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DUE PROCESS AND THE EXCLUSIONARY RULE: INTEGRITY AND JUSTIFICATION

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In the fourth amendment case prioritizing and development, most of the credit is due to the work and research produced for me by a former student, Blan L. Teagle, Esquire.

I. INTRODUCTION

Historically an inherent conflict has existed between the exercise of governmental power and the interests of individuals in minimizing the effects of that exercise upon them. The debate has evolved around the proper use of the police power of government. To ensure limited encroachment upon the lives of private persons, the courts devised various tests of reasonableness. At the common law, these tests were originally employed to check the arbitrary and lawless actions of the crown. Courts tested the limits upon governmental excess under a due process standard. In a civilized legal system, every person is entitled to fair treatment from government if the government attempts to deprive those persons of a cognizable liberty or property right.

The genealogy of due process is one of multiple parentage. Procedural elements can be found in the Magna Carta and many of the advances in human rights in the seventeenth century. Substantive origins, although less definite, may nevertheless claim roots in the clashes giving rise to the Magna Carta, the Petition of Rights, and the ultimate supremacy of the English Parliament. In England, however, supremacy of law was secondary to supremacy of parliament. Lord Coke's supremacy of law only flourished in the colonies under due process.

Due process of law has become so important to the ordering of constitutional priorities that the late Lon Fuller labeled it the inner morality of law; the morality that makes law possible.[1] For Fuller, eight conditions of inner morality are necessary for the very existence of law: (1) laws must be generalized as rules; (2) laws must be made public; (3) laws must impose liability for prospective, not retroactive, acts; (4) laws must be clear, not vague; (5) laws must avoid practical contradictions; (6) laws should not require the impossible; (7) laws should be sufficiently stable in order to insure reliance; and (8) laws must be implemented according to their terms.[2] Fuller presented these conditions as the very touchstone of law. They are fundamental and procedural, and conformity to them is a precondition to the existence of a civilized legal system. They are found in the United States Constitution under the bold heading due process. Without due process, application of the rules we live by would be less than meaningful.

Due process is a critical element in our legal system — the foundation of rights. It identifies the goals and aims of government and

1. L. FULLER, THE MORALITY OF LAW 33 (1964).
2. *Id.* at 39.

modifies them when they are in conflict with foundational rights of individuals. The goal of due process is to specify a set of rights that implements claims necessary to promote the individual guarantees set forth within the foundational theories emerging from the Constitution.

One such foundational theory holds that persons are to be protected from unreasonable governmental interference, including that which occurs without physical intrusion. In *Katz v. United States*,[3] the Court concluded the Constitution protects, among other interests, invasions of recognizable privacy rights. In other words, the fourth amendment is exercised to protect those foundational rights that are also obtained within its language. Thus, protection recognizes a right of privacy and, as such, ensures security from "writs of assistance."[4] The fourth amendment is an essential component of the foundational theory of privacy because it is designed to ensure prohibition against unlawful governmental invasion of privacy of the person or the home.[5] Justice Frankfurter noted that historical evidence surrounding the drafting of the fourth amendment suggests no limits upon either "search and seizure" or "persons, houses, papers and effects."[6] Therefore, if reliable and reproducible facts are available, the fourth amendment will balance in favor of the governmental interest and allow the entry. For those instances in which independent judicial scrutiny is required and the facts are not reliable, or the invasion is otherwise in violation of the fourth amendment, the Court has devised a scheme of excluding "tainted evidence."

The history of the fourth amendment, thus, became the history of the warrant clause. The warrant clause was defined not by the right

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3. 389 U.S. 347 (1967).

4. It would appear that the primary abuse of the General Warrant and the Writ of Assistance was their indiscriminate quality. Because they were a license to search without any real cause, they were an affront to all who held the "rights of Englishmen" dear. *See* 2 T. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 247 (3d ed. 1882).

5. *See generally* Amsterdam, *Perspective on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). *See also* T. Baker, "The Right of the People to be Secure . . .": Toward a Metatheory of the Fourth Amendment (1986) (unpublished manuscript, Texas Tech. Univ.) (identifying the elements of a theory that would recognize the dualism of the fourth amendment: that "people have a right to be secure from government and from themselves"); Morrissette, *The Exclusion of Evidence Under the* Canadian Charter of Rights and Freedoms: *What to Do and What Not to Do*, 29 MCGILL L.J. 521 (1984) (urging that Canada adopt balanced principle of discretionary enforcement rather than a "shock to the conscience" test).

6. *See generally* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 20 (1966) (discussing Frankfurter's belief that the fourth amendment "was designed to prevent the recurrence of a specific historical grievance and that its meaning therefore did not change with the ebb and flow of events").

but by the wrong. The exclusionary rule came into being and, by analogy, began to service the fourth amendment warrant clause, in a specialized manner, as an equivalency of the procedural due process clause of the fifth amendment. As such, the exclusionary rule became fundamental to the condition of legality of the fourth amendment; a candidate for enshrinement within the inner morality circle. An understanding of the argument requires an analysis of the rule itself. The fourth amendment provides:

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

The amendment reflects a dual purpose within its fifty-four words. This duality has created tensions ever since courts began to interpret its language. It is axiomatic that judges have a duty to uphold the Constitution above and beyond any rules or regulations calling for exclusion or implementation. That duty involves the integrity of the Constitution and fidelity to its goal. The dual purpose reflected within the fourth amendment gives judges insight into its goal.

First and foremost, the fourth amendent serves as an article of faith; faith in our government's inner morality. Hence, invasion of individual rights should not occur without clear and articulated reasons published before a disinterested judicial officer. The judicial officer must then weigh the invasion of the person, home, papers, or effects against the more pragmatic concerns of government in its effort to protect itself and its citizens from those who would do violence to the good order of society. To avoid unreasonable invasion of humanity and privacy, the judicial officer must understand the premise by which fourth amendment theory operates. Theoretically, nothing more should be needed to ensure the integrity of this process, yet all too often the government or judicial officer fails to comprehend the premise and structure of the fourth amendment. When that occurs and an unreasonable invasion of humanity results, the claimed interest in privacy is thought to be so important that it becomes an end in itself. When invasion of privacy becomes an end in itself it must be directly resolved. If the government is the invader and the invaded is charged with criminal sanctions, the result is, for better or worse, exclusion of any tainted evidence obtained during the invasion.

Thus, the exclusionary rule requires the exclusion of evidence from the guilt determination phase of the criminal justice system. The exclusion of evidence occurs when a court determines that such evidence

was obtained in violation of the fourth amendment or in violation of the fourth amendment as incorporated into the fourteenth amendment. As noted, this rule reflects a philosophy that recognizes and demands governmental respect for persons, their houses, and their "papers and effects" while acknowledging a governmental right to seek and punish criminal behavior. The rule does not deter crime or free large numbers of guilty or dangerous criminals, but simply guarantees the integrity of the guilt determination process.

For over one hundred years, from the United States Supreme Court's initial flirtation with the exclusionary rule in 1886 to the Court's present term, exclusionary issues have stimulated an overwhelming number of cases and comments. The more recent cases, many of which probably were never intended to be candidates for protection under *Mapp v. Ohio*,[7] riddle the fourth amendment with less than impressive jurisprudential development. In fact, case law continues to avoid development of an underlying premise. Reality has failed to conform to theory and theory has neglected to inform reality. The most noteworthy aspect of a review of the cases and commentaries is their sheer volume. At best, the volume is stifling; at worst, it is counterproductive. Fourth amendment exclusionary analysis, presently and in the recent past, is less than majestic; judicial review is hypothesized by the individual record in a given case. The law as the Court's mistress has become the facts as the Court's child. Thus, the Court tends to generalize from facts rather than specialize in theoretical concepts. The instincts for constitutional adjudication of the fourth amendment have given way to a field study of criminal and police activity. Perhaps the impact of the volume of cases from various state systems has caused the Court disenchantment. One might suggest that if the Court had elected to forego review of state exclusionary complaints, the pure analysis of the fourth amendment would be as elegant today as in preincorporation times.

Recently, the Court heard arguments in *California v. Rooney*.[8] That case centered around the perplexing question of whether a reasonable expectation of privacy for purposes of fourth and fourteenth amendment protection extends to garbage placed in a communal trash bin of a multi-unit apartment complex. The lower court held that contents in a communal trash bin were not yet abandoned property

7. 367 U.S. 643 (1961) (making inadmissible in state courts all evidence obtained through unconstitutional search or seizure).

8. 175 Cal. App. 3d 634, 221 Cal. Rptr. (Ct. App. 1985), *rev. granted*, 55 U.S.L.W. 3247 (U.S. Oct. 14, 1986) (No. 85-1853).

that could be seized without either a warrant or probable cause. Nevertheless, the California court had sufficient good sense to uphold a search warrant produced after the fact of scavenging, and presumably unrelated thereto, thus permitting the state to again prosecute the defendants. The question at issue — the expectation of privacy in an area accessible to the public — was not dispositive of the ultimate issue and would have been best left for another day. Apparently, the unfulfilled promise of *Katz* will be subjected to a test of reasonableness, cost-benefit, or some other currently popular catch-all phrase in the next *Rooney* case. The Court's conclusion will provide answers to the trash bin issue but will, in all probability, ignore the methodology for reaching those answers.

