Erosion of the Exclusionary Rule Fourth Amendment

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EROSION OF THE EXCLUSIONARY RULE

I. INTRODUCTION

The fourth amendment to the United States Constitution provides for the right of the people to be secure in their persons, houses, papers, and effects. This right is protected by provisions against unreasonable searches and seizures, and by the requirement that warrants be issued only upon probable cause supported by oath, describing in particular the place to be searched, and the persons or things to be seized. The means of implementing the protections afforded by the fourth amendment has generated a great deal of controversy.

The exclusionary rule, one of the tools to safeguard fourth amendment rights, excludes from criminal proceedings all evidence obtained pursuant to an illegal search and seizure. Almost from its inception, the rule has been attacked as inadequate because it protects a criminal’s constitutional rights at the price of suppressing valid, probative evidence.

The exclusionary rule is not constitutionally mandated by fourth amendment prohibitions against unreasonable searches and seizures. It is, rather, a judicial remedy purporting to

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1. 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.
   U.S. CONST. amend. IV.
2. Id. See T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 372 (5th ed. 1883). Writing about unreasonable searches and seizures, Cooley states that “it is better often times that crime should go unpunished than that a citizen should be liable to have his premises invaded, his desks broken open, his private books, letters and papers exposed to prying curiosity, and to misconstructions of ignorant and suspicious persons. . . .”
4. See Wilkey, A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak, 62 JUDICATURE 351, 354 (1979). Judge Wilkey states that “the definition of ‘unreasonable searches and seizures’ is nowhere found in the Constitution. It has been a matter for the courts to decide, and it could be a matter for Congress.” See Kamisar, The Exclusionary Rule in Historical Perspective: The

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safeguard fourth amendment guarantees through its deterrent effect on police misconduct. The rule is also invoked to avoid any judicial taint arising from the use of illegally obtained evidence, and as a means of assuring the people that the government will not profit from its lawless behavior. Through a continuous process of erosion, the policies aimed at avoiding judicial taint and maintaining governmental integrity have been abandoned, leaving deterrence as the rule's only, although doubtful, justification. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effective available way—by removing the incentive to disregard it."

The Burger Court, in questioning the rule's deterrent effect, has engaged itself in an erosion process by restricting the exclusion of evidence and expanding the number of exigent circumstances permitting warrantless searches. This comment traces the Supreme Court's erosion of the exclusionary rule and will examine whether the highest Court will discard this controversial remedy or simply continue its erosion. The Court's alternatives may depend upon the congressional response to Chief Justice Burger's 1971 proposal that Congress provide a tort remedy for those defendants whose rights have been violated. Such legislation, if enacted, would probably signal the end of the exclusionary rule. If, on the other hand,

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Struggle to Make the Fourth Amendment More than an Empty Blessing, 62 JUDICATURE 337 (1979). Professor Kamisar suggests that the exclusionary rule is not necessarily mandated by the fourth amendment, but states that any arrest, search, or seizure in violation of the amendment is nevertheless illegal regardless of the application of the rule. See also Schrock & Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 69 MINN. L. REV. 251, 337-66 (1974).


8. Id. at 347-48 n.5.

9. Id. (quoting with approval Elkins v. United States, 364 U.S. 206, 217 (1960)).


Congress fails to provide such a remedy, the Court may opt to further erode the rule, allowing into evidence the fruits of illegal searches and seizures in which the police, although acting in good faith, have violated fourth amendment requirements. In either case, the burden remains with the Court to protect the right of the people to be secure in their persons, houses, papers, and effects. The judiciary, as well as other branches of government, need be mindful of Justice Brandeis' words:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

II. THE EXCLUSIONARY RULE AND ITS EROSION

A. Historical Perspective

The application of the exclusionary rule by state courts has had a short history. The California Supreme Court, for example, has applied the rule for only twenty-seven years since its decision in People v. Cahan. In contrast, the rule's application in federal courts dates back to Weeks v. United States, decided in 1914.

In Weeks, the Supreme Court ruled that evidence illegally obtained must be excluded from criminal proceedings. The defendant had been charged with using the mails to

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13. Justices White, Powell, and Rehnquist as well as Chief Justice Burger have expressed their support for the good-faith exception. See supra note 10.
17. The forerunner of Weeks was Boyd v. United States, 116 U.S. 616 (1886). In Boyd, the Court, per Justice Bradley, held that a forced production of papers amounted to an unreasonable search directed toward the acquisition of mere evidence of crime. The fourth amendment protections were applicable and the forced production of evidence leading to the defendant's self-incrimination was prohibited by the fifth amendment.
transport lottery tickets. These tickets were found during a warrantless search prior to defendant's arrest. Justice Day wrote that:

The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures . . . should find no sanctions in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.¹⁸

In *Weeks*, defendant's property was searched and the evidence seized by a United States Marshall in collaboration with other officers who engaged in a warrantless search of the defendant’s house. Since the evidence had been obtained as a result of illegal conduct by a federal officer, the *Weeks* opinion left undecided whether the Court would apply the same rule to illegal conduct by a state official. Heretofore, the fourth amendment protections were a matter of federal constitutional interpretation.

