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INDEPENDENT AND ADEQUATE

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Independent and Adequate: Maryland's State Exclusionary Rule for Illegally Obtained Evidence

by Carrie Leonetti*

Maryland residents' protection against unreasonable searches and seizures derives from two primary sources: the Fourth Amendment to the United States Constitution[1] and Article 26 of the Maryland Declaration of Rights,[2] which predates the federal provision.[3] The Fourth Amendment prohibits unreasonable searches and seizures and establishes a warrant requirement based upon probable cause. In its literal terms, Article 26 contains only a warrant requirement, but Maryland courts have long interpreted it to prohibit unreasonable searches and seizures under the same circumstances that the Fourth Amendment does.[4]

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[1] The Fourth Amendment states:

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

The Fourth-Amendment prohibition against unreasonable searches and seizures constrains the actions of Maryland state and local authorities because the United States Supreme Court has held that the Due-Process Clause of the Fourteenth Amendment incorporates the Fourth Amendment and applies its protections to the states. *See Mapp v. Ohio,* 367 U.S. 643 (1961).

[2] Article 26 states, in pertinent part: "That all warrants, with or without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive . . . ."

[3] The issuance and validity of search warrants in Maryland has also been governed by statute since 1939. *See* 1939 Md. Laws Ch. 749. The statute implements and supplements the provisions of Article 26 and provides that a judge may issue a search warrant whenever there is probable cause to believe that a crime is being committed or there is property subject to seizure under the criminal laws of the state. *See* MD. CODE, Crim. Proc. Art. § 1-203 (a) (West 2001) (repealing and replacing MD. CODE, Art. 27, § 551 (1987) (repealing and replacing MD. CODE Art. 27, § 306 (1939)). The statute also provides that, if it later appears that there was no probable cause to issue the search warrant, the judge shall cause property taken under the search warrant to be returned to the person from whom it was taken. *See* § 1-203 (b). If there was probable cause, the judge must order the property to be retained by the State. *See id.*

[4] *See, e.g., Givner v. State,* 124 A.2d 764 (Md. 1956); *Miller v. State,* 198 A. 710, 716 (Md. 1938); *Hubin v. State,* 23 A.2d 706, 710 (Md. 1946).

There has been a great deal of scholarly literature on the subject of state constitutional law being different from federal constitutional law, particularly in the context of criminal procedure.[5] What this Article seeks to do is to provide one example of a state court, the Maryland Court of Appeals, whose lockstep interpretation of one of its state constitutional provisions, Article 26 of the Declaration of Rights, with its federal counterpart, the Fourth Amendment, resulted in Maryland's loss of its historically independent and adequate state-law remedy for illegal searches and seizures.

In 1914, the United States Supreme Court held in *Weeks v. United States*[6], that articles seized in violation of the Fourth Amendment could not be admitted in evidence at trial. In the wake of *Weeks,* a majority of state courts have adopted the view that their state constitutional search-and-seizure provisions similarly prohibited the admission of illegally seized evidence.[7] The Maryland Court of Appeals resisted this call in 1928 in a sharply divided opinion in *Meisinger v. State.*[8]

Since *Meisinger,* Maryland courts have often repeated, with great authority, that Maryland has no state exclusionary rule for illegally obtained evidence.[9] Oft-repeated though it

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[5] *See, e.g.,* Harry C. Martin, *The State as a "Font of Individual Liberties,"* 70 N.C.L.REV. 1749, 1750 (1992); Christopher Slobogin, *State Adoption of Federal Law,* 39 U. FLA. L. REV. 653, 661-62 (1987).

[6] 232 U.S. 383 (1914) (holding that papers seized from Weeks in violation of the Fourth Amendment should be returned to him prior to trial, preventing their introduction as evidence against him).

[7] *See Fitzgerald v. State,* 864 A.2d 1006, 1020 (Md. 2004) ("Now, forty-six states have an exclusionary rule for their state constitutions."); WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 1.5 (b) (3d. ed. 1996) "When (as is occurring with greater frequency) a state court finds that a certain arrest or search passes muster under the Fourth Amendment but that it violates the comparable provision of the state constitution, there does not appear to be any dissent from the conclusion that the fruits thereof must be suppressed from evidence."); *see, e.g., Gore v. State,* 218 P. 545, 548 (Okla. Crim. App. 1923).

[8] 141 A. 536 (1928) (reaffirming the rule of *Lawrence v. State,* 63 A. 96 (Md. 1906), in the wake of *Weeks,* on the basis of *stare decisis* principles).

[9] *See Brown v. State,* 916 A.2d 245, 251 (Md. 2007) ("Although the alleged conduct may also violated the Maryland Declaration of Rights, because there is no general exclusionary provision in Maryland for such violations, the conduct must violate the federal Constitution to be excluded."); *Sugarman v. State,* 173 Md. 52, 58 (1937); *Padilla v. State,* No. 212, slip. op. at 21-22 (Md. Ct. Spec. App. May 30, 2008) ("[N]o exclusionary rule exists for a violation of Article 26."); *Miller v. State,* 824 A.2d 1017, 1023 (Md. Ct. Spec. App. 2003); *Anne Arundel Co.. v. Chu,* 518 A.2d 733, 738 (Md. Ct. Spec. App. 1987) ("Maryland, for that matter, has no Exclusionary Rule of its own

may be, countercurrents in the case law call into question this claim. The court in *Meisinger* purported to uphold the traditional rule that competent evidence could not be attacked collaterally on the basis of the manner in which it was obtained, but other opinions from the Court of Appeals dealing with the relationship between Articles 26 and 22[10] of the Maryland Declaration of Rights suggest that there was already an exclusionary rule for illegally seized evidence as a matter of Maryland's common law. This rule was derived from Article 26's prohibition against warrantless searches and seizures as understood in light of Article 22's privilege against self-incrimination. The Maryland Court of Appeals' decision in *Meisinger* not to "recognize" a state exclusionary remedy for illegally seized evidence was founded upon the faulty premise that Maryland did not already have one.

While Maryland courts have historically interpreted Article 26 *in pari materia* with the Fourth Amendment, this *pari-materia* doctrine is descriptive, not normative, as the Court of Appeals has emphasized:

> [O]ur cases clearly recognize the similarity between the Fourth Amendment . . . and our own older Declaration of Rights, Art. 26, which grew out of the same historical background. Because of this similarity the consistent position of this Court has been that decisions of the Supreme Court on the kindred 4th Amendment are entitled to great respect. . . .
> [A]lthough a clause of the United States Constitution and one in our own Declaration of Rights may be in pari material, and thus decisions applying one provision are persuasive authority in cases involving the other, we reiterate that each provision is independent, and a violation of one is not necessarily a violation of the other.[11]

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to this very day."); *see also* Stephen E. Henderson, *Learning from All Fifty States,* 55 CATH. U. L.REV. 373, 410 n.157 (2005); Irma S. Raker, *Fourth Amendment and Independent State Grounds,* 77 MISS. L.J. 401, 407-08 (2007).

[10] Article 22 provides: "That no man ought to be compelled to give evidence against himself in a criminal case."

[11] *Gahan v. State,* 430 A.2d 49, 55 (Md. 1981). *See Parker,* 936 A.2d at 879; *Dua v. Comcast Cable,* 805 A.2d 1061, 1071 (Md. 2002); *Attorney General v. Waldron,* 426 A.2d 929, 946 (Md. 1981).

The Oregon Supreme Court, well known for its independent state constitutionalism, began with a similar progression. First, it acknowledged that it *could* interpret OR. CONST. art. I § 9 differently than the Supreme Court interpreted the Fourth Amendment, while declining to do so. *See, e.g., State v. Florance,* 527 P.2d 1202 (Or. 1974) (overruling prior Oregon precedent and holding that § 9 did not require that the scope of a search incident to arrest be reasonably related to the offense that prompted the arrest, based on the persuasive authority of *United States v.*

Because the *pari-materia* doctrine is not normative, Maryland courts could interpret the protections of Article 26 more broadly than the Supreme Court interprets the protections of the Fourth Amendment. While the privilege contained in Article 22 is generally *in pari materia* with its federal counterpart,[12] there are situations in which the privilege under Article 22 has been viewed more broadly than the privilege under the Fifth Amendment and the exclusionary rule for statements obtained in violation of Article 22 has been applied independently.[13] And because Maryland courts have made clear, in cases like *Gahan,* that the state *pari-materia* doctrine is an empirical rather than a normative one (*i.e.* – they have made explicit that the mere fact that they historically have interpreted Article 26 with reference to the persuasive authority of federal-court interpretations of the Fourth Amendment does not mean that they are bound to do so in the future), if Maryland courts chose to interpret the protections of Article 26 more broadly than the protections of the Fourth Amendment, Article 26 would be an independent state-law ground on which Maryland courts could not only base jurisprudence but from which they could insulate their decisions suppressing evidence on the ground that it was obtained in violation of Article 26

Robinson, 414 U.S. 218 (1973) (holding that warrantless searches incident to arrest were "reasonable," irrelevant of their relationship to the offense of arrest)). Only later did it actually do so. *See, e.g., State v. Caraher,* 653 P.2d 942 (Or. 1982) (overruling *Florance* and reinstating the requirement that searches incident to arrest be necessary to preserve evidence of the crime for which the defendant was arrested, pursuant to § 9); *see also State v. Dixson,* 766 P.2d 1015 (Or. 1988) (holding that, unlike the Fourth Amendment, § 9 applied to the "open fields" beyond the curtilage of a residence); *State v. Campbell,* 759 P.2d 1040 (Or. 1988), and *State v. Tanner,* 745 P.2d 757 (Or. 1987) (rejecting the Fourth-Amendment "reasonable expectation of privacy" test); *State v. Galloway,* 109 P.3d 388 (Or. App. 2005) (holding that defendants retained a possessory interest in their garbage while they sit at curbside awaiting collection under the state constitution).

