DAVIS v. UNITED STATES: THE “GOOD-FAITH” EFFORT TO END THE EXCLUSIONARY RULE

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I. INTRODUCTION

To diminish the frequencies of unlawful searches and seizures and enforce the Fourth Amendment of the United States Constitution,¹ the United States Supreme Court created the exclusionary rule and required lower federal courts to exclude from criminal prosecution evidence obtained from illegal searches.² To ensure that all citizens would be protected by the principles of the Fourth Amendment, the Supreme Court mandated that the exclusionary rule apply to the states.³ There was a time when the exclusion of evidence obtained as a result of a search in violation of the Fourth Amendment seemed routine.⁴ However, it is clear that the Supreme Court no longer views exclusion as automatically triggered whenever there is an unlawful search or seizure.⁵ Indeed, the Court views exclusion as a possible remedy to a Fourth Amendment violation only if it is certain to deter government officials from future misconduct.⁶ This article will examine the inception of the exclusionary rule, its expansion, and finally focus on its ultimate future in light of the recent limitations placed on it by the Rehnquist and Roberts Courts. This article will take the position that the recent “good-faith” exception to the exclusionary rule, articulated by the Court, will essentially make exclusion inapplicable, therefore making the Fourth Amendment little more than a moral declaration with no real enforcement. Finally, this article will take the position that deterrence is not the sole purpose for the exclusionary rule. In addition to deterrence, more important considerations for the exclusionary rule include maintaining judicial integrity and ensuring that individual rights under the Fourth Amendment are protected. In light of these considerations, this article will take the

¹ U.S. Const. amend. IV.
⁴ See, e.g., Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
position that the exclusionary rule is necessary in order to preserve the basic protections of the Fourth Amendment and to ensure that the Court is not sanctioning the illegal activity of the government.

II. DEVELOPMENT OF EXCLUSIONARY RULE

A. The Birth of the Exclusionary Rule

The first case that is credited with the development of the modern exclusionary rule is Boyd v. United States.\textsuperscript{7} However, the Boyd case was a civil case, not a criminal case. There was no police involvement. There were no illegal searches or seizures. The government initiated a forfeiture proceeding against the defendants for importing thirty-five cases of plate glass in violation of custom revenue laws.\textsuperscript{8} During the course of the proceedings, the defendants were ordered by the judge to produce documents showing the quantity and value of the shipments.\textsuperscript{9} The defendants appealed following a verdict in favor of the government. The defendant’s alleged that the compelled production of the invoices was in violation of their Fourth and Fifth Amendment rights under the Constitution of the United States.\textsuperscript{10} The Supreme Court determined that certain documents had been obtained illegally by the government.

Although the portion of Boyd that was premised on the Fourth Amendment has since been rejected, the Court appeared to view the proper remedy for a constitutional violation to be exclusion.\textsuperscript{11} The Court observed that it is the “duty of courts to be watchful for the constitutional

\textsuperscript{7} 116 U.S. 616 (1886).
\textsuperscript{8} Id. at 617
\textsuperscript{9} Id. at 618
\textsuperscript{10} Id.
\textsuperscript{11} The Court concluded that the compulsory production of the invoices “to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution . . . because it is a material ingredient, and effects the sole object and purpose of search and seizure.” Id. at 622. This rationale has since been
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rights of the citizen, and against any stealthy encroachments thereon.”12 The Court concluded by
determining that the admission of the invoices into evidence was “erroneous and
unconstitutional.”13

The next case that is credited with developing the exclusionary rule is Adams v. New
York.14 This case arose when Albert Adams was arrested and convicted for illegal gambling.
Adams’ conviction was obtained in part because of the admission of private papers that the
police had seized. On appeal, Adams argued that the papers had been seized in violation of the
Fourth and Fourteenth Amendments and should have never been introduced into evidence.
Justice Day, for the Court, found that there had been no Fourth Amendment violation and did not
address the question whether the provisions of the Fourth Amendment were applicable to the
states through the Fourteenth Amendment. Justice Day went on to suggest that the exclusion of
evidence was an evidentiary issue rather than a constitutional issue.15 The Court concluded that
so long as the evidence was “clearly competent” it would be admitted.16

In rejecting the exclusionary rule, the Adams Court observed that the security guaranteed
by the Fourth Amendment was to prevent violations of “private security in person and property
and unlawful invasion of the sanctity of the home . . . by officers of the law . . .”17 However, the
Court concluded that “nearly all” American courts had declined to extend the exclusion doctrine

12 Boyd, 116 U.S. at 635
13 Id. at 638.
14 192 U.S. 585 (1904).
15 Id. at 594. (“[T]he weight of authority as well as reason limits the inquiry to the competency of the proffered
testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained.”).
16 Id.
17 Id. at 598
to evidence and testimony if it were “otherwise competent.”\textsuperscript{18} In a single case, Justice Day seemed to reject any application of the exclusionary rule before it had even been officially recognized.

