2 COURTS OF LAW, NOT JUSTICE

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Courts in the United States are cherished institutions. Even in an era of divisive politics, public distrust of government, and acrimonious public dialogue, courts have remained respected institutions. Their place in the body politic—their purpose—is one reason for the respect they receive. Because courts adjudicate all criminal defendants, interpret the law, and protect individual rights, this chapter is devoted to them.

ORDER IN THE COURT *SYSTEM*

LEARNING OBJECTIVE

Describe the organization and role of the various federal and state courts.

There are over 17,000 courts in the United States at the local, state, territorial, and federal levels. And they are busy. In 2018, approximately 84 million cases were filed in state and local trial courts. Of these, 53% were traffic offenses, 20% were criminal cases, 20% were civil cases, 6% were domestic cases, and 1% were juvenile cases.[1] In 2022, the federal system was composed of one Supreme Court, 13 appellate courts, and 94 district courts. In 2021, the district courts, the federal system's trial courts, had 419,032 total cases, of which 74,465 were criminal cases. The 3 United States Courts of Appeals received 44,546 appeals. A total of 434,540 bankruptcies were filed in the United States bankruptcy courts. In 2020, 5,307 cases were filed, 72 were heard, and 69 cases terminated in the Supreme Court.[2] Not only is this a lot of judges, hearing lots of cases—these data illustrate that the United States has a complex tapestry of courts. This discussion begins with an explanation of why the American judiciary

is so complex. And as you will see, the courts fit together like a jigsaw puzzle, providing the American people with an ordered system of justice.

Regarding why the judiciary is so complex, the nation's political architecture, specifically federalism, is, in part, to blame. Each state, the territories, Native American tribes fand the federal government has its own system of courts. At the state level, that includes state-level courts, as well as local, or municipal, courts. To further complicate matters, some states have multiple courts, with overlapping jurisdiction, at the same level. For example, the state of Indiana has three types of trial courts: circuit courts, superior courts, and local courts.

Recall that the framers constructed a complex, federal system for a reason—they believed that dividing governmental power would protect the people from despotism. They were aware that federalism is an inefficient and sometimes clunky model of governance. But they prioritized liberty over efficiency.

Another major difference in courts is in their function. The biggest distinction in function is between trial and appellate courts. Trial courts are where cases start. It is where the drama that is portrayed in crime film and books happens. Prosecutors file charges, judges issue warrants, police present arrestees, and, obviously, trials happen. It is where the **ultimate factual question** is answered: whether a defendant is guilty or not guilty. And if a defendant is found guilty, it is trial court that imposes sentence.

Federal trial courts are labeled *district courts*. Every state has at least one federal district. Larger states are divided into two or three districts. For example, Indiana is divided in half, with the United States District Court for Northern Indiana and the United States District Court for Southern Indiana. Each district has several judges. District judges, as well as appellate judge and justices of SCOTUS, are referred to as Article III judges, because they are appointed under, and possess the authorities defined in, Article III of the Constitution. To be appointed, an Article III judge must be nominated by the president of the United States and confirmed by the Senate of the United States. Once appointed, Article III judges serve for life. The Framers established lifetime tenure, and forbid Congress from reducing their salaries, to insulate the judges from political and social influences. Like other federal officers, federal judges can be removed from office through impeachment by the House of Representatives and conviction by the Senate for treason, bribery, high crimes and misdemeanors. Another provision of the Constitution provides that judges shall hold their offices during "good behaviour." To date, this has not been used to impeach and remove a judge for conduct other than treason, bribery, or a high crime and misdemeanor.

Each federal district also has magistrate judges, who issue warrants, conduct arraignments, and try misdemeanor cases; a court clerk; a United States attorney who is responsible for representing the United States in the court; and a United States marshal.

State trial courts are known by various names, including superior, circuit, district, common pleas, chancery, and supreme. Most trial-level criminal courts possess general jurisdiction. A **court of general jurisdiction** is one that hears a wide variety of civil and criminal cases. Most states also have **courts of limited jurisdiction** that hear cases of a specific subject matter or that involve specific classes of people. Juvenile court, family court, military court, and drug court are examples. State trial courts hear more than 95% of all the criminal cases filed in the United States.

A party who is unhappy with what happens in a trial court may appeal. Under the **Final Judgment Rule**, neither the defendant nor the state may appeal a judge's decision until the verdict has been rendered and the trial judge has entered an order of final judgment into the record. The purpose of the final judgment rule is to facilitate a smooth and efficient trial process. Permitting appeals from every pretrial order would result in never-ending cases and huge appellate court workloads. There are several exceptions to the final judgment rule. Pretrial appeals of trial court decisions are referred to as **interlocutory appeals**.

One interlocutory appeal that is widely recognized is when a court lacks jurisdiction to hear a case. To avoid unnecessary, costly, and protracted litigation and because all actions of jurisdiction-less courts, including final orders, are invalid, the jurisdiction question can be appealed while the rest of the case is being heard by the trial court. Courts have also carved out exceptions for important issues that are "controlling." An example is a claim of governmental immunity. If a government or one of its employees asserts immunity to a lawsuit involving a governmental function, and the defense is denied, an interlocutory appeal is often permitted. The rationale for this exception is the same as

Military courts are courts of limited jurisdiction.

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when a court lacks jurisdiction. The interlocutory appeal saves the parties and courts time, money, and mental anguish. Other exceptions exist, such as when a legal question is novel and significant, when a trial judge appears to be fundamentally wrong (e.g., clearly deviating from established law), and when a party can demonstrate that resolving the legal question early will result in a more efficient proceeding.

The role and procedures of appellate courts are different from trial courts. First, appellate courts are not fact-finding bodies. They don't hear or see the witnesses, they don't inspect the bloody knife, and they don't empanel juries. Their function is to review the decisions of lower courts for legal error. The legal decisions of trial judges are reviewed **de novo**. De novo translates to "anew," and in practice, this means that an appellate court will freely reverse a lower court's interpretation of the law. These are examples of criminal procedure issues that an appellate court would hear:

- A trial court's decision to permit evidence of a confession to be heard by a jury over the objection of a defendant who contends that the confession was obtained illegally.
- A trial court's decision to conduct a trial virtually rather than in person because of the threat of COVID over the objection of a defendant who contends that their Sixth Amendment right to confront their accusers is violated.

Decisions of fact by trial courts are given more deference by appellate courts. They don't freely reverse jury decisions, or other factual decisions of trial judges, like they do the legal decisions of trial judges. Generally, there is no second bite at the apple for the convicted offender who believes the jury made the wrong decision. In what is known as the **substantial evidence** standard, an appellate court will only intervene when there is little or no evidence to support a jury's conviction. So long as the jury's interpretation of the facts is reasonable, it doesn't matter if the appellate court would have reached a different conclusion.

Instead of receiving evidence, an appellate court reviews the **record** from the court below. The record includes the documents, exhibits, audio and visual recordings, and judicial decisions from the court below. In addition to the record, the parties present their legal arguments through written briefs and oral arguments.