The Court, in other words, seems to be more involved in quantity rather than quality. For example, another recent case captured the Court's fact imagination with the following record. On the evening of February 12, 1981, federal task force agents, although unable to obtain a search warrant, went to the object of their affidavit, the apartment of a private citizen, Andres Segura. At 11:15 p.m., Segura entered the lobby of his apartment building and was arrested by the waiting agents. The agents took Segura to his apartment and entered with him without requesting or receiving permission. Following a brief exchange with the other occupants, the agents conducted a "security check" of the apartment to ensure that no one else was there who could pose a threat to safety or who could destroy evidence. During the course of the extensive "security check," the agents found in plain view, accouterments of drug trafficking. After the security check, the agents placed another occupant, Luz Colon, under arrest. At that point, the officers conducted a search incident to Ms. Colon's arrest and found a loaded revolver in her purse. After Colon, Segura, and all others were removed to police headquarters, two agents remained in the apartment and awaited the search warrant. It arrived nineteen hours later. The Court, speaking through Chief Justice Burger in an exceptionally cynical opinion, disregarding the fabric of the exclusionary rule and its importance as an implementor of privacy rights and ignoring the nineteen hour takeover, concluded that the officers did not act in bad faith.[9]

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9. Segura v. United States, 468 U.S. 796 (1984). The assumption of the majority appears to be that police would not intentionally act in bad faith while investigating crime. *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 290.2 (1975) (determination of motion to suppress evidence). *Segura* makes a distinct shift from the Warren Court, which was much stricter in its scrutiny of police tactics. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

This cynical emasculation of a rule designed to ensure integrity of process is of little moment as far as the exclusionary rule itself is concerned, but is of great significance as far as an agency's endorsement of the illegal action of its officers. In fact, the Court in *Segura* refused to denounce illegal conduct and indeed, associated itself with the agency engaged in such conduct. This turn of events is even more troubling than the out of hand dismissal of the exclusionary rule. In *Segura*, the Court became a participant in illegal conduct and failed to function as a treasured institution designed to protect liberty and ensure constitutional integrity. The nature of the debate surrounding the exclusionary rule is clear: how does the Court view the position of the exclusionary rule within the hierarchy of values it seeks to protect? As Justice Brandeis stated in *Olmstead v. United States*:

> Experience should teach us to be most on our guard to protect liberty when the Government's surprises are beneficient. Those born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[10]

This article is an attempt to expand upon the idea of Justice Brandeis. In so doing, I hope to develop the topic of the conference within the exclusionary rule setting. My intent is not to plead for the dying rule, but rather to argue for a proper burial. To do so will require development of the rule, a discussion of how it achieved its status as the due process clause of the fourth amendment, and some observations as to what I perceive to be its central purpose — ensuring integrity within the guilt determination process.[11]

The Court's obsession with defining the exclusionary rule solely in terms of the wrong committed is puzzling. Lower courts appear more willing to grapple with issues, while the Supreme Court continues to occupy itself with exclusionary matters that are fact oriented and lack a perspective capable of identifying an underlying premise of constitutional significances. During this term alone, the Court has accepted

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10. 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

11. At present, the bulk of material analyzing the Supreme Court's role in exclusionary rule matters is so massive that it has become a delicate and valuable art for one simply to sift through the literature. *See, e.g.*, M. WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE (1982); Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

nine exclusionary rule cases for consideration.[12] Not one of these cases is a likely candidate for consideration within the context of the constitutional dualism that continues to tug at fourth amendment methodology.

The Court seems to be moving away from one of its institutional roles, that of serving as a buffer between other governmental agencies and people-participants in the social process. A brief look at the development of the constitutional components of the rule, as well as the Court's functionalist role in it, might facilitate an understanding of the present judicial preoccupation.

II. The Supreme Court's Unique Role in Limiting Power within Government

An essential element of formal constitutionalism is the limitation of government powers. The limitation is established through a predetermined set of rules, or if you will, an internal morality. These rules are supreme over all that is outside the constitutional framework. An agency has conferred upon it the power to ensure the limits of government and to channel governmental interference with individual liberties within predictable and well-established constitutional principles. The implied duty of the assigned agency, therefore, is to translate into effective and working reality those predetermined principles of humankind that are established as a part of the orderly process of constitutional government. If the Constitution is to endure without clutter, agencies of constitutional government must, as they have done in the past, continue to assume not only a creative posture, but a functional role that ensures constitutional integrity as well.

At least since *Calder v. Bull*,[13] the Supreme Court has struggled with its role, which is, in part, the articulation and implementation of certain constitutionally designed principles. In recent times, however, the Court's articulation of these principles seems to ignore the fundamental conditions of constitutionally established moral imperatives.[14] The first and foremost moral imperative in this constitutional

12. *See, e.g.*, Creighton v. City of St. Paul, 766 F.2d 1269 (8th Cir. 1985), *cert. granted sub nom.* Anderson v. Creighton, 106 S. Ct. 3292 (1986); Ortega v. O'Connor, 764 F.2d 703 (9th Cir.), *cert. granted in part*, 106 S. Ct. 565 (1985); Garrison v. State, 303 Md. 385, 494 A.2d 193 (1985), *rev'd sub nom.* Maryland v. Garrison, 107 S. Ct. 1013 (1987).

13. 3 U.S. (3 Dall.) 386 (1798). The first congress also struggled with the concept of judicial review. *See generally* Casto, *The First Congress' Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 26 B.C.L. Rev. 1101 (1985).

14. I think it is safe to say that the Court in redefining the political question doctrine in Baker v. Carr, 369 U.S. 186 (1962), also redefined its role in the political process. Prior to

republic is that the people have a right to choose their governmental leadership. The Court, of course, is not chosen democratically. Yet, while scholars have attempted to reconcile this disparity,[15] the Court has, with the acquiescence of the people, taken on the task of Republican Schoolmaster. This task requires judicial integrity and the avoidance of disrepute in the Court's interpretation and implementation of discovered constitutional principles. To do less would destroy confidence in the Court's ability to assume its constitutional imperative. The Court, by avoiding the taint of collusion, became a governmental reality[16] and evolved as the institution best suited to deal with difficult moral questions.

The Court's role has been and continues to be to search for constitutionally-accepted fundamental principles and to apply them appropriately to the specific question presented. Apparently, the people have accepted the Court as the intellectual starting point of their search to understand the principle of inner morality. This principle is constitutionally significant because it establishes the ground rules by which society conducts its affairs. Thus, we must look to the Court in order to better understand those elusive "fundamental conditions of legality."[17] The Court establishes the necessary constitutional methodology that must be satisfied before any institution can be judged substantively. The Court sets forth the constitutional premise upon which a structural theory must rest. Finally, the Court marks the theoretical and practical boundaries that limit both government and citizen.

With these observations in mind, the intent of this paper is to focus now upon the Supreme Court and its interpretation of inner morality. Inner morality, as used in this context, involves those conditions that must be met before the Court can contemplate the rules, rules designed for compliance. The characteristics of this inner morality

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Baker, the Court tended to keep away from the internal workings of the other branches of government. After *Baker*, the Court had begun a subtle move into the "political thicket." *See* Colegrove v. Green, 328 U.S. 549, 556 (1946). The bright line (if there ever was one) between representative democracy and the role of the Court had dulled considerably. *See also* L. FULLER, *supra* note 1, at 178 (after *Baker*, the Court will have to "tread a difficult middle course").

15. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970); L. LUSKY, BY WHAT RIGHT? (1975); Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977).

16. *See, e.g.*, Hazard, *The Supreme Court as a Legislature*, 64 CORNELL. L. REV. 1 (1978).

17. *See* L. FULLER, *supra* note 1, at 95-151. *See generally* Reisman & Freedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, 76 AM. J. INTL LAW 737 (1982).

are found in the operating legal institutions devolving from the Constitution. The inner morality is to be judged quite apart from the substantial aims of law. The separation is necessary for an implementation of law according to its terms.

This implicates Fuller's eight conditions of inner morality and is relevant to the exclusionary rule. The present judicial treatment of the exclusionary rule seems to ignore Fuller's characteristics of inner morality in that the Court refuses to describe the structure of the amendment and the assumptions drawn therefrom. The self-fulfilling pragmatic approach ignores the full range of grace and elegance within the fourth amendment. An awkward combination results: the impact of due process upon the internal morality is ignored, while the practicality of the moral status of substantive goals of the governmental system is honored.

Few areas of human endeavor have so sharply focused this conflict as has the question of the judicial implementation of these due process norms because of their impact upon the legal and moral behavior of the criminal justice system. The concept of law at issue involves the idea of a rule designed to maximize fourth amendment privacy. The fourth amendment, as should be apparent, is an important ingredient within the foundation of our constitutional system. The amendment has operated as such because, in the past, the Court has served as a buffer between participants in the social system. In this manner, the Court became the connecting link between Fuller's notion of an inner morality of law and external operative rules. The court accomplished this task of connection by implementing due process standards that protect against unreasonable governmental intrusion into the home or person.

This seems simple enough, yet by applying a reasonableness, bright line, cost-benefit, or other fact-oriented analysis, the present Court reveals that it is no longer convinced. If the Court is now prepared to exclude this element of due process protection, then it should at least be prepared to place its reasoning at a higher level. At a minimum, the Court should mark the constitutional boundaries that will continue to ensure the integrity of the constitutional system of guilt determination. At present, the Court has simply concluded that deregulation of the exclusionary rule will not adversely affect the fundamental conditions of legality and their impact upon the fourth amendment. If the court is prepared to take intellectually this final step, then the exclusionary rule can rest in peace. History, however, demonstrates that the Court is actually unwilling to take the final step, and thus has embroiled itself in trivia, not dynamics.

III. HISTORY OF THE EXCLUSIONARY RULE

An historical examination of the exclusionary rule is essentially the study of a paradox, liberty and limitation. An overview of the scholarship analyzing the exclusionary rule captures the struggle inherent in our society. One might timidly suggest that the debate underlying the exclusionary rule is, in reality, a debate about integrity. Embodied in this concept are individual liberties, such as privacy, recognized in the Constitution as ends in themselves. Limitations upon those liberties, required by the Court for the good of the community, may be imposed only for an overriding social need.

In general, Anglo-American countries have attempted to resolve these conflicts through written, codified laws governing human behavior. On the one hand, criminal laws govern the most egregious deviations from prescribed social order. On the other hand, it is beyond debate that these laws must impose the minimum constraints on individuals in order to ensure maximum personal freedom without jeopardizing the general good.[18] In the United States, as elsewhere, the key element to criminal justice is fairness.[19]

The critical ingredient in ensuring fairness is integrity. Integrity should permeate all governmental offices, but does so only in a perfect world. Even in an imperfect society, it should be found in the police department, an agency charged with the duty of exercising one of the most significant of the constitutional police powers; and in the courts of justice. When addressing the specific issue of integrity, however, the focus must come to rest on the judiciary, if for no other reason

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18. *See* H. DEAN, JUDICIAL REVIEW AND DEMOCRACY 43-46 (1966) (addressing notions of democracy and multigroup societies, limitations on majority rule, and conflicting images of democracy). *See generally* J. MILL, *On Liberty* (1859), in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 95-96 (1951) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."). *But see* P. DEVLIN, THE ENFORCEMENT OF MORALS 102-23 (1965) (refuting Mill's principles and asserting that individuals must not be allowed such expansive parameters).

