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Thomas M. Hardiman
United States Court of Appeals for the Third Circuit

Lauren Gailey

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IS THE EXCLUSIONARY RULE A PROHIBITION-ERA RELIC?

Thomas M. Hardiman & Lauren Gailey***

THE PROHIBITION ERA AND POLICING: A LEGACY OF MISREGULATION. By *Wesley M. Oliver*. Nashville: Vanderbilt University Press. 2018. Pp. x, 202. Cloth, $69.95; paper, $27.95.

INTRODUCTION

In his engaging new book, *The Prohibition Era and Policing: A Legacy of Misregulation*, Wesley M. Oliver[1] advances a novel view: the legal regime that regulates modern policing is a vestige of the Prohibition Era. During Prohibition, when intrusive and unreasonable police searches were commonplace, courts attempted to deter these affronts to privacy by introducing the exclusionary rule. Decades later, the Warren Court continued to adhere to this approach, expanding the exclusionary rule's reach from the search-and-seizure context to new and very different problems, like coerced confessions and the excessive use of force. Oliver argues that excluding evidence in excessive-force cases was problematic because that remedy fails to address the underlying police misconduct and precludes the admission of reliable evidence.

Oliver's insights into the provenance of the exclusionary rule lead him to conclude that the Supreme Court's apparent retreat from it in recent years is less an outright rejection (as is commonly thought) than a course correction. After all, the remedy of exclusion has been unmoored from its original purpose—deterring unconstitutional searches and seizures of illegal alcohol—for nearly a century. Oliver's hope is that the Court's focus will shift away from the exclusion of reliable evidence (however obtained) and toward remedies he views as better suited to addressing the types of police misconduct that are more pressing today: coerced confessions and excessive force.

The erosion of the exclusionary rule has been a recurring theme in criminal procedure scholarship for years, and many of the arguments predicting its demise are by now familiar.[2] But *The Prohibition Era and Policing* adds a

* Circuit Judge, United States Court of Appeals for the Third Circuit.

** J.D., Duquesne University School of Law; former clerk to Hon. Thomas M. Hardiman.

1. Associate Dean for Faculty Scholarship, Director of the Criminal Justice Program, and Professor of Law, Duquesne University School of Law.

2. *See, e.g.*, Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL'Y 457 (1997).

new prologue to this story. Oliver rejects the prevailing view that the exclusionary rule originated around the turn of the twentieth century and then went dormant, only to be resurrected by the Warren Court decades later.[3] Instead, he claims the exclusionary rule actually became the default judicial remedy for search-and-seizure violations in state courts during Prohibition, in response to societal concerns about police overreach. The exclusion from evidence of illegally seized alcohol was a sensible remedy when courts and citizens alike were primarily concerned with overzealous searches and seizures. And because much of the country disagreed with Prohibition anyway, there was little outrage when prosecutions were discontinued. But after Prohibition ended, illegal searches and seizures became a less pressing concern than coerced confessions and the use of force by police.

Oliver's thesis is that the law of criminal procedure has not evolved to keep up with the changing times. Instead of formulating new legal doctrines and remedies to address these new concerns, the Warren Court stretched Prohibition-Era search-and-seizure precedent—including the exclusionary rule—to apply to these other forms of police misconduct as well. In Oliver's view, it was a poor fit, and the Court's Fourth and Fifth Amendment case law fails to deter police excesses, excludes reliable evidence in a manner that undermines prosecutions, and frustrates the development of a body of law that would provide officers with more specific guidance regarding the appropriate use of force.

By supplying historical context, *The Prohibition Era and Policing* ties together subjects that are of interest to both constitutional scholars (the erosion of the exclusionary rule) and the general public (police use of force, coerced confessions, and wrongful convictions).

I. Modern Policing and Its Effects on Criminal Procedure

In Part One of his book, Oliver begins with an interesting discussion of the history of policing. During the founding era, the state interacted with the people very differently than it has since modern police departments were first created in the mid-1800s (p. 13). Investigatory power during the colonial period rested with British customs officers, whose flagrant use of the dreaded general "writs of assistance" was among the factors that motivated the colonists to revolt against King George III (p. 13). Although these writs did not survive independence, customs officers retained much of their authority (pp. 14–15). Ordinary law enforcement officers had little power by comparison, and the extent to which a crime was prosecuted at all depended heavily on the willingness of the victim to seek a remedy (pp. 15–16). British rule was still fresh in the minds of early Americans, and their wariness of standing armies led them to resist the creation of "military-style police force[s]" (p. 21).

3. *See infra* note 20.

That changed by the mid-nineteenth century, however, when "[t]he realities of modern urban life put pressure on even a staunchly democratic society to create methods of social control" (p. 21). As the nation grew in size and population, violent crime and riots prompted large cities like New York and Chicago to establish police forces modeled after the 1829 police force the British Parliament created to keep order in London (p. 21). Once these police forces were established, the investigatory role shifted from magistrates to police officers.[4] As police assumed more power, they were criticized for their "brutality and corruption."[5] But instead of moving to reduce police power, the public's response was to reform and professionalize officers' behavior.[6] Even progressives like Teddy Roosevelt, who was then police commissioner in New York City, believed proper training and management would ameliorate some of the abuses by helping officers to distinguish between "appropriate" and "inappropriate" uses of violence, which "was not necessarily a bad thing so long as it was directed against the criminal element" (pp. 24–26).

