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Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)

Scott E. Sundby*

It should come as little surprise that the exclusionary rule has been the continual target of strong criticism for a very long time. The rule appears to run head-on into a basic principle of justice learned as early as one's playground days: "Two wrongs don't make a right." Professor Wigmore sarcastically captured the rule's vulnerability on this point in an oft-cited quote:

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.¹

And, of course, Justice Cardozo expressed the same sentiment in one of the most famous judicial lines ever penned, "The criminal is to go free because the constable has blundered."² Such criticism becomes only more poignant when the criminal going free is a drug dealer, or worse, a murderer, despite being caught red-handed; a result no one celebrates.

Far more of a surprise, then, given such an entrenched critique from a variety of quarters, is that the exclusionary rule has continued to remain a centerpiece of Fourth Amendment jurisprudence for almost a century.³ While some of the rule's

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¹ 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2184 (3d ed. 1940).

² *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). Justice Stewart once observed that the rationale against the exclusionary rule "was distilled in [that] single Cardozo sentence." *Elkins v. United States*, 364 U.S. 206, 216 (1960).

³ To say "almost a century" is to mark the start of the modern exclusionary rule with the Court's adoption of the rule for federal courts in *Weeks v. United States*, 232 U.S. 383 (1914). The exclusionary rule, in fact, obtained a foothold in Supreme Court jurisprudence as early as 1886 in

staying power no doubt can be attributed to stare decisis and legal inertia, the rule's lengthy reign suggests that the exclusionary rule, like its critique, also draws upon some basic wellsprings of justice. This Essay argues that although those competing principles largely have been obscured in the Court's formal doctrine since the Burger and Rehnquist Courts redirected the legal dialogue solely towards deterrence, they are still very much in play and worth contemplating as the Roberts Court appears to be rethinking the rule once again.⁴ Indeed, as will be seen, the exclusionary rule's underlying tenets arguably have even more poignancy in today's world than when the Supreme Court first enthusiastically embraced the rule.

In undertaking this discussion, it is helpful to acknowledge upfront that a major difficulty in discussing the rule's role and purposes is the tendency in today's world to see the exclusionary rule as an ideological litmus test—i.e., liberals like it, conservatives dislike it.⁵ And in Gallup Poll terms, the rule probably is an issue that provides a fairly quick read on an individual's political predilections. But as Professor Slobogin in his provocative and insightful article, *Why Liberals Should Chuck the Exclusionary Rule*,⁶ thoughtfully reminds us, we need to think beyond a quick gut reaction to the rule and ask what values are in fact being served.

In his article, Professor Slobogin makes a strong argument that the exclusionary rule as a means of deterring police misbehavior is not the most effective means for promoting the values that the rule's liberal supporters hope to promote. This Essay does not aim to refute Professor Slobogin's argument about deterrence, finding much of his reasoning about the rule's failure to deter individual police officers persuasive.⁷ Rather, the Essay intends to accept Professor Slobogin's broader invitation to think deeply about the rule and its purposes, and, in so doing, to suggest that the opposite is true as well: the exclusionary rule promotes values that go well beyond what might be thought of as the liberal agenda and that help explain the rule's historical roots and staying power. Specifically, this Essay will argue that when rule-of-law principles are used as the prism through which the exclusionary rule is viewed, the exclusionary

Boyd v. United States, 116 U.S. 616 (1886), and the rule could thus be argued to have an even longer lineage. See *infra* note 9 (discussing *Boyd's* role in the rule's development).

⁴ See generally Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211 (2010) (discussing recent Supreme Court decisions that make "it clear that it is dissatisfied with the mandatory aspect of the *Mapp* rule").

⁵ See Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 111 (2003).

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

⁷ Although the bulk of his argument focuses on deterrence, Professor Slobogin does address and critique various "noninstrumental justifications" that have been used to justify the rule. *Id.* at 423–42. Among those addressed are what he terms the "judicial review theory" based on the idea that one whose rights have been violated is entitled to judicial review and a remedy. *Id.* at 433–36. While this Essay puts forward a vision of the exclusionary rule that emphasizes the importance of independent judicial review, the emphasis is on judicial review for a far different purpose, i.e. to promote rule-of-law values within our constitutional system.

rule's fundamental value to our criminal justice system becomes far more compelling. In short, there are reasons that everyone who believes in the American constitutional system, including conservatives, should embrace the exclusionary rule.

I. THE EXCLUSIONARY RULE AS A VINDICATION OF THE RULE OF LAW

Reading only Supreme Court majority opinions since the Burger Court, one is unlikely to surmise that at one time a majority of the Court was not just supportive of the exclusionary rule, they were downright passionate about it.⁸ From the time of the exclusionary rule's first appearance in *Boyd v. United States* in 1886⁹ through the 1960s, the Court's decisions were often as much paeans as opinions in defending the rule as an essential part of the Fourth Amendment. While the reasoning of those earlier decisions will be developed more fully later, the opinions all resonated with the idea that the rule was critical to maintaining an independent judiciary untainted by the admission of illegally seized evidence. The rule was spoken of as a safeguard against a return to the tyranny that the War of Independence had overthrown and as an essential firewall for the courts to guard against government overreaching.¹⁰ The exclusionary rule was thus viewed as an integral part of the constitutional structure for ensuring that basic liberties were

⁸ See generally Milton Hirsch, *Big Bill Haywood's Revenge: The Original Intent of the Exclusionary Rule*, 22 ST. THOMAS L. REV. 35 (2009) (looking at federal and state development of exclusionary rule); Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391 (2010) (tracing the historical development of the exclusionary rule in the Court's cases). See also Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996) (examining the Court's early Fourth Amendment decisions and finding a far broader and more expansive interpretation than commonly assumed).

⁹ 116 U.S. 616 (1886). Identifying the true "beginning" of the Court's recognition of the exclusionary rule requires a little explication. *Boyd* is frequently cited as the initial case, and the Court did exclude the evidence in the case because the statute was invalid. As Professor Thomas Davies points out, because *Boyd* was based on the idea that the statute was "void," it was not an exclusionary rule case in the literal sense that the police actions were the basis for exclusion. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 728–29 & n.515 (1999). It was really with *Weeks* in 1914 that the modern exclusionary rule began with the Court's recognition that police actions were governmental actions "under color of law" that could give rise to exclusion. *Id.* at 729–30. *Boyd*, however, remains the starting point for understanding the genesis of the Court's development of the exclusionary rule because it provides the foundation of doctrine and principles upon which the Court built in *Weeks* and the subsequent cases. *Cf. id.* at 729 ("Boyd opened the way for later court decisions to create modern [exclusionary rule] doctrine, but it did not actually do so itself.").

¹⁰ See, e.g., *Boyd*, 116 U.S. at 630 ("The struggles against arbitrary power in which [the founding fathers] had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred."). See generally Sundby & Ricca, *supra* note 8, at 394–414.

protected. Under this “majestic conception”¹¹ deterrence was rarely mentioned, the passages invoking the rule frequently bordered on judicial purple prose,¹² and the exclusionary rule was viewed as an important member of the inner circle of constitutional protections in the area of criminal procedure.