Thirty-five years later in *Wolf v. Colorado* the Court extended fourth amendment protections to defendants in state prosecutions. Although not ready to impose the restrictions of *Weeks* upon the states, the Court held that the fourth amendment was incorporated into the due process clause of the fourteenth amendment. A law enforcement officer could not intrude arbitrarily into one’s privacy, but the relevant evidence obtained by an unreasonable search and seizure was admissible in state court. Justice Douglas objected to the Court’s holding, stating that evidence obtained in violation of the fourth amendment had to “be excluded in state, as well as federal prosecutions, since in absence of that rule of evidence the amendment would have no effective sanction.”

In the 1961 landmark decision of *Mapp v. Ohio*, the

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18. 232 U.S. at 387.
19. *Id.* at 392.
20. *Id.* at 396.
22. *Id.* at 33. Justices Murphy, Douglas, and Rutledge dissented from the opinion by Justice Frankfurter. The three dissenters, in separate opinions, wrote that notwithstanding the Court’s data showing that two thirds of the states had not adopted the *Weeks* rule, they would nevertheless apply it uniformly to all states.
23. *Id.* at 40.
24. 367 U.S. 643 (1961). The Ohio state police broke into the accused’s apart-
Court applied the exclusionary rule to the states. In an opinion by Justice Clark, the Court overruled Wolf and held "that all evidence obtained by searches and seizures in violations of the Constitution is, by that same authority, inadmissible in a state court." 28 The Court noted that many states which opposed the exclusionary rule before Wolf had, by their own legislative or judicial decisions, "wholly or partly adopted or adhered to the Weeks rule." 27 Reasoning that the exclusionary rule was an essential part of both the fourth and fifth amendments, Justice Clark suggested that a failure to adopt it would lead to double standards of justice. In states where the exclusionary rule was inoperative, federal officials could simply "step across the street to the state’s attorney with unconstitutionally seized evidence" and procure a defendant’s prosecution "in a state court in utter disregard for the fourth amendment." 28 The Court acknowledged that the consequence of the rule’s application would indeed result in Justice Cardozo’s prediction that “[t]he criminal [was] to go free because the constable has blundered.” 29 The Court, however, was more concerned with the imperative of judicial integrity. If the criminal was to go free, “[i]t [was] the law that [set] him free. Nothing [could] destroy a government more quickly than its failure to observe its own laws, its disregard of the charter of its own existence.” 30 With Mapp, the Court hoped to bring an end to the controversy that Wolf had begun. Henceforth, the exclusionary rule would be applied to both federal and state jurisdictions. 31

B. The Policies for the Rule

The Supreme Court has never entirely agreed on the policies underlying the exclusionary rule. Judicial integrity, gov-
ernment development," and deterrence of illegal police conduct have most commonly been cited as rationales for upholding the rule. Deterrence is the only policy surviving twenty-one years of the rule's application to the states, and "it is fair to say that [deterrence] . . . is [the rule's] major purpose." Judicial integrity prohibits the courts from allowing the introduction of illegally obtained evidence. *Elkins v. United States* concerned the exclusion of several recordings and a recording machine originally seized by state officers and turned over to federal agents. The Court held that articles obtained by state officers as a result of an unreasonable search and seizure, without involvement of federal officers, could not be used as evidence in a federal trial when the defendant makes a timely motion for its suppression. Justice Stewart, writing for the Court, stated that there is an "imperative of judicial integrity" that demands "the rejection of a doctrine that would freely admit in a federal criminal trial evidence seized by state agents in violation of the defendant's constitutional rights." He quoted Justice Holmes' dissenting opinion in *Olmstead v. United States* for the proposition that "no distinction can be taken between the government as prosecutor and the government as judge."

Justice Stewart, in explaining the rationale for the doctrine of judicial integrity, also quoted Justice Brandeis' dissent in *Olmstead* at length:

> To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should

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32. The development theory finds its purpose in assuring that the government will not profit from its unlawful conduct, thereby compelling people to obey the law and trust in government. *See infra* note 33.
34. *Id.* at 17.
36. *Id.* at 222.
37. 277 U.S. 438 (1928). Justices Holmes and Brandeis stressed the importance of the individual's right of privacy against the government's unwarranted intrusions.
38. 364 U.S. at 253 (quoting Olmstead v. United States, 277 U.S. at 470 (Holmes, J., dissenting)).
This "imperative of judicial integrity," was echoed in later cases, but soon abandoned.

Deterrence has been the rule's most seriously considered purpose, and presently remains its sole recognized rationale. The Court first introduced the notion of deterrence in Wolf v. Colorado, where the Court expressed the need to avoid police violations of an individual's privacy. Justice Powell, delivering the opinion of the Court in United States v. Calandra, wrote that "[t]he rule's primary purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."

The actual effectiveness of the rule's deterrence on illegal police conduct has been unclear. Justice Blackmun wrote in United States v. Janis that "[t]he debate within the Court on the exclusionary rule has always been a warm one. It has been unaided, unhappily, by any convincing empirical evidence as to the effects of the rule." The problem has not been the unavailability of empirical evidence, but that no study has sufficiently demonstrated the rule's deterrent effect.