With rare exception, trial proceedings have only one judge. Appellate courts, however, are collegial bodies where multiple judges hear a case. Sometimes this is every judge of a court, known as

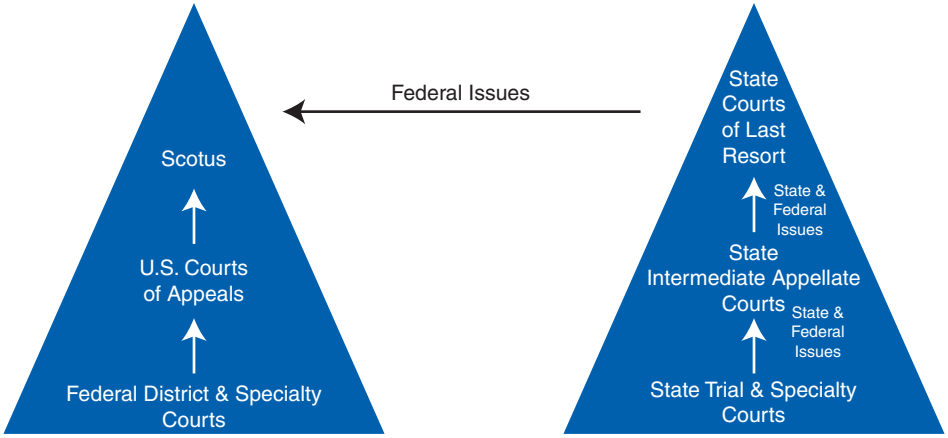
an en banc hearing; in others, it is a subset, or panel, of the full body. SCOTUS hears its cases as a full court—all nine justices—except when a seat is vacant or a judge is recused (withdraws) from a case for personal or professional reasons, such as when a litigant is closely related to the judge. The U.S. Courts of Appeals, which vary in size from six to 29 judges,[3] most often hear cases in panels of three judges. Appeals from panel decisions to the full appellate court are permitted, although rarely granted. Oddly, even though the term *en banc* refers to all the judges of a court, larger federal circuits empanel only a subset of its judges for en banc review. The Ninth Circuit, for example, conducts en banc sessions with 11 of its 29 judges.

Following their review, the judges of an appellate court will discuss and vote on the appeal. If there is a majority in agreement on the outcome, the judges in the majority will issue a written, **majority opinion** explaining their decision. But judges don't always agree. A judge who disagrees with the majority's decision has the option of writing a **dissenting opinion**. A judge who agrees in the outcome but who has more to say than what appears in the majority's opinion, or who believes the majority is right in outcome but wrong in law, may issue a **concurring opinion**. The objective of having judges explain themselves through these opinions is to educate the public about the law, to frame issues of the law for consideration by legislators and executive officials, and to direct and guide other courts when making legal decisions in future cases.

If an appellate court decides that the lower court didn't commit legal error, the lower decision is affirmed. If the opposite is found, the lower court's decision may be reversed or altered. In some instances, the case may be remanded (returned) to the lower court with orders to fix the error. Imagine, for example, that police break into a home without a warrant. They find illegal drugs inside which are used at trial to convict the homeowner of possession of a controlled substance. On appeal, the trial court's legal decision to allow the drugs into evidence is reversed. Because the drugs were critical to the guilt determination, the appellate court would likely order that the case be remanded with an order that a new trial be held, with the drugs excluded from evidence.

In nearly all states, and as you have already learned, in the federal system, there are two levels of appellate courts, intermediate and "last resort." At the federal level, the 13 courts of appeals are intermediate appellate courts and SCOTUS is the court of last resort. The states that have two levels of appellate courts typically label their courts of last resort *supreme courts*, but there are exceptions. In New York, supreme courts are one of several trial-level courts, the intermediate appellate court is known as the appellate division of the supreme court, and the Court of Appeals is the court of last resort. The state courts of last resort are the final interpreters of state law. SCOTUS is the final word on federal law. Procedurally, trial courts, state and federal, apply state and federal law. A state trial judge, for example, must apply the Fourth Amendment's rules about searches and seizures. These decisions are appealed through the state appellate courts, along with issues of state law. However, SCOTUS is the final word on federal law. So, an interpretation of federal law by a state court of last resort may be appealed to SCOTUS. See Figure 2.1 for a diagram of the state and federal court systems.

FIGURE 2.1 ■ State and Federal Court Systems



Questions and Problems

For Questions 1 through 3, identify whether the de novo or substantial evidence standard will be applied by the appellate court.

1. A trial court decision that a warrantless search by police that discovered a dead body in the trunk of a defendant's car did not violate the Fourth Amendment.
2. Debbie Defendant is convicted of unlawfully accessing a bank's computer system, a felony. She believes the jury misunderstood the facts of the case. Indeed, the jury heard about sophisticated networks and systems and digital forensic investigative techniques. She has appealed the verdict with a request that the appellate court review the jury's verdict, which she contends is not supported by the facts.
3. Wally Walker was stopped by a police officer while walking on a public sidewalk. The officer frisked him during the stop. The officer felt what he thought was a weapon under Wally's coat. The officer reached under the coat, retrieved the gun, and arrested Wally for illegally possessing a firearm. Wally challenged the stop, but the trial judge decided it was lawful. Wally has appealed the trial judge's decision to admit the gun into evidence at trial.
4. Identify, through speculation and research, the reasons for distinguishing the review standards for factual and legal decisions. What values underpin the difference?

COURTS OF LAW, NOT JUSTICE

LEARNING OBJECTIVE

Compare and contrast the legal model and justice model of judicial decision-making.

As you just read, it is the law that courts interpret and apply. This chapter is titled Courts of Law, not Justice. This phrase conveys a basic American political principle that is expressed in the idiom, *The United States is a Nation of laws, not men*. This means that legitimate, written law should govern all people equally, regardless of position or station in life. It privileges the law over the will of powerful people. The law is to be applied using objectivity, not according to the judgments and values of monarchs or oligarchs. Applying this principle to courts, the idiom can be restated as the *United States is a nation of courts of law, not courts of justice*. A famous exchange between two legal giants, Judge Learned Hand and Justice Oliver Wendel Holmes, illustrates the conflict between law and justice:

> I remember once I was with [Justice Oliver Wendel Holmes]; it was a Saturday when the Court was to confer. It was before we had a motor car, and we jogged along in an old coupe.' When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: "Well, sir, goodbye. Do justice!" He turned quite sharply and said: "Come here. Come here." I answered, "Oh, I know, I know." He replied: "That is not my job. My job is to play the game according to the rules."[4]

This may appear counterintuitive. After all, shouldn't courts do justice? Think of the two models, law and justice, as occupying the opposite ends of a continuum. The objective of both is to achieve justice. But they achieve it in two different ways; the legal model emphasizes procedure while the justice model emphasizes substance.