Gradually, however, this “majestic conception” of the rule began to give way to a deterrence focus. Cost-benefit analysis had begun to creep into the Court’s standard analysis once the Court started to address whether the exclusionary rule should be extended to contexts beyond the federal criminal trial, such as whether the rule should apply to the states.¹³ Once the Court began addressing these new situations, even those Justices who favored extending the rule needed to address why an expansion of the rule beyond the traditional context of the federal criminal trial was warranted, which meant a cost-benefit analysis of the rule started to become a significant part of the Court’s dialogue.¹⁴ The deterrence narrative as the focus of a cost-benefit analysis finally became fully ascendant when the Court addressed whether the rule should extend to grand jury proceedings in *United States v. Calandra* in 1974¹⁵ and habeas corpus in *Stone v. Powell* in 1976.¹⁶ By the 1980s, the deterrence narrative had largely choked off the Court’s discussion of any other rationale and the Court’s focus has been on deterrence ever since.¹⁷

¹¹ *Herring v. United States*, 555 U.S. 135, 151–52 (2009) (Ginsburg, J., dissenting) (“Others have described ‘a more majestic conception’ of the Fourth Amendment and its adjunct, the exclusionary rule. . . . I share that vision of the Amendment.” (quoting Justice Stevens’s dissent in *Arizona v. Evans*, 514 U.S. 1, 18 (1995))).

¹² See Hirsch, *supra* note 8, at 80–83 (excerpting “rhetorical *tours de force*” on both sides of the argument).

¹³ See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (“stoutly adher[ing] to [the exclusionary rule,]” but declining to extend the rule to the states after a cost-benefit analysis), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961). The question of deterrence was occasionally raised in earlier opinions, but was not a part of the Court’s standard dialogue. See Sundby & Ricca, *supra* note 8, at 433–34.

¹⁴ In *Mapp*, for example, while the Court extended the exclusionary rule to the states, Justice Clark’s opinion spent far more time than earlier Court opinions in justifying the rule and why it was needed from a deterrence rationale. *Mapp v. Ohio*, 367 U.S. 643, 648–60 (1961). See generally Sundby & Ricca, *supra* note 8, at 433–34 & n.276.

¹⁵ 414 U.S. 338 (1974).

¹⁶ 428 U.S. 465 (1976). For a discussion of *Calandra* and *Stone*, see *infra* notes 65–77 and accompanying text.

¹⁷ See, e.g., *Herring v. United States*, 555 U.S. 135, 139–40 (2009) (“[O]ur decisions establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial. We have stated that this judicially created rule is ‘designed to safeguard Fourth Amendment rights generally through its deterrent effect.’” (citations omitted); *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (“Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except ‘where its deterrence benefits outweigh its substantial social costs.’”) (internal quotation marks omitted). Some Justices have attempted to revive the Court’s earlier rationale for the rule, most recently Justice Ginsburg in her *Herring* dissent. *Herring*, 555 U.S. at 148, 151–52 (“Others have described ‘a more majestic conception’ of the Fourth Amendment and its adjunct, the exclusionary rule. . . . I share that vision of the Amendment.”). The deterrence rationale, however, has undeniably been the focal point of a majority of the Court since *Calandra*.

The Burger and Rehnquist Courts' refocusing of the exclusionary rule debate solely on deterrence has had an effect far beyond the formal legal analysis that is applied to exclusionary rule situations. As the Court pushed the earlier alternative rationale off the center stage, the single-minded focus on deterrence dramatically reshaped the debate's rhetoric in a manner unfavorable to the rule. Most fundamentally, while the rule originally had been heralded as a doctrine that defended and actively promoted the American legal system's positive values,¹⁸ the deterrence-only language transformed the rule into a "necessary evil" that was the option of last resort to prevent misbehavior in future cases. "Evil" because the rule allows a patently guilty person to go free, creating the image of a lottery for criminals who are "lucky" enough that the officers in their case did not follow the rules. And "necessary" in the sense that the Court will only invoke it if all other alternatives to deterring police misbehavior have failed,¹⁹ a justification that sounds a bit like a variation on Churchill's defense of democracy—the exclusionary rule is the worst form of enforcing the Fourth Amendment, except for all those other forms that have been tried from time to time. Not exactly the type of ringing endorsement that engenders respect for the rule, even if it allows the rule to limp along based on the justification that no better solution exists.

So the question arises: How might a twenty-first century defense recapture the constitutional zest which runs through the cases in which the Court first embraced the exclusionary rule? First, one must step back from the deterrence justification's tendency to focus the debate on a specific case at hand and instead look at the larger values at stake. In other words, the discussion must be not just about the police officer and the drug dealer, but also about the citizen and her rights, and why, in the words of Justice Jackson, the exclusionary rule secures the rights "of Everyman."²⁰ The next step is to find the concept that expresses the underlying principles that gave rise to the Court's enthusiastic original embracing of the rule and that can serve as a justification for the exclusionary rule in the coming years. Put in its most basic terms, if the principle of justice that most effectively critiques the exclusionary rule is "two wrongs don't make a right," what is the countervailing notion of justice that explains why the exclusionary rule has persevered despite its many critics?

While the exclusionary rule has been justified in a number of ways over the years,²¹ it may be that the concept that best captures why the exclusionary rule has survived for so many years—the competing principle of justice to the idea that "two wrongs don't make a right"—is that at bottom the rule is a fundamental

¹⁸ See *supra* notes 10–12 and accompanying text, and *infra* notes 33–42 and accompanying text (examining the Court's earlier themes of "judicial integrity" and the exclusionary rule's other positive values from a rule-of-law perspective).

¹⁹ See, e.g., *Hudson*, 547 U.S. at 591 ("Suppression of evidence, however, has always been our last resort, not our first impulse.").

²⁰ See *infra* notes 49–56 and accompanying text.

²¹ See Slobogin, *supra* note 6, at 423–42 (summarizing and critiquing various "noninstrumental justifications" that have been used to justify the rule).

expression of the “rule of law” in the criminal procedure context, or, in more colloquial terms, that “there is a right way and a wrong way” and “the end does not justify the means.”²² The rule of law is, of course, a cornerstone of the American constitutional system²³ and is often expressed through the idea that the United States is “a government of laws, and not of men.”²⁴ And although a broad concept,²⁵ the rule of law at its most basic embodies the idea that no one is above the law, even those in positions of government authority, and that the legitimacy of our system of laws depends on the ability of ordinary citizens to invoke the law on their behalf in everyday courts.²⁶

The next section will look at the exclusionary rule through the prism of the rule of law and its underpinnings. What the examination reveals is that the exclusionary rule furthers the rule of law in three critical ways: (a) the rule holds

²² Cf. Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149 (2012) (describing experiments showing that individuals tend to support the exclusionary rule in concrete situations based on concerns over integrity even when abstractly opposed to the rule).

²³ For an examination of how the separation of powers doctrine furthers the rule of law, see Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305–09 (1989). See also Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1336–37 (2001).

²⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

²⁵ See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3 (2004) (noting “elusiveness” of the concept given the various interpretations).

