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Wesley M. Oliver

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# PROHIBITION'S ANACHRONISTIC EXCLUSIONARY RULE

Wesley M. Oliver\*

## INTRODUCTION

For over a century, federal courts have, with several exceptions, refused to admit evidence seized in a manner inconsistent with the Fourth Amendment's prohibition on unreasonable searches and seizures. An incomplete history of the exclusionary rule is familiar to any lawyer or law student who has taken constitutional criminal procedure.<sup>1</sup> This often leaves an impression that the rule is an overbroad federal doctrine the Court stumbled into late in the nineteenth century to prevent the investigation of business crimes in *Boyd v. United States*.<sup>2</sup> The rule was refined to its modern form in the early twentieth century in *Weeks v. United States*.<sup>3</sup> Then, *Mapp v. Ohio* imposed it on the states as the only way to deter police misconduct in 1961.<sup>4</sup> This traditionally-offered account fails to consider state court opinions and does not look at patterns of criminal enforcement to understand why courts began to reject reliable evidence of crimes in order to give courts a mechanism to regulate police.<sup>5</sup>

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\* Professor of Law and Associate Dean for Faculty Scholarship, Duquesne University. I am grateful for comments from participants at the Vanderbilt Criminal Justice Roundtable, including Tom Clancy, Andrew Crespo, Fiona Doherty, Mary Fan, Aya Gruber, Nancy King, Richard McAdams, Richard Myers, Eric Miller, and Chris Slobogin.

1. This Supreme Court-centric approach appears in a number of places. Almost all criminal procedure casebooks begin their exclusionary rule sections with *Mapp*, with some books beginning with *Boyd*. See Robert Weisberg, *A New Legal Realism for Criminal Procedure*, 49 *BUFF. L. REV.* 909, 911 (2001) (observing Warren Court focus of criminal procedure casebooks). Not surprisingly, Potter Stewart's history of the rule in the *Columbia Law Review* looks only at the Court upon which he sat. The passage of time has not changed our approach. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 *COLUM. L. REV.* 1365 (1983). Tracey Maclin's recent book-length treatment of the exclusionary rule similarly limits itself to its development in the United States Supreme Court—as its title indicates, it set out to trace only this history. TRACEY MACLIN, *THE SUPREME COURT AND THE EXCLUSIONARY RULE* (2012).

2. 116 U.S. 616 (1886); Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 *J. CRIM. L. & CRIMINOLOGY* 933, 955 (2010).

3. *Weeks v. United States*, 232 U.S. 341 (1914).

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

5. Critics of the rule in the New York Constitutional Convention of 1938 contended that the rule was a New Deal-style rule that substituted the judgment of the elite for the will of the

Stripped of the historical context that led to the exclusionary rule's acceptance, modern lawyers tend to either absolutely accept or reject the legitimacy of the rule. For most, it is either a rule that was always appropriate, a right answer that courts discovered about a century into the republic, or one that was wrongly adopted and never had an appropriate place in American law. Civil libertarians and defense-oriented lawyers generally regard the rule as an indispensable tool in curbing illegal searches and seizures.<sup>6</sup> On the other hand, law-and-order types have largely regarded the rule as an act of judicial fiat that finds no support in the Framing Era and punishes society for the misdeeds of officers.<sup>7</sup> The forgotten historical context reveals a basis for a very different discussion—one that asks whether the rule is an appropriate and necessary limit on police for some moments in history, but not others.

The exclusionary rule gained its greatest traction during Prohibition when society became obsessed with finding a way to force police to obey constitutional limits. Search and seizure violations reached a high-water mark in American history during this period. Searches for liquor were quite invasive—saloons were smashed up,<sup>8</sup> car upholstery slashed,<sup>9</sup> and homes ransacked.<sup>10</sup> Officers in unmarked cars fired on innocent motorists who had no way of knowing if they were being stopped or robbed.<sup>11</sup> The Detroit River was a war zone where Prohibition agents resorted to any degree of force necessary to seize ships suspected of rum running.<sup>12</sup> In the minds of even staunch present-day opponents of the rule, the tradeoff of sacrificing reliable evidence to

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people. Instead of a bureaucratic agency, judges were identified as “experts,” who imposed their vision of good on society, so the criticism ran. 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 578–603 (1938). See also WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK, 1920–1980*, at 125–27 (2001).

6. *But see* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363.

7. See Binyamin Blum, *Doctrines without Borders: The “New” Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STAN. L. REV. 2131, 2137 (2008) (“[T]he United States, England, and Australia all developed an exclusionary rule through judicial fiat.”); Roger Roots, *The Framers’ Fourth Amendment Exclusionary Rule: The Mounting Evidence*, 15 NEV. L. J. 42, 46 (2014) (noting that when he began his research, “every constitutional scholar who expressed any opinion on the origins of the Fourth Amendment exclusionary rule repeated the claim that the rule is in defiance of the Framers’ original intent”).

8. J. ANNE FUNDERBERG, *BOOTLEGGERS AND BEER BARONS OF THE PROHIBITION ERA* 347 (2014).

9. *Carroll v. United States*, 267 U.S. 132 (1925).

10. LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE* (2015).

11. LARRY ENGELMANN, *INTEMPERANCE: THE LAW AGAINST LIQUOR* 38 (1979).

12. *Id.* at 69.

curb rampant unjustified physical intrusions during Prohibition would likely be defensible.

The historical context of the exclusionary rule's rise reveals that the Supreme Court may have misdirected its efforts when it chose to impose this rule—capable of deterring only the illegal acquisition of evidence—on state courts. *Mapp v. Ohio* was decided in 1961. The 1960s were a time of tremendous unrest between citizens and police. Police brutality, not an officer's power to search, was feared. The Supreme Court has frequently described its regulation of police as attempting to achieve a balance between law enforcement needs and individual liberty.<sup>13</sup> Requiring the states to adopt a rule that deterred officers from engaging in illegal searches and seizures often sacrificed the convictions of guilty individuals and imposed substantial costs on society's interest in combatting crime. The Court's incursion into the prerogatives of police in the 1960s seemingly should have addressed inappropriate use of official violence. Many of the staunchest supporters—and most vigorous opponents—of the exclusionary rule would likely agree that police brutality raises far more serious concerns than illegal searches, both then and now.

There is a tendency to think of judicial decisions—particularly landmark judicial opinions with which we agree—as statements of universal principles, unmoored from the contemporary circumstances in which they were decided.<sup>14</sup> Precedent takes on a timeless feel. As late as 1960, Supreme Court citations contained no indication of the date of decisions they cited.<sup>15</sup> While critics of an opinion may claim

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13. See, e.g., *United States v. Place*, 462 U.S. 696, 722 (1983) (“[A] reviewing court must balance the individual’s interest in privacy against the Government’s law enforcement interest and determine whether the seizure was reasonable under the circumstances.”); *Arizona v. Gant*, 556 U.S. 332, 345–46 (2009) (rejecting the State’s argument that a bright-line rule for searches incident to arrest of automobile in *New York v. Belton* properly strikes balance between law enforcement interests and arrestee’s interest in privacy in automobile); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (rejecting invitation to extend *Miranda*, concluding that the decision “strikes the proper balance between society’s legitimate law enforcement interests and the defendant’s Fifth Amendment rights”). Commentators have similarly argued that the overall program of Fourth Amendment regulation ought to strike such a balance. See, e.g., David Gray & Danielle Citron, *The Right to Quantitative Policy*, 98 MINN. L. REV. 62, 111 (2013) (“As in all Fourth Amendment cases, the guiding principle would be to strike a reasonable balance between the needs of law enforcement and the privacy interests of suspects and society at large.”).

14. Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L. J. 1545, 1551 (1989) (describing Supreme Court claims that its decisions involve “timeless judicial neutrality”).

15. It seems that in the late 1950s and early 1960s, the convention began to change. See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960) (Fourth Amendment case containing an appendix identifying which states had the exclusionary rule prior to *Weeks v. United States*, after *Weeks*, and after *Wolf v. Colorado*. Despite the historical nature of the appendix, none of the citations in the opinion included years); see also *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) (interrogation case that provided no year for the one U.S. Supreme Court case it cited); *Spano v. New*

that a decision is wrong and ought to be overruled, one rarely hears that a judicial decision was appropriate for a particular time, but inappropriate for another. Courts themselves consider the continuing viability of precedent by looking at whether: the precedent is practically workable, society has come to rely on the rule, other rules have eroded the decision, and facts have changed since the rule was announced.<sup>16</sup>

My critique of *Mapp*, however, is not that changes since 1961 suggest it should be overruled, but rather that *Mapp* was the wrong decision for 1961. Prohibition was a time like no other, creating profound fears of corruption as well as concern about honest but zealous enforcement. The balance between a court's search for truth and the need to control officers could quite understandably be different when the crime is bootlegging and lawless searches are causing outrage throughout the nation. It is plausible that Prohibition awakened state courts to a rule that was essential to ordered liberty that the Court eventually embraced in *Mapp*. The social context of the *Mapp* decision suggests, however, that a concern other than search and seizure should have animated the Court's decision. Indeed, the opinion itself suggests that the Court was concerned with matters other than the search for incriminating evidence.

This Article contends that the Supreme Court, with *Mapp v. Ohio*, mimicked the regulation of police in the states for the previous hundred years, creating a system that carefully managed searches for liquor, but left the use of police force beyond judicial control. Remarkably *Mapp* did so at a time when there was no epidemic of illegal searches, but rather substantial concerns about police brutality that were about to create a firestorm. The need for a mechanism for judicial oversight of police was clear, but the need to prevent illegal searches was far from compelling. Borrowing a century-old scheme, the Supreme Court in *Mapp* addressed the fears of the 1960s with a remedy for the abuses of the 1920s. *Mapp*'s critics contend that the decision was inappropriate because the exclusion of reliable evidence is never justified.<sup>17</sup> A weaker version of this argument seems com-

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York, 360 U.S. 315, 320 (1959) (including the year for citations to *Brown v. Mississippi*, 297 U.S. 278 (1936) and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), but did not provide citations to less seminal U.S. Supreme Court opinions, such as *Malinski v. New York*, 324 U.S. 401 (1945)). *Mapp v. Ohio*, 368 U.S. 367 U.S. 643 (1961) is a groundbreaking case in constitutional criminal procedure in many ways. It appears to be the first such case in which every citation to a case includes a reference to the year in which it was decided.

16. See *Casey v. Planned Parenthood*, 505 U.S. 833, 854–55 (1992).

17. Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and the Exclusionary Rule*, 43 TEX. TECH. L. REV. 373, 374–75 (2010).

pelled by the historical context. *Mapp* adopted a rule that was not capable of addressing the most troubling contemporary police misconduct—or indeed the most troubling police misconduct of our time—excessive force.

The first Part of this Article describes the rise of modern police and vice crimes. As police emerged in mid-nineteenth century American society, there were new threats to liberty, but searches were not the most pressing concern. There were frequent complaints about the brutality of these officers. Defenders of these early officers were able to convince society to accept police brutality as a necessary evil—or even a positive good. Civil service reforms successfully assured the public that police would only use unnecessary force against the criminal element.<sup>18</sup> Police were thus permitted to self-regulate their use of force into the twentieth century.

Oddly, search and seizure concerns alone prompted reforms in the mid-nineteenth century to curb the power of police. Mid-nineteenth century society saw not only a new type of policing but a new type of criminal statute. Vice crimes and their enforcement became a new part of American life. States throughout the Northeast and Midwest adopted short-lived statewide prohibitory laws about seventy years before National Prohibition.<sup>19</sup> While versions of the exclusionary rule had made early but rare appearances near the dawn of the republic,<sup>20</sup> a number of states began to adopt mechanisms to deny the state the fruits of unlawful liquor searches. All citizens, wealthy or poor, black or white, were caught in the snare of early liquor laws. Courts embraced a very early version of what we now call the exclusionary rule to ensure that those investigating suspected violations of the new controversial laws had an adequate basis for their searches.

Efforts to enforce National Prohibition would be considerably more aggressive as the law enforcement apparatus had developed at the federal and state level and the private groups interested in assisting with the effort included the Ku Klux Klan in the 1920s. The second Part of this Article describes the considerably more robust response to fears of police searches, as complaints about twentieth-century alcohol searches dominated headlines. Most liquor searches in the 1850s were initiated by the equivalent of an application for a search warrant, spe-

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18. See MARILYNN JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* (2003).

19. RONALD F. FORMISANO, *FOR THE PEOPLE: AMERICAN POPULIST MOVEMENTS FROM THE REVOLUTION TO THE 1850s*, at 290 n.18 (2008).

20. See Roger Roots, *The Originalist Case for the Fourth Amendment*, 45 *GONZ. L. REV.* 1 (2009–2010).

cifically a complaint alleging possession of alcohol. Search warrants in liquor cases were unique in requiring applicants to state the basis of their suspicions, making the failure to allege the basis for probable cause a concern in liquor cases alone. Warrantless searches were far more common in the 1920s. Accordingly, state courts frustrated with unlawful searches for liquor began to adopt a version of the exclusionary rule not limited to liquor searches. Thus, a more generic form of the exclusionary rule emerged in National Prohibition to address the problem of rampant abuses of the Fourth Amendment in the search for alcohol. This Part analyzes state court regulation of search and seizure during National Prohibition, demonstrating that alcohol regulation forced the hand of state courts.

The exclusionary rule was the only mechanism for judicial oversight of police practices that enjoyed any degree of judicial support when *Mapp v. Ohio* was decided, but it did nothing to address the most pressing concerns about police in the early 1960s. The final Part of this Article therefore suggests that the Supreme Court embraced the wrong rule to address the needs of its time—or indeed, our time. *Mapp*'s primary premises fall apart when the historical context of the case is considered. To impose the exclusionary rule on all states, *Mapp* relied on the need to deter illegal searches and seizures and the fact that a large number of state courts already utilized the rule.<sup>21</sup> State courts, however, had adopted the rule because of a unique period of rampant illegal searches that had long passed by 1961. The historical record further does not support the Court's implicit claim that tort law had proven inadequate to limit illegal searches. Outside of Los Angeles, search and seizure concerns do not appear to have garnered attention in the 1950s or early 1960s. Police brutality was (and is), by contrast, a pressing issue and one that seemed to concern the Court in *Mapp*. Since *Mapp*, courts have continuously addressed the scope of an officer's power to search, but have not defined the limits on an officer's appropriate use of force. The price paid for this ambiguity has been high—Watts in 1965 and Ferguson in 2015.

Critics of *Mapp* and the exclusionary rule have long contended that ignoring reliable evidence is contrary to a court's function.<sup>22</sup> The historical context reveals a far more scathing critique of *Mapp* that will resonate with civil libertarians. *Mapp* spent the Court's political capital to deter one of the least troubling aspects of police misconduct in

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21. 367 U.S. at 651–52.

22. See, e.g., JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2184 (1905).

the 1960s, while leaving the use of force largely beyond judicial oversight.

## II. EMERGENCE OF POLICE AND VICE CRIMES

Two innovations in the mid-nineteenth century fundamentally reshaped criminal law and its enforcement—police forces and vice crimes. The emergence of police forces prompted no new rules limiting their powers, while a new apparatus of criminal procedure was developed to limit searches for alcohol.<sup>23</sup> The present dichotomy between intense regulation of searches and seizures and a lack of regulation on the use of force was thus present as the modern criminal justice system was emerging. Eighteenth and early nineteenth century Americans feared anything resembling professional police forces. Such organizations were akin to standing armies to former colonists who feared mechanisms capable of thwarting the will of the people.<sup>24</sup>

Accordingly, a meager system of policing remained in American cities well after the realities of urban life required a more robust force. The very limited role of American law enforcement officers through the mid-nineteenth century cannot be overstated. Custom, law, social standing, and financial incentives converged to ensure that constables and night watchmen did no more than was specifically required by court orders.<sup>25</sup> These officers did not pose the threat of modern police, who Justice Robert Jackson described as being engaged in the “competitive enterprise of ferreting out crime.”<sup>26</sup> Early officers by contrast avoided circumstances that have led to complaints about modern police—such as searches for incriminating evidence and physical confrontations requiring an exercise of force.<sup>27</sup>

These officers mostly served as functionaries of crime victims by conducting investigations and prosecuting the crimes. Victims initiated the criminal process by going to magistrates and requesting a search or arrest warrant.<sup>28</sup> Even magistrates deferred to crime victims—the complainant merely had to claim he had probable cause for

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23. See Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447 (2010).

24. EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 636–38 (1999); DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF AMERICAN POLICE 1800–87*, at 15 (1979); JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, at 25 (1970).

25. RICHARDSON, *supra* note 24, at 3–22.

26. *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

27. RICHARDSON, *supra* note 24, at 3–22.

28. Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 25–36 (2007).



the warrant requested.<sup>29</sup> Through the mid-nineteenth century, magistrates did not consider, as modern magistrates must,<sup>30</sup> the facts upon which the complainant based his suspicion and whether those facts were sufficient for probable cause.<sup>31</sup> Complainants were rarely denied requests for warrants. Requests were denied only in cases in which the complainant was not considered credible.<sup>32</sup> Officers tended to wait for a complainant to initiate the criminal process in part because there were virtually no victimless crimes in early America.<sup>33</sup> Legal rules also encouraged reluctance. If an officer had probable cause to believe an individual had committed a crime, but in fact no crime had been committed, the officer was civilly liable for the erroneous arrest.<sup>34</sup> The victim's complaint shielded the arresting officer from liability.

