



DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD

The Exclusionary Rule Redux--Again

The Harvard community has made this article openly available.
[Please share](#) how this access benefits you. Your story matters.

Citation	Lloyd L. Weinreb, The Exclusionary Rule Redux--Again, 37 Fordham Urb. L.J. 837 (2010).
Published Version	http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2346&context=ulj
Accessed	February 19, 2015 1:11:00 PM EST
Citable Link	http://nrs.harvard.edu/urn-3:HUL.InstRepos:10906929
Terms of Use	This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Open Access Policy Articles, as set forth at http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#OAP

(Article begins on next page)

Fordham Urban Law Journal

Volume 37, Issue 3

2009

Article 6

The Exclusionary Rule Redux - Again

Lloyd L. Weinreb*

*

Copyright ©2009 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

The Exclusionary Rule Redux - Again

Lloyd L. Weinreb

Abstract

The exclusionary rule itself is not very complicated: if the police obtain evidence by means that violate a person's rights under the Fourth Amendment, the evidence is not admissible against that person in a criminal trial. The basic provision, however, has been freighted with innumerable epicycles, and epicycles on epicycles ever since it was made part of Fourth Amendment jurisprudence. The exclusionary rule survives in a kind of doctrinal purgatory, neither accepted fully into the constitutional canon nor cast into the outer darkness. It survives, but its reach is uncertain, its rationale questioned, and its value doubted. *Hudson v. Michigan* and *Herring v. United States* again pose the question what the rule's future is, or rather, whether it has a future.

KEYWORDS: herring, hudson, exclusionary rule, Fourth Amendment, jurisprudence, history, mapp, weeks

THE EXCLUSIONARY RULE REDUX—AGAIN

Lloyd L. Weinreb*

According to whether one starts counting with *Weeks v. United States*,¹ decided in 1914, or *Mapp v. Ohio*,² decided in 1961, we are closing in on fifty or one hundred years since the exclusionary rule was made part of Fourth Amendment jurisprudence. One would have thought that there has been more than enough time for the Supreme Court to have clarified what the rule is about and whether it is worth having. In broad outline, at any rate, the rule is not very complicated: if the police obtain evidence by means that violate a person's rights under the Fourth Amendment, the evidence is not admissible against that person in a criminal trial. The basic provision has been extended to violations of other constitutional rights³ and freighted with innumerable epicycles, and epicycles on epicycles, but it is at bottom straightforward. Clarification has not happened. Instead the exclusionary rule survives in a kind of doctrinal purgatory, neither accepted fully into the constitutional canon nor cast into the outer darkness like "separate but equal"⁴ and, in criminal procedure, the right to counsel before formal proceedings have begun.⁵ It survives, but its reach is uncertain, its rationale questioned, and its value doubted.

There has been no shortage of cases in which those issues are presented and discussed, usually in conflicting opinions that together leave no argument unsaid. It is something of a parlor game—with as much serious consequence—to browse through all that has been written for and against the exclusionary rule and extract just those words and phrases that support whatever position one has decided to take. Articles analyzing its constitutional underpinnings, ruminating about its likely effects, or studying its ac-

* Dane Professor of Law, Harvard Law School.

1. 232 U.S. 383 (1914).

2. 367 U.S. 643 (1961).

3. *United States v. Wade*, 388 U.S. 218, 240-41 (1967) (lineups; Sixth Amendment); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (privilege against compulsory self-incrimination).

4. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. *See Escobedo v. Illinois*, 378 U.S. 478 (1964). *But see Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

tual effects abound. Symposia, like this one, flourish.⁶ Every few years, the demise of the rule is reported, but it then turns out that reports of its death were exaggerated. So here we are, at it again, prompted this time by two cases that follow the usual pattern but seem to make a more frontal, more threatening assault on the rule than we have been accustomed to, and so pose, yet again, the question what its future is, or rather, whether it has a future.

In view of the current fashion for behavioral studies of the judiciary, especially the Supreme Court,⁷ there may be some temptation to explain the Court's on-again, off-again attitude toward the exclusionary rule as nothing more than a consequence of the Court's shifting membership, hardline liberals and hardline conservatives never gaining more than an incomplete and impermanent ascendancy. There has, certainly, been a marked unwillingness to find the rule's common ground, perhaps more so or more enduringly so, than about other controversial matters. But even taking that into account, the course of the rule's jurisprudence is remarkable. All the more so, because it is not a "hot button" issue. Abolishing the exclusionary rule—a possibility, it should be noted, that presumably depends constitutionally on what the Court has from time to time offered as the rule's rationale—is regularly proposed, but, despite its detractors' prophecies of gloom and doom, I doubt that the public cares very much either way. Although carefully phrased questions elicit predictable responses, elections are not won or lost over the exclusionary rule. And, in fact, as the rule is now understood and applied, there is little convincing evidence that it makes much difference either way. To a considerable extent, the rule is a distinctly legal matter, not political, social, or economic. It gives us legal scholars something to do—keeps us, as it were, off the streets.

