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The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule

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THE MAJESTIC AND THE MUNDANE: THE TWO CREATION STORIES OF THE EXCLUSIONARY RULE

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> *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.*
>
> *- Herring v. United States, (Ginsburg, J. dissenting)*[1]

> *Justice Ginsburg's dissent champions what she describes as "'a more majestic conception' of . . . the exclusionary rule," which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception, and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis.*
>
> *- Herring v. United States, (Roberts, C.J.)*[2]

I. INTRODUCTION

The Supreme Court's decision in *Herring v. United States* resurrected the debate over the future of the exclusionary rule in American criminal procedure.[3] In many ways, however, the decision is as fascinating for how it views the history of the exclusionary rule as for what it portends about the rule's future. In *Herring*, Chief Justice Roberts and Justice Ginsberg articulated remarkably different visions of the exclusionary rule and its judicial heritage.

Justice Roberts, writing for the five-justice majority, framed the exclusionary rule as a simple evidentiary rule of narrow application: "[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.'"[4] Justice Roberts's description of the exclusionary rule as not a constitutional right itself, nor even as a necessary corollary to the Fourth Amendment, but as a judicial rule solely designed to deter police misconduct, is consistent with the Court's view since the 1970s. Under this mantra, the rule should be applied only to exclude evidence where its ability to deter egregious behavior by law enforcement clearly outweighs the social

1. Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J. dissenting).

2. *Id.* at 700 n.2 (majority opinion).

3. *See id.* at 704-05 (2009); Sean D. Doherty, *The End of an Era: The Exclusionary Debate Under* Herring v. United States, 37 HOFSTRA L. REV. 839, 839-40 (2009); Jeffrey L. Fisher, *Reclaiming Criminal Procedure*, 38 GEO. L.J. ANN. REV. CRIM. PROC. xv (2009); Wayne R. LaFave, *Recent Development: The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 758 (2009).

4. *Herring*, 129 S. Ct. at 699 (citations omitted) (quoting United States v. Calandra, 414 U.S. 318, 348 (1974)).

costs.[5] Using this cost-benefit analysis, it will be the rare occasion when the deterrence benefits of what Justice Scalia has termed a "massive remedy" are found to outweigh the social costs of the exclusion of relevant evidence.[6] Any expansion of the rule's scope would impede the truth-seeking mission of the jury trial to the benefit of obviously guilty criminals.

In her *Herring* dissent, Justice Ginsburg alluded to a very different vision, a "more majestic" conception of the exclusionary rule.[7] Her truncated description of that conception, however, does little to further that grand label, sounding more McMansion than Taj Mahal in grandeur. In a limited discussion, she does describe a rule which is "necessary" to enforce the prohibitions of the Fourth Amendment and which has been held to be inseparable from the Amendment itself.[8] And while she does argue that the rule serves the additional purposes of preserving judicial integrity and of ensuring that the government will not profit from its wrongdoing, she concedes to Justice Roberts's claim that the primary purpose of the rule is deterrence.[9] As noted dismissively by Chief Justice Roberts, Ginsburg also relied almost exclusively on dissents to support her argument that there is a "more majestic conception" of the exclusionary rule.[10]

Ginsburg's limited description of the majestic conception is curious because the historical development of the exclusionary rule is, in fact, replete with grand, dramatic, and yes, majestic rhetoric. Starting with *Boyd v. United States*, the first case recognizing the exclusionary rule in 1886, and on through the first half of the twentieth century, the Court's language used to develop the rule would make Chief Justice Roberts blush with the boldness of its claims for the rule.[11] So while Chief Justice Roberts is correct that Ginsburg relied primarily on dissents for support, she did not have to because the Court's foundation cases sing the rule's praises in unabashed terms. One could read these early cases and wonder how our system of justice would not crumble without the exclusionary rule to protect the judiciary's dignity and to safeguard the liberties our forefathers fought for in the struggle against British tyranny. Remarkably, the question of the deterrent effect of the rule, which now even the dissenting justices in *Herring* concede as the "primary purpose" behind the rule, is almost completely absent. How, then, did this dramatic change in focus happen?

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5. Hudson v. Michigan, 547 U.S. 586, 595 (2006). As Justice Scalia explained in *Hudson v. Michigan*, "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.'" *Id.*

6. *See id.* at 599.

7. *See Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting Justice Stevens's dissent in Arizona v. Evans, 514 U.S. 1, 18 (1995)).

8. *See id.* (quoting 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, 1389 (1983)).

9. *See id.* (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

10. *Id.* at 700 n.2 (majority op.).

11. *See* Boyd v. United States, 116 U.S. 616, 625 (1886).

This Article will look at the changing perception of the rule as illustrated by Justices Roberts and Ginsburg's contrasting views. The difference between Roberts's opinion and Ginsburg's opinion is more than simply a different take on the history of the rule or a different reading of the case law. Their opinions reflect two distinct "creation stories" about the exclusionary rule, stories that not only describe the history of the rule very differently, but also have completely different articulations of the rule's purposes and its place in the constitutional structure.

In particular, this Article will explore the rhetorical and historical arc of these two competing creation stories. In Part II, we will review the development of the majestic conception of the exclusionary rule from its inception in *Boyd* on through its refinement in later cases. In this section, we will see Justices Brandeis and Holmes emerge as the primary prophets for the creation story, with their words often quoted with almost Biblical reverence.[12] Part III will turn to the rise of the "mere evidentiary rule" creation story of the exclusionary rule, where Justice Cardozo stands out as the Justice who provides much of the foundational thinking. In the final part, we will trace the juncture at which these two narratives crossed in history—when the majestic conception lost its dominance and the evidentiary rule conception gained preeminence; in doing so, we hope to glimpse some insight into how a formally grand constitutional concept became relegated to the obscurity of dissents, footnotes, and law review articles.

II. THE MAJESTIC EXCLUSIONARY RULE

The Fourth Amendment protects the right of the American people to be free from unreasonable searches and seizures.[13] It contains no language explaining just how this right is to be enforced.[14] When the Supreme Court first answered this question in 1886 in *Boyd v. United States*, it did so in a forfeiture case.[15] The Court reviewed the constitutionality of the applicable forfeiture act, a law which gave the court the power to compel defendants to produce evidence, in this case an invoice, which they had refused to provide until ordered by the trial court.[16] Justice Bradley, writing for the Court, found that the statute violated both the Fourth and Fifth Amendments and that

12. Justice Frankfurter referred to Brandeis and Holmes as "originators" and stated that "pronouncements since have merely been echoes and applications, when not distortions, of principles laid down by them." Rios v. United States, 364 U.S. 206, 233 (1960) (Frankfurter, J., dissenting).

13. U.S. CONST. amend. IV.

14. *See id.* The Fourth Amendment states:

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

Id.

15. *See Boyd*, 116 U.S. at 622.

16. Act Cong. June 22, 1874, 19 U.S.C. 535; *Boyd*, 116 U.S. at 617.

therefore the evidence was inadmissible.[17] In coming to this conclusion, the Court laid the groundwork for the majestic conception of the exclusionary rule and the various themes that would underpin an expansive exclusionary rule.[18] By the time the Court had finished erecting the majestic conception over almost a century, five themes had emerged: (1) the need for the judiciary to act as a sentinel against tyranny; (2) the special taint and threat that comes from government illegality; (3) a parallel between the exclusionary rule and the presumption of innocence as a means of protecting the rights of all citizens; (4) the use of illegally seized evidence as compelling a person to be a witness against himself; and (5) the conceiving of the rule as integral to the Fourth Amendment itself.

A. The Judiciary as Sentinel Against the Looming Threat of Tyranny

Boyd uses a dramatic theme as its backdrop: a belief that the liberty secured by the nation's forefathers is constantly in peril, with only the Fourth and Fifth Amendments and the courts preventing utter despotism.[19] For today's legal reader, *Boyd*'s language in sketching this backdrop is surprising in its passion. Indeed, the opinion is so passionate in tone for judicial writing it borders on purple prose. For Justice Bradley, the statute at issue was no mere procedural tool; it was the looming threat of a tyrannical government bent on subjecting American citizens to its will:

> [The Fourth and Fifth amendments] affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employees [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense.[20]

This passage would become a familiar refrain for the majestic conception of the exclusionary rule, repeated over and over by those advocating expansion of the rule's reach.[21]

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17. *See Boyd*, 116 U.S. at 638.

18. *See id.* at 619-38. From this dramatic conception in *Boyd*, the principle that unconstitutionally seized evidence would not be admitted against the defendant solidified into the exclusionary rule and expanded its breadth of application. *See, e.g.*, Agnello v. United States, 269 U.S. 20 (1965) (noting that evidence is excluded even where defendant did not make an application for its return); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the rule to the states); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (finding that knowledge gained from illegally seized evidence is inadmissible); Weeks v. United States, 232 U.S. 383 (1914) (applying the rule to the federal government in criminal cases).

19. *See Boyd*, 116 U.S. at 630.

20. *Id.*

21. *See, e.g.*, United States v. Watson, 423 U.S. 411, 445-46 (1976); Lopez v. United States, 373 U.S.

Boyd also invoked the colonial hatred for the English use of writs of assistance and general warrants in stressing that protection from such tools was of foremost importance to the Framers.[22] To read the opinion, one would think that the Revolution had occurred merely a few years earlier. The threat of tyranny looms large and "compulsory discovery" is among its greatest danger.[23] The Court was certain that the Framers would not have approved of the statute at issue because "[t]he struggles against arbitrary power in which they 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."[24]

Invoking the Revolution also allowed the *Boyd* court to place the Framers firmly behind a tenet essential to the majestic exclusionary rule—the idea that the judiciary had a special, almost sacred, role in policing abuses by the other branches. *Boyd*'s excerpt from James Madison was to become another mantra of the majestic conception:

> 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.[25]

Madison's language was particularly important for the eventual enthronement of the majestic exclusionary rule, because it allowed the Court to turn what initially might seem like an argument against the rule—the minor nature of the intrusion in the case—into an argument for the rule.[26] According to the Court, not only did it not matter that the issuance of a subpoena for a commercial invoice was a relatively trivial case in the universe of government

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427, 455-57 (1963); *Mapp*, 367 U.S. at 646-67; *Weeks*, 232 U.S. at 344 (1914).

22. *See Boyd*, 116 U.S. at 625.

23. *Id.* at 632.

24. *Id.* at 630. Justice Day picked up on this historical theme in *Weeks v. United States*, the case in which the Court adopted the exclusionary rule for the federal courts. *Weeks*, 232 U.S. at 386. In *Weeks*, the defendant's house was searched without a warrant and papers were seized from him which the government then tried to admit as evidence against him in proving an indictment based on the sale of lottery tickets. *Id.* The defendant petitioned the court for the return of the papers on the grounds that they were seized in violation of the Fourth and Fifth Amendments. *Id.* at 387-88. The district court required the return of any papers not relevant to the case but permitted relevant papers to be introduced into evidence. *Id.* at 388. The Supreme Court held that all of the papers seized in violation of the Constitution had to be returned and could not be used against the defendant. *Id.* at 398. Following *Boyd*'s outline, Justice Day started with the historical significance of the Fourth Amendment and the Framers' view that a man's home was his castle and could not be invaded by general warrants. *Id.* at 390.

25. *Mapp*, 367 U.S.at 663 n.8 (referring to Justice Bradley's interpretation of the Bill of Rights in *Boyd*, using the words of James Madison, I ANNALS OF CONGRESS 439 (1789)).

26. *See id.*

action, the very fact that it was an arguably minor intrusion made it all the more important that the Court fulfill its role as guardian of the Constitution:

> 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*.[27]

Thus, a foothold was gained for an expansive, even aggressive application of the exclusionary rule to what otherwise might be seen as a *de minimis* government intrusion.[28] Like a virus, tyranny had to be attacked quickly and immediately lest it spread and become an epidemic of government overreaching.[29] Thus, in *Boyd*, even though there was no breaking of doors or bashing of heads, even though the production was made under all seeming due process of law, the compelled production was unconstitutional and could not be permitted.[30] This expansive approach is in marked contrast to today's exclusionary rule analysis in which it is assumed that "slight deviations" do not merit the "drastic" remedy of the exclusionary rule.[31]

The impending tyranny narrative faded for a period after *Boyd* and *Weeks* as other themes supporting the majestic conception emerged.[32] The Court's language, even in cases upholding the rule or expanding the Fourth Amendment's reach, did not tend to urgently sound the trumpet of impending

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27. *Boyd*, 116 U.S. at 635. 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," a mere "bruising [of] the grass," or "treading upon the soil." *Id.* at 627 (quoting Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765)).

