Tulsa Law Review

Volume 12 | Issue 2

1976

Polishing the Tarnished Silver Platter Doctrine: The Effect of Janis v. united States on Intersovereign Fourth Amendment Violations

Chris E. Hagberg

POLISHING THE TARNISHED SILVER PLATTER DOCTRINE: THE EFFECT OF *JANIS v. UNITED STATES* ON INTERSOVEREIGN FOURTH AMENDMENT VIOLATIONS

I. INTRODUCTION

Since at least 1914, evidence obtained by federal officers in violation of the fourth amendment[1] has been held inadmissible in a federal criminal prosecution.[2] This exclusionary rule, although generally applicable where the federal government alone is involved, has been expanded and contracted by the United States Supreme Court under various circumstances where state officers are involved. The picture has been further complicated by the fact that in *Weeks v. United States*,[3] the very case which established the federal rule, intersovereign violations of the fourth amendment were exempted from the operation of the rule.[4] In other words, if a state or local law enforcement official seized evidence in violation of a defendant's fourth amendment rights, federal officials

1. U.S. CONST. amend. IV states:
The right of the people to be secure in their 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 or the person or things to be seized.

2. *See* Weeks v. United States, 232 U.S. 383 (1914). As used in this comment, the term "inadmissible" will refer to evidence which is inadmissible in the prosecution's case in chief. It is the general rule that evidence obtained in violation of a defendant's fourth amendment rights may be used at the criminal trial for purposes of impeaching the credibility of the defendant, if he chooses to take the stand. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954). For extensive commentary on the admissibility of illegally obtained evidence for impeachment purposes, see Dershowitz and Ely, *Harris v .New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Note, *Impeachment by Unconstitutionally Obtained Evidence: The Rule of Harris v. New York*, 1971 WASH. U.L.Q. 441; Cole, *Impeaching With Unconstitutionally Obtained Evidence: Some Reflections on the Palatable Fruit of the Poisonous Tree*, 18 DE PAUL L. REV. 25 (1968); Comment, *The Impeachment Exception to the Exclusionary Rule*, 34 U. CHI. L. REV. 939 (1967).

3. 232 U.S. 383 (1914).

4. *Id.* at 398.

could use the evidence against the defendant in a federal criminal proceeding.[5]

The judicially-sanctioned use of such evidence was termed the "silver platter" doctrine[6] and, with certain exceptions,[7] was in force for some forty-seven years. In 1960, however, in *Elkins v. United States*,[8] the Supreme Court overruled *Weeks'* silver platter exemption.[9] After *Elkins*, a citizen could feel reasonably confident that he would be free from federal criminal prosecution based on the fruits of an unreasonable search and seizure, regardless of whether the evidence was seized by federal or state officials. This confidence has waned considerably as a result of the Supreme Court's recent decision in *United States v. Janis*.[10]

The *Janis* case provided the Court with an opportunity to reexamine the silver platter doctrine in an ostensibly civil, but actually quasi-criminal context.[11] *Janis* grew out of a November, 1968 incident when a Los Angeles police officer swore out an affidavit based upon information from a purportedly reliable informant, and obtained a warrant from the Los Angeles Municipal Court for the search of certain premises and of respondent Janis. Pursuant to this warrant, city police seized certain wagering records and a quantity of cash, and arrested respondent. The city police then notified the Internal Revenue Service of respondent's alleged bookmaking activities and the IRS, relying solely on an examination of the evidence seized by the city police, assessed respondent wagering excise taxes in the amountof $89,026.09, plus interest. Res-

5. The general term "intersovereign" can refer to the opposite situation as well; *i.e.*, where federal authorities obtain evidence in violation of a defendant's fourth amendment rights, and then turn that evidence over to state authorities for use in state proceedings. This comment will not deal with that aspect of intersovereign violations of the fourth amendment. For comment on this situation, see Garfinkel, *Although a Federal Suppression Order Has Been Granted, Federal Officials Are Not Prohibited From Transferring Evidence to State Authorities; However, Federal Authorities Are Prohibited From Testifying in State Proceedings*, 8 HOUSTON L. REV. 371 (1970). There seems to be little doubt that the exclusionary rule is wholly inapplicable where a foreign government or a private party violates the defendant's fourth amendment rights. *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465 (1921); Barnes v. United States, 373 F.2d 517 (5th Cir. 1967); United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal. 1967), *aff'd*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). *See generally* Note, *Searches South of the Border: Admission of Evidence Seized by Foreign Officials*, 53 CORNELL L. REV. 886 (1968); Note, *Mapp v. Ohio and Exclusion of Evidence Illegally Obtained by Private Parties*, 72 YALE L.J. 1062 (1963).

6. The phrase "silver platter" was first turned by Mr. Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 79 (1949).

7. *See* notes 30-36 *infra* and accompanying text.

8. 364 U.S. 206 (1960).

9. *Id.* at 223.

10. 96 S. Ct. 3021 (1976).

11. *See* notes 81-112 *infra* and accompanying text.

pondent was subsequently criminally charged in the Los Angeles Municipal Court with violations of the local gambling laws. He moved to quash the warrant on the basis of *Spinelli v. United States*.[12] The trial judge granted the motion to quash,[13] ordering all items seized pursuant to the warrant to be returned, with the exception of the cash which had been levied on by the IRS in partial satisfaction of the assessment.

Respondent then filed suit in the United States District Court for the Central District of California seeking a refund of the money. The district court held that the affidavit was insufficient to support a finding of probable cause.[14] The court ordered the money refunded to Janis because the evidence used by the IRS in calculating the assessment was obtained in violation of respondent's fourth amendment rights. The government's counterclaim was dismissed with prejudice, and the Court of Appeals for the Ninth Circuit affirmed by unpublished memorandum opinion. The United States Supreme Court thereafter granted the government's petition for certiorari.[15]

The major issue presented in *Janis* was whether evidence seized by state or local law enforcement officials in good faith,[16] but nevertheless unconstitutionally,[17] is admissible in a civil tax proceeding[18] to which

12. 393 U.S. 410 (1969). In *Spinelli* and an earlier decision in Aguilar v. Texas, 378 U.S. 108 (1964), the Supreme Court established specific guidelines for determining whether a search warrant based on information obtained from an informant has been properly issued. These guidelines consist of a two-pronged test which states that (1) the application for the warrant must set forth enough of the underlying circumstances to enable the magistrate independently to judge the validity of the informant's conclusion that illegal activity was indeed occurring, and (2) the affiant must support the claim that the informant is "credible" and "reliable" by stating the information from which he drew these conclusions. *Spinelli* reaffirmed *Aguilar* in quashing a warrant where neither prong of the test was met. 393 U.S. at 415-16.

For an exception to the second prong of the *Spinelli-Aguilar* test, see Draper v. United States, 358 U.S. 307 (1958). *Draper* was also reaffirmed by *Spinelli*. *Accord*, United States v. Ventresca, 380 U.S. 102 (1965); McCray v. Illinois, 386 U.S. 300 (1967). *See also* Beck v. Ohio, 379 U.S. 89 (1964); Nathanson v. United States, 290 U.S. 41 (1933).

13. In granting the motion, the judge held that the affidavit did not set forth in sufficient detail the underlying circumstances to enable the warrant-issuing state court to determine independently the reliability of the informant's information. 96 S. Ct. at 3024.

14. 96 S. Ct. at 3025.

15. 421 U.S. 1010 (1975).

16. "Good faith," as used by the Court in this context, refers to good faith reliance by the police on a defective search warrant. For further comment on this issue, see notes 113-135 *infra* and accompanying text.

17. As used in this comment, "unconstitutionally" indicates that there was a violation of the fourth amendment. The question of evidence obtained in violation of the fifth amendment will not be dealt with in this comment.

18. See note 109 *infra* and accompanying text. *Janis* involved a tax refund suit

the United States is a party.[19] The Supreme Court reversed the Ninth Circuit and held the evidence admissible; yet the specific factual considerations which influenced the decision are at best unclear. Avoiding significant reliance on the fact that the fourth amendment violations by the police had been committed in good faith, the Court seemed more concerned with the type of litigation and the jurisdiction of the police officers involved: "[T]he judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign."[20] The basic rationale behind the *Janis* holding is that the exclusionary rule is a judicially created remedy, serving the purpose of deterring unconstitutional police conduct, and is not mandated by the language of the fourth amendment.[21]

This comment will critically analyze the theoretical and practical implications of *Janis* and the effect of these implications on future applications of the exclusionary rule. The discussion will initially trace the development of the various rationales for the exclusionary rule and how they have been utilized both to support and reject the silver platter doctrine. Finally, this development will be placed in the context of the *Janis* decision in an attempt to identify the factors which led to the admission of the tainted evidence in *Janis*.

