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**Criminal Procedure—Good Faith, Big Brother, and You: The United States Supreme Court's Latest Good Faith Exception to the Fourth Amendment Exclusionary Rule. *Arizona v. Evans*, 115 S. Ct. 1185 (1995).**

Elisa Masterson White

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CRIMINAL PROCEDURE—GOOD FAITH, BIG BROTHER, AND YOU: THE UNITED STATES SUPREME COURT'S LATEST GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE. *ARIZONA V. EVANS*, 115 S. Ct. 1185 (1995).

I. INTRODUCTION

Isaac Evans's wrong-way drive down a one-way street was the auspicious beginning of yet another chapter in the United States Supreme Court's struggle with the Fourth Amendment exclusionary rule.<sup>1</sup> *Arizona v. Evans*<sup>2</sup> is the most recent in a series of cases favoring the State's right to search over an individual's right to privacy.<sup>3</sup>

Since its 1961 landmark decision in *Mapp v. Ohio*,<sup>4</sup> the Court has created several "good faith" exceptions which narrow the application of the exclusionary rule.<sup>5</sup> In its efforts to avoid exclusion, the Supreme Court has limited not only the rule itself,<sup>6</sup> but also the scope<sup>7</sup> and content<sup>8</sup> of the

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1. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

The exclusionary rule "commands that where evidence has been obtained in violation of the search and seizure protections guaranteed by the U. S. Constitution, the illegally obtained evidence cannot be used at the trial of the defendant." BLACK'S LAW DICTIONARY 564 (6th ed. 1990).

2. 115 S. Ct. 1185 (1995).

3. See John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1124 (1989).

4. 367 U.S. 643 (1961). For a discussion of *Mapp*, see *infra*, part III.E.

5. See, e.g., *Illinois v. Krull*, 480 U.S. 340 (1987) (admitting evidence seized in reliance on an unconstitutional statute); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (admitting evidence seized in reliance on a warrant that incorrectly listed items to be seized); *United States v. Leon*, 468 U.S. 897 (1984) (applying good faith exception to admit evidence discovered pursuant to a warrant not supported by probable cause).

6. Junker, *supra* note 3, at 1123; see *infra* notes 118-21 and accompanying text. Some commentators believe the Court's handling of the exclusionary rule is the result of the rule's political unpopularity. See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392-96 (1983) (listing and responding to "modern criticisms" of the rule).

7. Junker, *supra* note 3, at 1123. See, e.g., *California v. Hodari*, 499 U.S. 621 (1991) (stating the defendant was not "seized" until the pursuing officer tackled him, so the drugs he discarded during the chase were admissible); *Rakas v. Illinois*, 439 U.S. 128 (1978) (finding passengers in a vehicle that was searched illegally lacked standing to move for suppression of the unconstitutionally seized evidence).

8. Junker, *supra* note 3, at 1123. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (finding warrantless entry valid, based on the consent of a third party who police erroneously believed had common authority over the premises); *California v. Ciraolo*, 476 U.S. 207

Fourth Amendment. The "good faith" exceptions are the Court's latest method to find the proper balance between the rights of the individual and the rights of the State.

Until *Evans*, the Court confined the good faith exceptions to cases in which a valid warrant existed at the time of the unconstitutional search;<sup>9</sup> however, the warrant in *Evans* was quashed seventeen days prior to Evans's arrest.<sup>10</sup> Establishing a good faith exception for evidence seized in reliance on a court clerk's computer error,<sup>11</sup> the *Evans* decision marks the first time the United States Supreme Court applied the good faith standard to a warrantless arrest and search.

This note will examine the history of the Fourth Amendment and the exclusionary rule. It will also analyze the rationale underlying the good faith exceptions that existed prior to *Evans*. After examining the facts of the case and the reasoning of the Court, this note will address the significance of the *Evans* holding.