Once the warrant was issued constables began the investigatory process. Larceny and assault were the two most common crimes in the first few decades of the new country.<sup>35</sup> Constables arrested a suspect accused of assault without further investigation. A search was

29. *Id.* at 31–54.

30. *Nathanson v. United States*, 290 U.S. 41 (1933).

31. Arcila, *supra* note 28, at 31–54.

32. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 424–25 (1944).

33. Investigations in the first half of the nineteenth century almost exclusively involved warrants obtained by crime victims. See OLIVER L. BARBOUR, *A TREATISE ON THE CRIMINAL LAW AND CRIMINAL COURTS OF THE STATE OF NEW YORK* 499 (2d ed. 1852); *In re Special Investigations No. 228*, 458 A.2d 820, 831 (Md. Ct. Spec. App. 1983) (“[T]he common law of England and of Maryland recognized the search warrant for stolen goods, but no other search warrant.”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 765 (1994) (describing that “common law search warrants . . . were solely for stolen goods.”). *But see* A. OAKLEY HALL, *A REVIEW OF THE WEBSTER CASE BY A MEMBER OF THE NEW-YORK BAR* (New York, J.S. Redfield 1850) (a rare case in which a search warrant was authorized without statutory authority for the search of a home for clothes which a witness claimed the culprit wore). Some early American statutes permitted searches for smuggled items or dangerous items such as gunpowder or diseased or infected items. *Id.* By the end of the nineteenth century, warrants for evidence of victimless crimes were recognized by commentators. Treatise writer Joel Bishop recognized in 1880 that search warrants were most commonly issued for stolen goods although warrants to discover lottery tickets, intoxicating liquors, and gaming implements were beginning to be issued as new statutes created victimless crimes. 1 JOEL PRENTISS BISHOP, *CRIMINAL PROCEDURE; OR, COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES* 145 (3d ed. 1880).

34. Thomas Y. Davies, *Farther and Farther from the Original Fourth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1004 (2003) (“The constable had neither a duty nor the authority to investigate the possibility of uncharged crimes; in fact, in the absence of a warrant, the constable had little more arrest authority than any other person.”).

35. Amar, *supra* note 33, at 765 (observing that most common search warrant application was for stolen goods).

required to investigate a claim of stolen goods; however, the constable merely accompanied the victim who directed the search.<sup>36</sup>

Constables were unlikely to interrogate suspects. Under long-standing practice, magistrates alone took statements from the accused.<sup>37</sup> The interrogation scene from Shakespeare's *Much Ado About Nothing* illustrates the common practice. In the fourth act, a magistrate, who is about to conduct an interrogation, is summoned away and instructs the constable, Dogberry, to stand in for him.<sup>38</sup> Dogberry protests that he is not permitted to perform this task, but at the magistrate's insistence, conducts a completely incompetent interrogation in which the suspects openly mock him.<sup>39</sup> Early American statutes codified this long-standing practice of judicial interrogations.<sup>40</sup> The law of confessions during this period further made the admissibility of any statement given to a constable unlikely. Almost anything a constable told a suspect could be considered a threat or promise, undermining the voluntariness of the statement.<sup>41</sup> Although never adopted in the United States, an English statute forbid officers from questioning suspects.<sup>42</sup>

36. *Frisbee v. Butler*, 1 Kirby 213, 213–14 (Conn. 1787).

37. 1 S. MARCH PHILLIPPS & ANDREW AMOS, *TREATISE ON THE LAW OF EVIDENCE* 380 (Boston, Elisha G. Hammond 1839) (“Confessions of prisoners are often made in the course of their examination before magistrates.”).

38. WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, act 4, sc. 2.

39. *Id.*; O. HOOD PHILLIPS, *SHAKESPEARE AND THE LAWYERS* 67–68 (1972) (describing Dogberry's incompetent examination).

40. N.Y. CODE CRIM. PROC. §§ 13–15 (1829); 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 73 n.B (Springfield, G.&C. Merriam 1836) (citing Massachusetts statute). In most other states in the early-nineteenth century, magistrates were, as a matter of custom, required to warn suspects of their right to silence. *See, e.g.*, RHODOM A. GREENE & JOHN W. LUMPKIN, *THE GEORGIA JUSTICE* 98–101 (Milledgeville, P.L. & B.H. Robinson 1835) (describing Georgia practice); JOHN H.B. LATROBE, *THE JUSTICES' PRACTICE UNDER THE LAWS OF MARYLAND* 317 (Baltimore, Fielding Lucas, Jr., 3d rev. ed. 1840) (describing Maryland practice). Nineteenth-century Louisiana practice similarly required such warnings, but as trial procedures permitted the prosecution to comment on the suspect's pretrial silence, the warnings included the caveat that silence may not be in the suspect's interest. EDWARD LIVINGSTON, *A SYSTEM OF PENAL LAW FOR THE STATE OF LOUISIANA* 507 (Phila., J. Kay, Jun. & Bro., Pittsburgh, J.L. Kay & Co. 1833) (“The magistrate shall . . . [inform the accused] that, although he is at liberty to answer in what manner he may think proper to the questions that shall be put to him, or not to answer them at all, yet a departure from the truth, or a refusal to answer without assigning a sufficient reason, must operate as a circumstance against him, as well on the question of commitment as of his guilt or innocence on the trial.”).

41. *See* Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule* (pt. 1), 53 OHIO ST. L.J. 101, 158 n.300 (1992) (collecting nineteenth century voluntariness cases).

42. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 749 n.574 (1999) (observing that officers were not permitted to interrogate suspects at the time the Bill of Rights was drafted).

Legal constraints were but one limitation on constables and watchmen. Socially, the men who patrolled early American cities were not respected. James Otis referred to them as “petty officers” in his famed argument against the writs of assistance in 1761.<sup>43</sup> Often, citizens were compelled to serve as officers, though even those of little means were able to relieve themselves of this duty.<sup>44</sup> Law enforcement was not a career, but a burden on the lower classes. Officers had day jobs and the vigorous enforcement of their duties interfered with their primary source of income. Any arrest required the officer to appear before a judge, taking time that could have been devoted to the officer’s more lucrative employment.<sup>45</sup> These meager citizens, who were insufficient in number, had little incentive to risk their lives or even expend their energies to investigate crimes and suspicious persons or quell riots, brawls, or fist fights.<sup>46</sup> With almost no incentive to protect the towns they were guarding, these officers were ineffective and posed little threat to liberty.

Big-city concerns like riots and unsolved crimes, however, forced American cities to rethink their fears of standing armies.<sup>47</sup> London created a police organization in 1829 that would become the model for

43. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 57 (1970); T. H. Breen, *Subjecthood and Citizenship: The Context of James Otis’s Radical Critique of John Locke*, 71 *NEW ENG. Q.* 378, 378 (1998).

44. GEORGE WILLIAM EDWARDS, *NEW YORK AS AN EIGHTEENTH CENTURY MUNICIPALITY 1731–1776*, at 323 (1917) (observing that “[s]erving on this watch or securing a substitute was undoubtedly an onerous task for the poorer New Yorkers”).

45. 3 I.N. PHELPS STOKES, *THE ICONOGRAPHY OF MANHATTAN ISLAND* 643–44 (1998).

46. See LISA KELLER, *TRIUMPH OF ORDER: DEMOCRACY & PUBLIC SPACE IN NEW YORK AND LONDON* 163 (2009) (describing recognition of increasing manpower when first modern police department was created in New York City); Davies, *supra* note 42, at 641.

47. There is substantial agreement that nineteenth century riots produced modern police forces. See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 119–21 (1989) (“Between 1837 and 1850, as the determination of the judiciary to intensify state prosecution and the punishment of rioters grew, support for expanding and improving the city’s police force increased.”); SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 4 (1977) (contending that modern police forces were developed as a “consequence of an unprecedented wave of civil disorder that swept the nation between the 1830s and the 1870s”); JOHNSON, *STREET JUSTICE*, *supra* note 18, at 8–9 (comparing the rise in strong policing to other historical sequences of events); Robert Liebman & Michael Polen, *Perspectives on Policing in Nineteenth Century America*, 2 *SOC. SCI. HIST.* 346 (1978) (reviewing scholarship on the creation of early police forces). *But see* ERIC H. MONKONEN, *POLICE IN URBAN AMERICA, 1860–1920*, at 56 (1981) (contending that cities seized the opportunity to create a mechanism of social control, but were not motivated by any particular events); EDWIN G. BURROWS & MIKE WALLACE, *GOTHAM: A HISTORY OF NEW YORK TO 1898*, at 637–38 (1999) (attributing willingness of New Yorkers to finally accept a new police force to media coverage of a brutal unsolved murder); AMY GILMAN SREBNICK, *THE MYSTERIOUS DEATH OF MARY ROGERS: SEX AND CULTURE IN NINETEENTH-CENTURY NEW YORK* 87 (1997) (explaining how a high-profile murder shifted “the tone and direction of earlier debates over urban crime and punishment”).

American police forces.<sup>48</sup> The hallmarks of these entities were a hierarchical military-style command structure and a sufficient number of full-time officers to control crowds and conduct criminal investigations without relying on militia, posse, or private citizens.<sup>49</sup> Law enforcement went from a part-time requirement imposed on citizens to a career in which officers could rise in the ranks. With greater social standing and incentives to aggressively assert their powers, officers simultaneously became better protectors of their communities and a real threat to them.

In Philadelphia, Boston, and New York City, police departments based on the London model began to develop in the mid-nineteenth century.<sup>50</sup> Citizens' fears of these new organizations quickly emerged and police brutality became a frequent concern.<sup>51</sup> Some reformers sought mechanisms to limit the amount of force officers could use or the circumstances justifying the use of force. In New York City, for instance, there were proposals to limit the use of police force to that necessary to effect an arrest or protect the life or safety of the officer.<sup>52</sup> Other proposals sought to shorten the length of police clubs to fourteen inches. Eighteen-inch locust clubs, standard issue in New York City through the nineteenth century, were frequently lethal.<sup>53</sup> Yet another proposal sought to prevent officers from carrying brass knuckles, nunchucks, or other non-conventional weapons capable of inflicting substantial injury.<sup>54</sup>

Despite the reasonableness of these suggested limits, they were all thwarted by claims that such measures would give criminals an advantage. Progressives of the late nineteenth century contended that it was not police violence itself, but inappropriate uses of police violence that was problematic.<sup>55</sup> Hot-headed officers who pursued personal vendettas or mistreated unlucky citizens in their path were criticized by all reformers.<sup>56</sup> But for Progressives, unnecessary violence against

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48. JOHNSON, *URBAN UNDERWORLD*, *supra* note 24, at 9. *See generally* DAVID BENTLEY, *ENGLISH CRIMINAL JUSTICE IN THE NINETEENTH CENTURY* (1998) (describing the creation of the London police force in 1829).

49. JOHNSON, *URBAN UNDERWORLD*, *supra* note 24, at 15.

50. *See generally* ROGER LANE, *POLICING THE CITY: BOSTON, 1822-1885* (1967); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880* (1989); RICHARDSON, *supra* note 24.

51. JOHNSON, *STREET JUSTICE*, *supra* note 18, at 4-5.

52. *Id.* at 88-89.

53. *Id.*

54. *Id.* at 99.

55. JAY STUART BERMAN, *POLICE ADMINISTRATION AND PROGRESSIVE REFORM: THEODORE ROOSEVELT AS POLICE COMMISSIONER OF NEW YORK* (1987).

56. JOHNSON, *STREET JUSTICE*, *supra* note 18, at 91.

the criminal element was not only tolerable, but a positive good. Teddy Roosevelt, the New York City Police Commissioner in 1895, was the leading advocate for this position. He believed that physical force encouraged respect for an officer's authority and deterred criminal activity. He encouraged his officers to use their clubs liberally against the criminal element.<sup>57</sup> At the same time, however, he fought to obtain civil service reforms that prevented unqualified officers from receiving appointments and, more importantly, to keep the patronage system from interfering with discipline of officers who misused force.<sup>58</sup> Progressive civil service reforms in other cities similarly emboldened police. In New Orleans, new protocols for hiring and firing in 1886 led to more arrests and fewer social services being performed by officers.<sup>59</sup> These social services had been used to placate legitimacy concerns.<sup>60</sup>

Judge William Gaynor was elected Mayor of New York City in 1910 due in part to his concerns about police brutality. He concluded that Progressive reformers believed that society could "be reformed and better made . . . instead of being debased, by the policeman's club and the fireman's axe."<sup>61</sup> Interestingly, Gaynor's stance against police violence did not survive the political or social realities of his term as mayor. His anti-brutality orders that limited the use of clubs and forbid acts of unnecessary violence were withdrawn after opponents of the regulation blamed an increase in crime on the policies.<sup>62</sup>

One historian describing Seattle in the years just before Prohibition observed that the "Queen City was proud of its pugilistic police, and the cage in the morning was often crowded with underworld characters sporting blackened eyes and split lips."<sup>63</sup> In 1934, New York City Police Commissioner Lewis Valentine presented a lineup of well-dressed mobsters to the press and brazenly told them that such men should not be brought to the jail in this condition—he instructed officers to "muss up" such men.<sup>64</sup> "Men like him should be mussed up! Blood should be smeared all over his velvet collar," he told the report-

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57. *Id.* at 88.

58. *Id.* at 56.

59. DENNIS C. ROUSEY, *POLICING THE SOUTHERN CITY: NEW ORLEANS 1805–1889*, at 173–96 (1996).

60. *Id.*

61. LATELY THOMAS, *THE MAYOR WHO MASTERED NEW YORK: THE LIFE AND OPINIONS OF WILLIAM J. GAYNOR* (1969).

62. JOHNSON, *STREET JUSTICE*, *supra* note 18, at 100–06.

63. PHILIP METCALF, *WHISPERING WIRES: THE TRAGIC TALE OF AN AMERICAN BOOTLEGER* 6 (2007).

64. ARTHUR NASH, *NEW YORK CITY GANGLAND* 29 (2010).

ers.<sup>65</sup> Like police chiefs of his generation, Valentine publicly and unapologetically supported third-degree interrogation tactics.<sup>66</sup>

As police brutality was coming to be grudgingly accepted as a necessary, perhaps even appropriate, aspect of modern policing, residents in certain parts of the country were getting a preview of a type of police intrusion that would not be tolerated. States in the Northeast and Midwest experimented in the mid-nineteenth century with versions of prohibitory laws that would be imposed on the entire nation in the 1920s.<sup>67</sup> Police forces were not well developed in many of the cities and towns subject to these new laws.<sup>68</sup> Much of the enforcement therefore fell on private citizens, members of the Temperance Watchmen, who would petition courts to search their neighbors' homes for liquor. Fear of their zeal prompted legislatures to require more of applicants for liquor warrants than was required of applicants seeking any other type of search warrant.<sup>69</sup> Judges then dismissed convictions in cases involving inadequately supported search warrant applications.<sup>70</sup> Thus, for a particular type of investigation—liquor searches—

65. *Id.*

66. Phillip Messing, *When Cops Were Robbers: The Early Days of NYPD*, N.Y. Post, Apr. 12, 2015.

67. William Blackwood & Sons, *Blackwood's Edinburgh Magazine* 211 (1867) (identifying the 13 states to adopt Prohibition in the mid-nineteenth century); see also Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, in *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* 141 (Mark H. Moore & Dean R. Gerstein eds., 1981). Prohibition did not extend to the southeast in the nineteenth century because of the linkage between the Temperance Movement and the Abolition Movement, though Prohibition nearly succeeded in parts of the antebellum South, such as Kentucky. See Thomas H. Appleton, Jr., "Moral Suasion Has Its Day": *From Temperance to Prohibition in Antebellum Kentucky*, in *A MYTHIC LAND APART: REASSESSING SOUTHERNERS AND THEIR HISTORY* 19–42 (John David Smith & Thomas H. Appleton, Jr. eds., 1997). Ironically, Prohibition then found some of its strongest support in the south in the early twentieth century as the Ku Klux Klan, with its strongest (though not exclusive) support in the southeast, strongly supported Prohibition. KATHLEEN DROWNE, *SPIRITS OF DEFIANCE: NATIONAL PROHIBITION AND JAZZ AGE LITERATURE, 1920–1933*, at 20 (2005); Kris Durocher & Amy Louise Wood, *Ku Klux Klan, Second (1915–1944)*, in *24 NEW ENCYCLOPEDIA OF SOUTHERN CULTURE* 228–29 (Thomas C. Holt & Laurie B. Green eds., 2013).

68. See *THE ENCYCLOPEDIA OF POLICE SCIENCE* 10 (William G. Bailey ed., 2d ed. 1995).

69. Ann-Marie Szymanski, *Dry Compulsions: Prohibition and the Creation of State-Level Agencies*, *J. POL'Y HIST.* (1999) (discussing creation of Temperance Watchmen in New York and Massachusetts to investigate illegal liquor possession); Matthew C. Moen & Kenneth T. Palmer, *Maine: Which Way Should Life Be?*, in *PRAYERS IN THE PRECINCTS: THE CHRISTIAN RIGHT IN THE 1998 ELECTIONS* 272 (John Clifford Green et al., eds., 2000) (describing the creation of the "Watchmen of Temperance" in Maine "whose sole purpose was to ferret out information about hidden liquor stocks for public officials").

70. See *State v. Staples*, 37 Me. 228, 230 (1854) (arresting conviction as complaint authorizing search for alcohol was found to be inadequate since it failed to describe basis of complainant's belief of location of liquor); *Fisher v. McGirr*, 67 Mass. 1, 6 (1854) (discussing action to recover value of liquor seized on the basis of improper complaint, which was analogous to modern

a number of courts clearly embraced an early form of the exclusionary rule.

