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THE EXCLUSIONARY RULE AND THE 1983-1984 TERM

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I. INTRODUCTION

The Soviet and American people are guaranteed security in their homes and protected from illegal searches by remarkably similar constitutional provisions.[1] Different consequences have resulted not from the slight differences in wording, but rather from the power vested in the American judiciary to breathe life into the words of the fourth amendment. The judiciary, however, has the reciprocal power to squeeze the life out of the amendment, and in four cases decided during the 1983-1984 Term, the United States Supreme Court took strides toward doing so.

History, not logic, is the key to understanding the fourth amendment, the exclusionary rule, and the dilemma of accommodating an individual's fourth amendment rights with society's interest in convicting the guilty. It is difficult to tear

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1. U.S.S.R. CONST. arts. 55-57 provides:

> Citizens are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of the residents. The privacy of the citizens, their correspondence . . . [and] communications is protected by law. Citizens have the right to protection by the courts against encroachments of their . . . personal freedom and property.

U.S. CONST. amend. IV provides:

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

the strand that carries the fourth amendment and the exclusionary rule from the seamless web of Anglo-American political and legal history. Accordingly, this Article first presents a brief historical overview of the exclusionary rule, focusing on certain touchstone cases central to its genesis and subsequent development. Second, the four major exclusionary rule cases of the United States Supreme Court's 1983-1984 Term are addressed. And finally, this background is followed by an analysis of the various policy arguments which have surrounded the exclusionary rule, an affirmation of faith in the rule, and a series of proposals to give it vitality in the future.

II. HISTORICAL BACKGROUND

A. English Law

The sanctity of the home provided the foundation for the fourth amendment.[2] "[O]ne of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince . . . ."[3]

In England this sanctity was challenged by the Star Chamber proceedings, which resulted in the issuance of gen-

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2. For a discussion of the history of the fourth amendment, see generally A. AMSTERDAM, FEDERAL CONSTITUTIONAL RESTRAINTS ON SEARCH, SEIZURE, ARREST, DETENTION AND INTERROGATION BY STATE LAW ENFORCEMENT OFFICERS (1966); E. CHANNING, HISTORY OF THE UNITED STATES (1912); R. DAVIS, FEDERAL SEARCHES AND SEIZURES (1964); T. GARDNER & V. MANIAN, PRINCIPALS AND CASES OF THE LAW OF ARREST, SEARCH AND SEIZURE (1974); L. KOLBREK & G. PORTER, THE LAW OF ARREST, SEARCH AND SEIZURE (1965); W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); G. TREVELYAN, THE AMERICAN REVOLUTION (1905); J. VARON, SEARCHES, SEIZURES, AND IMMUNITIES (2d ed. 1974); J. WIGMORE, EVIDENCE (3d ed. 1940); Atkinson, *Admissibility of Evidence Obtained through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921); Kaplan, *Search and Seizures: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474 (1961); Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49; Stengel, *The Background of the Fourth Amendment to the Constitution of the United States*, 4 U. RICH. L. REV. 60 (1969); Woody & Rosen, *Fourth Amendment, Viewed and Reviewed*, 11 S. TEX. L.J. 315 (1969).

3. Frank v. Maryland, 359 U.S. 360, 379 (1959) (Douglas, J., dissenting) (quoting W. TUDOR, LIFE OF JAMES OTIS OF MASSACHUSETTS 68 (1823)).

eral warrants or authorizations permitting government "messengers" to arrest anyone and search any place to uncover authors, printers, and publications.[4] These roving commissions were necessary, the Crown reasoned, to protect itself from seditious libel.[5]

These general authorizations were attacked by the English libertarian, Wilkes, and addressed by Lords Camden, Lofft, Mansfield, and Prat between 1763 and 1765.[6] For example, in *Entick v. Carrington*,[7] Lord Camden acknowledged a relationship between unreasonable searches and self-incrimination by holding that general warrants violated the principle against self-incrimination.[8] He condemned the uncertainty of general warrants and provided the philosophical cornerstone for a right built not only upon form, in requiring particular procedures in obtaining a warrant, but also upon substance, in condemning unreasonable searches regardless of the procedures followed.[9]

B. The Fourth Amendment

America was contemporaneously plagued with writs of assistance, which were general search commissions used to discover smugglers and confiscate their stolen property. Excessive use of these writs provoked attacks on the Crown led by John Adams and James Otis, Jr.[10] Provisions similar to the fourth amendment were included in state constitutions

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4. Fraenkel, *supra* note 2, at 362-63. Professor Lasson traces this sanctity to biblical times. *See* N. LASSON, *supra* note 2, at 13-50.

5. Fraenkel, *supra* note 2, at 363.

6. *See, e.g.*, Entick v. Carrington, 95 Eng. Rep. 807 (1765); Money v. Leach, 96 Eng. Rep. 320 (1765); Huckle v. Money, 95 Eng. Rep. 768 (1763); Wilkes v. Wood, 98 Eng. Rep. 489 (1763).

7. 95 Eng. Rep. 807 (1765).

8. *Id.*

> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle.

Id.

9. For a discussion of Lord Camden's opinion in *Entick*, see Boyd v. United States, 116 U.S. 616, 626-30 (1886).

10. *See* N. LASSON, *supra* note 2, at 51-78; Atkinson, *supra* note 2, at 14; Fraenkel, *supra* note 2, at 364-65.

and laws,[11] and the fourth amendment, taken from the 1765 Massachusetts Declaration of Rights, was incorporated into the Bill of Rights.[12]

The first significant United States Supreme Court fourth amendment pronouncement came in 1886 from Justice Bradley in *Boyd v. United States*.[13] Like Lord Camden, Justice Bradley linked the freedom from unreasonable searches to the privilege against self-incrimination.[14] The Court held that any procedure, regardless of form, which accomplished the result intended by an unauthorized search violated the fourth amendment.[15] The amendment itself, and not some judicially fashioned exclusionary rule, was the basis for forbidding the compulsory production of papers.[16] Thus, even though a statute expressly authorized the government to receive evidence produced from a search warrant pursuant to a compulsory order, the fourth amendment could serve to bar its use.[17]

Unlike *Entick*, the *Boyd* decision was short lived[18] and the Supreme Court demonstrated how much less constraining stare decisis was in America than England in answering the question that inevitably surfaced following the *Boyd* decision: does the mere receipt at trial of evidence seized in an unlawful search constitute reversible error? Although several lower federal and state courts relying on the *Boyd* decision had reached a contrary result,[19] in *Adams v.*

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11. *See* F. STIMSON, FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES (1908); Atkinson, *supra* note 2, at 12; Fraenkel, *supra* note 2, at 361.