19. *See* C. Gray, The Exclusionary Rule as Constitutional Renewal: American Integrity and Canadian Repute 8-9 (1986) (unpublished paper delivered at AMINAPHIL Conference, Univ. Pa.). *See also, e.g.*, J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 526-33 (2d ed. 1983) (discussing procedural due process as the requirement of fair adjudicative procedures); Grant, *Police Powers: A Question of Balance?*, in CIVIL LIBERTIES 103 (P. Wallington ed. 1984) (1983 British police practices legislation fails to promote fair and just criminal justice system). From a semantic perspective a word like fairness is at best "artfully vague" and at worst "hopelessly abstract." For a consideration of linguistic limitations in the law and the need for verbal abstraction, see R. DICKERSON, MATERIALS ON LEGAL DRAFTING 31-63 (1981).

than because of the inordinate burdens the criminal justice system places upon out-of-date and under-staffed law enforcement agencies.

Consider the issue in the context of a specific factual question: May evidence tending to prove the guilt of an accused be heard in court if the police obtained it in a manner that does violence to the exclusionary rule? The answer is, or at least has been, that such illegally obtained evidence is inadmissible.[20] If, however, the reliable evidence proves the guilt of the accused, some would argue the obvious response should be to sustain the conviction on behalf of an overriding social need. The Court should then, if necessary, institute sanctions against law enforcement officials who violate established evidence gathering procedures. In this manner, the inner thread of morality remains intact.[21] Why should a felon responsible for a reprehensible crime go free because a warrantless search uncovered evidence sufficient for conviction? Why should the system lose its authority to punish a crime just because a warrant based on hunch rather than probable cause turned out to be correct? These questions challenge the foundation not only of the exclusionary rule, but also of the very hierarchy of constitutional values including the judicial responsibility to privacy protection.

IV. JUSTIFICATION OF THE EXCLUSIONARY RULE

The exclusionary rule has been justified on numerous grounds since its imposition on federal courts in *Weeks v. United States*.[22] Justice Brandeis, in *Olmstead*, endorsed the idea of exclusion as an implicit guarantee of privacy derived from a combined reading of the fourth and fifth amendments.[23] The rule has been invoked as an assurance of a fair trial.[24] More importantly, I suggest, exclusion has been viewed

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20. Mapp v. Ohio, 367 U.S. 643 (1961).

21. *See, e.g.*, WORKING GROUP FOR ENGLAND AND WALES, THE HANDLING OF COMPLAINTS AGAINST THE POLICE 55-82 (1974); Harris, *The Return to Common Sense: A Response to "The Incredible Shrinking Fourth Amendment,"* 22 AM. CRIM. L. REV. 25 (1984).

22. 232 U.S. 383 (1914). The fourth amendment, unlike its neighbors, provides us with a rich historical background. Historians tell us that the fourth amendment is one of the procedural safeguards growing directly out of events that preceded the Revolution. For an excellent account of the historical development of the fourth amendment, see B. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY (1986).

23. 277 U.S. at 478 (Brandeis, J., dissenting).

24. Irvine v. California, 347 U.S. 128, 148 (1954) (Frankfurter, J., dissenting); *see also Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (recognizing the "right to be let alone — the most comprehensive of rights and the right most valued by civilized men"); *see generally* Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890) (laying foundation for

as an "imperative of judicial integrity"[25] based on a kind of "clean hands" doctrine.[26] As Justice Clark stated in *Mapp*,[27] "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[28]

Another justification, and the one most frequently advanced for the rule, has been deterrence of police misconduct.[29] The rationale behind the deterrence argument is that the only way to compel police to respect the constitutional guarantee against unlawful search and seizure is to remove any potential incentive to disregard the rule.[30] The Court's evolving view of these justifications and its gradual reordering of their importance can best be examined by collapsing theory and reality through selected cases. In this manner, counter examples might yield judicially-created structure and boundaries.

A. *Emergence of the Rule and Its Impact Upon Federal Courts*

1. The Right of Privacy

In *Weeks*, Justice Day, speaking for a unanimous Court, concluded that evidence seized in violation of the fourth amendment was inadmissible in federal criminal trials. The Court concluded that unlawful searches must not abrogate aspirational goals. The Court recognized that if it were to allow the admission of letters and private papers improperly seized from the "citizen accused of an offense, [this] protection of the 4th Amendment, declaring his right to be secure against such searches and seizures [would be] of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[31]

The Court refused to admit into evidence the documents uncovered in two warrantless searches of the defendant's room.[32] The Court concluded that the police, if allowed to benefit from the fruits of the

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modern privacy right and acknowledging right to protection from government intrusion in one's home).

25. Mapp v. Ohio, 367 U.S. 643, 659 (1961); Elkins v. United States, 364 U.S. 206, 222 (1960).

26. *See* Elkins v. United States, 364 U.S. 206, 223 (1960); *see also* C. Gray, *supra* note 19, at 9-10 (discussion of rule of law and equity).

27. 367 U.S. at 659.

28. *Id.*

29. Elkins v. United States, 364 U.S. 206, 217 (1960).

30. *Id. But see* C. Gray, *supra* note 19, at 2 (deterrence not the best rationale for exclusionary rule).

31. 232 U.S. at 393.

32. *Id.* at 398 (holding that admission would be prejudicial error).

unlawful search, could destroy a right secured by the Constitution.[33] *Weeks* warned that such an attack on the purpose of the fourth amendment "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution . . . ."[34]

The Court's reasoning in *Weeks* was compelling and jurisprudentially sound. Although the fourth amendment provides no express remedy for a violation of its prescription on unlawful search and seizure,[35] the exclusionary remedy as it emerged in *Boyd v. United States*[36] could be nothing short of implicit in the rule. If the right were never violated, the papers would remain private until officers could show probable cause to obtain a valid warrant. In many cases, a court applying hindsight would have to speculate about whether the officer would have found probable cause. If probable cause had never been shown, then the contents of the purloined letter would remain forever the private information of the defendant. So, the only adequate remedy in such a case would be exclusion of the evidence that would never have been discovered but for the illegal search.

Although the Court's holding was compelling, it was limited to its facts. The *Weeks* opinion mandated exclusion in the federal system of illegally obtained items in evidence if the defendant were the owner or intended lawful possessor of the evidence.[37] The question whether the Court would extend fourth amendment protection to exclude improperly seized contraband remained unanswered until the Court's decision in *Agnello v. United States*.[38]

In *Agnello*, Justice Butler, speaking for the Court, extended fourth amendment protection to a defendant who was in possession of cocaine, an offense in violation of federal law. The narcotic was unlawfully in the defendant's control and, therefore, subject to a proper seizure. Nevertheless, the Court stated that, although it had never directly answered the contraband question, the previous assumption that one's

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33. *Id.* at 392.

34. *Id.*

35. *See* Terry v. Ohio, 392 U.S. 1 (1968); *see also* Elkins v. United States, 364 U.S. 206, 223 (1960) (recognizing need to keep judiciary from becoming conspirator in use of illegally obtained evidence); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 377-78 (1981) (four principles underlying *Weeks* exclusionary rule: (1) avoiding unfairness; (2) preventing further privacy invasion; (3) avoiding appearance of court profiting by police wrong; and (4) preserving judicial integrity)).

36. 116 U.S. 616 (1886).

37. *See* Stewart, *supra* note 11, at 1375.

38. 269 U.S. 20, 31-32 (1925).

house is safe from warrantless search was valid unless incident to a lawful arrest on the premises.[39] Justice Butler reasoned that "[t]he protection of the fourth amendment extends to all equally, . . . to those justly suspected or accused, as well as to the innocent."[40] Justice Butler concluded that any warrantless search of a private dwelling, whether revealing contraband or not, was constitutionally unreasonable. Except in specified instances, including those incident to an arrest, the Court found no justification for the search of a private dwelling without a warrant. The Court further concluded that a belief, no matter how reasonable, that an article sought is concealed in a dwelling furnishes no justification for a search without a warrant.[41] The *Agnello* Court then excluded the evidence[42] and thus erased any doubt about extension of *Weeks* to protect individuals from unlawful searches, regardless of facts tending to prove the existence of probable cause.

Both *Weeks* and *Agnello* seemed to base their decisions to exclude evidence primarily on the sanctity of the privacy of the home and restraint on police discretion to enter private dwellings. As in *Olmstead*, in which Justice Brandeis mentioned an interplay between the fourth and fifth amendments,[43] *Agnello* returned to Justice Bradley's reasoning in *Boyd*.[44] *Agnello* underscored the association of ideas between fourth amendment security from unreasonable search and fifth amendment freedom from incriminating admission of the fruits from such a search. This association, though compelling, has been disregarded in the more recent cases because courts have decided the fourth amendment implies its own exclusionary remedy. The fifth amendment safeguard from self-incrimination is no longer available as a buttress for the fourth amendment. The fifth amendment now, of course, operates mainly in the area of coerced confessions.[45]

2. Concepts of Federalism

In 1949, the Supreme Court in *Wolf v. Colorado*[46] upheld the vitality of the exclusionary rule in the federal context. However, the Court

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39. *Id.* at 32.
40. *Id.*
41. *Id.*
42. *Id.* at 35.
43. 277 U.S. at 478 (Brandeis, J., dissenting).
44. *Boyd*, 116 U.S. 616.
45. *See* 269 U.S. at 34.
46. 338 U.S. 25 (1949).

refused to mandate state adoption of the remedy.[47] Although the Court did not appear to separate the right from its remedy in a federal setting, in *Wolf* it did separate the two in a prosecution in a state court for a state crime.[48] Justice Frankfurter, writing for the Court, argued that the rule was a judicial creation.[49] The Court agreed that the fourth amendment guaranty against unreasonable search and seizure applied to the states through the fourteenth amendment due process clause, but insisted that the inferential remedy of exclusion was not constitutionally mandated. Although Justice Frankfurter found the warrantless search inconsistent with basic constitutional concepts of human rights, he deferred to the states, concluding that they could penalize police intrusion in other ways.[50]

The position of the Court in *Wolf* spawned confusion among state courts.[51] The doctrine of comity did not begin to wither until *Mapp*. Yet, after *Mapp* and incorporation, the flood of state cases to the Supreme Court probably had something to do with the indecisive due process exclusionary analysis.[52]

3. State Court Compliance: Reasonable Extension of the Exclusionary Rule

Mapp is the crucial case in the development of the exclusionary rule, both for its modification of *Wolf* and for its articulation of grounds for an exclusionary rule.[53] The facts in *Mapp* are neat and clean. The police conducted a search in clear violation of the fourth amendment.[54] The Court held that evidence obtained as a result of that search was inadmissible at trial. The Court stated that *Wolf* had extended the fourth amendment right of privacy to states by way of the fourteenth amendment due process clause.[55] Clearly, *Wolf* stood for an extension of fourth amendment rights to individuals being tried in state courts.