Ten years later, in an extraordinary twist of fate, Justice Day wrote the unanimous opinion of the Court in \textit{Weeks v. United States},\textsuperscript{19} which adopted the exclusionary rule in federal prosecutions where evidence had been obtained in violation of the Fourth Amendment. Like Adams, the defendant Weeks was tried and convicted for illegal gambling. Weeks, like Adams, argued on appeal that his conviction was a result of papers that were obtained in violation of the Fourth Amendment and admitted into evidence. On appeal, the government argued that the decision in \textit{Adams} controlled and the evidence was properly admitted because it was otherwise competent.\textsuperscript{20}

In rejecting the government’s argument, the Court asserted that “[t]he effect of the 4\textsuperscript{th} Amendment is to put the courts of the United States and Federal officials . . . under limitations and restraints as to the exercise of [their] power and authority.”\textsuperscript{21} Writing for the Court, Justice Day articulated that the purpose of the Fourth Amendment is to “forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of the law.”\textsuperscript{22} Day concluded by asserting that when the Fourth Amendment is violated to

\begin{footnotes}
\item \textit{Id.}
\item 232 U.S. 383 (1914).
\item \textit{Id.} at 345
\item \textit{Id.} at 392.
\item \textit{Id.}
\end{footnotes}
obtain a conviction then such unlawful searches and seizures “should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution . . .”

The Court distinguished its decision in *Adams* by asserting that that case had turned on the lack of a timely objection at trial. Whereas Adams did not object until prior to the government admitting the evidence during trial, Weeks objected to the admission of the evidence prior to trial. In excluding the evidence in *Weeks* the Court observed that “[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment . . . is of no value . . . and might as well be stricken from the Constitution.”

The next opportunity the Court had to develop the Fourth Amendment exclusionary doctrine came in *Silverthorne Lumber Company v. United States*. In *Silverthorne Lumber Co.*, federal officials illegally raided the offices of a lumber company and obtained books, records, and other papers. The government copied all of the materials it obtained. The district court ordered that the originals be returned to the lumber company but kept possession of all the copies. When this issue reached the Supreme Court, the government contended that the Fourth Amendment did not protect against prosecution based on the information obtained in the search, and that the amendment only required the return of the illegally seized original copies.

In the Courts’ opinion, Justice Holmes expanded the principles articulated in *Weeks* by observing that the “essence of a provision forbidding the acquisition of evidence in a certain way

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23 *Id.*
24 *Id.* at 393
25 251 U.S. 385 (1920).
26 *Id.* at 391.
is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.” The Court reasoned that to hold otherwise would reduce “the Fourth Amendment to a form of words.” With that, the prevailing view of the Court became that the exclusionary rule was constitutionally based. This view would remain unchallenged for a quarter-century.

One year after it decided Silverthorne Lumber Co., the Court was presented with a similar issue in Gouled v. United States. In that case, the government illegally obtained several documents from the defendant Gouled, and without his knowledge. Because Gouled had no knowledge of the illegal seizure, he was unable to move for suppression before trial and did not raise the issue until the government attempted to admit the documents in evidence during trial. In light of the Court’s decision in Adams, it seemed that Gouled would fail in his attempt for suppression. However, the Court ruled in favor of Gouled and observed that “[t]he objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable.” The Court went further, effectively overruling Adams, and held that the rule articulated in Adams was a “rule of practice” and that it should not be “allowed for any technical reason to prevail over a constitutional right.”

B. The Path to Mapp v. Ohio

27 Id. at 392.
28 Id.
29 E.g., Olmstead v. United States, 277 U.S. 438, 462-63 (1928) (discussing Weeks and observing that states that had adopted the exclusionary doctrine did so because they believed it was constitutionally based); Dodge v. United States, 272 U.S. 530, 531 (1926) (“If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used.”).
30 255 U.S. 298 (1921).
31 Id. at 305.
32 Id. at 313.
The view that the exclusionary rule was constitutionally required remained unchallenged until 1949. In 1949, the Court decided *Wolf v. Colorado*, and changed the direction of its Fourth Amendment jurisprudence. Undoubtedly, *Wolf* was an attempt at a compromise by the Court, seeking to apply the basic search and seizure values of the Fourth Amendment to the states without requiring that the exclusionary rule be mandated. The Court noted that “[t]he security of one’s privacy against arbitrary intrusion by the police . . . is . . . implicit in ‘the concept of ordered liberty’ and as such enforceable against the states through the Due Process Clause.” However, the Court determined that exclusion was not “an essential ingredient of the right.” The *Wolf* Court refused to impose the exclusionary doctrine upon the states where other “equally effective” state remedies were available.