Once Prohibition took effect, however, the aggressive tactics that police used to enforce it called this approach into question.[7] Prohibition had begun not as a national phenomenon but in the states.[8] Often led by private groups like the Temperance Watchmen or the Societies for the Suppression of Vice, several states enacted legislation banning alcohol (p. 27). The first to pass a prohibitory law was Maine, which did so in 1846 (pp. 28–29). Until that time, alcohol had been controlled by local licensing laws that were especially permissive in rum-soaked Portland, which was then a bustling commercial seaport (pp. 28–29). That system changed when Neal Dow, a resident of Portland and a Quaker temperance advocate, successfully pushed the state government to enact a prohibition law.[9]

Oliver adeptly explains how Maine's experiment with prohibition during the second half of the nineteenth century presaged what was to come nationwide on January 16, 1920, when the Eighteenth Amendment and the Volstead Act made Prohibition the law of the land.[10] Just as Maine's courts had begun to supervise and limit aggressive enforcement of prohibition by police in that state, so too would other courts around the country attempt to regulate police conduct during national Prohibition.[11] Courts did so primarily by enforcing Fourth Amendment limits on intrusive searches for and sei-

4. *See* pp. 21–22.

5. *See* p. 22.

6. *See* pp. 24–26.

7. *See* pp. 27–28.

8. *See* p. 27.

9. Maine's cutting-edge Prohibition law has been the subject of Oliver's scholarship. *See, e.g.*, Wesley M. Oliver, *Portland, Prohibition, and Probable Cause: Maine's Role in Shaping Modern Criminal Procedure*, 23 ME. B.J. 210 (2008).

10. *See* pp. 35–37, 39.

11. *See* p. 35 ("Much of the fossil record of modern criminal procedure can . . . be found in the Maine Supreme Judicial Court's interpretation of the nation's first prohibitory laws.").

zures of alcohol.[12] Applications for search warrants came under heavier scrutiny, and courts required individualized suspicion where little or none had been required previously.[13] Ultimately, every state but Maryland enacted a version of the Volstead Act, and the judicial approaches to criminal procedure that courts adopted in response—which Oliver examines in Part Two of the book—gradually made their way to the Supreme Court.[14]

The first case Oliver discusses arose in the United States Court of Appeals for the Third Circuit. The home of one J.J. Nathanson had been searched pursuant to a warrant based upon a Prohibition agent's conclusory averment "that he had 'cause to suspect and does believe' that untaxed liquor from Canada was in" Nathanson's residence.[15] The Third Circuit upheld the search, concluding that it was for state legislatures to decide whether a warrant required a factual foundation.[16] The Supreme Court reversed in 1933 in *Nathanson v. United States*,[17] holding that a magistrate could not properly issue a warrant to search a home without probable cause (p. 45). The Court thus confirmed that judicial scrutiny of the underlying basis for an affiant's belief—or, in lay terms, "the legitimacy of [the] search"—was required under the Fourth Amendment (p. 45). Although that procedural safeguard had been in use since the Maine law and had become "standardized" as prohibition spread throughout the country, it was now a federal constitutional requirement (p. 45).

A. *The Exclusionary Rule*

Oliver's discussion of Prohibition's impact on the development of the remedy for constitutional violations—the exclusionary rule—is even more incisive. The highlight is his interesting and enlightening clarification of its provenance. The exclusionary rule is usually attributed to the Court's decisions in *Boyd v. United States*,[18] an 1886 civil forfeiture case, and *Weeks v. United States*,[19] a 1914 criminal case involving the return of a defendant's il-

12. *See* pp. 36–37, 40.

13. The courts' increased scrutiny of search warrants applied not just to alcohol, but to pornography and espionage as well. For example, "[t]he Comstock Act of 1873, which prohibited sending pornography through the mail, included a search and seizure provision much like the one in Neal Dow's prohibitory law in Maine." P. 43. Likewise, the Espionage Act of 1917 required affidavits to "set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." P. 44 (quoting Espionage Act of 1917, ch. 30, tit. XI, § 5, 40 Stat. 217, 228).

14. *See* pp. 39–41.

15. P. 44 (quoting Nathanson v. United States, 63 F.2d 937, 937 (3d Cir. 1933)).

16. P. 45 (citing Nathanson v. United States, 63 F.2d 937 (3d Cir. 1933)).

17. 290 U.S. 41 (1933).

18. 116 U.S. 616 (1886).

19. 232 U.S. 383 (1914).

legally seized property.[20] While it is true that those cases introduced early versions of the exclusionary rule into the Supreme Court's precedent, Oliver argues convincingly that Prohibition's role in establishing the rule as a fixture of criminal procedure has not been given its due.[21]

Before *Weeks*, only Iowa had adopted a generic exclusionary rule barring evidence discovered during an illegal search.[22] The number of states that adopted the exclusionary rule did not truly spike until national Prohibition went into effect several years later; eighteen more states adopted the rule while Prohibition was in effect.[23] And only six endorsed the rule between the end of Prohibition and the Supreme Court's nationalization of the issue in *Mapp v. Ohio* in 1961 (p. 62). But not even the *Mapp* Court noticed the causal connection; most of those states were responding to the "crisis in law enforcement" that Prohibition brought on (p. 62).

In support of his argument that the exclusionary rule's spike in popularity during Prohibition was not coincidental, Oliver delves into state court opinions in South Carolina, New York, Alabama, Oklahoma, Florida, and other states that enforced the exclusionary rule soon after Prohibition was established.[24] His discussion of the legal landscape in New York contains one of the book's more interesting twists, in which he debunks the common perception that then-Judge Benjamin Cardozo disapproved of the exclusionary rule because, as Oliver paraphrases Cardozo's quotable line, "the criminal should not go free because the constable blundered."[25] Cardozo indeed wrote his famous line at the "height of Prohibition" in 1926, but it's important to note that New York had repealed its prohibitory law by the time the case arose, and police in that state had ceased searching for alcohol (pp. 61–62). Although Cardozo's line has "served as a compelling critique for . . . opponents of the exclusionary rule," the historical context Oliver pro-

20. Pp. 46–47; *see also, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 787–88 (1994) (identifying *Boyd* as the first exclusion case); Thomas Y. Davies, *An Account of* Mapp v. Ohio *That Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 622–23 (2007) (book review) (tracing exclusionary rule to *Boyd* and *Weeks*).

