Missouri Law Review

Volume 70
Issue 2 *Spring 2005*

Article 4

Spring 2005

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Christian Halliburton

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*Christian Halliburton**

For almost half a century, courts have been going about their constitutionally delegated business of enforcing the Fourth Amendment's guarantees[1] in a fundamentally misguided fashion. It would not be fair to say that Fourth Amendment jurisprudence lacks any internal consistency. Rather, the decision of whether to suppress unlawfully collected evidence in a criminal case has long been guided by a policy not derived from, and ultimately incompatible with, the Fourth Amendment itself. Yet the Supreme Court is never just deciding a particular Fourth Amendment case or determining whether evidence offered against a specific defendant should be excluded; it is also telling a tale about constitutional meaning and the price of noncompliance. This narrative woven around the Fourth Amendment's exclusionary rule has taken a crooked course that significantly impedes the liberty-preserving function of the Amendment itself. The trend has even gone so far as to spawn new legislation that may portend the end for this portion of the Bill of Rights.

While it has been said that "[t]he touchstone of the Fourth Amendment is reasonableness,"[2] in its purest form the Fourth Amendment requires every search or seizure to be conducted pursuant to a warrant supported by probable cause.[3] Although there are many recognized exceptions to this "warrant preference," largely premised on the need for law enforcement flexibility,[4] the

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* Assistant Professor, Seattle University School of Law. The author would like to thank all those who supported this effort, including the Deans of his home institution and the editorial board of the *Missouri Law Review*. The author wishes to express particular gratitude to Professor John Mitchell for his inexhaustible energy and flow of inspiration, and to Professor Janet Ainsworth for her expert guidance in developing these ideas. The Article would not have been possible without the constructive hospitality shown by the participants at numerous gatherings, not least of all those at the St. Louis University School of Law's faculty workshop series, nor without the priceless insights offered by Professors Francisco Valdés, Camille Nelson, Frank Rudy Cooper, and Emily Houh during its development. The deepest appreciation is owed to Jason Schwarz, whose agile and indefatigable research assistance defied all superlatives.

1. U.S. CONST. amend. IV.

2. Florida v. Jimeno, 500 U.S. 248, 250 (1991) (citing Katz v. United States, 389 U.S. 347, 360 (1967)).

3. United States v. Harris, 403 U.S. 573 (1971).

4. *See* California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (noting that as of 1991 there were twenty-two exceptions to the warrant requirement (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985)); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 169 (2001) ("Today, roughly twenty-four exceptions to this 'warrant require-

law has not dispensed with the probable cause requirement. Thus, before they can interfere with an individual's liberty, agents of the law must possess specific facts and information that would cause a person of reasonable caution to believe that criminal activity has been or is about to be committed.[5] Moreover, the suspicion of illegal conduct must be particularized to an individual or a discrete group of specific individuals—generalized suspicion will not justify intrusion into the Fourth Amendment's protected sphere.[6]

A corollary of the Fourth Amendment's two interactive decrees, requiring reasonableness in police procedures and that warrants be issued pursuant to a showing of probable cause, is that evidence collected contrary to these provisions cannot be used against the accused at any subsequent criminal prosecution. This exclusionary rule was originally recognized as flowing from the Fourth Amendment directly (even though it is nowhere mentioned in the text), and the logical force of coupling a remedy to the constitutional right is compelling.

The rule of evidentiary exclusion, while certainly of constitutional origin, has been treated as if founded upon one of several justifications at once. On one hand, the early Court indicated that admitting evidence derived from Fourth Amendment violations would impermissibly compromise the integrity of the judicial system by derogating from the tribunal's own commitment to constitutional commands. At the same time, however, the Court determined that evidentiary exclusion was necessary to remedy the profound personal harm inflicted by Fourth Amendment violations. While the notion of judicial integrity and this nascent remedial theory of exclusion appear to be consistent, early courts tended to emphasize the remedial aspect of the rule as being its *raison d'etre*, notwithstanding the benefits the rule had on the dignity of the judiciary.

However, even after the exclusionary rule was announced as a component of the Fourth Amendment's guarantees, it remained unclear whether the rule should be applied beyond the federal system. It took forty-seven years for the Supreme Court to settle the incorporation debate and conclude that the Fourth Amendment exclusionary rule should constrain state officials per force of the Fourteenth Amendment.[7] Perhaps related to this search for scope, the Court was also grappling with the question of why it should apply the exclusionary rule at all.

Over time, and without explicit warning, the Court shifted focus from the principles of remedy and integrity to a deterrence rationale. According to

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ment' exist, discovered by the Court largely in cases coming from state courts."). *See also* South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search); Cardwell v. Lewis, 417 U.S. 583 (1974) (automobile exception); Warden v. Hayden, 387 U.S. 294, 298 (1967) (hot pursuit); United States v. Jeffers, 342 U.S. 48 (1951) (exigent circumstances); Carroll v. United States, 267 U.S. 132 (1925) (mobile containers).

5. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

6. Maryland v. Garrison, 480 U.S. 79, 84 (1987).

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

this justification for the Fourth Amendment exclusionary rule, evidence collected by unlawful means was to be suppressed at a subsequent criminal prosecution if, and only if, doing so would deter future instances of undesirable law enforcement conduct. Although the shift from a remedial to a deterrence rationale for evidentiary exclusion under the Fourth Amendment was achieved by subtle means, there is no understating the significance of the move.

Indeed, the decision to pursue deterrence goals rather than provide a remedy for the deprivation of constitutional rights had a profound effect on the subsequent development of the exclusionary rule. Perhaps due to the logical structure of the deterrence model, this shift set the stage for the recognition of several important exceptions to the exclusionary rule that represent fundamental compromises in the protection or relief exclusion might offer the accused.[8]

More recently, and perhaps less predictably, it has become clear that the Court's steady migration towards a deterrence rationale of exclusion—an instance of what I call *interbranch locution*—is conceptually integral to a deeper paradigm shift in American criminal procedure: the rejection of probable cause as the fundamental prerequisite for incursions on individual liberty. Interbranch locution is a way of describing how the Court, through its decisions, educates the other branches of government on constitutional values and provides cues as to the areas in which its demand for constitutional compliance will be less stringent.

By way of example, according to the USA PATRIOT Act, law enforcement agencies no longer need to demonstrate probable cause, or even the less-onerous "articulable suspicion,"[9] to justify infringing on our protected spaces; nor need they inform those whose privacy has been invaded of the fact of the invasion. By reducing the level of suspicion required for a constitutional search or seizure, the Act alters the central balance between the government's authority to detect and punish wrongdoing and the public's basic right to be left alone, and purports to allow official conduct previously declared beyond the boundaries imposed by the Fourth Amendment. This Article takes the position that, although the PATRIOT Act is superficially unrelated to the specifics of the exclusionary rule, such a drastic departure from constitutional norms would not have been possible had the Court not conditioned the Fourth Amendment exclusionary rule's operation on pursuit of the inherently unstable target of institutional deterrence.

Part I of this Article will trace the development of the Fourth Amendment's exclusionary rule from its origins in federal court through its incorporation against the states, paying particular attention to the underlying purpose of the exclusionary rule as announced by the Court, and concluding with a survey of several exceptions to the exclusionary rule derived from that pur-

8. *See infra* Part D.

9. Terry v. Ohio, 392 U.S. 1, 31 (1968) (Harlan, J., concurring).

pose. Part II will discuss aspects of the PATRIOT Act that are facially inconsistent with clearly established Fourth Amendment law, describe the operational relationship between the shift to a deterrence model of evidence exclusion and the Act's passage, and identify the criminological assumptions on which the Act is based. Part III of this Article argues that the wrong turn made in the area of evidentiary exclusion fifty years ago, problematic as it has always been, must now share the blame for a loss of Fourth Amendment protection enjoyed by the American public as a whole. I conclude by suggesting that the single solution is to restore the remedial vision of the Fourth Amendment through interpretation of the exclusionary rule.

I. EVOLUTION OF EXCLUSION

A. Foundations of Fourth Amendment Freedom

The text of the Fourth Amendment, by itself, does not provide a high degree of guidance as to the limitations it imposes on law enforcement conduct.[10] In one glorious run-on sentence the Framers promised us that

> 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.[11]

Embedded in that lyric are two distinct entitlements. First, we have the overarching right to be free from unreasonable invasions of our bodies, houses, papers, and effects. This provision expressly grants a fundamental measure of privacy and security to tangible forms and objects, and that same sphere of protection was later recognized as extending to intangible items such as oral communications.[12] It is also noteworthy that this is the only place where reasonableness, an inherently flexible and relative notion, is included in our nation's fundamental legal code.[13]

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10. Indeed, the Fourth Amendment does not expressly mention, and is therefore not necessarily limited in application to, agents exercising criminal as opposed to civil authority. For an exploration of the significance of the Fourth Amendment's textual breadth, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

11. U.S. CONST. amend. IV.

12. Katz v. United States, 389 U.S. 347, 353 (1967).

13. Some scholars have argued that reasonableness is, in fact, the overarching guideline to be observed when understanding the Fourth Amendment's true operation. Instead of being bound by fixed markers such as the presence of a warrant, or the possession of "fixed, easily knowable" probable cause, the limits imposed by the

Additionally, we are guaranteed that no warrants shall issue unless they are supported by probable cause and particularly describe the objects of the search or seizure. Despite this seemingly clear language, the United States Supreme Court did not declare until 1948 that this provision created a "warrant preference" governing the course of criminal investigations.[14] Justice Jackson brought the warrant preference to life in the case of Ms. Anne Johnson, who was convicted of narcotics charges after officers executed a warrantless entry and search of her Seattle hotel room.[15] The Seattle Police Department had initially been led to Ms. Johnson by a confidential informant, known by the police to be an active drug addict, who told them that "unknown persons were smoking opium in the Europe Hotel."[16] Seattle Detective Belland visited the hotel with the informant, and testified that he detected the odor of burning opium coming from the hotel's Room 1.[17] Detective Belland contacted and was later joined by federal narcotics agents, and together they demanded entry into Room 1 where Ms. Johnson was staying.[18] There they engaged in a complete search of the hotel room that revealed incriminating narcotics paraphernalia.[19]

Justice Jackson recognized that the Fourth Amendment's protections require that probable cause determinations which lead to constitutional events should ordinarily be made by a neutral and detached magistrate during a warrant application process; to do otherwise would leave the security of citizens in the discretion of officers employed in the "competitive enterprise of ferreting out crime."[20] Indeed, interposing the magistrate between the law en-

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Fourth Amendment on official behavior are essentially reduced to a reasonableness consideration, "factoring in the degree of the intrusion and the gravity of the investigated offense." *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 956 (2003).

14. Johnson v. United States, 333 U.S. 10 (1948).

15. *Id.* at 12.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *See id.* at 13-14 ("The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

History appears to support this reading of the Fourth Amendment. For example, commentators have suggested that the Fourth Amendment's warrant clause was written in response to, and in order to prevent, the use of general writs of assistance as a means of regulating law enforcement interactions with the public. Writs of assistance were a general command that the person named in the writ submit to the authority of an officer in possession of such a writ, and authorized this interference without any substantial showing that the individual had engaged in criminal behavior. Perhaps not

forcement officer's suspicions and the individual's entitlement to a presumption of innocence strikes the balance between the rights of the person and the powers of the government. "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."[21]

Despite their importance to the functioning of the criminal justice system, the content of warrants issued by judicial officers is now one of the least common subjects of judicial analysis under the Fourth Amendment. Instead, courts focus on such thorny questions as whether probable cause to arrest is established by running from law enforcement,[22] whether an anonymous tip that someone is carrying a gun is enough to justify a search of that person,[23] and whether thermal imaging is a permissible way to detect unlawful drug-related activity.[24] One could fairly ask how we got to the point where the standards governing the necessary content of properly issued search warrants have become so seemingly unimportant.[25]

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unpredictably, writs of assistance quickly became a way for authorities to suppress communicative activities and quiet political dissent. *See generally* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 30-48 (1966); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-105 (1970); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 572 (1983); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983).

The warrant preference recognized in *Johnson* is also favorably supported by the legislative history of the Fourth Amendment itself. It is important in this regard to consider that warrantless searches were apparently so uncommon in Colonial times that Madison's first draft of the Fourth Amendment only referred to unreasonable searches and seizures as a function of invalid warrants. This may suggest that warrantless law enforcement intrusions were simply not a creature of colonial police practices, and therefore not a concern that required explicit protections. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 600-04 (1999). *But see* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 218-23 (1993).