39. 277 U.S. at 485 (Brandeis, J., dissenting).
44. Id. at 347.
46. Id. at 446.
47. The Court was aware of the evidence offered in Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 667-68 (1970), that there is no convincing empirical evidence to support a claim that the rule actually deters illegal conduct of law enforcement officers. See also Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives, 2 J. LEGAL STUDIES 243 (1973). But see Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 61 KY. L.J. 681 (1974).
48. Other studies are equally unconvincing. See Kaplan, Limits of the Exclusionary Rule, 26 STAN. L. REV. 1027, 1029 (1974). The author asserts that the exclusionary rule "must stand or fall simply on the basis of its demonstrated utility."
Judicial integrity and the government development theory have met a common fate. In many instances only ritual references have been made to "the imperative of judicial integrity" and the opinions "were so indefinite about the controlling combination of rationales that deterrence could become the sole rationale by default." The Court, by continually limiting the rule's rationale to deterrence, renders it little more than an empty blessing.

C. The Process of Erosion

The fourth and fifth amendment protections are analogously safeguarded by the exclusionary rule, which makes unavailable to the trier of fact any "fruits of the poisonous tree." A defendant will not stand trial or be convicted on a charge based solely on evidence obtained pursuant to an illegal arrest, search, or seizure. The evidence is said to be "tainted" and unless other circumstances make the connection between the officer's illegal conduct and the evidence obtained so attenuated as to purge the taint, the evidence will be excluded.

By applying the exclusionary rule to the states, Mapp mandated the suppression of any evidence produced by an unreasonable search, or obtained without a warrant issued under the proper authority and upon probable cause. Mapp failed to address, however, (1) whether the rule applied to the states retroactively, (2) whether it was to be used outside the


49. See Schrock & Welsh, Up From Calandra, supra note 4, at 263-64.

50. The "fruits of the poisonous tree" are items of evidence directly obtained pursuant to an illegal arrest, search, or seizure. Such evidence must be excluded on fifth amendment grounds if it is found to be self-incriminating and the defendant has standing to object to the violation. See 1 W. LAFAVE, SEARCH AND SEIZURE, supra note 33, at 612.


52. Similarly, the tainted evidence will not be excluded where admitting it would result in harmless error, or where its discovery would be inevitable. See 1 W. LAFAVE, SEARCH AND SEIZURE, supra note 33, at 719-49.

53. The fourth amendment requires that the place to be searched and the persons or things to be seized be described with particularity. This requirement can be seen to fulfill the condition that the search be reasonable.
criminal process, (3) whether it should exclude illegally obtained evidence, when applicable, in all criminal proceedings, and (4) whether such evidence could be used in the criminal process but not in the case-in-chief. The subsequent resolution of these issues by the Supreme Court has gradually eroded the fourth amendment protections safeguarded by the exclusionary rule.84

1. Erosion by the Progeny of Mapp

In 1965, the Supreme Court decided not to apply Mapp retroactively to state convictions that had become final prior to the overruling of Wolf.58 The Court, in Linkletter v. Walker,54 held that the purpose of the exclusionary rule was not furthered by applying it retroactively because the police misconduct had already occurred and would not be deterred by the release of the prisoners involved. The individual's privacy had already been violated and could not be restored.57 The Court was not persuaded by the retroactive application of the exclusionary rule in prior cases dealing with coerced confessions. In those cases, the danger of unreliability was greater, but "there [was] no likelihood of unreliability or coercion present in search and seizure cases."58 The plurality asserted that the right to exclude illegally obtained evidence was not personal, but rather one to be considered with other factors, including whether the police would be deterred by its application. Consequently, the scope of the rule's applicability was limited to safeguarding the fourth amendment provisions when police could be deterred.

In Terry v. Ohio,59 the Supreme Court ruled on whether evidence obtained pursuant to a limited search based on less than probable cause could be used to prosecute a defendant. A detective, believing that three suspects were casing a store for a robbery and might be armed, stopped them after notic-
ing that they had repeatedly strolled by and peered into a store window. A frisk uncovered two pistols which were introduced into evidence. The Court ruled the “stop and frisk” reasonable under the fourth amendment both because the scope of the “search” and “seizure” was limited to discovery of weapons and because the search was based upon a reasonable man’s belief, under the circumstances, that his and others’ safety was in danger. This exception to the traditional requirements of probable cause was justified by the need for police safety and the interests of crime prevention and detection. These interests then had to be balanced with the individual’s fourth amendment rights. The Court acknowledged the right of the individual to the possession and control of his own person. The freedom from all restraint and interference of others was paramount and continued to be safeguarded by the exclusionary rule. Nonetheless, the Court considered that in some contexts the rule was an ineffective deterrent. Chief Justice Warren noted that the use of the rule should not discourage the employment of other remedies to curtail abuses where the exclusionary rule was inappropriate.

Regarding the necessity of probable cause for a search and seizure, the Court saw it “imperative that the facts be judged against an objective standard.” “Simple good faith on the part of the arresting officer [was] not enough . . . if subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate. . . .”

Justice Douglas dissented, arguing that a “search” and “seizure” based on less than the traditional requirements of probable cause was unconstitutional. He felt that the Court was giving the police greater authority to search and seize than a magistrate could authorize (a warrant issued by a magistrate requires probable cause).

