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THE EXCLUSIONARY RULE: NINE AUTHORS IN SEARCH OF A PRINCIPLE

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I. INTRODUCTION

In 1921, the Italian playwright, Luigi Pirandello, presented his now famous play *Six Characters in Search of an Author.* This play was designed to illustrate, through a modification of the dramatic technique, that characters have a life of their own apart from the author, the actors, and the directors who create and interpret them. This technique of presentation involved the development of "a sense of chaos" which denied the audience the type of certainty many would have welcomed with gratitude and relief.[1] Many members of the public and many of those engaged in law enforcement have been similarly denied certainty in the interpretation of the exclusionary rule during the past twenty years. There seems little doubt that the "audience" of the Supreme Court would welcome certainty with as much gratitude and relief as would the audience of the Pirandello play.

It may seem farfetched to compare the role of the Supreme Court in its enforcement and interpretation of the exclusionary rule to the sense of controlled chaos created by a dramatist in emphasizing the independent life of a dramatic construct. However, an examination of the history and present application of the exclusionary rule reveals that the meanderings of decisional precepts, exacerbated by bare majority and plurality opinions, have created chaos in law enforcement. Imposition of order that might be derived from a unified collegial body is sorely needed. Due to the philosophic disarray of its members, the Supreme Court has not demonstrated the ability to control the exclusionary rule, to define it, and to lend symmetry to its various applications and limitations. Consequently the exclusionary rule has

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1. R. Oliver, *Dreams of Passion, The Theater of Luigi Pirandello* 54-55 (1975).

developed a chaotic life of its own. The major question now is whether the chaos can be characterized as "controlled." This article will demonstrate that the development and present contours of the exclusionary rule have resulted from a series of ad hoc determinations by the Supreme Court from which no coherent principle may be derived.

II. BACKGROUND

In a recent article, Professor Yale Kamisar stated that the exclusionary rule rested on constitutional "principle" rather than "deterrence."[2] If one accepts this postulate and determines that the establishment of the exclusionary rule for federal prosecutions in *Weeks v. United States*[3] was based upon principle rather than deterrence of lawless official conduct, one becomes embroiled in the determination and definition of the principle to be served. This principle, I suggest, has developed a life of its own quite separate from the one created by the nine justices of the *Weeks* court.

Indeed, the *Weeks* decision does not attempt to furnish any extensive rationale for its conclusion that evidence obtained in violation of the fourth amendment should be excluded.[4] When

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2. Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIMINAL LAW BULLETIN 5, 6-7 (1979).

3. 232 U.S. 383 (1914).

4. The opinion of the Court in *Weeks v. United States* contained only the following statement in support of its holding that the exclusionary rule would apply to papers and documents illegally seized by a United States marshall:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

232 U.S. at 293. The Court, however, began its prologue to the opinion by stating:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . 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.

Id. at 392. This language may be interpreted as supporting the concept of the "imperative of judicial integrity" mentioned in *Elkins v. United States*, 364 U.S. 206, 222 (1960).

the exclusionary rule was later applied to the states in *Mapp v. Ohio*,[5] Mr. Justice Harlan found it unclear whether the *Weeks* opinion was based upon the supervisory power of the Supreme Court over the federal judicial system or whether it was of constitutional origin. For purposes of argument, however, he accepted the assumption of the majority that the rule was of constitutional origin.[6]

In *Mapp*, four justices took the position that the principal issue decided by the Ohio Supreme Court and tendered by the jurisdictional statement was a first amendment challenge to an Ohio statute which made mere knowing possession or control of obscene material a criminal offense.[7] Thus, the "principle" underlying the exclusionary rule extended to the states in *Mapp* was determined by five justices without the benefit of plenary briefing and argument on the issue decided.[8] In fact, the decision in *Mapp* represented a summary reversal of *Wolf v. Colorado*,[9] in which the Court had delivered a carefully researched opinion noting the state courts' lack of reception of the *Weeks* doctrine

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It is difficult to conclude from these statements whether the motivation of the court was deterrence or constitutional principle.

5. 367 U.S. 643 (1961).

6. 367 U.S. at 678 (Harlan, J., dissenting). Although making this assumption, Harlan attacked the extension of the exclusionary rule to the states with the following observations:

> It cannot be too much emphasized that what was recognized in *Wolf* was not that the Fourth Amendment *as such* is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment which, as *Wolf* itself pointed out, has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment." It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in *Wolf* of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a preexisting legal context on which both interpreting decision and enabling statutes must as least build.
>
> Thus, even in a case which presented simply the question of whether a particular search and seizure was constitutionally "unreasonable"—say in a tort action against state officers—we would not be true to the Fourteenth Amendment were we merely to stretch the general principle of individual privacy on a Procrustean bed of federal precedents under the Fourth Amendment.