21. *Johnson*, 333 U.S. at 14.

22. *See* California v. Hodari D., 499 U.S. 621 (1991).

23. *See* Florida v. J.L., 529 U.S. 266 (2000).

24. *See* Kyllo v. United States, 533 U.S. 27 (2001).

25. Indeed, several scholars have capably addressed possible causes of skepticism regarding judicial review of warrant applications and supporting affidavits. *See, e.g.*, Steven Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405 (1986); Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173 (1987); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

B. Exclusionary Protoplasm

Interestingly, one of the earliest Supreme Court cases interpreting the Fourth Amendment did not actually involve any sort of exclusionary principle *in a criminal case.* Instead, the Court was asked to consider how, if at all, the Fourth Amendment affects the government's power to demand the production of certain documents in a civil forfeiture proceeding. In essence, it was a discovery dispute. In the 1886 case *Boyd v. United States*,[26] the Court analyzed a federal statute that conferred on the government's trial counsel the right to a court order directing inspection of a defendant's relevant papers; the penalty for refusal was that all of the government's allegations would be taken as true.[27] In an opinion that provides a probable starting point for Fourth Amendment analysis, the *Boyd* Court found the challenged statute to be unconstitutional under both the Fourth *and* Fifth Amendments.[28]

With respect to the Fourth Amendment, the Court (which, arguably, was closer in time and thus more aware of the spirit of the Amendments) recognized that the statute operated to provide the government access to Boyd's private papers in an unreasonable manner. After reviewing the historical practices engaged in by English and Colonial authorities as explanatory of what was meant by the phrase "unreasonable searches and seizures," the *Boyd* court opined that "[i]t is not the breaking of [a person's] doors, and the rummaging of his drawers, that constitutes the essence of the offense" against the Constitution, but "the invasion of his indefeasible right of personal security, personal liberty, and private property . . . this *sacred* right."[29] More importantly, and perhaps presciently, the Court warned against subtle encroachments on the right secured by the Fourth Amendment, for it would be in this manner that "illegitimate and unconstitutional practices get their first footing."[30]

After the expansive language employed in *Boyd*, the Court's first serious treatment of an exclusionary question in a criminal setting was not very inspiring. In 1904, the Supreme Court reviewed petitioner Albert Adams's conviction for possession of certain gambling paraphernalia allegedly used in a numbers game called "policy."[31] In the course of his prosecution, the trial court permitted the state to introduce other, non-criminal documents in order to prove Adams's possession and ownership of the policy slips.[32] Adams's Fourth Amendment challenge stemmed from the fact that the search warrant

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26. 116 U.S. 616 (1886).
27. *Id.* at 619-20.
28. *Id.* at 632-33.
29. *Id.* at 630 (emphasis added).
30. *Id.* at 635. It is this last notion which may put the remainder of this discussion into its proper relief.
31. Adams v. New York, 192 U.S. 585 (1904).
32. *Id.* at 594.

authorizing the inspection of his apartment did not extend to the search for or seizure of those other private papers not qualifying as gambling paraphernalia.[33] There seemed to be no dispute that the scope of the search warrant was exceeded by the officers who executed it, and that the search and seizure of Adams's property was therefore unlawful. However, after reviewing American and English precedent together with Greenleaf's treatise, the *Adams* Court concluded that, so long as the evidence put before the trial court tended to establish the guilt of the defendant below, then even if the illegality of the collection of that evidence is conceded, the Court need not trouble itself with the means of collection and no objection to admissibility could properly be raised.[34]

While this conclusion may at first seem out of step with *Boyd*, the *Adams* Court was actually carving out, or at least laying the foundation for, one of several important exceptions to an exclusionary rule that had yet to be squarely announced.[35] Thus, the key question in *Adams* was, "Were the papers found in the execution of the search warrant, which had a legal purpose in the attempt to find gambling paraphernalia, competent evidence against the accused?"[36] The key conclusion to be taken from *Adams* is that evidence discovered incident to the execution of a valid search warrant, although not within the enumerated scope of the search warrant, is not inadmissible if that evidence is inadvertently and legitimately encountered by the officers executing the warrant.[37] That crucial exception continued to gain strength and is now well known as the plain view doctrine.[38]

In the course of its decision, the *Adams* Court was careful to distinguish its case from *Boyd*, and relied heavily both on the legal justification for the search, in the form of the search warrant, and the plain view discovery of the

33. *Id.* at 595-96. This, Adams argued, failed to comply with the Fourth Amendment requirement that any warrant approved particularly describe the contraband nature of the item to be seized. *Id.*

34. *Id.* at 594-96.

35. The first, stated only a little bluntly, might be that unlawfully collected evidence is admissible so long as it aids the prosecution in tending to show the guilt of the accused. Indeed, Justice Day saw the issue as arising "upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused." *Id.* at 594. Justice Day opined that "[i]n such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony." *Id.*

No commentator could be cynical enough to say this about today's body of criminal procedure doctrine, but the *Adams* Court did not appear to be shy about expressing this view, stating that even "'[i]f the search warrant were illegal, or if the officer serving the warrant exceeded his authority . . . this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue.'" *Id.* at 595 (discussing Greenleaf Vol. 1 § 254a, and quoting Commonwealth v. Dana, 43 Mass. 329, 337 (1841)).

36. *Id.* at 597.

37. *Id.* at 595.

38. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

non-contraband evidence relating to Adams's gambling activity. These factors notwithstanding, the *Adams* Court did recognize that the Fourth Amendment represents a constitutional guarantee of a certain measure of privacy and security, and that it was adopted to provide a *remedy* for times when that privacy or security is violated.[39] Indeed,

> [t]he security intended to be guaranteed by the 4th Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home by officers of the law . . . and to give remedy against such usurpations when attempted.[40]

C. A Theory of Exclusion Coalesces

From *Adams*'s encouraging statements and less encouraging results, it took only ten years for the Court to depart from the *Adams* line of precedent and declare that the basis for excluding evidence collected contrary to the Fourth Amendment's restrictions was an inherent aspect of the Amendment itself. In 1914, Justice Day, who wrote *Adams*, was confronted with another conviction for running numbers in *Weeks v. United States*.[41] This time, poor Mr. Fremont Weeks was convicted on the basis of evidence unlawfully collected by local *and* federal agents in the undisputed absence of a warrant.[42] After again reviewing the same historical evils associated with general warrants and writs of assistance that drove the Framers, the *Weeks* Court began its analysis with *Boyd*'s spirit and *Adams*'s "exceptions." It then announced for the first time that if evidence can be unlawfully seized and used against the accused, "the protection of the [Fourth] Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[43] Justice Day continued: "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[44]

As if this weren't enough, the *Weeks* Court made two additional pronouncements that deserve particular attention. First, the Court emphasized, in an eminently humane fashion, that the Fourth Amendment's protection reaches "all alike, whether accused of crime or not, and the duty of giving to

39. *Adams*, 192 U.S. at 598.
40. *Id.*
41. 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).
42. *Id.* at 386.
43. *Id.* at 393.
44. *Id.*

it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws."[45] The obligation to respect boundaries imposed by the Bill of Rights, Justice Day instructed, reaches every person and level of the federal system.[46]

Perhaps more significant was the *Weeks* Court's decision that the Fourth Amendment imposed no restriction on what state-authorized officers, unaided by their federal counterparts could do, nor limited what evidence could be admitted in a state criminal court proceeding.[47] The *Weeks* Court thereby established what essentially became two parallel systems for regulating law enforcement conduct: one system governed by the Constitution and the Bill of Rights that affected federal actors and influenced evidence at federal trials, and a separate system governed by the rules of evidence and criminal procedure of each of the fifty states that controlled the conduct of state actors and impacted state prosecutions. Thus, by 1920 (when the Court decided *Silverthorne Lumber*), it was well-established that, at least with respect to federal actions, "[t]he essence of [the] provision forbidding the acquisition of evidence in a certain way" is that such evidence cannot subsequently be used in court—for to allow otherwise is to "reduce[] the Fourth Amendment to a form of words."[48] At the same time, the Fourth Amendment provided no protection against unlawful evidence collection or other violations of privacy by the state.[49]

Picking up on the thread loosened by *Weeks*, many state courts simply declined to follow *Weeks* or to adopt a similar exclusionary rule.[50] Typical of this trend, (then) Judge Cardozo explicitly rejected *Weeks*'s reasoning in the 1926 case of *People v. Defore*.[51] The law could not tolerate, Justice Cardozo wrote, a rule that allowed a criminal to go free simply because the constable

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45. *Id.* at 392.

46. This would obviously include all three of the coordinate branches of government. The fight over whether this obligation would be similarly imposed upon actors of state agencies would wait for another day. *See* Mapp v. Ohio, 367 U.S. 643 (1961), discussed *infra* notes 56-62 and accompanying text, and Wolf v. Colorado, 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961)),

47. *Weeks*, 232 U.S. at 398.

48. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

49. *Weeks*, 232 U.S. at 398.

50. Massachusetts (Commonwealth v. Wilkins, 138 N.E. 11 (Mass. 1923); Commonwealth v. Donnelly, 141 N.E. 500 (Mass. 1923)); California (People v. Mayen, 188 Cal. 237 (1922), *overruled in part by* People v. Cahan, 282 P.2d 905 (Cal. 1955), *superseded by statute as stated in* People v. Daan, 207 Cal. Rptr. 228 (Cal. Ct. App. 1984)); Connecticut (State v. Reynolds, 125 A. 636 (Conn. 1924)); Ohio (Rosanski v. State, 140 N.E. 370 (Ohio 1922)); Kansas (State v. Johnson, 226 P. 245 (Kan. 1924)); Iowa (State v. Rowley, 195 N.W. 881 (Iowa 1923)); Virginia (Hall v. Commonwealth, 121 S.E. 154 (Va. 1924)); and South Dakota (City of Sioux Falls v. Walser, 187 N.W. 821 (S.D. 1922)).

51. 150 N.E. 585 (1926).

blundered in the course of his apprehension.[52] The *Defore* court also rejected the federal rule, in part, *precisely on account of* its inconsistent application to state versus federal actors.[53] Because it saw no merit in a rule so schizophrenic, New York sided with the majority of states and explicitly rejected the *Weeks* rule.[54] Most interestingly, the *Defore* court justified its result by noting the availability of other civil *remedies* for the invasion of Fourth Amendment rights which it found satisfactory.[55]

Surprisingly, this condition where state and federal agents were bound by different rules lasted nearly four more decades, until the Supreme Court finally found the Fourth Amendment's exclusionary rule binding on the states in the landmark 1961 case of *Mapp v. Ohio*.[56] *Mapp* involved an obscenity possession conviction which was based on evidence collected by local law enforcement officers' strong-arm tactics and a sham warrant that was, most likely, a blank sheet of paper.[57] The *Mapp* Court's extensive historical analysis led it to undo a troubling decision rendered twelve years earlier in *Wolf v. Colorado*.[58] In *Wolf*, the Supreme Court held that the privacy rights protected by the Fourth Amendment were made applicable to the states by the Fourteenth Amendment, but the exclusionary rule was not implicit in the Due Process concept of "ordered liberty" and therefore did not affect state law enforcement action.[59]

The *Mapp* decision closed the door on this less-than-logical Fourteenth Amendment distinction, a change in perspective so deep that it might only be explained by the addition of six new faces on the bench during those inter-

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52. *Id.* at 587-88. This is consistent with the type of analysis adopted in *Adams*. *See supra* notes 31-40.

53. *Defore*, 150 N.E. at 588.

54. *Id.*

55. *Id.* at 586-87. For an argument that civil remedies should, in fact, supplant the remedy of evidentiary exclusion, see Amar, *supra* note 10. Professor Amar argues more broadly that the modern body of Fourth Amendment decisions results from a misreading of the text itself. *Id.* While there are very real restrictions imposed by this portion of the Bill of Rights, Professor Amar argues that none of them imposes an absolute warrant requirement, makes probable cause an essential ingredient to permissible law enforcement encounters, or applies strictly to criminal investigations and actors. *Id.*

For purposes of this discussion, it is not important to pursue the significance of the Court's reference to civil remedies any further than to emphasize the mentality it reveals: that violation of an individual's Fourth Amendment freedoms represents a legally cognizable injury. From that point of analysis the need for a remedy of some sort, particular to the individual, is brought into focus.