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47. *See* Mertens & Wasserstrom, *supra* note 35, at 380.

48. 338 U.S. at 25-26.

49. *Id.* at 28.

50. *Id.* ("How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.").

51. *See generally* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621.

52. *See* Geller, *supra* note 51, at 628-29; Mertens & Wasserstrom, *supra* note 35, at 380.

53. 367 U.S. at 655-57.

54. *Id.* at 644-45.

55. *Id.* at 655.

The difference between *Mapp* and *Wolf* was that *Mapp* recognized that the right carried with it the concomitant remedy of exclusion of illegally obtained evidence.

Mapp principally supported an extension of the exclusionary rule for three reasons.[56] First, the majority found the rule an essential, inextricable element of the fourth amendment, because it protected the individual's constitutional rights.[57] This justification was much the same as reasons expressed earlier. The defendant should be free from unwarranted invasions of privacy in the home. Law enforcement officers should identify items to be seized and demonstrate probable cause before a search. The most direct redress of an individual invasion of privacy is exclusion because this remedy puts the individual back in the position the individual would have occupied before the unlawful intrusion, as though no privacy invasion occurred.[58]

Second, and most important, the Court found that exclusion promoted judicial integrity.[59] The evidence-gathering role of the police was directly related to the evidence-admitting function of the courts. As Justice Brennan reiterated much later, with this close connection in mind, "courts . . . cannot be absolved of responsibility for the means by which evidence is obtained."[60]

Third, *Mapp* recognized the deterrence rationale that appeared as a major justification for the rule.[61] If the rule would deter illegal police searches, then such prevention supported the rule's extension. The Court had finally disassociated itself from unlawful activities of other governmental agencies. Having done this, the Court was able to conduct itself in a manner befitting its role in the constitutional scheme, as an agency that would not be a party to lawless invasions of privacy. The Court would not allow profiteering from lawless acts of government. The rise to prominence of the integrity basis for the rule may have started before *Mapp*; however, in *Mapp* it became one of the main reasons adopted to justify the application of the exclusionary rule.[62] As a result, deterrence became the focal point and its rationale

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56. *See id.* at 655-57.
57. *Id.* at 656-57.
58. *See* Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith,"* 36 VAND. L. REV. 1511, 1536-37 (1983).
59. 367 U.S. at 659.
60. United States v. Leon, 468 U.S. 897, 937 (1984) (Brennan, J., dissenting).
61. 367 U.S. at 658.
62. *Id.* at 656-59.

gradually became the main ingredient of the rule. In fact, the Court had narrowed the rule's application.[63]

B. *The Exclusionary Rule Post* Mapp

After *Mapp*, the distinction between the procedural requirements of the fourth amendment and the exclusionary rule began to blur.[64] The application of the rule was no longer a separate jurisprudential subject somewhat removed from substantive search and seizure law.[65] In *Mapp*, the Court did not decide what the police can or cannot do. Rather, the Court concluded that it would not tolerate collusion between police and the judge. Therefore, when the police fail to comply with rules regulating search and seizure, the fourth amendment concept of due process is implicated and requires exclusion of the evidence. To do otherwise would undermine trust in government in general and the judiciary in particular.

A search that was lawful before *Mapp* was lawful afterward. In *Mapp*, however, the Court supplied, through a due process analysis, a remedy against lawlessness that had permitted arbitrary governmental behavior that resulted in an unwarranted invasion of privacy. The purpose of the remedy was to discourage in practice what the Court condemned in theory. The Court noted that even if lower courts punished individual officers or found a way to take punitive steps against the government fostering the violation, the usual result was the introduction of the ill-gotten fruits. This result was, therefore, tantamount to substituting a vague doctrine of fair play for strict procedural adherence and would probably cause the dissipation of fairness as a value within the fourth amendment.

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63. *See* Stone v. Powell, 428 U.S. 465, 484-85 (1976) (deterrence as the primary justification for the exclusionary rule in *Mapp*); United States v. Peltier, 422 U.S. 531, 536 (1975) (deterrence rather than judicial integrity the primary focus of the Court in considering retroactive application of exclusionary rule); United States v. Calandra, 414 U.S. 338, 347-48 (1974) (exclusionary rule's primary purpose is police deterrence rather than the redress of search victim's rights).

64. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 INT'L & COMP. L.Q. 513, 513-14 (1982); *see also* Ingber, *supra* note 58, at 1554 (*Mapp* changed remedy for, not substantive standards of, fourth amendment violations). Both of these sources cite to Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966), in which the author laments the traumatic effects of the *Mapp* decision. The author discusses modification of procedures and promulgation of new standards required by the New York City police department. Both Ingber and Dawson underscore the irony of this complaint, which is really an admission of guilt. *Mapp* did not change the rules; it simply clarified the wages of transgression.

65. *See* Dawson, *supra* note 64, at 515.

1. Deterrence as a Rationale

Well before the present Supreme Court settled on the more limited approach to the purpose of exclusion, individual judges and commentators impugned the exclusionary rule as an ineffectual deterrent.[66] Justice Jackson, in *Irvine v. California*,[67] argued that the deterrence justification lacked foundation. He questioned the reliability of empirical evidence showing that police malpractice decreased as a result of the rule. Moreover, he enumerated several of what he considered fatal flaws in the rule.[68] According to Jackson, the exclusionary rule results in the escape of guilty persons and that result "is more capable of demonstration than that it deters invasion of right by the police . . . ."[69] He pointed out that exclusion inures only to the benefit of the defendant with something to hide, but does nothing to vindicate the rights of truly innocent victims of illegal searches that turn up nothing. The police are rebuked for their miscarriage only if the intuitive conclusions they reach turn out to be correct and they find something incriminating. Those who fear the onslaught of crime today invoke Justice Jackson's logic and cite his observation as a reason to dispense with the exclusionary rule or, at least, to curtail its application to those situations in which it will most clearly deter police infractions.

2. *Calandra* and Its Impact Upon the Fate of the Exclusionary Rule

Two of the more notable cases in which the exclusionary rule has been confined are *United States v. Calandra*[70] and *United States v. Williams*.[71] Both are presented to illustrate, first, the trend in the Court, and second, the signals that this trend has sent to lower federal courts. In *Calandra*, the Court refused to allow a grand jury witness to decline to answer questions based on illegally seized evidence. The majority stressed the deterrence function of the exclusionary rule and stated that this purpose would not be furthered by barring admission

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66. Irvine v. California, 347 U.S. 128, 135 (1954); *see, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 674-75 (1970) (praising Justice Jackson's candor in admitting the lack of hard evidence that the exclusionary rule was an effective deterrent).

67. 347 U.S. 128, 135-36 (1954).

68. *Id.* at 136-37.

69. *Id.* at 136.

70. 414 U.S. 338 (1974).

71. 622 F.2d 830 (5th Cir. 1980) (en banc).

of the evidence because the evidence would not be used at trial. The Court concluded that this "collateral use" of evidence was permissible.[72]

In dissent, Justice Brennan argued that regardless of the collateral use, evidence illegally obtained and used, even indirectly, to compel testimony, entangles the courts in the illegal acts of government agents.[73] Significantly, Justice Brennan's dissent quoted *Silverthorne Lumber Co. v. United States*,[74] a case the *Calandra* Court circumscribed. *Silverthorne*, decided in 1920, was one of the first cases to prohibit the use of indirect fruits of illegally obtained evidence. The Court distinguished *Silverthorne* primarily on the grounds that, in *Silverthorne*, the grand jury had already indicted the defendants, thereby triggering the fifth amendment protection against self-incrimination. In *Calandra*, the witness was granted immunity and, thus, not subject to prosecution. *Calandra* also revived the *Wolf* reasoning that the exclusionary rule operates as "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."[75]

United States v. Williams followed *Calandra* by six years. In *Williams*, the United States Court of Appeals for the Fifth Circuit took its cue from the Supreme Court's announced dissatisfaction with the rule and added a far-reaching exception that allows direct use of illegally obtained evidence at trial. The defendant in *Williams* was seen in Ohio in violation of a probation restriction imposed in another matter. The government official who recognized her searched her purse and found heroin. The officer then opened her luggage and found larger amounts of the drug and subsequently arrested her for possession of a controlled substance and drug trafficking. The evidence was

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72. 414 U.S. at 347-48; *see also* United States v. Janis, 428 U.S. 433 (1976) (illegally obtained evidence admissible in civil suit); Stone v. Powell, 428 U.S. 465, 488-89 (1975) (Court found "incremental" deterrent effect of exclusionary rule and refused to extend application); Oregon v. Haas, 401 U.S. 222 (1971) (illegally obtained evidence admitted to attack defendant's credibility if defendant takes stand); United States v. Alderman, 394 U.S. 165 (1969) (illegally obtained evidence admitted against defendant because defendant not the victim of the illegal search); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975) (illegally obtained evidence allowed for use in probation or revocation proceeding); United States v. Schiponi, 435 F.2d 26 (2d Cir. 1970) (unlawfully obtained evidence permitted for use in sentencing decision).