12. Fraenkel, *supra* note 2, at 362.

13. 116 U.S. 616 (1886).

14. *See id.* at 633-35.

15. *Id.* at 622.

16. *See id.*

17. *Id.* at 620-24.

18. The *Boyd* decision was criticized as unnecessarily broad by the concurrence, see 116 U.S. at 639 (Miller, J., concurring), and later in the legal literature. *See generally* N. LASSON, *supra* note 2, at 107-10; Corwin, *The Supreme Court's Construction on the Self-Incrimination Clause*, 29 MICH. L. REV. 1 (1930); Nelson, *Search & Seizure: Boyd v. United States*, 9 A.B.A. J. 773 (1923); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922).

19. United States v. Flagg, 233 F. 481 (2d Cir. 1916); United States v. Wong Quong Wong, 94 F. 832 (D. Vt. 1899); State v. Sheridan, 121 Iowa 164, 96 N.W. 730 (1903); Blum v. State, 94 Md. 375, 51 A. 26 (1902); Town of Blacksburg v. Beam, 104 S.C. 146, 88 S.E. 441 (1916); State v. Slamon, 73 Vt. 212, 50 A. 1097 (1901).

New York[20] the Supreme Court upheld a state criminal conviction against the exact kind of fourth and fifth amendment challenge the Court had invited in *Boyd*. Adams argued that the state court's receipt into evidence of papers containing his handwriting, which were seized from his office pursuant to a warrant that authorized a search for gambling materials, violated the fourth and fifth amendments.[21] He maintained that those amendments were applicable to his state action through the privileges and immunities clause of the fourteenth amendment.[22] The Court refused to address this argument.[23] Although the Court stated it did not want to detract from the authority of *Boyd*,[24] it did exactly that by taking a giant step backwards from the principals articulated in that case. Justice Day opined that if evidence were pertinent to an issue in a case, it was not important whether the evidence was legally or illegally seized.[25]

The contradiction between the *Adams* and *Boyd* decisions was presented in the 1914 *Weeks v. United States*[26] decision. A warrantless search of Weeks' house by police and federal agents produced incriminating evidence, all of which was subsequently admitted at Weeks' federal criminal trial after his pretrial motion to return the illegally seized evi-

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20. 192 U.S. 585 (1904).

21. *Id.* at 594.

22. *Id.* at 590-91.

23. *Id.* at. 594.

24. *See id.* at 597. This turnabout from the *Boyd* decision actually reaffirmed the general common-law rule that probative evidence should be admitted regardless of the source.

25. *See id.* at 594-96. *See also* United States v. Mills, 185 F. 318 (C.C.S.D.N.Y. 1911), *appeal dismissed sub. nom.* Wise v. Mills, 220 U.S. 549 (1911). Pursuant to the authority of the Supreme Court's *Boyd* decision, the defendant in *Mills* filed a pretrial motion seeking the return of seized books and papers. Upon the court's granting of defendant's motion, the prosecutor refused to return the books and papers, and the court convicted him of contempt. The Supreme Court dismissed the prosecutor's appeal on the grounds that no constitutional question was presented. The Supreme Court observed that the lower court had the power to return the seized papers because of its authority to correct abuses of discretion by court officers. *See* 220 U.S. at 555.

26. 232 U.S. 383 (1914). *See generally* Atkinson, *Prohibiton and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748 (1925); Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471 (1952); Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 S. CAL. L. REV. 60, 62-63 (1941); Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 182-85, 198-99 (1969); Waite, *Police Regulation by Rule of Evidence*, 42 MICH. L. REV. 679, 681 (1944).

dence was denied.[27] The Supreme Court, again speaking through Justice Day, spurned *Adams* for *Boyd* and refused to sanction the use of such evidence.[28] The Court held that to admit such evidence would render the fourth amendment valueless and that if such were the case it might as well be stricken from the Constitution.[29]

C. *The Exclusionary Rule after* Weeks

The *Weeks* decision precipitated fifty years of scholarly and judicial debate on whether the exclusionary rule should be applied to state proceedings. In *Wolf v. Colorado*[30] and *Irvine v. California*,[31] two of a parade of cases refusing to

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27. 232 U.S. at 386-89.

28. *See id.* at 386-96. Specifically, the Supreme Court held that the evidence seized by local police acting alone could be admitted into evidence, but that the evidence seized by the federal agents could not be admitted into evidence. The Court held that other avenues of redress against the local police (all those who violated an individual's rights other than the federal government and its agencies) were open, but did not detail what those avenues were. *See id.* at 398.

29. *See id.* at 393-94. The language could be interpreted as meaning that the Supreme Court was basing its holding on the fourth amendment itself. If the Court meant that the fourth amendment demanded exclusion of such evidence so that it would not become a nullity, the fourth amendment would seem to be the basis for the holding.

An alternative interpretation is that the Court created a judicial remedy not based on the fourth amendment but rather on the Court's power to control lower court proceedings. Scholars have adopted this interpretation and, consequently, trace the exclusionary rule to the *Weeks* decision and not to the *Boyd* decision. Perhaps this interpretation is what the Court intended, but any difference in basis for the rulings in *Boyd* and *Weeks* may have been an attempt by the Court to distinguish and circumvent the intervening case of *Adams*. *See* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 581-85 (1983) (stating exclusionary rule is "judge-made"); Mathias, *The Exclusionary Rule Revisited*, 28 LOY. L. REV. 1, 2 (1982) (stating exclusionary rule born in *Weeks* case).

In any event, prohibiting the use of illegally seized evidence in *Weeks* through a judicially created rule left open the question of whether Congress might supercede a judicially imposed rule over lower court operations by authorizing particular evidence-gathering acts. *See* Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (Black, J., concurring).