Id. at 678-79 (citations omitted).

7. *Id.* at 686 (Stewart, J., dissenting).

8. *Id.* at 676 (Harlan, J., dissenting).

9. 338 U.S. 25 (1949).

and its complete rejection by English speaking jurisdictions in the United Kingdom and British Commonwealth.[10]

Regardless of the travail attendant upon its birth, the exclusionary rule has unquestionably been with us since the Court held in *Mapp* that the right to privacy embodied in the fourth amendment could no longer be permitted to "remain an empty promise."[11] Later cases developed the exclusionary rule in terms of Justice Harlan's stated fears that the substantive principles of individual privacy would be stretched upon a "[p]rocrustean bed of federal precedents under the fourth amendment" within which state criminal procedure would be constrained.[12] Thus, the Supreme Court became the authoritative promulgator and interpreter of a criminal procedure code applicable to the federal jurisdictions and all fifty states.

III. Problems With Substantive Application of the Right To Privacy

At the time of *Weeks v. United States*,[13] the specific guarantees contained in the first eight amendments to the Constitution of the United States were not thought to be applicable to the states.[14] The application of the exclusionary rule was thus limited to the administration of criminal justice in the federal system, and the impact upon general law enforcement was not heavily felt by the public at large.[15] Hence, the extension of the

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10. *Id.* at 29-30. Justice Frankfurter quoted the thoughtful opinion of Chief Justice Cardozo in *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926), which also rejected the adoption of the exclusionary rule:

> No doubt the protection of the statute would be greater from the point of view of the individual whose privacy has been invaded if the Government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.

338 U.S. at 31 n.2, *quoting* People v. Defore, 242 N.Y. 13, 24-25, 150 N.E. 585, 589 (1926).

11. 367 U.S. at 660.

12. *Id.* at 679 (Harlan, J., dissenting).

13. 232 U.S. 383 (1914).

14. *See* Twining v. New Jersey, 211 U.S. 78 (1908).

15. The relative numerical importance of state as opposed to federal law enforcement may be illustrated by figures set forth in Argersinger v. Hamlin, 407 U.S. 25 (1972). In *Argersinger*, Justice Douglas pointed out that there were 24,000 felony cases in the

exclusionary rule to the states in *Mapp* enormously enriched the bill of fare of constitutional controversies to be presented to the Supreme Court. In becoming the font of final wisdom in the area of criminal constitutional safeguards, the Court assumed a formidable task. The emergency responses of urban police officers to crime on the streets often bore little resemblance to the carefully prepared and documented cases handled by officers of the Federal Bureau of Investigation, the Treasury Department, and other federal law enforcement agencies. Thus, the Court had to promulgate rules relating to probable cause,[16] as well as investigatory stops,[17] searches incident to arrest,[18] searches of automobiles and other movable objects,[19] and inventory searches.[20] In the process, distinctions became increasingly more subtle. It became difficult, if not impossible, for state and lower federal tribunals — not to mention police officers — to follow the shifting majorities that announced both refinements of old doctrines and completely new constitutional requirements during each term.

A. Automobile Searches

In *Robbins v. California*,[21] Justice Stewart, writing for a four-justice plurality, held that although the search of an automobile by California highway patrol officers was lawful, the warrantless opening of a container wrapped in plastic bags found in a recessed compartment in the rear of a station wagon was constitutionally impermissible under prior cases.[22] The search in

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federal system and 314,000 cases in the state systems. In addition to the felony cases, there were between four and five million nontraffic misdemeanors in the state judicial systems. Without reference to misdemeanor cases, the volume of serious criminal business in the state systems was approximately thirteen times as great as that in the federal judicial system. *Id.* at 34 n.4.

16. 358 U.S. 307 (1959).

17. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979); Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

18. *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

19. *See, e.g.*, United States v. Chadwick, 433 U.S. 1 (1976); Chambers v. Maroney, 399 U.S. 42 (1970).

20. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973); Cooper v. California, 386 U.S. 58 (1967).

21. 101 S. Ct. 2841 (1981).

22. *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753 (1979); U.S. v. Chadwick, 433 U.S. 1 (1977).