60. Id. at 6.
61. Id. at 30.
62. Id. at 9.
63. Id. at 13.
64. Id. at 15.
65. Id. at 21.
66. Id. at 22 (quoting with approval Beck v. Ohio, 379 U.S. 89 (1964)).
67. Id. at 35-36 (Douglas, J., dissenting).
2. **Erosion by the Burger Court**

Since the arrival of Chief Justice Burger and the other Nixon appointees to the Court, erosion of the exclusionary rule has accelerated. The new Chief Justice promptly expressed his willingness to discard the rule, although he did not propose its abandonment until some meaningful alternative could be developed.

In 1974, the Burger Court held in *United States v. Calandra* that a grand jury witness (the accused) could not refuse to answer questions on grounds that they were based on evidence obtained from an unlawful search and seizure. The district court had granted the defendant's motion to exclude the illegally obtained evidence, ruling that he need not answer questions on grounds of self-incrimination. Justice Powell, writing for the Court, concluded that the grand jury's primary function was the determination of whether a crime had been committed and whether criminal proceedings should be instituted against any persons. The proceedings did not amount to an adversary hearing where the guilt or innocence of the accused was adjudicated.

The majority stressed that the rule was a judicially created remedy intended to deter unlawful police conduct, holding that:

> Despite its broad deterrent purpose, the exclusionary rule [had] never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule [had] been restricted to those areas where its remedial objectives [were] thought most efficaciously served.

The Court concluded that allowing the witness to invoke the

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69. *Id.* at 420-21.
71. *Id.* at 351-52.
72. 332 F. Supp. 737, 742 (N.D. Ohio 1971). The law enforcement officers had obtained a warrant to search defendant's office on a gambling investigation. They proceeded to search not only his office but also his home and his car finding no evidence of paraphernalia specified in the warrant. They came instead upon evidence of loansharking and seized books and records of defendant's company as well as stock certificates.
73. 414 U.S. at 343-44.
74. *Id.* at 348.
exclusionary rule would interfere with the "effective and expeditious discharge of the grand jury's duties;" that the fourth amendment did not require adoption of every proposal that might deter police misconduct; and that the incremental deterrent effect achieved by extending the rule in this case was uncertain at best.\textsuperscript{75} It was further noted that the accused had no right of privacy before the grand jury and that the Court's holding applied to evidence seized during the course of an unlawful search and seizure, including any "fruits" derived therefrom.\textsuperscript{76}

Justice Brennan's dissent\textsuperscript{77} vehemently attacked the majority's opinion and stated that the majority's "downgrading of the exclusionary rule to a determination of whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling objective and purpose of the rule."\textsuperscript{78} He stressed that the exclusionary rule was "part and parcel" of the fourth amendment protections.\textsuperscript{79} Unlike the majority, he was unpersuaded that the defendant was sufficiently protected by the inadmissibility of evidence at other steps of the criminal prosecution. Justice Brennan feared that:

[W]hen next we confront a case of conviction rested on illegally seized evidence, [the Calandra] decision will be invoked to sustain the conclusion in that case also, that "it is unrealistic to assume" that the application of the rule at trial would "significantly further" the goal of deterrence—though, if the police are presently undeterred, it is difficult to see how removal of the sanction of exclusion will induce more lawful official conduct.\textsuperscript{80}

Justice Brennan's fear was not unfounded. Subsequent Court decisions have continued the erosion. In United States v. Janis,\textsuperscript{81} the Court held that the exclusionary rule should not be extended to forbid the use of illegally seized evidence by a law enforcement agent of one sovereign in a civil proceeding of

\textsuperscript{75} Id. at 349-51.  
\textsuperscript{76} Id. at 353-55.  
\textsuperscript{77} He was joined by Justices Douglas and Marshall. Id. at 356.  
\textsuperscript{78} 414 U.S. at 356.  
\textsuperscript{79} Id. at 360 (quoting with approval Mapp v. Ohio, 367 U.S. 643, 651 (1961)).  
\textsuperscript{80} Id. at 365-66.  
\textsuperscript{81} 428 U.S. 433 (1976).
another sovereign. This holding distinguished Elkins v. United States, which had overruled the "silver platter doctrine," permitting the use of illegally seized evidence in intrasovereign exchanges. In Janis, Los Angeles police illegally seized gambling records and cash from the defendants. The police then notified the Internal Revenue Service which assessed wagering taxes and levies upon the cash. The Court quoted Calandra to establish that the prime purpose of the rule was to "deter future unlawful police conduct" and concluded that "[i]n the complex and turbulent history of the rule, the Court never [had] applied it to exclude evidence from a civil proceeding, federal or state." The Court found that because the officers had relied in good faith on a warrant which later proved to be defective, they had already been deterred by the exclusion of the evidence from the criminal proceeding. The rule's "marginal deterrent [effect was] diluted by the attenuation existing when a different sovereign used the material in a civil proceeding."

In a modest footnote, the Court reviewed the purposes behind the exclusionary rule, finding deterrence was its prime purpose, and "judicial integrity" was "a relevant, albeit subordinate factor . . . . Judicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the fourth amendment." In light of the Court's decisions in United States v. Peltier and Michigan v. Tucker, the Court, in Janis, suggested that the inquiry into "judicial integrity" was essentially the same as the inquiry into whether exclusion of evidence would serve as a deterrent.

