *Judicial Expansionism: An Evaluation of the Ongoing Debate*, 8 Ohio N.U.L. Rev. 1, 56 n.447 (1981).

2. Mapp v. Ohio, 367 U.S. 643 (1961).

3. Weeks v. United States, 232 U.S. 383 (1914).

which the Framers intended to assure a free and open society.

G. Okay, I don't want to antagonize you, so for the sake of argument let us put the history aside. Still, I cannot see a right to exclusion in the fourth amendment. Help me see it.

P. Look closer.

G. I still cannot see it.

P. Look closer, — you *need* it.

G. I need it?

P: To protect personal rights. If you did not have the exclusionary right, then the other rights would be meaningless. There would be no effective remedy for their breach. The whole integrity of the Constitution would dissolve into nothingness.

G: But I thought you said the personal right was already there? Is not a determination of need separate from the question of being there?

P: No, not really. Besides, it *is* there. Recognizing its need merely helps you to see it.

G: But I *cannot* see it! If the Framers put it there, surely I should be able to see it, and history demonstrates . . . .

P: History- again! You cannot see it because you really do not realize how much you need it.

G: You have lost me. If I need it, why not allow myself and my fellow citizens to decide *if* we need it, and how much we need it?

P: That is silly. A constitution is precisely about giving up what citizens may at any one moment decide they need. The Bill of Rights is about just that — rights against the people — individual rights that cannot be tampered with when the people get second thoughts.

In fact, I am glad you raised that point, because that is precisely what we are talking about: the rights of criminal defendants in the Bill of Rights, and our Constitutional promise to stand by those rights when the going gets tough. People like you cannot be trusted because you get too uptight about crime. In other words, since you fear crime so much, you might be tempted to lose sight of, and not appreciate the personal rights the Constitution gave individuals.

G: There you go again. You talk about the right in the Constitution, but you don't answer my question. Where in the Constitution is the right to exclusion?

P: Look, you can lead a horse to water, but — sorry, I'm getting frustrated myself. Let us take a different tack. You agree that the Court has the power of judicial review, don't you?

G: Sure.

P: Aha! Then the Court, in order to protect the right you do not see or evidently don't appreciate fully, will do it for you. That is precisely the role of the Court — to make Constitutional guarantees meaningful in today's society: to protect the integrity of those rights.

G: But as I understand and accept judicial review, the Court is equally bound by the text, and since you do not seem to be able to locate the right you claim in the text, how does the power of judicial review give the Court the power to write it in?

P: Egads, man! Where have you been for the past 25 years? Look, I do

not mean to get so hot, but what if Congress attempted to establish a national church? To protect the integrity of the Constitution, the Court would be bound to strike down such an attempted violation of the First Amendment.

G: Of course! The Framers clearly intended to prohibit such an occurrence. But I do not see how that helps your case — unless of course you are claiming that the Framers also intended to exclude even reliable evidence? If that is your contention, well then I certainly *could* see the right you claim, and the necessity to enforce it. I would be most eager to hear any evidence you have!

P: You miss my point. We are not simply talking about what the Framers believed *then*, or what rights meant 200 years ago. We are talking about today and what we have learned about the importance of individual rights against the frequent attempts of representative bodies to dilute the rights intended by the Framers to be inviolable. *That* is what judicial review is all about. The Court must decide what rights mean, and how to make these rights meaningful in contemporary circumstances. This is the Court's function and has always been.

Look, take coerced confessions, for example. Some of those confessions were unquestionably reliable. Under common law they should have been admissible. Still, the Court excluded them, not on the standards prevalent in 1787, but on moral standards as we learned to appreciate them in the context of police abuses. Indeed, the Court eventually adapted the fifth amendment prohibition against self-incrimination to police interrogation. How can judges admit confessions obtained by force or violence? We have grown more sensitive to the subtle aspects of police coercion. The Court could not jeopardize the integrity of the Constitutional demands by evaluating them on standards more than a hundred years old! Progress has been made.

G: You know, I wanted to talk about the coerced confession rule . . .

P: Stick to the subject . . . exclusion.

G: Well, all right, let us put confessions aside. Your approach, though . . . is exactly what the Supreme Court did when it constitutionalized certain economic rights during the laissez-faire period. They also believed progress was being made, and confused their personal and institutional integrity with what the Framers had intended.

P: This discussion is getting ridiculous. There is an enormous difference between the two situations. The issue of exclusion today has nothing to do with what the Court did during the laissez-faire years. There, I agree, the Court usurped legitimate legislative choices on public policy matters. They constitutionalized alleged economic rights — their personal beliefs — that were never in the Constitution. Today, however, the Court is merely fleshing out, and adapting to current circumstances, rights that were clearly put in the Bill of Rights by the Framers.

G: Clearly? Where? How do we know?

In the most contemporary phase of the debate, exclusionary proponents

press three arguments: there exists a personal constitutional right to exclusion of illegally obtained evidence; admission of such evidence jeopardizes the personal integrity of judges, as well as taints the judiciary institutionally; exclusion of such evidence serves a function analogous to judicial review, assuring fidelity to constitutional provisions.[4]

In analyzing the subject matter illustrated above, this article will not present a case-by-case chronology or analysis. First, while it is theoretically convenient to speak in terms of an exclusionary rule, there in fact exists no single rule but instead a number of interrelated legal doctrines: e.g., probable cause to search and arrest. Second, the case law is so filled with inconsistencies that if a case-by-case analysis is ever attempted, it is best left for another time or other scholars. Third, this article addresses the issue of legitimacy: the right of the judiciary to impose the exclusionary rule, rather than the pros or cons of exclusionary policies.[5]

II. The Exclusionary Rule

A. *Background*

1. *The Common Law: Evidence Admissibility*

It is unjust to convict and imprison the innocent. A means, therefore, must be selected wherein guilt or innocence of criminal offenses is established. Under English common law, the jury trial developed, "the basic purpose [of which was] the determination of truth."[6]

The outcome of a trial, however, must be less arbitrary than the flipping of a coin.[7] Under English common law, the presentation of evidence beyond reasonable doubt would convict or lead to the release of the accused. The principle governing evidence admissibility was its probable truth, whether or not it was reliable.[8] Reliable evidence increased the prospects of justice, thus

---

4. *See infra* notes 283-318 and accompanying text.

5. *See, e.g.*, Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 Geo. L. J. 10 (1975). This matter will of course be further considered. The thesis of this article is that the Supreme Court, along with its laissez-faire economic policy predecessors, continues to usurp legislative authority by making exclusionary rule public policy decisions.

6. Frankel, *The Search for Truth — An Umpired View*, 31 Annual Benjamin N. Cardozo Lecture Delivered Before The Association Of The Bar Of The City Of New York 11, 13 (Dec., 1974). In England, jury trials succeeded "trial by ordeal" which itself was an improvement over preceding practices. *See* F. Pollock & W. Maitland, The History of English Law Before The Time of Edward I, 653-61 (1968); H. Myers, The History and Meaning of The Fourteenth Amendment 128-37 (1977).

7. S. Hook, Common Sense And The Fifth Amendment 57 (1963).

8. "It is a mistaken notion, that facts which have been obtained from prisoners . . . is to be rejected from regard to public faith. . . . Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or not intitled to credit." King v. Jane Warickshall, 1 Leach 263, 263-64, 168 Eng. Rep., Crown Cases 234 (1783).

giving greater assurance that conviction of the innocent would be less likely. After all, how could truth contribute to the conviction of an innocent accused?

The method of evidence acquisition, it followed logically, was irrelevant except when the methods used to obtain the evidence affected reliability. In Professor Wigmore's well known phraseology, "an illegality in the mode of obtaining evidence cannot exclude it, but must be redressed or punished, or resisted by appropriate proceedings otherwise taken."[9] Coerced confessions, for example, could be excluded from trials since under certain circumstances even innocent persons might confess falsely. Still, under various state practices, even coerced confessions, in part or whole, could be introduced at trial if their truth could be established.[10] Reliable evidence was regularly admitted, and if acquired through illegal means, such illegality was punished, if at all, separately by civil or criminal trial, or through administrative discipline of the offending officer.[11]

The American common law approach to evidence admissibility, often bolstered by state statutes, apparently did not change after ratification of the Constitution and the Bill of Rights until the exclusionary rule was im-

---

9. *See generally* H. WIGMORE, EVIDENCE, § 2264, at 369 (1940).

10. *Id.* § 822, at 246, §§ 856-859, at 337-42. The "basic purpose" of the common law rule was "to test the trustworthiness of a confession." A. BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW 47 (1955). The apparent object was to protect an innocent man from being convicted upon false evidence. *See* Schaefer, *Federalism and State Criminal Procedures*, 70 HARV. L. REV. 1, 12 (1956). The trustworthy rule made an essential set of assumptions:

> If two persons with the same physical and mental characteristics, one guilty and one innocent of the crime with which he is charged, are subjected to the same pressures, the guilty one will confess sooner than the innocent person. This is because the innocent person will have the strength that innocence gives and . . . will not be subjected to the pressures of lying and trying to cover up the irreconcilable contradictions that will develop in his story. To deny this would be to deny that truth and innocence are greater sources of strength than falsehood and guilt.

Ritz, *Twenty-five Years of State Criminal Confessions Cases in the Supreme Court*, 19 WASH. & LEE L. REV. 35, 41 (1962).

For a detailed examination of common law confession history, see H. WIGMORE, EVIDENCE, §§ 817-820, at 232-38 (1940); Gangi, *The Court And Confessions: Justice At The Expense Of Truth* (1971) (Ph.D. Thesis, Notre Dame) [hereinafter cited as *Confessions*]; W. Gangi, *The English Common Law of Confessions and Early Cases Decided by the United States Supreme Court*, 205 JUDICATURE, INFORMATION REPORT SERIES 1, 1-7 (Sept., 1973).

11. As detailed subsequently, the availability of such remedies for deterring illegal police conduct came to be considered insufficient or ineffective. *See infra* notes 34-38 and accompanying text. *See also* H. WIGMORE, *supra* note 9, §§ 826, 2251, 2183-2184b.

Professor McCormick challenged Wigmore's attempt to keep the policy purposes of the privilege and common law confession rule distinct. *See generally* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE §§ 155-157 (1954) [hereinafter cited as *Handbook*]; McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 250 (1946) [hereinafter cited as *Problems*]; McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 450-57 (1938) [hereinafter cited as *Scope*].

posed on lower federal courts in 1914,[12] and on state courts in 1961.[13] Up until this time, relevant Bill of Rights provisions had no impact on state common law or statutory evidence admissibility policies. First, of course, the federal Bill of Rights had not applied against the states.[14] The Bill of Rights had been proposed, lest one forget, by opponents of the Constitution. They feared federal power, and so it was proposed to provide additional assurance that even the limited powers granted would be exercised within the context of familiar procedures.[15]

Second, common law procedures had already existed for some time in many of the states. The Bill of Rights, in other words, was modeled on existing state granted rights, not vice versa. The antifederalists particularly sought to secure these already traditional liberties of Englishmen from the newly created political authority of the federal government.[16] Those opposing the Constitution did so "because it did not contain . . . those safeguards which they have long been accustomed to have interposed between them and the magistrate."[17]

---

12. *See* Weeks v. United States, 232 U.S. 383 (1914).

13. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

14. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

15. *See generally* R. LEE, A LAWYER LOOKS AT THE CONSTITUTION, 1, 17-25 (1981); F. MCDONALD, E. PLURIBUS UNUM 359-71 (1965). As noted by Professor Raoul Berger, "the Bill of Rights issued out of state distrust of the power of general government." Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 16 (1980).

16. *See* Gangi, *supra* note 1, at 41-43. *Cf.* Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 880-81 (1975) (state court evasion of Burger Court decisions).

17. Berger, *Ely's Theory of Judicial Review Reserving the Significance of the Political Process*, 42 OHIO ST. L.J. 87, 124 (1981) [hereinafter cited as *Ely's*]. Such considerations lead to a conflict over the status and origins of individual rights, a subject elsewhere considered. *See* Gangi, *supra* note 1, at 39-43. The sources subsequently encountered, in the author's opinion, fail to introduce substantive arguments regarding the diversity of opinion by Berger's critics over the origins of such rights, the existence of a double standard regarding economic and civil rights, and the essential relationship between rights and progress. The reader, however, may wish to consult the following sources. For those generally favoring the position that the Court is merely enforcing rights, (though the sources are by no means consistent on whether these rights are in the Constitution per se, are logical derivations, are values essential to it, or should be essential to it, or have evolved) see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367-68, 399-400 (1974); Benedict, *To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage*, 42 OHIO ST. L.J. 69, 84-5 (1981); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 225-29, n.96 (1980); Chase, *The Burger Court, The Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 566-69, 572-73, 594-97 (1977); Ely, *The Supreme Court, 1977 Term—Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 7, 10, 14-15 (1978); Grano, *Ely's Theory of Judicial Review: Preserving the Significance of the Political Process*, 42 OHIO ST. L.J. 167, 178-79 (1981); Gray, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-14 (1975); Perry, *Non Interpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 293-96 (1981) [hereinafter cited as *Non Interpretive*]; Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1158-71 (1978); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065-72 (1980); White, *Reflections on the Role of the*

Finally, Bill of Rights provisions did not interfere substantively with either state or federal legislative power to define violations and formulate remedies.[18] During this period the people's right to self-government was not considered the same as the sum product of individual rights. In the modern sense, there simply were no "rights" against the legislature.[19] Instead, the people's right to self-government preceded the specification of individual rights. In other words, the former was the great right from which the latter flowed.[20] The liberties often alluded to in our colonial history were guaran-

---

Supreme Court: The Contemporary Debate and the 'Lessons' of History, 63 JUDICATURE 162, 169-70 (1979).

Opposition arguments, again not necessarily compatible with one another, may be found in Berger, *Soifer to the Rescue of History*, 32 S.C. L. REV. 427, 453-60 (1981); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8, 20-3 (1971); Dixon, *The 'New' Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 57-64; Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old*, 51 IND. L.J. 1025, 1034-35 (1976); Kendall, *John Locke Revisited*, 2 THE INTERCOLLEGIATE REV. 217, 228-30 (1966); Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U.L. REV. 1; McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 45-50; Perry, *Interpretivism, Freedom of Expression and Equal Protection*, 42 OHIO ST. L.J. 266-67, 284-97 (1981); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164-65, 1174 (1977); Shattuck, *The True Meaning of the Term "Liberty" in These Clauses in the Federal and State Constitutions which "Protects Life Liberty and Property"*, 4 HARV. L. REV. 365, 375-76 (1891).

One circumstantial occurrence should be noted. In light of the Burger Court's "retreat" in criminal defendant cases, (*see infra* notes 104-11) some commentators generally associated with applauding increased judicial power have since shifted allegiance to state rather than federal courts. *See* Margolick, *On Liberal Law in the Reagan Era*, N.Y. Times, December 10, 1981 at B5; Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977).

18. *See supra* comment accompanying note 9 (Professor Beisel on the protection afforded by common law). As Professors Kendall and Carey make abundantly clear, the representative assembly emerged as the governmental agency entrusted with the responsibility to deliberate "on the delicate topics touched upon, to pass laws in the sensitive areas from the standpoint of freedom." W. KENDALL & G. CAREY, BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION 55 (1970). On the ordinary level, the people engaged in self-government through electorally accountable representatives—the legislature. On the extraordinary level, the people still governed because of the contents of article V of the Constitution. Until the people chose to exercise that right, however, they were bound by those limits found in the constitution to which they had consented. *See* Gangi, *supra* note 1, at 66-67.

19. W. KENDALL & G. CAREY, *supra* note 18, at 59-60. The one " 'indubitable inalienable, and indefensible right' " to emerge from the one hundred and fifty years preceding the American Revolutionary War was the right of the people to self-government. *Id.* at 67 (quoting the Virginia Declaration of Rights (1775)). The "rights of all individuals will be safest if first the rights of the people are assured, and above all the right or rights of the people to govern themselves. . . ." *Id.* at 66. It is the right of the people to modify and or abolish an existing system of government that precedes all others. "These provisions . . . are clearly the core of article V of our Constitution which gives the majority of the American people the right in question." *Id.* at 67.

20. W. KENDALL & G. CAREY, *supra* note 18, at 52. Professors Kendall and Carey effectively demonstrate that while "liberties" had been written down in Massachusetts for the first

tees primarily against judicial and executive abuses.[21] "It was conceivable to protect the common law liberties of the people against their rulers, but hardly against the people themselves."[22]

To summarize, there were certain liberties citizens insisted be written down and absolutely followed by executive and judicial personnel. But with respect to rights "we might expect to be against legislative encroachment or violation," there were none that did not contain "escape clauses."[23] Rights against the legislature were considered unnecessary since the people themselves were represented in that legislature. Similarly, the granting of individual rights, in the modern sense of the term, was considered imprudent. History taught that in a free society a delicate balance existed between societal and individual needs, and the extent of such rights was heavily dependent upon circumstances. No absolute statement of any right could be made without jeopardizing the very ability of the people to govern themselves. Should the society fail to preserve itself against its enemies, no individual rights would exist. The right of the people to govern themselves was precisely the right for which the Revolution was fought sucessfully.[24] The Constitution itself was a product of the people's right to self-government, an extraordinary statement of governing principles. On the ordinary level, legislative representatives — accountable to the people through the regular elections demanded by the instrument — were to apply those extraordinary principles to existing circumstances by balancing individual and societal

---

time in 1641, each contained exceptions and the potential for additional qualifications made by the General Court, the representative assembly. *Id.* at 52-53.

21. *Id.* at 52. *See also Ely's*, *supra* note 17, at 124-25. While we subsequently adopted a Lockean language (i.e., "rights" instead of "liberties"), Kendall and Carey argue that there was no substantive change in how we viewed rights or liberties. The Declaration of Rights of Virginia, as the federal Bill of Rights which followed it, did not deviate from the traditional perception of rights or liberties as exemplified earlier in Massachusetts. As Professor Levy has noted, "the Bill of Rights was in large measure . . . more an expression of federalism than of Libertarianism." L. Levy, Legacy Of Suppression ix (1963). The first eight amendments were common law rights with specific and limited meaning. Shattuck, *supra* note 17, at 375-76.

22. G. Wood, Creation Of The American Republic 1776-1787, 63 (1969), *quoted in Ely's*, *supra* note 17, at 125. Regarding colonial thinking the *Albemarle County Resolutions* (1774) offer a representative example:

> *Resolved*. That the inhabitants of the Several States of *British America* are subject to the laws which they adopted at their first settlement, and to such others as have been since made by their respective Legislatures, duly constituted and appointed with their own consent. That no other Legislature whatever can rightly exercise authority over them; and that these privileges they hold as the common rights of mankind, confirmed by the political constitutions they have respectively assumed, and also by several charters of compact from the Crown.

W. Swindler, Sources and Documents of United States Constitutions, 280-81 (2d series 1982).

23. W. Kendall & G. Carey, *supra* note 18, at 52.

24. *Id.* at 48-72, 123-36, 143-54. *See also* Gangi, *supra* note 1 at 64-65.

needs.[25]

Thus, to understand properly what the federal Bill of Rights provisions were intended to secure at the time of their adoption, one is compelled to understand how those rights had been practiced up until that time in each state. That understanding would inevitably reveal the regular admission of evidence based on reliability rather than on the method of acquisition.[26]

Specifically, an analysis of the fourth amendment is necessary.[27] Two important issues of fact are apparently ignored. First, certainly the Framers anticipated that some "unreasonable" searches inevitably would occur. Had no such searches occurred in colonial history, or even subsequent to independence, prior to ratification of the Constitution?[28] After all, it was protection from "unreasonable" searches which prompted the fourth amendment.[29] If one wants to ascertain what remedy was envisioned then for searches found unreasonable, he should examine what had occurred when

---

25. The roots of modern natural law theory may be found in the natural sciences. Just as man discovered the physical law of the universe (Physics: e.g., the law of gravity), so too would he discover similar "natural laws" that govern man, society and destiny. *See* G. NIEMEYER, BETWEEN NOTHINGNESS AND PARADISE 3-43 (1971). Serious deficiencies can be found in the legal literature with respect to understanding the distinctions that exist between classical and modern natural law theories. *See, e.g.*, Ely, *supra* note 17, at 22-32; Tushnet, *Darkness on the Edge of Town: The Contribution of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1060-62 (1980). Cf. Gangi, *The Supreme Court: An Intentionists Critique of Non Interoetive Review*, 25 CATH. LAW. 253, 258 n.30 (1983).

26. Wilson, *The Origin and Development of the Federal Rule of Exclusion*, 18 WAKE FOREST L. REV. 1073, 1074-76 (1982).

27. Take, for example, Professor Amsterdam's assessment of fourth amendment precepts as had been explained in a work by Professor Taylor:

> Professor Taylor . . . observes that the preconstitutional history of the amendment was concerned exclusively with searches under general warrants and writs of assistance; he infers from this history that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants," and he therefore reasons that "Justice Frankfurter, and others"—now comprising a majority of the Supreme Court—"who have viewed the fourth amendment primarily as a requirement that searches be covered by warrants, have stood the amendment on its head." Professor Taylor does not conclude, of course, that warrantless searches are entirely uncovered by the amendment; his view is that they are controlled by the *reasonableness* requirement of the amendment's first clause; and his difference from the Court is that he would allow a broader range of generally "reasonable" warrantless searches, including relatively wide-ranging searches incident to arrest, and perhaps others.
>
> I concur with Professor Taylor about the focus of the preconstitutional history. I concur that the framers were "concerned" about general warrants and writs, insofar as "concerned" is used to denote the specific subject that they had under consideration. I concur that the Court has stood the fourth amendment on its head, in the same wise way that the Court has stood the commerce clause on its head in order to allow a collection of states to grow into a nation. From his ultimate conclusion concerning the permissible scope of warrantless searches, I respectufily dissent.

Amsterdam, *supra* note 17 at 410 (emphasis added) (citations omitted).

28. *See supra* note 26 and accompanying text.

29. U.S. CONST. amend. IV.

such illegalities were subsequently committed. Exclusion of reliable evidence was *not* the remedy practiced.[30] Since exclusion of reliable evidence was not required, one should not necessarily conclude that those who framed the fourth amendment believed it was a meaningless provision. It evidently had been important enough to prompt extraordinary political action. The difficulty lies, then, in one's understanding of the amendment's significance, the meaning of rights as our forefathers understood them, and the legislature's role in punishing their violation.[31]

Second, it would seem obvious, or logical, that after suffering the Writs of Assistance,[32] the people would have simply decided to exclude all evidence unreasonably seized. Yet, as demonstrated by subsequent common law and statutory practice, this did not occur even in federal courts, until more than a century later.[33] It is suggested, therefore, that the people did not request or even contemplate exclusion, because for them, the issue surrounding the amendment's proposal was not the use of evidence seized, but rather searches and seizures that were "unreasonable." Moreover, it was not so much the searches per se, as it was searches for items another political authority (England) determined could not be possessed without penalty.

The American Revolution, of course, settled a good part of the problem. Now, it was the American *people*, through their elected state and federal representatives, who would subsequently decide what items could be possessed, under whatever penalty thought appropriate. Patriots during the Revolution may have smuggled, but now citizens of the more perfect union intended to punish such conduct! The fourth amendment provided protec-

---

30. *See supra* note 10 and accompanying text. It was never contemplated nor did the people require exclusion of reliable evidence as a remedy for an illegal search. They were concerned primarily with the "reasonableness" of its procurement, not its "use" as evidence. Repeated unreasonable conduct could prompt political deliberation in the legislature if not political repurcussions at the polls.

At this point a few observations regarding Writs of Assistance should be made. First, it was custom-house officers that possessed the writ, and, the issue of taxation without representation (at the center of the right to self-governing) is integral to an understanding of colonial distaste. Second, judges were not held in the highest esteem, particularly when they had been appointed by the King and owed loyalty to him. Colonial judges, on the other hand, were expected to do their patriotic duty, by declaring the writ contrary to English law. Instead, as Otis noted, the possessors of the Writ intimidated the colonial judges. The former were practically immune from any checks in the exercise of the writ. Third, while Otis concedes the validity of special writs (warrants) to search particular houses, for particular things, even "that special writs may be granted on oath and probable suspicion," the Writ of Assistance, giving such broad, unsupervised (by representatives of the people, the legislature) powers to petty representatives of the King were unacceptable and contrary, Otis argued, to English law. *See* SWINDLER, *supra* note 18, at 176-77.

31. Discussed elsewhere is the problem of criteria for historical research and the obligation scholars have to explain by what principles their research proceeds. *See infra* notes 144-56 and accompanying text.

32. *See supra* note 30 and accompanying text.

33. *See* Weeks v. United States, 232 U.S. 383 (1914).

tions against possible overreaching by a newly created federal government, but it did not inhibit the people's right to self-government or to define abuses and propose remedies.

In sum, the Bill of Rights sought to prevent judicial and executive abuses. The ratified rights themselves compelled procedures believed conducive to protecting the innocent from wrongful conviction. Admission of reliable evidence, furthermore, did not endanger innocent men, only guilty ones, and therefore was not inconsistent with provisions of the fourth, fifth, sixth, seventh and eighth amendments. For these reasons, Bill of Rights provisions posed no barrier to the common and statutory law practice of admitting evidence proportionate to its probable reliability, regardless of the mode of acquisition. Abuses and appropriate remedies were addressable to the legislature. Flagrant violation of a defendant's rights in particular cases might even be considered by the accused's peers, culminating in acquittal from which there was no appeal.

2. *Reform, Exclusionary Principles, and Rationale Development*

a. *Reform.*[34] Admission of reliable evidence, critics asserted, failed to consider growing evidence of police abuse through the practice of the so-called "third degree."[35] As made evident by the *Wickersham Report*, reform

---

34. The scope of this article is not prepared to trace the history of reform nor, is it necessary. For purposes of historical concreteness, however, exclusionary rule reform began around 1915 with the decision in Weeks v. United States, 232 U.S. 383 (1914). While it is suggested that certain assumptions affected how the occurrences described were perceived and what shape reforms would take, it is clearly erroneous to deny the experience reformers had, particularly their judgments of unfairness and injustice. To do that would be to fail to understand them as they understood themselves. *See, e.g.*, Hall, *Evidence and the Fourth Amendment*, 8 A.B.A. J. 646 (1922); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922). For an assessment, *see* Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than 'An Empty Blessing,'* 62 JUDICATURE 337, 344-46 (1979).

35. *See* Chafee, *The Progress of the Law, 1919-1922 Evidence II*, 35 HARV. L. REV. 428, 439-40 (1922). There are several important questions that unfortunately cannot be explored in any depth. First, did, as often asserted, other common law remedies (*e.g.*, civil action for trespass) in fact "fail" to remedy police abuses? It is an assertion frequently repeated in the literature. *See* Amsterdam, *supra* note 17, at 429; Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GEO. L.J. 1, 44-51 (1975); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Practices*, 30 MO. L. REV. 392 (1965); Kamisar, *supra* note 34, at 338, 345-46; Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POL. SCI. 225, 260 (1961); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 312, 314 (1974); Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 849 (1974); Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MTN. L. REV. 150, 156-58 (1962); Note, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4, S.W. L.J. 68, 79-87 (1972) [hereinafter cited as *Decline*]. *But see* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1032 (1974); Comments, *Search and Seizure in Illinois. Enforcement of the Constitutional Rights of*

was in the air.[36] Reformers charged that police misconduct could have a det-

---

Privacy, 47 Nw. U.L. Rev. 493, 493-94 (1952) [hereinafter cited as *Comments*]; When the judgment therein is made, from whose perspective did other remedies "fail?" Who has to be convinced—reformers, defendants, citizens?

Why was the exclusionary rule remedy the one ultimately selected, exclusively one might say, while other remedies dropped? Did it simply seem to be the most efficacious, or, the most "appropriate?" Professor Kamisar, for example, suggests that the exclusionary rule was put forth because other remedies failed and doubts about the rule's effectiveness to deter police lawlessness is of recent vintage. Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness Test"*, 65 Mich. L. Rev. 59, 87-89 (1966). But even Professor Chafee, in 1922, implied that the exclusionary rule offered only "slight protection," suggesting instead "disbarment" of offending prosecutors and policemen. Chafee, *supra* note 35, at 439. Chafee, in fact, lauded the fact that technical grounds for excluding evidence were being reduced. *Id.* at 440. Professor Chafee also suggested the applicability of the self-incrimination clause. *Id.* at 439-40. Could it be that once the self-incrimination clause was held inapplicable in Brown v. Mississippi, 297 U.S. 278, 285 (1936), critics of police abuses turned to the exclusionary rule with more vigor and exclusiveness? Surely, one must consider that several means might reach the same end, assuming of course, one has resolved the question of who should identify police abuses and decide what remedies would be suitable.

The point is this: for some time after 1915, legitimate choices were perceived available—choices relating to the specific injustices perceived. In many states, for example, exclusion was adopted on a limited basis. Nevertheless, why other options were ignored, or more important, why exclusionary proponents chose to devote all their energy toward constitutionalization of this rule, is a legitimate field of inquiry.

Second, even at the present time, there is the question of whether other remedies should be investigated, or implemented, thus supplanting or supplementing the exclusionary rule. *See generally* Davidow, *Criminal Procedure Ombudsman As A Substitute for the Exclusionary Rule: A Proposal*, 4 Tex. Tech. L. Rev. 317-18 (1973); Horowitz, *Excluding the Exclusionary Rule—Can There be An Effective Alternative*, 47 L.A. B. Bull. 91, 94 (1972); Levin, *Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 Judicature 74 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 753-54 (1970); Wingo, *Growing Dissallusionment With the Exclusionary Rule*, 25 S.W. L. Rev. 573, 579-82 (1971); *Decline*, *supra* note 35, at 79-83; Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 Yale L.J. 143, 145 (1968) [hereinafter cited as *Federal*]; Note, *The Privacy Interest of the Fourth Amendment—Does Mapp v. Ohio Protect It or Pillage It?*, 74 W. Va. L. Rev. 154, 160-62 (1971); Comments, *Federal Injunctive Relief from Illegal Search*, 1967 Wash. U.L.Q. 104 (1967) [hereinafter cited as *Injunctive*]; Case Note, *Constitutional Law—Coerced Confessions—Civil Damages Under Section 1983*, 20 De Paul L. Rev. 984 (1971); Comment, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 Harv. C.R.—C.L. L. Rev. 104 (1970) [hereinafter cited as *Use*].

Both issues, the alleged failure of other remedies and possible alternatives, must be put aside because they are problems that serve only to demonstrate the importance of the issue at the core of this paper, namely whether the exclusionary rule is constitutionally mandated? If it is, then the existence of other possible remedies, effective or not, is irrelevant on the ordinary statutory level.

36. G. Wickersham, *Report on Lawlessness in Law Enforcement*, National Commission Of Law Observance and Enforcement, No. 11 (Washington, June 25, 1931) [hereinafter cited as *Report*]. There is little question the Report affected the thinking of Supreme Court justices thereafter. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 445 (1965).

Professor Chafee was one of the Report's consultants and his noted article had been cryptically cited by Justice Brandeis in a footnote several years earlier. *See* Ziang Sun Wan v. United States, 266 U.S. 1, 17 n.6 (1924). *See also Confessions*, *supra* note 10, at ch. III, and notes 28-34

rimental effect on our society.[37]

> We are not sentimentalists; we don't believe in 'coddling' men accused of crime. We stand for swift and vigorous prosecution and oppose the practices which we have pointed out not merely nor chiefly because they are unlawful but because in the long run they do much more harm than good.[38]

During this period, third degree police interrogation practices were defined as "the employment of methods which inflict suffering, physical or mental, upon a person, in order to obtain from that person information about a crime."[39] Such practices were allegedly "widespread."[40] According to the report, third degree practice "brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public."[41]

Particularly, after World War II, concern with the effect of abusive police tactics was integrated with the belief that criminal defendants constituted a "permanent minority," an unpopular segment of society insufficiently protected by the normal representative devices.[42] Reformers argued that a functioning representative democracy assumed the constant shifting

---

and accompanying text.

37. *Report*, *supra* note 36, at 1. "Respect for law, which is the fundamental prerequisite of law observance, hardly can be expected of people in general if the officers charged with enforcement of the law do not set the example of obedience to its precepts." *Id.*

38. *Id.* at 48.

39. *Id.* at 19. These methods included such practices as continuous questioning and denial of sleep and/or food. *Id.* For further analysis of the Commission's definition of third degree, *see Confessions*, *supra* note 10, ch. III, nn.32-33.

40. *Report*, *supra* note 36, at 4. "The issue in a criminal case should be a single one, Is the Prisoner Guilty? The third degree practices introduce into many cases another and logically irrelevant issue, Did the officers maltreat the defendant." *Id.* at 189-90.

Although the dispute is outside the scope of this article, it should be noted that the Report's conclusion of widespread abuse was disputed immediately. *See* Waite, *Report on Lawlessness in Law Enforcement*, 30 MICH. L. REV. 54, 55 (1931). The Report's authors advocated extension of the privilege as a potential remedy. *See Confessions*, *supra* note 10, ch. III, nn.36-39. *See also supra* note 35 and accompanying text.

