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ENTITLED: The History, Development, and Alternatives to the Exclusionary Rule

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History makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.

-Justice Frankfurter
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INTRODUCTION

The rule has been described as both an essential ingredient "to ensure the constitutional guarantees against unreasonable searches and seizures" and "a judge-made rule of evidence that should be discarded." It is the exclusionary rule and in a span of 75 years since its formation, it has spawned advocates from the left and the right who either call for its abolition or praise it for safeguarding our criminal and judicial system. No paper could do full justice to the history, the development, and possible alternatives to the exclusionary rule, otherwise called the suppression doctrine; indeed, entire treatises have been written on these very same topics. This paper will attempt this gargantuan feat, albeit at a superficial level. Essentially, the paper will provide: a survey of the history behind the source of the exclusionary rule, the Fourth Amendment; a survey of the major Constitutional cases that have altered the judicial concept of the rule; and an alternative or modification of the rule such that some of its critics (though certainly not all) will be fairly satisfied.

HISTORY OF THE FOURTH AMENDMENT

In order to understand the intricacies of the exclusionary rule, one must first unearth the history behind the source of the rule: the Fourth Amendment. Although history, alone, cannot be the sole

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1 Yale Kamisar, "Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?" *Judicature*, Vol. 62, No. 5, Nov. 1978.
2 Malcolm Wilkey, response to "Is the exclusionary rule an 'illogical' or 'unnatural' interpretation of the Fourth Amendment?" *Judicature*, Vol. 62 Number 2, August 1978, p. 67.
source of all search and seizure cases if only because history, itself, is a nebulous concept and, certain recent technical innovations such as wire-tapping could not have been foreseen by the framers of the constitution; it can, nevertheless, help in the judicial process by shedding some light on the basic underlying purposes of the Amendment. Indeed, for Justice Frankfurter, the history behind the Amendment determined many of his opinions in cases dealing with the exclusionary rule. The final product reads:

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

The arduous path to this final product, however, has its roots in both British and American history. The history of the Fourth Amendment has two principal sources: the English and American experiences of virtually unrestrained and judicially unsupervised searches. I will first consider the English and then the American historical antecedent to the Fourth Amendment.

**HENRY VIII AND THE LICENSING SYSTEM**

The principle reason for a broad search and seizure power in England (beginning with the Tudors) was to regulate and censor

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printed material through a licensing system. In fact, the fight against these broad search and seizure powers would continue for the next three centuries. Essentially, the battle was fought for the right to print material without fearing one's offices searched and seized by those in charge of the licensing system.4

Henry the VIII in 1538 began a system of prior state censorship which made it mandatory for all publications to receive the nation's license. Barring few interruptions, Henry's system continued almost until the 1700s after which, less direct methods of control were used for another hundred years.5

During Mary's reign, vast powers of search and seizure were delegated to the Stationers' Company, a private guild organization.6 In exchange for monopoly privilege over printing material, the Company was instructed "to make search wherever it shall please them in any place...within our kingdom of England...and to seize, take hold, burn...those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation..."? This was a particularly savvy maneuver by the monarchy, for by delegating the search powers to the printers, themselves, it served to silence any objections to the licensing system by the printing trade. Furthermore, until the decline of the monarch in the 1640s, this system of licensing enforcement was very effective because it

5 Ibid., p. 48.
6 Landynski, p. 21.
worked with the self-interest of the Stationers' Company since by searching for non-licensed printing material, it was, in essence, protecting its own monopoly rights. 8

Prior to the English Revolution, three associated tribunals enforced the suppression of seditious printing: the Monarch's Privy Council; the Court of Star Chamber (the Privy Council's judicial offshoot which grew in power beginning with Elizabeth's reign); and the ecclesiastical Court of High Commission, which was also established by Elizabeth in 1558. In the sixteenth and seventeenth centuries, these tribunals became very adroit at discovering forbidden materials. 9

Charles I quickly expanded the powers of the Privy Council in order to combat the antagonism and defiance over the tonnage and poundage duties. He empowered Privy Council messengers "to enter into any vessel, house, warehouse, or cellar, search in any trunk or chest and breach any bulk whatsoever..." 10 Further, Charles was noted for his general search on all printed matter. Among the victims of such broad search powers was the great Sir Edward Coke whose house and office was ransacked by Privy Council messengers "as Coke lay dying in the great curtained bed, they ransacked study and library, took away the manuscripts for all four parts of the Institutes, the manuscript notes for additional books of Reports, and

8 Landynski, p. 21.
10 Ibid., p. 30.
some fifty additional manuscripts."11 Finally, in 1637, to aid enforcement of even a stricter censorship edict by the Star Chamber, the Stationers' Company was authorized to "search at any time of the day or night [as] they saw fit."12

The days of the Star Chamber, however, were drawing to an end. In 1637, a decree by the Long Parliament abolished the Star Chamber and High Commission as well as ordering punishments for those who had executed general warrants against members of Parliament. However, such an act was more symbolic than substantive for Cromwell was no champion for the freedom of the press. Instead, "the royal prerogative had now given way to the authority of Parliament, but the substance of the regulations remained unaltered."13

Even after the Puritan Revolution, the quest for the right to privacy did not improve with the Restoration Parliament. In fact, one can argue that the abuses of broad, extensive searches were exacerbated by this temporary parliament. As Lasson states, "The Regulation of Printing Act of 1662 made provision for powers of search as broad as any ever granted by Star Chamber decree."14 The secretaries of state were invested with the broadest power to issue search warrants. The incredibly broad range of these warrants was exemplified by the warrant issued to Roger L'Estrange, who was the

12 Lasson, p. 32.
13 Ibid., p. 32-33.
14 Lasson, p. 37.
head of the newly created post of Surveyor of the Press. His authority consisted of no less than "to seize all seditious books and libels and to apprehend the authors, contrivers, printers, publishers, and dispersers of them" and to "search any house, shop, printing room, chamber, warehouse, etc for seditious, scandalous or unlicensed pictures, books or papers..."15

**THE DECLINE OF THE SEARCH AND SEIZURE POWER**

The discussion thus far, has revealed a virtually uninterrupted growth of the search and seizure power in English history for roughly 150 years. Beginning around the time of the English Revolution of 1688, however, the search and seizure power of the government began to wane.16 Even immediately prior to the revolution, Justice Scroggs was impeached, in part because of his issuance of general warrants. Lasson remarks that this was first time Parliament recognized "the idea that general warrants were an arbitrary exercise of governmental authority against which the public had a right to be safeguarded."17 Ironically, the Printing Act was renewed the very same year that Justice Scroggs was impeached. But when it expired in 1694, the Commons refused to renew the legislation despite the Lords' protest.18 According to Siebert, the reason for the Commons' defiance was more political than libertarian as he remarks that "the growth of a two-party system made it too risky a business