²⁶ See generally Steven L. Winter, *What If Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL’Y F. 155 (2001) (describing various strains of the “rule of law” in the context of American constitutionalism). One cannot think of the “rule of law” without thinking of Justice Scalia’s invocation of the rule of law as a primary basis for constitutional interpretation. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Justice Scalia’s focus when he raises the rule of law is an insistence on rules of sufficient clarity that they constrain the discretion of constitutional decision makers. *Id.* at 1175–83. For Justice Scalia, this leads to a restricted role for judges in interpreting the Constitution, and he no doubt would argue that the Court under the rule of law had no power to recognize the exclusionary rule because it is only, as characterized by the Court later, a “judicially created remedy.” *United States v. Calandra*, 414 U.S. 338, 348 (1974); cf. Ellis Washington, *Excluding the Exclusionary Rule: Natural Law vs. Judicial Personal Policy Preferences*, 10 DEAKIN L. REV. 772 (2005) (arguing that the Court’s recognition of the exclusionary rule violated the rule of law). The merits of Justice Scalia’s version of the rule of law and focus on originalism is beyond the scope of this Essay. Certainly the Court in the cases adopting the exclusionary rule saw the rule as firmly within the Constitution and necessary to the maintaining of the constitutional structure. See Cloud, *supra* note 8, at 560–62 (noting the Court’s decisions during the *Lochner* era were an “integrated” mix of constitutional theories drawing upon both formalism and pragmatism); Davies, *supra* note 9, at 725–29 (“The Justices responded to the confluence of those developments [such as police powers not available at common law to act without a warrant] by adjusting constitutional search and seizure doctrine to modern realities in the 1914 decision *Weeks v. United States*.”); Hirsch, *supra* note 8, at 61–69 (discussing *Weeks* and subsequent cases as developing an exclusionary rule as consistent with the original intent of the Fourth Amendment). This Essay thus does not invoke the rule of law in the strict interpretive sense upon which Justice Scalia relies, but in the broader themes that have been understood as the underpinnings of the rule of law and are reflected in the Court’s exclusionary rule opinions prior to the mid-1970s.

police officers and government officials accountable to citizens in a manner that gives practical force to the idea that the American constitutional system is “a government of laws, and not of men,” and to its corollary that all individuals, even the powerful, are accountable to the law; (b) the rule allows the judiciary to maintain its independence and integrity apart from the government wrongdoing, which in turn enables the courts to enforce the rule of law through the separation of powers; and (c) because the exclusionary rule requires a suppression hearing, the rule plays an essential role for giving voice to the rule of law by providing an “ordinary” forum for everyday citizens to be heard in challenging government actions. Once the exclusionary rule is understood as serving fundamental rule-of-law tenets, its historical appeal begins to make far greater sense and highlights the importance of the exclusionary rule for the future.

A. The Exclusionary Rule and “A Government of Laws, and Not of Men”

The rule of law at its most basic incorporates the idea that no one is above the law, even those who make the laws and enforce them. Few settings could offer a more vivid illustration of that principle than the exclusionary rule setting, where the claim is none other than that the very individuals and institutions enforcing the law have violated the constitutional rules that govern their power. The exclusionary rule's command, therefore, is simply an expression of the first principle of constitutional government: when accusing a citizen of a crime, government actors themselves must abide by the law and cannot resort to evidence they have obtained outside the bounds of the Constitution. As Justice Brandeis observed in a passage that resonates with rule of law concerns:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.²⁷

Thus, rather than viewing the exclusionary rule as punishment of a police officer for failing to follow the law in a specific case, the rule can be understood as a doctrine giving voice and substance to the rule of law in the context of law enforcement: the preservation of the principle that government actors must be held strictly accountable to the Constitution to protect the long-term values that underlay the rule of law. Understood in this way, the exclusionary rule could as

²⁷ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

easily have been labeled, and perhaps might have better been termed for public relation purposes, the “constitutional enforcement rule.”

Indeed, while the exclusionary rule is sometimes critiqued on the basis that the United States largely stands alone in adopting the rule,²⁸ such uniqueness can be celebrated as an instance of American exceptionalism.²⁹ The exclusionary rule shows a dedication to and insistence on a long-term commitment to the rule of law that trumps short-term outcomes. Thus when the question arises, “How strongly does the United States believe in the principle that its government actors are bound by the Constitution?,” the answer becomes, “So strongly, that the concern over how the government obeys the law means that we are willing to risk letting someone who commits a crime walk free lest a broader commitment to the rule of law be jeopardized.” It is the type of answer that one might expect to read in Toqueville as a description of the United States’s fundamental commitment to principles of governance that provides the long-term undergirding for the American “experiment” of constitutional democracy.

This commitment to the rule of law also helps explain why the idea that “two wrongs don’t make a right” does not automatically win the exclusionary rule debate, because from a rule-of-law perspective, the “wrong” of the government’s transgression and the “wrong” of the alleged crime are not comparable or interchangeable in the threats that they pose. Much like the presumption of innocence and the idea that it is better to let ten guilty people go free than convict one innocent person, the exclusionary rule recognizes that the tradeoff must favor the long-term interests at stake.³⁰ Thus, while letting a guilty person go free in the name of the presumption of innocence is undeniably a “wrong,” the law has made

²⁸ See, e.g., William T. Pizzi, *The Need to Overrule Mapp v. Ohio*, 82 U. COLO. L. REV. 679 (2011).

²⁹ How out-of-step America’s exclusionary rule is with the international community is not entirely clear. As the American rule has been modified by doctrines like the good-faith exception and inevitable discovery which have curtailed the rule’s scope, some countries have been moving towards a more expansive use of excluding evidence. See, e.g., David Ormerod & Diane Birch, *The Evolution of the Discretionary Exclusion of Evidence*, 2004 CRIM. L. REV. 767 (2004) (chronicling the expanding use of discretion to exclude evidence by British judges under Section 78 of the Police and Criminal Evidence Act (PACE) of 1984). In fact, one can find comparative law literature using the United States’s current form of the exclusionary rule as an example of a *weak* exclusionary rule. See Yvonne Marie Daly, *Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and the Winds of Change*, 19 IRISH CRIM. L.J. 40 (2009) (using the United States as an example of a weaker exclusionary rule compared to the Ireland Supreme Court’s rejection of a good faith exception); compare also Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/5/1986, “Rayford, Reginald y Otros / tenencia de estupefacientes,” Fallos (1986-308-733) (Arg.) (Argentina allows third-party standing to exclude evidence illegally obtained from another individual), with *Alderman v. United States*, 394 U.S. 165, 171–72 (1969) (“[S]uppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.”).

³⁰ See Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 457–62 (1989) [hereinafter Sundby, *Reasonable Doubt Rule*] (examining the presumption of innocence in terms of competing values).

the judgment that the greater “wrong” rests with the conviction of the innocent and that guarding against the greater wrong takes precedent.

A similar judgment can be seen as part of the basis of the exclusionary rule: the long-term interest of ensuring that the government stays within its constitutional bounds is the more dangerous “wrong” and outweighs the possibility of letting a guilty person go free. This is not to ignore that the more serious the crime (the rule’s critics understandably invoke the murderer who may go free as the nightmare scenario),³¹ the greater the “wrong” in the immediate case from exclusion. Such a criticism, however, invariably will arise against any rule that directs its effect at long-term values; Sir Stephen, for example, questioned whether it was always better that ten guilty individuals be set free in the name of the presumption of innocence, suggesting that “[e]verything depends on what the guilty . . . have been doing.”³²

The real question, then, is how the tradeoff between the short-term and long-term values should be made, a tradeoff that the early Court resoundingly made in favor of the exclusionary rule and the rule of law. For example, in *Weeks*, the case adopting the exclusionary rule for federal courts, the Court made clear its concern over the long-term risks at stake if the exclusionary rule was not adopted:

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.³³

And this idea, that a unique and particularly serious “wrong” occurs when the government oversteps its constitutional bounds, runs throughout the exclusionary rule cases all the way through *Mapp*.³⁴ It was the unique nature of the wrong that

³¹ In *Brewer v. Williams*, a case involving the murder of a ten-year-old girl, Chief Justice Burger wrote that, “Today’s holding fulfills Judge (later Mr. Justice) Cardozo’s grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.” *Brewer v. Williams*, 430 U.S. 387, 416 (1977) (Burger, C.J., dissenting). In *Brewer*, the defendant had led the police to the body of the murder victim, a ten-year-old girl. *Id.* at 393 (majority opinion). Because the police had learned of the body’s location through a Sixth Amendment violation, however, Williams’s statements leading them to the body had to be suppressed. *Id.* at 405–06. On a subsequent appeal, the Court held that the body could be admitted under an “inevitable discovery” exception to the exclusionary rule. See *Nix v. Williams*, 467 U.S. 431, 448–50 (1984).