II. JUDICIAL TREATMENT OF INTERSOVEREIGN FOURTH AMENDMENT VIOLATIONS

The seminal case in the silver platter area is the 1914 case of

---

and a counterclaim by the IRS for a substantial amount of unpaid wagering taxes. The majority in *Janis* treated this situation as a civil action, but in his dissent Mr. Justice Stewart pointed out:

> These provisions, constituting an "interrelated statutory scheme for taxing wagers," Marchetti v. United States, 390 U.S. 39, 42, operate in an area "permeated with criminal statutes," and impose liability on a group "inherently suspect of criminal activities." Albertson v. SACB, 382 U.S. 70, 79, *quoted in* Marchetti v. United States, 390 U.S. at 47. . . . The wagering provisions are not merely to raise revenue, but also to assist "the efforts of state and federal authorities to enforce [criminal] penalties" for unlawful activities. Marchetti v. United States, 390 U.S. at 47.

19. 96 S. Ct. at 3023. The Court also considered the issue of the burden of proof in a federal tax assessment. The majority assumed, without deciding, that the burden of proof lies with the taxpayer to demonstrate the incorrectness of an assessment. The Court also assumed without deciding that in the case of an assessment which is totally without foundation (such as an assessment based wholly on evidence which must be excluded) the burden of proof shifts to the government. 96 S. Ct. at 3026.

20. 96 S. Ct. at 3035. The language used by the Court in framing this holding would seem to apply to the federal-to-state situation (the "reverse silver platter") as well. *See* note 5 *supra*. Of course, it is arguable that *Janis* should be read to apply only in the state-to-federal situation, as that is the factual context of the case.

21. 96 S. Ct. at 3028.

Weeks v. United States.[22] Local police officers entered the defendant's house without a search warrant, seizing various items which were later transferred to a United States Marshal. The police and marshal returned shortly thereafter, made a further warrantless search and seized additional material. The evidence resulting from these searches was subsequently used by the federal government in convicting the defendant of violating a federal criminal statute.[23] The Supreme Court reversed and remanded, finding that the conviction rested upon illegally obtained evidence and the federal marshal had been involved in the second search. The Court then enunciated the exclusionary rule: evidence obtained by federal officials in violation of the fourth amendment is inadmissible in a federal criminal proceeding.[24] The effect of the Federal rule prohibited the admission of the evidence illegally obtained by the federal officer in the second search.

The Court refused to extend the exclusionary rule to the intersovereign area, however, apparently on the theory that the fourth amendment applied only to the federal government.[25] With regard to the first search in *Weeks*, the Court held that evidence obtained solely by state officials was admissible in a federal criminal proceeding.[26]

Despite the conceptually diverse rulings in *Weeks*, the language on which the federal rule was based seemed sufficiently broad to include intersovereign constitutional violations when they existed:

> The tendency of those who execute the criminal laws of this country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> . . . .
>
> . . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are,

22. 232 U.S. 383 (1914).

23. The defendant was charged with using the mails for the purpose of conducting a lottery or gift enterprise. *See* 35 Stat. 1129 (1909).

24. 232 U.S. at 398.

25. *Id.* at 391-92. *See* Boyd v. United States, 116 U.S. 616 (1886).

26. 232 U.S. at 398. The intersovereign distinction in *Weeks* provided the basis for the silver platter doctrine in the federal courts. As Justice Frankfurter later stated in Lustig v. United States, 338 U.S. 74, 78-79 (1949): "The crux of the doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." *See* Annot., 24 A.L.R. 1408, 1424 (1923) and supplementing annotations for a collection of the major cases following the *Weeks* doctrine.

> 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.[27]

Thus the Court in *Weeks* established general principles of judicial integrity as the primary basis for the exclusionary rule; the federal courts must not be accomplices to violations of the Federal Constitution.[28] The real issue left unresolved by *Weeks* was whether these principles were constitutionally mandated, a question going to the very origins of the exclusionary rule.[29]

As a result of the intersovereign-intrasovereign distinction in *Weeks*, the silver platter doctrine essentially amounted to a loophole in the exclusionary rule, often resulting in collusion between state and federal law enforcement officials to obtain convictions with evidence seized in violation of the fourth amendment.[30] The Supreme Court recognized the existence of this collusive activity in *Byars v. United States*[31] and attempted to correct the problem by holding that evidence obtained illegally must be excluded in federal criminal trials if there was

---

27. 232 U.S. at 392-93.

28. *Id.* The emphasis on principles of judicial integrity as the historical foundation for the exclusionary rule was further delineated in the dissenting opinion of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928), where he argued that "in order to preserve the judicial process from contamination," courts should not participate in the fruits of constitutional violations. *Id.* at 484. Describing the need for respect for the American governmental system and the enforcement of its laws, Justice Brandeis stated at length:

> 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 imperilled 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. 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.

Id. at 485. *See also* McNabb v. United States, 318 U.S. 332, 345 (1943).

29. To the extent that the principles of judicial integrity found in *Weeks* were constitutionally mandated, the exclusionary rule should apply by that same authority where either state or federal officials violate the Federal Constitution. Perhaps more importantly, a constitutional foundation would preclude Congressional or judicial erosion of the exclusionary rule. *See* McNabb v. United States, 318 U.S. 332, 341-42 (1943).

30. *See, e.g.*, Marron v. United States, 8 F.2d 251 (9th Cir. 1925); Flagg v. United States, 233 F. 481 (2d Cir. 1916); United States v. Brown, 8 F.2d 630 (D. Ore. 1925); United States v. Falloco, 277 F. 75, 82 (W.D. Mo. 1922); United States v. Slusser, 270 F. 818 (S.D. Ohio 1921).

31. 273 U.S. 28 (1927).

overt participation by federal officials in the search and seizure.[32]

The *Byars* doctrine was extended in *Gambino v. United States*,[33] wherein state officials illegally seized liquor from the defendant's automobile. The evidence was subsequently admitted in a federal criminal proceeding against the defendant and he was convicted of violating the National Prohibition Act.[34] The Supreme Court, in a unanimous decision, reversed the conviction on the ground that the state officials had no reason to believe that the defendant had violated any state law at the time of the search and seizure.[35] Although the state officers were not acting pursuant to any *known* agreement with federal officers, the illegally seized evidence had relevance only in proving a federal crime. As a result, the Court found that the state officers "believed they were required by law to aid in enforcing the National Prohibition Act; and that they made this arrest, search and seizure . . . solely for the purpose of aiding in the federal prosecution."[36] Thus, to prevent the possible circumvention of the overt participation doctrine in *Byars* through covert federal directions to state agents, the Court in *Gambino* established a "constructive federal participation" doctrine in circumstances where illegally seized evidence had no relevance to a state crime.

The restrictions on the silver platter doctrine in *Byars* and *Gambino*, coupled with the basic *Weeks* rationale, subsequently led to conflicts and inconsistencies among the circuits.[37] By 1949, however, certain basic principles had emerged and were consistently followed: (1) evidence unconstitutionally obtained by federal officials was *inadmissible* in a federal criminal proceeding under the *Weeks* federal rule; (2)

32. *Id.* at 33. The *Byars* "overt participation" doctrine was actually an extension of *Weeks* since without such participation by federal officers, there could be no fourth amendment objection to illegal searches and seizures by state officers. Later, in Lustig v. United States, 338 U.S. 74 (1949), the Court further refined the concept of overt federal participation:

> The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal officer in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.

Id. at 79.

33. 275 U.S. 310 (1927).

34. 41 Stat. 305 (1919).

35. 275 U.S. at 314.

36. *Id.* at 315.

37. *See, e.g.*, United States v. Butler, 156 F.2d 897 (10th Cir. 1946); Kitt v. United States, 132 F.2d 920 (4th Cir. 1942); Ward v. United States, 96 F.2d 189 (5th Cir. 1938); Sutherland v. United States, 92 F.2d 305 (4th Cir. 1937); Sloane v. United States, 47 F.2d 889 (10th Cir. 1931).

evidence obtained illegally by state or local officials with overt federal participation was *inadmissible* in federal criminal trials, pursuant to *Byars*; and (3) evidence obtained illegally by nonfederal officials was *admissible* in all federal proceedings, absent the constructive federal participation in *Gambino*.[38]

In 1949, *Wolf v. United States*[39] directed a major shift of emphasis in the fourth amendment area which adversely affected both the exclusionary rule and the silver platter doctrine. *Wolf* was an intrasovereign situation; the defendant was convicted in state court upon evidence illegally obtained by state officers. The Supreme Court affirmed the conviction; holding for the first time that fourth amendment provisions against unreasonable searches and seizures applied to the states through the due process clause of the fourteenth amendment.[40] However, the Court refused to apply the federal exclusionary rule to the states, ruling that the admission of evidence in state courts that had been unconstitutionally obtained by state officers was not reversible error. In effect, the Court viewed adoption of the exclusionary rule as a matter for each state to decide for itself.[41]

The *Wolf* decision supported the federal intrasovereign rule in *Weeks* but failed to take the critical step of requiring the states to adopt the federal exclusionary remedy. This result was achieved by a doctrinal shift by the Court which, although almost unnoticed at the time, relegated the principles of judicial integrity in *Weeks* to something less than constitutional status. To the extent that *Weeks* characterized these principles as implicitly mandated by the fourth amendment, the *Wolf* Court disclaimed this foundation for the exclusionary rule in no uncertain terms: "[The exclusionary rule] 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."[42]

38. *See* Elkins v. United States, 364 U.S. 206, 212-13 (1960). As noted previously, this comment will not deal with the admissibility in state proceedings of evidence illegally obtained by federal authorities. In 1949 there was a split of authority among the states on this point. *See* Wolf v. Colorado, 338 U.S. 25, 33-40 (1949). *See also* Elkins v. United States, 364 U.S. 206, 224-25 (1960) (Table depicting state exclusionary rules pre-*Weeks*, pre-*Wolf*, and post-*Wolf*).

