2010

"A More Majestic Conception:" the Importance of Judicial Integrity in Preserving the Exclusionary Rule

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Recommended Citation

Robert M. Bloom and David H. Fentin. ""A More Majestic Conception:" the Importance of Judicial Integrity in Preserving the Exclusionary Rule." *University of Pennsylvania Journal of Constitutional Law* 13, no.1 (2010): 47-80.

"A More Majestic Conception:"[1] the Importance of Judicial Integrity in Preserving the Exclusionary Rule

By Robert M. Bloom[2] and David H. Fentin[3]

ABSTRACT

In *Mapp v. Ohio (1961)*, the Warren Court held that the so-called exclusionary rule was applicable to the states. Subsequent Supreme Courts have shown their disenchantment with the rule by seeking to curb its applicability. Most recently, the Court has characterized the exclusionary rule as a "massive remedy" to be applied only as a "last resort." The Courts' analytical framework for the last thirty-five years for cutting back the exclusionary rule was a balancing test which weighed the costs of suppressing reliable evidence with the benefits of deterring future police violations.

This balancing has been used most recently in two Supreme Court cases, *Michigan v. Hudson (2006)* and *Herring v. United States (2009)*. In *Herring*, Justice Ginsberg's dissent pointed out that there was a "more majestic conception" for the exclusionary rule due to its important role in preserving judicial integrity. Judicial integrity was the original reason for adopting the exclusionary rule in the Supreme Court case of *Weeks v. United States (1914)*. The Court in *Weeks* saw the exclusionary rule as a remedy that would give meaning to the Fourth Amendment as well as prevent the Court from participating in an illegality by utilizing unlawfully obtained evidence. Through balancing, the Court has eviscerated the relevance of judicial integrity as the original justification for the exclusionary rule. This article will demonstrate that the exclusionary rule is the only viable remedy to give meaning to the Fourth Amendment, and argues that the exclusionary rule be returned to its previous prominence by reinstating judicial integrity as its primary purpose.

Justice Ginsburg's dissent in *Herring v. United States* suggested there is more to the exclusionary rule than just deterring police misconduct.[4] She described the exclusionary rule as an "essential auxiliary" to the "majestic" Fourth Amendment

[1] Herring v. U.S., 129 S.Ct. 695, 707 (2009) (Ginsburg, J., dissenting).
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[4] *Herring*, 129 S.Ct. at 707.

right.[5] The remedy was necessary, Justice Ginsburg explained, to ensure that "the Fourth Amendment prohibitions are observed in fact" and "that the government would not profit from its lawless behavior."[6] These two goals, to give effect to the Fourth Amendment right and to prevent the courts from serving as accomplices to unlawful behavior, reflect the Court's historical interest in preserving judicial integrity.[7] Joined by three of her colleagues, Justice Ginsburg reminded us of the importance of this fundamental principle, a principle which has largely been ignored by a majority of the Court for the last fifty years. This article joins with Justice Ginsburg's vision to argue for a reinstatement of judicial integrity as one of the primary purposes of the exclusionary rule. A return to this important consideration will ensure the continued viability of the Fourth Amendment and avoid reducing the constitutional right to an "empty promise."[8]

The Court's recent decisions in *Hudson v. Michigan* and *Herring v. United States* have explained that the exclusionary rule is a "massive remedy" to be applied only as a "last resort."[9] In order to be applied, the rule must overcome a balancing test that weighs the benefit of "some incremental deterrent" to police misconduct against the "substantial social cost" of setting a criminal free.[10] As applied, the balancing test embodies all the ambiguities and subjectivity of a Rorschach test.

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[5] *Id.*
[6] *Id.* (internal quotations omitted).
[7] Robert M. Bloom *Judicial Integrity: A Call for its Re-emergence in the Adjudication of Criminal Cases*, 84 J. Crim. L. & Criminology 462, 464 (1993).
[8] Mapp v. Ohio, 367 U.S. 643, 660 (1961); *see also* Silverthorne Lumber Co. v. U..S., 251 U.S. 385, 392 (1920)(explaining that failing to exclude illegally obtained evidence "reduces the Fourth Amendment to a form of words"); Wolf v. People of Colorado, 338 U.S. 25, 47 (1949) (Rutledge, J., dissenting)("the Amendment without the sanction is a dead letter").
[9] *Herring,* 129 S.Ct. at 700 (majority opinion); Hudson v. Michigan, 547 U.S. 586, 599 (2008).
[10] *Herring*, 129 S.Ct. at 700.

Justice Brennan characterized it as rife with "intuition, hunches and occasional pieces of partial and often inconclusive data."[11] Predictably, the exclusionary rule does not fare well when these imbalanced factors are weighed. Instead, the Court has used the balancing test to repeatedly uphold the introduction of evidence despite constitutional violations, leaving the Fourth Amendment right to protect itself through a set of anachronistic remedies announced over six decades ago in *Wolf v. Colorado*. Despite the Roberts Court's assurances that the exclusionary rule can be ignored due to the increasing professionalism of police forces and greater availability of civil rights suits, we will show that the alternative remedies mentioned in *Wolf* have not progressed as far as the Roberts Court would have us believe.

As this article will argue, the true cost of the crude balancing test used to determine whether to apply the exclusionary rule is the damage levied upon the Fourth Amendment. In failing to apply a remedy to an acknowledged constitutional violation, the Court sacrifices our Fourth Amendment right for the sake of a criminal conviction and threatens the legitimacy of a just government. As Justice Brandeis explained in *Olmstead*:

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

[11] U.S. v. Leon, 468 U.S. 897, 942 (1984) (Brennan, J., dissenting).

> criminal-- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[12]

Somewhere along the way, the Court has forgotten that judicial integrity is a substantial benefit to the enforcement of constitutional rights and a legitimate cost associated with any decision that impliedly sanctions government misconduct. The remedy of exclusion is not just about deterrence, it has also served as "a constraint on the power of the sovereign, not merely some of its agents."[13] Part IA of this article provides a brief history of the foundations of the exclusionary rule, paying particular attention to the Court's original interest in safeguarding the principles of judicial integrity. Part IB traces the rise of the deterrence rationale and the genesis of the balancing test, which have correlated with a trend towards deemphasizing the majesty of the Fourth Amendment through the curtailment of its principal remedy. Part II will analyze the recent decisions in *Herring* and *Hudson* to highlight the Roberts Court's recent efforts to curtail application of the exclusionary rule. Finally, Part III will argue that an attack upon the exclusionary rule is an attack upon the Fourth Amendment right itself, which stands little chance of being observed without the constitutional support of the Supreme Court.

[12] Olmstead v. U.S., 277 U.S. 438, 468 (1928) (Brandeis, J., dissenting).
[13] *Herring,* 129 S.Ct. at 707 (Ginsburg, J., dissenting) (internal quotation marks omitted).

I. The Foundations of Modern Exclusionary Rule Doctrine

A. The Initial Role of Judicial Integrity

The Supreme Court first applied the exclusionary rule as a remedy to a Fourth Amendment violation in *Weeks v. United States*.[14] In *Weeks*, the Court suppressed evidence that was unlawfully obtained by federal officers and introduced into a federal prosecution. The Court addressed two concerns that were accomplished by suppressing unlawfully seized evidence. First, the remedy would enable courts to fulfill their obligatory duty of giving effect to the Fourth Amendment right.[15] In the unanimous opinion, Justice Day explained that without the remedy of suppression, "the protection of the 4th Amendment… is of no value."[16] *Weeks* emphasized the "great principles" of the Constitution and expressed an unwillingness to sacrifice these fundamental rights to aid the conviction of one criminal.[17] The exclusionary rule was thus conceived as a necessary adjunct to the Fourth Amendment right itself.

In addition, application of the exclusionary rule protected the legitimacy of governmental action by demonstrating that courts would not defer to the enforcement authorities when their convictions were secured by constitutional violations. "Unlawful seizures" Justice Day explained, "should find no sanction in the judgments of the courts, which are charged at all times with the support of the

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[14] Weeks v. U.S., 232 U.S. 383 (1914).
[15] *Weeks*, 232 U.S. at 392 ("this protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of laws").
[16] *Id.*
[17] *Id.*

Constitution."[18] Thus, the benefits of judicial integrity were understood as giving value to the Fourth Amendment while at the same time ensuring that courts did not serve as accomplices to the unlawful seizure by sanctioning the use of illegally obtained evidence.