³² 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 438 (1883). And like the exclusionary rule where tradeoffs are involved, the proper tradeoff in the context of the presumption of innocence has not been without controversy. See generally Sundby, *Reasonable Doubt Rule*, *supra* note 30, at 458–62.

³³ *Weeks v. United States*, 232 U.S. 383, 393 (1914).

³⁴ Sundby & Ricca, *supra* note 8, at 392–414 (tracing development of the “majestic conception” narrative of the exclusionary rule through *Mapp*).

arises when the government itself violates the Constitution, for instance, that drove Justice Holmes's support of the exclusionary rule:

[T]he case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance. . . .
 . . . 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.³⁵

The question, therefore, is which "wrong" is to be given the greater weight, and for those Justices who believe that the exclusionary rule is a means of vindicating long-term interests, the choice although not necessarily easy, must come down on the side of exclusion; as Justice Holmes stated, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."³⁶

B. *The Exclusionary Rule and the Separation of Powers: The Judicial Integrity Rationale*

The exclusionary rule as a manifestation of the rule of law is also abundantly evident in how the Court viewed the exclusionary rule as necessary to carry out its constitutional duties under the separation of powers.³⁷ The importance of the exclusionary rule in aiding the judiciary to serve its constitutional role as a check on executive and legislative overreaching was very much on the minds of the Supreme Court in recognizing the exclusionary rule. In *Boyd*, the 1876 case that gave the exclusionary rule its initial footing, the Court turned to James Madison for their justification:

³⁵ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920).

³⁶ *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting). Justice Holmes's and Brandeis's dissents in *Olmstead* are influential opinions in the exclusionary rule's development. Although written as dissents because the majority voted not to extend the Fourth Amendment to wiretapping or to apply the exclusionary rule to actions that did not violate the Constitution, their reasoning reflects the Court's original reasons for embracing the rule and played an important role in the rule's later development. See Sundby & Ricca, *supra* note 8, at 394, 400–01. Justice Holmes, of course, was also the author of *Silverthorne Lumber Co.* that established the "fruits of the poisonous tree" doctrine. Dismissing Holmes's and Brandeis's *Olmstead* opinions as "dissents," therefore, does not give the opinions their full due in reflecting the Court's thinking about the rule prior to the mid-1970s. Cf. *Herring v. United States*, 555 U.S. 135, 141 n.2 (2009) (The majority dismissed Justice Ginsburg's dissent advocating "a more majestic conception" of the exclusionary rule because "[m]ajestic or not, our cases reject this conception, and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis." (citations omitted)).

³⁷ For an exposition on the separation of powers as an expression of the rule of law, see Verkuil, *supra* note 23.

If they [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.³⁸

The judiciary's need to stand as a "guardian" to ensure that the other branches stayed within their constitutional mandates was a familiar refrain for the Court all the way through *Mapp*; Justice Day's statement of the rationale in *Weeks* typifies the Court's view during this period:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, 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.³⁹

Importantly, however, the Court saw the exclusionary rule not only as a means to keep the other branches within their proper constitutional bounds, but as a necessary tool for enabling the judiciary to enforce the rule of law. The Court believed that without the exclusionary rule the admission of unconstitutionally obtained evidence would make the judiciary itself a party to the illegality: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."⁴⁰ Justice Brandeis was an especially strong voice in defending the exclusionary rule as a measure critical to the courts maintaining the integrity necessary to serve their role: "[Admission of illegally obtained evidence] is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . . The court protects itself."⁴¹

³⁸ *Mapp v. Ohio*, 367 U.S. 643, 663 n.8 (1961) (Black, J., concurring) (referring to Justice Bradley's interpretation of the Bill of Rights in *Boyd* and quoting James Madison, 1 ANNALS OF CONG. 439 (1789)).

³⁹ *Weeks v. United States*, 232 U.S. 383, 392 (1914).

⁴⁰ *Id.* at 394.

⁴¹ *Olmstead*, 277 U.S. at 484–85 (Brandeis, J., dissenting). For an analysis of Justice Brandeis using the exclusionary rule as a form of an "unclean hands" equitable argument, see Sundby & Ricca, *supra* note 8, at 402–03; see also *Mapp*, 367 U.S. at 660 ("The ignoble shortcut to

The judicial integrity rationale also raises another rule-of-law theme running throughout the Court's original exclusionary rule opinions: the idea that if the government misbehavior gains even the slightest foothold, the contagion of government lawlessness will spread. The judiciary thus has the solemn obligation to earnestly put a stop to every overstep, no matter how slight its tread, and the Court saw the exclusionary rule as necessary to fulfill that obligation. Consequently, in *Boyd* the Court used the fact that the government illegality might be characterized as minor (it was a subpoena for a commercial invoice) not as an argument against exclusion, but an argument *for* it:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. 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*.⁴²

The Court's decisions under this majestic conception narrative, in contrast to the current Court's efforts to limit the exclusionary rule's application to only egregious Fourth Amendment violations (if applied at all),⁴³ thus argued for the need for an expansive application of the exclusionary rule. As Justice Clark summarized in his *Mapp* opinion: "In this jealous regard for maintaining the integrity of individual rights, the [*Boyd*] Court gave life to Madison's prediction that 'independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.'"⁴⁴

conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.").

⁴² *Boyd v. United States*, 116 U.S. 616, 635 (1886). The Court also quoted Lord Camden's famous words that a government intrusion impermissibly infringes upon the sanctity of individual property "be it ever so minute," including a mere "bruising [of] the grass," or "treading upon the soil." *Id.* at 627 (quoting *Entick v. Carrington & Three Other King's Messengers*, 19 How. St. Tr. 1029 (1765)).

⁴³ In *Herring*, for example, the majority opinion attempted to characterize the Court's historical application of the exclusionary rule as limited to flagrant instances of police misconduct, *Herring v. United States*, 555 U.S. 135, 143 (2009), and *Hudson* dismissed Supreme Court language in earlier cases for a broad interpretation of the exclusionary rule as "[e]xpansive dicta." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

⁴⁴ *Mapp*, 367 U.S. at 647 (quoting 1 ANNALS OF CONG. 439 (1789)); see also Sundby & Ricca, *supra* note 8, at 396–99 (tracing the Court's original arguments for the need to apply the exclusionary rule in an expansive fashion).

The exclusionary rule can thus be seen as a particularly important aspect of the judiciary's constitutional role in fulfilling the rule of law by acting as a check over the executive branch (and Congress to the extent the rule is applied to searches and seizures conducted pursuant to an unconstitutional law). The judicial integrity argument, however, largely lost its voice in the exclusionary rule debate in the 1970s as the deterrence rationale shoved it aside.⁴⁵ The reasons for the argument losing its voice will be examined later, as will the prospect of it becoming full-throated again through the rule of law.⁴⁶ The important point to be made at this juncture, however, is that although the Court did not discuss judicial integrity expressly in terms of the "rule of law," the underpinnings of the rule of law that make it so crucial to our constitutional system run throughout the rationale. The Court, in other words, saw the exclusionary rule as especially important because it vindicated the idea that no individual is above the law and because it operates as a constraint on government actors and the other branches of government.