28. *See id.*

29. *See id.* at 630.

30. *Id.*; *see also* Gouled v. United States, 41 U.S. 298, 303-04 (1921) (holding that the Fourth and Fifth Amendments must be given a liberal construction to prevent the gradual depreciation of the rights).

31. *See infra* notes 38-39 and accompanying text.

32. This is not to say that the impending tyranny theme completely faded away. Justice Brandeis, in his famous dissent in *Olmstead v. United States*, relied heavily on the theme and the idea that even small transgressions must be taken seriously:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

doom if the Court did not act against every encroachment by the other branches. The theme did experience a bit of a revival in *Mapp v. Ohio*, aided by the egregiousness of the police behavior which gave significant heft to the rhetorical urgency of the impending tyranny narrative.[33] As Justice William O. Douglas noted in his *Mapp* concurrence, the facts showed "the casual arrogance of those who have the untrammeled power to invade one's home and seize one's person."[34] Justice Clark, writing for the majority, cited *Boyd* and *Weeks* in stressing the importance to the Framers of the issues at stake and for the proposition that the Court had a duty to interpret these provisions liberally.[35] Clark wrote, "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.'"[36]

Mapp, however, was the swan song of the impending tyranny theme—a theme that already had lost force and urgency. As the pendulum began to swing away from the expansive application of the rule and towards the deterrence rationale, the Court increasingly moved away from the theme. Especially notable has been the movement away from the early exclusionary rule cases' view that the smaller the government intrusion, often the more necessary the Court thought it to move aggressively against the government illegalities, lest they spread like a contagion.[37] Indeed, in recent cases, *Mapp*'s egregious facts were used for the exact opposite proposition. In *Herring*, for example, Chief Justice Roberts characterized not just *Mapp* but also *Weeks* as exceptional cases addressing a time when the Court needed to step in to address "flagrant" Fourth Amendment violations.[38] Similarly, in *Hudson v. Michigan*, the majority dismissed as simply "expansive dicta" *Mapp*'s arguments for the need to broadly construe the exclusionary rule based on the impending tyranny theme.[39] Over time, the impending tyranny narrative had thus fallen from a strong justification for "adhering to the rule that constitutional provisions for

33. *See* Mapp v. Ohio, 367 U.S. 643, 656-57 (1961) (discussing the scope of the Fourth Amendment as applied against state and federal officers). The officers forcibly entered the defendant's home without a warrant, restrained her, and searched her house. *See* Corinna B. Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1375-76 (2004) (describing the egregious nature of the police officers' conduct in *Mapp*).

34. *Mapp*, 367 U.S. at 671 (Douglas, J., concurring).

35. *Id.* at 647 (majority op.).

36. *Id.* (quoting I ANNALS OF CONG. 439 (1789)).

37. *See supra* notes 25-30 and accompanying text.

38. *See* Herring v. United States, 129 S. Ct. 695, 702 (2009) (describing instances of egregious police conduct in which Fourth Amendment protections needed to be applied).

39. *See* Hudson v. Michigan, 547 U.S. 586, 591 (2006) (holding exclusionary rule does not apply to knock-and-announce violations).

the security of person and property should be liberally construed" into nothing more than "expansive dicta."[40]

B. Government Illegality and Judicial Integrity

Under the impending tyranny theme, the judiciary serves a special role as guardian against the threat of government overreaching. In *Weeks v. United States*, Justice Day took this idea in a related but new direction, laying the foundation for the "judicial integrity" narrative:

> 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.[41]

According to this theme, the courts must exclude evidence not only to keep tyranny at bay but to preserve their moral standing as guardians of the citizens' rights.[42] The harm of government illegality, therefore, occurs not only at the time of the intrusion, but also through the use of the tainted evidence by courts. In other words, if the courts are to maintain their role of constitutional guardian—as "high priests" of the Constitution—they must remain free of the taint themselves.

This theme is built upon two underlying arguments. First, the narrative depends on the principle that illegal actions by government officials present a particular threat to constitutional principles. The government as actor must be understood as a fundamentally different, and more dangerous, character than a simple trespasser. Second, judicial sanction of government illegality presents the most dangerous threat of all. Thus, judicial integrity requires maintaining a distance from any government illegality, no matter how well-intentioned or minute.

1. Illegal Actions by Government Officials Present a Special Threat to Constitutional Principles

The question of whether evidence obtained by an illegal intrusion by the government is different in kind than the same evidence gathered by a trespasser's intrusion is a central tension in the exclusionary rule debate. For

40. *Compare* Boyd v. United States, 116 U.S. 616, 635 (1886) (asserting that the Court must guard the Constitution), *with Hudson*, 547 U.S. at 591 (finding the Court's guardian role only necessary in exceptional cases).

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

42. *See id.*

those advocating a strong exclusionary rule, evidence illegally obtained by the government must be treated differently by the very fact that the government was involved. As Justice Holmes explained in *Silverthorne Lumber*:

> [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.[43]

The antithesis to Holmes's assumption, of course, is the idea that "evidence is evidence is evidence" when it comes to a criminal trial and that no unique wrong is worked when the evidence introduced at trial was obtained through an illegality committed by the government rather than a "stranger."[44] Indeed, whether a Justice believes special significance for the purposes of trial should attach to the same piece of evidence (say a kilo of cocaine) depending on whether it was obtained illegally by the government or by a private citizen turns out to be a fairly reliable litmus test for a Justice's view of the exclusionary rule.[45]

For those, like Justice Holmes, who adhere to the majestic conception of the exclusionary rule, illegal action by the government is a unique wrong that extends on through trial. While this may be most easily argued in cases like *Mapp* where egregious police misbehavior occurred, the narrative sees the taint of government illegality as attaching to evidence even when the government official acts with good intentions or makes an honest mistake.[46] As Justice Day wrote in *Weeks*:

> 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.[47]

This view hearkens back, of course, to *Boyd*'s admonition to the courts to be vigilant against even small encroachments on liberty.[48]

In contrast to cases like *Herring*, therefore, evidence obtained by the negligent officer is just as dangerous to the constitutional principles of the

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43. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920).

44. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 355 (1974). And just as with a trespass by a stranger, the appropriate remedy for a government trespass would be through a tort action (e.g., an action under § 1983). *See, e.g., id.* at 355 n.10.

45. *See infra* notes 46-54 and accompanying text.

46. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 656-57 (1961).

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

48. *See supra* notes 27-30 and accompanying text.

Fourth Amendment as the flagrant actions by the officers in *Mapp*.[49] As Justice Brandeis eloquently wrote in his *Olmstead* dissent, in words that would become an obligatory quote for future majestic exclusionary rule opinions:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[50]

For Justice Brandeis, therefore, even evidence gained through well-intentioned but illegal means should be excluded because the evidence must be viewed beyond the specific case and in the larger context of guarding against government abuse.[51] And he left no doubt that he saw the government's use of the evidence at trial as part of the constitutional violation: "When the Government, having full knowledge, sought . . . to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed *moral responsibility*."[52] The taint of the police officers' illegal actions thus has a ripple effect beyond what happens in the field on through the prosecutor's decision to use the evidence at trial.[53]

From the viewpoint of those like Justices Holmes and Brandeis, therefore, it matters very much whether the person illegally peering through the defendant's window wears a police uniform or a burglar's outfit when he sees the marijuana plants. And if this is true, then special consequences should flow from when the government violates the Constitution, including how courts handle the illegally seized evidence. Indeed, from this perspective, the courts themselves risk being dragged into the illegality if they do not act to exclude it, which is the second argument forming a basis for the judicial integrity theme.

2. *The Sanctioning of Illegal Actions by the Courts Threatens the Integrity of the Judiciary and the Rule of Law*

Under English common law, it was the general rule that courts would not permit a collateral inquiry into the source of competent evidence for purposes

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49. *Mapp*, 367 U.S. at 660 ("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.").

50. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). *Olmstead*, of course, addressed the question of whether the use of evidence gathered through wiretaps violated the Fourth and Fifth Amendment rights of the defendants. *Id.* at 455 (majority op.). The majority found that it did not by determining that there was no unlawful search or seizure and no compulsion by the government (those speaking on the phone were speaking voluntarily). *Id.* at 465-69.

51. *See id.* at 471-85 (Brandeis, J., dissenting).

52. *Id.* at 483 (emphasis added).

53. *Id.*

of admissibility.[54] Starting with *Boyd* and then cemented in place by *Weeks*, the Court established that for federal criminal trials the evidentiary rule barring inquiry did not apply where the source of competent evidence was tainted by constitutional violations: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[55] Under the government illegality theme, therefore, any unconstitutional action poses two intertwined dangers. First, is the danger that comes from the government acting illegally to obtain the evidence.[56] Second, is the peril that arises from the judiciary allowing the illegally gathered evidence into court against the accused.[57] And because the second danger implicates the judiciary itself in perpetuating a violation of the very Constitution it claims to uphold, it is the most powerful theme still associated with the majestic conception of the exclusionary rule.[58]

While *Weeks* explicitly raised the danger of the judiciary allowing the state to use illegally seized evidence against a defendant, it is Justice Brandeis's *Olmstead* dissent that has taken on iconic status for the judicial integrity theme.[59] Brandeis argued that admitting unconstitutionally seized evidence dragged the courts into the illegality itself.[60] In making the argument, Brandeis invoked the doctrine of "unclean hands" from the courts of equity as a counterweight to the common-law rule of evidence that the source did not matter.[61] By using the equity concept of unclean hands, Brandeis made the exclusion of the tainted evidence a moral imperative for the court to "protect itself":

> [A]id 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 rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. . . . The court protects itself.[62]

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54. *See* Weeks v. United States, 232 U.S. 383, 396 (1914) (restating that the common law doctrine was adopted because such inquiry may unnecessarily delay resolution of litigation at hand).

55. *Id.* at 394.

56. *See* Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting).

57. *See id.*

58. *See id.* 705-10. This is the theme that Justice Ginsburg turns to in her defense of the majestic conception in her *Herring* dissent. *See id.* at 707. Of course, in her dissent, Justice Ginsburg states that maintaining the integrity of the judiciary is an "important purpose" of the exclusionary rule. *See id.* She concedes, without a fight, that its importance is second to that of the deterrence purpose. *See id.*

59. *See* Olmstead v. United States, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting).

60. *See id.*

61. *See id.* at 483-84.

62. *Id.* at 484-85.

Brandeis then tied the idea of judicial integrity with the "impending tyranny theme" in arguing that the courts must stop official lawlessness at its inception or risk it spreading like a disease and undermining the very foundation of the nation:

> 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.[63]

Thus, Justice Brandeis concluded, the focus should not be on the immediate result that a guilty defendant might go free, but on the deleterious long-term consequences of allowing the government to rely on unconstitutional actions to reach its desired ends: "To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."[64] Brandeis's argument became a foundation stone for the majestic exclusionary rule.

Justice Holmes, the other primary prophet of the majestic exclusionary rule, also saw the judiciary's role in this constitutional drama as no different than any other government actor if it should admit the illegally obtained evidence: "[N]o distinction can be taken between the Government as prosecutor and the Government as judge."[65] This view led him to conclude that "[i]f the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."[66] For Holmes, it was not an option for the courts to acknowledge the violation of the Constitution but then admit the evidence anyway.

The power of the judicial integrity theme is particularly well articulated by Justice Traynor's opinion in *People v. Cahan* that adopted the exclusionary rule for California.[67] In *Cahan*, Justice Traynor overruled his own earlier opinion

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63. *Id.* at 485.