Justices Holmes helped solidify these twin goals of judicial integrity through his majority opinion in *Silverthorne* and separate dissent in *Olmstead*. In *Silverthorne*, Holmes established the "fruit of the poisonous tree" doctrine and reiterated *Weeks*' emphasis upon exclusion as a necessary protection of the Fourth Amendment right. Holmes declared that the failure to exclude the unlawfully obtained evidence "reduces the Fourth Amendment to a form of words."[19] In his dissent in *Olmstead*, Holmes sympathized with the difficult choice facing justices to either sustain a conviction of a known criminal or sanction an unlawful search. However, he emphasized that it is "a less evil that some criminals should escape than that the government should play an ignoble part."[20]

The application of the exclusionary rule was restricted in *Wolf v. Colorado* to federal prosecutions. While acknowledging that the exclusion of evidence may be an effective remedy, Justice Frankfurter's majority opinion suggested that equally effective methods of addressing the constitutional violations could be found through the "remedies of private action" and the "internal discipline of the police."[21] In dissent, Justice Murphy exposed the Court's choice to defer to alternative remedies as a choice to ignore the unlawful conduct:

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[18] *Id.*
[19] *Silverthorne*, 251 U.S. at 392.
[20] *Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting).
[21] *Wolf*, 338 U.S. at 30 (1949).

> "[a]lternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all."[22]

Justice Murphy explained that the only truly effective remedy to a Fourth Amendment violation was to exclude the evidence. The other remedies were "illusory" because there was little evidence to suggest that they provided any positive deterrence.[23] In addition, Justice Murphy echoed the judicial integrity concerns of Justices Day and Holmes by reiterating that the Fourth Amendment required suppression to be given effect and admonishing the Court for sanctioning "lawlessness by officers of the law," which would have a "tragic effect upon public respect for our judiciary."[24] These significant, foundational purposes of the exclusionary rule have nothing to do with deterrence.

A decade later, the majority opinion of *Elkins* associated these concerns with the "imperative of judicial integrity."[25] *Elkins* barred use of the so-called "silver platter" doctrine, a practice whereby federal prosecutors avoided the exclusionary rule remedy by encouraging state officers to unlawfully obtain evidence on their behalf. The Court emphasized the importance of preventing courts from serving as

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[22] *Id.* at 41 (Murphy, J., dissenting).
[23] *Id.* at 42.
[24] *Id.* at 46.
[25] Elkins v. U.S., 364 U.S. 206, 222 (1960); *but see* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 Colum. L. Rev. 1365, 1385 (1983). (Justice Stewart later suggested that he "did not intend to imply that [judicial integrity] provided a constitutional basis for the exclusionary rule." Instead, Stewart believed the exclusionary rule was constitutionally required because without it "the fourth amendment's prohibitions would be rendered ineffective." However, one of the twin goals of judicial integrity, as originally expressed in *Weeks* is to fulfill the judicial obligation of supporting the Constitution. By insisting that the exclusionary rule was required to give effect to the Fourth Amendment right, that it was part and parcel of the right itself, Justice Stewart was actually justifying the constitutionality of the doctrine through one of the twin goals of judicial integrity as originally conceived in *Weeks*).

"accomplices in the willful disobedience of a Constitution they are sworn to uphold."[26]

Just a year later, *Mapp v. Ohio* applied the exclusionary rule for Fourth Amendment violations to all state actions and prosecutions. The egregious Fourth Amendment violation in *Mapp* involved a warrantless search of defendant's home that culminated in the police officers breaking the window of the back door and, once inside, ransacking the house indiscriminately. In reviewing the Ohio Supreme Court's decision to sustain the conviction despite the blatant Fourth Amendment violations, the Court declared that "we can no longer permit that right to remain an empty promise."[27] Justice Clark's majority opinion explained that the application of the exclusionary rule grants individuals their constitutional rights, but, more importantly for the courts, it conferred "that judicial integrity so necessary in the true administration of justice."[28]

Significantly, *Mapp* reiterated the policy first expressed in *Weeks* that the exclusionary rule was a necessary adjunct to the Fourth Amendment right. In overruling *Wolf*, Justice Clark explained that the remedy was "an essential ingredient of the Fourth Amendment" and "part and parcel of the Fourth Amendment's limitations."[29] Without the exclusionary rule, Clark continued, the Fourth Amendment would be "valueless" and "so neatly severed from its conceptual

[26] *Elkins*, 364 U.S. at 223.
[27] *Mapp*, 368 U.S. at 660.
[28] *Id.*
[29] *Id.* at 651.

nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'"[30]

B. The Rise of Deterrence

The *Mapp* decision represented a high water mark for the exclusionary rule and the Supreme Court's concern for judicial integrity. As the Court's disenchantment with the exclusionary rule became more apparent, its desire to maintain judicial integrity began to recede into footnotes. Among justices interested in curtailing the remedy, the deterrence rationale rose in prominence. Ultimately, a balancing test emerged highlighting deterrence as the sole benefit with the substantial social costs of exclusion, specifically the criminal going free and reliable evidence being suppressed, weighing strongly against application of the disfavored remedy.

The benefit of deterring police misconduct was not among the original justifications presented for the exclusionary rule in *Weeks*. Over the course of the last fifty years, however, deterrence has occupied a growing centrality to the point that it is now considered the only benefit and purpose of the exclusionary rule. The language of deterrence was first mentioned in passing as a potentially beneficial purpose of the exclusionary rule in *Wolf*'s majority opinion.[31] Five years later, in *Irvine v. People of California*, Justice Jackson suggested that the remedy provided

[30] *Id.* at 655.
[31] *See Wolf*, 338 U.S. at 31 ("in practice the exclusion of evidence may be an effective way of deterring unreasonable searches").

only a "mild deterrent at best."[32] It was not until *Elkins* that deterrence was established as one of the rule's important goals. Writing for the majority, Justice Stewart explained that "its purpose is to deter-to compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it."[33] In the evolution of Supreme Court jurisprudence concerning the exclusionary rule, the specific holding in *Elkins* regarding the "silver platter" doctrine has been of relatively minor importance. Yet, its language regarding deterrence has become the principal citation for justices seeking to limit the application of the exclusionary rule by suggesting that the doctrine is aimed at accomplishing a limited policy objective.

Mapp followed closely on the heels of *Elkins*, and was significant in two important respects beyond its landmark application of the exclusionary rule to the states. *Mapp* was the first case to briefly mention the deterrence language of *Elkins*, although it did so alongside its greater emphasis upon judicial integrity. *Mapp* is also significant because it signaled the emergence of the argument, in Justice Harlan's dissent, that the exclusionary rule should be limited to instances where it serves a deterrent effect. Harlan emphasized that since the exclusionary rule "is aimed at deterring," it should only be applied when it can achieve this goal, providing a first glimpse of one of the critical arguments in favor of curtailing the remedy.[34]

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[32] Irvine v. People of California, 347 U.S. 128, 137 (1954).
[33] *Elkins*, 364 U.S. at 217.
[34] *See Mapp*, 367 U.S. at 680 (Harlan, J., dissenting).

Just four years later, *Linkletter v. Walker* was the first to deny the application of the exclusionary rule to a Fourth Amendment violation by focusing on deterrence as the primary purpose of the remedy. The Court refused to apply the holding in *Mapp* retroactively by finding that suppression would fail to accomplish the only justification for the rule, which was "based on the necessity of providing an effective deterrent to illegal police action."[35] In dissent, Justice Black found the narrowed emphasis upon deterrence, as opposed to the Court's obligation to give effect to the right itself, "a rather startling departure from many past opinions."[36] To the extent the Court even addressed judicial integrity, it managed to obscure the concept entirely by suggesting that an opposite holding would cause such an administrative burden that the "integrity of the judicial process" would be negatively affected.[37]

Following *Linkletter*'s lead, the Court continued to devalue the role of judicial integrity in *United States v. Calandra*, in which the Court held that the exclusionary rule was not applicable to grand jury proceedings. Demonstrating how far the ideal of judicial integrity had fallen, Justice Stewart managed only to address the consideration in a footnote to his majority opinion and then only to dismiss the dissent's concerns by stating it would be an "unprecedented extension of the exclusionary rule to grand jury proceedings."[38] *Calandra* also began to unravel the concept that the remedy was part and parcel of the Fourth Amendment right,

[35] Linkletter v. Walker, 381 U.S. 618, 636-37 (1965).
[36] *Id.* at 649 (Black, J., dissenting).
[37] *See* Bloom, *supra* note 4, at 469.
[38] U.S. v. Calandra, 414 U.S. 338, 354 (1974).