The justice model commands judges to do what is just. The law model commands judges to follow the law. Often, the two models lead to the same result. But this isn't always true. In the justice model, a judge is expected to ignore the law if it leads to an unjust result. In the law model, a judge is expected to follow the law, even if it leads to injustice. What was Justice Holmes's beef with doing justice? On the surface, it appears to be the right way to judge. But it has a significant drawback. It

empowers the individual judge to decide what is just; to impose their values into the law. This method of decision-making transforms America from a Nation of Laws into a Nation of Men. This is even more true today than during Holmes's day. With America's increasing political, ethnic, religious, and cultural diversity, consensus about what is just in any case is often very difficult, if not impossible, to achieve. Even more, when liberties are involved, consensus is immaterial. After all, the point of protecting individual rights is to empower the dissenter to stand up against the majority's ideas and values.

On the other hand, the legal model has its downsides. The robotic application of the law can lead to an outcome that is absurd or unjust, by any person's measure. Although the United States falls closer to the legal model side of the continuum, it doesn't fall to the outermost end of it. As you will see in the chapters that follow, there are safety valves that empower courts to deviate from the law, in favor of justice, in extreme cases.

Questions and Problems

1. What is the difference between a court of law and a court of justice?
2. Do you favor a judiciary that emphasizes law or justice? Explain your answer and how you would design the system to address its weakness, for example, abuse of discretion in the justice model and robotic decisions that result in unfairness in the legal model.

ROBES AND HATS

LEARNING OBJECTIVE

Describe the organization of courts, the roles of judges, and the history and significance of judicial review.

In addition to the iconic robes, judges also wear many hats. That is, courts serve more than one function. Their most important responsibilities are to adjudicate cases, protect liberty, and resolve conflicts between the other two branches of government. Article III, section 2 of the U.S. Constitution defines the authority of federal courts in this way:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

This section creates two forms of jurisdiction—over cases and over controversies. "Cases" refers to matters involving federal law and federal officials. "Controversies" refers to conflicts that involve the states themselves or the federal government. The former is of the most importance in criminal law. You learned in Chapter 1 that federal jurisdiction extends over specific subjects, such as the post office and interstate and international commerce. The commerce power is a significant source of authority and Congress has used it to create many criminal laws. But as you also learned in chapter 1, there is a limit to the commerce power. Congress can't criminalize conduct that has only a small impact on interstate commerce. Through the civil rights amendments, Congress can also criminalize some civil rights crimes.

While federal courts have limited jurisdiction, state courts possess general jurisdiction. They are the primary courts in the United States, adjudicating nearly all civil, family, probate, and criminal cases.

As adjudicators, American judges oversee the formal stages of criminal cases. Unlike judges in most European nations, who are involved in the investigation of crimes, judges in the United States don't become involved until a warrant is sought, an arrest is made, or formal charges are filed. Thereafter, judges supervise the judicial process. But a criminal court judge is more umpire than manager. The parties, prosecution and defense, are responsible for investigating the facts and developing their own theories about what and how the law applies to the case.

Judges become involved in criminal cases during specific events and stages of the process. Before trial, judges issue arrest and search warrants, ensure that probable cause exists to prosecute, issue requested orders, and resolve legal problems. Otherwise, the investigative process is under the control of police and prosecutors.

At trial, judges guide the process, resolve disputes, ensure the law is followed, and guard against unfairness. The parties decide what witnesses to call, the physical evidence to introduce, and the arguments to present. The judge is responsible for deciding whether the rules of evidence are being followed and justice is being served.

This leads to the second hat: Judges protect liberty. Recall from Chapter 1 that the United States is a constitutional republic. In this context, republican means having popularly elected representatives make laws for the people. But the republican element is modified—limited—by the Constitution. The structure of government is defined by the Constitution. Congress, at least, not alone, can't change it. Similarly, there is a zone of individual liberty that is out of the reach of Congress. For that matter, it is beyond the control of the majority of people. A person's right to post a YouTube video expressing an opinion about a vaccine mandate, to not having a confession beaten out of them, and to a public trial are not preconditioned on a vote of the people. The idea of a right is the opposite; an individual is entitled to enjoy their rights even when opposed by a majority of the people.

The founders intended to protect liberties in a couple of ways. The first was through the structure of government. Dividing governmental power is seen by many today as inconvenient and cumbersome. And it is. But the value in preventing the centralization of power, and thereby protecting liberty, outweighs its costs. The second way liberties are protected is by expressly recognizing them in the Constitution.

The Sixth Amendment guarantees a right to counsel in criminal cases.

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The Constitution protects **negative rights**, or prohibitions on the state from interfering with an individual's enjoyment of some aspect of life. Negative rights are drafted as limitations on governmental authority. The first words of the First Amendment are illustrative, "Congress shall make no law. . . ." Negative rights are contrasted with **positive rights**, which guarantee people a specific good, service, or benefit, such as the right to education or health care.

Most, if not all, constitutional rights are negative. There are a couple of rights, however, that challenge the distinction. Take the right to counsel, for example. In 1791, the Sixth Amendment's right to counsel in criminal cases was limited to barring the state from allowing a defendant to be represented. In the 1960s, however, the right to counsel was expanded to require the government to provide counsel to defendants who can't afford a lawyer. This change in law can be interpreted as creating a positive right, the government must provide a benefit, or a negative right, for example, the state is barred from punishing an individual unless the individual was represented. Another right that confounds the basic classification is voting. With these possible exceptions, positive rights are not found in the Constitution. But many have been created through statutory law. See Table 2.1 for examples of negative and positive rights.

All people have a duty to respect the rights of the people. This includes the president and members of Congress, who should be the first line of defense. But human nature leads both to enact and enforce laws that are unconstitutional. This is where the judiciary steps in. James Madison, the author of the Constitution, wrote that

> independent tribunals of justice will consider themselves in a peculiar manner the guardians of [individual rights]; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[5]

Courts, both state and federal, have assumed this role, in varying degrees, throughout U.S. history. But the Constitution doesn't expressly assign the guardian role to the federal courts. As you read earlier, the Constitution's delegation of authority to courts is rather bland. They are to hear cases and controversies. Does this include defending the rights of people when they are violated by the other two branches of government?

Alexander Hamilton addressed this issue in *Federalist 78*, where he penned that

> [a] constitution…belongs to [judges] to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

TABLE 2.1 ■ Examples of Negative and Positive Rights in the United States

Right	Positive or Negative	Source
Freedom of Speech; Press; Religion; Assembly; To Petition Government with Grievances	Negative	First Amendment
To Bear Arms	Negative	Second Amendment
To Be Free of Unreasonable Searches and Seizures	Negative	Fourth Amendment
Jury trial; Counsel	Negative & Positive	Fifth Amendment
Freedom from Cruel & Unusual Punishment	Negative	Eighth Amendment
Social Security	Positive	Federal Statutory Law
Education	Positive	State Statutory Law
Enjoyment of Public Parks	Positive	Federal and State Statutory Laws

It is a large leap from deciding whether a specific search was lawful to invalidating a law made by Congress. The authority of courts to invalidate unconstitutional laws is the subject of one of the most important SCOTUS decisions in U.S. history, *Marbury v. Madison*. This is the case in your next Digging Deeper.