64. *Id.*

65. *Id.* at 470 (Holmes, J., dissenting). While Justice Holmes's opinions were to be cornerstones for the majestic exclusionary rule, he, much more than Justice Brandeis, acknowledged that arguments existed against a strong exclusionary rule. *See, e.g., id.* at 470; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). Justice Holmes, however, despite seeing the rule as a choice between competing goals and policies, then came down on the side of a strong exclusionary rule with language that became an obligatory cite in later cases adopting the majestic exclusionary rule. *See Silverthorne Lumber*, 251 U.S. at 392.

66. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting).

67. People v. Cahan, 282 P.2d 905, 915 (Cal. 1955).

that had rejected the exclusionary rule for the state.[68] Traynor's *Cahan* opinion is especially interesting because of its cautious tone in adopting the exclusionary rule; he methodically reviews the arguments on either side and his discomfort with the breadth of the rule is evident.[69] But despite his wariness, Traynor in the end found judicial integrity a powerful reason to apply the rule when coupled with the failure of other remedies to curb violations:

> We have been compelled to reach that conclusion [applying the rule] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.[70]

Traynor observed that where the purpose of the illegality is to get evidence to admit against the defendant in court, the success of the "lawless venture" is completely dependent upon the court's role in admitting the evidence.[71] This, he concluded, like Justice Brandeis whom he quotes extensively, is a moral wrong.[72]

Justice Traynor's *Cahan* opinion also updated Brandeis's warning that without strong judicial integrity it is too easy for governments to suffocate liberties and rights in the name of maintaining order.[73] Writing but a decade after World War II, Traynor argued that we should not forget "recent history['s]" lesson of "how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights."[74] This part of the judicial integrity argument is the most direct answer to the reductive power of the cost/benefit deterrence rationale. To Justice Cardozo's famous line, "[t]he criminal is to go free because the constable has blundered," the judicial integrity argument will respond: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[75] Adherents to the judicial integrity view, therefore, do in fact apply a cost-benefit analysis, but they focus on the long-term costs to society of allowing the judiciary's moral standing to be eroded by admitting tainted evidence. As Justice Holmes stated in *Olmstead*, "We have to choose,

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68. *See id.* at 911-12 (overruling People v. Le Doux, 102 P. 517 (Cal. 1909) and People v. Mayen, 205 P. 435 (Cal. 1922)).

69. *See id.*

70. *Id.*

71. *Id.* at 912.

72. *Id.*

73. *See id.* at 913 (discussing how courts have a duty to protect citizens against flagrant police conduct).

74. *Id.* at 912.

75. Mapp v. Ohio, 367 U.S. 643, 659 (1961) (stating the counterpoint to Justice Cardozo's statement); People v. Defore, 242 N.Y. 13, 21 (1928) (quoting then Judge Cardozo); *see* discussion *infra* notes 166-67, 169-80 and accompanying text.

and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[76]

C. *The Exclusionary Rule Parallel to the Presumption of Innocence*

The third theme of the majestic conception story is the idea that the only way to protect the rights of the innocent is to also protect the rights of the guilty.[77] The theme is roughly parallel to the well-known maxim that it is better to let ten guilty people go free than to convict one innocent person.[78] In *Brinegar v. United States*, Justice Jackson addressed the problem that police may subject innocent citizens to illegal searches on a regular basis, but their cases will never come before a court.[79] He noted that the right to be protected from unreasonable searches is a protection from government action and can only be enforced in court.[80] Consequently, the only realistic way that the courts can act against this wrong is by protecting the rights of the guilty:

> Only occasional and more flagrant abuses comes 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. . . .
>
> Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . . So a search against Brinegar's car must be regarded as a search of the car of Everyman.[81]

The need to protect the rights of the innocent was also an important point for Justice Traynor in *Cahan*—but with a twist. Like Justice Jackson in *Brinegar*, Traynor noted that any fashioning of a remedy for constitutional violations must account for innocent citizens subjected to police misbehavior as well as the guilty: "The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before

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76. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

77. *See* Stephen C. Thaman, *"Fruits of the Poisonous Tree" in Comparative Law*, 16 SW. J. INT'L L. 333, 373 (2010) (citing Spanish law, which requires exclusion of evidence gathered in violation of fundamental rights in part because of the presumption of innocence); Richard Vogler, *Spain*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 380 (Craig Bradley, ed., Carolina Academic Press 2d ed. 2007); *see also* Craig Bradley, *Symposium on the Fortieth Anniversary of* Mapp v. Ohio*:* Mapp *Goes Abroad*, 52 CASE W. RES. L. REV. 375, 397 (2001) (summarizing the position of Spanish law on evidentiary exclusion as presented by Richard Vogler).

78. *See generally* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 459-61 (1989) (discussing origins of presumption of innocence).

79. *See* Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

80. *See id.*

81. *Id.*

the court."[82] Traynor, however, then noted that because Fourth Amendment violations on the whole are unlikely to raise the public's ire, the responsibility falls upon the courts to address the problem.[83] And indeed, to the extent the public becomes upset that a guilty person is going free because of the exclusionary rule, Traynor suggests that it is beneficial because it focuses public attention on curtailing police misbehavior, which benefits all citizens, including innocents who otherwise would have their rights violated.[84]

At bottom, the presumption of innocence theme draws upon the idea that the exclusion of evidence reflects no more than what the Constitution itself requires. That is, if the Constitution had been obeyed, the evidence now in dispute never would have been found in the first place. The Fourth Amendment is itself, therefore, in some sense an exclusionary rule—contemplating that to protect everyone's rights from unjustified government intrusions, some evidence of wrongdoing will go uncovered. Viewed this way, the exclusionary rule is simply carrying out a decision made by the Framers that in order to protect the constitutional rights of the innocent some guilty individuals go free. Or as Justice Traynor framed the response to Justice Cardozo's famous adage that the criminal is to go free because the constable blundered: "[The defendant] does not go free because the constable blundered, but because the [Federal and California] Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught."[85]

There are two particular points to be made about the protection of innocents theme. First, Justice Jackson's worldview, in which law enforcement subjects innocent persons to illegal invasions of person, home, and property on a regular basis, is virtually absent from the current cost-benefit analysis of the exclusionary rule.[86] The counter-narrative is, of course, that the rule benefits and protects those who are clearly guilty, i.e. "dangerous" criminals.[87] Justice Ginsburg in her *Herring* dissent did try to resurrect Justice Jackson's concern for the innocent.[88] In *Herring*, the defendant was arrested because a computer record indicated he had an outstanding warrant.[89] In fact, he did not, but the sheriff's department had failed to update the record system; a search pursuant to an illegal arrest uncovered drugs and a weapon.[90] But while Herring was guilty, Justice Ginsburg raised concerns regarding the rights of the innocent.[91]

82. People v. Cahan, 282 P.2d 905, 913 (Cal. 1955).
83. *See id.*
84. *See id.* at 914.
85. *Id.*; People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).
86. *See supra* text accompanying notes 79-81.
87. *See* Hudson v. Michigan, 547 U.S. 586, 591 (2006).
88. *See* Herring v. United States, 129 S. Ct. 695, 704 (2009) (Ginsburg, J., dissenting).
89. *Id.* at 698-99 (majority op.).
90. *See id.*
91. *See id.* at 704-10 (Ginsburg, J., dissenting).

In today's world, computer databases are the "nervous system" of criminal justice operations, including large, interconnected databases such as the National Crime Information Center, terrorist watch lists, and databases for the federal government's employee eligibility system.[92] If those databases are not properly maintained, she noted, large numbers of innocent people could be subjected to illegal arrest or illegal search and seizure.[93] As a result, Justice Ginsburg argued, even if one guilty Herring is permitted to go free, courts should apply the exclusionary rule to ensure the protection of the rights of innocents by providing a strong incentive for the government to properly maintain its databases.[94]

The second point is that the presumption of innocence theme as described above is a deterrence narrative. Protecting the rights of the guilty and thereby deterring bad police behavior safeguards the rights of the innocent. Justice Stewart picked up on the connection in his opinion in *Elkins v. United States*.[95] Recalling Justice Jackson's image of numerous innocents having their rights violated without redress, Stewart argued that the purpose of the rule was to deter violations of the Fourth Amendment.[96] Justice Ginsburg's *Herring* dissent likewise makes the express connection, maintaining that courts must deter law enforcement from being negligent in their recordkeeping by applying the exclusionary rule to cases like Herring's.[97] The presumption of innocence theme, therefore, is another way to talk about deterrence and cost-benefit analysis.[98] Under the majestic conception, though, the deterrence and cost-benefit analysis are focused on protecting rights of the innocent, even when that means permitting guilty people to go free.[99] And unlike the current conception of the rule where the Court's analysis focuses on deterring the specific officers in the specific case, for the majestic conception the benefit of applying the exclusionary rule extends far beyond to the social and moral good achieved by protecting "Everyman's" constitutional rights.

D. The Fifth Amendment Privilege: Introduction of Illegally Seized Evidence as "Compulsion"

Today, the exclusionary rule is understood as relating only to the Fourth Amendment, but the Fifth Amendment privilege against self-incrimination has played various roles in conceptualizing the exclusionary rule. In fact, in the beginning, the Court understood the exclusionary rule as rooted in both the

92. *Id.* at 708.

93. *Id.* at 709.

94. *See id.* at 708.

95. *See* Elkins v. United States, 364 U.S. 206, 217-18 (1960) (quoting Brinegar v. United States, 338 U.S. 160, 181 (1949) (Frankfurter, J., dissenting)).

96. *See id.*

97. *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting).

98. *See Elkins*, 364 U.S. at 217-18.

99. *See supra* text accompanying notes 79-84.

Fourth and Fifth Amendments, with *Boyd* concluding that the statute compelling production of the defendant's private papers violated both amendments.[100] In coming to this conclusion, the Court described the "intimate relation" between the Fourth and Fifth Amendments:

> For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[101]

For the *Boyd* Court, no significant difference existed between seizing a man's private papers to be used against him and forcing him to testify against himself. The compulsory production commanded by the statute was both an unreasonable search and seizure violating the Fourth Amendment and a compelling of the defendant to testify against himself in violation of the Fifth.[102] The text of the Fifth Amendment, commanding that no person shall be compelled to be a witness against himself, served to anchor the exclusion of the evidence.[103] As Justice Bradley wrote: "In this regard the Fourth and Fifth amendments run almost into each other."[104] The Court repeated this view in several subsequent cases.[105]

The exclusionary rule's grounding in the Fifth Amendment eventually fell by the wayside in the majestic conception narrative. As early as *Weeks*, the Court seemed to abandon, without discussion, the application of the Fifth Amendment to the issue.[106] The issue was certainly before the *Weeks* Court: "The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the Fourth and Fifth Amendments to the Constitution of the United States."[107] The Court simply limited its

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100. *See* Boyd v. United States, 116 U.S. 616, 634-35 (1886) (finding that compelled production of defendant's private papers qualifies as search and seizure and self-incriminating testimony); *see also supra* notes 54-65 and accompanying text (discussing the implications of the Fourth and Fifth Amendments and the exclusionary rule).

101. *Boyd*, 116 U.S. at 633.

102. *Id.* at 634. Justice Miller concurred in the judgment because he concluded that the statute violated the Fifth Amendment but not the Fourth. *Id.* at 639-40 (Miller, J., concurring). In his opinion, the statute did not authorize a search and seizure and therefore the Fourth Amendment was not implicated. *Id.* at 641.

103. *Id.* at 634-35 (majority op.).

104. *Id.* at 630.

105. *See, e.g.*, Williams v. United States, 401 U.S. 646, 662 (1971) (explaining that the basis for excluding coerced testimony finds its roots in the Fourth and Fifth Amendments); Bram v. United States, 168 U.S. 532, 543-44 (1897) (relying on *Boyd* in requiring exclusion of compelled confession under the Fifth Amendment).

106. *See* Weeks v. United States, 232 U.S. 383, 389-90 (1914) (deferring to Fourth Amendment analysis in excluding defendant's confiscated private papers).