30. 338 U.S. 25 (1949).

31. 347 U.S. 128 (1954). For a discussion of the *Wolf* and *Irvine* decisions, see generally Allen, *The* Wolf *Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 U. ILL. L.F. 1 (1950); Fraenkel, *Search and Seizure Developments in the Law Since 1948*, 41 IOWA L. REV. 67, 77-84 (1955); Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); Knowlton, *The Supreme Court,* Mapp v. Ohio *and Due Process of Law*, 49 IOWA L. REV. 14, 20-24, 31 (1963); Reynard, *Freedom From Unreasonable Search and*

extend the exclusionary rule to state proceedings, the United States Supreme Court identified other remedies for unlawful police conduct. For example, the Court noted that if law enforcement officials willfully deprived a United States citizen of a right or privilege secured by the fourteenth amendment, such as the fourth amendment right to be secure in one's home, the unlawful conduct would give rise to a federal cause of action under 18 U.S.C. § 242.[32]

A half-step forward was taken in the 1960 *Elkins v. United States*[33] decision when the Court abolished the doctrine that illegally obtained evidence was inadmissible in a federal prosecution if seized by federal officers, but admissible if seized by state officers.[34] And thanks to strong dissents by Justices Douglas, Murphy, and Rutledge in the *Wolf* decision, the exclusionary rule was finally given full vitality in *Mapp v. Ohio*.[35] Justice Clark wrote for the majority:

Seizure — A Second Class Constitutional Right?, 25 IND. L.J. 259, 308-13 (1950); Rudd, *Present Significance of Constitutional Guarantees against Unreasonable Searches and Seizures*, 18 U. CIN. L. REV. 387, 387-388, 415-16 (1949); Comment, *Wolf v. Colorado and Unreasonable Search and Seizure in California*, 38 CALIF. L. REV. 498 (1950).

32. *Irvine*, 347 U.S. at 137. The *Irvine* Court indicated: "This section provides that whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution of the United States shall be fined or imprisoned." *Id.*

Statutory and common law actions were catalogued in *Wolf*, 338 U.S. at 30 n.1, and a report of federal actions was presented in *Irvine*, 347 U.S. at 155-56 app.

33. 364 U.S. 206 (1960). *See generally* Berman & Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure — A Federal Problem*, 55 NW. U.L. REV. 525, 538-52 (1960); Eichner, *"Silver Platter" — No Longer Used for Serving Evidence in Federal Courts*, 13 U. FLA. L. REV. 311 (1960); Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 UCLA L. REV. 1, 15-24, 42-43 (1961).

34. 364 U.S. at 223.

35. 367 U.S. 643 (1961). *See generally* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1; Broeder, *The Decline and Fall of* Wolf v. Colorado, 41 NEB. L. REV. 185 (1961); Burns, Mapp v. Ohio: *An All-American Mistake*, 19 DE PAUL L. REV. 80 (1969); Kamisar, *Public Safety vs. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171, 173-76, 181-82 (1962); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1002-03 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667-72, 675-715 (1970); Rogers, *The Fourth Amendment and Evidence Obtained by a Government Agent's Trespass*, 42 NEB. L. REV. 166, 166 (1962); Thompson, *Unconstitutional Search and Seizure and the Myth of Harmless Error*, 42 NOTRE DAME LAW. 457, 460-64 (1967); Traynor, *Mapp v. Ohio at Large in the Fifty*

> [W]e once again examine *Wolf*'s constitutional documentation of the right to privacy free from unreasonable state intrusion, and . . . are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that . . . conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.[36]

The *Weeks* Court had left open other avenues of redress, the *Wolf* Court had mapped those avenues, and the *Mapp* Court observed their dead ends. Justice Clark described the reconciliation of state and federal law in *Mapp* as an end to the war between the Constitution and common sense.[37] He lauded the *Mapp* holding for its settling effect in giving the individual constitutional guarantees, the police no less than that to which honest law enforcement was entitled, and the courts that judicial integrity so necessary to the true administration of justice.[38]

Notwithstanding the calming assurances of Justice Clark, debate over the exclusionary rule continued and continues yet today. Criticism of the exclusionary rule was long led by Justice Black.[39] Winds of change were forecast by Justice White's endorsement of a good faith exception to the rule in *Stone v. Powell*.[40] Justice White reiterated his view in *Illinois v. Gates*[41] and catalogued Supreme Court limitations of the exclusionary rule.[42]

In a series of decisions the Court limited standing to raise exclusionary rule objections to criminal defendants on

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States, 1962 DUKE L.J. 319; Wilson, *Perspectives of Mapp v. Ohio*, 11 U. KAN. L. REV. 423 (1963).

36. 367 U.S. at 654-55.

37. *See id.* at 657.

38. *See id.* at 660.

39. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 493-510 (1971) (Black, J., concurring and dissenting); Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (Black, J., concurring). *See generally* G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977); J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1973).

40. 428 U.S. 465, 537-39 (1976) (White, J., dissenting).

41. 103 S. Ct. 2317, 2336-51 (1983) (White, J., concurring).

42. *Id.* at 2340-44.

trial.[43] The Supreme Court refused to extend the rule to grand jury proceedings.[44] The Court permitted the use of evidence illegally seized by state officials in a federal civil suit on the grounds that the social costs of exclusion outweighed the probability of deterring unlawful police conduct.[45] The Court also approved the use of illegally seized evidence offered to impeach defendants testifying on their own behalf[46] and allowed testimony of a witness at trial regarding evidence derived from a concededly unconstitutional search.[47] The Court has also refused to exclude evidence when law enforcement agents have acted in good faith reliance upon laws subsequently ruled unconstitutional.[48] These rulings may arguably be justified as only clarifications of, and not restrictions on, the operation of the exclusionary rule; nevertheless they substantially narrow the broad pronouncement of the *Weeks* and *Mapp* decisions that evidence obtained illegally must be suppressed.