DIGGING DEEPER

What is a court to do when it hears a case where a coequal branch violates the Constitution?

Case: MARBURY v. MADISON
Court: Supreme Court of the United States. Citation: 5 U.S. 137
Year: 1803

[The facts of *Marbury v. Madison* have the intrigue and drama of a major motion picture. They begin with the divisive and acrimonious presidential election of 1800, where incumbent president John Adams, a federalist, lost to Thomas Jefferson, an anti-federalist (Democratic-Republican). The federalists also lost control of Congress. In an attempt to pack the judiciary with federalists, and thereby extend federalist policies into the Jefferson years, Adams and Congress reduced the number of SCOTUS justices from six to five, to be effective at the next vacancy, and they added several judgeships to be filled by Adams before he left office. These positions were added in the final days of the Adams's administration. Adams's Secretary of State, John Marshall, worked through the night affixing the seal and arranging for the delivery of the commissions to the new judges. For this reason, they are commonly known as the midnight judges.

However, the paperwork—the "commissions"—of many of these midnight appointments were not delivered before Adams departed. Jefferson found the commissions after taking office. He decided to deliver some, but not all, of them. These decisions were largely political; the commissions of Adams's largest supporters, which included Marbury, were shelved.

Marbury filed a lawsuit in SCOTUS seeking a mandamus, an order to Jefferson's secretary of state, James Madison, to deliver his commission. In a turn of events that wouldn't be permitted today, the case was overseen by the man who was initially charged with delivering Marbury's commission, John Marshall. He was one of Adams's midnight judges. Only his appointment was as Chief Justice of SCOTUS. Marshall was also Jefferson's cousin, political enemy, and the official who administered his presidential oath of office. That must have been an uncomfortable ceremony!]

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case requiring the Secretary of State to show cause why a mandamus should not issue directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia. . . .

In the order in which the Court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is:

1. Has the applicant a right to the commission he demands?

His right originates in an act of Congress passed in February, 1801, concerning the District of Columbia. After dividing the district into two counties, the eleventh section of this law enacts,

> "that there shall be appointed in and for each of the said counties such number of discreet persons to be justices of the peace as the President of the United States shall, from time to time, think expedient, to continue in office for five years."

It appears from the affidavits that, in compliance with this law, a commission for William Marbury as a justice of peace for the County of Washington was signed by John Adams, then President of the United States, after which the seal of the United States was affixed to it, but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law

continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The second section of the second article of the Constitution declares,

> "The President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

The third section declares, that "He shall commission all the officers of the United States." An act of Congress directs the Secretary of State to keep the seal of the United States,

> "to make out and record, and affix the said seal to all civil commissions to officers of the United States to be appointed by the President, by and with the consent of the Senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the Constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations:

1. The nomination. This is the sole act of the President, and is completely voluntary.
2. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.
3. The commission. To grant a commission to a person appointed might perhaps be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."

The acts of appointing to office and commissioning the person appointed can scarcely be considered as one and the same, since the power to perform them is given in two separate and distinct sections of the Constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the Constitution which authorises Congress "to vest by law the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the President to commission an officer appointed by the Courts or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which perhaps could not legally be refused.

[After analyzing whether Marbury was entitled to the delivery of his commission, the Court wrote that] it is therefore decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State. . . .

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry, which is:

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law. "In all other cases," he says,

> "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."

And afterwards, page 109 of the same volume, he says,

> "I am next to consider such injuries as are cognizable by the Courts of common law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals are, for that very reason, within the cognizance of the common law courts of justice, for

it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."

The Government of the United States has been emphatically termed a government of laws, and not of men [emphasis added]. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right. . . .

[The Court then decided that a mandamus to the Secretary of State is the proper procedure.]

This, then, is a plain case of a mandamus, either to deliver the commission or a copy of it from the record, and it only remains to be inquired:

Whether it can issue from this Court.

The act to establish the judicial courts of the United States authorizes the Supreme Court

"to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The Secretary of State, being a person, holding an office under the authority of the United States, is precisely within the letter of the description, and if this Court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.

The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case, because the right claimed is given by a law of the United States.

In the distribution of this power. it is declared that

"The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

It has been insisted at the bar, that, as the original grant of jurisdiction to the Supreme and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that Court in other cases than those specified in the article which has been recited, provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage— is entirely without meaning—if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed, and, in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it.

If the solicitude of the Convention respecting our peace with foreign powers induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them, yet the clause would have proceeded no further than to provide for such cases if no further restriction on the powers of Congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system divides it into one Supreme and so many inferior courts as the Legislature may ordain and establish, then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be that, in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original.,If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that, if it be the will of the Legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this to enable the Court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States to issue writs of mandamus to public officers appears not to be warranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

The Government of the United States is of the latter description. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Certainly, all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject. It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares that "no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it, must the Court condemn to death those victims whom the Constitution endeavours to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Here the language of the Constitution is addressed especially to the Courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the Legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the Legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words:

> "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government? If it is closed upon him and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime.