41. *Report*, *supra* note 36, at 190. A close reading of the Report reveals that its authors did not believe there was any single remedy for abusive police practices. Furthermore, they believed that police brutality was impractical and unnecessary since scientific techniques of investigation would eventually replace abusive police tactics. *Id.* at 188-89. The "scientific" police methods upon which so much hope was vested was the then growing science of psychologically based interrogation. *See, e.g.*, F. INBAU AND J. REID, POLICE INTERROGATION AND CONFESSIONS 17-23, 108-19 (1967). It was these practices that were later condemned in *Miranda* as inherently coercive. *See* Miranda v. Arizona, 384 U.S. 436, 445 (1965). *See also* Gangi, *supra* note 1, at 49 n.404. Finally, the Report stated that abusive police practices were directed primarily at minority groups, especially blacks, the poor, young and unpopular. *Report*, *supra* note 36, at 158-60.

42. A. GOLDBERG, EQUAL JUSTICE 49 (1971).

of various groups seeking to form majority coalitions.[43] The democratic process broke down, however, when an unpopular minority such as criminal defendants could not form political alliances.[44] These permanent minorities could not approach executives or legislatures effectively, and therefore, they may be treated unjustly by an "ill-spirited" majority.[45] Criminal defendants could look only to the courts for protection because, urged by inflammed or fearful constituents concerned about crime, legislators or executives would ignore the long-term consequences of rights denial.[46] In other words, representative institutions could not rise above the demands of constituents.[47]

The Framers, reformers argued, had been well aware of the potential for democratic shortsightedness, and for that reason they wisely "embed[ed] protection for . . . scrupulously fair criminal procedures in the Bill of Rights."[48] With equal foresight, the Framers realized that the Supreme

---

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 50-51.

47. *Id.* at 49-51.

48. *Id.* at 51. The conflict between Professor Raoul Berger and his many critics over the latters' contention that the Supreme Court is the institution *best suited* to protect individual liberties has been discussed elsewhere. *See* Gangi, *supra* note 1, at 26-33. The sources subsequently encountered, in this author's opinion, fail to introduce arguments not discussed there. The reader, however, may wish to consult the following sources. For those generally favoring the position that the Court is best suited to protect individual liberties, see Bennett, *Mere Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1102-03 (1979); Brest, *supra* note 17, at 228-29; Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227, 234-35 (1972); Lusky, *Public Trial and Public Right: The Missing Bottom Line*, 8 HOFSTRA L. REV. 273, 274, 313-14 (1980); Perry, *supra* note 17, at 293.

Arguments of the opposition may be found in *Ely's supra* note 17, at 88, 91, 97; Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MO. L. REV. 122-24 (1981); Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1372, 1379-80 (1979); Perry, *supra* note 1, at 276-79, 304-317; Sandalow, *supra* note 17, at 1165-66.

Several additional observations should be noted. First, it is necessary to further differentiate between opposing factions. The "traditional" view, represented by Professor Berger, may be briefly summarized as follows: even ceding the power of judicial review, the Court still may not *initiate* public policy. *See Gangi, supra* note 1, at 11-13. Law cannot be confused with morals. *Id.* at 24. Where no right is established historically, or by intent, no remedy is guaranteed. *Id.* at 42. *See also* Nagel, Book Review, 127 U. PA. L. REV. 1174, 1191 (1979).

In contrast, the "modern" view is fragmented. Under this view, extensive judicial power to remedy perceived evils is advocated either with respect to (a) keeping democratic process channels open, or (b) extension of substantive values, or (c) pursuit of moral values, or (d) all three listed above. *See generally* Ely, *supra* note 17, at 5-25. Many influencial commentators suggest that the Court's duty is as follows:

> [It should intervene in] disputes with respect to which there exist special reasons for supposing elected officials cannot be trusted—those involving the constriction of the political process or victimization of politically defenseless minorities. Instead, it importantly involves the Court in the merits of the policy or ethical judgment sought to be overturned, measuring those merits against some set of 'fundamental' value judgments.

Court was best suited to protect those rights.[49] Having life tenure, the justices can be "bold against popular feelings," oppose those tempted to take impermissible shortcuts on crime control, and instead, "demand the respect and obedience of an unwilling majority" for the protective provisions of the Bill of Rights.[50]

Also associated with the concern expressed over third degree police methods and the political impotence of the criminal class was the fact that both realities coincided with the other practical disabilities of race and poverty.[51] In many important respects, therefore, the grievances of criminal defendants against the American democratic system were symbolic of the unequal treatment afforded rich and poor.[52] By the end of World War II, reformers became increasingly aware of the enormous gap existing between what they believed were rightful expectations created by the Bill of Rights and the realities that often inhibited their practical exercise.[53] They contended that representative institutions were unwilling and ill-suited to deal with this gap. Many people must have found Bill of Rights provisions "to be the sheerest of illusion and promissory deception."[54]

Id. at 15.

49. The issue of which institution is *best suited* (*see supra* note 48 and accompanying sources) to institute reforms in the twentieth century depends, for many authors, on what good results might be obtained. Any inquiry into the wisdom or morality of results, however, does not exhaust the inquiry into whether contemporary expansion of judicial power is legitimate. *See* Gangi, *supra* note 1, at 33-37. *See also* W. HURST, DEALING WITH STATUTES 99-106 (1982). The essential question, as Professor Berger makes clear, is whether we continue to be bound by the clearly discernible intentions of the Framers. *See* Gangi, *supra* note 1, at 56-57. See *infra*, note 335, for additional sources.

With regard to the relationship between which institution is best suited to make public policy decisions and results on various issues, see Brest, *supra* note 17, at 228-29; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-37 (1973); Lusky, *Public Trial and Public Right: The Missing Bottom Line*, 8 HOFSTRA L. REV. 273, 313; Nagel, *supra* note 48, at 1191-93; Perry, *supra* note 1, at 304; Wolfe, *A Theory of U.S. Constitutional History*, 43 J. POLITICS 292, 300-04 (1981).

Second, reserving judgment on the various aspects of their presentations, Professors Choper and Hurst provide valuable materials and detail regarding alleged legislative unresponsiveness. *See* Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-46 (1974); W. HURST, *supra*, at 1-29. *But see* Parker, *The Past of Constitutional Theory and Its Future*, 42 OHIO ST. L.J. 223, 239 (1981) (Courts should take a more aggressive role in establishing "care and humility" in our society.).

50. Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212, 1216 (1977).

51. A. GOLDBERG, *supra* note 42, at 3-10. *See also Report*, *supra* note 36, at 158-60.

52. A. GOLDBERG, *supra* note 42, at 9. *See* Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, CRIMINAL JUSTICE IN OUR TIME 3 (A. Howard ed. 1965).

53. *See* Gangi, *supra* note 1, at 27-28 esp. n.1.

54. A. GOLDBERG, *supra* note 42, at 26. Most often these arguments lead to the claim that the Court is best suited to act in the vacuum created by expectations, on the one hand, and legislative inaction on the other. The essential components of the vacuum point of view are discussed substantially elsewhere. *See* Gangi, *supra* note 1, at 22-26. Sources encountered sub-

As detailed elsewhere, reformers argued that it should fall upon the Supreme Court "to adapt . . . [Bill of Rights provisions to] changed circumstances, to ensure that they did not lose their meaning in a new society, to enable their continued, effective exercise in the spirit of equality, and to allow them to meet new evils and impediments that the framers did not know."[55] Hypocrisy is dangerous to any society, and the changes the Court "designed [were intended] to give practical effect to the protections afforded by the Bill of Rights and to deal with the realities of the varying situations confronting . . . [it] in the area of criminal justice."[56] In this respect, the Court "introduced an entirely new principle — a new promise — that where there is a right, that right will not remain unenforceable because of the defendant's poverty, ignorance, or lack of remedy."[57]

b. *Principles.* The exclusionary rule, as distinguished from common law rules of evidence-admissibility based on reliability, requires exclusion of any evidence illegally obtained.[58] In its simplest form, prior to trial, the accused contends that evidence to be used against him has been acquired in violation of some legal standard, e.g., search without warrant, or without probable cause. A hearing, absent the jury, is held on the issue, and resolved by the judge. If the motion is granted, the evidence is excluded.[59]

To understand the rule fully, one has to recognize that there are two

---

sequently, in the author's opinion, fail to introduce arguments not considered there. The reader, however, may wish to consult these additional materials. For those apparently supporting the position that the Court is entitled to act in the vacuum created by legislative or executive inaction, see Amsterdam, *supra* note 17, at 378-79; Brest, *supra* note 17, at 229-30, n.96; Gleicher, *The Straying of the Constitution: Raoul Berger and the Problem of Legal Continuity*, 1 CONTINUITY 99, 116 (1981); Perry, *supra* note 17, at 293; Schrock & Welsh, *supra* note 17, at 1151; *Ely's*, *supra* note 17, at 126-29; Berger, *supra* note 48, at 23-24; Holland, *supra* note 17, at 1029-31; Leedes *supra* note 48, at 1361-72; Nagel, *supra* note 49, at 1186-88; Perry, *supra* note 1, at 303-304; Rehnquist, *The Notion of a Living Constitution* 54 TEX. L. REV. 693, 695, 700 (1976).

55. A. GOLDBERG, *supra* note 42, at 20. The position that the Court is empowered to adapt the Constitution to changing circumstances is discussed elsewhere under the heading of *dead—living* arguments. *See* Gangi, *supra* note 1, at 18-22. With the exception of Professor Wolfe, *see infra* notes 170, 371 and accompanying text, the sources encountered subsequently failed to introduce any arguments not considered there. The reader, however, may wish to consult the following sources. For those tending to favor the judicial power of adaptation see Amsterdam, *supra* note 17, at 397-401; Brennan, *supra* note 17, at 495; Brest, *supra* note 17, at 225-29. Grano, *supra* note 17, at 168-69, 184-85; Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 187-89 (1979). For those generally critical, see Bork, note 17, at 14; Holland, *supra* note 17, at 1037; Leedes *supra* note 48, at 1365; Nagel, *supra* note 49, at 1178-79; Perry, *supra* note 1, at 282-84 Rehnquist, *supra* note 54, at 696-98; Sandalow, *supra* note 17, at 1165-66, 1178.

56. A. GOLDBERG, *supra* note 42, at 20-21.

57. *Id.* at 20.

58. *Cf. supra* notes 6-13 and accompanying text.

59. Omitted are those instances where "other use" may be made of illegally obtained evidence. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (evidence used for credibility purposes).

essential premises. First, the rule has nothing to do with reliability of the evidence. It may be true that evidence acquired illegally also may be of suspect reliability (e.g., coerced confessions), but on the level of principle, the rule excludes even the most reliable of evidence.[60]

For example, in an arrest of an accused for selling narcotics, should probable cause for arrest be found lacking, the narcotics seized would be inadmissible despite the fact their discovery would constitute prima facie evidence of the possession statutorily prohibited. Depending on the rationale employed, the narcotics would be excluded either because the police who committed the illegality must be (a) punished[61] or (b) deterred from engaging in such prohibited conduct in the future (by denying them the conviction);[62] (c) because it is unseemly for police to benefit from such illegality;[63] (d) because the *use* of such evidence offends specific constitutional guarantees;[64] (e) because it subverts the spirit of such provisions;[65] or (f) because it is offensive to our sense of fair play.[66]

Second, the rule does not itself define the practices prohibited, or the standard of defining such practices. Instead, the rule only defines the consequence to be invoked (i.e., exclusion) if and when the practice is found to have been illegal.[67] For example, the rule does not define the standards for probable cause, for issuance of a search warrant, or for interrogation of suspects — to mention a few. If these existing standards (however defined) are not followed, however, then exclusion is required of any evidence obtained by the breach.

c. *Rationale Development.* The change from admissibility based on reliability to exclusion based on violation of legal standards did not come easily.[68] While intending to review this development with more particularity, starting with the Supreme Court cases that gave it its beginning, what might be called the Frankfurter criterion of "progress" should be mentioned here, along with its implementation by the Warren Court, and the Burger Court's subsequent retrenchment.

(1) *Frankfurter Criterion: Progress.* Justice Frankfurter first enunciated the symbols associated with the eventual recognition of defendant rights,

---

60. M. Paulsen, Police Power And Individual Freedom: The Quest For Balance 87 (Sowle ed. 1960) [hereinafter cited as *Quest*].

61. *See infra* notes 177-203 and accompanying text.

62. *See id.*

63. *See id.*

64. *See infra* notes 248-59 and accompanying text.

65. *See infra* notes 300-50 and accompanying text.

66. *See infra* notes 245-83 and accompanying text.

67. "The rule merely states the consequences of the breach of whatever principles might be adopted to control law enforcement officers." *Quest, supra* note 60, at 87.

68. "Progress of the Law," is how one commentator described it. *See* Chafee, *supra* note 35, at 428.

including exclusion.[69] The Supreme Court, he maintained, should of course respect the states' "notion of what will best further [their] own security in the administration of criminal justice"[70] but the "history of liberty has largely been the history of observance of procedural safeguards."[71] While the Court offered the states some flexibility, it could not sanction "methods that may fairly be deemed in conflict with deeply rooted feelings of the community."[72] "Judicial supervision of the administration of criminal justice in federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."[73]

Our society in general and the Court in particular are obliged to develop safeguards which "not only . . . assur[e] protection for the innocent but also . . . secur[e] conviction of the guilty by methods that commend themselves to a progressive and self-confident society."[74] To do otherwise would be to "disregard standards that we cherish as part of our faith in the strength and well-being of a rational, civilized society."[75] Police cannot be permitted to use "authoritarian methods,"[76] and in order to "remove the inducement to resort to such methods this Court has repeatedly denied the use of the fruits of illicit methods."[77]

Frankfurter believed the use of illicit methods violated the "underlying principle in our enforcement of the criminal law."[78] In Frankfurter's words, "ours is the accusatorial as opposed to the inquisitorial system."[79] In our system, the burden of proof is on society.[80] Society must prove its case, not out of the accused's "own mouth," but by "evidence independently secured through skillful investigation."[81] Our society follows such a course, "not out of tenderness for the accused but because we have reached a certain stage of civilization."[82]

---

69. In discussions that follow no effort is made to distinguish or specifically trace the complex histories leading to the selective incorporation doctrine, whereby relevant provisions of the Bill of Rights have been applied to the states via the fourteenth amendment. For a discussion of the above see Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 FORDHAM L. REV. 215 (1975). Similarily, any detailed discussions of the coerced confession doctrine, "due process" (both procedural and substantitive), the supervisory power of the Supreme Court, and habeus corpus doctrines, to name a few of the more pertinent issues are omitted.

70. McNabb v. United States, 318 U.S. 332, 340 (1943).

71. *Id.* at 347.

72. Haley v. Ohio, 332 U.S. 596, 604 (1947).

73. McNabb v. U.S., 318 U.S. at 340.

74. *Id.* at 344.

75. Haley v. Ohio, 332 U.S. at 606.

76. Fikes v. Alabama, 352 U.S. 191, 199 (1957) (Frankfurter, J., concurring).

77. Haley v. Ohio, 332 U.S. 596 at 607.

78. Watts v. Indiana, 338 U.S. 49, 54 (1949).

79. *Id.*

80. *Id.*

81. *Id.*

82. Stein v. New York, 346 U.S. 155, 200 (1953) (Frankfurter, J., dissenting).

States have primary responsibility for protecting their citizens from crime, but the adoption of the fourteenth amendment, contended Frankfurter, "severely" restricted their administration of justice.[83] There could be "no escape," therefore, from the Court's duty to review state criminal procedures.[84] We have learned that "coercive police methods . . . tend to brutalize habits of feeling and action on the part of police, thereby adversely affecting the moral tone of the community."[85] Should the Court not do its duty by failing to condemn illicit practices, it would be a "retrogressive step in the administration of criminal justice."[86]

(2) *The Warren Court: Implementation.* Beginning in 1960, "the evolving standards of decency that mark the progress of a maturing society" took on a specificity not previously known.[87] Provisions of the Bill of Rights were made applicable to the states. According to Chief Justice Warren: "As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence."[88]

The Court, noted Warren, was often "forced to resolve a conflict" between society's needs for effective law enforcement and "the right of its individual members from being abridged by unconstitutional methods of law enforcement."[89] Society's needs, however, must be long-ranged and look beyond particular defendants. There are "deep-rooted feelings that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals, as from the actual criminals themselves."[90] Moreover, the Court could not "escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated."[91]

It was argued that the power of judicial review was entrusted to the Supreme Court by the Framers in order to keep the Bill of Rights meaningful in ever-changing circumstances.[92] "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused" to exercise his

---

83. Watts v. Indiana, 338 U.S. at 50.

84. *Id.*

85. Stein v. New York, 346 U.S. at 199-200.

86. *Id.* at 201.

87. Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., delivered the opinion of the Court). For an excellent summary of this period see EDITORS, THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH 1960-1970 (1972) [hereinafter cited as *Criminal*].

88. Blackburn v. Alabama, 361 U.S. 199, 206 (1959) (Warren, C.J., delivered the opinion of the Court).

89. Spano v. New York, 360 U.S. 315, 315 (1959) (Warren, C.J., delivered the opinion of the Court).

90. *Id.* at 320-21.

91. Haynes v. Washington, 373 U.S. 503, 515 (1963) (Goldberg, J., delivered the opinion of the Court).

92. *See supra* note 55 and accompanying text.

rights.[93] Indeed, elsewhere the Chief Justice added, "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal laws."[94] The Court, in performing its duty, could not ignore history.

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable than a system which depends on extrinsic evidence independently secured through skillful investigation. . . .
>
> We have also learned the companion lesson of history that no system of criminal justice can, or should survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to . . . [exercise his rights], he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[95]

As one commentator concluded of the Warren Court years, "[w]e have emerging a concept that the accusatorial system must be enforced . . . because the *nature* of a free society demands it and because anything less jeopardizes that society itself."[96] In this manner, exclusionary supporters argued that the Warren Court brought to fruition and made pertinent the Bill of Rights as envisioned by the Founding Fathers. That Court, they insisted, was true to the ideals of liberty and equality at the core of the American political tradition.[97]

In sum, the Warren Court legacy consists of four components. First, the Court elevated the rights of criminal defendants, giving them practical effect. Second, the Court transcended particular convictions and instead focused on being true to the long-ranged ideals of our society — those expressed in the Bill of Rights. The Warren Court fleshed out the demands of the accusatorial system[98] by creating the "Due Process Model."[99] Guilt no longer meant the determination of whether the accused in fact committed the crime charged. Instead, "legal guilt" now included the question of

---

93. Escobedo v. Illinois, 378 U.S. 478, 488 (1964) (Goldberg, J., delivered the opinion of the Court).

94. Miranda v. Arizona, 384 U.S. 436, 480 (1960) (Warren, C.J., delivered the opinion of the Court) (quoting Schaefer, *Federalism and State Criminal Procedures*, 70 HARV. L. REV. 29 (1956).

95. Escobedo v. Illinois, 378 U.S. at 488-90.

96. Note, *Escobedo in the Courts*, 19 RUTGERS L. REV. 111, 137 (1965) (emphasis added) [hereinafter cited as *Escobedo*].

97. For discussion on the dispute over individual rights, see generally, Gangi, *supra* note 1, at 39-43. For additional sources, see *supra* notes 17 and 364.

98. Watts v. Indiana, 338 U.S. 49, 54 (1949).

99. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 16 (1964).

whether the factual determination was made "in procedurally regular fashion and by authorities acting within competences allocated to them."[100] The "legal innocence" doctrine guaranteed the propriety of procedures followed from arrest to conviction. The "integrity of the process" became inseparable from the factual determination of the crime charged.[101] Third, to assure that the rights claimed could be meaningfully exercised, the Court consistently excluded evidence acquired by their violation.[102] Finally, the Court vigorously pursued the rights model logically, by insisting on more rigorous use of required procedures (e.g., warrants), tightening standards governing police discretion (e.g., probable cause, search) and establishing standards intended to prevent police from circumventing defendant "rights" (e.g., Miranda warnings).[103]

(3) *The Burger Court: Retrenchment.* From the perspective of its supporters, the Warren Court made enormous strides in bringing life to moribund constitutional commands. These supporters contend, however, that the "Court Retreat[ed]" under the leadership of Chief Justice Burger.[104]

With the Burger Court, critics asserted, came "a preoccupation with accurate results in individual cases, and a disregard of procedures that protect the integrity of the process in ways unrelated to factfinding."[105] The Court "no longer [is] a bold, innovative institution and has abandoned . . . the role of keeper of the nation's conscience."[106] Despite popular conceptions to the contrary, critics asserted, it is not a conservative, passive institution under the "Nixon" majority.[107] In fact, the "Burger Court is an activist court. It asserts its power as aggressively as did the Warren Court; it simply has different goals in mind."[108] For example, "the Burger Court has chosen to disregard legal guilt . . . as the dominant focus for the resolution of issues of criminal procedure."[109] It "has refused to go forward, and indeed has retreated."[110] A "new federalism" is developing, these critics contend, in which several states have evaded the Burger Court retrenchment and instead have continued the Warren legacy by interpreting state constitutional provisions accordingly.[111]

---

100. *Id.* at 16.
101. *Id.* at 16-17.
102. *See e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1965).
103. *See, generally* Chase, *supra* note 17.
104. *See* W. LOCKHART, Y. KAMISAR, & J. CHOPER, CONSTITUTIONAL LAW: CASES— COMMENTS—QUESTIONS 685 (4th ed. 1975).
105. Chase, *supra* note 17, at 519.
106. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).
107. *Id.* at 424-25.
108. *Id.*
109. Chase, *supra* note 17, at 519.
110. *Id.* at 595.
111. See, e.g., Wilkes, *supra* note 106.

3. *Summary: Current Rationale Conflict*

Burger Court critics contend that at every opportunity the Court has failed to maintain and or strengthen the exclusionary rule, and instead has concentrated on seriously undermining it.[112] The Burger Court apparently defends itself by contending that early rule proponents urged imposition on the grounds that other means of deterring police misconduct had failed.[113] Deterrence, therefore, evidently had been the reason for the rule's adoption. More recent evidence, however, indicates that in fact, under certain circumstances the rule is ineffective in achieving that purpose. Accordingly, when it is found that it is unlikely that deterrence will occur, or other important values are threatened, no useful purpose is served by expanding the rule's application. The rule "in sum . . . is a judicially created remedy . . . rather than a personal constitutional right of the party aggrieved."[114] Accordingly, under the Burger Court, the exclusionary rule no longer enjoys the constitutional stature it apparently had enjoyed in the *Weeks v. United States*[115] or *Mapp v. Ohio*[116] decisions. The rule is only a "judicially created remedy," and as such, various suggestions have been made to modify, if not substitute for it altogether.[117]

In the wake of the Burger "Counter-Revolution" has come the most fully explicated constitutional rationale defending the exclusionary rule.[118] Supporters currently argue that while the rule may be relatively recent and not explicitly mentioned in the Bill of Rights, it is nevertheless to be found in the Constitution.[119] Deterrence, furthermore, was not the most important reason for the rule's imposition. Instead, the rule is a personal, constitutionally mandated right. As such, fidelity to the United States' primary instrument of governance (the Constitution) requires adherence. In this context, the exclusionary rule is identified with judicial review: the primary constitu-

---

112. *See generally* United States v. Calandra, 414 U.S. 338 (1974); Harris v. New York, 401 U.S. 222 (1971); Chase, *supra* note 17; Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

113. *See generally supra* note 35, *infra* notes 229, 251 and accompanying text.

114. United States v. Calandra, 414 U.S. 338, 348 (1974).

115. 232 U.S. 383 (1914).

116. 367 U.S. 643 (1961).

117. *See, e.g.*, Gangi, *Confessions: Historical Perspective and a Proposal*, 10 HOUS. L. REV. 1087, 1104 (1973); *See also infra* note 198 and accompanying text. This article does not consider various proposals to modify the exclusionary rule, nor seeks to offer alternatives to the rule.

118. *See generally* Amsterdam, *supra* note 17, at 490-39; Bennett, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973); Chase, *supra* note 17 at 563-574; Kamisar, *supra* note 3, at 81-84; Schrock & Welsh, *supra* note 35, at 252-62, 302, 333; *Note, Herdon v. Ithaca—Application of the Exclusionary Rule in Civil Proceedings*, 39 ALB. L. REV. 131, 142-45 (1974).

119. *E.g.*, Miranda v. Arizona, 384 U.S. at 479.

tional fidelity.[120] The Court, it is further alleged, cannot compromise in applying the rule's precepts since it has a duty to uphold the Constitution. For the rule to be a truly principled expression of our societal values, it must be applied totally, automatically, and, above all, with logical consistency.[121] While it may be possible to develop additional remedies for police misconduct, the constitutional exclusionary command cannot be abandoned. The rule's possible effectiveness as a deterrent to police misconduct[122] is a beneficial side effect, not to be confused with its constitutional necessity.

B. *Phase I: The Early Debate*

The concern of this article is with the contemporary status of the exclusionary rule debate. Much has already been said about its nature and development; but before elaborating on its contemporary status, it is first necessary to lay out clearly what appears to have been the critical turns in its earliest phase.

1. *The Historical Debate*

a. *Four Primary Precedents.* Exclusionary rule proponents trace their ancestry primarily to four cases. In *Boyd v. United States*,[123] the Court, predicting an intimate relationship between the fourth and fifth amendments, excluded certain evidence from the trial of that defendant.[124] State courts subsequently rejected that relationship as historically unfounded, and for all "practical purposes," so did federal courts.[125] Nevertheless, one aspect of the *Boyd* opinion persisted: "the doctrine that a search and seizure unlawful under the Fourth Amendment renders inadmissible any document or chattel

---

120. *See generally* Kamisar, *supra* note 3, at 78-83; Schrock & Welsh, *supra* note 10, at 251-54, 325; Sevilla, *supra* note 35, at 844. The entire rationale will be subsequently subject to a more detailed exposition.

121. *See generally* Coe, *supra* note 35, at 42; Dershowitz and Ely, *supra* note 112, at 1214-15, 1221-27; Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. Rev. 32, 32-33 (1967); Schrock & Welsh, *supra* note 35, at 273-81, 302-09, 312-19, 335-39; Note, *supra* note 118, at 139, 141; Comment, *Criminal Procedure—Exclusionary Rule—Brown v. Illinois, Miranda Warnings Do Not Per Se Attenuate the Taint of an Illegal Arrest*, 7 Loy. U. Chi. L.J. 227, 250-51 (1976) [hereinafter cited as *Procedure*].

122. Shrock & Welsh, *supra* note 35, at 333; Kamisar, *supra* note 3, at 81-84.

123. 116 U.S. 616 (1885).

124. *Id.* at 633-34.

125. H. Wigmore, *supra* note 9, § 2264, at 368-70. According to Professor Wigmore, the fifth amendment privilege was at least partially applicable but irrelevant once the evidence, however acquired, came in possession of the court. *Id.* at 363-71. The circumstances in Boyd v. United States, 116 U.S. 616 (1885) are admittedly unique. The defendant in *Boyd* was ordered to produce the incriminating evidence in a "judicial" proceeding. *Id.* at 618. Under the applicable statute, failure to produce would be taken per se as equal to a confession of guilt. *Id.* at 620. In other words, Boyd was damned if he did, and damned if he didn't. H. Wigmore, *supra* note 8, § 2264 at 367 n.4. *See also*, Schrock & Welsh, *supra* note 35, at 282-85.

thus illegally obtained."[126]

With the decision in *Weeks v. United States*,[127] the exclusionary rule took firm root in federal courts. *Weeks* decided that if evidence illegally seized could be held and subsequently introduced at trial, a constitutional right (against unreasonable search and seizure) would be put at naught.[128] The Supreme Court held, in effect, that in federal courts the use of illegally obtained evidence constituted prejudicial error and invoked the exclusionary sanction in order to protect the rights of innocent victims.[129]

In *Wolf v. Colorado*,[130] the issue was whether the due process clause of the fourteenth amendment required the states to adopt the exclusionary rule.[131] In the opinion of the Court, Justice Frankfurter apparently announced two propositions. First, individual immunities against arbitrary intrusion and unreasonable search and seizure by the police is a right "basic to a free society."[132] As such, this right is therefore implicit in "the concept of ordered liberty" and is enforceable against the states through the Due Process Clause.[133] Second, the exclusion of illegally seized evidence is merely one method left to the states to deter unreasonable searches, and it is not for this court to judge methods equally as effective.[134]

In 1961, however, the Court in *Mapp v. Ohio*[135] reversed itself, holding the exclusionary rule to be constitutionally required by the Due Process Clause of the Fourteenth Amendment.[136]

---

126. H. WIGMORE, *supra* note 9, § 2264 at 372. *See also id.* § 2184 at 30-40. Reference is made occasionally to the declarations of Pitt and Otis, as well as other English precedents. Upon cursory examination, however, the suggested relevancy seems considerably less than that implied, if the words and actions are placed in their historical context. *See supra* note 30. *See generally* H. WIGMORE, *supra* note 9, § 2264 at 368-69; Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 48, 70-72. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952-53 (1965); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 374-76 (1938).

127. 232 U.S. 383 (1914). *Weeks* was followed by such decisions as Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Burdeau v. McDowell, 256 U.S. 465 (1921) and Gambino v. United States, 275 U.S. 310 (1927). These decisions limited application of the rule to public officials, and established what became known as the "fruit of the poisonous tree doctrine." *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963).

128. Weeks v. United States, 232 U.S. at 393.

129. *See generally id.* at 398. Any protection afforded the "innocent" by the exclusionary rule of necessity would be proscriptive since the rule cannot prevent the illegality which already occurred. *See* Plumb, *supra* note 126, at 375-76.

130. 338 U.S. 25 (1949).

131. *Id. See also* Allen, *The Wolf Case: Search and Seizure, Federalism and Civil Liberties*, 45 ILL. L. REV. 1, 1-3 (1950). *See also Quest*, *supra* note 48, at 77, 87; Taft, *Protecting the Public from Mapp v. Ohio Without Amending the Constitution*, 50 A.B.A. J. 818 (1964).

132. Wolf v. Colorado, 338 U.S. at 27-28.

133. *Id.* at 31. *See also Quest*, *supra* note 48, at 84.

134. Wolf v. Colorado, 338 U.S. at 28.

135. 367 U.S. 643 (1960).

136. *Id.* at 657.

b. *Competing Assessments.* Thus, one finds exclusionary proponents reaching as far back as 1896 to support their view that adequate and consistent precedents exist upon which to base the rule's constitutional status.[137] The imposition of the rule on the States in *Mapp*, proponents argued, had occurred only after other remedies for police abuse had failed or proved ineffective.[138] The imposition of the rule, moreover, characterizes our society as progressive, civilized, and responsive to injustices.[139]

Opponents of the rule strenuously objected. They contend that the rule differs radically from common law practice where illegal evidence procurement would be punished, if at all, outside the context of the trial.[140] Furthermore, until 1960, these opponents argue that illegally obtained but reliable evidence was admitted with such exceptions as deemed fitting by the citizens of the several states under common and statutory law, reversible judicial opinions, or state constitutional provisions.[141] Between 1915 and 1961, some states specifically adopted exclusion, others rejected it, while many apparently accepted it with modifications.[142] In sum, opponents contend that departure from common law proscriptions, as well as the recent vintage of its imposition on the states, casts doubt upon elevating the exclusionary rule to constitutional proportions.[143]

c. *Reasons for Putting Historical Debate Aside.* Resolution of these competing historical claims is relevant, even perhaps crucial, to a judgment on the exclusionary rule's constitutionality. For several reasons, however,

---

137. *See, e.g.*, Weinstein, *supra* note 29, at 152-62; Wilkes, *A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth*, 32 WASH. & LEE L. REV. 881, 884-93 (1975). Similarily in *Mapp*, the majority ultimately rested imposition of the rule upon the states on the ground that it is a constitutional command. Mapp v. Ohio, 367 U.S. at 660.

138. *See supra* note 35 and *infra* note 251.

139. *See generally supra* notes 35, 69-86 and accompanying text. The rationale will be explored in more detail subsequently.

140. *See supra* note 10 and accompanying text.

141. W. HURST, *supra* note 49, at 70-71. Judicial law making not based on constitutionalized intentions is reversible by ordinary legislation. For example, referring to the case of People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955) one commentator notes that "the California Supreme Court did not decide the [imposition of the exclusionary rule] on a constitutional basis. Rather, it held the exclusionary rule to be a 'judicially declared rule of evidence.' " COX, *supra* note 35, at 78. Similarly, on the federal level, supervisory powers over lower federal courts would be subject to Congressional alteration, an exercise of "Regulations." U.S. CONST. art. III, § 2. Furthermore, a federal supervisory power over lower state courts is highly suspect. *See* McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L. CRIMINOLOGY & POL. SCI. 266, 268 (1961) [hereinafter cited as *McGarr*]; Burns, *Mapp v. Ohio: An All American Mistake*, XIX DE PAUL L. REV. 80, 81-82 (1969). *See generally* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUMB. L. REV. 181 (1969).