73. 414 U.S. at 364 (Brennan, J., dissenting) (quoting Gelbard v. United States, 408 U.S. 41, 51 (1972)).

74. 251 U.S. 385 (1920).

75. 414 U.S. at 348. *See* Mertens & Wasserstrom, *supra* note 35, at 385 (points out inconsistency of this position with Court's continued adherence to standing criteria).

obtained illegally; the defendant's probation violation did not provide grounds for a search; and her presence in Ohio did not give officers probable cause to suspect she was trafficking in heroin. Nevertheless, the court, faced with an irresistable counter-example, determined that the officer's good faith mitigated the circumstances of the arrest and militated strongly against exclusion.[76] The only way the court could reach such a conclusion was by concentration on deterrence as the only valid consideration in the exclusion decision. If the rule would not deter arbitrary police behavior, then the Fifth Circuit Court reasoned that justification to enforce it did not exist.[77]

The court then proceeded to balance the costs and benefits of excluding probative evidence. The *Williams* court stressed that imposition of any remedy is tied directly to the cost and benefits resulting from its enforcement. The cost would be denying a jury access to severely inculpating evidence highly probative of the fact that the defendant was engaged in trafficking a dangerous narcotic. The official's lawlessness was minor in comparison to the defendant's misconduct. In fact, the court's view of the record suggests that the officer's misunderstanding of the fourth amendment proved his lack of bad faith and, thus, to penalize him would have no deterrent effect on his conduct.[78] The court's epithetical approach was a simple way of avoiding conceptual difficulties. Its approach ignored reasonable methodology and bypassed *Mapp* by assigning its own relative weight to judicial integrity.

3. A Good Faith Exception

Taking a page from *Williams*, the Supreme Court, in 1984, announced a significant change in the relationship of the fourth amendment to the exclusionary rule. Previously, the Court had found the exclusionary rule inapplicable in matters not directly related to prosecution of the defendant in the specific case under scrutiny. *United*

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76. 622 F.2d at 840, 846-47. A year later the Attorney General's Task Force on Violent Crime seemed to approve of the reasoning of the majority in *Williams*. *See* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 55 (1981).

77. 622 F.2d at 840-41.

78. *See* Dawson, *supra* note 64, at 525-29 (thorough analysis of *Williams* decision pointing out that police officer's state of mind determinable only at trial level and not reviewable on appeal because a fact issue; situation creates virtual immunity from review on appeal of trial judge's determination).

States v. Leon[79] and *Massachusetts v. Sheppard*,[80] however, abandoned the previously inviolable principle that illegally obtained evidence must not be admitted at a defendant's trial if it is part of the prosecution's case-in-chief. The exception, formulated in *Leon*, appears to be limited. The exclusionary rule was modified to allow a prosecutor to use illegally obtained evidence in the case-in-chief against a defendant only if the officers who violated proper procedure, acted in reasonable "reliance on a search warrant [which was] issued by a detached and neutral magistrate that ultimately is found to be defective."[81]

The facts in *Leon*, similar to those in *Williams*, concerned drug possession and distribution. The defendants were charged with conspiracy to possess and distribute cocaine and with possession of methaqualone and cocaine. Unlike *Williams*, which involved a warrantless search, in *Leon* a warrant was issued, but without probable cause. The officers in *Leon* prepared an affidavit to take before a magistrate. They relied both on confidential information given by an informant and on their own investigation of the matter. The informant's knowledge was stale and the officers failed to establish the tipster's credibility, so, at both the trial and appellate level, the courts excluded the evidence.

The Supreme Court reversed the lower decisions and applied a good faith exception. The Court might have based its ruling on a finding from the record that the officers had shown probable cause, but instead, it formulated a new rule. The Court clearly stated that, despite its finding that the warrant was defective under the fourth amendment, the evidence was admissible because the officers acted in reasonable good faith. It mattered little to the Court that the evidence illegally obtained is not a power the government has authority to exercise.

The Court justified its result on four grounds. First, the Court said that exclusion was a judicially-created rule and not a required corollary of the fourth amendment. Second, and most perplexing, the Court argued that the use of illegally obtained evidence was not a separate constitutional wrong. According to the majority, the constitutional wrong was accomplished by the police invasion. Once the wrong

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79. 468 U.S. 897 (1984); *see also* LaFave, *The Seductive Call of Expediency*: United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895 (questioning the cost/benefit basis of the good faith exception and lamenting that an expansive reading of *Leon* would emasculate the exclusionary rule).

80. 468 U.S. 981 (1984).

81. *Leon*, 468 U.S. at 907.

occurred, the time had passed for the judiciary to cure it. Consequently, use at trial of the fruits of the search constituted no new fourth amendment violation. Under this reasoning, the court below could never be a party to lawless governmental invasions because by the time the matter came to the attention of the judiciary, it would be too late to withhold the constitutional imprimatur. Third, the Court concluded that to exclude the evidence would not deter police misconduct.[82] The Court once again argued that deterrence was the primary function of the rule. Fourth, the Court justified its exception to exclusion by applying the *Williams* cost-benefit balancing analysis. The Court found that the scales tipped heavily in favor of the good faith exception. The costs of exclusion were that some guilty defendants would receive reduced sentences or escape punishment altogether. The benefits of exclusion, the Court averred, were minor, especially when police acted in "objectively reasonable reliance" on a neutral magistrate's issuance of a warrant.[83]

In dissenting opinions, Justices Brennan and Stevens rejected the majority approach. Justice Brennan refused to accept the conclusion that the exclusionary rule was judicially created or that it was not equally incumbent on the police and the courts to honor it. In his opinion, when one arm of the government misused evidence, exclusion became a constitutional imperative. The fourth amendment restrains the whole power of the government, not just a particular agency while all others are exempt. "[The] police and the courts cannot be regarded as constitutional strangers to each other . . . ."[84] Justice Brennan argued that the primary intention behind all searches is to gather evidence for a trial. He rejected the majority's reliance on the deterrence rationale as the principal purpose of exclusion. He stressed that the rule's function was not so much to deter police malpractice as it was to allow review of the constitutionality of search and seizure law

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82. *Id.* at 906-13. The Court stated:

> Many of these researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches and seizures . . . . Because we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case, . . . we conclude [the rule] cannot pay . . . ."

Id. at 907-08 n.6.

83. *Id.* at 922.

84. *Id.* at 936-38 (Brennan, J., dissenting) (citing *Weeks*, 232 U.S. at 393). I believe Justice Brennan is correct in urging the exclusionary rule as a matter of constitutional right. The use of illegally obtained evidence is as much a constitutional violation as the initial search and seizure.

and to provide guidance from the courts to keep fourth amendment law from being frozen in place.[85] Justice Brennan seems to recognize the Supreme Court as Republican Schoolmaster, thus suggesting that the Court must at all times avoid the taint of collusion between police and judge. To do otherwise condemns the Court to a partnership role in lawless activity.

Finally, Justice Brennan rejected the majority's cost-benefit analysis. He argued that the majority's balancing approach was inherently unstable and inadequately supported by empirical evidence.[86] Even if he were to endorse the majority approach, Justice Brennan would disagree with the majority's conclusions. According to his data, assessments in more recent studies showed lost convictions resulting from the exclusionary rule were minimal. Moreover, according to Justice Brennan, the majority's narrow focus on individual cases was myopic, blinding the majority to the broader function of the exclusionary rule "to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally."[87] Not only did Justice Brennan disapprove of the cost-benefit test, he also believed that the Court misstated the costs of the rule. The fact that some criminals go free was not so much a cost of the exclusionary rule as it was a cost of the fourth amendment. Criminals go free, Justice Brennan declared, "because official compliance with the fourth amendment requirements makes it more difficult to catch [them]."[88] The fourth amendment itself, therefore, commands the Court to disassociate itself from illegal police conduct. The fourth amendment demands that the Court serve as a buffer between government and people.

Justice Stevens attacked the majority's approach and attempted to expose its infirmity from a semantic standpoint.[89] Because searches made with invalid warrants were, by definition, constitutionally unreasonable, Justice Stevens contended that the fourth amendment required exclusion of any illegally obtained evidence the searches produced. The question arises, as well, how an officer may reasonably rely

85. *Id.* at 944-53 (Brennan, J., dissenting) ("Inherently unstable" balancing test criticized).

86. *Id.* at 950-51 n.11 (Brennan, J., dissenting).

87. *Id.* at 953 & n.12 (Brennan, J., dissenting).

88. *Id.* at 941 (Brennan, J., dissenting). Brennan explained that the loss of evidence was the cost society must pay to enjoy freedom and privacy safeguarded by the fourth amendment. *Id.*

89. *Id.* at 960 (Stevens, J., dissenting).

on a constitutionally unreasonable warrant. The answer seems to be an inverted tautology, reasonable reliance on the unreasonable.[90]

Additionally, Justice Stevens was uncomfortable with the judicial formulation of the "good faith" exception. He believed the Court had gone beyond what was "necessary to decide the case before it."[91] When a court does that, Justice Stevens warned, "it can only encourage the perception that it is pursuing its own notions of wise social policy, rather than adhering to its judicial role."[92] Justice Stevens asserted that, if the majority were genuinely interested in upholding the rule when its deterrent function was most evident, then it would not adopt the "good faith" exception. According to Justice Stevens, if police cannot use evidence obtained through warrants based on less than probable cause, they have less incentive to seek those warrants and magistrates feel less compulsion to issue them. Under the new rule, even when police know their warrant application is very likely insufficient to show probable cause, Justice Stevens' analysis is that the officers might still submit these to magistrates if they see an outside chance that the magistrate might "take the bait." In other words, Stevens' concern was that, while exclusion might not keep the police honest, the new exception only serves to remove incentives to remain truthful.[93]

The companion case to *Leon*, *Massachusetts v. Sheppard*, illustrates the uncertainty in the law resulting from *Leon*. *Sheppard* is an example of a factually compelling case that seems to demand a "good faith" exception to ensure that the most reprehensible criminals are dealt with forcibly. Yet, if abstracted from its own factual setting,

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90. *Id.* at 961 (Stevens, J., dissenting). Both Kamisar and Ingber, relying to an extent on Kamisar's analysis, point out the conceptual flaw in reasonable misunderstanding of the fourth amendment. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 22 (5th ed. 1980) (seventy to ninety percent of prosecuted cases result in guilty pleas); Ingber, *supra* note 58, at 1559 (refuting the perception that the exclusionary rule hamstrings police because "[w]hile the exclusionary rule only functions to suppress evidence at trial, our criminal justice system focuses more on obtaining guilty pleas than on securing convictions at trial").