## II. SUMMARY OF FACTS

On December 13, 1990, Isaac Evans failed to appear before a Phoenix justice of the peace for several traffic violations, and the justice issued a warrant for his arrest.<sup>12</sup> When Evans appeared in court one week later, a justice pro tempore quashed the warrant.<sup>13</sup> However, the warrant was not deleted from the computerized files in the Maricopa County Sheriff's office.<sup>14</sup>

On January 5, 1991, Officer Bryan Sargent stopped Evans for driving the wrong way on a one-way street.<sup>15</sup> When Sargent entered Evans's name into the patrol car's computer terminal, he discovered an outstanding misdemeanor warrant for Evans's arrest.<sup>16</sup> Based on the existence of this warrant, Sargent arrested Evans.<sup>17</sup>

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(1986) (stating that warrantless aerial observation of fenced area adjacent to home was not an "unreasonable" search under the Fourth Amendment).

9. L. Anita Richardson, *Exceptions to the Rule: Computer Error Sparks Latest Challenge to Evidentiary Exclusion*, A.B.A. J., Dec. 1994, at 48.

10. *Arizona v. Evans*, 115 S. Ct. 1185, 1188 (1995).

11. *Id.* at 1194.

12. *Id.* at 1188.

13. *Id.*

14. *State v. Evans*, 836 P.2d 1024, 1025 (Ariz. Ct. App. 1992).

15. *Evans*, 115 S. Ct. at 1188.

16. *Id.*

17. *Id.*

As Sargent handcuffed him, Evans dropped a marijuana cigarette.<sup>18</sup> Sargent and another officer then searched Evans's car and found a bag of marijuana under the passenger seat.<sup>19</sup> On January 8, 1991, the state of Arizona charged Evans with felony possession of marijuana.<sup>20</sup>

Because the warrant was quashed seventeen days before his arrest, Evans argued the court should suppress the marijuana seized during the unlawful arrest.<sup>21</sup> At the suppression hearing, the trial court did not determine whether the employees of the justice court or the Sheriff's office were responsible for the computer error.<sup>22</sup> Nevertheless, the court declared the State responsible for the inaccurate records, no matter who actually committed the error,<sup>23</sup> and granted Evans's motion to suppress.<sup>24</sup>

On appeal, the Arizona Court of Appeals ruled that the trial court judge abused his discretion in granting the motion.<sup>25</sup> Because the exclusionary rule was intended only to deter police misconduct, the court held it inapplicable to a case where no evidence of police department misconduct was presented.<sup>26</sup>

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18. *Id.*

19. *State v. Evans*, 836 P.2d 1024, 1025 (Ariz. Ct. App. 1992). The officers found additional cigarettes, rolling papers, and marijuana residue in Evans's passenger's purse. *Id.*

20. *Id.* Evans was charged with knowingly possessing or using less than one pound of marijuana, a class six felony under ARIZ. REV. STAT. ANN. § 13-3405. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-3405 (1989)). When this offense occurred, the sentence for a class six felony was one and one half years for a first offense; however, a judge could adjust the sentence based on the circumstances of the crime. *See* ARIZ. REV. STAT. ANN. §§ 13-701(C)(5), -702(A) (1989).

21. *Evans*, 115 S. Ct. at 1188.

22. *Id.* The chief clerk of the Justice Court explained the procedure for quashing a warrant: A justice court clerk notifies the sheriff's office that a warrant has been quashed and records the telephone call in the court file. *Id.* The sheriff's office then records the call in its telephone log and removes the warrant from its computer files. *Evans*, 836 P.2d at 1025. Evans's court file showed no record of a telephone call to the sheriff's office, and the sheriff's office phone log showed no call quashing Evans's warrant. *Evans*, 115 S. Ct. at 1188.

23. *Evans*, 115 S. Ct. at 1188.