142. Paulsen, *supra* note 35, at 264.

143. *See* Friendly, *supra* note 126, at 953-54; Hofstadter and Levittan, *Lest the Constable Blunder: A Remedial Proposal*, 20 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 629, 631-33 (1965); *McGarr*, *supra* note 141, at 267.

these historical arguments will be temporarily put aside.

First, while approaching the threshold,[144] scholars have not reached a consensus on the proper criteria to use when studying historical materials. This issue requires some explication.[145] To begin with, research does not recreate history. As with all history, some facts are always more pertinent than others. Moreover, economists for example, approach historical materials differently than theologians. Each discipline has criteria intended to discern relevance. Different subjects require different methods of inquiry.[146] The materials studied can be misconstrued if the criterion initially employed is later found defective. Experience indicates it is far more likely than not that in the course of investigation scholars make mistakes e.g., wrong assumptions.[147] Take for example the scholar who assumes history has been evolving in a predictable direction: the increasing actualization, dissemination and expansion of personal liberty.[148] In 1948 our scholar decides to study free speech in the United States during the Revolutionary War period.[149]

Since our scholar in 1948 brings to his study knowledge of the events occurring between the revolutionary period and his own time, that knowledge might affect which revolutionary period "facts" he considers pertinent. More specifically, his assumptions regarding the progress of liberty could lead to his interpreting events during the revolutionary period to be

---

144. *See generally* Perry, *supra* note 1, at 263-97; *Non Interpretive supra* note 17, at 327-41; R. Berger, Government By Judiciary 363-72 (1977); W. Hurst, *supra* note 49, at 32-40, 56-65.

145. Historical research is a fragile tool, fraught with the possibility of intentional or unintentional abuse. Intentional abuse, disregarded here, is fraud of either misdemeanor or felonious proportions. It is the danger of *unintentional* abuse that is addressed here. *Cf.* Gangi, *supra* note 1, at 60 n.464. *See also* E. Voeglin, New Science Of Politics 3-49 (1952) [hereinafter cited as *New Science*].

146. *New Science*, *supra* note 145, at 4-6. Professor Voeglin adds: "even Aristotle had to remind certain pests of his time that an 'educated man' will not expect exactness of the mathematical type in a treatise on politics." *Id.* at 5.

147. L. Strauss, Natural Right And History 20 (1952).

148. *Compare* Shattuck, *supra* note 17, at 366, with Perry, *supra* note 1, at 289. Professor Tuevson notes: " 'The real history of the idea of progress,' it has been remarked, 'is not written yet.' The reason is not hard to find. Historians who have written on the subject have themselves been so deeply permeated by the progressivist faith that they could hardly view it objectively." E. Tuveson, Millennium And Utopia 2 (1964). According to Professor Bickel:

> The Justices of the Warren Court thus ventured to identify a goal. It was necessarily a grand one—if we had to give it a single name, that name. . . . would be the Egalitarian Society. And the Justices steered by this goal . . . in the belief that progress, called history, would validate their course, and that another generation, remembering its own future, would imagine them favorably. . . . On such a faith . . . was built the Heavenly City of the Twentieth-Century Justices.

A. Bickel, The Supreme Court and the Idea of Progress 13-14 (1970). *See also* Ely, *supra* note 49, at 946; Linde, *supra* note 48, at 230; Sandalow, *supra* note 17, at 1168, 1181; Ely, *supra* note 17, at 52-54; Gangi, *supra* note 25, at 257-60.

149. Z. Chafee, Free Speech in the United States 21 (1948).

foreshadowings of later events — events which the author knows occurred prior to the time of his writing. In short, such a scholar may subconsciously connect events in order to demonstrate continuity and the progress assumed. Certain events during the revolutionary period become seeds of liberty intended to grow into what is or should be the public posture (a progressive curve is assumed) in 1948.[150] The possibility that assumptions will affect the selection and interpretation of facts is compounded when the words used — e.g., free speech — are the same in both periods. In short, words or events are not self-interpreting, and one may require further information to help determine what was intended when those words were employed.[151]

Therefore, in order for historical studies to be considered acceptable today at least four criteria should be employed: (1) the author of the work in question must attempt to understand the "values" ennunciated by the historical figures as they themselves understood them;[152] (2) opinion (perception of principles) which developed only after the period studied must be exorcised from any purported reconstruction;[153] (3) an author must attempt to demonstrate concretely, and experientally, what was meant by the opinions expressed;[154] (4) should different perceptions exist regarding what opinions were held during the period studied, the author must attempt to determine the relative extent of adherence to the different opinions.[155]

Thus, regarding our earlier example, it is generally recognized today that when "free speech" was used by those framing the first amendment, they did not intend thereby to supercede the common law doctrine of seditious libel.[156] This is just one example of why the above criteria are important.

Should it be demonstrated that scholars fail to adhere to the minimum criteria described above, their conclusions become suspect and it is necessary to once again examine the original materials, hopefully with a less prejudiced eye. In many respects, this article attempts such a reexamination of the assumptions regarding the contemporary role of the Court in general,

---

150. *See* L. LEVY, *supra* note 21, at 1.

151. W. HURST, *supra* note 49, at 32-40. For a more thorough discussion, see Gangi, *supra* note 25, at 285-87.

152. Professor Strauss put forth the principle:

> Our most urgent need can then be satisfied only by means of historical studies which would enable us to understand classical philosophy exactly as it understood itself, and not in the way in which it presents itself on the basis of historicism. We need, in the first place, a nonhistoricist understanding of nonhistoricist philosophy.

L. STRAUSS, *supra* note 147, at 33.

153. *See* Gangi, *supra* note 1, at 55-56 (discussing Professor Raoul Berger on the content of the fourteenth amendment.)

154. *See generally* L. LEVY, *supra* note 21 at 1-5.

155. *See, e.g.*, R. BERGER, *supra* note 144, at 419-22.

156. *Compare supra* notes 149-50 and accompanying text, *with* L. LEVY, *supra* note 21 at ix, 213-14.

and the constitutional status of the exclusionary rule in particular.

The second reason for setting aside the competing historical claims has to do with the realization that any serious probing of those claims reveals the infusion of other issues. Self-incrimination and coerced confessions for example, have already been noted.[157] The following also may be added: (1) failure of other remedies to deter police lawlessness;[158] (2) the necessity of providing a "meaningful" remedy for violated personal rights;[159] (3) the ethical correctness of the rule;[160] (4) protection of judicial integrity;[161] (5) preservation of a fair trial;[162] (6) encouragement of police efficiency;[163] (7) preservation of "justice;"[164] (8) protection of group values and maintenance of the doctrine of legal innocence.[165] In short, the historical debate often disguises these additional considerations. The above considerations will be addressed directly in Phase II of the exclusionary controversy.

Third, the competing historical claims make evident the existence of different criteria of relevance. For example, it is apparently assumed by exclusionary proponents that history is viewed as being a tale of progress, expressed in such terms as advancing stages of civilization, growth of individual rights or moral evolution.[166] From the perspective of such believers, common law precedent appears preoccupied with reliability (factual guilt) in

---

157. *See supra* notes 10, 125 and accompanying text.

158. *See supra* note 35 and accompanying text.

159. *See Kamisar, supra* note 34, at 344-50. The issue of a meaningful remedy does *not* automatically result in an exclusionary answer. Instead, it raises the following questions: (a) What do we mean by a right? (b) How do we know when we have one? (c) Is there a right to a meaningful remedy? (d) How do we propose an answer to (c)? (e) Which institution, if any, was authorized to decide if a remedy provided is "meaningful?" (f) Who must be convinced that the remedy provided, is truly a remedy, or to put it another way, who must be convinced that the remedy provided is "meaningful?" (g) Finally, how do we distinguish rights and remedies once offered by the courts, but now discarded, from those the courts now tell us exist.

160. *See infra* notes 246-59 and accompanying text.

161. *See infra* notes 295-306 and accompanying text.

162. *See, e.g.*, Snyder, *Justice at the Expense of Truth: A Comment on the Opinion in Rogers v. Richmond*, 10 U. KAN. L. REV. 425, 425-28 (1962).

163. Exclusionary proponents usually argue that police efficiency improves when, denied the ease of building their case through the use of intimidating interrogation tactics, police are prompted to search for other evidence, independently secured, through skillful investigation. *See, e.g., supra* note 95 and accompanying text; Case Note, *Failure to Give Warning of Constitutional Rights Prior to Police Interrogation Violates Fifth Amendment Privilege Against Self-Incrimination*, 1966 UTAH L. REV. 687, 695; Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 577-79, 587-88 (1955). *But see* Gangi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases*, 28 ARK. L. REV. 45-47 (1974).

164. *See generally* Kamisar, *supra* note 52; Note, *Exclusionary Rule Under Attack*, 4 U. BALT. L. REV. 89, 122-23 (1974) [hereinafter cited as *Attack*].

165. *See supra* notes 98-103 and accompanying text. *See also infra* notes 411-16 and accompanying text.

166. *Compare supra* notes 68-97 and accompanying text *with* A. BICKEL, *supra* note 148, at 11-13; G. GILMORE, THE AGES OF AMERICAN LAW 99-100 (1977).

particular cases, instead of the more advanced view of protecting the integrity of the process through the Due Process Model. Once these progressivist assumptions take hold, the emphasis falls on an heretofore non-existent criminal justice system: a future paradigm. Public policy options are accordingly limited to those perceived as moving in conformity with the assumed desirable product of the evolutionary process.[167] Progressivist assumptions also taint precedents, frequently leading to interpretations quite different from those which their historical context supports.[168] Furthermore, these assumptions begin to spill over onto traditional canons of construction. As Professor Wolfe demonstrates, there is a correlation between progressivist assumptions and abandonment of traditional canons.[169]

Finally, progressivist assumptions have a powerful effect on the question of whether the Constitution is to remain a viable document, one adaptable to changing economic, social, political and moral circumstances. An affirmative response does not thereby resolve such issues as what branch did the Framers charge with the task of adaptation, or how were such changes to be decided, or, regarding the former questions, are we still bound to proceed in the same fashion as dictated by the Framers two hundred years ago? Thus, progressivist assumptions affect one's attitude toward history and canons of construction, which in turn leads to a disposition to see the Constitution, at least in part, as an open-ended document.[170] These issues are only dimly perceived in the debate over the historical origins of the exclusionary rule. Other commentators have already clearly formulated the eventual question of whether the judiciary may legitimately assume the function of primary public policy-maker.[171]

---

167. *See* Chase, *supra* note 17, at 519; Packer, *supra* note 99, at 13-18. See also Professor Horowitz's comment with respect to Judge Pound: "The principle argument [made by Pound] is that there is some sort of inevitable and necessary unfolding of different stages of legal ideas." Horowitz, *Review Essays, The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEG. HIST. 275, 279 (1973). Horowitz then reviewed Pound's stages: (a) Archaic; (b) Strict Law; and (c) Liberalization. *Id.* Horowitz then observes: "The watchword of this stage is morality or some phase of ethical import, such as good conscience . . . or natural law. . . . Never are we told why the second stage becomes the third, or, indeed, which social forces gain and which lose by this transition." *Id.* at 279.

168. *Compare* Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting) *with* Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981), *and* Everson v. Board of Education, 330 U.S. 1 (1947), *with* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 102-33 (1982).

169. Professor Wolfe comments: "The distinctive aspect of modern discussion of rules of interpretation is . . . that they hardly exist." Wolfe, *supra* note 49, at 305. *See generally* Wolfe, *supra* note 49, at 297-99, 304-07; Gangi, *supra* note 1, at 5-10, 55-56; W. HURST, *supra* note 49, at 56-65.

170. A systematic presentation and assessment of such questions is beyond the scope of the present article. *See* Gangi, *supra* note 25, at 257-64, 268-73.

171. *See generally* R. BERGER, *supra* note 144, at 373-96; *Non Interpretive*, *supra* note 17, at 281; W. HURST, *supra* 49, at 67-69, 99-106. For example, what really prevents Congress or

In short, concealed under the historical debate debris is the question of what role the Supreme Court may legitimately play in contemporary American government. The contention thus presented is that if the Supreme Court imposes the exclusionary rule on no other basis than a majority's belief in its beneficence as public policy, then, like its laissez-faire predecessors, the Court arbitrarily cuts off and inhibits deliberation by representative institutions.[172]

d. *Summary.* The historical debate can be put aside because: (1) there is insufficient consensus regarding how to pursue historical research; (2) the debate is intimately related to other issues best pursued directly or elsewhere; and (3) progressivist assumptions prompt examination of the judicial role which emerges clearly only in Phase II of the exclusionary debate. Putting the historical debate aside, however, does not imply that history is irrelevant. On the contrary, historical evidence is not only relevant, but it is crucial for establishing that, for whatever it may be, the exclusionary rule is not now, nor could it have ever been, a personal constitutional right. Under the criteria of historical research suggested above, a good case, even a definitive one, can be made for rejecting the position that the exclusionary rule can have constitutional status. More precisely, while it may be impossible to conclusively discern the Framers' fourth amendment intentions in every respect, surely exclusion of reliable evidence was never envisioned.

To understand both the nature and content of personal rights as they were understood by those who framed and lived them, it becomes obvious that exclusion of otherwise reliable evidence, because of illegality in acquisition, could not be traced to any intention of the Framers. The common law, along with statutory law passed pursuant and subsequent to adoption of the Constitution, and state laws, are themselves monuments to that conclusion.[173] By the same token, contemporary standards of privacy read retroactively into the Framers' fourth amendment intentions as providing a constitutional basis for exclusion, would prove unsustainable.[174] Examination of

---

even the Court from "adapting" the Constitution to modern times by substituting a four for a two year term for representatives? *See* Gangi, *supra* note 1, at 25 n.213. To put the adaptability issue in Professor Bridwell's terms: "[O]ne of our most outstanding modern rhetorical questions [is] '[m]ay we thrust aside the dead hand of Earl Warren?' " Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule*, 31 S.C.L. REV. 617, 643-44 n.114 (1980).

172. *See* Gangi, *supra* note 1, at 54. Professor Mendelson describes that unique judicial experiment in government called "Warren Court activism" as containing opinions that grew "more and more devious, sloganistic and directed to the human thirst for fairy tales . . . [the] purpose [being] to obscure (for lesser minds) a raw exercise of judicial fiat." Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437, 440-443 (1979). For a brief survey of periods of activism on the Supreme Court, see Mendelson, *Separation, Politics and Judicial Activism*, 52 IND. L.J. 313 (1977).

173. *See supra* notes 6-26 and accompanying text.

174. The point is simply that "privacy" is not an explicit constitutional command. Furthermore, the fourth amendment certainly did not prohibit all searches, only "unreasonable"

historical materials would reveal that whatever rights were intended to be protected by the Framers in the fourth amendment, legislative delineation and oversight would be more consistent with that evidence and our constitutional scheme than judicial imposition.

In response to the above, a contemporary exclusionary supporter would respond: So what? We are not talking about what the Constitution meant two hundred years ago, but today, under circumstances the Founding Fathers could never have anticipated. As Professor Miller has put it: "The Founding Fathers have been buried. They should not rule us from their graves."[175] Therefore, it is asserted that until the progressivist assumptions underlying such an attitude are identified, appreciated and challenged as such, there is no realistic prospect that they will be rejected. Indeed, the fruits of even the most impeccable historical research pursued would be largely ignored, as have been other historiographical materials. Thus, it seems more fitting and practical that a theoretical case for use of proper criteria of relevance be enunciated first, after which an adequate critique of assumptions currently dominating the legal literature would be more effective.[176]

2. *The Deterrence Debate*

a. *The Rationale.* Evidence exclusion obviously does not prevent an already occurred illegality. The door has already been broken, the privacy invaded and the evidence seized. In the early exposition of the exclusionary rationale, however, there is much to suggest that implementation of the rule was urged to deter (i.e., discourage, make too costly by jeopardizing convic-

---

ones, and the rule never contemplated exclusion of reliable evidence, however it was acquired. The states, before the decision in Mapp v. Ohio, 367 U.S. 643 (1961), had been free to adopt, reject, or modify the rule. Accordingly, Professor Allen attacks this issue from another vantage point:

> Analysis of recent Supreme Court opinions has led some to the conclusion that the value recognized as of primary importance in these cases is not a 'right of privacy'. It is rather what might be called a privilege against conviction by unlawfully obtained evidence. Whatever may be said for the exclusionary rule as a deterrent to invasions of privacy, there can be little doubt that the consequence of administering the rule is to create a 'privilege against conviction' by 'unconstitutional evidence'.

Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, SUP. CT. REV. 7, 35 (1961).

175. Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrines of Separation of Powers*. 27 ARK. L. REV. 583, 601 (1963).

176. With respect to historical material see *supra* sources accompanying note 138; R. BERGER, *supra* note 144, at 52-68, 177-56; W. KENDALL & G. CAREY, *supra* note 18, at 9-11; Perry, *supra* note 1, at 266-75, 284-97. With specific respect to assumptions dominating the legal literature, see Bridwell, *The Federal Judiciary: America's Recently Liberated Minority*, 30 S.C.L. REV. 461, 472-74 (1979).

tions) future police violations.[177] If convictions were lost, police would refrain from engaging in such conduct in the future. The exclusionary rule provided a judicially implied remedy where no other practical legislative or administrative remedy would have proven effective.[178] The rule was the means by which the Court could, in effect, police the police.[179] As a practical proposition, the deterrent effect of the rule was recognized early on as "an act of faith, because we do not have impressive factual proof to make a clear certain demonstration."[180]

b. *Opposition Reasoning and Tactics.* Rule opponents eventually seized upon this admission and before long challenged imposition of the rule on the practical grounds that "the rule does not work."[181] They tried to identify the rule's viability with its factual ability to deter police misconduct,[182] and sought to demonstrate that the rule failed to live up to its billing. They claimed, first, that the sanction (exclusion of evidence) fell most directly on prosecutors, not police.[183] Police, therefore, often were not deterred.[184] Second, the rule assumed that convictions are of paramount importance to line officers, whereas in fact they often are concerned only with "arrests and case clearances."[185] Oftentimes the purpose of the police is to seize (narcotics, weapons), or harass (prostitution, gambling), and conviction (going to trial) many times is not contemplated. Loss of convictions, therefore, would not and could not deter such police practices.[186]

Opponents attempted to demonstrate further, that rigorous exclusionary assumptions treated all crimes and all violations equally. The rule, they asserted, hunted a mosquito with an elephant gun. It failed to distinguish the effects of the rule on different kinds of crime (narcotics versus murder), the varied effect the rule had on police conduct, and the profoundly different effect of different crimes upon the population.[187] Opponents therefore argued that: (1) Certain crimes should be put outside the scope of the rule because not doing so is too costly for society; (2) the rule made no distinction between corrupt policemen and those merely overzealous; or (3) be-

---

177. *See, e.g.*, *Attack*, *supra* note 164, at 103.

178. *See* Elkins v. United States, 364 U.S. 206, 220-21 (1965).

179. *Id.* at 217-19. *See, e.g.*, Amsterdam, *supra* note 17, at 431-34; Finzen, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 U. KAN. L. REV. 768, 770-71 (1972).

180. Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 74 (1958).

181. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitious Conclusion*, 62 KY. L.J. 681, 684 (1974).

182. Oaks, *supra* note 35, at 665, 671.

183. *Id.* at 726.

184. *Procedure*, *supra* note 121, at 238-39. *See also* Burger, *Who Will Watch the Watchman?* 15 AM. U.L. REV. 1, 11 (1964).

185. Wingo, *supra* note 35, at 576.

186. *Procedure*, *supra* note 121, at 239-40.

187. *See supra* notes 41-50 and accompanying text.

tween a mistaken snap judgment on the part of an individual officer and a premeditated police policy of systematic violations; and finally; (4) implementation of the rule resulted in the escape of guilty defendants.[188] Having lost the legal argument over application of the rule to the states in 1961,[189] rule opponents apparently concentrated on challenging the rule's ability to deter and thereby sought to limit its application.

The Burger Court, as previously noted, did not take long to elevate deterrence from a prime to the sole justification for the rule's existence.[190] "In sum, the rule is a judicially created remedy . . . rather than a personal constitutional right of the party aggrieved."[191] Having selected deterrence as the *raison d'etre*, when defendants petitioned to extend the rule's application, the Burger Court often held that the proposed extension would not in fact deter, or the expected deterrent effect was counter-balanced by more important considerations.[192]

This retrenchment occurred much to the chagrin of rule supporters. As summarized earlier, they charged the Burger Court with a redefinition of the rule's purpose,[193] and accused it of distorting relevant precedents.[194] Contrary to the Burger majority, they argued (and this will be examined later) that the original justification for the rule was not deterrence; rather, deterrence was only a bonus. The rule, instead, was a personal constitutional right, and a moral imperative of judicial integrity. The rule required the exercise of judicial review to guarantee Bill of Rights constitutional protections.[195] Furthermore, rule supporters argued that if the rule failed to deter, that failure might be attributable precisely to the Court's unwillingness to close existing loopholes, or extend the rule to cover those situations where

---

188. *See* Finzen, *supra* note 179, at 772; Oaks, *supra* note 35, at 669-72; Kaplan, *supra* note 35, at 1032-35, and Wingo, *supra* note 35, 575-79. For additional sources, see *Confessions*, *supra* note 10. ch. III, n.135.

189. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

190. United States v. Calandra, 414 U.S. 338, 354 (1974). Chief Justice Burger is on record as being an opponent of the rule. *See* Burger, *Who Will Watch the Watchman*, 14 AM. U.L. REV. 1 (1964) (published prior to his appointment to the Supreme Court). *See also* Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388, 411 (1971) (Burger, C.J.).

191. United States v. Calandra, 414 U.S. at 348.

192. *See, e.g.*, Harris v. New York, 401 U.S. 222, 224 (1971); Calandra v. United States, 414 U.S. 338, 354 (1974). *See generally* Bennett, *supra* note 118, at 1130-33; Dershowitz & Ely, *supra* note 112, at 1209-27; Schrock & Welsh, *supra* note 35, at 263-71; Sevilla, *supra* note 35, at 860; Shapiro, *Miranda Without Warning: Derivative Evidence as Forbidden Fruit*, 41 BROOKLYN L. REV. 325, 339-44 (1974).

193. *Critique: On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 N.W. U.L. REV. 740, 778 (1974) [hereinafter cited as *Critique*].

194. *Critique*, *supra* note 193, at 778-90; *Attack*, *supra* note 164, at 102-22. *See also* *supra* note 190.

195. *See generally* Bennett, *supra* note 118, at 1133-47; Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment*, 62 JUDICATURE, 67, 79-80 (1978); Shrock & Welsh, *supra* note 35, at 295-302.

police avoidance could be discerned.[196]

c. *Two Levels of Confrontation.* Between exclusionary rule proponents and opponents, serious public policy differences may be identified. What each camp is talking about occurs on two interrelated levels. The first level contains questions relating to the efficacy of the exclusionary sanction. Does the rule work, how does it work, and in what kinds of situations? Is more or less exclusionary application better or worse for the citizenry? On the second level, the issue of whether specific Bill of Rights provisions limit first level public policy-making options is addressed. In other words, if exclusion is required by the Constitution, then legislators may not circumscribe it on the ordinary legislative level, and may instead be required to propose an amendment to the Constitution if they conclude the exclusionary rule application is no longer conducive to the common good.

First level issues are outside the scope of this article. They are largely questions of evaluation and prudential judgments which are traditional legislative functions. Questions on the second level concerning Bill of Rights provisions and what branch of government was intended by the Framers to address public policy questions, however, end precisely where they must by addressing the issue of what role the Court is to play in interpreting the constitutional text and what limits exist regarding public policy options. As concluded with respect to the historical arguments, the above issues are perhaps best confronted directly in Phase II of the exclusionary debate.[197]

d. *Conclusion: Put Debate Aside.* Insofar as the debate over the deterrent effect of the exclusionary rule relates to its efficiency, it is put aside, because before factual evaluation of the rule's deterrent ability occurs or related prudential judgments are made, arguments defending the imposition of the rule by the judiciary would have to be found illegitimate. For the same reason, suggested modifications of the rule or alternative remedies are not considered in this article.[198] Such proposals are relevant to representa-

---

196. *See supra* at notes 192, 194-95. *See generally* Chase, *supra* note 17, at 525-51; Sevilla, *supra* note 35, at 849-50; Shapiro, *supra* note 192, at 332-39. In regard to the reasoning used to justify expansion of the rule, Professor Barker has concluded "[t]he party is damned by this evidence from the moment it is found, and if it is admissible even in a civil action, the deterrent affect of the *Mapp* policy is watered down." Barker, *Admissibility in Civil Actions of Constitutionally Protected Evidence: Some Brief Observations*, 34 ALB. L. REV. 512, 522 (1970).

197. As mentioned earlier, questions on the second level inevitably raise issues such as what protections did the Framers intend to provide when the Bill of Rights was proposed and ratified, what judicial role was envisioned, and was not the legislature—the people—given considerable latitude, especially on the state level, to deliberate on the common good.

198. The interested reader, however, may wish to explore suggested modifications or alternative proposals. For those commentators generally inclined toward alternatives, *see* Davidow, *supra* note 35; Kaplan, *supra* note 35, at 1041-45; Levin, *supra* note 35; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243, 269-75 (1973); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 227-32 (1978); Wingo, *supra* note 35, at 579-82; *Federal*, *supra* note 35;

tive policy makers only if they are not prohibited by constitutional provisions from engaging in deliberation. Although the matter is discussed subsequently, the following proposition is set forth. If a constitutional basis for the exclusionary rule cannot be found, then the *Weeks*[199] and *Mapp*[200] cases are symbolically equivalent to the decisions in *Bailey v. Drexel Furniture Co.*[201] and *Schecter Poultry Corp. v. United States.*[202] All four of these cases illegitimately cut off deliberation on the common good by representative institutions.[203]

3. *The Empirical Data Dispute*

The empirical data dispute is the chronologically advanced state of the deterrence argument, its distinguishing feature being the crossing of statistical rather than legalistic swords.[204] The issue here is how the exclusionary rule actually affects police behavior.

a. *Origin and Purpose.* The empirical assault on the exclusionary rule began with Professor Oaks,[205] who along with others[206] sought to prove that the rule in fact failed to deter police illegalities. Professor Oaks and those agreeing with his side of the argument believed that the evident increase in suppression motions following *Mapp*[207] demonstrated that the rule was not deterring police. Professor Oaks did not stop there. He also sought to demonstrate the negative impact of the rule, breaking it down into eight

---

Decline, *supra* note 35, at 77-91; *Use*, *supra* note 35; *Injunctive supra* note 35, at 502-05.

For those commentators generally inclined toward rule modification, see Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 By Law Enforcement Officials and the Courts*, 63 GEO. L.J. 305 (1974); Horowitz, *supra* note 35; Sauter, *supra* note 35, at 160-62; and Note, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453, 1472 (1973) [hereinafter cited as *Excluding*]. Contray views are expressed by Bennett, *supra* note 91, at 1147-59; Chase, *supra* note 17, at 587-88; Kamisar, *supra* note 34, at 345-46.

199. Weeks v. United States, 232 U.S. 383 (1914).

200. Mapp v. Ohio, 367 U.S. 643 (1961).

201. 259 U.S. 20 (1922).

202. 295 U.S. 495 (1935).

203. *See infra* notes 202, 443-69 and accompanying text. *Compare* B. CARDOZO THE NATURE OF THE JUDICIAL PROCESS 73, 76-79 (1921) *and* A. GOLDBERG *supra* note 42, at 51-52 *with* W. HURST *supra* note 49, at 69, 104-05 and G. GILMORE, *supra* note 166, at 91-93. *See also* Gangi, *supra* note 1, at 32-33, 50-51. With the Court's decision in United States v. Calandra, 414 U.S. 338 (1974) one could say that *Weeks* and *Mapp* have been silently overruled, something like the current status of Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

204. *See generally* Amsterdam, *supra* note 17, at 475 n.593; Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283; Note, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968) [hereinafter cited as *Effect*]; *Procedure*, *supra* note 121 at 238-42.

205. *See* Oaks, *supra* note 35.

206. *See, e.g.*, Kaplan, *supra* note 35, at 1033-35; Spiotto, *supra* note 198, and Wingo, *supra* note 35, at 575-79.

207. Oaks, *supra* note 35, at 681.

categories. According to Professor Oakes, the exclusionary rule: (1) provides nothing for the innocent, but freedom for the guilty;[208] (2) may foster false testimony by the police,[209] thereby introducing the problem of police perjury;[210] (3) contributes to delay and diversion from the primary questions of guilt and innocence;[211] (4) may have side effects on the criminal justice system, such as (a) lowering standards of probable cause in order to circumvent the effects of releasing guilty defendants, (b) delaying the final disposition of criminal trials due to suppression hearings, and (c) increasing the number of guilty pleas and/or lowering the length of sentences wherein suppression of evidence would be in doubt;[212] (5) encourages police immunization of criminals by collusionary illegal searches;[213] (6) leads to police imposition of extra-judicial punishment, either directly or in cooperation with citizen vigilantes;[214] and (8) forestalls development of alternative remedies and unjustifiably contributes to public perception of the courts handcuffing the police.[215]

b. *Thrust and Parry.* All parties to the exclusionary debate concede that the initial thrust on the rule's effectiveness by opponents was successful in one important respect: "By portraying the exclusionary rule as a pragmatic social policy, rather than a necessary adjunct to basic constitutional principles, the critics . . . shifted the scope of debate from their losing position on legal principles to the ambiguous outcome of empirical evolution."[216]

Supporters responded to this empirical thrust by: (1) challenging the assumption that the number of motions to suppress constitutes an adequate statistical criterion;[217] (2) contending that an immediate drop in motions to suppress so soon after the rule's adoption evidenced unrealistic expectations;[218] (3) issuing studies purporting to show that the rule's effectiveness could be supported;[219] (4) contending that any evident ineffectiveness was

---

208. *Id.* at 736-39.

209. *Id.* at 739-42.

210. *Id. See also* People v. McMurty, 64 Misc. 2d 63, 314 N.Y.S.2d 194 (Crim. Ct. 1970); *Police Perjury: An Interview With Marin Garbus*, 8 CRIM. L. BULL. 363 (1972) [hereinafter cited as *Police*]; Sevilla, *supra* note 35, at 863-75; Younger, *The Perjury Routine*, 3 CRIM. L. BULL. 551 (1967); *Procedure*, *supra* note 121, at 241.

211. Oaks, *supra* note 35, at 742-47.

212. *Id.* at 747-49.

213. *Id.* at 749.

214. *Id.* at 749-53.

215. *Id.* at 753-54.

216. *Critique*, *supra* note 193, at 776-77.

217. *See* Cannon, *supra* note 181, at 713; *Critique*, *supra* note 193, at 746; *Procedure*, *supra* note 121, at 242.

218. *Procedure*, *supra* note 121, at 242.

219. *See generally* Canon, *supra* note 181; Kamisar, *supra* note 35, at 340-41; Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications*, 45 N.C.L. REV. 119, 130-47 (1966); Wingo, *supra* note 35, at 586-88; *Critique*, *supra* note 193; *Effect*, *supra* note 204, at 89-104.

due to the continued existence of legal loopholes encouraging police disobedience, a situation prompted by the Burger Court's abandonment of the Warren Court's vision;[220] (5) suggesting that the cure for the rule's evasion is a matter of better police training and reforming police behavior;[221] and finally and most importantly, (6) claiming that empirical demonstrations were irrelevant because therein deterrence and not a constitutional criterion such as judicial integrity was identified as the primary justification for the rule.[222] After all, rule supporters asserted that the real issues are what is the nature of our society and the rights we possess.[223]

One can sympathize with Professor Amsterdam's evaluation of the foregoing empirical exchange as a "standoff."[224] Similarly, another commenta-

---

220. *See supra* note 196 and accompanying text.

221. Canon, *supra* note 181, at 716-17. See *Effect*, *supra* note 204, at 89-96. There are several areas which are beyond the scope of this article, though pertinent to an assessment of the exclusionary rule. They are omitted because unless the rule is found to be properly before representative institutions, they cannot be utilized in any assessment of the rule of public policy.

First, there is the question of how the rule affects police organizations and training. *See generally* SKOLNICK, JUSTICE WITHOUT TRIAL, 219 (1975); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 Mo. L. REV. 566, 593-607 (1965); McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659 (1972); Milner, *Supreme Court Effectiveness and Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 483-85 (1971); Oaks, *supra* note 35, at 700-01; Sevilla, *supra* note 35, at 875-78.

Second, there is the distinct possibility that police staff officers and police line officers view the rules differently. *See generally*, R. DALEY, TARGET BLUE, 57-86 (1973); SKOLNICK, *supra*, at 219-20, 225-27; Oaks, *supra* note 35, at 727-34; *Effect*, *supra* note 204, at 101-102.