[12] *See Gray v. State,* 873 A.2d 395, 404 (Md. 2002); *Winder v. State,* 765 A.2d 97 (Md. 2001).

[13] *See Choi v. State,* 560 A.2d 1108, 1111 n.3 (Md. 1989) (noting that, although Article 22 is generally *in pari materia* with the Fifth Amendment, there are situations in which it has been viewed differently and more broadly), *see e.g., Allen v. State,* 39 A.2d 820 (Md. 1944) (holding that Article 22 prohibited a witness-defendant from being asked at his trial to try on an item of clothing in order to establish his ownership of it to connect him with the crime); *Chesapeake Club v. State,* 63 Md. 446, 457 (1885) (holding that a witness's testifying about a particular subject matter did not preclude invocation of the privilege for other questions relating to the same matter); *cf. Rogers v. United States,* 340 U.S. 367, 372-73 (1951) (holding that a witness's answering incriminating questions constituted a waiver of the Fifth-Amendment privilege against compelled self-incrimination with regard to further disclosure on the same subject).

from Supreme Court review.[14] In *Meisinger,* for example, the illegally obtained evidence at issue (alcohol) was seized pursuant to a warrant.[15] Nonetheless, it was undisputed that the seizure of the alcohol was unlawful.[16] While the Court of Appeals refused to exclude the evidence used against Meisinger on the ground that it had been illegally obtained, therefore, it did not do so on the merits of the legality of the seizure of the evidence by applying an exception to the exclusionary remedy like the one that the Supreme Court would later embrace in *Leon.* Under the prevailing view that Maryland does not have an independent exclusionary rule for violations of Article 26, however, Article 26 is not presently an adequate state ground upon which to sustain the suppression of illegally obtained evidence. Recognition of an independent exclusionary rule under Article 26 would permit the Maryland courts to expand their protection against unreasonable searches and seizures beyond that required by the United States Supreme Court, as the Maryland Court of Appeals has sometimes expressed a willingness to do (but for its belief that it has no state-law remedy with which to do it)[17] and other state supreme courts have done.[18]

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[14] *See Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983) ("[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."); *Delaware v. Prouse,* 440 U.S. 648 (1979); *Fox Film Corp. v. Miller,* 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is . . . adequate to support the judgment."); *but see Maryland v. Garrison,* 480 U.S. 79, 83-84 (1987) (reversing a decision by the Maryland Court of Appeals, which was based in part on Article 26 of the Maryland Declaration of Rights, because of prior Maryland opinions indicating that Article 26 was *in pari materia* with the Fourth Amendment).

[15] *See Meisinger,* 141 A. 536.

[16] *See id.*

[17] *See, e.g., Fitzgerald,* 864 A.2d at 1026 (Greene, J., dissenting) ("In order to provide Maryland residents greater protection against random canine sniffing searches, I believe we should reach the state constitutional question and declare canine sniffs of dwellings conducted on less than probable cause presumptively unreasonable. In addition, Maryland should adopt its own exclusionary rule."); *Pringle v. State,* 805 A.2d 1016 (Md. 2002) (holding that police lacked probable cause to arrest Pringle for drug possession and that Pringle's confession was a direct result of his illegal arrest, requiring its suppression) (reversed by *Maryland v. Pringle,* 540 U.S. 366 (2003); *Everhart v. State,* 337 A.2d 100, 115 (Md. 1975) ("Thus, although it might seem more nearly constitutionally accurate that inquiry be made as to whether the place . . . where the search and seizure was made . . . was within an area where Everhart had a reasonably 'legitimate expectation of privacy,' it would seem, *a fortiori,* that if there was an intrusion

The incorporation of the exclusionary remedy to the states in *Mapp* occurred in the midst of the Warren-Court era of expansion of individual liberties. With the passage of the Bouse Act for misdemeanor cases, followed by the Supreme Court's decision in *Mapp* in 1961 and the expansion of the scope of Fourth-Amendment protection by the Warren court,[19] Maryland courts wishing to protect against unreasonable searches and seizures came to rely exclusively on federal constitutional and state statutory remedies for unreasonable searches and seizures and, at least until 1973, had little need for a state constitutional exclusionary remedy.[20] During this same time period, the Supreme Court was *restricting* the scope of the Fifth Amendment privilege against self-incrimination,[21] while the Maryland Court of Appeals was *expanding* the scope of Article 22 and the common-law prohibition against admission of involuntary confessions. With the "repeal" of the Bouse Act and the contraction of the federal exclusionary remedy, Maryland now finds itself in need of the very state exclusionary remedy that it so carelessly shed in 1928.[22]

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geographically within the curtilage it would be within such a protected area, notwithstanding that such . . . may have been within the officers' plain view.").

[18] *See, e.g., State v. Hardaway,* 36 P.3d 900, 910 (Mont. 2001) (noting that the range of warrantless searches permitted by MONT. CONST. art. II, § 10 is narrower than that permitted by the Fourth Amendment) (citing *State v. Elison,* 14 P.3d 456 (Mont. 2000)); *State v. McKinney,* 60 P.3d 46, 48 (Wash. 2002) (noting that "the protections guaranteed by article I, section 7, of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.") (citing *City of Seattle v. McCready,* 868 P.2d 134 (Wash. 1994)).

[19] *See, e.g., Katz v. United States,* 389 U.S. 347 (1967) (recognizing a Fourth Amendment interest whenever a search infringed on an individual's reasonable expectation of privacy); *Camara v. Municipal Court,* 87 U.S. 347 (1967); *Jones v. United States,* 362 U.S. 257 (1967).

[20] Several commentators have noted a pattern of states ceasing to look to their own constitutions during the Warren-Court era. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW § 1.1 (1992) ("A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of Warren Court decisions left state constitutional law in a condition of near atrophy in most states."); Howard, *supra* note xxx at 878 (noting that state courts fell into "the drowsy habit of looking no further than federal constitutional law"); Slobogin, *supra* note xxx at 657, 661.

[21] The Fifth Amendment states, in pertinent part, that: "No person . . . shall be compelled in any criminal case to be a witness against himself."

[22] *See* William J. Brennan, Jr., *The Bill of Rights and the States,* 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Bill of Rights*]; William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]; Stanely H. Friedelbaum, *Advances and Departures in the Criminal Law of the States,* 69 ALB. L. REV. 489, 495 (2006); Hans A. Linde, *First Things First,* 9 U. BALT. L. REV. 379 (1980); Stanley Mosk, *California Constitutional Symposium,* 17 HASTINGS CONST. L. Q. 1 (1989); Stanley Mosk, *State Constitutionalism,* 63 TEX. L. REV. 1081, 1088 (1985).

Section I of this Article explores the doctrinal evidence that the *Meisinger* court misread historical precedents in deciding that Maryland did not have an independent exclusionary rule for suppressing evidence obtained in violation of Article 26 of the Declaration of Rights. It explores the origins and evolution of the exclusionary rule under the Fourth and Fifth Amendments to the United States Constitution. It traces the exclusionary rule of *Weeks* back to its precursor for simultaneous violations of the Fourth and Fifth Amendments under the "convergence theory" of the late nineteenth and early twentieth centuries. It argues that *Weeks* is best understood as the first application of the exclusionary remedy to violations of the Fourth Amendment alone. It explores the doctrinal evidence for the existence of a Maryland state exclusionary remedy for illegally seized evidence. It argues that, historically, Maryland had an exclusionary rule for evidence in violation of Articles 22 and 26 together, under the convergence theory, which should have been the precursor for an Article 26 exclusionary rule in the same way that the federal exclusionary rule for Fourth-and-Fifth-Amendment violations was a precursor to the Fourth-Amendment exclusionary rule recognized in *Weeks.* It argues that the *Meisinger* court misunderstood critical precedents from prior Maryland Court of Appeals' cases and the relationship between Articles 22 and 26 at common law, resulting in a "loss" of Maryland's independent exclusionary rule.

Section II explores the historical evidence for the existence of a Maryland state exclusionary remedy for illegally seized evidence. It points to the language of the statute conferring upon the State the limited right to appeal certain rulings in a criminal case , pre-*Mapp* Maryland case law in which the courts appear to be excluding illegally obtained evidence on the basis of a Maryland common-law exclusionary rule, and the development of court-created mechanisms for the pretrial return of illegally seized property as historical evidence that

Maryland courts were suppressing evidence obtained in violation of Article 26 prior to the Supreme Court's decision in *Mapp,* and argues that such suppression would have to have been based upon state law independent of the Fourth Amendment.

The Conclusion discusses recent opinions by the Maryland Court of Appeals in which the court declined to overrule *Meisinger* and argues that the recent contraction of Fourth-Amendment protection by the United States Supreme Court gives rise to a need and an opportunity for Maryland courts to use a state exclusionary rule to give citizens of Maryland greater protection against unreasonable searches and seizures. It concludes that, rather than "creating" a state exclusionary rule for evidence seized in violation of Article 26, the Maryland Court of Appeals should recognize that one existed prior to *Meisinger* and reanimate it.

I.