arguing that it was a "judicially created remedy" rather than a "personal constitutional right."[39]

Calandra's historical significance is also due to the fact that it introduced the now familiar balancing test to the exclusionary rule analysis, restricting application of the remedy to instances where the deterrence purpose would be "most efficaciously served."[40] Balanced against the benefit of deterrence was the cost of suppressing reliable evidence. In applying the balancing test, the Court held that "any incremental deterrent effect" of the rule was outweighed by the rule's substantial interference with grand jury proceedings.[41] Justice Brennan's dissent classified the opinion as a "downgrading of the exclusionary rule" and a rejection of the "historical objective and purpose of the rule."[42] Brennan pointed out the legacy of the remedy as an "enforcement tool" that gives both "content and meaning to the Fourth Amendment's guarantees" and prevents the appearance of judges as accomplices to illegal government conduct.[43] These two historical goals of judicial integrity, Brennan argued, were being discounted "to the point of extinction" by the Court.[44]

For a short period following *Calandra*, the language of judicial integrity persisted despite the Court's declining interest in its preservation. In *U.S. v. Peltier*, the Court denied application of the exclusionary rule while determining that the concern of judicial integrity was not "sufficiently weighty" to compel application of

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[39] *Id.* at 348.
[40] *Id.*
[41] *Id.* at 351.
[42] *Id.* at 356 (Brennan, J., dissenting).
[43] *Id.*
[44] *Id.* at 360.

the remedy.[45] In *Brown v. Illinois*, the Court again refused to suppress unlawfully obtained evidence, but still suggested that the consideration of judicial integrity was a principal concern alongside deterrence.[46] Clarifying its decision not to apply the rule, the Court in *Brown* held that the remedy should be limited to cases where "the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity… most clearly demands that the fruits of official misconduct be denied."[47]

Yet, the language of co-equal consideration suggested by *Brown* belied the freefall of judicial integrity amidst the rise of deterrence and the corresponding "slow strangulation" of the exclusionary rule through the balancing test.[48] In *Stone v. Powell*, the rising centrality of deterrence as the prime purpose of exclusion was used as a justification for curtailing the application of the exclusionary rule within an increasingly simplified balancing test. *Stone* helped to substantiate the balancing approach articulated in *Calandra* by explaining that it was implicit within previous applications of the exclusionary rule.[49] Concerned more with the "ultimate question of guilt or innocence," rather than the constitutional violation, the Court bemoaned the high cost of suppressing "the most probative information bearing on the guilt or

[45] U.S. v. Peltier, 422 U.S. 531, 539 (1975).
[46] *See* Brown v. Illinois, 422 U.S. 590, 599 (1975).
[47] *Id.* at 604; *see also* Dunaway v. New York, 442 U.S. 200, 217 (1979)("*Brown*'s focus on 'the causal connection between the illegality and the confession,' reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but also use of the evidence is more likely to compromise the integrity of the courts.").
[48] *See Peltier*, 422 U.S. at 561 (Brennan, J., dissenting).
[49] Stone v. Powell, 428 U.S. 465, 489 (1976).

innocence."[50] Solidifying the two factors it would consider in its balancing test, the Court held that the "substantial social costs" of setting the guilty free, far outweighed the "incremental contribution" of deterring one police officer.[51]

Significantly, Justice Powell's majority opinion began to redefine the meaning of judicial integrity altogether by suggesting that applying the exclusionary rule bears the risk of generating disrespect for the administration of justice by affording a "windfall" to a guilty defendant.[52] Justice Powell then dismissed the original understanding of judicial integrity as a "rhetorical generalization" that was "fatally flawed."[53] The majority opinion hypothesized that rigid adherence to judicial integrity would require exclusion even if the criminal defendant consented to the inclusion of the unlawfully seized evidence, a hypothetical that bordered on absurdity itself. Thus, the Court explained that "while courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."[54]

Stone was decided on the same day as *U.S. v. Janis*, which bestowed another significant blow to the Fourth Amendment right by further redefining the meaning of judicial integrity.[55] While again just acknowledging the consideration in a footnote to the majority opinion, Justice Blackmun's opinion suggested that the "primary meaning of judicial integrity" was limited to ensuring that "the courts must

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[50] *Id.* at 490.
[51] *Id*. at 488.
[52] *Id.* at 490.
[53] *Id.* at 499.
[54] *Id.* at 485.
[55] In an ironic twist of fate for one of the Founders' most famously articulated constitutional rights, these latest degradations of the Fourth Amendment were announced on July 6, 1776, the first day the Court was back in session after the nationwide celebration of the bicentennial of Independence Day.

not commit or encourage violations of the Constitution."[56] Described in this fashion, Blackmun effectively conflated the concern for judicial integrity within the rationale of deterrence. The Court then proceeded to use the same cost-benefit balancing test to restrict the exclusionary rule from application to habeas corpus claims.

Amidst another decision to apply no remedy to a constitutional violation, Justice Brennan watched helplessly as the Fourth Amendment continued to be assaulted by the Court. Exasperated, Brennan could muster only a terse response that merely pointed to the dissent he issued just one year prior in *Peltier*:

> If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule, with no opportunity afforded parties most concerned to be heard, would be indefensible in any circumstances. But to attempt covertly the erosion of an important principle over 61 years in the making as applied in federal courts clearly demeans the adjudicatory function, and the institutional integrity of this Court.[57]

The conflation of judicial integrity within the goals of deterrence was solidified in subsequent decisions. In *Illinois v. Gates*, Justice Rehnquist dismissed concerns of judicial integrity, again only within the confines of a footnote, by building upon *Janis'* redefined "primary meaning." Justifying the unification of the goals of judicial integrity within the purpose of deterrence, Rehnquist explained that "I am content that the interests in judicial integrity run along with rather than counter to the deterrence concept, and that to focus upon the latter is to promote, not denigrate, the former."[58]

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[56] U.S. v. Janis, 428 U.S. 433, 458 (1976).
[57] *Peltier*, 422 U.S. at 561-62 (Brennan, J., dissenting).
[58] Illinois v. Gates, 462 U.S. 213, 260 (1983).

Just one year later in *United States v. Leon*, the Court again dismissed the dissent's concerns for judicial integrity in a footnote. In *Leon,* for the first time, the Court refused to exclude evidence in the prosecution's case in chief obtained by police who acted in "good faith."[59] Citing *Janis* to suggest the inquiry into judicial integrity was essentially the same as that of deterrence, the Court asserted that the integrity of the courts is not affected by the reasonable actions of police officers.[60]

Leon provided another significant benchmark for the use of the balancing test to curtail the exclusionary rule, emphasizing that the "balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us."[61] The costs of excluding "inherently trustworthy tangible evidence," Justice Blackmun explained, "have long been a source of concern."[62] Weighing "the substantial costs of exclusion" against the "marginal or nonexistent" deterrent benefits led the Court to once again rule in favor of allowing the evidence to be admitted.[63]

In the *Leon* dissent, Justice Brennan provided a scathing rebuke, claiming the "Court's victory over the Fourth Amendment is complete."[64] In a vain attempt to remind the majority of the majestic right of the Fourth Amendment as originally conceived by the Framers, Brennan sought to exclaim the lost purpose of the constitutional right:

> The majority ignores the fundamental constitutional importance of what is at stake here….what the Framers understood then

[59] *See* Bloom, *supra* note 4, at 470.
[60] U.S. v. Leon, 468 U.S. 897, 921 (1984).
[61] *Id.* at 913.
[62] *Id.* at 907.
[63] *Id.* at 922.
[64] *Id.* at 929 (Brennan, J., dissenting).

> remains true today-that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms. In the constitutional scheme they ordained, the sometimes unpopular task of ensuring that the government's enforcement efforts remain within the strict boundaries fixed by the Fourth Amendment was entrusted to the courts.[65]

In sum, the rise and fall of judicial integrity as a principal justification for the use of the exclusionary rule mirrored the rise and fall of the Court's interest in applying the rule as a remedy to Fourth Amendment violations. As the rationale of deterrence rose, judicial integrity was downplayed and then completely subsumed within the deterrence justification. With deterrence increasingly recognized as the sole benefit of the exclusionary rule, the Court established a deceptively simple balancing test skewed against applying the remedy. Not only did deterrence become the only benefit on one side of the ledger, but each application of the remedy was perceived to have only "marginal" or "incremental" deterrent value. In contrast, the exclusion of "highly probative evidence" was deemed a "substantial social cost" of applying the remedy. As a result, the rise of the deterrence rationale in combination with the balancing test led to a significant curtailment of the exclusionary rule and ultimately a downgrading of the Fourth Amendment right itself.