Robbins was based upon probable cause to believe the automobile contained marijuana. The same day Justice Stewart delivered an opinion in *New York v. Belton*,[23] which reversed the New York Court of Appeals and held that the arrest of automobile occupants would support a search of all containers, open or closed, within the passenger compartment, with the exception of the trunk, even when the occupants no longer had physical access to the automobile.[24] Thus, the United States Supreme Court, through the medium of the same author, drew a distinction between the scope of an automobile search depending upon whether the search was based on probable cause or was incident to an arrest.

In probable reaction to the inherent practical difficulties of implementing the plurality opinion in *Robbins*, the Court essentially rejected the rationale of *Robbins* in *United States v. Ross*.[25] In *Ross*, the Court held that when police officers have probable cause to believe that an automobile contains contraband, the scope of the search should be as broad as if it were authorized by a valid warrant.[26] This holding would justify the search of every part of the automobile and its contents that may conceal the object of the search. Such a search would include closed containers (presumably ranging from paper bags to suitcases or boxes) in the manner in which a search authorized by a warrant might take place.

An interesting aspect of the *Ross* opinion is that Justice Stevens, writing for six members of the Court, did not find it necessary to cite or discuss *Belton*. Consequently, while *Ross* achieved the result of simplifying the scope of a search based upon probable cause, there remains a significant distinction between a search based upon probable cause and a search incident to an arrest. This distinction may, of course, be blurred by the often encountered factual phenomena which may equate probable cause for arrest of an operator of an automobile with probable cause to search the motor vehicle. This may occur especially in cases involving possession and sale of narcotics.

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23. 101 S. Ct. 2860 (1981).
24. *Id.* at 2864.
25. 102 S. Ct. 2157 (1982).
26. *Id.* at 2172.

B. *Questioning of Suspects*

In *Rhode Island v. Innis*,[27] the Court refined the teachings of *Brewer v. Williams*[28] and announced another subtle distinction in the application of the exclusionary rule. In *Brewer*, the defendant's conviction was based, in part, on his response to a noninterrogatory statement by a skilled police officer which was designed to elicit and did elicit an incriminating response.[29] The Court reversed the defendant's conviction and excluded the improperly elicited evidence. In *Innis*, however, the Court upheld the defendant's conviction under factual circumstances almost identical to those in *Brewer* and announced the "functional equivalent to interrogation" doctrine in reversing the Rhode Island Supreme Court.

The Court defined the functional equivalent to interrogation as words or actions of police that should be known to be reasonably likely to elicit an incriminating response from the suspect.[30] The Court found that the officer's statements in *Innis*, while similar to those made in *Brewer*, did not constitute the functional equivalent to interrogation because the defendant failed to show that the police should have known that their words and actions were reasonably likely to elicit an incriminating response.[31] Therefore, the Court held that the defendant's response to the statement by the police was admissible.

Returning to Professor Kamisar's position that the exclusionary rule rests upon principle rather than deterrence,[32] it is difficult in *Robbins* and *Belton* and in *Brewer* and *Innis* to discern either the principle to be served or the deterrence to be achieved. When one inserts a constitutional distinction in a "barely visible space,"[33] the principle achieved becomes scarcely perceptible, and deterrence diminishes to the vanishing point.

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27. 446 U.S. 291 (1980).

28. 430 U.S. 387 (1977).

29. 430 U.S. at 399.

30. 446 U.S. at 301.

31. *Id.* For a discussion of *Innis*, see Comment, *The Supreme Court Narrows Definition of Interrogation to Allow Admission of Some Custodial Confessions*, Rhode Island v. Innis, 32 S.C.L. REV. 611 (1981).

32. *See supra* note 2 and accompanying text.

33. *See* Patterson v. New York, 432 U.S. 197 (1977) (Powell, J., dissenting).

IV. Substantive Extensions of Fourth Amendment Protection

A. *Protection of Dwelling Places*

In *Payton v. New York*,[34] the Court held unconstitutional a state statute authorizing warrantless entry into a dwelling house to arrest a person when probable cause existed to believe that he had committed a felony. The New York police had probable cause, after a two-day investigation, to arrest Payton for the murder of a gas station manager. Detectives went to his apartment, where they saw a light and heard music. They knocked, obtained no response, and then entered by breaking open a metal door. The apartment was unoccupied, but the police found a 30 calibre shell casing, which was introduced as evidence at the trial. The New York statute authorized forcible entry by police officers to arrest a suspect without a warrant when there was probable cause to believe that the occupant had committed a felony.[35] The Court, however, determined that in the absence of exigent circumstances, a warrantless arrest may not be effected within the suspect's dwelling house.[36] Unfortunately, the Court did not indicate in *Payton* what type of circumstances might be deemed exigent.

