

The Fourth Amendment's Exclusionary Rule as a Constitutional Right

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The Supreme Court has candidly admitted that the “debate within the Court about the exclusionary rule has always been a warm one” and “the evolution of the exclusionary rule has been marked by sharp divisions in the Court.”¹ The exclusionary rule for violations of the Fourth Amendment, clearly adopted in 1914 for federal prosecutions in *Weeks v. United States*,² was not applied to the states until 1961. Although the rule in *Weeks* and many years thereafter was considered constitutionally mandated, the Court deconstitutionalized it in 1974. Since then, the Court has consistently maintained that the exclusionary sanction is not “a personal constitutional right of the party aggrieved” and it “is neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’”³ The exclusionary rule, according to the Court’s current view, is a judicially created remedy designed to deter future police misconduct and, apparently, targets only conduct that the Court views as sufficiently culpable. Deterrence is now the rule’s sole purpose, despite decades of Supreme Court declarations that that purpose has never been empirically proven and despite much skepticism about whether the rule does in fact deter.

I am a proponent of the view that the rule is constitutionally based and is an individual remedy for the violation of that person’s Fourth Amendment rights. Both sides of the exclusionary rule debate regarding whether it is a mere tool to enforce deterrence or whether it is an individual right-based remedy have weighty authority and supporters. In my view, the constitutionally-based argument is persuasive: in constitutional law, there can be no right without a remedy. Subsidiary arguments reinforce that view. Those include the absence of any rational or empirical justification for the rule if based on deterrence theory, the lack of authority of the Court to apply the rule to the states absent a constitutional basis, and the coherence of the justification for exceptions to the rule’s application if constitutionally based, unlike the ad hoc deterrence rationale, which is a mere substitute for each justice’s subjective assessment as to whether to apply the sanction.

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¹ *United States v. Janis*, 428 U.S. 433 (1976).

² 232 U.S. 383 (1914).

³ *United States v. Leon*, 468 U.S. 897, 906 (1984) (citations omitted).

In this essay, I make several additional points. First, there are no articulate proponents on the current Court who embrace *Weeks*'s view that the rule is constitutionally based. Also, the evolution of the basis of the rule in the states is particularly convoluted, based on the influence of Supreme Court developments over the decades. However, in reaction to the high Court's rejection of a constitutional basis for the rule in recent decades, there have developed some spokespersons for the *Weeks* rationale—albeit on independent state constitutional grounds. Finally, although we are reaching the nadir in the current United States Supreme Court regarding the justification for—and application of—the exclusionary rule, it may simply be another moment in time.

I. THE ORIGINAL CONCEPTION OF THE RULE AS A PERSONAL RIGHT

In 1914, Justice Day wrote the unanimous opinion for the Court in *Weeks v. United States*,⁴ which adopted the exclusionary rule in federal prosecutions.⁵ That was an era of muscular individual rights, including rights afforded by the Fourth Amendment,⁶ and the *Weeks* Court enforced those rights with an equally strong

⁴ 232 U.S. 383 (1914).

⁵ *Boyd v. United States*, 116 U.S. 616 (1886), is arguably the source of the rule. Decided in 1886 in the context of a forfeiture proceeding, the *Boyd* Court determined that an invoice had been illegally obtained by the government. *Id.* at 638. The Court held that the inspection of the invoice by the district attorney and its admission into evidence by the trial court “were erroneous and unconstitutional proceedings.” *Id.* *Boyd* was premised in part on a relationship of the Fourth and Fifth Amendment that has since been rejected. *E.g.*, *Leon*, 468 U.S. at 906; *Andresen v. Maryland*, 427 U.S. 463, 471–73 (1976). Nonetheless, the Court appeared to view the remedy of denial of the document's use to be constitutionally based. *See, e.g.*, *United States v. Peltier*, 422 U.S. 531, 551 n.9 (1975) (Brennan, J., dissenting) (observing that the origins of the exclusionary rule extend to *Boyd*). Still, although the *Boyd* Court spoke at length about the nature of the constitutional violations, its discussion of the grounding of the remedy was cryptic.

In *Adams v. New York*, 192 U.S. 585 (1904), Justice Day wrote a complex and confusing opinion for an unanimous Court, which is sometimes cited for the proposition that *Adams* rejected the application of the Fourth Amendment (and any exclusionary rule) to the states. In actuality, the Court in *Adams* did “not feel called upon to discuss the contention that the 14th Amendment [had] made the provisions of the 4th and 5th Amendments” applicable to the states. *Id.* at 594. Instead, based on examining the record, Day wrote that the Court was convinced that there had been “no violation of these constitutional restrictions, either in an unreasonable search or seizure, or in compelling [Adams] . . . to testify against himself.” *Id.* *Adams* was a prosecution for possession of gambling paraphernalia used in a game then commonly known as policy and today known as a lottery. *Id.* at 586. Justice Day, for the Court, observed that there had been no objection at trial to the testimony of the police officers regarding the policy slips and that Adams's objection had been to the introduction of those slips into evidence. *Id.* at 594. Finding that the policy slips were “clearly competent” as evidence, the Court maintained that “the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained.” *Id.* The Court pointed out that English and “nearly all” American cases had declined to exclude competent evidence. *Id.* at 598. Justice Day, in *Weeks*, reinterpreted *Adams* to be about procedure, that is, the claim seeking exclusion of illegally obtained evidence cannot be raised for the first time during the trial. *Weeks*, 232 U.S. at 393–97.

⁶ *See, e.g.*, Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property*,

remedy. Justice Day asserted:

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all [e]ntrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.⁷

In *Weeks*, private papers, including lottery tickets and letters, were seized during an illegal search of Weeks's room in a private house.⁸ *Weeks* was recently summarized by the Court as follows:

[T]he abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. In *Weeks*, a foundational exclusionary rule case, the officers had broken into the defendant's home (using a key shown to them by a neighbor), confiscated incriminating papers, then returned again with a U.S. Marshal to confiscate even more. Not only did they have no search warrant, which the Court held was required, but they could not have gotten one had they tried. They were so lacking in sworn and particularized information that "not even an order of court would have justified such procedure."⁹

The *Weeks* Court itself observed:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned,

Privacy, or Security?, 33 WAKE FOREST L. REV. 307, 309–27 (1998); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996).

⁷ 232 U.S. at 391–92.

⁸ *Id.* at 388–89.

⁹ *Herring v. United States*, 555 U.S. 135, 143 (2009) (citations omitted).

might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.¹⁰

The protections of the Amendment, the Court stated, applied to legislative and judicial actions and “equally extended” to the actions of federal law enforcement officers.¹¹ Thus, to permit law enforcement officers to illegally seize evidence “would be to affirm by judicial decision a manifest “neglect” if not an open defiance of the prohibitions of the Constitution.”¹² The Court in *Weeks* thereafter found that it was error not to restore the papers to Weeks and by “holding them and permitting their use upon the trial, we think prejudicial error was committed.”¹³ *Weeks* also determined that the Fourth Amendment applied to the actions of the federal government and not to state actors.¹⁴

In the next case discussing the exclusionary rule, *Silverthorne Lumber Company v. United States*,¹⁵ federal officials illegally raided a company’s offices and seized all of its books, records, and papers.¹⁶ The material records were photographed or copied.¹⁷ Although the district court ordered the originals returned to the company, it impounded the photographs and copies.¹⁸ After the company failed to comply with subpoenas issued for the originals, the district court found the company in contempt.¹⁹ Upon review of that order in the Supreme Court, Justice Holmes, writing for the Court, clearly viewed the exclusionary rule as constitutionally based:

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the

¹⁰ 232 U.S. at 393.

¹¹ *Id.* at 394.

¹² *Id.*

¹³ *Id.* at 398.

¹⁴ *Id.*

¹⁵ 251 U.S. 385 (1920).

¹⁶ *Id.* at 390.

¹⁷ *Id.* at 391.

¹⁸ *Id.*

¹⁹ *Id.*

forbidden act. *Weeks*, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.²⁰

This view—that the exclusionary rule was constitutionally based—prevailed, unchallenged, for many years.²¹ Indeed, there was no dissent from that view.

II. UNDERMINING THE CONSTITUTIONAL BASIS-APPLICATION OF THE RULE TO THE STATES

Then came *Wolf v. Colorado*.²² In that case, the Court engaged in a radical reordering of the relationship of the exclusionary rule to the substantive protections of the Amendment within a due process framework. *Wolf* was a misconceived attempt at compromise, seeking to apply essential search and seizure values to state actors without mandating the exclusionary rule as a remedy. The Court said: “The security of one’s privacy against arbitrary intrusion by the police . . . is . . . implicit in ‘the concept of ordered liberty’ and as such enforceable against the states through the Due Process Clause.”²³ But the Court held that the exclusionary rule was not enforceable against the States as “an essential ingredient of the right.”²⁴

The majority, speaking through Justice Frankfurter, reasoned:

In *Weeks v. United States*, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured

²⁰ *Id.* at 391–92 (citations omitted).

²¹ *E.g.*, *United States v. Wallace & Tiernan Co.*, 336 U.S. 793 (1949) (collecting cases applying the exclusionary rule); *Olmstead v. United States*, 277 U.S. 438, 462 (1928) (“The striking outcome of the *Weeks* Case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment.”); *Dodge v. United States*, 272 U.S. 530, 532 (1926) (“If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used.”).

²² 338 U.S. 25 (1949).

²³ *Id.* at 27–28.