[65] *Id.* at 929-30.

II. Modern Curtailment in Herring and Hudson

Two recent decisions have breathed new life into the downgrading of the exclusionary rule to the point that its existence as a remedy to Fourth Amendment violations has been seriously imperiled. In *Hudson v. Michigan* and *Herring v. United States*, the Court has laid down fresh lines of attack against the purpose and justification of the remedy while at the same time reducing the value of deterrence, which remains the only acknowledged benefit of the exclusionary rule when utilizing the balancing test. In applying the now familiar cost-benefit analysis, Justice Scalia's majority opinion in *Hudson* obscured the deterrence rationale by assessing the relative strength of police incentives to disregard the Fourth Amendment. Justice Robert's opinion in *Herring* further narrowed the deterrence benefit by reducing it in proportion to the level of culpability evident in the officer's misconduct. Significantly, neither of the majority opinions discussed the concerns of judicial integrity at any point in their opinions, which is indicative of the current status and potential fate of the once majestic Fourth Amendment right and its adjunct, the exclusionary rule. Through these two decisions, the Roberts Court has expressed its value judgment that the ultimate question of guilt outweighs the need to protect constitutional rights.[66]

A. Hudson

[66] For recent analysis of the Roberts Court's attack upon the exclusionary rule through *Hudson* and *Herring*, *see* Thomas Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 Chicago-Kent L. Rev. 191 (2010); Scott Sundby, *Mapp v. Ohio's Unsung Hero: The Suppression Hearing as Morality Play*, 85 Chicago-Kent L. Rev. 255 (2010); Wayne R. Lafave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. of Crim. L. and Criminology 757 (2009); George M. Dery III, Good *Enough for Government Work: The Court's Dangerous Decision, in Herring v. United States, to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior*, 20 George Mason Civil Rights L. J. 1 (2009); David A. Moran, *Waiting for the Other Shoe: Hudson and the Precarious State of Mapp*, 93 Iowa L. Rev. 1725 (2008);

Justice Scalia's analysis in *Hudson* began with what he clearly believed to be the most salient point, the defendant's guilt. In opening Part I of his opinion, Scalia succinctly explained that, "[p]olice obtained a warrant authorizing a search for drugs and firearms at the home of petitioner Booker Hudson. They discovered both."[67] Hudson was eventually convicted of a relatively minor offense, simple possession of less than twenty-five grams of cocaine, and sentenced to eighteen months of probation.[68] Despite adding nothing substantive to the legal analysis, Justice Scalia provided further incriminating details of the crime scene, explaining that police also found "large quantities" of drugs and a "loaded gun" on the premises.[69]

Having opened his opinion by focusing on details of the defendant's guilt, Scalia lamented that the case was "only" before the Court because of a Fourth Amendment violation regarding a failure to comply with the knock-and-announce rule. The principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an unquestioned command of the Fourth Amendment and was conceded as such in *Hudson*.[70] "Happily," Scalia explained, the Court did not have to debate the murky details of whether a knock-and-announce violation actually occurred since the Fourth Amendment violation was readily admitted by the police officers involved.[71]

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[67] *Hudson*, 547 U.S. at 588.
[68] *See* Appellate brief of petitioner, 2005 WL 2072141.
[69] *See Hudson*, 547 U.S. at 588; *but see* Appellate brief of petitioner, 2005 WL 2072141 (While it is true that more drugs and a firearm were found on the premises, the police only had enough evidence to sustain a conviction for the simple possession charge.).
[70] *Hudson,* 547 U.S. at 589.
[71] *Id.* at 590.

The actual question before the Court was limited to whether the inevitable discovery doctrine was a per se exception to the exclusionary rule for evidence seized after a knock-and-announce violation. The inevitable discovery doctrine applies when a prosecutor establishes, by a preponderance of the evidence, that unlawfully seized evidence would have been inevitably found through lawful police investigation.[72] The goal of the doctrine, as explained by the Court in *Nix v. Williams*, is to assure that "the State and the accused are in the same positions they would have been in had the impermissible conduct not taken place."[73] Defendant challenged the constitutionality of applying the inevitable discovery doctrine to the facts in *Hudson*, arguing that the inevitable discovery doctrine requires that the prosecution identify a source that would have produced the evidence by means independent of the tainted source that actually produced it.[74] In *Hudson*, the same officers who violated the Fourth Amendment ultimately discovered the evidence.

Rather than focusing on the parameters of the inevitable discovery debate, Justice Scalia focused his analysis on attacking the exclusionary remedy itself. Without quoting any precedent to support the position, Scalia suggested that applying the rule "has always been our last resort."[75] The exclusionary rule, he argued, had a "costly toll upon truth-seeking," which created a "high obstacle for those urging [its] application."[76] In the subsequent text of his analysis, Scalia took no pains to conceal his disenchantment with the rule, describing the remedy as

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[72] *See* Nix v. Williams, 467 U.S. 431, 437-38 (1984).
[73] *Id.* at 447.
[74] *See* Appellate brief of petitioner, 2005 WL 2072141.
[75] *Hudson*, 547 U.S. at 591. Scalia is fairly hypocritical here as only in the next paragraph does he admit that the Court "did not *always* speak so guardedly," referencing *Whitely v. Warden* which held that all evidence obtained in violation of the Constitution was inadmissible.
[76] *Id.*

"severe," "enormous," "substantial," "considerable," and, on four separate occasions, "massive."[77]

Scalia developed his criticism of the exclusionary rule further within his cost-benefit balancing test, where he weighed some additional costs. He began by reiterating the familiar "substantial social costs" of "releasing dangerous criminals into society."[78] In addition to this "grave adverse consequence," Scalia added new costs to the equation.[79] He warned that applying the remedy in the knock-and-announce context would generate an administrative burden associated with the flood of "lottery" entrants who would be looking for a "get-out-of-jail-free" card through suppression motions.[80] Another cost of applying the remedy appeared to be the careful observance of the knock-and-announce rule itself. Scalia criticized the potential effect of police officers erring on the side of caution and potentially waiting longer than the law required as "producing preventable violence against officers in some cases, and the destruction of evidence in many others."[81]

The opinion's inclination to expand the costs associated with applying the exclusionary rule is troubling. By the time the Court in *Stone* had applied the balancing test, the costs were supposedly "well known" and limited principally to a concern of interfering with the conviction of a criminal by suppressing "highly probative" evidence.[82] The extension of costs to include administrative burdens, police safety, and the destruction of evidence may signal a new approach to

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[77] *Id.* at 591-629.
[78] *Id.* at 594-95.
[79] *Id.* at 587.
[80] *Id.* at 595.
[81] *Id.*
[82] *See Stone* 428 U.S. at 485, 489.

curtailing the exclusionary rule. It is plausible that these three new costs could be added to the balancing test in instances other than just the knock-and-announce context. Indeed, it is difficult to imagine a case where cutting constitutional corners would not reduce administrative burdens, increase police safety and have a greater chance of preserving whatever evidence exists.

Balanced against these "substantial social costs" was a significantly reduced deterrence benefit obscured by Scalia's analysis regarding the police officers' incentive to commit the violation. In *Hudson*, Scalia explained that the "value of deterrence depends upon the strength of the incentive to commit the forbidden act."[83] *Mapp* had indicated that one of the principal deterrent benefits of the exclusionary rule was "removing the incentive to disregard" the Fourth Amendment.[84] Scalia attempted to distinguish the type of incentive emphasized in *Mapp* from the incentives to ignore knock-and-announce. While violating a warrant requirement, for instance, would result in securing evidence that could not be lawfully obtained, ignoring knock-and-announce, Scalia argued, would only avoid life-threatening resistance by occupants or prevent the destruction of evidence that would eventually be lawfully seized. Since the incentives associated with knock-and-announce could be bypassed with reasonable suspicion of their existence, Scalia suggested that the incentive to disregard the Fourth Amendment was lessened.[85]

By shifting the analysis towards a discussion of the relative weight of incentives, Scalia added a difficult criteria to quantify in the incentive determination.

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[83] *Hudson*, 547 U.S. at 596.
[84] *Mapp*, 367 U.S. at 656.
[85] *Hudson*, 547 U.S. at 596.