Justice Rutledge, joined by Justice Murphy, wrote a dissent where he agreed with the Court that the Fourth Amendment does apply to the states, but dissented with the Court’s decision to not make the exclusionary rule constitutionally mandated when evidence had been obtained as a result of an illegal search and seizure.

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36 Id. at 29.
37 Id. at 31 (“[T]he exclusion of evidence may be an effective way of deterring unreasonable searches, [however] it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.”).
38 Id. at 47 (“I reject the Court's simultaneous conclusion that the mandate embodied in the Fourth Amendment, although binding on the states, does not carry with it the one sanction-exclusion of evidence taken in violation of the Amendment's terms . . . the Amendment without the sanction is a dead letter.”)
Justice Murphy, joined by Justice Rutledge, also dissented and argued that there was only one alternative to the exclusionary doctrine: “no sanction at all.” Justice Murphy emphasized that exclusion was the only proper remedy available and concluded:

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

In Irvine v. California, the Court again rejected that the exclusionary rule was constitutionally mandated and denied its application to the states. Irvine involved the police making a duplicate key to the defendant’s home, entering the home on several occasions, and placing a microphone in different locations of the home. The evidence obtained by the police via the microphone recordings was later used at Irvine’s trial. Writing for a plurality of the Court, Justice Jackson stated: “Whether to exclude illegally obtained evidence in federal trials is left largely to our discretion . . .”

Justice Jackson expressed skepticism about the effectiveness of the exclusionary doctrine and noted that “the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers.” In denying extension of the exclusionary rule to the states, Justice Jackson reasoned that “[t]here is no

\[39\] Id. at 41.
\[40\] Id. at 44
\[42\] Id. at 134.
\[43\] Id. at 135
reliable evidence known to [the Court] that inhabitants of those states which exclude the
evidence suffer less from lawless searches and seizures than those of states that admit it.”

The Irvine plurality went further and criticized the exclusionary rule when it added:

That the rule of exclusion and reversal results in the escape of
guilty persons is more capable of demonstration than that it deters
invasions of right by the police. The case is made, so far as the
police are concerned, when they announce that they have arrested
their man. Rejection of the evidence does nothing to punish the
wrong-doing official, while it may, and likely will, release the
wrong-doing defendant. It deprives society of its remedy against
one lawbreaker because he has been pursued by another. It protects
one against whom incriminating evidence is discovered, but does
nothing to protect innocent persons who are the victims of illegal
but fruitless searches. The disciplinary or educational effect of the
court’s releasing the defendant for police misbehavior is so indirect
as to be no more than a mild deterrent at best.45

In 1960, the Court again addressed the exclusionary rule in Elkins v. United States.46 In
Elkins, the defendants were convicted of federal offenses in federal courts. However, evidence
was introduced against the defendants that had been obtained by a state politician in a manner
that would have violated the Fourth Amendment had federal officers conducted the search and
seizure. A principle issue in the case was whether the court should continue to apply the “silver
platter” doctrine, which permitted the use of evidence in federal courts that had been illegally
obtained by state officials.47

In overruling the “silver platter” doctrine, the Court observed that the exclusionary rule
“is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the

42 Id. at 136.
43 Id. at 136-37
44 364 U.S. 206 (1960)
constitutional guaranty in the only effective way available—by removing the incentive to disregard it. The Court did not address the question whether the exclusionary rule was constitutionally required.

Justice Frankfurter dissented, and argued “that society is entitled to every man’s evidence [and] . . . everything rationally related to ascertaining the truth is presumptively admissible.”

Frankfurter maintained the distinction articulated in Wolf between the application of due process to state actors and the application of the Fourth Amendment to federal actors, resulting in different remedies.

One year after the Court decided Elkins, it was presented with the perfect opportunity to address the questions whether the exclusionary rule was constitutionally required and whether the remedy of exclusion applied to the states, when it decided the landmark case, Mapp v. Ohio.