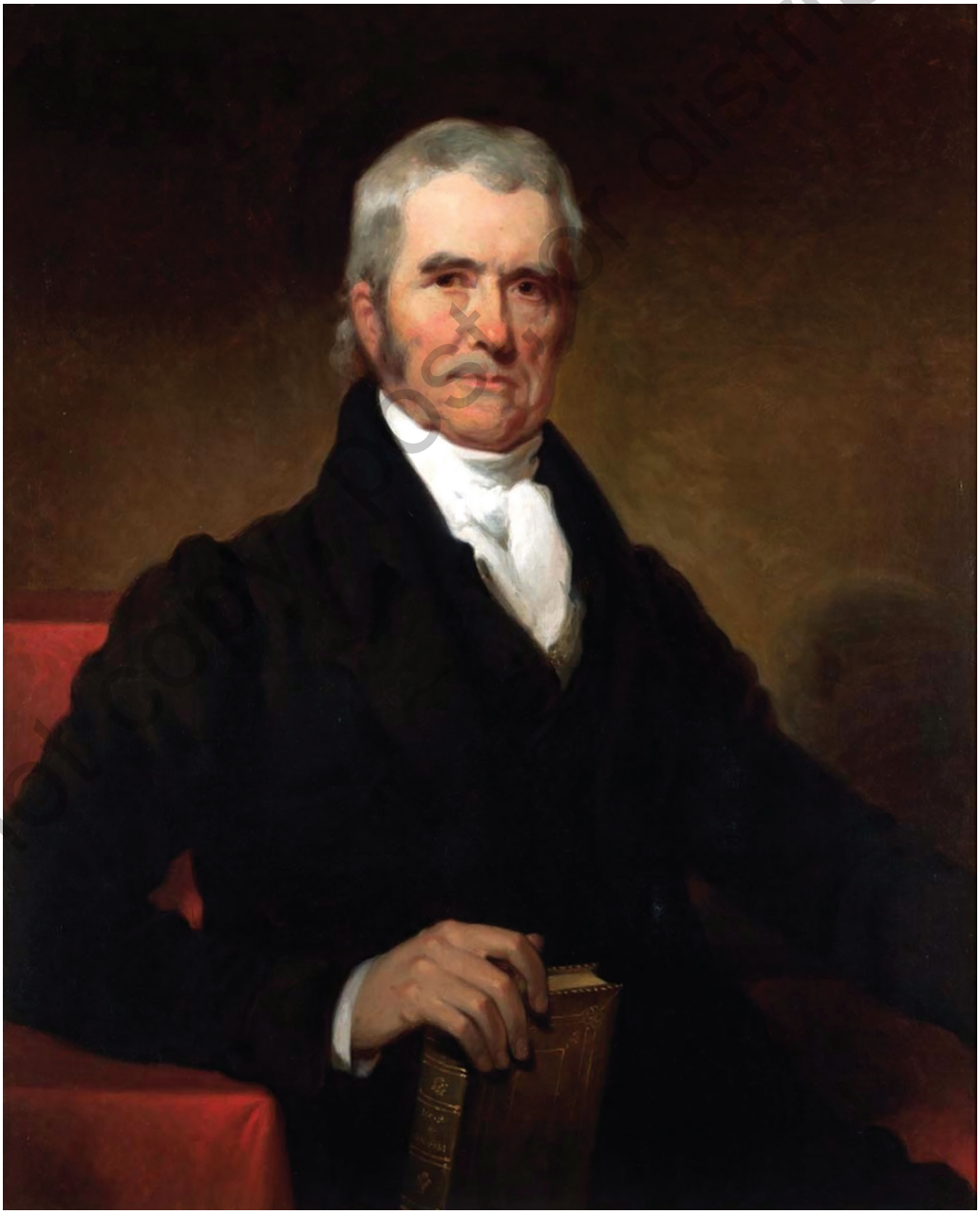
It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Marbury v. Madison is commonly regarded as the case where the power of **judicial review** was established.[6] Judicial review refers to the power of a court to invalidate laws created by Congress or the acts of the executive branch that violate the Constitution. To support the decision, the Court, through Chief Justice Marshall's opinion, held that courts must interpret and "say" what the law is in any case. On the surface, this is an expression of the obvious. To adjudicate, a court must apply the law. To apply the law, the meaning of the law must be known. To know it requires a court to interpret it. However, when the judge's constitutional duty to follow the constitution is added to the mix, the obvious becomes consequential—the judge must set aside the law.

Chief Justice Marshall was artful in his handling of the case. By invalidating the legislation that gave SCOTUS the power to hear Marbury's case, the Court both exercised judicial review and avoided a direct confrontation with President Jefferson, who likely would have ignored the Court's order to deliver Marbury's appointment. Marshall was rightfully concerned that establishing a precedent of ignoring the Court's orders would have had long, harmful consequences for the Court and Nation.



Chief Justice John Marshall is credited with establishing judicial review.

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SCOTUS has been cautious in its use of the judicial review. Between 1958 and 2019, SCOTUS invalidated, in part or whole, 487 state and federal laws, about eight per year. This is far less than 1% of all enacted laws.[7] A large majority of stricken laws are at the state level. It is more common for SCOTUS to sever an offending provision of a statute rather than strike an entire law.

All courts, state and federal, are called upon to interpret the Constitution. Through Article VI of the Constitution, state courts have an obligation to apply federal law even if contrary to their own state's laws. Section 2 of Article VI reads

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

An example of the use of judicial review to invalidate a law is found in the 2020 decision *Ramos v. Louisiana*.[8] The defendant in that case, Evangelisto Ramos, had been convicted of murder by a 10–2 vote of the jury. At the time, Louisiana and Oregon permitted convictions with 10 or more votes of a 12-person jury. SCOTUS decided that unanimous jury verdicts were required for convictions by the Sixth Amendment. It, therefore, reversed Ramos's conviction and invalidated the Louisiana law permitting non-unanimous verdicts.[9]

Judicial review applies to the actions of executive branch, as well as to the laws created by Congress and the legislatures of the states. This is very important in criminal law, where courts check the behavior of police and prosecutors. One form of judicial review that is specific to criminal cases is the exclusionary rule. You may recall from Chapter 1 that this rule is one of three reasons the U.S. Constitution has expanded in its importance in state, as well as federal, criminal law.

Questions and Problems

1. Chief Justice Marshall of SCOTUS wrote in *Marbury v. Madison* (1803) that it is emphatically the duty of the courts to interpret and define the law. Why must criminal courts do this? What impact does this have on criminal cases?

   For Questions 2 through 4, explain why the statement is true or false concerning the role of judges in American criminal law.

2. A trial judge is responsible for developing the legal theories of the case.
3. The parties are responsible for deciding what evidence should be presented at trial.
4. To ensure fairness, trial judges oversee police investigations of suspects before arrest or formal charges are filed.

   For Questions 5 through 8, identify the right as negative or positive. Explain your answers.

5. The right to be free from self-incrimination.
6. The right to free education.
7. The right to be free from cruel punishment.
8. The right to be protected from assault by other individuals.

POISONOUS TREES AND THEIR FRUIT

LEARNING OBJECTIVE

Describe and apply the exclusionary rule.

You will take a deep dive into the Fourth Amendment in the next three chapters. For the moment, it is enough for you to know that the Fourth Amendment sets out the rules for government searches and seizures. Some searches, for example, can only happen after a judge finds probable cause to believe the

evidence the police are seeking will be found in the place the police want to search. A smaller number of searches require not only probable cause, but for a judge to issue a warrant authorizing the search.

But what happens when the state doesn't follow the rules? The Fourth Amendment is silent on the subject. The answer to this question lies in the intersection of the various duties and powers of courts that you learned about earlier in this chapter. Specifically, the duty of courts to adjudicate criminal cases, to enforce the law, to protect individual liberties, along with the authority of judicial review, combine to form the exclusionary rule.

Under this rule, evidence that the state has seized illegally is excluded from trial. The idea that illegally seized evidence should be excluded in federal trials dates to *Boyd v. United States*[10] in 1886, but the rule was given wider and more significant effect in the 1914 decision *Weeks v. United States*.[11] But federal prosecutions are few when compared to state prosecutions. Returning to what you learned in Chapter 1, the exclusionary rule was "incorporated" in *Mapp v. Ohio*, the case featured in your next Digging Deeper.

DIGGING DEEPER

Can Illegally Obtained Evidence Be Used in State Court?

Case: MAPP V. OHIO
Court: Supreme Court of the United States. Citation: 367 U.S. 643
Year: 1961
MR. JUSTICE CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code. As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home. . . ."

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance, but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. 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 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.

At the trial, no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because

the methods' employed to obtain the [evidence] . . . were such as to 'offend a sense of justice,'" but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant."