222. *See generally* Bennett, *supra* note 118, at 1133-47; Schrock & Welsh, *supra* note 35, at 335-72; *Procedure*, *supra* note 121, at 246-47.

223. *See generally Procedure*, *supra* note 121, at 244-45; *Critique*, *supra* note 193, at 776, 782.

224. Amsterdam, *supra* note 17, at 475 n.593. An attempt to provide an empirical demonstdration of deterring police misconduct places a Justice, not to mention a scientist-scholar or strict methodologist of data evaluation, in a rather ridiculous position. First, once *Mapp* made the exclusionary rule constitutionally mandated throughout the states, the comparision between exclusionary and nonexclusionary jurisdictions became impossible. Furthermore, this presumes all other factors (quality of police training and clarity of directions) would be equal. In this author's opinion, this would be an approvable assumption.

Second, examination of available literature reveals so many variables that the task of determining relevance — not to mention the availability of reliable data — shatters the patience of even the most imaginative researcher. Take, for example, the prospect that some police may not make an arrest at all. They may simply walk away because they are not sure the arrest would be valid, or that the arrest would be prosecuted. This author contends that this data is relevant to the rule's evaluation. The question then becomes where would one find such a data. The problem is that this data does not exist. This makes it impossible to empirically assess its impact on citizens.

Similarly, if the police merely seize an item, and indeed it is an illegal seizure, but no arrest is made, where do these figures show up? Furthermore, prosecutors anticipating a motion to suppress the evidence may drop the charges. *See* Canon, *supra* note 81, at 718; *Procedure*, *supra* note 121, at 242.

Doubt and competing evidence, however, are nothing new to legislators. They confront

tor's astute observation is that such empirical exchanges "illustrate the obstacles that stand in the way of any sound, empirical evaluation of the rule."[225] The empirical dispute, in fact, masks more complex questions. Where, for example, does the burden of proof lie? Must supporters prove that the rule effectively deters, or should opponents be obliged to demonstrate ineffectiveness? The stakes after all are high: "Whichever side is required to prove the effect of the rule loses."[226] They lose because empirical demonstration appears impossible.

At this point a review of the scenario is appropriate. After *Mapp*, rule opponents attempted to demonstrate empirically that the rule failed to deter and imposed high societal costs.[227] The Burger Court responded by restricting the rule's application where effective deterrence was suspect.[228] Supporters of the rule subsequently cried foul, retorting that "the little affirmative evidence available far outweighs the evidence of the fact that proposed alternatives have proven more illusionary than real."[229] More important, they argued that even if the rule failed to deter, constitutional rights had been violated, and any felt deficiency in deterrence should be met with *expansion*, not contraction, of the exclusionary rationale.[230]

c. *Conclusion: Put Dispute Aside.* At this juncture it is suggested that the empirical data dispute be put aside. The mere recounting of the dispute should convince the reader that its resolution — or more precisely, the process of investigation and the infinite variety of possible choices — is more appropriately a legislative task. After all, it is legislative bodies that hold hearings, subpoena expert testimony and fine tune policy.[231] Similarly, in-

---

such realities every day, on almost every vote. In this context, comparative figures between arrest and conviction rates become even more tenuous. It is not so much that they are irrelevant, but rather these figures are the only ones that can be collected. *See Critique, supra* note 193, at 760.

225. *Critique, supra* note 193, at 763.

226. *Id.* at 764.

227. *See*, Oaks *supra* note 29, at 678-709; Spiotto, *supra* note 198, at 243.

228. *See supra* notes 190-92 and accompanying text.

229. *Procedure, supra* note 121, at 243 n.70 (citing Kamisar, *Wolf and Lustig Ten Years Later*; *Illegal Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1150 (1959)).

230. Schrock & Welsh, *supra* note 35, at 271-81; Wilkey, *supra* note 198, at 217-18 (emphasis added). A *Catch 22* reasoning appears to be developing. On the one hand, supporters, and some opponents, contend that if a remedy for police illegality could be found, it would have to be proven viable before implementation. Even then, such alternatives, at least for those proponents who assert a "right" to exclusion would have to be *added* to the constitutional exclusionary demand, not substituted for it. Even Chief Justice Burger, an opponent of the rule, stated that the Court could not abandon the rule until a viable substitute was found; otherwise the result might be an open police season on criminals. *See* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 421 (1971) (Burger, J., Opinion). *See also* Kamisar, *supra* note 34, at 345.

231. *See* W. HURST, *supra* note 49, at 40-46. For background on the laissez-faire era and the Supreme Court see E. GOLDMAN, RENDEVOUS WITH DESTINY 24-289 (1956) and R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 3-169 (1955).

vestigation of police selection techniques, training and continuing education programs are valid objects of inquiry. As stated earlier, dismissal of these issues should not imply that such legislative attempts, as limited and difficult as they might be, are either illegitimate or irrelevant. All such issues are matters of appropriate legislative concern.

The argument is put aside because, as with the historical and deterrent arguments which precede them, the competing views once again raise the issue of what role the judiciary is to play in American society. For if the people are not presently free under the Constitution to accept or reject exclusion, only an amendment could remedy the situation.[232]

One final query on this phase of the discussion is necessary. Are the various choices and concurrent values present in the deterrence and empirical debates any more complex than those which confront legislatures regarding economic, taxing and or spending issues? Aside from personal choices, are the decisions therein involved any less important or vital than past or present disputes over what economic decisions are vital to the common good? Can historical evidence be presented to indicate that the Framers believed representative institutions to be any less competent to deliberate on personal rights than on economic issues? Why then, do we applaud reformers who successfully challenged the laissez-faire[233] Court, but condemn, scholars such as Professor Berger who presently insist that the issue of self-government is equally at stake in personal rights issues?[234]

4. *The Comparative Debate*

Post-*Mapp* exclusionary opponents, attempting to demonstrate the rule's ineffectiveness, turned to other common law jurisdictions, such as Canada and England, where it was noted that "no such rule is observed."[235] They did so, first, because *Mapp* left them with no exclusionary-free jurisdiction with which to compare the effects of the rule.[236] Second, it was generally conceded that despite the absence of an exclusionary sanction, "courts [there] are otherwise regarded as models of judicial decorum and fairness."[237] Exclusionary opponents argued (generalizations only being necessary here) that despite the absence of an exclusionary sanction in these

---

232. Schrock & Welsh, *supra* note 35, at 270 n.62.

233. *See supra* note 231 and accompanying text.

234. *See generally* Gangi, *supra* note 1, at 20 n.169.

235. Oaks, *supra* note 35, at 669.

236. *Id.* at 701; *see supra* note 224..

237. *Id.* at 669. The comparative approach (referring to other common law jurisdictions, especially England) had been employed by Justice Frankfurter in his explication of minimum due process standards. *See supra* notes 69-86 and accompanying text; Wilkes *supra* note 137, at 888-93. Similarily, the Supreme Court majority and dissents made reference to the English Judges' Rules in *Miranda*. *See* Miranda v. Arizona, 384 U.S. 436, 486-89 nn.60-63 (1965) (Warren, C.J., for the majority). *See id.* at 522 (Harlan, J., dissenting).

countries, police discipline was taken seriously and the tort remedy for police abuses was found reasonably effective and supported by jury verdicts.[238]

Exclusionary rule supporters rejected these comparisons as being only marginally relevant. First, they insisted that a distinction be drawn between the nature of police offenses in the United States and other jurisdictions.[239] In the former, evidence was excluded because, they contended, it was obtained by "exceeding constitutional restrictions," whereas in other jurisdictions violations were merely of statutory or common law provisions.[240] Second, they claimed that America's legal system is "unique" in several respects. "There is . . . reason to believe that our legal system is more deeply committed than others to the principle that government must respect the privacy of the individual."[241] The United States had "enshrined the right to be free from unreasonable search and seizure in a fundamental charter of government to insulate that right from the caprices of legislative bodies and the whims of executive officials."[242] "Another unique feature of our legal system is widespread police corruption and abuse of power."[243] Finally, they contended that a careful assessment of other jurisdictions' precedents failed to support admission of all illegally obtained evidence there, but instead revealed "they are willing, under appropriate circumstances, to suppress probative evidence of crime because of the procedures utilized to obtain it."[244]

This comparative argument may be abruptly put aside. It quite clearly leads to the subsequently examined pivotal arguments regarding the role the

---

238. Oaks, *supra* note 35, at 701-06. *See also* Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 271 (1961); Ratuskny, *Unravelling Confessions*, 13 THE CRIMINAL Q. 453, 463-67 (1970-71); Weinberg, *The Judicial Discretion to Exclude Relevant Evidence*, 21 McGILL L.J. 1 (1975); Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 272 (1961).

239. Wilkes, *supra* note 137, at 898.

240. *Id.* at 898-99.

241. *Id.* at 899.

242. *Id.* The statements in the text, in this author's opinion, are faulty on four counts. First, the statements make assumptions regarding "privacy," which includes the question of who is empowered to define it authoratively. This article contends that this is a function of the legislature. Second, even "privacy" assumes the Court may expand a value constitutionalized in the text. This expansion, however, should not be in opposition to the legislature. The judiciary has no special expertise and cannot be held accountable. Third, the statements assume the existence of a personal right which the Supreme Court has renounced in United States v. Canada, 414 U.S. 338, 348 (1974). Fourth, the statements presume that the task of defining "unreasonable" is beyond legislative competence. If this is true, are airport metal detectors or searches to be considered "unreasonable?" *See* Wilkey, *supra* note 198, at 229. In short, the conclusion is reached, not upon evidence, but upon the assumption that the principles are already a "given."

243. *Id.* at 900.

244. *Id.* at 901. *Compare Id.* at 901-16; Kamisar, *supra* note 35, at 348-49; McGowan, *supra* note 221, at 670-71; Ratuskny, *supra* note 238, at 469-74, *with* Oaks, *supra* note 35, at 701-09.

judiciary is to play in public policy making.[245]

5. *The Morality Debate*

Normally morality decisions are not typically constitutional ones, but instead are appropriately and precisely what legislative policy making is and always has been about since time immemorial. Unfortunately, laying aside the moral argument regarding exclusion is not that easy here because in examining the literature, at least two categories and three interlocking rationales are often simultaneously put forth.

a. *Ethical Category*. In this first category, the accompanying rationale discusses the exclusionary rule in traditional ethical terms. The specific action (police conduct) is reprehensible (either the act, e.g., police brutality, or the violation of a legal norm, e.g. unreasonable search) or the use of the fruit of that illegality (the evidence) is deemed repugnant to justice. Each, but especially both, constitute the condemned ethical impropriety. Ethical arguments have never been identical to legal arguments, and of course are further distinguishable from those constitutional arguments based directly or indirectly on the text.[246]

---

245. Supporters assert, in short, precisely what they are obliged to prove: the exclusionary rule is constitutionally mandated. *See infra* notes 283-94 and accompanying text.

246. Gangi, *supra* note 1, at 24 (R. Berger citing Justice Holmes on the inappropriateness of confounding law and morals). The repeated cliche that you cannot legislate morality is often embodied in the form of two different arguments. The first argument states that some legislated morality is difficult, sometimes even impossible, to enforce (e.g., prohibition, marijuana, fair housing). In order to assure respect for all law, wise legislators do not attempt to extend the coercive power of the state too far. The states should confine themselves to public wrong, not private sin. This argument is more an argument for prudence than inherent limits. The second argument is one of personal repugnance. In other words, one would prefer if the legislature did not legislate on *that* topic because, quite honestly, "it is *my* ox that is being gored" (e.g., right to contract, abortion, public accomodations, busing, windfall profits). This argument revolves more around competing values, possible resistance — the wisdom of such legislation. Again, there are no inherent limits. The one traditional legislative limit is the use of state coercive power to compell belief. Still, if I choose in any way to exercise those "beliefs," the two categories above become pertient. *See also* Gangi, *supra* note 25.

Justice Rehnquist recently has explained the relationship between law and morality in constitutional adjudication:

> This is not to say that individual moral judgments ought not to afford a springboard for action in society, for indeed they are without doubt the most common and most powerful wellsprings for action when one believes that questions of right and wrong are involved. Representative government is predicated upon the idea that one who feels deeply upon a question as a matter of conscience will seek out others of like view or will attempt to persuade others who do not initially share that view. When adherents to the beliefs become sufficiently numerous, he will have the necessary armaments required in a democratic society to press his views upon elected representatives of the people, and to have them embodied into positive law.
>
> Should a person fail to persuade the legislature, or should he feel that a legislative victory would be insufficient because of its potential for future reversal, he may seek to run the more difficult gauntlet of amending the Constitution to embody the

b. *Constitutional Category.* This second category contains two rationales. In the first, the emphasis falls on an otherwise innocent party; the judge in particular and the judiciary in general. Both lose integrity when the use of illegally obtained evidence is permitted. Admission of the evidence so acquired, it is argued, constitutes a sanction of the initial illegal police action.[247] This argument usually is described in terms of judicial integrity. In the *constitutional* category, the condemnation parallels that made in the first *ethical* category; the act or use of the fruits of that act are inappropriate, but the emphasis falls on an alleged violation of constitutional, not ethical principles.

In the second rationale, constitutional is used in the sense of public submission; our submission today to fourth amendment commands. Phrased another way, the Constitution demands exclusion. Implicit in this second rationale is the very interesting position that the people are bound today by the ratification process in which their ancestors participated. The judiciary, whose job it is to enforce the Constitution, simply does its duty of excluding evidence obtained in violation of its provisions. With this rationale, the judiciary merely reminds us of what we promised when we consented to the Constitution.

c. *Analysis of Overlapping Rationales.* First, the second category and its two related rationales assume: judicial personnel can legitimately adopt personal assessments of what "integrity" demands when considering matters of law, not to mention constitutional law; demand for constitutional fidelity presumes the command is known and is binding on successive generations. The fidelity, in short, is to something that has been previously established as being commanded by the Constitution. These assumptions are addressed in Phase II of the exclusionary debate where the appeal to constitutional morality is considered analogous to judicial integrity and judicial review.[248]

Second, the two categories, not to mention the various rationales, are not clearly distinguishable in the literature. Instead, they often interlock

---

view that he espouses. Success in amending the Constitution would, of course, preclude succeeding transient majorities in the legislature from tampering with the principle formerly added to the Constitution.

Rehnquist, *supra* note 54, at 705. *See* Gangi, *supra* note 25, at 295 n.235 (discussion of the relevance of "higher law"in American political tradition).

247. *See, e.g.*, Kamisar, *supra* note 195, at 78-83.

248. *See infra* notes 461-516 and accompanying text. Since the issue of fidelity to the Constitution is raised here, several questions must be put forth for the reader to ponder. If, as is suggested, we are bound to the Constitution by our ancestors' consent, are we bound to the entire Constitution, or only to those portions we continue to find coincident with our sense of right and wrong? How do we establish *to what* the Constitution binds us? Can we consistently insist that we are not bound by our ancestors' perception of individual rights, but are nevertheless bound, for instance, by their insights regarding the structure of the separation of powers? Furthermore, can we consistently maintain that we are bound by the structure regarding the original limits placed on executive and legislative powers, but *not* bound regarding the original limits of judicial power? *See generally* Gangi, *supra* note 1, at 56-67.

and overlap, serving to support one another. In this case, the sum seems to add up to more than the parts. As a hopefully representative example, a brief review of Professor Paulsen's seminal article is necessary.[249]

Professor Paulsen begins by explaining the reason for the rule — the first category "ethical" rationale. "The evidence is kept out of the trial not because it is unworthy of belief, but because it is the product of police methods which violate the law."[250] Exclusion, he maintains, is "morally correct and appropriate to a free society."[251] Paulsen then explains the moral basis of the rule: "It is *unseemly* that the *government* should with one hand forbid certain police conduct and yet, at the same time, attempt to convict persons through use of the fruits of the very conduct which is forbidden."[252] This moral judgment is not simply based upon the "ethical judgment that governmental *hypocrisy* is an evil to be avoided for its own sake, but it takes into account the serious undermining of *trust in government* which is an unavoidable consequence of any scheme permitting the state to benefit from unlawful conduct."[253] Paulsen then notes that "government is a teacher" and:

> [f]ew things are more subversive of free institutions than a mistrust of official integrity. When the police themselves break the law and other agencies of government eagerly reach for the benefits which flow from the breach, it is difficult for the citizenry to believe that the government

---

249. Paulsen, *supra* note 35, at 255.

250. *Id.*

251. *Id.* at 257. The free society analogy is discussed elsewhere. *See infra* notes 315-18, 352-54 and accompanying text. Also, a clarification of Professor Paulsen's article is necessary. By his use of "appropriate" in the text Professor Paulsen cannot be interpreted to mean that exclusion is constitutionally mandated. As proof of this, Professor Paulsen asserts that "[a]ny fairminded observer will find the case against excluding illegal evidence an impressive one." Paulsen, *supra* note 29, at 256. In addition, he states that "[t]he case against the rule is an impressive one." *Id.* at 257. Therefore, by "appropriate," Paulsen means that despite the "impressive" case against the rule, he still believes we *ought* to adopt and/or retain the rule (Paulsen's article being published just prior to the *Mapp* decision, about which he adds a short epilogue). *Id.* at 264. Basically, this rule is appropriate because Paulsen believes it to be the ethically correct course and it is the "most effective" remedy we have. *Id.* at 257. Paulsen, however, admits that even to assert the latter is "an act of faith." Paulsen, *supra* note 180, at 74. Thus, for Professor Paulsen, "appropriate" is tied to a number of beliefs he subsumes under the heading of "free society." Paulsen implies that society is *free* to reject the rule. If society was not free, the "impressive" case would be irrelevant, except perhaps as argument for a constitutional amendment. It is erroneous to suggest, however, that Paulsen denied that society was free to reject the rule, because *Mapp* had not *yet* been decided, and no where is such a suggestion even implied. In fact, upon close scrutiny, Paulsen's whole premise, at least before *Mapp* was decided, was that exclusion was *not* a "right" but a rule of evidence. The sentence quoted in the text in its entirety reads: "The *exclusionary evidence rule* is morally correct and appropriate to a free society." Paulsen, *supra* note 35, at 257 (emphasis added).

252. Paulsen, *supra* note 35, at 257 (emphasis added).

253. *Id.* at 258 (emphasis added).

truly meant to forbid the conduct in the first place.[254]

It is at this juncture that Paulsen begins to merge the above first category ethical considerations with second category fourth amendment "constitutional morality" arguments which are those articulated initially in 1914 and subsequently applied to the states in 1961.[255] Paulsen concludes that the Court, in *Mapp*, reaches the states through fourteenth amendment incorporation and holds exclusion "to be a clear, specific, and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the fourth amendment would have been 'reduced to a form of words.' "[256]

d. *Further Observations on Ethical Choices and Interlocking Rationales.* Once *Mapp* was decided in 1961,[257] the different ethical arguments understandably merged with constitutional claims. Ethical arguments, however, are nonconstitutional. They contain prudential judgments. While such judgments are certainly important, even traditional to our understanding of ourselves as a people, they are appropriately legislative policy choices, choices related to the common good.[258]

What about the ethical rationale? The confrontation between exclusionary supporters appears to present opponents of the rule with an either/or proposition. Either condemn certain police practices in a meaningful fashion by giving up use of any derived fruit of that conduct (i.e., exclude such evidence),[259] or one's ethical sensitivity is thereby suspect. Furthermore, it is

---

254. *Id.* Much of what Paulsen articulates at this point in his article begins to fall under the judicial integrity heading discussed subsequently. *See infra* notes 260-71 and accompanying text. See also the discussion on "models" of judicial responsibility. *See infra* notes 360-72 and accompanying text.

255. *Id.* at 258 (referring to Weeks v. United States, 232 U.S. 383 (1914) and Mapp v. Ohio, 367 U.S. 643 (1961)). *See also Attack, supra* note 164, at 107.

256. Paulsen, *supra* note 35, at 264 (citing Mapp v. Ohio, 367 U.S. 643, 648 (1961)). Professor Paulsen does add the following comment: "An interesting point about this formulation is the fact that it does assert that the exclusionary rule is a 'deterrent safeguard.' The point is not simply that the Constitution requires the rule without respect to its aspect as a deterrent to police misconduct." *Id.*

Two additional points are necessary. First, it is interesting that at least early estimates of *Mapp* contained this linkage to deterrence. Second, Paulsen's support for the rule seems to be linked with its deterrent abilities. He might, therefore, part company with other supporters to whom the actual deterrent effect is irrelevant. *See, e.g.*, Schrock & Welsh, *supra* note 35, at 270, n.62.

257. Mapp v. Ohio, 367 U.S. 643 (1961).

258. *See supra* comment accompanying note 246.

259. What is meant, more precisely, is that some supporters insist opponents condemn as morally reprehensible those practices already considered illegal (e.g., physical and mental coercion). Furthermore, they encourage the Court to expand existing definitions of what they advocate should constitute illegality (e.g., stricter standards for probable cause). Finally, supporters assert that exclusionary criteria should be applied to new areas to close any "loopholes" (e.g., civil cases, third part consent). One is urged to support whatever judicial power is necessary to accomplish these "good" results. *See supra* notes 193-96 and accompanying text.

implied, if not stated directly by supporters, that, absent exclusion, opponents of the rule actually *approve*, consciously or subconsciously, the abusive police methods, and consequently they threaten the liberties granted by the Constitution.[260]

Exclusionary opponents respond to such charges by accusing rule supporters of coddling criminals, and by holding them responsible for increased crime and for the absence of citizen security.[261] They blame rule supporters for citizens' imprisonment in their homes while criminals run free, and suggest that society is degenerating into rampant vigilantism and suffering a breakdown of civil order.[262]

The principles and beliefs of exclusionary rule proponents have already been articulated and will be considered further in this article.[263] Putting this aside, however, what light can exclusionary opponents shed on the ethical issue? They seem to be saying that even after one cedes the ethical impropriety of police misconduct in a particular case, one may still in good faith hesitate in subscribing to a logic that requires reliable evidence to be excluded. They assert that principles at least equal to the police violation exist and are entitled to be weighed against any believed exclusionary benefits.[264]

Turning again to Professor Paulsen's exposition,[265] several reasons are cited for taking this position. First, absent tainted but reliable evidence, the prosecution may not be able to meet the burden of proof, and as a result "a great many obviously guilty people must be acquitted."[266] Exclusionary opponents claim it is ethically wrong for the guilty to escape punishment.[267]

---

260. *See* Kamisar, *supra* note 195, at 82. Professor Paulsen contends that from the perspective of "[a]t least, many of the community's most scrupulous and noble" citizens, acceptance of tainted evidence draws the prosecutor and judiciary into the lawlessness of the police conduct. Paulsen, *supra* note 35, at 258.

261. *See, e.g.*, Gangi, "*'And Set the Guilty Free'* . . .", 8 PROSECUTOR 479, 480-81 (1973).

262. *See generally id.*

263. *See supra* notes 249-54 and *infra* notes 295-306 and accompanying text.

264. *See generally* Paulsen, *supra* note 35, at 256-57.

265. Paulsen, *supra* 35. The brief summary of Professor Oaks' may also be consulted, as it appears to be modeled on Paulsen's work. *See* Oakes, *supra* note 35, at 736-39. *See also supra* notes 209-16 and accompanying text.

266. Paulsen, *supra* note 35, at 256.

267. *Id.* The logic of the rule certainly makes clear that even guilty defendants must escape conviction if their conviction rests solely on reliable but tainted evidence. As a result, exclusionary opponents charge that release of guilty defendants leads to increased crime. *Id.* Presumably the defendant continues to commit crimes until he is caught, and indeed recidivism studies confirm the probability that when an accused escapes punishment because reliable evidence is excluded, it is unlikely that he stops his criminal profession.

This anti-exclusionary logic demonstrates the opposite of the deterrence rationale, and it is suspected it would be equally difficult to prove, except for the fact that it *is* proven in every instance where an admittedly guilty person is released. This reality is both denied, and admitted by rule supporters. Kamisar, *supra* note 35, at 339-41.

Excluders of reliable evidence either must assume that as a public policy exclusion is good, encouraging an "open society," or that exclusion is demanded by the Constitution. They are

Second, the rule does not directly punish the police misconduct, but instead punishes the innocent public by permitting release of the guilty.[268] Opponents believe it is ethically *wrong* to punish the innocent public. Third the very release of guilty defendants on a wide variety of technicalities may contribute to the disrespect of government as much if not more than the illegal police conduct. Rule opponents assert that it is ethically wrong for the people not to respect its government, and government ought to protect law-abiding citizens, not law-breaking ones.[269] Fourth, the rule may increase police misconduct insofar as it permits corrupt police officers to immunize offenders. Furthermore, opponents suggest that some kinds of police misconduct are even less ethical than others.[270] Fifth, it is wrong to lump together corrupt police officers and simply overzealous police officers, just as it is also wrong not to distinguish between different kinds of misconduct. The rule "interrupts, delays and confuses the main issue at hand — the trial of the accused."[271] Opponents contend that a criminal justice system should convict the guilty, release the innocent, not vice versa. It is wrong for a criminal justice system to be inefficient because such a system fails to deter criminal activity.[272] Sixth, exclusion, in fact, fails to deter police misconduct. It does not work.[273] It is wrong to pretend that good is being done, when it appears that the harm has been ignored. Finally, in some instances there may be greater outrage over the crime committed than the police illegality.[274]

In brief, the public's moral outrage at the police misconduct and or fear of police arbitrariness may be offset by considerations stated above in Pro-

---

prepared to take credit if imposition of the exclusionary rule results in a better society. They should also be willing, however, to take responsibility if they are wrong. They must take responsibility because every instance where an admittedly guilty person is released as a result of the application of the rule is proof that they are wrong. The rule has rendered our society increasingly less civilized and it is not constitutionally mandated. *See* Gangi, *supra* note 1, at 54.

268. Paulsen, *supra* note 35, at 256.

269. *Id.*

270. *Id.*

271. *Id.* at 257. *See also McGarr*, *supra* note 141, at 267; Frankel, *supra* note 6, at 12-14.

272. *See supra* notes 182-86 and accompanying text.

273. *See supra* note 181 and accompanying text.

274. Take for example one of the most frequent and probably influential initial exclusionary applications, coerced confessions. The public may respond differently today to a case involving clear physical brutality (*see* Brown v. Mississippi, 297 U.S. 278 (1936)) than to intensive and extensive police interrogation (*see* Ashcraft v. Tennessee, 322 U.S. 143 (1943)), or to exclusion based only on an illegal "delay" in arraignment (*see* McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1956)), to one slap across the face of a hardened criminal (*see* Stein v. New York, 346 U.S. 156 (1952)), the refusal of police to permit a suspect to call his wife prior to interrogation (*see* Haynes v. Washington, 373 U.S. 503 (1963)) or a police officer lying to a suspect, a childhood friend (*see* Spano v. New York, 360 U.S. 315 (1958)), a violation of some prophylatic rule (*see* Miranda v. Arizona, 384 U.S. 436 (1965)), or exclusion of the fruits of a "christian burial speech" made by officers to a suspect (Brewer v. Williams, 430 U.S. 387 (1977)).

fessor Paulsen's "impressive" case against the rule.[275] After all, under the exclusionary rule the criminal may go free and the specific police misconduct may also remain unpunished.

Rule supporters counter, however, that the rule protects all citizens. The rule protects the personal right of the defendant in the particular case as well as the future right of all citizens from such police misconduct in the future.[276] Moreover, they argue, the rule does not define standards — "illegalities" — but only provides a meaningful sanction when legal standards are violated.[277]

It is precisely at this juncture that exclusionary supporters usually confuse the first category rationale (exclusion is an ethically good public policy) with the two second category rationales (exclusion is a constitutionally mandated remedy for violation of personal rights, and or that it may be legitimately imposed by the judiciary). This article's position is, however, that the two categories and three rationales can and must be distinguished in legal analysis. Second category constitutional morality rationales, however, will be explored later in Phase II of the debate.

This much, however, may be stated now on the level of principle. No amount of reiteration of second category rationale arguments made in abstract fashion, or repetition of the same conclusion (how "good" the rule is) in different forms, or logical application of the assumed premises, can substitute for adequately grounding the rule in our history, experience as a people, or constitutional precedents. Rule proponents are obliged to establish the right they claim, a task substantially handicapped, if not foreclosed, by the decision in *United States v. Calandra*.[278]

Confining the analysis here to the first category ethical rationale, one notices this rationale never attains constitutional status. The decision to exclude even reliable evidence merely expresses a judgment on what one believes is a beneficent resolution of competing societal needs. For a number of reasons the exclusionary choice may be rejected by those responsible for making public policy.[279]

First, the claim that the rule protects all citizens directly is prima facie false. The rule may be invoked only by those accused of crime, a numerically small part of the population.[280] The people may, of course, choose to extend exclusionary protection to such a minority because they believe it is

---

275. *See supra* note 251 and accompanying text. *See also* Schrock & Welsh, *supra* note 35, at 266-69.

276. *See* Oakes, *supra* note 35, at 736-39. *See also supra* notes 129, 256 and accompanying text.

277. *See supra* note 50 and accompanying text.

278. 414 U.S. 338 (1974) "In sum the rule is a judicially created remedy . . . rather than a personal constitutional right of the party aggreived." *Id.* at 348.

279. *See infra* notes 482-89 for a discussion of this position as it crosses over to "institutional integrity."

280. *See supra* note 59 and accompanying text.

in the long term best interest of all citizens. They may also decide to risk whatever repercussions may stem from limiting or eliminating the rule. Second, the assertion that the rule protects citizens from future police abuses is an act of faith, not fact.[281] Citizens have traditionally had the right, through accountable elected representatives, to choose how they were to be protected, as well as from what. Citizens make such choices anywhere along the scale from rejection to acceptance of various claims, including ethical ones, pressed upon them by advocates of what constitutes good public policy. Decisions on public policy always have been made on that basis.

e. *Conclusion: Put Debate Aside.* This article proposes that the ethical aspects of the first category rationale for and against exclusion be put aside. Whatever ethical considerations may be legitimately invoked by exclusionary proponents may be offset by at least equally legitimate ethical considerations of opponents. Neither set of arguments enjoy constitutional status. As such, an estimate of the competing ethical considerations is part of the function of representative institutions.

The issue, it must be remembered, is not whether the exclusionary rule needs constitutional roots to endure, or flourish, or protect it from alleged legislative encroachment of principles its supporters consider crucial to a free society. Instead, the issue is whether supporters can locate the right they claim in the Constitution. This article contends that failure to locate the right, either reduces the exclusionary rule supporters' position to the subconstitutional status of an ethical preference and hence subject to legislative modification, or forces them to elevate the judicial power to heights they cannot establish as legitimate. With this in mind, the analysis now shifts to Phase II of the debate which deals with the constitutionality of the exclusionary rule.

C. *Phase II: The Contemporary Debate*

In Phase II of the exclusionary debate, supporters contend: (1) the Constitution guarantees rights and these rights have a certain nature; (2) judicial integrity requires exclusion; and (3) exclusion is a means by which fidelity to the Constitution is enforced; a type of judicial review.[282] While each of these arguments is distinct, together they create what may be described as the constitutional morality rationale. Before challenging these

---

281. Paulsen, *supra* note 180, at 74.

282. *See infra* notes 283-94 and accompanying text (personal rights); notes 295-306 and accompanying text (judicial integrity); notes 307-14 and accompanying text (judicial review). Each of these arguments will be subsequently challenged. *See infra* notes 354-482 and accompanying text (personal rights); notes 461-88 and accompanying text (judicial integrity); and notes 488-92 and accompanying text (judicial review). There are additional sub-arguments such as meaningful remedies, an open society, fair trial/prosecution symbols, various models, and the quality of civilization, omnipresent teacher and totalitarian analogies. These issues will also be subsequently addressed.

contentions, however, the component arguments must be briefly reviewed from the perspective of their adherents.

1. *Constitutional Morality: Three Component Arguments*

a. *Personal Rights.* Rule supporters would contend something like this: "Our Constitution relegates a 'free and open society' to a higher place in the scheme of values than swift and efficient law enforcement."[283] It is the Bill of Rights which specifies the personal rights of criminal defendants and interference with the exercise of these rights is beyond ordinary legislative competency.[284] The Supreme Court, supporters argue, initially found exclusion to be a "personal constitutional right" in federal trials, and in 1961 made that right applicable to state courts.[285] Supporters note that in applying the rule to the states the Supreme Court stated:

> This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words. . . . [The fruits of illegality] . . . should find no sanction in the judgments of the Courts. . . . [The evidence] . . . shall not be used at all.[286]

From this perspective: "Exclusion . . . exists to protect the right of the

---

283. *Procedure*, *supra* note 121, at 245. *See also* Sevilla, *supra* note 35, at 843-44.

284. *See supra* notes 192-96. *See also* Bennett, *supra* note 118, at 1150-51, 1156-57; Chase, *supra* note 17, at 566, 585; Schrock & Welsh, *supra* note 35, at 274-75, and *Critique*, *supra* note 193, at 782-86.

285. *See* Mapp v. Ohio, 367 U.S. at 643 (1961). *See also Attack*, *supra* note 164, at 107.