²⁴ *Id.* at 29.

through an illegal search and seizure. . . . It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the *Weeks* decision.²⁵

The *Wolf* majority surveyed the views of the states regarding the exclusionary rule and compiled lists of the states adopting and refusing to adopt the rule.²⁶ The majority ultimately observed: "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."²⁷

Wolf was thus a begrudging extension of constitutional protection against unreasonable search and seizures to state actors. Justice Frankfurter, the author of *Wolf*, was a consistent advocate of a view of due process that saw that right as not incorporating all of the Fourth Amendment's features. Instead, he sought to find the essence of "ordered liberty" underlying due process and to identify those essential features.²⁸ The search and seizure vision protected by due process was, in many undefined ways, distinct from the legal principles constructed to define the rights protected by the Fourth Amendment. *Wolf* reflected that view: ordered liberty prohibited unreasonable searches and seizures but did not mandate exclusion of evidence by the states. The remedy was thus severed from the right.

Justice Black concurred in *Wolf*. He agreed with what appeared to him to be the "plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of

²⁵ *Id.* at 28–29.

²⁶ *Id.* at 29–39.

²⁷ *Id.* at 31.

²⁸ *Id.* at 27, 40.

evidence which Congress might negate.”²⁹ Black was the first justice to explicitly so characterize the rule.

Dissenting in *Wolf*, Justice Rutledge, joined by Justice Murphy, agreed that the Fourth Amendment applied to the states but rejected the Court’s failure to provide the sanction of exclusion. Rutledge believed “that the Amendment without the sanction is a dead letter.”³⁰ Recalling Justice Holmes’s words in *Silverthorne*, Rutledge asserted that

the version of the Fourth Amendment today held applicable to the states hardly rises to the dignity of a form of words; at best it is a pale and frayed carbon copy of the original, bearing little resemblance to the Amendment the fulfillment of whose command I had heretofore thought to be “an indispensable need for a democratic society.”³¹

He also rejected “any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment.”³² Rutledge mistakenly concluded: “The view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established. It is too late in my judgment to question it now.”³³

Justice Murphy, joined by Justice Rutledge, also wrote a dissent in *Wolf*. He believed that there was “but one alternative to the rule of exclusion. That is no sanction at all.”³⁴ Murphy discussed why alternative remedies were an illusion and asserted:

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

If proof of the efficacy of the federal rule were needed, there is testimony in abundance in the recruit training programs and in-service courses provided the police in states which follow the federal rule.³⁵

²⁹ *Id.* at 39–40 (Black, J., concurring).

³⁰ *Id.* at 47 (Rutledge, J., dissenting).

³¹ *Id.* at 47–48.

³² *Id.* at 48.

³³ *Id.* (citations omitted).

³⁴ *Id.* at 41 (Murphy, J., dissenting).

³⁵ *Id.* at 44.

After detailing some of those training programs, Murphy maintained that “this is an area in which judicial action” had produced a “positive effect upon the breach of law; and that without judicial action, there are simply no effective sanctions presently available.”³⁶ The opinions in *Wolf* began an extended debate about the basis for the exclusionary rule and those opinions raised most of the arguments that continue to this day.³⁷

The view that the exclusionary rule is constitutionally based reached the high-water mark of the post-*Wolf* era in *Mapp v. Ohio*,³⁸ which overruled *Wolf* and applied the exclusionary rule to the states. The Court held that “all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court.”³⁹ Justice Clark wrote the opinion for the majority and viewed the rule as “an essential part of both the Fourth and Fourteenth Amendments.”⁴⁰ Justice Clark traced the history of the Court’s

³⁶ *Id.* at 46. Justice Douglas wrote a separate dissent, agreeing with Justice Murphy that, “in the absence of that rule of evidence the Amendment would have no effective sanction.” *Id.* at 40 (Douglas, J., dissenting).

³⁷ In *Elkins v. United States*, 364 U.S. 206 (1960), a significant rhetorical shift in the rationale for the exclusionary rule appeared. In that federal prosecution, the Court overruled the “silver platter” doctrine, which had permitted the use in federal trials of evidence obtained illegally by state agents. *Id.* at 208. Applying the exclusionary rule to such prosecutions, the Court viewed its decision as involving “the Court’s supervisory power over the administration of criminal justice in the federal courts.” *Id.* at 216. The “basic postulate of the exclusionary rule,” *Elkins* proclaimed, is that it “is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Id.* at 217.

Although the Court noted that there were no empirical statistics available to demonstrate the rule’s effectiveness and that “it is hardly likely that conclusive factual data could ever be assembled,” “pragmatic evidence” nonetheless was available:

The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. Not more than half the states continue totally to adhere to the rule that evidence is freely admissible no matter how it was obtained. Most of the others have adopted the exclusionary rule in its entirety; the rest have adopted it in part. The movement towards the rule of exclusion has been halting but seemingly inexorable.

Id. at 218–19 (footnotes omitted). *Elkins* discussed at some length those trends in the states and the practical effects of rules the Court announces. It also pointed to “another consideration—the imperative of judicial integrity,” that is, it could not countenance making courts accomplices in the disobedience of the Constitution by police officers. *Id.* at 222–23.

³⁸ 367 U.S. 643 (1961).

³⁹ *Id.* at 655.

⁴⁰ *Id.* at 657. The Court in *Stone v. Powell*, 428 U.S. 465, 484 n.21 (1976), maintained that Justice Clark’s opinion did not garner a majority. *Powell* asserted that “[o]nly four Justices adopted the view that the Fourth Amendment itself requires the exclusion of unconstitutionally seized evidence in state trials” and that Justice Black, the fifth vote, grounded the constitutional basis for exclusion on a “conjunction” of the Fourth and Fifth Amendments. *Id.* That observation is true but, in *Mapp*, Justice Black stated:

I fully agree with Mr. Justice Bradley’s opinion [in *Boyd*] that the two Amendments upon which the *Boyd* doctrine rests are of vital importance in our constitutional scheme of

treatment of the exclusionary rule and observed:

This Court [since *Weeks*] has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to “a form of words.” It meant, quite simply, that “conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . .,” and that such evidence “shall not be used at all.”

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.⁴¹

Justice Clark viewed the application of the exclusionary rule to the states to be “logically and constitutionally necessary” as “an essential ingredient of the right newly recognized by the *Wolf* case.... To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.”⁴² He stated that the use of other remedies to enforce the Fourth Amendment had proven to be of “obvious futility.”⁴³ Clark also spoke of the imperative of judicial integrity: “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its

liberty and that both are entitled to a liberal rather than a niggardly interpretation. The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court’s opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case and to join the Court’s judgment and opinion which are in accordance with that constitutional doctrine.

Mapp v. Ohio, 367 U.S. 643, 666 (1961) (Black, J., concurring). By joining not only the judgment but also the “opinion,” Black at least arguably made Clark’s opinion a majority one. For an insightful analysis of Justices Clark’s and Black’s negotiations that produced Clark’s opinion in *Mapp*, see Dennis D. Dorin, *Marshaling Mapp: Justice Tom Clark’s Role in Mapp v. Ohio’s Extension of the Exclusionary Rule to State Searches and Seizures*, 52 CASE W. RES. L. REV. 401 (2001). Nonetheless, in several subsequent cases, Justice Black reiterated his view that the Fourth Amendment had no exclusionary rule and that exclusion was warranted only when it worked in conjunction with the Fifth Amendment. *E.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 496–98 (1971) (Black, J., concurring and dissenting); *Berger v. New York*, 388 U.S. 41, 76 (1967) (Black, J., dissenting); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 703–05 (1965) (Black, J., concurring). See also Jacob W. Landynski, *In Search of Justice Black’s Fourth Amendment*, 45 FORDHAM L. REV. 453, 478 (1976) (observing that Justice Black “had taken nearly every possible position on the [exclusionary] rule’s derivation”).

⁴¹ 367 U.S. at 648–49 (citations omitted).

⁴² *Id.* at 656.

⁴³ *Id.* at 652–53.

disregard of the charter of its own existence.”⁴⁴

Clark also maintained that there was no evidence that the exclusionary rule “fetters law enforcement.”⁴⁵ He concluded:

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.⁴⁶

In the years following *Mapp*, the battle regarding the nature and purpose of the exclusionary rule continued. In *Linkletter v. Walker*,⁴⁷ the Court declined to make *Mapp* retroactive because, in large part, the deterrent function of the exclusionary rule would not be advanced by doing so. Justice Black in dissent criticized this reasoning:

One reason—perhaps a basic one—put forward by the Court for its refusal to give *Linkletter* the benefit of the search and seizure exclusionary rule is the repeated statement that the purpose of that rule is to deter sheriffs, policemen, and other law officers from making unlawful searches and seizures. The inference I gather from these repeated

⁴⁴ *Id.* at 659.

⁴⁵ *Id.*

⁴⁶ *Id.* at 660 (footnote omitted). Justice Douglas, while joining the opinion of the Court, emphasized in his concurring opinion the illegality of the acts in *Mapp* and the inadequacy of other remedies. *Id.* at 670–72. Douglas wrongly predicted that *Wolf* had evoked “a storm of constitutional controversy which only today finds its end.” *Id.* at 670. Justice Stewart dissented on other grounds. *Id.* at 686. Justice Harlan dissented, in an opinion joined by Justices Frankfurter and Whittaker. Although he assumed that the exclusionary rule was of constitutional origin, Harlan maintained that it was a remedy that “is aimed at deterring [official misconduct] in the future.” *Id.* at 678, 680. He detailed why he would not impose that remedy on the states, including his views that the states should be given freedom to experiment, that the Fourteenth Amendment did not empower the Court to “mould state remedies,” and that it was not fundamentally unfair to permit relevant evidence to be presented in a trial. *Id.* at 680–85.