24. *Evans*, 836 P.2d at 1025. The trial court found the facts in Evans's case indistinguishable from *State v. Greene*, 783 P.2d 829 (Ariz. Ct. App. 1989). *Evans*, 836 P.2d at 1025 (citing *Greene*). In that case, a police officer discovered an outstanding warrant for Greene's arrest when he ran a record check during a routine traffic stop. *Greene*, 783 P.2d at 829. During the subsequent arrest, the officer searched Greene's pockets and found narcotics. *Id.* However, because the warrant had been quashed eight months prior to the arrest, the trial court suppressed the evidence. *Id.* The Arizona Court of Appeals affirmed, finding that suppression would deter the police from "failing to keep [their] paperwork or computer entries up to date, exposing persons to a possible wrongful arrest." *Id.* at 830.

25. *Evans*, 836 P.2d at 1028.

26. *Id.* at 1026-27. The court found no evidence that the Sheriff's office or the arresting officers were negligent. *Id.* at 1027.

The Arizona Supreme Court then reversed the Court of Appeals's judgment, reasoning that no one should be arrested because of any government entity's negligent computer record keeping.<sup>27</sup> To deter inefficiency in criminal record keeping, the court held the exclusionary rule should apply to this case even if court employees were responsible for the erroneous computer record.<sup>28</sup>

The United States Supreme Court granted Arizona's writ of certiorari to resolve whether the exclusionary rule required suppression of evidence seized in an unlawful arrest caused by a computer error, regardless of whether court employees or police department employees were responsible for the error.<sup>29</sup> The Court held the exclusionary rule does not apply when erroneous records are the result of court employees' clerical errors.<sup>30</sup>

### III. BACKGROUND

#### A. General Background

Historians agree that the framers created the Fourth Amendment to prevent their newly formed government from using two of the British government's most hated devices—general warrants and writs of assistance.<sup>31</sup> While the colonists were concerned with general warrants as a restriction on freedom of the press,<sup>32</sup> the general warrant debate in the

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27. *State v. Evans*, 866 P.2d 869, 872 (Ariz. 1994). The court found that, "[a]s automation increasingly invades modern life, the potential for Orwellian mischief grows. Under such circumstances, the exclusionary rule is a 'cost' we cannot afford to be without." *Id.* Justice Brennan expressed a similar concern in *Florida v. Riley*, 488 U.S. 445, 466-67 (1989) (Brennan, J., dissenting) (comparing a police officer in a helicopter hovering 400 feet above the suspect's fenced yard with the "Police Patrol" in George Orwell's novel, *NINETEEN EIGHTY-FOUR*).

28. *Evans*, 866 P.2d at 872.

29. *Arizona v. Evans*, 115 S. Ct. 1185, 1189 (1995).

30. *Id.* at 1194.

31. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13 (1937). For general discussions of relevant British and American history, see also Stewart, *supra* note 6, at 1369-72; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 *CREIGHTON L. REV.* 565, 571-73 (1982-1983); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 30-48 (1966).

32. LASSON, *supra* note 31, at 51. General warrants were a powerful censorship tool used to eliminate publications critical of the Crown. Often issued without probable cause, they allowed the holder unlimited power to search, seize, and destroy offensive printed matter. LASSON, *supra* note 31, at 25-26.

colonies focused primarily upon the writs of assistance.<sup>33</sup> Public furor over the writs fueled the spirit of independence in the colonies.<sup>34</sup>

Immediately following the Revolution, four states adopted constitutional provisions forbidding general warrants.<sup>35</sup> Other states adopted similar provisions prior to the 1787 Constitutional Convention.<sup>36</sup> These state constitutional provisions served as models for the Fourth Amendment to the United States Constitution.<sup>37</sup>

## B. Pre-Exclusionary Rule Cases—The Foundation

The text of the Fourth Amendment provides no remedy for its violation.<sup>38</sup> At common law, those who executed illegal searches and seizures were held liable for damages,<sup>39</sup> and courts admitted evidence obtained in an illegal search for over a century after the Revolution.<sup>40</sup>

33. LASSON, *supra* note 31, at 51. In response to restrictions on colonial trade outside the British Empire, the colonies began smuggling operations. To combat the smuggling, the King issued writs of assistance that allowed customs officials unlimited power of search and seizure for the duration of the issuing sovereign's life. LANDYNSKI, *supra* note 31, at 30-31.