Payton was followed the next term by *Steagald v. United States*,[37] in which the Court further extended protection to dwelling houses. The Court held that an officer with an arrest warrant could not search the dwelling of a third person in order

34. 445 U.S. 573 (1980).

35. *See* 445 U.S. at 577 n.6. New York was in accord with a majority of the common law commentators who took the position that warrantless entries into dwellings were justified in order to arrest individuals when there was probable cause to believe that they had committed felonies. *See, e.g.*, 4 W. Blackstone, Commentaries *292; 1 J. Chitty, A Practical Treatise on Criminal Law 23 (London 1816); 2 M. Hale, History of the Pleas of the Crown 85 (n.p. 1736).

36. 445 U.S. at 590. In arriving at this conclusion, the Court did not cite or discuss its previous opinion in Hill v. California, 401 U.S. 797 (1971), where the Court upheld an entry and subsequent search of a dwelling house based upon probable cause to arrest the occupant, even though it ultimately turned out that the person arrested was not the person for whom probable cause existed. In *Hill*, the Court held that since the police had probable cause to arrest Hill and probable cause to believe that the person arrested was Hill, they were entitled to what they could have done if in fact the person arrested had been Hill. 401 U.S. at 804.

37. 101 S. Ct. 1642 (1981).

to apprehend the object of the warrant unless a search warrant had been obtained.[38] The officers in *Steagald* had a warrant to arrest a drug fugitive and had reason to believe that he might be present in the Steagald apartment. They entered the apartment without a search warrant and uncovered cocaine during the course of their search for the fugitive. The Court held that the entry was illicit in the absence of exigent circumstances and the cocaine was excluded from the evidence.[39]

Neither *Payton* nor *Steagald* should be underestimated in terms of extending fourth amendment protection and in their impact upon law enforcement. Quoting Justice White's dissent in *Payton*:

> The policeman on his beat must now make subtle discriminations that perplex even judges in their chambers.
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> . . . Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at the trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community.[40]

If an arrest for murder is routine and does not by its nature establish exigency, it is difficult to imagine a set of circumstances that would justify a warrantless entry.[41] It is obvious that the definition and parameters of the term "exigent circumstances" will have to be worked out on a case-by-case basis and will yield even more subtle distinctions. For every arrest or search warrant which is issued, there are a multitude of warrantless arrests. Many take place in dwelling houses; undoubtedly many take place in the dwelling houses of third persons. It is

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38. *Id.* at 1653.

39. *Id.* at 1649.

40. 445 U.S. at 618-19 (White, J., dissenting).

41. In Riddick v. New York, 445 U.S. 573 (1980), the companion case to *Payton*, the Court held that the arrest of a robbery suspect without a warrant was also termed routine. *Id.* at 583.

difficult to conceive of a more fruitful source of litigation than the question of the legality of these warrantless arrests in the dwelling houses of suspects and arrests without search warrants in the homes of third persons.

B. Repositories of Personal Effects

Beginning in 1977, the Court crafted another doctrine extending fourth amendment protection in a special way to the repositories of personal effects. In *United States v. Chadwick*,[42] the Court clearly articulated the distinction between a search and a seizure for the first time.[43] The Court established that a repository of personal effects was entitled to a higher degree of protection than an automobile because of the greater expectation of privacy associated with the repository. The *Chadwick* Court concluded that it was reasonable for the officers to seize the repository, but once the exigency of mobility had been removed, they could no longer reasonably open and search the repository without the safeguards provided by a judicial search warrant.[44]

This decision was followed by *Arkansas v. Sanders*,[45] in which the Court again held that when police officers lawfully stop an automobile and seize a piece of luggage, they must first obtain a warrant before searching the luggage in the absence of exigent circumstances.[46] This doctrine was later followed in

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42. 433 U.S. 1 (1977).

43. In Chambers v. Maroney, 399 U.S. 42 (1970), a case involving a search of a station wagon after the station wagon had been removed from the place where its occupants had been arrested, Justice White reasoned that for constitutional purposes there was no distinction between seizing an automobile and holding it while a warrant was requested from a magistrate and going forward with a search without a warrant, given the underlying probable cause. *Id.* at 52. Later, in Cardwell v. Lewis, 417 U.S. 583 (1974), the Court, passing upon the seizure of an automobile and the examination of its exterior, implied that a distinction should be made between a seizure and a search. It was not until *United States v. Chadwick* that this distinction was clearly articulated by the Court.