III. THE SUPREME COURT 1983-1984 TERM

A Supreme Court majority side-stepped the exclusionary rule on procedural grounds during the 1982-1983 Term in *Illinois v. Gates*.[49] However, the 1983-1984 Term was a different story as the Court decided several cases that further limit the scope and breadth of the exclusionary rule. Although these decisions were a departure from the broadest readings of the fourth amendment announced under Chief Justice Warren, they were hardly unforeseen. The Burger Court's preoccupation with avoiding and disregarding procedural and technical traps to focus on the ultimate question of guilt had long suggested that, unless the Court majority

43. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969); Wong Sun v. United States, 371 U.S. 471 (1963).

44. *See* United States v. Calandra, 414 U.S. 338 (1974).

45. *See* United States v. Janis, 428 U.S. 433 (1976).

46. *See* United States v. Haven, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954).

47. *See* United States v. Ceccolini, 435 U.S. 268 (1978).

48. *See* Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Peltier, 422 U.S. 531 (1975).

49. *See* 103 S. Ct. 2317, 2321-25 (1983).

viewed the abandonment or modification of the exclusionary rule as impailing the integrity of the criminal trial process, the rule would be modified and perhaps abandoned.

The Burger Court has shown the greatest interest in those rights that protect the innocent and thereby the trial process, such as the right to counsel and the prohibition against coerced confessions.[50] It has shown less interest in those rights that may serve to protect the guilty, such as the exclusionary rule.[51] A kind of "hierarchy of rights" has developed, based on the likelihood that denial of a particular right might result in the conviction of the innocent. Thus, where the guilt of an individual is obvious and a conviction appears reliable, but is challenged on the "technical grounds" of police misconduct or judicial error, the Court is inclined to limit rather than preserve or expand the individual's rights. The following decisions illustrate how the Court's preoccupation with seeing the guilty convicted resulted in a modification, if not an abandonment, of the exclusionary rule during the 1983-1984 Term.

A. United States v. Jacobsen

Although it did not specifically address the exclusionary rule, the *United States v. Jacobsen*[52] decision was significant because it served as a vivid illustration of the Court's preoccupation with conviction of the obviously guilty and foreshadowed what was to come later in the Term when the Court addressed the exclusionary rule. In *Jacobsen* employees of Federal Express, a private freight carrier, discovered a white powdery substance in the innermost of a series of plastic bags that were concealed inside a tube in a damaged package.[53] The package, which consisted of a cardboard box wrapped in brown paper, was examined pursuant to company policy by a Federal Express manager.[54] Federal Ex-

50. *See, e.g.*, Edwards v. Arizona, 451 U.S. 477 (1981); Estelle v. Smith, 451 U.S. 454 (1981); United States v. Henry, 447 U.S. 264 (1980).

51. See, for example, *supra* text accompanying notes 43-48 (note that *Alderman*, *Wong Sun*, and *Walder* predate the Burger Court) and *infra* notes 66-117 and accompanying text.

52. 104 S. Ct. 1652 (1984).

53. *Id.* at 1655.

54. *Id.*

press employees called the Drug Enforcement Administration (DEA) to report their findings, and DEA agents were dispatched.[55] The contents had been replaced when the agents arrived, but the tube containing the bags holding the powder was still visible.[56] The agent opened the bags and performed a field test to determine whether the substance was cocaine.[57] When the field test proved positive the agents rewrapped the packages, obtained a warrant to search the address on the package, executed the warrant, and arrested the Jacobsens.[58] The Jacobsens were convicted of drug possession, but the Eighth Circuit Court of Appeals reversed the conviction on the grounds that the evidence should have been suppressed because the warrant was the product of a warrantless, illegal search and seizure by the DEA agents.[59]

The Supreme Court reversed the Eighth Circuit's decision and reaffirmed the conviction.[60] The Court first reasoned that the action of the Federal Express employees was an act within the private sector which did not violate the fourth amendment.[61] The Court then proceeded to analyze whether the subsequent actions of the DEA agents in removing the bags and testing the contents exceeded the scope of the private search by infringing upon a legitimate expectation of privacy that had not already been invaded by the private search. The Court majority concluded that after the private search the contents of the package were in plain view for the federal agents and that it was reasonable for the agents to seize and test the contents because it was apparent that the bags contained contraband and little else.[62] In short, the Court concluded that because the Jacobsens had no reasonable expectation of privacy in the bags at the time the agents arrived and found them in plain view, the seizure and

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *See* 683 F.2d 296 (8th Cir. 1983), *rev'd*, 104 S. Ct. 1652 (1984).
60. 104 S. Ct. at 1652.
61. *Id.* at 1656 (citing Walter v. United States, 447 U.S. 649 (1980)). *See also* United States v. Miller, 425 U.S. 435 (1975).
62. 104 S. Ct. at 1659-60 (citing Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971); Burdeau v. McDowell, 256 U.S. 465, 475-76 (1921)).

test were based on probable cause, and the failure to obtain a warrant was reasonable.[63] Balancing the interests of the police with those of the individual, the Court concluded that the safeguards of a warrant would only minimally advance fourth amendment interests.[64]

Although the Court focused on the plain view doctrine in the *Jacobsen* decision and did not specifically address the exclusionary rule, the case illustrates the operation of the "hierarchy of rights" which would later account for the Court's attack on the rule. Because the incriminating acts of the defendant were not questioned, the majority was unwilling to uphold the Eighth Circuit's decision and reverse the conviction on what probably would be asserted to be mere "technical grounds." The Court thus carved out yet another exception to the warrant requirement[65] — warrantless searches preceded by a search by private persons — and was able to save the conviction.

B. Nix v. Williams

In *Nix v. Williams*[66] the police informed counsel for defendant Williams, a murder suspect, that they would pick up Williams and transport him from Davenport to Des Moines, Iowa without questioning.[67] Without advising him of his rights, the police prevailed upon Williams to show them where his ten year old victim was buried by stating that the parents "should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered" and that an impending snow storm might make it impossible to find her.[68] The defendant subse-

63. 104 S. Ct. at 1661 (citing United States v. Place, 103 S. Ct. 2637 (1983); Texas v. Brown, 103 S. Ct. 1535, 1540-44 (1983); Payton v. New York, 445 U.S. 573, 587 (1980); General Motors Leasing Corp. v. United States, 429 U.S. 338, 354 (1977); Harris v. United States, 390 U.S. 234, 236 (1968)).