56. 367 U.S. 643 (1961).

57. *Id.* at 644-45. No warrant was ever produced at Mapp's trial. *Id.* at 645.

58. 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

59. *Id.* at 26-27.

vening twelve years.[60] In some of the strongest language justifying exclusion written by that time, the *Mapp* court referred to the admission of unconstitutionally collected evidence as a most "flagrant abuse of [a] basic right," and noted that relegating the Fourth Amendment's guarantees to *remedies* other than exclusion would be a futile undertaking.[61] Not only is the admission of evidence collected contrary to the Fourth Amendment a flagrant abuse of sacred rights, *Mapp* recognized that viewing the exclusionary rule as a remedial element of the Fourth Amendment "makes very good sense."[62] For those manifest reasons, the Court declared that evidence collected contrary to the Fourth Amendment shall not be used against the accused in her criminal prosecution.

Despite such heartwarming language, the days were numbered for this conception of the Fourth Amendment embodied in *Mapp*. Indeed, the same Court may have hastened its demise a year earlier in *Elkins v. United States*.[63] There, the Court stated that one of the purposes of the Fourth Amendment exclusionary rule was "to deter—to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it."[64] Unfortunately, subsequent tribunals took this deterrence language, which may simply be a nod to an attractive function of the remedial exclusion of evidence, and treated it as the sole motivating force behind application of the exclusionary rule. This inordinate focus on deterrence extracted the remedial theory from the evidentiary exclusion inquiry.

There is, however, another way to understand the Court's treatment of the issue in *Elkins*. There is no doubt that the theme of deterrence figures prominently in the Court's opinion. Yet this need not, and should not, lead to the conclusion that deterring institutional actors from engaging in future constitutional violations, as opposed to making whole one who suffers such a violation, is the sole reason for applying the exclusionary rule to a given piece of challenged evidence.

Indeed, there are circumstances under which it is perfectly appropriate for a court to discuss the institutional deterrent value of a remedial exclusionary rule. The question presented in *Elkins* was whether the Fourth Amendment forbade the admission in federal court of evidence unconstitutionally collected by state actors.[65] In deciding to close this preexisting loophole, fre-

60. For a fuller discussion of this shift in personnel, and of the changing faces of the Supreme Court generally, see 2 DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT, 903-1022 (4th ed. 2004).

61. *Mapp*, 367 U.S. at 654-55.

62. *Id.* at 657.

63. 364 U.S. 206 (1960).

64. *Id.* at 217.

65. *Id.* at 208.

quently referred to as the silver platter doctrine,[66] it was necessary for the Court to indicate that, where state actors intentionally seek to circumvent the rulings and authority of the federal judicial system, such strategic behavior must itself be deterred. Where its own authority and ability to effectively supervise the American law enforcement complex is challenged, the Court must penalize such efforts with the most effective sanction—exclusion.[67]

Thus, far from laying the foundation for a "new" theory of exclusion based on deterrence models, *Elkins* suggests that the Court will rely on the remedial exclusionary rule in order to ensure that officers do not seek to do an "end run" around the guidelines the Court must establish. The larger issue at stake in *Elkins*, given that the violation of Elkins' Fourth Amendment rights was essentially conceded by the time the case reached the Court, was not merely one of individual rights vindication, but a more comprehensive challenge to the Court's ability to invoke its supervisory authority.[68] In this case, the conflict was as much between the state's executive authority and the supremacy of the Supreme Court on questions of constitutional compliance as it was about the state overbearing upon the individual defendant.

In this regard, *Elkins* is better understood in the light cast by the Court's more recent decisions on the extent to which *Miranda* rights might be compromised by strategic law enforcement misbehavior. *Missouri v. Seibert*[69] presented the Court with an opportunity to pass on the constitutionality of a police technique known as "question-first" in which officers interrogating a suspect would purposely withhold *Miranda* warnings until incriminating statements or a confession could be elicited.[70] The officers would then recite the warnings required by *Miranda* "midstream" in the interrogation, and proceed to repeat their earlier questioning until the inculpatory statement or confession is likewise repeated.[71] "The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to

66. This practice of using illegally collected evidence gathered by state-empowered actors in federal court was first dubbed the "silver platter doctrine" in *Lustig v. United States*, 338 U.S. 74, 78-79 (1949).

67. *Elkins*, 364 U.S. at 221 ("[E]ven more is to be said for adoption of the exclusionary rule in the particular context here presented—a context which brings into focus considerations of federalism. The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.").

68. *Id.* at 216 ("What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has 'from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.'") (quoting McNabb v. United States, 318 U.S. 332, 341 (1943)).

69. 124 S. Ct. 2601 (2004).

70. *Id.* at 2606.

71. *Id.*

give them, after the suspect has already confessed."[72] Although the extent to which this technique was employed throughout the country was not readily discernable,[73] the Court in *Seibert* noted that practitioners of this technique employed it precisely because it was devastatingly effective in achieving "its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset."[74]

The *Seibert* Court recognized the question-first "protocol"[75] to be precisely what it is: "a police strategy adapted to undermine the *Miranda* warnings."[76] The intentional omission of *Miranda* warnings was found to be a deliberate effort "designed to circumvent" the constitutional protection that case provides,[77] an "end-run" around the Fifth Amendment's privilege against self-incrimination. Quite rightly, the *Seibert* Court refused to allow "[s]trategists dedicated to draining the substance out of *Miranda* [to] accomplish by training instructions what *Dickerson*[78] held Congress could not do by statute."[79] It ordered suppression of both the pre-warning and post-warning statements in order to ensure that the judicial system's ability to enforce the constitutional commands of *Miranda* was not frustrated.

Although the Court did not confront precisely the same technique in *Elkins* as it did with the question-first protocol in *Seibert*, the silver platter doctrine embodied no less a deliberate effort to thwart the effectiveness *and* symbolic significance of the Fourth Amendment. Under these circumstances

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72. *Id.* at 2610. The interrogating officer "testified that he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Id.* at 2606.

73. That said, the Court also had no doubt that the question-first practice "is not confined to Rolla, Missouri" (the jurisdiction which investigated and prosecuted Respondent Patrice Seibert), and provided a litany of law enforcement training materials that expressly taught and encouraged use of the question-first technique and other behaviors that ignore *Miranda*'s dictates. *Id.* at 2608-09. That these sorts of systematic protocols, designed to undermine the purpose of *Miranda* and defeat the efficacy of its rule, were being integrated into departmental policy seemed to give the Court particular cause for concern. *See id.* at 2608-09 & n.3.

74. *Id.* at 2610-11.

75. *Id.* at 2605.

76. *Id.* at 2612.

77. *See id.* at 2614 (Kennedy, J., concurring) (noting that the question-first protocol both "undermines the *Miranda* warning and obscures its meaning").

78. *See* Dickerson v. United States, 530 U.S. 428 (2000). *Dickerson* represents the Court's latest, and likely final, word on whether the *Miranda* rule is of constitutional character, or is merely a judicially crafted safeguard ancillary to the Fifth Amendment. The Court reached the former conclusion in a case that required it to pass on the validity of 18 U.S.C. § 3501, by which Congress attempted to restore the pre-*Miranda* "totality of the circumstances test" as the basis for testing the admissibility of confessions in federal court. *Id.* at 436-37.

79. *Seibert*, 124 S. Ct. at 2613 (footnote not in original).

some attention to deterrence makes sense: what these recent discussions show is that courts will, and should, suppress evidence collected by methods that are *designed* to short-circuit the practical benefit of the constitutional protections afforded to the accused.[80] The *Seibert* Court indicated, as did its predecessor tribunal in *Elkins*, that faithful and not merely nominal compliance with the Court's constitutional pronouncements will be demanded *per force* of the exclusionary rule. The fact that such exclusion vindicates the individual's constitutional rights is the underlying, true purpose of this rule which can, at times, simultaneously ensure that the Court's supervisory authority is respected.

But this wisdom was lost on the Court that heard *Franks v. Delaware*.[81] There, the Court had to decide whether a defendant could *ever* peer behind the face of a judicially-approved search warrant and scrutinize the contents of the supporting law enforcement affidavits for material misstatements and untruths. Apparently swayed (and confused) by the language of deterrence used in earlier decisions, the *Franks* Court held that a defendant has the right to challenge the veracity and sufficiency of a search warrant affidavit, and thus potentially present a claim of invalidity that would lead to exclusion, *only* if she can make a substantial preliminary showing that a false statement or inaccurate information was purposefully, knowingly, or recklessly used in support of the search warrant request; a claim of unwitting or unintentional inclusion of false information would not suffice.[82] The *Franks* Court was clearly applying a solely deterrence-based exclusionary rule by singling out deliberate and reckless falsification.[83] Given that unintentional abuses of the

80. It is of course true that, with respect to the exclusionary rule, "'unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment'" and that, "unlike the Fourth Amendment exclusionary rule, the '*Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.'" *Id.* at 2616-17 (O'Connor, J., dissenting) (quoting, in order, *Dickerson*, 530 U.S. at 441 and Oregon v. Elstad, 470 U.S. 298, 306 (1985)) (alteration in original). These realities do not, however, indicate that a deliberate end-run around a Fourth Amendment standard is any less reprehensible—indeed, given the types of behavior tolerated in the *Miranda* arena, *see, e.g.*, *Elstad*, 470 U.S. at 309 (permitting unwarned incriminating statements to be used against the accused where the failure to warn was unintentional, "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will"); United States v. Patane, 124 S. Ct. 2620 (2004) (refusing to suppress physical evidence discovered as a result of an unwarned, and therefore inadmissible, confession obtained outside the presence of counsel), it may be fair to say that deliberate strategies designed to circumvent the Fourth Amendment's protections are even more compelling bases for judicial rebuke through the exclusion of evidence.

81. 438 U.S. 154 (1978).

82. *Id.* at 171.

83. *Id.* at 169 (observing that allowing impeachment of the search warrant affidavit, under the proper circumstances, is necessary because the magistrate's initial review "not always will suffice to discourage lawless or reckless misconduct").

search warrant process cannot, by definition, be deterred, the *Franks* Court completed the shift from remedy to deterrence without realizing how far out of step it was with the primary purpose of the rule at its inception. It was this decision that took the concept of deterrence out of the appropriate, but limited, context suggested by *Elkins*, and which got our precious exclusionary rule so off track.

Thus, by 1978 (when the Court decided *Franks*) there was no longer any hint of a true remedial spirit in the Court's opinion, but this is only a reflection of the *Franks* Court's out-of-context reliance on the language of deterrence without importing any of the *Elkins* decision's imbedded wisdom. *Elkins* may fairly be read as suggesting that the deterrence of constitutional violations is not the end of the exclusionary rule. Instead it is the means by which the exclusionary rule prospectively serves the ultimate end of protecting and preserving individual liberty. The *Franks* Court relied on this deterrence-only conception of exclusion as a basis for the outcome of a case that would have been more properly focused on the judiciary's constitutional obligation to restore the balance between the state and the accused.

D. Exceptions Gone Wild

This distorted emphasis on deterrence gave birth to an odd facet of Fourth Amendment law illustrated by the Supreme Court's decision in *United States v. Leon*.[84] In ruling on a challenge to Leon's conviction on narcotics trafficking charges, Justice White crafted a "good faith" exception to the application of the exclusionary rule which allows the use of unlawfully collected evidence in cases where officers act in reasonable reliance on a judicial search warrant subsequently determined to be invalid.[85] *Leon* involved a litany of evidence, including extensive surveillance and detailed confidential informant testimony, which was collected by a seasoned officer over a substantial period.[86] That officer prepared a lengthy affidavit and search warrant application, and even took the time to have his application reviewed by several members of the district attorney's office before presenting it to a California Superior Court judge.[87] The superior court in turn approved a search warrant for several residences and automobiles that were linked to Leon, leading to a seizure of contraband narcotics.[88] Under these circumstances, there was no doubt about the good faith of the officers who investigated this case, both prior to and including the execution of the search warrant.