39. 338 U.S. 25 (1949).

40. *Id.* at 28.

41. *Id.* at 31. Although *Wolf* left the states free to adopt alternatives to the exclusionary rule, the states were nevertheless required to accord criminal defendants minimum requirements of due process. *Compare* Irvine v. California, 347 U.S. 128 (1954) *with* Rochin v. California, 342 U.S. 165 (1953).

42. 338 U.S. at 28.

Whether the doctrinal shift in *Wolf* affected the status of the silver platter doctrine remained to be fully articulated. Since *Wolf* disclaimed any fourth amendment basis for the exclusionary rule, the federal courts were left virtually free, subject to minimum requirements of due process and Congressional intervention, to scrutinize the bases and purposes of the rule through general policy analysis. Although this analysis in *Wolf* seemed to focus on the deterrence of future violations of the fourth amendment,[43] the decision did not purport to vitiate the principles of judicial integrity on which the federal exclusionary rule in *Weeks* was based. Instead, the *Weeks* rationale appeared to remain viable solely in its application to the federal courts. After *Wolf*, if a state official seized evidence in violation of the fourteenth amendment, the federal courts should have refused to admit the tainted evidence by the same principles which excluded evidence obtained by federal officials in violation of the fourth amendment. These implications were largely ignored, however, by the federal judiciary.[44]

Three of the circuits did perceive that *Wolf* had attenuated the silver platter doctrine;[45] these decisions, however, were narrow holdings, and at least one of the cases turned on the *Gambino* "constructive participation" doctrine.[46] As the Supreme Court later noted in *Elkins v. United States*:[47] "[T]he Court of Appeals for the District of Columbia [was] alone in squarely holding 'that the *Weeks* and the *Wolf* decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts.' "[48]

The *Elkins* case and its companion, *Rios v. United States*,[49]

43. *Id.* at 31-32.

44. *See, e.g.*, Galleagos v. United States, 237 F.2d 694, 696-97 (10th Cir. 1956); United States v. Moses, 234 F.2d 124 (7th Cir. 1956); Ford v. United States, 234 F.2d 835, 837 (6th Cir. 1956); Williams v. United States, 215 F.2d 695, 696 (9th Cir. 1954); Burford v. United States, 214 F.2d 124, 125 (5th Cir. 1954).

45. *See, e.g.*, Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958); United States v. Benanti, 244 F.2d 389 (2d Cir. 1957), *rev'd on other grounds*, 355 U.S. 96 (1957); Jones v. United States, 217 F.2d 381 (8th Cir. 1954).

46. In United States v. Benanti, 244 F.2d 389 (2d Cir. 1957), state officials obtained evidence linking defendant with illegal narcotics traffic by a telephone tap and, based on this information, the police searched defendant's car. The search revealed no narcotics, but rather liquor which was without the required federal tax stamps. The liquor was turned over to federal authorities, and defendant was convicted of violating federal tax laws. The Court of Appeals for the Second Circuit affirmed. The United States Supreme Court reversed, holding that evidence obtained through such a state wiretap was inadmissible in a federal court, because disclosure of the information would violate the Federal Communications Act, 47 U.S.C. § 605 (1953). 244 F.2d at 394.

47. 364 U.S. 206 (1960).

48. *Id.* at 214, *quoting* Hanna v. United States, 260 F.2d 723, 727 (D.C. Cir. 1958).

49. 364 U.S. 253 (1960).

presented the Court with an opportunity to address the questions raised by *Wolf* in the silver platter area.[50] In *Elkins*, petitioners were indicted for intercepting and divulging telephone conversations in violation of the federal wiretapping laws.[51] On defendant's motion to suppress the evidence, the trial judge assumed that the search by state officers which uncovered the wiretapping paraphernalia was unreasonable and unconstitutional. The court refused to suppress the evidence, however, after finding no federal participation in the illegal search and seizure. Petitioners were convicted and the Ninth Circuit Court of Appeals affirmed,[52] accepting the trial court's reasoning on the suppression issue. In reversing the conviction, the Supreme Court ruled the evidence inadmissible, holding that when *Wolf* was handed down, "the foundation upon which the admissibility of state-seized evidence in a federal criminal trial originally rested . . . disappeared."[53] Reaffirming the position in *Wolf* that the exclusionary rule is not constitutionally founded, the Court based its holding on "the Court's supervisory power over the administration of justice in the federal courts."[54]

The Court in *Elkins* thus moved to an evidentiary analysis in balancing away the silver platter doctrine initiated in *Weeks*, reasoning that considerations underlying the exclusion of evidence obtained illegally by state officers outweighed the need for the discovery of truth in federal criminal trials.[55] If indeed *Wolf* conceptually undercut the original foundation for silver platter evidence, the decision in *Elkins* rested on the principles of judicial integrity established in *Weeks*.[56] However, the Court in *Elkins* also adopted a more pragmatic basis for the exclusionary rule by emphasizing the deterrence rationale: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective way—by removing the incentive to disregard it."[57] The emphasis on deterrence in *Elkins* indicated that no distinction should be drawn

50. The Court had denied certiorari in two other silver platter cases only a year before it agreed to decide *Elkins* and *Rios*. *See* Gaitan v. United States, 252 F.2d 256 (10th Cir.), *cert. denied*, 356 U.S. 937 (1958); Costello v. United States, 255 F.2d 389 (8th Cir.), *cert. denied*, 358 U.S. 830 (1958).

51. *See* 47 U.S.C. §§ 501, 605 (1954); 18 U.S.C. § 371 (1948).

52. 266 F.2d 588 (9th Cir. 1959), *rev'd*, 364 U.S. 206 (1960).

53. 364 U.S. at 213.

54. *Id.* at 216, *quoting from* McNabb v. United States, 318 U.S. 332, 341 (1943). *See* FED. R. CRIM. P. 26.

55. 364 U.S.at 216.

56. *Compare* Elkins v. United States, 364 U.S. 206, 222-23 (1960) *with* Weeks v. United States, 232 U.S. 383, 391-92 (1914).

57. 364 U.S. at 217.

between constitutional violations by state or federal officers in determining whether the purposes of the exclusionary rule will be served.

One year later, in *Mapp v. Ohio*,[58] the Court held the exclusionary remedy mandatory on the state courts by virtue of the fourteenth amendment; thus the discretion left to the states by *Wolf* was removed. Even so, the *Mapp* Court reiterated the dual policy bases for the exclusionary rule; deterrence of unconstitutional police conduct and the maintenance of judicial integrity.[59]

In cases since *Mapp*, the historical emphasis by the Court on principles of judicial integrity has been subordinated in deference to the deterrence rationale. Moreover, the primary focus on deterrence in recent cases has resulted in several limitations on the scope of the exclusionary rule in certain collateral or fringe areas.[60] For example, the Supreme Court refused to accord retroactivity to *Mapp* and its progeny on the basis that deterrence would not be furthered.[61] Furthermore, in *Calandra v. United States*,[62] the Court failed to mention judicial integrity, relying exclusively on the deterrence rationale in exempting grand jury proceedings from the operation of the rule.[63] The

58. 367 U.S. 643 (1961).

59. *Id.* at 656, 659-60.

60. *See* note 2 *supra*. Two of the more notable areas in which the Supreme Court has restricted the scope of the exclusionary rule have included cases on impeachment and standing. In Walder v. United States, 374 U.S. 62 (1954), the Court permitted illegally seized heroin to be used to impeach the defendant's credibility after the defendant had testified that he had never possessed narcotics. *See also* Harris v. New York, 401 U.S. 222 (1971). Furthermore, in Alderman v. United States, 394 U.S. 165 (1967), the Court held that the "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." 394 U.S. at 171-72. Justice White reasoned that society's interest in discovering the truth in a criminal trial outweighed any deterrent effect the exclusionary rule might otherwise have if extended to individuals whose rights had not been violated. *Id.* at 175.