21. Pp. 47–48. Oliver attributes this to the legal academy's "focus on the US Supreme Court to pinpoint the origins of legal innovation." P. 47. He points out that this sort of myopia is "odd" in the criminal procedure context because, at that time, the relative number of federal criminal cases was "min[u]scule"—the overwhelming majority of the action was taking place in the state courts. P. 48.

22. P. 49. Iowa's was the more "modern" of the two formulations of the exclusionary rule that came into being following the introduction of state prohibition laws in the latter half of the nineteenth century. *See* pp. 48–49. The earlier version only excluded evidence where the search in question was based on an invalid warrant; the generic version applies whether an illegal search was conducted pursuant to a warrant or not. P. 48.

23. After *Weeks* was decided, a few states that had prohibition laws (such as South Carolina and Michigan) adopted the exclusionary rule as well—but, as Oliver argues, correlation does not necessarily indicate causation. Pp. 49 & 223 n.35, 62.

24. *See* pp. 54–62. The other states included Illinois, Kentucky, Michigan, Mississippi, Missouri, Oregon, Tennessee, Washington, Wisconsin, and West Virginia. P. 55.

25. P. 61 (citing People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

vides reveals that Cardozo and his colleagues simply had no need to impose it, because the raison d'être for the exclusionary rule (regulating police overreach in their quest to enforce Prohibition) was no longer an issue in New York (pp. 61–62).

B. *Interrogations*

Prohibition did not just affect the courts, of course. The intrusiveness and selectivity of enforcement did extensive damage to the public's respect for police, and the outrage wasn't limited to aggressive search-and-seizure practices.[26] As Oliver explains, the Wickersham Commission, which was convened in 1929 to study these issues, "produced a fourteen-volume criticism of nearly every aspect of the criminal justice system with the greatest attention being given to its scathing report detailing incidents of physical torture by police interrogators" (p. 63).

Oliver explains that, in the decades before Prohibition, courts had been concerned more with the reliability of confessions than with the methods police used to obtain them.[27] Oliver traces the issue of the admissibility of coerced confessions to the late-eighteenth-century English case of *Rex v. Warickshall*,[28] which involved evidence discovered as a result of a confession that had been coerced through "promises of favor" (p. 64). The court reasoned that, while the statements might have been questionable, the physical evidence did not raise reliability concerns—the stolen property that the defendant hid was where she'd said it would be (pp. 64–65). It was therefore admissible.[29]

State courts by the early twentieth century "would routinely accept not only the reliable physical discoveries made as a result of a confession, but [the] tortured confessions themselves" (p. 67). The Supreme Court began to express an interest in coercion in 1897, when it held "that due process required a confession to be voluntary."[30] Twenty-seven years later in *Ziang*

26. *See* p. 63.

27. *See* pp. 64–65.

28. (1783) 168 Eng. Rep. 234; 1 Leach 263.

29. Pp. 64–65. Although *Warickshall* remained the rule for much of the nineteenth century, there were exceptions. One particularly egregious example is the 1856 case of *Jordan v. State*, 32 Miss. 382 (1856), in which a runaway slave in Mississippi was tortured in order to extract a confession that he had fatally stabbed a fellow slave. Pp. 66–67. The Mississippi High Court of Errors and Appeals rejected the *Warickshall* rule and held that the testimony connecting the defendant to the knife could not be admitted into evidence, as it was a result of the illegal confession. P. 67. The Georgia Supreme Court held likewise in the 1894 case of *Rusher v. State*, 21 S.E. 593 (Ga. 1894). P. 67. According to Oliver, *Jordan* and *Rusher* "would be outliers"; state courts during this period generally did not "recogniz[e] any circumstances under which reliable incriminating physical evidence would be excluded." *See* p. 67. Nevertheless, it is worth noting that southern appellate courts in cases like this were "much more liberal than one would expect" in excluding confessions, especially when the defendant was African American. *See* p. 71.

30. Pp. 67–68 (citing Bram v. United States, 168 U.S. 532, 549 (1897)).

Sung Wan v. United States,[31] the Court held that a confession made by a seriously ill defendant after nearly two weeks of interrogation was inadmissible because it had been coerced (pp. 69–70). The Court declared that "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion."[32] Oliver explains that "it was the compulsion itself, not the effect of the compulsion on the accuracy of the statement, that required its exclusion" (p. 70). As *Wan* demonstrates, by this time the Court was looking to "something other than reliability" to determine whether a confession was admissible.[33]

As with search-and-seizure practices, both the Supreme Court and state courts were losing patience with police interrogations during the Prohibition Era.[34] But here, Oliver identifies a surprising incongruity: "[S]tate courts, even in states to adopt the exclusionary rule, did not generally adopt the idea, as the Supreme Court had in *Wan*, that coercion should be viewed like unlawful searches and the fruits excluded for similar reasons" (p. 72). Although state courts condemned "in unmeasured terms" the use of the so-called "third degree" to extract confessions, they "were willing to sacrifice reliable evidence to deter illegal searches for liquor but not to deter torture."[35]

As with Fourth Amendment law, however, "Prohibition . . . began to change the public's tolerance for violently induced confessions, and with this new attitude came greater judicial oversight of interrogation practices" (p. 79). The Supreme Court began to regulate state interrogations soon after the Wickersham Commission issued its report criticizing those practices (p. 81). Oliver discusses at length a seminal case on the subject, *Brown v. Mississippi*.[36] *Brown* involved confessions obtained from three witnesses fol-

31. 266 U.S. 1 (1924).