⁴⁷ 381 U.S. 618, 636–37 (1965).

statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. In passing I would say that if that is the sole purpose, reason, object and effect of the rule, the Court's action in adopting it sounds more like lawmaking than construing the Constitution. Both the majority and the concurring members of the *Boyd* Court seemed to believe they were construing the Constitution. Quite aside from that aspect, however, the undoubted implication of today's opinion that the rule is not a safeguard for defendants but is a mere punishing rod to be applied to law enforcement officers is a rather startling departure from many past opinions, and even from *Mapp* itself. *Mapp* quoted from the Court's earlier opinion in *Weeks v. United States*, certainly not with disapproval, saying that the Court "in that case clearly stated that use of the seized evidence involved 'a denial of the constitutional rights of the accused.'" I have read and reread the *Mapp* opinion but have been unable to find one word in it to indicate that the exclusionary search and seizure rule should be limited on the basis that it was intended to do nothing in the world except to deter officers of the law. If the exclusionary rule has the high place in our constitutional plan of "ordered liberty," which this Court in *Mapp* and other cases has so frequently said that it does have, what possible valid reason can justify keeping people in jail under convictions obtained by wanton disregard of a constitutional protection which the Court itself in *Mapp* treated as being one of the "constitutional rights of the accused"?⁴⁸

III. THE PRIMACY OF DETERRENCE THEORY

The view that the exclusionary rule is constitutionally based has lost the debate within the Court. As to the nature of the exclusionary rule, the Court in *United States v. Calandra*⁴⁹ emphatically de-constitutionalized it. That has been the unwavering position of the Court ever since.⁵⁰ Indeed, since *Calandra*, few justices have grounded the exclusionary rule in the Constitution.⁵¹ As to the

⁴⁸ *Id.* at 648–50 (Black, J., dissenting) (citations omitted).

⁴⁹ 414 U.S. 338 (1974).

⁵⁰ *E.g.*, *United States v. Leon*, 468 U.S. 897, 906–07 (1984).

⁵¹ *E.g.*, *Penn. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 370–71 (1998) (Stevens, J., dissenting); *Arizona v. Evans*, 514 U.S. 1, 19 (1995) (Stevens, J., dissenting); *Leon*, 468 U.S. at 935 (Brennan, J., dissenting). The argument that the rule is constitutionally based persists in the writing of many commentators. *E.g.*, Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

Akhil Reed Amar, in his article, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757,

purpose of the rule, the view that the rule is designed to deter future police misconduct has evolved to be the rule's *sole* purpose.⁵² The other articulated purposes have been relegated to the past.⁵³ Of course, when the rule was seen as constitutionally required, its overriding purpose was to enforce the Fourth Amendment's promise of no unreasonable searches and seizures and "the

811-16 (1994), claimed that the exclusionary rule should be abolished as having no legitimate basis and that a "traditional civil-enforcement model" that includes entity liability, no immunity defenses, punitive damages, class actions, attorneys fees, and injunctive relief, should be substituted. Numerous scholars disagree with his views, including his historical analysis and the roles of exclusion and civil actions. *E.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again"*, 74 N.C. L. REV. 1559 (1996); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994). *See also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.2 (4th ed. 2004) (discussing inadequacy of other remedies); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 18 (2001) (collecting authorities and stating: "There is general agreement on the ineffectiveness of tort actions under current law. The reasons most commonly cited are inadequate damages, immunity defenses, individual liability, juror prejudice, and lack of representation."). For other scholarly comment in favor of eliminating the rule, *see* Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603 (2007); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999).

⁵² *E.g.*, *Hudson v. Michigan*, 547 U.S. 586, 613 (2006) (Breyer, J., dissenting) (the "critical" rationale underlying whether the exclusionary rule applies is whether it would "deter future errors"); *Penn. Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998).

⁵³ The Court in *United States v. Janis*, 428 U.S. 433 (1976), effectively established deterrence as the sole basis for the rule. Although the Court modestly stated that deterrence of future unlawful police conduct was the "'prime purpose' of the rule, if not the sole one," *id.* at 446, it then proceeded to eliminate judicial integrity as the other remaining justification by subsuming it into deterrence theory:

The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights [T]his inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose. The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment.

Id. at 458 n.35 (citations omitted). *See also* *Stone v. Powell*, 428 U.S. 465, 485 (1976) ("While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."); *United States v. Peltier*, 422 U.S. 531, 537 (1975) ("The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner."); *Illinois v. Gates*, 462 U.S. 213, 260 n.14 (1983) (White, J., concurring) ("I am content that the interests in judicial integrity run along with rather than counter to the deterrence concept, and that to focus upon the latter is to promote, not denigrate, the former.").

implementation of this constitutionally mandated sanction merely place[d] the government in the same position as if it had not conducted the illegal search and seizure in the first place.”⁵⁴ That purpose disappeared with the de-constitutionalization of the rule.

In determining whether to apply the rule, the *Calandra* Court maintained that “the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served,” with a “balancing process implicit in this approach.”⁵⁵ Yet, even as it elevated the importance of deterrence, the Court in *United States v. Janis*⁵⁶ discounted its efficacy, asserting, “unhappily” that there was no “convincing empirical evidence” of the rule’s deterrent effects.⁵⁷ The Court cited abundant scholarship attempting to measure deterrence but believed that, for a variety of reasons, “each empirical study on the subject, in its own way, appears to be flawed.”⁵⁸ It asserted that no effective quantitative measure of the rule’s deterrent efficacy had been devised. Collecting various authorities, the Court believed they fell “short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule.”⁵⁹ The *Janis* majority stated that “[t]he final conclusion is clear. No empirical researcher, proponent or

⁵⁴ *Arizona v. Evans*, 514 U.S. 1, 19 (1995) (Stevens, J., dissenting). See also *United States v. Peltier*, 422 U.S. 531, 553 n.11 (1975) (Brennan, J., dissenting) (noting that the test for application of the exclusionary rule was whether the Fourth Amendment had been violated, “nothing more and nothing less”); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261 (1998) (arguing that the main purpose of the exclusionary rule should be to restore the *status quo ante* and that that restorative justification provides a principled basis for judicial decision making).

⁵⁵ 414 U.S. 338, 348 (1974). The dissent was written by Justice Brennan, joined by Justices Douglas and Marshall. Tracing prior case law, Brennan rejected any central role for deterrence and clung to the view that the rule was an essential part of the Fourth Amendment. He observed: “The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.” *Id.* at 361 (Brennan, J. dissenting).

⁵⁶ 428 U.S. 433 (1976).

⁵⁷ *Id.* at 446.

⁵⁸ *Id.* at 449–50 (footnote omitted).

⁵⁹ *Id.* at 453 n.22 (quoting Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970)). The *Janis* majority “conclude[d] that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion.” *Id.* at 454. Believing that it had to employ “common sense” in the “absence of convincing empirical data,” the majority found that the deterrent effect is “highly attenuated when the ‘punishment’ imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign.” *Id.* at 457–58. Extending the exclusionary rule in such circumstances “would be an unjustifiably drastic action by the courts in the pursuit of what is an undesired and undesirable supervisory role over police officers.” *Id.* at 458. The majority added: “There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches. We find ourselves at that point in this case.” *Id.* at 459.

opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied.”⁶⁰

From *Calandra*, through the most recent decisions, the Court relentlessly applies what is called an empirically⁶¹ based balancing test, which weighs the efficacy of deterrence of future governmental misbehavior against the costs of exclusion.⁶² This is despite repeatedly-stated doubts about the existence of deterrence and the Court’s view that there has been no convincing studies on the matter.⁶³ According to the Court, exclusion of evidence “exact[s] a costly toll upon

⁶⁰ *Id.* For similar doubts about the effectiveness of the deterrence function of the rule see, for example, *United States v. Leon*, 468 U.S. 897, 918–19 (1984); *Schneekloth v. Bustamonte*, 412 U.S. 218, 268–71 (1973) (Powell, J., concurring); *Coolidge v. New Hampshire*, 403 U.S. 443, 490–91 (1971) (Harlan, J., concurring); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

⁶¹ The Court has sometimes stated that it would reconsider its refusal to extend the rule to some situations “if future empirical evidence” undermined the assumptions upon which the decision was based. *Illinois v. Krull*, 480 U.S. 340, 353 n.8 (1987). See also *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) (“The debate over the efficacy of an exclusionary rule reveals that deterrence is an empirical question, not a logical one.”). Cf. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring) (“any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one”). Cf. *id.* at 942–43 (Brennan, J., dissenting) (“Although the Court’s language . . . suggests that some specific empirical basis may support its analyses, the reality is that the Court’s opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data. . . . By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics.”).

⁶² *Krull*, 480 U.S. at 347; *E.g., Leon*, 468 U.S. at 906–07; See also Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 270–80 (1998) (tracing the Supreme Court cases relying on deterrence theory).

⁶³ *E.g., Stone v. Powell*, 428 U.S. 465, 492 (1976) (“Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.”); *Irvine v. California*, 347 U.S. 128, 135, 137 (1954) (plurality opinion) (questioning efficacy of exclusion on deterrence grounds). Cf. *Leon*, 468 U.S. at 929 (Brennan, J., dissenting):

[T]he language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the majority’s result. When the Court’s analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the “costs” of excluding illegally obtained evidence loom to exaggerated heights and where the “benefits” of such exclusion are made to disappear with a mere wave of the hand.