However, the authority of *Alderman* as support for the Court's deterrence analysis in deciding whether to apply the exclusionary rule proves to be of dubious validity upon close examination. It should be noted that the standing decision in *Alderman* rested on the Court's refusal to extend the fourth amendment to certain individuals and therefore had no relevance to the issue of whether the deterrent purpose of the exclusionary rule would be served.

61. *See* United States v. Peltier, 422 U.S. 531 (1975); Linkletter v. Walker, 381 U.S. 618 (1965).

62. 414 U.S. 338 (1974).

63. The limitations recently placed on the exclusionary rule may be attributed to the attenuation doctrine now employed by the Court in balancing the efficacy of the rule in a specific situation. As Justice Powell, concurring in Brown v. Illinois, 422 U.S. 590 (1975), has explained:

> [I]n some circumstances strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. The notion of the "dissi-

evidentiary analysis expressed in *Elkins* has also become prevalent in recent years, resulting in an analysis of the rule's purposes with close attention to the factual context of each case. Yet until *Janis*, this balancing approach had never been employed by the Court to permit the direct use of tainted evidence in the government's case in chief.

III. THE JANIS ANALYSIS AND ITS IMPLICATIONS

Notwithstanding the narrow issue presented in the *Janis* decision,[64] the Supreme Court's analysis represents a potentially far-reaching departure from the underlying principles of *Weeks*, *Elkins*, and *Mapp*. By reaffirming the nonexistence of a constitutional basis for the exclusionary rule, the Court has clearly divorced the right to freedom from unreasonable searches and seizures, as expressed in the fourth amendment, from the remedy of exclusion.[65] This distinction suggests that the conceptual basis for the rule lies solely within the Supreme Court's supervisory powers; powers which traditionally have extended only to the federal courts.[66]

The Court in *Janis*, however, further rejected the notion that a supervisory basis for the rule places *per se* limitations on the courts in the form of principles of judicial integrity. Relying on recent restrictions on the exclusionary rule in collateral areas,[67] the Court redefined these principles in terms of whether suppression has a direct deterrent effect on the law enforcement community:

> The primary meaning of "judicial integrity" in context of evidentiary rules is that the court must not commit or en-

---

pation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.

Id. at 608-09.

64. *See* notes 16-19 *supra* and accompanying text.

65. The distinction between right and remedy in the fourth amendment area marks a rejection of the constitutional language in Mapp v. Ohio, 367 U.S. 643 (1961), and reaffirms the foundation for the exclusionary rule expressed in United States v. Peltier, 422 U.S. 531 (1975) and United States v. Calandra, 414 U.S. 338 (1974). As Justice Powell stated in *Calandra*:

> [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.
>
> . . . As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.

414 U.S. at 348, *quoted in* United States v. Janis, 96 S. Ct. 3021, 3028-29 (1976).

66. For an extended discussion of the Supreme Court's supervisory powers over the federal courts, see Ker v. California, 374 U.S. 23, 31-34 (1963); McNabb v. United States, 318 U.S. 332, 341 (1943).

67. See notes 60-63 *supra* and accompanying text.

> courage violations of the Constitution. *In the Fourth Amendment area, however, the evidence is unquestionably accurate and the violation is complete by the time the evidence is presented to the court.* . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights.[68]

The Court has therefore considered the twin goals of the rule—deterrence and judicial integrity—and subordinated the latter to the former, thereby effecting a fundamental shift in focus from the courts to the police. However, the shift in emphasis may well have gone too far, as the language in *Janis* concerning judicial integrity indicates. If indeed these principles have any continued vitality in admonishing the courts not to "commit or encourage" violations of the fourth amendment, then it is difficult to understand why the Court's analysis did not focus on the defective search warrant issued by the state court in *Janis*.[69] When a state or federal magistrate issues a warrant which does not meet the requirements of *Spinelli v. United States*,[70] the fourth amendment violation is, in effect, committed by the judicial process. In this instance, admission of the tainted evidence will tend to discourage strict adherence by state and federal magistrates to the constitutional requirements of probable cause. The failure of the Court in *Janis* to provide sanctions on the warrant-issuing state court may indicate that the principles of judicial integrity have been completely eliminated.[71]

In any event, the redefinition of judicial integrity in *Janis* indicates that the Court is no longer focusing on whether the federal courts should be automatically prohibited from participating in the fruits of unconstitutional searches and seizures. Instead the Court has moved to a less-restrictive evidentiary standard which measures the degree of deterrence that exclusion will exert on future police conduct. In this context, *Janis* makes clear that evidence obtained in violation of the fourth amendment

68. 96 S. Ct. at 3034 n.35.

69. The search warrant in *Janis* was issued by a judge of the Municipal Court of the Los Angeles Judicial District. 96 S. Ct. at 3023.

70. 393 U.S. 410 (1969). *See* note 12 *supra* and accompanying text. *See also* Giordenello v. United States, 357 U.S. 480 (1958); Carroll v. United States, 267 U.S. 132 (1925).

71. *But see* Stone v. Powell, 96 S. Ct. 3037 (1976). In *Stone*, the Court emphasized that the lower courts must remain ever "concerned with preserving the integrity of the judicial process." *Id.* at 3047. The Court in *Stone* apparently felt that the principles of judicial integrity must be balanced with the *severity* or *substance* of the constitutional violation. As the Court stated in United States v. Peltier, 422 U.S. 531, 538 (1975), these principles are "not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law." *See* notes 113-135 *infra* and accompanying text.

will be excluded only where the resultant deterrent effect outweighs the societal costs incurred by suppressing otherwise probative evidence.[72]

The difficulty which the lower courts will have in applying the emerging case-by-case analysis in the fourth amendment area is accentuated by the multiplicity of factors involved in determining the rule's deterrent effect in a given factual setting.[73] Indeed the Supreme Court has consistently recognized a paucity of accurate empirical data concerning the rule's efficacy,[74] and has seemed to accept the proposition that studies on deterrence are generally impossible to validate.[75] Neverthe-

72. 96 S. Ct. at 3032. *See* Stone v. Powell, 96 S. Ct. 3037, 3048-49 (1976), where the Court traced the emergence of the balancing analysis in the fourth amendment area. In defining the social costs imposed by excluding unconstitutionally obtained evidence in criminal trials, emphasis has been typically placed on the fact that exclusion detracts from the factfinding process and often permits the guilty criminal to remain at large in society. *See, e.g.*, Stone v. Powell, 96 S. Ct. 3037, 3050 (1976); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 416-19 (1971) (Burger, C.J., dissenting); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974); Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-91 (1964). The Court in *Janis*, however, failed to note that these costs are substantially less when tainted evidence is excluded in a civil tax proceeding under the federal wagering tax laws. *See* Suarez v. Commissioner, 58 T.C. 792, 805 (1972).

Admittedly, exclusion of evidence in a *Janis*-type situation will inhibit the discovery of truth in tax litigation; yet in *Janis*, the evidence had been previously excluded in the state criminal trial. As a result, the social costs incurred by suppression in the federal tax proceeding would have only included the loss of taxable revenue to the federal treasury. Justice Stewart, dissenting in *Janis*, recognized the anomaly of excluding illegally seized evidence in criminal trials while, on the basis of similar reasoning, admitting that same evidence in tax assessments under the wagering revenue laws:

> [U]nder the Court's ruling [in *Janis*], society must not only continue to pay the high cost of the exclusionary rule (by foregoing criminal convictions which can be obtained only on the basis of illegally seized evidence) but it must also forfeit the benefit for which it has paid so dearly.

96 S. Ct. at 3036 (Stewart, J., dissenting). Moreover, if the wagering tax provisions in *Janis* are viewed as criminal sanctions to be imposed for illegal conduct, then the deterrence rationale would be substantially furthered by exclusion. *Id.*

73. *See generally* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. L.Q. 621; Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

74. *See, e.g.*, Janis v. United States, 96 S. Ct. 3021, 3030-32 (1976); Stone v. Powell, 96 S. Ct. 3037, 3051 & n.32 (1976); United States v. Calandra, 414 U.S. 338, 348 n.5 (1974); Elkins v. United States, 364 U.S. 206, 218 (1960).

75. *See* 96 S. Ct. at 3030 n.22. Further support for the proposition in text may be found in the *Janis* Court's extensive quotation of language in *Elkins*:

> Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. *Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled.* For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule.