34. LASSON, *supra* note 31, at 58-59.

35. LANDYNSKI, *supra* note 31, at 38. Virginia passed its provision prior to the signing of the Declaration of Independence. After the signing, Pennsylvania, Maryland, and North Carolina followed. LANDYNSKI, *supra* note 31, at 38.

36. The 1780 Massachusetts Declaration of Rights was the first to use the phrase "unreasonable searches and seizures." This provision was duplicated in the 1784 New Hampshire Bill of Rights. LASSON, *supra* note 31, at 38. Although Vermont was not admitted into the Union until 1791, it adopted a search provision in 1777. 6 THE FEDERAL AND STATE CONSTITUTIONS 3741 (Francis Newton Thorpe ed., 1909), *quoted in* LANDYNSKI, *supra* note 31, at 38 n.93.

37. LASSON, *supra* note 31, at 82. As James Madison proposed the amendment and as the draft came out of committee, it prohibited only improper warrants:

The rights of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized.

LASSON, *supra* note 31, at 101. Representative Benson objected and proposed that the words "by warrants issuing" be changed to "and no warrant shall issue." This revision was voted down. However, Benson chaired the committee appointed to arrange the amendments, and when the amendment left his committee, it read as he had unsuccessfully proposed. In that form, it was accepted by the Senate, enacted by both houses of Congress, and ratified by the States. LASSON, *supra* note 31, at 101-03.

38. See *supra* note 1 for the text of the Fourth Amendment.

39. BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 16 (1986). Wilson contends that the common law remedy of a civil suit was the implied remedy because the British common law applied where no positively enacted law contradicted it. *Id.* at 14.

40. *Id.* at 45. Justice Wilde's decision, in *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841), stated this rule as follows: "When papers are offered into evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they

However, in 1886, the United States Supreme Court decided *Boyd v. United States*<sup>41</sup> and planted the seeds of the exclusionary rule. *Boyd* is one of three decisions generally credited with creating the rule.<sup>42</sup>

At issue in *Boyd* was a federal law that allowed a prosecutor, in civil forfeiture proceedings, to compel the production of records helpful to the government's case.<sup>43</sup> Failure to obey an order to produce the records was deemed an admission of guilt.<sup>44</sup> The majority found that the forced production of private papers was a "search" within the meaning of the Fourth Amendment, and the search was unreasonable because it sought private papers, not contraband.<sup>45</sup>

The Court held that the admission of private papers seized in violation of the Fourth Amendment would also violate a person's Fifth Amendment right to avoid self-incrimination.<sup>46</sup> Justice Bradley, writing for the majority, linked the Fourth and Fifth Amendments by analogizing the seizing of private papers to compelling a person to testify as to their contents.<sup>47</sup> The Court excluded the evidence and declared the law unconstitutional.<sup>48</sup>

form a collateral issue to determine that question." *Quoted in* WILSON, *supra* note 39, at 47-48. Most state courts, including Arkansas, agreed with this determination. *See, e.g.,* Starchman v. State, 62 Ark. 538, 36 S.W. 940 (1896).

41. 116 U.S. 616 (1886).

42. Stewart, *supra* note 6, at 1372. The other two are *Adams v. New York*, 192 U.S. 585 (1904), and *Weeks v. United States*, 232 U.S. 383 (1914).

43. *Boyd*, 116 U.S. at 617.

44. *Id.* at 619-20. The defendants obeyed a subpoena ordering them to produce their invoices and records for the court, and they appealed the judgment on Fifth Amendment grounds. *Id.* at 618.