The modern history of the rule begins with *Mapp*. But its early history, before *Mapp*, contained a preview of things to come. The exclusion of evidence was embraced but not wholeheartedly, rejected but not definitively. As one would expect, the Court's opinion in *Weeks*, where it all began, tilted toward the rights-based approach. It observed that if a person's property could be seized unlawfully and retained for use as evidence against its possessor, after an application for its return has been made,

the protection of the Fourth Amendment . . . is of no value, and, so far as those placed are concerned, might as well be stricken from the Constitu-

6. This Essay was written as part of the Fordham Urban Law Journal's Symposium on "The Future of the Exclusionary Rule and the Aftereffects of the *Herring* and *Hudson* Decisions."

7. For a survey of such studies and commentary on them, see RICHARD A. POSNER, HOW JUDGES THINK 19-56 (2008).

tion. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution⁸

This strong language was weakened inferentially by the Court's acknowledgment that courts generally did not inquire into the manner in which competent evidence was obtained, and that had the illegality of the seizure in *Weeks* not been established before the trial began, precedent dictated that the trial not be stopped to resolve that collateral issue and that the evidence be admitted.⁹

*Wolf v. Colorado*¹⁰ looked the other way, but again, not clearly. Because *Wolf* was a state case and the Fourth Amendment had not yet been incorporated into the Due Process Clause, the attention of Justice Frankfurter, who wrote the opinion, was drawn to the latter issue and not to the Fourth Amendment itself. What he said ("stoutly adher[ing]" to *Weeks*) was that the exclusionary rule was not express in the Fourth Amendment but was, rather, "a matter of judicial implication."¹¹ That in itself was not so damaging; a great deal of constitutional law is a matter of judicial implication, and the first part of the Amendment, which declares the right that the Amendment protects, is, after all, an extraordinarily compressed statement of abstract principle. Frankfurter went on at length, however, to deprecate the value of exclusion and to suggest strongly that the right and the remedy were separate. On the other hand, focusing on the issue of incorporation, he said also that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."¹² One might have found some room to argue that if a state were systematically to deny any effective remedy for violation of the right, that would be "affirmatively to sanction such police incursion into privacy," and, so doing, "would run counter to the guaranty of the Fourteenth Amendment."¹³ Then what?

A mere five years later, there was another turn of the screw. In *Irvine v. California*, another state case, police secretly entered the defendant's house on several occasions to install a microphone, listened to conversations in the house for more than a month, and then entered the house to arrest the

8. *Weeks v. United States*, 232 U.S. 383, 393-94 (1914).

9. *See id.* at 395-96.

10. 338 U.S. 25 (1949).

11. *Id.* at 28.

12. *Id.* at 27-28.

13. *Id.* at 28.

defendant and searched without a warrant.¹⁴ A majority of the Court, following *Wolf*, concluded that although the conduct of the police was flagrantly unlawful, the admission of evidence so obtained did not violate the Due Process Clause, and it need not be excluded. Frankfurter, however, disagreed. Putting *Wolf* aside, he asserted that *Rochin v. California*,¹⁵ another opinion that he had authored two years earlier, dictated that the evidence be excluded because the manner by which it was obtained “offend[s] elementary standards of justice.”¹⁶ *Irvine* was in truth a skirmish in the larger battle over incorporation of the whole Bill of Rights into the Due Process Clause of the Fourteenth Amendment, a battle Frankfurter and Justice Black were then waging,¹⁷ with the other Justices mostly standing on the sidelines. Although the exclusionary rule itself was not involved, *Irvine*, following *Wolf*, considerably muddled matters. For there was Frankfurter, in dissent, arguing that the evidence should, indeed, have been excluded.

And then there is *Mapp*. It was itself an odd case, hardly likely to make much of a stir. The Court heard Mapp’s appeal to consider a First Amendment issue.¹⁸ The evidentiary issue was not raised in Mapp’s brief, and when her attorney was asked at oral argument if he was asking the Court to overrule *Wolf*, he said that he had never heard of the case.¹⁹ The American Civil Liberties Union, in its brief as amicus, raised the evidentiary issue in passing. If the due process rationale that Frankfurter had stated in *Rochin* was good law, *Mapp* was an obvious case for its application; the unlawful conduct of the police, described in detail in Justice Clark’s opinion for the Court, was prolonged, included physical abuse, as in *Rochin*,²⁰ and, evidently, knowingly unlawful. But Justice Clark had indicated his disapproval of that “*ad hoc*” approach in a concurring opinion

14. 347 U.S. 128, 131 (1954).