C. *The Exclusionary Rule, Transparency, and the Rule of Law's Protection of the "Ordinary" Citizen*

The rule-of-law values protected by the exclusionary rule that have been examined so far are familiar themes in the Court's early cases even if expressed with different phrasing. The exclusionary rule, however, vindicates the rule of law in an additional way that has received less attention, both in terms of the exclusionary rule and of the rule of law: the exclusionary rule serves a critical role in ensuring that the government's actions are able to be litigated by everyday people and made transparent in everyday courts.

For the rule of law to have meaning, to be enforceable against the powerful and those who make and execute the law, the ordinary citizen must have the ability to invoke the law in a meaningful way. To serve the purposes of the rule of law, therefore, a system must have, as Professor Winter has phrased it,

the quality of ordinary law administered by ordinary tribunals. This is the sense in which great issues of constitutional law can be raised and determined in an ordinary trespass action, as in *Entick v. Carrington* or *Luther v. Borden*, or a simple action for assault, as (more notoriously) was the case in *Dred Scott v. Sandford*.⁴⁷

In short, the constitutional rights that constrain government actors and that protect its citizens from constitutional transgressions mean little if the everyday person has no way of raising them in forums to which they have ready and full access. And in

⁴⁵ See *infra* notes 63–75 and accompanying text.

⁴⁶ See *infra* notes 75–77 and accompanying text.

⁴⁷ Winter, *supra* note 26, at 162 (citations omitted).

this regard, the exclusionary rule plays a particularly critical role.

Because the exclusionary rule requires a suppression hearing, it means that law enforcement behavior is continually litigated, put in the spotlight, and constitutionally scrutinized in courtrooms across the country.⁴⁸ As a practical matter, therefore, the exclusionary rule creates a forum for a citizen's claim of constitutional violations to be heard. Indeed, while the Court has often analyzed the exclusionary rule in comparison to other remedies in terms of deterrence effect, the comparative assessment that matters even more from a rule-of-law perspective is the ability to have a broad swatch of claims of Fourth Amendment violations heard and adjudicated. And when that comparison is undertaken, the alternatives usually proposed to the exclusionary rule—civil law suits and police disciplinary hearings—fall far short in their ability to provide anything close to comparable widespread scrutiny because they will be reserved for only the most egregious cases.⁴⁹ Without the suppression hearing, the ability of citizens subjected to illegal searches and seizures to be heard in an “ordinary” forum would be dramatically reduced and the rule of law diminished.

One response may be that the “citizens” mentioned above are accused defendants and the evidence that they are attempting to exclude is often highly reliable physical evidence. Should the rule of law care? Even assuming that all of the accused are in fact guilty, the answer is still “yes,” and no one has articulated the reason more effectively than Justice Robert Jackson in his dissent in *Brinegar v. United States*.⁵⁰

⁴⁸ See generally Scott E. Sundby, *Mapp v. Ohio's Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255 (2010) [hereinafter Sundby, *Morality Play*].

⁴⁹ Recovery in civil suits, for example, is limited by doctrines such as qualified immunity, making it difficult to find legal representation other than in the most egregious instances. Likewise, police disciplinary proceedings generally will be limited to more serious cases of police misbehavior, which means that many violations that otherwise would be raised through a suppression motion will never be raised before an adjudicative body. See generally *id.* at 262–65 (examining how civil suits and police disciplinary hearings fail to provide full forums for a citizen's complaint that the Fourth Amendment was violated and fulfill the rule's “educational” purposes). Very importantly from a rule-of-law perspective, because police disciplinary proceedings generally are not before courts, they also cannot fulfill the rule of law's separation of power function of the judiciary serving as a check on the executive branch. See *supra* notes 37–46 and accompanying text. Instead, the procedures are oriented towards “punishing” the police officer rather than the exclusionary rule's emphasis on enforcing the rule of law. See *infra* note 88 and accompanying text; see also DARREL W. STEPHENS, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, *Police Discipline: A Case for Change* 5–10 (2011), available at <http://www.nij.gov/pubs-sum/234052.htm> (detailing inadequacies of current police disciplinary proceedings from both police and citizenry's viewpoints). This is not to rule out the possibility that other forums might provide a more effective means to examine police behavior than the current alternatives. See Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 567 (2013); *infra* note 89.

⁵⁰ 338 U.S. 160 (1949). For a more general examination of Justice Jackson's *Brinegar* opinion and how we should interpret the Fourth Amendment, see Scott E. Sundby, “Everyman”'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

Brinegar involved a search of a bootlegger's car during Prohibition under circumstances that Justice Jackson believed failed to establish probable cause.⁵¹ What particularly concerned Justice Jackson, however, was that he perceived the majority as not giving the Fourth Amendment its full due because all that was at stake was the search of a bootlegger. As a result, he began his opinion with a remarkably powerful "prologue,"⁵² arguing passionately that the exclusion of illegally seized evidence was important for reasons that far transcended the case of a Missouri bootlegger. For Justice Jackson the urgency in excluding the evidence against someone like *Brinegar* was that excluding the evidence served as the only means of giving meaning to the Fourth Amendment *for everyone*, the innocent citizen as well as the bootlegger. In his typical poignant phrasing, Justice Jackson argued, "a search against *Brinegar*'s car must be regarded as a search of the car of Everyman."⁵³

In making his argument, Justice Jackson sounded themes that resonated strongly with a rule-of-law perspective and the need to make sure that constitutional claims are heard in "ordinary" forums. As Justice Jackson explained, Fourth Amendment violations are especially susceptible to avoiding scrutiny and being controlled because of the nature of how most violations occur:

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.⁵⁴

He specifically contrasted the difficulty of enforcing the Fourth Amendment with other constitutional rights that are far more easily subjected to the judicial review necessary to vindicating the rule of law:

[F]reedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that

⁵¹ *Brinegar*, 338 U.S. at 185–88 (Jackson, J., dissenting).

⁵² *Id.* at 182 (calling the opening of his opinion a "prologue").

⁵³ *Id.* at 181.

⁵⁴ *Id.*

to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the act in terms of money.

But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.⁵⁵

And, Jackson noted, if police actions are effectively immunized from judicial review, it places the power of interpretation and action solely within the discretion of the police:

We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. . . .

And we must remember that the authority which we concede to conduct searches and seizures without warrant [and thus no judicial scrutiny] may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies.⁵⁶

The question for Jackson became, then, how to bring such actions under judicial scrutiny so that the many police-citizen encounters that occur will be subject to the Fourth Amendment even where the citizen is entirely innocent. And for Justice Jackson the way to bring such searches within the rule of law was to utilize the exclusionary rule as the means of scrutiny:

Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. Federal courts have used this method of enforcement of the Amendment, in spite of its unfortunate consequences on law enforcement. . . . We must therefore look upon the exclusion of evidence in federal prosecutions, if obtained in violation of the Amendment, as a means of extending protection against the central government's agencies. So a search against Brinegar's car must be

⁵⁵ *Id.* at 182.

⁵⁶ *Id.*

regarded as a search of the car of Everyman.⁵⁷

Or to paraphrase Justice Jackson, when a defendant moves for suppression based on a constitutional violation, his motion is on behalf of Everyman.