MISREADING OF HISTORICAL CASES: DOCTRINAL EVIDENCE THAT *MEISINGER* WAS WRONGLY DECIDED

This Section argues that the *Meisinger* court misread Maryland Court of Appeals' precedents when it determined that the decision in *Lawrence* foreclosed the possibility of a state exclusionary remedy for illegally obtained evidence. Subsection A traces the creation, evolution, and disappearance of the "convergence theory" at the federal and Maryland levels – between the Fourth and Fifth Amendments to the United States Constitution and Articles 26 and 22 of the Maryland Declaration of Rights, respectively. These evolutionary paths were parallel up until the Supreme Court's decision in *Weeks* and the Maryland Court of Appeals' decision in *Meisinger,* where the jurisprudence of the two courts diverged. Subsection B discusses the Maryland Court of Appeals' decision in *Lawrence* and demonstrates how *Lawrence* was a ruling on the admissibility of evidence rather than the existence of an exclusionary remedy for evidence obtained in violation of the Maryland Declaration of Rights. Subsection C discusses the

Maryland Court of Appeals' decision in *Meisinger* and explains how the majority misinterpreted its own precedent in determining that Maryland had no exclusionary remedy for evidence obtained in violation of Article 26. Subsection D traces the enactment and "repeal" of the Bouse Act in the wake of (and in reaction to) the court's decision in *Meisinger.* The Bouse Act was the primary vehicle for suppression of illegally seized evidence in Maryland for almost sixty years until it was superseded by the exclusionary rule for Fourth-Amendment violations incorporated to the states by *Mapp*.[23] Subsection E discusses the ongoing vitality (and expansion) of the Maryland common-law exclusionary rule for evidence obtained in violation of Article 22 and argues that the Maryland Court of Appeals' Article-22 jurisprudence directly contradicts the *Meisinger* court's claim that its decision in *Lawrence* was inconsistent with an independent state exclusionary rule.

A. *The Birth and Death of the Convergence Theory*

Today, the Supreme Court interprets the Fifth-Amendment privilege against self-incrimination as a limited right to remain silent, prohibiting only acts that compel testimonial communication by an accused – in other words, statements, expressive conduct, or testimony (*e.g.,* police subjecting a suspect to interrogation against her will, investigators subpoenaing an accused for a pretrial deposition, a prosecutor calling a defendant as a witness at trial).[24] In the past, courts interpreted the prohibition against self-incrimination to prohibit compulsion of a much wider range of conduct (*e.g.,* the production by a suspect of inculpatory physical

[23] *See Chu v. Anne Arundel Co.,* 537 A.2d 250, 254 (Md. 1988); *Everhart v. State,* 337 A.2d 100 (Md. 1975).
[24] *Compare Pillsbury v. Conboy*, 459 U.S. 248, 256-57 (1983) ("[A] District Court cannot compel [a witness] to answer deposition questions, over a valid assertion of his Fifth Amendment right . . .") *with Andresen v. Maryland,* 427 U.S. 463 (1976) (holding that the Fifth Amendment did not prohibit Andresen's seized personal papers from being used against him at trial) *and Schmerber v. California,* 384 U.S. 757 764 (1966) (holding that the privilege against self-incrimination is a bar against compelling "communications" or "testimony" from an accused, but not "real or physical evidence").

evidence).[25] During the period when the privilege was interpreted to prohibit the compelled production of non-testimonial types of evidence, its protections overlapped a great deal with those of the prohibition against unreasonable searches and seizures. Evidence seized as a result of an unreasonable search or seizure was often derived directly from an accused in the absence of a warrant or probable cause, thereby violating the prohibition against compelled self-incrimination, as well.[26] This overlap between the historical protections of the Fourth and Fifth Amendments is often referred to as the "convergence theory."[27]

The convergence theory originated in Great Britain in *Entick v. Carrington,*[28] in which Lord Camden held that a search warrant issued for the search of the premises of a weekly paper that had been critical of the English government was illegal, based upon the sanctity of property, the invasiveness of searches and seizures, and the right of individuals not to give evidence against themselves.[29] In *Carrington*, Lord Camden set forth an early formulation of the convergence between the right of privacy enshrined in the prohibition against unreasonable searches and seizures and the privilege against compelled self-incrimination: "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle."[30]

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[25] *See, e.g., Agnello v. United States,* 269 U.S. 20 (1925) (holding that the seizure of contraband from Agnello in violation of the Fourth Amendment permitted Agnello to invoke his privilege against self-incrimination under the Fifth Amendment to prevent the Government from introducing the contraband against him at trial).
[26] *See United States v. Boyd,* 116 U.S. 616 (1886).
[27] *See, e.g., Andresen,* 427 U.S. at 472 n.6; *State v. Earls,* 805 P.2d 211, 226 (Wash. 1991)*State v. Knapp,* 700 N.W.2d 899, 917 (Wis. 2005); Sanford Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule,* 61 Wash. L. Rev. 459, 524-25 (1986).
[28] 19 How. St. Tr. 1029 (1765).
[29] *See id.*at 1066, 1073. The English common-law prohibition against self-incrimination was expressed as: "*Nemo tenetur prodere seipsum.* (No one should be required to betray himself)." *See Gray,* 796 A.2d at 708-09. For a comprehensive account of the British origins of the American Fifth Amendment and the history of the writing of the first American bills of rights, including the Maryland Declaration of Rights, *see* LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).
[30] *Id.* at 1073.

The convergence theory was imported to the United States and adopted by the Supreme Court when it set forth the exclusionary remedy for evidence obtained in violation of the Fourth and Fifth Amendments in 1886 in *United States v. Boyd,* which relied heavily upon *Carrington.* Boyd was under investigation for violating a customs-revenue statute by importing a glass plate without paying the appropriate tariff.[31] The statute in question permitted customs authorities to compel a suspect to produce documentary evidence relating to the assessment and collection of customs duties – books, ledgers, diaries, etc. – and, if the suspect refused to produce such evidence, permitted a court to infer guilt from the refusal.[32] The customs authorities obtained a court order compelling Boyd to produce the invoice for the glass plate, Boyd refused, his guilt was inferred, and he was convicted of customs-duty evasion.[33]

On appeal, Boyd argued that the provisions of the customs-revenue statute compelling production of evidence and inferring guilt from the failure to produce the requested evidence violated both the Fourth and Fifth Amendments.[34] The Supreme Court agreed, reversing Boyd's conviction.[35] The Court relied upon the convergence theory, saying:

> We have already noticed the intimate relation between [the Fourth and Fifth Amendments]. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal case is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[36]

[31] *See Boyd,* 116 U.S at 617-18.
[32] *See id* at 619-20.
[33] *See id.* at 618.
[34] *See id.* at 622-23.
[35] *See id* at 638.
[36] *Id.* at 633-34.

During the convergence-theory period, the Maryland Court of Appeals interpreted its state constitutional provisions governing search and seizure and the privilege against self-incrimination largely in lockstep with the Supreme Court's interpretations of the corresponding federal constitutional amendments. Specifically, the Maryland Court of Appeals recognized a convergence between Article 22 and Article 26 of the Declaration of Rights that was almost identical to the convergence between the Fourth and Fifth Amendments to the United States Constitution. The 1902 case of *Blum v. State*[37] is exemplary. The Blum Brothers owned a grocery business.[38] The Blums became the targets of a fraud and money-laundering investigation.[39] The court appointed a receiver to administer the business during the investigation, and the receiver turned over books, ledgers, and diaries from the business to the fraud investigators.[40] The State used the materials provided by the receiver to convict the Blums.[41] On appeal, Blum argued that the receiver and investigators had violated both the warrant requirements of the Fourth Amendment and Article 26 and the prohibition against self-incrimination of the Fifth Amendment and Article 22 in seizing the inculpatory documents.[42] Citing *Boyd* liberally, the Court of Appeals agreed, explaining:

> While ordinarily the privilege against self-incrimination extends only to the refusal to answer an incriminating question or give testimony, the rights protected by Article 22 and the Fifth Amendment and the rights protected by Article 26 and the Fourth Amendment are "intimately related to each other and . . . throw great light on each other."[43]

The significance of the Court of Appeals adoption of the convergence theory is that, like federal courts interpreting the Fourth and Fifth Amendments, Maryland courts employed an

[37] 51 A. 26 (1902).
[38] *See id.* at 27.
[39] *See id* at 28.
[40] *See id.*
[41] *See id.*
[42] *See id.*
[43] *Id.* at 29.

exclusionary remedy for simultaneous violations of Article 22 and 26, at least until the abandonment of the convergence doctrine.

Conventional wisdom holds that the Supreme Court established the exclusionary remedy for Fourth-Amendment violations in 1914 in *Weeks.* Police officers entered Weeks's home, searched his room, and seized various articles therefrom, including papers, letters, and envelopes, on two separate occasions, without a search warrant.[44] On the basis of the seized evidence, Weeks was charged with running an illegal mail lottery.[45] Prior to trial, Weeks filed a petition seeking the return of his private property on the grounds, *inter alia,* that its warrantless seizure violated the Fourth and Fifth Amendments.[46] The trial court agreed that the search and seizure were illegal and ordered the Government to return to Weeks all of his property that it did not need to use as evidence at Weeks's trial, but denied the petition with regard to all "pertinent" seized matters, ruling that, "the evidence having come into the control of the court, it would not inquire into the manner in which they were obtained, but if competent would keep them and permit their use in evidence."[47] On appeal of his conviction, relying heavily on *Entick* and *Boyd,* the Supreme Court held that the search of Boyd's home and seizure of his letters and private documents violated the Fourth Amendment, without addressing Weeks's Fifth-Amendment claim.[48] The Court concluded that the district court had committed "prejudicial error" by permitting Weeks's seized letters to be used against him at trial rather than ordering their pretrial return.[49] The significance of *Weeks*, therefore, was not that it established an exclusionary remedy for evidence obtained in violation of the Fourth Amendment, but rather that it retained

[44] *See Weeks,* 232 U.S. at 386.
[45] *See id.*
[46] *See id.* at 387.
[47] *Id.* at 394.
[48] *See id.* at 389-94, 398.
[49] *See id.* at 398.

Boyd's exclusionary remedy for evidence obtained in violation of the Fourth Amendment independent of the convergence theory and without requiring a simultaneous violation of the Fifth Amendment.