Many commentators, even assuming that a balancing test is appropriate, question the Court’s choices of what to balance and the methodology by which it performs that balancing. *E.g., Yale Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 627–64 (1983). Indeed, some take issue with the label

the ability of courts to ascertain the truth in a criminal case”⁶⁴ and permits “some guilty defendants [to] go free or receive reduced sentences as a result of favorable plea bargains.”⁶⁵ Thus, the Court has restricted application of the exclusionary rule to instances where its “remedial objectives are thought most efficaciously served.”⁶⁶ As a consequence, the Court has developed numerous situations where the exclusionary rule simply does not apply.⁶⁷ Deterrence theory also has been used to limit the type of actors to whom the exclusionary rule applies, leaving the police as the sole actors subject to the rule.

Deterrence theory leaves the rule without a constitutional grounding. Under *Mapp*, the rule was constitutionally required and the Court had clear authority to insist that the states exclude evidence recovered in violation of the Fourth Amendment. Under *Calandra* and its progeny, the rule is not constitutionally required. It is, instead, a “prudential [rule] rather than constitutionally mandated.”⁶⁸ Thus, although deterrence theory would permit the Court to impose the rule on federal courts—presumably based on its supervisory powers,⁶⁹ the Court has no such authority over state courts.⁷⁰ *Wolf* and not *Mapp* should be the operative precedent.

“deterrence” as being “quite misleading.” *Id.* at 597 n.204. As Professor Kamisar has observed: “Deterrence” suggests that the exclusionary rule is supposed to influence the police the way the criminal law is supposed to affect the general public. But the rule does not, and cannot be expected to, “deter” the police the way the criminal law is supposed to work. The rule does not inflict a “punishment” on police who violate the fourth amendment; exclusion of the evidence does not leave the police in a worse position than if they had never violated the Constitution in the first place. Because the police are members of a structural governmental entity, however, the rule influences them, or is supposed to influence them, by “systemic deterrence,” i.e., through a department’s institutional compliance with fourth amendment standards.

It may be preferable to abolish “deterrence” terminology altogether, despite its popularity. It seems more accurate and more useful to call the rule a “*disincentive*”—a means of eliminating significant incentives for making illegal searches, at least where the police contemplate prosecution and conviction.

Id. See also *id.* at 658–64.

⁶⁴ *United States v. Payner*, 447 U.S. 727, 734 (1980).

⁶⁵ *Leon*, 468 U.S. at 907.

⁶⁶ *Id.* at 908 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

⁶⁷ See generally THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 609–26 (2008).

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

⁶⁹ For Supreme Court cases that view the rule as enforcing the Court’s supervisory powers over the admission of evidence in federal courts, see, for example, *Elkins v. United States*, 364 U.S. 206, 216 (1960), and *Irvine v. California*, 347 U.S. 128, 134–35 (1954) (plurality opinion). Cf. *Mapp v. Ohio*, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting) (assuming that the rule must be of Constitutional dimensions because the Supreme Court had no “general supervisory power over the state courts”).

⁷⁰ Cf. *Dickerson v. United States*, 530 U.S. 428, 438–39 (2000) (finding that *Miranda* warnings are grounded in a “constitutional rule” in part because the warnings had been imposed on state courts and the Court would not have otherwise had the authority to do so).

IV. RECENT SUPREME COURT CASE LAW

More recently, new modes of attack on the rule have developed. Justice Scalia, for the Court in *Hudson v. Michigan*,⁷¹ made a frontal assault:

Suppression of evidence . . . has always been our last resort, not our first impulse. The exclusionary rule generates “substantial social costs,” which sometimes include setting the guilty free and the dangerous at large. We have therefore been “cautio[us] against expanding” it, and “have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application[.]” We have rejected “[i]ndiscriminate application” of the rule, and have held it to be applicable only “where its remedial objectives are thought most efficaciously served,” that is, “where its deterrence benefits outweigh its ‘substantial social costs[.]’”

We did not always speak so guardedly. Expansive dicta in *Mapp*, for example, suggested wide scope for the exclusionary rule But we have long since rejected that approach.⁷²

Hudson, which created a *per se* rule of inapplicability of the exclusionary rule to violations of the knock and announce requirement for warrant executions, called into question the future of the exclusionary rule, pointing to, *inter alia*, the increase in police professionalism,⁷³ and adding: “We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.”⁷⁴ Remove a few words from the first sentence of this quotation and the rationale for abolition of the rule is clear: “We cannot assume that exclusion . . . is necessary deterrence simply because we found that it was necessary deterrence . . . long ago.”⁷⁵ Abolition was Scalia’s clear aim; he planted the seeds in *Hudson* and needed one more vote to reap the harvest.⁷⁶

⁷¹ 547 U.S. 586 (2006).

⁷² *Id.* at 591 (citations omitted).

⁷³ *But see* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.6 (4th ed. 2004) (2011 update) (“The [*Hudson*] majority’s claim that increased police professionalism and self-discipline have changed things overlooks the fact that such changes have come about largely *because of* the exclusionary rule.”).

⁷⁴ 547 U.S. at 597.

⁷⁵ *Id.*

⁷⁶ Justice Kennedy was the crucial fifth vote in *Hudson*. He wrote a concurring opinion in which he stated that the *Hudson* “decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.” *Id.* at 603 (Kennedy, J., concurring in part and concurring in the judgment). Kennedy added that “the causal link between a violation of the knock-and-announce requirement and

Justice Breyer's dissent in *Hudson* challenged much of the majority's reasoning but did so by defending the rule as necessary deterrence. Breyer also saw no reason to believe that the remedies that the Court found inadequate in *Mapp* would adequately deter unconstitutional police behavior for knock and announce violations.⁷⁷ He viewed "the need for deterrence—the critical factor driving this Court's Fourth Amendment cases for close to a century," as requiring exclusion in *Hudson*.⁷⁸ Breyer asserted:

There may be instances in the law where text or history or tradition leaves room for a judicial decision that rests upon little more than an unvarnished judicial instinct. But this is not one of them. Rather, our Fourth Amendment traditions place high value upon protecting privacy in the home. They emphasize the need to assure that its constitutional protections are effective, lest the Amendment "sound the word of promise to the ear but break it to the hope." They include an exclusionary principle, which since *Weeks* has formed the centerpiece of the criminal law's effort to ensure the practical reality of those promises. That is why the Court should assure itself that any departure from that principle is firmly grounded in logic, in history, in precedent, and in empirical fact. It has not done so.⁷⁹

Perhaps Breyer's dissent is noble or, perhaps, mere noble sentiment. Arguably, there appear in his dissent hints of a broader justification for the rule, that is, that the rule is constitutionally mandated. But Breyer failed to make that argument. Absent such a ground, Breyer's discussion is little more than wishful thinking and he, like the majority, continued the evidence-free debate over the efficacy of deterrence.

This brings us to *United States v. Herring*,⁸⁰ which achieves most of the goals intimated in *Hudson* by employing a flanking action: narrowing the rule to only situations where the police have engaged in demonstrably outrageous conduct.⁸¹ *Herring* could be read narrowly⁸² or broadly.⁸³ The broader reading, which I⁸⁴ and

a later search is too attenuated to allow suppression." *Id.* at 603.

⁷⁷ *Id.* at 609–10 (Breyer, J., dissenting).

⁷⁸ *Id.* at 610.

⁷⁹ *Id.* at 629–30.

⁸⁰ 555 U.S. 135 (2009).

⁸¹ *Id.* at 142–44.

⁸² *E.g.*, *State v. Handy*, 18 A.3d 179, 180–81, 186 (N.J. 2011) (rejecting the broader implications of *Herring* and applying the exclusionary rule when the arrest was based on incorrect information regarding the existence of a ten year old outstanding warrant, conveyed by a police dispatcher to the officer who had stopped Handy for riding his bicycle on the sidewalk in violation of a city ordinance; the warrant did not match the spelling of Handy's name and bore a different date of birth); *People v. Estrada*, 914 N.E.2d 679, 684 (Ill. App. 1 Dist. 2009) (Suppressing evidence resulting from an investigatory stop and stating: "Unlike the officers in *Herring*, the officer in the

others⁸⁵ have argued is the Court's true goal, signals a dramatic restriction in the application of the exclusionary rule and fundamentally changes the litigation of motions to suppress in criminal cases. That is, a central question under *Herring* is whether the officer had a culpable mental state; if not, the rule does not apply. If that mode of analysis prevails, it will reduce appreciably the number of cases addressing the merits of Fourth Amendment claims and expand dramatically the inapplicability of the exclusionary rule. A court could simply skip the merits of a claim and address solely the lack of an exclusionary remedy. Thus, a court could simply rule: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence.

Narrowly, the issue in *Herring* was whether the good faith doctrine should be applied when police officers in one jurisdiction checked with employees of the sheriff's office in another jurisdiction and were told that there was an outstanding warrant for Herring, who was then arrested.⁸⁶ Contraband was discovered during the search incident to Herring's arrest. The report was in error and the warrant should have been removed from the records but had not been due to the negligence of personnel in the reporting jurisdiction's sheriff's office.⁸⁷

Writing for a majority of five, Chief Justice Roberts stated that the exclusionary rule did not apply. A narrow reading of *Herring* can be drawn from the following statement of the holding by the majority: "Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."⁸⁸ Words of limitation jump out from these sentences: "isolated negligence;"

present case was not acting in reliance on wrong information. Instead, he was operating on his own suspicion or hunch.").

⁸³ *E.g.*, *United States v. Julius*, 610 F.3d 60, 66–68 (2d Cir. 2010); *People v. Robins*, 224 P.3d 55, 68 (Cal. 2010).

⁸⁴ Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 203–07 (2010).