15 Siebert, p. 254.
16 Landynski, p. 25.
18 Siebert, p. 306.
for Parliament to entrust a government of one party with the enforcement of a licensing system that could be manipulated for political advantage."\textsuperscript{19}

\textit{PARLIAMENT'S ROLE}

Aside from these political concerns, the main reason for the decline of the search and seizure power was Parliament's decision to mitigate the abusive nature of enforcing the tax laws. At the behest of William of Orange, one tax was eliminated by Parliament because the searches required for its enforcement constituted, "a badge of slavery upon the whole people, exposing every man's house to be entered into, and searched by persons unknown to him."\textsuperscript{20} In 1733, Walpole's efforts to push a wine tax through parliament failed because of its search provisions. Finally in 1763, William Pitt proclaimed against the cider tax and its search provision words that have reverberated ever since: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail--its roof may shake--the wind may blow through it--the storm may enter--the rain may enter--but the King of England cannot enter; all his force dares not cross the threshold of that ruined tenement!"\textsuperscript{21}

\textit{MAGNA CARTA FOUNDATION}

\textsuperscript{19} Ibid., p. 263.
\textsuperscript{20} Lasson, p. 39.
Was their deep-rooted principles in English law such as the Magna Carta that could further mitigate the propensity of broad searches? Though the Magna Carta has some relevance to this attempt--as in its provision in Chapter XXXIX which denies the sovereign the right to "go upon" or "send upon" any "freeman" except "by the law of the land"--not only was its guarantee of protection limited to certain social classes, but the main intent of Chapter XXXIX was to preclude the king from "swooping down...on those who had offended him and arbitrarily meting out judgement without recourse to established legal procedures of the day (such as trial by combat)."22

COMMON LAW FOUNDATION

Perhaps more important than the Magna Carta, then, was the history and the development of common law. Unlike the Star Chamber and Parliament, which legitimized broad searches and seizures, common jurists stood steadfast in their commitment to privacy. These jurists--either through the formulation of statutory rules of arrest or through judicial recommendations--tried to check against the complete obliteration of individuals' rights to privacy. Foremost among these jurists was Sir Matthew Hale, who in his renowned *History of the Pleas of the Crown*, charted legal rules.23

Some of his work would later become the source for the United States Constitution.

Hale's view on warrants was unique to his time. He viewed general warrants as unjustifiable because "it makes the party to be in effect the judge; and therefore searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them."\(^{24}\) In short, Hale's view on justifiable warrants was the following: "[Warrants] are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do she his reasons of such suspicion."\(^{25}\) It is clear that Hale's thoughts, especially concerning "probable cause" and the implied "neutral magistrate" have had a lasting impact in the formulation of our Constitutional law and specifically, the Fourth Amendment.

Unfortunately, Hale's ideas failed to affect the King or Parliament, but the judiciary with a series of important cases, provided the principal driving force for the abolition of the general warrant. Officially, licensing of printing came to an end in 1694,\(^{26}\) and the new venue for restricting freedom of the press was prosecution for seditious libel, not prior restraint. To aid these prosecutions, the secretaries of state continued to issue general warrants although the Printing Act, which gave them such powers.

\(^{24}\) Ibid., p. 149.
\(^{25}\) Ibid., p. 577.
\(^{26}\) Landynski, p. 27.
had not been renewed. These general warrants, then, gave rise to several important English cases.

WILKES CASE

The first of such cases concerned John Wilkes who had begun publications of the North Briton, a pamphlet series which criticized the English government on a number of topics. The government was particularly perturbed by Number 45 in the series and Lord Halifax, then Secretary of State, issued a general warrant to four messengers, authorizing the arrest of the perpetrators and seizure of their papers. When the authorship of Wilkes was recognized, he was arrested and upon his subsequent refusal to accompany the messengers back to prison, Wilkes was carried away into the Tower, though his days there were limited because of his status as member of Parliament. His bureau was thoroughly ransacked and all his private papers were seized. The printers brought suit against the messengers for false imprisonment and Chief Justice Pratt declared that, "to enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour..." Subsequently, he ordered damages of three hundred pounds. Wilkes' own suit against the the undersecretary in charge of the warrant's execution resulted in a verdict of one thousand pounds, and years later, he was awarded four thousand pounds against Lord Halifax. Pratt declared that the issue of general warrant was "a point of the greatest consequence he

had ever met with in his whole practice...If such power is truly
invested in a secretary of state, and he can delegate this power, it
certainly may affect the person and property of every man in this
kingdom, and is totally subversive of the liberty of subject."28

The people of England supported Justice Pratt’s view. He was
granted freedom of several cities, including London and Dublin. The
city of London also commissioned Sir Joshua Reynolds to paint his
portrait and Dr. Samuel Johnson supplied the inscription of "zealous
supporter of English liberty by law."29

**ENTICK CASE**

It did not take long for Wilkes to be used as precedent. In
*Entick v. Carrington* 30 (1765), Pratt now elevated to peerage as Lord
Camden, continued his crusade against the general warrant. In this
case, Entick, the editor of the Monitor, was the victim half a year
before the *Wilkes* decision of a general search in which his papers
were also seized. Encouraged by Wilkes’ success, he brought a suit
for trespass and received an award for three hundred pounds. Pratt
delivered the opinion of the Court of Common Pleas sustaining the
verdict on appeal, "If this point should be determined in favor of the
jurisdiction...the secret cabinets and bureaus of every subject in this
kingdom will be thrown open to the search and inspection of a
messenger, whenever the secretary of state shall think fit to charge,

28 Ibid., p. 1167.
29 Lasson, p. 46.
30 19 Howell’s State Trials 1029 (1765).
or even to suspect a person to be the author, printer, or publisher of a seditious libel." 31  Further, he dismissed the Star Chamber precedent of legitimizing such warrants as without common-law court precedent and "nothing but ignorance can excuse the judge that subscribed [to] it." 32

The popular feeling aroused by these judicial decisions prompted Parliament to finally act. In 1766, the Commons proclaimed general search warrants as illegal except when their use might be specifically authorized by an act of Parliament. 33