107. *Id.* at 389.

discussion to the Fourth Amendment, stating, "[w]e shall deal with the Fourth Amendment . . . ."[108] Thus, in the seminal exclusionary rule case, the Court was already moving away from the Fifth Amendment as a formal home for the rule. The Court did intermittently make reference to the Fifth Amendment in later cases such as *Gouled* and *Agnello*, but the overall status of the Fifth Amendment is less than clear.[109]

The formal Fifth Amendment view of the rule had a very brief resuscitation as late as 1961 in Justice Black's concurrence as the critical fifth vote in *Mapp v. Ohio*.[110] Justice Black returned to the Fifth Amendment as a home for the rule because he found it "extremely doubtful" that the Fourth Amendment alone supported the inference of the exclusionary rule.[111] When he turned to the Fifth Amendment, however, he found "a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."[112] What is fascinating given Black's usual insistence on strict textualism, is that he turned back to *Boyd* and celebrated that the opinion came from the "spirit" of the Bill of Rights even "though perhaps not required by the express language of the Constitution."[113] Reflecting a more familiar Black-like insistence on Constitutional textualism, Black also turned to the Fifth Amendment in part because it provided certainty compared to other recent cases that had used a "shock the conscience standard" to keep evidence out.[114] Thus, in reversing course from his earlier opinions rejecting the rule, a reconsideration brought on by a "more thorough understanding of the problem brought on by recent cases,"

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108. *Id.*

109. *See, e.g.*, Agnello v. United States, 269 U.S. 20, 34 (1925) (using the Fifth Amendment analysis to exclude the evidence—a can of cocaine—even where the defendant had not made an application for the return of the evidence); Gouled v. United States, 255 U.S. 298, 311 (1921) (finding that admission as evidence of papers taken in violation of the Fourth Amendment is a violation of the Fifth Amendment as it compels the defendant to be a witness against himself). Justice Cardozo, in *People v. Defore*, argued that while the unreasonable seizure of things contraband violated the Fourth Amendment, the Fifth was not violated unless the seizure was of things innocent unto themselves but supplying evidence of guilt (i.e., books and papers). *See* People v. Defore, 150 N.E. 585, 589 (N.Y. 1920). He was unsure whether *Agnello*, which was the first of the cases to apply the exclusionary rule to contraband, had abandoned this distinction, and it seems that the Court itself was generally unsure about the status of illegally seized evidence under the Fifth and so kept more closely to the Fourth Amendment. *See* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 427-28 (1999) (analyzing the inapplicability of the Fifth Amendment to nontestimonial evidence such as drugs and alcohol under the exclusionary rule).

110. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., concurring).

111. *Id.* at 661-62 (asserting doubts that the Fourth Amendment alone could sufficiently justify use of the exclusionary rule in *Mapp*).

112. *Id.* at 662.

113. *Id.* at 662-63 n.8; *see generally* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994) (describing instances in which Black construed statutes strictly by their plain language).

114. *Mapp*, 367 U.S. at 664-66 (citing Irvine v. People of California, 347 U.S. 128 (1954) and United States v. Rabinowitz, 339 U.S. 56, 66-68 (1950) (Black, J., dissenting)). Black found that the forcible pumping of a defendant's stomach in *Rochin v. California* was "an almost perfect example of the interrelationship between the Fourth and Fifth Amendments." *Id.* at 664 (citing Rochin v. California 342 U.S. 165, 172 (1952)).

Black concluded the Fourth and Fifth Amendments are "entitled to a liberal rather than niggardly interpretation."[115]

While Black's *Mapp* concurrence had no lasting impact in trying to revive the Fifth Amendment as a formal home for the rule, the Fifth Amendment already had begun to provide a conceptual basis for the rule quite apart from a textual grounding for the rule. One critique of the exclusionary rule is that the use of illegally seized evidence at trial should not be seen as part of the Fourth Amendment wrong because the improper search or seizure is in the past by the time of trial; under this view, therefore, the rule is cast as a question of remedy rather than constitutional wrong, allowing the judiciary more leeway in shaping, weighing, or even discarding the rule.[116] The Fifth Amendment, on the other hand, provides a way to think about the act of admitting the illegally seized evidence against the accused as a continuing constitutional violation. The admission of the illegally seized evidence becomes a form of the government improperly compelling the accused to be a witness against himself. As the Court in *Gouled* stated:

> In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.[117]

This use of the Fifth Amendment as a means of finding a continuing constitutional violation also can be seen in *United States v. Agnello*, where the defendant failed to make an application for return of the illegally seized cocaine.[118] Under the common-law rule, courts generally refused to inquire into the source of relevant evidence.[119] Thus, in the early exclusionary rule cases, such as *Boyd*, the courts required the defendant to apply for the return of illegally seized evidence.[120] It was through this procedural mechanism that the Court addressed the question of the legality of the search.[121] The returning of the evidence to the accused developed into the exclusionary rule.[122] In *Agnello*,

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115. *Id.* at 666.

116. *See* United States v. Calandra, 414 U.S. 338, 354 (1974) ("Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong."); *see also infra* notes 131-33 and accompanying text (discussing the view that the Fourth Amendment itself requires the exclusion of illegally seized evidence by the government).

117. Gouled v. United States, 255 U.S. 298, 306 (1921).

118. Agnello v. United States, 269 U.S. 20, 34 (1925).

119. *See* Olmstead v. United States, 277 U.S. 438, 467 (1928) (citing 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254(a) (I.F. Redfield ed., 12th ed. 1866) (1842), for the common law rule that "the admissibility of evidence is not affected by the illegality of the means by which it was obtained").

120. *Id.* at 458.

121. *Id.* at 476.

122. *Id.* at 478-79

the defendant failed to make the proper application and the government argued that he had forfeited his right to the evidence.[123] The Court found otherwise, noting that there was no dispute that the defendant's Fourth Amendment rights had been violated and that the government was seeking to incriminate him through the evidence obtained through that violation.[124] No reason existed, the Court stated, why the defendant could not "invoke protection of the Fifth Amendment immediately and without an application for the return of the thing seized. 'A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.'"[125] Because admission of the contraband would itself have caused a separate constitutional violation, the defendant was able to successfully keep the evidence out.[126]

The nexus between the Fourth and Fifth Amendments also provided a strong rhetorical narrative supporting the exclusionary rule as a protection of the sphere of individual liberty and privacy established by the Framers. *Mapp* relied in part on this idea.[127] In extending the exclusionary rule to the states, Justice Clark expounded upon the nature of the protections at stake, noting that the Fourth and Fifth amendment rights are complementary: "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence."[128] Thus, while Clark did not go as far as Justice Black's concurrence in relying on the Fifth Amendment, his opinion demonstrated the lasting impact of the majestic conception's origins in the Fifth Amendment dating back to *Boyd*.

E. The Exclusionary Rule as Part and Parcel of the Fourth Amendment Right

The final theme of the majestic conception views the exclusionary rule as an inherent part of the Fourth Amendment right to be protected from unreasonable searches and seizures. From this perspective, the Fourth Amendment protects individuals from unreasonable searches and seizures, and the very substance of the protection itself means that evidence seized in those searches cannot be used against any individual. Without the necessary corollary of the exclusionary rule, therefore, the Fourth Amendment lacks any meaning or force.

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123. *Agnello*, 269 U.S. at 35.

124. *Id.*

125. *Id.* at 34-35 (quoting Gouled v. United States, 255 U.S. 298, 313 (1921)).

126. *See id.* at 35. Interestingly, and somewhat problematically from a Fifth Amendment perspective, the Court did not explicitly address the fact that the evidence at issue, which was technically to be returned to the defendant, was a can of cocaine.

127. *See* Mapp v. Ohio, 367 U.S. 643, 657 (1961).

128. *Id.*

This understanding of the rule was first articulated in *Weeks*:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[129]

This quotation would become another key scripture for the majestic conception creation story. It is critical to note that in this narrative the rule is not a remedy for a Fourth Amendment violation. Rather it is the rule that gives meaning to the right itself and is thus part of the right. As Justice Holmes stated in *Silverthorne*, in language that also became revered scripture, allowing the government to use the knowledge gained from the illegally seized evidence "reduces the Fourth Amendment to a form of words."[130] The Fourth Amendment's command that the government not engage in unreasonable searches and seizures means "not merely that evidence so acquired shall not be used before the Court but that it shall not be used at all."[131]

It would seem from *Weeks* and *Silverthorne* that the Court had established beyond question that the Fourth Amendment itself required the exclusion of illegally seized evidence as part of the right. In *Wolf v. Colorado*, however, the Court, in declining to extend the exclusionary rule to the states, separated the rule from the right, characterizing the rule as simply a remedy, and one of several remedies at that, which the states should be able to choose among in their own way.[132] Justice Frankfurter concluded for the majority that *Weeks*'s application of the rule was a matter of "judicial implication."[133]

In *Mapp*, Justice Clark attempted to reestablish the exclusionary rule as an integral part of the Fourth Amendment itself, undoing the right-remedy separation imposed by Justice Frankfurter in *Wolf*.[134] Thus, *Mapp* not only overturned *Wolf* by deeming the exclusionary rule applies to the states, but did so by declaring it to be part of the Fourth Amendment.[135] In doing so, Justice Clark looked back at both *Boyd* and *Weeks* to find language supporting the position that the admission of evidence seized in violation of the Fourth

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

130. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

131. *Id.*

132. Wolf v. Colorado, 338 U.S. 25, 27, 28-29 (1949). The Court in *Wolf* did incorporate the Fourth Amendment itself against the states. *See id.* at 28.

133. *Id.* at 28. The dissenters, particularly Justice Murphy, strongly disagreed with this interpretation. As Justice Murphy stated, "It is disheartening to find so much that is right in an opinion which seems to me so fundamentally wrong." *Id.* at 41 (Murphy, J., dissenting). Murphy strenuously argued that the exclusionary rule was a necessary part of the right, because it was the only way to give meaning to the right. *Id. See infra* notes 134-39 and accompanying text (discussing the importance of the exclusionary rule as part of the Fourth Amendment in later cases).

134. *See* Mapp v. Ohio, 367 U.S. 643, 657 (1961).

135. *Id.* at 660.

Amendment is a constitutional violation itself, even if "judicially implied."[136] Justice Clark dismissed cases referencing the rule as a rule of evidence as "passing references."[137] As evidence that such a view of the rule was well entrenched, Clark highlighted Chief Justice Taft's complaint in *Olmstead* that the Court in *Weeks* had, with a "sweeping declaration," firmly established in "striking" fashion the rule's necessity to the right.[138] The *Mapp* Court certainly saw the rule as part of the right:

> The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks*, and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case.[139]

If part of the Fourth Amendment's constitutional fabric, then the exclusionary rule not only was to be incorporated against the states, but also—theoretically, as it turned out—would be largely immune from later judicial alteration.

F. Summary: The Majestic Conception Before Being Dethroned

With the Court's decision in *Mapp*, the majestic conception of the exclusionary rule was at its apex. A rule that had started with *Boyd*'s thunder and lightning proclamations of the constitutional need for the rule to guard against the slightest intrusion on liberty had matured into a concept with a number of overlapping and reinforcing themes. On through the 1960s, the majestic conception remained dominant with its view of the judiciary as the jealous guardian of the citizenry's hard-won liberties. And to serve this role, the Court had set the judiciary apart as an institution that had to remain above and untouched by any government lawlessness.

Yet even while the majestic conception reigned supreme, a counter-narrative, an alternative creation story for the exclusionary rule existed, especially in the states. This counter-narrative to the majestic conception's strong moral tone saw the exclusionary rule not as part of the courts fulfilling a grand role, but as a far more pedestrian question of evidence focused on a particular defendant in a particular case. And it is to this other creation story

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136. *Id.* at 649.

137. *Id.* Opponents of the rule would later take issue with this position. *See e.g.*, Hudson v. Michigan, 547 U.S. 586, 591 (2006) (describing *Mapp*'s constitutional conclusions as "[e]xpansive dicta").

138. *Mapp*, 367 U.S. at 649 (quoting Olmstead v. United States, 277 U.S. 438, 462 (1928)); *see also infra* notes 154-57 and accompanying text (discussing Taft's view of *Weeks*).

139. *Mapp*, 367 U.S. at 655-56.

and the reasons it eventually triumphed over the majestic conception that the Article now turns.