⁸⁵ *See, e.g.*, Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 759–60 (2009); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court uses an Axe to take out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183 (2011); James J. Tomkovicz, *Davis v. United States: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 390–91 (2011). *See also* Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 686–88 (2011) (proposing "that *Herring* may be better understood in the context of the largely unexamined influence that constitutional tort doctrine has had in shaping exclusionary rule jurisprudence"). *But see* Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 101 (2012) (maintaining that, in light of recent cases, "the exclusionary rule, though limited, is neither dead nor unacceptably constrained").

⁸⁶ 555 U.S. at 136–37.

⁸⁷ *Id.* at 137–38.

⁸⁸ *Id.* at 137.

attenuation.⁸⁹

In contrast, the rest of the majority opinion was very broadly written and significantly recast modern exclusionary rule theory. Instead of viewing the issue as part of a good faith exception to the exclusionary rule, Roberts seemed to dismiss that notion; instead, he viewed *United States v. Leon*,⁹⁰ the genesis of that exception, as follows: “When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted ‘in objectively reasonable reliance’ on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance ‘good faith.’”⁹¹ Creatively reframing exclusionary rule analysis, Roberts asserted that suppression “turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.”⁹² He later repeated: “The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct.”⁹³ He added: “Judge Friendly wrote that ‘[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights.’”⁹⁴

Exclusion appears justified after *Herring* based on culpability.⁹⁵ Thus,

⁸⁹ Consistent with a narrow view, Roberts later asserted: “An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place.” *Id.* at 144. In *Hudson*, the majority viewed the knock and announce violation as attenuated from the recovery of the evidence in the house. 547 U.S. at 586. It stated: “Attenuation . . . occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” *Id.* at 593. The concept of attenuation in *Hudson* and in *Herring* differs markedly from the concept of attenuation that prevailed in pre-*Hudson* Supreme Court jurisprudence. See Thomas K. Clancy, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* §§ 13.3.1.2., 13.3.6. (2008).

⁹⁰ 468 U.S. 897 (1984).

⁹¹ 555 U.S. at 142. The label “good faith” is misleading to the extent that it suggests that the actual belief of the officer is examined. Instead, the inquiry focuses “expressly and exclusively on the *objective reasonableness* of an officer’s conduct, not on his or her subjective ‘good faith’ (or ‘bad faith’).” *People v. Machupa*, 872 P.2d 114, 115 n.1 (Cal. 1994). See also *Leon*, 468 U.S. at 918 (stating that the Court has “frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment”). However, labeling the officer’s conduct as “objectively reasonable” has also been criticized as misleading. See, e.g., *id.* at 975 (Stevens, J., dissenting) (“[W]hen probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution.”).

⁹² 555 U.S. at 137.

⁹³ *Id.* at 143.

⁹⁴ *Id.* (quoting Judge Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965)) (footnotes omitted) (citing *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975)) (Powell, J., concurring in part) (“[T]he deterrent value of the exclusionary rule is most likely to be effective” when “official conduct was flagrantly abusive of Fourth Amendment rights”).

⁹⁵ Cf. Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith*

Roberts recounted several cases of “intentional” and “flagrant” misconduct, including in *Weeks*, that would support exclusion. Roberts flatly asserted:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.⁹⁶

The Chief Justice emphasized that negligence is simply not worth the costs of exclusion.⁹⁷ “Mere negligence” would make many—if not most—Fourth Amendment violations inappropriate candidates for suppression. Roberts ended the majority opinion by quoting one of the more famous statements in opposition to the adoption of the exclusionary rule and added: “[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not ‘pay its way.’ In such a case, the criminal should not ‘go free because the constable has blundered.’”⁹⁸

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented.⁹⁹ Justice Ginsburg certainly did not view the *Herring* decision as narrow.¹⁰⁰ She

Exception to the Exclusionary Rule, 76 MISS. L.J. 483 (2006) (wide-ranging discussion of role of culpability in exclusionary rule analysis).

⁹⁶ 555 U.S. at 144. Roberts maintained that recordkeeping errors by the police are not immune from the exclusionary rule but “the conduct at issue was not so objectively culpable as to require exclusion.” *Id.* at 146. He noted: “If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.” *Id.*

⁹⁷ *Id.* at 144 n.4. Despite all of the Court’s references to apparently subjective states of mind, Roberts added a confusing twist: all of these inquiries are objective ones. He emphasized that “the pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of arresting officers[.]’” *Id.* at 145. Factors in making that determination include a “particular officer’s knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer’s knowledge and experience, but not his subjective intent[.]” *Id.*

⁹⁸ 555 U.S. at 147–48 (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (opinion of the Court by Cardozo, J.)).

⁹⁹ Justice Breyer, in a separate dissent joined by Justice Souter, believed that negligent record keeping errors were susceptible to deterrence through application of the exclusionary rule. 555 U.S. at 157–59 (Breyer, J., dissenting).

¹⁰⁰ As she noted, the Court had cited a view of the exclusionary rule “famously held by renowned jurists Henry J. Friendly and Benjamin Nathan Cardozo.” 555 U.S. at 151. Anyone familiar with the history of the exclusionary rule debate knows that those two jurists are frequently

replied with a defense of the rule that is notable for the fact that, for the first time in decades, a member of the Court suggested that the exclusionary rule is based on some notion broader than deterrence. But her assertions were at best opaque and she failed to clearly ground her views. She wrote:

Others have described “a more majestic conception” of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental “right of the people to be secure in their persons, houses, papers, and effects,” the Amendment “is a constraint on the power of the sovereign, not merely on some of its agents.” I share that vision of the Amendment.

The exclusionary rule is “a remedy necessary to ensure that” the Fourth Amendment’s prohibitions “are observed in fact.” The rule’s service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.

Beyond doubt, a main objective of the rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” But the rule also serves other important purposes: It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”¹⁰¹

After stating this, Justice Ginsburg without further explanation ended that section of her dissent and then argued in the next section that deterrence theory supported exclusion in *Herring*. If Ginsburg truly believed in a “more majestic conception” of the rule, she did not apply that concept in *Herring* unless that conception was merely about deterrence. She gave us no vision and no guides.

relied on by opponents of the rule. *See also* *Elkins v. United States*, 364 U.S. 206, 216–17 (1960):

Most of what has been said in opposition to the rule was distilled in a single Cardozo sentence—“The criminal is to go free because the constable has blundered.” *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 [(1926)]. The same point was made at somewhat greater length in the often quoted words of Professor Wigmore: “Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus’ conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.”

Cf. *United States v. Payner*, 447 U.S. 727, 734 (1980) (“Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. After all, it is the defendant, and not the constable, who stands trial.”).

¹⁰¹ 555 U.S. at 151–52 (Ginsburg, J., dissenting) (citations omitted).

Her dissent was the beginning of some partially articulated thought. Rather than supporting her “more majestic conception” with citations to such foundational opinions as *Weeks*, *Silverthorne*, or *Mapp*, Ginsburg relied primarily on a few dissents and a couple of law journal articles. This allowed Chief Justice Roberts for the majority to observe: “Majestic or not, our cases reject this conception and perhaps for this reason, [Justice Ginsburg’s] dissent relies exclusively on previous dissents to support its analysis.”¹⁰²

*Davis v. United States*¹⁰³ builds on *Herring* and reinforces the view that *Herring*’s analysis will have broad applicability.¹⁰⁴ The consequences of the severance of the Fourth Amendment right from the remedy are starkly illustrated by *Davis*. All of the justices acknowledged that the Fourth Amendment had been violated by the search of *Davis*’s vehicle. But because the majority viewed application of the exclusionary rule as a separate question, it left “*Davis* with a right but not a remedy.”¹⁰⁵

Justice Alito wrote for a majority of six. Viewing the exclusionary rule as a “bitter pill,”¹⁰⁶ a “windfall,”¹⁰⁷ a “deterrent sanction,”¹⁰⁸ and a “prudential doctrine,”¹⁰⁹ which has the “sole purpose”¹¹⁰ of deterring future Fourth Amendment violations by law enforcement, Alito specifically rejected the original vision of the rule as “a self-executing mandate implicit in the Fourth Amendment”¹¹¹ in favor of the view that it is a judicially created remedy. As a result, he observed, the Court’s cases eventually “imposed a more rigorous weighing of its costs and deterrence benefits,”¹¹² with a later recalibration of that analysis to “focus the inquiry on the ‘flagrancy of the police misconduct’ at issue.”¹¹³ Alito, relying heavily on *Herring*, continued: “The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion ‘var[y] with the culpability of the law enforcement conduct’ at issue.”¹¹⁴

¹⁰² *Id.* at 141 n.2 (citation omitted).

¹⁰³ 131 S. Ct. 2419 (2011).

¹⁰⁴ *Davis* created a new good faith exception to exclusion: “we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.” *Id.* at 2423–24. It applied that rule to searches incident to arrest involving motor vehicles, concluding that the police reasonably relied on prior precedent that permitted such searches. *Id.* at 2429.

¹⁰⁵ *Id.* at 2437 (Breyer, J., dissenting).

¹⁰⁶ *Id.* at 2427.

¹⁰⁷ *Id.* at 2433.

¹⁰⁸ *Id.* at 2423.