64. *See* 104 S. Ct. at 1663. *See also* Cupp v. Murphy, 412 U.S. 291, 296 (1973); United States v. Van Leeuwen, 397 U.S. 249, 252-53 (1970).

65. For a discussion of the exceptions to the warrant requirement, see generally Project, *Twelth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-82*, 71 GEO. L.J. 339, 369-96 (1982-83).

66. 104 S. Ct. 2501 (1984).

67. *Id.* at 2505.

68. *Id.* at 2504-05.

quently led police to the victim's body.[69]

In 1977 the Supreme Court affirmed a divided Eighth Circuit Court of Appeals panel, holding that the comments of the detective constituted an interrogation of the defendant in violation of his right to counsel.[70] The Supreme Court noted, however, that although Williams' incriminating statement could not be introduced into evidence upon retrial, evidence of the location and condition of the victim's body might be admissible under a theory that the body would have been discovered anyway, even without Williams' statements.[71]

Following conviction upon retrial, the Iowa Supreme Court affirmed, finding a "hypothetical independent source" exception to the exclusionary rule.[72] The two elements of the exception, as recognized by the Iowa Supreme Court, were proof that (1) the police did not act in bad faith to hasten discovery of the evidence, and (2) the evidence would have been discovered by lawful means.[73]

In subsequent habeas corpus proceedings, the Eighth Circuit assumed, without deciding, that an inevitable discovery exception to the exclusionary rule did in fact exist as described by the Iowa Supreme Court.[74] But finding that the State had not proved the lack of bad faith element of the exception, the Eighth Circuit reversed the federal district court's denial of the writ.[75]

Decrying this holding for putting the police in a worse position than they would have been had there been no improper interrogation, the United States Supreme Court reversed the Eighth Circuit, thereby denying the writ and upholding the conviction.[76] The Court emphasized that the only element of the exception the State need prove is that the evidence would have been discovered anyway because

69. *Id.* at 2505.

70. *See* Brewer v. Williams, 430 U.S. 387 (1977).

71. *See id.* at 406-07 n.12.

72. *See* State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979).

73. *Id.* at 258.

74. *See* Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983), *rev'd,* 104 S. Ct. 2501 (1984).

75. *See id.* at 1173.

76. *See* Nix v. Williams, 104 S. Ct. 2501, 2510 (1984), *rev'g,* 700 F.2d 1164 (8th Cir. 1983).

"[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[77]

The dissent of Justice Brennan, in which Justice Marshall joined, recognized the inevitable discovery exception as akin to the independent source exception recognized since *Silverthorne Lumber Co. v. United States*,[78] but noted that in the inevitable discovery exception, unlike the independent source exception, the evidence is not actually obtained.[79] This distinction, the dissent reasoned, should demand a higher standard of proof before such evidence may be admitted.[80]

The overwhelming evidence suggested Williams was guilty. Despite recognizing constitutional violations of the defendant's rights, the Supreme Court focused on the ultimate question of guilt in concluding, by implication, that the constitutional violations by the police did not affect the trial process or increase the likelihood of convicting an innocent defendant.

C. Massachusetts v. Sheppard *and* United States v. Leon

The *Jacobsen* and *Williams* decisions were mere preliminaries to the main bout fought in two unrelated cases argued and decided the same day. While the two cases appeared to hold the fate of the exclusionary rule, it became clear that if the Supreme Court again focused on guilt, these two convictions would be vindicated.

In *Massachusetts v. Sheppard*[81] the state trial court refused to suppress evidence, despite finding a search warrant defective for failing to specifically list the items to be seized.[82] An affidavit listing those items existed, but because of an oversight by the police, it was not attached to the warrant or incorporated by reference.[83] The state trial court re-

77. 104 S. Ct. at 2510.
78. 251 U.S. 385, 392 (1920).
79. *Nix*, 104 S. Ct. at 2517 (Brennan, J., and Marshall, J., dissenting).
80. *Id.*
81. 104 S. Ct. 3424 (1984).
82. Commonwealth v. Sheppard, 387 Mass. 488, __, 441 N.E.2d 725, 731-36 (1982).
83. *Id.* at __, 441 N.E.2d at 731-32.

fused to apply the exclusionary rule, finding "the actual search undertaken was within the limits of the authority the police thought reasonably had been granted."[84] The court concluded that police conduct would not be altered by excluding otherwise relevant and reliable evidence.[85] Therefore, the only consequences of applying the exclusionary rule would be to impair the truth-finding function of the jury by keeping probative evidence from them.[86] The court thus distinguished between errors committed by a judicial officer in issuing the warrant and fourth amendment violations by law enforcement officers in executing the warrant.[87]

The Supreme Judicial Court of Massachusetts acknowledged the trial court's distinction between judicial and police blunders and agreed that the exclusionary rule was not tailored to deterring judicial misconduct.[88] The court questioned suppression of evidence as a deterrant where police conduct was proper and the defendant was not prejudiced by the judicial officer's error.[89] Nevertheless, the court reversed the trial court on the grounds that the United States Supreme Court had yet to approve an exception to the exclusionary rule under such circumstances.[90]

In *United States v. Leon*[91] the federal district court suppressed evidence obtained from a search conducted under a warrant issued by a state judge.[92] The district court found that the police affidavit used to obtain the warrant relied, in material part, on a confidential police informant whose reliability and credibility had not been established.[93] The court found that other details in the warrant concerned another transaction or were as consistent with innocence as with guilt.[94] The district court concluded that the warrant was not based on probable cause, because the informant's credi-

84. *Id.* at __, 441 N.E.2d at 730.
85. *Id.* at __, 441 N.E.2d at 730.
86. *Id.* at __, 441 N.E.2d at 730.
87. *Id.* at __, 441 N.E.2d at 730.
88. *See id.* at __, 441 N.E.2d at 735.
89. *See id.* at __, 441 N.E.2d at 733.
90. *See id.* at __, 441 N.E.2d at 735-36.
91. 104 S. Ct. 3405 (1984).
92. *Id.* at 3411.
93. *Id.* n.2.
94. *Id.*

bility and reliability were not sufficiently established, and suppressed the seized evidence.[95] A Ninth Circuit Court of Appeals panel, over one dissent, affirmed the suppression order and specifically refused to recognize a good faith exception to the exclusionary rule.[96]