THE WRIT OF ASSISTANCE

Concurrently, while Britons were struggling to free themselves against indiscriminate searches, significant developments to the Fourth Amendment were happening across the Atlantic in England's colony in America. In 1760, the relatively lax provisions of the Navigation and Trade Acts began to be rigorously enforced as the result of the French and Indian Wars, and the principal enforcement weapon was the writ of assistance which historians describe as synonymous to general warrants. 34 The reaction to these writs, in England and America, differed markedly. In England, while there was considerable amount of resentment to these writs as Pitt's famous declamation against the cider tax revealed, the frequency of

31 Ibid., p. 1063.
32 Ibid., p. 1071
33 Lasson, p. 48-49.
34 Landynski, note 53, p. 32.
its practice was minimal.\textsuperscript{35} Though the writ of assistance was obnoxious both in England and in the colonies, it was only in the latter that it was enforced rigorously. The most offensive aspect with these writs was their permanent nature. Those that possessed authority over the writ might use it without discretion for the duration of the life of the sovereign. It was therefore not surprising that these writs caused considerable resentment in the colonies.\textsuperscript{36}

\textbf{OPPOSITION IN MASSACHUSETTS}

Historically, Massachusetts was the center of both the enforcement and opposition to the writs. In Massachusetts, as elsewhere in the colonies, it was common practice of custom officers to enter and search buildings with no formal authority than that of their commissions as Crown officers.\textsuperscript{37} When opposition to these warrantless searches became intensified, the Governor found it necessary to enact procedures requiring the Superior Court to issue the writs.

The legality of the writs of assistance in the colonies were nebulous at best for the simple reason that England, herself, had inconsistent statutes for their enforcement.\textsuperscript{38} During the reign of Charles II, the authority for issuing the writs came from the Court of

\textsuperscript{37} Lasson, p. 55.
\textsuperscript{38} Landynski, p. 32.
Exchequer, but it did not specify the standards that must be met for their issuance. The second statute, under William III, merely extended the jurisdiction of the first to include the colonies. Not only was the first statute obscure, the colonies did not possess any analogous branch to the Court of Exchequer.\textsuperscript{39} With these ambiguities in the statute books, it is not surprising that the legality of the writ of assistance was challenged immediately.

\textit{JAMES OTIS JR. REPRESENTS THE COLONISTS}

In Boston, sixty-three merchants engaged James Otis Jr. and Oxenbridge Thatcher to represent them against the Crown and the writ of assistance. Attorney General Gridley, representing the provincial government, argued that the writs were valid both because they had the basis of English statutes and because they provided a check against arbitrary searches since their execution required the presence of a sheriff who could "have an eye over" the customs officers. Gridley then followed with a terse argument against the notion of privacy: "Everybody knows that the subject has the privilege of house only against his fellow subjects, not vs. the King either in matters of crime or fine."\textsuperscript{40}

Otis attacked the government's argument mainly on libertarian grounds. He denounced the writ as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found on the English

\textsuperscript{39} Landynski, p. 32.
\textsuperscript{40} As quoted in Landynski, p.34.
law-book." He conceded that, in particular cases, special warrants were justifiable, but general warrants, even in the face of Parliament’s approval, must be null and void because it contradicted the contents of Magna Carta. Further, if an act of Parliament were to counter the words of this great petition directly, then the act must become void. As one can see, Otis’s words were not only eloquent, but prophetic as well, for his speech seemed to directly forecast and call for judicial review that would one day become a reality in the name of Marbury v. Madison.

Despite Otis’s eloquence, the Chief Justice elected not to follow the emotional tide and instead, elected to wait until courts in England decided on similar cases. In the meantime, the General Court (legislature) of Massachusetts issued a bill outlawing general warrants and authorizing only special warrants, but this was vetoed by the Governor. Thereafter, the writs were executed without difficulty until 1765, but the relatively calm atmosphere was deceptive indeed.

The issue rekindled itself with the passage of the Stamp Act. Old feelings were revived and the house of Chief Justice Hutchinson [who, in effect, ruled against Otis] was “destroyed with a savageness unknown in a civilized country.” Despite the passage of a new act of

42 Ibid., p. 471.
43 Lasson, p. 62.
44 Landynski, p. 36.
45 Horace Gray Jr., Appendix in Quincy’s Massachusetts Reports, 1761-1772, p. 422.
Parliament in 1767, it became almost impossible to enforce the writs as popular resentment reached its apex. Thus, in Massachusetts, the issue of the writs of assistance was closed: it could not be enforced.\footnote{Ibid., p. 449.}

**OPPOSITION IN OTHER STATES**

Massachusetts, by far the most vocal and violent, was not the only state in opposition to the writs. While the \textit{people} of Massachusetts represented most of the resistance, in Pennsylvania, Delaware, Virginia, Connecticut, Rhode Island, Georgia, and Maryland, the \textit{courts} were the main opposition to the writs, for they either refused or ignored applications for the writ.\footnote{Landynski, p. 37.}

But the main instigator for the opposition movement against the writs must be attributed to James Otis, Jr. whose oration, John Adams said in retrospect, "breathed into this nation the breath of life. He was a flame of fire!...Every man of a crowded audience appeared to me to go away,...ready to take arms against writs of assistance...Then and there the Child Independence was born...In fifteen years, namely in 1776, he grew up to manhood, and declared himself free."\footnote{Adams, p. 276.}

The controversy over the abuse of search power continued well into the Revolutionary War as the colonists listed among its grievances to King George III, "The officers of the customs are empowered to break open and enter houses, without the authority of
any civil magistrate, founded on legal information."49 Within this context, it is somewhat surprising that there is no specific mention of writs of assistance in the Declaration of Independence since the document was, in part, a listing of grievances against King George III. According to Lasson, the omission is hidden behind the clause, "He has...sent hither swarms of Officers to harass our people..."50

**MASSACHUSETTS DECLARATION OF RIGHTS**

Even prior to the Declaration of Independence, several states had already moved to provide constitutional guarantees against recurrence of the writs of assistance. For example, Article X of Virginia's Declaration of rights specifically denounced general warrants as "grievous and oppressive."51 Pennsylvania, Maryland, and North Carolina also adopted constitutional safeguards regulating searches. But the most comprehensive state declaration against abusive searches belonged to Article XIV of the Massachusetts Declaration of Rights. Within this text, the phrase "unreasonable searches" was born and served as the first model for the Fourth Amendment:

> Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers and his possession. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously

49 Quoted in Lasson, p. 75.
50 Lasson, p. 80, note 7.
51 Landynski, p. 38.
supported by oath or affirmation, and if the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued, but in cases, and with the formalities prescribed by the laws."