15. 342 U.S. 165 (1952).

16. *Irvine*, 347 U.S. at 148 (Frankfurter, J., dissenting). *Rochin* had established the so-called “shock the conscience” test, to the effect that evidence obtained by police conduct so egregious that it shocked the conscience was to be excluded as a matter of due process, without regard to the Fourth Amendment. *Rochin*, 342 U.S. at 172.

17. See *Rochin*, 342 U.S. at 168-74 (Frankfurter, J., dissenting), 174-77 (Black, J., concurring); *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring), 68 (Black, J., dissenting).

18. 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, 1367 (1983).

19. *Id.*

20. In *Irvine*, the reason given by Justice Jackson with the concurrence of three other Justices for not applying *Rochin* was that, however “obnoxious” the police conduct in the latter case, it did not involve physical abuse. *Irvine*, 347 U.S. at 133.

in *Irvine*,²¹ and the assignment of the majority opinion to him made it unlikely that *Rochin* would be followed. In fact, when the opinion was assigned to Clark, it was understood that the Court would reverse Mapp's conviction on the basis of the First Amendment argument. Clark later obtained the agreement of a majority to overrule *Wolf*.²²

Clark referred to cases describing the *Weeks* exclusionary rule as a part of the constitutional right, but at the same time he emphasized its deterrent function. It was, he said, "a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'"²³ Twice declaring that it was not "basically relevant,"²⁴ he considered the States' experience since *Wolf* at some length. Then, reverting to the rights-based approach, he observed that not to exclude evidence unlawfully seized "is to grant the right but in reality to withhold its privilege and enjoyment."²⁵ Reading Clark's opinion, one could be sure that *Wolf* had been overruled, but whether because the Fourth Amendment required it or on empirically validated utilitarian grounds was impossible to say.

The matter was not made easier by three concurring or dissenting opinions,²⁶ variously endorsed by six of the nine Justices. Justice Black, never a fan of the Fourth Amendment, concurred. He said that in his view "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."²⁷ But, he said, the Fourth and Fifth Amendments considered together required the exclusionary rule.²⁸ Justice Douglas, concurring, evoked *Weeks*, saying that the exclusion of evidence unlawfully seized was required lest the right itself be "a dead letter."²⁹ Justice Harlan, after objecting to the

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

22. Stewart, *supra* note 18, at 1368.

23. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

24. *Id.* at 651, 653.

25. *Id.* at 656.

26. There was also a brief memorandum by Justice Stewart declining to express any view on the merits because he thought that the matter was not properly before the Court. *Id.* at 672 (Stewart, J., mem.).

27. *Id.* at 661 (Black, J., concurring). Justice Douglas concurred. He also joined the opinion of the Court and wrote a concurring opinion of his own. *Id.* at 666 (Douglas, J., concurring).

28. *Id.* at 662. So far as I am aware, except for Justice Douglas's concurrence in *Irvine*, no other Justice has endorsed Black's explanation of the exclusionary rule. Black rejected *Rochin*'s shock-the-conscience test altogether.

29. *Id.* at 670 (Douglas, J., concurring) (quoting *Wolf v. Colorado*, 338 U.S. 25 (1949) (Rutledge, J., dissenting)).

Court's consideration of the issue without briefs or oral argument,³⁰ rejected the incorporation of the Fourth Amendment into the Due Process Clause and left it at that.³¹ Noting that *Wolf* had been decided only twelve years before, with the concurrence of three of the five Justices who now composed the majority in *Mapp*, he observed with unintended irony: "It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law."³²

A good deal of the ambivalence and confusion that surrounded the exclusionary rule during the dozen years between *Wolf* and *Mapp* is explained by the debate over incorporation, which raised larger issues. After Frankfurter retired in 1962, the Court quickly embraced Black's view favoring incorporation, in *Gideon v. Wainwright* in 1963.³³ Thereafter, for the rest of the decade, in a series of cases the Court incorporated all but two of the provisions of the Bill of Rights having to do with criminal cases.³⁴ (The interment of Frankfurter's anti-incorporation view made the "shock the conscience" test that he had championed in *Rochin* and *Irvine* moribund as well. After *Mapp*, the *raison d'être* of that test—to justify the exclusion of evidence without an exclusionary rule—was gone.) Frankfurter had won the battles over incorporation, but Black won the war. The exclusionary rule provided the jurisdictional basis for the Court's intervention in cases involving police practices and was not generally questioned. Then, starting with *United States v. Calandra*³⁵ in 1974, a new majority on the Court looked with less favor on the rule. It downplayed the rule's rights-based

30. *Id.* at 676-77 (Harlan, J., dissenting).