32. P. 70 (quoting *Wan*, 266 U.S. at 14–15).

33. *See* p. 69.

34. *See* p. 69.

35. P. 73 (quoting Ross v. State, 289 P. 358, 359 (Okla. Crim. App. 1930)). The book contains an interesting discussion of the "third degree," which was introduced by New York Police Department Inspector Thomas Byrne in the late nineteenth century. P. 74. This method of extracting confessions was used with relative impunity because New York at that time assigned the decision whether to suppress the evidence to the jury rather than the trial court. *See* p. 74. Thus, "juries were left with a choice of freeing someone who had confessed, often to a serious crime, or finding that it should not consider evidence that it had just heard because the statement was improperly obtained." P. 74. And "[n]o appellate court during the Gilded Age in New York found that a jury was improperly given the option of deciding whether a confession was voluntary." P. 78. During the Prohibition Era, however, juries were less willing to give the police the benefit of the doubt and "in the 1920s began acquitting suspects who appeared to have been the victims of third-degree tactics, just as they acquitted defendants in liquor cases who had suffered unreasonable searches." P. 79.

36. 297 U.S. 278 (1936).

lowing the most heinous and depraved torture imaginable.[37] Justice Griffith of the Mississippi Supreme Court, who had dissented from the decision under review, described the transcript as "read[ing] more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."[38] In vindicating Justice Griffith's position and ruling the confessions inadmissible, the U.S. Supreme Court "did little more than let the facts . . . speak for themselves" (p. 85). But the case was nonetheless a key development in the Court's confession jurisprudence. Though *Brown* was "one of the earliest cases to impose limits on state investigatory practices" (p. 83), the Court did not mention reliability. It focused instead on the coercive nature of the torture that the deputies had admittedly perpetrated.[39]

C. *Wiretapping*

To conclude Part Two, Oliver turns from medieval investigatory methods to the state of the art: electronic communications and wiretapping. The law governing these practices also experienced a major shift in response to the public's frustration with aggressive Prohibition-Era law enforcement tactics. In the late nineteenth century, sealed packages traveling through the mail were protected by the Fourth Amendment but telegraph communications were not, as there were only minimal restrictions on subpoenas for telegrams.[40] This dichotomy reflected the contemporary understanding of the relative degrees of privacy those two technologies offered. Telegrams were not deemed private for several reasons. First, it was well known that "electronic snoops" with a little technical know-how could intercept information sent by wire (p. 94). Second, a series of high-profile investigations made clear

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37. P. 81; *see also* pp. 81, 84–85 (describing manner in which "vulnerable" African American suspects were hanged, beaten, and threatened by white deputies over the course of several days).

38. P. 85 (quoting *Brown*, 297 U.S. at 282 (in turn quoting Brown v. State, 161 So. 465, 470 (Miss. 1935) (en banc) (Griffith, J., dissenting))).

39. Four years after *Brown*, the Court in *Chambers v. Florida*, 309 U.S. 227 (1940), again failed to mention reliability in finding confessions inadmissible. *See* pp. 86–87 (citing *Chambers*, 301 U.S. at 231, 239). Although the Court's decision did not turn on the allegations of physical violence, it focused on the fact that the suspects had confessed only after being interrogated for a week. P. 87. Likewise, in *Lisenba v. California*, 314 U.S. 219 (1941), the Court again emphasized the improper use of coercion (but concluded that the confession at issue there was not involuntary). P. 88 (citing *Lisenba*, 314 U.S. at 236, 239).

40. P. 96 (discussing *Ex parte* Jackson, 96 U.S. 727, 732–33 (1877) ("Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.")); *see also* Olmstead v. United States, 277 U.S. 438, 464 (1928) ("The United States takes no such care of telegraph or telephone messages as of mailed sealed letters.").

that the government had no trouble obtaining telegrams via subpoena.[41] Indeed, this was the way things had always been since the commercial telegraph came into widespread use during the Civil War.[42] As a result, the public was well aware of "[t]he government's ability to acquire access to virtually any information passed over a telegraph wire" (p. 99).

The inability of the telegraph operators to persuade courts to impose anything more than "minimal" scope restrictions on subpoenas seeking telegrams underscores this theme (p. 104). Even reformers at the time sought to "prevent[] subpoenas from being unduly broad and burdensome," which "incidentally provided some privacy protection" but still presupposed that the Fourth Amendment's warrant requirement did not apply.[43] That Western Union and other telegraph companies challenging the subpoenas were privately owned compounded the problem because "no court or legislature had concluded that a telegraph company's interest, or the interest of its customers, in privacy outweighed 'the superior claim which society has upon the testimony of all its members when essential to the proper administration of [public] justice.' "[44]

The prevailing view that communication by wire was not protected from government scrutiny also applied to telephones when they began to make their way into American households. For example, when New Yorkers learned in the early twentieth century that the NYPD had been secretly tapping their phones, "the public, although initially startled, accepted that the police needed this tool to fight crime" (p. 108). The police commissioner justified the wiretaps with "a very modern defense": they were only "unconstitutional if used against innocent persons" (p. 109). As Oliver cheekily explains, honest citizens did not have to worry that their rights had been violated, because "the commissioner of police[] had considered the evidence

41. P. 95. These high-profile cases included the impeachment of President Andrew Johnson and a fraud investigation targeting members of President Ulysses Grant's administration. Still others were congressional investigations into a "large land fraud" allegedly perpetrated by a grocery-store chain and voter-fraud allegations arising from the controversial and hotly contested 1876 presidential election. *See* pp. 98–102.