Dollree Mapp lived on the second floor of a two family home brick house. She rented out extra rooms to boarders. In mid-May, 1957, several police officers came to her home and demanded entrance. The officers explained to her that they were looking for a man in connection with a recent bombing. Mapp consulted with her attorney on the telephone and denied the officers entrance. The officers returned later and forced their way into Mapp’s residence. Mapp demanded to see a search warrant and was handed a piece of paper, which she placed in her

48 364 U.S. at 217.
50 Elkins, 364 U.S. at 234.
51 See, Thomas K. Clancy, supra note 33, at 617-18 (2008) (discussing the evolution of the exclusionary doctrine and examining the application of the remedy to state actors and federal actors).
blouse. The officer’s demanded Mapp return the paper, but she refused. Finally, she was placed in handcuffs, the paper was taken, and her home was searched. A search warrant was never produced. The bombing suspect was never found. However, the police did find four books and a hand-drawn picture, all described to be obscene material.53

Mapp’s conviction in Ohio state court was overturned by the Supreme Court. Writing for the Court, Justice Clark asserted that “all evidence obtained by searches and seizures in violation of the Constitution [are] . . . inadmissible in state courts.”54 Tracing the history of the exclusionary rule Justice Clark observed:

This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to ‘a form of words.’ . . . It meant, quite simply, that ‘conviction by means of unlawful seizures and enforced confessions should find no sanction in the judgments of the courts’ . . . and that such evidence ‘shall not be used at all.’55

Justice Clark viewed the exclusionary doctrine as “an essential part of the right to privacy,” and its extension to the states to be “logically and constitutionally necessary” to enforce the securities guaranteed by the Fourth Amendment.56 Justice Clark based the Court’s decision on the premise that it was founded on “reason and truth” and that it gives to the individual “no more than that which the Constitution guarantees . . . the police officer no less

53 Id. at 673. Mapp was charged under an Ohio Statute that made it a criminal offense for the mere possession or control of obscene material. Her convictions were affirmed by the Ohio Court of Appeals and the Supreme Court of Ohio.
54 Id. at 665.
55 Id. at 648
56 Id. at 655-56
than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."  

Justice Black concurred in judgment and agreed with the Court that the Fourth Amendment’s prohibition against unreasonable searches and seizures is applicable to the states. Justice Black also added that he “agree[d] with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.”  

Justice Harlan dissented and argued that the Fourteenth Amendment did not allow the Court to apply the exclusionary rule to the states. Justice Harlan argued that the Fourteenth Amendment does not empower the Court to “mould [sic] state remedies effectuating the right to freedom from ‘arbitrary intrusion by the police’ to suit its own notions of how things should be done.”  

C. Weakening the Exclusionary Rule

In the years following Mapp, the Court wrestled with the nature and scope of the exclusionary rule. The most significant post-Mapp case to discuss the nature of the exclusionary rule was United States v. Calandra. The Calandra Court introduced the cost-benefit analysis of the exclusionary rule and de-constitutionalized it. In Calandra, Justice

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57 Id. at 660.
58 Id. at 661.
59 Id. at 983.
60 See, e.g., Linkletter v. Walker, 381 U.S. 618 (1965) (declining to make Mapp retroactive because doing so would not accomplish the goal of deterrence); Alderman v. United States, 394 U.S. 165 (1969) (defendants whose Fourth Amendment rights were not violated lack standing to suppress evidence).
62 In asserting that the exclusionary doctrine is not the defendant’s right, but simply a judicial remedy meant to deter future police misbehavior, the Court often adopts the rationale of renowned jurist Benjamin Cardozo, quoting his
Powell, writing for the Court, emphasized that the exclusionary rule “is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”63 The Court reasoned that “[i]n deciding whether to [exclude evidence] . . . we must weigh the potential injury [to society] . . . against the potential benefits of the rule as applied in this context.”64

Justice Brennan vehemently dissented and argued that “[t]he exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.”65 Brennan concluded and noted that he was “left with the uneasy feeling that [the Calandra] decision may signal that a majority of [the Court] have positioned themselves to reopen the door further and abandon altogether the exclusionary rule in search-and-seizure cases.”66 Despite Justice Brennan’s dissent, the Court continues to maintain that the exclusionary rule is not grounded in the Constitution.67

The Court followed-up its decision in Calandra with United States v. Janis,68 which held that deterrence was the sole basis for the exclusionary rule. Quoting Calandra, the Janis Court stated that “[t]he debate within the Court on the exclusionary rule has always been a warm one. It has been unaided, unhappily, by any convincing empirical evidence on the effects of the rule. The Court, however, has established that the ‘prime purpose’ of the rule, if not the sole one, ‘is to

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famous words in People v. Defore, 242 N.Y. 13, 24–25, 150 N.E. 585, 588–589 (1926), the criminal should “go free because the constable has blundered.”