B. Competency of Evidence

During the same time period in which the Supreme Court and the Maryland Court of Appeals were developing their convergence-theory jurisprudence, Maryland was developing its common law of evidence. Maryland has always subscribed to the majority view that the manner in which an item was obtained did not undermine its competency as evidence.[50] Unfortunately, these two, previously unrelated strands of jurisprudence, one dealing with constitutionally required remedies for the illegal procurement of evidence and the other dealing with the competency and admissibility of illegally procured items as evidence, would become indefinitely intertwined in the Court of Appeals' *Meisinger* decision. This intertwining occurred primarily because of the *Meisinger* court's misapplication of the precedent set by *Lawrence v. State.*[51]

Lawrence was a leading evidence case, which dealt with a challenge to the admissibility of evidence obtained by way of an illegal search and seizure. It was decided in 1902, just four years after the court's decision in *Blum.* Lawrence was charged with theft by false pretenses for selling a large quantity of relatively valueless stock for a large amount of money.[52] The State's theory of the case was that the stock sales were fraudulent because Lawrence knew that the stock was not worth anywhere near the price for which it was sold.[53] One of the State's key pieces of evidence to prove that Lawrence knew that the stock in question was worthless was that he

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[50] *See* MD. RULE 5-402; s*ee, e.g.,* GREENLEAF ON EVIDENCE § 254 ("Though papers and other subjects of evidence may have been . . . unlawfully obtained this is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice of how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."); WIGMORE ON EVIDENCE (3d. ed. 1940) § 2183 ("[T]he admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.").
[51] 63 A. 96 (Md. 1906).
[52] *See id.* at 97.
[53] *See id.* at 100.

carried large numbers of the certificates around town in a satchel, rather than storing them in a secure location (like a bank or safe) as one would expect him to do if he believed that they were very valuable.[54] Prior to trial, Lawrence moved to exclude the State's evidence that he carried the stock certificates on his person on the ground that the certificates were not competent evidence because the State had illegally seized them from his person.[55] The trial court denied his motion and admitted the stock certificates seized from him as evidence that he knew their true value.[56] On appeal, the Maryland Court of Appeals affirmed Lawrence's conviction, concluding:

> [I]t would seem upon reason and the great preponderance of authority that the manner in which the State secured control of these articles did not make them inadmissible in evidence upon the ground [that they were taken in violation of Lawrence's constitutional right to security against unlawful search, and seizure of his property].[57]

Lawrence is the first and primary authority that Maryland courts cite to support the assertion that Maryland had no exclusionary rule of its own at common law, based on the fact that Lawrence's challenge to the admissibility of the stock certificates and the manner of their seizure was based, at least in part, on their having been seized without a warrant.[58] Courts since *Meisinger* have misunderstood two things about the *Lawrence* case, however: first, that the evidence in *Lawrence* was legally seized without a warrant as a search incident to arrest, and, second, that the nature of Lawrence's challenge was *evidentiary – i.e.,* he challenged the admissibility of the purportedly illegally obtained evidence not as a *remedy* for the violation of his constitutional rights, but rather argued that the evidence lacked competency as evidence because of the allegedly unconstitutional manner in which it was obtained. While the *Lawrence*

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[54] *See id.* at 101-02.
[55] *See id.* at 102.
[56] *See id.* at 101-02.
[57] *Id.* at 102.
[58] *See, e.g., Chu,* 537 A.2d at 251-52; *Padilla,* slip op. at 23-24.

opinion is rather skeletal, the Court of Appeals interpreted Lawrence's evidentiary challenge as being predicated on the manner in which the seized evidence was obtained, characterizing it as follows: "The incriminatory effect of the appellant having the articles in question in possession arose from the *relevancy* of this as evidence to prove the issue. The objection could only go to the manner of its production."[59] Lawrence's theory of inadmissibility, therefore, was more akin to a chain-of-custody or authenticity challenge than to a request to the court to use its supervisory power to establish an *ex ante* incentive to discourage illegal law-enforcement practices. In this sense, Lawrence's challenge to the evidence was more like a motion *in limine* (or even a contemporaneous objection at trial) asking a court to rule that a certain item of evidence is inadmissible on evidentiary grounds[60] than a motion to suppress evidence on constitutional grounds,[61] if framed in modern procedural terminology.[62] The Court of Appeals rejected Lawrence's reliance on *Boyd* and *Blum*, finding those cases to be "dealing with a very different question from the one involved in the case at bar," concluding: "Evidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even an illegal, manner."[63]

C. *The Loss of the State Exclusionary Rule for Article-26 Violations*

Maryland lost its state exclusionary rule in the *Meisinger* case – specifically, in the *Meisinger* court's interpretation of the precedent of *Lawrence.* Meisinger was convicted of

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[59] *Lawrence,* 63 A. at 102.
[60] *See* MD. RULE 4-252 (d); *see, e.g., Myer v. State,* 943 A.2d 615, 617 (Md. 2008); *cf.* OHIO R. CRIM. P. 12 (B).
[61] *See* MD. RULE 4-252 (a) (3); *cf.* OHIO R. CRIM. P. 12 (B) (3).
[62] Procedurally, the distinction between a motion *in limine* to exclude evidence and a motion to suppress is that a motion *in limine* seeks a tentative, preliminary ruling and the movant must still object to the admission of evidence at trial, while a motion to suppress seeks a definitive ruling prior to trial, which does not require a contemporaneous objection. *See, e.g., Riojas v. State,* 530 S.W.2d 298, 301 (Tex. Crim. App. 1975). Substantively, a motion to suppress is the proper vehicle for raising a constitutional challenge to a piece of evidence based upon an exclusionary rule, while a motion *in limine* is the proper vehicle for a preliminary ruling on evidence, in which a movant asks a court for its anticipated ruling prior to trial on whether a party may offer a prospective item in evidence to avoid injecting prejudicial matters before the jury. *Se* Black's Law Dictionary (6 ed. 1990) at 1013-14, *see, e.g., State v. French,* 650 N.E.2d 887, 890 (Ohio 1995).
[63] *Lawrence,* 63 A. at 103-04.

illegal possession of alcohol for sale in Cecil County, Maryland.[64] On appeal, he challenged the admission against him of alcohol seized pursuant to a search warrant that the State conceded was "illegal" because it had been issued in a county in which the state search-warrant statute did not apply.[65] Conventional wisdom dictates that the Court of Appeals, in *Meisinger,* declined the Supreme Court's invitation in *Weeks* to "create" an independent exclusionary remedy for evidence obtained in violation of the state constitution. The narrowly divided Court of Appeals interpreted its action in just such a manner. In declining to reverse the denial of the motion to exclude the evidence, the Court of Appeals opined that its conclusion was compelled by *Lawrence,*[66] which was "conclusive on the question, so far as this state is concerned."[67] The court concluded:

> If this case were the first in this court involving the question now under consideration, we would be at liberty to examine and comment upon the authorities and the reasons supporting them in other jurisdictions, but, it having been definitely decided by our predecessors that when evidence offered in a criminal trial is otherwise inadmissible, it will not be rejected because of the manner of its obtention [*sic*], we feel bound by the decision, and are entirely content to follow the reasoning therein employed, especially in that it is supported and fortified by the weight of authority elsewhere.[68]

In doing so, the court relied upon a doctrinal distinction between evidence illegally seized *from the person* of the accused and evidence otherwise illegally seized.[69]

In dissent, Judge Parke argued:

> It is, therefore, within the province of [the Court of Appeals] to reexamine its decision in *Lawrence v. State* to see whether it was decided that, if the citizen's domicile be unlawfully invaded for the

[64] *Meisinger,* 141 A. at 536.
[65] *See id.* at 536, 538.
[66] 63 A. 96.
[67] *Meisinger,* 141 A. at 537.
[68] *Id.* at 537-38; *see generally Townsend v. Bethlehem-Fairfield Shipyard, Inc.,* 47 A.2d 365, 370 (Md. 1946) (explaining that, under the doctrine of *stare decisis,* a court's previous decisions should not be lightly set aside).
[69] *See Meinsinger,* 141 A. at 537 (citing 4 WIGMORE ON EVIDENCE § 2264).

> purpose of learning if a misdemeanor has been committed upon his premises, the evidence so procured may be used against him in a subsequent criminal proceeding."[70]

Judge Parke distinguished the facts of *Meisinger* from those of *Lawrence* on the ground that the search and seizure at issue in *Lawrence* was legal. He pointed out that, at the time of the search of his person and seizure of evidence, Lawrence was under arrest and in police custody and that, therefore, no warrant required to search him incident to that arrest.[71] Judge Parke explained:

> It follows that *Lawrence v. State, supra,* is, *on its facts,* not an authority supporting the prevailing opinion in the instant case, because here the traverser was not charged with a crime, nor was under arrest when his premises were searched. The owner was not committing a crime nor exposing contraband goods in the presence of an officer of the law, but, because the state's attorney thought he had probable cause to believe that the local liquor law was being violated, he procured an illegal search warrant whereby the sheriff unlawfully entered upon the traverser's premises for the sole purpose of discovering if a crime were being committed and of securing the evidence to convict the traverser, if his search and seizure proved successful. It, therefore, needs no argument to enforce the point that, because of wide and fundamental difference in facts, the decision in *Lawrence v. State, supra,* is not controlling, unless because it contains the declaration of some applicable principle of law.[72]

Judge Parke also argued that the majority's holding that "the admissibility of evidence is not affected by the illegality of the means through which the party has been able to obtain the evidence" could not be reconciled with the court's Article 22 jurisprudence:

> Should this principle be sound with reference to documents, chattels, and testimony obtained by illegal search and seizure in violation of the *Fourth Amendment of the Constitution of the United States* and article 26 of the Bill of Rights, why should it not be sound with respect to self-criminatory [*sic*] evidence in the form of confessions obtained by unlawful or improper means from parties accused of crime in violation of the *Fifth Amendment of the Constitution of the United States,* and article 22 of the Bill of

[70] *Meisinger,* 142 A. 190, 191 (Md. 1928) (Parke, J., dissenting) (internal citation omitted).
[71] *See id.*
[72] *Id.*

> Rights of Maryland? . . . If the rule that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence was intended by *Lawrence v. State, supra,* to be unqualifiedly pronounced, then, if a gaoler, by threats, by putting in fear or by torture, induce a prisoner in custody to confess a crime, the incriminatory statement would be admissible in evidence.[73]

The split between the four-judge majority and three-judge dissent in *Meisinger* was fundamentally the result of a misunderstanding of historical precedent. What the majority failed to grasp when refusing to order suppression of the illegally obtained evidence at issue was twofold: first, that Maryland already had an exclusionary rule for evidence obtained in violation of Article 26 under the convergence theory dating back at least to *Blum;* and, second, that the holding of *Lawrence*, as Judge Parke pointed out in dissent, was an evidentiary, not a constitutional one.