82. Id. at 459-60.
84. 428 U.S. at 433.
85. Id. at 447.
86. Id. at 454 n.27. The Court felt that the rule's marginal utility was outweighed by its costs.
87. Id. at 458 n.35.
88. 422 U.S. 531 (1975). Evidence obtained from a search should be suppressed only if the law enforcement officer had knowledge or could properly be charged with knowledge that the search was unconstitutional under the fourth amendment. Peltier declined to give retroactivity to Almeida-Sanchez v. United States, 415 U.S. 266 (1973).
89. 417 U.S. 433 (1974). Miranda warnings are only prophylactic standards designed to safeguard or to provide practical enforcement for the privilege against self-incrimination and are not themselves constitutional protections.
Neither purpose was found determinative.90

In 1976, the Supreme Court decided to restrict certain state claims of fourth amendment violations from its review. Stone v. Powell91 inflicted another setback upon the rule by giving the district courts discretion to determine which state cases would ultimately reach the Supreme Court's docket.92 Powell's murder conviction in California state courts was based partly on evidence obtained when he was arrested in Nevada under a vagrancy ordinance which was subsequently declared unconstitutional. The defendant moved to have the evidence suppressed. After an unsuccessful appeal in state court and the denial of a habeas corpus petition by the California Supreme Court, he petitioned for habeas corpus relief in federal court.93

The Supreme Court reiterated that the exclusionary rule "was a judicially created means of effectuating the rights secured by the Fourth Amendment,"94 but noted that in Mapp only four justices had required the exclusion of unconstitutionally seized evidence in state criminal trials.95

Given the Court's weak support for the exclusion of evidence in Mapp, Justice Powell cautioned that to apply the

92. Id. at 469, 482. The Supreme Court, eight years after Powell was convicted of murder, decided the issue of whether "a federal court should consider, in ruling on a petition for habeas corpus filed by a state prisoner, a claim that evidence obtained by an unconstitutional search and seizure was introduced at his trial, when he has previously been afforded an opportunity for full and fair litigation of his claim in the state courts." Justice Powell, writing the opinion of the court, stated that the Constitution does not require that a state prisoner be granted such habeas corpus relief. Id.
93. Id. at 470-71. Defendant filed for habeas corpus under 28 U.S.C. § 2254 in the Federal District Court for the Northern District of California alleging that (1) the statute under which he was arrested was vague and that (2) the officer who arrested him had no probable cause for the arrest. The court ruled that the officer had probable cause for the arrest, that even if the ordinance was unconstitutional, the deterrent purpose of the exclusionary rule did not require a bar to admission of the fruits of search incident to an otherwise valid arrest, and if there was error in admitting the evidence, it was harmless. The United States Court of Appeals for the Ninth Circuit reversed. It held that the statute was unconstitutional, the arrest was therefore illegal, and exclusion would deter the legislature from enacting unconstitutional statutes. 507 F.2d 93 (9th Cir. 1974).
94. Id. at 482.
95. Id. at 484 n.21.
rule indiscriminately would, instead of nurturing respect for fourth amendment values, generate disrespect for both the law and the administration of justice.

Chief Justice Burger concurred, reaffirming his belief that the Weeks mandate should not be operative here. Unlike Stone, Weeks had not dealt with the question of burglar’s tools and other incriminating evidence.96

Justice Brennan, writing in dissent, thought the Court had missed the point presented by Stone. Justice Brennan felt that the real issue was the availability of a federal forum to vindicate federally guaranteed rights,97 and not the question of a defendant’s right to have evidence excluded at a criminal trial when that evidence was seized “in contravention of rights ostensibly secured by the fourth and fourteenth amendments.”98 He wrote that a state’s rejection of fourth amendment claims under the Federal Constitution would be without redress because the majority gave the district courts total discretion as to whether or not to review state cases where fourth amendment constitutional rights may have been violated. Congress should decide these questions. Justice Brennan feared that this decision would be followed by claims “of double jeopardy, entrapment, self-incrimination, Miranda violations, and use of invalid identification procedures—that [the] Court later decides are not ‘guilt related.’ ”99 He felt that the majority compromised constitutional values in an attempt to protect society from lawbreakers.100 In summary, he noted that if the Court wished to modify or do away with the exclusionary rule, it should “at least [accomplish it] with some modicum of logic and justification,”101 which he found lacking in the majority’s opinion.

Justice White also dissented, asserting that Weeks and Mapp “had overshot their mark insofar as they aimed to deter lawless actions by enforcement personnel . . . .”102 Yet, he

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96. Id. at 497.
98. Stone v. Powell, 482 U.S. at 503 (Brennan, J., dissenting). Justice Brennan explained that he had used “ostensibly” because it was clear the Court had not yet given its “final frontal assault on the exclusionary rule.” Id. n.1.
99. Id. at 517-18.
100. Id. at 524.
101. Id. at 534.
102. Id. at 538 (White, J., dissenting).
was not in favor of overruling either case. He would only modify the rule "to prevent its application in those circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable ground for his belief."\textsuperscript{103} The rule's deterrent effect would not be furthered in situations where the police acted reasonably under the circumstances. The admission of evidence under such "good-faith" searches and seizures would not "render judges participants in fourth amendment violations" by allowing its use in court. "The violation, if there was one, had already occurred and the evidence [was] at hand."\textsuperscript{104}