Late nineteenth century Progressive reformers were able to thwart efforts to limit or externally control the use of force by police by ensuring the public that only the “criminal element” would encounter the policeman’s baton.<sup>71</sup> Those endeavoring to rid the nation of alcohol could make no promise that enforcement efforts would fall only on the undesirables.<sup>72</sup> Prohibition transformed a large percentage of otherwise law-abiding citizens into criminals overnight.<sup>73</sup> Alcohol was enjoyed at every strata of society—a fact that federal and state prohibitory laws did not change.

Nineteenth century prohibitory laws created new mechanisms for obtaining search warrants and introduced penalties for violating these mechanisms. Probable cause went from a pleading requirement to an evidentiary threshold that applicants for warrants were required to satisfy. The exclusionary rule was introduced in many jurisdictions as courts recognized Prohibition’s zealous enforcers were not satisfying the new alcohol-specific requirements for searches.

Efforts to control drinking in the United States began with campaigns for moderation. Long after reformers shifted toward advocating for a ban on alcohol, the name “Temperance Movement” remained.<sup>74</sup> In the late 1840s, Neal Dow of Portland, Maine, became the most prominent advocate of a law that prohibited selling—or possession with the intent to sell—intoxicating beverages.<sup>75</sup> Like a num-

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search warrant); *People v. Toynbee*, 11 How. Pr. 289, 330 (N.Y. Sup. Ct. 1855) (“The complaint [analogous to the modern affidavit in support of a search warrant] is a substitute for an indictment . . . and requires at least as much particularity.”); *State v. Twenty-Five Packages of Liquor*, 38 Vt. 387, 390–92 (1866) (recognizing that action to forfeit liquor could be quashed when search warrant in insufficiently particular).

71. WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870*, at 80 (1973).

72. *But see* MCGIRR, *supra* note 10 (though those enforcing the law obviously would not expressly identify which groups Prohibition enforcement would fall upon, practically racial minorities and poorer Americans bore the brunt of such efforts).

73. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State*, 48 WM. & MARY L. REV. 1, 21 (2006).

74. JOHN A. KROUT, *THE ORIGINS OF PROHIBITION 266* (1925); LORI D. GINZBERG, *WOMEN IN THE WORK OF BENEVOLENCE: MORALITY, POLITICS, AND CLASS IN THE UNITED STATES 98–132* (1990); Jed Dannenbaum, *The Origins of Temperance Activism and Militancy Among American Women*, 15 J. SOC. HIST. 235, 239–40 (1981) (explaining Temperance Movement’s shift from moral suasion to prohibition in terms of gender).

75. NEAL DOW, *THE REMINISCENCES OF NEAL DOW: RECOLLECTIONS OF EIGHTY YEARS 24* (1898). General James Appleton made the attempt in Massachusetts and his family would insist that he had not received his due for the later success in Maine. *See* DANIEL F. APPLETON, *THE ORIGIN OF THE MAINE LAW AND OF PROHIBITORY LEGISLATION WITH A BRIEF MEMOIR OF JAMES APPLETON* (1886).

ber of states on the Atlantic coast, Maine had a seaport with many businesses that catered to drunken sailors, but it also had a considerably more conservative inland population where Dow's prohibition message gained traction.<sup>76</sup> From the country's earliest days, individual localities had been able to choose whether to permit alcohol and the circumstances under which it could be sold.<sup>77</sup>

Dow was able to cobble together a coalition of Maine legislators to pass the nation's first statewide prohibition law in 1846.<sup>78</sup> This law was ineffective because it lacked a mechanism enabling searches for what Dow labeled "demon rum."<sup>79</sup> Prosecutions under this law frequently failed for lack of physical evidence. Temperance Watchmen—a group of private citizens that volunteered to enforce the liquor laws—often testified to witnessing forbidden sales, but their testimony was frequently discounted due to concerns about their credibility or an unwillingness to enforce the liquor law on the basis of such bare assertions.<sup>80</sup>

The effort to permit discovery of tangible proof of liquor law violations revealed Maine's internal conflict on prohibition and previewed the nation's split personality on the issue seven decades later. Dow returned to the Maine Legislature in 1849 with a bill that would allow a search warrant for liquor on the basis of a complaint signed by three citizens who claimed to have probable cause that liquor would be discovered.<sup>81</sup> Such a procedure for seeking a warrant seems, by modern standards, contrary to constitutional principles.<sup>82</sup> None of these complainants were required to explain the basis of their accusations, they merely had to allege that they indeed had, to their own satisfaction, an adequate foundation for asserting that liquor would be discovered.

The mechanism for obtaining the warrant Dow proposed was, however, by the standards of the mid-nineteenth century, quite demanding. Search warrants until the latter half of the nineteenth century were almost exclusively for stolen goods. Applicants for search warrants merely had to allege that a crime had been committed and that

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76. FRANK L. BYRNE, *PROPHET OF PROHIBITION: NEAL DOW AND HIS CRUSADE* 37 (1961).

77. See generally KROUT, *supra* note 74 (tracing history of prohibition from colonial era to enactment of Maine Law).

78. HENRY STEPHEN CLUBB, *THE MAINE LIQUOR LAW: ITS ORIGIN, HISTORY, AND RESULTS* (1856).

79. Neal Dow himself later recognized that without the search mechanism, his efforts would have been doomed to failure. See *Prohibitory Laws of Maine*, N.Y. TIMES, Feb. 3, 1896, at 5.

80. THOMAS BYRNE, *PROPHET OF PROHIBITION: NEAL DOW AND HIS CRUSADE* 37 (1961).

81. *Id.* at 42–43.

82. See *Nathanson v. United States*, 290 U.S. 41 (1933) (finding a mere allegation insufficient for search warrant).



they had probable cause to believe evidence of the crime could be found in the location identified.<sup>83</sup> The warrant application process Dow proposed required, by contrast, three people to swear that they had probable cause. Unlike a larceny victim, however, an applicant for a search warrant for liquor was usually unable to swear that a crime had in fact occurred.<sup>84</sup>

Maine legislators who supported the essentially unenforceable prohibitory law in 1846 were less willing in 1849 to support a provision that allowed searches necessary to enforce the liquor laws. A number of legislators in pro-temperance districts opposed a law that would enable both effective enforcement of the liquor laws and abuses from zealots willing to play fast and loose in their efforts to discover alcohol. These legislators therefore struck a deal with Governor John Dana who agreed to veto the bill they felt politically compelled to support.<sup>85</sup>

The constitutional problem with Dow's proposal, from a mid-nineteenth century perspective, was the number of searches that became possible. Search warrants for stolen goods were finite in number as only victims of missing items could seek them. However, any citizen could allege liquor could be discovered in any number of homes.<sup>86</sup> Governor Dana observed that for a warrant to discover stolen items,

there must be a pre-existing fact, not merely suspect, but *known* to the complainant, to wit: the loss of the goods; and when such a fact exists, the person suffering the loss, in instituting the search, will give to it, only that direction which the circumstances may indicate, as most likely to result in recovery of the property.<sup>87</sup>

Governor Dana recognized that there were victimless crimes prior to this new liquor law for which applicants could seek warrants—and like the liquor searches, there was no way for the warrant applicant to be sure that a crime had been committed.<sup>88</sup> In Maine, it was illegal to

83. See Arcila, *supra* note 28, at 17–44.

84. Thomas Y. Davies, *Can You Handle the Truth?: The Framers Preserved Common-Law Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness is Only a Modern, Destructive Judicial Myth"*, 43 TEX. TECH. L. REV. 51, 103 (2010) (describing the crime-in-fact requirement of early state criminal warrants).

85. This inference is supported by the fact that a similar development occurred with the passage of the liquor law of 1851, which was successful. Several members of the legislature who voted for the bill counseled then-Governor John Hubbard to veto it, noting that they could not have voted for it and retained their seats. They advised him to follow the course of his predecessor. See Dow, *supra* note 75, at 340–43. Neal Dow also observed that Governor Dana had taken the "counsel of some of the leaders in his party" in vetoing the bill. *Id.* at 320.

86. ACTS AND RESOLVES PASSED BY THE THIRTIETH LEGISLATURE OF THE STATE OF MAINE A.D. 1850, at 298 (Augusta, William T. Johnson 1850).

87. *Id.*

88. *Id.* at 297–98.

store gunpowder in an unsafe manner and town elders could seek a warrant to ensure that this law was not being violated.<sup>89</sup> Governor Dana acknowledged that this law existed, but concluded that such searches were rare enough to not pose a risk to liberty.<sup>90</sup> Though Dana did not mention them, Maine's statutes in 1849 also permitted warrants to be obtained to search for pornography, prostitutes, and gambling instruments.<sup>91</sup> With no full-time police forces, or even part-time police forces with an incentive to conduct these searches—and in a world with no private society aimed at stamping out vice generally—the ability to seek these warrants existed on paper, but did not occur in practice.

The liberty of early Americans rested in the infrequency of government intervention, not the legitimacy of its intervention. The mid-nineteenth century criminal justice system protected citizens from widespread searches, not unjustified searches. Neal Dow's proposal of 1849, with his Temperance Watchmen standing at the ready to seek warrants, guaranteed a large number of alcohol searches. Throughout the nation's effort to enforce prohibition, whether alone at the state-level in the 1850s or at the national level in the 1920s, opponents of liquor searches were of two minds. Some opposed all liquor searches, while others opposed merely unjustified searches.<sup>92</sup> Governor Dana's veto of Dow's proposed search mechanism would have appealed to both camps. Practically speaking, nothing at the time required magistrates to test the reliability of a complainant's suspicion. Dow's 1849 proposal did nothing to improve the reliability of searches and would have exponentially increased the number of potential searches. Governor Dana's veto prevented dragnet searches that were the concern

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89. One of the earliest statutes of Maine provided that a search warrant could be obtained by a selectman of the town to investigate the possibility that gunpowder was being stored contrary to the regulations of the town. An Act for the Prevention of Damage by Fire, and the Safe Keeping of Gun Powder, ch. 25, § 5, 1821 Me. Laws 112, 114 (Brunswick, J. Griffin 1821); JOHN MAURICE O'BRIEN, *THE POWERS AND DUTIES OF THE TOWN OFFICER, AS CONTAINED IN THE STATUTES OF MAINE* (Hallowell, Glazier & Co. 2d ed. 1824). Statutes regulating the possession of gunpowder in early American states were somewhat common. See Saul Cornell, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 510–13 (2004).

90. *ACTS AND RESOLVES*, *supra* note 86, at 298.

91. *ME. REV. STAT.*, tit. XII, ch. 160, §§ 18, 20, 39 (1841).

92. Justice William Anderson of the Mississippi Supreme Court is an excellent example of a prohibitionist who insisted on searches consistent with state constitutional prohibitions on unreasonable searches and seizures. In a dissent, he rejected a proposal to allow an exception from the state's prohibitory laws for a "medicine" that was 95% alcohol because he argued that such loopholes would undermine the enforcement of Prohibition. At the same time, he required courts in his home state to exclude unlawfully obtained evidence to deter unlawful searches. See discussion at *infra* notes 201–205 and accompanying text.

of mid-nineteenth century civil libertarians. Implicitly, he recognized that the protections of the mid-nineteenth century warrant application process did nothing to guard against a single unjustified search, but would prevent widespread searches, whether justified or not.

The nineteenth century warrant application process, that required a victim's assurance that a crime had occurred, certainly could not survive modern policing, vice crimes, and white-collar crimes. By the twentieth century police had the manpower and incentive to conduct searches to discover evidence other than stolen goods. A mechanism to justify such searches, other than a victim's affirmation that a crime had occurred, was obviously required to search for evidence of victimless crimes. Such a mechanism was created in mid-nineteenth-century Maine with statewide Prohibition. In his zeal to stamp out liquor consumption, Dow was required to develop a new type of protection that would at least satisfy the objections of civil libertarians. In doing so, Dow introduced the modern warrant application procedure to state criminal cases.

In 1851, Dow returned to the Maine Legislature with a new search provision. Like the 1849 proposal, it required three citizens to swear that illegally possessed alcohol could be discovered at the location in question. Unlike the previous bill, however, it required at least one of the applicants to provide the facts upon which he concluded that alcohol had been sold on the premises.<sup>93</sup> While a number of treatises in the late eighteenth and early nineteenth century required applicants to provide the facts upon which they concluded probable cause existed, evidence of historical practice reveals probable cause was nothing more than a pleading requirement—something that applicants merely had to allege.<sup>94</sup> Despite the actual practice, a bill that required applicants to explain the factual basis of their suspicions would be comfortable to any lawyer who had read Blackstone's *Commentaries on the Laws of England*, or any number of treatises that required magistrates to consider the factual basis for an applicant's assertion of suspicion.<sup>95</sup>

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93. An Act for the Suppression of Drinking Houses and Tippling Shops, ch. 211, § 11, 1851 Me. Laws 210, 214–15.

94. See Arcila, *supra* note 28, at 17–44.

95. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 290–91 (London, 1826); 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 150 (London, E. Rider new ed. 1800); 2 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 130–31 (Thomas Leach ed., London, His Majesty's Printer 6th ed. 1824). Blackstone's version of the warrant application procedure could well have been familiar to members of the Maine Legislature with legal training as one of the earliest American versions of Blackstone's treatise was published in Portland and Maine-specific treatises in the first half of the nineteenth century cited Blackstone's warrant standard. SIR WILLIAM BLACKSTONE, KNT., COMMENTARIES ON THE

Including this requirement in a revised statute authorizing liquor searches strongly suggests that Mainers, or at least their representatives, required more protection from unlawful vice crime searches than from searches for stolen goods. By the time the bill passed both houses of the legislature, John Hubbard had replaced John Dana in the Maine Governor's Mansion.<sup>96</sup> Dow did not simply reintroduce his previously unsuccessful bill once the new pro-prohibition<sup>97</sup> governor was inaugurated.<sup>98</sup> He sought the assistance of an eminent lawyer in Portland to help him modify the rejected version and, for the first time in United States criminal procedure, a proposed criminal procedure statute expressly required a magistrate to second-guess a complainant's conclusion that he had enough suspicion to initiate a criminal proceeding.<sup>99</sup> The legislative history of this statute suggests it was intended to modify actual practice. Because of concerns unique to liquor searches, advocates of such searches were forced to impose requirements on the warrant process that were unknown to other types of warrant requests.

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LAWS OF ENGLAND (Portland, Thomas B. Wait 1807); JEREMIAH PERLEY, *THE MAINE JUSTICE* 75–76 (Hallowell, Goodale, Glazier 1823) (stating standard from Blackstone). I am grateful to Chris Livesay, who allowed me to spend a day going through these and other original nineteenth-century treatises he has collected in his Brunswick, Maine, law office.

96. DAVID G. GOLD, *AN EXEMPLARY WHIG: EDWARD KENT AND THE WHIG DISPOSITION IN AMERICAN POLITICS AND LAW* 158 (2012).

97. WILLIAM G. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY 1852–56*, at 47 (1987).

98. See MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 747 (1999) (discussing John Hubbard's support for Maine's prohibitory law, which came to be known as the Maine Law).

99. See DOW, *supra* note 75, at 35 (“Having completed [the bill] to my own satisfaction, I submitted it to Edward Fox [who] . . . suggested a few changes, principally on technical points, which I accepted.”). John Neal, who was Neal Dow's cousin, stated that in drafting the Maine Law, Dow “had the help of a legal personage, for whom we profess to feel a sincere regard, in preparing the very portions which are most offensive and preposterous, and which mainly distinguish it from the old law.” John Neal, *The Liquor Law of Maine*, MAINE EXPOSITOR, Aug. 31, 1853, at 2. He continued, “What those are, will be seen hereafter, as we proceed with the ‘searching analysis’ we have in our mind.” *Id.* Given Dow's reference to Fox's “technical assistance,” the reference is not difficult to decode, but subsequent writings from Neal would clarify any ambiguity. John Neal would quickly grow considerably less charitable toward Fox when he, one week later, specifically named him, noting that was “the gentleman who ranks among one of the putative fathers of the Maine Liquor Law, and is rather disposed to glory in the co-partnership, though he thinks it too merciful.” John Neal, *Mr. Neal's Reply*, MAINE EXPOSITOR, Sept. 14, 1853, at 1. These claims were made public because John Neal and Neal Dow had gotten into a very public feud after John, who supported Neal's efforts to pass the Maine Law, represented Kitty Kentuck, the proprietor of a house of ill-repute in Portland on a charge that she had violated the state's new liquor law. Neal Dow accused his cousin of having more than a lawyer-client relationship with the known madam. John Neal, *The Liquor Law of Maine—No. 2*, MAINE EXPOSITOR, Sept. 7, 1853, at 1; JOHN NEAL, *WANDERING RECOLLECTIONS OF A SOMEWHAT BUSY LIFE* 370–72 (1869).