63 Id. at 348.
64 Id. at 349.
65 Id. at 361
66 Id. at 365.
deter future unlawful police conduct.’’69 Applying this rationale, the Court concluded that the rule’s deterrence purpose would not be served by excluding evidence illegally obtained by state police officers in a federal civil case. Again, Justice Brennan dissented and reiterated his view that “the exclusionary rule is a necessary and inherent constitutional ingredient of the protections of the Fourth Amendment.”70

Ultimately, the Calandra line of cases established the Court’s preference to determine whether to exclude evidence by balancing the efficacy of deterrence of future government misbehavior against the costs of exclusion.71 Although, while balancing, the Court keeps in mind that there is an “absence of supportive empirical evidence . . . [that shows] the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment . . .”72 As a consequence, the Court has developed several exceptions where the exclusionary doctrine does not apply.73

The Court’s position that the purpose of the exclusionary rule is deterrence and its decision to balance relevant factors to determine whether exclusion is warranted has been meant with hostility. Justice Brennan continued his resistance when he stated:

[T]he language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the

69 Id. at 446 (quoting Calandra, 414 U.S. at 347).
70 Janis, 428 U.S. at 460.
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majority’s result. When the Court’s analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the “costs” of excluding illegally obtained evidence loom to exaggerated heights where the “benefits” of such exclusion are made to disappear with a mere wave of the hand.74

In addition, commentators have questioned the Court’s decision to balance, and its choices of factors that it should balance.75 Despite criticism, the Court has remained relatively consistent in its analysis that exclusion is not constitutionally based and that it should balance before it determines whether exclusion is warranted.76

More recently, the current Roberts’ Court has continued the debate over the nature and scope of the exclusionary rule. In Hudson v. Michigan,77 Justice Scalia, writing for the Court, observed:

The exclusionary rule generates “substantial social costs,” which sometimes include setting the guilty free and the dangerous at large. We have therefore been “cautio[us] against expanding” it,

75 E.g., Yale Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”? 16 Creighton L. Rev. 565, 627-64 (1983)
76 In Colorado v. Connell, one hundred years after its decision in Boyd v. United States, the Court summarized the state of the exclusionary doctrine and firmly established that the rule was judicially created and that the Court would balance relevant factors to determine whether it applied. In Connell, Chief Justice Rehnquist, speaking for the Court, stated:

[T]he exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence. . . . The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. . . . We have previously cautioned against expanding “currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries....” . . . [W]hile we have previously held that exclusion of evidence may be necessary to protect constitutional guarantees, both the necessity for the collateral inquiry and the exclusion of evidence deflect a criminal trial from its basic purpose.

479 U.S. 157, 166 (1986).
77 547 U.S. 586 (2006)
and “have repeatedly emphasized that the rule's ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application,” We have rejected “[i]ndiscriminate application” of the rule, and have held it to be applicable only “where its remedial objectives are thought most efficaciously served,”—that is, “where its deterrence benefits outweigh its ‘substantial social costs,’ ” We did not always speak so guardedly. Expansive dicta in Mapp, for example, suggested wide scope for the exclusionary rule. . . . But we have long since rejected that approach.78

The Hudson Court continued and called into question the future application of the exclusionary rule:

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.79

Justice Breyer dissented in Hudson, and passionately challenged much of the majority’s rationale. Justice Breyer stated:

To argue, as the majority does, that new remedies, such as 42 U.S.C. § 1983 actions or better trained police, make suppression unnecessary is to argue that Wolf, not Mapp, is now the law. . . . To argue that there may be few civil suits because violations may produce nothing “more than nominal injury” is to confirm, not to deny, the inability of civil suits to deter violations. And to argue without evidence (and despite myriad reported cases of violations, no reported case of civil damages, and Michigan's concession of their nonexistence) that civil suits may provide deterrence because claims may “have been settled” is, perhaps, to search in desperation for an argument. Rather, the majority, as it candidly admits, has simply “assumed” that, “[a]s far as [it] know[s], civil

78 Id. at 591-92
79 Id. at 597
liability is an effective deterrent,” a support-free assumption that Mapp and subsequent cases make clear does not embody the Court’s normal approach to difficult questions of Fourth Amendment law. It is not surprising, then, that after looking at virtually every pertinent Supreme Court case decided since Weeks, I can find no precedent that might offer the majority support for its contrary conclusion.\(^\text{80}\)

The Court went further in limiting the application of the exclusionary rule when it decided *Herring v. United States*.\(^\text{81}\) In *Herring*, a database error led an officer to believe that there was an open warrant on Bennie Herring. Because of the error, Herring was arrested and searched by officers. During the search, the officers discovered illegal narcotics. In *Herring*, the Court focused on the goal of deterrence and considered whether exclusion of the narcotics following negligent police errors would considerably deter the police from relying on arrest databases.\(^\text{82}\) Writing for the Court, Chief Justice Roberts concluded that exclusion of the evidence would not have a substantial deterrent effect in Herring’s case. He noted that exclusion is warranted only when the abuses by law enforcement feature “intentional conduct that was patently unconstitutional.”\(^\text{83}\) He added that an error that results from nonrecurring negligence is “far removed from the core concerns that led to the rule’s adoption.”\(^\text{84}\) Thus, in order to trigger the doctrine, “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”\(^\text{85}\)

\(^{80}\) *Id.* at 611.