45. *Id.* at 622-23; *see also* Stewart, *supra* note 6, at 1373. The government could not obtain private papers even under the colonial writs of assistance. Stewart, *supra* note 6, at 1373. Justice Stewart noted that, under the *Boyd* rule, only "testimonial evidence such as papers or books—and not contraband, such as drugs or guns—had to be excluded" because the "exclusion was a by-product of the fifth amendment's ban on compulsory testimony." Stewart, *supra* note 6, at 1375.

46. *Boyd*, 116 U.S. at 630-35. In his concurring opinion, Justice Miller found no Fourth Amendment search or seizure in this case, but he agreed the statute violated the Fifth Amendment. *Id.* at 638-40 (Miller, J., concurring).

47. *Id.* at 630-34. Justice Bradley based his opinion on the English case, *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765). *See Boyd*, 116 U.S. at 630. In *Entick*, Lord Camden stressed the relationship between the concepts of an illegal search and compelled self-incrimination. *Id.* at 629. However, Landynski indicates Justice Bradley's reliance on *Entick* was misplaced. LANDYNSKI, *supra* note 31, at 59-60. In *Entick*, the warrant was based on mere suspicion, and, in this context, Lord Camden stressed its relation to the right to avoid self-incrimination. The *Boyd* warrant listed specific papers and was not based on mere suspicion. LANDYNSKI, *supra* note 31, at 59-60.

48. *Boyd*, 116 U.S. at 638. The opinion did not make clear whether the Fourth Amendment violation alone required exclusion. *See* LANDYNSKI, *supra* note 31, at 58 (stating that the Court united the Fourth and Fifth Amendments in a "mystical bond" to exclude the evidence); *but see* Stewart, *supra* note 6, at 1373 (stating that exclusion was

Justice Bradley was deceased by the time the next major Fourth Amendment case was decided, leaving Justice Day to write the majority opinion in *Adams v. New York*.<sup>49</sup> Under the facts of this case, the Court found that no unreasonable search or seizure occurred.<sup>50</sup> However, the Court stated that, even if a search were unreasonable, a court could not stop during a trial to address the "collateral" issue of how police officers obtained the evidence.<sup>51</sup> Therefore, prosecutors could use evidence discovered during an illegal search. Although the majority attempted to distinguish *Boyd*,<sup>52</sup> the *Adams* decision seemed to overrule the earlier case.

The *Adams* rule lasted only ten years before the landmark decision of *Weeks v. United States*.<sup>53</sup> In *Weeks*, the Court developed and used the exclusionary rule in a federal criminal trial.<sup>54</sup> After a United States Marshal discovered evidence during a clearly illegal search,<sup>55</sup> the defendant petitioned for the return of his property before the trial began. The trial court denied the petition, allowing federal officers to retain possession of the defendant's property for use as evidence at trial.<sup>56</sup> The United States Supreme Court reversed, ruling that the retention of the defendant's property and its use at trial was a violation of the Fourth Amendment.<sup>57</sup> This decision limited *Adams* by giving a person whose property was seized unconstitutionally the opportunity to prevent its use at trial by a pretrial petition.<sup>58</sup>

In addition to providing a method of circumventing the *Adams* rule, *Weeks* also established the "judicial integrity" rationale for the exclusionary rule. The Court found that the admission of evidence gathered in violation

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required only by the Fifth Amendment).

49. 192 U.S. 585 (1904).

50. *Id.* at 594. After receiving a warrant to search for "gambling paraphernalia," officers seized other private papers and used them as evidence against the defendant at trial. *Id.*

51. *Id.* at 595. The Court quoted *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841), to support its ruling. *Id.*; see *supra* note 40.

52. The Court noted that many of the state cases they cited as support for their ruling had distinguished *Boyd*. *Adams*, 192 U.S. at 597. The Court also found that the defendant in this case was not compelled to produce evidence against himself because he was "not compelled to testify concerning the papers or make any admission about them." *Id.* at 598.

53. 232 U.S. 383 (1914).

54. *Id.* at 398.

55. *Id.* at 393. After the defendant's arrest at his place of business, a United States Marshal searched his home and confiscated his property without a search warrant. *Id.* at 386.