286. Mapp v. Ohio, 367 U.S. at 648-49. *See also* Kamisar, *supra* note 260, at 67-79; *Attack*, *supra* note 164, at 107; *Critique*, *supra* note 193, at 788. The Court in *Mapp* continued: "There are in the cases of this court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed." Mapp v. Ohio, 367 U.S. at 649.

Let me make several brief comments. First, did *Weeks* hold what we commonly repeat it held, and is that holding supportable and legitimate? To address those questions, one must first address issues such as, whether and under what conditions we remain bound by the intentions of those who framed the instrument, and how relevant history is in our determinations. *Compare* Wilson, *supra* note 26, at 1084-1104, *with* Mapp v. Ohio, 367 U.S. 643, 646-55 (1961). Second, the origins of legal doctrines are to be resolved by evidence, not speculation, or assertion, or the counting of heads. *See* Gangi, *supra* note 1, at 7. Third, the burden of proof is on those asserting constitutional status for a right not heretofore recognized as such. That burden, as John Marshall stated is high: " '[T]o establish a principle never before recognised, [it] should be expressed in plain and explicit terms.' " R. Berger, *supra* note 144, at 21 *citing* United States v. Burr, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693). Fourth, the issue is whether the judiciary has the right to impose the exclusionary rule authoriatively on the federal government when challenged by the legislative branch, or on the states at all, not whether the rule can be considered consistent with the Bill of Rights Fourth Amendment provisions. *Cf.* Schrock & Welsh, *supra* note 35, at 311, and *infra* note 295.

people to be secure against unreasonable searches and seizures. It is 'part and parcel' of the Fourth Amendment."[287] Supporters believe "Judicially implied"[288] does not mean "judicially contrived" or "judicially manufactured." "It means derived by judges construing the language of the amendment itself, the normal judicial function."[289] The Constitution requires exclusion because the Supreme Court decrees it "as necessary to the logic of the Bill of Rights."[290]

In this context, supporters note, the Warren Court looked to the logic of the fourth and other amendments, applying them in such fashion as "to create . . . living amendment[s]."[291] Because the Burger Court "does not see the exclusionary rule as necessary to the logic of the Bill of Rights,"[292] advances made under the Warren Court with respect to the symbolic importance of criminal prosecutions and fair trials have been jeopardized.[293]

> [T]he parties have the . . . right to demand a just and fair trial: "fair" in the procedural sense and "fair" by reason of the fact that the adversaries meet each other on equal ground. Evidence obtained by unconstitutional means gives the government an advantage. It cannot be contended that a conviction obtained by the use of such evidence is "fair" under any accepted meaning of the word.[294]

b. *Judicial Integrity.* Ordinary category one ethical arguments have been discussed previously.[295] Some attempt must be made, however, to flesh out the principles that rule supporters see as applicable. The position usually begins with a statement such as: "When the prosecutor takes evidence gained by the lawless enforcement of the law and places it before a court, that court by accepting the offer of proof becomes inevitably drawn into the lawlessness."[296] If the illegally seized evidence were admitted, judges personally become involved in the "dirty business,"[297] thereby "legitimatizing"[298]

---

287. *Attack, supra* note 164, at 108.

288. Paulsen, *supra* note 35, at 264. *See also supra* text accompanying note 256.

289. *Attack, supra* note 164, at 108.

290. *Id.* at 109.

291. Schrock & Welsh, *supra* note 35, at 311.

292. *Attack, supra* note 164, at 109.

293. *See* Arnold, *The Criminal Trial as a Symbol of Public Morality,* CRIMINAL JUSTICE IN OUR TIME 137 (A. Howard ed. 1965); Chase, *supra* note 17, at 551; Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation?" When Does it Matter?*, 67 GEO. L.J. 1, 82-83, 91-92 (1978); Schrock & Welsh, *supra* note 35, at 255-62.

294. *Procedure, supra* note 121, at 246.

295. See *supra* text accompanyings notes 259-82.

296. Paulsen, *supra* note 35, at 258. These arguments are closely associated with those put forth by Justices Holmes and Brandeis. *Compare* Kamisar, *supra* note 195, at 68-69; Schrock & Welsh, *supra* note 35, at 263, 282-88 *with* Hill, *supra* note 141, at 199-205.

297. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting). *See also Injunctive, supra* note 35, at 498; Coe, *supra* note 35, at 16. Professor Hill observes:

> But these three justices [Brandeis, Holmes and Stone] had assumed . . . that the federal officers had committed "crimes" . . . It was the criminal conduct, rather than

or condoning the illegality committed.[299] "We have to choose, and for my part I think it a less evil that some criminal should escape than the Government should play an ignoble part."[300]

It is posited, therefore, that judicial participation in police lawlessness impacts on the entire judiciary.[301] Exclusion is necessary "in order to preserve the judicial process from contamination."[302]

> 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 lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. . . .[303]

The institutional integrity argument, as it bears on the exclusionary rule, is "nothing more and nothing less than a procedural expression of the court's interest in its own integrity."[304] With exclusion, "the imperative of judicial integrity" as an institution is preserved:[305]

> A trial has purposes other than to lay reality bare. A trial is part of government's teaching apparatus. Social values of greatest importance receive expression in the courtroom. To reach a decision in accordance with the truth is only one value which, in some circumstances, may have to bow before others.[306]

c. *Judicial Review.* Allied but distinct from the integrity arguments is the claim that exclusion is but a particular application of the Court's power of judicial review. "The Court's primary focus in exercising judicial review is not upon society, but upon the constitutional rights of the individual parties

---

> distaste for wiretapping, which was the basis of the "unclean hands" contention of Justice Brandeis. . . . As for Justice Holmes, he saw the Government's position as one of "pay[ing] its officers for [getting] evidence by crime," and then asking the courts in effect to act as accessories. It was this that he called "dirty business," rather than, as commonly assumed, wiretapping as such.

Hill, *supra* note 141, at 202. (citations omitted).

298. *See* Kamisar, *supra* note 35, at 339.

299. *See* Coe, *supra* note 35, at 16; Sevilla, *supra* note 35, at 857; Oaks, *supra* note 35, at 668.

300. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

301. Paulsen, *supra* note 35, at 258.

302. Olmstead v. United States, 277 U.S. at 484 (Brandeis, J., dissenting).

303. *Id.* at 485. *See also* Schrock & Welsh, *supra* note 35, at 265-71.

304. Chase, *supra* note 17, at 537.

305. Elkins v. United States, 364 U.S. 206, 222 (1960).

306. Paulsen, *supra* note 35, at 263. *See also* Chase, *supra* note 17, at 537-38; Kamisar, *supra* note 293, at 82-83, 91-92.

before it."[307] Rule supporters accordingly argue that once the personal constitutional right to exclusion had been established in *Weeks v. United States*,[308] and subsequently applied to the states in *Mapp v. Ohio*,[309] the Court is obliged to enforce it. At this juncture, Professors Schrock and Welsh argue, exclusion and judicial review become analogous, if not identical.

> . . . Exclusion *qua* judicial review is neither compensation for harm done by another branch of government, nor deterrence of harm threatened, nor judicial self-protection. It is rather the court's method of avoiding a wrong it might do to the defendant by ignoring, in his case, what we shall call a constitutional "rule of recognition." Exclusion as judicial review is the court's affirmation of the defendant's personal due process right to have *this* rule of recognition — the fourth amendment — observed in his case.[310]

It could be argued, therefore, that "the exclusionary rule is not a separate 'rule' at all, but is simply another name for judicial review."[311] The exclusionary sanction is a particularized expression of constitutionalism. "The vindication of rights secured by the Constitution is an end in itself and if it serves no other purpose than to reassess and reaffirm the basic tenets of democracy, the court has accomplished its task."[312] The conflict between individual and societal rights are "value judgments or, rather, prejudgments" contained in the Constitution.[313] "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[314]

2. *Related Doctrines*

Besides the three component arguments detailed above—personal rights, judicial integrity, and judicial review—three additional and interlock-

---

307. Bennett, *supra* note 118, at 1156. This point has been expressed thusly:

> The status of the defendant . . . is . . . irrelevant. The [f]ourth amendment is a command; a command to government in general, and when the government seeks to disregard that command, it is the Court's province . . . to re-evaluate basic notions of freedom and articulate the bounds beyond which no government official may go.

Procedure, *supra* note 121, at 244.

308. 232 U.S. 383 (1914).

309. 367 U.S. 643 (1961).

310. Schrock & Welsh, *supra* note 35, at 325 (emphasis added). *See also* Paulsen, *supra* note 35, at 258.

311. Schrock & Welsh, *supra* note 35, at 324-25.

312. *Procedure*, *supra* note 121, at 246.

313. *Id.* at 245. Elsewhere the rationale is expressed: "If the Fifth Amendment self incrimination clause has been violated, it is not the Court but the Constitution that demands exclusion." *Attack*, *supra* note 134, at 99. *Cf.* Perry, *supra* note 17, at 350 n.272.

314. Mapp v. Ohio, 367 U.S. at 659.

ing groups of assumptions exist. Each of these assumption groupings can stand on their own, and often may be articulated as such, or may also directly or tacitly antecede each or all three of the component assumptions. From the perspective of exclusionary adherents, these assumptions may be summarized as follows:

a. *Open Society*. The Amendments comprising the Bill of Rights, together with the Civil War amendments (rather than the body of the Constitution), contain the preemminent values of liberty and equality originally put forth in the Declaration of Independence. The fusion of liberty and equality constitutes our most characteristic feature; a people committed to an "open society."[315] In such a society rights are personal and are beyond interference by ordinary legislative majorities.[316] The people commit themselves to removing barriers to free expression and individual goals. These obstacles are private or governmental barriers that are either discriminatory, arbitrary and or institutional. With these barriers removed, man's "moral evolution"[317] is thereby promoted. Before the first quarter of the twentieth century, however, progress toward societal openness in the United States had in many respects been severely circumscribed by legislative misfeasance, nonfeasance and or malfeasance.[318]

---

315. Lusky, *Government by Judiciary: What Price Legitimacy?* 6 HASTINGS CONST. L.Q. 403, 416-17 (1979). *See also* Soifer, *Protecting Civil Rights: A Critique of Raul Berger's History*, 54 N.Y.U. L. REV., 651, 661-62, 674-75, 682-83 (1979); Perry, *supra* note 17, at 295. Professor Perry states: "we seem to be open as a society to the possibility that there are right answers to political-moral problems." *Id.* A correlation apparently exists between the openness of a society's beliefs and the presumed faith in progress. *See* McCloskey, *supra* note 17, at 46-48.

316. *See* Soifer, *supra* note 315, at 682, 705-06. *But see* reply, Berger, *supra* note 17, at 458-60; Perry, *supra* note 1, at 285 n.100, 286-87; Berger, *supra* note 48, at 1. The open society concept, while frequently used, is rarely fleshed out in any principled exposition. *See* Gangi, *supra* note 1, at 43 n.359. One does discern, however, two distinct components, roughly corresponding to "principle democrats" and "process democrats" oriented advocates, or, as frequently appearing in the legal literature, process and substantive rights proponents. The former distinction is offered in a popular college text, J. BURNS, J. PELTASON & T. CRONIN, GOVERNMENT BY THE PEOPLE (BASIC), 8-9 (10th ed. 1981). The latter legal literature, may be represented by such commentators as Professor Tribe, *supra* note 17 (a substantive position), and the process orientation of Professor Ely. See Ely, *supra* note 17, at 4-10.

317. *Non Interpretive*, *supra* note 17, at 292. Professor Perry adds:

> Man is not 'finished,' finite. Man is open because he is not closed, he is not complete because he is itinerant, not definite, not 'finished in-complete. . . . No person considers himself as finished, as having exhausted the possibilities of becoming. The opening of which we speak is constitutive of the human being, the other side of what we call contingency. . . . Recognizing Man's openness means admitting he is . . . not (yet?) finished, absolute, definitive. It means admitting there is something in him that must evolve; it also affirms the capacity for such evolution.

Id. at 300 n.80 (quoting R. PANIKKAR, MYTH, FAITH AND HERMENEUTICS 208 (1979)) (footnote omitted).

318. These arguments relate to the existence of an alleged vacuum, created by the failure of representative institutions to act when, according to critics, it should have. *See supra* note 54.

b. *Contemporary Role of the Supreme Court.* With regard to the above context, by the middle of this century, an acute gap had developed between our professed ideals of liberty and equality (an open society) and existing realities (racial, sexual, and economic discrimination). While the need for long-range social reform was apparent,[319] often archaic if not repressive, state executive and legislative institutions stood in the way. They were ill-equipped or unwilling to embark on reform programs. Indeed, state institutions themselves frequently posed social and institutional obstacles to greater societal openness. Traditional political remedies, i.e., electoral accountability, held little promise in such circumstances. Elections do not work either where the vote itself is denied or severely circumscribed, or where those who where denied rights were members of permanent racial, sexual or economic minorities. State and federal legislatures were part of the problem, not the solution, for at least two reasons. First, officials often were elected by constituents who were prejudiced, resulting in majority legitimization of unjust, arbitrary and or discriminatory practices. Second, state legislative and or amendment processes were cumbersome because they too closely reflected majority prejudices and or too readily served to inhibit insular and isolated minorities.[320]

Since the other branches of government had proven ineffective, the Supreme Court eventually took action, stepping into the vacuum created by the gap between professed ideals and social realities.[321] Thus, since the end of World War II, the Supreme Court has become, and must be recognized as, our primary public policy-maker. Americans, it is contended, no longer subscribe to the eighteenth century's preoccupation with separation of powers as a bulwark of citizen liberty. They have accepted this new Supreme

---

319. Forrester, *supra* note 50, at 1216.

320. *See supra* notes 42-57 and accompanying text. *See, e.g.*, Gleicher, *supra* note 54, at 115-16. *See generally* Mendelson, *The Politics of Judicial Activism*, 24 EMORY L.J. 43, 57-61 (1975) [hereinafter cited as *Politics*]; Mendelson, *Separation, Politics and Judicial Activism*, 52 IND. L.J. 313, 317-21 (1977) [hereinafter cited as *Separation*]. The component arguments conflict and relevant sources regarding the position that the legislative branch and the Amendment procedure are cumbersome are provided elsewhere. *See* Gangi, *supra* note 1, at 37-39. Sources encountered since that time fail to introduce any new arguments. *See, e.g.*, Brest, *supra* note 17, at 227-29. Brest charges the judiciary with protection of individual rights. *Id. Cf.* Berger, *supra* note 48, at 24-26; Dixon, *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931 (1968). Professor Dixon astutely observed: "It is easy to make a major constitutional decision but almost impossible thereafter to draft an amendment to undo the one unpopular decision without affecting anything else or creating new problems." *Id.*, at 933.

Recent literature reveals that defenders of Court activism (of the Warren variety) now demand that reversal of earlier Court decisions be attempted only by constitutional amendment. *See* Kaufman, *Congress v. the Court*, N.Y. Times, Sept. 20, 1981 (magazine) 44, 56. Others contend that congress may legitimately veto prior Court legislation by removing jurisdiction *See Non Interpretive*, *supra* note 17, at 328-29, 339-41.

321. See Forrester, *supra* note 50, at 1215, for a list of reform issues tackled by the Court.

Court role, as our "Supreme Administrative Agency"[322] if not "Legis-Court."[323] "Judicial review," one commentator recently has asserted, "represents the institutionalization of prophecy. The function . . . is prophetic; it is to call the American people—actually the government, the representative of the people—to provisional judgment."[324]

c. *Meaningful Remedies.* Once the Bill of Rights and the role of the Supreme Court is understood properly, with the former as our expression of societal openness and the latter as guarantor of the former, the very existence of rights implies that effective remedies are available should any provision be violated. The absence of practical remedies would "reduce to a form of words"[325] Bill of Rights guarantees. To exclusionary rule supporters, there is a constitutionally implied personal right against use of evidence obtained by the breach of any specific fourth, fifth or sixth amendment provision. This is precisely the perspective executed by the Warren Court.[326]

III. Critique

Before proceeding, it is important to summarize what has been reviewed to this point. In Phase II of the exclusionary debate, supporters contend that the Constitution contains a personal right to exclusion.[327] They further assert that judicial integrity is compromised when judges fail to make that right meaningful by excluding illegally obtained evidence.[328] The criminal goes free, they argue, not because of any judicial judgment, but instead because of what we, the people, originally consented to when we ratified the fourth amendment to the Constitution. By insisting on the exclusionary sanction, the Supreme Court only forces the people to keep their word, by providing remedies for rights violations.[329] Both the right and remedy are implicit in the fourth amendment and other Bill of Rights provisions.[330] These constitutional morality arguments ultimately may be distilled to the following proposition: The Supreme Court is empowered to make Bill of Rights protections meaningful in existing circumstances. Thus, the confrontation with the exclusionary supporters may eventually be reduced to a single issue: What is the legitimate role of the Supreme Court in our systems of government?

---

322. Leedes, *supra* note 48, at 1361.

323. Forrester, *supra* note 50, at 1216.

324. *Non Interpretive*, *supra* note 17, at 291.

325. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

326. *See supra* note 286 and accompanying text. *See also*, White, *supra* note 15, at 169.

327. *See supra* notes 283-94 and accompanying text.

328. *See supra* notes 295-306 and accompanying text.

329. *See supra* text accompanying note 310.

330. *See generally* Oliver v. United States, 104 S.Ct. 1735, 1744-51 (1984) (Marshall, J. Dissenting).

A. *Criteria of Relevance*

In answering the question posed above, the relevancy of two propositions sufficiently defended elsewhere is asserted.[331] First, we, the three branches of government and we, the people, are bound by the clearly discernible intentions of the Framers.[332] Second, we are similarly bound by the Framers' limited intentions respecting the proper scope of judicial review.[333] Before 1961, these two propositions, more than any others, governed our history as a people, the decisions of the Supreme Court, and the discipline traditionally know as constitutional law.

These criteria are not widely shared today. Instead, for some commentators, the role the Court is to play in our government is a matter of personal choice. It is either an acknowledgement of what is,[334] or of the "good" results obtained,[335] or of a matter of selecting a "model" of Court power.[336] They seem to suggest that the contemporary role played by the Court is to be preferred to the one constitutionalized by the Framers. They also assert that this new Court role has elevated individual rights to the place these rights deserve and, in addition, that the judicial role exclusionary rule sup-

---

331. *See* Gangi, *supra* note 1, at 51-57.

332. *Id.* at 11.

333. *Id.* at 53-54.

334. The arguments defending the current role of the Court, usually expressed in terms of merely recognizing "what is," have been elsewhere described as the *Irreversible* symbol. *See* Gangi, *supra* note 1, at 47-52. For those contending that the current status of rights or Court power is irreversible, see Benedict, *supra* note 17, at 70-71 and especially Lusky, *supra* note 48, at 281-82, 284-85, 315-16, who weaves a significant component tapestry. *See also* Brennan, *supra* note 17, at 500-02; Perry, *supra* note 1, at 293-94; Schrock & Welsh, *supra* note 17, at 1158-71, 1159, 1165.

335. Much of contemporary legal writing fails to distinguish issues of legitimacy from approval of results. *See* Gangi, *supra* note 1, at 33-37. The reader may wish to consult these additional materials. For those tending to support the identification, see Brest, *supra* note 17, at 226; Grey, *supra* note 17, at 714; Lusky, *supra* note 48, at 295. For those supporting Berger's critique of such an identification, but not necessarily his views, see Berger, *supra* note 48 at 16-18; Ely, *supra* note 49, at 944-49; Kurland, *supra* note 17, at 8; Nagel, *supra* note 48, at 1177. In addition, two commentators help to flesh out a number of the arguments for discussion. *See generally* Ely, *supra* note 17, at 16-22; Linde, *supra* note 48, at 228-31, 237-38. Finally, there is little question that the issue of results is initimately related to the power of the Court. *Compare* Bork, *supra* note 17, at 3-4, *with Non Interpretive*, *supra* note 17, at 350 n.272 *and* Chase, *supra* note 17, at 572-73.

336. *See e.g.*, L. Tribe, American Constitutional Law 1-14 (1978); *Non Interpretive*, *supra* note 17, at 293-95; Tribe, *supra* note 17, at 1077-80; White, *supra* note 17, at 170-73. For comments regarding the evidently similar, although differing in content positions on substantive rights, of the works of Professors Dworkin, Rawls and Nozick, see Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 Ohio St. L.J. 3, 12, 36 (1981); *Ely's*, *supra* note 17, at 113 n.202; Benedict, *supra* note 17, at 75; Carey, *The Just and Good State: Rawls and Nozick Read Anew*, 20 Mod. Age 372 (1976); Chase, *supra* note 17, at 519, 564-66; Leedes, *supra* note 48, at 1378-92; Perry, *supra* note 1, at 267 n.271; *Non Interpretive*, *supra* note 17, at 303-05; Sandalow, *supra* note 17, at 1166-72; and Van den Haag, *Moral Rights and the Law: A Response to Dworkin*, 8 Intercollegiate Rev. 33 (1972).

porters applaud is better suited to contemporary circumstances.[337]

The choice of the Court role must be defended, however, and the chooser must take responsibility for his selection. One cannot have it both ways. One may choose whatever Court role one wishes, but if that choice cannot be supported either from the constitutional text, or the discernible intentions of the Framers, or the history surrounding adoption and ratification of the Constitution and or the Bill of Rights, but instead relies on speculation, or assertions, or personal judgments, then the chooser must face three consequences. First, he may no longer maintain that the Court role selected is consistent either with earlier constitutional law, or the American political tradition, as they were previously understood.[338] Second, he is pro-

---

337. *See supra* note 48 and accompanying text.

338. The traditional judicial role, even after ceding the legitimacy of judicial review as part of the Framers' clear intentions was that of a "nay-sayer." *See* Gangi, *supra* note 1, at 11. This position as indeed the "traditional" one is demonstrated by Professor Wolfe. *See* Wolfe, *supra* note 49, at 300-03. Professor Hurst concedes that at a minimum recent Supreme Court decisions validly raise the issue of legitimacy. *See* W. HURST, *supra* note 49, at 69, 104.

Under the Warren Court, the progress criterion employed by Justice Frankfurter (the civil liberties variety—the property variety having been abandoned) accelerated dramatically. Long established precedents fell before the "domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Friendly, *supra* note 126, at 950.

In this manner, Mapp v. Ohio, 367 U.S. 643 (1961), having ignored the historical context in which precedents and doctrines were developed, not to mention assuming an illegitimate judicial power, (*see supra* notes 10, 30, 35 and *infra* note 371.) was cited in deciding the later case of Gideon v. Wainwright, 372 U.S. 335, 342 n.6 (1963). Then *Mapp* and *Gideon*, along a parallel development, were cited to support the Court's decision in Malloy v. Hogan, 378 U.S. 1, 4 n.2, 6-10 (1964).

In addition, *Gideon*, along with Massiah v. United States, 377 U.S. 201 (1964), which itself had cited *Gideon* for authority, were used to decide Escobedo v. Illinois, 378 U.S. 478, 479, 484-88, 491 (1964). Compare the dissents of Justices Stewart and White. *Id.* at 493-99. As a grand finale the Court used all of the above to decide Miranda v. Arizona, 384 U.S. 436 (1965). *See* Miranda v. Arizona, 384 U.S. at 466 (referring to Mapp v. Ohio), 473 (Gideon v. Wainwright), 460, 463-65, 486 n.37 (Malloy v. Hogan) 440, 442, 450, 465, 466, 470, 475, 477, 479 n.48 (Escobedo v. Illinois)

Professor Graham concludes: "[i]t is difficult to analyze the *Miranda* opinion without considering what the majority of the Court says the history has been. This is because the majority has, in some sense, rewritten the record." Graham, *What is "Custodial Interrogation?" California's Anticipatory Application of Miranda v. Arizona*, 14 UCLA L. REV. 59, 70 (1966). Professor Graham then goes on to explore the Chief Justice's rendition of the history and policy considerations of the privilege and confession rules. *Id.* at 70-71. He then concludes:

> This leaves the Chief Justice with only one embarrassing question: Why is it that this rather obvious evolution of the privilege has not been detected before? His answer involves a reinterpretation of earlier developments. First, two old cases which explained the confession doctrine in terms of the privilege are resurrected. These old federal cases have never been forgotten, we are told. It is just that the existence of the *McNabb-Mallory* rule in the federal courts has relieved the Court of the need to handle confession cases on a constitutional basis, the supervisory and rule-making power being sufficient; and so far as state courts were concerned, there was the *Twining* doctrine that the fifth amendment did not apply to state court proceedings.

hibited from using precedents to support his position because at a minimum he ignores the pertinent facts that served to define those precedents, and, at a maximum, is purposely distorting them.[339] Finally, above all, he is prohibited from citing those traditions and precedents which establish legitimacy because, it must be remembered, he freely chose to abandon them. He instead chose to adopt a new role of Court power because he believed the role selected is either better, more protective of rights, or more suited to the times than the limited judicial role or statement of rights that in fact emerges from study of our history and constitutional law.

If Professor Perry is correct in demanding consistency from interpre-

---

> Then, the opinion continues, and this is where the argument gets tricky, in *Malloy v. Hogan*, the Court decided to re-examine the *Twining* rule. *Malloy* reversed *Twining* but, in so doing, the Court was merely recognizing what had long since become apparent—that it had been applying the fifth amendment to the states anyway. (That's not the tricky part; *Malloy* says just that.) Ignoring the fact that earlier he stated that the voluntariness doctrine might not apply to *Miranda* defendants, at least not "in traditional terms," the Chief Justice says that the voluntariness doctrine "encompasses all interrogation practices which are likely to exert such pressure upon the individual as to disable him from making a free and rational choice", and, it is concluded, *Escobedo* merely elaborates this proposition.
>
> Whoa! Try that again. If you re-read *Escobedo* you will find that there is not so much as a single stray citation to *Malloy*. As a matter of fact, the opinion of Justice Goldberg makes it clear that he views the decision as part of the *Gideon-Massiah* complex which follows from the application of the sixth amendment to the states, not the fifth. . . . Finally, the Warren opinion concludes its discussion of *Escobedo* by stating that there is a third basis for the decision—the protection of rights at trial. Though the Court's discussion of the point is not so forthright, one of the commentators cited by the court explains that this means "that the exclusionary rule is necessary to prevent state law enforcement authorities from circumventing the safeguards of the accusatorial, adversary trial." Just what this adds to the fifth and sixth amendment grounds is not entirely clear, but it suggests that rather than banning confessions, the court wishes to see that they are secured under conditions similar to those that prevail at trial.

Id. at 71-73.

Defending the Warren Court against such criticism, Professor Amsterdam responds: "Skillful domino players have a prescient purpose in the moves they make, however arbitrary these may seem to an observer lacking knowledge of their hidden pieces or their game plan." Amsterdam, *supra* note 15, at 351. Professor Amsterdam's response may be countered as follows: (1) the justices are not free to impose their "game plan" on the people or the legislative branch; (2) it is suspected their "hidden pieces" are nothing more than defective progressivist assumptions. Examination of the cases cited above reveals a very selective and deficient view of historical relevance wherein rights only expand, never contract. (3) The Court used invisible canons of construction, and continues to do so, as Professor Wolfe suggests, for an increasingly obvious reason. "To have a set of rules of interpretation would be to put excessive limits on the capacity of the judiciary to adapt the Constitution." Wolfe, *supra* note 49, at 305.

339. What is meant by distortion, is that precedents are taken out of the historical context which gave them meaning. Put another way, the criteria described elsewhere has been violated in not only one but frequently several ways. *See supra* notes 152-56 and accompanying text.

tivists,[340] similarly, noninterpretivists cannot demand that the people, or other branches of the government, be bound by the intentions of the Framers regarding *some* constitutional provisions, while others remain arbitrarily open-ended. Open-ended constitutional adjudication goes beyond the traditional categories of strict versus loose interpretations.[341] Besides, both those terms had originally applied to the exercise of legislative, not judicial, power. If the Supreme Court is no longer bound by the original intentions of the Framers regarding the proper scope of judicial power, noninterpretivists are open to the charge of maintaining that the Court can rewrite the entire Constitution, and amend it in any manner, even contrary to the known intentions of its Framers.[342]

B. *The Role of the Court and Exclusionary Rule Legitimacy Equation*

Must the reader then treat as identical the arguments used to defend the constitutional status of the exclusionary rule and those arguments adopted to proclaim the Court as supreme public policy maker?[343] Is this an attempt to place the reader between a rock and a hard place?

The rule's constitutional status must be equated with the contemporary role of the Court because many of its proponents, at least the most articulate among them, appear to rest their case precisely upon that equation. Indeed, they insist upon it.[344] Professor Kamisar, for example, under the "timelag argument,"[345] dismisses as ultimately irrelevant the absence of consistent precedents holding the exclusionary rule essential to the fourth amendment because, as he observes, in first, fifth, and sixth amendment cases, changes in Court doctrine have occurred over at least as long a period

---

340. Perry, *supra* note 1, at 275-78, 284-93.

341. Those who argue that the Constitution is and was intended to be an open-ended document make two essential contentions. First, the Constitution is open-ended in the sense that various phrases contained therein are conducive to adaptation of the document. Second, those who framed the Constitution, most notably those proposing the fourteenth amendment, purposely left certain provisions ambiguous in order to permit expansion in meaning, as circumstances changed. The reasons for rejecting these premises is outside the scope of this work. *See* Gangi, *supra* note 25, at 268-73; Gangi, *supra* note 1, at 55-57.

342. Rejected is the position taken by Professor Lusky and others that the Court has a "new and grander conception of its own place in the governmental scheme." Lusky, *supra* note 315, at 408. It is true that Lusky and others cite recent "experience," alluding to Court decisions during the past forty years. The better view, however, is with Professor Berger, who concludes that proponents of Court power have failed to establish the legitimacy of their claim, as well as having rendered meaningless traditional constitutional law. *See* Gangi *supra* note 1, at 49-52, 55-57 (discussing Professor Berger's views). Finally, they have been unable either to limit the role they envision for the Court or distinguish its contemporary exercise from that of its laissez-faire predecessors. *See generally* Gangi, *supra* note 1, at 46.

343. *See* notes 334-37 and accompanying text.

344. *See supra* notes 307-14 and accompanying text. *See generally Attack*, *supra* note 164, at 92-111; Kamisar, *supra* note 260, at 77-84; White, *supra* note 17, at 170-73.

345. Kamisar, *supra* note 260, at 74.

of time as the eventual finding of the exclusionary rule's applicability to the states.[346] In short, the Court has changed the meaning of constitutional provisions in other areas.[347] Professor Kamisar then specifically equates the contemporary role of the Supreme Court as our primary policy maker, with the legitimacy of the rule's constitutionality.[348]

Absent dependency on the presumed legitimacy of an expanded judicial role, this article contends as did Kamisar, that rule supporters would find it impossible to raise the exclusionary rule to constitutional stature. Still, if proponents of exclusion insist that the constitutionality of the rule and current Court power be considered as one issue, so be it.

In response to the above identification, two arguments are presented. First, insofar as those who contend the rule cannot be modified by ordinary legislation, and thus defend that position by referring to earlier Court decisions made in other areas (e.g., first and fifth amendments), the legitimacy of the decisions cited becomes thereby equally subject to scrutiny. If in those decisions, the Supreme Court either ignored, failed to address, or refused to address relevant questions regarding the historical accuracy in cited decisions, or the scope of their power, then the decisions cited add no authority to exclusionary rule decisions.[349] Instead, those decisions are to be considered inherently flawed and of little weight, and doubt is now equally cast on their legitimacy. Should such decisions be found to rest simply on "modern" judicial review arguments,[350] at a minimum, the Court is not entitled to claim deceptively that continuity with precedents cited therein exists, for any objective examination of those precedents would reveal conclusions very different from those suggested by the Court. In other words, no more dishonesty under the guise of adaptation.[351]

Second, "traditional" constitutional interpretation criteria cannot be declared irrelevant to contemporary circumstances in some matters (e.g., first, fourth, fifth, sixth, fourteenth amendments and scope of the judicial power), while at other times (e.g., limits of legislative and executive power) our allegience to the intentions of the Framers is demanded.[352] In other words, when historical and doctrinal continuity is repeatedly broken in the civil liberties area, fidelity to other constitutional components is inevitably at risk.[353]

---

346. *Id.* at 74-75.

347. *Id.* at 74-78 *passim.*

348. *Id.* at 78 (emphasis added).

349. *See supra* note 338.

350. *See supra* note 169.

351. *See* Gangi, *supra* note 1, at 54, 56.

352. Professor Berger put it thusly: "What is sound sense for the impeachment of Richard Nixon does not become nonsense when applied for refutation of Chief Justice Warren." Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CON. L.Q., 527, 623 (1979).