Supreme Court briefs and arguments in *Leon* and *Sheppard* focused on their particular facts and upon the competing interests of convicting the guilty and protecting the rights of the criminal defendant. The government's position was that a good faith[97] exception to the exclusionary rule should be adopted by the Court.[98] However, in the *Sheppard* case Justice O'Connor expressed concern over the distinction between judicial error and police misconduct.[99] She inquired whether the police had an obligation to execute the warrant as written and return to the magistrate when the warrant failed to specify the place to be searched or the items to be seized.[100]

On the final day of the 1983-1984 Term, the Supreme Court reversed the *Leon* suppression order and sent the case back for reconsideration in an opinion that held that the exclusionary rule could be modified without jeopardizing its ability to perform its intended function.[101] Specifically, the Court stated:

> [The fourth amendment] has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. . . .[102] Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge and jury.[103]

Writing for the majority, Justice White stated that by suppressing inherently trustworthy, tangible evidence, the exclusionary rule imposed substantial societal costs that, at least

95. *See id.*
96. *See* 104 S. Ct. at 3411.
97. Solicitor General Lee used the term "reasonable mistake."
98. *See* 52 U.S.L.W. at 3542-43.
99. *See id.*
100. *See* 52 U.S.L.W. at 3541-42.
101. *See Leon*, 104 S. Ct. at 3412.
102. *Id.* at 3412 (citing Stone v. Powell, 428 U.S. 465, 486 (1976)).
103. 104 S. Ct. at 3413 (citing United States v. Payner, 447 U.S. 727, 734 (1980)).

in the context of a seemingly valid search warrant, outweighed the benefit achieved by deterring official misconduct.[104] Justice White suggested that the exclusionary rule was designed to deter the police misconduct rather than to serve as punishment for judicial blunders and that the threat of excluding relevant evidence could not be expected to significantly deter neutral judicial officers who have no stake in the outcome of particular criminal prosecutions.[105] Although he questioned the existence of empirical evidence showing any deterrent effect of the exclusionary rule,[106] he pointed out that even if deterrence were assumed, the rule could not be expected to deter "objectively reasonable law enforcement activity."[107] Introduction of this "objectively reasonable" criteria, Justice White explained, requires not only that the officer have a good faith belief in the validity of the warrant, but also that this belief be reasonable when evaluated objectively.[108] Thus, a subjective belief based on ignorance of the Constitution would not insulate an invalid warrant from attack.

Justice White noted that "the preference for warrants is most appropriately effectuated by according 'great deference' to the magistrate's determination."[109] But he explained that this deference was bounded, suggesting appellate review is appropriate to (1) determine whether the finding of probable cause was based on a known or recklessly false affidavit, (2) assure the neutrality and detachment of the magistrate who must not become a rubber stamp for police law enforcement activities, and (3) establish a substantial basis for the warrant by requiring that the probable cause determination reflect a proper analysis of the totality of the circumstances and a warrant that is proper in form.[110] The majority thus recognized the balance between the fourth amendment rights of individuals and the societal interest in convicting

104. *See* 104 S. Ct. at 3416-19.

105. *See id.* at 3418-19.

106. *See id.* "No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect . . . ." *Id.* at 3419 (citing United States v. Janis, 428 U.S. 433, 452 n.22 (1976)).

107. 104 S. Ct. at 3419.

108. *Id.* at 3421.

109. *Id.* at 3417.

110. *See id.*

guilty criminal defendants, in this instance striking the balance against the fourth amendment.

Justice Blackmun concurred, but stated that the assumptions underlying the decision were provisional and would now be tested in the real world of state and federal law enforcement.[111] Justice Brennan in dissent criticized the narcotic effect of such balancing and cost-benefit analysis which "creates an illusion of technical precision and eluctability."[112] In conclusion, Justice Brennan despaired, "[I]t now appears the Court's victory over the Fourth Amendment is complete."[113] Justice Stevens also dissented, characterizing the majority's decision in *Leon* as a step toward converting "a Bill of Rights into an unenforced honor code that the police may follow at their discretion."[114]

The *Sheppard* case was also reversed that same day.[115] The Court simply refused to uphold the Massachusetts Supreme Judicial Court's reversal of a first degree murder conviction on such a highly technical defect in the search warrant.[116] The *Sheppard* decision thus carves out another exception to the exclusionary rule: evidence seized pursuant to a warrant based on probable cause, but technically invalid, need not be suppressed.[117]

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111. *See id.* at 3424 (Blackmun, J., concurring). The Court left open the possibility that the exclusionary rule could be reinstated with full force if experience proved it necessary, for example, if police were to ignore the fourth amendment or magistrates were to rubber stamp police misconduct. Justice Blackmun wrote that "[i]f it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here." *Id.*

112. 104 S. Ct. at 3430 (Brennan, J., dissenting).

113. *Id.* In apparent rebuttal Justice White said, "[it] is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect." 104 S. Ct. at 3422. He noted that the officer's good faith belief must also be objectively reasonable. He concluded that evidence would be suppressed if the police misled the magistrate in obtaining a warrant; if the magistrate abandoned the appropriate judicial role; or if the warrant was on its face obviously defective. *Id.* at 3421-22.

114. 104 S. Ct. at 3456 (Stevens, J., dissenting).

115. *See Sheppard*, 104 S. Ct. at 3424. Justice Stevens concurred with the majority on the separate ground that the search was supported by probable cause regardless of the defective warrant. *See id.* at 3448-50 (Stevens, J., concurring). Justices Marshall and Brennan dissented. *See id.* at 3430-46 (Brennan, J., dissenting).

116. *See* 104 S. Ct. at 3429-30.

117. In a third exclusionary rule decision handed down on the final day of the 1983-1984 Term, the Supreme Court held that illegally obtained evidence need not be

IV. THE EXCLUSIONARY RULE AND THE FUTURE

The historical genesis, development, and subsequent dilution of the exclusionary rule in *Nix*, *Sheppard*, and *Leon* are best understood in light of the continuing debate over the merits of the rule. What follows is a brief summary of the various public policy justifications and criticisms of the exclusionary rule and, in light of these considerations, some proposed alternatives for the future.