Nevertheless, the California district court concluded prior to Leon's trial that the search warrant affidavit suffered from fatal defects and was insuffi-

84. 468 U.S. 897 (1984).
85. *Id.*
86. *Id.* at 901-02.
87. *Id.* at 902.
88. *Id.*

cient to authorize the search that ensued.[89] Specifically, the trial court concluded that the application was inadequate to establish the reliability of tips given by confidential informants and relied on other outdated information, thus failing to make the required showing of probable cause.[90] This of course invalidated the only legitimate basis for the intrusion upon Leon's Fourth Amendment freedoms and required the suppression of much of the evidence offered against him.[91] The California Court of Appeals affirmed.[92]

On certiorari from the California Court of Appeals, the Supreme Court "modified somewhat" the exclusionary rule in order to allow the admission of the evidence.[93] There was no debate on two key questions in the minds of the majority. First, the Court left undisturbed the lower courts' rulings that the search warrant had been improperly issued.[94] Second, the Court found unimpeachable the good faith of the officers involved.[95] In the face of these conflicting features of the case, the Court proceeded upon an "evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate."[96] The Court ultimately concluded that such evidence may be admitted in the prosecution's case in chief.[97]

It did not matter that Leon's Fourth Amendment rights had, in fact, been violated—what was most important was that the Court could "discern no basis . . . for believing that exclusion of evidence seized pursuant to a warrant [would] have a significant deterrent effect on the issuing judge or magistrate."[98] Even though it had never before allowed a good faith exception in the application of Fourth Amendment requirements, the *Leon* Court used the rationale of law enforcement deterrence (and its conception of the inherent limitations of the exclusionary rule's deterrent effect) as a means for narrowing the scope of this constitutional corollary. Thus, instead of being a necessary consequence of the Fourth Amendment's right to privacy, the exclusionary rule was understood in 1984 to be applied 1) on a case-by-case basis, and 2) only in those *unusual circumstances* where exclusion would 3) deter future police misconduct.[99] In this way, and as the *Leon* Court was explicitly aware,

89. *Id.* at 903-04.

90. *Id.* at 904 n.2.

91. For reasons not germane to this discussion, the Court declined to suppress *all* of the unlawfully collected evidence as to *any* one of the multiple defendants, in short for reasons of standing. *See id.* at 903.

92. *Id.* at 904.

93. *Id.* at 905.

94. *Id.*

95. *Id.* at 926.

96. *Id.* at 913.

97. *Id.*

98. *Id.* at 916.

99. *Id.* at 918.

the Fourth Amendment's exclusionary rule was no longer being treated as "'a personal constitutional right of the party aggrieved.'"[100]

More broadly, the deterrence-oriented theory of exclusion became a tool for carving out still more exceptions to the rule. As the *Leon* decision demonstrates, courts could now avoid losing challenged evidence simply by deciding that suppression would not have a direct deterrent effect on the category of actor who erred. In Leon's case, the constitutional error undisputedly belonged to the magistrate judge who approved the challenged search warrant even though probable cause had not been adequately demonstrated in the warrant application. Because the Court determined suppression would not affect the conduct of magistrate judges in similar circumstances, Mr. Leon was out of luck.[101] Moreover, we are told in *Leon* that the Fourth Amendment's exclusionary rule was meant to "punish" the bad cop, not the bad judge.[102] Yet there is no basis in the case law for transforming the Fourth Amendment's guarantees of privacy, security, and freedom from official interference, into whips specially designed to punish the police. To the extent that this purely punitive conception of the exclusionary rule (as opposed to one based on the rule's instrumental value in securing personal freedoms) flows from *Franks*'s misuse of *Elkins*'s language, it is essential to ask whether it is still credible to conceive of this constitutional provision in this fashion.

Not surprisingly, the *Leon* Court offered no empirical evidence demonstrating that magistrate judges, as a class, are unconcerned with the outcome of the cases in which they are involved, or that they lack any personal investment in the probable cause and search warrant application decisions they make. Indeed, the opposite conclusion could easily have been reached if the Court had assumed the best, rather than the worst, characteristics of magistrate judges to be their model of analysis. What does it say about a system

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100. *Id.* at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). This is an unfortunately odd way to characterize an express provision of the Bill of Rights, that portion of the founding Constitution specifically designed to safeguard fundamental rights in the new nation.

The *Leon* Court also seized on the notion expressed in *Calandra* that "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *Id.* (quoting *Calandra*, 415 U.S. at 354). The important dynamic to observe here is how the Court uses the limited efficacy of the exclusionary rule as further argument against its application—a tactic which harkens all the way back to the way Justice Cardozo's own disdain for the exclusionary rule influenced his opinions on the matter. *See Leon*, 468 U.S. at 906 (claiming that "the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered'" as a reason to enforce the rule not by reference to the injury suffered by the accused, but rather by reference to its generalized deterrent effect) (quoting Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

101. *Leon*, 468 U.S. at 916-17.

102. *Id.* at 916 (stating that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates").

purportedly committed to fairness and accuracy if the very people who are entrusted to make these crucial determinations are construed to be so incautious and divested from the process that they don't care if they make a mistake?[103]

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103. While perfectly anecdotal, the author's personal experience with the Federal District Court and its complement of able magistrate judges flies in the face of the *Leon* Court's unseemly suggestion. Nor can the Court's denigration of magistrate judge integrity be rationally limited to those actors. Why not level the same criticism at all Article III judges, who are appointed to lifetime terms and who are unaccountable to the political process? Of course, the answer presents itself as soon as the question is formulated: no system of justice could effectively operate if its personnel have no desire, instinct, or incentive towards honesty and truth.

Moreover, at the time the PATRIOT Act was adopted, magistrate judges and other judicial officers did not operate without scrutiny, as evidenced by increasingly aggressive oversight measures such as the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. While the PROTECT Act was primarily responsive to the sexual and other criminal abuse of minors, it carried with it a provision known as the Feeney Amendment which aggressively restricted the discretion of sentencing courts to depart downward from the Federal Sentencing Guidelines, and expressly reserved for those downward departure decisions the lowest level of deference upon appellate review. *Id.* § 401, 117 Stat. at 667 (codified at 18 U.S.C. § 3553 (Supp. 2002) (held unconstitutional by United States v. Booker, 125 S. Ct. 738 (2005)). Perhaps most importantly, the Act as amended empowered the Department of Justice to scrutinize the records of federal judges, particularly of those it suspected of being too lenient, and required the Department to provide a yearly report to Congress on the extent to which the Federal Judiciary was obeying this mandate. *Id.* § 401(*l*), 117 Stat. at 674.

The author of the Feeney amendment defended his bill as "a number of provisions designed to ensure a more faithful adherence to the laws of the United States" by putting "strict limits on [downward] departures for child crimes and sex offenders," claiming that "[t]his is important because it limits the judge's discretion, forces the judge to explain what he has done, and provides for an opportunity for the prosecutors to appeal if the judge has been completely unfaithful." 149 CONG. REC. H3059, H3061 (daily ed. Apr. 10, 2003) (statement of Representative Feeney). More saliently, the Act "provide[d] for the Department of Justice to have access to [an] existing judge-identifying database maintained by the [Sentencing] Commission," so that rogue judges could be brought back in with Congressional and Executive preferences. *Id.* (describing this increase in Congressional middle-management of the Judiciary as "a great victory").

According to House Judiciary Committee Chairman F. James Sensenbrenner, Jr., the "Feeney Amendment represent[ed] a legislative response to long-standing Congressional concern that the Sentencing Guidelines were increasingly being circumvented by some federal judges." 150 CONG. REC. E425, E426 (daily ed. Mar. 23, 2004) (statement by Representative Sensenbrenner to the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary, expressing perplexity "as to why such furor has been raised over obtaining records from a judge's publicly decided cases," suggesting that this is "both Constitutionally authorized and otherwise appropriate"). To complicate matters, the Chairman thought "it is important

From *Leon*'s "magistrate judge exception," in which judicial officers are deemed to be uninfluenced by the deterrent value of evidentiary suppression, it was a short step to the good faith exception created in 1995 for civilian employees of criminal justice systems. Thus, in *Arizona v. Evans*,[104] the Supreme Court refused to suppress narcotics seized incident to an arrest even though the arrest was based on a warrant that had been quashed days earlier. Although the state conceded that the arrest was unlawful because the warrant had been quashed,[105] the *Evans* Court nevertheless ruled the evidence admissible. Because the clerical employees who allowed the invalid warrant to persist were neither adjunct to, nor cohorts in, the law enforcement enterprise, the suppression of evidence based on their mistakes would not likely deter future improper or careless conduct.[106]

Relying on the developing principle that application of the exclusionary rule is separate from the question of whether a Fourth Amendment violation has occurred, the *Evans* Court had come to view the exclusionary rule as "a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect."[107] Thus, although the court will still refer to exclusion as a *remedy*, it is a remedy divorced from its constitutional underpinnings and which is only appropriate if justified by its deterrent side effect. And, although *Evans* remains a perfectly good statement of the law, it nonetheless represents an endpoint in the unnatural evolution of the exclusionary rule out of its Fourth Amendment roots and into a modern, toothless "form of words" whose protections will be "of no value [to the accused] and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[108]

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to note that Congressional oversight has assumed increased importance because of the delegated authority currently possessed by the Judiciary to investigate and impose appropriate discipline upon its members and its decidedly mixed record in this regard." *Id.* (expressing "profound questions with respect to whether the Judiciary should continue to enjoy delegated authority to investigate and discipline itself," and promising that "[i]f the Judiciary will not act, Congress will . . . begin assessing whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue").

If the Department of Justice is actively collecting the name, rank, and serial number of those judges who are rendering decisions out of step with the Department's wishes, is it not untenable to suggest that judges will be insensitive to reversals of their judgment? Again, off-the-record conversations with sitting judges reveal quite the opposite to be true.

104. 514 U.S. 1 (1995).

105. *Id.* at 6 n.1.

106. *Id.* at 15.

107. *Id.* at 10.

108. Weeks v. United States, 232 U.S. 383, 393 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

E. Remedy v. Deterrence: A Study in Contrasts

The differences between a remedial theory of exclusion and a deterrence theory of exclusion could not be more striking. A remedial theory of exclusion, not surprisingly, is driven by the command that the accused shall not suffer from the violation of her Fourth Amendment rights, and seeks to restore the accused to her *status quo ex ante* the illegal intrusion. Because this iteration of the rule is inherently retrospective, and because the "bell" of the unlawful intrusion itself cannot be "unrung," the only way to cure the harm occasioned by the unlawful official intrusion is to restore the accused to a position equal to that which she would have enjoyed but for the intrusion.

The deterrence-driven concept of exclusion is short-hand for the now well-established notion that the Fourth Amendment's exclusionary rule should be applied with an aim to deter similar constitutional transgressions by law enforcement actors in the future. Basically, a deterrence-driven exclusionary rule is the constitutional equivalent of making an example out of one bad apple or, more likely, out of an overzealous but otherwise good apple. But the deterrence theory is purely prospective, focused on the effect an evidentiary ruling will have on law enforcement at large, and unconcerned about the effect of the violation on the individual suffering the deprivation.[109]

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109. Many have since criticized the Court's reliance on deterrence as a justification for exclusion, primarily on the basis that it is unclear whether the rule carries such an effect. *See, e.g.*, United States v. Janis, 428 U.S. 433, 449-50 (1976) (stating that "although scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed"); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 415-16 (1971) (Burger, C.J., dissenting); William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with Law*, 24 U. MICH. J.L. REFORM 311, 359 (1991) (stating that "[i]t is arguable . . . that even without exclusion the same percentage of officers might have indicated that they would have refrained from carrying out intrusions they believed to be illegal"); and Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (concluding that the exclusionary rule has no deterrent effect). Critics also note that it is not the proper role of the courts to be regulators of day-to-day police conduct. *See, e.g.*, David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 463 (1999); Jerome H. Skolnick, *Deception by Police*, 1 CRIM. JUST. ETHICS 40, 43 (1982) (saying the officer "lies because he is skeptical of a system that suppresses truth in the interest of the criminal"). *But see* Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017 (1987).