91. 468 U.S. at 962-63 (Stevens, J., dissenting).

92. *Id.* at 963 (Stevens, J., dissenting).

93. *Id.* at 974 (Stevens, J., dissenting). As Stevens explained it,

> [i]f the police cannot use evidence obtained through warrants issued on less than probable cause, they have less incentive to seek those warrants, and magistrates have less incentive to issue them . . . . Under the majority's new rule, even when the police know their warrant application is probably insufficient, they retain an incentive to submit it to a magistrate, on the chance that he may take the bait.

Id.

the holding stands for the proposition that the officer's faith need only be good and not necessarily reasonable.

In *Sheppard*, the police submitted an adequate affidavit showing probable cause to believe evidence connecting the suspect with a brutal murder would be found at his dwelling.[94] The officers applied for the warrant on a Sunday, when the appropriate type of warrant was not available. Instead of the proper form, the magistrate used a warrant form designed for narcotics searches. The magistrate made several changes in the warrant, but did not obliterate the search authorization language or try to replace it with more specific language describing the items to be seized. The officers, who had written the affidavit describing with particularity what was to be seized, relied on the warrant and, in fact, seized the very evidence they expected to find.

The evidence was clear: Sheppard had raped and murdered the victim. Most would recoil from a justice system that allowed such a felon to escape prosecution because of a mere technicality. Not surprisingly, the Court found that the officers acted in good faith reliance on the warrant and, therefore, the fourth amendment failure to describe the "things to be seized" would not result in exclusion of the evidence.[95]

In *Leon*, the Court carefully articulated several instances in which the good faith exception would not be activated, even if the officers had no intention of violating the fourth amendment. The Court resolved that the exclusionary rule would still apply in the event of a facially deficient warrant, especially one that completely failed to specify the items to be seized. In such a case, reliance on the warrant would be unreasonable and the good faith exception would not operate. Yet, in *Sheppard*, the majority showed that at the very least this exception will be construed broadly. The Court held that a warrant describing drugs instead of evidence of murder was still reliable because an underlying affidavit correctly identified the items.[96] Yet, the underlying affidavit did not satisfy the purpose of the fourth amend-

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94. For a precise statement of the facts, see Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *rev'd sub nom.* Massachusetts v. Sheppard, 468 U.S. 981 (1984).

95. *Sheppard*, 468 U.S. at 990-91.

96. *Id.* This result leads one to wonder about the purpose of identifying items with specificity in a warrant. The person being searched deserves at least to know the reason behind a police invasion. Although the warrant, of course, is for the officer's benefit to assist in limiting the search, seemingly the rationale behind the requirement serves a function in informing the person whose privacy is disturbed as well. That way, the individual can evaluate the reasonableness of the invasion to determine whether to take action against oppressive police behavior.

ment, which is to provide the person being searched with some reason for the search — a proper justification. Suspects or innocent persons who are searched never see affidavits. Apparently, in this case, good faith is reliance on a warrant, but not on its content.

Justices Brennan's and Stevens' dissents in *Leon* voiced their concerns over *Sheppard* as well. Although Justice Stevens believed for other reasons that the evidence should not be excluded, he did express concerns about the reasonableness of the officers' reliance on the warrant. Justice Stevens maintained that the police may never reasonably rely on the mere fact of issuance and should always examine the warrant, and in a case like *Sheppard* they might, at least, have tried to change it.[97] The vague *Sheppard* warrant did not comply with fourth amendment standards and, thus, any search conducted pursuant to it was unconstitutional.

The logical conclusion to Justice Stevens' syllogism is that the police who violated the fourth amendment in *Sheppard* could not qualify for the "reasonable" good faith standard. As Justice Stevens explained:

> Today, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding . . . . Courts simply cannot escape their responsibility for redressing constitutional violations if they admit evidence obtained through unreasonable search and seizures, since the entire point of the police conduct that violates the fourth amendment is to obtain evidence for use at trial.[98]

Justice Brennan's concerns, delineated previously, are equally applicable in *Sheppard.* Just as the lack of probable cause in *Leon* showed that the issuance of the warrant was unreasonable, automatic reliance on the magistrate's incorrectly worded warrant was also unreasonable. As Justice Brennan envisioned it, the Court "gave way to the seductive call of expediency"[99] in both cases and in so doing forsook its commitment to protect individual liberty and privacy.

C. *The Fate of the Fourth Amendment*

The fate of the fourth amendment is difficult to predict. The status quo will undoubtedly change, and as the fear of crimes against persons

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97. *Leon*, 468 U.S. at 974 (Stevens, J., dissenting).
98. *Id.* at 977-78 (Stevens, J., dissenting).
99. *Id.* at 930 (Brennan, J., dissenting).

increases, the rights of the accused for these compelling governmental reasons are likely to be diminished. Several advantages and disadvantages to the modern trend have emerged in the past few years; most of these have been developed and discussed in the cases cited. An analysis of the rationale underlying those cases might aid in a better understanding of the "benefits" to be derived from a less stringent exclusionary rule.

1. The Focus of the Present Court

It would seem that a majority of the present Court[100] has found several reasons justifiying both limitations on the exclusionary rule and broad exceptions to its mandate. The societal costs of exclusion are manifold. Doubtless, the rule can divert the truth-finding process at trials. If applied in cases like *Sheppard* or *Leon*, it would most surely free guilty parties. Additionally, the failure to convict and incarcerate known criminals can generate disrespect for the justice system. Even if reliable statistics and empirical studies demonstrate that felons escape punishment as a result of exclusion, a popular perception that crime is on the rise might suggest that institutional legitimacy requires inclemency against the accused and leniency towards the police. The perceived disproportionality in individual cases between the police error "and the windfall afforded a guilty defendant by application of the rule . . .," as the Court has suggested, "is contrary to the idea of proportionality that is essential to the concept of justice."[101]

One commentator has suggested that, not only does the rule divert truth-seeking, free the guilty, and diminish credibility of law enforcement; it does all of this under a purported constitutional imperative that does not appear in the express words of the Constitution.[102] The only concrete right announced in the search and seizure provision is the right to be free from lawless intrusion. The amendment provides no enforcement mechanism. Because the present majority of the Court sees great social costs rather than benefits and because it perceives a general failure of the rule to deter police misconduct, particularly when police act in good faith, it has limited application of the exclusionary remedy.

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100. I would include within this majority Justice Antonin Scalia.

101. Stone v. Powell, 428 U.S. 465, 490 (1975).

102. *See generally* L. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY (1985) (explaining politics of Supreme Court and pointing out that all justices are activists on behalf of their own constitutional visions).

2. The Beleaguered Justice Brennan and Friends

Justices Brennan and Stevens, and numerous commentators, have demonstrated many disadvantages inherent in the majority approach. Commentators have catalogued these disadvantages.[103] What follows is a brief recapitulation of the recurrent criticisms of both the good faith exception and any other attempt to limit the exclusion of illegally obtained evidence. The criticisms fall generally into five basic categories.[104]

First, exclusion is not a part of the plain language of the fourth amendment; however, the doctrine of judicial integrity might require exclusion in order to prevent the courts from appearing to become accessories to police lawlessness.[105] Second, the rule, when viewed in individual cases, may not deter police misconduct but, when viewed systematically, may be a powerful general deterrent.[106] Third, the cost-benefit analysis is self-fulfilling when applied to exclusion. Statistics are easy to compile about the number of guilty individuals who go free or receive reduced sentences. These are affirmative occurrences. To the contrary, those who would prove systematic deterrence and increased police and judicial integrity are disadvantaged by having to prove a negative. It is difficult to amass empirical data to prove that the existence of the rule prevented a precisely calculated number of unlawful searches and seizures. Fourth, as Justice Brennan has suggested, adoption of the good faith exception will "stop dead in its tracks"[107] the development and spread of knowledge about fourth amendment substantive law.[108] Courts will seldom reach the search

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103. *See supra* notes 58 & 64.

104. *See* Note, *I Come Not to Praise the Exclusionary Rule But to Bury It*, 18 CREIGHTON L. REV. 819, 848 (1985).

105. *Id.* Note, *id.*, mentions six reasons. This article combines judicial integrity with the personal constitutional right because judicial integrity involves a respect for the rights of the individual and an unwillingness to participate in constitutional violations or to benefit by them.

106. *See Ingber, supra* note 58, at 1542-52.

107. United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting); *see also* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 354-55 (1982) (advocating limited interpretation of the good faith exception because good faith issue should be considered only after search and seizure has been determined illegal).

108. *See* Mertens & Wasserstrom, *supra* note 35, at 402-03:

> The exclusionary rule not only prevents fourth amendment violations . . . , but also is indispensible to the development of law by the lower courts . . . . Given both the myriad factual situations that the police encounter and the often unpredictable variations within even common patterns, reducing probable cause to a

and seizure issue since police good faith allegations give officers a much more flexible hold on opportunities that circumvent the fourth amendment. Fifth, critics believe the rule will tempt officers to violate the fourth amendment through the good faith exception.[109] Especially when dealing with a guilty defendant, officers will rationalize a justification for violating constitutional procedures. Placing this sort of temptation in front of law enforcement officers seems unfair, especially because enforcers who see the ravages of crime tend to view themselves as above the law and might manipulate it to achieve what they believe is a just result.[110]

Despite all the criticisms of the new good faith exception, public trust in the law is essential to preserve society. Even though the minority view seems intellectually tempting, without practical application, it is of little moment. The fourth amendment, with the disclaimer "unreasonable," is one of the more pragmatic amendments, at least as far as its societal outlook is concerned. Perhaps alternative remedies are available to exclusion of the fruits of an illegal search.