A. Analysis of the Rule

Proponents of the exclusionary rule contend that the overriding public policy considerations of fairness, judicial integrity, and the fourth amendment prohibition against unreasonable searches and seizures are more important than any individual criminal conviction.[118] They argue it is less important that courts admit all reliable and relevant evidence than it is that courts ensure proper evidence-gathering methods are followed and constitutionally defective methods avoided.[119] Specifically, proponents maintain that: (1) exclusion preserves and protects the integrity of the courts; (2) the fourth amendment was adopted to protect individuals from police misconduct, and this result is best accomplished by excluding illegally seized evidence; and (3) exclusion of illegally seized evidence does not of itself free the guilty, but merely returns the status quo, that is, the position the individual would have been in but for the unlawful intrusion.[120] Thus, a conviction can still be obtained using legally seized evidence. A warrant, like that in the *Sheppard* case, which fails to specify the items to be seized may prevent several functions of the warrant from being served. For example, the individual and the police are deprived of notice as to what is subject to search and seizure.[121]

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excluded from a civil deportation hearing. *See* United States Immigration & Naturalization Service v. Lopez-Mendoza, 104 S. Ct. 3479 (1984).

118. *See, e.g.*, Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 578-82 (1982); Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5, 12-14 (1979); Oaks, *supra* note 35, at 667-72.

119. See, for example, the authorities listed *supra* note 118.

120. *See supra* note 118.

121. *See Leon*, 104 S. Ct. at 3422.

Critics of the exclusionary rule counter that the admission of evidence should be predicated solely upon its reliability and relevance and that excluding reliable evidence works against police efforts to eliminate crime by freeing the guilty.[122] They note that there is little evidence to suggest that the rule has had, or will have, a deterrent effect when the police operate in good faith.[123]

In answer to those advocating this type of modification, the exclusionary rule's defenders respond that Supreme Court decisions have removed abuses and that a good faith or reasonable mistake exception only encourages ignorance of the law by the police as a defense to their misconduct, requiring courts to make a subjective determination con-

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122. *See, e.g.*, Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951-53 (1965); Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638-42 (1982); Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573, 584-85 (1971); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 737 (1972). *See also* Canon, *supra* note 118, at 560; Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternative*, 1975 WASH. U.L.Q. 621, 656-83; Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978); Note, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 U. KAN. L. REV. 768, 782-88 (1972).

123. *See Leon*, 104 S. Ct. at 3419-20. For a discussion of the good faith exception, see generally United States v. Williams, 622 F.2d 830 (5th Cir. 1980)(en banc); Ashdown, *Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 124 WM. & MARY L. REV. 335 (1983); Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DE PAUL L. REV. 51 (1980); Brown, *The Good Faith Exception to the Exclusionary Rule*, 23 S. TEX. L.J. 655 (1982); Friendly, *supra* note 122, at 951-56 (1965); Geller, *Is the Evidence In on the Exclusionary Rule?*, 67 A.B.A. J. 1642 (1981); Oaks, *supra* note 35, at 709; Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1412-21 (1981); Comment, *Reason and the Fourth Amendment — The Burger Court and the Exclusionary Rule*, 46 FORDHAM L. REV. 139, 168-75 (1977); Comment, *The Exclusionary Rule Revisited: Good Faith in Fourth Amendment Search and Seizure*, 70 KY. L.J. 879 (1982); Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotta Research and* United States v. Calandra, 69 NW. U.L. REV. 740 (1974). *See also* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIMES FINAL REPORT (1981).

For a discussion of the "reasonableness" element in a reasonable mistake or good faith exception, see generally Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); Bernardi, *supra* note 123, at 101-04; Note, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 915, 930-33 (1978).

cerning the executing officer's state of mind.[124] On this issue, Professor LaFave has commented that if an exception to the rule were adopted, the courts would lose control of the fourth amendment the same way they lost control of the fifth amendment before the *Miranda* decision under the voluntariness test governing admission of confessions.[125]

B. Alternatives to the Rule

If, as retired Justice Potter Stewart has suggested,[126] the problem is with the fourth amendment and not the exclusionary rule, the amendment could be amended to read:

(1) The right of the people to be secure in their houses, papers, and effects must be balanced with society's interests in law enforcement and conviction of those guilty of crimes. Judicial and law enforcement officers should act to ensure that evidence-gathering procedures are reasonable. Normally, this standard requires the use of a warrant, issued by an independent judicial officer, based upon probable cause, and supported by an attached oath or affirmation describing the place to be searched and the person(s) or thing(s) to be seized.

(2) Notwithstanding section one, any evidence that is relevant and reliable is admissible at trial regardless of its source.

(3) Whenever evidence gathering or other actions result in a deprivation of the right to be secure from unreasonable searches, such injury shall be redressed as Congress provides; or if Congress does not provide, in any state

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124. For a criticism of the good faith exception, see generally Fyfe, *Enforcement Workshop: In Search of the "Bad Faith" Search*, 18 CRIM. L. BULL. 260 (1982); Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065 (1982); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Uviller, *The Acquisition of Evidence for Criminal Prosecutions: Some Constitutional Premises and Practices in Transition*, 35 VAND. L. REV. 501 (1982); Note, *The Emerging Good Faith Exception to the Exclusionary Rule*, 57 NOTRE DAME LAW. 112 (1981).

125. *See* Fitzhugh, *The New Exclusionary Rule Cases*, 70 A.B.A. J. 58, 61 (1984) (quoting Professor LaFave).

126. *See* Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392 (1982).

or federal court by a tort action based on this amendment.

Lesser included remedies could be statutorily created or judicially developed. Congress could authorize suits under specific statutes or rules, for example, by enlarging 18 U.S.C. § 242 or 42 U.S.C. § 1983.[127] Fourth amendment rights are as worthy of protection as the right to correct credit information which is protected by the Truth in Lending Act.[128] Alternatively, Congress could set up an independent administrative procedure like that applicable to veterans' claims[129] or sanction administrative procedures like those the Supreme Court recommended for processing prisoner property claims in *Parratt v. Taylor*.[130] Either alternative would isolate the fourth amendment deprivation proceeding from any state or federal criminal trial. Administrative proceedings would preclude judges from deciding claims against judges and plaintiff criminal defendants from having to win jury suits against the police. Review could be to the United States Courts of Appeals. A "clearly erroneous" or "against the clear weight of the evidence" standard of review could be employed or review could be limited to seeing that due process was not denied.