While these criticisms are certainly valid, at least in part, they would apply with equal force but less significance to the remedial model of exclusion. One of the strengths of applying the exclusionary rule with an eye towards curing a harm of constitutional dimension is that it has an equal (if not greater) capacity to deter that conduct to which all society should object. The additional strength of the remedial theory in this regard is that the deterrent influence is a secondary goal, a side effect of

This is the paradigm shift that occurred in Fourth Amendment law: a shift from a rule of exclusion that is concerned about preserving the sanctity of constitutionally enshrined individual rights, to a system of rights enforcement that is primarily conditioned upon the positive teaching effect which the exclusion of unlawfully collected evidence may have on future law enforcement actors.[110] Indeed, the migration of values illuminated by the cases discussed herein represents a distortion of the ideals and spirit that originally animated the adoption of the Fourth Amendment. In the first instance, American courts, which were (and arguably still are) the traditional protectors of a powerless public against an overreaching government, now decide whether evidence bearing the taint of constitutional transgression may be used against a member of that public solely by asking whether exclusion would prevent future transgressions by agents of the law. Compound that with the fact that an accused may not even challenge the sufficiency of the magistrate's decision to approve the warrant that leads to her arrest, and you have fertile soil from which we can only reap violations of Fourth Amendment privacy and liberty interests.

i. The Right to a Remedy

The remedial theory of exclusion provides the only complete remedy for a constitutional violation. One way to understand the Constitution is as a blueprint for the size and shape of structural relationships. The main body of the Constitution structures relationships between branches of government, and between state and federal authorities. The Bill of Rights, no less, struc-

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the primary purpose to restore a constitutionally-imposed balance in the relationship between person and state. The remedial model of evidentiary exclusion thus offers all of the benefits a deterrence-driven model should offer, and retains all of its logical force even in the face of well reasoned criticism of the deterrent approach.

110. This shift parallels, and was pivotal to, a larger paradigm shift from a conception of civil liberties as the essential guarantees of a free government and as placing fundamental limits on law enforcement activities to a conception of those same civil liberties and of a free public as fundamental obstacles to the eventual development of a law enforcement-centered government complex. In future Articles, I will attempt to develop a framework for understanding this and earlier paradigm shifts in criminal law, focusing at least initially on tracing the contours of relationship between the nominal end of the Civil Rights Era, the rise in the American prison population, and the ongoing "war on drugs." Any effort in this regard would likely begin by exploring the ways in which criminal laws during Reconstruction, and continuing through the Jim Crow era of the American South, were used to manage an increasingly bold population of blacks and African Americans. This Article is not meant to suggest that the transformation of the exclusionary rule treated in the instant discussion is purely a product of race politics in this same way, or to deny that possibility. What I mean to suggest is future work designed to explore the ways in which watershed, paradigmatic shifts in criminal law (and procedure) both respond to, and seek to direct, fundamental changes in American society.

tures the relationship between the individual or private communities and the government as a whole, and any response to a violation of constitutional dimension must restore the balance in that structure.

Civil remedies are wholly inadequate to compensate the individual whose Fourth Amendment rights are compromised. Damages incurred during the collection of evidence, especially if the law enforcement agents are careful or the investigative activity involves no physical damage, will be at best nominal in the majority of cases. This leaves the individual with only token relief, *and* fails to discourage similar law enforcement behavior in the future. Moreover, civil damage suits are an expensive proposition unlikely undertaken by the average criminal defendant, who is already facing the prospects of civil and criminal sanctions, and unlikely to provide relief to those who need it most.[111]

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111. There is one alternative civil sanction that has not received the same kind of attention as have monetary damage actions, but which promises to achieve much of what those monetary damage actions may not, at least by way of individual law enforcement actor's compliance with constitutional regulations. Professor Roger Goldman has expressed strong support for the decertification, or "delicensing," of law enforcement officers found to have violated the Constitution in the course of their official duties. *See* Roger L. Goldman, *State Revocation of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121 (2003). The proposal ensures that the officer receives due process in the course of the revocation, including the right to a hearing and the assistance of counsel, and proceeds before an administrative law judge. *Id.* The advantages of this proposal are clear: it avoids the cost of a full-blown civil trial, and does not rely on the ability of the defendant to bring the action; it provides an official sanction that correlates, intuitively and logically, with the nature of the offending official conduct; it provides a uniform remedy that will operate with equal effectiveness for state and federal actors; and it ensures that law enforcement officers shown to lack sufficient professionalism upon being duly convicted of a constitutional violation cannot practice in the field in another jurisdiction—it weeds out members of the force who are essentially a liability to both the government and public. *See also* Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45 (1987); Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541 (2001).

This decertification proposal indeed carries many benefits, and in some senses may be a viable alternative or supplement to the exclusion of evidence in a criminal case. The primary limitation of decertification as compared to exclusion is that it leaves the individual whose rights were compromised out of the equation. To the extent that this further deemphasizes the personal nature of the injury, it does not respond to (and may not be designed to respond to) the type of concerns raised in this Article regarding the purpose of Fourth Amendment regulation by exclusion. And, while decertification does not entail a separate civil trial, it does require a completely separate judicial proceeding where matters of fact and law may have to be relitigated even after resolution at the criminal trial. Exclusionary sanctions (and a remedial exclusionary sanction, specifically) continue to be available for imposition by trial

Advocates for civil damage alternatives to remedial exclusion also overlook the fact that the collection of evidence in an unlawful manner is not the full extent of the constitutional injury. Instead, the accumulating constitutional injury continues through the use of unlawfully collected evidence at trial because it creates an uneven "playing field," and distorts the structures prescribed by the Bill of Rights by giving the government an advantage over the individual that the rules of the game say it shall not have. Every Fourth Amendment violation that is not rectified by the suppression of evidence forces defendants to pay for law enforcement convenience at the price of their liberty, and tilts the field in favor of the government in a way that ignores the terms of the very charter that spawned it. The difficulty is that the creation of a level playing field, or perhaps the definition of what constitutes a balance of power between the government and the individual, is the only authentic way to understand the operation of the Constitution and its Bill of Rights.

In this sense, the confusion engendered by the migration from remedy to deterrence obscures the fact that only make-whole relief can compensate an individual for a violation of her constitutional rights, and that exclusion of evidence is the only form of make-whole relief that exists. It is well established that the first eight provisions of the Bill of Rights[112] represent fundamental laws so integral to the American concept of personal freedom as to be part of the Fourteenth Amendment's definition of liberty expressed in the Due Process Clause. Given the essential nature of these rights, fidelity to the meaning of the Constitution requires that the right be coupled with a remedy for the individual whose dignity and personal freedom are disregarded by state-empowered law enforcement officers.

ii. The Hidden Costs of Deterrence Modeling

Shadowing the paradigmatic transformation of our criminal procedure systems that elevated the deterrence theory of exclusion is a more far-reaching alteration in the fabric of our constitutional democracy and the meaning of "fundamental" rights. The primary focus of our criminal procedure jurisprudence used to be centered on preventing "bad" actors from doing "bad" things in violation of the Constitution. This attitude is epitomized by

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judges, those best situated to recognize the transgressive nature of complicated law enforcement activities in the process of trying the action. Simultaneously, the decertification process should continue to be available to state and federal Police Officer Standards and Training commissions, as those organizations are best situated to impose license-based disciplinary sanctions and removals of personnel in order to maintain the integrity and discipline of the law enforcement industry. It may be, by combining these two approaches, the criminal justice system could best achieve a *balance*, rather than *compromise*, of remedial and deterrent values that may be equally served by the Fourth Amendment.

112. With few exceptions, such as the right to grand jury indictment and minimum jury size, not relevant to the current discussion.

the decision in *Mapp*, which not only highlighted the indefensible rough handling that Ms. Mapp received at the hands of the police but also alluded to the officers' juvenile attempt to use a sham warrant to violate the protections of Ms. Mapp's home. *Mapp* also condemned as incompatible with notions of freedom and justice the top-to-bottom sacking that occurred. Neither the officers' demeanor under the circumstances nor their investigative conduct could be tolerated by a Court unwilling to allow overzealous officers to violate her Fourth Amendment rights. The Court indicted both the officers' personal/official value sets and their conduct.

However, with the advent of exceptions to the exclusionary rule, in particular the role of good faith in cases where the loss of evidence is deemed to be of no concern to agents of the system, the Court has dispensed with the conception that those who violate the Constitution are necessarily bad actors. This variation on the theme is best captured by the Court's language in *Leon*, where Justice White states that the question "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'"[113] "Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred [by the exclusion of evidence] on such guilty defendants offends basic concepts of the criminal justice system."[114] Thus, with the Court's focus on deterrence, we are told to accept, at least in some instances, that a deprivation of our civil rights is a good and acceptable practice.

This reduces formerly fundamental constitutional rights to something less than fundamental. No longer are those who violate the supreme law of the land considered to be outside the ambit of appropriate social standards, and their illegal behavior is routinely recharacterized as a technical transgression. This infects aspects of the Fourth Amendment far beyond questions of exclusion, as will be shown, and fosters a willingness to eliminate core Fourth Amendment requirements of probable cause and warrants approved by a neutral and detached magistrate.

f. Interbranch Locution: The Court Speaks, Congress Listens, and America Changes

The process of fixing the boundaries of fundamental law, of divining constitutional values and direction, has always entailed a sort of conversation between the branches of government. This interbranch locution clearly has some aspects of exchange between coequal partners, but there is nevertheless a dominant voice when it comes to questions of constitutional meaning. The

113. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting Illinois v. Gates, 426 U.S. 213 (1983)).

114. *Id.* at 907-08.

Court instructs and guides its counterpart institutions in their efforts to discharge their own governmental functions. The Court's jurisprudence thus articulates a narrative that identifies limitations on and trajectories for executive and legislative conduct. By rejecting or sustaining challenges to any sort of governmental conduct, but particularly with reference to search and seizure activity regulated by the Fourth Amendment, the Court informs the legal community, if not the general public, as to the contours of liberty.

So the limits of both legislative and executive policy designs of all varieties are inherently a reflection, at least in part, of this dynamic. The Court's constitutional decisions determine the rules of engagement by which these branches must abide and define the range of strategic approaches they may permissibly employ. By telling a tale in which the vindication of an individual's fundamental liberty interest, the right to be let alone and free of unreasonable government intrusion, can be made contingent upon the deterrent value—a mere side effect—of its remedy, the Court altered the inalienable status of the right itself and set the stage for incursions by other governmental branches. The Court told a parable that changed the significance of constitutional violations so that these violations become permissible with the right excuse.

The Court's parable allowed bold and creative members of the Department of Justice to imagine the USA PATRIOT Act. Without the Court's narrative transformation of the exclusionary rule from remedial measure to deterrent device, the justifications offered in the Act for ignoring constitutional limitations would have been cognitively untenable. The Act was not a necessary response to September 11th but rather a crystallization of a long history of judicial storytelling, of interbranch locution, which was merely precipitated by that catastrophic event.

What is equally troubling about the Act is its myriad provisions that simply do away with clear limitations on law enforcement conduct previously imposed under even the most generous (generous, that is, to law enforcement's desire for flexibility and freedom from accountability) formulation of Fourth Amendment doctrine. While many scholars have detailed the ways in which the USA PATRIOT Act does or does not fit within our existing constitutional framework, here's the real news: it was the shift from norms of remedy to norms of deterrence in the suppression of evidence—as much if not more than the September 11th attacks—that precipitated this aggressive move away from core constitutional norms and values.

While the events of September 11th and the fears they generated were certainly a catalyst for the Act, it is important to realize that the Act could not have been pushed through Congress had the Court not first forgotten *why* we exclude evidence in the first place. Thus, the rationale for the exclusionary rule played an equally important part in producing the Act because it provided a value framework whereby such expansive executive powers could appear more palatable.

Of course, I realize that I have gone beyond just my microthesis that our jurisprudence on exclusion has lost sight of the only legitimate understanding

of Fourth Amendment strictures. I am instead considering determinations of probable cause and the issuance of warrants under federal statutory rather than Fourth Amendment guidelines. But these seemingly mundane matters are central to my macrothesis that the *narrative* articulated by the Court—shifting from the bad actor/bad act model to the good faith actor/permissible act model—has driven our legal system's concept of what constitutes acceptable police behavior. It is this narrative reformation that led to an Act that is facially inconsistent with the language and interpretation of the Fourth Amendment. This observation leads one to question whether the September 11th terrorist attacks were used by an opportunistic legislature bent on repealing the freedoms guaranteed by the Founders. A brief review of several particularly troubling aspects of the USA PATRIOT Act, admittedly limited to those derived under a Fourth Amendment rubric, are prefatory to exploring the relationship between the old constitutional limits on, and such new statutory grants of, government power.