56. *Id.* at 388.

57. *Id.* at 398-99. This decision differed from *Boyd* by basing the reversal on the Fourth Amendment alone; see also WILSON, *supra* note 39, at 59.

58. *Weeks*, 232 U.S. at 394-96. The defendant avoided the "collateral issue" problem of *Adams* by his pretrial petition. *Id.* at 398. See also *Wise v. Mills*, 185 F. 318 (C.C.S.D.N.Y. 1911), *error dismissed*, 220 U.S. 549 (1911), where this method of avoiding the *Adams* rule was successful prior to the *Weeks* decision.



of the Constitution ratified a wrongful act and tainted the entire justice system.<sup>59</sup>

### C. Broadening the Exclusionary Rule

The first major step toward broadening the rules of *Boyd* and *Weeks* was *Silverthorne Lumber Co. v. United States*.<sup>60</sup> While previous Fourth Amendment decisions were based on the idea that because the defendant's property had been confiscated he or she had a right to its return,<sup>61</sup> this case marked the end of that property-based analysis.<sup>62</sup>

In *Silverthorne*, a United States marshal illegally seized the defendants' papers, and the defendants successfully petitioned for their return.<sup>63</sup> However, the lower court allowed the District Attorney to photograph and photocopy the papers before returning them and then use those copies to subpoena the originals.<sup>64</sup> Justice Holmes, writing for the majority, said the government could neither keep possession of the illegally seized evidence nor make use of the evidence at all.<sup>65</sup> To allow this to occur would "reduce[] the Fourth Amendment to a form of words."<sup>66</sup>

59. *Weeks*, 232 U.S. at 394. See also *Elkins v. United States*, 364 U.S. 206, 222-23 (1960) (discussing the "imperative of judicial integrity" as a reason to exclude illegally obtained evidence); *Olmstead v. United States*, 277 U.S. 438, 469-71 (1928) (Brandeis, J., dissenting) ("If the government becomes a lawbreaker, it breeds contempt for law.")

60. 251 U.S. 385 (1920).

61. See WILSON, *supra* note 39, at 81-86. In *Weeks*, the trial court's right to use the defendant's property as evidence derived from its right to possess that property in the first place. The Supreme Court found there was no right to possess the property at the time of trial because it should have been returned to its owner before trial. WILSON, *supra* note 39, at 81. See also James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273 (1983), where the author asserts that exclusion grew out of property rights inherent in the "overlapping" constitutional concepts of liberty and property. White, *supra*, at 1276-77. "Property was an extension of the person[,] . . . [which] is perhaps why the use of one's property in a criminal proceeding was felt to violate the fifth amendment prohibition of compulsory self-incrimination as well as the fourth amendment prohibition of unreasonable seizures [in *Boyd v. United States*]." White, *supra*, at 1277.

62. WILSON, *supra* note 39, at 82. But see White, *supra* note 61, at 1278-79 (stating that *Silverthorne's* decision to forbid the "derivative use of improperly seized property . . . was a natural outgrowth of the primary prohibition [against using the property itself]").

63. *Silverthorne*, 251 U.S. at 390-91.

64. *Id.* at 391.

65. *Id.*; see also *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963) (holding that the government could not use confessions made subsequent to an unlawful arrest).

66. *Silverthorne*, 251 U.S. at 391-92. Justice Holmes noted that this rule "does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others." *Id.* at 392. Thus, this case established the independent source exception to the exclusionary rule.