Id. at 3032, *quoting from* Elkins v. United States, 364 U.S. 206, 218 (1960) (emphasis

less, the Court in *Janis* initiated a touchstone for the lower courts by assuming the continued substantial efficacy of the rule in strictly criminal proceedings.[76] Furthermore, in *Stone v. Powell*,[77] the companion case to *Janis*, the Court acknowledged the deterrent value of the exclusionary rule as an educative device over the long term:

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term this demonstration that our society attaches serious consequences to violations of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value systems.[78]

By assuming that substantial deterrence results from exclusion in criminal proceedings, the Court in *Janis* posited two rather broad rules of attenuation which, at least in their totality, effectively reduce the deterrence rationale. If, as the *Janis* holding seems to suggest, the existence of intersovereign violations in federal civil proceedings was the crucial factor in the Court's balancing analysis, future application of the rule may depend strictly on the nature of the proceeding and the law enforcement officers involved.[79] However, to the extent that the good faith reliance by the police on the defective search warrant in *Janis* was necessary to the holding, application of the rule may depend on the substance of the constitutional violation.[80]

A. The Nature of the Litigation, Intersovereign Violations and Deterrence

While the *Janis* rationale provides support for the continued application of the exclusionary rule in criminal proceedings,[81] there remains some question of the rule's applicability in civil proceedings involving *intrasovereign* violations.[82] The Court in *Janis* was careful not to

added). However, the *Janis* Court was careful not to rule out the possibility that valid statistical data may be assembled in the future. *See* 96 S. Ct. at 3031 n.26.

76. 96 S. Ct. at 3029.
77. 96 S. Ct. 3037 (1976).
78. *Id.* at 3051 (footnotes omitted).
79. *See* notes 81-112 *infra* and accompanying text.
80. *See* notes 113-135 *infra* and accompanying text.
81. *See* notes 76-78 *supra* and accompanying text.
82. The term "civil proceedings" as used in this comment, refers generally to civil-

explicitly address this issue, refusing only to extend the rule to civil tax proceedings involving *intersovereign* violations. However, arguments for the rule's application to intrasovereign civil proceedings must now assume, on the apparent authority of *Janis*, that intersovereign violations significantly diminish the deterrent effect of the rule.

With the possible exception of *Janis*, the Supreme Court has never restricted the fourth amendment or the exclusionary rule to the formal confines of the criminal process.[83] Indeed, the Court has consistently invoked the rule of *Weeks* and *Mapp* in civil proceedings with criminal overtones or which involve a sufficient nexus to the violation of criminal laws.[84] As early as 1886, in *Boyd v. United States*,[85] the Court applied the rule in a federal forfeiture proceeding, reasoning that the fourth amendment's limitations on unreasonable governmental intrusion should not be wholly contingent on the form of the litigation in which the tainted evidence is offered. More recently, a unanimous Court in *One 1958 Plymouth Sedan v. Pennsylvania*[86] reiterated the reasoning in *Boyd* by holding that evidence obtained unconstitutionally is inadmissible in state forfeiture proceedings.[87] Viewed together, these two decisions indicate that the exclusionary rule should apply to proceedings in which the purposes are analogous to the objectives sought by criminal

type proceedings which are not strictly criminal in nature but which are initiated by the federal government. *See* United States v. Janis, 96 S. Ct. 3021, 3032-33 (1976). It seems fairly settled that the exclusionary rule is inapplicable in purely civil proceedings in which the government has no direct interest, at least where the fourth amendment violations are not committed by state agents. *See, e.g.*, Burdeau v. McDowell, 256 U.S. 465 (1927); Sackler v. Sackler, 15 N.Y.2d 40, 255 N.Y.S.2d 83, 203 N.E.2d 481 (1964); Diener v. Mid-American Coaches, Inc., 378 S.W.2d 509 (Mo. 1964). *Contra*, Williams v. Williams, 8 Ohio Misc. 2d 156, 221 N.E.2d 622 (1966).

83. Unlike the fifth amendment, the fourth amendment makes no distinction between unreasonable searches and seizures in the criminal context and those in the civil context. *Compare* U.S. CONST. amend. IV *with* U.S. CONST. amend. V. Indeed this distinction has prompted the Tax Court to apply the fourth amendment to civil tax proceedings, while refusing to apply the fifth amendment to proceedings which are not criminal in nature. Suarez v. Commissioner, 58 T.C. 792, 805 (1972).

84. *See* Camara v. Municipal Court, 387 U.S. 523 (1967) (fourth amendment barred prosecution of one refusing to permit warrantless search of private residence pursuant to housing code); See v. City of Seattle, 387 U.S. 541 (1967) (extended principle in *Camara* to commercial establishments); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (state forfeiture proceedings); Boyd v. United Sates, 716 U.S. 616 (1886) (federal forfeiture proceedings). *See also* Abel v. United States, 362 U.S. 217, 254-55 (1959) (Brennan, J., dissenting). For a discussion suggesting that *One 1958 Plymouth* and *Camara* exerted a liberalizing effect on the exclusionary rule, see Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1319-23 (1967).

85. 116 U.S. 616 (1886).

86. 380 U.S. 693 (1965).

87. *Id.* at 702.

prosecution and conviction. As Justice Bradley stated in *Boyd*:

> If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens . . . . This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment . . . .[88]

The characterization in *Boyd* and *One 1958 Plymouth* of some civil proceedings as quasi-criminal for fourth amendment purposes has prompted the federal courts to invoke the rule in a variety of intrasovereign civil proceedings,[89] including civil tax proceedings under the federal wagering tax laws.[90] The Court in *Janis*, however, failed to discuss the criminal implications of the civil tax assessment with which it was presented.[91] Instead, the Court broadly distinguished the lower federal decisions on the sole basis of the intersovereign violation which occurred in *Janis*.[92] Implicit in this distinction is the assumption that police

88. Boyd v. United States, 116 U.S. 616, 633-34 (1886) (emphasis in original).

89. *See, e.g.*, Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968) (administrative agency hearing involving cease and desist order for violating Robinson-Patman Act); Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966) (military discharge proceedings); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd sub nom.* Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969) (state antitrust action wherein court characterized treble damage actions as quasi-criminal). For an example of a state court relying on *One 1958 Plymouth*, see People v. Moore, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968), where the California Supreme Court applied the exclusionary rule in a civil narcotics addict commitment proceeding, stating: "Whatever the label that may be attached to those proceedings, it is apparent that there is a close identity to the aims and objectives of criminal law enforcement . . . ." 69 Cal. 2d at —, 446 P.2d at 805, 72 Cal. Rptr. at 805 (citations omitted).

90. *See* Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969); Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966).

91. This failure indicates that the Court characterized the civil tax proceeding in *Janis* as civil in nature for purposes of the exclusionary rule. Support for this proposition may be taken from the fact that the Court cited with approval the quasi-criminal standard established in *One 1958 Plymouth* and *Boyd*, yet made no attempt to extend this standard to the issue in *Janis*. *See* United States v. Janis, 96 S. Ct. 3021, 3029 & n.17 (1976). The implicit refusal of the Court to characterize the tax assessment in *Janis* as quasi-criminal may indicate that *One 1958 Plymouth* and *Boyd* are to be strictly limited to their facts.

92. 96 S. Ct. at 3032-33. In this regard, the question arises whether the *Janis* Court, by distinguishing the federal intrasovereign decisions, was citing them with approval. The Court's preoccupation with the intersovereign distinction implies that this

officials are only sufficiently interested in proceedings involving the sovereign of which they are agents. Aside from the validity of this assumption, however, its effect seems to resurrect the silver platter doctrine in federal proceedings which are not strictly criminal in both nature and form.

The view that intersovereign fourth amendment violations substantially reduce the deterrent efficacy of the exclusionary rule in civil tax proceedings ignores the policy considerations which led the Court in *Elkins* to reject the silver platter exception in criminal areas. The intrasovereign-intersovereign distinction seems at odds with the Supreme Court's recurring recognition in previous cases that cooperation often exists between state and federal law enforcement officials.[93] Indeed, examples of state and local assistance to the Internal Revenue Service are replete in the federal tax case law.[94] Moreover, the silver platter exception to the exclusionary rule in *Janis* re-establishes the need for enforcement of the "federal participation" doctrines enunciated in *Byars* and *Gambino*.[95]

These doctrines have become obsolete under the rule in *Elkins* where evidence obtained unconstitutionally is excluded in federal criminal trials whether the violation is committed by state or federal officers.

---

may have been the case. This argument, however, assumes that the Supreme Court would extend the quasi-criminal standards in *One 1958 Plymouth* and *Boyd* to intrasovereign civil tax proceedings. *See* notes 101-112 *infra* and accompanying text. *But see* note 89 *supra*.

93. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 211 (1960); Gambino v. United States, 275 U.S. 310 (1927); Byars v. United States, 273 U.S. 31 (1926); notes 30-36 *supra* and accompanying text.

94. *See* Pizzarello v. United States, 408 F.2d 579, 584 n.6 (2d Cir. 1969); Anderson v. Richardson, 354 F. Supp. 363, 365 (S.D. Fla. 1973). *See generally* Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968).