II. THE USA PATRIOT ACT: OLD LIMITS AND NEW VISIONS OF POLICE POWER

A. Setting the Stage for Change

Immediately after the horrendous loss of life suffered on September 11, 2001, the federal government undertook a broad effort to expand the scope of its law enforcement authority over inhabitants of this nation, and arguably of any nation, who might find themselves implicated within the murky ambit of the country's "national security interests."[115] Just one week after the attacks in New York, Washington, D.C., and Pennsylvania, Congress encouraged the President to protect against "acts of international terrorism against the United States" by using "all necessary and appropriate force against those nations, organizations, or persons [that] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[116] That same day the President gladly accepted this responsibility.[117]

115. The Supreme Court recognized the "inherent vagueness of the domestic security concept" as part of the basis for rejecting President Nixon's bid to expand the executive power to conduct warrantless wiretaps in pursuit of national security interests. United States v. U.S. Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 320 (1972).

116. S.J. Res. 23, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

117. *See* Press Release, White House, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html. In signing Senate Joint Resolution 23, the President declared that "[t]hose who plan, authorize, commit, or aid terrorist attacks against the United States and its interests—including those who harbor terrorists—threaten the

In the weeks that followed the attacks, President Bush's first order of business was to turn the tables on Congress, as he and the Department of Justice demanded that they pass legislation that would "provide law enforcement with the tools necessary to identify, dismantle, disrupt and punish terrorist organizations before they strike again."[118] Not only did the President and Attorney General demand new law enforcement tools to cope with what they described as a new and unprecedented threat against the United States, they demanded action by a fantastically short, and clearly inadequate, deadline.[119] With insufficient time to read,[120] much less properly analyze,[121] the Department of Justice's hastily drafted piece of legislation, Congress nonetheless passed the 342 page Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act[122] on October 25, 2001—a mere six weeks after the attacks.

Even before the attacks, there had been a movement afoot among a faction of federal lawmakers and officials seeking to repeal some, if not many, of the modest Fourth Amendment gains that had been made during the 1960s

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national security of the United States," and that "Senate Joint Resolution 23 recognizes the seriousness of the terrorist threat to our Nation and the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States." *Id.*

118. *See Hearing on Administration's Draft Anti-Terrorism Act of 2001 Before the House Comm. on the Judiciary*, 107th Cong. (2001) (statement made during testimony of United States Attorney General John Ashcroft) [hereinafter *Anti-Terrorism Hearing*].

119. *See, e.g.*, 147 CONG. REC. S10,989, S11,020 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold) (discussing Attorney General Ashcroft's directive that his new legislation be "enact[ed] by the end of the week" even though "[t]hat was plainly impossible").

120. The ungainly speed with which the Act moved through Congress was largely a response to the administration's cajoling. *See Anti-Terrorism Hearing*, *supra* note 118 (informing Congress that "American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts"). *See also Homeland Defense: Hearing Before the Senate Judiciary Committee*, 107th Cong. (2001) (statement of Attorney General John Ashcroft) ("Until Congress [passes] these changes, we are fighting an unnecessarily uphill battle [by] sending our troops into the modern field of battle with antique weapons.").

121. The Act was passed with severely limited exposure to hearings or public debate, was not referred to a Congressional conference or committee for evaluation, and was presented without a conference or committee report to guide the votes of lawmakers. NANCY CHANG, CTR. FOR CONSTITUTIONAL RIGHTS, THE USA PATRIOT ACT: WHAT'S SO PATRIOTIC ABOUT TRAMPLING ON THE BILL OF RIGHTS? (Nov. 2001), *available at* http://www.ccr-ny.org/v2/reports/docs/USA_PATRIOT_ACT.pdf. Nevertheless, the Act passed by overwhelming margins in both the House of Representatives (by a margin of 357 to 66) and the Senate (by a margin of 98 to one). 147 CONG. REC. H7224 (daily ed. Oct. 24, 2001); 147 CONG. REC. D1053 (daily ed. Oct. 25, 2001).

122. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

and 70s. However, institutional resistance thwarted most early attempts to redefine American criminal procedure,[123] even while the vision of an increasingly militarized police force was steadily being realized.[124] As suggested by members of the current administration's cabinet, America was not ready for a change in the balance of civil liberties, akin to those that occurred after the United States' entry into World War II, because this generation of Americans had not yet experienced a "catastrophic and catalyzing event—like a new Pearl Harbor,"[125] and were thus unprepared to give up their constitutional freedoms.

But the national political climate changed drastically after September 11th and Congress could no longer resist the internal pressure to grant law enforcement agencies additional powers and control over the conduct of persons within our borders.[126] The September 11th attacks struck at the heart of this country's sense of security and, like Pearl Harbor, gave the government

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123. *See, e.g.*, Dickerson v. United States, 530 U.S. 428 (2000); United States v. U.S. Dist. Court for the E. Dist. Of Mich., 407 U.S. 297, 320 (1972) (rejecting attempt to expand foreign surveillance powers and exercise those powers against targets of domestic criminal suspicion). *But see, e.g.*, Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801-11 (2000)) ("FISA").

124. An effort to better equip, and more heavily arm, local and federal law enforcement agencies was a parallel initiative that was designed to alter the balance of power between law enforcement actors and members of the populace. For a helpful survey of the history, and a thoughtful critique, of the paramilitary police model, ultimately suggesting it is incompatible with civilian law enforcement's central peacekeeping role, see Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383 (2003).

125. THOMAS DONNELLY, PROJECT FOR THE NEW AM. CENTURY, REBUILDING AMERICA'S DEFENSES: STRATEGY, FORCES AND RESOURCES FOR A NEW CENTURY 51 (Sept. 2000). Almost exactly twelve months later, enemies used a coordinated airborne attack to strike unsuspecting and largely defenseless targets on American soil. It seems as though our Pearl Harbor has conveniently occurred. *See also* Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571 (2002) (comparing the two attacks on the United States, both in terms of the severity of the violence, as well as the severity of the government's responsive curtailing of constitutional freedoms).

126. Problems posed by the drastic augmentation in the government's power to conduct foreign operations as authorized by the Senate Joint Resolution, and the administration's willingness to act unilaterally in the face of a clear international consensus refusing support, clear as they may be, are beyond the scope of this Article.

For an interesting approach to the question of American military unilateralism and the possible legal significance of our foreign military endeavors post-September 11th, see Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691 (2004); Henry J. Richardson, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L.J. 27 (2003). *Cf.* Scheherazade S. Rehman, *American Hegemony: If Not Us, Then Who?*, 19 CONN. J. INT'L L. 407 (2004).

an excuse to repeal freedoms as a means of protecting them. The time was ripe for the Department of Justice to introduce and demand passage of a sweeping set of changes to what domestic law enforcement agencies would be empowered to do in the "war on terror," and Congress dutifully responded by granting its knee-jerk consent. On October 26, 2001, the PATRIOT Act was signed into law by President Bush, thereby ushering in a new phase in the extended ebb of constitutional limits on police power. The enhanced law enforcement powers provided for in the Act may pose a direct threat to the civil liberties of every person within the United States' jurisdiction.[127]

B. A Sampler's Platter of Constitutional Distortion

From the outset, the Act purports to permit law enforcement conduct that would routinely be recognized by courts as patently violating well established Fourth Amendment law.[128] Although the following survey is not ex-

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127. *See, e.g.*, ANN BEESON & JAMEEL JAFFER, AM. CIVIL LIBERTIES UNION, UNPATRIOTIC ACTS: THE FBI'S POWER TO RIFLE THROUGH YOUR RECORDS AND PERSONAL BELONGINGS WITHOUT TELLING YOU (July 2003); CHANG, *supra* note 121. Not surprisingly, there are those who are neither troubled by the apparent conflict between the government's legislative response to September 11th and the body of Constitutional and decisional law preserving individual civil liberties, nor convinced that such conflicts are always to be avoided. Indeed, some have suggested that "[t]here may be circumstances when it would be appropriate to go outside the legal order, at times even violating otherwise accepted constitutional dictates, when responding to emergency situations." Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1134 (2004) (proposing a generalized, but narrow-defined "Extra-Legal Measures" model of analyzing official responses to extraordinary events like the 2001 terrorist attacks). Others have suggested that the public engage in a more explicit surrender of certain civil liberties in order to increase law enforcement authority and freedom to investigate, as long as it is in exchange for a complimentary enhancement in other aspects of individual privacy and liberty. *See* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002) (touting the value of a "grand trade" in which individual liberties under both the Fourth and Fifth Amendments should fluctuate with crime rather than being construed as fixed and immutable). Even prior to the recent terrorist attacks, there have been suggestions that the Fourth Amendment should generally be a malleable standard that does not provide strict guidelines, but rather may be more of an esthetic which produces rules by comparing the offensiveness of the alleged criminal conduct to the offensiveness of the challenged law enforcement misconduct. *See* Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1 (1987).

128. The Act is also written in such a way as to offend equally deep-rooted notions of liberty protected by the First Amendment, the Fifth Amendment, the Sixth Amendment, and the Fourteenth Amendment, among others. For some insight into the potential for constitutional violations in other areas of criminal and constitutional law, see, for example, Susan Dente Ross, *Secrecy's Assault on the Constitutional Right to Open Trials*, 40 IDAHO L. REV. 351 (2004) (dealing with both First and Sixth

haustive, these examples were chosen because they illustrate both the depth of the changes enacted and their stark contrast to previous limits announced by the United States Supreme Court. To the extent that any court would find itself constrained to exclude evidence offered at trial on the grounds that it was unlawfully obtained, the Act constitutes a sea change by drastically narrowing the scope of "unlawful" police behavior.[129] What follows is a before-and-after analysis of three different aspects of law enforcement activity that would have received vastly different treatment under Fourth Amendment standards than the Act's new law enforcement guidelines. My purpose in this discussion is to demonstrate how the Act is a product of interbranch locution, and a reflection of the narrative value movement away from the remedial bases for exclusion towards a deterrence-based model.

i. The Role of Probable Cause in Justifying Intrusions into Protected Spheres

The question of whether a Fourth Amendment violation will lead to the exclusion of evidence has never been as clear a question as when probable

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Amendment issues); Catalina Joos Vergara, *Trading Liberty for Security in the Wake of September Eleventh: Congress' Expansion of Preventive Detention for Noncitizens*, 17 GEO. IMMIGR. L.J 115 (2002) (focusing on Section 412 of the Act and the Fifth Amendment Due Process concerns it raises); Lindsay N. Kendrick, Comment, *Alienable Rights and Unalienable Wrongs: Fighting the "War on Terror" Through the Fourth Amendment*, 47 HOW. L.J. 989 (2004) (discussing the potential for racial profiling under the USA PATRIOT Act and the Equal Protection issues that would thereby arise); Sharon H. Rackow, Comment, *How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651 (2002) (discussing the Act in context of conflicts with First Amendment); Shirin Sinnar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA PATRIOT Act*, 55 STAN. L. REV. 1419 (2003) (focusing on Section 412 of the Act and the Fifth Amendment Due Process concerns it raises).

129. Without presuming that the PATRIOT Act is an invalid congressional enactment, even in light of the ways in which it squarely conflicts with well established Fourth, Fifth, or Sixth Amendment precedent, a court would be hard pressed to deny that aggressive law enforcement tactics consistent with the PATRIOT Act's relaxed standards lacked any basis in law.

This presents yet another legal anomaly that merits judicial and scholarly attention, and sets up a possible Supremacy Clause fight. To what extent can the Department of Justice's package of legal reforms give new meaning to judicially-announced standards of constitutional origin? Beginning with decisions as ancient as *Marbury v. Madison*, 5 U.S. 137 (1803), and running up through a less activist Court's pronouncement in *Flores v. City of Boerne*, 521 U.S. 507 (1997), the judiciary has always been, and continues to be, the final arbiter of the meaning of the supreme law of the land. If that doctrine carries any force, it should operate to provide positive limits on the extent to which the PATRIOT Act can be applied in a fashion inconsistent with preexisting law.

cause must be shown to support a search or seizure. The Supreme Court has consistently held that any interference with liberty amounting to a search or seizure[130] must be justified by the existence of objectively verifiable, individualized probable cause, i.e. evidence that would warrant a person of reasonable caution in the belief that criminal activity has been or is about to be committed.[131] This requirement of probable cause is understood to be instrumental to the Fourth Amendment's general guarantee that individuals will be free from unreasonable government intrusions into their sphere of protected liberty.