The need to be wary of letting “small” Fourth Amendment transgressions slip by in the name of fighting crime was an issue that Justice Frankfurter also addressed with some warmth:

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the First World War . . . [and] searches and seizures in violation of the Fourth Amendment in connection with the Communist raids.⁵⁸

And presaging Justice Jackson’s argument in *Brinegar*, Justice Frankfurter stressed that it is only through judicial intervention when the opportunity presents itself—even if it means freeing “some sordid offender”—that the rule of law can be given voice, precisely because so much law enforcement conduct is conducted out of judicial sight:

If it be said that an attempt to extend the present case may be curbed in subsequent litigation, it is important to remember that police conduct is not often subjected to judicial scrutiny. Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene. It is for this reason—the dangerous tendency of allowing encroachments on the rights of privacy—that this Court in the

⁵⁷ *Id.* at 181. Justice Jackson noted that many state courts did not utilize the exclusionary rule, adding, “This inconsistency does not disturb me, for local excesses or invasions of liberty are more amenable to political correction, the Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source.” *Id.* Justice Jackson’s suggestion that the states may be less in need of the exclusionary rule does not, of course, diminish his fundamental point of the need for the rule as a means of bringing Fourth Amendment violations out of the shadows. Moreover, one could make a strong argument that given the later growth of state law enforcement, both in terms of personnel and technological capacity, coupled with the enhanced cooperation between state and federal law enforcement, that Justice Jackson would have supported extension of the rule to the states by the time of *Mapp*, and almost certainly following the War on Drugs. Cf. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 68–77 (2010) (describing the expansion and increased militarization of state and local forces through the provision of federal monies to fund the “War on Drugs”).

⁵⁸ *Harris v. United States*, 331 U.S. 145, 173 & n.8 (1947) (Frankfurter, J., dissenting).

Boyd case gave to the Fourth Amendment its wide protective scope.⁵⁹

And as Learned Hand observed, if constitutional constraints are not enforced in all cases where the government has overreached, even those where the exclusion of evidence is against someone about whom we care little (or, if we care, it is because we want to see him locked away), the falling away of the constraints jeopardizes having the protections of the rule of law available when they are most needed: “Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.”⁶⁰

As jurists like Robert Jackson, Felix Frankfurter, and Learned Hand recognized, the Fourth Amendment poses special challenges in the area of the rule of law. Judicial oversight is especially challenging because law enforcement activity to a large extent takes place hidden from public view, making it difficult to bring constitutional overstepping against the citizenry to light. As a result, a mechanism is needed through which the rule of law’s “ordinariness”—the ability to hold government actors accountable in accessible forums—can be fulfilled in the Fourth Amendment context. The exclusionary rule performs this critical role and thus serves a purpose far greater than deterrence, acting procedurally as a spotlight to bring law enforcement practices out from the shadows. And even though it may mean that the citizenry’s advocate sometimes must take the form of a “squalid huckster,” every suppression motion that brings the police before a court in the name of the rule of law also has a silent co-party with the name of Everyman.

II. UNDERSTANDING THE EXCLUSIONARY RULE AS PART OF THE CONSTITUTIONAL FRAMEWORK

Examining the exclusionary rule through a rule-of-law lens reveals the exclusionary rule to have far deeper and stronger roots in our constitutional system than the current focus on deterrence. In a system that emphasizes the need to jealously guard against government overreaching, a need valued across the political spectrum, the exclusionary rule presents itself as a constitutional mechanism for preserving the courts’ role under the separation of powers and providing a transparent public forum in which law enforcement’s actions can be held to account. And critically, despite often being overlooked, the rule serves as the best means for vindicating the rights of Everyman. As Justice Jackson observed, the Fourth Amendment presents unique challenges in enforcement because so much of what happens in police-citizen encounters will be one-time encounters that will never be reviewed.⁶¹ Although not perfect, the exclusionary

⁵⁹ *Id.* at 173.

⁶⁰ *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926).

⁶¹ *See supra* note 54 and accompanying text.

rule and the forum of the suppression hearing provide an essential avenue for judicial and public overview of police actions.

These are not new arguments. As has been seen, these rule-of-law themes run throughout the traditional conceptions put forward in the Court's opinions upholding the exclusionary rule. The effort to rethink those opinions through rule-of-law principles has the objective only of trying to bring back into the debate a more constitutionally robust view of the exclusionary rule. It is a mistake, in other words, to think of the exclusionary rule solely as punishing Officer Jones in one case with the hope that it might keep Officer Smith from violating the Fourth Amendment in a later case.

Rather, the power of the rule of law and its cherishing of "the ordinary" is that it transforms even the lowest tribunal into a forum where the most fundamental tenets of our constitutional system are vindicated on a daily basis. The suppression hearing is in many ways a "morality play," a means through which the importance and tenets of the Fourth Amendment are reinforced not only for the police officer whose actions are being reviewed, but also for the constitutional system as a whole.⁶² Although it may sound a bit much like a Norman Rockwell depiction of Americana, it is true: the local judge in the courthouse on the town square hearing a suppression motion challenging the local police officer's actions is carrying out an act with ramifications that go far beyond the courtroom; by hearing the motion, the judge strengthens the rule of law through the day-to-day action of an independent judiciary acting as a constitutional check and making sure that a citizen's claim of a government actor's overreaching is heard. The Supreme Court may be the architectural supervisor that ensures that the grand scheme of the separation of powers and rule of law is properly sketched, but it is the lower courts that pound in the nails and properly square the corners to make sure the system functions during the workday even when the supervisor is not around.

A. Reviving a Proper Understanding of the Judicial Integrity Rationale

Thinking about the exclusionary rule in rule-of-law terms also holds the promise of revitalizing the "judicial integrity" rationale that eventually was pushed aside. As seen earlier, the phrase "judicial integrity" was meant to capture the idea that for a court to allow a conviction to proceed based on illegally obtained evidence was in some sense to "dirty" the hands of the judiciary as well. As Justice Traynor wrote for the Supreme Court of California in adopting the exclusionary rule for the state prior to *Mapp*, "the courts under the old rule [of no exclusion] have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers."⁶³

⁶² See generally Sundby, *Morality Play*, *supra* note 48.

⁶³ *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955). Justice Holmes likewise argued that "no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not

The difficulty with the “judicial integrity” rationale from a rhetorical viewpoint as it developed over time, especially in its more florid statements, is that it could be caricatured as sounding like the courts adopting a “we will remain pure” lecturing attitude towards the other branches. And when the exclusionary rule is applied to a case where a dangerous criminal might be freed, the rationale can be portrayed as the Court fiddling while Rome burns or, in Professor Wigmore’s words, as a “misguided sentimentality.”⁶⁴

The Burger Court’s effort to characterize “judicial integrity” as an idealistic but naïve understanding of the “real world” was largely accomplished in the case of *Stone v. Powell*.⁶⁵ *Stone* was not, to put it mildly, an ideal setting for defending the exclusionary rule, since it involved two murder cases and the question of whether to allow habeas relief based on the trial courts’ alleged failures to exclude unconstitutionally seized evidence. In his dissent,⁶⁶ Justice Brennan had ardently articulated the judicial integrity rationale seen in the Court’s opinions first embracing the exclusionary rule:

To sanction disrespect and disregard for the Constitution in the name of protecting society from law-breakers is to make the government itself lawless and to subvert those values upon which our ultimate freedom and liberty depend. “The history of American freedom is, in no small measure, the history of procedure,” and as Mr. Justice Holmes so succinctly reminded us, it is “a less evil that some criminals should escape than that the Government should play an ignoble part.”⁶⁷

In his *Calandra* dissent two years earlier, Justice Brennan had concluded with the fire-and-brimstone warning that, “When judges appear to become ‘accomplices in the willful disobedience of a Constitution they are sworn to uphold,’ we imperil the very foundation of our people’s trust in their Government on which our democracy rests.”⁶⁸

Justice Powell did not share such concerns, however, and in his opinion for the *Stone* majority used Justice Brennan’s dissents as a foil, casting Justice Brennan’s dire warnings as “hyperbole”⁶⁹ and an overly dramatic response to

permit the judge to allow such iniquities to succeed.” *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

⁶⁴ See 8 WIGMORE, *supra* note 1, at § 2184.