\(^{81}\) 555 U.S. 135 (2009).

\(^{82}\) *Id.* at 145.

\(^{83}\) *Id.* at 135.

\(^{84}\) *Id* at 136.

\(^{85}\) *Id.*
Justice Ginsburg wrote a dissent in which she argued that the Fourth Amendment serves as a “constraint” on the power of the sovereign and that the exclusionary rule is a remedy that is “necessary” to ensure that the Fourth Amendment is observed. Justice Ginsburg observed that in limiting the exclusionary rule to “deliberate” and “reckless” behavior, the Court is leaving Herring, and others like him, with “no remedy for violations of their constitutional rights.”

Next, she emphasized that even if police conduct is deliberate or reckless, there will be a heavy burden on the “impecunious defendant to make the required showing . . .”

Interpreted to its full extent, Herring stands for the proposition that exclusion is only warranted when the government deliberately or recklessly performs searches or seizures in violation of an individual’s Fourth Amendment protections. The inquiry would be objective and would evaluate whether the deliberate or reckless action (if committed) could be deterred in the future if the evidence obtained as a result of the action were to be excluded.

The Court emphasized the Herring culpability standard in Davis v. United States. In Davis, the defendant, Willie Gene Davis, was arrested for providing an officer with a false name after the car he was a passenger in was pulled over on a routine traffic stop. The driver of the vehicle was arrested for driving while intoxicated. At the time of Davis’ arrest, the United States Court of Appeals for the Eleventh Circuit interpreted the United States Supreme Court case New York v. Belton as allowing an officer to search a vehicle in connection with an arrest. While

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86 Id. at 152
87 Id. at 156
88 Id. at 157.
89 131 S.Ct. 2419 (2011).
90 453 U.S. 454 (1981). In Belton, a New York police officer made a routine traffic stop. While speaking with the driver the officer smelled marijuana. The officer also saw an envelope on the floor of the vehicle. The officer ordered the occupants of the vehicle out of the car and placed them under arrest before searching the passenger
searching the vehicle the officer found a gun that belonged to Davis, a convicted felon. Davis filed a motion to suppress the gun. The motion was denied. Following his conviction, Davis appealed. During his appeal the Supreme Court decided Arizona v. Gant,\textsuperscript{91} holding that the Belton rule did not apply when the person had been subdued following an arrest. Davis argued that because of the Court’s holding in Gant, the exclusionary rule should apply to suppress the evidence discovered as a result of the police officer’s search of the car.

Justice Alito authored the majority opinion for the Court and reaffirmed that the exclusionary rule was a judicially created rule geared toward deterring future violations of the Fourth Amendment.\textsuperscript{92} Recognizing the social costs associated with excluding evidence of criminal activity, the Court noted that evidence should only be suppressed when the benefits of exclusion outweigh the costs.\textsuperscript{93} According to Justice Alito, deterrence benefits of exclusion “var[y] with the culpability of the law enforcement conduct’ at issue.”\textsuperscript{94} Exclusion is warranted “[w]hen the police exhibit ‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights . . .”\textsuperscript{95} Justice Alito concluded by noting that the “absence of police culpability dooms Davis’s claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield . . . deterrence, and culpable enough to be . . . worth the price paid by the justice system. . . . The conduct of the officers here was neither of these

\textsuperscript{91} 556 U.S. 332 (2009). In Gant, the defendant was arrested while walking away from his vehicle and charged with driving with a suspended license. After Gant was placed in a patrol car the police searched his vehicle and found a bag of cocaine. The Supreme Court held that the search of the vehicle was impermissible and evidence of the cocaine should be suppressed. The Court distinguished Belton and articulated that the police could only search a vehicle incident to an arrest if the suspect had access to the vehicle or if the search was related to the arrest.

\textsuperscript{92} Davis, 131 S.Ct. at 2423.

\textsuperscript{93} Id. at 2427

\textsuperscript{94} Id.

\textsuperscript{95} Id.
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things.” Thus, the Court determined that exclusion was not warranted because “the officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence.”