An 1853 legislative modification to Maine's liquor search provision appears to have been an effort to allow applicants to obtain search warrants for liquor as easily as theft victims obtained warrants to look for stolen goods.<sup>100</sup> Under this version of the law, a magistrate could permit the search of a dwelling for alcohol if "by the testimony of witnesses upon oath . . . there is reasonable grounds for believing" that unlawfully possessed liquor could be found in the house to be searched.<sup>101</sup> Opponents of the bill alleged this version of the search provision allowed a mere allegation to be sufficient for a search.<sup>102</sup> Supporters contended the new version did not change the law and pointed critics to a new provision that imposed a one-year jail term upon anyone who committed perjury in the process of seeking authorization to search for liquor.<sup>103</sup>

Whatever the actual motives of the sponsors of this new bill, Temperance Watchmen quickly sought to demonstrate that a mere allegation of unlawful liquor possession was sufficient to obtain a warrant. They began to apply for warrants omitting any facts supporting their allegations that liquor was believed to be present in the homes they asked to search. The Supreme Judicial Court of Maine rejected the argument implicitly made by the Watchmen that a mere allegation that probable cause existed was sufficient.<sup>104</sup> The previous version of the statute required a specific type of proof—applicants had to describe witnessing an unlawful sale of alcohol. The court held that the 1851 version created a standard that present-day lawyers would recognize as the standard for establishing probable cause.<sup>105</sup> No specific fact had to be identified, but sworn facts had to be offered to a magistrate that would warrant a person's belief that the alleged crime had been committed and evidence of the crime could be discovered in the place to be searched.<sup>106</sup> Critically, this requirement existed only for liquor searches.

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100. REPORT OF JOINT SELECT COMMITTEE ON SO MUCH OF THE ADDRESS OF THE GOVERNOR AS RELATES TO THE ACT FOR THE SUPPRESSION OF DRINKING HOUSES AND TIPPLING SHOPS, 23 DOCUMENTS PRINTED BY ORDER OF THE LEGISLATURE OF THE STATE OF MAINE 26 (1853).

101. *Id.* (reciting bill).

102. *Id.* at 27.

103. *Id.* at 4 (responding to criticisms, proponents noted that to search a dwelling, "evidence of witnesses [had to] be given in writing, on oath, filed with the magistrate, sufficient to show that there is good ground to believe that spirituous and intoxicating liquors are kept or deposited therein"). Throughout the 1850s, there is no evidence in the appellate reports or newspapers of Maine indicating that anyone was prosecuted for perjury under this statute.

104. *State v. Staples*, 37 Me. 228 (1854); *State v. Spirituous Liquors*, 39 Me. 262 (1855).

105. *Id.*

106. *Id.*

As important as the new legislative limits on liquor searches were, the courts played a far more substantial role in imposing limits on the efforts of Temperance Watchmen. When magistrates granted warrants on the basis of applications that lacked a statement explaining the basis for believing an illegal liquor sale had occurred, the Supreme Judicial Court of Maine arrested the judgment of conviction, effectively dismissing the case.<sup>107</sup> The legal instrument that allowed a search for alcohol was identified as a complaint and if the prerequisites for the complaint were not satisfied, appellate courts in Maine regarded the entire prosecution as flawed.<sup>108</sup> This was an early version of the exclusionary rule. Even though this version of the exclusionary rule only applied to searches initiated with search warrants, practically, this was the only mechanism needed to deter liquor searches conducted without adequate suspicion. In a world prior to professional police forces, Temperance Watchmen, acting as private citizens, would have been trespassing if they conducted searches without judicial authorization.

Maine was not an anomaly in its experimentation with prohibition or its judicial efforts to limit those searches. Most states throughout the Midwest and Northeast adopted prohibitory statutes similar to the one Dow navigated through the Maine Legislature.<sup>109</sup> State courts in jurisdictions adopting the prohibitory laws required complainants seeking to search for liquor to explain the basis of their suspicions and dismissed convictions when search warrants were issued without this prerequisite.<sup>110</sup>

A new body of search and seizure law developed in state courts in the 1850s, but it dealt only with searches for liquor. In 1961, every court in America would be required to apply these rules for searches and seizures to efforts to discover evidence of any type of crime. Im-

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107. *Id.*

108. *Id.*

109. Though one tends to think of the Southeast as having the most restrictive alcohol laws in the twentieth century, an overlap between the leadership of the Prohibition, Women's Suffrage, and Abolition movements prevented southern states from embracing the new anti-liquor laws. JOE L. COKER, *LIQUOR AND THE LOST CAUSE: SOUTHERN EVANGELICALS AND THE PROHIBITION MOVEMENT 2* (2007) ("During the antebellum period, the temperance movement enjoyed great success in the northeastern United States, and during the 1850s, more than a dozen northern states enacted statewide bans on liquor. But because of the temperance movements Yankee origins—not to mention its strong ties to the abolition movement—it received a tepid reception in the antebellum South.").

110. *State v. Twenty-Five Packages of Liquor*, 38 Vt. 387 (1866) (recognizing that forfeiture action could be quashed for failure to have a sufficiently particular search warrant); *Fisher v. McGirr*, 1 Gray 1 (Mass. 1854) (action for value of seized liquor permitted on the basis of an insufficient search warrant); *People v. Toynbee*, 11 How. Pr. 289 (N.Y. Sup. Ct. 1855).

portantly, liquor searches, not unjustified acts of violence by police, inspired nineteenth-century America to place new limits on police.

### III. EXCLUSIONARY RULE GAINS ACCEPTANCE DURING NATIONAL PROHIBITION

The connections between the exclusionary rule and Prohibition are not understood. The history of criminal procedure tends to be viewed entirely through the lens of the Supreme Court.<sup>111</sup> Thus, the pivotal role Prohibition played in the acceptance of the exclusionary rule is overlooked if one simply focuses on Supreme Court opinions. Looking at state court decisions, one discovers that the exclusionary rule gained acceptance in the states only because of Prohibition. In 1961, *Mapp v. Ohio* borrowed this rule as an emergency measure to regulate police engaged in a very different sort of misconduct.

While the Supreme Court famously adopted a version of the exclusionary rule in 1886 in *Boyd v. United States*,<sup>112</sup> the rationale of this decision was quite idiosyncratic and had very limited relevance for criminal prosecutions.<sup>113</sup> *Weeks v. United States*, decided in 1914,<sup>114</sup> would put the federal version of the rule on a footing recognizable to present-day lawyers, but neither *Boyd* nor *Weeks* had much of an impact on the American criminal justice system.<sup>115</sup> The federal criminal docket represented only a tiny portion of the prosecutions occurring at the turn of the twentieth century.<sup>116</sup> To understand police conduct in the early twentieth century—and the effect of judicial efforts to regulate it—one must look to state courts. Until National Prohibition, state courts did not follow the lead of the Supreme Court in adopting the exclusionary rule. It was only with fears of police aggressively enforcing the new liquor laws that state courts found *Boyd* or *Weeks* worth embracing.

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111. See Weisberg, *supra* note 1, at 911.

112. 116 U.S. 616 (1886).

113. Thomas Y. Davies, *An Account of Mapp v. Ohio that Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. L. J. 619, 622–23 (2007) (“The Fourth Amendment exclusionary rule first appeared in a cryptic statement in the 1886 decision in *Boyd v. United States*[.]”); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 422–23 (1995) (describing the collapse of the doctrine in *Boyd* within 20 years of the decision).

114. 232 U.S. 341 (1914).

115. Davies, *Can You Handle the Truth?*, *supra* note 84, at 119–21 (describing how *Weeks* moved the exclusionary rule closer to the modern standard).

116. MITCHEL P. ROTH, *CRIME AND PUNISHMENT: A HISTORY OF THE CRIMINAL JUSTICE SYSTEM* 172 (2d ed. 2010).

*Boyd v. United States* is traditionally (and falsely) viewed as the earliest example of the exclusionary rule in the United States.<sup>117</sup> The prosecution in *Boyd* sought and obtained a subpoena for an invoice of the contents of a ship to demonstrate that required duties had not been paid.<sup>118</sup> The Supreme Court concluded that the seizure of these papers was unreasonable.<sup>119</sup> Much like the Fifth Amendment protected citizens against self-incrimination, *Boyd* concluded the Fourth Amendment ensured the government could not seize an individual's books or records to incriminate him.<sup>120</sup> Under this rationale, no degree of suspicion would allow the government to obtain recorded information. This decision therefore insulated businesses from revealing financial misdeeds, but did not survive the rise of the regulatory state in the early twentieth century.<sup>121</sup> However, the idea that constitutional values sometimes required the sacrifice of reliable evidence survived the turn of the century.

*Weeks* involved a warrantless entry into the defendant's home where evidence of illegal gambling was discovered.<sup>122</sup> The Court held the method in which the incriminating evidence was discovered—not the mere recovery of incriminating evidence as in *Boyd*—precluded its admission in a criminal trial.

*Boyd* and *Weeks* were different than the mid-nineteenth century mechanism that limited the Temperance Watchmen. Each decision applied to the fruits of searches for any type of crime, though *Boyd* appears to have been limited to written documents.<sup>123</sup> Neither *Boyd* nor *Weeks* caught on in the states, at least not until there was a second effort to enforce a prohibitory law—this time, a national effort with

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117. Davies, *Can You Handle the Truth*, *supra* note 84, at 58 (“The conventional account of Fourth Amendment history was initially sketched out in the 1886 decision *Boyd v. United States* . . .”).

118. *Boyd*, 116 U.S. at 636.

119. *Id.* at 638.

120. *Id.* at 621.

121. Stuntz, *supra* note 113, at 428 (noting that if the protections of *Boyd* had been extended to corporations, “the modern regulatory state would have been dead almost before it was born”).

122. 232 U.S. 341.

123. *Boyd* rested on the Court's view that the Fourth and Fifth Amendments ran into each other. 116 U.S. at 630. Only documents created by the defendant would involve a conscious act of self-incrimination. Commentators often describe *Boyd* as specifically providing privacy in documents, rather than merely providing protection in one's private possessions. Of these people, some clearly had an interest in accenting the constitutional protection for documents. See Senator Bob Packwood, “Dear Diary—Can You Be Used Against Me?: The Fifth Amendment and Diaries, 35 B.C. L. REV. 965, 966 (1994) (noting that in “*Boyd v. United States*, the Court held that the Fifth Amendment protected an individual from compelled production of all personal documents”).



large, highly organized police departments in place to carry out liquor searches.<sup>124</sup>

The Eighteenth Amendment permitting Congress to regulate the possession and sale of alcohol was passed on January 17, 1919 and the Volstead Act criminalizing possession with the intent to sell went into effect one year later.<sup>125</sup> Many similar state laws had gone into effect in the 1910s, some even earlier.<sup>126</sup> Surprisingly, some states passed such laws despite booming legal distilling operations. In 1909, Tennessee passed its prohibitory law, forcing the Jack Daniel's distillery to move to St. Louis and the George Dickel distillery to move to Kentucky.<sup>127</sup> Kentucky, by far the country's most prominent producer of whiskey, adopted a prohibitory law in 1919.<sup>128</sup>

By 1930, eighteen states had adopted a generic version of the exclusionary rule.<sup>129</sup> Only Iowa embraced the rule prior to twentieth cen-

124. Francis Barry McCarthy, *Counterfeit Interpretations of State Constitutions in Criminal Procedure*, 58 SYRACUSE L. REV. 79, 109 (2007) ("Before the *Weeks* decision, only one state, Iowa, had created an exclusionary rule for search and seizure violations.").

125. Henry S. Cohn & Ethan Davis, *Stopping the Wind that Blows and the River that Runs: Connecticut and Rhode Island Reject the Prohibition Amendment*, 27 QUINNIAC L. REV. 327, 327 (2009); Scott Allen Merriman, *Gangster and Bootleggers*, in JAZZ AGE: PEOPLE AND PERSPECTIVES 39 (Mitchell Newton Matza & Peter C. Mancall eds., 2009).

126. Early state prohibitory laws are somewhat familiar to constitutional scholars. For example, in *Mugler v. Kansas*, 123 U.S. 623 (1887), the Supreme Court concluded that Kansas' prohibitory law did not violate the due process rights of a beer brewer to his property.

127. ELIZABETH K. GOETSCH, *WICKED NASHVILLE* 85 (2017) (Tennessee's statewide prohibitory law was in effect from 1909 to 1938); MARK H. WAYMACK & JAMES F. HARRIS, *THE BOOK OF CLASSIC AMERICAN WHISKEYS* 182 (1995) (observing that Jack Daniel's Distillery moved to St. Louis when prohibition began in Tennessee; Jack Daniel's was far from the only distillery affected by statewide prohibition. By the turn of the twentieth century, Tennessee had licensed 700 distilleries); STEPHANIE STEWART-HOWARD, *KENTUCKY BOURBON AND TENNESSEE WHISKEY* 132 (2016) (describing Dickel's move to Louisville).

128. DIXIE HIBBS & DORIS SETTLES, *PROHIBITION IN BARDSTOWN: BOURBON, BOOTLEGGERS & SALOONS* (2016) (providing a brief history of every licensed distillery in western Kentucky). The *Wine and Spirits Bulletin*, a trade publication of the alcohol industry, published what it called a "National Directory—Fine Blends and Trade Brands" that listed whiskeys produced in the United States in the early 1900s. The number of Kentucky-based distillers in the list is striking. Thomas H. Appleton, Jr., *Prohibition and Politics in Kentucky: The Gubernatorial Campaigns and Election of 1915*, 75 REG. KY. HIST. SOC. 28 (1977); Stanley D. Baum & Thomas H. Appleton, Jr., *Wet Dry Referenda in Kentucky and the Persistence of Prohibition Forces*, 39 SOUTHEASTERN GEOGRAPHER 172 (Nov. 1999). Congress bolstered state efforts at prohibitory laws in 1913, enacted a law excluding from interstate commerce alcohol whose consumption is illegal at its destination point under state law. Lindsay Rogers, *Unlawful Possession of Intoxicating Liquors and the Webb-Kenyon Act*, 16 COLUM. L. REV. 1, 1 (1916).

129. *Youman v. Commonwealth*, 224 S.W. 860 (Ky. 1920); *People v. Marxhausen*, 171 N.W. 557 (Mich. 1919); *State v. Owens*, 259 S.W. 100 (Mo. 1924); *State v. Laundry*, 204 P. 958 (Ore. 1922); *Hughes v. State*, 238 S.W. 588 (Tenn. 1922); *State v. Gibbons*, 203 P. 390 (Wash. 1922); *State v. Wills*, 114 S.E. 261 (W. Va. 1922); *Artz v. Andrews*, 94 So. 329 (Fla. 1922); *Gore v. State*, 24 Okla. Crim. App. 394 (1923); *Tucker v. State*, 90 So. 845 (Miss. 1922); *State v. Arregui*, 254 P. 788 (Idaho 1927); *People v. Castree*, 143 N.E. 112 (Ill. 1924); *Flum v. State*, 141 N.E. 353 (Ind.

ture efforts at liquor enforcement.<sup>130</sup> With metropolitan police departments well established,<sup>131</sup> warrantless liquor searches were as threatening as searches pursued by the Temperance Watchmen. Illegal searches of any sort therefore had to be deterred and *Weeks* provided a template for deterring such misconduct.

Few contemporary legal scholars attribute the change of heart by state courts to abuses in liquor enforcement—or to opposition to Prohibition itself—despite language in state court opinions that make these conclusions all but inescapable.<sup>132</sup> Zechariah Chafee contended that the trend of jurisdictions adopting the rule in the early 1920s was due to an interest in conforming federal and state criminal procedure.<sup>133</sup> One academic even contended that Prohibition had deterred states from adopting the exclusionary rule in light of concerns that the rule would impair efforts to enforce the liquor laws.<sup>134</sup> In the years following Prohibition, almost no one has discussed the role of Prohibition in the decision of states to adopt the exclusionary rule.<sup>135</sup>

Prohibition, however, not the Supreme Court's persuasive influence, seems to have been the catalyst for the exclusionary rule's acceptance in the states. Some state courts during this period were unwilling to acknowledge they were adopting a federally devised mechanism to address abuses in liquor searches. Excluding reliable evidence of a crime to deter police misconduct was a radical departure from the law that had historically prevailed, with a few minor excep-

1923); *State v. Gooder*, 234 N.W. 610 (S.D. 1930); *State ex rel. King v. Dist. Ct.*, 224 P. 862 (Mont. 1924); *Hoyer v. State*, 193 N.W. 89 (Wis. 1923); *State v. George*, 231 P. 683 (Wyo. 1924); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 196–98 (1981).

130. *State v. Rowley*, 195 N.W. 881 (Iowa 1923).

131. ERIC MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920* (2004).

132. Asher Cornelius' search and seizure treatise may be the only substantial legal text of the time to expressly acknowledge the causal connection between Prohibition and the legal doctrines that were developing. See ASHER L. CORNELIUS, *THE LAW OF SEARCH AND SEIZURE: BEING A PRESENTATION IN THE FORM OF BRIEFS WHICH COVER ALL OF THE PHASES OF THE SUBJECT TOGETHER WITH PERTINENT FORMS* 54 (1925).

133. Zechariah Chafee, Jr., *The Progress of the Law, 1919–1922*, 35 HARV. L. REV. 673, 696 (1922). While a number of the state courts adopting the exclusionary rule during Prohibition cited precedent from the United States Supreme Court, only the South Dakota Supreme Court cited the merits of conformity between federal and state law as a virtue of adopting the rule. *Gooder*, 234 N.W. at 613 (“While a contrary view to that herein announced still prevails in a majority of the state courts, the rule we now adopt is that of the Supreme Court of the United States and other federal courts and seems to be gaining adherents from the state courts.”).

134. Thomas E. Atkinson, *Prohibition and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748 (1925).

135. Francis Allen's article is an exception, striking for the date of its publication, 1961. Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 246, 250 (1961) (observing that “most of the states that accepted the ‘Weeks Rule’ did so during the period of national prohibition”).

tions.<sup>136</sup> One would therefore expect a court working such a change in the law to include every possible source of support available.