Before passage of the PATRIOT Act, the only exception to the requirement that a search or seizure be justified by probable cause (and that it ordinarily be conducted pursuant to a judicially-approved search warrant stating with particularity the places to be searched or the things to be seized) was made for government agents investigating threats to national security. Under the Foreign Intelligence Surveillance Act, the Federal Bureau of Investigation was permitted to engage in secret surveillance without demonstrating individualized probable cause for suspecting the target of its investigation of criminal conduct, but only upon a senior agency official's sworn certification that "*the purpose* of the surveillance is to obtain foreign intelligence information."[132] This concession was made in order to fully honor the executive branch's pressing need to preserve the nation's security, but it was made with the express proviso that any investigation undertaken for the purpose of criminal law enforcement must always be subject to the guarantees of the Fourth Amendment.

The PATRIOT Act flies in the face of this accepted constitutional wisdom by lowering the standard of suspicion necessary to justify official intrusions. Concomitantly, it alters the balance of power between the individual and the state by altering the aspects of FISA that govern the use of search and seizure powers for foreign intelligence and national security purposes. Section 218 of the Act amends FISA to no longer require certification that the collection of foreign intelligence information is "the purpose" of the surveil-

130. These sorts of intrusions are to be carefully distinguished from law enforcement or other official conduct that falls short of a "full blown" Fourth Amendment event. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (distinguishing a full blown "search" or "seizure," which require probable cause, from a less intrusive "stop and frisk," and declaring the latter to be justified by the less rigorous "articulable suspicion" standard); Camara v. Municipal Court, 381 U.S. 523 (1967) (distinguishing a "search" or "seizure" undertaken for criminal purposes from those undertaken for non-penal administrative purposes, and declaring probable cause unnecessary in the latter scenario based on the assumption that administrative searches were both less intrusive and less odious than their criminal analogs).

131. Brinegar v. United States, 338 U.S. 160 (1949).

132. *See* FISA, 50 U.S.C. § 1804(a)(7)(B) (2000), *amended by* 50 U.S.C. § 1804 (Supp. 2001) (emphasis added).

lance.[133] Instead it allows the use of FISA warrants that are not supported by any showing of probable cause in any case where an investigating official is willing to state that the collection of foreign intelligence information is a "significant purpose" of an investigation.[134] This is so even if the investigation is, in fact, primarily or almost exclusively designed for the collection of ordinary criminal evidence, and thus would otherwise be governed by the Fourth Amendment's probable cause standard.

Similarly, pre-PATRIOT Act FISA guidelines authorized issuance of a court order permitting access to and seizure of records held by third parties not suspected of criminal activity so long as there were "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power."[135] Section 215 of the PATRIOT Act inflates this power far beyond its original scope by authorizing the government to compel any entity, including any person or business, to produce "any tangible things (including books, records, papers, documents and other items)" the government might want to examine.[136] In a circular effort to insulate these requests for secret access to records from judicial scrutiny, Section 215 of the Act *requires* a judge considering a request under this provision to grant the application so long as "the application meets the requirements of the section."[137] Most significantly, Section 215 does not carry the former FISA restriction that there be "specific and articulable facts" suggesting that the target of these investigative techniques is an agent of a foreign power, otherwise involved in terrorist activity, or even marginally suspected of any criminal activity at all. Section 215 of the Act thus grants far greater power to invade private space than traditional understandings of the Fourth Amendment could tolerate, effectively permitting access to private records and information which is limited only by the discretion and judgment of an investigative agent for the executive branch. This is achieved not just by bypassing the review of a neutral and detached magistrate but also by expressly permitting intrusions under circumstances that could never receive the sanction of that neutral and detached magistrate in the first instance.

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133. USA PATRIOT Act of 2001, sec. 218, § 1804(a)(7)(B), 115 Stat. 272, 291.

134. *Id.*

135. 50 U.S.C. § 1862(b)(2)(B) (2000), *amended by* 50 U.S.C. § 1862 (Supp. 2001). This FISA provision was expressly limited to records held by "a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility." 50 U.S.C. § 1862(a) (2000), *amended by* 50 U.S.C. § 1862 (Supp. 2001). The Act expands this FISA-based power to include any person or business possessing "tangible things." 50 U.S.C. § 1862(a) (Supp. 2001).

136. USA PATRIOT Act of 2001, sec. 215, § 1862, 115 Stat. 272, 287.

137. *Id.* § 215, 115 Stat. at 288.

ii. The Proper Method for Executing Judicially-approved Warrants

The Fourth Amendment's restriction on unreasonable intrusions into an individual's protected sphere of liberty also regulates the *manner* in which search warrants may be executed. Under traditional law enforcement practices and well established Fourth Amendment principles, law enforcement officers are required to notify the person whose property is to be, or has been, searched. In addition, before entering the premises officers are required to announce their presence and state his purpose for being there.[138] This simple concept of notifying an individual that their rights would be compromised came to be known as the "knock and announce" rule,[139] and it was designed to serve at least two distinct purposes. First, the rule was premised on the notion that every deprivation of constitutionally secured rights or interests must be done with due process of law, which at a minimum requires notice of the deprivation and an opportunity to challenge official conduct. [140] For related reasons, the knock and announce rule was also designed to provide an interested observer an opportunity to supervise the search of the premises in order to raise subsequent challenges to its scope and any resulting seizures. Considered as a whole, the knock and announce rule was understood to provide important protections against official overreaching and a measure of

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138. Limited exceptions to this practice, so-called "no-knock warrants," are permitted from time to time under practices that vary from one jurisdiction to the next. However, the prevailing patterns show such no-knock warrants were only to be permitted under circumstances of extreme law enforcement exigency, mostly involving concerns for officer safety or the destruction of evidence, and were acceptable only upon a showing of need in addition to the warrant secured through the normal application process. Wilson v. Arkansas, 514 U.S. 927, 936 (1995).

139. The knock and announce rule is deeply rooted in Anglo-American common and statutory law, and may reach as far back as *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603). The United States Supreme Court has held that the common law knock and announce rules are so deeply embedded that they form part of the reasonableness inquiry called for by the Fourth Amendment into the manner of the warrant's execution. *See Wilson,* 514 U.S. at 931 (discussing the vintage and importance of the knock and announce rule, and suggesting that it may be traced as far back as 1275). *See also* Richards v. Wisconsin, 520 U.S. 385 (1997) (emphasizing the constitutional character of the knock and announce rule in rejecting the state's blanket per se rule permitting no-knock warrants in all felony narcotics cases).

140. *See, e.g.*, FED. R. CRIM. P. 41(f)(3), according to which "[t]he officer executing the warrant must: A) give a copy of the warrant and a receipt for [any] property taken to the person from whom, or from whose premises, the property was taken, or B) leave a copy of the warrant and receipt at the place where the officer took the property." *See also* FED. R. CRIM. P. 41(f)(4), requiring "[t]he officer executing the warrant [to] promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant. . . . [who] must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken."

civilian oversight of law enforcement behavior while imposing only minimal restrictions on legitimate law enforcement practices.

The PATRIOT Act eviscerates any restriction the knock and announce rule might impose on the execution of judicially approved warrants. First, Section 213 of the Act permits officials to substantially delay notification of a person whose property has been searched if it can make one of several *de minimis* showings of need.[141] This includes the power to surreptitiously enter a given location (by physical or other technological means) and search, inspect, or copy documents, or to download and transmit computer files, without ever leaving any notice or trace of the intrusion. According to the Act, law enforcement functionaries simply no longer need to knock, or provide notice of their intentions, before they cross the threshold of private property.

Similarly, the Act undermines the very purpose of "announcing" by allowing law enforcement to suppress any indication of the official nature of the intrusion. Instead of being forced to announce their presence and identity—which is a clue to the subject of the search that the search has a criminal investigatory purpose and triggers a meaningful opportunity to supervise—law enforcement officers are now allowed to "sneak and peek" at our private materials and affairs without being subject to interested individuals' supervision or scrutiny. Such sneak and peek warrants wholly displace the knock and announce standard's central role as a guarantee of reasonableness in the conduct of official investigations.[142]

iii. The Limits on Law Enforcement Surveillance of Oral Communications

In pre-PATRIOT Act America, electronic surveillance and the collection of oral communications (respectively known as wiretapping and eavesdropping) by law enforcement agents underwent a thorough process of judi-

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141. *See* USA PATRIOT Act, § 213, 115 Stat. 272, 286 (codified at 18 U.S.C. § 2705(a)(2)(a)-(f) (Supp. 2002)) (permitting delayed notification if the government can show that immediate notice will 1) endanger a person's physical safety; 2) increase the risk of flight from prosecution; 3) cause evidence to be destroyed or tampered with; 4) create the potential for witness intimidation; or 5) jeopardize the investigation or unduly delay trial). The Act also permits a court to continue delay of notification upon good cause shown. *Id.* § 213, 115 Stat. at 286 (codified at 18 U.S.C. § 3103a (Supp. 2002)).

It should be noted that every one of the bases recognized by the Act as legitimate grounds to disregard the Fourth Amendment's knock and announce requirements are routine concerns in any criminal investigation, and that § 213 is not limited to terrorism investigations, but purports to apply to all criminal investigations generally. Thus, through § 213 of the Act, the Department of Justice gave itself the very powers the Court has routinely denied to it and all agents of the law enforcement machine.

142. *See Wilson*, 514 U.S. at 929.

cial, executive, and legislative evaluation and refinement.[143] This process culminated in the recognition that even intangible items such as oral communications were embraced by the Fourth Amendment's privacy guarantees. Any non-consensual interception of these private communications, however transmitted, were searches within the meaning of the Constitution requiring advance approval by a neutral magistrate.[144] In those limited situations where the investigation was necessary to preserve national security, FISA provided a mechanism for the Attorney General to secure permission to engage in secret surveillance without probable cause upon certification that the target of the secret surveillance was an agent of a foreign power or engaged in international terrorist activities.

Once again, Section 214 of the PATRIOT Act amends FISA so that this latter certification is no longer required. The application for enhanced authority to intercept oral or electronic communications must still declare that "the information likely to be obtained is foreign intelligence information" or that the information is "relevant to an ongoing investigation,"[145] but the Act contains no mechanism for evaluating the level of suspicion regarding the target. Thus there is no mechanism for evaluating the validity of the proposed intrusion in light of the Fourth Amendment's privacy concerns and guarantees of reasonableness in the search and seizure context.

Indeed, Section 216 of the Act *requires* a court to enter an order merely upon application by an attorney for the government.[146] It directs the judge to authorize installation of surveillance devices (interfering with all manner of

143. *Cf.* Federal Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103-04 (codified as amended at 47 U.S.C. § 605 (2000)); Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. § 2510-22 (2000)); and Olmstead v. United States, 277 U.S. 438 (1928).

144. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

145. USA PATRIOT Act of 2001, sec. 214, § 1842, 115 Stat. 272, 286 (codified as amended at 50 U.S.C. § 1842 (Supp. 2004)).

146. For those paying close attention, this should certainly raise concerns under the Separation of Powers doctrine because it appears that the Act expressly limits an Article III tribunal's authority and ability to render a decision in a pending case. To the extent that the Act constitutes a restriction on these tribunals' jurisdictional power, it may run afoul of both the Separation of Powers Doctrine and Article III itself by redefining the scope of judicial independence. *See* United States v. Robertson, 45 F.3d 1423 (10th Cir. 1995) (emphasizing that Separation of Powers Doctrine requires that the Judiciary and Executive branches stay independent of the other's affairs); Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL'Y 455 (2002) (discussing provisions of the Patriot Act that represent compromises in the integrity of the Separation of Powers Doctrine).

wire or electronic communications)[147] anywhere in the country if "the attorney for the government has certified to the court that the information likely to be obtained . . . is relevant to an ongoing criminal investigation."[148] This transforms FISA's limited concession to the needs of national security into an end run around the Fourth Amendment. The Act disregards the role of the neutral and detached magistrate as a layer of protection ensuring adequate consideration of both the needs of law enforcement and the rights and privileges reserved to the individual. It delegates the right to make those determinations to the very government functionary seeking permission to engage in the constitutional intrusion. But the Fourth Amendment is an expression of the fundamental (and fundamentally true) premise that officers who are personally and professionally invested in the criminal investigation can never exercise the type of balanced and unbiased judgment required by due process. The whims and desires of the Attorney General cannot supplant the dispassionate and unflinching commitment to fairness that a neutral and detached magistrate is institutionally situated to honor.