⁶⁵ 428 U.S. 465 (1976).

⁶⁶ The bulk of Justice Brennan’s dissent addressed the curtailment of habeas corpus, as he noted that he had addressed most of the majority’s viewpoint on the exclusionary rule in his *Calandra* dissent two years earlier. *United States v. Calandra*, 414 U.S. 338, 356–61 (1974) (Brennan, J., dissenting).

⁶⁷ *Stone*, 428 U.S. at 524–25 (Brennan, J., dissenting) (citations omitted).

⁶⁸ *Calandra*, 414 U.S. at 360 (Brennan, J., dissenting) (citations omitted).

⁶⁹ *Stone*, 428 U.S. at 495 n.37. As in *Calandra*, an earlier draft had been more caustic in addressing the dissent, and the language was softened in the released opinion. See Sundby & Ricca, *supra* note 8, at 430 n.256.

unrealistic concerns. While he saved his more caustic comments about the judicial integrity argument for private,⁷⁰ in the opinion he proceeded to characterize the judicial integrity argument as a “preoccupation” with procedure rather than “truth and justice.”⁷¹ As Justice Powell portrayed the judicial integrity rationale, it represented an overly wrought concern with procedure that ignored the larger costs to society and failed to recognize that “[o]ur goals are truth and justice, and procedures are but means to these ends.”⁷² While Justice Powell did acknowledge the historical lineage of the judicial integrity argument,⁷³ he also suggested that because the Court had not extended the exclusionary rule to every setting in which illegally seized evidence was introduced (for example, where the defendant was not the individual subjected to the illegality), in the end the judicial integrity argument was at best a secondary argument in cases where the real rationale for exclusion was the far more “pragmatic” rationale of deterrence.⁷⁴ He thus gave a formal nod to judicial integrity—“courts, of course, must ever be concerned with preserving the integrity of the judicial process”—but effectively dismissed “this concern” in the exclusionary rule context as having “limited force as a justification for the exclusion of highly probative evidence.”⁷⁵

The important aspect to note about Justice Powell’s opinion is that the judicial integrity rationale he dismisses is not the rationale as understood from a rule-of-law perspective. Justice Powell focuses on the rationale as one of giving too much importance to “procedure” for procedure’s sake and at the price of truth. His version also emphasizes the judicial integrity language that focuses on the need of the judiciary to keep its hands clean and not be an “accomplice” to the unlawful search by admitting the evidence, a proposition with which Justice Powell clearly

⁷⁰ The extent of Justice Powell’s skepticism over the judicial integrity argument is far more explicit in his private papers. For example, he wrote “absurd” and “forensic overkill!” in the margin next to Justice Brennan’s argument that judges become “accomplices” by admitting illegally obtained evidence. For a full examination of Justice Powell’s views of the exclusionary rule as shown by his in-chamber memos and written comments, see Sundby & Ricca, *supra* note 8, at 425–31. In a case several years earlier, Justice Powell had responded in a footnote to a similar argument by Brennan with a somewhat sarcastic response: “The dissent also voices concern that today’s decision will betray ‘the imperative of judicial integrity,’ sanction ‘illegal government conduct,’ and even ‘imperil the very foundation of our people’s trust in their Government.’ There is no basis for this alarm. ‘Illegal conduct’ is hardly sanctioned, nor are the foundations of the Republic imperiled, by declining to make an unprecedented extension of the exclusionary rule to grand jury proceedings where the rule’s objectives would not be effectively served and where other important and historic values would be unduly prejudiced.” *Calandra*, 414 U.S. at 356 n.11 (citations omitted).

⁷¹ See *Stone*, 428 U.S. at 491 n.30.

⁷² *Id.* (quoting Dallin H. Oaks, *Ethics, Morality, and Professional Responsibility*, 1975 BYU L. REV. 591, 596 (1975)). In a footnote, Justice Powell quoted Professor Oaks: “I am criticizing, not our concern with procedures, but our preoccupation, in which we may lose sight of the fact that our procedures are not the ultimate goals of our legal system. Our goals are truth and justice, and procedures are but means to these ends.” *Id.*

⁷³ *Id.* at 485 (“[O]ur decisions often have alluded to the ‘imperative of judicial integrity.’”).

⁷⁴ *Id.* at 484.

⁷⁵ *Id.* at 485.

did not agree, labeling it as “absurd” in his private written comments.⁷⁶ And if one views the exclusionary rule as some type of procedural purist’s attempt to create a Fourth Amendment utopia where the Amendment is enforced in all situations no matter what, then the idea of letting two convicted murderers go free (as in *Stone*) in the name of procedure and judicial purity does seem like a constitutional extravagance, and a dangerous one at that.

Thinking of judicial integrity in terms of the rule of law, however, not only returns the rationale to its original roots, it provides a far more compelling justification for the exclusionary rule. What Justice Powell’s critique fails to capture in his treatment of the judicial integrity rationale is that procedure is not being heralded as an end to itself, nor is judicial purity being touted as a virtue unto itself. Rather, the exclusionary rule as expressed by judicial integrity is a means to an end, exactly as Justice Powell argues procedure must be viewed, because the exclusionary rule is essential to maintaining the rule of law in the context of law enforcement. The exclusion of evidence is not the mindless application of a remedy simply to have a remedy, but a necessary measure to ensure that the executive branch remains subject to its constitutional constraints and to judicial oversight. And the need for the judiciary to not participate in the admission of the evidence is not so that the judges’ legal souls remain unsullied, but because only a judiciary independent from the wrongdoing can enforce the rule of law. Thus while Justice Powell is correct—procedures should not be an end in themselves, but rather a means to accomplishing larger goals—he failed to give fair play to the larger values at stake.

Out of fairness to Justice Powell, some of the rhetoric in support of judicial integrity does have an overblown quality to it, making it easier in a case like *Stone* to say that despite not applying the exclusionary rule, “‘Illegal conduct’ is hardly sanctioned, nor are the foundations of the Republic imperiled.”⁷⁷ The point, though, of the judicial integrity cases and their rule-of-law themes is that the danger arises not within the context of any one case, but with the relaxing of the rule of law to make allowances so that eventually the legal constraints become weakened and give way.

B. *The Rule of Law and the Exclusionary Rule in the Twenty-First Century*

Not surprisingly, rule-of-law themes in the exclusionary rule context have often found their strongest voice when the perception of the dangers of the government overstepping its bounds is at its greatest. *Weeks*’s recognition of the modern exclusionary rule came after the powers of police officers to act without warrants had expanded dramatically and had moved beyond common law limitations.⁷⁸ Following World War II, the example of Nazi Germany was on the

⁷⁶ See *supra* note 70.

⁷⁷ *United States v. Calandra*, 414 U.S. 338, 356 n.11 (1974).