In the meantime, the process of ratifying the newly formed Constitution at the Philadelphia Convention faced its most considerable challenge over the Bill of Rights issue. Patrick Henry, who favored its inclusion, adamantly urged for rejection of the Constitution largely because a search provision was lacking:

Any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of habeas corpus. But here a man living hundreds of miles from the judge may get in prison before he get that writ.

THE DEBATE OVER THE WORDING OF THE FOURTH AMENDMENT

James Madison, the de facto leader for the incorporation of the Bill of Rights, also argued for checks against arbitrary searches. His

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52 Quoted in Landynski, p. 39.
argument, however, was unique because he linked the importance of this safeguard to the necessary and proper clause. He reasoned that since the government has a right to pass all laws which are necessary to collect its revenue, the government could also pass a law for general warrants if it felt that such a law was necessary for the collection of revenues. To safeguard against this possibility, Madison proposed this clause:

The rights of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Madison's draft proposal for this addition to the Bill of Rights was referred to committee where the search provision was altered to read:

The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.

55 Ibid., p. 434-435.
After two errors were corrected (the word "secured" was changed to "secure" and the phrase "unreasonable searches and seizures, inadvertently omitted in the committee's draft, was inserted), the Amendment was approved. The final version of the Fourth Amendment, however, had one specific difference than the passage the committee approved. The final product substituted "by warrants issuing" with "and no warrant shall issue" on the grounds that the former was not strong enough. Interestingly, though this proposal was rejected by a substantially large majority, because the author of the change (Benson of New York) was also the head of a committee on Amendments, his alteration was overlooked. Thus, no one noticed the change, and the altered form was accepted. In this less than auspicious way, the amendment in its present form formally passed the House, the Senate and was ratified by the states.

The history of the Fourth Amendment, in one sense, parallels the historical trend prevalent during the time of its ratification: the gradual loosening of monarchical power in the place of a more representative government. During the sixteenth and seventeenth centuries, the monarchs abused their search powers largely to censor print material. When the people banded together to oppose the writs of assistance, the Crown at first, fought to retain this executive privilege. After the American Revolution, the colonists made sure that such writs could not become part of their lifestyle.

56 Ibid., p. 435.
57 Lasson, p. 101-103.
and the Fourth Amendment was born. Perhaps Justice Brandeis best captured the essence of the Fourth Amendment:

The Makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and, of his intellect. They knew that only a part of the pain, pleasure, and satisfaction of life are to found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensation. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and a right most valued by civilized men.  

FROM THE FOURTH AMENDMENT TO THE EXCLUSIONARY RULE: THE PRECEDENT OF BOYD AND WEEKS

Though the road to the Fourth Amendment was long and painful, it "remained for almost a century a largely unexplored territory." Then, in 1886 came Boyd v. United States, and the question of whether evidence obtained illegally could be admissible in a court of law was introduced. The case involved George and Edward Boyd who were New York merchants. The conflict began when they were forced to produce and invoice showing the quantity and value of their goods which the federal government alleged were imported illegally. The Boyds challenged the government, but the jury decided for the government and the goods were forfeited to the

58 Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).
59 Landynski, p. 42.
60 116 U.S. 616, 6 S.Ct. 524, 29, L.Ed. 746 (1886).
government. The Boyds needed three resolutions in their favor: (i) whether the search that revealed the papers was a search within the meaning of the Fourth Amendment; (ii) whether the protections of the fourth Amendment extended to forfeiture proceedings; (iii) and whether valid, competent but illegally obtained goods must be excluded. The Court, per Justice Bradley, affirmed the first two provisions in a dry, mundane manner, but on the third issue Justice Bradley was most creative with his combination of the Fourth and Fifth Amendments:

They throw great light on each other, for the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

Justice Bradley therefore concluded "that the notice to produce the invoice... and the law which authorized the order, were unconstitutional and void, and that the inspection by the district

attorney of the said invoice, when produced in obedience to the said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."

The Justices thus deemed it erroneous for the Court "to assume that the action of the court below, in requiring a party to produce certain papers as evidence on the trial, authorizes an unreasonable search or seizure of the house, papers, or effects of that party." Thus, Boyd awakened the sleeping giant by giving more substance to the hitherto largely symbolic Fourth Amendment.

The essence of Boyd—the exclusion of illegally obtained evidence—was practically undermined in Adams v. New York (1904).\(^6_2\) In this case, state officers executing a warrant for policy slips also seized other papers, which were admitted at trial to identify Adams' handwriting on the policy slips. The Court declared that "the weight of authority as well as reason" supported the tradition of common law whereby the Courts would not inquire as to the means by which evidence that was otherwise admissible was acquired. The Court seemed to dismiss Boyd with very little misgivings.

Then in 1914, the Supreme Court decided Weeks v. United States.\(^6_3\) This case concerned the conviction in the federal courts for the use of the postal service to transmit lottery tickets. Weeks' home was searched by local police, who turned certain evidence over to the U.S. Marshal, and the marshal later that day participated in a second

\(^{63}\) 232 U.S. 3383, 34 S.Ct. 341, 58 L.Ed. 6552 (1914).
warrantless search of the house by the police. Upon Week's pre-trial motion for return of the property seized, the court ordered the return of all of the property except that which the prosecutor wished to introduce into evidence. Before the Supreme Court, Weeks contended that the seizure of his private papers violated the Fourth and Fifth Amendment. Justice Day writing for an unanimous court, however, (who had also written the Adams decision) dealt only with the Fourth Amendment. The Court had little doubt that had Week's request for a timely motion for return of the illegally seized evidence been granted, the conviction based upon that particular evidence could not stand. Justice Day's opinion also revealed the common theme of judicial integrity as a justification for the exclusionary rule:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority...This protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures...should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. To sanction (unlawful invasion of the sanctity of his home by officers of the law) would be to affirm by judicial decision a manifest neglect,
if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action (emphasis added).

When the government questioned the consistency of *Weeks* in light of *Adams*, Justice Day responded that the element of timing was the difference in the two cases. The crux of *Adams* was the notion that a court engaging in a criminal trial should not have to get into the tangential issue of the constitutionality of the competent evidence; *Weeks*, however, had petitioned for return of the property before the trial.\textsuperscript{64} The evidence obtained by state officials in the first search, however, was admissible "as the Fourth Amendment is not directed to individual misconduct of such [state] officials." This haphazard, technocratic-type reasoning would surface repeatedly as the Supreme Court attempted to reconcile the inherent problems within the suppression doctrine.