III. THE COUNTER-NARRATIVE: THE "MERELY EVIDENTIARY" EXCLUSIONARY RULE

> *"Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct."*
>
> *- Herring v. United States, (Roberts, C.J.)*[140]

In *Herring*, the parties agreed that the defendant's Fourth Amendment rights had been violated.[141] The sheriff arrested him without probable cause or a valid warrant.[142] His arrest was illegal; the search incident to it was illegal; the evidence seized in that search, a gun and methamphetamines, was seized illegally.[143] Under the exclusionary rule articulated in *Boyd*, *Weeks*, and *Mapp*, the evidence would have been excluded.[144] And yet, the *Herring* majority found that despite the Fourth Amendment violation, the exclusionary rule did not apply.[145]

Chief Justice Roberts's opinion, with its tight focus on police deterrence, stands in stark contrast to the language used in cases such as *Boyd*, *Weeks*, *Olmstead*, and *Mapp*.[146] The Court's current question of the rule's applicability in a particular case is a truncated cost-benefit analysis: Is the social cost of allowing a potentially guilty defendant to go free outweighed by the potential deterrent effect on the police behavior in question?[147] And in *Herring*, the majority found a sufficient deterrent effect present only when the police behavior at hand is particularly flagrant, in the sense of being at least reckless, where the police relied on a faulty warrant.[148] In arriving at this conclusion, Roberts was building off the counter-narrative view of the exclusionary rule, what might be termed the "merely evidentiary" exclusionary rule.[149] As with

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140. Herring v. United States, 129 S. Ct. 695, 698 (2009) (Roberts, C.J.).

141. *Id.* Roberts was not so sure that the defendant's Fourth Amendment rights had been violated at all. He started his analysis with a comment that if a probable cause determination was based on a reasonable belief, which turns out to be in error, the Fourth Amendment has not necessarily been violated. *Id.* at 699. Given the posture of the case, however, he cast this merely as an observation. *Id.*

142. *Id.* at 698.

143. *See id.*

144. *See supra* notes 136-39 and accompanying text.

145. *Herring*, 129 S. Ct. at 705.

146. *Id.* at 699 (citing United States v. Calandra, 414 U.S. 338, 348 (1974)); *see supra* Part I (discussing the Court's earlier focus).

147. *See Herring*, 129 S. Ct. at 700-01 (citing Illinois v. Krull, 480 U.S. 340, 352-53 (1987)).

148. *Id.* at 700. The unresolved question after *Herring* is whether the Court's heightened culpability standard to trigger the exclusionary rule will apply only to searches where the officer is relying on an otherwise legitimate authority (like a warrant or statute), or also be extended to warrantless searches. *See id.*

149. *See id.* at 700-01.

the majestic creation story, the merely evidentiary creation story has also developed various themes over time: the exclusionary rule as the exception to the usual evidentiary rules promoting the trial's search for truth; the blundering constable as the paradigmatic Fourth Amendment violator; the rule as a windfall for guilty individuals; and the rule as a remedy, not a personal right.

A. The Search for Truth Is Paramount

For those opposed to the exclusionary rule, the rule was wrongheaded from the beginning because it was in direct contradiction to a long-standing common-law rule of evidence. Before the majestic conception gained clear dominance of the narrative in *Weeks*, the question of whether to admit illegally obtained evidence was a fairly easy one; evidence was to be admitted that was:

> [C]learly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of the 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.[150]

A sense of how far the majestic conception had moved from the common law norm can be easily divined from Chief Justice Taft's 1928 opinion in *Olmstead*.[151] He began by noting that traditionally it had been assumed that the common law applied at federal trials—if the "tendered evidence was pertinent, the method of obtaining it was unimportant."[152] A violation of the law on the part of the government could be remedied by a lawsuit seeking damages.[153] Taft made no effort to hide his dismayed astonishment at the development of the exclusionary rule in *Weeks*: "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."[154]

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150. Adams v. New York, 192 U.S. 585, 594 (1904). For possible exceptions to the general rule favoring admissibility, see William R. Baldiga, *Excluding Evidence to Protect Rights: Principles Underlying the Exclusionary Rule in England and the United States*, 6 B.C. INT'L & COMP. L. REV. 133, 136 (1983) (observing that evidence could be excluded when it was found to be highly prejudicial or unreliable); *see also* Adam M. Parachin, *Compromising on the Compromise: The Supreme Court and Section 24(2) of the Charter*, 10 WINDSOR REV. LEGAL & SOC. ISSUES 7, 15 (2000) (noting that under English law, judges retained the discretion to exclude highly prejudicial evidence).

151. *See* Olmstead v. United States, 277 U.S. 438, 455-70 (1928).

152. *Id.* at 462-63.

153. *See id.* (citing Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841)).

154. *Id.* at 462 (emphasis added). Somewhat ironically, given Taft's dismay, Taft's language conceding the expansive reach of *Weeks* and its progeny would later be cited to justify further expansion of the rule. *See* Mapp v. United States, 367 U.S. 643, 650 (1961); *supra* notes 15-21 and accompanying text.

No fan of *Weeks*'s "striking outcome," Taft wanted to at least brake the rule's expansion.[155] For him, the common-law rule had made sense and the new rule had no support in the text of the Fourth Amendment. Moreover, he objected that the rule would "give criminals greater immunity" than they had before, which is perhaps why, as a rhetorical matter, he stressed that the crime in the case was of an "amazing magnitude."[156] Taft's goal, therefore, was to limit the rule's scope and treat *Weeks* as the "exception."[157] And he did so with limited success, making it clear that the exclusionary rule applied only to constitutional violations and not simply unethical police behavior; he wanted to ensure that the Court not make "society suffer" because evidence had been "obtained by other than nice ethical conduct."[158] Therefore, because the telephone wiretapping at issue, according to the majority, did not implicate the Fourth Amendment, the evidence need not be excluded even if unethical and a misdemeanor under the state's law.[159]

Thinking about the exclusionary rule as an evidentiary "exception" within the common-law rules of evidence, like Taft does, influences the debate in several ways. First, the juxtaposition of the rule as an exception has the rhetorical effect of aiding the characterization of the exclusionary rule as itself simply being another rule of evidence. This characterization helps deprive the rule of constitutional status and makes it easier to limit and shape the rule's scope as with any rule of evidence. Although he would later change his mind, Justice Black's argument in *Wolf v. Colorado* for not extending the exclusionary rule to the states captures this argument well: "[The] rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[160]

Conceptualizing the exclusionary rule as a rule of evidence also aids in casting the exclusionary rule as an anomaly to the norm for trials, because the first rule of evidence is that all relevant evidence should be admitted.[161] Statements of this theme in later cases often up the rhetorical ante by casting the exclusionary rule as a costly interference with the truth-seeking mission of the criminal trial: "[T]he rules' costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application."[162] The

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155. *See Olmstead*, 277 U.S. at 466-67.

156. *Id.* at 455-56, 468. The case involved the smuggling and selling of liquor in violation of Prohibition, netting an annual income to the conspirators of over two million dollars. *Id.* at 455.

157. *Id.* at 467.

158. *Id.* at 468.

159. *Id.* at 466-70.

160. Wolf v. Colorado, 338 U.S. 25, 38-40 (1949) (Black, J., concurring); *see supra* notes 110-15 and accompanying text.

161. *See* FED. R. EVID. 402.

162. Herring v. United States, 129 S. Ct. 695, 701 (2009) (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365-65 (1998)); *see also* Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates 'substantial costs . . . .'") (quoting United States v. Leon, 468 U.S. 897, 907 (1984)); *Scott*, 524 U.S. at 364-65 ("Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes

rule's interference with the determination of "the truth" thus becomes part of the "significant" social costs imposed by the rule and stand out as the exception to the norm that must be justified.[163]

One other argument used to bolster the view that the exclusionary rule is but another rule of evidence attempts to turn the grandiose nature of the majestic rule's claim on itself. Justice Powell, for instance, argued that if the rule truly was meant to protect such loftily described ends as judicial integrity, the rule was far too modest in its reach:

> Logically extended, [the judicial integrity] justification would require that courts exclude unconstitutionally seized evidence despite lack of objection by the defendant, or even over his assent. It also would require abandonment of the standing limitations on who may object to the introduction of unconstitutionally seized evidence, and retreat from the proposition that judicial proceedings need not abate when the defendant's person is unconstitutionally seized. Similarly, the interest in promoting judicial integrity does not prevent the use of illegally seized evidence in grand jury proceedings. Nor does it require that the trial court exclude such evidence from use for impeachment of a defendant, even though its introduction is certain to result in conviction in some cases.[164]

In other words, if the exclusionary rule was more than just an evidentiary rule, if it were inherent to the constitutional right or necessary to preserve the integrity of the judiciary, then the rule would apply in every situation. Powell thus uses the limits on the rule that the Court had developed—some of them from opinions he wrote—to in essence say, "the exclusionary rule isn't nearly as majestic as *Boyd*, *Weeks*, and *Mapp* claim; otherwise the legal system would extend it to its full breadth."[165]

B. The Blundering Constable

As seen earlier under the majestic narrative, the fact that the government is the perpetrator of the unconstitutional invasion is of critical importance.

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significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions."); Stone v. Powell, 428 U.S. 465, 488 (1976) (stating that the public interest in the determination of the truth is a necessary consideration to application of the rule); People v. Cahan, 44 Cal. 2d 434, 442-43 (Cal. 1955) (discussing the importance of the rule admitting evidence regardless of illegal seizure to the justice system).

163. Chief Justice Burger, concurring in *Stone v. Powell* but calling for the abolition of the exclusionary rule, argued that the rule set up a "remarkable situation [...] unknown to the common law." 428 U.S. at 497 (Burger, C.J., concurring). For Burger, the seminal cases of *Boyd*, *Weeks*, and *Silverthorne*, were a limited category of cases addressing solely the question of protection of an individual's private papers. Burger saw the extension of those cases to the seizure of contraband as wrongheaded because the Framers would not have thought it "essential to protect the liberties of people to hold that which it is unlawful to possess." *Id.* at 498.

164. *Stone*, 428 U.S. at 485 (internal citation omitted).

165. *See also infra* Part III.B (discussing Justice Cardozo's argument that no real difference exists between private and government illegalities).

Evidence obtained through an illegal government search or seizure is seen as far different from when the same evidence is obtained by an illegal private intrusion. For adherents to the majestic conception, special dangers attach, especially to the integrity of the judiciary, when evidence obtained by a government illegality is allowed into evidence.

In the counter-narrative, on the other hand, no significant distinction attaches to the evidence based on whether the illegal action was committed by the government or a private citizen. The government essentially is a trespasser, and the exclusionary rule imposes an unnecessarily excessive remedy for a basic trespass. As Justice Cardozo, then on the New York Court of Appeals, famously wrote in *People v. Defore*, "There has been no blinking the consequences. The criminal is to go free because the constable has blundered."[166] Cardozo's opinion was to take on revered status for the counter-narrative, comparable to Holmes and Brandeis's opinions for the majestic narrative.[167] (Justice Stewart later noted that most of the opposition to the exclusionary rule "was distilled in [that] single Cardozo sentence.")[168]

In *Defore*, Cardozo characterized the illegal search of a room that had uncovered a weapon as a trespass, noting that as a trespasser the offending police officer faced possible consequences: the defendant, for example, could have sued for damages, or the policeman could have been disciplined.[169] But most importantly for Cardozo, if the officer is merely a trespasser, then the common-law rule of evidence would apply: the trespasser's evidence against a defendant does not become incompetent simply by virtue of the illegality of the trespass.[170] Punishment for the illegal trespass is a matter quite separate from the competency of his testimony or evidence.[171]

Cardozo insisted that such a view does not denigrate the Fourth Amendment.[172] For Cardozo, the Amendment's command that the government not engage in unreasonable searches and seizures was a means of subjecting the government to legal process, like any other entity or citizen acting illegally, when it engages in those activities: "In times gone by, officialdom had arrogated to itself a privilege of indiscriminate inquisition. The [protection against unreasonable searches and seizures] declares that the privilege shall not exist."[173] This characterization of the Amendment—as forcing the government to obey the law like any other citizen—provides a nice rhetorical opening to then suggest that the evidence obtained should also be treated alike, casting it as a matter of fairness and equality: "Thereafter, all alike, whenever search is

166. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

167. *See, e.g.*, California v. Minjares, 443 U.S. 916, 921-22 (1979); Elkins v. United States, 364 U.S. 206, 216 (1960); *Defore*, 150 N.E. at 587.