42. *See* pp. 93, 98.

43. *See* p. 104.

44. *See* p. 103 (quoting 44 CONG. REC. H602 (daily ed. Jan. 12, 1877) (report of congressional committee charged with investigating 1876 election)). The issue of government subpoenas of customers' personal information in the custody of private companies remains relevant today. Companies such as wireless carriers, technology companies, and merchants are regularly served with such subpoenas—which are frequently challenged in court, raising novel legal issues. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (holding that criminal defendant had reasonable expectation of privacy in cell phone data records that revealed information about his location and movements for Fourth Amendment purposes, even though records were in wireless carrier's custody); United States v. Microsoft Corp., 138 S. Ct. 1186, 1187–88 (2018) (per curiam) (dismissing as moot case involving issue of whether email provider was required to comply with subpoena seeking information stored on server located outside United States).

supporting the wiretap and found it to be sufficient. And rarely, if ever, was his professional judgment wrong" (p. 110).

Although the public initially accepted this reasoning—and wiretapping generally—Prohibition would "awaken[] a hatred of wiretapping" that would ultimately result in major changes to the law (Chapter Five). For Oliver, the exception that proves the rule is the seminal case of *Olmstead v. United States*.[45] In *Olmstead*, the leader of a major West Coast bootlegging ring challenged his conviction, which was based on evidence that federal officers had obtained by wiretapping private conversations for "many months."[46] The Supreme Court affirmed the conviction, reasoning that the wiretaps did not violate the Fourth Amendment because there had been no physical trespass to the defendant's home or office.[47]

Oliver points out that, in a broader sense, *Olmstead* "implicitly acknowledged the authority of any federal agent to tap any citizen's telephone without obtaining authorization from anyone" (p. 113). It thus represented a high-water mark for the Court's approval of aggressive police practices linked to Prohibition. Yet because the tide of public opinion by 1928 had shifted decidedly against these enforcement efforts, "[i]n almost every way, the Supreme Court's decision to side with law enforcement in *Olmstead* was against the will of the majority" (p. 113). The majority made its will clear when, shortly after the Twenty-First Amendment brought Prohibition to an end, the Communications Act of 1934 proscribed wiretapping and prevented telephone companies from sharing communications with third parties (p. 114). "Wiretapping during Prohibition—which became a major issue in the *Olmstead* case—created such backlash that communication over wires became more protected than information in sealed envelopes or effects in one's home" (p. 116). In essence, this shift had "revers[ed] societal assumptions of an expectation of privacy in electronic communications" (p. 93).

II. The Warren Court and Prohibition

In Part Three, Oliver turns to what he calls "Prohibition's Legacy in the Warren Court and Beyond" (p. 117). Here, Oliver cites the Court's 1961 decision in *Mapp v. Ohio*[48] as "perhaps the single most important case shaping the current misregulation of police" (p. 122). Although *Mapp*'s sweeping impact on the law of criminal procedure has been undeniable, its facts involve small-time crime. When a Cleveland bookie's house was bombed, police identified a rival bookie as a suspect and had reason to believe he was hiding in the home of Dollree Mapp.[49] The police barged in without a war-

45. 277 U.S. 438 (1928), *overruled in part by* Berger v. New York, 388 U.S. 41 (1967), *and* Katz v. United States, 389 U.S. 347 (1967).

46. *Olmstead*, 277 U.S. at 455–57.

47. *Id.* at 464–65.

48. 367 U.S. 643 (1961).

49. P. 122. Oliver notes that *Mapp* includes a "celebrity cameo" of sorts: the bookie whose house was bombed was none other than the notorious Don "Only in America" King,

rant and found illegal pornography (pp. 122–23). Although Mapp's lawyer had challenged her conviction on First Amendment grounds, the Supreme Court—which "had reached a boiling point" of frustration with police behavior and was "looking for a way to control [it]"—took the case in a very different direction, holding that the evidence was inadmissible under the Fourth Amendment.[50] With only three sentences' worth of briefing to guide it, the Court held more broadly that the exclusionary rule, which up to that point had been left to the states, was now a federal constitutional imperative.[51]

Oliver argues that the *Mapp* Court intended the exclusionary rule to address "one type of police misconduct, unreasonable searches and seizures for reliable evidence," after "other methods of deterring this sort of misconduct had proven ineffective" (p. 122). But by attacking police misconduct on the search-and-seizure front, the Court "left the most serious police misconduct of the late 1950s—harassment, excessive force, and unjustified shootings—to be regulated by mechanisms the [C]ourt itself [had] found to be ineffective at deterring illegal searches and seizures" (p. 122).

This is one of Oliver's central (and most incisive) themes, and he reiterates it in his discussion of another landmark case, *Terry v. Ohio*.[52] In *Terry*, the Court upheld the stop and frisk of three men who were "casing" a jewelry store, announcing that the Fourth Amendment permitted seizures for investigatory purposes upon mere reasonable suspicion of criminal activity (pp. 130, 132). Addressing the argument that so lenient a rule would permit "wholesale harassment" of, for example, African Americans, the Court acknowledged the exclusionary rule's limitations: because "the rule is ineffective as a deterrent" when the goal of the police is something other than collecting evidence, such harassment "will not be stopped by the exclusion of any evidence from any criminal trial."[53]

Oliver identifies a paradox in these cases: although *Mapp* takes the position that the exclusionary rule is necessary because other methods of deterring police misconduct don't work, the Court in *Terry* acknowledged that police were harassing citizens but admitted that "the exclusionary rule could do nothing to prevent it" (p. 132). In Oliver's view, this yields a result that is

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who went on to become a boxing promoter to, most notably, world heavyweight champion Mike Tyson. *See* p. 122.