Concededly, suppression has a more direct impact upon the incentives associated with violating the warrant requirement rather than the incentives associated with knock-and-announce. Police may have an incentive to disregard the Fourth to ensure their safety, but it is arguable that the deterrent benefit is less in these contexts because the police would likely repeat a violation to ensure their safety. When the only acknowledged benefit of exclusion is deterrence, it is plausible that suppression has less of an impact in the knock-and-announce context and is better suited to instances where the police would not have been able to secure the evidence at all without the misconduct. However, the remedy of suppression also serves the important purposes of protecting the defendant's Fourth Amendment right and avoiding the courts' complicity in police misconduct, which would be accomplished in all applications of the exclusionary rule. By ignoring the goals of judicial integrity, the Court allows the incentives of safety and the preservation of evidence to absolve the constitutional violation. In effect, by focusing on incentives in the knock-and-announce context, rather than on the principles of judicial integrity, Scalia shifts his analysis away from the constitutional rights of the defendant and towards the goals of law enforcement officials.

Furthermore, while Scalia subjected the deterrence benefit to a flexible weight analysis, the "substantial social costs" remained impossibly constant. In *Hudson*, the "grave adverse consequence" of applying the exclusionary rule would have been overruling the defendant's relatively minor sentence of eighteen months of probation. Indeed, while most critics of the exclusionary rule highlight

suppression of the "bloody knife" as evidence of the substantial social costs,[86] the reality is that the exclusion of evidence in violent cases is exceedingly rare.[87] Rather, the exclusionary rule is applied most often to relatively minor offenses, such as the drug possession charge in *Hudson*.[88] To the majority of the Roberts Court, the exclusionary rule can not even "pay its way" when the costs associated would be the overturning of a relatively minor sentence of eighteen months probation.[89] Such a biased calculation is precisely why Justice Brennan criticized the balancing test as a meaningless exercise of balancing "intuition, hunches and occasional pieces of partial and often inconclusive data."[90]

The clear effect of Scalia's balancing analysis is to further skew the values assessed within the cost-benefit analysis against applying the exclusionary rule. Given this inclination, it is of no surprise that concerns regarding judicial integrity were not mentioned once in the entire opinion. In fact, reflective of the Roberts Court's complete disinterest in either of the twin goals of judicial integrity, Scalia downplayed the relative value of the Fourth Amendment right itself, explaining that exclusion could not be premised on the "mere fact that a constitutional violation was

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[86] Akhil Amar, *Fourth Amendment First Principles* 107 Harv. L. Rev. 757, 793-94 (1994).
[87] Yale Kamisar, 26 Harv. J.L. & Pub. Pol'y 119, 131 (2003) (citing Thomas Y Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 640, 645.).
[88] *See id.*
[89] The Court should also be reminded that there are significant monetary costs, as opposed to the esoteric costs typically assessed, associated with imprisoning criminals, estimated at over $20K per inmate. See "Expenditures/Employment," U.S. Bureau of Justice Statistics. http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=16 (The average annual operating cost per state inmate in 2001 was $22,650, or $62.05 per day). With the largest imprisonment rate in the world, it is difficult to understand why setting one convicted drug offender free in order to preserve our constitutional rights has such grave adverse consequences.
[90] *Leon*, 468 U.S. at 942 (Brennan, J., dissenting).

a 'but-for' cause of obtaining the evidence."[91] The idea that a constitutional violation could be offhandedly dismissed as a "mere fact," suggests that the Court views the judicial integrity goals of avoiding the sanctioning of unlawful conduct and giving effect to the Fourth Amendment right as trivial relative to the goals of criminal enforcement. This is especially ironic when considering Justice Frankfurter's sentiment about the Fourth Amendment. "Historically," Justice Frankfurter explained, "we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American independence."[92]

The fait accompli of the exclusionary rule, however, may lie in the *Hudson* opinion's resuscitation and expansion of *Wolf*'s alternative remedies. As mentioned above, the Supreme Court first suggested that remedies other than exclusion of evidence provided sufficient protection of the Fourth Amendment in *Wolf*, where the Court looked to "remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion."[93] The Court in *Irvine* developed the concept of alternative remedies further by explaining that the Attorney General of the United States should prosecute the misconduct.[94] However, the Justice Department took no action against the officers in *Irvine*, which appears to have influenced Chief Justice Warren's later stance that the exclusionary rule was a necessary protection of the Fourth Amendment right.[95] In renewing the alternative

[91] *Hudson*, 547 U.S. at 592.
[92] Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting).
[93] *Wolf*, 338 U.S. at 30.
[94] *Irvine*, 347 U.S. at 138.
[95] Morgan Cloud, *Rights without Remedies: the Court that Cried Wolf*, 77 Miss. L.J. 467, 497 (2007).

remedies argument, Scalia attempted to distinguish this prior futility by suggesting that much had changed since *Mapp*.[96] The continued application of the exclusionary rule, Scalia argued, was "forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."[97]

Hudson first suggested that the *Mapp* precedent was outdated because of the development of civil remedies, such as §1983 and *Bivens* actions, to combat constitutional violations as well as the great expansion of public-interest law firms interested in pursuing these cases. However, Scalia provided no support for his faith in civil remedies as an effective replacement to the exclusionary rule. Rather than requiring affirmative evidence in the form of citations to successful verdicts, as one might expect from an argument to overturn a landmark precedent, Scalia seemed to just give the benefit of the doubt to civil remedies. Despite no citations indicating these remedies have provided any substantial awards for knock-and-announce violations, and thus no incentive to pursue them, Scalia found surprising faith in the absence of evidence, explaining that "we do not know how many claims have been settled."[98] Later in the same paragraph, Scalia rested his entire justification for the effectiveness of these remedies, not on any damage awards, but merely on four technical victories that had allowed knock-and-announce cases to proceed to trial.[99] These limited case citations merely demonstrated instances where police officers had been denied qualified immunity in civil suits claiming knock-and-announce violations. However, not one citation was given to any damage

[96] *Hudson*, 547 U.S. at 597.
[97] *Id*.
[98] *Id.* at 598.
[99] *Id.*

award resulting from such litigation. Again trusting the lack of evidence as persuasive, Scalia argued that "as far as we know, civil liability is an effective deterrent."[100]

The civil liability approach is most seriously flawed because it ignores the well documented failure of tort actions to impact the behavior of government officials. Scalia argues that the failure to abide by constitutional requirements "exposes municipalities to financial liability."[101] However, government officials do not internalize costs in the same way as private actors and cannot be expected to alter their behavior in the same manner. As Daryl Levinson pointed out, "[b]ecause government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay."[102] Indeed, individual police officers often have multiple layers of insulation from financial liability such as the affirmative defense of qualified immunity as well as the financial support of police departments who often will indemnify officers against personal liability, while at the same time offering rewards and promotions for the types of aggressive policing that routinely cross into Fourth Amendment violations.[103] The political pressure to reduce crime is often met with an aim to boost arrest and conviction statistics to achieve the promises of elected officials.[104] Levinson argues persuasively that the exclusionary

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[100] *Id.* at 599.
[101] *Id.*
[102] Daryl J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 347 (2000).
[103] *See id* at 384-85.
[104] *See* Sean Gregory, *Why Corey Booker Likes Being Mayor of Newark*, TIME, July 27, 2009 (article demonstrates how focused the mayor is on reducing crime by increasing arrest statistics).

remedy is a model remedy for constitutional violations because it operates directly on the incentives relevant to police officers and election officials.[105]

Ironically, at the same time that Justice Scalia defers the protection of the Fourth Amendment right to civil remedies, he has limited the effectiveness of civil remedies by expanding the application of qualified immunity. The qualified immunity defense allows a police officer to avoid liability for damages unless the officer violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[106] As it was first applied, qualified immunity was only available if the law itself was not clearly established such that a reasonable person would have been able to comply with its provisions. However, in *Anderson v. Creighton*, Justice Scalia's majority opinion expanded the protection to officers who reasonably believed their actions were lawful despite the fact that the right violated was clearly established and understood.

Scalia's expansion of qualified immunity under *Anderson* has brought considerable confusion to the defense.[107] While a plaintiff may successfully establish that a reasonably prudent police officer lacked probable cause, the officer may still be provided qualified immunity if he reasonably believed he did have probable cause. Thus, the police conduct can somehow be both "constitutionally

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[105] *See Harris*, 331 U.S. at 417. Harris also explains that the majoritarian pressure to reduce crime is felt disproportionally by low income communities and young men who spend lots of time in the streets.