44. United States v. Chadwick, 433 U.S. 1, 13-15 (1976). In *Chadwick*, officers who had probable cause to believe that a double locked foot locker contained marijuana seized the foot locker from the trunk of an automobile, brought the foot locker to the Federal Building in Boston, and later opened the foot locker without having obtained a warrant. As the officers reasonably believed, the foot locker contained a large quantity of marijuana.

45. 442 U.S. 753 (1979).

46. *Id.* at 766.

Walter v. United States[47] under somewhat bizarre circumstances. A shipment of cartons was mistakenly delivered to a commercial establishment named L'Eggs Products, Inc. instead of to the actual addressee, Leggs, Inc. Employees of L'Eggs Products discovered pornographic films in the packages and gave the films to FBI agents, who viewed the films without a warrant. Ultimately, indictments were issued for interstate transportation of obscene materials based upon five of the 875 films in the shipment. Justice Stevens, writing for the Court, drew a distinction between the lawful possession of the boxes by the FBI agents and the search of their contents. The Court held that the opening of the packages without a warrant, in spite of lawful possession, was constitutionally impermissible.[48]

V. Limitations on the Application of the Exclusionary Rule

A. Contextual Limitations

Apart from the arcane substantive teaching contained in Supreme Court opinions construing the appropriate commands derived from the fourth amendment in particular cases, the Court has developed a large body of procedural refinements relating to the contexts in which the exclusionary rule can be invoked. The determination of these contexts depends to a great extent upon the perceived purpose of the rule.

For example, in *United States v. Calandra*,[49] the Court declined to apply the exclusionary rule to grand jury proceedings. The rationale of this approach was based upon the determination that the principal purpose of the exclusionary rule is deterrence.[50] Predicated upon this determination, the Court held:

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to

47. 447 U.S. 649 (1980).
48. *Id.* at 659.
49. 414 U.S. 338 (1974).
50. *Id.* at 347.

grand jury proceedings would significantly further that goal.[51]

Three justices dissented, arguing that it was essentially subversive of the imperative of judicial integrity for courts to lend themselves directly or indirectly to the sanctioning of unlawful conduct.[52]

In *Stone v. Powell*,[53] the Court again limited the context in which the exclusionary rule would be applied. The Court relied on the same assumption that the principal rationale for the exclusionary rule in fourth amendment cases was to deter lawless conduct on the part of the police.[54] The Court withheld federal habeas corpus jurisdiction for claims based upon assertions of illegal searches or seizures when there was an adequate opportunity to litigate such claims in the appropriate state tribunals. In summary, Justice Powell asserted:

> we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force.[55]

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51. *Id.* at 351.

52. *Id.* at 359. This phrase was taken from Justice Stewart's opinion in Elkins v. United States, 364 U.S. 206 (1960). After considering the reasons for overturning the "silver platter doctrine" in *Elkins*, Justice Stewart concluded:

> But there is another consideration—the imperative of judicial integrity. It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in *Olmstead v. United States*, 277 U.S. 438, at 469, 471, more than 30 years ago. "For those who agree with me," said Mr. Justice Holmes, "no distinction can be taken between the Government as prosecutor and the Government as judge." 277 U.S. at 470 (Dissenting opinion.) "In a government of laws," said Mr. Justice Brandeis, "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. . . . 277 U.S. at 485 (Dissenting opinion).

364 U.S. at 222-23.

53. 428 U.S. 465 (1976).

54. *Id.* at 486.

55. 428 U.S. at 494-95. Chief Justice Burger, in a concurring opinion, made an attack upon the exclusionary rule itself. He questioned the deterrent effect of the rule by suggesting:

Justice White dissented on the ground that limiting the availability of the federal habeas corpus remedy constituted the wrong approach. Nevertheless, he indicated an open mind to revision of the exclusionary rule:

> The rule has been much criticized and suggestions have been made that it should be wholly abolished, but I would overrule neither *Weeks v. United States* nor *Mapp v. Ohio*. I am nevertheless of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief.[56]

> A more clumsy, less direct means of imposing sanctions is difficult to imagine, particularly since the issue whether the policeman did indeed run afoul of the Fourth Amendment is often not resolved until years after the event. The "sanction" is particularly indirect when . . . the police go before a magistrate, who issues a warrant. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Imposing an admittedly indirect "sanction" on the police officer in that instance is nothing less than sophisticated nonsense.