*Weeks* not only continued where *Boyd* left off, it opened up the second issue of discerning between federal and state violations of the Fourth Amendment. The necessity for clearing up the federal-state distinction surfaced with *Byars v. United States*.\textsuperscript{65} Here, state officers executing a state search warrant, defective by federal standards, were accompanied by a federal agent, who participated in the search. The Court contended that because the search was, in effect, a joint operation between local and federal agents, the fruits

\textsuperscript{64} LaFave, p. 8.
\textsuperscript{65} 273 U. S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927).
of the search was inadmissible in the federal courts. The Court emphasized, however, that the rule would be otherwise if the evidence was illegally obtained by state officers entirely on their own volition. The so-called silver platter or Byars doctrine was born thanks to Justice Frankfurter who stated, "a search is a search by Federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."66

In retrospect, Weeks in part, and the essence of Byars dealt with the applicability of the Bill of Rights on the states since the aforesaid "rights" was originally designed as a limitation on only the federal government.67 With the adoption in 1868 of the Fourteenth Amendment, which prohibited the states to "deprive any person of life, liberty, or property, without due process of law," there arose the difficult question of which or how much of the Bill of Rights was applicable to the states.

**THE QUESTION OF STATE APPLICABILITY: WOLF V. COLORADO**

Weeks and Byars set the stage for the ultimate confrontation between the Fourteenth and the Fourth Amendment, and their relation to illegally obtained evidence. Justice Frankfurter in Wolf v. Colorado68 summarized the question as:

Does a conviction by a State court for a State offense deny the 'due process of law' required

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by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*?

The answer was a qualitative no. Justice Frankfurter acknowledged that the right to privacy against arbitrary intrusion by police was basic to any free society. Thus, the right against arbitrary search and seizure was enforceable against the states through the Fourteenth Amendment's Due Process Clause. He further argued that were a state to sanction, affirmatively, police intrusions into privacy, it would be counter to the safeguards of the Fourteenth Amendment. From this standpoint, it appeared as if Justice Frankfurter was undermining his own decision.

The critical component of Justice Frankfurter's reasoning, however, was his belief that there are different ways of enforcing the basic right of privacy. He began this justification by noting that *Weeks* "was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy...[it] was a matter of judicial implication." He continued by asserting that the "immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded." Citing further that 30 states had
rejected the *Weeks* rule and noting also that most of the "English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained," he thus concluded that it was not "a departure from basic standards" to leave the victims of illegal state searches "to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford."

Any thoughts that all illegally seized evidence would now be admissible—despite the outrageous or offensive nature of the police behavior—was quickly dispelled three years later in *Rochin v. California*. There, state officers broke into a defendant's home, used force in an unsuccessful attempt to retrieve capsules the defendant put in his mouth, and then took the defendant to a hospital where they directed a doctor to force an emetic solution into the defendant's stomach, forcing him to vomit up the capsules he had swallowed. The court, per Justice Frankfurter declared such actions as unconstitutional on the grounds that "the conduct shocks the conscience." Further, Justice Frankfurter eloquently remarked that "It would be a stultification of the responsibility which the course of constitutional history has cast upon this court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract by force what is in his stomach."
Justice Frankfurter's seemingly subjective test of "conduct that shocks the conscience" would soon be retested two years later in *Irvine v. California*. In *Irvine*, the Court in a 5-4 decision held that the repeated illegal entries into petitioner's home to install and relocate a secret microphone and the listening to the conversations of the occupants for over a month did not require exclusion of the fruits of such conduct. Justice Jackson, who announced the judgment of the Court, reasoned that though the police measures "flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment," *Rochin*, nevertheless, was not controlling because the facts of the case did not involve "coercion, violence or brutality to the person."

The exclusionary rule would face another change when the so-called silver-platter doctrine was overturned in *Elkins v. United States*. The silver-platter doctrine, a concoction of Justice Frankfurter, stipulated that as long as the federal officer did not participate in obtaining the illegally seized evidence, or as long as the evidence was simply handed over on a "silver platter" from state officials, the evidence could be submitted to a federal court. Justice Stewart speaking for the majority rejected this seemingly inconsistent rule and spoke of the detrimental effects it may produce between federal and state relations:

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72 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 (1960).
The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work not conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers. The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way.

Justice Frankfurter, the author of Wolf ostensibly dissented arguing that "it was a complete misconception of the Wolf case to assume...that every finding by this Court of a technical lack of a search warrant, thereby making a search unreasonable under the Fourth Amendment, constitutes an 'arbitrary intrusion' of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment."

THE REASSESSMENT IN MAPP V. OHIO

By far the most controversial and significant decision affecting the exclusionary rule was Mapp v. Ohio in 1961.73 The decision, in

effect, overturned the previous *Wolf* precedent of allowing individual states the option of enforcing its own type of suppression rule. The case was brought about by Miss Dollree Mapp who was convicted of having in her possession certain obscene books, pictures and photographs which the police had found in an illegal search of her home. The state supreme court upheld the obscenity statute under which she was convicted and also upheld the common law rule of admitting competent evidence obtained illegally.

The ironic aspect of the case involved Miss Mapp's counsel's manner of arguing his case. Miss Mapp's counsel in his brief and in his oral argument never even cited *Wolf* let alone ask for *Wolf* to be overturned. Instead, he opted for the safer route of contesting the constitutionality of convicting someone for the mere possession of obscene materials. In fact, only the American Civil Liberties Union in its amicus brief advocated that *Wolf* be overruled.74

The reasoning behind *Mapp* is particularly unclear when compared to *Wolf*. In holding "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court," the Court reasoned in *Mapp*:

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise then just as without the *Weeks* rule the assurance against unreasonable federal

74 LaFave, p. 15.
searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'

The Court still had to reconcile Mapp's ruling with Wolf. It attempted this feat by stating that the factual considerations which supported Wolf were without "current validity." These changes included the fact that almost one half of the two-thirds of the states originally in opposition to the exclusionary rule had since passed the rule either through their own legislative or judicial decision. Further, the contention in Wolf that there were other means to safeguarding individuals' rights from illegal searches were found to be highly ineffective. Moreover, Justice Clark had much to say about the illogical nature of the exclusionary rule in its relation to the states and the federal systems:

Our holding...is not only the logical dictae of prior cases but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a states' attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.
Thus, the Supreme Court in the span of 75 years had gone from no exclusionary rule to one that encompassed first, only the federal judicial system, but later, the state system as well. The country in a matter of less than 200 years had gone from abolishing search privileges by the king's officials in the form of writs, to forbidding any evidence that was obtained illegally. Justice Frankfurter signaled the danger of incorporating the rule so liberally and still advocated the freedom for each state to either reject or enforce the rule and urged the Court not to put letters on the states with "an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement (dissenting opinion in Mapp)."