Justice Stewart, in his dissenting opinion in *Janis*, acknowledged the realities of federal tax enforcement by arguing that state and federal law enforcement officers frequently provide the IRS with information obtained in criminal investigations which tend to prove violations of the federal wagering tax laws. United States v. Janis, 96 S. Ct. 3021, 3035-36 (1976) (Stewart, J., dissenting). Justice Stewart supported his arguments by citing to *Marchetti* and by referring to the deposition of one of the arresting state officers in *Janis*. The statements of the police officer, reproduced in Justice Stewart's dissenting opinion, suggest that the larger the bookmaking or gambling arrest or investigation, the more likely that state cooperation and assistance to federal revenue agents will occur. 96 S. Ct. at 3036 (Stewart, J., dissenting).

95. *See* notes 30-36 *supra* and accompanying text. It should be noted that before the silver platter doctrine was overruled in *Elkins*, the federal exclusionary rule in *Weeks* forced the federal courts to police the cooperation which commonly existed between state and federal officials. *See* Marron v. United States, 8 F.2d 251, 259 (9th Cir. 1925); United States v. Brown, 8 F.2d 630, 631 (D. Ore. 1925). Without the enforcement of the participation doctrines, federal officials could circumvent the federal rule by directing state and local officials to obtain needed evidence through illegal means.

In proceedings which are not strictly criminal, however, the reemergence of the participation doctrines imposes on the federal courts the difficult task of adjudicating the extent of federal involvement in state searches and seizures in virtually every instance where timely objection is made.[96] Given the participation doctrines established in *Byars* and *Gambino*, the intersovereign exception in *Janis* will no doubt encourage covert and unobtrusive methods of cooperation between state and federal police officers. The Court in *Elkins* summarized the problems of the intersovereign distinction in this regard:

> Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.[97]

Apart from the problems of federal-state cooperation, the real tension between *Janis* and *Elkins* derives from their opposing assumptions regarding the interest which state officials have in federal proceedings. Contrary to the implications of *Janis*, the overruling of the silver platter doctrine in *Elkins* was founded on the assumption that state police officers have a substantial interest in the conviction of criminals they assist in apprehending, whether the conviction is obtained in

96. The Supreme Court in *Elkins* noted the difficulties which the lower federal courts had prior to the overruling of the silver platter doctrine in criminal proceedings in determining whether federal participation had occurred in unlawful state searches and seizures. *See* Elkins v. United States, 364 U.S. 206, 212 (1960). Regarding issues of overt federal particpation, the federal courts not only reached varying results, but were internally inconsistent in their decisions as well. *Compare* United States v. Butler, 156 F.2d 897 (10th Cir. 1946); Ward v. United States, 96 F.2d 189 (5th Cir. 1938); Sutherland v. United States, 92 F.2d 305 (4th Cir. 1937); Fowler v. United States, 62 F.2d 656 (7th Cir. 1932) *with* Kitt v. United States, 132 F.2d 920 (4th Cir. 1942); Sloane v. United States, 47 F.2d 889 (10th Cir. 1931). In addition, the federal courts experienced no less difficulty in determining whether, absent the actual and overt federal participation prohibited in *Byars*, a state search and seizure consisted of the "constructive participation" prohibited in *Gambino*. *Compare* Marsh v. United States, 29 F.2d 172 (2d Cir. 1928); United States v. Jankowski, 28 F.2d 800 (2d Cir. 1928) *with* United States v. Butler, 156 F.2d 897 (10th Cir. 1946).

97. Elkins v. United States, 364 U.S. 206, 221-22 (1960), *quoted in* Janis v. United States, 96 S. Ct. 3021, 2036 (Stewart, J., dissenting). *See* Mapp v. Ohio, 367 U.S. 643, 657-58 (1961).

state or federal court.[98] The fact that the Court in *Janis* acknowledged the *Elkins* assumption in criminal proceedings, however, indicates that the two decisions are reconcilable.[99] But unless the import of *Elkins* is to be severely restricted, the broad principle which must be gleaned from *Janis* is that as the nature of the proceeding in question moves towards the criminal area, the outcome-interest assumption in *Elkins* increases in viability.[100] In other words, as the type of proceeding becomes more criminal in nature, the interest of state officers in the outcome, and therefore the deterrent efficacy of the rule, increases proportionately.

Under this analysis, unlike that of the *Janis* majority, the cogency of the intersovereign exception is dependent on a proper characterization of the litigation. Viewed in terms of the Court's deterrence rationale, the issue becomes whether the exclusionary rule should obtain in a particular proceeding involving intrasovereign fourth amendment violations.[101] Where the proceeding is sufficiently quasi-criminal to warrant the application of the exclusionary rule, as in the federal forfeiture in *Boyd*, the outcome-interest assumption in *Elkins* should preclude the attenuation of deterrence when intersovereign violations are involved.

The foregoing analysis actually suggests that the intersovereign distinction should not exist in the federal courts; rather, when evidence improperly obtained by federal officers is excluded, the result should also extend to violations by state officers. The theory is that federal law enforcement officers should not be able to accomplish through state and local police what they are prohibited from doing themselves.[102] To

98. *Compare* Elkins v. United States, 364 U.S. 206 (1960) *with* United States v. Janis, 96 S. Ct. 3021 (1976). This assumption seems especially true after *Janis*, wherein the Court reaffirmed the *Elkins* holding exclusively in terms of the deterrence rationale. 96 S. Ct. at 3029.

99. *See* note 98 *supra.*

100. Although this conclusion is supportable from the Court's reaffirmance of *Elkins* in *Janis*, note 96 *supra*, it establishes the precise point of disagreement between the majority opinion in *Janis* and Justice Stewart's dissent. The real issue which divided the Court in *Janis* concerned the point at which the outcome-interest assumption in *Elkins* obtains sufficiently to preclude the admission of silver platter evidence in the federal courts. The *Janis* majority held in effect that the *Elkins* assumption is only viable in criminal proceedings, while Justice Stewart gave *Elkins* a much broader reading. The distinction indicates that the majority refused to characterize the *Janis* tax assessment as quasi-criminal in nature, while this was the major import of Justice Stewart's dissent. *See* notes 105-112 *infra* and accompanying text.

101. *See* cases cited in notes 89 and 90 *supra.*

102. The proposition that *Janis* established a silver platter doctrine in federal noncriminal proceedings assumes that, had federal agents participated in or committed the constitutional violations, the tainted evidence, and any fruits thereof, would have been excluded. In other words, the various arguments criticizing the use of silver platter

determine in a given instance whether the deterrence resulting from exclusion will outweigh the resultant social costs, the courts should analyze the true nature of the litigation. The Court in *Janis* was unresponsive to this issue, however, implying that *all* federal proceedings not strictly criminal are civil in nature for purposes of deterrence.[103] This implication not only ignores the characterization process an-

---

evidence are significant *only if* the federal courts distinguish between *intersovereign* and *intrasovereign* fourth amendment violations by admitting evidence obtained by the former but not the latter. For this reason, the Court in *Janis* remanded the case for a determination of whether federal agents had participated in the illegal search and seizure. 96 S. Ct. at 3033 & n.31. Should federal participation be proven by the defendant on remand, the *intrasovereign* issue would be presented on appeal. *Id.*

Aside from the crucial distinction between intersovereign and intrasovereign fourth amendment violations, the admission of the silver platter evidence in *Janis* raises fundamental questions involving federalism and the regard of the federal courts for legitimate state policies. *See* Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1159-61 (1959). These questions are especially important if the Supreme Court's recent rejections of the constitutional language in *Mapp* signify a return to the *Wolf* era; an era during which states were permitted to adopt their own methods of enforcing the right to privacy values in the fourth amendment. *Compare* United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974) *with* Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949). In these circumstances, states which have elected to adopt the exclusionary rule would have their policies of enforcing the fourth amendment thwarted by the admission of silver platter evidence in the federal courts. *See* Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1160-61 (1959); Parsons, *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 42 CORNELL L.Q. 346, 363, 368 (1957); Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 23 (1950).

In this regard, concern for a "healthy federalism" prompted the Supreme Court in *Elkins* to criticize the silver platter doctrine in terms of respect for state exclusionary policies:

> [W]hen a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Fedral Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers.

364 U.S. at 221. As the *Elkins* language suggests, the admission of the silver platter evidence in the federal tax proceeding in *Janis* effectively frustrated the California policy of exclusion expressed in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). In contrast, the Supreme Court in *Elkins* explicitly sought to preserve respect for the California policy in *Cahan* by rejecting the intersovereign distinction in federal criminal proceedings. *See* 364 U.S. at 220-21. Any supposed distinction between the types of the proceedings in *Janis* and *Elkins* should not warrant the inconsistent treatment of state policy. See notes 105-111 *infra* and accompanying text.