Id. at 498. The Chief Justice went on to suggest that the "judicial integrity" rationalization is fatally flawed in view of the standing requirements which the Court has traditionally imposed upon assertion of fourth amendment violations. *Id.* at 499, *citing* Alderman v. United States, 394 U.S. 165, 172-73 (1969).

56. 428 U.S. at 537-38. An interesting example of the disenchantment of many thoughtful people with the exclusionary rule may be found in the final report of the Attorney General's Task Force on Violent Crime (August 17, 1981). In that report a distinguished task force co-chaired by former Attorney General Griffin B. Bell and Governor James R. Thompson of Illinois set forth Recommendation 40 in relation to the exclusionary rule. That recommendation asserted that the fundamental and legitimate purpose of the exclusionary rule was to deter illegal police conduct. The recommendation went on to say:

> In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such good faith belief.

The task force proceeded to recommend that the Attorney General and the Solicitor General should urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both. In the commentary, the task force cited United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 946 (1981), in support of this good faith rule.

A significant problem may be confronted in respect to the "good faith" approach. For example, the assertion that the issuance of a warrant should under all circumstances insulate a search or arrest against the exclusionary rule overlooks the element of the possibility that a warrant might be issued on less than probable cause or without colorable cause at all. In all likelihood, the framers of the fourth amendment were more concerned by the general warrant than with warrantless searches and seizures. As James

B. *Individual Standing to Invoke the Exclusionary Rule*

In addition to contextual limitations, the Court has recently developed a new doctrine on the issue of the individual's standing to invoke the fourth amendment right to privacy and its enforcement arm, the exclusionary rule. It has long been settled that only one whose right to privacy has been violated may seek to exclude evidence derived from this violation.[57] In *Jones v. United States*[57.1], the Court established a relatively simple, bright line rule of standing, holding that one charged with possession of a forbidden substance had standing to object to the means by which the substance was discovered and seized.[58] The Court further stated that any person lawfully on the premises could object to a search of the premises.[59]

Eight years later, in *Simmons v. United States*,[60] the Court held that testimony adduced in order to establish standing could not be used against a defendant in the trial of a criminal case.[61] Although *Simmons* opened the door to the establishment of standing without penalty, the Court gradually increased the stringency of standing requirements as a result of the availability of this device. In *Brown v. United States*,[62] the defendants moved to suppress evidence illegally seized at a codefendant's warehouse. The trial court denied the motion and the Supreme Court affirmed, holding that defendants had no standing to contest a search and seizure when they (1) were not on the premises at the time of the search, (2) had no proprietary or possessory interest in the premises, and (3) were not charged at the time of the challenged search and seizure with an offense that included possession of the seized evidence as an essential element

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Otis declared so persuasively, one of the most flagrant abuses of privacy in the colonial period was the easy issuance of general warrants and their widespread use by officers of the Crown to search persons and places without a shred of probable cause.

Thus, the recommendation of the Attorney General's Task Force does not furnish a panacea for the almost metaphysical complexities created by the fine distinctions drawn over the years in varying contexts by the Supreme Court.

57. *See* Jones v. United States, 362 U.S. 257, 261-62 (1960).

57.1. 362 U.S. 257 (1960).

58. *Id.* at 264.

59. *Id.* at 267.

60. 390 U.S. 377 (1968).

61. *Id.* at 394.

62. 411 U.S. 223 (1973).

thereof.[63] Although not essential to the determination of the case, *Brown* suggested that the automatic standing rule of *Jones*, was no longer necessary in light of *Simmons*.[64]

Five years later in *Rakas v. Illinois*,[65] the Court overturned one element of the *Jones* standing rule. Although the petitioners in that case were passengers in an automobile and therefore "legitimately on the premises," the Court held that this fact was not determinative of whether they had a legitimate expectation of privacy in the particular portions of the automobile that had been searched.[66] The Court further suggested that the *Jones* rule of according standing to any person legitimately on the premises had too broad a gauge for measurement of fourth amendment rights.[67] The automatic standing rule of *Jones*, which allowed those charged with possessory offenses to challenge the search or seizure that produced the offending article or substance, was overturned in *United States v. Salvucci*.[68] Here again the Court, in directly overturning the automatic standing rule, relied upon the suggestions in *Brown* that it was no longer needed in light of the opportunity to establish standing offered by *Simmons*.[69]

However, lest one infer that standing may be established by assertion or evidence of ownership of seized articles, a further hurdle was established by *Rawlings v. Kentucky*.[70] In that case police officers entered the home of a man named Marquess, armed with a warrant for his arrest. The officers did not find Marquess, but discovered marijuana seeds on a bedroom mantel while looking for him. The police then detained visitors to the Marquess dwelling, including Rawlings and Vanessa Cox. Rawl-

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63. *Id.* at 229. The owner of the warehouse in *Brown* also challenged use of the evidence against him, and the trial court suppressed such use.