Other state courts and the Supreme Court have recognized this distinction between evidentiary and constitutional challenges to seized evidence, which the *Meisinger* court missed. Between *Boyd* and *Weeks*, the United States Supreme Court reached the exact same result that the Maryland Court of Appeals was to reach in *Lawrence* two years later in a case called *Adams v. New York.*[74] The State of New York charged Adams with operating an illegal lottery. Police officers obtained a warrant, searched his office, and seized not only betting slips but also non-gambling-related papers, for the purpose of conducting a handwriting comparison with the betting slips. At trial, the State introduced the seized papers in evidence over Adams's objection. On appeal, the Supreme Court held the evidence to be admissible. Like the Maryland Court of Appeals in *Lawrence,* the Court relied upon the evidentiary rule laid down by Greenleaf that the manner in which documents are seized did not affect their admissibility. In doing so, the Court

[73] *Id.* at 192 (Parke, J., dissenting).
[74] 192 U.S. 585 (1904).

distinguished *Adams* from *Boyd,* on the grounds that the papers in *Adams* had not been illegally seized and that Adams had not been compelled to give evidence against himself, expressly declining to overrule *Boyd.*

Nonetheless, ten years later, the Supreme Court issued its opinion in *Weeks.* In *Weeks,* the Government relied upon *Adams,* arguing that the seized papers should not be returned to Weeks.[75] The Court characterized the holding in *Adams* as being "that a court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent testimony."[76] The Court distinguished *Adams* and *Weeks* on the ground that *Adams* (like *Lawrence*) involved the incidental seizure of papers during the execution of a legal search warrant, while *Weeks* was involved an application "in due season" for the return of papers seized in violation of the Fourth Amendment (like *Meisinger*).[77] The Court concluded that *Adams* "afford[ed] no authority for the action of the court in this case."[78] It is this distinction, between the evidentiary rulings in *Adams* and *Lawrence* and the constitutional rules of *Boyd, Blum,* and *Weeks* that the *Meisinger* court failed to appreciate, while other state courts recognized it.[79] In essence, the *Meisinger* majority treated as an issue of first impression a question that had already been long decided – the existence of a state exclusionary remedy for illegally obtained evidence. As a result, the

[75] *See Weeks,* 232 U.S. at 394-95.
[76] *Id.* at 396.
[77] *See id.*
[78] *Id.*
[79] *See, e.g., State v. Wills,* 114 S.E. 261 (W. Va. 1922) (recognizing the distinction between the "general rule of evidence that its competency [wa]s not affected by the fact that it was wrongfully obtained" and "the effect upon this rule of evidence of the rights secured by the *Fourth Amendment to the United States Constitution* and by the similar provisions in state constitutions."); *cf. Sugarman v. State,* 195 A. 324, 326 (Md. 1937) (refusing Sugarman's motion to suppress and return to him seized evidence as the fruit of an illegal search, but nonetheless finding the seized inadmissible).

majority opinion, which purported to be an exercise in *stare decisis,* in reality, constituted a complete failure to understand and follow precedent.[80]

D. The Legislative Fix

In response to the *Meisinger* opinion, and in recognition of public objection to Prohibition-era law-enforcement methods, the Maryland General Assembly enacted the "Bouse Act" in 1929, which provided that evidence either procured by an illegal search or seizure or having the effect of compelling a defendant to give evidence against him- or herself would be inadmissible in the trial of misdemeanors.[81] The Bouse Act forbade the admission of evidence

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[80] Thomas Davies has documented a similar phenomenon of loss with respect to the common-law arrest standards in the late nineteenth century:

> The bottom line is that search-and-seizure history did not follow the steady path that the Framers expected. In contrast to the conventional account of doctrinal continuity, the authentic history of search-and-seizure doctrine is a story of lost meanings and substantial discontinuity. Indeed, the authentic history is a story of considerable irony: it appears that the Framers were content to simply invoke common-law arrest standards under the rubrics of "the law of the land" and "due process of law" because those standards seemed so settled that there was no reason to set them out explicitly. However, when later generations became increasingly ignorant of the common-law standards, the invocative character of the Framers' texts ultimately left once-settled arrest standards vulnerable to change and loss.

Thomas Y. Davies, *Correcting Search-and-Seizure History,* 77 MISS. L.J. 1, 13 (2007).

[81] The Bouse Act, codified as part of the Maryland Evidence Code, read, in pertinent part, as follows:

> No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through or in consequence of any illegal search or seizure *or* of any search and seizure prohibited by the Declaration of Rights of this State; *nor* shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case . . . .

1929 Md. Laws Ch. 194, *codified at* MD. CODE Art. 35, § 4A (West 1929) (repealed 1973). *See* CARL N. EVERSTINE, THE BOUSE ACT (Research Division, Legislative Council of Maryland, Research Rept. No. 27, July 1948), at 24-25.

When introduced as S.B. No. 237, the Bouse Act would have applied to all criminal cases, but the Senate Committee on Judicial Proceedings reported it with amendments restricting it to misdemeanor cases. *See* MD. SENATE JRNL (1929 Spec. Session) at 279, 556-57, 657; EVERSTINE, *supra* note xxx, at 28.

Unlike in many other jurisdictions, in Maryland, most crimes are misdemeanors. Only two classes of crimes in Maryland constitute felonies, irrelevant of the amount of imprisonment authorized upon conviction: those

arising from three categories of searches and seizures: (1) those that were "illegal;" (2) those that violated the Maryland Declaration of Rights; and (3) those that would result in a violation of the prohibition against compelled self-incrimination. According to the Maryland Legislative Council's 1948 analysis, the exclusionary provisions of the Bouse Act referred to two articles in the Maryland Declaration of Rights, Article 26 and Article 22, and was "passed in order to implement these constitutional provisions."[82] The Bouse Act was "repealed" in 1973, as part of the project to revise the Maryland Code, and the General Assembly enacted no replacement.[83]

E. The Exclusionary Rule for Article 22 Violations

Perhaps the best historical evidence for the *Meisinger* court's misunderstanding of the meaning and scope of *Lawrence* is the continued (and largely unquestioned) vitality of the exclusionary rule for evidence obtained in violation of Article 22 of the Maryland Declaration of Rights. In Maryland, a confession is admissible in evidence against an accused if its is: "voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution *and* Article 22 of the Maryland Declaration of Rights."[84] Maryland courts also recognize a "common-law" prohibition against the admissibility of involuntary confessions, which originated in *Nicholson v. State.*[85] The cases universally recognize three authorities for

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that were felonies at common law and those that are explicitly designated as felonies by statute. *See Dutton v. State,* 91 A. 417, 419-20 (Md. 1914); EVERSTINE, *supra,* at 14.

[82] *See* EVERSTINE, *supra* note xxx, at 1.

[83] In 1973, as part of the project to recodify the "Evidence" section of Article 35 of the Maryland Code into a Courts and Judicial Proceedings Article, the Revisor submitted to the General Assembly as proposed "Courts and Judicial Proceedings Article" without the Bouse Act because of his (erroneous) view that it was "unconstitutional" because it was somehow inconsistent with *Mapp. See* 1973 Md. Laws Ch. 2, at 332 (repealing the Bouse Act by enacting the Courts and Judicial Proceedings Article of the Maryland Code); *Parker v. State,* 936 A.2d 862, 875 (2007); Horace E. Flack, *in* EVERSTINE, *supra* note xxx (Foreword).

[84] *Ball v. State,* 699 A.2d 1170, 1178 (Md. 1997) (emphasis added) (quoting *Hoey v. State,* 536 A.2d 622, 625 (Md. 1988)).