In *Town of Blackburg v. Beam*, the Supreme Court of South Carolina considered a case in which a farmer concealed liquor in a trunk on a train.<sup>137</sup> An officer, “without any process” searched the defendant’s person, obtained a key to the trunk, and found whisky contained therein.<sup>138</sup> The Court cited no authority, federal or otherwise, in concluding that this unlawfully obtained evidence would not support a conviction:

We have no doubt but that a conviction under the recited circumstances is unlawful. Some things are to be more deplored than the unlawful transportation of whisky; one is the loss of liberty. Common as the event may be, it is a serious thing to arrest a citizen, and it is a more serious thing to search his person; and he who accomplishes it, must do so in conformity to the laws of the land. There are two reasons for this; one to avoid bloodshed, and the other to preserve the liberty of the citizen. Obedience to law is the bond of society, and the officers set to enforce the law are not exempt from its mandates.

In the instant case the possession of the liquor was the body of the offense; that fact was proven by a forcible and unlawful search of the defendant’s person to secure the veritable key to the offense. It is fundamental that a citizen may not be arrested and have his person searched by force and without process in order to secure testimony against him.<sup>139</sup>

A year later, a defendant in South Carolina sought to have illegally-seized evidence of gambling activity excluded from his criminal trial.<sup>140</sup> In support of his argument he cited *Beam*, seemingly binding authority on a South Carolina court.<sup>141</sup> He also cited the *Weeks* decision—not binding authority on a matter of criminal procedure in 1917, but certainly a precedent one would not expect a state court to ignore.<sup>142</sup> The South Carolina Supreme Court rejected both *Weeks* and *Beam*. Of *Weeks*, the Court noted that “protection against officers not acting under claim of federal authority is not afforded by the guaranty of immunity from unreasonable searches and seizures under the Fourth Amendment of the Constitution.”<sup>143</sup>

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136. *Roots*, *supra* note 7, at 43 (challenging the traditional conclusion that the Framers knew nothing of an exclusionary rule).

137. *Town of Blacksburg v. Beam*, 88 S.E. 441 (S.C. 1916).

138. *Id.* at 441.

139. *Id.*

140. *State v. Harley*, 92 S.E. 1034 (S.C. 1917).

141. *Id.* at 1035.

142. *Id.*

143. *Id.*

It was harder for the court to reject the *Beam* decision. The court held, remarkably, that *Beam* could be better explained as a recognition of an individual's right to possess alcohol for personal consumption rather than a decision about the limits of an officer's search and seizure powers.<sup>144</sup> South Carolina thus expressly limited its version of the exclusionary rule to seizures—with or without a warrant—of alcohol.

South Carolina was not the only state to use precedents other than *Boyd* and *Weeks* to deter illegal liquor searches. Other states used long-existing authority developed in state courts to exclude illegally obtained evidence. A number of states relied on doctrines dating back to Dow's 1851 prohibitory law in Maine to conclude that a complaint about illegally possessed alcohol not supported by adequate suspicion prevented a subsequent conviction even if alcohol was discovered. A New York court in 1921 recognized that an action to forfeit alcohol could not proceed if officers were not permitted by the warrant to enter the property they searched.<sup>145</sup> The mechanism that responded to the Maine Law remained a limitation on liquor prosecutions in states like Alabama that never adopted the exclusionary rule.<sup>146</sup> Indiana likewise concluded in 1921 that a search warrant application filed without an affidavit supporting probable cause prevented a forfeiture action for the alcohol from going forward.<sup>147</sup>

These decisions all reflected the same idea as mid-nineteenth century liquor laws—the search warrant was viewed as the complaint and an action could not follow from an invalid complaint.<sup>148</sup> A New York trial court in 1920 used this idea to invalidate a criminal prosecution unrelated to liquor. In *People v. Kinney*, an indictment for the illegal possession of a weapon was quashed because the gun was discovered in a search based on an invalid warrant.<sup>149</sup>

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144. *Id.*

145. *In re Search Warrant to Search & Seize Intoxicating Liquors at 52 Front St.*, 190 N.Y.S. 574 (N.Y. Cty. Ct. 1921); *Cheek v. State*, 57 So. 108 (Ala. App. Ct. 1911).

146. *See Elkins v. United States*, 364 U.S. 206, 224–25 (1960) (containing an appendix identifying which states had the exclusionary rule and which states did not).

147. *Thompson v. State*, 130 N.E. 412 (Ind. 1921).

148. It is hardly surprising that search and seizure cases in state court in liquor cases only addressed the most common challenge to a search—an invalid warrant. Thomas Davies has observed that the United States Supreme Court in *Weeks v. United States* only addressed a small portion of what would come to be the scope of the exclusionary rule. *Weeks*, he correctly noted, only considered the requirement of a valid warrant for a search. The decision covered no more than necessary, not even mentioning arrests. Davies, *Can You Handle the Truth?*, *supra* note 84, at 120.

149. 185 N.Y.S. 645 (S. Ct. Erie Cty. 1920).

While modern commentators generally did not regard the expansion of the exclusionary rule in the states to be an effort to control improper police searches, one very prominent professor acknowledged a correlation between Prohibition and expansion of the rule. John Henry Wigmore, author of the most influential evidence treatise in American history, was perhaps the most ardent opponent of the exclusionary rule—and certainly the most acerbic.<sup>150</sup> He saw the rule as grounded in an illogical sympathy for the victims of illegal searches, not an effort to deter police misconduct. The first edition of his treatise was published in 1905 and described the exclusion of evidence because of the manner in which it was seized to be an exercise of “misguided sentimentality.”<sup>151</sup>

In subsequent editions, as federal courts became committed to the rule and state courts began to embrace the rule, the eminent treatise writer called the rule un-American. Wigmore concluded that such emotional appeals had been too readily accepted in post-World War I courts. For Wigmore, “the stern repressive war measures against treason, disloyalty and anarchy in the years 1917–1919” prompted a “recrudescence of individualistic sentimentality for freedom of speech and conscience” which criminal defendants exploited to prevent the admission of incriminating evidence.<sup>152</sup> “It was natural,” Wigmore wrote, “for the misguided pacifist or semi-pro-German interests to invoke the protection of the Fourth Amendment.”<sup>153</sup>

While documents had been seized to prosecute sedition cases during World War I, Fourth Amendment concerns did not play a major role.<sup>154</sup> Wigmore’s anti-German comments appear to have had an anti-alcohol tone. Prohibition had been a success, in part, because many American brewers and distillers were of German origin. Companies that now seem synonymous with America—Budweiser,

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150. ANDREW PORWANCHER, JOHN HENRY WIGMORE AND THE RULES OF EVIDENCE: THE HIDDEN ORIGINS OF MODERN LAW 2 (2016) (claiming Wigmore “helped catalyze a new era in American law” and describing him as a “prophet of modernity”); Jill Lepore, *On Evidence: Proving Frye as a Matter of Law, Science, and History*, 124 YALE L. J. 1092, 1106 n.85 (2015) (quarreling with another academic’s contention that an acerbic example of Wigmore’s writing was uncharacteristic).

151. WIGMORE, *supra* note 22, at § 2184.

152. *Id.* (2d ed. 1923).

153. *Id.*

154. See GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT TO THE WAR ON TERRORISM 135–234 (2004) (discussing prosecutions for expressions of ideas during World War I).

Anheuser-Busch, Pabst, Schlitz, Stroh's, and George A. Dickel—were founded by German immigrants.<sup>155</sup>

A number of interest groups, whose motives ranged from benevolence to intolerance combined to make Prohibition a reality. From Carrie Nation's Anti-Saloon League to the Ku Klux Klan, a wide-ranging coalition supported Prohibition.<sup>156</sup> Post World War I, support for Prohibition was partially derived from a resentment of German-owned companies profiting from American vice.<sup>157</sup> For a curmudgeon like Wigmore, who painted with a broad brush, the exclusionary rule was offensive because it protected Germans of all sorts—from spies to brewers. He believed that as Prohibition caused more searches it also created more opportunities for illogical, unpatriotic acts by courts that undermined their legitimacy:

Since the enactment of the Eighteenth Amendment and its auxiliary legislation, a new and popular occasion has been afforded for the misplaced invocation of this principle; and the judicial excesses of many Courts in sanctioning its use give an impression of maudlin complaisance which would be ludicrous if it were not so dangerous to the general respect for law and order in the community.<sup>158</sup>

Undeniably, more searches occurred because of the new liquor laws. The Texas Court of Criminal Appeals observed in 1922 that the “question of search and seizure is now being raised in nearly all liquor cases tried in this State, if the facts at all justify the defense in interposing objections relating to such question.”<sup>159</sup> But unlike Wigmore, society was outraged by the searches, not the suppression of evidence.<sup>160</sup> An Assistant United States Attorney handling liquor cases in New York City observed in 1923:

For a time after the Volstead Act went into effect . . . few persons, even among lawyers, conceived the idea of questioning any Federal Government agent's right to search for and seize contraband liquor as he felt inclined or as his suspicions directed. The agents them-

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155. MARGARET LITTMAN, *MOON TENNESSEE* (2016) (noting Dickel's ethnic heritage); JAMES A. HART & DIETER SCHULTZE-ZEU, *U.S. BUSINESS AND TODAY'S GERMANY: A GUIDE FOR CORPORATE EXECUTIVES AND ATTORNEYS* 215–17 (1995) (describing history of Budweiser company); THOMAS ADAMS, *GERMANY AND THE AMERICAS: CULTURE, POLITICS, AND HISTORY* 132 (2005) (describing founding of major breweries by German immigrants).

156. DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 29, 86 (2010).

157. Margot Opdycke Lamme, *Tapping into War: Leveraging World War I in the Drive for a Dry Nation*, 21 *AM. JOURNALISM* 63 (2013).

158. John Henry Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 *A.B.A. J.* 479, 481 (1922).

159. *Welchek v. State*, 247 S.W. 524, 526 (Tex. Crim. App. 1922).

160. *See, e.g., John Barker Waite, Evidence: Police Regulation by Rules of Evidence*, 42 *MICH. L. REV.* 679, 685–86 (1944) (describing destruction of bars once alcohol was found).

selves, and many of their superiors, felt secure in their right to do so as Government officials.<sup>161</sup>

The Wickersham Commission observed in 1931 that Prohibition had gotten off to a “bad start” in part because:

High-handed methods, shootings and killings, even when justified, alienated thoughtful citizens, believers in law and order. Unfortunate public expressions by advocates of the law, approving killings and promiscuous shootings and lawless raids and seizures and deprecating the constitutional guarantees involved, aggravated this effort. Pressure for lawless enforcement, encouragement of bad methods and agencies of obtaining evidence, and crude methods of investigation and seizures on the part of badly chosen agents started a current of adverse opinion in many parts of the land.<sup>162</sup>

There was a proliferation of search and seizure law because there was a proliferation of searches and seizures. With an ever-expanding number of states denying prosecutors the right to use unlawfully obtained evidence, a vast body of law was created. In 1926, Asher Cornelius, completed the first American treatise dedicated entirely to search and seizure law. Cornelius concluded the topic deserved thorough treatment because of National Prohibition.<sup>163</sup> The new laws, he observed, had resulted “in the creation of a multitude of officers whose duties are almost wholly those of search and seizure.”<sup>164</sup>

During Prohibition, the greatest concern was the search for liquor; however, social groups were affected differently. For less affluent targets, violence during liquor raids was not uncommon and jail was the only alternative if they were unable to pay fines. Conversely, for socialites, Prohibition may have added a degree of glamour. New York City Mayor Jimmie Walker had his own booth in a cellar-level speakeasy in the upscale Club 21 that could be concealed by a door that resembled a solid wall.<sup>165</sup> Upper-class victims of liquor searches were rarely shot in raids or forced to serve lengthy jail sentences, but illegal searches and seizures befell all social groups.<sup>166</sup> The African American publication *Richmond Planet* observed, “A man’s home

161. Victor House, *Search and Seizure Limits Under the Prohibition Act*, N.Y. TIMES, Feb. 11, 1923, at X14.

162. NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, Part III, 2 (Jan. 7, 1931).

163. ASHER CORNELIUS, THE LAW OF SEARCH AND SEIZURE: BEING A PRESENTATION IN THE FORM OF BRIEFS WHICH COVER ALL THE VARIOUS PHASES OF THE SUBJECT, TOGETHER WITH PERTINENT FORMS iii (1926).

164. *Id.* at 2.

165. GEORGE WALSH, GENTLEMAN JIMMY WALKER: MAYOR OF THE JAZZ AGE (1974); HERBERT MITGANG, ONCE UPON A TIME IN NEW YORK: JIMMY WALKER AND FRANKLIN ROOSEVELT AND THE LAST GREAT BATTLE OF THE JAZZ AGE (2000).

166. MCGIRR, *supra* note 10, at 88, 119.

used to be his castle. Now it is the United States government's castle and the rights and privileges have been taken away."<sup>167</sup> Police brutality has long been inflicted more heavily on racial minorities, and this certainly did not abate during Prohibition.<sup>168</sup> In fact, the Ku Klux Klan was deputized to assist in Prohibition enforcement in some communities.<sup>169</sup> Nevertheless, rich and poor, black and white, found common ground in their concern about liquor searches.

Neither state nor federal Prohibition agents were well-trained and there was a feedback loop to this culture of incompetence. Federal agents were already constrained by the exclusionary rule, but the poor track record of federal agents, and certainly state agents, in the early days of Prohibition created pressure for greater regulation of state agents enforcing Prohibition. As the Wickersham Report observed in 1931, "in some states concurrent state enforcement made an especially bad start with respect to searches and seizures."<sup>170</sup> Early federal officers were "largely unfit by training, experience, or character to deal with so delicate a subject."<sup>171</sup> As the "distinction between federal and state enforcement officers was not easily made," there was pressure on state courts to control the excesses of the first years of Prohibition enforcement.<sup>172</sup>

Accounts of illegal seizures often appeared in the decisions of state courts that increasingly recognized that excluding illegally obtained evidence was essential to deter illegal liquor searches. Even though the Kansas Supreme Court concluded in 1924 that a still seized in a warrantless search of a home could be admitted in a criminal trial, a spirited dissent noted the country's recent change of heart on the exclusionary rule.<sup>173</sup> In his dissent, Justice Harvey observed that searches for evidence were uncommon in the country's first hundred years, but had become more common with statutes creating victimless crimes.<sup>174</sup> Harvey concluded that the long-standing view that reliable evidence was always admissible had been challenged as police searches became more common.

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167. *Id.* at 91.

168. SHANNON KING, *WHOSE HARLEM IS IT ANYWAY?: COMMUNITY POLITICS AND GRASS-ROOTS ACTIVISM DURING THE NEW NEGRO ERA* 11 (2015) (discussing how issues of police brutality were covered in different newspapers in the 1920s).

169. MCGIRR, *supra* note 10, at 122, 134–35, 139, 141.

170. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES*, Part III:2, p. 82 (Jan. 7, 1931).

171. *Id.*

172. *Id.*

173. *State v. Johnson*, 226 P. 245 (Kan. 1924).

174. *Id.* at 250 (Harvey, J., dissenting).



The early authorities in this country without much discussion of the matter, and some later state decisions, hold that the rule of evidence should be followed, and that one who was deprived of his constitutional rights must seek redress by an action against the officer for damages. It is now generally recognized that the only effective way of securing the constitutional rights of the party in such a case is to prohibit the use of such evidence by prosecuting officers.<sup>175</sup>

In reversing a liquor conviction, the Oklahoma Court of Criminal Appeals strongly hinted at the state's minimal interest in prosecuting Prohibition offenders. The defendant in *Gore v. State* had been convicted of operating a still, a misdemeanor offense.<sup>176</sup> The court recognized it was reversing long-standing assumptions when it adopted the exclusionary rule, but observed that new types of searches had led to previously unforeseen opportunities for government oppression.<sup>177</sup> Almost mocking the liquor laws themselves, the court identified other crimes which posed no harm to others.

The insidious encroachments upon the liberty and private affairs of the individual by boards, commissions, examiners, detectives, inspectors, and other agents of the state and municipalities now prevail to such an extent that self-respecting citizens, in urban communities especially, do not know in the course of a day how many rules or regulations they have violated, for which they may be subject to a penalty. If one inadvertently expectorates in the street, or parks his car at a wrong angle, or places his garbage in the wrong kind of receptacle he may be guilty of an offense. If these government agencies, contrary to the letter and the spirit of our Constitution, are encouraged or condoned by the courts in their invasion of the privacy of homes, offices and places of business, forcibly and without invitation, for the purpose of procuring evidence to convict one of some misdemeanor, the practice followed to its logical conclusion will make our vaunted freedom a mere pretense, valueless, and without substance. Whenever the courts actively encourage officers to procure evidence illegally by force, the officers soon become dictatorial, arrogant, and even brutal—a natural consequence of the court's approval of obtaining evidence illegally by force.<sup>178</sup>

Even though *Gore* addressed several other crimes, its decision to adopt the exclusionary rule seems driven by its concern about Prohibition enforcement. It is hard to imagine how evidence proving any of the other identified offenses would involve an intrusive search. In *Gore*, the crimes offered as analogous to Prohibition were quite trivial, implying the court thought Prohibition was as well. Illegal

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175. *Id.*

176. *Gore v. State*, 218 P. 545 (Okla. Crim. App. 1923).

177. *Id.* at 548.

178. *Id.* at 549–50.

searches, the court appears to have been noting, were occurring to enforce a law no more serious than a parking violation.