The State says that, even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf v. Colorado*, 338 U. S. 25 (1949), in which this Court did indeed hold "that, in a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." On this appeal, of which we have noted probable jurisdiction, it is urged once again that we review that holding.

Seventy-five years ago, in *Boyd v. United States*, 116 U. S. 616, 630 (1886), considering the Fourth and Fifth Amendments as running "almost into each other" on the facts before it, this Court held that the doctrines of those Amendments apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments]."

The Court noted that "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional." Less than 30 years after *Boyd*, this Court, in *Weeks v. United States*, 232 U. S. 383 (1914), stated that

> "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . ., and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded

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

Finally, the Court in that case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." Thus, in the year 1914, in the *Weeks* case, this Court "for the first time" held that, "in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . .

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*--and its later paraphrase in *Wolf*--to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. In *Byars v. United States* a unanimous Court declared that "the doctrine [cannot] . . . be tolerated *under our constitutional system*, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

In *McNabb v. United States*, 318 U. S. 332 (1943), we note this statement:

> "[A] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. *Boyd v. United States* . . .

> *Weeks v. United States*. . . . And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified' . . . or 'who have been unlawfully held incommunicado without advice of friends or counsel.' . . ."

Significantly, in *McNabb*, the Court did then pass on to formulate a rule of evidence, saying, "[i]n the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue, [for] . . . [t]he principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution."

II

In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf v. Colorado, supra*, again for the first time, discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

> "[W]e have no hesitation in saying that, were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment."

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in the concept of ordered liberty" and, as such, enforceable against the States through the Due Process Clause," *cf. Palko v. Connecticut*, 302 U. S. 319 (1937), and announcing that it "stoutly adhere[d]" to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." The Court's reasons for not considering essential to the right to privacy, as a curb imposed upon the States by the Due Process Clause, that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy, were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based.

The Court in *Wolf* first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of *Weeks* was "particularly impressive"; and, in this connection, that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of evidence." While, in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions. . . ." In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the right to privacy." The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*. . . .

It therefore plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling. . . .

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then, just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule, the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." . . . At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence

seized in violation of its provisions. Even *Wolf* "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd, Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but, in reality, to withhold its privilege and enjoyment. Only last year, the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. And nothing could be more certain than that, when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We find that,

> as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle." They express "supplementing phases of the same constitutional purpose to maintain inviolate large areas of personal privacy." The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, as was said in *Elkins*, "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." . . .

There are those who say, as did Justice (then Judge) Cardozo, that, under our constitutional exclusionary doctrine, "[t]he criminal is to go free because the constable has blundered." In some cases, this will undoubtedly be the result. But, as was said in *Elkins*, "there is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States* (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year, this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. The Court noted that

> "The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. . . . The movement towards the rule of exclusion has been halting, but seemingly inexorable."

> The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.
>
> The judgment of the Supreme Court of Ohio is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.
>
> Reversed and remanded.

Mapp is a landmark decision in criminal procedure. Through it, the exclusionary rule is regularly applied in every criminal court in the United States. There is a continuing debate about the purpose of the exclusionary rule. One purpose of the exclusionary rule is to remedy, or fix, Fourth Amendment violations. After all, what is the point of a right if there aren't ways to enforce it? A second purpose of the rule is to deter police and prosecutor misconduct.

The exclusionary rule comes with high social costs. As expressed by Justice Cardozo, sometimes the criminal goes free because a constable has blundered. Consequently, the public pays for police misconduct with increased insecurity—by having more criminals on the street. Alternatives to the exclusionary rule exist. They include

1. Department disciplinary action
2. State disciplinary action, such as revoking a police officer's "sworn" status
3. Using state and federal civil rights and tort law to sue offending officers
4. Prosecuting offending officers under state and federal civil rights laws

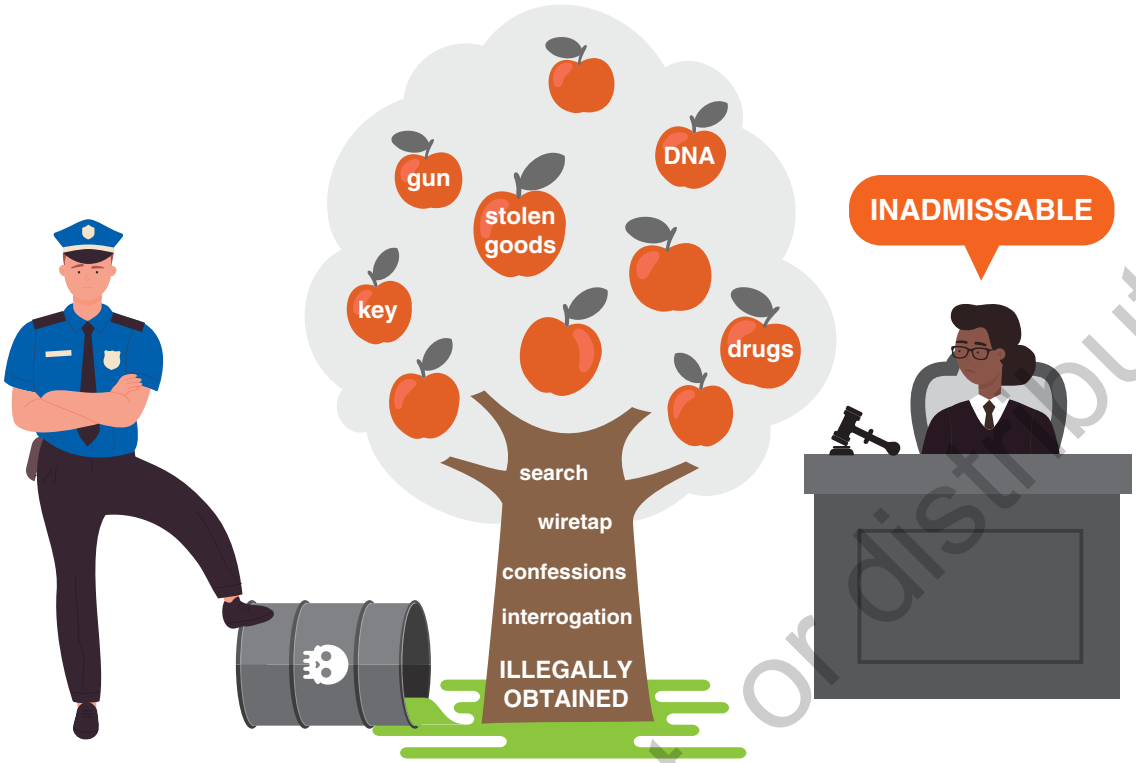
The exclusionary rule applies to primary evidence—proof of crime that is directly obtained through an illegal search or interrogation. In some cases, primary evidence leads to secondary evidence. The exclusionary rule also applies to this secondary evidence under the **fruits of the poisonous tree doctrine**.