D. *Potential Pragmatic Alternatives to Achieve the Goals of Exclusion*

The former Chief Justice has suggested that reasonable options to a strict exclusionary rule exist and should be used in the alternative.[111] He argues that proponents of the rule ascribe far too much value to it.[112] Essentially, alternatives must do three things to accomplish the goals of exclusion. First, any viable alternative must protect the rights

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> set formula is an impossible task. Nevertheless, by deciding fourth amendment cases, courts are able to define probable cause more precisely. Thus, through this continual refinement, the police can become more certain of when probable cause exists and when it is lacking.

Id.

109. *See* Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. LAW. 25, 34-40 (1978) (police behavioral adjustments to exclusionary rule).

110. *See* Ingber, *supra* note 58, at 1523.

111. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 420 (1971) (Burger, C.J., dissenting). Burger said the exclusionary rule was experimental, not required, and, he believed, a failure. *Id.* at 415. Therefore, alternatives to uphold the fourth amendment purpose should be developed in its place. *Id.* at 420. Burger recommended several legislative guidelines for alternatives. *Id.* at 421-23.

112. *Id.* at 415 (Burger, C.J., dissenting). Others have also been vocal opponents of the exclusionary rule and echo many of Burger's sentiments. *See* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 223 (1978); *see also* Oaks, *supra* note 66, *passim* (examining the exclusionary rule's effect on police search and seizure behavior).

of individuals who suffer in specific cases because of police misconduct — a purpose now served by the fact finding at suppression hearings. Second, the alternative to exclusion must also compensate the individual whose rights are infringed — a purpose presently served by exclusion of the improperly seized evidence. Third, any process or technique used to replace the exclusionary rule must both deter future police misconduct and educate law enforcement officials about prevailing legal standards — a twin goal currently fulfilled by the suppression hearing and judicial opinion writing.

Several methods have been suggested for reviewing police procedure, addressing recriminations of those whose fourth amendment rights are infringed, and deterring police misconduct. The first of these are the external review alternatives, which are reviews by non-police advisory boards. These civilian review boards weigh evidence in individual cases, award damages, enjoin certain practices, and impose sanctions to discipline police. Many of these lay tribunals operated in the United States in the 1960s, among them the Philadelphia Police Advisory Board and the New York Civilian Complaint Review Board.[113] Very few, if any, remain in the 1980s.[114] The main opposition to such review boards comes from implacable police forces who fear deleterious effects and, as a rule, refuse to cooperate with citizen enforcement groups. Thus, the external review concept has been largely abandoned.

The second method of providing an alternative remedy to exclusion has been the internal review process or administrative rulemaking by police departments themselves.[115] Despite the inherent tendentiousness of self-imposed review, at least the police find enforcement by their own superiors less inimical to their law enforcement goals than civilian review. As several commentators have observed, police behavior is frequently governed by internal norms and the police will usually accept as legitimate only the internal when they are in the streets, not in the chambers. If the police, for whatever reasons ignore or disobey the law in practice, the court cannot follow suit with the law in theory. Law enforcement personnel should not be in a position to make or interpret the rules they enforce. If they are so permitted, then society is faced with the contradictory alliance of the controller

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113. *See* Note, *Grievance Response Mechanisms for Police Misconduct*, 55 VA. L. REV. 909, 940 (1969).

114. *See* Dawson, *supra* note 64, at 531.

115. *See generally* Kaplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500 (1971).

and the controlled in one institution, thus paving the way for a victimization of the most vulnerable. The new partnership will certainly lead to lawless invasions, but, more importantly, it has the potential for undermining public confidence in the Constitution.[116]

The third type of remedial substitute for the exclusionary rule is the civil remedy under 42 U.S.C. § 1983.[117] Initially, this alternative was appealing. The guilty party, incarcerated as a result of evidence obtained illegally instead of going unpunished would simply have a cause of action against the officer who conducted the search or against the law enforcement agency under a *respondeat superior* analogy. This alternative potentially preserves the legitimacy of the criminal justice system for those who take an uncompromising stand against crime, while providing a check on arbitrary police conduct. The police force could no longer afford to violate criminal procedures. Irrespective of the ostensible allure of a statutory tort claim, this third alternative to exclusion is really no more practicable than the previous two.

Problems abound with civil remedies. The most formidable hurdle for anyone suing under section 1983 is the officer's intent. If the officer lacked the requisite unlawful intent, the statute will bar recovery completely. Proving gross or culpable negligence is an almost insurmountable burden, similar to showing that an officer was not acting in reasonable good faith. The best a potential plaintiff could hope to do would be to show total ignorance or disregard for indisputable law. Such flagrant disregard seldom occurs, and even when it does, search and seizure law is inscrutable enough that no one could ever prove the officer's bad faith. As if this burden were not difficult enough, the potential plaintiff enters any legal action disadvantaged as a confirmed wrongdoer. This individual is likely to have little or no credibility with a judge or jury. As a prisoner, the individual might fear future harrassment from law enforcement personnel. Furthermore, the person suing in such an action would likely be impecunious and,

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116. *See* Dawson, *supra* note 64, at 532:

> [T]he judiciary must continue to exercise jurisdiction over the content of the rules, to ensure their legality, and over compliance with them in individual cases. To do otherwise would be to allow a situation in which the police make the rules and enforce the rules, surely a definition of a police state.

Id.

117. *See* 42 U.S.C. § 1983 (1982); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 509 (1955); McCaffrey, *Recent Developments in 42 U.S.C. Section 1983 Claims Against Municipalities and Their Police Departments*, 15 FORUM 747, 751 (1980).

if in prison, would have no income to pay attorney's fees. Success in a civil action seems a remote possibility for a plaintiff facing so many obstacles.

Strangely, if an individual succeeded in a civil action against the police, the results might actually have a more profound deterrent effect on law enforcement than the exclusionary rule. Although Chief Justice Burger and others have called for formulation of a more effective deterrent than exclusion, the question arises whether that is really what they want. The police officers who actually conduct searches are seldom well paid and are frequently at risk. If the civil suit is to be a deterrent, field officers might begin to conduct their own microeconomic cost-benefit analysis and give up searching altogether. If fourth amendment law is actually intolerably obscure, officers may refuse to take chances for fear of financial hardship. So, fewer defendants would go free because of a fourth amendment violation, but fewer would be brought to justice as well.

Of course, this overkill deterrence argument eventually breaks down because, in practice, officers probably would not pay the judgments anyway. The damages would most likely come from a general insurance fund that would operate somewhat like malpractice insurance. The individual officer would incur no real liability and might escape accountability for constitutional infractions.[118] The result might be that many communities, especially smaller ones, would be at financial risk.

E. *The Exclusionary Rule and Institutional Integrity*

The present Court evinces the doctrine of deterrence as the main justification for exclusion. This view of the rule as a singleness of purpose encourages disregard for vindication of individual rights and for preservation of judicial integrity. Moreover, it draws attention away from the actual substantive requirements of the fourth amendment. If the exclusionary rule is justified simply on deterrence grounds, then the law has reduced its educational and moral force to the least common denominator. The deterrence aspect of exclusion influences only future behavior and concentrates on the "doer" — the police officer who might conduct the illegal search. Conversely, the vindication aspect involves a measure of retroactivity — it concentrates on the individual to whom it was "done." If deterrence is the only

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118. *See generally* Dawson, *supra* note 64, at 531-33; *see also* Ingber, *supra* note 58, at 1552-56 (analyzing effect of good faith exception on scope of fourth amendment).

basis for exclusion, then no reason exists to enforce the rule in those situations in which unlawful search and seizure results from mere police ignorance. If, on the other hand, exclusion is designed to educate the one who violates proscribed search and seizure provisions, then the evidence wrongfully obtained should be inadmissible even if the violation resulted from reasonable misapprehension or ignorance.

F. *Some Final Overworked Observations*

1. Jurisprudential Inconsistency

In most societies the absence of an exclusionary rule or its equivalent is rather uncontroversial. Other people have accepted limitations on individual liberties for the sake of safety. Although some argue no such guarded society exists in the United States (where the Bill of Rights is enshrined), exceptions, such as airport searches, do exist for reasons of safety. Yet, these limited detours from the Bill of Rights do not replace those rights in our society. The Bill of Rights is a legacy inspired by concern over potential governmental oppression more than fear for public safety. As long as the present perception of the Bill of Rights exists, abrogation of the exclusionary rule or limitation of its impact diminishes the symbolic force of all the constitutional amendments. The true test of any system containing a statement of individual liberties lies in the observation of how that system imposes its own rules upon itself. The right to be free from unreasonable search and seizure means the right to be free from the repercussions of, and the assurance that the right in question will be reviewed by, a judicial system disassociated from the police practice. The freedom from the initial invasion, the right to exclusion of evidence once invaded, and the assurance of judicial integrity are concatenated parts of the central freedom guaranteed by the fourth amendment.

I would suggest that privacy is a fundamental right whether written in the Constitution or not. The framers viewed privacy from within the context of search and seizure.[119] It matters little that the fourth amendment was probably not intended to protect the clandestine scheming of criminals. The drafters feared direct governmental intrusion into private lives and sought to limit such power.[120] Police regu-

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119. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 19, at 735 (identifying the oldest and best understood privacy interest protected by the Constitution as the fourth amendment guarantee of freedom from unreasonable search and seizure).