103. This contention, however, is dependent on whether the Court in *Janis* indicated approval of the holdings in *One 1958 Plymouth* and *Boyd*. *See* note 91 *supra*. To the extent that these holdings were affirmed in dictum, the Court carved out an exception to the statement in text in the case of forfeitures of property used in violation of the criminal laws.

nounced in *One 1958 Plymouth* and *Boyd*, but it also fails to properly analyze the nature of the tax assessment in *Janis*.[104]

Though the Court's decision in *One 1958 Plymouth* involved the nature of forfeiture proceedings, its rationale indicates that a civil-type action should be considered criminal for fourth amendment purposes when "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law."[105] Some questions may be raised, however, concerning the authority of *One 1958 Plymouth* on the *Janis* issue. The argument can be made that the real issue in *One 1958 Plymouth* was whether the *right* in the fourth and fourteenth amendments should be extended to forfeitures, and not whether the remedy of exclusion should apply *assuming* the right had been violated.[106]

This argument assumes that the Court in *One 1958 Plymouth* relied on the constitutional principles in *Mapp* and therefore predated the Court's shift to deterrence as the primary basis for the exclusionary rule.[107] Despite the validity of this argument, the rationale in *One 1958 Plymouth* seems appropriate to the deterrence analysis now applied by the Court in the fourth amendment area. According to this rationale, the deterrent efficacy of the rule is substantial in federal proceedings involving objectives analogous to those of the criminal process.[108]

By analogy to the forfeiture proceedings in *One 1958 Plymouth*

104. *See* notes 105-112 *infra* and accompanying text.

105. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

106. *Compare* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) *with* Mapp v. Ohio, 367 U.S. 643 (1961).

107. The argument demonstrates the confusion resulting in the fourth amendment area after the Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961). Since *Mapp* held the exclusionary remedy to be an "essential ingredient" of the fourth amendment, *id.* at 651, the argument states that the issue in cases after *Mapp* actually concerned whether the right in the fourth amendment had been violated. The implication of this argument is that the exclusionary remedy after *Mapp* automatically followed a violation of the right and was therefore contingent on the parameters of federal and state action. *See* Burdeau v. McDowell, 256 U.S. 465 (1921), where the Court held that the fourth amendment provides limitations on "the activities of sovereign authority." *Id.* at 475. *See generally* Shelly v. Kraemer, 334 U.S. 1 (1948).

The decision in *One 1958 Plymouth* indicates, however, that even during the *Mapp* era, the Court refused to hinge the application of the exclusionary rule purely on state action concepts. Instead of focusing on whether sovereign authority was involved, the Court in *One 1958 Plymouth* seemed more concerned with whether evidence unconstitutionally obtained should be excluded in proceedings which are not strictly criminal. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1965). Thus, it may be argued that *One 1958 Plymouth* limited the constitutional principles in *Mapp* to criminal prosecutions and focused instead on the deterrence rationale in *Elkins* in deciding whether to invoke the rule in forfeitures. *See* United States v. Blank, 261 F. Supp. 180, 182-83 (N.D. Ohio 1966).

108. *See* United States v. Janis, 96 S. Ct. 3021, 3036 (1976) (Stewart, J., dissenting).

and *Boyd*, the argument should be made that the assessment in *Janis* for failure to pay federal wagering excise taxes was actually criminal in nature. The Supreme Court has expressly recognized that the wagering provisions in the Internal Revenue Code of 1954[109] were intended not only to raise revenue but to "assist the efforts of state and federal authorities to enforce [criminal] penalties" for illegal gambling activities.[110] Undoubtedly Justice Stewart, dissenting in *Janis*, was correct in describing the gambling enforcement process as "one of mutual cooperation and coordination, with the federal wagering tax provisions buttressing state and federal criminal sanctions."[111]

Perhaps the ultimate issue in the analogy is the extent to which the objectives in civil tax proceedings must approximate criminal objectives. The Court in *One 1958 Plymouth* and *Boyd* seemed to focus on whether the sanctions involved were penal in character. Indeed, at least one federal court relying on this analysis has concluded that a civil proceeding under the federal wagering tax laws imposes "onerous monetary penalties" and requires a determination that the criminal laws have been violated.[112] Any attempt to restrict the quasi-criminal standard to a requirement of both penal sanctions *and* criminal procedures should be limited, since this requirement would involve an element not appropriate to the deterrence rationale. Whether a police officer is interested in the outcome of a proceeding should not depend on whether it is criminal in form. Rather, the deterrent efficacy of the rule should be contingent on whether the civil proceeding imposes sanctions commensurate with those of the criminal process.

If the analysis is correct in concluding that federal officers have a substantial interest in civil tax proceedings under the federal wagering

109. I.R.C. § 4401 (1974) (excise taxes); I.R.C. § 4411 (1974) (occupational taxes); I.R.C. § 4412 (registration taxes).

110. United States v. Janis, 96 S. Ct. 3021, 3035 (1976) (Stewart, J., dissenting) (brackets in original), *quoting from* Marchetti v. United States, 390 U.S. 39, 47 (1968). As the Court noted in United States v. Kahriger, 345 U.S. 22 (1953), the legislative history to the federal wagering tax laws at least suggests that the provisions were intended to deter criminal gambling activities. *Id.* at 27. *See* 97 Cong. Rec. 6892 (1951).

111. 96 S. Ct. at 3035-36 (Stewart, J., dissenting).

112. *See* United States v. Blank, 261 F. Supp. 180, 182, 184 (N.D. Ohio 1966). In applying the quasi-criminal standard in *One 1958 Plymouth* and *Boyd* to civil tax proceedings under the federal wagering tax laws, the court in *Blank* stated:

> Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused . . . would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil forum.

Id. at 182.

tax laws, the assumption in *Elkins* should also apply to state officers. This proposition is supported by the realities of federal-state enforcement of the criminal gambling laws. By focusing on the specific nature of the civil tax proceeding in *Janis*, the analysis demonstrates that the apparent holding of the Court is of questionable validity. These conclusions tend to reinforce the argument that the Court in *Janis* was heavily influenced by the good faith efforts of the police.

B. Good Faith Reliance on a Defective Search Warrant and Deterrence

Admission of the suspect evidence in *Janis* was predicated primarily upon the belief that evidentiary exclusion would not further the deterrence of unlawful police conduct under the facts of the case.[113] The majority, however, noted as a further reason for admitting the evidence the fact that the police officers acted under a good faith belief that they were in compliance with the mandates of the fourth amendment.[114] This consideration of a good faith factor has appeared in several recent Supreme Court decisions.[115]

The effect of the presence of good faith was noted by the Court in *Michigan v. Tucker*:[116] "Where the official action was pursued in complete good faith . . . . the deterrence rationale loses much of its force."[117] Superficially viewed, this argument has much appeal; "[e]xclusion should surely not be demanded where the officer did not know and had no reason to know that in some minor technicality he was violating the rule."[118] However, an exception carved out of the exclusionary rule for good faith violations of the fourth amendment would create a host of new difficulties. Indeed, if the application of such a standard is carried to its logical end, the result would be the virtual overruling of a line of cases extending from 1886 to the present.[119] Furthermore, a good faith test could easily be carried over into the fifth amendment area and vitiate current standards there as well.[120]

113. 96 S. Ct. at 3029.
114. *Id.* at 3034, n.35.
115. *See, e.g.*, United States v. Peltier, 422 U.S. 531, 539 (1975); Michigan v. Tucker, 417 U.S. 433, 447 (1974).
116. 417 U.S. 433 (1974).
117. *Id.* at 447.
118. Bator and Vorenberg, *Arrest, Detention, Interrogation and Possible Legislative Solutions*, 66 Colum. L. Rev. 62, 76 (1966).
119. The fact that the illegally obtained evidence was excluded at Janis' criminal trial and that this result was not questioned by the Supreme Court in *Janis* demonstrates that the rule in *Elkins* is still applicable.
120. *See* Michigan v. Tucker, 417 U.S. 433, 447 (1974).

Initially, it must be noted that the Supreme Court has not yet squarely upheld the admission of evidence solely upon a finding of good faith,[121] and therefore any practical standards in this area are not clearly defined. Neither has the Court precisely indicated the weight that the presence of good faith is to have in the *Janis* balancing analysis. As a result, lower courts are left without a clear delineation of the contours of the good faith standard which would lead to an orderly and consistent application of the rules of law in the area. Reliance by lower courts on the good faith standard in its present form[122] could well result in serious confusion in the fourth amendment area, encourage police perjury, and negate present constitutional protections.