Imagine, for example, that Ernie, a police officer, stops the driver of an automobile, Bert. Ernie has no evidence that Bert was violating the law. During the stop, Ernie searches Bert's car, finding illegal drugs. He arrests Bert and uses the drugs he seized during the car search to obtain a warrant to search Bert's home, where he finds both illegal drugs and stolen electronics. Ernie's stop and search of Bert's car were both illegal, so the drugs found during that search are tainted. They are the *poisonous tree*. The drugs and stolen electronics that were subsequently found in the home are a derivative of the illegal stop and search; they are the *fruits of the poisonous tree*. Like the primary evidence, they are also excluded from trial. See Figure 2.2 for a graphic depiction of the fruits of the poisonous tree doctrine.

Exclusion of illegally seized evidence, both the tree and the fruit it bears, is the default. However, there are several exceptions to the exclusionary rule. First, in what is known as the **state action doctrine**, the rule doesn't apply to evidence that is obtained illegally by private persons. This is because the Framer's intended to control government through the protection of rights. Accordingly, a defendant is not entitled to have evidence that was illegally seized by a private person excluded.

> There are two neighbors in Oceanville, Bob and Patrick. Bob suspects that Patrick is selling crab that has been caught in violation of fishing laws. One night, while Patrick is away from home, Bob breaks into Patrick's house, seizes several large containers of crab, and turns them over the police. Because Bob isn't an agent of the state, the evidence may be used to prove Patrick's guilt.

FIGURE 2.2 ■ Fruits of the Poisonous Tree



This isn't to say that there aren't consequences for illegally seizing evidence. In our scenario, Bob may be prosecuted for trespass and burglary.

A person doesn't have to be employed by the state for the amendments to apply. If a police officer asked Bob to break into Patrick's house and search for the evidence, the exclusionary rule will apply because Bob's status changed from private individual to agent of the state.

A second exception to the exclusionary rule is that illegally obtained evidence is admissible at court hearings where the ultimate determination of guilt is not made. This includes grand jury proceedings, pretrial hearings, and sentencing.

Using illegally seized evidence to impeach a defendant's testimony is the third exception. In this context, impeachment refers to challenging the credibility of a witness. *Kansas v. Ventris* (2009)[12] illustrates this doctrine. Police planted an informant in jail with the defendant with instructions to listen for incriminating statements. The informant went beyond listening, prodding the defendant into confessing to a murder. While the informant's testimony about the defendant's confession could not be admitted at trial to prove guilt, the Supreme Court held that it could be used to impeach the defendant's testimony that he didn't commit the crime. The Court found the deterrent effect on police by excluding the evidence at trial to prove guilt was adequate and that the exclusion didn't need to extend to a rebuttal of the defendant's testimony. The Court wrote that

> once the defendant testifies inconsistently, denying the prosecution 'the traditional truth-testing devices of the adversary process,' is a high price to pay for vindicating the right to counsel at the prior stage. On the other hand, preventing impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence for officers, who have an incentive to comply with the Constitution, since statements lawfully obtained can be used for all purposes, not simply impeachment.

In a variant of the impeachment exception, a prosecutor may cross-examine a defendant about otherwise inadmissible evidence when the defendant "opens the door." While this is similar to the impeachment exception, it differs because the defendant's credibility isn't the issue. The prosecutor is permitted to explore the subject because it would be unfair to permit the defendant alone to refer to it before the jury.

Fourth, illegally obtained evidence may be admitted when the state has an **independent source** for it. The independent source must be unconnected to the original source. Further, it must be legal. To illustrate, let's return to Bert and Ernie. At the time Ernie was searching Bert's home, which you may recall was unlawful, an informant, Ji-Young, told a police detective that drugs and stolen electronics could be found in Bert's home. Ji-Young signed an affidavit which the detective used to obtain a search warrant. The detective arrived at Bert's home 30 minutes after Ernie conducted his search. Although Ernie's search was unlawful, the drugs and electronics are still admissible because the detective had an independent source for the evidence.

A fifth exception is found in the **inevitable discovery doctrine**. This doctrine looks like the independent source doctrine. But there is a difference. The state must obtain evidence from an untainted, lawful source to invoke the independent source doctrine while the inevitable discovery doctrine permits illegally seized evidence to be admitted if it is probable that the evidence would have been lawfully discovered by the state at a later time. To illustrate, let's look at a 1984 SCOTUS decision, *Nix v. Williams*.[13] The defendant in this case had been arrested and arraigned for murdering a child. While being transported from one city to another, police illegally questioned the defendant. In response to the questioning, the defendant made incriminating statements, including identifying the location of the child's body. At the same time, a large search party was making plans to search the area identified by the defendant. The search was called off after the defendant took the police to the body. Subsequently, the trial court decided that the questioning violated the defendant's right against self-incrimination. Without question, his confession was to be excluded. But the status of the victim's body, the fruit of the poisonous confession, was debated. Ultimately, SCOTUS decided that because the search party would have inevitably found the victim's corpse, that evidence was admissible at trial.

The sixth exception, the **attenuation doctrine**, allows admission of illegally obtained evidence when the causal connection between the government's wrongful conduct and the evidence is broken by an intervening event. For example, in *Utah v. Strieff*, the defendant, Edward Strieff, was unlawfully stopped while driving. During the stop, the police officer discovered that Strieff had an outstanding arrest warrant. Consequently, Strieff was arrested and searched. The officer discovered illegal drugs during the search. Strieff's motion to exclude the drugs was denied and he was convicted of drug possession. On appeal, SCOTUS, upheld the admission of the drugs at his trial, even though he was stopped illegally, because the outstanding arrest warrant for Strieff acted as an intervening

The state must obtain evidence from an untainted, lawful source for it to be admissible at trial.

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circumstance between the stop and the search. The warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling the officers to make the arrest. It was also important to the Court that while the stop wasn't supported by reasonable suspicion, the officer didn't flagrantly violate Strieff's rights or otherwise engage in misconduct.[14]

Officer good faith is the seventh exception. The **good faith exception**, first recognized by SCOTUS in *Leon v. United States* (1984),[15] applies when a police officer, acting in good faith, obtains a warrant from a judge that is later invalidated. There are two circumstances of bad faith:

- An officer lies or manipulates the facts or in some other way misleads the judge who issued the warrant
- No reasonable officer would believe probable cause exists, regardless of whether a judge issues a warrant

In most cases where a warrant is invalidated by a second judge later in the process, which is rare, the cause is a reasonable disagreement over whether the facts rise to the level of establishing probable cause, not because there has been bad behavior by the officer who applied for the warrant. Because the officer has done what the law expected—sought a warrant from a neutral magistrate—there is no bad conduct to deter. This exception is criticized because it focuses exclusively on the deterrence rationale for the exclusionary rule, ignoring the purpose of "righting the wrong," regardless of the officer's good or bad faith. For this reason, many state courts have rejected the good faith exception. In those states, evidence obtained by a warrant that is invalidated is excluded.

The eighth exception applies when a suspect is not given a "Miranda warning" before being interrogated and the suspect's statement leads police to other evidence. Although the statement may be inadmissible, the fruits of the suspects voluntary, un-Mirandized statement may be admissible. You will learn more about *Miranda* and this exception in a later chapter.