353. Judicial power proponents generally and exclusionary supporters in particular must

C. *"Progress" and Seven Other Unsupported Personal Rights Assumptions*

Exclusionary arguments (personal rights, judicial integrity and judicial review),[354] rest upon assumptions and/or personal preferences ultimately not traceable and probably inconsistent with the principles constitutionalized by the Framers. In fact, underlying an infinite variety of catchwords[355] is the pervasive effect of what Professor Bickel and Gilmore shrewdly discerned: progress.[356] All one has to do is scratch the surface of the personal rights, judicial integrity and review arguments, and what will be found are the personal views of the Justices on what constitutes progress, and not constitutional arguments in any traditional meaning of that word.[357] Under laissez-

---

address the following issues. First, what are the proper canons of construction to employ when defining and resolving constitutional questions? Is one bound by the clearly discernible intentions of those who framed and ratified constitutional provisions? Second, are Supreme Court decisions which cannot be rooted in the clearly discernible intentions of the Framers binding, and if so, to what degree? Absent discernible intentions, upon what evidence is it assumed the judiciary is more qualified than elected representatives to resolve public policy issues? Third, is judicial resolution compatible with our republic's commitment to democratic (majority) self-rule? Are the constitutional structures equally malleable: may the Supreme Court also redefine them (as it has with individual rights) contrary to the intentions of the Framers? Last, but not least, how can one distinguish between Supreme Court abandonment of original intentions that have been condemned, as in laissez-faire, and those in which they choose to presently engage?

With respect to the exclusionary rule in particular, contemporary Court power proponents must forthrightly address such questions as: (a) *Which* constitutional provision(s) *command* exclusion, and upon what historical evidence is such a claim based? (b) When did substitution of judicial for legislative choices on public policy questions become permissible? (c) *Why* does judicial "institutional integrity" not exceed the proper scope of judicial power as understood by the Framers of the Constitution? As detailed subsequently, rule proponents cannot meet any burden of proof demanded of them.

354. See *supra* text accompanying notes 283-314.

355. Analysis of the more important catchwords will be discussed subsequently. See *infra* text accompanying notes 399-460. For now, it is sufficient to state that the literature abounds with preference loaded words and phrases, preferences the preferrer assumes the Constitution contains but which could not be attributable to the Framers, or to the people, by ordinary or extraordinary legislative means. Even so-called "neutral principles" are illegitimate if they contain substantive or procedural preferences not embedded in the Constitution. *See* Gangi, *supra* note 1, at 46 n.386. Reference is made more specifically to phrases such as "moral momentum" or "moral ascendancy," Schrock & Welsh, *supra* note 17, at 1167 n.247, "mystic function" *Id.* at 1174, "particular vision," Chase, *supra* note 15, at 519, "model," *Id.* at 533; "tainted character," *Herdon*, *supra* note 91, at 135, "moral evolution" *Non Interpretive*, *supra* note 17, at 294, "moral justification," *Id.* at 298, and "emergent principles," *Id.* at 307. Many of such phrases must assume a certain progressivist evolution.

356. *See supra* comment and sources accompanying note 148. One may add, moreover, that the alleged prospect of "value-free" adjudication, (see Tushnet, *supra* note 25, at 1038) itself is part of the assumptions surrounding the idea of the progress. *See* L. Strauss, Natural Right And History 41-48 (1952); E. Voegelia, Anamnesis 13-22 (1978) [hereinafter cited as Anamnesis].

357. This fact is hardly a revelation. See Ely, *supra* note 17, at 14-16. Indeed, the bulk of open-ended adjudication celebrates it. See *supra* comment and sources accompanying note 55.

faire Court case veneer is faith in economic progress, while under the Warren Court case veneer is faith in social science progress. Under the Burger Court case veneer is periodic doubt about at least some aspects of both progresses.[358] Even though the degree may vary, underlying all three case veneers, are personal choices, each ultimately supporting court power as being at the center of our governmental system. It is a role that this article's analysis rejects as unfounded, unsupportable and inconsistent with the Constitution.[359]

To state that under case veneer lies personal value preferences is not to say that the policies preferred are wrong, or morally inferior. Rather, this is to state that under our constitutional scheme, personal value preferences may not be imposed without the consent of the people. The Court is charged with assuring that we remain bound to judgments clearly discernible from the intentions of the Framers. While disagreement may exist over what those intentions were, it is quite a different thing to act contrary to those intentions.[360]

Furthermore, the above remarks do not imply that moral considerations are irrelevant. On the contrary, they are essential in the process of ordinary and extraordinary deliberation within the constitutional values imposed. The legislative institutions, however, are charged with that responsibility because they are accountable for the choices that result. The Framers, moreover, made no distinction between economic and personal rights respecting such deliberations.[361] Therefore, demonstrating each component argument: personal rights, integrity, and judicial review — serves merely to mask personal preferences.

The beginning of this article dealt with the proposition that Bill of Rights provisions have been wrenched from their common law context.[362] The purpose there was to refresh the reader's memory regarding our country's history, the Framers' probable intentions regarding the significance

---

358. *See* G. GILMORE, *supra* note 166, at 101-04.

359. In classical philosophy, imposition of values by the ruler, whether it be one, few or many—to suit the ruler's own purpose, even if it was conceived as being beneficent, was considered tyranny. It was the American understanding of consent that itself prompted concern for majority tyranny. *See* Gangi, *supra* note 1, at 59-62. In American constitutional law, exercise of powers beyond those granted is called usurpation. The fact that the most recent imposers believe that personal rights are superior to economic rights, tells us something about those beliefs, but, it adds nothing to the legitimacy of its imposition.

360. *See* Gangi, *supra* note 1, at 5-7.

361. *See generally* W. KENDALL & G. CAREY, *supra* note 18, at 51-53, 71-73.

362. The fact that the Supreme Court ignores or distorts the common law heritage of the Bill of Rights may not be of much consequence to proponents of increased judicial power. Others disagree. *See* R. BERGER, DEATH PENALTIES 21, 59-111 (1982) (The Framers used common law terms in order to give the Constitution fixed meaning). The issue, moreover, is whether the role claimed for the Court is the legitimate meaning intended by the Framers, or whether this role was subsequently consented to by the people. On either count, supporters have failed to make their case. *See* Gangi, *supra* note 1, at 43-47, 56-57.

and operation of the Bill of Rights and, lastly, the obstacles which exist to recapturing an unbiased assessment of those events.

The purpose of the pages that follow, however, is quite different, although some of the materials are identical. The thrust of what follows is to educate the reader as to the most frequently encountered (most often repeated) assumptions underlying contemporary exclusionary views, as well as to state why the assumption is not sustainable because each only demonstrates the personal beliefs of the advocate.

1. *Bill of Rights provisions elevated personal rights above the people's rights to self-government.*[363]

This assumption must be rejected because it fails to grasp one hundred and fifty years of colonial history. When the relationship between the Constitution and the Bill of Rights is understood, as it was understood by those who framed and ratified both, it is clear that Bill of Rights limitations were perceived as protective of the "people" only from potentially abusive federal power, even then leaving Congress relatively free to act even within the areas proscribed.[364]

2. *The primary purpose of those framing relevant Bill of Rights provisions was to protect even guilty defendants from conviction if specified*

---

363. *See*, e.g., R. LEE, *supra* note 15, at 17; White, *supra* note 17, at 169. Elsewhere is discussed the fact that while some commentators believe the major decisions ("pre-judgments") about the nature of our rights were made by the Founders in the Bill of Rights, others, conceding that there is no historical support for that position, instead recognize that concern for rights, particularly by the judiciary, came only much later. *See* Gangi, *supra* note 1, at 39-40 and text accompanying *supra* note 313.

364. *See supra* notes 18, 21-22. Professors Kendall and Carey describe the position that liberty and equality constitute the core of our tradition as the "official literature," meaning that it is a dominant view. W. KENDALL & G. CAREY, *supra* note 18, at 9 n.9. More specifically, the "official literature" consists of the great body of secondary writings which assert that the Declaration of Independence marks the beginning of our tradition and that there is a consistency between it and the subsequent expressions of that tradition found in the Constitution, the Federalist Papers, and Bill of Rights. *See generally id.* at 3-10, 26-29, 119-36. In light of contemporary scholarship, however, Professors Kendall and Carey contend that the consistency assumed by the "official literature" is extremely doubtful. To find such consistency necessiatates suppression of relevant facts. Details must be left to the reader, but five basic areas are identified by the authors. They are: (1) Why did the Framers oppose a Bill of Rights? *Id.* at 10-12; (2) Where did God go between the Declaration of Independence and the Constitution? *Id.* at 12; (3) If the Declaration declared "natural rights", and indeed the colonialists fought the Revolution to secure such rights, were these rights identical to those eventually proposed in the Bill of Rights? If so, then why did the Framers oppose their inclusion into the Constitution? *Id.* at 12-13; (4) What happened to the equality espoused in the Declaration? *Id.* at 14-15; (5) If, as often contended, we fought the Revolution to secure the "rights of Englishmen," what were they specifically? Did the Englishmen have them, and what happened to them, after the War was won? If one suggests that such rights were incorporated into the Bill of Rights, see (1) and (3) above. *Id.* at 14-17. *See, e.g.*, L. LEVY, *supra* note 21, and HYMAN, TO TRY MEN'S SOULS (1964).

procedures were violated.

This assumption is inconsistent with the evidence. It reveals more of the "progressivist" criteria employed for evaluating good government than what is known about the Bill of Rights. If common law practice is an accurate reflection of what Bill of Rights protections included, the primary purposes for the rule were to provide procedures thought more likely to prevent conviction of innocent persons and minimize the potential for federal executive or judicial abuse.[365]

3. *Bill of Rights provisions may be defined solely by reference to textual language.*[366]

This assumption entails ignoring the traditional judicial obligation to define the law by exploring the intent of those who framed it. Furthermore, whether by statute or constitution, other canons of construction for discerning intent remain constant for exploring the specific actions taken concurrent with and subsequent to passage.[367]

This assumption also implies that the intentions of the Framers, even when discernible, can be legitimately ignored. The assumption must be rejected on principle. Professor Monaghan puts it bluntly when he states, "For I would insist that any theory of constitutional interpretation which renders unimportant or irrelevant questions as original intent, *so far as that intent can be fairly discerned,* is not, given our traditions, politically or intellectually defensible."[368]

4. *The judiciary may adapt Bill of Rights provisions to existing circumstances, interpreting relevant phrases on the basis of "logic" derived from understanding the "nature" of the Bill of Rights.*

This assumption, or rather, these assumptions, must be rejected on several grounds. These assumptions further demonstrate the interlocking character of the judicial expansionist rationale.[369] First, judicial power to "adapt" the Constitution, contrary to the wishes of the representative assembly, cannot be established prior to the usurpations in question.[370] Sec-

---

365. *See supra* notes 10, 18-22 and accompanying text.

366. Professor Berger criticizes Ely's contentions regarding alleged "invitations" to open-ended interpretation. *See generally, Ely's, supra* note 17, and Berger, *Government By Judiciary: John Hart Ely's Invitation,* 54 IND. L.J. 277 (1978).

367. *See* Gangi, *supra* note 1, at 8; W. HURST, *supra* note 49, at 32-40.

368. Monaghan, *The Constitution Goes to Harvard,* 13 HARV. C.R.-C.L. L. REV. 117, 124 (1978) (emphasis in original).

369. See *infra* note 527.

370. *See* Gangi, *supra* note 1, at 35, n.293 (refering to contemporary Supreme Court decisions). Still, like Professor Berger, the author does not deny a legitimate judicial policy making role. "I consider that if the terms of a particular constitutional provision are *ambiguous* and no *framer's choices are discernible,* there is *room* for judicial policymaking." *Id.* at 38 n.318. Policy

ond, the "nature" of the Bill of Rights, insofar as it makes assumptions already rejected above, is itself an unsupported assumption — one contrary to available historical data.[371] Finally, logic may explicate legitimate claims, but it does not establish legitimacy. Logic may be inherently defective if it proceeds, as it often does, on the basis of false premises. Once "rights" are understood from the perspective of those who framed and ratified them, it would be clear that each Bill of Rights provision had a precise common law meaning. Whatever one's "logic," the fourth amendment did not then require exclusion of reliable evidence, just as the fifth amendment did not prohibit admission of reliable evidence even when acquired by police violence. Similarly, freedom of the press did not immunize one from the charge of seditious libel, however illogical that may be perceived to be from our contemporary perspective of the "nature" of rights.[372]

---

making is a continuous process, dependent upon both judicial and legislative actions. *See* W. HURST, *supra* note 49, at 40-46.

371. Court decisions in first and fifth amendment cases have often gone significantly beyond what we can discern as the Framer's original purpose. So too, as Berger has demonstrated, are those cases relating to the fourteenth amendment (school segregation and voting rights). Professor Perry cedes as much, Perry, *supra* note 1, at 284-89 (first and fourteenth amendments) but, in a recent piece, tries to justify those Court decisions. *See Non Interpretive*, *supra* note 17.

What has occurred under open-ended constitutional interpretation, by both Warren and Burger Courts, has been the advocacy of preferences thought right, just or necessary by particular justices and their supporters. *See* R. BERGER *supra* note 362 at 1-9; Gangi *supra* 1 at 1-2 (areas of judicial policy making). These preferences are grafted into the "generalities" of the constitutional text, often under the rubric that these preferences have always been there. *See generally id.* These preferences have been, one assumes, waiting to be released by the "right" set of circumstances, a fairy tale repeated since laissez-faire. The objective is, as always, to take American society where advocates believe it ought to go. Professor Wolfe, in a recent paper, concisely summarized the methodology:

> The process whereby the Constitution has been taken out of constitutional law consists of several steps. First, the Constitution has been emptied of substantive content. This has been done by severing constitutional provisions from their underlying theoretical principles and by raising the meanings of constitutional provisions to such a high level of generality that they are vague and ambiguous.
>
> Second, the Constitution has been given a new content. This has been done generally by re-defining interpretation as "specification of constitutional generalities" by means of balancing competing interests and by adding to the Constitution a new unwritten clause which may be called the "judicial necessary and proper clause."
>
> Other, more particular methods have been employed as well (e.g., taking advantage of changed meanings of words, substituting words broader or narrower than those of the Constitution, misusing history, taking old precedents out of context and investing them with a new meaning, and ignoring implications of one part of the Constitution for another.)

Wolfe, *How the Constitution Was Taken Out of Constitutional Law*, (memograph delivered at the 1981 meeting of the American Political Science Association (Sept. 3-6 1981)).

372. *See supra* notes 151-56 and accompanying text.

5. *Pertinent Bill of Rights provisions apply to the states through the fourteenth amendment, thereby placing state courts under the supervision of the Supreme Court.*

This assumption, almost universally accepted, is increasingly suspect. The historical evidence is convincingly against the position that those who framed the fourteenth amendment intended to apply the Bill of Rights to the states.[373] Moreover, those who framed the Civil War amendments, at most, intended to increase federal legislative, not judicial, power.[374] There also appears to be an increasing awareness that with the New Deal, eventually what emerged was "not much more than changing of the guard."[375] Social science replaced laissez-faire economic progressivist assumptions. It was "a change in course, not a change of goal."[376]

6. *Application of defendant rights, as exclusionary proponents choose to define them, will have no adverse affect on the ability of the people to address the crime issue.*[377]

This assumption ignores all the evidence indicating that the federal Bill of Rights provisions were similar, if not identical, to those under common law and existing state constitutions. It similarly ignores all the evidence that each state and their people were relatively free to determine what those rights meant, how they would apply, and what remedies were necessary for violations. Finally, exclusionary supporters offer no proof for their position. Instead, one is asked to take this "invisible hand," on faith.

The Constitution, however, was an expression of the people's desire to govern themselves. The Preamable[378] clarifies the purposes for which it was proposed and ratified. The Constitution embodies an experiential tension: a balancing of competing concerns in the midst of concrete realities. *The Federalist Papers* provide candid insight regarding both the realities and con-

---

373. *See generally* Gangi, *supra* note 1, at 9-10, 41-43.

374. With respect to increased legislative power, see R. BERGER, *supra* note 362, at 153, 172. Also, there is Professor Wolfe's conclusion: "Accordingly, with regard to segregation, I am inclined to say that a congressional law prohibiting school desegregation, under section 5 [of the fourteenth amendment], should be upheld by a court, while state segregation laws should not have been overturned by judicial decree." Wolfe, *supra* note 371, at 23. *See also Non Interpretive*, *supra* note 17, at 315 n.138.

375. G. GILMORE, *supra* note 166, at 87.

376. *Id.* at 100.

377. *See supra* notes 283-94, 312-14 and accompanying text.

378. We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

U.S. CONST. preamble.

cerns considered by the Convention.[379] The subsequent addition of a Bill of Rights added little substantive content. Rather, the Bill of Rights made explicit what had been presumed to be implicit — the limited nature of the newly created federal government and the importance of traditional common law rights.[380]

For national and international purposes, the people were prepared to act as one, a realization of necessity, for otherwise they might not be able to persevere.[381] In union, they might preserve a republican government and be spared the fate of preceding attempts at pure democratic self-rule. Regarding public policy on human affairs, the states were left free to pursue related self-interpretations as each saw fit. Of course, each state was limited in that pursuit, by that which they consented to as a part of the union, as well as those limits consented to in the particular state constitutions adopted.[382]

This much may be deduced. Between the newly created federal government and each state, the people's right to self-government entailed the competency to deal with any subject "thought meete and convenient for the general good."[383] Therefore, when judicial interpretation prohibits both federal and state governments from dealing with issues of public concern, and there is a corresponding failure to locate the prohibition in the clearly discernible intentions of the Framers, such interpretation is inherently misguided. Somewhere along the line, the judicial interpretation went astray and either illegitimate presumptions were made, or the Justices injected personal preferences into their decisions. The laissez-faire Court made this mistake, and as suggested earlier, so have the Warren and Burger Courts.[384] The essence of the mistakes made by all three Courts has been the same — illegitimate presumptions regarding history and progress, and substitution of personal preferences for those of the Framers regarding the nature of the rights or the Bill of Rights. Where each specifically went astray is a matter of detail, already sufficiently discussed.[385]

Insofar as adoption of the Constitution entailed certain judgments over others, we are bound to that instrument.[386] Deviation from clearly discernible intentions on those judgments must be addressed to the people.[387] In all other matters the Constitution is clear: "All legislative power herein granted

---

379. THE FEDERALIST (A. Hamilton, J. Madison, J. Jay).

380. *See supra* notes 14-25 and accompanying text.

381. THE FEDERALIST Nos. 4-18 (A. Hamilton, J. Madison, J. Jay).

382. *Id.* at Nos. 9-10, 51. *See also* Gangi, supra note 1, at 59-62.

383. MAYFLOWER COMPACT (1620).

384. *See supra* notes 87-111 and accompanying text.

385. *See supra* notes 281, 363-76 and accompanying text.

386. It is suggested the Framers approached constitution-making in the classical tradition. They recognized that existing realities and the need for consent limited their ability to pursue the best regime. *See supra* note 25.

387. U.S. CONST. art. V (amendment procedures).

shall be vested in a Congress of the United States. . . ."[388] The essence of self-government is, after all, precisely about deliberation on matters affecting the common good. For the same reason, it is necessary to affirm that consent must be obtained to change judgments already constitutionalized and, insofar as those judgments have not been constitutionalized, the people are free to deliberate.[389] American history clearly shows that the representative assembly has had primary responsibility for deliberating and deciding public policy options.[390]

7. *Without the exclusionary rule, fourth amendment rights would be reduced to a mere "form of words" because other remedies for police abuse have failed.*[391] *Admission of reliable evidence constitutes approval of the illegal police practices.*[392]

As has been seen, exclusionary proponents argue that once a police illegality (e.g., search without probable cause) is committed, use of evidence so acquired would be unjust or unfair.[393] It would be better (a judge would remain untainted) if the evidence obtained was not used at all.[394]

This preference for exclusion is certainly understandable. After all, it is a possible response for a breach of ethics, or fair play. The exclusionary sanction offers a remedy at least believed appropriate by its proponents for police misconduct. An exclusionary option, however, does not establish it as a *right* mandated by the Constitution, nor does it allow the judiciary to impose that sanction. It is contended here that the judiciary lacks the legitimate authority to impose the exclusionary sanction because even though it can assert such a right, the judiciary cannot establish the right claimed. The evidence of historical practice supports such a conclusion. Reliable but illegally obtained evidence was consistently admitted in courts prior to, concurrent with, and subsequent to adoption of federal and state constitutions and bills of rights.[395] Admissibility came under ordinary statutory rules of evi-

---

388. *Id.* at art. I. § 1.

389. Professors Kendall and Carey characterize "deliberation" as essential to the American tradition; the representative assembly emerged as the body entrusted with the responsibility to deliberate "on the delicate topics touched upon, to pass laws in the sensitive areas from the standpoint of freedom." W. KENDALL & G. CAREY, *supra* note 18, at 55. In governing themselves, the people gave their representatives the responsibility to make judgments on the common good. *Id.* at 99. These representatives were thereby to define and balance conflicting views on individual rights, duties and societal ordering in particular circumstances. *Id.* at 56-60.

390. *See generally Politics, supra* note 320, at 45-63; W. HURST, *supra* note 49, at 1.

391. *See supra* notes 35, 286 and accompanying text. *See also* Kamisar, *supra* note 260, at 82.

392. *See, e.g.*, Kamisar, *supra* note 260, at 78-83. *See also supra* notes 296-303 and accompanying text.

393. *See supra* notes 246-82 and accompanying text.

394. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

395. *See* H. WIGMORE *supra* note 9, § 2281, at 5 n.1 for a list of applicable case law. *See*

dence. Whatever judicial policy making occurred was subject to legislative oversight and statutory correction.[396] Furthermore, it must be remembered that rules of evidence have no constitutional stature.[397] The mere "form of words" argument therefore amounts to nothing more than a restatement of the exclusionary system of belief that it is wrong to use such evidence. Although this may be an ethical judgement, repetition does not elevate it to a constitutional right. Proponents simply are reading their personal judgments into the Constitution. Stated another way, rule proponents are substituting their judgments on public policy options for those initially constitutionalized by the Framers. More specifically, rule supporters are substituting judicial assessments for those duly elected legislators who are accountable to the people.

The mere "form of words" argument, furthermore, rests on the apparent conclusion that the common law remedies had failed or were inadequate. It is suggested, however, that only the citizenry through their electorally accountable representatives can make such a determination. In the eyes of exclusionary proponents, which may include members of the judiciary, the fact that other remedies failed or are inadequate does not address the issue of whether the rule is constitutionally mandated.

Finally, the fact that defendants found fourth amendment protections to be a mere "form of words" if reliable evidence could be used against them, is, of course, equally irrelevant. The people, not defendants, must be convinced of the failure or inadequacy of remedies provided.[398] The focal point of amendment protection was not defendants, at least not in our current understanding of that term. The focus was on what procedures were thought necessary to reduce possibilities of executive or judicial abuses, as well as protect innocent citizens from unjust convictions. The starting point was not protection of defendants, but deliberation on appropriate procedures from the perspective of citizens, *before* they became defendants. No exclusionary sanction was contained in federal or state constitutions because representative assemblies, electable and accountable to those same citizens, were charged with identifying abuses and specifying remedies. Thus, it is to the common and statutory law that we must look for remedies, and therein we find no basis for excluding reliable evidence.

To avoid the conclusion that the exclusionary rule lacks constitutional stature, proponents must make one or more of the seven historically unsupported assumptions detailed above. The only other alternative is to assert a judicial power to revise the Constitution, a topic considered subsequently.

---

also supra notes 26-27 and accompanying text.

396. *See supra* note 172; W. HURST, *supra* note 49, at 40-46.

397. The author suggests that "due process" cannot possibly be understood outside of the context of its common law heritage, a heritage steeped in concern for reliability of evidence, which is to say, with innocence. *See* Kamisar, *supra* note 195, at 76.

398. *See infra* notes 446-56 and accompanying text.

D. Six Additional Personal Preference Arguments

This article is not quite out of the personal rights (based on unproven assumptions and personal preference) woods yet. After all, it has been many years and the forest has been allowed to grow wild; the trees are almost choking one another. It really is quite a "mess."[399] Therefore, a further attempt will be made to establish the existence of additional assumptions or personal preferences which likewise are not traceable to judgments constitutionalized by the Framers.[400]

1. *Open Society*

This is a popular, oft repeated phrase, but what exactly does it mean? The absence of exactness, one suspects, is part of its charm. Do proponents mean open, as in a free society, versus closed, as in a totalitarian one?[401] Does the phrase really illuminate what principles the Framers constitutionalized? For several reasons, this is not the case. The least of these reasons is the fact that the term "open society" was obviously unknown to the Framers who preceded its usage. The term in fact is a shorthand expression for a variety of assumptions and personal judgments regarding the nature and content of rights already explored. In the absence of same, the phrase is unintelligible.[402] Finally, even when policy judgments are linked to the first amendment, it cannot be said that they were values constitutionalized by the Framers.[403]

---

399. Leedes, *supra* note 48, at 1361.

400. *See* Perry, *supra* note 1, at 263-64. The Constitution consists "of a complex of value judgments the Framers wrote into the text of the Constitution and thereby constitutionalized." *Id.* at 263-64. "[T]he effort [for interpretivists] is to ascertain, as accurately as available historical material will permit, the character of a value judgment the Framers constituted at some time in the past." *Id.* at 264.

Perry also mentions that such judgments need not be explicit in "some particular provision" or the "overall structure." *Id.* This appears to be consistent with earlier remarks made in this article and those of Professor Berger, who after all points out that judicial review is not explicitly mentioned in the text but was nevertheless intended. *See* Gangi, *supra* note 1, at 11; R. Berger, *supra* note 144, at 351-62.

401. *See* Gangi, *supra* note 1, at 43 n.359, 65-67 n.483. *See also supra* notes 315-18 and accompanying text and *infra* notes 455-59 and accompanying text.

402. *See* Kendall, *The Open Society and Its Fallacies*, Liv. Am. Pol. Sci. A. Rev. 972 (1960); Kendall, *The People Versus Socrates Revisited*, 3 Modern Age 98, 108-09 (1958-59) [hereinafter cited as *People*] (characteristics of recurrent problem in political theory: the proclaimer of divine truth).

403. According to Professor Perry: "The decisions in virtually all modern constitutional cases of consequence . . . cannot plausibly be explained except in terms of noninterpretative review, because in virtually no such cases can it plausibly be maintained that the Framers constitutionalized the determinative value judgment." Perry, *supra* note 1, at 265.

2. *Fair Trial/Fair Prosecution "Symbols"*

Some commentators employ symbols of fair trial/fair prosecution to justify the imposition of the exclusionary rule, or to expound on the importance of specific constitutional provisions.[404] They point to the disparities that they say exist between what the symbols of fairness or constitutional provisions imply, and the realities they say that in fact impede realization of that fairness.[405]

As with remedies, however, unless exponents ground ideas of fairness into the intentions of the Framers, they remain personal judgments. Furthermore, if proponents wish to assert that the fairness they demand is part of traditional constitutional law, they will have to confront and overcome the already stated position that the Bill of Rights was aimed at reducing executive or judicial abuses and minimizing wrongful convictions. There is no evidence to support contentions that fairness, as envisioned by the Framers, required exclusion of reliable evidence. Should proponents choose not to meet that burden, but instead assert that their ideas of fairness are superior to those constitutionalized by the Framers, then there are three consequences they must face. First, they must concede the fact that they are asserting personal choices. Next, they must address the issue of legitimacy, as well as the possible consequences of abandoning the intentions of the Framers. Finally, they must admit precisely what they are doing — creating new symbols based upon personal preferences.

To conclude, references to fair trial/fair prosecution symbolism cannot be sustained outside the implicit assumptions made with respect to rights, the personal ethical judgments otherwise contained, or the subterfuge of asserting that these rights were in the Constitution though only recently discovered.[406] Furthermore, those currently employing fair trial/fair prosecution symbols often change and abuse them without authorization.[407] They

---

404. *See, e.g.*, Schrock & Welsh, *supra* note 35, at 260-62.

405. *Id.*

406. Perry, *supra* note 1, at 265; *Non Interpretive*, *supra* note 17, at 350-51 n.272.

407. A brief explanation is appropriate. Professor Voegelin introduced the "self-interpretation" concept in order to understand and appreciate a society's development through time. *See Anamnesis*, *supra* note 356, at 116; E. VOEGELIN, NEW SCIENCE OF POLITICS, 27 (1952) [hereinafter cited as *New*]. Symbols, hence, offer a legitimate means by which one can study what societies believed as their truth as a people.

Professors Kendall and Carey applied Voegelin's criterion to American history, noting with respect to symbolism:

> A people that has given itself a set of symbols does not just leave it at that. With the passing of time it develops its symbols; perhaps enriching or impoverishing them, perhaps giving them new twists, perhaps emphasizing this symbol at the expense of that one, or even perhaps dropping old symbols and replacing them with new ones.

W. KENDALL & G. CAREY, *supra* note 18, at 24. In addition symbols can and do change, and, can be degraded and abused. *See* M. ELIADE, IMAGES AND SYMBOLS 18 (1961). *Compare* Tonsor, *The Use and Abuse of Myth*, 15 INTERCOLLEGIATE REV. 67 (Spring, 1980), *with* ARNOLD, THE SYMBOLS OF GOVERNMENT 10 (1935) [hereinafter cited as *Symbols*].

apparently do not see symbols as source material for greater understanding, or as a means by which scholars may explore a people's self-interpretation. Instead, they see symbols as irrational and as a means of manipulation; "a very useful tool in the hands of another, who wishes to exercise social control."[408] They do not seek to understand the truth contained in the symbols in asmuch as they use the symbols to reach goals they consider good, thus demonstrating once again personal preference.[409] Such activity constitutes an abuse of symbols. Symbols should be used to illuminate, not manipulate. In doing so they cannot hope to grasp what was intended by the Framers or the people, and should refrain from such implication.

3. *Model Building*

Models are defective when they either employ assumptions developed subsequent to materials studied, and or divorce themselves from the context which gave them meaning.[410] The purpose of a model should be to illuminate; to help one understand the object studied. Models are a legitimate analytical tool (barring the above two defects) if the scholar never loses sight of the fact that he is not studying reality, but instead an abstraction of his own making.

The models under analysis usually not only suffer from the two primary defects, but are frequently much more destructive when those employing the models forget that it was never an actual part of the Constitution. To illustrate this point reference is made to Professor Packer's brilliantly constructed *Two Models of Criminal Process*.[411] There he identifies "factual"

The problem of tradition, then, may be pursued in the following manner. Self-interpretation equals tradition. On the one hand, for it to be said that a tradition exists, there should be a continuity of expression and action found in the symbols identified over an extended period of time and the people's behavior. While the exact meaning of original symbols that appear in "compact" (compressed) form may be somewhat unclear, subsequent "differentiation" (actions that result in additional detail) helps us grasp more precisely what was intended by the compact symbol. Conversely, should introduction of symbols be discordant with earlier ones, or if it can be established that an earlier tension was redefined or abandoned, or that meaningful continuity does not exist between various expressions, then it may be said that a tradition does not exist. Instead, there may be a number of traditions, perhaps related, perhaps not, but not one tradition.

408. *Symbols, supra* note 407, at 10.

409. *Compare Symbols, supra* note 407, at 6-10 *and* Kamisar, *supra* note 293, at 82-83, *with* W. KENDALL & G. CAREY, *supra* note 18, at 18-22 *and* Tonsor, *supra* note 407. It is further contended that unless the reader grasps the difference in approach to symbols, he will fail to understand the repeated abuse and manipulation of precedents by Court majorities and commentators. Finally, if the Warren Court indeed manipulated precedent, how can the Burger Court return to the original thrust of those precedents, without itself being accused of manipulating Warren Court precedents?

410. *See supra* notes 152-56 and accompanying text.

411. Packer, *Two Models of the Criminal Process*, 113 U. PENN. L. REV. 1 (1964). Professor Packer pursues the subject of criminal process by abstracting models from reality. *Id.*, at 1-

guilt versus "legal" guilt,[412] while still remaining sensitive to the consequences that resulted from the distinction.[413] Compare this with Professor Chase, who thirteen years later, uses legal and factual guilt models as if they had always been part of constitutional interpretation.[414] Other scholars have built related models, e.g., "fragmentary" versus "unitary" views of government prosecution.[415] None of these models had been constitutionalized by the Framers because, aside from procedures of common law ancestry, prosecution and evidence admission had always been an area in which various considerations existed in tension. The legislature generally was in charge of making whatever changes or adjustments that were demanded by existing circumstances or constituents.[416]

The model-building process, however, is illuminating. Models are primarily word constructions quickly divorced from the circumstances surrounding initial application. If historical data is employed at all, it is selective, choosing facts consistent only with the premises of the constructed model. The totality of the people's actions, those which would illuminate the meaning, are minimized, if not totally ignored.[417] Freed from the historical context of the tension (the balancing of concerns), the model-builder begins to spin a web of natural (logical) consequences from the principles (premises) he has selectively chosen.[418] Freed from the totality of experiences underlying the original tension, the builder is limited only by his imaginative

---

6. Packer has noted: "When we polarize, we distort. The models are, in a sense, distortions . . . . This article does not make value choices, but only describes what are thought to be their consequences." *Id.* at 6.