¹⁰⁹ *Id.* at 2426.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2427.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

Alito catalogued the Court's good faith cases and then applied the analysis to the facts in *Davis*. He observed: "all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way."¹¹⁵ He concluded: "Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms *Davis*'s claim. . . . The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case."¹¹⁶

Justice Sotomayor, in her opinion concurring in the judgment of the Court, asserted that the "primary purpose"¹¹⁷ of the exclusionary rule was deterrence but she did not identify any other purpose. Although Sotomayor was "compelled to conclude" that the exclusionary rule did not apply in *Davis*, she did not believe that culpability analysis was dispositive.¹¹⁸ Instead, she contended:

[A]n officer's culpability is relevant because it may inform the overarching inquiry whether exclusion would result in appreciable deterrence. Whatever we have said about culpability, the ultimate questions have always been, one, whether exclusion would result in appreciable deterrence and, two, whether the benefits of exclusion outweigh its costs.¹¹⁹

Justice Breyer, joined by Justice Ginsburg, dissented, but he offered little as to a vision of the exclusionary rule. Citing without explanation *Mapp* and *Weeks*, Breyer merely observed that suppression was the "normal remedy"¹²⁰ and that, by giving *Davis* a right but no remedy, "the Court 'keep[s] the word of promise to our ear' but 'break[s] it to our hope.'"¹²¹ He posed the question: "If the Court means what it says, what will happen to the exclusionary rule[?]"¹²² Critical of the new culpability approach, Breyer saw it as eliminating the rule in

a very large number of cases, potentially many thousands each year. And since the exclusionary rule is often the only sanction available for a Fourth Amendment violation, the Fourth Amendment would no longer protect ordinary Americans from "unreasonable searches and seizures." It would become a watered-down Fourth Amendment, offering its

¹¹⁵ *Id.* at 2428.

¹¹⁶ *Id.* at 2428–29.

¹¹⁷ *Id.* at 2434 (Sotomayor, J., concurring).

¹¹⁸ *Id.* at 2435.

¹¹⁹ *Id.* at 2435–36 (citations omitted).

¹²⁰ *Id.* at 2436 (Breyer, J., dissenting).

¹²¹ *Id.* at 2437.

¹²² *Id.* at 2438.

protection against only those searches and seizures that are *egregiously* unreasonable.¹²³

The new culpability standard articulated in *Herring* and *Davis* has remarkable similarities to the “shocks the conscience” standard that was briefly employed by the Court post-*Wolf* and pre-*Mapp* in a few cases. In *Rochin v. California*,¹²⁴ the Court reversed a conviction for possession of morphine because the police used a doctor to force an emetic solution through a tube into the stomach of a man to induce vomiting after he swallowed two capsules of morphine. The Court asserted that the actions to obtain the incriminating evidence “shock[ed] the conscience” under the Due Process Clause.¹²⁵ In *Irvine v. California*,¹²⁶ the Court was asked to apply the shocks the conscience standard to a situation that involved repeated illegal entries into a home, during which the police placed a microphone in various locations, including the bedroom, to overhear incriminating statements.¹²⁷ The plurality stated:

Each of these repeated entries of petitioner’s home without a search warrant or other process was a trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished. Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busy-body. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment¹²⁸

Yet, the plurality refused to be shocked, maintaining that *Rochin* involved a search of the person and an element of coercion that was missing in *Irvine*.¹²⁹

¹²³ *Id.* at 2440 (citations omitted).

¹²⁴ 342 U.S. 165 (1952).

¹²⁵ *Id.* at 172.

¹²⁶ 347 U.S. 128 (1954).

¹²⁷ *Id.* at 145. The result in *Irvine* affirming the convictions was tenuously grounded. Justice Clark, the deciding vote, concurred only in the judgment, even though he thought *Wolf* was wrongly decided and that due process analysis led to unpredictable results. *Id.* at 138–39 (Clark, J., concurring). For an analysis of *Irvine* and its influence on Chief Justice Warren’s views on the exclusionary rule, see Morgan Cloud, *Rights Without Remedies: The Court That Cried “Wolf”*, 77 *Miss. L.J.* 467, 492–503 (2007).

¹²⁸ 347 U.S. at 132.

¹²⁹ *Id.* at 133. *But see* *Olmstead v. United States*, 277 U.S. 438, 463–64 (1928) (maintaining that an intrusion into the home by “stealth” was “equivalent to an entry by force”).

According to the plurality, *Rochin* was not reversed solely because of the search and seizure issue but, instead, because of the compelled submission to the stomach pump.¹³⁰ It distinguished *Irvine*: “However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping.”¹³¹

Justice Clark, concurring, made an argument that is equally applicable to the current Court’s views:

Of course, we could sterilize the rule announced in *Wolf* by adopting a case-by-case approach to due process in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guess-work—just how brazen the invasion of the intimate privacies of one’s home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned and a guilty man may go free. *Rochin* bears witness to this. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions.¹³²

Justice Frankfurter, in dissent (remember he wrote *Wolf*), argued for reversal:

There was lacking here physical violence, even to the restricted extent employed in *Rochin*. We have here, however, a more powerful and offensive control over the Irvines’ life than a single, limited physical trespass. Certainly the conduct of the police here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month. Those affirming the conviction find that this conduct, in its entirety, is “almost incredible if it were not admitted.” Surely the Court does not propose to announce a new absolute, namely, that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials. Considering the progress that scientific devices are making in extracting evidence without violence or bodily harm, satisfaction of due process would depend on the astuteness and subtlety with which the police engage in offensive practices and

¹³⁰ 347 U.S. at 133.

¹³¹ *Id.*

¹³² *Id.* at 138 (Clark, J., concurring).

drastically invade privacy without authority of law. In words that seem too prophetic of this case, it has been said that “[d]iscovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”¹³³

As in *Irvine*, the police in *United States v. Jones*¹³⁴ monitored Jones’s vehicle continuously for over a month by surreptitiously installing a GPS device. The Court recently determined that those actions constituted a search but did not further determine whether they were reasonable or whether exclusion would be appropriate. Assuming that the actions in *Jones* were illegal, were they sufficiently culpable to justify exclusion? If the monitoring in *Irvine*, which lasted over a month and included what occurred in Irvine bedroom was not shocking, why should the actions in *Jones* justify exclusion? As Justice Frankfurter observed in his *Irvine* dissent, as have many others, technology has unprecedented and ever increasing abilities to intrude. When does the illegal use of technology become sufficiently culpable? I think Justice Clark answers this question; as he points out, a standardless standard, whether under a shocks the conscience verbiage or a culpability approach, is no standard. For the reasons stated by Clark, it would not even deter. In contrast, if what mattered was the violation of the person’s Fourth Amendment rights, then the officer’s intent, quantifying his culpability, or calculating future deterrence would be irrelevant. To state it otherwise, shaping police behavior may be a by-product of protecting a right but the goal of exclusion should be to protect the person’s right.

Professors Gould and Mastrofski, researchers at George Mason University, and their students observed officers in a medium-sized police department for three months.¹³⁵ They concluded that 34 of the 115 searches that were observed were unconstitutional but that only two or three were egregious enough to provide grounds for civil liability.¹³⁶ They characterized the violations as “a steady drumbeat of droplets rather than a torrential deluge.”¹³⁷ “One way to read this data is that the violations they uncovered were largely technical—objectionable not intrinsically, but only because search-and-seizure doctrine defines them as illegal. Gould and Mastrofski worry that even a steady drumbeat of droplets can do damage, over time, to the legitimacy of the police.”¹³⁸ My concerns are different:

¹³³ *Id.* at 145–46 (Frankfurter, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting)).

¹³⁴ 132 S. Ct. 945 (2012).

¹³⁵ See Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315 (2004).

¹³⁶ *Id.* at 331–34.

¹³⁷ *Id.* at 334.

¹³⁸ David Alan Sklansky, *Is The Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 583 (2008).

the “steady drumbeat” of violations that will not be subject to exclusion under *Herring* and *Davis* will become more and more accepted—not as technical violations—but as accepted behavior. Reinforcing that erosion are the qualified immunity cases, which confusingly blend Fourth Amendment principles with qualified immunity principles.¹³⁹ Along with that change, what will be considered egregious enough to justify exclusion will also be influenced, resulting in increasingly diminished respect for the right to be secure over time.

V. TRENDS IN THE STATES

Trends in the states have had some influence on the Court’s decision to apply the exclusionary rule to the states. In *Wolf*, in the era where the rule was seen as constitutionally mandated in federal prosecutions, the Court compiled lists of states adopting or rejecting the rule.¹⁴⁰ The lists were updated in *Elkins*¹⁴¹ and again in *Mapp*.¹⁴²

Likewise, the trends in the United States Supreme Court have had strong influence on the states.¹⁴³ In the pre-*Wolf* era, many of the state decisions adopting the rule were constitutionally based, that is, grounded on each state’s constitution.¹⁴⁴ In the post-*Mapp* but pre-*Calandra* era, there was not much development of independently grounded exclusionary rules, given that the federal rule was seen as constitutionally mandated. But in the post-*Calandra* era, after the Supreme Court deconstitutionalized the rule, and particularly after the adoption of the good faith exception in *United States v. Leon*,¹⁴⁵ there has been increasing

¹³⁹ See Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 196–200 (2010). The most recent Supreme Court cases in this area illustrate that trend. See *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012) (discussing when probable cause is so lacking in warrant situations so that an officer cannot reasonably rely on warrant); *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (confusing mixture of qualified immunity and exigent circumstances analysis).

¹⁴⁰ *Wolf v. Colorado*, 338 U.S. 25, 29–39 (1949).

¹⁴¹ *Elkins v. United States*, 364 U.S. 206, 219–21, 224–32 (1960).

¹⁴² *Mapp v. Ohio*, 367 U.S. 643, 651–52 (1961).

¹⁴³ E.g., *State v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987) (noting the “ebb and flow of federal search-and-seizure law during” the twentieth century). See generally Symposium: *Independent State Grounds: Should States Depart from the Fourth Amendment in Construing Their Own Constitutions and, if so, on What Basis Beyond Simple Disagreement with the United States Supreme Court’s Result?*, 77 MISS. L.J. 1 (2007).