31. *Id.* at 678-86.

32. *Id.* at 677.

33. 372 U.S. 335 (1963). Black, who wrote the opinion for the Court, was careful to state the underlying rationale of the extension of the right to counsel to state cases ambiguously, in a manner that those who did not subscribe to incorporation might accept.

34. *See*, in chronological order, *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compulsory self-incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation of witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy). The right to a public trial and the prohibition against cruel and unusual punishments had been "absorbed" into the Due Process Clause earlier. *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishments); *In re Oliver*, 333 U.S. 257 (1948) (public trial). The two provisions that have not been incorporated are the grand jury provision in the Fifth Amendment and the bail provision in the Eighth Amendment. It is generally presumed that the latter is, in fact, incorporated, although the Court has not quite said so. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *Sistrunk v. Lyons*, 646 F.2d 64, 67 (3d Cir. 1981).

35. 414 U.S. 338 (1974).

justification and emphasized its deterrent aspect, which has remained the dominant view ever since.

If incorporation was the *éminence grise* in the debate over the exclusionary rule in the 1950s, the so-called revolution in criminal process played that role in the succeeding decade, and the so-called counter-revolution in the decades since. In some ways, the exclusionary rule was an accidental hostage to larger forces: first the Court's determination to address the gross failure of the States' supervision of their own police practices, which the decline of federalism in the wake of the Depression, the New Deal, and World War II had made intolerable, and later, the reaction to what was perceived as excessive unrest and lawlessness, engendered by the empowerment of newly assertive social groups and opposition to the war in Vietnam. Those forces played out on a larger stage than the Court could readily occupy. The admission or not of evidence, on the other hand, was something that courts did all the time, for which they were plainly well-suited. In that context, the exclusionary rule's history is comprehensible, even if its rationale is obscure.

There is very little that is truly novel in *Hudson v. Michigan*³⁶ or *Herring v. United States*.³⁷ The opinions in both cases trot out familiar arguments wrapped in familiar rhetoric and manipulate them in familiar ways. Still, they are not just the "same old, same old," and they merit our attention. In *Hudson*, the majority opinion by Justice Scalia offered two reasons why evidence seized in the defendant's house need not be excluded, even though the police entered the house without complying with the "knock-and-announce" requirement, which made the entry and the search of the house unlawful.³⁸ The first reason referred to the statement in *Wong Sun v. United States*, decided two years after *Mapp*, that even if one could trace a causal line from unlawful police conduct to the seizure of evidence, the "taint" of the illegality might be so "attenuated" that the evidence need not be excluded.³⁹ There was nothing new or startling about the proposition that the chain of "but for" causes linking the illegality and the evidence might simply be too long for the former to count as the cause of the latter. It reflects ordinary speech about the causal relation generally; at some point, we stop referring to one event as the cause of another and refer in-

36. 547 U.S. 586 (2006).

37. 129 S. Ct. 695 (2009).

38. See *Hudson*, 547 U.S. at 588-602.

39. 371 U.S. 471, 487 (1963) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939) (internal quotation marks omitted)). There was an indication in the Court's opinion that a typical case in which the taint is not attenuated or "dissipated" is one in which the police "exploited" the illegality. *Id.* at 487.

stead to an event closer in time and circumstance to the latter. That understanding would have been part of the inquiry dictated by the exclusionary rule whether or not it was stated explicitly, simply as part of what we mean by causal connection. Like causation generally, it is a matter of fact, albeit difficult to pin down, and not subject to empirical verification. The notion of attenuation was applied after *Wong Sun*, but necessarily ad hoc. During periods when Fourth Amendment interests were favored or before a favorably disposed judge, the taint of illegality might persist a little longer; when Fourth Amendment interests were in decline or before an unfavorably disposed judge, the taint was attenuated more quickly. The issue was generally resolved at the trial level and left there.