[106] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[107] *See* Oliveira v. Mayer, 23 F.3d 642, 648-49 (2d Cir. 1994)("it is not readily apparent how a police officer could have an objectively reasonable belief that conduct was lawful when the unlawfulness of that conduct rests on a determination that an objectively reasonable police officer would not have acted); *see also* Mahoney v. Kesery, 976 F.2d 1054, 1058 (7th Cir. 1992)(asserting that the question of immunity merges with the merits when probable cause is the issue).

unreasonable" and "objectively reasonable."[108] Justice Stevens' dissent accurately described the *Anderson* holding as affording police "two layers of insulation from liability."[109]

Beyond the alleged advancement of civil remedies since *Mapp*, Scalia also touted the "increasing professionalism of police forces" as further justification that the exclusionary rule was no longer necessary. This argument relied principally upon the training of police officers, suggesting Fourth Amendment rights are now better respected, and the deterrent effect already provided through internal discipline and citizen review boards. In support of his assertion, Justice Scalia cited a book by Samuel Walker, which had applauded the Warren court for playing a pivotal role in stimulating some of the police reforms that had taken shape over the course of the last forty years.[110] However, Scalia distorted the analysis of the book by suggesting that this progress suggested abandonment of the exclusionary rule was merited because civil rights violations were being adequately deterred through internal discipline.[111] Following the publication of the decision, Samuel Walker authored an article in the Los Angeles Times, clarifying that his main argument was "twisted" by Scalia "to reach a conclusion the exact opposite" of what he had argued.[112] Rather than arguing that the improvements indicated that the exclusionary rule was no longer required, as Scalia implied, Walker actually argued

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[108] *See* Michael Avery, David Rudovsky, Karen Blum, *Police Misconduct: Law and Litigation*, p. 243 (3rd edition, 2005).
[109] Anderson v. Creighton, 483 U.S. 635, 659 (1987) (Stevens, J., dissenting).
[110] *See Hudson*, 547 U.S. at 599 (quoting Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice* 1950-1990, p. 51 (1993), "there have been 'wide-ranging reforms in the education, training, and supervision of police officers.").
[111] *See id.*
[112] Samuel Walker, *Thanks for nothing, Nino*, LA TIMES, June 25, 2006

that such improvements indicated its continuing importance.[113] Furthermore, in contrast to Scalia's blind faith in the increased professionalism of police, recent empirical studies suggest the opposite; police misconduct has not been relegated to the days of old.[114] These sources suggest that while there has been improvement in the "professionalism" of police departments that has reduced the frequency and severity of Fourth Amendment violations, internal discipline measures can not completely supplant judicial safeguards.

B. Herring

The majority opinion in *Herring* began in much the same fashion as *Hudson*, by accepting that a constitutional violation took place while questioning whether the Court should provide a remedy. The Fourth Amendment violation in *Herring* stemmed from an error in one of the County sheriff's computer records, which relayed false information to an investigating officer that the defendant was subject to an outstanding warrant. Prior to learning of the probable cause error, the investigating officer arrested the defendant and, in a search incident to the arrest, found a small amount of methamphetamine and a pistol. Despite the fact that the original error was committed by a member of the police department, the Court upheld the conviction based upon the investigating officer's good faith reliance.

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[113] See id.; Other sources cited by Scalia were published just two years after the *Report of the Independent Commission on the Los Angeles Police Department* determined that significant reforms were necessary in the wake of the Rodney King beating.

[114] *See* David A. Harris, *How Accountability-Based Policing Can Reinforce-Or Replace-The Fourth Amendment Exclusionary Rule*, 7 Ohio St. J. Crim. L. 149. Harris demonstrates that, even viewed conservatively, roughly a third of all search and seizure activity violates the Fourth Amendment.

Leon was the first case to establish a "good faith" reliance exception to the exclusionary rule, holding that police officers were justified in relying upon a facially valid search warrant. In *Leon*, the misconduct was committed by a magistrate who issued a search warrant with insufficient probable cause. The Court in *Leon* justified establishing the good faith exception by finding "strong support" from the balancing test, which it held was targeted exclusively at deterring police, rather than judicial, misconduct.[115] Citing multiple precedents, *Leon* held that the effectiveness of the remedy presumes that "the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right."[116] However, the hope was not just that the police would be deterred from committing highly egregious Fourth Amendment violations, but also that the courts would seek to encourage "a greater degree of care toward the rights of an accused."[117] In a footnote of the majority opinion, the Court cited Professor Jerold Israel to support its understanding of the good faith exception, warning that this exception "should not encourage officers to pay less attention to what they are taught."[118]

The Court in *Arizona v. Evans* expanded the good faith exception to justify reliance upon clerical errors committed by court employees, again making the distinction between the ineffectiveness of deterrence upon the court as opposed to law enforcement personnel.[119] The facts in *Herring* appeared to have fallen squarely within the type of unlawful behavior that was appropriately remedied by

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[115] *Leon*, 468 U.S. at 913.
[116] *Id.* at 919.
[117] *Id*.
[118] *Id.*
[119] *Arizona v. Evans*, 514 U.S. 1, 14 (1995).

the exclusionary rule because the misconduct was originally committed by a police officer rather than a magistrate or court employee. While Chief Justice Roberts disputed the dissent's assertion that the *Evans* holding was based upon this distinction, it is difficult to understand what *Evans* stands for if not for this distinction. The "most important" reason why the Court in *Evans* denied application of the exclusionary rule was because "court clerks are not adjuncts to the law enforcement team … they have no stake in the outcome."[120] Negating the relevance of this distinction appears then to diminish the "most important" justification for the decision in *Evans.*

Herring sidestepped the relevance of the court-police distinction by reassessing the value of deterrence within the balancing test just three years after *Hudson* had performed a similar sleight of hand. "The extent to which the exclusionary rule is justified by these deterrence principles," Roberts explained, "varies with the culpability of the law enforcement conduct."[121] In *Leon*, the opinion had suggested that the deterrent benefit of the exclusionary rule depended, at the very least, upon negligent conduct by a police officer.[122] In *Herring*, the Roberts Court raised the bar on the type of misconduct that can be deterred to "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[123] Announcing a heightened iteration for the balancing test, Roberts suggested that the exclusionary rule should only be triggered if police misconduct is: (1) "sufficiently deliberate that exclusion can meaningfully deter it;"

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[120] *Id.*
[121] *Herring*, 129 S.Ct. at 701.
[122] *Leon*, 468 U.S. at 919.
[123] *Herring*, 129 S.Ct. at 702.

and (2) "sufficiently culpable that such deterrence is worth the price paid by the justice system."[124] In this regard, *Herring* introduced police culpability into the inquiry, requiring deliberate, reckless, or grossly negligent conduct, as opposed to isolated negligence, to trigger the remedy of exclusion.

The holding in *Herring* managed to accomplish the undesirable end warned in *Leon* by teaching officers that paying less attention to details can have beneficial effects. Police departments now seem to have an incentive to be dilatory with record maintenance because it maintains probable cause for subsequent searches and the original error can be exonerated through good faith reliance. As Justice Ginsburg explained in dissent, the foundational premise of negligence liability in tort law is that it "creates an incentive to act with greater care."[125] While the majority opinion acknowledged Justice Ginsburg's assessment of negligence liability, it felt that the substantial social costs of suppression too high to deter conduct related to negligence.[126] However, Justice Ginsburg pointed out that the County sheriff's department had no routine practice of ensuring the accuracy of its database.[127] Without exclusion, this sheriff's department and others like it had no incentive to correct negligent practices to prevent future Fourth Amendment violations.

In *Herring* and *Hudson*, the Roberts Court applied two different approaches to its analysis of the exclusionary rule with similar effect. Justice Scalia analyzed the incentives of police officers in the knock-and-announce context to diminish the

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[124] *Id.*
[125] *Id.* at 708 (Ginsburg, J., dissenting).
[126] *Id.* at 704.
[127] *Id.* at 708 (Ginsburg, J., dissenting).

relative value of deterrence. Chief Justice Roberts raised the culpability requirement needed to apply the exclusionary rule, suggesting that the deterrence benefit was too minimal to be applied to negligent misconduct. In both cases, the ultimate outcome of the balancing test as applied was predictably the same and the exclusionary rule was further weakened.

III. An Argument for the Reinstatement of Judicial Integrity

The Roberts Court curtailment of the exclusionary rule is significant in two respects. While the Court purports to objectively balance the costs and benefits of applying the exclusionary rule, the new methods clearly favor keeping illegally obtained evidence admissible at trial. By simply ignoring the concerns of judicial integrity altogether and instead focusing entirely upon deterrence, the Roberts Court has subtly pushed the original justifications for the rule into historical obscurity. The steps taken, as demonstrated by *Hudson* and *Herring,* indicate a desire by the current Court to eliminate the exclusionary rule entirely.