¹⁴⁴ See *Olmstead v. United States*, 277 U.S. 438, 462–63, 467–68 (1928) (collecting cases and observing that those states that had adopted the exclusionary rule believed that it was “required by constitutional limitations”); Milton Hirsch, *Big Bill Haywood’s Revenge: The Original Intent of the Exclusionary Rule*, 22 ST. THOMAS L. REV. 35, 79 (2009) (“The state courts that chose to follow the *Weeks* [rule] did so on the grounds that the Fourth Amendment (or its state-court congeners) is a rule of exclusion[.]”). But see *People v. Goldston*, 682 N.W.2d 479, 483–89 (Mich. 2004) (characterizing that court’s adoption of the exclusionary rule in 1919 as based on non-constitutional grounds and asserting that “it is a judicially created rule, not a constitutional rule”).

¹⁴⁵ 468 U.S. 897, 922 (1984).

litigation seeking to exclude evidence in violation of state search and seizure provisions.¹⁴⁶

The currents of Supreme Court jurisprudence have rippled repeatedly through the state courts. For example, in Illinois, its Supreme Court adopted an exclusionary rule in 1924 that was constitutionally grounded,¹⁴⁷ rejected reconsidering that view in light of *Wolf*,¹⁴⁸ and recently affirmed that view, despite adhering to a limited lock-step approach for defining substantive search and seizure rights.¹⁴⁹ Missouri adopted an exclusionary rule in 1924 that appeared constitutionally based,¹⁵⁰ was viewed as “independent of the federal rule,”¹⁵¹ but now simply follows federal analysis.¹⁵² New Jersey and New Hampshire did not have independent exclusionary rules prior to *Mapp*, found no need to adopt one after *Mapp*, but adopted such rules based on more recent restrictions imposed by the high Court on the federal rule.¹⁵³

Many states continue to follow in lock-step United States Supreme Court analysis¹⁵⁴ and some states, which never had a state-based exclusionary rule, still do not.¹⁵⁵ California, for example, has adopted a provision that requires its courts *not* to depart from Fourth Amendment exclusionary rule analysis.¹⁵⁶ Professor Sklansky has noted one significant consequence of that legal framework:

What has happened when evidentiary exclusion is removed as a remedy for police illegality? . . . The most prominent example of such a restriction is the ban that California constitutional law places on warrantless searches of trash placed at curbside for collection. That restriction was rejected, as a matter of federal constitutional law, by the U.S. Supreme Court in 1984. Since that time, as far as I can tell, police in California have pretty much completely ignored the warrant

¹⁴⁶ See generally Lawrence Friedman, *Reactive and Incompletely Theorized State Constitution Decision-Making*, 77 MISS. L.J. 265, 269–313 (2007).

¹⁴⁷ *People v. Castree*, 143 N.E. 112 (Ill. 1924).

¹⁴⁸ *Chicago v. Lord*, 130 N.E.2d 504 (Ill. 1955).

¹⁴⁹ *People v. Caballes*, 851 N.E.2d 26 (Ill. 2006).

¹⁵⁰ *State v. Owens*, 259 S.W. 100 (Mo. 1924).

¹⁵¹ *State v. Brown*, 708 S.W.2d 140, 145 n.10 (Mo. 1986).

¹⁵² *Id.* at 146.

¹⁵³ *State v. Canelo*, 653 A.2d 1097 (N.H. 1995); *State v. Novembrino*, 519 A.2d 820 (N.J. 1987).

¹⁵⁴ *E.g.*, *Brown*, 708 S.W.2d at 145–46. See generally Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

¹⁵⁵ *E.g.*, *State v. Fredette*, 411 A.2d 65, 67 (Me. 1979).

¹⁵⁶ *People v. Camacho*, 3 P.3d 878, 882 (Cal. 2000) (“Our state constitution . . . forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the Federal Constitution as interpreted by the United States Supreme Court.”).

requirement imposed by state constitutional law for garbage searches. Without the remedy of the exclusionary rule, the rule has evaporated.

In fact, California police officers are now trained to ignore it. Police academy materials explain that garbage loses most if not all of its “expectation of privacy” when it is “bagged and placed at the curbside.” The authoritative legal sourcebook distributed to police departments by the state’s Department of Justice dutifully notes that “[o]ld California cases” prohibited “exploratory” searches of trash left for collection, but immediately reassures officers that the 1982 initiative makes any “evidence seized in compliance with federal law . . . admissible in court, even if there was a violation of California law.” Elsewhere the Sourcebook points out that “[a]s a practical matter . . . no [search or seizure] case has discussed any ‘independent state grounds’ for many years,” and suggests that “the differences which once existed between ‘federal law’ and ‘California law’ have for the most part faded into history.”

....

It would be a mistake to make too much of the single example of garbage searches in California, just as it would be a mistake to make too much of the enormous difference of scale between suppression hearings and civil damage actions for police illegality. But both pieces of evidence point to a conclusion consistent with other available evidence. Despite the genuinely vast changes in law enforcement over the past forty years, the exclusionary rule probably still does a lot of work that no other remedy stands ready to duplicate.¹⁵⁷

Some state courts that reject the federal analysis have failed to “articulate a coherent rationale” for the state-based exclusionary rule.¹⁵⁸ Thus, for example, some state courts simply view the balancing of interests or the possibility of deterrence differently than the United States Supreme Court.¹⁵⁹ Looking broadly at the state trends, there is little new analysis. As with the high Court, the various opinions fall on one side or the other of the proposition that the rule is constitutionally based, and then recycle what has been repeated for decades to support that conclusion. However, the analysis of some courts that have grounded exclusion on a constitutional basis reinforces my contention that it is the only sound basis for the rule.¹⁶⁰

¹⁵⁷ David Alan Sklansky, *Is The Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580–81 (2008) (footnotes omitted).

¹⁵⁸ Lawrence Friedman, *Reactive and Incompletely Theorized State Constitution Decision-Making*, 77 MISS. L.J. 265, 299 (2007).

¹⁵⁹ *E.g.*, *State v. Marsala*, 579 A.2d 58, 63–64 (Conn. 1990). Prior to *Mapp*, Connecticut did not have an exclusionary rule; the Supreme Court of Connecticut adopted one in 1988. *State v. Dukes*, 547 A.2d 10 (Conn. 1988).

¹⁶⁰ For an insightful and biting criticism of the Utah Supreme Court’s adoption of an

Iowa was one of the first states to adopt the exclusionary rule, predating *Weeks* by several years.¹⁶¹ The rule was viewed “as an integral part” of the state constitution; however, in 1923, the Iowa Supreme Court “discarded” it and “Iowa did not again have a state exclusionary rule until compelled to do so by” *Mapp*.¹⁶² In light of the adoption of the good faith exception in *Leon*, the Iowa Supreme Court was asked to adopt that exception as a matter of Iowa constitutional law. It declined to do so in a detailed decision embracing the exclusionary rule as constitutionally based. The court saw the rule as serving a “purpose greater than simply deterring police misconduct.”¹⁶³ The rule was viewed as a remedy for a constitutional violation:

It is true . . . that suppression of the evidence does not “cure” the constitutional invasion, but it is clearly the best remedy available. As with many civil remedies, the exclusionary rule merely places the parties in the positions they would have been in had the unconstitutional search not occurred, and the State is deprived only of that to which it was not entitled in the first place.¹⁶⁴

It added: “There is simply no meaningful remedy available to one who has suffered an illegal search other than prohibiting the State from benefitting from its constitutional violation.”¹⁶⁵ The Iowa court also saw the rule as protecting the integrity of the courts: “By admitting evidence obtained illegally, courts would in essence condone the illegality by stating it does not matter how the evidence was secured. . . . Judges would become accomplices to the unconstitutional conduct of the executive branch if they allowed law enforcement to enjoy the benefits of the

exclusionary rule on independent state grounds that were not based on the Utah constitution, see Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751. As Professor Cassell noted:

The opinion [in *State v. Larocco*, 794 P.2d 460 (Utah 1990)] suggested that Utah’s exclusionary rule may rest on-other-than constitutional footing. In a commendable effort to limit the reach of the opinion, the plurality explained: “We therefore say nothing about the nature of the exclusionary rule (constitutional requirement versus judicial remedy) pursuant to article I, section 14 of the Utah Constitution. We simply hold that it exists.” If the plurality opinion had simply held that the exclusionary rule was a “constitutional requirement” based on an interpretation of the Utah Constitution, one could at least understand the basis for the plurality’s holding. But reserving the constitutional issue raises questions about the opinion’s soundness.

Id. at 826–27. That lack of clear reasoning remains a part of Utah jurisprudence. *Cf.* *State v. Walker*, 267 P.3d 210, 216–27 (Utah 2011) (Lee, J., concurring) (rejecting view that there is an exclusionary rule under the Utah constitution).

¹⁶¹ *State v. Cline*, 617 N.W.2d 277, 284–85 (Iowa 2000).

¹⁶² *Id.* at 285–87.

¹⁶³ *Id.* at 289.

¹⁶⁴ *Id.* (citation omitted).