In *Hudson*, Justice Scalia took the notion of attenuation in a new direction, saying that however close the causal link, the taint of illegality is attenuated if suppression would not serve “the interest protected by the constitutional guarantee that has been violated.”⁴⁰ I do not think that the language of *Wong Sun*, on which Justice Scalia draws, easily bears that construction.⁴¹ But that aside, it is at least not obvious that an unlawful act of the police should be disassembled into its component parts and the interest protected by each part considered in isolation from the rest. The search that turned up evidence against Hudson was initiated by an unlawful entry. Why is that not enough? The additional requirement that Justice Scalia imposes has no apparent relevance to any of the general purposes usually asserted for the exclusionary rule: to vindicate the right that the unlawful police conduct infringed, to avoid compromising the integrity of the trial court—both purposes that Justice Scalia does not care much about in any event—and to deter similar unlawful conduct in the future—in Scalia’s view, the only purpose.⁴² Bare statement of the exclusionary rule perhaps permits the construction that Justice Scalia gives it, but the only justification for doing so is to confine the rule as narrowly as possible.⁴³

The second, independent reason given for not applying the exclusionary rule is that the costs of doing so outweigh the benefits.⁴⁴ This is thoroughly plowed ground, and the harvest in *Hudson* contains little that is new. As a rule, when the Court concludes that evidence should be excluded, it adopts

40. *Hudson*, 547 U.S. at 593.

41. The point that Justice Scalia makes is related to, but not the same as, the rule that evidence obtained unlawfully need not be excluded if the police would inevitably have discovered it anyway. See *Nix v. Williams*, 467 U.S. 431, 432 (1984).

42. *Hudson*, 547 U.S. at 594-99.

43. Justice Scalia cited three cases as precedents. Justice Kennedy, who provided the majority’s fifth vote, pointedly expressed his disagreement about two of them. *Id.* at 602, 604 (Kennedy, J., concurring).

44. See *id.* at 594-600.

the rhetoric of rights and emphasizes the injury to the defendant.⁴⁵ If, as in *Hudson*, it concludes that evidence should not be excluded, it adopts the rhetoric of utility and emphasizes the rule's deterrent function.⁴⁶ The fullest exploration of both positions is the debate between Justice White for the Court and Justice Brennan, dissenting, in *United States v. Leon*,⁴⁷ in which the Court established the so-called good-faith exception to the rule. If exclusion's only function is to deter police misconduct, the exception makes sense. In *Leon*, the police had investigated extensively and on the basis of their investigation had obtained a search warrant, which was later invalidated for lack of probable cause.⁴⁸ Their conduct, albeit mistaken, was not just lawful, it was exemplary; there was nothing to deter. Leon's rights under the Fourth Amendment had been violated and admitting the evidence might seem as though the Court were letting the government (serendipitously, to be sure) take advantage of the violation. But again, if deterrence is all that counts, that might not matter. That utilitarian perspective had been prominent in some earlier opinions involving another stage in the criminal process⁴⁹ or a noncriminal proceeding,⁵⁰ but *Leon* was the first case in which it was applied to the admission of evidence as part of the prosecution's case in a criminal trial.⁵¹ The Court's opinion in *Leon* elicited a lengthy dissenting opinion by Justice Brennan which remains the strongest and clearest statement of the rights-based approach.⁵² He emphasized the integral relationship between the police and the prosecutor, who together assemble the case against a defendant, and the courts, which determine his guilt. Justice Brennan rejected the view that "the substantive

45. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 11 (1977) ("In this case, important Fourth Amendment privacy interests were at stake.")

46. E.g., *Hudson*, 547 U.S. at 591 ("The exclusionary rule generates 'substantial social costs,' which sometimes include setting the guilty free and the dangerous at large.") (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)); *Leon*, 468 U.S. at 907 ("The substantial social costs exacted by the exclusionary rule . . . have long been a source of concern.")

47. 468 U.S. 897 (1984).

48. *Id.* at 901-03.

49. See *Stone v. Powell*, 428 U.S. 465 (1976) (habeas corpus proceeding); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury proceeding). It had also been used to justify a strict requirement of standing that allowed a defendant to move to suppress evidence only if he were the person whose rights had been violated. E.g., *Rakas v. Illinois*, 439 U.S. 128 (1978).

50. See *United States v. Janis*, 428 U.S. 433 (1976) (civil tax proceeding).

51. The Court had previously allowed the prosecution to use unlawfully seized evidence only to impeach a defendant's own testimony. See, e.g., *United States v. Havens*, 446 U.S. 620 (1980); *Walder v. United States*, 347 U.S. 62 (1954). That exception to the exclusionary rule did not extend to the testimony of a defense witness other than the defendant. *James v. Illinois*, 493 U.S. 307 (1990).