Justice Breyer dissented and harshly criticized the extent of the Court's “good faith” exception to the exclusionary rule. Justice Breyer observed that if the Court “means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was ‘deliberate, reckless, or grossly negligent,’ then the ‘good faith’ exception will swallow the exclusionary rule.” He concluded by observing that changing the application of the exclusionary rule to instances of deliberate, reckless, or grossly negligent constitutional violations by police officers would affect “a very large number of cases, potentially many thousands each year. And since the exclusionary rule is often the only sanction available for a Fourth Amendment violation, the Fourth Amendment would no longer protect ordinary Americans from . . . unreasonable searches and seizures. . . .”

III. THE NECESSITY OF EXCLUSION

A. Implications of Herring and Davis

The Court initially adopted the exclusionary rule because it viewed the Fourth Amendment as a limit and restraint on the exercise of government power. The Court saw the Fourth Amendment as an instrument to protect the people against all unreasonable searches and

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96 Id. at 2428
97 Id.
98 Id. at 2239.
99 Id. at 2240.
seizures and noted that the courts could not support its violation by sanctioning evidence that was obtained as a result of an illegal search and seizure. Under this theory, the Court decided *Mapp v. Ohio*\(^{101}\) and articulated that the exclusionary rule was constitutionally based and applied to the states.

During the latter half of the twentieth century the *Weeks* rationale quickly declined and the Court began to view the exclusionary rule not as constitutionally based, but as a judicially created rule established to deter future police misconduct. The Court’s holdings in *Herring* and *Davis* embody these principles, and goes a step further, severely weakening the application of the exclusionary doctrine. Certain members of the Court believe that the exclusionary rule is no longer necessary because of the increased professionalism of the police.\(^{102}\) Under the *Herring* line of cases exclusion of evidence is only warranted when police officers deliberately, recklessly, or grossly negligently violate an individual’s constitutional right. On the other hand, exclusion is not warranted when the police are simply negligent, un-informed, or relying on outdated information. In addition to the high standard of culpability, the burden is on the defendant to show that the police were deliberately or recklessly disregarding constitutional rights.

The *Herring* line of cases narrows the scope of the exclusionary rule only to situations where the benefits of its application, i.e. police deterrence, significantly outweighs the cost. In other words, evidence will only be excluded when the police affirmatively disregard the Fourth Amendment. Furthermore, the Supreme Court continues to maintain that the exclusionary rule is

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not constitutionally based. Therefore, the Court, and Congress, possess the authority to abolish the exclusionary rule.

The future of the exclusionary rule is uncertain. Since the 1970s, the Court has slowly chipped away at the applicability of the rule. First, it articulated that it was not constitutionally based. Next, it introduced a cost-benefit analysis to determine whether or not it should apply. Finally, it has introduced a “good-faith” exception where the rule only applies when the police act in a deliberate, reckless, or grossly-negligent manner. Arguably, the current good-faith exception is potentially paving the way for an end to the exclusionary rule. Yet, without exclusion, the protections of the Fourth Amendment are of no value and might as well be removed from the Constitution. Thus, in order to preserve the fundamentally protections guaranteed by the Fourth Amendment, the Court should abandon its current good-faith dichotomy and cost-benefit analysis and return to the rule articulated in Mapp v. Ohio; the exclusionary rule is constitutionally based and necessary in order for the Fourth Amendment to be effective.

B. The Exclusionary Rule as Constitutionally Based

The exclusionary rule is “a remedy necessary to ensure that” the Fourth Amendment's prohibitions “are observed in fact.” The rule is essential to the survival of the Fourth Amendment, as is evident in the Court’s early decisions where the exclusionary rule and Fourth Amendment were considered inseparable. A primary purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—

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103 Weeks, 232 U.S. at 393.
by removing the incentive to disregard it."\textsuperscript{106} To be sure, the exclusionary rule is often the only remedy available to effectively redress a Fourth Amendment violation.\textsuperscript{107} However, the current Court has taken that purpose of the rule, to deter, and used it to severely gut the situations in which exclusion is warranted. Thus, the Court ignores other, more important, considerations for the rule, such as: protecting the privacy rights of citizens;\textsuperscript{108} “enabling the judiciary to avoid the taint of partnership in official lawlessness”; and “assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”\textsuperscript{109}

The framers of the exclusionary rule were clear that the purpose of the Fourth Amendment is to “put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law . . .”\textsuperscript{110} In crafting the rule, Justice Day specified that the “tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution . . .”\textsuperscript{111}