The Florida Supreme Court in *Atz* regarded the exclusionary rule as necessary to avoid hypocrisy. The court observed that if society was going to expect its citizens to be so morally pure to avoid alcohol, it could not use unlawfully obtained evidence to prove the infraction.

For one to acquire illegally, or illegally to possess intoxicating liquors is a crime; but it is a crime that generally affects a few persons in a restricted locality. To permit an officer of the State to *acquire evidence illegally* and in violation of sacred constitutional guarantees, and to use the *illegally acquired* evidence in the prosecution of the person who illegally acquired the intoxicants, strikes at the very foundation of the administration of justice, and where such practices prevail make law enforcement a mockery.<sup>179</sup>

Similar to *Gore*, this seems to be a judgment about the relative seriousness of liquor offenses. The calculation expressly balances the seriousness of the offense against the gravity of the search and seizure violation. The prosecutors in *Atz* made no attempt to explain the unlawful seizure of evidence as an anomaly. Instead they argued courts should not concern themselves with excesses of Prohibition enforcement. While it should be expected that officers of the law “know the law of the realm, and mean duly to observe it . . . we cannot hope, in the present state of society, to be certain of the protection of officers possessing the qualifications above mentioned.”<sup>180</sup> The Florida Supreme Court adopted the exclusionary rule in light of the attorney general’s concession that widespread unlawful searches to enforce the low-level crime would continue.<sup>181</sup>

The Supreme Court’s first automobile search case came out of Michigan during Prohibition. *Carroll v. United States* held that a warrant is not required to search an automobile if the searching officer has probable cause.<sup>182</sup> The facts of the case illustrate the liberties of officers were routinely taking with the privacy of citizens. Prohibition agents set up a liquor purchase with three men in a Grand Rapids apartment on the evening of September 29, 1921.<sup>183</sup> The men, likely suspecting that this was a sting operation, told the agents they would deliver the liquor that evening, departed in an Oldsmobile Roadster,

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179. *Atz v. Andrews*, 94 So. 329, 332 (Fla. 1922).

180. *Id.*

181. *Id.* at 332.

182. 267 U.S. 132 (1925); see, e.g., *The Supreme Court, 1980 Term—Search Incident to Arrest and the Automobile Exception*, 95 HARV. L. REV. 251, 261 (1981) (identifying *Carroll* as the origin of the automobile exception).

183. *Id.* at 134.

and never returned.<sup>184</sup> Months later, the same agents saw this car traveling on a highway from Detroit to Grand Rapids.<sup>185</sup> They pulled the car over, slashed the upholstery in the seats, and discovered sixty-eight bottles of whiskey and gin.<sup>186</sup> The Court assumed there was probable cause for the search and did not consider what the appropriate scope of liquor searches should be. The extent of the intrusion that occurred, based on weak proof of a relatively petty crime, is a story common to police-citizen interactions.

*Carroll* was far from the only—or most egregious—example of police abuses in the searches for liquor in Michigan. Michigan adopted prohibitory laws in 1918, before the Volstead Act went into effect in 1920 and made alcohol possession a federal crime.<sup>187</sup> Foreshadowing events to come, ill-trained and ill-equipped zealous officers almost immediately began to make the public uncomfortable with their tactics. In 1919, troopers in an unmarked car suspected a car traveling between Ann Arbor and Detroit of bootlegging and ordered it to stop. Unsure of whether he was being stopped by police or robbed by criminals, the driver of the car did not comply. The officers therefore opened fire on the non-compliant automobile, hitting one of the passengers in the neck. No alcohol was discovered in the subsequent search.<sup>188</sup>

Between 1918 and 1920, because Michigan had forbidden the sale of alcohol, importation of alcohol into Michigan was largely concerned with circumventing the state's laws.<sup>189</sup> However, once liquor sales were prohibited in every state, Michigan became a gateway for much of the nation's alcohol from the British Empire. Historian Larry Englemann observed that in Michigan "prohibition enforcement was too often careless and even gratuitous, and many times its victims were not rumrunners but innocent bystanders. . . . Bullets of the police, many citizens concluded, were wreaking more havoc on an innocent public than the bottled beverages of the brewers ever did."<sup>190</sup>

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184. *Id.* at 134–35.

185. *Id.* at 135.

186. *Id.* at 136.

187. STEPHEN C. JOHNSON, *DETROIT BEER: A HISTORY OF BREWING IN THE MOTOR CITY* (2016).

188. ENGELMANN, *supra* note 11.

189. See RUSSELL M. MAGNAGHI, *UPPER PENINSULA OF MICHIGAN: A HISTORY* 162 (2017) (noting that as statewide Prohibition started two years before National Prohibition, Michiganders "had two years to develop means of importing or making their own alcohol supply").

190. ENGELMANN, *supra* note 11, at 97.

Michigan, not surprisingly, was the only state to have the exclusionary rule when National Prohibition went into effect.<sup>191</sup> *People v. Marxhausen* was decided by the Michigan Supreme Court on February 18, 1919, roughly eight months before Congress passed the Volstead Act over President Wilson's veto prohibiting the sale, distribution, or transportation of beverages containing more than 0.5% alcohol.<sup>192</sup> The Volstead Act must have been foreseeable to the Michigan Supreme Court. After a lengthy national campaign for Prohibition, the Eighteenth Amendment was certified one month before *Marxhausen* and authorized Congress to enact laws forbidding commerce that involved alcohol.<sup>193</sup> Even before federal enforcement efforts added tension to the situation, Michigan experienced considerable issues in the mistreatment of its citizens in efforts to enforce the state liquor laws. Asher Cornelius described the historical context that prompted the state's supreme court to adopt the rule:

A large part of the entire force of the Michigan State Police, numbering more than two hundred and fifty men, were employed from May 1, 1918, to Feb. 18, 1919, in patrolling truck highways of the state, day and night, stopped every automobile to search for intoxicating liquors. Sometimes the search was thorough; sometimes merely casual, by looking into the car; but none escaped. It can hardly be doubted that the Supreme Court of Michigan was cognizant of this condition of affairs at the time the *Marxhausen* case was rendered . . . and that such conditions were of influence in that decision.<sup>194</sup>

Prohibition encouraged a variety of troubling conduct that courts were doubtlessly trying to discourage. Not only those on the public payroll at the state or federal level were interested in zealously enforcing Prohibition in the 1920s. As in the 1850s, private groups particularly interested in the subject were permitted to join the effort. In the nineteenth century, Temperance Watchmen conducted liquor searches with the authorization of courts. In the early twentieth century, local law enforcement frequently allowed a far more sinister organization

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191. Iowa adopted the exclusionary rule in 1903, *State v. Sheridan*, 96 N.W. 730 (Iowa 1903), but rejected it in 1923, *State v. Rowley*, 195 N.W. 881 (Iowa 1923). South Carolina appeared to adopt the rule in 1916, *Town of Blackburg v. Beam*, 88 S.E. 441 (S.C. 1916), but in a year either limited the rule to alcohol cases or overruled it entirely, *State v. Harley*, 92 S.E. 1034, 1035 (S.C. 1917). There were other primitive versions of the exclusionary rule, most frequently involving invalid mid-nineteenth century liquor searches.

192. 171 N.W. 557 (Mich. 1919).

193. DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 106 (2010).

194. ASHER L. CORNELIUS, *THE LAW OF SEARCH AND SEIZURE: BEING A PRESENTATION IN THE FORM OF BRIEFS WHICH COVER ALL OF THE PHASES OF THE SUBJECT TOGETHER WITH PERTINENT FORMS* 54 n.63 (1925).

to assist in its efforts.<sup>195</sup> In adopting the exclusionary rule, the Florida Supreme Court contrasted the purity that prohibitionists were insisting upon with the unlawful tactics they were willing to tolerate. Interestingly, the Florida court referenced the Klan in its opinion as an example of the worst kind of abuses American society had known, perhaps taking a veiled shot at the company prohibitionists were willing to keep.

In this era, when earnest-thinking men and women are ardently trying to arouse public sentiment on the subject of strict law enforcement, it would seem most meet and proper for the courts to set the example, and not sanction law-breaking and constitutional violation in order to obtain testimony against another law-breaker. Better the mob and the Ku-Klux, than a conviction obtained in a temple of justice by testimony illegally acquired by agents of the government and officers of the law. The distinction between illegally acquired testimony and perjured testimony is not in kind, but in degree, and a conviction obtained by the use of either or both of these methods condemns the administration of justice at the same time that it condemns the prisoner. The liberties of the people cannot safely be intrusted [sic] to those who believe that violation of prohibition laws is more heinous than violations of the Constitution.<sup>196</sup>

Anti-Prohibition sentiment doubtlessly drove some of the movement toward the exclusionary rule. Some courts, the highest courts in Florida and Oklahoma among them, expressly compared the seriousness of liquor law violations to the unlawful searches that officers were conducting to discover such violations. Anti-Prohibition interests prompted Texas to be the only state in the nation to adopt the exclusionary rule.<sup>197</sup> Prohibition in Texas existed in no small part because its legislature was dominated by Klan-backed candidates.<sup>198</sup> As with all southern states at this time, virtually all elected officials were Democrats<sup>199</sup> and many wings of the party opposed Prohibition. When the Klan lost control of the Texas Democratic Party in 1924, the newly-elected legislature forbid the admission of unlawfully seized evidence in Texas courts the following year.<sup>200</sup>

Other supporters of the exclusionary rule were, however, clearly in favor of Prohibition. Justice William Anderson of the Mississippi Su-

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195. MCGIRR, *supra* note 10, at 132–42.

196. *Atz*, 94 So. at 322.

197. Dawson, *supra* note 129, at 195–98.

198. CHARLES C. ALEXANDER, *THE KU KLUX KLAN IN THE SOUTHWEST* 222 (1965).

199. MICHAEL PERMAN, *PURSUIT OF UNITY: A POLITICAL HISTORY OF THE AMERICAN SOUTH* 6–7 (2009).

200. ALEXANDER, *supra* note 198, at 121; V. O. KEY JR., *SOUTHERN POLITICS IN STATE AND NATION* 264 (1949); Dawson, *supra* note 129 at 195–98 (describing adoption of exclusionary rule by Texas Legislature).

preme Court fit into this camp. Prior to writing the opinion that gave the Magnolia State the exclusionary rule,<sup>201</sup> he dissented from an opinion that concluded Jamaica Ginger, with its ninety percent alcohol content, fit within the state's medicinal exception of its prohibitory law.<sup>202</sup> In that case, Anderson argued that allowing such exceptions would make enforcement too difficult.<sup>203</sup> However, Justice Anderson would later write the majority opinion that excluded reliable evidence of a liquor law violation.<sup>204</sup> He reasoned that this result was necessary to ensure the law was enforced consistent with the prohibition on unreasonable searches and seizures that was common to the constitutions of Mississippi and the United States.<sup>205</sup>

There was no particular pattern to which states adopted, or chose not to adopt, the exclusionary rule during Prohibition. West Virginia adopted the rule, but not Virginia;<sup>206</sup> Mississippi, but not Alabama;<sup>207</sup> South Dakota, but not North Dakota; Illinois, but not New York.<sup>208</sup> Michigan,<sup>209</sup> Washington,<sup>210</sup> and Kentucky<sup>211</sup> adopted the rule. While the timing of state decisions adopting the rule and the language of these decisions strongly point to Prohibition as the catalyst for the exclusionary rule, a map of the states themselves would not lead a casual observer to conclude that Prohibition explains the rule's emergence. States that appeared equally affected by Prohibition went both ways. The decision of the New York Court of Appeals to poetically reject the rule in 1926 illustrates the role Prohibition played.

New York's highest court in 1903, like every state but Iowa, refused to follow the U.S. Supreme Court's lead and adopt the exclusionary rule prior to Prohibition.<sup>212</sup> In the early 1920s, however, trial and in-

201. *Tucker v. State*, 90 So. 845 (Miss. 1922).

202. *Young v. State*, 102 So. 161 (Miss. 1924) (Anderson, J., dissenting).

203. *Id.*

204. *Tucker*, 90 So. at 845.

205. *Id.*

206. *State v. Wills*, 114 S.E. 261, 268 (W. Va. 1922); *Hall v. Commonwealth*, 121 S.E. 154, 155 (Va. 1924).

207. *State v. Gooder*, 234 N.W. 610, 613 (S.D. 1930); *State v. Fahn*, 205 N.W. 67, 70-71 (N.D. 1925).

208. *People v. Castree*, 143 N.E. 112, 117 (Ill. 1924); *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926).

209. *People v. Marxhausen*, 171 N.W. 557 (Mich. 1919).

210. *State v. Gibbons*, 203 P. 390 (Wash. 1922).

211. *Youman v. Commonwealth*, 224 S.W. 860, 867 (Ky. 1920).

212. *People v. Adams*, 68 N.E. 636, 640 (N.Y. 1903) (“[T]he court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property which are material and properly offered into evidence.”). Michigan adopted the rule prior to National Prohibition, but after the adoption of a statewide prohibitory law less than a year before the Volstead Act went into effect. *People v.*

intermediate appellate courts in the Empire State acted contrary to clear, controlling, and recent precedent and excluded the fruits of illegal searches.<sup>213</sup> Then, famously, in 1926, the New York Court of Appeals in *People v. Defore*<sup>214</sup> restated the position it previously took and rejected the exclusionary rule. The consequences of the exclusionary rule are stark, then-Judge Benjamin Cardozo poetically wrote for the majority, “[t]he criminal is to go free because the constable has blundered.”<sup>215</sup>

The timing of Cardozo’s opinion has been unappreciated (or completely unnoticed) by those who have considered the *Defore* decision. Prohibition had been quite controversial from the start in New York.<sup>216</sup> The gubernatorial election of 1922 had been a referendum on Prohibition. Al Smith, the anti-Prohibition candidate, won the election and in 1923 New York’s prohibitory law was repealed.<sup>217</sup> After 1923, New York was only affected by federal prohibitory laws. Unlike courts in virtually every state that had adopted the exclusionary rule, New York courts after 1923 did not have occasion to admit the fruits of searches for liquor.<sup>218</sup> The repeal of the state’s prohibitory law meant that state and local police would engage in liquor searches only to the extent they were assisting in federal prosecutions.<sup>219</sup> Therefore, a rule excluding unlawfully obtained evidence in

Marxhausen, 171 N.W. 557 (Mich. 1919). Michigan’s adoption of the rule is therefore best regarded as occurring during National Prohibition.

213. See, e.g., *People v. Kinney*, 185 N.Y.S. 645 (Crim. Ct. 1920) (ordering return of defendant’s revolver discovered in a search of his home for opium on the basis of an invalid warrant); *State v. One Hudson Cabriolet Auto.*, 116 Misc. 399, 404 (N.Y. Cty. Ct. 1921) (returning alcohol seized and dismissing action for unlawful alcohol possession); *People v. 738 Bottles of Intoxicating Liquors*, 116 Misc. 252, 256–57 (N.Y. Cty. Ct. 1921) (holding that dismissal and return of alcohol is the appropriate remedy for unlawfully seized alcohol); *People v. Jakira*, 193 N.Y.S. 306, 314 (N.Y. Gen. Term 1922); *In re Search Warrant to Search & Seize Intoxicating Liquors at 52 Front St.*, 190 N.Y.S. 574, 576 (N.Y. Cty. Ct. 1921).

214. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

215. *Id.*

216. MICHAEL LERNER, *DRY MANHATTAN* 41 (2007).

217. See ROBERT A. SLAYTON, *EMPIRE STATESMAN: THE RISE AND REDEMPTION OF AL SMITH* 125–39 (2001); Comment, *Enforcement of the 18th Amendment in the Absence of State Legislation*, 36 *YALE L.J.* 260 (1926) (observing New York’s repeal of the Mullan-Gage Act); Post, *supra* note 73, at 32–33 (discussing Al Smith’s view that the states were not required to assist the federal prohibitory effort); EDWARD BEHR, *PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA* 167 (New York, Arcade Publishing 1996).

218. Maryland never adopted a state analog to the federal prohibitory law. Eugene A. Gilmore, *Liberalizing the Volstead Act*, 18 *IOWA L. REV.* 22, 29 n.19 (1932–1933).

219. *People v. Conti*, 216 N.Y.S. 442, 448–49 (Sup. Ct. 1926); *People v. Wade*, 217 N.Y.S. 486, 487 (Ct. Spec. Sess. 1926). See Orin Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 *HARV. L. REV.* 476, 504–05 (2011–2012); *Byars v. United States*, 273 U.S. 28, 30–33 (1927); *Gambino v. United States*, 275 U.S. 310, 515–16 (1927).

New York courts would do nothing to encourage police to comply with constitutional limits while conducting searches for liquor.

By the end of Prohibition, eighteen states had adopted the exclusionary rule.<sup>220</sup> Between Prohibition's repeal in 1933 and the Supreme Court's decision in *Mapp v. Ohio* in 1961, nine more states adopted some version of the rule, but this number is deceptive. Alaska and Hawaii were admitted into the Union during this period and prior to their admission territorial courts were compelled to follow the federal rule; thus, the newly admitted states' courts were merely following existing precedent.<sup>221</sup> Three of those states, Alabama, Maryland, and New Jersey, adopted the rule in statutes that limited application to specific types of cases. Alabama and New Jersey limited application of the rule to liquor cases,<sup>222</sup> while Maryland limited the rule to misdemeanor cases.<sup>223</sup> Only four jurisdictions adopted a version that applied to all types of crimes after Prohibition: California,<sup>224</sup> Delaware,<sup>225</sup> North Carolina,<sup>226</sup> and Rhode Island.<sup>227</sup> Notably, the California Supreme Court was responding to a unique problem of search and seizure abuses in Los Angeles that rivaled the lawlessness of Prohibition enforcement.