52. *Leon*, 468 U.S. at 928-60 (Brennan, J., dissenting).

protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual's privacy and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police."⁵³ With respect to the deterrence argument itself, Brennan questioned the majority's assessment of the costs and benefits of exclusion but also challenged the cost-benefit accounting more broadly:

By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics.⁵⁴

It is difficult to quarrel with that conclusion. But unless one subscribes to Brennan's view of the purposes of the exclusionary rule, his own statement might be read as a preface to abandoning it. Brennan understood that. He foresaw that *Leon*, not very significant in itself because it was limited to the relatively rare case of a search on a warrant, would be extended to warrantless searches as well, and he speculated that the majority was bent on overturning the exclusionary rule altogether.⁵⁵ That has not happened, but the decisions in *Hudson* and *Herring* come close.

Justice Scalia's description in *Hudson* of the costs and benefits of exclusion supports Brennan's skeptical view of that approach. Scalia waxes eloquent about the costs. There is "always," he says, "the grave adverse consequence" of "the risk of releasing dangerous criminals into society."⁵⁶ And beyond that, he says, applying the rule to failures to knock and announce would generate a "constant flood" of motions to suppress; because of the indeterminacy of the knock-and-announce requirement, "[c]ourts would experience as never before"⁵⁷ the need for extensive litigation to resolve the question of exclusion. Furthermore, officers making an arrest and wanting to comply with the law (or, at any rate to avoid exclusion) would wait longer than necessary, which would "produc[e] preventable violence against officers in some cases, and the destruction of evidence in many others."⁵⁸ He is much more dubious about the possible benefits. An officer,

53. *Id.* at 935. Justice Brennan had written in a similar vein in a dissenting opinion in *United States v. Calandra*, 414 U.S. 338, 355 (1974).

54. *Leon*, 468 U.S. at 943 (Brennan, J., dissenting).

55. *Id.* at 928-29, 959. He made a similar speculation in *Calandra*. 414 U.S. at 365 (Brennan, J., dissenting).

56. *Hudson v. Michigan*, 547 U.S. 586, 595 (2006).

57. *Id.*

58. *Id.*

he says, has no incentive whatever to violate the knock-and-announce requirement—he can expect to achieve “absolutely nothing”—except to prevent the destruction of evidence and avoid “life-threatening resistance by occupants,”⁵⁹ a reasonable suspicion of which suspends the requirement anyway. If a deterrent is needed, the possibility of a civil action against the offending officer is available: “As far as we know, civil liability is an effective deterrent here.”⁶⁰ In addition, “the increasing professionalism of police forces,” “a new emphasis on internal police discipline,” and “increasing use of various forms of citizen review” reduce the need for an external deterrent.⁶¹ In sum, the available deterrents to knock-and-announce violations are “incomparably greater”⁶² than they were when *Mapp* was decided. Aside from citations to a few books describing police administration in general terms, Justice Scalia’s assertions are supported only by quotations selected from the Court’s own prior statements.

Justice Breyer’s dissenting opinion is not much better. He gives the knock-and-announce requirement a larger place in the rights protected by the Fourth Amendment than Justice Scalia does. So far as the exclusionary rule is concerned, however, he accepts the premise that its “driving legal purpose” is deterrence.⁶³ But aside from noting that cases reporting knock-and-announce violations are “legion,”⁶⁴ he offers little affirmative evidence that stringent application of the exclusionary rule would make much difference. (The reported cases were presumably decided when the rule was, or was thought to be, applicable.) He too relies mainly on selected quotations from the Court’s opinions.

Writing only for himself, in a short concurring opinion, Justice Kennedy takes the position, evocative of *Wolf*, that the knock-and-announce rule is “linked to ancient principles in our constitutional order” and that it is a “serious matter” when police disregard it, but that “suppression is another matter.”⁶⁵ Suppression is not appropriate in this instance, he concludes, because the failure to knock and announce “cannot properly be described as having caused the discovery of evidence.”⁶⁶ Although this brief statement refers only to the causal connection between the illegality and the seizure of evidence, the summary dismissal of such a connection evidently is

59. *Id.* at 596.

60. *Id.* at 598.

61. *Id.* at 598-99.

62. *Id.* at 599.

63. *Id.* at 608 (Breyer, J., dissenting); *see also id.* at 604.

64. *Id.* at 610.

65. *Id.* at 602, 603 (Kennedy, J., concurring).

66. *Id.* at 604.

aligned with Scalia's disassembly of the requirements of a lawful search into its component parts and their distinct purposes. Kennedy's vote was necessary to the outcome. The reservations and doubts that he expresses about the reasoning, if not the result, of the majority opinion make *Hudson* a frail augury of the exclusionary rule's future course. All the same, for four Justices and perhaps for five, *Hudson* signals a determination to continue whacking the rule by a combination of logic-chopping, dubious assertions of fact, selective precedents, and high-sounding but, in the event, empty rhetoric.