412. *Id.* at 16-17.

413. Professor Packer noted:

> The Due Process Model, while it may in the first instance be addressed to the maintenance of reliable factfinding techniques, comes eventually to incorporate prophylactic and deterrent rules that result in the release of the factually guilty even in cases in which blotting out the illegality would still leave an adjudicative factfinder convinced of the accused's guilt.

Packer, *supra* note 411, at 18. In an accompanying note Packer added: "This tendency, seen most starkly in the exclusionary rule for illegally seized evidence, [*Mapp*] . . . is also involved in the rejection of the 'special circumstances' approach to testing the deprivation of counsel, [*Gideon*] . . . and in the apparently similar trend in confession cases, [*Mallory*] . . . [*Escobedo*]." *Id.* at 18 n.16 (citations omitted).

414. *See* Chase, *supra* note 17, at 518-19.

415. *See* Schrock & Welsh, *supra* note 35, at 255-60.

416. *See supra* notes 246, 389 and accompanying text.

417. *See, e.g.*, Gangi, *A Critical View of the Modern Confession Rule*, 28 ARK. L. REV. 1, 48-49 (1974).

418. Professor Voegelin has described the tactic:

> If, therefore, I can build a system, the truth of its premises is thereby established; that I can build a system on a false premise is not even considered. The system is justified by the fact of its construction; the possibility of calling into question the construction of system, as such, is not acknowledged.

E. VOEGELIN, SCIENCE, POLITICS AND GNOSTICISM 44 (1968).

ability.[419] Employing logic, the builder then proceeds to demolish everything and any other principle that impedes the path of the principle at the core of his construction. Indeed, reality itself begins to be shaped by the model constructed.[420] An intoxicating brew, this model-building, as are the persuasive abilities necessary to maintain it.[421] Since some continue to view reality differently than does the model adherent, probing questions are raised. Either the model builder suppresses these relevant questions by referring the questioner to the values in the model, or he must abandon the model.[422] More often than not the former course is chosen.

Therefore, model-building may be summarily rejected. First, if the model constructed depends on personal preferences instead of historical experience, no constitutional claim can be recognized or has been established.[423] Second, insofar as the models constructed manipulate integral

---

419. Professor Voegelin comments:

> Images of reality must be examined for their form of reality; when the pattern of form has become clear, the contents must be examined; schemes of reality that present themselves as systems must be examined for the intellectual tricks with the help of which the nonsystematic form of reality is closed to make up a system; particularly one must not accept the demand of adherents of a system that their premises are the condition for understanding the system, for precisely systems can be understood only by interpretations "from without," i.e., interpretations beginning with the form of reality. . . .

Anamnesis, *supra* note 356, at 169.

420. Professor Voegelin concludes about those enamored by their "system" that "in the clash between system and reality, reality must give way." E. VOEGELIN, *supra* note 418, at 44.

421. The problem of abuse by persuasion was first identified by Plato. *See* Voegelin, *Wisdom and the Magic of the Extreme: A Mediation*, S. REV. 235, 244 (Spring, 1981).

> Speech . . . is . . . a great and powerful master . . . it operates with magic force . . . on man, the spell of . . . language . . . can swerve the soul when it is weakened, by passion or lack of knowledge, toward opinion . . . in conflict with truth, the power [it has] . . . over the soul can be compared to that of a drug . . . over the body, as a drug can heal or kill, harmful persuasion can drug and bewitch the soul.

Id. at 249.

422. Professor Voegelin notes: "we now see more clearly that an essential connection exists between the suppression of questions and the construction of a system." E. VOEGELIN, *supra* note 418, at 45.

423. For example, Professors Schrock and Welsh adopt a particular perspective toward individual rights, or, as they put it, the "significance of rights." Schrock & Welsh, *supra* note 35, at 271. They claim that the perspective one chooses toward how rights are viewed can have an enormous effect on how societal problems are resolved. As they put it, what a "difference a right makes." *Id.* at 271-73. They prefer to view rights absolutely, and in viewing the fourth amendment from that perspective, they posit that the amendment created substantive rights against the legislature. *Id.* at 274, 343-44. In short, the Bill of Rights can be construed in Hobbesian-Lockean fashion to find rights that are superior to the people's right to self-government. *Id.* at 273 n.72.

This article contends, however, that: (a) Fourth amendment provisions had not included exclusion of reliable evidence; (b) Absolute rights against the legislature of a substantive nature were not known; (c) Bill of Rights provisions were understood only in the context of common law rights; (d) It is not legitimate for a scholar to "prefer" a perspective on how rights should

symbols (e.g., fair trial, right to counsel), they fall because their authors lack authority to change their meaning. For example, with regard to legal guilt or unitary prosecution, there is simply no way to attribute the principles contained therein to the principles constitutionalized by the Framers. They are personal preferences, not constitutionalized principles. Since the models depend on premises unsupported by the evidence, the models fall with them.[424] In short, the models *change*; they do not illuminate the symbols.

---

be viewed, but to understand those rights as they had been understood by those who framed and ratified them. Should one prefer another perspective it should be labelled as personal, not constitutional, in character.

424. *See supra* note 400. As a concrete example see Professor Kamisar's analysis of the Supreme Court's opinion in Brewer v. Williams, 430 U.S. 387 (1977). *See* Kamisar, *supra* note 293. The facts in *Brewer* were that police officers rode with the defendant to his place of arraignment. Brewer v. Williams, 430 U.S. at 391. The defendant, suggestive and very religious, was told that with Christmas approaching, it would be a shame if the expected snow storm made discovery of the murdered child's body (the victim) impossible to find, thereby denying the parents the opportunity to bury the child promptly. *Id.* at 392-93. After this "Christian burial" speech the defendant led the officers to the body. *Id.* at 393.

Professor Kamisar seems to contend that police interrogation of a defendant, without required warnings and/or absence of counsel would be understandable (though he apparently disapproves) in "so-called 'rescue' or 'emergency' doctrine" situations. Kamisar, *supra* note 293, at 9. In *Brewer*, however, he contends that such doctrines "could not have been properly applied" because it was clear that the police officer who addressed the defendant "meant the girl's body, not the girl." *Id.* In short, the police were apparently aware that the child victim, was no longer alive, and therefore she could not be "rescued." *Id.* at 10. This distinction is perfectly consistent with Professor Kamisar's premises regarding the nature of rights and the role of the Supreme Court. *See supra* text accompanying notes 347-48.

Who is to decide that upon death the selection of important principles, their balancing and competition, ceases for others? There is, for example, the need of parents, relatives and friends to begin the grieving process; to reconcile themselves to their loss. Could the community as a whole believe that despite the death of this particular child, other principles persist? Could they not raise the question, what kind of civilization *do* we have when, at the moment of death, our existence is to cease to have meaning for anyone else? See *infra* text accompanying notes 428-40.

In the "model" constructed by Professor Kamisar, however, the right of the people to balance the principles they consider appropriate in such circumstances is denied because, he contends, we foreclosed that possibility by adopting the fifth amendment compulsory self-incrimination clause. Kamisar, *supra* note 293, at 22.

Did the people indeed foreclose such considerations? The Framers of the fifth amendment certainly did not, because the compulsory self-incrimination constitutional provision did not apply at all to coerced confession situations. In fact, for them it did not apply against the states either. Thus, to reach Professor Kamisar's conclusion one must assume that the Supreme Court has the power to substitute their personal judgments for those constitutionalized by the Framers, or more specifically, the people must accept what may be fairly described as a personal preference regarding the legal pertinence of a victim being alive or dead. Of course, it is assumed that if such a distinction was not made, then for a model-builder like Kamisar the self-incrimination clause would be meaningless. It is suggested that such a conclusion is also a personal judgment not traceable to the constitutionalized principle.

4. *"The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal laws."*[425]

This judgment has its theoretical roots in Justice Frankfurter's accusatorial versus inquisitorial distinction,[426] a distinction, as noted by Justice Jackson, that depends "mainly on the emotional state of the writer."[427] Accusatorial, like open society, is hardly a self-illuminating phrase for anyone not already subscribing to its implicit assumptions.[428] Still, the Frankfurter-Warren injection of these criteria should be examined further.[429] Beside the fact that the accusatorial-inquisitorial pairing connotes a personal choice preference, there is also this curious question. Was ours an accusatorial system when the Bill of Rights was proposed and ratified? Of course it was, because, as Justice Frankfurter pointed out, Bill of Rights provisions or common law rights, were precisely what distinguished our system, the accusatorial, from other systems, e.g., the inquisitorial system.[430] These rights had their roots in hundreds of years of preceding English history.[431]

If that is the case, it is not clear what exclusionary proponents mean today either when they refer to the nature of those rights or assert that the existence of such rights supercedes the right of the people to govern themselves. The people in the several states at the time the Constitution and Bill of Rights were proposed had many of those same rights — rights rooted in centuries of preceding common law. Nevertheless, these people remained free to identify abuses and select remedies other than exclusion. They also regularly admitted evidence under conditions assuring probable reliability.[432]

Furthermore, insofar as the Bill of Rights was demanded, it was demanded to better assure that the newly formed federal government would not erode the accusatorial system as had existed in the several states. So if an attempt is made today to justify exclusion on what proponents believe is the nature of the accusatorial system, it is suggested that their conception of its nature must be derived from something other than our tradition or the principles constitutionalized by the Framers. They must, in fact, rest their case on the already explored assumptions regarding the import of the Bill of Rights and the nature of personal rights.[433] They also must change or ma-

---

425. Miranda v. Arizona, 384 U.S. 436, 480 (1965) quoting Schaefer, *Federalism and State Criminal Procedures*, 70 HARV. L. REV. 26 (1956).

426. Watts v. Indiana, 338 U.S. 49, 54 (1949).

427. *Id.* at 60.

428. *See supra* notes 401-03 and accompanying text.

429. *See supra* notes 69-101 and accompanying text.

430. *See, e.g.*, Watts v. Indiana, 338 U.S. at 54; Culombe v. Connecticut, 367 U.S. 568, 570-606 (1960) (wideranging opinion by Justice Frandfurter).

431. *See supra* notes 6-10 and accompanying text.

432. *See supra* note 11 and accompanying text.

433. *See supra* notes 283-94 and accompanying text.

nipulate relevant traditional symbols or construct "models" which cannot be traced to the principles constitutionalized by the Framers.[434] Finally, contrary to the evidence they must elevate the role of the Court to a status not given it by the Framers.[435]

There are even more serious objections, for at the core are personal beliefs regarding a "progressive and self-confident society."[436] Within that attitudinal framework lies unsupported views on progress and history as well as sophisticated variations of the open society concept.[437] Upon this cluster of assumptions rests the personal assessment that there are questions which transcend guilt or innocence.[438] None of these assumptions can be rooted in the Constitution without wrenching it from its common law roots. Purported lessons of history offered by the judiciary are nothing more than personal assessments of what the Court majority believes those lessons to be; and only after the history upon which these lessons supposedly rested was grossly abused or totally misunderstood.[439] Who, moreover, granted the judiciary the power to determine whether "there is something very wrong with that system" or if it is "worth preserving?"[440]

The Constitution never elevated the rights accorded the criminally accused above the right of the people to govern themselves. Relevant state and federal individual rights already contained those procedures believed necessary to protect citizens from executive and judicial abuse as well as those procedures necessary to minimize the risk of convicting the innocent. When, and if, one loses sight of these two considerations and asserts without proof that the primary focus was to protect defendants from being convicted even on reliable evidence, assumptions or personal preference judgments are made that cannot be traced to the values constitutionalized by the Framers. Imagination has created a system he would prefer, but one without historical roots, and the imaginer should be obliged to say so. He cannot be permitted to take refuge in a tradition or constitution they have freely chosen to abandon.[441]

It is stated unequivocably that the question of the "quality of a nation's civilization," is precisely that, a question to be answered by the nation's people through elected representatives accountable and responsible to them.

---

434. *See supra* notes 410-24 and accompanying text.

435. *See supra* notes 363-424 and accompanying text.

436. *See supra* text accompanying notes 74-75, 82, 96. *See also* Hill, *supra* note 141, at 211.

437. *See supra* notes 171-75, 281.

438. Chief Justice Warren had declared: "As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence." Blackburn v. Alabama, 361 U.S. 199, 206 (1959).

439. *See supra* text accompanying note 95. *Cf.* Gangi, *supra* note 2, at 38-42.

440. Escobedo v. Illinois, 378 U.S. 478, 488-90 (1964). *See also supra* text accompanying note 95.

441. *See supra* text accompanying notes 331-53.

Whether and by what degree we choose to evaluate our civilization by how we treat the criminally accused, is for the people to make within the context of the clearly discernible intentions of the Framers to which our ancestors consented. The people are entitled to decide that civilized conduct requires concern for citizens, even citizen victims, above solicitude for criminal defendants or remedies to which the people have *never* consented.

5. *The Omnipresent Teacher*[442]

First, put aside the fact that this symbol, as proposed by its author, has no constitutional status.[443] Similarly, put aside some pertinent historical factors such as, at the time of its proposal, the exclusionary rule touched few crimes affecting personal security and indeed did not touch the states at all. Finally, the fact that Justice Holmes stated "for *my* part,"[444] is sufficient to prove the point that the symbol is a personal preference.

a. Imagery. The imagery should nevertheless be probed. Is the government the omnipresent teacher? This article suggests that one's decision will rest principally on the personal, extra-constitutional, attitudinal training; the response is in the eyes of the student! In other words, the government may be your teacher, it is not mine. For me, my government is just that — my government. It was created by my forebearers to deliberate (and be accountable to me for its decisions) on what should be done for the general good and in respond to the "inventiveness of wickedness" that may from time to time surround it.[445]

Governmental officials, as "existential" representatives of its people's truths,[446] may have to do things that as individual good men they ordinarily would refrain from doing. As citizens, one may be obliged to take the life of an otherwise innocent enemy who may be endangering either the truth of

---

442. *See supra* text accompanying note 303.

443. *See* Schrock & Welsh, *supra* note 35, at 282, 286-88. Professor Berger is emphatic in his denunciation. "Nowhere in the Constitution or its history is there an intimation that judges were given a power of attorney to fashion unenumerated . . . [rights] in order to remedy 'injustice, as they perceived it.' " Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527, 605 (1979).

444. Olmstead v. Unitd States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (emphasis added). One hears a great deal about Justice Holmes' concern for personal judicial integrity (*see supra* notes 297, 300 and accompanying text) but one is seldomly reminded of other aspects of the tension he carried, including the fact that, though personally a believer in laissez-faire economics, he resisted its constitutionalization. Justice Holmes stated:

> I have not yet adequately expressed the more than anxiety I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the states. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court for any reason undesirable.

Baldwin v. Missouri, 281 U.S. 586, 595 (1929).

445. L. STRAUSS, *supra* note 147, at 161.

446. *See New, supra* note 409, at 41-49.

one's society, its self-preservation, or its ability to govern itself. Likewise, government on behalf of the common good may have to forego what many good men believe to be just, in order to obtain, for example, sufficient oil supplies. A government, similarly, may have to employ bribery of foreign officials to obtain military bases either to secure its own country's survival, or that of a valued ally. A government also may pursue less than perfectly just policies in international affairs, but policies which it perceives are more just than those practiced by other governments and their people. Government, hence, teaches me little more than I already know as a human being — pursue good, avoid evil. That is frequently not easy, and at times requires a balancing of principles.[447]

There are equally agonizing choices present in pursuing criminal justice. Government, in the name of the people, may find it necessary to immunize some citizens from deserved prosecution and punishment in order to secure sufficient evidence to convict other citizens whose conduct it is judged is even more despicable than those immunized. Indeed, it may be necessary to make such choices to insure that at least one accused is brought to justice. It may be necessary, even essential for the government, on behalf of the people, to deal with informers, or other characters individual citizens ordinarily and studiously avoid. On behalf of the people, some members of the government may find it necessary to practice deception in order to identify other members of the government conspiring to forsake their public trust.

b. *Traditional View.* Aside from personal attitude formulation, government as an omnipresent teacher finds no refuge in the Constitution. Bill of Rights provisions were ones of procedure. They sought to assure the pursuit of the common good while sketching certain specifics on the continued relationship between citizens and a citizen accused of crime. Left open to deliberation was the entire arena of competing moral claims and considerations believed relevant regarding admissibility of evidence and remedies for police abuse. These considerations and how they were balanced in fact were perceived differently by the citizens in each state until 1961. One would be obliged to examine their constitutions, statutory laws, and judicial opinions in order to discern what balance each thought appropriate. There was no single or simple answer, nor could there be. Each state had interpreted the matter of the relationship between citizens and those accused of crime. In each state the relationship perceived as appropriate was fragmented because justice itself was perceived as consisting of a balance of competing principles.

This much is certain about government as an omnipresent teacher. Those who advocated, as well as those who framed and ratified the Bill of Rights, did not trust citizens exercising governmental power. At the same time they recognized that power was essential to achieve the common good.

---

447. *See* BARKER, THE POLITICS OF ARISTOTLE 101 (1962).

Fear that governmental power would be abused was not equivalent to distrust of the people. The Framers feared majority tyranny, but recognized the people would consent to nothing less than majority rule. The Constitution expressed the boundaries of the tension between both.[448] In the Constitution only limited powers were granted to the federal government. That power was further circumscribed by separating the legislative, executive and judicial powers. No formal institutional barrier could be erected to prevent the people bent on exceeding the boundaries to which they had agreed without thereby negating the democratic essence of the regime. Insofar as the omnipresent teacher symbol inadequately expresses the original tension between majority rule and majority tyranny, it is defective. It either makes one or more of the unwarranted assumptions detailed above, or substitutes personal judgments for those constitutionalized by the Framers, or does both.

Finally, the omnipresent teacher analogy confuses the relationship among the government, the criminal defendant, and the people.[449] The dis-

---

448. This position is summarized elsewhere. *See* Gangi, *supra* note 1, at 60-61.

449. A good example is found in statements such as "*it* teaches the whole people by its example." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (emphasis added). *See also supra* text accompanying note 303. Or, for instance, the statement: "When the government . . . sought . . . to avail *itself* of the fruits of these acts in order to accomplish *its* own ends. . . ." Kamisar, *supra* note 195, at 69, quoting Justice Brandeis (emphasis added).

Frequently, the false distinction is in terms of "us," citizens and "they," the government. *Id.* at 68. Similarly, Professors Schrock and Welsh treat the government (executive and judiciary) on the one hand, and the people, on the other, as distinct for purposes of criminal prosecution in their "unitary" system. Schrock & Welsh, *supra* note 35, at 257-60.

It is contended here, however, that despite apparent inconsistencies, the symbols of government and people, one in some respects but separate in others, remained an experienced whole, a tension, perhaps expressed best by President Lincoln: government "of the people, by the people, for the people." Lincoln, The Gettysburg Address (1863) found in R. Morris, Basic Documents In American History, 128 (1956). It is contended that in ratifying a constitution, the people created governmental structures distinguishable but at the same time not separate from society. The people prohibited to themselves certain specific actions. Otherwise, they retained the right to define rights and duties through their elected representatives. In creating a government, or prohibiting certain actions, the people did not, and could not render themselves incompetent to govern themselves by construing individual rights superior to the creation of the structure that contained an amendment procedure and otherwise provided for electoral accountability.

Instead of understanding the tension present in the prosecution symbol, Professors Schrock and Welsh, employ a unitary "model" to remove what they consider are inconsistencies, thereby shattering the experience as it was originally understood by the participants. The process they employ distorts and destroys the truth of what only the inconsistencies in tension illuminate. It is a method that is the hallmark of system builders. *See supra* notes 281, 418-19 and accompanying text. It is further contended that the models imposed by Schrock and Welsh do *not* illuminate the historical relationship of government and people, as understood by those people. These models instead *create* a new reality in which the principles to which Schrock & Welsh subscribe are projected as the criteria of composition. It is suggested that once these models are rejected as just that, logical constructs of the author's own choosing, much of their case dissolves into nothing more than personal preference imposition. *See* Schrock & Welsh,

tinctions made can neither be understood nor supported outside the context of already stated presumptions regarding the "nature" of an "open society" or personal rights. The actual relationship was and is between the citizen defendant and the people of the state or of the United States, on whose behalf government officials act. To perceive prosecution of the criminally accused as a contest between an individual and the government is to either ignore the perception constitutionalized by the Framers, or to manipulate symbols whose meaning was quite clear to those originally utilizing them.

c. *The True Lesson.* The purpose of a trial was to teach, but not to teach all citizens. Citizens, through their agent the government, were teaching citizenship to one of their peers who breached an obligation to do what had been determined by all as "meete and convenient for the generall good."[450] A trial was meant to determine whether indeed he had committed that breach, and if found guilty, to punish him for the offense. It is true (and most revealing about the true quality of its civilization) that the citizen accused of the breach, the citizen body as a whole, and its representatives, the government, all remained bound to an earlier promise. All parties were to reach a determination of the charge by utilizing the Bill of Rights procedures to which all had already consented. The determination, furthermore, would be reached on a "beyond a reasonable doubt" basis. Thus, as concerned as the body of citizens were that criminal breaches be punished, strong suspicion would not be enough. Effective crime control did not, for the Framers, preclude fairness or substitute speculation for reliable evidence.[451]

Probably the most important aspect of the teaching of the defendant, was that all citizens had agreed beforehand that it would be most fitting and assure the best protection against possible abuse to have a free man judged by a jury of his peers, perhaps by a "symbolic" number.[452] Unquestionably, these procedures are instructive. It is not, however, the government who is teaching, but the people. From their concrete experience, not to mention from their ancestors, the people believed that the procedures they adopted would more likely arrive at fair judgment than the procedures of combat or ordeal that preceded them.[453] These procedures (rights) were agreed to by the people before any of them became defendants, and all procedures adopted were believed perfectly consistent with justice and the rights due free citizens. To be "fair," the trial would have to get at the truth, for it was

---

supra note 35, at 291-93 n.111.

450. MAYFLOWER COMPACT (1620).

451. *See generally supra* notes 6-30. The point is simply that concern for criminal violations and fairness in ascertaining them were all factors (a balance of values—a tension) subsumed under appropriate state constitutions and legislation.

452. "And that *number of twelve* is much respected in *holy writ*, as in 12 *apostles*." 1 Coke, *Institutes of the Laws of England*, 155a (London, 1628-1641) *quoted in*, R. BERGER, *supra* note 144, at 398.

453. *See supra* notes 6-8 and accompanying text.

only upon obtaining the truth that culpability, or degrees thereof, could be judged and justice thereby proportionately administrated.[454] When justice was done, citizens' values would be affirmed. With the truth of their self-interpretation again affirmed, perhaps then the citizen accused and the society in which he lived could be reconciled. It was, after all, citizens teaching themselves the responsibilities of self-government as well as teaching that a penalty ensues to those who choose to forsake that civic duty. Put another way, the object was the formulation of a free citizenry determined to "establish Justice, insure domestic Tranquility . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[455]

6. *Totalitarian Analogy*

Some suggest that unless practices employed by police in totalitarian regimes are renounced here, our nation would become just like these regimes.[456] The analogy nevertheless is troubling, not for what it asserts, but for the ignorance essential to making the assertion. Hopefully it will be possible to dismiss this analogy quickly, since significant aspects of it have already been detailed. First, on the elementary level, one cannot abandon a practice simply because a totalitarian regime likewise employs it. If we did, we could neither tax, nor spend. Second, the analogy depends on an either/or frame of reference.[457] In other words, renounce practices exclusionary proponents consider characteristic of totalitarian regimes, or the doubter is accused of fostering such a regime. The practices become the focus with no understanding of all the other substantive and procedural realities that surround the practice.

Assuming coercion, does it matter if our country is suspicious of such evidence historically and generally, and may choose to forego it completely, while a totalitarian regime knowingly admits false confessions regularly and purposely? Furthermore, is it at all relevant that coercion in totalitarian regimes is most noticeable in political, not violent, crimes? Does the analogy require, for example, that if when investigating a child murder, we make no distinction between the child being alive or dead, and totalitarian regimes do the same thing, then we too are to be considered totalitarian?[458] Who, in

---

454. *Cf. supra* text accompanying notes 294 and 306. For an interesting comment on proportionality and justice, see Ritz, *supra* note 10; Ritz, *State Criminal Confession Cases: Subsequent Developments in Cases Reversed by the United States Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202 (1962).

455. U.S. CONST. preamble. Omitted are two phrases: "We the People of the United States, in Order to form a more perfect Union," which is precisely why *the* Constitution was created, and "provide for the common defense," not pertinent to the discussion, but crucial to an understanding of the founding. Whatever the virtue of a constitution, a people unable to defend themselves, would risk loss of the right to self-government.

456. *See, e.g.*, Bennett, *supra* note 118, at 1134-35.

457. Frankel, *supra* note 6, at 32.

458. *See supra* text accompanying note 424.

totalitarian regimes, decides upon such distinctions, and who does so here?[459] Does that make a difference? Does it make any difference that here the balancing of principles relating to police practices, abuses and remedies occurs through those held electorally accountable, and in a totalitarian regime it does not?[460] Third, the analogy suffers from an imprecision not unrelated to the assumptions associated with an open society. Is the choice pressed upon us in the totalitarian analogy any different in principle than our laissez-faire friend who insists that either we permit the free market forces to interact in unbridled freedom, or we favor a controlled socialist economy? Those are the types of questions that must be asked when dealing with a totalitarian analogy.

E. *Judicial Integrity*[461]

1. *Assumptions Common to Personal and Institutional Integrity Arguments.*

Integrity arguments fall into two categories: personal integrity of individual judges and the institutional role the judiciary plays in protecting the Constitution. Before addressing each category separately, it is first necessary to point out common assumptions or implicit personal preferences which permeate both categories.

First, insofar as the integrity rationale adopts premises respecting the "nature" of individual rights, but does not root those premises in principles constitutionalized by the Framers, or subsequent historical practice, the rationale is proportionately defective. In other words, the rationale rests on unsupported assumptions or personal judgments.[462] Second, insofar as judicial integrity adherents assert that the Bill of Rights was an "anti-government" document,[463] without penetrating the distinction between both the

---

459. *See supra* notes 18-22, 246 and accompanying text.

460. Contrast the assessment of Professor Waelder:

> [A]n egalitarian society needs an authority which has the power to enforce equality and which sees to it that nobody gets out of line. In this indirect way, the attempt at wiping out the power of man over man and to achieve complete equality actually leads to the setting up of an authoritarian rule; with it, the power of man over man has returned. Those who started out to eliminate every differentiation between people end up, inevitably, by creating greater differentiations than have existed before.

Waelder, *The Concept of Justice and the Quest for an Absolutely Just Society*, 57 J. CRIM. L. CRIMINOLOGY & POL. SCI. 1, 6 (1966).

Modern totalitarian regimes have deep roots in equalitarian ideology. *See* J. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRARY 1-2 (1960). *See also* Yarbrough, *Thoughts on the Federalists' View of Representation*, XII N.E. POL. SCI. A. 65 (Fall, 1979). Professor Yarbrough suggests that contemporary supporters of "interest group representation" more closely reflect the "views of the Anti-federalists than those of the Federalists." *Id.* at 67.

461. *See supra* text accompanying notes 295-306.

462. *See supra* notes 13-20, 363-90 and accompanying text.

463. *See, e.g., Procedure, supra* note 121, at 244 n.76.

division of powers among the federal government and the states and the fear of majority tyranny, while retaining majority rule, these adherents fail to understand the purpose of that document.[464] Third, insofar as integrity rationales distort, change, or manipulate precedents traditionally associated with criminal prosecution, these rationales are inherently defective as well as intentionally deceptive.[465] Fourth, insofar as integrity rationales are premised on defective "models," or make unsupported assumptions regarding the unity of criminal prosecution, or other unsupported distinctions such as legal guilt, the rationales cannot be sustained.[466] Fifth, insofar as judicial integrity rationales employ theoretically deficient criteria for judging the quality of civilization, the rationales must be rejected as unsupportable.[467] Sixth, insofar as judicial integrity rationales misconstrue the relationship between government, the people, and the accused, these rationales fail to accurately illuminate or explain those relationships as envisioned by the Framers.[468] Seventh, insofar as integrity rationales are dependent upon a comparison between our government and totalitarian regimes, these rationales often lack adequate criteria for differentiation as well as misconstrue the essence of our own governmental structures.[469] Eighth, insofar as integrity rationales presume that the Supreme Court is better suited[470] than the legislature[471] to protect the individual rights it alleges exist,[472] these rationales assume what has not yet been proven, namely the existence of such rights and the Court's authority to perform a legislative role denied by the Framers.[473] Finally, insofar as integrity rationales urge substitutions of essentially personal ethical choices, thereby circumventing those charged with identifying and providing remedies for perceived abuses, these rationales contribute to undermining legitimate legislative authority.[474]

What integrates all of the above defective premises is the failure to distinguish personal expectations and visions of justice, rights and the judicial role, as exclusionary proponents see them, from the institutional function of the judiciary as envisioned by the Framers. In short, exclusionary supporters confuse what protection the Constitution ought to have provided, with what protection had actually been provided. To avoid disappointment, the Constitution is written in their own image through personal judgments.[475]

---

464. *See, e.g., supra* text accompanying notes 28-30.
465. *See supra* notes 410-24.
466. *See supra* notes 405-09 and accompanying text.
467. *See supra* notes 425-41 and accompanying text.
468. *See supra* notes 442-60 and accompanying text.
469. *See supra* notes 456-60 and accompanying text.
470. *See supra* note 48.
471. *See, e.g., Procedure supra* note 121, at 245.
472. *See supra* note 17.
473. Gangi, *supra* note 1, at 11-12.
474. *See, e.g., supra* text accompanying notes 89-97, 295-306.
475. For a general discussion disputing arguments made for personal and institutional

a. *Personal Integrity.* Positions like those of Justices Holmes and Brandeis rest on nonconstitutional grounds.[476] They offer no support to exclusionary proponents claiming the rule is mandated by the Constitution.[477] Furthermore, since such positions usually depend on any or all of the preceding eight premises, they are substantially discredited.

There is no constitutional authority permitting Justices to inject their personal ethical opinions into adjudication. Nevertheless, it occurs. To deny that possibility would be to deny judges their humanity. Human beings should be repelled by injustices that confront them.[478] Still, views on justice differ, and there is the possibility that some citizens might impose their views on others. Each society decides who shall determine what is essential to the common good, and how those entrusted with the power to make such decisions will be selected. There are many possibilities, which are dependent upon the circumstances, but in the United States the choice of who decides issues of public policy may be found in the Constitution.[479] While the people attempted to protect themselves from majority tyranny, believed to be the greatest potential danger facing them, they clearly believed that decisions of ultimate importance would be decided by majority rule.[480]

The judicial function ordinarily would consist of applying legislative majority decisions to particular cases.[481] Judges, however, had no authority to refuse to enforce the judgment of the legislature if they disagreed with its wisdom or morality. Judges could not, for example, legitimately refuse to enforce fugitive slave laws, however repulsive they found them personally.[482] True, judges could resist implementing such laws, seek to temper them, or perhaps choose to resign rather than enforce them. Yet, insofar as they did not apply the law and thereby violated their duty, they could, unless the

---

judicial integrity, see Coe, *supra* note 35, at 17, 25; Hill, *supra* note 141, at 205, 207, 214; Kaplan, *supra* note 35, at 1037; *McGarr, supra* note 141, at 266-67; McGowan, *supra* note 221, at 692; Wingo, *supra* note 35, at 583-84. *But see* Bennett, *supra* note 118, at 1147-62 (criticizing Burger Court retrenchment). Professor Bennett states: "The defendant is viewed more in the guise of a member of the public than as an individual with an independent fourth amendment interest, and as such an interest is, for that reason obscured." *Id.* at 1150. It is suggested, however, that the historical evidence supports precisely and only such a view that he criticizes, and that Professor Bennett's assumptions of an "independent fourth amendment interest," distorts the meaning of right, as previously understood, and ultimately amounts to a rewriting of the instrument. The assumptions that are made may be essential to Professor Bennett's vision of the good society, but they cannot be established as part of our history.

476. *See* Schrock & Welsh, *supra* note at 256 n.100; Burns, *supra* note 141, at 87. *See also supra* notes 248-78 and accompanying text.

477. *See supra* notes 143, 392-98 and accompanying text.

478. *See, e.g.*, Lisenba v. California, 314 U.S. 219 (1941).

479. *See supra* notes 25, 386.

480. *See*, Gangi, *supra* note 1, at 10-14, 58-65.

481. Reference is made here to the judicial function on the common law and statutory level, in which judge-made law is possible, but reversible by legislative action.

482. *See* Berger, *supra* note 17, at 450-53; G. GILMORE, *supra* note 166, at 36-39..

legislature reconsidered its judgments in light of the judge's actions, be punished through the impeachment process.