Since Mapp v. Ohio, the Fourth Amendment has been the subject of more litigation than any other provision of the Bill of Rights.\textsuperscript{75} Part of the reason for this plethora of litigation is the inherent ambiguity of the Fourth Amendment. While the history behind the Amendment was arduous, and for all the efforts our Founders placed on the Amendment, the end result is anything but clear. The most conspicuous deficiency of the Amendment is its lack of enforcement directives. Although it guarantees the people the rights against "unreasonable searches and seizures", it does not state explicitly what the consequences of such breaches are. The exclusionary rule by suppressing evidence obtained unconstitutionally, has thus been called a "judiciously created" rule.

\textsuperscript{75} LaFave, p. v.
The rule has spawned myriad critics who contend that the rule simply does not serve the purposes it was intended. In order to support or refute these critics, we must first discuss the actual purposes behind the rule.

THE INTENDED PURPOSES OF THE EXCLUSIONARY RULE

The most compelling and the one purpose most cited by the Supreme Court Justices is that of deterrence. The reasoning behind this function is simple: If there are no penalties for violations of the Fourth Amendment, then why have the Amendment at all? In Elkins, the Court emphasized that "The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it." In Mapp, the Court also alluded to the exclusionary rule as a "deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a form of words."

The deterrent effect has been the subject of much debate. Stuart Nagel through responses from questionnaires (from police chiefs, judges, attorneys, ACLU officials) found that 75% of the respondents from initiating states (those states that had voluntarily adopted the exclusionary rule prior to Mapp) reported increases in police adherence to the requirements for legal search and seizure, and 57% of the respondents from the noninitiating states (those states that were forced to adopt the exclusionary rule because of

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76 Lafave, p. 17.
Mapp) reported increases in police adherence to these requirements. Professor Oaks, however, in his study concluded that the exclusionary rule had no deterrent effect on police behavior. Critics to this study, however, contend that, among other reason, Oak's study was invalid because of his focus on one city: Cincinatti. And, in fact, Canon's study on the subject suggests that only four other cities possessed Cincinatti's minimal response pattern. It appears, then, that the exclusionary rule does provide some deterrence on police behavior, but the full extent of this deterrence is still questionable.

A second purpose of the rule, while not cited as often, is that of judicial and government integrity. In Elkins, the Court found it imperative that the judicial system not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Further, this language from Elkins is reiterated in Mapp as well as in Terry where the Court reasoned:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus our system evidentiary rulings provide the context in which the

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80 Lafave, p. 18.
judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other action by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Justice Brandeis in his strong dissent in Olmstead contended that those who teach and make the law—namely, justices and government officials—must also abide by it; otherwise, not only would the whole system become a mockery, but the stability of the nation will be jeopardized as each would attempt to take the law into his/her own hands:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a 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. Against that pernicious doctrine this court should resolutely set its face.
The final purpose behind the exclusionary rule is to guarantee citizens of their rights to privacy. From Weeks to Mapp, the exclusionary rule has been justified as protecting the privacy of the individual against illegal searches and seizures. Recently, however, this purpose relative to the exclusionary rule has been downgraded. In U.S. v. Calandra, Justice Powell reasoned "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: 'the ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late." It is important to note, however, that while the exclusionary rule as a method of guaranteeing privacy has been downgraded, the Fourth Amendment's indirect call for privacy remains a powerful symbolic force such that gross violations of privacy can still spring the exclusionary rule into action.

Political scientists, professors of law, lawyers, judges and laymen and women have all provided their input on what changes (if any) should be made. The shortcoming of most of these alternatives is a lack of empirical evidence. On the most part, these suggestions are either semantical analyses, gut reactions, or personal emotional sentiments. Stuart Nagel criticizes these approaches and offers an alternative approach:

82 Malcolm Richard Wilkey, "Reply to Is the Exclusionary rule and 'illogical' or 'unnatural 'interpretation of the Fourth Amendment?" Judicature, Vol. 5, Number 5, November, 1978, p. 220.
Legal scholars have long been concerned almost exclusively with individual case studies, chronologies of precedent development, armchair speculation, statements of author preferences, individual biographies, and especially descriptions of the holdings in sets of judicial opinions. In order to further aid the legislator, administrator, judge, and practitioner, it seems time to supplement traditional scholarship with more testing of empirical generalizations in legal research.84

THE SOS ALTERNATIVE

Nagel postulates that there are two ways of resolving disputes. The first way is to view the conflict as a zero sum or fixed pie thinking.85 This approach views the conflict with the following rule: If one side wins "x" amount, the other side must lose "x" amount. There are three problems with this view. First, it is inherently competitive in that when one side wins, the other must lose. For example, if a plaintiff asks for $100 while the defendant concedes to only $10, the monetary decision—if it turns out to be either $10 or $100 exactly—will necessarily mean that one side has lost. The second problem with this approach is in how both sides came up with their settlement demands. The plaintiff, for example, may actually feel that proper settlement required $300 while the defendant may feel he has no liability at all. But to achieve the

greatest likelihood of success in the pending litigation, both sides have reduced their demands to appear more reasonable thereby forgoing the actual perceived costs. Finally, if the ultimate decision is between $10-$100 dollars, both sides may distort the figure as a victory. That is, if the settlement resulted in the plaintiff receiving $75, the plaintiff may view this as a victory since his margin of $25 is less than the defendant's margin, $65. But at the same time, the defendant may view this as a victory simply because the plaintiff did not obtain the full amount. In actuality, however, both sides are losers since the plaintiff is losing either $225 (What s/he actually thinks is his/her rightful compensation) or $25; while the defendant is losing $75 or $65.

The super-optimum solution's approach (SOS) tries to solve the above dilemma by initiating a different way of viewing the conflict. Instead of thinking rigidly in terms of a zero-sum gain approach, the essence of SOS is to find resolutions that exceed the best possible solutions for both parties involved. As Nagel illustrates, in a litigation such as above, an SOS solution may involve the defendant giving merchandise which the defendant manufactures that is worth more than $100 to the plaintiff, but whose variable cost is worth less than $10 to the defendant. In this way, the SOS approach achieves the best of both worlds.