Herring continues more forcefully and directly along the same path. In itself, the case is not very significant. Herring was arrested on the basis of an error in police records.⁶⁷ Although there is abundant anecdotal evidence that police record-keeping is not all that it might be, neither the majority nor the dissenting opinion gives any indication of how often an inaccurate police record leads to an invalid arrest that turns up evidence necessary for a conviction. Since the arrest is not valid, the discovery of evidence is presumably serendipitous. It is just worth noting, however, that it was not entirely serendipitous in this case: the officer who initiated the records check was involved in a personal dispute with Herring and hoped that the records would give him a basis to make an arrest and, therefore, search Herring and his truck.⁶⁸

The reason for our interest in the case has to do not with its particular facts but with the generalities that the facts provoked. Chief Justice Roberts's opinion disposes of the prior debate about the underpinnings of the exclusionary rule in a few brief sentences, indicating that for him and the four concurring Justices, the debate is effectively over. Exclusion, he says, is "not an individual right" and is appropriate only if it "result[s] in appreciable deterrence."⁶⁹ Furthermore, the fact that there will, or may be, some deterrent effect is not enough; the benefit of exclusion must outweigh the cost. And benefits and costs should be considered both in gross—in cases of that kind—and in detail—in the particular case.⁷⁰

The calculation of costs and benefits is eerily general and consists mostly of references to the facts of other cases and what the Court itself said about them. Pretermitted inquiry whether a defendant might have been, or might be, convicted anyway, it observes that "the principal cost . . . is, of

67. *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

68. *Id.* at 705 (Ginsberg, J., dissenting).

69. *Id.* at 700 (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984) (internal quotation marks omitted)).

70. *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987)).

course, letting guilty and possibly dangerous defendants go free.”⁷¹ As for benefit, the Court observes, reasonably enough, that the threat of exclusion has the most deterrent effect when the conduct of the police is deliberate and flagrantly unlawful, and the least—if any—when police believe that their conduct is lawful.⁷² On their own terms, such calculations are unexceptionable; a threat deters someone only if he is aware that the threat is directed at him. But they wash out of consideration what, in the context of police work, is likely to be the more common situation. Not least because the Court itself has had such a difficult time explaining and clarifying Fourth Amendment law, and also because police administrators and local officials characteristically emphasize the value of arresting offenders and depreciate the value of protecting their rights, officers must often find themselves thinking that conduct that they contemplate is probably but not certainly all right, or that it is probably but not certainly not all right. If the exclusion of evidence is a deterrent at all, one would expect that, forcefully applied, it would have an effect in many such cases.

The large change that *Herring* makes is that it applies the calculation of costs and benefits not only to the *type* of case before it but also to the specific, concrete facts. *Leon*, it is true, had required courts to consider the specific facts of a case, but only with respect to the officer’s good faith, and even then, only if good faith was clearly indicated because the officer had obtained a search warrant.⁷³ *Herring* goes a great deal further. Even in the absence of good faith, a court is directed to calculate the costs and benefits of exclusion, with a strong suggestion that the benefits are likely to prevail only if the officer(s) are found to have acted knowingly and deliberately in violation of the law. A trial judge following that lead, and having to decide whether to exclude evidence probative of guilt, will find it easy to weigh the immediate and direct cost of exclusion (eminently including the risk that a “guilty and possibly dangerous” defendant will go free⁷⁴) more heavily than the speculative and indirect benefit of better police behavior thereafter, a factual determination easy to affirm on appeal. If, as the Court evidently anticipates, evidence is excluded less often, that will, of course, reduce the deterrent effect of the exclusionary rule further.

So where are we? Justice Brennan’s dire prediction in *Leon*, that the good-faith exception to the exclusionary rule would be extended to warrantless searches, has been fulfilled, although not in just the way that he anticipated. Whether an officer has obtained a warrant or not, so long as

71. *Id.* at 701.

72. *Id.* at 701-02.

73. *See supra* text accompanying notes 47-54.