64. *Id.*

65. 439 U.S. 128 (1978).

66. *Id.* at 148. In *Rakas*, the police, after ordering the occupants out of the car, searched it and found rifle shells in the glove compartment and a sawed off rifle under the front passenger seat. The Court held that the passengers had no legitimate expectation of privacy in that particular area. The Court further stated that automobiles were not to be treated identically with houses or apartments. However, it was also suggested in dictum that one legitimately in a house or apartment might not have reasonable expectations of privacy in all areas of the structure.

67. *Id.* at 142.

68. 448 U.S. 83 (1980).

69. *Id.* at 89-90.

70. 448 U.S. 98 (1980).

ings had earlier placed 1800 tablets of LSD and other controlled substances in Cox's handbag. When the police ordered Cox to empty her purse and the contraband was revealed, Cox told the defendant to take his property. At that point Rawlings admitted ownership of the drugs and was later indicted for possession with intent to sell the controlled substances. In a further extension of the standing requirements, the Court held that Rawlings had no standing to object to the search of the purse of Vanessa Cox because he had no reasonable expectation of privacy in the purse, nor did he have a right to exclude others from it.[71] The Court held that the defendant's claim of ownership of the drugs was only one fact to be considered and noted that had he placed his drugs in plain view, he could not claim any legitimate expectation of privacy even though he would still have owned the drugs.[72] This observation would suggest that even an assertion of ownership will not confer standing unless the place of concealment is one in which the defendant has a legitimate expectation of privacy. Thus, the question of standing seems to have become intertwined with the validity of the search. In light of *Rawlings*, the legitimate expectation of privacy becomes an essential element in determining standing, whether or not the defendant asserts ownership of the materials seized.

It appears that even egregious conduct on the part of police officials will not relax the standing requirements. In *United States v. Payner*,[73] federal officers clandestinely, and in utter disregard of the right of privacy of the victim, copied the contents of a third party bank officer's brief case in order to obtain evidence that Payner had falsified a tax return. Nevertheless, the Court held that even the supervisory power of the federal court would not extend to the suppression of evidence unlawfully seized from a third party not before the Court.[74] Using the deterrent rationale, the Court stated that Payner had no standing to challenge the seizure of bank records in which he had no reasonable expectation of privacy, and that he had no standing to seek exclusion of tainted evidence when he was not the victim

71. *Id.* at 105-06.
72. *Id.* at 106.
73. 447 U.S. 727 (1980).
74. *Id.* at 735.

of the challenged practices.[75] This seems to be a complete rejection of the imperative of judicial integrity theory and conditions the deterrence rationale upon the standing of a criminal defendant.

VI. CONCLUSION

Two distinct trends in opposite directions are apparent in the fourth amendment area. Standing and contextual requirements for application of fourth amendment protection and the exclusionary rule have become more restrictive. At the same time the substantive protection of the fourth amendment has been extended in the area of arrests and in the protection given to dwelling places and repositories of personal effects. From the foregoing case discussions, it would, I believe, be appropriate to conclude that no overriding principle underlying the exclusionary rule is applicable under all circumstances. A substantial number of justices base the exclusionary rule upon the idea of its deterrence to lawless police conduct. A minority of the justices would emphasize the imperative of judicial integrity. Perhaps only Justices Brennan and Marshall could now be included in the latter category on a consistent basis. It therefore seems that the United States Supreme Court has been no more able to capture the "principle" underlying the exclusionary rule than the six characters of Pirandello were able to find an author who would give them complete depth and meaning. As a result, the exclusionary rule has followed a tortuous and essentially unprincipled life based upon a series of ad hoc determinations. No great jurisprudential philosophic underpinnings can be perceived.