Nagel provides another example, one in which a third-party enters into the dispute to create a SOS solution. The dispute is the minimum wage battle. Liberals in Congress want a new minimum

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wage set at around $5.00 while conservatives want it at $4.00. The traditional compromise point would be at $4.50 and may well be hailed as a victory by both sides. Liberals would feel victorious because the new minimum wage is $1.15 higher while the conservatives would feel as if they had won since the new wage is 50 cents less than what the liberals were seeking.\footnote{Ibid., p. 6.}

Nagel points out that both sides may actually lose with such a resolution. Liberals may be at a loss if $5.00 an hour (not $4.50) is the necessary amount for minimum food, shelter, and other necessities for a family of four. Conservatives may be at a loss if $4.00 an hour is the maximum amount that businesses can pay without having to lay off more workers.\footnote{Ibid., p.6.}

The SOS solution that Nagel offers is for a government subsidy plan that will pay an additional $2.00 on top of a minimum wage of only $3.50 to the employer. The government would pay the $2.00 difference for "every minimum-wage worker who would otherwise be unemployed either because the firm could not afford to hire the worker, or because the worker would not be sufficiently inspired to take the job at less than the minimum wage."\footnote{Ibid., p.8.}

The beauty of this SOS solution is that everyone, both conservative and liberal, will come out ahead. Liberals will come out better because the $5.00 wage would be higher than their best expectations. Conservatives will come out better because $3.50 will
be lower than their best expectations (although they may need some convincing that the government subsidy program will not amount to just another tax hike).

To assuage those critics who might take issuance with the taxpayers paying the difference, it is important to realize the full range consequence made possible by this SOS solution. Strictly in monetary terms, this SOS solution has four effects that will more than offset the tax increase:

1. Money will be saved in terms of public aid, public housing, Medicaid, and unemployment.
2. There will be a decrease in anti-social behavior (since a substantial percentage of these behaviors are done by the unemployed) resulting in tax dollars saved.
3. There will be a subsequent increase in the GNP as more workers will lead to more products.
4. There will be an increase in government revenues because of the taxes these newly employed people will pay.

Aside from these monetary advantage, there is the added benefit which may prove to be the biggest one of all (one that no one could possibly place a dollar figure amount). These newly employed people will inevitably be better role models to their children and their employment may be the means for them to escape the vicious cycle of unemployment, welfare, and criminal activity.\(^\text{90}\) As such, the possible benefits to this SOS solutions exceed both the monetary and humanitarian wishes of both liberals and conservatives alike.

\(^{90}\) Ibid., p. 8.
In terms of the exclusionary rule, the SOS can be used to find the best alternative\(^9\) to reconcile both the conservative and liberal critics. Traditionally, conservatives have had the goal of reducing crime and anti-crime symbols high on their criteria for evaluating new illegal search and seizure rules. Liberals, on the other hand, generally value deterrence to illegal searches and privacy symbol more. Unfortunately, with the present system, no one is happy because the rule is not lowering crime and its deterrent effect on illegal searches is at best unclear.

Getting back to Nagel's approach, if one chooses either a conservative alternative (allow all evidence as long as there was no intentional violation of the Fourth Amendment) or a liberal alternative (exclude evidence if it is obtained illegally with no exceptions), one, ostensibly, achieves figures coinciding with the type of approach one chooses, with the liberal approach scoring high on liberal criteria and the conservative approach scoring high on conservative criteria. The super-optimum solution, exclude with professionalism and drug medicalization, scores higher than the liberal or the conservative approach even under their criteria (see Table 1). In this way the essence of SOS has been achieved.

**THE SOS ALTERNATIVE APPLIED TO THE EXCLUSIONARY RULE**

In reviewing Nagel's table, there is one other goal that can be added: judicial integrity. The importance of judicial integrity, in the

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9. When I speak of alternatives to the exclusionary rule, I do not mean, as many critics advocate, a complete overhaul of the rule. Rather, I propose that the existing rule be modified, not completely obliterated.
abstract sense, has been expounded earlier. Essentially, the government must: 1) be subject to the same constitutional limitations as the citizens; and 2) not profit from illegal activities. If the government and the judicial system cannot uphold a high level of integrity, the entire system will be viewed as a mockery; thus, this is an essential criteria in which to evaluate any alternative to the exclusionary rule.

Along with the three other SOS alternatives as cited by Nagel, a fourth SOS alternative—exclude if findings by an Independent Review Board warrant exclusion—is proposed (see notes to Table 1). The Independent Review Board should, simultaneously, improve both conservative and liberal goals in relation to the exclusionary rule. The need for such a board has become painfully clear. On one side of the spectrum, we see gross violations of civil rights all in an effort to convict someone. On the other side, we also see criminals who are free to walk the streets simply because the "constable has blundered." Justice Burger illustrates that in other industries, such as the airlines, every accident is made subject to careful inquiry as to the causes of the crash. Those that conduct this investigation are functionally independent of the airline industry and possess specific training and experience to understand aircraft operations. Once the causes of the crash are revealed, this information is circulated around the industry and may even lead to a new airline regulation.

93 Ibid., p. 15-16.
The Review Board will hold an analogous function. When it hears of a possible violation (the Board must review every transcript in which evidence is suppressed both at the district as well as the appellate level in addition to hearing complaints made by individuals), it will then conduct an investigation immediately and announce its decision. The immediacy of such a hearing and decision is crucial to preserve the deterrent effect if any violations occurred.

The members in the board, then, must also be functionally independent of both the police and the judicial department, and most likely, be directly responsible to the executive branch of government. With these major structures in place, the board should provide the modification necessary for the exclusionary rule to become more effective than the best expectations of both conservatives and liberals alike. (There are other structural aspects to this board which are outlined very nicely in Burger's essay in footnote 92).

One of the specific benefits of this alternative is that the conservative goal of "getting" the criminal will improve because this board will not treat all breaches of the Fourth Amendment equally. According to the present system, any violation is punished equally: suppression. Justice Burger contends that different violations should have different levels of punishment:

Letting a mouse in a school room is not as serious as putting a tiger there and the law would hardly punish these two acts in the same way. But up to now we treat the accidental law violation of a police officer in precisely the same way we treat a flagrant violation such as deliberate Irvine-type
conduct of placing recording devices in a private home.94

Especially pertinent are those instances when the police have followed the proper procedures but the guilty go free because of a defect in the warrant. This is the type of situation which elicited Justice Cardozo's famous quote, "The criminal goes free because the constable has blundered." In these cases where a constable has made a mistake, with an independent review board, the prisoner will not go free; instead, the constable will be disciplined according to the level of his negligence. Further, the public will not view the "technicalities" as getting in the way of convicting the guilty. More and more, the exclusionary rule has developed a reputation as the friend of the convict. The public, whether through ignorance or not, has this view and it is not healthy for the criminal system. If the constable was in error, s/he should be disciplined, not the prosecutor and the criminal must not be released. By punishing the constable, a message will be sent that those entrusted to uphold the law must abide by these same laws, and by convicting the criminal another message will be sent that the exclusionary rule is not synonymous with an escape route from conviction. Thus, the alternative receives high marks on all three marks: crime, anti-crime symbol, as well as judicial integrity (see notes to Table 1).