In \textit{Michigan v. DeFillippo},\textsuperscript{105} the Court partly adopted the "good-faith" approach suggested by White in \textit{Powell}. The defendant, arrested pursuant to a "stop and identify" ordinance subsequently declared unconstitutional, was searched and charged with possession of a controlled substance.\textsuperscript{106} The Court upheld the arrest because it was allowed under the ordinance and the officers had complied in good faith with the existing law. Because the search was performed pursuant to a valid arrest, the defendant could not have the evidence suppressed. The officers did not violate the defendant's rights simply because they should have known the ordinance was invalid and would later be declared unconstitutional.\textsuperscript{107}

Justices Brennan, Marshall, and Stevens dissented, arguing that this was not a matter of an officer's good-faith actions and the defendant's conviction from evidence found on his person, but rather, "[t]he ultimate issue [was] whether the state gathered evidence against the respondent through unconstitutional means."\textsuperscript{108} Because the ordinance was unconstitutional, the state, through its officers, could not arrest citi-

\textsuperscript{103. }\textit{Id.}
\textsuperscript{104. }\textit{Id.} at 540.
\textsuperscript{105. }443 U.S. 31 (1979). Before the Court began analyzing Justice White's "good-faith" exception, it distinguished a number of cases in which the exclusionary rule was found inapplicable on different grounds. In \textit{United States v. Ceccolini}, 435 U.S. 268 (1978), the Court found that there was sufficient attenuation between the officers' illegal search and the witness testimony to purge the taint and that a witness testimony was different from other tangible evidence. Since witnesses were free to testify, and their testimony would be obtained inevitably, it should not be excluded from the grand jury to show the defendant had committed perjury.
\textsuperscript{106. }\textit{Id.} at 31-34.
\textsuperscript{107. }\textit{Id.} at 37.
\textsuperscript{108. }\textit{Id.} at 43.
zens legally, even if those officials possessed a good-faith belief that they were complying with the law. For that reason, the dissenters considered the arrest illegal and would have excluded any evidence obtained pursuant to that arrest. It mattered not that the offender was convicted for possessing illegal drugs rather than for violating the ordinance.

The United States Court of Appeals for the Fifth Circuit has openly adopted the good-faith exclusion. United States v. Williams held that the exclusionary rule was inapplicable in cases where an officer had a reasonable, though mistaken, good-faith belief that the actions leading to the discovery of the evidence were authorized. The court first reiterated the fact that the exclusionary rule is not constitutionally mandated. It then turned to the rule's deterrent effect in this case and said it made "no sense to speak of deterring police officers who acted in good-faith belief that their conduct was legal..." The Court of Appeals found support for their position accepting United States v. Janis and a number of other Supreme Court cases. The court observed that the officer had ample probable cause to support his conduct and had proceeded with unquestionable good faith. Furthermore, the majority believed that the decision did not undercut the fourth amendment because "it concern[ed] only the exclusionary rule, one device—but not the sole one—for enforcing the amendment." The cost of applying the rule in these circumstances was "paid in coin tainted from the very core of [the]

110. Id. at 846-47. A Drug Enforcement Administration agent arrested the defendant after ascertaining that she was in breach of travel restrictions imposed by the Northern District Court of Ohio. Her motion to suppress evidence of two packs of heroin had been granted in that court and she was released pending appeal of that decision on condition that she stay in Ohio. The D.E.A. agent stopped her at Atlanta's International Airport and upon verifying her identity, arrested her. On a search, a pack of heroin was found in her pocket. A subsequent search of defendant's luggage made pursuant to a valid warrant uncovered additional quantities of heroin.
111. Id. at 841.
112. 428 U.S. at 433.
114. United States v. Williams, 622 F.2d at 847.
fact finding process, the cost of holding trials at which the truth is deliberately... suppressed and witnesses... are forbidden to tell the whole truth and censured if they do."

D. The Choice Between Further Erosion or Safeguarding Fourth Amendment Protections

The Fifth Circuit's acceptance of the good-faith exception in Williams offers an alternative to the application of the exclusionary rule. The question is, however, whether the rule was meant simply to deter "unreasonable" or "bad-faith" police conduct.

The defenders of the rule contend that all evidence obtained by the police pursuant to constitutional violations must indeed be excluded regardless of reasonable good-faith beliefs. The line should not be drawn between minor violations on one hand, and gross or aggravated ones on the other, simply because minor violations infringe less on individual rights. This sliding scale approach is unacceptable. The defenders maintain that the exclusionary rule is closely allied to fourth amendment provisions, and that police deterrence was not the sole reason for its original invocation in Weeks.