In a situation where the police have failed to obtain a search warrant, admission or exclusion of evidence obtained in violation of the fourth amendment would turn not only upon the objective existence of probable cause for the search,[123] but also upon the trial judge's evaluation of the police officer's subjective knowledge and state of mind at the time of the search and seizure. As Professor Kamisar has noted: "The notion that the judge can take into account whether the violation was willful or not would be an exceedingly difficult task and it would seem to put a premium on an untrained or relatively ignorant police department. They could just say they didn't know any better."[124]

The application of a good faith test by the trial judge would be relatively simple in the case of a blatant and aggravated violation, such as that in *Mapp*.[125] As in the application of most standards, however, closer situations would have to be decided on a case-by-case basis. The courts would be required to draw the line between good faith (evidentiary admission) and bad faith (evidentiary exclusion) by considering a number of factors, such as the police officer's demeanor and credibility

121. At least one lower court has moved in this direction, however. *See* State v. Grady, 153 Conn. 26, 28, 211 A.2d 675 (1965).

122. Although good faith is mentioned in text, the relegation of this test to a footnote is an indication that the Court did not place serious reliance on it.

123. *See* note 128 *infra* and accompanying text.

124. 48 ALI Proceedings 376 (1971).

125. In *Mapp*, the police entered the defendant's house by use of force, refused to allow defendant's attorney access to defendant, produced what was purportedly a search warrant, and then refused to permit defendant to examine the "warrant." The officers also seized defendant, twisted her arm, and handcuffed her "because she had been 'belligerent.'" 367 U.S. at 644-45 (1961). For a discussion of standards which have been proposed in this area, see *Model Code of Pre-Arraignment Procedures* § SS 290.2(2), (Proposed Official Draft No. 1, 1972). It should be noted, however, that a proposal similar to the *Model Code* was incorporated in S. 2657, 92d Cong., 2d Sess. (1972), and was defeated 129 to 114 in the House of Representatives.

on the witness stand, his apparent level of intelligence, and perhaps his actual knowledge of the technical requirements for a valid search and seizure. It is certainly questionable at best to rely on this type of subjective determination in the implementation of a constitutional guarantee. Moreover, because a finding of good faith by the trial judge would be based upon factors which would not necessarily appear in the record, a ruling on the issue would be difficult to attack through the appellate process.[126]

In the situation where a police officer does go before a judicial officer[127] to obtain a search warrant, serious difficulties arise in the attempt to apply a good faith standard. The test the magistrate must apply to determine whether a search warrant should be issued is the standard of probable cause.[128] This standard requires that the affiant present facts and circumstances within the scope of his knowledge which are sufficient to warrant a reasonably cautious person's belief in the truth of the underlying facts.[129]

In *Janis*, the officers obtained their facts from an informant, rather than through their own first hand observations. In this situation, a more specific standard of probable cause applies—the two-pronged test set forth in *Spinelli v. United States*.[130] Once the magistrate has weighed the facts and concluded that a search warrant should be issued, the implementation of a search by the police is in good faith. In this context, too, there is room for abuse. Given the fact that the police officer wants to obtain a search warrant, it is to his advantage to present the facts and circumstances to the magistrate in such a way that that official will be convinced of the existence of probable cause. A good faith test might well fail to uncover such a slanted presentation of the facts, especially considering the difficulties which the courts have had in applying the current objective standards.[131]

A related problem in the use of a good faith test arises in the situa-

126. Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 583-84 (1968).

127. For convenience, the term "magistrate" will be used hereinafter to indicate any judicial official with power to issue a search warrant.

128. This requirement is expressly stated in the fourth amendment. *See* note 70 *supra*.

129. *See, e.g.*, Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959); Johnson v. United States, 333 U.S. 10 (1948).

130. 393 U.S. 410 (1969).

131. *See, e.g.*, United States v. Harris, 403 U.S. 573 (1971); Jones v. United States, 362 U.S. 257 (1962). *See generally* Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958 (1969).

tion where a search warrant has been sought and obtained. The Supreme Court in *Janis* has subsumed the concept of good faith under the concept of the deterrence of unconstitutional conduct by the police.[132] This formulation ignores the presence of a third party, the magistrate who issues the warrant. This judicial official is essentially a buffer between the private citizen and the zealous law enforcement official. Mr. Justice Jackson has noted: "[The protection of the fourth amendment] consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[133] Thus the magistrate occupies a critical position in the protection of a citizen's constitutional rights; therefore, deterrence should focus not only upon the police, but also upon the judicial officials who must decide whether to issue a search warrant. A warrant proceeding is nonadversarial and often a magistrate is untrained in the law; he may not make the effort to scrutinize the evidence closely.[134] A good faith standard which is applicable solely to the police would fail to protect the citizen from any lapse of good faith on the part of the magistrate.

Although the majority in *Janis* speaks of good faith in terms of deterrence of unlawful police conduct, the Court did not totally discard the concept of judicial integrity.[135] It is clear that courts are still under the constraints mandated by that concept. A magistrate who issues a warrant in violation of the *Spinelli* standard also violates the fourth amendment standard of probable cause, and the evidence obtained pursuant to that warrant should be excluded solely on grounds of judicial integrity. Judicial integrity may be violated by a magistrate in good faith; he may issue a warrant where there is insufficient probable cause, and yet do so in the good faith belief that the affiant has supplied facts sufficient to measure up to the constitutional standard. It is arguable that the exclusion of the evidence obtained by the use of that warrant would not deter the magistrate from committing further violations of the fourth amendment, because his error was made in good faith. The evidence should still be excluded at any later criminal trial, however, because of the violation of judicial integrity.

132. 96 S. Ct. at 3034, n.35.

133. Johnson v. United States, 333 U.S. 10, 13 (1948).

134. *See* TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME 119 (1967). In the case of federal magistrates, this problem has been alleviated by the upgrading of the standards for such officials in the Federal Magistrates Act, 28 U.S.C. §§ 631-639 (1968).

135. 96 S. Ct. at 3034 n.35.

The application of a good faith standard to magistrates would thus tend to erode their position as a shield between the zealous policeman and the citizen. The concept of judicial integrity is broader than the concept of good faith, and the former is the appropriate standard to apply to the courts. Where a warrant has not been obtained, good faith should be no more than *Janis* has dictated; one consideration in a test which balances the efficacy of deterrence of unconstitutional conduct by the police against the cost to society of evidentiary exclusion.

IV. CONCLUSION

The Supreme Court in *Janis* continued its assault on the exclusionary rule by further restricting the conceptual bases upon which the rule has traditionally rested. By relying on an evidentiary balancing analysis, the decision indicates that the Court is moving to a rationale in the fourth amendment area which focuses exclusively and quantitatively on the deterrent effect the rule will have on future police conduct.

However, the subordination of the *Weeks* principles of judicial integrity to the deterrence rationale in *Janis* raises certain questions to which the Court has not given a definitive answer. Perhaps the most immediate question concerns the effect this shift in focus will have on state and federal magistrates in issuing search warrants under the guidelines of the fourth amendment. Although a defective search warrant was issued by the state court in *Janis*, the Court made no attempt to resolve these implications, leaving open the question of whether the judicial integrity basis for the exclusionary rule has been completely eliminated. The rejection of these principles in *Janis* may simply indicate that the federal courts should only retain their integrity when the deterrence rationale is substantial.

Although the Court has yet to determine precisely the degree of deterrence resulting from exclusion in a specific factual situation, the *Janis* Court avoided a decision on this issue by engaging in what may be termed an assumption analysis. By assuming that deterrence is substantial in strictly criminal proceedings, the Court proceeded to apply a doctrine of attenuation to the facts in *Janis*. In a general sense, the factors identified by the Court as attenuating the deterrence rationale included the civil nature of the tax proceeding, the sovereign status of the law enforcement officers committing the fourth amendment violation, and the good faith efforts of these officers in implementing the defective search warrant. In what was apparently the primary holding of the decision, the Court ruled that the social costs of exclusion

outweighed any deterrent effect the exclusionary rule would have in situations involving *intersovereign* fourth amendment violations in federal civil tax proceedings.

In view of the continued vitality of *Elkins*, the theory which must be derived from the *Janis* holding is that tax assessments for violations of the federal wagering tax laws are strictly civil in nature. The analysis which shows that these proceedings should be treated as quasi-criminal for purposes of deterrence reveals the dubious validity of the silver platter exception in *Janis*. The question therefore remains concerning the extent to which the silver platter doctrine has been rejuvenated in federal proceedings which are not purely criminal in nature and form.

The analysis also suggests that the Court in *Janis* was perhaps heavily influenced by the good faith reliance of the state police officers in implementing the defective search warrant. As in *Janis*, however, the Supreme Court has yet to explicitly base a decision in the fourth amendment area on the substance of the constitutional violation. Therefore many of the difficulties which attend the good faith standard have not been specifically addressed. Because of these problems, as well as the criticisms of the apparent silver platter rationale in *Janis*, the federal courts should be hesitant to extend the decision substantially beyond its facts.

Chris E. Hagberg