An alternative legislative response would be to set out police guidelines by statute or regulation. For example, police regulations could spell out all exceptions to the warrant requirement or to the requirement that the warrant list the items to be seized. Courts could ensure that the guidelines were consistent with fourth amendment dictates. When acting within the guidelines, police conduct would be presumed to be reasonable. This system would ensure uniformity of treatment, limit the broad discretion police officers exercise, and provide a standard for evaluation. Actions outside the

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127. 42 U.S.C § 1983 (1982) provides that a civil action may be brought against any person who, under color of law, deprives any United States citizen, or person within the jurisdiction thereof, of any rights granted by the Constitution. 18 U.S.C. § 242 (1982) provides that a criminal action may be brought against any person who, under color of law, deprives an alien or citizen of any constitutionally protected right because of the citizen's color or race.

128. *See* 15 U.S.C. § 1601 (1982).

129. *See* 38 U.S.C. §§ 301-62 (1982).

130. 451 U.S. 527 (1981). *See also* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964) (advocating a review board).

guidelines not justified as reasonable could be punished by named penalties, exclusion of evidence, or both.[131]

Courts could encourage the use of judicially recognized tort or *Bivens* actions.[132] But even if the Supreme Court authorized such suits[133] judgments would be difficult to obtain against police and judicial officers because of their good faith and absolute immunity, respectively.[134] Victims of fourth amendment violations, particularly innocent victims, are reluctant to prosecute, and awards are likely to be nominal. If juries refused to make awards against officials, a right to non-jury trials could be recognized.

Another possible solution is that the exclusionary rule could be limited to lesser crimes. For example, it could be abolished in homicide prosecutions.[135] However, such differentiation might create havoc in plea bargaining. A defendant charged with first degree murder would have a very strong motive to plead guilty to a lesser offense if incriminating, illegally seized evidence could be introduced in a murder trial. And prosecutors might stretch to charge offenses exempted from the rule solely to be able to introduce illegally seized items. Such a law also might create serious equal protection problems for those not afforded its protection.

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131. For an analysis of jurisdictions employing administrative remedies, see Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1033 (1983); Comment, *Comparative Analysis of the Exclusionary Rule and Its Alternatives*, 57 TUL. L. REV. 648, 659-81 (1983). *See also* Kaczynski, *The Admissibility of Illegally Obtained Evidence: American and Foreign Approaches Compared*, 101 MIL. L. REV. 83 (1983).

132. Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388 (1971). For further discussion of such tort remedies, see 1 W. LAFAVE, *supra* note 2, at 30-33; Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1562-63 (1972); Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647 (1982). *But see* Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 RUTGERS L. REV. 526 (1957); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

133. The Supreme Court has exhibited a kind of approach-avoidance behavior toward such actions. *See, e.g.*, Haring v. Prosise, 103 S. Ct. 2368 (1983); Allen v. McCurry, 449 U.S. 90 (1980).

134. And the Court may act to restrict such suits in certain circumstances. *See* Chappell v. Wallace, 103 S. Ct. 2362 (1983) (military personnel may not maintain suit against their superior officer for alleged constitutional violations).

135. *See* Allen, *supra* note 35, at 36; Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044-49 (1974).

Problems with these alternatives were outlined by Chief Justice Burger in *Stone v. Powell*:[136]

> It can no longer be assumed that other branches of government will act while judges cling to the Draconian, discredited device in its present absolutist form. Legislatures are unlikely to create statutory alternatives, or impose direct sanctions on errant police officers or on the public treasury by way of tort action, so long as persons who commit serious crimes continue to reap the enormous and undeserved benefits of the exclusionary rule.[137]

Chief Justice Burger explained that even if legislatures were to act no assurance would exist that courts would abolish the rule.[138] He opined that the greatest shortcoming of leaving the defense of the fourth amendment to the exclusionary rule is that it offers no relief to those victims of overzealous police work who never appear in court.[139]

V. CONCLUSION

With the *Leon* majority's recognition that evidence seized pursuant to a warrant not based on probable cause need not be suppressed as long as the police act in good faith, with the *Sheppard* majority's holding that the good faith execution of a technically invalid warrant does not require suppression of evidence obtained with it, and with the *Nix* majority's recognition of an "independent source" exception to the exclusionary rule, the balance has apparently shifted away from individual rights to the interest in convicting the guilty. But the lesson of history is that the pendulum will swing back. No single philosophy has stayed in power, as sooner or later successful challengers emerge and "unpack" the Court. Faith in the system and in the Court to withstand particular philosophies is justified because the judiciary has proven to be remarkably independent. This optimism is not reposed in a particular jurist, judicial

136. 428 U.S. 465 (1976).

137. *Id.* at 500-01 (Burger, C.J., concurring).

138. *Id.* at 501.

139. *Id.* For additional discussions of alternatives, see S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977); Geller, *supra* note 123, at 689-721; Miles, *Decline of the Fourth Amendment: Time to Overrule* Mapp v. Ohio?, 27 CATH. U.L. REV. 9 (1977).

philosophy, or even Term of Court, but in the process and form of government.

Critics may lament the Supreme Court's two-step-forward, one-step-backward approach. But it is a strength of our judicial system and form of government that the Court continues to wrestle with the issues raised in the *Nix*, *Leon*, and *Sheppard* decisions. In these cases the public outcry to punish the defendant may not be reconcilable with the defendant's fourth amendment rights. The Court's distinction between judicial errors and police misconduct and its recognition of a good faith or reasonable mistake exception to the exclusionary rule dealt the rule a crushing blow; but it may yet survive.

If the exclusionary rule is a weakness in our criminal law, it is a strength of our individual freedom, and the strain it places on society and our legal system may be better tolerated than shifted. Justice Holmes cautioned that where distinctions are vital rather than formal, problems and conflicts should be existentially endured rather than rationally reconciled.[140] Hopefully, the Court will not abrogate the exclusionary rule, even if that leaves the dilemma unresolved.

140. Dunne, Book Review, 80 MICH. L. REV. 652, 655 (1982).