Deterrence had initially been introduced as a rationale in Wolf v. Colorado, in which the Supreme Court debated "the wisdom of the exclusionary rule." In retrospect, the Court in Weeks, as well as the opinions of Justice Holmes and Brandeis in Olmstead, stressed the indivisible unity between all branches of government. According to these opinions, the courts in their prosecutorial role should exclude evidence illegally seized by the law enforcement officers. Otherwise the government, through the judiciary, would affirmatively sanction its own illegal conduct. Therefore, for those who view the

115. Id.
117. Justice Powell seems to adhere to this sliding scale approach. He proposes weighing the harm caused by the suppression of evidence with the benefits and rights the exclusionary rule safeguards. See Ball, Good Faith and the Fourth Amendment, supra note 11, at 652.
118. See Schroch & Welsh, supra note 4, at 281-312 and accompanying text.
120. See Olmstead v. United States, 277 U.S. 438, 469-85 (1928) (no distinction between the government as prosecutor and the government as judge).
government's judicial and prosecutorial roles as a single entity, it is no argument that evidence illegally obtained in good faith can ever be admissible. Consequently, the exclusionary rule and the provisions of the fourth amendment go hand in hand; it is not the rule that handcuffs the police, but the constitutional provisions guaranteed to the citizens of all states. The choice left to the courts then, is not between a judicially created remedial rule and the fourth amendment. The choice is between upholding the amendment's provisions or rejecting them. What was an unconstitutional search or seizure before the exclusionary rule was applied to the states would remain unconstitutional even if the rule is abandoned. 121

Heading the opposition to the rule, Chief Justice Burger believes that there is no empirical evidence to support even a minimal claim of deterrence. He expressed his willingness to throw out the rule in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 122 a case decided during his early days on the Court. Bivens concerned the viability of a civil action for damages pursuant to an unconstitutional search and seizure by agents of the Federal Bureau of Narcotics. The Court, per Justice Brennan, held that damages were recoverable upon proof of injuries resulting from the agents' violation of the defendant's fourth amendment rights and remanded the case. 123

Among the dissenters 124 was Chief Justice Burger, who found it improper for the court to allow remedies not provided in the Constitution or enacted by Congress, but concluded that the case had "significance far beyond its facts and its holding." 125 In his analysis, he expressed the point that "[r]ejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will release the wrongdoing defendant." 126 He affirmed that "[i]f an effective alternative remedy [was] available, concern for the official observance of the law [would] not require adherence to the exclu-

121. See Kamisar, The Exclusionary Rule in Historical Perspective, supra note 4.
123. Id. at 397-98.
124. Chief Justice Burger and Justices Blackmun and Black filed separate dissenting opinions.
125. 403 U.S. at 412.
126. Id. at 413 (quoting Irvine v. California, 347 U.S. 128 (1974)).
He acknowledged that the exclusionary rule had "been justified on the theory that the relationship between the self-incrimination clause of the Fifth Amendment and the Fourth Amendment required the suppression of evidence seized in violation of the latter."

According to the Chief Justice, however, the self-incrimination clause did not protect a person from a seizure of incriminating evidence, but protected him simply "from being the conduit by which the police acquired evidence." The Chief Justice found no merit to the suppression doctrine's vague assumption that law enforcement was a monolithic government enterprise. Furthermore, even making such an assumption, the educative effect of the suppression of evidence was reduced by the long time lapse between the original unlawful police conduct and its final judicial evaluation. The Court's indiscriminate punishment of an officer because of his conduct was incomprehensible to Chief Justice Burger. An official's smallest mistakes were punished the same as deliberate and flagrant ones, by the exclusion of valid probative evidence. The Chief Justice submitted that society had the right to expect more "rationally graded responses from judges" instead of the "capital punishment" they inflicted on all evidence obtained through police error. He proposed that Congress provide a remedy for the victims of unlawful police conduct, and put forth a simply structured statute as an example. Without an existing remedy, however, the Chief Justice would not propose abandoning the rule.

Some Supreme Court Justices did not show the Chief Justice's restraint. They would eliminate the rule, at least as it applied to the states, and stressed that the rule handcuffs

127. Id. at 414.
128. Id.
129. Id. at 414.
130. Id. at 418-19.
131. Id. at 420.
132. Id. at 422-23. The text of the proposal is found in the Chief Justice's opinion. Note that he would establish a quasi-judicial tribunal to adjudicate all claims falling within the proposed statute.
133. Justice Harlan, for example, in Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring), a case decided with Bivens, expressed the need to overhaul the law of search and seizure, indicating he would start the process by overruling Mapp. In that same opinion, Justices Black and Blackmun asserted that the fourth amendment did not support the exclusionary rule. Id. at 497 (Black, J., concurring and dissenting) and Id. at 510 (Blackmun, J., joining Justice Black in the
the police and aids the guilty without protecting the innocent. Several commentators argue that the rule should be replaced.\textsuperscript{134} Claiming that it is not cost-effective and not mandated by the fourth amendment, they argue that the exclusionary rule provides little or no guidance as to proper police conduct under the fourth amendment and may even be seen to encourage law enforcement officers “to tell the higher truth” (perjure themselves) in order to preserve the probative evidence.

Furthermore, the rule remains an external sanction to police administration and provides no incentive to develop internal disciplinary action. By the rule’s application to the states, the Supreme Court has made it virtually impossible to experiment with other methods of controlling unreasonable and unlawful police conduct.\textsuperscript{135}

E. Deterrence and “Bright-Line” Alternatives for Fourth Amendment Protections

The deterrence of police misconduct alone may not be a sufficiently compelling reason to maintain the exclusionary rule.\textsuperscript{136} For those who claim that the “argument for the exclusionary rule must stand or fall simply on its demonstrated utility,”\textsuperscript{137} the answer may be unclear because the evidence is inconclusive as to the rule’s actual deterrent effect.\textsuperscript{138}

There are those who have already decided on the rule’s fate. They are convinced that the rule is “little more than a loophole through which the guilty wriggle to escape punishment” and that it should be replaced entirely with a tort remedy.\textsuperscript{139} Their efforts have not yet produced conclusive results.