168. *Elkins*, 364 U.S. at 216.

169. *Defore*, 150 N.E. at 586-87.

170. *Id.* at 587.

171. *Id.*

172. *Id.*

173. *Id.* at 588.

unreasonable, must answer to the law. For the high intruder and the low, the consequences become the same."[174] And if government and private illegal intrusions are to be treated "alike," then any question of admissibility should turn on the "object of the trespass rather than the official character of the trespasser."[175]

Cardozo also used the argument that no real difference exists between evidence illegally seized by the government and a private person to try and call the bluff of the judicial integrity narrative.[176] If the moral implications of judicial sanctioning of illegal action are so great, he maintained, then the rule should serve to exclude all illegally seized evidence, including evidence seized by private citizens: "We exalt form above substance when we hold that the use is made lawful because the intruder is without a badge."[177] In short, Cardozo argued that admission of evidence illegally seized by private individuals is still judicial sanction of illegal behavior, so if judicial integrity truly is at stake, the courts should be prepared to bear the full consequences of it.

Perhaps most powerfully, Cardozo's blundering constable offered a competing image to the majestic narrative's summoning of the nation's forefathers shedding blood on Bunker Hill to secure our liberties. The blundering constable is masterful in defusing the notion of government agents running roughshod over citizens' rights and replacing it with the far more benign image of an officer who is part Keystone Kop, part Officer Friendly.[178] The image especially has rhetorical power when contrasted with, as Cardozo put it, the "murderer [who] goes free."[179] Indeed, Cardozo works to turn the idea that the Fourth Amendment provides protection from arbitrary actions by "petty" government officers into an argument against the exclusionary rule: "The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious."[180]

By providing a central image around which the counter-narrative turns, the blundering constable also laid the groundwork for the good faith exception to emerge: if the government is not engaging in wholesale bad faith violations, then the exclusionary rule becomes excessive if the officer is blundering rather than flagrantly violating the Constitution.[181] Moreover, a good faith exception provides an answer, of sorts, to the majestic narrative's powerful theme of the

174. *Id.*
175. *Id.*
176. *See id.*
177. *Id.*
178. *See id.*
179. *See id.*
180. *Id.* This is an apparent play off of *Boyd*'s quoting of James Otis's decrying of placing "the liberty of every man in the hands of every petty officer." *See* Boyd v. United States, 16 U.S. 616, 625 (1886); *see generally* Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501 (2004) (providing a general look at the idea of the petty officer in contemporary Fourth Amendment jurisprudence).
181. *See* United States v. Leon, 468 U.S. 897, 908 (1984).

judicial sanction of government illegality. Where the constitutional violation is not the product of bad government intent or malice, if the officer acted in "good faith," then the court does not sanction anything malicious by admitting the evidence.[182] As Justice White, the first mover on the Court in strongly pushing for a good faith exception, stated the argument:

> Admitting the evidence in such circumstances does not render judges participants in Fourth Amendment violations. The violation, if there was one, has already occurred and the evidence is at hand. Furthermore, there has been only mistaken, but unintentional and faultless, conduct by enforcement officers.[183]

In *United States v. Leon*, White finally succeeded in establishing the good faith exception to the exclusionary rule.[184] In *Leon*, the officer relied on a search warrant issued by a magistrate that later proved to be unsupported by probable cause.[185] White focused on the fact that the government had not acted in bad faith as a way to cast the application of the rule as excessive.[186] In White's narrative, the government is fundamentally good—he assumed that the police and the magistrate generally try to act in accord with the law.[187] In *Leon*, the defendant's Fourth Amendment rights were violated not just by an officer, but by an officer acting with judicial approval.[188] For White, therefore, the blundering constable and the blundering magistrate are absolved by their reasonable belief that what they were doing was lawful.[189]

Herring, of course, took this a step further. In *Herring*, the arresting officer acted in good faith on a warrant that turned out to be invalid because the sheriff's department had negligently failed to remove the recalled warrant from their database [190] The majority acknowledged that the police errors were the result of negligence, albeit "isolated negligence," but given that there was no deliberate or reckless behavior on the part of law enforcement, they concluded that the exclusionary rule was too extreme a sanction.[191] In *Herring*, we have the blundering constable, but Cardozo's lament is resolved: the criminal will not go free.

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182. *Id.*

183. Stone v. Powell, 428 U.S. 536, 540 (1976) (White, J., concurring in part and dissenting in part).

184. *Leon*, 468 U.S. at 928.

185. *Id.* at 904. The Court of Appeals for the Ninth Circuit found there was insufficient probable cause for the warrant because the information supplied (by the officer who eventually performed the unlawful search and seizure) was fatally stale and did not show any credibility of the informant. *Id.*

186. *Id.* at 908.

187. *Id.* at 916. White notes that there are some potential issues with the magistrate's role (e.g., the magistrate as a rubber stamp), but concludes that there is no indication that this is an issue of "major proportions." *Id.* at 916 n.14.

188. *Id.* at 902.

189. *Id.* at 908.

190. *Id.*

191. *See id.* at 699-700 (finding that the application of the exclusionary rule must weigh the benefits of deterring police misconduct against letting a criminal potentially walk free).

C. The Exclusionary Rule as a Windfall to Murderers and Thieves

If the government is fundamentally a good actor, albeit occasionally a blunderer, as the counter-narrative assumes, then a rule which requires the exclusion of relevant and often powerful evidence of criminal guilt confers a windfall to criminals subjected to the illegality. Arguments against the rule constantly reference this theme, either using the gruesome facts of the case at hand, or, if such facts are lacking, positing, as Justice Cardozo did, murderers and thieves being turned loose.[192] In *Brewer v. Williams*, a case involving the murder of a ten year old girl, Chief Justice Burger brought both together lamenting that, "Today's holding fulfills Judge (later 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."[193] In contrast to the majestic narrative's view of the entire citizenry as the rule's beneficiary, in the counter-narrative, the primary beneficiaries are the "bad guys."[194] Just as the blundering constable narrative assumes that all (or almost all) of the government actors are good, this theme assumes that the people subjected to unlawful searches and seizures are usually bad and that the rule effectively precludes their criminal convictions.[195] This contrasts sharply, of course, with Justice Jackson's presumption of innocence argument that many innocent people are subjected to unlawful searches and seizures and the rule is important in protecting them.[196]

The windfall critique is a relatively easy argument to make against the rule: A rule that operates to keep out reliable and relevant evidence, possibly requiring dismissal of the charges, is certain to be unfathomable to many. The unfortunate nature of the rule's operation is that the direct benefit goes to one

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192. People. v. Defore, 150 N.E. 585, 588 (1926). In *Defore*, Cardozo wrote,

> A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free.

Id.

193. 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. 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. The Court in a later case, *Nix v. Williams*, 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).

194. *See Brewer*, 430 U.S. at 416-30 (Burger, C.J., dissenting).

195. This perhaps became a more significant issue when the rule was expanded in *Agnello v. United States* to apply not just to private books and papers, but also to contraband. *See* Agnello v. United States, 269 U.S. 20, 34-36 (1925). Before this expansion, it was understood that there was no privacy interest in contraband. *See* James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1422-23 (2007) (acknowledging that prior to *Agnello*, it was the government's right to search the accused for contraband during the course of an arrest without a warrant).

196. *See supra* Part II.C.

who is guilty: "[T]he only defendants who benefit by the exclusionary rule are those criminals who could not be convicted without the illegally obtained evidence."[197] Professor Wigmore used this consequence to famously mock the rule:

> 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.[198]

Indeed, this theme becomes something of the counter-narrative's version of the judicial integrity argument. The threat, though, now comes not from the judiciary dirtying its hands with tainted evidence, but with the cell door swinging open for guilty individuals, especially where the government's misbehavior has not been flagrant:

> An objectionable collateral consequence of this interference with the criminal justice system's truthfinding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.[199]

Thus, while the majestic narrative saw a grave danger in the "steady encroachment" or "gradual depreciation" of rights "by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers,"[200] the counter-narrative sees the real threat to the judiciary's moral integrity as the "spectacle" of the release of guilty defendants where the officers acted in good faith, and at most, blundered.[201]

D. The Question Is One of Remedies Not Rights

Ultimately, the counter-narrative's theme that is the linchpin tying together the various threads in a way that allows the exclusionary rule to be limited, or even abolished, is the idea that the question of what to do with the illegally

197. People v. Cahan, 282 P.2d 905, 910 (Cal. 1955).

198. 8 JOHN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN THE TRIALS AT COMMON LAW § 2184 (3d ed. 1940).

199. United States v. Leon, 468 U.S. 897, 907-08 (1984).

200. Gouled v. U.S., 255 U.S. 298, 304 (1921).

201. *Cahan*, 282 P.2d at 916 (Spence, J., dissenting).

obtained evidence is a question of remedy. While the majestic narrative as late as *Mapp* saw the exclusionary rule as intertwined with the DNA of the Fourth Amendment, the counter-narrative has worked consistently from Cardozo forward in maintaining that they comprise two separate questions: did a Fourth Amendment violation occur? And if so, which of the various possible remedies constitutes the best policy choice? Of course, once the Court invites a discussion on policy, the dialogue naturally begins to turn to a cost-benefit analysis, an analysis that tends to skew in a specific case against exclusion because of the vivid prospect of a criminal walking free.

The severing of right and remedy can be seen in *Wolf v. Colorado*, one of the few cases in which the counter-narrative got the upperhand during an era that otherwise was dominated by the majestic narrative.[202] In *Wolf*, while the Court found that the Fourth Amendment applied to the states, it concluded that the exclusionary rule did not.[203] In coming to this conclusion, Justice Frankfurter for the majority maintained that the rule was not part of the Fourth Amendment right but only a matter of judicial implication: "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."[204]

Critical to the long-term prospects of the counter-narrative, Frankfurter not only characterized the rule as a remedy, but he also tied its purpose directly into deterring unwanted police behavior.[205] He concluded that for the immediate question of applying the rule to the states: "We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence."[206] And even more importantly for the respective fates of the majestic narrative and counter-narrative, *Wolf* had separated the exclusionary rule from the Fourth Amendment itself and made the Court talk about the rule in terms of a deterrence cost-benefit analysis.[207]

Though *Wolf* was only a temporary victory for the counter-narrative, the goal of deterrence had entered the discourse and was to gain increasing power. In *Elkins v. United States*, the Court abolished the "silver platter doctrine," a doctrine that had permitted federal officials to make use of evidence obtained by state officials in violation of the Fourth Amendment.[208] Justice Stewart's opinion contains a great deal of majestic conception language, but also assumed alá *Wolf* that the rule sought to deter unlawful government behavior as one its primary purposes.[209] He then engaged in a cost-benefit analysis to establish that

202. *See* Wolf v. Colorado, 338 U.S. 25, 31-32 (1949).
203. *Id.*
204. *Id.* at 28.
205. *Id.* at 31.
206. *Id.* at 31-32.
207. *See id.*
208. Elkins v. United States, 364 U.S. 206 (1960).
209. *See id.* at 206-25.

deterrence required the abolition of the silver platter doctrine.[210] *Wolf* and *Elkins* marked the beginning of a new stage in the Court's exclusionary rule analysis. After these cases, even in decisions that expanded the exclusionary rule, a look at the deterrent effect on law enforcement actors in the specific context of the case was now part of the standard discourse.

The eventual rise of deterrence as the primary rationale did not necessarily preordain that the rule would become curtailed. One can define deterrence broadly, as in encouraging the government to engage in a careful undertaking of all of its policies and training.[211] Deterrence also can be used to argue for an expanded view of standing under the exclusionary rule, because in some situations the only realistic way to deter the government is to allow a third-party to invoke the exclusionary rule.[212] This broad view of standing was argued to the Court, albeit unsuccessfully, in *Alderman v. United States*.[213] But as the deterrence argument developed in the counter-narrative, these types of arguments would not gain traction. Because the deterrence question in the counter-narrative is intertwined with themes that the exclusionary rule is merely an evidentiary exception to the normal rule of evidence favoring admissibility, and moreover, bestows a windfall on guilty defendants, the counter-narrative's thumb is placed rather heavily on the cost side of the cost-benefit analysis. Or as Justice White stated in a line in his *Alderman* opinion that would become central to the cost-benefit deterrence analysis in the later cases, the emphasis on the goal of deterrence does not mean that anything which "deters illegal searches is thereby commanded by the Fourth Amendment"; deterrence, in other words, becomes a necessary precondition for the counter-narrative, but that is only the first step: "[W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[214]

With the counter-narrative having severed the remedy of the rule from the Fourth Amendment right and having started to alter the Court's discourse, the only question was whether it would come to dethrone the reign of the majestic

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210. *Id.* at 220-21.