This alternative also serves another liberal goal: deterring illegal searches. With the present system, there are two major deficiencies within the deterrent objective that this SCS alternative

94 Ibid., note 42, p. 13.
alleviates. First, there is the time lag between the violation and the supposed deterrent court action. As Justice Burger correctly ponders, "How then are police deterred in the future because a court today rejects evidence seized illegally a year ago?" The SOS alternative, by placing a permanent extension of the executive branch in charge solely of overseeing suppression cases, will be able to act much quicker thereby creating a more powerful deterrent. The second problem with the present suppression system in relation to the deterrence objective, is that the person committing the violations are rarely deterred; instead, it is very often the prosecutor and not the police (who actually violated the Fourth Amendment) that receives the punishment. As Justice Burger notes, there is a tendency to confuse the prosecutor with the police department, and nowhere is this error more apparent than Justice Murphy's dissenting opinion in Wolf v. Colorado:

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violations of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police (emphasis added by Justice Burger)."

95 ibid., note 40, p. 13.
The obvious defect in the present system is that the deterring element is placed at the wrong person. The policeman, who commits the violation, is rarely disciplined and instead, the diligent prosecutor must face the ignominy of losing his/her case. With the review board, the policeman who violates any provision of the state statute pertaining to searches and seizures will be punished by the severity of the violation. In this way, the person actually violating the statute will be effectively deterred more so than the present system of deterring not the policeman but the prosecutor.

CONCLUSION
It is true that the present exclusionary rule is far from perfect. In fact, it is uncertain whether it meets its major purpose: deterring illegal searches and seizures. But as with most controversies, the debate over the efficacy of the exclusionary rule has extremists on both camps who either want to abolish the entire system, (despite the positive philosophical aspects of the rule i.e. judicial integrity), or maintain the existing system (despite the obvious shortcomings i.e. lack of deterrence power). However, the middle ground of maintaining the present system with some alterations is probably the best solution. The key to solving the problem, then, is to not be swayed too heavily by the extremists and continue researching the problem, perhaps with different SOS approaches, until a better system can be introduced. Until then, critics of the rule would better utilize their energies by finding a modification to the rule, rather
than adding their tidbit to the wealth of redundant literature on the deficiencies of the present rule.
### Table I. Evaluating Policies Toward Illegal Search and Seizure

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<tr>
<th>CRITERIA ALTERNATIVES</th>
<th>COAL Anti-Crime</th>
<th>LOCAL Illegal Searcher</th>
<th>N GOAL Pro-Privacy Symbol</th>
<th>LOCAL Anti-Crime Symbol</th>
<th>N GOAL Judicial Integrity</th>
<th>N TOTAL (Neutral Weights)</th>
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* Note: Figures in parenthesis indicate either sum totals with Judicial Integrity scores added or SOS ALTERNATIVE (Exclude with Independent Review Board) scores.

* Adapted from Stuart S. Nagel's "Super-Optimum Solutions in Public Controversies." October, 1989
NOTES TO TABLE 1

It is my contention that the SOS Alternative Exclude with Independent Review Board will substantially improve both conservative and liberal goals.

Crime: The Board will punish the police who violated a statute or rule and not punish the prosecutor by dismissing the case. In this way, evidence which is reliable\textsuperscript{96} will be admissible. The officer who committed the violation, however, will be subject to punishment based on the severity of the act.

Illegal Searches: The board will punish violators of the Fourth Amendment by the degree of culpable intent. There will be basically three possible board actions:\textsuperscript{97}

1. It might conclude that under the circumstances, the police action was justified. No disciplinary action would take place under this ruling.
2. It might conclude that the officer did violate a statute or constitutional provision but without culpable intent or because he was not fully aware of the rules. Disciplinary actions might be attendance at a police training school, official reprimand, discipline, or limited suspension.
3. It might conclude that the police acted with reckless and conscious disregard of known rules. In this the most serious offense, the board may decide to try on charges which could lead to dismissal. The victims of this offense could also personally try these officers and sue them on Fourth Amendment charges.

In time, these disciplinary actions will work to deter the police from violating rules much more effectively than the present system, the SOS alternative of allow but suspend and dismiss or the SOS

\textsuperscript{96} In the case of coerced confessions, the reliability of the evidence will be significantly reduced thereby precluding its use against the defendant. In other cases, the illegal manner of obtaining the evidence in no way reduces the validity or reliability of the evidence; thus, for this and other reasons as expounded later, the evidence should be admissible.

\textsuperscript{97} Berger, p. 19.
Alternative allow but prosecute and sue. It will be more effective because there will be a government sanctioned independent board with executive powers that will enforce these disciplinary actions. This aspect is missing from the latter two alternatives.

**Feasibility:** This is the weakest component of the alternative. Hopefully, as the other alternatives reveal their shortcomings, Justice Berger's alternative will gain public as well as official approval.

**Pro-Privacy Symbol:** More so by deterrence if nothing else, this alternative will improve this liberal goal. When the police know that retribution will follow any violations of statutes or constitutional provisions, they are more apt to think twice before they transgress someone's privacy for the sake of evidence.

**Anti-Crime Symbol:** By not allowing the criminal to go, merely because the constable or the police has blundered, this alternative should vastly improve this conservative goal. The public will not view the technicalities as getting in the way of convicting the guilty because the guilty person will not gain an acquittal even if the evidence is obtained illegally. Instead, the person(s) who obtained the evidence will be punished, not society by letting the guilty go free or the prosecutor who acted in good faith that the evidence was clean.

**Judicial Integrity:** Because the violators of the exclusionary rule will be punished accordingly, judicial integrity will not be sacrificed. When evidence is obtained illegally but is, nonetheless, reliable; one is not doing judicial integrity any great service by suppressing the evidence thereby letting the criminal go free. On the contrary, judicial integrity suffers a bigger blow by letting the criminal go free in the face of reliable evidence. The SOS Alternative (with Independent Review Board) punishes both transgressors of the law: the criminal is punished by conviction and if the evidence is obtained illegally, the violators are punished by the Independent Review Board. At the same time, the innocent participants are not punished: the prosecutor gains use of the reliable evidence and society is free from the dangers of a criminal who deserves time in jail.
BIBLIOGRAPHY


Gray, Horace, Jr. Appendix, in Quincy's *Massachusetts Reports*, 1761-1772.