Often overlooked, Justice Rehnquist's dissent in *California v. Minjares* provides important foreshadowing for the Roberts Court's abandonment of judicial integrity. In a provocative dissent to a denial of an application to stay, Rehnquist urged the Court to reconsider whether "the so-called exclusionary rule should be retained."[128] In conjunction with this bold request, he penned a lengthy attack upon "the argument that the rule somehow maintains the integrity of the judiciary."[129] Rehnquist's analysis of why courts should not aspire to the goals of judicial integrity provides insight into the mindset of contemporary justices interested in discarding the exclusionary rule. One line in particular bears notice given the unintentional irony of its hyperbole:

> while it is quite true that courts are not to be participants in 'dirty business,' neither are they to be ethereal vestal virgins of another world.[130]

[128] *California v. Minjares*, 443 U.S. 916, 928 (1979)(Rehnquist, J., dissenting).
[129] *Id.* at 924.
[130] *Id.*

In ancient Rome, "vestal virgins" were female priests within the Roman religious order honored for their sacred role in society.[131] While ridiculing the concept that the judiciary should aspire to such a venerable status, Rehnquist's analogy ironically carries meaningful symbolism. Like the Vestals of ancient Rome, judges in the United States are honored for a hallowed duty, which is to administer justice in accordance with the principles of the Constitution. Rehnquist's dismissive attitude towards the symbolic purity of the Vestals is indicative of the type of compromising mindset that has subjected one of our most fundamental constitutional principles to a corresponding fall from grace. Three decades after the *Minjares* dissent, the goals of judicial integrity have fallen so far out of favor that the Court no longer even bothers to dismiss it as a concern. Without the principles of judicial integrity serving as a guidepost to the Court's decisions, the sanctity of the Fourth Amendment right and the legitimacy of the courts are in serious peril.

Almost thirty years before *Hudson*, the *Minjares* dissent also foreshadowed Justice Scalia's argument regarding the availability of newly developed civil remedies since *Mapp*. Rehnquist noted that in the years following *Mapp*, the Court had resurrected §1983 and established *Bivens* actions. "Thus," he explained,

> most of the arguments advanced as to why the exclusionary rule was the *only* practicable means of enforcing the Fourth Amendment, whether or not they were true in 1949 or 1961, are no longer correct.[132]

Similar to Scalia's subsequent analysis in *Hudson*, Rehnquist's reasoning was remarkably conclusory. The mere existence of alternative remedies seemed to

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[131] Rodolfo Lanciani "The Fall of a Vestal" Ch. 6, in *Ancient Rome in the Light of Recent Discoveries.* Houghton, Mifflin and Co, p.136-140 (1898).
[132] *Minjares* 443 U.S. at 926.

assure him of their effectiveness despite a lack of evidentiary support. Rehnquist's overconfidence seemed also to stem from a naive overconfidence in the American jury. He suggested that since:

> juries are capable of awarding damages as between injured railroad employees and railroads, they surely are capable of awarding damages between one whose constitutional rights have been violated and either the agent who or the government agency that violated those rights.[133]

In his desire to eliminate the exclusionary rule, Rehnquist was blinded to practical realities. An injured railroad employee may be a sympathetic plaintiff in front of a jury, but a convicted criminal suing a police officer clearly is not.[134]

By the time Rehnquist asserted that alternative remedies were sufficient to enforce the Fourth Amendment, the resurgence of §1983 and the creation of *Bivens* were less than a decade old. Given this relatively short period, Rehnquist's failure to cite any empirical data or case law to support his assessment is perhaps excusable. Three decades later in *Hudson*, however, Justice Scalia renewed the same unbridled optimism regarding the effectiveness of civil remedies again without supporting case citations and again without acknowledging the high obstacles that convicted criminals face as plaintiffs. In fact, the only support Scalia relied upon for his analysis came from citations to academic literature, the content of which was significantly distorted to fit his argument.[135]

The Court's deference to civil remedies diminishes its fundamental obligation to preserve and protect the Constitution. As Justice Day explained in *Weeks*, "what

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[133] *Id.*
[134] Timothy Perrin, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669 (1998) (explaining the difficulties of plaintiffs in bringing civil suits against police officers, including "unsympathetic juries").
[135] See Avery, Rudovsky, Bloom, *supra* note 105, at vi.

remedies the defendant may have against [police officers] we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials."[136] The concerns of judicial integrity are focused upon the Court's duty to preserve the Fourth Amendment despite its inconvenience to law enforcement. So, when Rehnquist lamented that the exclusionary rule requires that "the whole criminal prosecution must be aborted to preserve judicial integrity," he has misdirected anger towards the exclusionary rule.[137] It is the Fourth Amendment right, not the exclusionary rule, that demands the exclusion of illegally obtained evidence.

One of the principal arguments against this notion that the Fourth Amendment requires the exclusionary rule is that the exclusionary rule is "beyond the corners of the Fourth Amendment."[138] This strict textualist argument questions the legitimacy of the exclusionary rule because the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands."[139] The exclusionary rule is therefore dismissed as merely a "judicially created remedy" with limited application.[140]

Yet, the history of constitutional law is riddled with rules and remedies found nowhere in the text of the Constitution itself, which remain unquestionably part and parcel of the Constitution.[141] The bedrock of constitutional law remedies articulated by Chief Justice Marshall in *Marbury v. Madison* was a judicially created remedy enabling courts to strike down unconstitutional laws despite having no such

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[136] *Weeks*, 232 U.S. at 398.
[137] *Minjares*, 443 U.S. at 924 (Rehnquist, J., dissenting)
[138] *Id.*
[139] *Herring* 129 S.Ct. at 699.
[140] *See Calandra*, 414 U.S. at 348.
[141] See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988).

power expressly articulated in the Constitution.[142] When Justice Marshall announced that "[i]t is emphatically the province and duty of the judicial department to say what the law is," he cited no particular passage in the Constitution explicitly granting such a duty.[143] It is ironic that the justices who question the legitimacy of the exclusionary rule as merely a "judicially created remedy" at the same time emphasize the *Bivens* remedy as a suitable alternative. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court held that it had the power to infer a cause of action and damage remedy directly from the Constitution.[144] As Susan Bandes argued, the crucial insight of *Bivens* is that the judicial branch not only can enforce the Constitution without congressional action by fashioning an adequate remedy for a constitutional violation, but that it is has an affirmative duty to do so.[145]

Indeed, without the latitude to provide an appropriate remedy, the Fourth Amendment right would have no effect. It has been well established since *Marbury* "that every right, when withheld, must have a remedy."[146] This so-called "*Marbury*-rights" position emphasizes the judiciary's critical role in vindicating constitutional rights.[147] The clarity of this proposition is magnified when the cognizable right in question is one of the pillars of the Bill of Rights and has been recognized as

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[142] While it is convenient to pinpoint the creation of this power in *Marbury*, it has been persuasively argued that *Marbury* occupied only an evolutionary role in the development of judicial review. See Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 Yale L.J. 502(2006); William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455 (2005).
[143] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
[144] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971).
[145] *See* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 292-94 (1995).
[146] *Marbury*, 5 U.S. at 147.
[147] *See* George D. Brown, *Counter-Counter-Terrorism Via Lawsuit: The Bivens Impasse*, 82 S. Cal. L. Rev. 841, 900 (2009).

essential to our ordered liberty. Applying a remedy to vindicate the substantive rights of the Fourth Amendment is a paradigmatic duty of the judiciary.[148] As Justice Harlan explained in *Bivens*, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment."[149] Where such a bedrock right has been invaded, federal courts are obligated to use "any available remedy to make good the wrong done."[150]

The exclusionary rule is best suited to vindicate a Fourth Amendment violation because it is the only effective remedy applied directly by the Court. When the Court declines to suppress evidence obtained via a Fourth Amendment violation, the simple effect is that the reviewing Court is compelled to excuse the misconduct. As Justice Murphy pointed out in his dissent to *Wolf*, the court that reviews a conviction supported by unlawfully seized evidence has but one choice in front of it: to admit or suppress the evidence.[151] If we are to take seriously the court's duty to protect our constitutional rights and preserve its sanctimonious role in the administration of justice, then courts must utilize the remedy of exclusion for acknowledged Fourth Amendment violations. By deferring to civil remedies to redress the constitutional violation, the Court legitimizes the misconduct as a simple cost of law enforcement. This position has unacceptably reduced the Fourth Amendment to "no more than unenforceable guiding principles."[152] Only the exclusionary rule can serve both the interests of the citizen who seeks restitution of

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[148] See Walter Dellinger, *Of Rights and Remedies: The Constitution as Sword*, 85 Harv. L. Rev. 1532, 1541 (1972)(quoting U.S. Const. Art. III, §2 "the judicial power shall extend to all Cases … arising under this Constitution …").
[149] *Bivens,* 403 U.S. at 407 (Harlan, J., concurring).
[150] Bell v. Hood, 327 U.S. 678, 684 (1946).
[151] *Wolf*, 338 U.S. at 41 (Murphy, J., dissenting).
[152] *See* Stewart, *supra* note 21, at 1383.

his Fourth Amendment right and the interests of the judiciary in supporting the Constitution and avoiding the taint of complicity with misconduct. We recognize that the exclusionary rule is not an effective remedy when no evidence is found as a result of a Fourth Amendment violation. Nevertheless, these situations do not implicate the judiciary in the misconduct as the government is not profiting from the illegality and there is a better opportunity for a civil suit because the victim of the violation was not subject to a criminal prosecution.