50. *See* pp. 123, 127.

51. Pp. 119, 122–23, 127. Oliver downplays the impact of the Court's decision to overturn *Wolf v. Colorado*, 338 U.S. 25 (1949), which had left the exclusionary rule to the states, saying that the Court had "merely requir[ed] half of the country to embrace a rule that the other half had adopted." P. 119. But in stating it this way, he implicitly acknowledges that only the barest majority of states—twenty-six of fifty—had adopted the exclusionary rule, and eighteen of those had done so during Prohibition. *See* p. 123. It is hardly a foregone conclusion, then, that the winds of change were blowing in such a way that the other twenty-four states would have adopted the exclusionary rule of their own volition.

52. 392 U.S. 1 (1968).

53. *Terry*, 392 U.S. at 13–15.

"unsatisfying" but hardly surprising, given that the Court chose "a Prohibition Era rule to control police—one that provides an opportunity to fine-tune the rules regulating searches for evidence but nothing to address police force" (pp. 132–33).

In Chapter Seven, Oliver returns to the subject of police interrogations, this time in the context of the Warren Court. Central to that discussion is, of course, *Miranda v. Arizona*.[54] This was not the first time the Court encountered the issues of whether custodial statements are admissible and which procedural safeguards are necessary to "assure that the individual is accorded his privilege [against self-incrimination]."[55] Two years earlier, in *Escobedo v. Illinois*,[56] the Court had held that police interrogators ran afoul of the Sixth Amendment when they denied a defendant's "repeated requests" for a lawyer and failed to inform him of his right to remain silent.[57] The rationale in *Escobedo* rested on two "lesson[s] of history": "that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses," and that "[i]f the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[58]

The *Miranda* Court expanded on these issues and provided "concrete constitutional guidelines for law enforcement agencies and courts to follow" in informing a defendant of his right to remain silent and to have counsel present.[59] According to Oliver, the Court in *Miranda* "merely placed more emphasis on a suspect's waiver of his right to silence, formally elevating the waiver to a necessary condition for admissibility" (p. 134). Oliver's characterization of *Miranda* as the apotheosis of "a long tradition of informing suspects of their rights to silence before interrogations" is another product of his skillful use of historical context.[60] He notes that "[a]s early as 1760, suspects were given warnings that were strikingly similar to what we now know as the *Miranda* warnings."[61] This changed, however, as police forces were created and the rules applicable to magistrates were deemed not to apply to police (p. 135). Initially, despite this change, whether a warning had been given was viewed as relevant to the confession's voluntariness (and thus its admissibility) (p. 135). But during Prohibition, when courts began to "aggressively police[] interrogation methods," "coercion itself came to be seen as a problem, even if the confession obtained was absolutely reliable"

54. 384 U.S. 436 (1966).

55. *Miranda*, 384 U.S. at 439.

56. 378 U.S. 478 (1964).

57. *Escobedo*, 378 U.S. at 481, 489–91.

58. *Id.* at 488–90 (footnotes omitted).

59. *Miranda*, 384 U.S. at 441–42, 467–69.

60. *See* p. 134.

61. P. 135. These warnings were not given out of solicitude for suspects; rather, they were designed to ensure that the trial court would not later find out that the statement had been made under a promise or threat and rule it inadmissible. P. 134.

(p. 136). In this way, Prohibition "facilitated an essential move toward our current system of regulation—the decoupling of coercion concerns from reliability concerns" (p. 136).

Here Oliver makes an important point that is likely to resonate with trial lawyers and trial judges: "*Miranda* is often described as a decision of convenience, a mechanism for avoiding fact-bound determinations that often led to inconsistent outcomes, leaving little guidance for lower courts" (p. 138). Pre-*Miranda* decisions like *Escobedo* looked to specific facts like the interrogation method or the "impact [of] those interrogation methods . . . on . . . particular suspects."[62] But as Herbert Wechsler explained not long after *Miranda* was decided, this case-by-case approach had become "increasingly intractable and burdensome," which put "pressure [on courts] to decree more rigid rules" that were easier to apply.[63] This was no easy feat, and it presented the Court with "a question it found itself unable to answer—how much coercion is permitted in an interrogation room?" (p. 139). In Oliver's view, the Warren Court in *Miranda* cut through this Gordian knot by formulating a rule that "trusted suspects to protect themselves" by "determin[ing] for themselves whether they are willing to submit to police questioning while in custody."[64]

In Oliver's view, the "fundamental problem" with this approach is that it "allowed courts to abandon the admittedly hard work of defining the limits on interrogation techniques in the cases of often less-than-sophisticated—and possibly innocent—suspects who waived these rights" (p. 139). The *Miranda* Court recognized that these suspects are in greater need of protection than others (p. 139). Yet paradoxically, the rule it announced puts these suspects, who are less likely to possess the "resolve to insist that the interrogation cease," in greater danger of "the coercive character of the interrogation overbear[ing] their will, perhaps even to the point of falsely confessing" (p. 139).

In the same vein, Oliver criticizes *Miranda* for "tak[ing] the eye of courts off of the voluntariness doctrine"—the only protection left to suspects who have waived their *Miranda* rights (pp. 139, 143). Although the Court "expressly held that the warnings would merely supplement the existing test for the admissibility of confessions," Oliver laments that *Miranda* has "all but displace[d]" the voluntariness test (pp. 139, 143). Once a suspect has waived his *Miranda* rights and consented to an interrogation, courts generally assume the statements that follow were not extracted involuntarily.[65] In prac-

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62. *See* p. 138.

63. Pp. 138–39 (quoting HERBERT WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS 18–19 (1968)).

64. *See* pp. 138–39.