211. This is deterrence aimed at institutions rather than individual officers. *See* Herring v. United States, 129 S. Ct. 695, 706-07 (2009) (Ginsburg, J., dissenting); Leon v. United States, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting).

212. *See, e.g.*, United States v. Payner, 447 U.S. 727, 731-35 (1980). In *Payner*, the government deliberately violated a third party's Fourth Amendment rights by unlawfully seizing his briefcase, which contained evidence against respondent in the form of bank records. *Id.* at 729-37. The Court held that evidence may not be excluded under the Fourth Amendment unless it is found that an unlawful search and seizure violated the defendant's own constitutional rights. *Id.* at 731. Thus, violations of a third party's Fourth Amendment rights are inapplicable to a defendant's attempts to invoke the exclusionary rule. *See id.*

213. Alderman v. United States, 394 U.S. 165, 171 (1969) ("Each petitioner demands retrial if any of the evidence used to convict him was the product of unauthorized surveillance, regardless of whose Fourth Amendment rights the surveillance violated.").

214. *Alderman*, 394 U.S. at 174-75.

narrative. That time eventually came with two opinions by Justice Powell—*United States v. Calandra* and *Stone v. Powell*.[215]

IV. THE SHIFT IN NARRATIVES: THE "MERE EVIDENTIARY RULE" CREATION STORY TAKES CENTER STAGE

Calandra offered a fact pattern favorable to those favoring a counter-narrative viewpoint. Calandra's business premises had been searched illegally and evidence of gambling found, but Calandra himself was not under indictment.[216] Instead, he was called as a grand jury witness and the government offered him immunity, as he was not the investigation's target.[217] Calandra's argument, therefore, was that the exclusionary rule should be extended to the grand jury investigative setting even though he did not face prosecution himself.[218]

Justice Powell saw the case as an opportunity to definitively sever the exclusionary rule as a remedy from the Fourth Amendment right.[219] Calandra's counsel at oral argument made the majestic narrative argument that each question asked of Calandra before the grand jury off of the illegally seized evidence was another Fourth Amendment violation, to which Powell wrote in his notes "goes pretty far" and "I can't buy this."[220] In his instructions to his law clerk on how to write the opinion, Powell stated that he wanted to make clear that deterrence was the rule's purpose and to settle the right-remedy question:

> Although numerous cases have said that deterrence is the purpose of the rule, the Brennan Douglas Marshall axis will react strongly . . . . I would like to settle the question that is sometimes raised as to whether the exclusionary rule is itself a constitutional personal right . . . . I personally have no doubt as to what we have said as a matter of constitutional law [that it is not]. I do want to be sure we have expressed it as carefully and precisely as possible.[221]

As White had in *Alderman*, Powell crafted the issue in *Calandra* as one of whether extending the exclusionary rule to grand jury proceedings was worth any minimal increased deterrence. In a memorandum to his clerk, he instructed that the opinion's central theme should be the balancing of the great importance of the societal role of grand juries against the marginal potential increase in

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215. *See* Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974).

216. *See Calandra*, 414 U.S. at 340.

217. *See id.* at 341.

218. *See id.* at 348. The District Court had suppressed the evidence and ordered that Calandra need not answer any questions based on the illegally seized evidence, and the Sixth Circuit had affirmed. *See id.*

219. *See id.*

220. Lewis F. Powell's handwritten notes on oral argument in *Calandra v. United States* 3 (on file with authors).

221. Memorandum from Justice Powell to Mr. John J. Buckley 1-2 (Nov. 10, 1973) (on file with authors).

deterrent effect.[222] And indeed, the opinion's legal analysis opens with an ode to the grand jury as an institution "deeply rooted in Anglo-American history" that the Founders perceived as "essential to basic liberties."[223] The opinion thus frames the issue of extending the exclusionary rule as an assault on a historically revered institution.

As to the exclusionary rule, Powell began with the basic counter-narrative understanding: "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[224] The opinion stressed the point that the rule's applicability is an issue quite apart from the violation, because "ruptured privacy . . . cannot be restored[;] [r]eparation comes too late."[225] Consequently, Powell declared "the rule's prime purpose is to deter," and any extra deterrence would be "speculative and undoubtedly minimal" because any deterrence already will have been achieved through concerns that the evidence would be excluded at trial even if an indictment were forthcoming.[226]

Justice Powell certainly was correct in anticipating the strong reaction from the "Brennan-Douglas-Marshall axis." Brennan sensed the danger that Powell's opinion posed to the majestic narrative, noting towards the end of his dissent:

> In *Mapp*, the Court thought it had "close[d] the only courtroom door remaining open to evidence secured by official lawlessness" in violation of Fourth Amendment rights. The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases.[227]

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222. Memorandum from Justice Powell to Mr. John J. Buckley 4 (Nov. 8, 1973) (on file with authors).

223. *Calandra*, 414 U.S. at 342-43.

224. *Id.* at 348.

225. *Id.* at 347 (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)).

226. *Id.* at 351-52. Powell had a difficulty to overcome in *Calandra* in the fact that *Silverthorne Lumber*, one of the foundational cases for the majestic conception of the exclusionary rule, applied the exclusionary rule in the grand jury context. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). In *Silverthorne Lumber*, officials unlawfully seized documents from the offices of defendants and presented them to a grand jury that already had indicted the defendants. *See id.* at 390. The district court ordered the documents returned but allowed copies to be kept. *See id.* at 391. The prosecutor then had the grand jury issue a subpoena *duces tecum* for the originals. *See id.* Justice Holmes determined that the subpoenas were unlawful because they were based on knowledge obtained from the original unconstitutional search and seizure. *See id.* at 392. As Justice Holmes said, 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." *Id.* at 392. Powell distinguished *Silverthorne Lumber* on the grounds that the defendants there were already indicted and were thus criminal defendants with standing to invoke the rule and the effect of the rule's application would be in the criminal trial context, because the grand jury had already handed down the indictments. *Calandra*, 414 U.S. at 352 n.8.

227. *Calandra*, 414 U.S. at 365 (Brennan, J., dissenting) (quoting Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)).

Indeed, Brennan characterized the majority's effort to make deterrence the rule's sole purpose as a deliberate effort to misconstrue the rule's origins:

> This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule.[228]

In a handwritten note on a draft of Brennan's dissent, Powell circled "purposeful rejection" and wrote in the margin "cheap shot!"[229]

Cheap shot or not, Brennan then proceeded to give a history lesson that amounts to a "greatest hits" rendition of the majestic narrative.[230] His essential point was that for the majestic narrative, deterrence may have been a "hoped-for effect . . . [but was] not its ultimate objective."[231] In tracing the majestic narrative creation story, the opinion quoted all of the obligatory majestic narrative themes from *Boyd*, *Weeks*, Madison, Brandeis, and Holmes.[232] From these sources he developed the judicial integrity theme of the courts as moral sentinels against tyranny and stressed the rule's role in protecting everyone's liberties because "[t]he judges who developed the exclusionary rule were well aware that it embodied a judgment that it is better for some guilty persons to go free than for the police to behave in forbidden fashion."[233]

Perhaps most illustrative of the head-on collision in *Calandra* of the majestic narrative and counter-narratives' creation stories are Justice Powell's margin comments upon reading Justice Brennan's draft.[234] At the top he wrote, "Reviewed and wholly unimpressed. More of a 'jury speech' than a rebuttal by analysis and reliance on precedent."[235] Powell particularly took umbrage with the idea that judges by admitting illegally seized evidence were in some way participants in the illegality.[236] He wrote "absurd" and "forensic overkill!" next to Brennan's line, "When judges appear to become accomplices in the willful disobedience of a Constitution that they are sworn to uphold . . . , we imperil the very foundation of our people's trust in their Government on which our Democracy rests."[237] Powell also double-underlined the words "accomplices" and "willful" and wrote in the margin below, "Did C[our]t in *Alderman* [by not adopting the vicarious exclusionary rule] 'sanction' or become an 'accomplice'

228. *Id.*

229. Lewis F. Powell's handwritten notes on William J. Brennan's dissent in *United States v. Calandra* 1 (Dec. 13, 1973) (on file with authors).

230. *See Calandra*, 414 U.S. at 356-61 (Brennan, J., dissenting).

231. *Id.* at 356 (describing the desired effect of *Boyd v. United States*).

232. *See id.* at 356-61.

233. *Id.* at 361.

234. *See* Lewis F. Powell's handwritten notes, *supra* note 229, at 1.

235. *Id.*

236. *Id.*

237. *Id.* at 5-6.

to unlawful action?"[238] With similar incredulity he later observed in the margin that "One would think the Fed agents stole the Hope Diamond!" in response to Brennan's statement, "In other words, officialdom may profit from its lawlessness if it is willing to pay a price."[239] He also reiterated his view that Brennan did not have the support of precedent, writing at one point, "Analogizing to a wire tap case shows how derelict Brennan is for relevant authority."[240]

Little of Powell's reaction spilled over into his revised final opinion, although he did add a footnote reflecting his belief that Brennan was engaging in "the sky is falling" rhetoric:

> 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.[241]

This argument—that the majestic narrative was an overreaction to the perceived threat of tyranny—was to play a more dominant role in Powell's opinion two years later in *Stone v. Powell.*

If Justice Brennan sensed in *Calandra* that the counter-narrative and majestic narratives' arcs were crossing, *Stone* marked the clear ascendance of the counter-narrative view that the exclusionary rule was a mere rule of evidence. The case addressed the question of whether federal habeas relief was available based on a claim that unconstitutionally seized evidence should have been excluded from the criminal trial.[242] Unlike *Calandra*, Justice Powell this time gave more attention to the judicial integrity argument, noting that "decisions prior to *Mapp*" articulated two rationales for the rule: "the imperative of judicial integrity" and the "more pragmatic ground" of deterrence.[243] He then proceeded, however, to argue through two lines of

238. *Id.* at 5.

239. *Id.* at 10.

240. *Id.* at 9.