[85] 38 Md. 140 (1873) (holding that confessions that were induced by threats or official promises should be excluded from evidence). *See Pappaconstantinou v. State,* 721 A.2d 241, 244-45 (Md. 1998) (explaining that "Maryland has followed the old common law rule, which has seemed to adopt a per se exclusion rule that *official* promises of leniency to a defendant in custody that induce a confession render the confession inadmissible."); *Reynolds v. State,* 610 A.2d 782, 788 (Md. 1992); *Hoey,* 536 A.2d 622; *Stokes v. State,* 423 A.2d 552, 554 (Md. 1980); *Hillard v.*

suppression of illegally obtained confessions: (1) the Fifth Amendment of the United States Constitution, (2) Article 22 of the Maryland Declaration of Rights, and (3) the Maryland "common law "of confessions. The exclusionary remedy for violations of Article 22 or the Maryland common-law prohibition against involuntary confessions does not, and never has, derive(d) from the Bouse Act.[86]

One of the interesting aspects of the *Lawrence* case on which the Court of Appeals relied in reaching its holding in *Meisinger* is that, had the evidence in *Lawrence* been illegally obtained, it would have been obtained in violation not only of Article 26's prohibition against unreasonable and warrantless searches and seizures but also in violation of Article 22's prohibition against compelled self-incrimination, as it was understood at that time.[87] Nonetheless, *Lawrence* continues to be viewed as authority only for the proposition that Maryland has no exclusionary remedy for evidence obtained in violation of Article 26, but has never been cited as authority for the proposition that Maryland has no exclusionary remedy for evidence obtained in violation of Article 22, while the Maryland Court of Appeals has continued, without cessation, to exclude not only illegally coerced confessions, but also the fruits thereof, under the authority of Article 22.[88] In simplest terms, this development begs the question: if

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State, 406 A.2d 415 (Md. 1979); *Kidd v. State,* 375 A.2d 1105, 1108 (Md. 1977); *Smith v. State,* 56 A.2d 818, 821-22 (Md. 1948); *McCleary v. State,* 89 A. 1100 (Md. 1914); *Green v. State,* 54 A. 104 (Md. 1903); *Biscoe v. State,* 8 A. 571 (Md. 1887).

[86] *See Ball v. State,* 699 A.2d 1170, 1178 (Md. 1999); *Pappaconstantinou v. State,* 703 A.2d 1295, 1298-99 (Md. Ct. Spec. App. 1998).

[87] *See* EVERSTINE, *supra* note xxx, at 10 (noting that "the Court of Appeals accepted it as a compulsion upon Lawrence to give evidence against himself in a criminal prosecution").

[88] An interesting question, beyond the scope of this Article, is why the exclusionary remedy for coerced confessions sometimes became categorized as a "common-law," rather than constitutional, rule after *Nicholson,* in light of the *Nicholson* court's recognition that the "rule of practice" excluding coerced confessions in criminal cases did not apply in civil cases (a characteristic generally of *constitutional* rules of evidence), *see Nicholson,* 38 Md. at 8-9, and the Supreme Court's recognition that the Fifth-Amendment exclusionary rule stemmed from the test that "has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness." *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961). *See Kidd v. State,* 366 A.2d 761, 775 (Md. Ct. Spec. App. 1977) (recognizing that the "massive and immemorial body of Maryland common law" was largely "grounded directly in

Lawrence truly stands for the proposition that the manner in which evidence is obtained does not affect its competency, then how can the courts suppress illegally obtained confessions on the basis of the manner in which they were obtained (*i.e.,* involuntarily)? The answer, as the Supreme Court has explained in the context of the Fifth-Amendment exclusionary rule, is that there is a fundamental difference between the *inadmissibility* of evidence at trial and the *suppression* of evidence that has been illegally obtained: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[89] It is this distinction between *inadmissible* evidence and *suppressed* evidence that the Maryland Court of Appeals' Article-22 jurisprudence recognizes even while the Court continues to follow *Meisinger* in ignoring the distinction in its Article-26 jurisprudence.

Allen v. State[90] provides a textbook example of the disconnection, in the wake of *Meisinger*'s misconstruction of *Lawrence,* between the evisceration of the Article-26 exclusionary rule and the continued expansion of the Article-22 exclusionary rule. Allen was charged with assault with intent to rape. A hat had been found at the scene of the crime. The State produced evidence that the hat had belonged to Allen. Allen denied having owned it. At trial, over his objection, Allen was required to try on the hat, apparently on the theory that if the hat fit, the jury could not acquit. On appeal, the Court of Appeals reversed Allen's conviction, holding that requiring him to try on the hat constituted compelled self-incrimination, in violation of Article 22:

> In passing upon these borderline cases, of which the one at bar is a striking illustration, the test is who furnished or produced the

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Article 22 of the Declaration of Rights proscribing compelled self-incrimination" and the "parallel federal provisions").

[89] *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920).

[90] 39 A.2d 820 (Md. 1944).

> evidence? If the accused, especially in open court and on the witness stand, is made to do so by performing an act or experimentation which might aid in connecting him with the crime and establishing his guilt, it is inadmissible.[91]

In other words, the Court of Appeals recognized that the unconstitutional *manner* in which the evidence relating to the hat was obtained – *i.e.,* in violation of Allen's privilege against self-incrimination – required it to be suppressed, even though there was no doubt about its competency as evidence. In sum, Maryland courts' continued recognition of an exclusionary remedy for Article-22 violations is proof that the holding in *Lawrence* could not have stood for the proposition that the *Meisinger* court ascribed to it.

II.

HISTORICAL EVIDENCE OF A STATE EXCLUSIONARY RULE FOR ILLEGALLY OBTAINED EVIDENCE PRIOR TO *MAPP: MEISINGER* WAS NOT ALWAYS FOLLOWED

Mapp applied the federal exclusionary rule to the states rather late in the timeline of search-and-seizure jurisprudence. The Supreme Court incorporated the Fourth-Amendment prohibition against unreasonable searches and seizures and the exclusionary remedy separately, in a two-step process. In *Wolf v. Colorado,*[92] the Court applied the Fourth-Amendment prohibition against unreasonable searches and seizures to the states, but expressly declined to incorporate the exclusionary rule of *Weeks.*[93] It was not until *Mapp,*[94] in 1961, that the Court held that due process required the states to exclude evidence obtained in violation of the Fourth Amendment.[95] The significance of this chronology is that, if Maryland courts were applying an exclusionary remedy for evidence obtained as a result of illegal searches and seizures prior to the

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[91] *Id.* at 823.
[92] 338 U.S. 25 (1949).
[93] *See id.* at 33.
[94] 367 U.S. 643.
[95] In *Wong Sun v. United States,* 371 U.S. 471 (1963), the Court extended the scope of the exclusionary rule to require suppression not only of evidence directly seized but also evidence indirectly obtained as the fruits of police conduct infringing upon Fourth-Amendment rights.

Court's decision in *Mapp* in 1961, such remedy could not have derived from the federal constitution, but could only have had a source in state law.

Pre-*Mapp* vestiges of Maryland's common-law exclusionary rule for evidence obtained in violation of Article 26 exist in statute, case law, and court rules, and these vestiges represent codifications of the distinction between *inadmissible* evidence and evidence that is *suppressed* because of a constitutional violation that the *Meisinger* court failed to appreciate. This section argues that these vestiges are historical evidence that there was an exclusionary rule for evidence obtained in violation of Article 26 at common law. Subsection A analyzes the Maryland statute governing the State's right of appeal in criminal cases and argues, based upon statutory-construction principles, that the wording of the statute reflects an understanding by the drafters of a distinction between State's evidence that a trial court ruled inadmissible and State's evidence that was suppressed as a remedy for a violation of the Maryland Declaration of Rights. Subsection B analyzes two pre-*Mapp* decisions by the Maryland Court of Appeals in which the court seemed to apply an exclusionary remedy for evidence obtained in violation of Article 26 and to understand such remedy as such. Subsection C discusses the process of codification of pretrial exclusionary rules into the modern court rules governing the return of a criminal defendant's illegally seized property after trial and argues that these modern rules are vestiges of older rules permitting the return of such property prior to trial, with the effect of rendering such unavailable for prosecution without a determination that the evidence was necessarily inadmissible.

A. *The State's Right of Appeal*

The language of the statute conferring the right of appeal in a criminal case upon the State, in certain circumstances, appears to embody the historical distinction between state's

evidence that a court has excluded as inadmissible and state's evidence that a court has suppressed as a remedy for a constitutional violation. The State's right of appeal in a criminal case is limited and wholly statutory.[96] The Maryland Code, originally codified in 1957 (*i.e.,* four years prior to *Mapp*), confers upon the State a right to appeal the granting of a motion to suppress illegally seized evidence in some circumstances.[97] The statute provides, in pertinent part:

> In a criminal case . . . involving a crime of violence . . . [or a drug-trafficking offense], the State may appeal from a decision of a trial court that excludes evidence offered by the State *or requires the return of property* alleged to have been seized in violation of the Constitution of the United States, the Constitution of Maryland, *or the Maryland Declaration of Rights.*[98]

It is the "or"'s in the statutory provision that are noteworthy. The first "or" separates the State's right to appeal a trial court's decision that its evidence is inadmissible from the State's right to appeal a trial court's order returning evidence that the State obtained unconstitutionally. The second "or" separates a violation of the federal constitution from a violation of the state constitution. The first "or" in § 12-302 (c) (3) (i) implies a meaningful distinction between *inadmissible* evidence and *suppressed* evidence that is analogous to the difference between the type of inadmissibility at issue in *Lawrence* and the type of suppression being sought in *Meisinger* – namely, the distinction between material that the trial court has deemed inadmissible in evidence and material that the court has deemed admissible in evidence but has suppressed due to the manner in which it was obtained (by way of a constitutional violation). The second "or," by separating the United States Constitution from the Maryland Constitution and Maryland

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[96] *See Sanabria v. United States*, 437 U.S. 54, 77-8 (1978); s*ee, e.g., Jones v. State,* 471 A.2d 1055, 1057 (Md. 1984); *State v. Bailey,* 422 A.2d 1021, 1024 (Md. 1980).

[97] *See* MD. CODE., CTS. & JUD. PROC. § 12-302 (c) (3) (i) (West 1973) (repealing & recodifying MD. CODE (1957) Art. 5, §§ 1, 14). Prior to the enactment of 1957 Md. Laws Ch. 399 (repealing and replacing MD. CODE, Art. 5, § 86 (1951)) , the pertinent statute afforded a general right of appeal to all parties to a criminal case. *See State v. Green,* 785 A.2d 1275, 1282 n.8 (Md. 2001); *State v. Cardinell,* 644 A.2d 11, 22-23 (Md. 1994) (Eldridge, J., dissenting).