\textsuperscript{106} Elkins v. United States, 364 U.S. 206, 217 (1960).
\textsuperscript{107} See, Mapp v. Ohio, 367 U.S. 643 (1961), supra note 51. In Mapp, the Court noted “the obvious futility of relegating the Fourth Amendment to the protection of other remedies.” \textit{Id.} at 652.
\textsuperscript{109} United States v. Calandra, 414 U.S. 338, 357, (1974) (Brennan, J., dissenting) (noting that “these considerations, not the rule's possible deterrent effect, were uppermost in the minds of the framers of the rule . . .”).
\textsuperscript{110} \textit{Weeks}, 232 U.S. at 391.
\textsuperscript{111} \textit{Id.} at 392.
The renowned Justice Brandeis added his influence to the purpose of the Fourth Amendment and the exclusionary rule in his prominent dissent in *Olmstead v. United States*, when he observed:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.\(^{113}\)

In his dissent, Justice Holmes added:

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.\(^{114}\)

Taken together, Justice Brandeis and Justice Holmes articulated the necessity for the exclusionary rule in order to maintain judicial integrity. The basic notion is that “[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”\(^{115}\)

Although deterrence is an important purpose served by the exclusionary rule, its emphasis ultimately relies on the fact that prior to the Court’s decision in *Mapp v. Ohio*, states had relied on the fact that exclusion only applied to federal officials and not state officials.\(^{116}\)

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\(^{112}\) 277 U.S. 438 (1928).
\(^{113}\) *Id.* at 485.
\(^{114}\) *Id.* at 470.
\(^{116}\) *Calandra*, 414 U.S at 360 (Brennan, J., dissenting).
Indeed, had *Mapp* been applied retroactively it would have resulted in the wholesale release of numerous convicted prisoners over an extensive period of time.\(^{117}\) It is in this light that the Court articulated that deterrence of future police conduct was a primary purpose of the exclusionary rule.

Beginning with *Calandra*, the Court started to describe the exclusionary rule as “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . .” This characterization of the exclusionary rule is incorrect. Rather, the exclusionary rule is “essential to the right of privacy . . .” and thus “part and parcel of the Fourth Amendment’s limitations upon federal encroachment of individual privacy.”\(^{118}\) Without the exclusionary rule the Fourth Amendment cannot be real. Without the exclusionary rule the Fourth Amendment is a fiction because it is a guarantee that does not carry with it a remedy if it is violated.\(^{119}\)

Furthermore, the Court has observed the importance of fair procedural requirements when it noted that “the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.”\(^{120}\) The framers of the exclusionary rule were well aware of the principle that it is better for some guilty persons to go free than it is for the police to engage in illegal conduct that is sanctioned by the courts.\(^{121}\) To allow an accused to be subjected to the fruits of an illegal search or seizure flies in the face of individual privacy and interweaves the courts in the illegal acts of the government.\(^{122}\)

\(^{117}\) *Id.*
\(^{118}\) *Mapp*, 367 U.S. at 650-51.
\(^{119}\) *See, Calandra* 414 U.S. at 361 (Brennan, J., dissenting).
\(^{120}\) *Miller v. United States*, 357 U.S. 301, 313, (1958).
\(^{121}\) *See, Calandra*, 414 U.S. at 361 (Brennan, J., dissenting).
In order to ensure that the rights guaranteed by the constitution are more than moral declarations, it is imperative that some measurable consequence be attached to their violations. It would be inexcusable for the Fourth Amendment guarantee against unreasonable search and seizure to be violated without consequence. Thus, deterrence is not the sole advantage of the exclusionary rule. It is not even the most important. The exclusionary rule, wholly apart from the deterrent effect, provides an occasion for judicial review of constitutional violations, and it gives credibility to those constitutional guarantees. The exclusionary rule allows the courts to ensure that an individual’s right to be protected against unreasonable searches and seizures will be enforced.

IV. CONCLUSION

Gone are the days when the exclusionary rule was labeled a “constitutional privilege.” The Court has done much to limit the exclusionary rule’s application by creating the “good-faith” exception which would only trigger the rule if the government “deliberately,” “recklessly” or “grossly-negligently” violated the Fourth Amendment. However, the exclusionary rule was designed to do more than just deter future government conduct. The exclusionary rule was designed to protect the constitutional rights of the citizens as well as to ensure that the courts would not become involved in the illegal activities of the government by sanctioning illegally obtained evidence. Nevertheless, the limitations placed on the exclusionary rule serve to undermine these more important considerations while only placing emphasis on the rule’s ability to deter. The ultimate result is that the Fourth Amendment and its guaranteed protections have been reduced to a “form of words.”

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123 Calandra, 414 U.S. at 366 (Brennan, J., dissenting).
124 See, Mapp 367 U.S. at 651.
125 See, Weeks, 232 U.S. at 392
it is imperative that the Court return to the days of *Mapp v. Ohio*, and make exclusion mandated whenever there is a violation of Fourth Amendment protections.