65. P. 143. Oliver cites studies indicating that confessions have been excluded as involuntary in only a few cases out of thousands. P. 144 (citing, for example, Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1219 n.54 (2001) (nine out of all federal and state cases involving confessions decided over two years));

tice, then, a waiver has become a "sufficient condition" for admissibility rather than merely the necessary one the Court intended (pp. 134, 143).

III. Recommendations to Modernize Criminal Procedure Law

In the fourth and final part of his book, Oliver offers some prescriptions to wrest the law of constitutional criminal procedure out of its Prohibition-Era box and bring it into closer alignment with the needs and problems of modern criminal justice. In view of advancements in biological testing that have exposed erroneous convictions and the public outcry over uses of deadly force by police, Oliver calls for a renewed focus on reliability and more attention to defining when and how much force is appropriate (pp. 147–48). Specifically, he implores "judges and policy makers . . . to minimize the exclusion of reliable evidence, to police the admission of *un*reliable evidence, and to identify and punish unnecessary uses of police force" (p. 148). Such an endeavor would empower trial judges to make findings of fact, on a case-by-case basis, on issues of coercion, force, and innocence. This approach would mark a radical departure from the Supreme Court's attempts to draw bright-line rules in these areas, but it's worth considering whether a shift in power from the Supreme Court back to the trial courts would more faithfully exonerate the innocent and convict the guilty.

As to Oliver's first prescription—minimizing the exclusion of reliable evidence—he makes an important but obvious point:

> Society is not equally harmed when it is unable to prosecute a marijuana possession case as it is when it is unable to try a defendant for murder. And intentional, egregious police misconduct is more problematic—and more easily deterred—than less serious misconduct the officer reasonably believes to be permitted by law. (p. 152)

This view finds support in at least three recent Supreme Court cases, which go a long way toward vindicating Oliver's suggestion that courts should minimize the exclusion of reliable evidence.

First, in *Hudson v. Michigan*[66] the Court held that a violation of the "knock-and-announce" rule does not require the suppression of evidence found during the subsequent search of a home.[67] After citing the relevant precedents, the Court emphasized that the exclusionary rule generates "substantial social costs."[68] For that reason, the rule applies only "where its remedial objectives are thought most efficaciously served."[69] Those remedial objectives would not have been served by exclusion in *Hudson*, because "the knock-and-announce rule has never protected . . . one's interest in prevent-

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see also, e.g., Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. B. Found. Res. J. 585, 601 (five of 7,035 state cases surveyed).

66. 547 U.S. 586 (2006) (plurality opinion in part).

67. *Hudson*, 547 U.S. at 594.

68. *Id.* (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

69. *Id.* at 591 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

ing the government from seeing or taking evidence described in a warrant."[70] In the process of explaining its decision, the Court tipped its hand as to its true assessment of the exclusionary rule, which it described as a "get-out-of-jail-free card"[71] and a "massive remedy."[72]

A few years later, the Court again declined to apply the exclusionary rule when it would have prevented the admission of reliable evidence. In *Herring v. United States*,[73] the Court held that evidence seized following an arrest based on a warrant that had been withdrawn was admissible because the police error was an isolated act of negligence and not systemic or reckless.[74] Agreeing with the assessment of the Court of Appeals for the Eleventh Circuit that the benefits of suppression would be "marginal or nonexistent" under the circumstances,[75] Chief Justice Roberts invoked Cardozo's quip, "the criminal should not 'go free because the constable has blundered.'"[76] Once again, the Court maligned the exclusionary rule, this time calling it an "extreme sanction,"[77] and cited *Hudson* for the proposition that exclusion "has always been our last resort, not our first impulse."[78]

Most recently, the Court held in *Davis v. United States*[79] that "[e]vidence obtained during a search conducted in [objectively] reasonable reliance on binding precedent is not subject to the exclusionary rule."[80] In *Davis*, police searched a car in good-faith reliance on the Supreme Court's decision in *New York v. Belton*,[81] which was overruled in *Arizona v. Gant*[82] two years after the search took place.[83] This state of affairs prompted Justice Alito, writing for the Court and again quoting Cardozo, to observe: "It is one thing for the criminal 'to go free because the constable has blundered.' It is quite another to set the criminal free because the constable has scrupulously adhered to governing law."[84]

70. *Id.* at 594.

71. *Id.* at 595.

72. *Id.* at 599.

73. 555 U.S. 135 (2009).

74. *Herring*, 555 U.S. at 144–45.

75. *See id.* at 139, 146 (quoting United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007) (in turn quoting United States v. Leon, 468 U.S. 897, 922 (1984))).

76. *Id.* at 148 (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)); *see also supra* text accompanying note 25.

77. *Herring*, 555 U.S. at 140 (quoting United States v. Leon, 468 U.S. 897, 916 (1984)).

78. *Id.* (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

79. 564 U.S. 229 (2011).

80. *Davis*, 564 U.S. at 241.

81. 453 U.S. 454 (1981) (holding that officers may search automobile's passenger compartment and any containers incident to arrest).

82. 556 U.S. 332 (2009) (holding that officers may search vehicle's passenger compartment incident to arrest if (1) arrestee is within reaching distance, or (2) officers reasonably believe vehicle contains evidence of crime of arrest).

83. *Davis*, 564 U.S. at 235.

84. *Id.* at 249 (citation omitted).