Taking a nose-count of states with the exclusionary rule in the aftermath of Prohibition does not necessarily provide a meaningful assessment of the country's view of the rule or its wisdom in a world without prohibitory laws. The minimal inference from the four new states to adopt the rule in this period is undermined by considering aspects of the rules in three of these states. The Supreme Court of Oregon questioned whether its Prohibition-era precedent establishing the rule was dicta.<sup>228</sup> Michigan amended its constitution to allow the admission of firearms and bombs regardless of the means by which they were discovered.<sup>229</sup> The South Dakota Legislature provided that any evidence seized by an officer acting with a warrant would be admissible regard-

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220. See *supra* note 129 and accompanying text. .

221. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1379 n.102 (2004).

222. *Oldham v. State*, 67 So. 55, 55 (Ala. 1953); ALA. CODE tit. 29, §210 (Supp. 1955); N.J. STAT. ANN. 33:1-62 (1930).

223. *Hitzelberger v. State*, 197 A. 605, 611 (Md. 1938) (describing statute).

224. *People v. Cahan*, 282 P.2d 905, 911, 915 (Cal. 1955).

225. *Rickards v. State*, 77 A.2d 199, 205 (Del. 1950).

226. *State v. Mills*, 98 S.E. 329, 335 (N.C. 1957). Interestingly, *Mills* involved a liquor prosecution. *Id.*

227. *State v. Hillman*, 125 A.2d 94, 96 (R.I. 1956).

228. *State v. Hoover*, 347 P.2d 69, 73 (Ore. 1959).

229. *People v. Gonzales*, 97 N.W.2d 16, 22 (Mich. 1959).



less of whether the warrant was lawfully issued.<sup>230</sup> With the lack of evidence of an emerging consensus, *Mapp v. Ohio* required every state court in the United States, in a post-Prohibition world, to exclude illegally obtained but reliable evidence.

#### IV. MAPP'S MISSED OPPORTUNITY

The Supreme Court decided *Mapp v. Ohio* at a time when police dogs and water cannons were being unleashed on civil rights marchers, and police brutality and wrongful shooting claims were about to take America to a breaking point in urban ghettos.<sup>231</sup> As the Court acknowledged within a few years of *Mapp*, the decision did nothing to address improper police tactics unrelated to the search for physical evidence.<sup>232</sup> Yet illegal searches and seizures were not a major concern in American society at the time—police misconduct was, but not misconduct in the search for evidence.<sup>233</sup> The exclusionary rule gained acceptance in many state courts at a time when illegal searches were a serious societal concern. The rule, however, was imposed on the remaining state courts when other issues were far more pressing. Both the historical context and the *Mapp* decision itself reveal that the remedy adopted was misplaced. As the Supreme Court continues to limit the scope of the exclusionary rule, the future of the rule is very much in doubt.<sup>234</sup> Fidelity to the actual societal concerns at the time of *Mapp* requires addressing long-existing concerns about police force. This is true regardless of whether the exclusionary rule is the appropriate mechanism for addressing those concerns.

Official abuses in the search for liquor were part of the national discussion in the early 1920s and cases involving questionable uses of force began attracting attention in the 1950s. A police shooting of an unarmed and uniformed African American veteran in New York City

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230. *State v. Lane*, 82 N.W.2d 286, 289 (S.D. 1957).

231. CHRISTOPHER B. STRAIN, *THE LONG SIXTIES: AMERICA, 1955–1973*, at 149–54 (2016).

232. *Terry v. Ohio*, 392 U.S. 1, 14 (1967); see also Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist History*, 74 *Miss. L. J.* 423, 457–58 (2004) (expressing surprise that even though the Warren Court was sympathetic to concerns about police, its decision in *Terry* “revealed a Court that was sympathetic to maintaining order over the black population”).

233. *Cahan*, 282 P.2d at 913 (“[P]ublic opinion is not aroused as it is in the case of other violations of constitutional rights. Illegal searches and seizures lack the obvious brutality of coerced confessions and the third degree and do not so clearly strike at the very basis of our civil liberties as do unfair trials or the lynching of even an admitted murderer.”). *Cahan*’s description of the public’s tolerance for search and seizure violations certainly would not have been true from 1920 to 1933.

234. MACLIN, *supra* note 1, at 349 (2013) (“[T]he current Court appears positioned to repeal the exclusionary rule altogether.”).

provoked outrage and national coverage.<sup>235</sup> The just-discharged soldier was shot by two white officers in December 1950.<sup>236</sup> Every elected official in Harlem attended a rally denouncing the shooting and images of the slain soldier were distributed to the national media.<sup>237</sup> An all-white New York City grand jury heard the testimony of forty-five witnesses, yet no charges were ever brought against the officers.<sup>238</sup> One year later, another Harlem resident, crippled by polio, was beaten unconscious and kicked in the face by officers in front of his home.<sup>239</sup> The victim's uncle, a New York trial judge, issued a public statement expressing his outrage and observing that in thirty years no New York City officer had been prosecuted for excessive force or unjustified homicide.<sup>240</sup>

Images of police brutality, often abusive treatment of civil rights marchers, were displayed on every American television on a regular basis.<sup>241</sup> Such abuses by police were not limited to protestors who put themselves in harm's way. In 1951, the Civil Rights Congress told the United Nations, "Now there is not a great American city . . . that is not disgraced by the wanton killing of innocent Negroes. It is no longer a sectional phenomena."<sup>242</sup>

The year of the *Mapp* decision, 1961, was a particularly bad year for police community relations in New Orleans.<sup>243</sup> Riots in 1960 prompted by the desegregation of schools put the police department on edge. One man was shot and killed when he was stopped for a broken taillight and reached to get his identification.<sup>244</sup> An unarmed eleven-year-old boy was shot five times and killed as he ran from the scene of a burglary.<sup>245</sup> Two weeks later, a burglary suspect was killed in his cell as police attempted to subdue him.<sup>246</sup> As in other cities, protests followed these police killings.<sup>247</sup> Black communities recognized that police were consciously treating Black citizens differently

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235. MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POST-WAR NEW YORK 191-93* (Harvard Univ. Press 2003).

236. *Id.* at 192.

237. *Id.* at 193.

238. *Id.*

239. *Id.*

240. *Id.* at 193-94.

241. See LEONARD N. MOORE, *BLACK RAGE IN NEW ORLEANS: POLICE BRUTALITY AND AFRICAN AMERICAN ACTIVISM FROM WORLD WAR II TO HURRICANE KATRINA* 43 (2010).

242. BIONDI, *supra* note 235 at 191.

243. MOORE, *supra* note 241, at 49-51.

244. *Id.* at 49.

245. *Id.* at 49.

246. *Id.* at 50.

247. *Id.* at 49-51.

than white citizens. Describing his policy of directing police enforcement in Black neighborhoods, Los Angeles Police Chief William Parker said in 1957, “I don’t think you can throw genes out of the question when you discuss the behavior of people.”<sup>248</sup>

Against this backdrop of extraordinary racial tension and police brutality, the Supreme Court decided *Mapp v. Ohio*, perhaps the single most important case in the area of investigatory criminal procedure.<sup>249</sup> The Court in *Mapp* adopted the exclusionary rule for one type of police misconduct, unreasonable searches and seizures for reliable evidence, finding that other methods of deterring this sort of misconduct had proven ineffective.<sup>250</sup> Thus, the Court left these ineffective mechanisms in place to address the most serious police misconduct of the late 1950s—harassment, excessive force, and unjustified shootings.

The facts of *Mapp* were far from typical. On May 23, 1957, the house of Don King, the future fight promoter, was bombed.<sup>251</sup> At the time, King was a bookmaker in Cleveland and one of his rivals had attempted to take him out. King gave the police a lead, identifying racketeer Alex Shonder Burns as a likely suspect because King had refused to pay him \$200 a week in protection money.<sup>252</sup> Another racketeer, Virgil Ogletree, also involved in illegal gambling and organized crime, was believed to have information about the bombing of King’s home.<sup>253</sup> Police focused their attention on the residence of Dollree Mapp, on the top floor of a two-family dwelling, where Ogletree was believed to be hiding.<sup>254</sup> They sought to question Ogletree about the bombing and discover any evidence that he was involved with a competing gambling enterprise.<sup>255</sup>

Police knocked on Ms. Mapp’s door.<sup>256</sup> Before answering, she called her attorney and then told the officers that they could not enter

248. JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY OF THE BLACK PANTHER PARTY* 28 (2013).

249. The exclusionary rule, which *Mapp v. Ohio* imposed on all the states, has been described as “giv[ing] force and effect” to the Fourth Amendment. *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, “Case by Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974)). It has also been described as “the primary mechanism for enforcing the [F]ourth [A]mendment.” Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974).

250. *Mapp v. Ohio*, 367 U.S. 643, 652–55 (1961).

251. PRISCILLA MACHADO ZOTTI, *INJUSTICE FOR ALL: MAPP V. OHIO AND THE FOURTH AMENDMENT 2* (2005).

252. *Id.* at 2, 7–8.

253. *Id.* at 16–17.

254. *Id.* at 17.

255. *Id.*

256. *Mapp v. Ohio*, 367 U.S. 643, 644 (1961).

without a warrant.<sup>257</sup> The officers kept watch over the residence for three hours and then forcibly entered without a warrant.<sup>258</sup> Ms. Mapp demanded to see the warrant, at which point one of the officers held up a piece of paper.<sup>259</sup> Ms. Mapp grabbed the paper out of his hand and shoved it down her shirt.<sup>260</sup> A tussle followed as officers retrieved the paper, handcuffed her, and proceeded to search her home.<sup>261</sup> Her attorney arrived on the scene after the police entered the home, but was denied access.<sup>262</sup> In the course of the thorough search, officers discovered pornographic materials for which Ms. Mapp was prosecuted, but neither Virgil Ogletree, nor any evidence of illegal gambling was discovered.<sup>263</sup>

Commentators have frequently assumed that *Mapp* was driven by the Court's concern about police misconduct at this particular point in history. Corinna Lain correctly observed that "[b]y 1961, the American public was more concerned with illegal law enforcement practices than it had been in years past."<sup>264</sup> Historian Martha Biondi observed, "The grassroots struggle for police reform stands as an important historical backdrop to the landmark U.S. Supreme Court rulings of the 1960s that restrained police behavior and expanded the rights of an accused person in state criminal proceedings."<sup>265</sup> A *New York Times* reporter in 1962 described *Mapp* as consistent with "a national moral sentiment" against police misconduct.<sup>266</sup> "Americans are plainly less willing to tolerate police misbehavior in any state," he wrote.<sup>267</sup> If these commentators are correct, and intuition alone leads one to think they are, then *Mapp* is puzzling. In its frustration with police, the Supreme Court addressed a type of misconduct for which California Chief Justice Roger Traynor concluded "public opinion is not aroused."<sup>268</sup>

Remarkably, this line was from Chief Justice Traynor's opinion that adopted the exclusionary rule in California—an opinion that the Supreme Court found particularly compelling. Noting that

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257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Mapp v. Ohio*, 367 U.S. 643, 644 (1961).

263. *Id.* at 645.

264. Lain, *supra* note 221, at 1382.

265. BIONDI, *supra* note 235, at 207.

266. Lain, *supra* note 221, at 1383.

267. *Id.* (quoting Anthony Lewis, *Historic Change in the Supreme Court*, N.Y. TIMES, June 17, 1962, § 6, at 7.).

268. *People v. Cahan*, 282 P.2d 905, 913 (Cal. 1955).

“[s]ignificantly, among those now following the rule is California,” the Supreme Court in *Mapp* embraced practically verbatim the reasoning and empirical conclusions of Chief Justice Traynor.<sup>269</sup> The Supreme Court concluded that state courts, like federal courts, were required to exclude unlawfully obtained evidence partially due to California’s experience that other methods of deterring illegal searches and seizures had proven “worthless and futile.”<sup>270</sup> The Court offered no authority for this proposition.<sup>271</sup> The only piece of evidence in the opinion that could be used to support this claim is that by the time *Mapp* was decided a majority of states had embraced the exclusionary rule.<sup>272</sup> The probative value of this evidence is diminished when it is realized that the overwhelming majority of states to adopt the rule did so when illegal searches were rampant and frequently complained of. By the 1960s, searches were not society’s primary concern with the police.

In fact, illegal search and seizures do not seem to be the actual issue the Court is concerned with in *Mapp*. The Court’s description of the facts does not reserve its harshest criticism for the warrantless entry itself, but the lack of dignity officers afforded Ms. Mapp. The gravest concerns were directed at officers’ actions that would have been permitted if a warrant had been obtained, actions that the decision did nothing to address:

When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp’s attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, *in this highhanded manner*, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the “warrant” and placed it in her bosom. *A struggle ensued* in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been “belligerent” in resisting their official rescue of the “warrant” from her person. *Running roughshod* over appellant, a policeman “grabbed” her, “twisted [her] hand,” and she “yelled [and] pleaded with him” because “it was hurting.” Appellant, in handcuffs, was then *forcibly taken* upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The

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269. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

270. *Id.* at 652.

271. *Id.*

272. *Id.* at 651.

search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen, and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.<sup>273</sup>

If the officers had a warrant to look for Ogletree and evidence of his gambling activities, there would have been no objection to the officers' struggling with Ms. Mapp, handcuffing her, or taking her with them as they searched. Even the thoroughness of the search would have been justified as evidence of Ogletree's gambling activities could have been concealed in any part of the house.<sup>274</sup> The officers' handling of Ms. Mapp, an African American woman, was the focus of the Court's factual description and a microcosm of national concerns. Search and seizure issues—the only issues addressed in *Mapp*—were a sideshow both in the Court's description of the case and in the national conversation about police.

Dollree Mapp's conviction, however, was reversed because officers failed to obtain a warrant to search her home, not because of how they went about searching it—or how they interacted with her during the search. If the Court's concern had truly been the lack of judicial approval of the officers' entry and search of her home, the opinion would have read very differently. There certainly is no dearth of Supreme Court opinions that extol the virtues of warrants. In *Katz v. United States*, the Supreme Court considered whether the Fourth Amendment precluded officers from placing a listening device on the outside of a phone booth.<sup>275</sup> The Court acknowledged in *Katz* that the officers had “acted in an entirely defensible manner,” beginning their eavesdropping only after they “had a strong probability that [Katz] was using the telephone to transmit gambling information,” and then limiting their surveillance “both in scope and duration . . . to the specific purpose of establishing the content of [Katz's] unlawful telephonic communications.”<sup>276</sup> These officers “acted with restraint” in listening in only after they had an appropriate basis for doing so and limited their surveillance.<sup>277</sup> The Court nevertheless held that it could not receive the evidence obtained in this method because “this

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273. *Id.* at 644 (emphasis added).

274. *See Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (holding that the object of the search determines scope of the search).

275. 389 U.S. 347 (1967).

276. *Id.* at 354.

277. *Id.* at 356.

restrain was imposed by the agents themselves, not a judicial officer.”<sup>278</sup>

Similarly, in *Mincey v. Arizona* the Court extolled the virtues of warrants.<sup>279</sup> Officers in *Mincey* responded to a murder scene and began to collect evidence inside the home where the murder occurred without obtaining a warrant.<sup>280</sup> Even though it was undisputed that a magistrate would have issued a search warrant to process the crime scene, the Court concluded that “it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.”<sup>281</sup> There are exceptional circumstances that permit searches without warrants, but the inevitability that such a warrant would be granted is not a basis for the exception. *Mincey*’s facts perhaps make it the Supreme Court’s greatest celebration of the virtues of judicial oversight of an officer’s investigation.

The Court has even used poetic language in describing the virtues of warrants. In *Johnson v. United States*, an officer smelled the defendant smoking opium in a Seattle hotel and knocked on the door, but was denied entry when he introduced himself as a police officer. The officer therefore entered and searched the hotel room, finding evidence of drug use.<sup>282</sup> The Court observed that “[a]t the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant.”<sup>283</sup> Robert Jackson, writing the majority opinion, rejected the argument that this fact was relevant to the disposition of the case. Searches are not reasonable merely because a warrant could have been issued, the Court held in one of its most memorable turns of a phrase:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.<sup>284</sup>

By contrast, *Mapp* does not chastise the officers who invaded Dolree Mapp’s house for their failure to stop by the magistrate’s cham-

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278. *Id.*

279. 437 U.S. 385 (1978).

280. *Id.* at 387–88.

281. *Id.* at 390.

282. 333 U.S. 10, 12 (1948).

283. *Id.* at 13.

284. *Id.* at 13–14.

bers on the way to her house. The Court's description of the officers' misdeeds addresses only the manhandling and restraint of Ms. Mapp, not omission of a "neutral and detached magistrate" by officers "engaged in the often competitive enterprise of ferreting out crime." The Court described a case that was about police brutality, or at a minimum police harassment, in the course of a search and used those facts to announce a rule preventing warrantless searches.