By limiting the exclusionary rule, the Court is removing the incentive for plaintiffs to raise substantive Fourth Amendment doctrine on appeal, which only further alienates the judiciary from its obligation to support and define constitutional rights.[153] Furthermore, the Court continues to add limitations to civil rights remedies to allow courts to sidestep Fourth Amendment doctrine. Plaintiffs in a civil damage suit against a police officer must establish both that a Fourth Amendment right has been violated and that the officer is not entitled to qualified immunity. Qualified immunity will usually apply if the right was not well established. In *Saucier v. Katz*, the Court held that the consideration of the Fourth Amendment violation would have to be addressed first.[154] Eight years later in *Pearson v. Callahan*, however, the Court overruled *Saucier*, allowing courts the discretion to skip the violation step and turn directly to qualified immunity.[155] As a

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[153] The additional value of the exclusionary rule is that it allows the Court "opportunities for substantive review of the fourth amendment." See Robert Bloom, *United States v. Leon and its Ramifications*, 56 U. Col. L. Rev. 247, 253 (1985). This further undermines the desirability of deferring to civil remedies..

[154] Saucier v. Katz, 533 U.S. 194 (2001).

[155] Pearson v. Callahan, 129 S. Ct. 808 (2009). See Thomas Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court,* 85 Chicago-Kent L. Rev. 191 (2010) for excellent discussion of the cutback of Fourth Amendment cases.

practical effect, *Pearson* further limits judicial review of Fourth Amendment violations, which narrows the value of the constitutional right.

Furthermore, not only is the exclusionary rule best suited to remedy these violations, but no alternative remedy has been proven to be as effective. Similar to his distorted citation of Samuel Walker's work, Justice Scalia also misrepresented a citation used to support his argument about the effectiveness of civil remedies. In *Hudson*, Justice Scalia cited the preface of *Police Misconduct: Law and Litigation* for the premise that "much has changed" since *Mapp*, arguing that the exclusionary rule was no longer necessary.[156] Yet, the book itself went on to lament on just the next page how the scope of the Fourth Amendment right as well as the procedural mechanisms to challenge police misconduct have been "dramatically narrowed."[157] In fact, the authors asserted in a footnote to their most recent edition that Justice Scalia's citation to their analysis in support of eliminating the exclusionary rule was "highly misleading."[158] The argument for the effectiveness of civil remedies, similar to that of the increasing professionalism, lacks the evidentiary heft required to suggest overturning the historical precedent of the exclusionary rule.

In fact, the evidence actually suggests that civil remedies have struggled to be an effective alternative. The *Bivens* remedy in particular has been gradually restricted by the Supreme Court ever since its inception and its effectiveness has been considerably undermined.[159] The expansion of the qualified immunity

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[156] *Hudson*, 547 U.S. at 597-98.
[157] See Avery, Rudovsky, Bloom, *supra* note 105, at vi.
[158] *Id.*
[159] See Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 Cato Sup. Ct. Rev. 23 (2007).

defense, most significantly under *Anderson*, has undermined plaintiffs opportunities to seek a remedy for an acknowledged Fourth Amendment violation. Furthermore, the Court's refusal to extend *Bivens* liability to new claims or different classes of defendants reflects its disfavored status as a remedy.[160] In addition, the hesitancy of jurors to award damages to convicted felons is now well documented.[161] As Laurence Tribe has suggested, "the best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."[162]

Admittedly, applying the exclusionary rule is no easy task. As Justice Stewart explained, "[a]pplying principles that do justice in the greater sense while working terrible misfortunes in particular cases is one of the most difficult tasks that any judge must face."[163] When evidence has been obtained in violation of the Fourth Amendment, it is not possible to both convict the guilty and preserve the constitutional right at the same time. Each time the Court faces such a decision, it is compelled to make a difficult choice. As Justice Holmes explained, "we have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."[164] Justice Holmes' famous quote emphasized the lesser of two evils, but the choice is equally clear from the standpoint of the greater of two goods. The greater good accomplished by protecting one of the key Bill of Rights greatly surpasses the incremental benefit of sustaining the conviction of one guilty criminal, especially when considering the fact

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[160] See Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 Stan L. Rev. ___ (forthcoming 2010).
[161] See Jonathan D. Casper et al., *The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making*, 13 Law & Soc. Inquiry 279, 282-303 (1988).
[162] See Tribe, *supra* note 156, at 26.
[163] Potter, *supra* note 22, at 1393.
[164] *Olmstead,* 277 U.S. at 469 (Holmes, J., dissenting).

that the vast majority of exclusionary rule applications are directed at non-violent offenses. Viewed as a greater good or a lesser evil, the choice appears clear. In applying the exclusionary rule to violations of the Fourth Amendment, the Court will not only return the judiciary to its sanctimonious role, but will also return the Fourth Amendment right to its "majestic" position as one of the most fundamental rights of a free society.

There is still hope that these twin pillars of judicial integrity will be preserved despite a majority of the Supreme Court's apparent indifference. Justice Ginsberg's dissent in *Herring* preserved the notion within the legal discourse of the Supreme Court and this notion has been accepted by the three additional justices dissenting in *Herring*. It should also be noted that Justice Kennedy felt compelled to point out in *Hudson* that the "continued operation of the exclusionary rule, as settled and defined by our precedent, is not in doubt."[165] In addition, a variety of state courts have accepted the notion that judicial integrity is a fundamental component of their exclusionary rule analysis.[166] While the majority of the Supreme Court is willing to

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[165] *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring).

[166] *See Commonwealth v. Webster*, 913 N.E.2d 890, 899 (Mass.App.Ct., 2009)("To be sure, deterrence of future misconduct is one aim of the suppression remedy…, but so too is a desire to avoid judicial participation in the use of evidence obtained in violation of a defendant's constitutional rights."); *People v. Hyde*, 775 N.W.2d 833, 840 (Mich.App., 2009)("Exclusion of improperly obtained evidence serves as a deterrent to police misconduct, protects the right to privacy, and preserves judicial integrity."); *State v. Knapp*, 700 N.W.2d 899, 920 (Wis., 2005)("aside from deterring police misconduct, there is another fundamental reason for excluding the evidence under circumstances present here, the preservation of judicial integrity."); *State v. Ellis*, 210 P.3d 144, 153 ("The purpose of the exclusionary rule is to 'deter illegal police conduct and preserve judicial integrity."); *State v. Campbell*, 198 P.3d 1170, 1175 (Alaska.App, 2008)("[the lower court] could reasonably conclude that society's interest in prosecuting Campbell was outweighed by the interest of deterring police misconduct and maintaining judicial integrity that follows from application of the exclusionary rule."); *Hensley v. Commonwealth*, 248 S.W.3d 572, 579 (Ky.App., 2007)(quoting *Mapp v. Ohio*: "we are also mindful that to maintain judicial integrity 'the criminal goes free, if he must, but it is the law that sets him free.'"); *State v. Lee*, 920 A.2d 80, 84 (N.J., 2007)("The rule also 'advances the imperative of judicial integrity and removes the profit motive from lawless behavior.'")

let the relevance of judicial integrity fade into historical obscurity, it appears that the rationale may remain a powerful force in constitutional law and help retain the exclusionary rule as a necessary adjunct to the Fourth Amendment right.[167]

[167] See Steiker, *Brandeis in Olmstead: 'Our Government is the Potent, Omnipresent Teacher*, 79 Miss. L. Jour. 149, 175 (2009).