241. United States v. Calandra, 414 U.S. 338, 355 n.11 (1974) (internal citations omitted).

242. *See* Stone v. Powell, 428 U.S. 465, 468 (1974). The case also involved a host of issues surrounding the proper role of habeas relief. *See id.* This aspect was one of the reasons Justice Powell was interested in granting certiorari. *See id.* In his handwritten notes on the preliminary memo, he wrote, "This type of case—on habeas—releases a dangerous criminal who raised these issues in the state courts. Habeas corpus was never intended to spring the guilty." Lewis F. Powell's handwritten notes on preliminary memo for conference on *Wolf v. Rice* 1 (May 16, 1975) (on file with authors). He originally noted he wanted to "grant and reverse summarily." *Id.*

243. *Stone*, 428 U.S. at 484.

reasoning that the judicial integrity rationale was not really a significant rationale.[244]

The first was to suggest that the judicial integrity argument had played only a "limited role" in the Court's prior cases once considered in context.[245] *Mapp*'s reliance on judicial integrity, for example, was recast with one sentence: "The *Mapp* majority justified the application of the rule to the States on several grounds, but relied principally upon the belief that exclusion would deter future unlawful police conduct."[246] Despite his brief dismissal of *Mapp* in the opinion, Powell in his personal notes, made clear that he felt that much of the confusion over the exclusionary rule's application stemmed from *Mapp* applying "a rule of evidence—the Exclusionary Rule—to the states in constitutional terminology."[247] As a result, he made clear in his notes that he wanted to use *Stone* to clarify that the exclusionary rule was not of constitutional stature:

> Three times within the last two years, a majority of this Court (six Justices in one instance) have said—in effect—that *Mapp* cannot be read as creating a personal constitutional right in the Exclusionary Rule. Nothing in the 4th Amendment itself supports the Rule, and certainly nothing supports an absolute, unbending rule. In any event, we have decided—unless the Court now wishes to change its mind—that the Rule itself is not a constitutional right.[248]

Powell noted that he would not argue in *Stone* against the rule's application in criminal trials and direct appeals but stressed that the rule was "simply a means—one means—of implementing the constitutional protection against unreasonable searches and seizures."[249]

His second line of attack drew off of his opinion's overall theme that pragmatism should be the touchstone of the exclusionary rule.[250] He thus presented his position as the common sense middle ground position between those who want an "absolutist" exclusionary rule and those who would abolish it all together.[251] His desire to sound pragmatic and moderate was aided in part by the other opinions.[252] On one side was a blistering concurring opinion by Chief Justice Burger that attacked the exclusionary rule as "bizarre," "clumsy," and a "doctrinaire result in search of validating reasons."[253] In an inter-

244. *Id.* at 485-86.
245. *Id.* at 485.
246. *Id.* at 484 (citing Mapp v. Ohio, 367 U.S. 643, 658 (1961)).
247. Lewis F. Powell's notes on *Stone v. Powell* 2 (Feb. 27, 1976) (on file with authors).
248. *Id.* at 3.
249. *Id.*
250. *See Stone*, 428 U.S. at 469-96.
251. *See id.* at 485-96.
252. *See id.* at 496-542.
253. *Id.* at 496, 498 (Burger, C.J., concurring). Chief Justice Burger at first indicated he would concur only in the result, a position Powell found "so surprising." Letter from Justice Lewis F. Powell to Chief

chamber note to Justice Powell, Burger called the rule "one of the great hoaxes on the public in its present form."[254] On the other side was Justice Brennan's strongly worded dissent, which Powell anticipated having learned from "the 'clerk grapevine' that Justice Brennan plans to file an 'explosive dissent'" and noting that "Mr. Justice Stewart thinks we should be prepared to make a strong response to Mr. Justice Brennan's full scale assault."[255]

The strength of Powell's response largely lay in repeating the theme of cautious pragmatism in a tempered tone over and over, and even pulling his punches on some language in response to the dissent.[256] From Powell's opinion, judicial integrity comes across as, at most, a background value that the Court had recited in past cases but always qualified by context and always made subservient to the "more pragmatic ground" of deterrence.[257] Powell's characterization thus portrays the judicial integrity theme as a bit of a romantic pie-in-the-sky paean to the role of the courts along the lines of Professor Wigmore's description of the rule as "misguided sentimentality."[258] More darkly, the opinion later implies that if allowed to turn into constitutional handwringing and a preoccupation with procedure, then the judicial integrity rationale could turn into a false worship of procedure at the cost of truth and justice.[259]

Having made the judicial integrity theme completely submissive to "pragmatic" concerns, Justice Powell turned to the familiar counter-narrative theme that the rule was a judicially created remedy rather than a personal right whose costs and benefits had to be weighed—in this case in the context of habeas corpus.[260] Not surprisingly, the opinion concluded that any incremental deterrence effect was far outweighed by the costs: the disruption of truth seeking because the rule goes to "typically reliable and often the most probative information"; the corresponding "windfall" benefit to the guilty; and the

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Justice Warren Burger 2 (June 18, 1976) (on file with authors). Burger joined the opinion after Powell offered to clarify in the majority opinion that they were "merely assum[ing] the continued vitality of the assumptions . . . support[ing] the rule . . . and mak[ing] crystal clear that we . . . do not reach . . . application of the rule at trial and on direct appeal." *Id.*

254. Letter from Chief Justice Warren Burger to Justice Lewis F. Powell (June 16, 1976) (on file with authors).

255. Memorandum to file from Justice Lewis F. Powell 1, 3 (May 7, 1976) (on file with authors).

256. Memorandum from Justice Lewis F. Powell on new footnote 1 (June 25, 1976) (on file with authors). A draft footnote had referred to the "Cassandra-like tone of the dissent," and after noting the dissent's various strongly worded criticisms, sarcastically remarked, "[d]espite these modest assessments of the Court's opinion the Republic still stands"; the footnote then proceeded to detail in lengthy fashion how the dissent had distorted the majority's viewpoint. *Id.* at 2-5. What was to become footnote 37 was significantly shortened and the sarcasm replaced with a simple: "With all respect, the hyperbole of the dissenting opinion is misdirected." *Stone*, 428 U.S. at 495 n.37.

257. *See Stone*, 428 U.S. at 484.

258. *See* 8 WIGMORE, *supra* note 198, § 2184.

259. *See Stone*, 428 U.S. at 491. Powell quotes 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.* at 491 n.30.

260. *See id.* at 491-95.

"generating [of] disrespect for the law and administration of justice," especially where the illegality was not flagrant.[261]

Justice Brennan directed most of his *Stone* dissent's ire at what he saw as the unjustifiable curtailment of habeas corpus, noting that he had already disputed the majority's viewpoint on the exclusionary rule in his *Calandra* dissent.[262] He did, however, warm to what he viewed as the majority's elevation of convicting the guilty over the protection of procedural rights, an issue central to the majestic narrative:

> The procedural safeguards mandated in the Framers' Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the "guilty" are punished and the "innocent" freed; rather, every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty. Particular constitutional rights that do not affect the fairness of factfinding procedures cannot for that reason be denied at the trial itself.[263]

Far from being procedural fetishism, Brennan argued that to sanction government illegalities is to ultimately undermine the very fabric of the courts and law.

> 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."[264]

Despite Justice Brennan's earlier efforts in *Calandra* to stave off the reckoning, by the time *Stone* was decided, the counter-narrative had gained supremacy over the majestic narrative. In *United States v. Janis*, a decision handed down the same day as *Stone*, Justice Blackmun declared the conflict as resolved: "The debate within the Court on the exclusionary rule has always been a warm one . . . . The Court, however, has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"[265] And Justice Blackmun's holding up of the counter-narrative's

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261. *Id.* at 490-91.

262. *Id.* at 509-10 (Brennan, J., dissenting).

263. *Id.* at 524.

264. *Id.* at 524-25 (internal citations omitted); *see supra* note 76 and accompanying text.

265. United States v. Janis, 428 U.S. 433, 446 (1976) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)). In *Janis*, the Court held the exclusionary rule did not apply to a civil tax trial because any

arm as the victor certainly has proven correct in the march of exclusionary rule cases since then. By the time the Court recognized the good faith exception in *United States v. Leon*, ten years after *Calandra*, Justice Brennan had thrown in the towel:

> Since [*Calandra*], in case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent the *pièce de résistance* of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been violated—a result that had previously been thought to be foreclosed.[266]

Brennan's *Leon* dissent called up all of majestic conception themes: the impending tyranny of the government, the rule as part of the Fourth Amendment right, and most importantly, the preservation of judicial integrity.[267] But despite conceding defeat, Brennan also sought to keep alive in the Court's discourse a recognition that deterrence was never part of the exclusionary rule's founding:

> [I]t is clear why the question whether the exclusion of evidence would deter future police misconduct was never considered a relevant concern in the early cases from *Weeks* to *Olmstead*. In those formative decisions, the Court plainly understood that the exclusion of illegally obtained evidence was compelled not by judicially fashioned remedial purposes, but rather by a direct constitutional command.[268]

But Justice Brennan had been in the dissent for some time and the fact remained that, whatever the history, the cost-benefit analysis and the deterrence rationale were now dominant, a fact that Brennan also understood even if he disagreed with the rationale:

> [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. . . . [We] 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.[269]

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incremental deterrence effect of extending the rule into civil trials could not justify the costs. *See id.* at 457-60.

266. *See* United States v. Leon, 468 U.S. 897, 928-29 (1984) (Brennan, J., dissenting). The majority opinion also notes that rationales other than deterrence "need not detain us long." *Id.* at 906.

267. *See id.* at 928-60.

268. *Id.* at 938-39.

269. *Id.* at 929.

V. CONCLUSION

Justice Brennan's reminiscences in *Leon,* a decade after the two narrative arcs crossed, does raise an interesting final question: Why did the Court's dialogue change so dramatically and allow the majestic narrative's creation story to be supplanted by the counter-narrative's creation story? No doubt much is involved—events and pressures of different eras, changes in Court personnel, views of the judicial role evolving, and critiques of the exclusionary rule in the political and academic realms—to name just a few of the possible influences.

As a rhetorical matter, though, one can identify the counter-narrative—especially the focus on deterrence—becoming part of the Court's standard dialogue once the Court started to address the rule's expansion outside the federal criminal trial.[270] Thus in *Wolf v. Colorado*, the majority avowed loyalty to the rule as part of the federal landscape—"we stoutly adhere to it"—but when it came to extending the rule to the states, asked whether the rule was so necessary to enforcement of the Fourth Amendment that the rule must be applied.[271] Because he had just formally held that the Fourth Amendment itself was incorporated against the states, Frankfurter had to sever the rule from the right to even reach this analysis (otherwise, if the rule was part of the Fourth Amendment, it would apply perforce to the states).[272] He accomplished this severance by deeming the rule "a matter of judicial implication," which of course is an essential building block of the counter-narrative's view of the rule as merely a rule of evidence.[273] Frankfurter then turned to Cardozo's *Defore* opinion as a guide on the costs and benefits of the exclusionary rule, a move that led to a rejection of applying the rule to the states.[274]

While *Wolf* eventually gave way to *Mapp*, the counter-narrative question of deterrence had gained a foothold in the Court's mainstream discussion of exclusionary rule issues. Unlike the early exclusionary cases where deterrence might be heralded as a "hoped-for effect" but was not a central focus, after *Wolf* even opinions endorsing the exclusionary rule now felt obligated to address the question of deterrence.[275] *Mapp*, for example, relied heavily on the majestic narrative, but Justice Clark still felt compelled to address the counter-narrative

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270. This is not to say that the counter-narrative was not raised in prior cases. As noted earlier, Chief Justice Taft in *Olmstead* expressed dismay over the rule, but because no Fourth Amendment violation was found, the Court did not apply the exclusionary rule to the evidence uncovered through the wire-tapping. *See supra* notes 151-59 and accompanying text.

271. Wolf v. Colorado, 338 U.S. 25, 28 (1984).

272. *Id.* at 39-40 (Black, J., concurring). This was Justice Black's position in concurring in *Wolf*: the rule would apply to the states if part of the Fourth Amendment, but it is not part of the Amendment itself. *Id.* He of course later voted to apply the rule to the states in *Mapp*, but did so based on the Fifth rather than Fourth Amendment. *See supra* notes 110-15 and accompanying text.

273. *Wolf*, 338 U.S. at 28.

274. *Id.* at 31.

275. *See supra* note 243 and accompanying text.

question of whether the rule could deter the police, a pattern that is repeated in other cases addressing extensions of the rule.[276]

Thus, while the explanation of why the counter-narrative eventually overtook the majestic narrative likely defies any single answer, efforts to extend the rule—to the states, to vicarious standing, to elimination of the "silver platter doctrine"—seem to have been the portal through which the counter-narrative became an accepted part of the Court's core exclusionary rule analysis. And, as we have seen, once the counter-narrative established a tendril in the Court's analysis, like constitutional kudzu it eventually overtook and smothered the majestic narrative altogether. Whether an individual sees the counter-narrative's success in supplanting the majestic narrative as stemming from its "narcotic effect" or from its superiority on the merits probably depends largely on one's own view of the merits of the exclusionary rule. What is important to recall though, is that despite the Court's amnesia since *Calandra*, the majestic narrative was more than just the province of dissents and footnotes; it was the creation story that originally gave rise to the exclusionary rule and largely ruled supreme for almost a century.

276. *See* Mapp v. Ohio, 367 U.S. 643, 648-49 (1961). Justice Powell in *Stone* asserted that *Mapp*'s primary rationale in fact was deterrence, but such a reading would seem to unduly downplay Clark's efforts to make clear that the exclusionary rule was part and parcel of the Fourth Amendment. *See supra* notes 133-39 and accompanying text.