⁷⁸ *Davies*, *supra* note 9, at 725–29 (“The genesis of modern doctrine appears rooted in the awakening of judicial concern over the newly powerful warrantless officer.”).

minds of many when thinking about the Fourth Amendment. In reversing course from his earlier opinion for the Supreme Court of California that had rejected the exclusionary rule, Justice Traynor wrote:

Today one of the foremost public concerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights. This peril has been recognized and dealt with when its challenge has been obvious: it cannot be forgotten when it strikes further from the courtroom by invading the privacy of homes.⁷⁹

And Justice Jackson, the former Nuremberg prosecutor, drew upon what he had witnessed to passionately defend the need to fully enforce the Fourth Amendment:

[The Fourth Amendment's protections], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.⁸⁰

One can believe in the good intentions of law enforcement and still listen with careful attention to those who urge caution—jurists like Brandeis, Holmes, Jackson, Frankfurter, and Learned Hand—that the rule of law is a protection that can easily slip away “day by day” without proper vigilance.⁸¹ And while every generation faces its unique challenges, the Fourth Amendment and rule of law currently face issues that are novel in the both the benefits and dangers that they pose. Few would question that the response to the 9/11 attacks and the ensuing War on Terror has placed heightened pressure to maintain the proper balance between protecting our security and our civil liberties.⁸² It is a work-in-progress

⁷⁹ *People v. Cahan*, 282 P.2d 905, 912–13 (Cal. 1955).

⁸⁰ *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting).

⁸¹ *Harris v. United States*, 331 U.S. 145, 173 (1947) (Frankfurter, J., dissenting) (“[I]t is important to remember that police conduct is not often subjected to judicial scrutiny. Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene.”).

⁸² See generally John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765 (2007); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

and one where the judiciary needs to play an independent role more than ever as the central government has expanded dramatically its surveillance resources to combat the threat of terrorism.

Nor do the challenges lie solely in the realm of the War on Terror. While technology holds much promise in improving the detection of illegal activity, it also holds the possibility of making government surveillance even more inscrutable.⁸³ As Justice Jackson warned,⁸⁴ one of the most difficult aspects of enforcing the Fourth Amendment is that transgressions are frequently one-off events or the type of activity that often avoids ever coming to the attention of the courts. With the government's technological capacity expanding exponentially to follow individuals⁸⁵ and to monitor their calls and activities⁸⁶ without detection, the need for vigilance grows proportionally. And while technology also holds considerable promise in bringing police techniques into the open for public scrutiny,⁸⁷ the need for Fourth Amendment enforcement mechanisms to bring law enforcement practices into the open may never have been greater.

The proper role of the exclusionary rule in meeting the need for Fourth Amendment vigilance no doubt will be vigorously debated, as it has been for the past century. The criticisms of the exclusionary rule are legitimate; the rule does have the potential to allow an individual who committed a crime to escape punishment. The original impulse behind the Court's adoption of the rule, however, has largely been obscured in recent times and too often is understood as an indirect effort to punish the police by freeing the criminal and serving as a warning against future transgressions. And if all that is at stake is the punishment

⁸³ For an insightful look at the challenges that technology poses to current Fourth Amendment doctrine, see Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303 (2010) (proposing using "liberty" as a conceptual basis for reanimating Fourth Amendment principles).

⁸⁴ See *supra* note 54 and accompanying text.

⁸⁵ The Court has just begun to address the issues raised by practices such as GPS tracking. See *United States v. Jones*, 132 S. Ct. 945 (2012) (holding invalid, but without a majority rationale, GPS tracking of defendant for 28 days without a valid warrant). Other technologies, such as using cell phone information to track an individual in "real time" or recreate their past movements, pose similar questions. See generally Steven M. Harkins, *CSLI Disclosure: Why Probable Cause Is Necessary to Protect What's Left of the Fourth Amendment*, 68 WASH. & LEE L. REV. 1875 (2011).

⁸⁶ See generally Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. ILL. J.L. TECH. & POL'Y 281 (2011); Christopher Slobogin, *Transaction Surveillance by the Government*, 75 MISS. L.J. 139 (2005); Christopher Soghoian, *Caught in the Cloud: Privacy, Encryption, and Government Back Doors in the Web 2.0 Era*, 8 J. TELECOMM. & HIGH TECH. L. 359 (2010).

⁸⁷ See, e.g., David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357 (2010). Because the rule-of-law approach revolves around the idea that the judiciary must be able to ensure that the police are held accountable, measures that bring interactions with citizens into the open may impact how the exclusionary rule is used and needed. The advent of dashboard cams in police cruisers and the possibility in the future of filming all interactions may go a considerable way in helping both provide clear feedback to the police and public oversight of police practices in a way that suppression hearings can only accomplish on an admittedly intermittent basis.

of an errant police officer, then the exclusionary rule can be seen as a rather clumsy means of doing so, and not only conservatives but liberals should be concerned about the rule's efficacy.

Properly understood as a manifestation of our system's rule-of-law principles, however, the exclusionary rule's longevity and vitality becomes far more understandable as an expression of bedrock constitutional values. The rule is not a punishment of the officer any more than the striking down of a law as outside the scope of congressional authority is a "punishment" of Congress.⁸⁸ Rather, as envisioned by the Court when it adopted the exclusionary rule, enforcement of the rule serves as a means for vindicating the rule of law and ensuring that constitutional constraints are maintained for the future, an objective that cuts across all political viewpoints, from liberal to conservative. As the discussion goes forward, therefore, whether the issue is the proper scope of the rule or even the rule's very existence, a rule-of-law perspective allows for a far more robust understanding of the rule's purposes.⁸⁹

⁸⁸ See Hirsch, *supra* note 8, at 56–57. Judge Hirsch argues that the idea that the rule punishes police officers is a "very false notion" and "deforms the debate on the exclusionary rule" because the exclusion is to protect the courts' integrity, not to punish the police officer. *Id.* at 56. Hirsch also notes that as a practical matter, "[e]xperienced trial judges and trial lawyers laugh at the suggestion that a police officer who engaged in a search or seizure the fruits of which were ruled constitutionally inadmissible feels in some sense 'punished.'" *Id.*

⁸⁹ As explained earlier, current alternatives to the exclusionary rule (primarily constitutional tort actions and police discipline) fall far short of vindicating the rule of law. See *supra* notes 45–46 and accompanying text. A number of creative proposals have been put forth that come closer to satisfying rule-of-law principles in that, if vigorously implemented, they arguably would offer access to "ordinary" courts that could help check the other branches and foster transparency of law enforcement practices. See, e.g., Calabresi, *supra* note 5 (proposing that improper police conduct be considered in a hearing *after* trial as a basis for sentence reduction); Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"*, 37 *FORDHAM URB. L.J.* 743 (2010) (discussing proposal for a "contingent exclusionary rule" that would give the government the opportunity to pay damages in lieu of exclusion); Slobogin, *supra* note 6 (proposing that exclusion of evidence be limited to flagrant cases supplemented by a monetary damage scheme for less egregious violations). These proposals still face the objection voiced by Justice Holmes that, "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." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). From this view, if the evidence was unconstitutionally acquired, then to allow the evidence to be used to obtain a conviction would be as objectionable to the rule of law as allowing an unconstitutional law passed by Congress to have continued effect. Whether one adopts Holmes's strong version or a softer version, the rule-of-law prism requires a proposed alternative to the exclusionary rule to be assessed not on the basis of deterrent effect, but on how well the proposal functions in holding government actors accountable in readily accessible forums and in promoting transparency of law enforcement practices.