The moral dilemma created by such a confrontation could be agonizing, both for judges and the people's representatives. In a democratic structure, such dilemmas cannot be prevented without undermining that structure, or opening it to abuses it was designed to prevent. For if the judiciary is permitted to impose personal preferences on the citizenry, it would violate the essence of democratic rule. Furthermore, once the judiciary is entitled to supercede the authority granted by the Constitution, an equal claim can be made by the executive or legislative branches. Breach of constitutional guidelines by one branch opens the door to the possibility of further breaches by all branches. Indeed, breach by one branch may encourage breach by another branch, citing as precedent for its breach the initial breach! Finally, repeated breaches will eventually lead to the inevitable result of victory by the most numerous branch. Absent fidelity to the Constitution, nothing can stand in the path of the majority. The natural result, of course, will be majority tyranny, the evil which the Constitution was initially designed to prevent. In short, where majority tyranny exists, no individual liberty is secure. The people mask their violence under law.[483]

To deny judges the right to impose justice on the citizenry therefore does not stem from abhorence of justice, or denial of the fact that in any particular instance judges may be more sensitive to the demands of the legislature. Instead, denial stems from experience. It is far more likely that such a power would be abused, and, absent a constitutional grounding, it is at odds with majority rule. Furthermore, as detailed above, injection of personal ethical preferences not rooted in community sentiment may eventually culminate in the destruction of the Constitution. With that loss, the opportunity for a people to pursue justice may be lost for a period of time, if not forever.

b. *Institutional Judicial Integrity.* Arguments suggesting a special role for the judiciary to protect the integrity either of the Constitution or society are closely related to the proper scope of judicial review, and in principle will be considered in the next section.

With specific reference to the exclusionary rule, however, this much may be concluded. The judicial integrity theory has had little substantive impact, playing a secondary role if any in the development of the suppression doctrine, and has "now been explicitly rejected by a majority of the Supreme Court as an independent ground for the exclusionary rule as a constitutional requirement."[484] The renunciation of the "imperative of judicial integrity" in part describes the Burger Court retrenchment.[485]

The principles upon which rejection of the institutional judicial integ-

---

483. *See* THE FEDERALIST Nos. 39, 47-51 (J. Madison).

484. Coe, *supra* note 35, at 17 (citing Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974)).

485. *See supra* notes 104-11 and accompanying text.

rity rationale rests have been stated elsewhere, and only a brief summary is required. First, insofar as the rationale masks imposition of personal ethical choices under the rubric of an institutional duty, it is inconsistent with the essence of majority rule.[486] Second, insofar as it depends on the other assumptions or personal judgments detailed above, the rationale is defective and cannot be supported.[487] The argument for institutional integrity ultimately amounts to a judgment as to what constitutes fair play. While of course fair play is not a trivial matter, unless that disagreement can be rooted in the Constitution, the judiciary is not authorized to substitute personal preference for legislative preference. At most, in federal courts and without constitutional authorization in state courts, the judiciary in exclusionary rule cases has put forth what it considers an appropriate resolution of competing values.[488] Should representative institutions express disagreement with that assessment by enacting conflicting legislation, the Court would be obliged to defer to the legislative judgment.

F. *Judicial Review*[489]

Proponents of judicial power, exclusionary rule supporters among them, have utilized several arguments to defend the contemporary role of the Supreme Court. They contend, for example, that changes in circumstances occurring since the republic's founding requires judicial interpretation of the

---

486. *See supra* references collected at note 475.

487. *See supra* notes 462-74 and accompanying text.

488. It is necessary to reiterate that the Bill of Rights initially applied only against the federal government. It was proposed to lessen anxieties expressed about the potential for abusive exercise of federal power. Despite current assumptions of the Court, the fourteenth amendment did not change that fact.

In the states, the primary locale for criminal activity, illegally obtained evidence was regularly admitted under common law with such exceptions as thought appropriate by the people of those states, under statutory law, state constitutions and revisable judicial opinions. See H. WIGMORE *supra* note 9, § 2181 at 5 n.1 for a list of applicable case law. *See also supra* notes 26-27 and accompanying text. Whatever the basis for the holding in Weeks v. United States, 232 U.S. 383 (1914), its practical effect was only on federal prosecutions, a very small and largely irrelevant portion of crime insofar as its impact on the daily existence of ordinary citizens was concerned. Even of that small number, many involved gambling and drug violations. Even then, the *Weeks* rule was further limited in impact until the overruling of the silver platter doctrine. *See* Elkins v. United States, 364 U.S. 206 (1960).

In short, it was not until the rule was more rigorously employed in McNabb v. United States, 318 U.S. 332 (1943), and more notably in Mallory v. United States, 354 U.S. 449 (1956), as well as applied to the states in Mapp v. Ohio 367 U.S. 643 (1961), that the rule began to be perceived as having any appreciable impact on the bulk of criminal prosecutions. This article therefore, is referring to legislative resistance that has since developed, both in the Burger Court and through congressional action. *See, e.g.*, Omnibus Crime Control and Safestreets Act of 1968, Pub. L. No. 90-351, U.S. CODE CONG. & AD. NEWS, 2112 (codified at 18 U.S.C. § 3501 (1970)). *See also* Gangi, *supra* note 117, at 1097.

489. *See supra* notes 307-14 and accompanying text.

Constitution in an open-ended fashion.[490] The Court, furthermore, should see its role as that of a progressive institution.[491] These proponents urge that the Court emphasize the expansion of individual rights[492] because other political branches have failed to do so.[493]

1. *A Question of Perspective*

Although currently dominating the legal literature, the above views have been resisted. The following quotation expresses that resistance in sufficient fashion:

> [O]ne who seeks to put a true construction on any part of our constitutions must have a constant eye to its history, and this is particularly the case when one is dealing with a clause in a bill of rights, because an American bill of rights is a collection of words and clauses, many of which have had a definite meaning for centuries. It may be true that if our constitutions are to meet all the requirements of a constantly advancing civilization, they must receive a broad and progressive interpretation. It is also true that upon no legal principle can an interpretation be supported, which ignores the meaning universally accorded to a word or clause for centuries, and the meaning which must, therefore, have been intended by those who inserted it in the constitution. It is perhaps well to bear this in mind at a time when there is a manifest tendency to regard constitutional prohibitions as a panacea for moral and political evils, to look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights, and to trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties,—at a time, that is to say, when there is danger of loose and unhistorical constitutional interpretation.[494]

The author of the words quoted contends that one must not ignore our history.[495] He argues that the meaning of constitutional phrases cannot be abandoned in light of centuries of use.[496] Finally, he suggests diligent regard must be given to the intentions of those who framed the Constitution.[497]It should be noted that the above quotation was not written recently. It is not a contemporary cry of wolf at all.[498] Rather, the words were written by Professor Shattuck in 1890 in resistance to the then-growing pressure to expand

---

490. *See supra* notes 319-26 and accompanying text. *See also* Gangi, *supra* note 1, at 22-24.
491. *See supra* text accompanying notes 69-86.
492. *See supra* note 17.
493. *See generally* Gangi, *supra* note 1, at 22-33.
494. Shattuck, *supra* note 17, at 366.
495. *Id.* at 365.
496. *Id.* at 365-66.
497. *Id.* at 366.
498. *See* Ely, *supra* note 49.

property rights, advocated by the laissez-faire progressivists of the day.[499]

It must be remembered that foremost among legal scholars are the members of the judiciary, and among the members are those few named as Supreme Court Justices, in whom this nation has placed its greatest trust. Their responsibility is even more acute than that of the notorious *Nine Men.*[500] For those nine had one refuge that the present Justices and advocates of judicial power do not have — the laissez-faire usurpation had no precedent of equal magnitude. There was no body of historical data quite like the data (the record of laissez-faire) that is before the present Justices.

Have the Court's recent predecessors, or the Justices presently sitting on the Court, or advocates of increased judicial power, manipulated "a clause in . . . [the] [b]ill of [r]ights" despite prior "definite meaning for centuries"?[501] What about basing decisions on assumptions of a "constantly advancing civilization" that requires "broad and progressive interpretation"?[502] Do not at least some of the Justices and proponents of increased judicial power advocate "constitutional prohibitions as a panacea for moral and public evils"?[503] How many, among the present Justices and advocates of Court power, "look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights"?[504] Furthermore, how many, amongst the judiciary and ourselves, "trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties"?[505]

Except for historically unsupported assumptions or personal preferences, in the absence of any constitutional distinctions between economic and personal rights, this article asserts that there is no substantive difference between the contemporary record of the Supreme Court and its laissez-faire predecessors. Then, as now, parts of the Constitution were elevated out of proportion to the whole, obliterating the great and balanced purposes for which the Constitution was framed.[506]

2. *Repetition of Laissez-Faire Practices*

With respect to the exclusionary rule, proponents repeat at every level

---

499. *See* Shattuck, *supra* note 17. For a good sample of decisions apparently subscribing to the laissez-faire progressivist tradition see Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1933); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Lochner v. New York, 198 U.S. 45 (1905).

500. L. Rodell, Nine Men (1955). *See supra* note 281.

501. *See, e.g., supra* note 338.

502. Shattuck, *supra* note 17, at 366. *See also supra* text accompanying notes 69-101.

503. Shattuck, *supra* note 17, at 366. *See also* Gangi, *supra* note 1, at 33-37.

504. Shattuck, *supra* note 17, at 366. *See also supra* notes 17, 47-57 and accompanying text.

505. Shattuck, *supra* note 17, at 366. *See also* Gangi, *supra* note 1, at 22-26.

506. *See supra* notes 378-85 and accompanying text. *See also* Gangi, *supra* note 1, at 41-43.

of symbolization the same devices rightly condemned by critics of the laissez-faire Court. First, these proponents claim a right which is not located in the clearly discernible intentions of the Framers.[507] To the degree they have been successful in constitutionalizing their personal views, they have nevertheless ignored the meaning that those terms have had for centuries, and have manipulated associated symbols.[508]

Second, exclusionary rule proponents have created a closed system. Questions that challenge essential premises are answered by referring the questioner to unsupported premises of the system.[509]

Third, instead of historical experience, defenders of the exclusionary system appeal to logic.[510] Imagination substitutes for experience, and earlier constitutional tensions are ignored.[511] Since our nation's historical experience (precedents) does not "fit" their "system," our history (precedents) is rewritten. Similarly, any considerations which formerly competed are downgraded or abandoned in order for the exclusionary system to work.[512] In other words, logic drugs, or the system falls apart.[513] Similarily, meaningful distinctions are suppressed solely on personal grounds.[514]

Fourth, both federal and state representative assemblies are prohibited from addressing ethical questions of public concern.[515] Finally, exclusionary proponents have been successful in writing their personal values into the Constitution under the rubric that these values (rights) have always been there.[516]

G. Conclusions

A personal constitutional right to exclusion cannot be sustained except on the basis of unsupported assumptions regarding the origin and meaning of the Bill of Rights, personal preference assertions respecting the "nature" of rights, or unsupported elevation of the Supreme Court as our primary public policy maker at least in matters of civil liberties. Unless at least one of these assumptions is made, there is no evidence to support the position that the exclusionary rule was constitutionalized by the Framers.[517] Existing

---

507. See Gangi, *supra* note 1, at 13-14.

508. *Id.* at 12 n.108, 41-42. The laissez-faire court did in effect the same thing to the contract symbol when it struck down federal and state legislation during the 1930's arguing that the right to contract had always been afforded protection by the due process clause of the fourteenth amendment. *Id.*

509. *See supra* notes 283-94, 418-20 and accompanying text.

510. *See supra* notes 369-72 and accompanying text.

511. *See supra* notes 249-76, 281, 338 and accompanying text.

512. *See supra* notes 394-400 and accompanying text.

513. *See supra* notes 419-23 and accompanying text.

514. *See supra* notes 267-76 and accompanying text.

515. *See supra* notes 377-85 and accompanying text.

516. *See supra* note 338.

517. *See supra* note 400 and accompanying text.

evidence, on the contrary, suggests that the Framers did not in any way envision the fourth amendment, or any other amendment, as providing immunization from criminal conviction on reliable evidence. The fact that some people today believe that the rights contained in the fourth amendment or other relevant Bill of Rights provisions should or could better protect citizens, is nothing more than a personal preference.

In essence, the issue is not whether exclusionary policies are good or bad, or whether such policies would supplement fourth amendment provisions. The issue is one of legitimacy as to whether the federal judiciary may impose the rule on federal and state courts. There is no constitutional barrier preventing Congress or state legislatures from passing legislation contrary to existing Supreme Court decisions for the same reason that federal and state legislatures continued to pass legislation after earlier attempts had been struck down as unconstitutional by the laissez-faire Court. Persistent legislation is a legitimate and orderly means for challenging usurpation. Thus, while *Weeks v. United States*,[518] and *Mapp v. Ohio*,[519] continue to bind federal and state courts respectively, ordinary statutory enactments by Congress, or legislation otherwise consistent with state constitutional provisions would be sufficient to repudiate existing inconsistent Court decisions. In this way, a case or controversy may be brought before the Court in a manner similar to that which occurred in *NLRB v. Jones & Laughlin Steel Co.*[520] wherein the Court cured its own usurpation of the legislative powers with respect to economic rights.[521] Until passage of such legislation, however, executive conduct is bound by relevant decisions of the Court.[522]

To put the matter forthrightly, those contending exclusion is constitutionally required mask their personal judgments under a constitutional morality banner that is not traceable to the instrument they cite. They put a personal preference cart before the constitutional horse, as did their laissez-faire predecessors. The efficacy of the remedies for constitutional violations is for the *people* to decide, not members of the judiciary or those who proclaim their ethical sensitivity.[523] What is at stake here is self-government.

---

518. 232 U.S. 383 (1914).

519. 367 U.S. 643 (1961).

520. 301 U.S. 1 (1937).

521. *See generally id. See also* Ferguson v. Skrupa, 372 U.S. 726 (1963). These are examples of watershed cases signalling the abandonment of judicial constraints on congressional power.

522. *See* Gangi, *supra* note 1, at 49-52.

523. Professor Paulsen's characterization serves as a good example: "At least, many of the community's most scrupulous and noble will see it so." Paulsen, *supra* note 35, at 258. For other phrases unintentionally conveying similar moral arrogance, see *supra* comment accompanying note 355.

This position of elevated moral conscience has been repeated over the past four centuries. *See* E. Tuveson, *supra* note 148, and G. Gilmore, *supra* note 166, at 99-101. Professor Voegelin's comments are particularly relevant:

> The topic chosen for this Conference is the Sense of Imperfection.

The people, for better or for worse, determine the morality of public affairs. While the "most scrupulous and noble"[524] amongst us are encouraged, or even morally required, to demand the highest ethical conduct, they cannot impose a presumed vision absent consent.

The issues today are no different from what they were after the adoption of the Bill of Rights or state constitutions. The issues of what dangers citizens identify regarding police practices — from the mildest to the most horrible and what remedies, from the mildest to the most severe, should be imposed on those practices still persist. In other words, the question is what is "thought most meet and convenient to the generall good."?[525] When deliberating on these issues, the people's representatives are free to consider whatever matters are believed appropriate, as long as fidelity to the specific complex of values constitutionalized by the Framers is maintained. Statutory remedies have no constitutional status and may be adopted, revised or abandoned as the people see fit.[526] It is on the ordinary statutory level, therefore, that the people are free to adopt the exclusionary rule totally or not at all. Should the people choose, however, to elevate the rule to one of constitutional stature, they may employ the amendment process.

Judicial usurpations since 1960 *cannot* shift that burden. If exclusionary proponents are dissatisfied with the subconstitutional status of the rule, the burden of elevating that status to consititutional proportions rests upon them and not on those opposing a rule whose current status as a judicially implied remedy is based upon an illegitimate exercise of power. This author's position is based on our New Deal experience, wherein the Court rightly deferred to the legislative branch when no constitutionalized principle could be identified. The legislature, not the judiciary, is electorally accountable for its decisions.

It must be reemphasized that exclusionary proponents, insist on equating the constitutionality of the rule with the contemporary role played by the Supreme Court. Views elevating judicial power have been briefly sketch-

---

> The choice is as judicious as it is provocative in a time when all of us are threatened in our humanity, if not in our physical existence, by the massive social force of activist dreamers who want to liberate us from imperfections by locking us up in the perfect prison of their fantasy. Even in our so-called free societies not a day passes that we are not seriously molested, in encounters with persons, or the mass media, or supposedly philosophical and scientific literature, by somebody's Utopian imagination.
>
> . . . .
>
> In the activist's language, Utopianism has become the great symbol that is supposed to justify any action, whatever its human cost, if it pretends to overcome the imperfection of man's existence. . . .

Voegelin, *Wisdom and the Magic of the Extreme: A Meditation*, S. Rev. 235, 236 (Spring 1981).

524. Paulsen, *supra* note 35, at 258.

525. Mayflower Compact (1620).

526. *See generally* W. Hurst, *supra* note 49, at 40-46.

ed herein with reference to an earlier article that focused on Professor Berger's views.[527]

Three additional conclusions can be reached. First, with respect to each of the argument groupings made against Professor Berger, adherents change the original understanding of the Constitution and the Court's role. They either ignore and or distort concurrent history, frequently breaching appropriate criteria of relevance. They refuse to acknowledge that the manipulations practiced constitute radical departures from original meanings. Rule proponents assert continuity where none exists outside their presumptions of an open-ended constitutional text.[528] Second, in this context, Professor Berger's rejoinders take on greater significance. For, if as suggested, what the people *do* helps illuminate what the people *meant*, then Berger's conclusions regarding the fourteenth amendment are difficult to deny.[529] Insofar as Berger's rejoinders are rooted in historically accurate information, then his works provide a solid foundation for a critique of currently dominating views. In addition, Berger's canons of construction become crucial to a scholar's ability to properly evaluate Court decisions.[530] Finally, in the absence of personal preferences and or unsupported assumptions (particularly with respect to the "nature" of individual rights, "progress," or the significance of the Bill of Rights), contemporary views of judicial review as well as many Supreme Court decisions cannot be sustained.[531] Since modern judicial review thus plainly falls, according to the equation offered by proponents, so does the exclusionary rule. It is simply not constitutionally mandated.[532]

---

527. *See* Gangi, *supra* note 1, at 17-18. As discussed there, judicial power proponents use nine complex symbols, each representing mutually supportive and interlocking arguments. They may be summarized as follows:

(a) The past is DEAD—the Constitution LIVING.
(b) When a VACUUM exists in pursuing societal ideals.
(c) The Supreme Court is BEST SUITED, (d) to obtain RESULTS.
(e) In the context of a CUMBERSOME amendment process,
(f) the Court has the responsibility of securing INDIVIDUAL RIGHTS.
(g) This new Court role has been ACCEPTED by the American people, and (h) is IRREVERSIBLE.
(i) The time has come to recognize explicitly our LEGISCOURT.

Id.

528. *See generally supra* notes 319-24, 363-400.

529. *See* R. BERGER *supra* note 144, (discussed in Gangi, *supra* note 1, at 3-5, 8; n.68, 55-56). *See also* Perry, *supra* note 1, at 293 n.35, 296 n.148.

530. See Gangi, *supra* note 1, at 5-10.

531. *See supra* notes 363-76 and accompanying text.

532. By its nature a constitution imposes limits. Our Constitution did so in a particular manner. The power of judicial review was confined to policing the boundaries of the instrument. There is no evidence to support the modern judicial role consistent with the clearly discernible intentions of the Framers, constitutional law as previously understood, and our tradition; people's action since ratification. To subscribe to modern judicial review is to rewrite our history, like arguing that we fought World War I to make the world safe for judicial oligarchy.

There is one facet of judicial integrity related to judicial review which remains.[533] Under traditional canons of interpretation the judiciary is entitled to employ its power to protect itself from attempts to diminish its constitutional stature.[534] This doctrine, although consistent with the intention of the Framers, amounts to no more than an aspect of policing the boundaries of the instrument. In this respect, the Court performs its legitimate function as a nay-sayer.

Today, however, the symbol of maintaining its integrity goes far beyond self-protection. It entails regular substitution of personal judgments for those of the legislature. As with respect to other symbols, this constitutes a manipulation, one never authorized or consented to by the people. Judicial integrity is no longer a defense against the charge of usurpation; it has become the means by which particular usurpations are committed. Stripped of any justification upon which modern judicial review may be traced to the principles constitutionalized by the Framers, the Court's current exercise of power rests upon the single principle of preservation of its self-enlarged power.

IV. Final Observations

This nation's adversary system grew because it was believed to be a better means of getting at truth. When reliable evidence is excluded on the level of principle there no longer is a benchmark upon which a prosecutor and defense counsel can measure their conduct. Traditionally, the role of defense counsel in an adversary proceeding was to put the prosecution to its proof, which is to convince the jury of the defendant's guilt "beyond a reasonable doubt." The defense counsel role was noble. It demanded that convictions rest upon evidence presented by the prosecution, not emotion. Counsel demanded adherence to traditional procedures in the midst of possible short-sighted passion, for the traditional procedures were perceived as essential for protection against wrongful conviction. Likewise, the prosecutor was expected to put forth all relevant evidence, with admissibility always being guided by rules that would assure reliability. For both prosecutor and defense counsel the objective was truth, and the best means to that end was believed to be an adversary one. No conscientious participant perceived his role as purposely suppressing the truth. Each role had rules governing the responsibilities of the parties.[535] Once defense counsel's role includes suppression of reliable evidence as an essential component, he has "nothing to do with justice,"[536] and the nobleness of the profession is lost. Even more

---

533. *See supra* text accompanying notes 307-14.

534. *See* E. Corwin, Court Over Constitution 1-3 (1938) (cited in L. Bozell, The Warren Revolution 117 (1966)).

535. *See* D. Mellinkoff, The Conscience Of A Lawyer (1974), reviewed by Gangi, A.B.A. J. 902 (August, 1974); Gangi, Book Review, 9 The Prosecutor 441 (1974).

536. Mills, *I have Nothing to Do With Justice*, Life 57 (March 12, 1971).

serious, of course, would be suppression of reliable evidence of innocence by the prosecutor. He, above all others, has been specifically entrusted by the governed to seek justice, not convictions. But so, too, with defense counsel who, though not as specifically charged by the governed, is nevertheless equally privileged to participate in the noblest of public matters: pursuit of justice in concrete cases.

When as an integral component, the exclusionary rule bans reliable evidence in criminal trials, it must have an impact upon a system which had regularly admitted such evidence. The common good of justice, perceived as a balance of values, determined by the governed, cannot be replaced by a perception of the common good that posits rights as superior to both the governed and justice, without having far-reaching, not to mention incalculable, effects. As illustrative of the above, the writings of Judge Frankel have begun to illuminate this impact.[537]

First, Judge Frankel observes that in contemporary circumstances "our adversary system rates truth too low among the values that institutions of justice are meant to serve."[538] An earlier perspective, where the "basic purpose of a trial is the determination of truth" has been abandoned.[539]

Second, the natural effect of abandoning reliable evidence is to proportionately change the purpose of a trial. When the purpose of a trial no longer is truth,[540] (the determination of guilt or innocence, and in concrete cases the devotion to justice),[541] both prosecutor and defense counsel can easily become disoriented and instead pursue "winning."[542]

Third, when the object subconsciously becomes winning (since truth, and with it justice, has been abandoned), then to spare one from doubts of impropriety, counsel must "avoid too much knowledge" — knowledge reminding him that his winning, results in *injustice*: the release of the factually guilty.[543] In addition, it appears that there is the proportionate personal moral responsibility one has should the accused commit further crimes when in fact he should have been incarcerated.

The self-deception must go deeper if it is to sustain itself by hiding the

---

537. *See* Frankel, *supra* note 6.

538. *Id.* at 12.

539. *Id.* at 13. *See also* Burns, *supra* note 141, at 90-95; Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts,"* 41 CALIF. L. REV. 672 (1953); Weinstein, *supra* note 35, at 152. Professor McGarr observes:

> I disagree that the criminal trial has any other function except to determine the applicability of the criminal law to the particular fact situation then before the court; in other words, to determine the guilt or innocence of the individual then standing before the bar of justice. That is not only its most important function; it is its only function.

McGarr, supra note 141, at 267.

540. Frankel, *supra* note 6, at 13.

541. *Id.* at 27.

542. *Id.* at 15.

543. *Id.* at 19.

injustice committed and the responsibilities abandoned. Counsel proceeds to abuse the precious gifts of logic and persuasion for causes which he suspects are not noble.[544] In other words, "the gladiator using the weapons [litigator's devices] in the courtroom is . . . [no longer] primarily crusading after truth, but seeking to win."[545]

Therefore, if reliable evidence is forsaken on the level of alleged principle and rights are presumed superior even over justice, the end result will be the injustice of the release of the guilty. "The statistical fact remains that the preponderant majority of those brought to trial did substantially what they are charged with."[546]

The release of guilty defendants is an integral possibility in exclusionary reasoning, a fact not denied by proponents.[547] The alleged inability to demonstrate by empirical data that exclusion results in release of the guilty is due primarily to the "system's" insistence upon use of a methodology which cannot touch aspects of the subject matter studied.

Furthermore, defense counsel often knows of his client's guilt and release which serves only to further disorient participants in the criminal justice system. Exclusionary proponents on the other hand, suggest that release of guilty defendants will not occur because the rule will not be followed, or they presume that justice will triumph over the injustice strictly required by the rule's imposition.[548] In a final attempt to suppress the question of the

---

544. Judge Frankel elsewhere adds: "If, as I increasingly believe, the 'art of advocacy' exhibits too much that is artful and not enough devotion to justice, how far should our law school go in teaching it?" *Id.* at 27.

545. *Id.* at 19. Judge Frankel adds:

> The sharp eye of the cynical lawyer becomes at strategic moments a demurely averted and filmy gaze. It may be agreeable not to listen to the client's tape recordings of vital conversations that may contain embarrassments for the ultimate goal of vindicating the client. Unfettered by the clear prohibitions actual "knowledge" of the truth might impose, lawyers may be effective and exhuberant in employing the familar skills: techniques that make a witness look unreliable when the look stems only from counsel's artifice, cunning questions that stop short of discomfiting revelations, complaisant experts for whom some shopping may have been necessary. The credo that frees counsel for such arts is not a doctrine of truthseeking.

Id.

546. *Id.* at 17. *See also* Oaks, *Ethics, Morality and Professional Responsibility*, 3 B.Y.U.L. Rev. 591, 595 (1975). *See also supra* comment accompanying note 413.

547. *See supra* notes 60, 88, 98-101, 196 and accompanying text. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 543-44 (1961). *Cf.* Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1 (1964):

> The Due Process Model, while it may in the first instance be addressed to the maintenance of reliable factfinding techniques, comes eventually to incorporate prophylatic and deterrent rules that result in the release of the factually guilty even in cases in which blotting out the illegality would still leave an adjudicative factfinder convinced of the accused's guilt.

Id. at 18.

548. *See* Kaplan, *supra* note 35, at 1037 n.56; Schrock & Welsh, *supra* note 35, at 377 n.314, quoting Kaplan (where consequences of rule would offend sense of proportion); *Attack*,

injustice present in the release of guilty defendants, rule proponents must as a matter of faith believe that the cumulative effect of daily injustices — release of or failure to prosecute guilty defendants — will not have a substantive impact on the common good. On each level suppression of both reliable evidence and the injustice of releasing guilty defendants is necessary in order to preserve the false premises of the nature of rights and the single ethical goodness of the rule.

Ultimately, the inevitable effect of systematic exclusion of reliable evidence will be to distort traditional concepts of fairness. A trial becomes a game: "fair trial entails a trial so tortured and obstacle-strewn as our adversary process, we make the system barely tolerable, if not widely admired."[549] It has become a game because the objective of determination of guilt or innocence which is essential to justice has been lost.[550] Justice is no longer pursued. Rather, it has been redefined in order to sustain the false premises upon which it rests.[551]

Therefore, Judge Frankel has just cause to be considered "among those who believe the laity have ground to question our service in the quest for the truth."[552] Judge Frankel concludes:

> Having argued that we are too much committed to contentiousness as a good in itself and too little devoted to truth, I proceed to some prescription of a general nature for modifying these flaws. Simply stated, these are what we should:
> (1) modify (not abandon) the adversary ideal:
> (2) make truth a paramount objective, and
> (3) impose upon the contestants a duty to pursue that objective.[553]

Judge Frankel perceives his suggestion in terms of *reforming* the system. The scope of this article is different. Judge Frankel's suggestions are integral to a *rediscovery* of the important function admission of reliable evidence served until 1961. The ills described by Judge Frankel are not accidental to the exclusionary rule, but are integral to it. Until and unless we perceive the rule as only a possible remedy, not as yet a constitutionally required one, the distortions it has created will not be healed. The present exclusionary rule system does not just have kinks, it is *scandalous*, for it undermines justice itself.***

---

supra note 164, at 115-16; *Procedure*, *supra* note 121, at 235-37. *But see* Burns, *supra* note 141, at 89-94.

549. Frankel, *supra* note 6, at 20.

550. *See* Oaks, *supra* note 546, at 595.

551. *See supra* notes 418-22 and accompanying text.

552. Frankel, *supra* note 6, at 21. *See also* Wingo, *supra* note 35, at 584; Coe, *supra* note 35, at 25.

553. Frankel, *supra* note 6, at 31.

***Author's note.*

During the recent Supreme Court term the Justices continued to ignore the controversey surrounding the place of the Framers' intentions. Instead, the resulting vacuum was filled, as it

has been for some time, with whatever a transient majority happens to think is right, just and/or good public policy. The fact that what once a Warren Court majority considered good policy is no longer shared by a Burger Court majority, should prompt one to inquire as to what substantive constitutional principles separate the two Courts. Compare Justice Powell's decision in Oliver v. United States, 104 S. Ct. 1735, 1742 (1984) with Justice Marshall's dissent. *Id.* at 1745-46.

For example, in *Oliver*, the majority held that the warrantless search of an open marijuana field was not prohibited by the fourth amendment. *Id.* at 1744. The majority contended that when the Framers' formulated the fourth amendment, they used common law words that had acquired specific meaning, e.g., "effects." *Id.* at 1740. In doing so, they purposely selected a term that was less inclusive than other words, e.g., "property." *Id.* at 1740 n.7. Thus today "effects," the Court argued, "cannot be said to encompass open fields." *Id.* Moreover, Justice Powell speaking for the majority concluded that the decision reached in Katz v. United States 389 U.S. 347 (1967) (reasonable expectation of privacy) is not contrary because "[t]he Amendment does not protect the merely subjective expectation of privacy, but only 'those expectations that society is prepared to recognize as 'reasonable.'" *Id.* at 1741 (citations omitted).

Justice Marshall's dissent is telling; the majority's reasoning is inconsistent with precedents they failed to overrule, including *Katz*, because "neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper or effect." *Id.* at 1745. Justice Marshall further explains that just as the Court extended first amendment protections in areas not anticipated by the Framers, so too, has it during the Warren years done so in the fourth amendment, and by logic, is authorized to do so with all provisions. *Id.* at 1746 n.5. The response to that line of reasoning is simple; instead of affirming illegitimate court power, all it does is to draw into the dispute the legitimacy of the cited cases. *See supra* notes 349-51 and accompanying text. Proceeding further, if the amendment protects the "people" from "unreasonable" searches and seizures, then is it not fitting, indeed more consistent with pre-Warren Court precedents and our political tradition, that legislatures, not courts, determine what is reasonable? *See supra* notes 5, 16, 20, 21 and accompanying text.

Thus it appears that during the 1984 Term the Burger Court "retrenchment" continues. *See supra* notes 104-11 and accompanying text. A majority, to use Justice Brennan's phrase, still appears "zealous . . . to emasculate the exclusionary rule." Nix v. Williams, 104 S. Ct. 2501, 2517 (1984) (Brennan, J., dissenting) (discovery and condition of a murder victim's body is properly admitted, where it would ultimately or inevitably have been discovered in the absence of any constitutional or statutory violations). In *Williams*, Chief Justice Burger once again identified deterrance as the main purpose of the rule. "The core rationale consistently advanced by this Court for extending the Exclusionary Rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Id.* at 2508. *See also supra* notes 112 and accompanying text.

In *Williams*, defense counsel made two claims that were rejected by the majority. First, should the Court sanction an "inevitable discovery doctrine . . . it must include a threshold showing of police good faith." *Id.* at 2508. Apparently, it is acceptance of this claim that distinguishes Justice Brennan's and Justice Marshall's, dissent. Second, unlike the fourth amendment exclusionary rule, the essential purpose of which is to deter police misconduct:

> [T]he Sixth Amendment Exclusionary Rule is designed to protect the right to a fair trial and the integrity of the factfinding process. . . . [and when such] interests are at stake, the societal costs of excluding evidence obtained from responses presumed involuntary are irrelevant in determining whether such evidence should be excluded.

Id. at 2510. Chief Justice Burger disagreed, holding that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Id.*Thus, cases such as the *Williams* decision demonstrate the inevitable tendency of contemporary constitutional adjudication to get sidetracked: swept into making public

policy choices which are more appropriately legislative. Once it is clear that exclusion is *not* demanded by the Constitution, then the federal and state legislatures can address the issues, among others, discussed in *Williams*.