[98] MD. CODE., CTS. & JUD. PROC. § 12-302 (c) (3) (i) (West 1973) (emphasis added).

Declaration of Rights, implies that these are separate authorities upon which a trial court could suppress evidence – *i.e.,* the statute permits the State to appeal the suppression of evidence alleged to have been seized in violation of the federal constitution *or* the suppression of evidence alleged to have been seized in violation of the state constitution as if the two types of suppression were separate and independent of one another.

B. *Case Law*

Two post-*Meisinger* pre-*Mapp* cases from the Maryland Court of Appeals provide possible evidence of the existence of a state exclusionary remedy for evidence obtained in violation of Article 26. The first is the 1954 case of *Gattus v. State.*[99] The Baltimore Police Department was investigating a suspected illegal gambling operation being run out of a vehicle parked in a vacant lot in Baltimore City. The police obtained a search-and-seizure warrant authorizing them to search the vehicle and anyone inside and seize any evidence of illegal gambling that they found and an arrest warrant authorizing them to arrest any individuals found at or inside the vehicle engaged in illegal gambling. While they were watching the suspect vehicle, preparing to execute the warrants, Gattus pulled up next to the gambling vehicle in his car. Before the police could stop him, he drove away. The police followed him out of Baltimore City, into Baltimore County,[100] where they stopped his vehicle, searched his person, seized illegal gambling slips from him, and arrested him, pursuant to the Baltimore City warrants. It was undisputed that the Baltimore City warrants were not valid in Baltimore County.[101] Because the police had executed the warrants outside of their territorial jurisdiction, Gattus moved, prior to trial, to "quash" the search warrant and "return" the property that was seized from him. The

[99] 105 A.2d 661 (Md. 1954).
[100] Baltimore City is not inside Baltimore County, but rather the two are entirely separate political subdivisions of the State of Maryland.
[101] *See* MD. CODE, CRIM. PROC. ART., § 1-203 (West 2001) (authorizing judges to issue search warrants only for crimes being committed "within the territorial jurisdiction of the judge").

trial court denied the motion to quash and return property. On appeal, the Maryland Court of Appeals reversed. The court held, citing no authority: "Finding that the search was invalid; that the motion to quash the search warrant should have been granted and the articles seized thereunder were not admissible in evidence; . . . the judgment will be reversed."[102]

The second is the 1944 case of *Dail v. Price ("Dail II").*[103] The procedural posture of *Dail II,* which arose out of a civil suit that Dail filed against the Baltimore Police Department in the middle of a criminal trial in which he was the defendant ("*Dail I"*), is a bit convoluted. The Baltimore Police Department seized a large quantity of alcohol from Dail, pursuant to a search and seizure warrant.[104] Largely on the basis of the seized evidence, the Grand Jury indicted Dail on two charges: the unlawful possession of the alcohol with the intent to distribute it and the illegal distribution of the alcohol.[105] Prior to trial, Dail filed a motion to quash the search warrant on the ground that it was issued in the absence of probable cause and sought the return of the seized alcohol.[106] The trial court granted Dail's motion to quash the search warrant, but did not rule on the motion to return the alcohol.[107] The case proceeded to trial on the unlawful-sale charge, of which Dail was convicted, while the State appealed the quashing of the search warrant in the possession-with-intent-to-distribute case in *Dail I.*[108] The State's appeal in this latter case was dismissed, in a one-sentence opinion, because there was not yet a final judgment in the case.[109]

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[102] *Gattus,* 105 A.2d at 666.
[103] 40 A.2d 334 (Md. 1944) ("*Dail II").*
[104] *See id.* at 335.
[105] *See id.*
[106] *See id.*
[107] *See id.*
[108] *See id.*
[109] *See id.; see Dail v. State,* 39 A.2d 752 (Md. 1944) ("*Dail I"*).

In the meantime, Dail filed a "miscellaneous petition," initiating a separate civil action against the Baltimore Police Department, seeking the return of the seized alcohol ("*Dail II"*).[110] The Baltimore Police Department moved to dismiss the petition on the ground that the quashing of the search warrant by the trial court in the criminal case was not a final judgment but rather "merely a ruling on evidence."[111] Perhaps unfortunately for the sake of procedural clarity, the civil trial court agreed with neither party, denying Dail's petition on the ground that the search warrant was validly issued.[112] Dail appealed the court's denial of his petition. The opinion opinion in *Dail II* is from that civil appeal.

In *Dail II,* the Maryland Court of Appeals dismissed Dails's appeal, characterizing it as a "collateral attack of a preliminary ruling in a pending criminal case."[113] More importantly for the thesis of this Article, the court characterized Dail's pretrial motion for the return of the seized property as "nonevidentiary" in nature, even though the trial court's granting it would have resulted in the pretrial exclusion of the evidence and a likely dismissal of the charges:

> The appellant . . . is, in effect, making a collateral attack upon that judgment, by seeking a review of a ruling that was preliminary to a criminal proceeding then pending. Such a ruling is not technically a ruling upon evidence, but it may be conclusive as to the admissibility in evidence of the articles seized. . . . .
> While the judge is directed [in exercising criminal jurisdiction] to cause the property to be returned if he finds the warrant invalid for want of probable cause, and this would ordinarily be the end of the case . . . , [the motion] was not designed as a substitute for an action in replevin . . . for the determination of the right to possession of property after it has served its purpose as real evidence in a criminal case.[114]

[110] *See Dail II,* 40 A.2d at 335-36.
[111] *Id.* at 335.
[112] *See id.* at 335.
[113] *Id.* 336.
[114] *Id.*

Both *Gattus* and *Dail* involved misdemeanors, so it is possible that the exclusionary remedy embraced by the Court of Appeals in both cases derived from the Bouse Act, but neither case cited the Bouse Act as authority, in much the same way that many Article 22 and "common-law" confessions cases from this same time period did not rely upon the Bouse Act as authority for the suppression of statements taken in violation of the prohibition against compelled self-incrimination. In addition, the distinction drawn by the Court of Appeals in *Dail II* between Dail's pretrial motion to quash the search warrant and return the property and a motion seeking a "ruling upon evidence" is precisely the distinction that the court failed to appreciate in *Meisinger* – namely, the distinction between a motion to suppress (like the motions in *Blum* and *Gattus*) and a motion *in limine* seeking a ruling that evidence is inadmissible (like the motion that was rejected in *Lawrence*).

C. *Pretrial Return of Seized Evidence*

While the exclusionary rule for illegally obtained evidence existed as a remedy for violations of Articles 22 and 26, it was a creation of the common law. Such common-law remedies may have been widespread among the states prior to *Mapp*. The Federal Rules of Criminal Procedure currently permit a defendant to move for the return of illegally seized evidence.[115] As a practical matter, these motions are generally made after trial, since the rule precludes the court's returning the evidence in a manner that would render it unavailable for admission at trial. The Advisory Committee Notes to Rule 41 strongly suggest that it was originally a codification of the *Weeks* exclusionary remedy and only more recently became a

[115] *See* F. R. CRIM. P. 41 (g) ("**Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property . . . may move for the property's return. . . . If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings."). .

mechanism by which to return property to a defendant without suppressing it at trial. The Notes to the adoption of the rule in 1944 say, in pertinent part:

> This rule is a restatement of existing law and practice . . . , *Weeks v. United States,* [with the exception that, w]hile under existing law a motion to suppress evidence or to compel return of property obtained by an illegal search and seizure may be made . . before a commissioner . . . , the rule provides that such motion be made only before the court.

The Advisory Committee Notes for the 1989 Amendments to Rule 41 (e) (the predecessor to current Rule 41 (g)), however, say the following, in pertinent part:

> The Amendment deletes language dating form 1944 stating that evidence shall not be admissible at a hearing or at a trial if the court grants the motion to return property under 41 (e). This language has not kept pace with the development of the exclusionary rule doctrine . . . .
>
> Rule 41 (e) is not intended to deny the United States the use of evidence permitted by the fourth amendment and federal statutes, even if the evidence might have been unlawfully seized.

This interplay, overlap, and confusion between suppression of evidence (which, in a criminal trial, is often contraband) as a remedy for a constitutional violation under *Weeks* and a *replevin*-like mechanism for return of (non-contraband) property (after its use at trial) is reminiscent of the confusion by the Maryland Court of Appeals in *Meisinger* about the interplay and overlap between the suppression mechanism of *Blum* and *Weeks* and the traditional evidentiary rule adopted in *Lawrence.*

III.

CONCLUSION

The federal exclusionary rule recognized in *Boyd* and *Weeks* was an entirely judicially created remedy, which presents an obvious question: Why is it necessary to prove the historical existence of an exclusionary remedy for Article 26 violations at common law when the Maryland

Court of Appeals could simply decide to create one as part of its inherent power to interpret the Maryland Declaration of Rights? The doctrinal answer is that evidence for the existence of an historical exclusionary remedy at common law is *not* necessary,[116] although proof of its prior existence might strengthen the argument for its recognition now under the principle of *stare decisis.*[117] The practical answer is quite simply this: the Maryland Court of Appeals has been asked repeatedly to create a judicial remedy for violations of Article 26 of the Maryland Declaration of Rights that is independent from the federal remedy for violations of the Fourth Amendment.[118] So far, except in a few limited circumstances, it has declined to do so.[119] What

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[116] *See Harrison v. Montgomery Co. Bd. of Educ.,* 456 A.2d 894, 903 (Md. 1983) (pointing out that "the common law is not static," but rather "common law doctrine in Maryland is . . . subject to modification by judicial decision").