\textsuperscript{134} See Wilkey, supra note 4 and accompanying text.
\textsuperscript{135} United States v. Calandra, 414 U.S. at 365-66 (Brennan, J., dissenting).
\textsuperscript{136} See United States v. Peltier, 422 U.S. 531, 551-52 (1975) (Brennan, J., dissenting). This is especially true where it is presupposed that the exclusionary rule seeks to deter by punishment or threat. The rationale is to deter unlawful police conduct by removing the incentives to disregard the rule.
\textsuperscript{137} Kaplan, supra note 48, at 1029 and accompanying text.
\textsuperscript{138} See supra note 48 and accompanying text.
\textsuperscript{139} See Moya, supra note 12, at n.1, col. 1. Senators Strom Thurmond and Orin Hatch proposed such a bill in the Senate. Their attempts have been unsuccessful. Senator Dennis DeConcini proposed another bill to permit judges to decide when to admit illegally seized evidence. His bill seemed to meet with the approval of the President who encouraged the senator at a White House meeting.

California Lieutenant Governor, Mike Curb, had also advocated some changes in
The major alternative to the elimination of the rule has been the "good-faith exception" proposed in Powell. This exception focuses on the law enforcement officer's conduct and measures it according to an objective standard of reasonableness. The focus, therefore, shifts from the defendant to the police officer's conduct. Initially the policeman is "put on trial" in place of the defendant and his conduct is weighed against other factors, such as the existence or lack of probable cause for his behavior. The good-faith exception allows into evidence the results of a search or seizure where the officers relied in good faith on an ordinance later declared unconstitutional, where probable cause may not have existed but the officers possessed a good faith though mistaken belief that they possessed the authority to arrest, search and seize.

The good-faith exception further erodes the exclusionary rule because it allows into evidence the results of police conduct which, as Chief Justice Warren warned in Terry, cannot be based upon good faith alone. The exception focuses entirely on the conduct of the police and gives little or no weight to the right of the people to be free from unreasonable searches and seizures. The exception allows law enforcement officers to make decisions based on their views of probable cause, without a magistrate's objectivity, and then to act upon them.

If the good-faith exception is accepted by the Supreme Court, the policy of deterrence, eroded by another excep-

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the exclusion of evidence. See Letter from Mike Curb to Voters (Dec. 12, 1981) (Citizens Committee to Stop Crime, P.O. Box 13299, Sacramento, CA 95813).

140. See Ball, supra note 10, at 640 (comparison between the good-faith exception and the law governing malicious prosecution). Professor Ball reduces the good faith analysis to a three prong equation: (1) where there is neither probable cause nor good faith, evidence is excluded, (2) where there is probable cause without good faith, probable cause makes the conduct lawful and the evidence admissible, (3) where there is no probable cause but there is good faith—the exclusionary rule is applied notwithstanding the officer's good faith. She contends that the rule should not apply in the last situation because, as in malicious prosecution, proper motive would bar the imposition of sanctions for "unlawful" acts. The state would have to rebut the presumption of no good faith where probable cause did not exist.


144. The swing vote may well rest with Justice O'Connor whose voting record in criminal cases has not been established yet. In the Arizona Court of Appeals she wrote at least one opinion where the court upheld the admission of a confession be-
tion, may be insufficient to support the rule. The deterrent effect will be limited to cases where officers lack both probable cause and good faith, and in such cases, it will be equally as difficult to prove the rule's utility in deterring unlawful police conduct. In this context, the only relevant and determinative factors will be the existence or lack of probable cause, and the absence of an officer's good-faith belief.

III. CONCLUSION

The alternatives for the future of the exclusionary rule may depend on who works most efficiently to eliminate the rule. If Congress replaces it by a statutory tort remedy, as Chief Justice Burger proposed in Bivens, the Court may opt to overrule Mapp and delegate the authority of safeguarding the people's fourth amendment rights to the states. On the other hand, if Congress does not agree on a remedy, which is a likely course given most recent unsuccessful attempts, the Court may follow the second alternative and adopt the good-faith exception. In either case, the people's fourth amendment rights are precariously safeguarded by the exclusionary rule. The alternatives are nothing but paths to the same course. To further erode the controversial "judicial remedy" may inevitably lead to its elimination.

Simão Ávila

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cause it was supported by substantial evidence and there was no "clear and manifest error." See State v. Brooks, 127 Ariz. 130, 618 P.2d 624 (1980). Her record in the Supreme Court is mixed. She has, for example, joined the majority in a six to three vote upholding a 40-year sentence imposed on a Virginia man convicted of two minor marijuana offenses. See Greenhouse, Justice O'Connor is Mostly With the Majority, Los Angeles Daily J., Feb. 1, 1982, at 3, col. 3. She has, however, also voted to overturn a teenage murderer's death sentence in a recent case. It may be safe to assume that she will vote with the four justices who have shown support for the good-faith exception or have expressed the desire to do away with the exclusionary rule altogether.

145. Congress may also enact legislation allowing judicial discretion to admit illegally obtained evidence where the officer is shown to have acted in good faith. See supra note 139 and accompanying text.