¹⁶⁵ *Id.* at 291.

illegality.”¹⁶⁶ Summing up, the court opined:

One of the fundamental guarantees of the Iowa Constitution is the protection of its citizens against unreasonable searches and seizures. We believe that the only effective way to ensure that this right is more than mere words on paper is to exclude illegally obtained evidence. The reasonableness of a police officer’s belief that the illegal search is lawful does not lessen the constitutional violation. . . . This court will simply not “condone and approve a clear and known violation of a fundamental constitutional right in order to sustain a conviction that we think correct.” To do so would elevate the goals of law enforcement above our citizens’ constitutional rights, a result not supported by any principle of constitutional law.¹⁶⁷

Other courts have employed similar reasoning, grounding the rule on independent state constitutional grounds.¹⁶⁸ In a strongly worded opinion, the Delaware Supreme Court traced the long history of grounding the exclusionary rule on the Delaware constitution, emphasizing repeatedly the theme that rights require remedies and that the exclusionary rule “is the constitutional remedy for a violation of the search and seizure protections” set forth in the Delaware Constitution.¹⁶⁹

Similarly, the Supreme Court of Idaho chose to reject the good faith exception to the exclusionary rule and took the occasion to discuss its view that “the rule [is] a constitutionally mandated remedy for illegal searches and seizures.”¹⁷⁰ It summarized its reasoning as follows:

[T]he United States Supreme Court has abandoned the original purposes of the exclusionary rule as announced in *Weeks* and adopted by this Court in [*State v. Arregui*, 254 P.2d 788 (Idaho 1927)], in that the federal system has clearly repudiated any purpose behind the exclusionary rule other than that of a deterrent to illegal police behavior. Thus, the change in federal law has provided an impetus for a return by this Court to exclusive state analysis. We believe that the exclusionary rule should be applied in order to: 1) provide an effective remedy to persons who have been subjected to an unreasonable government search and/or seizure; 2) deter the police from acting unlawfully in obtaining evidence; 3) encourage thoroughness in the warrant issuing process; 4) avoid having the judiciary commit an additional constitutional violation by considering

¹⁶⁶ *Id.* at 289–90.

¹⁶⁷ *Id.* at 292–93 (citation and footnote omitted).

¹⁶⁸ *E.g.*, *State v. Guzman*, 842 P.2d 660 (Idaho 1992).

¹⁶⁹ *Dorsey v. State*, 761 A.2d 807, 821 (Del. 2000).

¹⁷⁰ *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992).

evidence which has been obtained through illegal means; and 5) preserve judicial integrity. We see no reason to depart from the exclusionary rationale set out in *Weeks* and *Arregui* and their progeny, not withstanding the United States Supreme Court's recent begrudging approach towards fourth amendment protection.

Additionally, we disagree with the basic premise of the *Leon* decision—that the decision whether to apply the exclusionary rule should be made by determining whether the goal of police deterrence would be furthered in the case at bar—because it totally fails to take into account the other purposes of our independent state exclusionary rule. We believe, regardless of whether the goal of police deterrence would be served, that the other purposes of the state exclusionary rule justify application of the rule in every case where evidence is seized pursuant to a warrant which is not supported by a showing of probable cause.¹⁷¹

The Idaho court noted that its “concern goes much further” than rejection of the good faith rule announced in *Leon*; instead, it was the cost-benefit underlying the high Court's analysis that the Idaho court viewed as flawed:

All of the rules which limit the admission of relevant evidence, including the exclusionary rule, exist to protect values which are difficult to quantify, yet which are considered important by society.

[T]he Vermont high court has written that the *Leon* cost-benefit analysis is of no value because the costs and benefits involved cannot be accurately gauged:

The ultimate criticism of the Court's cost-benefit analysis in *Leon* is that it is attempting to do what at this time cannot be done. There simply are insufficient empirical data for the costs and benefits of a good faith exception to be accurately assessed. The benefits of the exclusionary rule are hard to measure because they consist of “non-events.” “Police compliance with the exclusionary rule produces a non-event which is not directly observable—it consists of *not* conducting an illegal search.”

[E]mpirical pronouncements without empirical support are not persuasive.¹⁷²

¹⁷¹ *Id.* at 672.

¹⁷² *Id.* at 673 (citation omitted). The court added that, even if it were to adopt a cost-benefit test, it viewed the factors differently than the United States Supreme Court. *Id.* at 674–78.

VI. EXCEPTIONS TO THE APPLICATION OF A CONSTITUTIONALLY-BASED RULE

Re-constitutionalizing the exclusionary rule, although clearly expanding the application of the remedy, would not eliminate all exceptions to it.¹⁷³ I do not attempt here to set forth a comprehensive list of exceptions but note, instead, that the rule has never been perceived to be an absolute bar to the admission of evidence. A significant limitation on the application of the exclusionary rule is the independent source doctrine, which permits the introduction of evidence that is not causally related to the Fourth Amendment violation. This doctrine has a long pedigree, with roots in case law at a time when the exclusionary rule was considered constitutionally based.¹⁷⁴ This view has been repeated and developed in later decisions.¹⁷⁵ Under the inevitable discovery doctrine, evidence that has been wrongfully seized is not suppressed if it would have been inevitably discovered by the police pursuing a lawful course of conduct.¹⁷⁶ Also in the era preceding the deconstitutionalization of the rule and the primacy of deterrence theory, the Court in *Wong Sun v. United States*¹⁷⁷ created and applied the classic formulation of the fruit of the poisonous tree doctrine to determine whether drugs and statements should be excluded in a federal prosecution.

VII. CONCLUSION

From *Wolf* through the present, shifting majorities have debated the exclusionary rule. There appears to be no tie-breaker in the debate nor time limit on it. As discussed, beginning at least with *Weeks* in 1914, and ending with *Calandra* in 1974, the rule was generally thought to be constitutionally based. As early as 1949, Justice Rutledge said it was too late to question that basis. Since 1974, the Court has taken the opposing view and, although there are no prospects that the Court in the near future will change its view again, what may prove as equally false as Justice Rutledge's observations are the ready assurances that the rule is not constitutionally mandated.

The debate concerning the exclusionary rule has often coincided with discussions of the availability and adequacy—or even the exclusivity—of other

¹⁷³ The State of Washington has the most unique search and seizure jurisprudence of all the states. Its exclusionary rule is “nearly categorical” and constitutionally grounded. *State v. Eserjose*, 259 P.3d 172, 176 (Wash. 2011). Yet, even Washington recognizes a variety of exceptions to exclusion, such as independent source and attenuation. *Id.* at 176–84.

¹⁷⁴ *Silverthorne Lumber Company v. United States*, 251 U.S. 385 (1920).

¹⁷⁵ *E.g.*, *Nix v. Williams*, 467 U.S. 431, 441 (1984); *Wong Sun v. United States*, 371 U.S. 471, 486, 491 (1963).

¹⁷⁶ *See, e.g.*, *Nix*, 467 U.S. at 446–48. The inevitable discovery doctrine “is in reality an extrapolation from the independent source doctrine; [because] the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.” *Murray v. United States*, 487 U.S. 533, 539 (1988).

¹⁷⁷ 371 U.S. 471 (1963).

remedies. My essential point is, however, that the availability of other remedies is beside the point *if* the rule is viewed as part of the constitutional right. There can be no greater authority to support that essential insight than *Marbury v. Madison*:

If he has a right, and that right has been violated, do the laws of this country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.¹⁷⁸

In *Bivens v. Six Unknown Agents*, implying a right to sue for damages for a Fourth Amendment violation, the Court relied on *Marbury*, stating:

The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."¹⁷⁹

The essential association of a remedy with the right is no less true when the government violates the Fourth Amendment and obtains evidence it seeks to use in a criminal case against the accused. For me, that ends the inquiry: in a criminal case, the only available remedy is exclusion.

Supporting my belief in the constitutional basis for the exclusionary rule are the consequences of the "deterrence" or "culpability" approach when the rule is viewed as non-constitutionally based. The Court has no authority to impose such a rule on the states. There is no coherent basis for its application and the ever evolving rationales appear to be nothing more than shallow attempts to justify subjective assessments of the value of the rule. We have been here before, with the short-lived *Rochin* shocks the conscience standard that could not "shape the conduct of local police one whit" and served at best to result in "unpredictable

¹⁷⁸ 5 U.S. 137, 162–63 (1803) (paragraph breaks omitted). If even older authority is needed, an essayist in 1765 wrote that general warrants should be condemned in all cases as illegal. He maintained: "In short, if this was not the constitution, I think, 'we might amuse the public with the sound of liberty, but should enjoy none.'" FATHER OF CANDOR, LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS 50 (5th ed. 1765). He also maintained that damages as a possible remedy had nothing to do with condemning such warrants as "an infringement of the constitution." *Id.* at 66.

¹⁷⁹ 403 U.S. 388, 397 (1971) (citations omitted).

reversals.”¹⁸⁰ Perhaps most alarming to me is the prospect of erosion of understanding of what the Fourth Amendment protects, the steady drumbeat of minor violations, leading to less and less respect for individual rights. Compounding that concern is the muddying of the distinction between the violation of a person’s right and whether the police should have qualified immunity (in civil cases) or whether the police actions are sufficiently culpable (in criminal cases).¹⁸¹

It is the nature of pendulums to swing from one side of center to the other once in motion. Short of outright abolition of the rule, the pendulum has swung as far as it can in favor of admitting evidence found to be in violation of the Fourth Amendment. The trends in some of the state courts are in the opposite direction, moving toward the view that the exclusionary rule is grounded in a personal right. Perhaps a future generation of Justices, like those who took notice of the trends in *Wolf*, *Mapp*, and *Elkins*, will be influenced by the views of the states. Perhaps then, at least for a time, the rule will be recognized as a right of the individual, to insure that his or her right to be secure is indeed secure.

¹⁸⁰ *Irvine v. California*, 347 U.S. 128, 138 (1954) (Clark, J., concurring).

¹⁸¹ The warning of *Boyd* rings true to me: “It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*” [“withstand beginnings”]. *Boyd v. United States*, 116 U.S. 616, 635 (1886). Similar cautions have been made throughout history. See FATHER OF CANDOR, LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS 51 (5th ed. 1765) (“Every thing of this sort is practiced with some tenderness at first. Tyranny grows by degrees.”).