The ninth and final exception is parole hearings. Parole is early release from prison, typically used as an incentive for inmates to behave during their incarceration. An inmate's remorse, rehabilitation efforts and success, likelihood of reoffending, mental illness, and conduct, as well as the victim's input are considered in the parole decision. SCOTUS has found that the purposes of the exclusionary rule are not satisfied by excluding evidence from the parole determination.[16] The Court explained the outcome this way:

> [This] Court has repeatedly declined to extend the [exclusionary] rule to proceedings other than criminal trials. It again declines to do so here. The social costs of allowing convicted criminals who violate their parole to remain at large are particularly high, and are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future crimes than are average citizens. Application of the exclusionary rule, moreover, would be incompatible with the traditionally flexible, nonadversarial, administrative procedures of parole revocation, in that it would require extensive litigation to determine whether particular evidence must be excluded. The rule would provide only minimal deterrence benefits in this context, because its application in criminal trials already provides significant deterrence of unconstitutional searches.

The same is true of clemency and pardon decisions. The president, governor, or other authority responsible for granting clemency may consider illegally seized evidence. Exceptions to the exclusionary rule can be seen in Figure 2.3.

Questions and Problems

Explain what purpose is served, if any, of applying the exclusionary rule and answer whether the rule applies in each of the following scenarios.

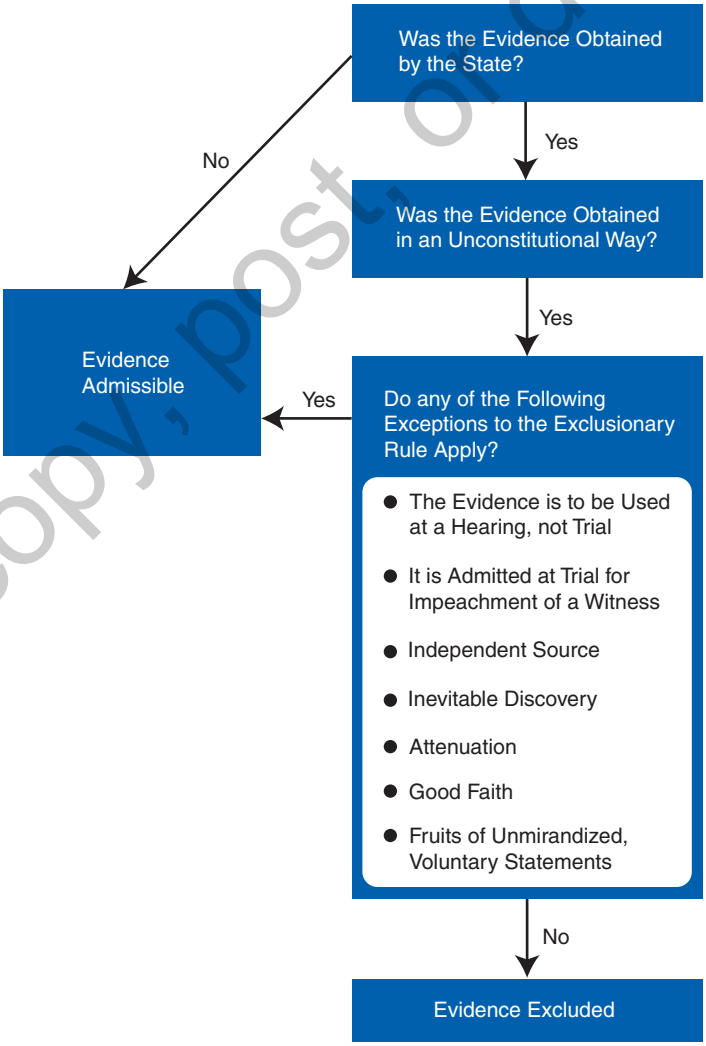
1. Darren Detective has been investigating Sally Suspect for extortion. He files a criminal complaint and an application for a search warrant for Sally's home with the local criminal

court. The judge reviews the evidence, determines probable cause exists to conduct the search, and issues the warrant. More evidence of Sally's crime is found and she is charged with extortion. Subsequently, the trial judge decides that while it was a close call, the earlier judge erred; probable cause to issue the warrant didn't exist. Sally has asked the trial judge to exclude the evidence found in her home from her trial.

2. Gladys Kravitz is a neighbor of Darren Bewich. Believing Darren to be hiding illegal weapons in his house, she enters his home through an unlocked window while he is away. In the basement, she discovers a grenade launcher and hand grenades. Gladys turns them over to police. Darren is arrested and charged with violating a state weapons law. He has asked the trial judge to exclude the weapons because they were obtained illegally.

3. Tricia, a deputy sheriff, observes Randal driving a white van. She believes he and his van look creepy, so she turns on her police cruiser's lights and siren. Randal pulls over and asks what he has done. Tricia orders him out of the van, handcuffs him, and searches his person. She finds cocaine in his pocket. Randal is arrested and charged with possession of an illegal substance. He has asked the trial court to exclude the cocaine from his trial.

FIGURE 2.3 ■ Fruits of the Poisonous Tree Exceptions



IN A NUTSHELL

American courts serve many important roles. Their obvious role is to adjudicate cases, civil and criminal. With tens of millions of cases filed every year, this is a large task. Another important role is the protection of individual liberties. This is vividly seen in criminal law, where courts ensure that police and prosecutors treat defendants fairly and Congress and state legislatures don't criminalize protected conduct or speech.

Important to this role is the judicial review, announced in *Marbury v. Madison* in 1803. As Chief Justice Marshall wrote in that opinion, "[i]t is emphatically the province and duty of the Judicial Department to say what the law is." Although exercised rarely, judicial review enables courts to strike down laws or the actions of the executive branch that violate the Constitution. An extension of judicial review, criminal courts exclude illegally obtained evidence from trials. To do otherwise would delegitimize courts by making them accomplices in illegal activity.

To hear the millions of cases filed every year, the United States has a large, coordinated network of courts. This system has local, state, territorial, and federal courts. Each state, territory, and the federal government has both trial and appellate courts. Trial courts are responsible for the on-the-ground judicial work. In criminal law, this includes issuing search and arrest warrants, determining whether a defendant should be held in jail or released before trial, determining the ultimate factual question—guilt, and sentencing convictees. Trial courts see and hear from defendants and witnesses. Appellate courts, on the other hand, review legal decisions of trial courts. They do not directly see or hear witnesses. Instead, appellate judges read records and hear from attorneys through written briefs and, in most cases, oral arguments.

KEY TERMS

Attenuation doctrine
Concurring opinion
Court of general jurisdiction
Courts of limited jurisdiction
De novo
Dissenting opinion
Final judgment rule
Fruits of the poisonous tree doctrine
Good faith exception
Independent source
Inevitable discovery doctrine
Interlocutory appeal
Judicial review
Majority opinion
Negative rights
Positive rights
Record
State action doctrine
Substantial evidence
Ultimate factual question