74. *See supra* note 71 and accompanying text.

there is not strong evidence that his conduct was deliberate or reckless, the calculation of the costs and benefits of exclusion along the lines indicated in *Herring* will give a trial judge cover for the admission of probative evidence, which is likely to be his individual preference anyway. Taking a longer view, the law is roughly where it was under the rules of *Wolf* and *Rochin*, as Frankfurter, author of both opinions, understood them. Exclusion is not automatic but is reserved for evidence obtained by police conduct that is sufficiently “shocking” and out of the ordinary to call for a response.⁷⁵

Is that an appropriate outcome after fifty or a hundred years of mulling the matter over? I doubt that there is anything more that can usefully be said about the abstract question whether the exclusionary rule is an integral part of the Fourth Amendment right or is rather a collateral issue affected by utilitarian considerations. It is, at any rate, certain that nothing can be said that will for the present affect the course of decisions. Abstractly, there are no rules that prescribe generally when and how an act is separated from its consequences. Concretely, the police practices that are gathered under the rubric “search and seizure” are certainly more respectful of individuals’ rights today than they were when *Wolf* was decided, although just as certainly we are not as well off as Justice Scalia speculated we are in *Hudson*. If, on one hand, preservation of the rule means that a criminal sometimes goes free, its abandonment, on the other hand, would disconnect the Fourth Amendment from its most visible practical protection.

Whichever of the asserted purposes of the exclusionary rule one favors, the current state of affairs is regrettable. The Court’s repeated downplaying of the rule and unwillingness to apply it as a remedy for a concrete violation of rights has the effect of making the rights themselves seem less urgent and in some, probably considerable, measure implicates the courts in their violation. That, in turn, reduces the deterrent effect of the rule. There is reason to believe that during the 1960s, when the courts not only applied the rule but championed it, local police departments and individual officers regarded respect for individual rights as a mark of a professional police officer.⁷⁶ The message that the courts, especially the Supreme Court, communicate now is quite different. On the rare occasions when evidence is excluded, it is done grudgingly and treated as an unwelcome and unhelpful interference with the police “who were only trying to do their job.” We know very little about how law, constitutional decisions of the Supreme Court in particular, is heard and enters the lives of ordinary

75. See *supra* note 16.

76. See, e.g., Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 28-30 (1980).

people. But there is little reason to doubt that the Court's own attitude is reflected outside the courtroom and picked up, especially by those whose conduct is in question.

So also, the fact that the exclusionary rule is typically applied long after the allegedly illegal police conduct occurred, in the course of an adversarial proceeding in which there is a winner and a loser and either the police officer or the defendant will look like a "mug," deprives the rule of much of its normative force. At a suppression hearing, the facts have hardened into the case for the prosecution and the case for the defense and have become remote from the facts on the ground. It should not surprise us that police officers are detached from the inquiry and see the exclusion of evidence not as a direct commentary on, and consequence of, their own conduct but, again, as unwelcome interference from without. In recent years, the Supreme Court's rhetoric, occasional flights of eloquence in praise of the Fourth Amendment notwithstanding, has done little to counteract this perception of the police and much to confirm it. Whether the rule, convincingly enforced and approved by the courts as well as local political leaders and chiefs of police, would be an effective deterrent to violations of individuals' rights is something we know very little about.

Where is the rule headed? One of the more puzzling aspects of the exclusionary rule's history has been its tenacity. For some years now, a plurality, and possibly a majority, of the Justices have generally disfavored the rule. It has been opposed by the Department of Justice.⁷⁷ Bills have been introduced in Congress to overturn it.⁷⁸ I doubt that the rule is so fixed in our consciousness as to be invulnerable.⁷⁹ It is not part of the script of innumerable television shows, like *Miranda v. Arizona*.⁸⁰ In view of all that the Court has said, especially clearly in *Hudson* and *Herring*, it would be a simple matter for the Court to abandon the rule, reserving exclusion for exceptional cases of flagrant lawlessness, "in the interest of justice." That would take us back to the situation in state courts before *Mapp*, while the "shock the conscience" test was still viable. One might see *Herring* as a

77. See, e.g., OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE (1986), reprinted in 22 U. MICH. J.L. REFORM 573 (1989).

78. E.g., Exclusionary Rule Limitation Act of 1989, H.R. 3918, 101st Cong. § 301 (2d Sess. 1989); Exclusionary Rule Limitation Act of 1995, S. 54, 104th Cong. (2d Sess. 1995). If it is only one deterrent among others, such action by Congress would not raise a constitutional issue.

79. Cf. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (discussing the precedential weight of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

80. 384 U.S. 436 (1966).

harbinger of that development. Indeed, as I have said, I think that is in substance, if not in form, where we are now.

Nevertheless, I doubt that will happen. The exclusionary rule is the key to the Court's jurisdiction over federal and, more important, state criminal proceedings. Unless there is some plausible claim that evidence should have been excluded under the Fourth or Fifth or Sixth Amendment, there is generally no basis for the Court to hear a criminal case. I do not think the Court will deprive itself of jurisdiction over so large an area, a jurisdiction, moreover, that it evidently enjoys exercising. Instead, I expect the Court to retain the rule, letting it limp along ineffectively, regularly dismissing it and on rare occasions applying it, just often enough to call for another symposium.