After the *Silverthorne* decision, there was no reason for a pretrial motion because the Court interpreted the Fourth Amendment to forbid the government's use of unconstitutionally seized evidence as well as any advantages gained by the illegal act.<sup>67</sup> Thus, although it did not state explicitly that a pretrial motion was no longer necessary, this decision seemed to bypass the property issue altogether.<sup>68</sup>

The United States Supreme Court further broadened the *Boyd* and *Weeks* rules in *Agnello v. United States*,<sup>69</sup> a case firmly establishing the exclusionary rule's connection to the Fourth Amendment.<sup>70</sup> In *Agnello*, the Court found a search for contraband unlawful.<sup>71</sup> Federal officers searched Agnello's house without a warrant, found a container of cocaine, and subsequently introduced it as evidence at trial.<sup>72</sup> Agnello alleged he had never seen the cocaine, so he could not have made a pretrial petition for its return.<sup>73</sup> Because the search clearly violated the Fourth Amendment and the evidence incriminated Agnello, the Court ruled Agnello could use the protection of the Fifth Amendment to exclude the evidence.<sup>74</sup> Thus, by 1925 the exclusionary rule was firmly embedded in federal jurisprudence.<sup>75</sup> The next step in the rule's development was its application to the states.

#### D. The Fourth Amendment and Due Process

The case of *Wolf v. Colorado*<sup>76</sup> applied the Fourth Amendment to the states through the Fourteenth Amendment.<sup>77</sup> However, the ruling did not require the exclusion of evidence seized in violation of due process.<sup>78</sup> By

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67. *Weeks v. United States*, 232 U.S. 383, 391 (1914); see also WILSON, *supra* note 39, at 82-83.

68. WILSON, *supra* note 39, at 82.

69. 269 U.S. 20 (1925).

70. Stewart, *supra* note 6, at 1376-77.

71. *Agnello*, 269 U.S. at 33. In a marked departure from its earlier cases, the Court did not distinguish between contraband and personal papers. See *supra* note 45 and accompanying text.

72. *Agnello*, 269 U.S. at 28-29.

73. *Id.* at 34.

74. *Id.* The *Silverstone* and *Agnello* decisions effectively overruled the *Adams* pretrial motion requirement. See Stewart, *supra* note 6, at 1375-77.

75. Stewart, *supra* note 6, at 1377.

76. 338 U.S. 25 (1949).

77. *Id.* at 27-28 ("[The] security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such is enforceable against the States through the Due Process clause.").

78. *Id.* at 33.

ruling states could use remedies other than exclusion,<sup>79</sup> the *Wolf* decision made the exclusionary rule applicable only to searches conducted by federal officials. Evidence gathered by state officials in unconstitutional searches remained admissible in federal court.<sup>80</sup> This was known as the "silver platter doctrine."<sup>81</sup> The doctrine lasted eleven years until it was overruled in 1960 by *Elkins v. United States*.<sup>82</sup>

The Court, in *Elkins*, expressly declined to decide whether the Fourteenth Amendment required exclusion.<sup>83</sup> Instead, the Court focused on the "underlying constitutional doctrine" established by *Wolf*.<sup>84</sup> The silver platter doctrine was based on the idea that unreasonable state searches did not violate the United States Constitution.<sup>85</sup> That idea was destroyed with the *Wolf* decision, however, because the *Wolf* Court found that unreasonable state searches violated the Constitution.<sup>86</sup> Based on this reasoning, the Court abolished the silver platter doctrine.

The *Elkins* majority offered two additional reasons for its decision. The Court noted the exclusionary rule was an effective deterrent of future violations of the Constitution and stated that the purpose of the rule was "to deter."<sup>87</sup> This decision appears to be the first to mention the exclusionary rule's deterrent effect as one of the primary reasons for its existence.<sup>88</sup> In

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79. *Id.* at 30-31. Justice Frankfurter described the ruling as follows:

Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.

*Id.* The dissent questioned the effectiveness of these "other methods." *See id.* at 41-47 (Murphy, J., dissenting).

80. *Elkins v. United States*, 364 U.S. 206, 213-14 (1960). However, this rule was not without limitations. *See Lustig v. United States*, 338 U.S. 74, 78-79 (1949) (holding that federal officials could not participate in the search); *Gambino v. United States*, 275 U.S. 310, 314-15 (1927) (holding that state officials must execute the search with the belief that the defendant committed a state offense).