The plain fact of the matter is that the exclusionary rule needs a consistent underlying principle to support it. In no other area of judicial exercise of authority have courts received such a groundswell of criticism from the press and the community than in the application of the exclusionary rule to release an obviously guilty person who has committed a serious and highly publicized criminal offense. It simply will not do to rest such a rule solely on the issue of judicial integrity. When an ordinary police

75. *Id.* at 732.

officer has misinterpreted the arcane learning which underlies the application of the exclusionary rule, confidence in judicial integrity will not be increased by releasing a vicious murderer upon the community. Similarly, lawless official conduct also threatens the liberties of all citizens. The common law has always been flexible enough to balance competing interests in such a way as to protect both individual and societal considerations. In interpreting the Constitution of the United States, the Supreme Court must also balance competing interests between the societal need for security of its citizens and the liberties of the individual. This is not an easy task and is perhaps not susceptible of neat doctrinal formulae. Perhaps the first step in the analysis should be the recognition that inconsistencies are inevitable and the promulgation of general rules will immediately beget exceptions upon exceptions.

When the Supreme Court of the United States took upon itself the task of supervising the procedural safeguards to be applied by officials in fifty sovereign jurisdictions as well as its own federal law enforcement administrative and judicial hierarchy, it was indeed assuming a formidable task. This task is often ill served by the lack of collegiality of that tribunal in approaching the issue. The deep philosophic divisions within the Court make the articulation of understandable rules based upon clear principled foundations even more difficult than the enormously hard cases submitted would inevitably require. It might be suggested that the nine authors continue with all of their efforts to pursue, if not a single principle, then a set of principles which may be applied with some degree of consistency and logical symmetry. Perhaps the pursuit of the perfect rule is less likely to achieve success than a more pragmatic approach to workable compromise.

It cannot be too strongly emphasized that a consensus upon the Court should be a prime objective. Five-to-four decisions with vigorous dissents are far less likely to persuade the professional or lay reader than a decision to which all members of the Court subscribe. Even more subversive of the Court's moral influence is the plurality opinion.[76] A tribunal which assumes the

76. This phenomenon has unfortunately become more common in recent years. There were 45 plurality decisions from 1801 to 1955. There were 42 plurality decisions from 1955 until the end of the Warren Court. During the tenure of the Burger Court

duty of regulating the conduct of all law enforcement agencies and of exercising revisory power over all other judicial bodies must continually demonstrate its competence. Competence will seldom be perceived in any organization, judicial or otherwise, whose membership is in philosophic disarray.

Let us end as we began with a reference to Pirandello's six characters:

> When a character is born, he acquires at once such an independence, even of his own author, that he can be imagined by everybody even in many other situations where the author never dreamed of placing him; and so he acquires for himself a meaning which the author never thought of giving him.[77]

Consequently, it may be fruitless to look back to *Weeks* or *Mapp* in order to discern the principles and purposes upon which the exclusionary rule has its philosophic foundation. It might be better to concentrate upon the present context in which the rule exists and the purposes which it might best serve now and in the future in light of experience since 1914 and especially since 1961. Obviously these principles and purposes must be fashioned and recognized by the nine authors who currently serve on the Supreme Court of the United States. Nevertheless, in their quest certain touchstones might be observed. First, the rules of exclusion should be based upon standards sufficiently clear and understandable so they can be observed and followed by police officials. Second, whenever possible, bright-line distinctions should be preferred over the obscure and the recondite. Third, rules of substance and procedure should be articulated precisely and promulgated with the realization that a decision in a particular case may have ramifications which exceed the boundaries of the controversy from whence it arose. Finally, rigorous efforts should be exercised to achieve unanimity so the Court's opinions may command the respect of its own members as a condition precedent to obtaining general professional and public acceptance. The principle of judicial integrity and the purpose of deterrence of lawless official conduct, although not

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until the end of the 1980 term 88 plurality decisions were rendered.

See Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 n.1 (1981). A significant number of the plurality decisions in this article relate to matters affecting the exclusionary rule.

77. L. PIRANDELLO, SIX CHARACTERS IN SEARCH OF AN AUTHOR, ACT III.

inevitably congruent, may be brought into reasonable juxtaposition by application of the foregoing techniques.

In essence, the exclusionary rule is a rule of evidence promulgated by the Supreme Court in implementation of its guardianship of constitutional liberties. It is strong medicine indeed, but at times it may be the only appropriate medicine which necessity, based upon either deterrence of lawless official conduct or judicial integrity, will prescribe. It is not so much a question of whether the exclusionary rule should be abandoned as it is how the rule should be molded in order to achieve maximum effect and acceptability. As in the dramatic sphere, with skill and precision, a rule may be crafted as a character may be formed. In spite of Pirandello's model, our nine authors should continue their assiduous search for a comprehensive and symmetrical set of relevant principles.