As for Oliver's second prescription—keeping *un*reliable evidence out—the Roberts Court has issued at least one opinion bearing on this point. In *J.D.B. v. North Carolina*,[85] the question presented was "whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*."[86] The Court held that it is.[87] Writing for the majority, Justice Sotomayor emphasized that a reasonable child will feel pressure to submit when a reasonable adult faced with the same circumstances would feel free to leave.[88] She also opined that to hold that age is never relevant would be to deny children the protection of *Miranda*.[89]

Oliver lodges an important criticism of this reasoning:

> *Miranda* has never provided a scheme to protect the innocent or the vulnerable, and the limits placed on the decision have ensured that only the most savvy defendants are capable of exercising its protection. The Rehnquist and Roberts Courts' decisions interpreting *Miranda* have put a spotlight on a fundament[al] flaw in the current system of regulating confessions and have done so by amplifying the flaws in the system. *Miranda* has always failed to prevent false confessions or to serve its stated mission of preventing coercion of the weak. The decades of watering down *Miranda*'s protection ha[ve] made this failure more complete. (p. 160)

In support of his argument that "a reinvigorated version of the voluntariness test provides a far superior basis to protect against police overreaching," Oliver approvingly cites Justice Alito's dissent in *J.D.B.*, where he argued that if *Miranda*'s "one-size-fits-all" standard fails "to account for the unique needs of juveniles, the response should be to rigorously apply the constitutional rule against coercion to ensure that the rights of minors are protected."[90]

Oliver's third prescription—defining and punishing unnecessary uses of police force—poses particular challenges. For starters, Oliver points out that "there is virtually no case law governing the use of non-deadly force."[91] And

85. 564 U.S. 261 (2011).

86. *J.D.B.*, 564 U.S. at 264.

87. *Id.* at 265.

88. *Id.* at 264–65, 272.

89. *Id.* at 281.

90. P. 178 (quoting *J.D.B.*, 564 U.S. at 297–98 (Alito, J., dissenting)). In that opinion Justice Alito warned that the Court ran the risk of running *Miranda* "off the rails." *See J.D.B.*, 564 U.S. at 298 (Alito, J., dissenting). He touted the clarity and administrability of *Miranda* and suggested that vulnerable defendants of all ages can rely upon the Fifth Amendment's prohibition against coercion. *Id.* at 296–97. As Oliver notes, Justice Alito also emphasized that before *Miranda*, the inquiry was all about voluntariness; the key question—to which all personal characteristics are relevant—was whether the defendant's will had been overborne. P. 178.

91. P. 195 (quoting William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043 (1995)). Oliver cites another quotation from Professor Stuntz in which he laments that "[n]o one knows what the Fourth Amendment requires before an officer strikes a suspect because courts do not discuss the issue—they are too busy discussing the terms under which officers can open paper bags found in cars." P. 195 (quoting William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043–44 (1995)).

the case law that does exist hardly provides a robust remedy. In cases arising under 42 U.S.C. § 1983, qualified immunity frequently insulates the state actor from civil liability,[92] and the *Bivens* remedy for federal misconduct is quite limited.[93]

Instead of suggesting a more expansive *Bivens* remedy or a narrower qualified immunity doctrine, Oliver cites with approval Ronald Rychlak's suggestion "that Fourth Amendment violations 'be treated like direct criminal contempt.' "[94] Under this regime, "[j]udges, who are accustomed to punishing officers for Fourth Amendment violations even at the cost of freeing criminals, would be allocated the task of assessing the appropriate sanction for improper searches and excessive uses of force" (p. 196). Recognizing that prosecutors would be quite unlikely to pursue contempt sanctions against police with whom they work, Oliver turns to 18 U.S.C. § 14141, which authorizes the Justice Department to request injunctions prohibiting the use of force (pp. 197–98). As Oliver notes, efforts by the Justice Department to seek such injunctions often result in consent decrees, which are his preferred remedy because "the remedial power of the court to control police misconduct is far superior than it is when the exclusionary rule is the court's only weapon" (p. 198). Regardless of the wisdom or practicality of this proposed remedy, Oliver concludes that "[t]he movement toward preventing unjustified force and investigative methods that risk wrongful convictions has not been as striking as efforts to limit the application of the exclusionary rule" (p. 200).

CONCLUSION

In *The Prohibition Era and Policing*, Wesley Oliver examines issues that matter to both legal scholars and the general public: how courts have attempted to conform police conduct to the strictures of the Constitution, and why those efforts sometimes fail. Although many commentators have addressed these timely topics, Oliver pursues a novel angle as he explains how, for better or worse, state and national experiments with Prohibition significantly influenced the development of the law. He persuasively argues that the shadow cast by Prohibition looms large over recent Supreme Court deci-

92. *See, e.g.*, Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (suspect shot by trooper attempting to disable vehicle in which he was fleeing did not have a clearly established right to be free from deadly force under those particular circumstances); Scott v. Harris, 550 U.S. 372, 374–75, 386 (2007) (no constitutional violation where officer rammed suspect's car, causing him to crash, during high-speed car chase involving "substantial and immediate risk of serious physical injury to others").

93. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1857, 1860 (2017) (declining to extend the remedy of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to claimants challenging conditions of confinement, explaining that the Court has only approved of such claims in three limited contexts and "disfavor[s]" expanding the remedy (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009))).

94. P. 196 (quoting Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241, 241 (2010)).

sions involving the Fourth and Fifth Amendments—and to the extent that shadow has contributed to the conviction of the innocent and the release of the guilty, it is a pernicious one indeed.

Ultimately, Oliver succeeds more in identifying these problems than in solving them. But as with so many complicated issues with deep historical roots, there is no easy fix here. For those who trust trial judges to discharge their duties with care and integrity, Oliver's prescriptions are a welcome attempt to empower those on the front lines of our justice system to answer critical questions about reliability, coercion, and force. Whether or not the Supreme Court moves its jurisprudence in that direction, courts at all levels—and society at large—will continue to wrestle with these difficult issues.