120. *See* Buckley, *Status of Intoxicating Liquor Seized Under Authority of a Subsequently Declared Invalid Search Warrant*, 12 GEO. L.J. 19, 21 (1923) ("The object of the fourth amend-

lation is not merely a means to achieve fourth amendment goals,[121] it is itself one of the goals.[122] The use and abuse of general warrants and writs of assistance was a form of an inquisitorial process recognized as one of the abuses of power. From that experience we insisted upon an adversarial system, thus forcing the Court into a moral role. The Bill of Rights requires the Court to ensure justice. If it is unjust to admit evidence obtained in an illegal manner, then the Court is charged with the duty of exercising its moral authority and destabilizing popularized malice. I would suggest that security against unrestrained police intrusion is elemental to this free society and lies at the heart of the fourth amendment.[123] As a colleague put it: "the attack is upon the citadel of the fourth amendment" and no matter how the Court or the current executive administration may phrase it, they are disguising their agenda in a shroud of obfuscation and casuistic rhetoric.[124]

2. Consideration of the American Concept of Judicial Interpretation

Some have suggested that the Bill of Rights is the victim of an over politicized Supreme Court that exceeds the bounds of its authority and creates implications out of the ethereal mist. Granted, the fourth amendment does not specifically authorize exclusion of illegally obtained evidence. "Strict constructionists" argue that the Constitution is a precise set of directions that usually admits but a single solution to any legal dispute.[125] Justice Brennan has spoken of the "cloaks of

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ment . . . was to protect the citizen from domestic disturbance by the disorderly intrusion of administrative officials. Such official misconduct is expressly prohibited by the amendment . . . ."). *See also* Weeks v. United States, 232 U.S. 383, 390-92 (1914) (reviewing history of fourth amendment and concluding that its purpose was to limit courts and officials in order to secure the people against "unreasonable searches and seizures under guise of law"); J. LANDYNSKI, *supra* note 6, at 20 (fourth amendment drafted for "express purpose of providing safeguards against a recurrence of highhanded search measures"); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1131-32 (1969) (discussing common law view that transgression of government officer constitutes trespass).

121. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 361-62 (1974).

122. *See* J. LANDYNSKI, *supra* note 6, at 42-46; *see also* Adams v. New York, 192 U.S. 585, 598 (1904) ("The security intended to be guaranteed by the 4th amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law . . . .").

123. *See* J. LANDYNSKI, *supra* note 6, at 30-39; *see also* W. LAFAVE, 1 SEARCH AND SEIZURE 3-6 (1978) (historical survey of origins and purposes of exclusionary rule).

124. *See* Ingber, *supra* note 58, at 1557.

125. Many view a failure to exercise judicial self restraint as anti-republican. One of the most articulate and forcible advocates of restraint was Justice Holmes, who was quoted as

generality," the artful vagueness in which the framers dressed these incipient words of a newly founded free society.[126] Indeed, terms such as "unreasonable searches," "due process," and "equal protection of the law," are indeterminate until a court imbues them with meaning. They are also part of a uniquely American terminology not frequently heard in foreign courtrooms.

I would summarize these thoughts on the exclusionary rule with a brief examination of the current and most fashionable constitutional debate because I do not believe that an analysis of the exclusionary rule is complete without a look at the institutional role played by the Court in the rule's emergence and decline. The debate centers around the historical question whether the Court should confine its interpretive skills to principles and policies discoverable in the text of the Constitution or, given the complexities of a modern state, legitimately create principles and policies based upon its perception of contemporary moral standards of the state and its people. It matters not whether such judgment is unsupported by the written document or apparent framer intent.[127]

The case on behalf of the latter, although set forth in different packaging, is scantly different from earlier attempts to move the Court into the legislative or executive world of policymaking.[128] This unnovel approach is to allege, and little more, that the Court is an unbridled policymaker and should be accepted as such. Advocates of this view ignore textual guidance.[129] In so doing, at the extreme, they surrender

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saying, "about seventy-five years ago, I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressingly forbidding them to do, I say, whether I like it or not, 'Goddamit, let 'em do it!' " C. CURTIS, LIONS UNDER THE THRONE 281 (1947).

126. Kilpatrick, *Two Ways to Interpret the Constitution*, Miami Herald, Nov. 5, 1985, at 17A, col. 1.

127. *Compare* P. BOBBITT, CONSTITUTIONAL FATE (1982) (justification of the constitutional legitimacy of judicial review through an analysis of its functions and arguments) *with* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982) (arguing that the Supreme Court's recent decisions on human rights are based on value judgments of the justices themselves rather than on the Constitution or on the values of its framers).

128. *Compare* M. PERRY, *supra* note 118 (recent Supreme Court human rights decisions based on value judgments of justices themselves), *and* Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982) (highlighting contradictions and problems inherent in the constitutional interpretive approach) *with* the legal realists school of the thirties, especially Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645 (1932) (emphasizing the inability to predict how courts will decide a specific case because of judge's reliance on own value judgments).

129. *See* M. PERRY, *supra* note 127, at 2-18. The development of non-interpretive criticism can be found in Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U.

constitutional principles to idealogues at both ends of the political spectrum. Their core values include discarding written systems of law. The former, for the most part, appear to begin from the premise of constitutional legitimacy.[130] Obviously, the framers did not envision all; yet, they did establish a structural morality that reflects a concept of constitutionalism recognizing specific, though limited, roles for government.[131] For example, in the abortion cases, the Court found that governmental intrusion into the body of a woman at certain points in her pregnancy exceeded the government's limitation mandate, for no compelling reason. Thus, judicial review took into account the textual commitment to limited governmental intrusion into private lives.[132]

The scholarly defense of constitutional interpretation is well demonstrated in Philip Bobbitt's work, *Constitutional Fate*. Bobbitt's argument is in support of the legitimacy of judicial review. Bobbitt's analysis recognizes interpretive flexibility since the time of *Marbury*. He attempts, in part, to catalogue constitutional arguments as distinguished from political policy conclusions. Bobbitt concludes that interpretivists seek constitutional accountability while non-interpretivists ignore it.[133]

As to scholars and jurists, preoccupation with whether the Court exceeds its constitutional mandate or remains true to the letter or, at least, the spirit of the document, appears to be an exercise in subtle polemics. I would agree with Professor Wellington that

> [t]he process has its own built-in dynamic of evaluation. Of course Justices are fallible. But when they make mistakes, they hear about them: signals are sent, groups are formed, legislation is proposed, and the public forum is heavily used. New cases will afford the court opportunities for reevaluation. The doctrine of stare decisis is not strong in the constitutional realm.[134]

DAYTON L. REV. 579 (1983); McArthur, *Abandoning the Constitution: The New Wave in Constitutional Theory*, 59 TUL. L. REV. 280 (1984).

130. *See generally* P. BOBBITT, *supra* note 127, at 152; Baker & Baldwin, *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "from Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 57-65 (1985).

131. *See* P. BOBBITT, *supra* note 127, at 152.

132. *Compare* Roe v. Wade, 410 U.S. 113 (1973) (Court invalidated Texas' near-total ban on abortions based on a woman's right to privacy) *with, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained from unconstitutional search and seizure inadmissible).

133. *See* McArthur, *supra* note 129, at 307.

134. Wellington, *History and Morals in Constitutional Adjudication*, 97 HARV. L. REV. 326, 335 (1983).

No amount of scholarship will change the task of the justice.

> [T]he art of judging involves separating false signals from real mistakes, whereas the consequences that a judicial decision has for the formation of moral opinion are completely unpredictable.
>
> In the end, judicial review is legitimate for the same reason that common law and statutory adjudication are legitimate: "We the People" consent.[135]

From this, one may glean a simple truth: nothing tells the justice which way to decide. However, in deciding and administering "the law," the judge cannot ignore the fact that he or she is subject to it. Therefore, the question remains, how creative does the justice view his or her role? The Constitution makes advocating or adopting the more creative role the most difficult task. Certainly, cases creating or abolishing the exclusionary rule should limit judicial creativity. If the ultimate result is in keeping with the moral ideals of the community, then the decision will be respected by most, except perhaps the lunatic fringe. This is, as Professor Wellington put it, not a quest for right or wrong answers.[136] Simply put, if the moral conclusions square with the community's moral conviction, the right or wrong of it becomes irrelevant. I would suggest, however, that, although the conclusions of the present Court in the exclusionary rule area are less than constitutionally moral in their focus, at the least they reflect the current popular attitude toward crime. Under these circumstances, the exclusionary rule is a victim rather than an instigator. For the Court to relinquish its role to miscalculation would be a grave mistake. "Deterrence is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred . . . ."[137]

V. CONCLUSION

I end where I began, with the standardless case development during the twilight years of the exclusionary rule that has become a

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135. *Id.*

136. *Id.* at 334. *Cf.* Hazard, *The Supreme Court as a Legislature*, 64 CORNELL. L. REV. 1 (1978) (illustrating the constructive ideas that follow from the view of the Supreme Court as a legislature).

137. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 333 (1973).

self-fulfilling prophecy. In reaching this conclusion, I too have been hypnotized by individual records in certain cases. In yielding to these irresistable fact examples, it is easy to understand how the warrant requirement has become an empty guarantee within a structureless theory. If the rule has little deterrent impact upon the constable, and the court has so found, then why exclude illegally obtained evidence? Somewhere along the way to this structureless theory, the Court seems to have lost sight of the principled basis[138] behind the rule; which is, I thought, the integrity of the guilt determination process. A loss of judicial integrity will, I suspect, go much farther toward an overall realistic erosion of public faith in the guilt determination process than the implementation of majoritarian concepts of community values reflected in the public's perception of the exclusionary rule.[139] The loss of principled decisionmaking, to the benefit of contaminated evidence, is a far greater loss to our Constitution than the Court's adherence to perceived community fears.[140]

I believe that the Court has now rejected a principled goal for the fourth amendment, a goal insuring integrity, and replaced it with a torturous and essentially unprincipled case-by-case analysis of the rule.[141] I would assume that the members of the Court would concede that Fuller was correct when he argued for integrity within the legal system. Yet, as the fourth amendment grew, somewhere along the way, the principle of integrity was abandoned and the new focus became the principle of fear.[142] This change in direction will, I suggest, have a profound negative impact upon the judicial branch of government. If the Court is to continue its dissection of the exclusionary rule, and if the Court is concerned with avoiding disrepute, then its task must be accomplished with a more principled scalpel.[143]

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138. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.J. 518, 537.

139. For an in-depth analysis of the relationship of the exclusionary rule to integrity and the avoidance of disrepute, see C. Gray, *supra* note 19.

140. *See* C. Gray, *supra* note 19, at 21-23.

141. *See, e.g.*, Weisberger, *The Exclusionary Rule: Nine Authors in Search of a Principle*, 34 S.C.L. REV. 253, 272 (1982).

142. *See generally* T. Baker, *supra* note 5.

143. *Cf.* Baldwin, *The United States Supreme Court: A Creative Check of Institutional Misdirection?*, 45 IND L.J. 550 (1970) (proposing an active role for the Supreme Court as necessary to protect the rights of the individual vis-á-vis the community).