While the Court's choice of doctrine in *Mapp* is difficult to explain in light of the social context, *Cahan*, the California decision upon which the Court relied so heavily, is rather easy to explain. Los Angeles police officers in the 1950s—under the orders of Police Commissioner William Parker—were engaging in the same sort of wholesale disrespect for limits on search and seizure that prompted many state courts to adopt the exclusionary rule. Understanding the context of *Mapp v. Ohio* depends on the political factors at play in California at that time. Fearing that Los Angeles was about to become the next Las Vegas, with city officials tacitly accepting illegal gambling, Commissioner Parker engaged in a very aggressive campaign against gambling.<sup>285</sup> Wiretapping would have been an important tool in Parker's campaign against gambling, but both federal and California law had prohibited it since Prohibition.<sup>286</sup>

California also forbade dictaphones, listening devices unattached to phone lines colloquially known as bugs, but officers could install such devices without the cooperation of a phone company.<sup>287</sup> To obtain the conversations the LAPD required to investigate gamblers, officers unlawfully entered businesses and homes and installed dictaphones.<sup>288</sup> The entry to place these bugs violated the Fourth Amendment's prohibitions on unreasonable searches and seizures and the bugs themselves violated the spirit of state and federal prohibitions on wiretapping. California, however, had no exclusionary rule and illegal entries by Chief Parker's officers had not been deterred by the threat of civil sanctions.<sup>289</sup>

Chief Parker's zeal had drawn the ire of the United States Supreme Court just one year prior to the *Cahan* decision. In 1954, the Court in *Irvine v. California* considered the consequences of an unlawful entry

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285. JOHN BUNTIN, *L.A. NOIR: THE STRUGGLE FOR THE SOUL OF AMERICA'S MOST SEDUCTIVE CITY* 202–03 (2009).

286. *Id.* at 208.

287. *See Berger v. New York*, 388 U.S. 41, 47–49 (1967) (describing history of wiretapping, as well as the laws of individual states on wiretapping and dictaphones).

288. BUNTIN, *supra* note 285, at 209. Remarkably, dictaphones that did not connect with a telephone line were not regarded as wiretapping. *Id.*

289. *Id.* at 203–09.



into a home by LAPD officers to install a transmitting device.<sup>290</sup> Officers took a locksmith to the home of a suspected gambler who made a key to the front door.<sup>291</sup> Two days later, officers used this key to enter the home, install a bug, and drill a hole in the roof through which wires were strung so that police in the neighbors' garage could overhear conversations that occurred in the house.<sup>292</sup> Officers later re-entered the home to move the location of the microphone.<sup>293</sup>

The United States Supreme Court condemned the warrantless entry into the home with four justices observing that "few police measures have come to our attention that more flagrantly, deliberately, or persistently violated the fundamental principle declared by the Fourth Amendment . . . ."<sup>294</sup> The Court even observed that the actions of the officers violated federal criminal laws and directed the clerk of the Court to forward a copy of its opinion to the Attorney General of the United States.<sup>295</sup> Nevertheless, the Court held that the decision of whether evidence should be excluded as a result of the illegal manner in which it was obtained was a matter for the states to decide, as the Court had previously ruled in *Wolf v. Colorado*.<sup>296</sup> The four-justice plurality did invite state courts to revisit their decisions permitting the admission of illegally obtained evidence. California did so the following year, in another case involving an illegal entry into a home by the LAPD to install a dictaphone.

The California Supreme Court adopted the exclusionary rule in this case, *People v. Cahan*, which served as a substantial basis for the decision in *Mapp*. The facts of *Cahan* were nearly identical to the facts of *Irvine*. In each case, listening devices were hidden in private homes and weeks of intimate conversations were intercepted in an effort to gather evidence of illegal gambling.<sup>297</sup> The modus operandi of the LAPD in its investigation of gambling cases rivaled the search and seizure tactics of officers attempting to enforce Prohibition.<sup>298</sup>

Nowhere else in the country did gambling enforcement prompt a change in search and seizure laws. Three other states adopted the exclusionary rule between the end of Prohibition and the decision in

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290. 347 U.S. 128 (1954).

291. *Id.* at 130-31.

292. *Id.* at 131.

293. *Id.* at 130-31.

294. *Id.* at 132.

295. *Id.* at 137-38.

296. *Irvine v. California*, 347 U.S. 128 (1954); *see also* *Wolf v. Colorado*, 338 U.S. 25, 31-33 (1949).

297. *People v. Cahan*, 282 P.2d 905, 905-06 (Cal. 1955); *Irvine*, 347 U.S. at 130-31.

298. *Cahan*, 282 P.2d at 906.

*Mapp*, and gambling enforcement had nothing to do with these changes.<sup>299</sup> The United States Supreme Court in *Mapp* assumed that the California Supreme Court's *Cahan* decision addressed a national concern. The exact opposite appears to be true. Chief Justice Traynor appears to have been addressing a local concern. Citizens of Los Angeles were living in a world in which the privacy and liberty concerns of Prohibition were still very much alive. Elsewhere, police brutality concerns dwarfed any concerns about search and seizure, yet *Mapp's* ruling was limited and only addressed these local search and seizure issues.

The opportunity *Mapp* missed became painfully apparent just four years later when officers in California performed an arrest in a manner that ignited a literal firestorm. The Watts Riots, the most deadly and costly urban uprisings in the country to that point, were sparked by efforts to subdue a drunk driving suspect and the suspect's mother who may have been interfering with the arrest.<sup>300</sup> On August 11, 1965, the California Highway Patrol stopped Marquette Frye in South Los Angeles suspecting he was intoxicated.<sup>301</sup> As one would expect, the facts of the encounter were disputed. At some point during the stop, Marquette's mother Rena Frye, who lived nearby, arrived.<sup>302</sup> Ms. Frye began to chastise either her son or the officers.<sup>303</sup> One officer claimed Ms. Frye spat upon him.<sup>304</sup> There were conflicting accounts over whether Ms. Frye then physically interfered with efforts to arrest her son. Some sort of physical tussle ensued with one officer pulling a gun on Marquette before he and his mother were placed in police cars.<sup>305</sup>

The crowd of onlookers did not perceive this as an isolated incident. Police brutality against African Americans had been a frequent complaint in Los Angeles as it had in a number of American cities. The tense standoff became particularly violent when false rumors spread throughout the crowd that Rena Frye had been physically struck by officers and that a pregnant woman in the crowd had also been assaulted.<sup>306</sup> Rocks, bottles, and pieces of wood and concrete were hurled at the officers. Six days of looting and arson followed, with at

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299. *State v. Mills*, 246 N.C. 237 (N.C. 1957); *State v. Hillman*, 125 A.2d 96 (R.I. 1956); *Rickards v. State*, 77 A.2d 199 (Del. 1950).

300. GERALD HORNE, *FIRE THIS TIME: THE WATTS UPRISING AND THE 1960s*, at 54 (1995).

301. *Id.*

302. *Id.*

303. *Id.* at 55.

304. *Id.*

305. *Id.* at 54.

306. HORNE, *supra* note 300, at 55.

least thirty-four deaths, injury to over a thousand people, and \$40 million worth of property damage.<sup>307</sup>

Watts was far from the only city to erupt during this turbulent time. Police brutality claims also sparked riots in Newark, Detroit, and Cleveland.<sup>308</sup> As a result of allegations of unjustified uses of police force against African Americans, the Black Panther Party developed in Oakland, California.<sup>309</sup> While African Americans were the most frequent victims of police harassment, they were not the only groups that were viewed suspiciously by police or distrusted officers. The activities of communists, hippies, and gays were also rigorously scrutinized by police.<sup>310</sup>

In this atmosphere of profound distrust between police and African American citizens, the United States Supreme Court took up the case of *Terry v. Ohio*.<sup>311</sup> For the first time, the Supreme Court was asked to consider the right of an officer to stop and frisk a citizen on the basis of some level of suspicion less than probable cause.<sup>312</sup> Though the facts of *Terry* did not expressly require the Court to answer this question, the parties assumed that an implicit issue in the case was the legitimacy of field interrogations, something the Court left for another time.<sup>313</sup>

In *Terry*, Cleveland Police Officer Martin McFadden was patrolling the streets when he saw three men acting suspiciously in front of a jewelry store.<sup>314</sup> Two of the men were standing on the sidewalk and took turns walking past the jewelry store, peering in the window each time.<sup>315</sup> The two men took between ten and twelve trips each past the store window.<sup>316</sup> Officer McFadden confronted them and asked for their names.<sup>317</sup> Officer McFadden frisked the men, discovering two of them were armed.<sup>318</sup> These two men were charged with unlawful possession of a concealed weapon.<sup>319</sup>

307. *Id.* at 55–56.

308. MOORE, *supra* note 241, at 12.

309. BLOOM & MARTIN, *supra* note 248, at 20–28.

310. See Joseph Gerald Woods, *The Progressives and the Police: Urban Police and the Professionalism of the Los Angeles Police* (1973) (unpublished Ph.D. Dissertation, UCLA) (on file with author).

311. 392 U.S. 1 (1968).

312. *Id.* at 9–10 (noting that the case presented “issues that have never before been presented to this Court”).

313. *Id.* at 15–16.

314. *Id.* at 1.

315. *Id.*

316. *Id.*

317. *Terry v. Ohio*, 392 U.S. 1, 1 (1968).

318. *Id.*

319. *Id.* at 4–8.

The case presented the Supreme Court with a disconnect between theory and practice. Officer McFadden's actions were consistent with a common practice in the 1960s known as "field interrogations." Officers routinely stopped individuals they found suspicious and questioned them and for their own safety routinely frisked those stopped.<sup>320</sup> Fourth Amendment doctrines at that point, however, recognized no category of suspicion justifying an investigative detention or pat-down.<sup>321</sup> Common law judges at the time the Bill of Rights was drafted had no occasion to consider the limits of field interrogations. Eighteenth century officers by and large conducted no investigations. Suspects were questioned only by magistrates after constables arrested them on the basis of probable cause, and generally with a warrant for the suspect's arrest. Modern police departments were charged with maintaining order and investigating crime. Field interrogations are part of the modern model of policing, but certainly not the early American model. With the heightened racial tensions of the 1960s this tactic would proliferate in ways that were racially biased. The Fourth Amendment lexicon in 1968, however, lacked a way to describe field interrogations or evaluate their reasonableness.

The NAACP filed an amicus brief in *Terry* opposing field interrogations, arguing that distrust between minority communities and the police could be attributed to this practice. Quoting a 1967 report by the National Crime Commission on the Police, the NAACP contended that:

Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt "aggressive patrols" in which officers are encouraged to stop and question persons on the streets who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.<sup>322</sup>

This practice disproportionately affected the minority communities of Los Angeles. Black residents of Watts and other African American neighborhoods were routinely frisked due to a Los Angeles Police Department policy of aggressively patrolling those neighborhoods.<sup>323</sup>

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320. See George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L. J. 849, 855 ("In retrospect, it is clear that the Court's objective in the *Terry* trilogy was merely to announce the framework that it would use to address nonarrest detention issues until it had more experience in the nonarrest detention area.").

321. Jeffrey Fagan, *Terry's Original Sin*, 2016 U. CHI. LEGAL F. 43, 50–51 (describing the new framework created).

322. Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae at 61, *Sibron v. New York*, 392 U.S. 40 (1968) (Nos. 63, 74, 67) (quoting President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 184 (1967)).

323. BLOOM & MARTIN, *supra* note 248, at 28.

The offensive nature of aggressive field interrogation practices cannot be understated. *Terry v. Ohio* permitted officers to briefly detain and frisk individuals on the streets upon a showing of an articulable basis for suspicion, a standard less than probable cause.<sup>324</sup> If the officer additionally had reasonable suspicion that the suspect was armed and dangerous, *Terry* further permitted the officer to perform a pat-down for weapons.<sup>325</sup>

The Court was not unsympathetic to the concerns raised by the NAACP, but correctly observed that the “exclusionary rule has its limitations . . . as a tool of judicial control” and “in some contexts the rule is ineffective as a deterrent.”<sup>326</sup> If the goal of a frisk is not to obtain evidence, the exclusionary rule the Court required of the states in *Mapp* was of no use. The Court further observed, however, that the “wholesale harassment by certain elements of the police community of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.”<sup>327</sup> Unjustified uses of non-lethal and lethal force obviously also fell outside the scope of regulation created in *Mapp*.

Unquestionably, the Court was correct about this conclusion. Combining the Court’s reasoning in *Mapp* and *Terry*, however, leads to an unsatisfying result. The exclusionary rule was necessary, the Court informed us in *Mapp*, because other methods of curbing police misconduct had proven ineffective. Yet in *Terry*, the Court acknowledged that police harassment was occurring and that the exclusionary rule could do nothing to prevent it. *Terry* thus identified a wrong for which it provided no remedy. This disconnect was a problem of the Court’s own making.

Only seven years prior, *Mapp* supplemented the ineffective deterrent mechanisms of tort damages and internal police regulations with the exclusionary rule. The Court had elected a remedy capable of regulating Prohibition Era fears of physical searches, but not the well-grounded fears of African Americans about policing in the 1960s. And the election of this particular remedy left unregulated a range of

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324. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

325. *Id.* at 21. A federal district judge enjoined the aggressive use of this procedure in New York City despite the precedent in *Terry*. The court’s injunction did not end this story. The claim that aggressive field interrogations violate the Constitution had a quite tortured process through the courts, ending in a consent decree. Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2400–01 (2017).

326. *Id.* at 23; Fagan, *supra* note 321, at 49 (“In effect, the Court said that the exclusionary rule was powerless and irrelevant to the realities of contemporary beat policing.”).

327. *Id.* at 14–15.

police activity unrelated to the search for evidence, from probing questions to lethal force.

Like claims of harassment in *Terry*, excessive use of force by police officers is believed to disproportionately affect minority communities.<sup>328</sup> Tort actions are particularly unable to define the parameters for the excessive use of force. Courts, in an effort to prevent crushing civil liability, second-guessing officers, and risking officer safety have allowed claims to go forward only if plaintiffs can get past an officer's defense of qualified immunity—thus, it must be plain to any reasonable officer that his use of force was unreasonable.<sup>329</sup> Further, courts have analyzed most use of force cases as split-second decisions, giving further deference to officers. When split-second decisions are involved, this deference is certainly justified. But many incidents of police force involve opportunities to call for backup, engage in tactical retreat, or delay a suspect in order to avoid a life-or-death decision.<sup>330</sup> A tort remedy that allows a jury to assess damages risks over-detering police interventions, or worse, might force an officer to choose between a lawsuit and his life. Just as juries might undervalue an illegal search, the current scheme is designed to prevent a risk that the jury will over compensate a victim of police violence, creating incentives for officers that place themselves or the public at risk.

A meaningful alternative to the exclusionary rule—one that gives judges an opportunity to pass on the legitimacy of police force in a setting in which over compensation could be prevented—was lost when *Mapp v. Ohio* adopted a remedy aimed only to prevent illegal searches. As an example, injunctions against Fourth Amendment violations that give judges the flexibility to tailor the sanction would prevent the problem of over compensation.<sup>331</sup> Judges, not juries, would thus be entrusted to apportion remedies based on the severity of the violation, subject to review by appellate courts.<sup>332</sup> Importantly, such a mechanism would require judges to pass on the legitimacy of the use of force. Just as the exclusionary rule has provided officers guidance on the appropriateness of searches, such a system would give officers

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328. Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killing*, 9 HARV. BLACKLETTER L. J. 1, 1 (1992) (describing studies examining causes for “disproportionately high rates of the use of excessive force or deadly force against minorities”).

329. Diana Hassell, *Excessive Reasonableness*, 43 IND. L. REV. 117, 117–18 (2009).

330. Seth Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 864–69 (2014); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 228–36 (2017).

331. Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI. KENT L. REV. 241, 241 (2010).

332. Joshua P. Davis, *Taking Uncertainty Seriously: Reversing Injunction Doctrine*, 34 RUTGERS L. J. 363, 385 (2003).

and police academies a body of law delineating the limits on the use of force. No doubt, fashioning such a remedy would have been difficult, and the rule messy. But if *Mapp* had addressed the concerns of the day and the apparent concerns of the Court at the time, then the Court's criminal procedure refinements over the past fifty years would not have been incorrectly limited to a societal concern that was prominent in the 1920s.

## V. CONCLUSION

*Mapp v. Ohio* was a decision from another time. It adapted a Prohibition era remedy to a world in which police violence was of far greater concern than illegal searches and seizures. As a result of *Mapp*, officers now know when they are allowed to search the trunk of a car, but have no idea when they need to engage in a tactical retreat, avoid using a chokehold, or wait for backup before applying force to subdue a suspect.<sup>333</sup> Creativity and innovation would have been required to fashion a remedy in 1961 that addressed both the illegal searches and the questionable use of force. Courts prefer not to be innovators. The exclusionary rule had a long pedigree—it existed in some form for at least a century before *Mapp*.

In adapting this remedy to a post-Prohibition world, however, the Court adopted a rule that was not well-received by the public. In 1921, the paradigmatic application of the exclusionary rule prevented a bootlegging conviction. In 1961 and thereafter, the exclusionary rule was perceived to prevent the conviction of drug dealers and violent criminals.<sup>334</sup> Though imposing a relatively old rule on the states, *Mapp* was seen as a revolutionary decision. It seems unlikely that a rule devised by the Court addressing police force would have been as controversial as the application of the exclusionary rule in a post-Prohibition world.

The *Mapp* decision was not revolutionary. Its conservative approach was its failing. The exclusionary rule was a well-developed doctrine in 1961, but one addressing a concern from another era. Avoiding innovation, the Court drew the ire of contemporary society and left American law without a meaningful mechanism to limit excessive force, wrongful shootings, or even police harassment for decades to come.

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333. See Stoughton, *supra* note 330, at 864–69.

334. WILLIAM J. STUNTZ, *THE COLLAPSE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM* 200–01 (2011) (observing that cases regulating liquor searches are not suitable for the regulation of murder and drug investigations).