[117] *See Townsend,* 47 A.2d at 370 (recognizing that "it is sometimes advisable to correct a decision . . . wrongly made in the first instance if it is found that the decision is clearly wrong and contrary to other established principles"); *Greenwood v. Greenwood,* 28 Md. 369, 381 (1868) ("Previous decisions of this court should not be disturbed . . . *unless* it is plainly seen that . . . some egregious blunder [has been] committed.") (emphasis added); *see e.g. Green,* 785 A.2d at 1285 (overruling *Cardinell,* 644 A.2d 11, because it "was wrongly decided").

[118] Several commentators, not to mention the Supreme Court in *Weeks,* have invited state supreme courts to do just that. On November 18, 1986, for example, Justice William J. Brennan, Jr. delivered a lecture at New York University School of Law about the revival of state constitutions as guardians of individual rights, which was reprinted. *See* Brennan, *Bill of Rights, supra* note xxx. In his lecture, Justice Brennan lamented what he observed as a trend in the years since 1969 toward a contraction of the scope of federal rights, noted with approval examples of state courts stepping into the breach by interpreting their state constitutions in a manner more protective of individual rights than the Supreme Court's interpretations of analogous federal constitutional provisions, and called upon the state courts to continue to play a role as the guardians of individual rights through the revival of their state constitutions. *See id.*; *see also* Brennan, *State Constitutions, supra* note xxx (urging state courts to turn to their own constitutions to buffer the impact of the federal conservative revolution); Jerome B. Falk, *The State Constitution,* 61 CAL. L. REV. 273 (1973); Robert Force, *State "Bills of Rights,"* 3 VAL. U. L. REV. 125 (1969); Hans A. Linde, *Without "Due Process,"* 49 OR. L. REV. 125 (1970).

[119] *See Parker,* 936 A.2d 862; *Fitzgerald,* 864 A.2d at 1007; *Richardson v. McGriff,* 762 A.2d 48, 52 (Md. 2000); *Chu.,* 537 A.2d 250 (declining to apply an exclusionary rule to civil actions for the return of property taken pursuant to a search warrant but also declining to hold that a state exclusionary rule would not apply in other contexts); *but see Sheetz v. Baltimore,* 553 A.2d 1281, 1284 (Md. 1989) (stating, as a matter of Maryland common law, that, although the exclusionary rule generally was not applicable in civil administrative employee-discharge hearings, the court was not willing to hold that illegally seized evidence was "always admissible"); *Chase v. State,* 522 A.2d 1348, 1362-64 (Md. 1987) (holding, based on the Maryland common law of fundamental fairness, that, even though the exclusionary rule was ordinarily inapplicable to the admission of illegally seized evidence in probation-revocation proceedings, "when the officer has acted in bad faith . . . , the evidence should, in any event, be suppressed.").

In response to the most recent request by a criminal defendant petitioning the court to do so, as the sole dissenting judge pointed out, the Court of Appeals went to great lengths to recognize a case-specific exclusionary rule based on the procedural posture of the particular appeal at issue, rather than simply answering the petitioner's call to create a state remedy for illegally obtained evidence. *See Parker,* 936 A.2d at 885-86 (Raker, J., dissenting) ("Unless this Court is prepared to state explicitly that the Court decides this case on Article 26 of the Maryland Declaration of Rights and that the Court deviates from Fourth Amendment jurisprudence, the judgment . . . should

be affirmed based on *Hudson v. Michigan* . . . . I do not believe that 'the peculiar circumstances of a case' should be the source of an exclusionary rule . . . "). Baltimore Police Department officers obtained and executed "no-knock" search warrants for three residences. *See id.* at 864-65. During the search, they found Parker inside one of the residences. *See id.* at 865. The search revealed cocaine, marijuana, a large quantity of hidden cash, a handgun, and ammunition at various places throughout the house. *See id.* Parker was charged with various drug- and weapons-related offenses. *See id.* He moved to suppress the evidence seized during the search, in part on the ground that the warrant application contained insufficient grounds to justify a "no-knock" warrant. *See id.* The trial court agreed that the "no-knock" portion of the warrant was unnecessary, but denied Parker's motion to suppress based on the "good-faith" exception to the warrant requirement. *See id*. Parker appealed to the Maryland Court of Special Appeals, arguing, *inter alia,* that the trial court had erred in denying his motion to suppress. *See id.* at 866.

At the time that Parker made his motion to suppress, the Maryland Court of Special Appeals had held that the Supreme Court's holding in *Richards v. Wisconsin,* 520 U.S. 385, 394 (1997), that, in order to justify a "no-knock" entry, police must have a reasonable suspicion that knocking and announcing their presence would be dangerous, futile, or would inhibit the investigation of the crime, was limited to situations where police officers "did not have no-knock authorization in the search warrant" and that the Fourth Amendment and *Richards* authorized a "no-knock" entry whenever the search-warrant application established a reasonable suspicion of exigent circumstances. *Davis v. State,* 797 A.2d 84, 90 (Md. Ct. Spec. App. 2002) (overruled by *Davis,* 859 A.2d 1112). While Parker's appeal was pending in the Court of Special Appeals, the Maryland Court of Appeals reversed that decision in *Davis v. State,* 859 A.2d at 1121 (holding that "Maryland does not statutorily authorize its judicial officers to issue 'no-knock' warrants") (abrogated by statute). In 2005, in response to *Davis,* the Maryland General Assembly enacted a no-knock warrant statute. *See* 2005 Md. Laws ch. 560, *codified at* MD. CODE, CRIM. PROC. ART.,§ 1-203 (a) (West 2006). On appeal, Parker argued that the trial court's reliance upon the good-faith exception for "no-knock" warrants had been erroneous in light of the new *Davis* decision and that the "no-knock" entry violated both the Fourth Amendment and Article 26. *See Parker,* 936 A.2d at 871. The State of Maryland's only argument in response was that the entry did not violate the Fourth Amendment because there had been exigent circumstances at the time of entry that justified the officers' failure to knock and announce. *See id.* The Court of Special Appeals agreed with neither party, and remanded the case to the trial court for a determination of whether the good-faith exception applied in light of *Davis*. *See id.* at 871-72.

Parker filed a petition for *certiorari* with the Court of Appeals, raising two issues with respect to the no-knock entry: (1) whether the trial court should conduct a new suppression hearing to determine whether exigent circumstances existed to justify the no-knock entry and, if not, whether the good-faith exception applied and (2) whether the "no-knock" entry violated either the Fourth Amendment or Maryland law, requiring suppression of its fruits. *See id.* at 872. The State did not file a cross-petition for *certiorari,* but rather filed an answer arguing that the Court of Special Appeals judgment had been correct because the no-knock entry did not violate the Fourth Amendment. *See id.* The day after the Court of Appeals granted Parker's petition, the United States Supreme Court decided *Hudson v. Michigan,* 547 U.S. 586 (2006) (holding that the Fourth-Amendment exclusionary rule was inapplicable to "knock-and-announce" violations). *See Parker,* 936 A.2d at 872. In briefing and argument before the Court of Appeals, Parker, relying on *Davis,* 859 A.2d at 1121, argued that the knock-and-announce rule was required by Article 26 and that "exclusion [wa]s the appropriate remedy for evidence obtained as the result of an entry made in violation of the knock and announce requirements of Article 26 and Maryland common law." *Parker,* 936 A.2d at 872. In briefing and argument, the State's response was that *Hudson* was dispositive to the suppression issue because Article 26 was *in pari materia* with the Fourth Amendment and had no exclusionary remedy of its own. *See id.* at 872-73. Rather than address the issue of whether to adopt an exclusionary rule under Article 26 and/or the Maryland common law of evidence, the Court of Appeals instead found: (1) that the State had failed to preserve the issue for appellate review because the opinions of the lower courts had been premised on the assumption that Maryland had an exclusionary rule and the State had not addressed that issue below and (2) that *Hudson* should not be applied retroactively to reverse a judgment to a criminal defendant's detriment. *See id.* at 877, 879-82. The court held:

> [W]e shall assume *arguendo* that, under federal law, *Hudson v.* Michigan controls the Fourth Amendment issue in this case, and that the Fourth Amendment's exclusionary rule is inapplicable to any violations of the "knock and announce" principle that may have occurred in the case at bar. We shall decide, however, that, *under the peculiar circumstances of this case,* the evidence is excluded if there is a violation of Maryland's "knock and announce"

the Court of Appeals has been willing to do in recent years is to reach back into Maryland judicial history and reanimate common-law doctrines thought to be lost. In the case of *Skok v. Maryland,*[120] for example, the court held that the common-law writs of *coram nobis* and *audita querela* had not been preempted by Maryland's postconviction statute[121] and that they were not only still available to Skok to challenge the collateral immigration consequences of his state drug-possession conviction, but that their remedies were broader than at common law.[122]

In sum, what this Article urges the Maryland Court of Appeals to do is to recognize the empirical and doctrinal mistake made by its predecessors in *Meisenger*, reverse course, and bring back to life the state exclusionary rule for evidence obtained in violation of Article 26. An independent state exclusionary rule is worth developing.

> principle. This is a very limited decision based *exclusively* upon Maryland non-constitutional law and procedure. . . .
> Consequently, if there was a violation of Maryland's "knock and announce" principle in this case, the evidence is inadmissible *under the particular circumstances here.* Whether such an exclusionary rule should be applied when there are violations of the Maryland "knock and announce" principle in other cases, or in cases arising after the effective date of [Maryland's "no-knock warrant" statute], are matters which we leave for another day.

Id. at 878-82 (emphasis added).
[120] 760 A.2d 647 (Md. 2000).
[121] Maryland Post Conviction Procedure Act, MD.CODE, CRIM. PROC. ART. § 7-101, *et seq.* (West 2001). *See Skok,* 760 A.2d at 653-54.
[122] *See Skok,* 760 A.2d at 657-60.