III. TURNING BACK TIME

The PATRIOT Act's expansions of executive authority to intrude upon the protected spaces of any person or entity are expressly and logically unrelated to the core purpose of preserving national security. Not only are the legitimate national security demands on officers deemphasized in the process of justifying any given intrusion, but ordinary criminal law enforcement objectives are elevated to matters of national security.

How could we have reached such a state where the executive can lead Congress by the nose into reversing decades, if not centuries, of painfully learned Fourth Amendment wisdom? In view of the long history of executive branch attempts to liberate itself from the strictures of the Fourth Amendment, Congress's explicit refusal to limit the PATRIOT Act to matters of international terrorism or national security shows that September 11th simply made these reversals politically possible and legislatively convenient, but not necessary. Yet this should come as no surprise to those watching the Court's migration over time from a robust remedial theory of exclusion to the modern deterrence-based rationale.

In the preceding Parts, I endeavored to show how the PATRIOT Act embodies nothing less than a wholesale revision of the Fourth Amendment.

147. Not everyone is convinced, of course, that the Patriot Act is constitutionally problematic in general, *see supra* note 127, or that the ways in which the Act defines government authority to collect oral and electronic communications represents a significant expansion over previous regulatory regimes. *See* Orrin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607 (2003).

148. USA PATRIOT Act of 2001, sec. 216, § 3123, 115 Stat. 272, 288-89 (codified as amended at 18 U.S.C. § 3123 (Supp. 2001)).

This final Part raises two additional questions: first, what's wrong with such a revision? Second, if there really is a problem, what is to be done about it?

As an initial matter, it appears that the USA PATRIOT Act is fundamentally premised on the notion that the lurking threat of terrorism is conduct *sui generis*, and that our existing body of law—as opposed to law enforcement strategies, methods, and techniques—was inadequate to the task of predicting, preventing, investigating, and punishing like conduct. Implicit in this position is the notion that the attacks of Semptember 11, 2001, represent a new form of illegal conduct, certainly not civil, and possibly "super-criminal," such that existing notions of criminal justice and procedure were instantly rendered obsolete.

But state and federal laws already on the books punish with all due severity the criminal attacks in Washington and New York. In fact, the PATRIOT Act frequently makes use of existing definitions of crime to expand executive power rather than creating new classes of crime to close the loopholes through which the terrorists might have jumped.[149] The criminal conduct allegedly justifying passage of the PATRIOT Act was clearly within the investigative powers previously authorized under FISA.

A related assumption—which has been given voice by more than one elected official towing the Department of Justice's party line—is that the civil liberties enjoyed by the American public prior to September 11th, and the right to political dissent they are designed to protect, were somehow to blame for the failures of the intelligence and law enforcement communities. It was fashionable immediately after the attacks to despise anyone voicing opposition to a united militaristic response, and to label civil libertarians as naïve, unpatriotic or, worst of all, terrorist sympathizers. It is perhaps enough, if not too cliché, to point out that a long line of patriots and American visionaries, stretching back to James Madison, emphasized the duty of dissent and oversight of government as one of the foremost duties of responsible citizenship.[150]

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149. The Act does potentially criminalize previously unregulated conduct, such as by creating new definitions of domestic terrorism; however, these expansions in the scope of criminal law, as opposed to expansions in law enforcement freedom, are not clearly responsive to the type of attacks the country suffered. *See, e.g.*, USA PATRIOT Act, §802, 115 Stat. 272, 376 (codified at 18 U.S.C. §2331(5) (Supp. 2004)) (defining the term "domestic terrorism" as activities that: "A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any state; B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and C) occur primarily within the territorial jurisdiction of the United States").

150. THE FEDERALIST NO. 51 (James Madison) ("[T]he private interest of every individual may be a sentinal over the public rights."). *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al., eds. 1973) ("it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the

If these two assumptions are indefensible—if neither a failing in our criminal laws nor the expression of political dissent caused the attacks—then the easy answer is to reject the policies to which they lead and press for the PATRIOT Act's repeal. There are hints that political opinion across the country is turning against the excesses of the Act,[151] and that members of Congress (out of regret or in response to personal or popular opposition) are beginning a movement in that direction. But there is a larger, more immediate problem that needs attention.

Even if the Act is chipped and cut away, it is likely to reappear in other guises with the next threat to our national security unless the Supreme Court changes its narrative patterns. For the PATRIOT Act could only exist if we accept that some violations of the Constitution are acceptable or even desirable. My concern is that deterrence-based theories of exclusion produce disrespect for constitutional values, as evidenced by the Act, and are inadequate to the exclusionary rule's true task of preserving the Fourth Amendment's liberty guarantee, even for those accused of criminal conduct. Imagine those situations in which law enforcement officers have no interest in using the fruits of their Fourth Amendment violation in court—of what value is the fundamental right then? And of what significance is deterrence? Given that the purpose of the exclusionary rule is instrumental, by the Court's own reasoning, to effectuate the language of the Fourth Amendment, deterrence theories are not up to the task. Although distortion and misapplication of precedent were certainly the means used by the Court to migrate from remedy to deterrence, that migration is misguided for the additional reason that its deterrence-centeredness is the wrong motivational principle. Instead, the only theory that actually serves the spirit and purposes of the Fourth Amendment is the remedial theory, and restoration of the remedial theory to its former position as a standard for judicial suppression of evidence would have several desirable consequences.

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noblest characteristics of the late Revolution."); *Government*, NAT'L GAZETTE, Dec. 31, 1791, *in* 14 THE PAPERS OF JAMES MADISON 178, 179 (Robert A. Rutland et al., eds 1973) ("[E]very good citizen will be at once a centinel over the rights of the people; over the authorities of the confederal government; and over both the rights and the authorities of the intermediate governments."); *Charters*, NAT'L GAZETTE, Jan. 18, 1792, *in* 14 THE PAPERS OF JAMES MADISON, *supra*, at 191, 192 ("Liberty and order will never be perfectly safe, until a trespass on the constitutional provisions for either, shall be felt with the same keenness that resents an invasion of the dearest rights; until every citizen shall be an Argus to espy, and and Aegeon to avenge, the unhallowed deed.").

151. This trend may be best represented by the 379 municipalities (across forty-three states), and six states as a whole, that have passed anti-Patriot Act resolutions rejecting the federal government's assertions of necessity and reaffirming their separate commitment to preserving civil liberties. *See* Am. Civil Liberties Union, *Main Street America Fights Back*, *available at* www.aclu.org/SafeandFree/SafeandFreeMain.cfm (last visited Apr. 27, 2005) ("These communities represent approximately 57 million people who oppose sections of the USA PATRIOT Act.").

IV. CONCLUSION

This Article proposes a simple but far-reaching modification of the exclusionary rule, stated as follows: if there has been an intrusion into the sphere of privacy protected by the Fourth Amendment, and if that intrusion leads to the discovery of inculpatory evidence, then the harm occasioned by that intrusion must be remedied by suppression of the evidence unlawfully collected. This may sound too much like a but-for rule to some, but it is, in fact, sufficiently flexible for practical application because the various doctrinal exceptions to the exclusionary rule—such as the doctrines of hot pursuit or exigent circumstances—make the first element of this new standard sensitive to law enforcement realities.

The restoration of a remedial theory of exclusion would not have unduly drastic effects on trial courts or routine details of trial administration. The main difference would be that the exclusionary rule would no longer be divorced from its constitutional basis. This newly reoriented standard would feel familiar enough to courts that they would have no problem with its implementation, particularly given that the rules of evidentiary *admissibility*, namely standards of relevance and probative value, will not markedly change.

Why would that restoration be a good thing? First, this perspective is wholly in line with the precedent that spawned the exclusionary rule. Beginning with the *Boyd* case, and carrying through *Adams* to *Weeks*, the earliest interpretations of the Fourth Amendment's purpose reflect a deep concern for the rights it secures for the individual vis-à-vis the government. It may, in fact, be more faithful to the Fourth Amendment for courts to focus on preserving the Fourth Amendment sphere of privacy inviolate. The only way to preserve that sanctity *ex post* an incursion by law enforcement is to exclude any derived evidence such that the citizen (or non-citizen, as the case may be) sits in as good a position at trial as she would have had the law enforcement officers played by the book.

Second, a remedy-centered exclusionary rule would write out of the law the strange magistrate judge's error exception, and rein in the other good faith exceptions that compromise the Amendment's protections. Again, because courts will currently not suppress evidence gathered by law enforcement officers in good faith, even if the magistrate judge or civilian clerk erred in issuing that warrant, there is a fundamental disconnect between the obvious purpose of the Fourth Amendment and its effects. It is intolerable to find a component of our Bill of Rights reduced to such window dressing.

However, if courts were driven to suppress evidence "in exchange for" a violation of that defendant's constitutional rights, the good faith exceptions would lose the one hobbled leg they now stand on. There would be no basis or need for such exceptions to the exclusionary rule if its function were remedial. It matters not that suppression will not deter future magistrate carelessness (if that be the cause), but only that a Fourth Amendment injury needs healing. Suppression would be the answer if, but only if, a cognizable constitutional

error had occurred. The magistrate judge exception would fall by the wayside, and command nary a passing comment on the way out.

More to present needs, restoration of the remedial theory of exclusion would fatally destroy the logic of the PATRIOT Act. The Act represents the logical extension of deterrence-based rationales and their related exceptions. It necessarily proceeds on the notion that, in this modern age, some constitutional violations are a good thing because they enhance the power of police, and powerful police are necessary in today's society. Especially where fear prevails, the conception of what law enforcement behavior is desirable will shift with the political winds. But a faithful application of the remedial theory of exclusion makes such distortions of logic insignificant. Even for those who are not willing to eternally condemn each and every constitutional violation as a sin against the order of our nation, remedial theories supply a rule of decision that requires exclusion without reliance on that value judgment. Indeed, remedial theories are superior to deterrence-driven models because they shift the focus from the law enforcement industry, which was virtually non-existent at the time of the drafting, back to the original focus of the Fourth Amendment and its original case law—the protection of individual persons from government overreaching, abuse, and official tyranny.

Finally, and perhaps most subtly, a return to the remedial model would send a better, healthier, and more committed message to the people. It is important to note that most of the Constitution's strictures and protections apply with equal force to citizens and non-citizens who reside here. That fact raises issues beyond the scope of this Article, but it is worth remembering that not everyone who has an occasion to consider, or even rely on, the U.S. Constitution has the good pleasure to grow up with it. For those people, their first recourse to the nation's fundamental protections may involve Fourth Amendment liberties or lack thereof. Regardless of one's national affiliation, the Constitution serves as a vehicle through which the government, an unchanging instrument comprised of ever-changing personalities, communicates or translates its values to the populace. It is of paramount importance that such communication reflect the notions of "individual worth and sovereignty" that are inherent in a liberal democracy. Who can say, with a straight face, that the Bill of Rights expresses fundamental, inalienable truths if such truths can be dismissed as so much kipple[152] when the trial chips are down? By contrast, an exclusionary rule that operates whenever necessary to reverse a constitutional wrong suggests that, even in the face of criminal wrongdoing, the values inherent in the Fourth Amendment, and indeed the document as a whole, are so surpassingly important as to tolerate no incursion, however slight.

Related to this last point is the concept of judicial integrity. Although such a romantic notion seems somewhat outdated in this age, it was an idea that re-

152. PHILIP K. DICK, DO ANDROIDS DREAM OF ELECTRIC SHEEP? 57 (1968) ("Kipple is useless objects, like junk mail or match folders after you use the last match or gum wrappers or yesterday's homeopape.").

ceived a lot of judicial attention in the first half of the twentieth century. It was recognized by the *Mapp* Court when Justice Clark observed that "nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."[153] "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . [i]f the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[154] That is the value of judicial integrity—to be the omnipresent teacher. While such flexible ideals cannot be strict guidelines for the court, an exclusionary rationale that simultaneously serves judicial integrity and remedies constitutional violations is infinitely more attractive than any rule that creates an internal tension. Not by accident, the exclusionary rule grew up in the halo of light cast by this notion of judicial integrity, and restoring the first principles to the former will ultimately serve the health and vitality of the latter.

153. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

154. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).