81. *Elkins*, 364 U.S. at 208 n.2. The Court in *Elkins* attributed the term "silver platter doctrine" to the following phrase: "[I]t is not a search by a federal official if evidence secured by state authorities is turned over to federal authorities on a silver platter." *Id.* at 78-79 (quoting *Lustig v. United States*, 338 U.S. 74 (1949)).

82. 364 U.S. 206 (1960).

83. *Id.* at 213.

84. *Id.*

85. *Id.* at 213-14.

86. *Id.* Therefore, "the constitutional doctrine of *Wolf* operated to undermine the logical foundation of the *Weeks* admissibility rule . . . from the very day that *Wolf* was decided." *Id.* at 214.

87. *Id.* at 217.

88. Stewart, *supra* note 6, at 1379. Justice Stewart stated that the doctrinal basis for the exclusionary rule was left unresolved in his majority opinion. Stewart, *supra* note 6, at 1379. However, later courts would seize upon the deterrence rationale as the sole purpose

addition, the Court found that the "imperative of judicial integrity" demanded the exclusion of all unconstitutionally seized evidence.<sup>89</sup> The *Elkins* decision made due process protection coextensive with the protections of the Fourth Amendment.<sup>90</sup>

#### E. A Constitutional Basis For Exclusion: *Mapp v. Ohio*

Overruling *Wolf v. Colorado*,<sup>91</sup> the Court in *Mapp v. Ohio*<sup>92</sup> held that the Fourth and Fourteenth Amendments required the exclusion of unconstitutionally obtained evidence in state, as well as federal, courts.<sup>93</sup> The appellant, Mapp, was convicted under an Ohio statute that made it illegal to possess pornography, after pornographic material was found during an illegal search of her home.<sup>94</sup> The evidence was admitted on the authority of *Wolf*.<sup>95</sup>

Although the petitioner argued only that the police officers' unconstitutional behavior warranted exclusion under the "shock the conscience" standard of *Rochin v. California*,<sup>96</sup> the Court overruled *Wolf*.<sup>97</sup> The majority

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of the exclusionary rule.

89. *Elkins*, 364 U.S. at 222.

90. *Id.* at 223. The Court held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial." *Id.* After this decision, many commentators remained unconvinced that Fourth Amendment standards were the same as the Fourteenth Amendment standards. See, e.g., Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, DUKE L.J., Summer 1962, at 319. The Court's decision in *Ker v. California*, however, made it clear that the states were required to abide by Fourth Amendment standards in search and seizure cases. *Ker v. California*, 374 U.S. 23, 33 (1963).

91. 338 U.S. 25 (1949).

92. 367 U.S. 643 (1961).

93. *Id.* at 655.

94. *Id.* at 643 (citing OHIO REV. CODE § 2905.34). Three hours after Mapp refused admittance to three police officers who wished to conduct a warrantless search of her home, approximately seven officers returned and forced their way into the house. *Id.* at 644. When Mapp asked for a warrant, an officer held up a piece of paper which Mapp grabbed and shoved down her shirt. *Id.* After a struggle, the officers recovered the paper, handcuffed Mapp, and searched her home. *Id.* at 644-45. During the search, they found "four little pamphlets, a couple of photographs, and a little pencil doodle—all of which [were] alleged to be pornographic." *Id.* at 668 (Douglas, J., concurring). The prosecution produced no warrant at trial. *Id.* at 645 (majority opinion).

95. *Id.* at 645-46.

96. 342 U.S. 165 (1952). In *Rochin*, doctors pumped a suspect's stomach against his will so police officers could recover two capsules of morphine. *Id.* at 166. The Court excluded the evidence because the methods of the police "shocked the conscience." *Id.* at 172.

97. *Mapp*, 367 U.S. at 655. Only the American Civil Liberties Union, in its amicus curiae brief, asked the Court to overrule *Wolf*. *Id.* at 674 n.5 (Harlan, J., dissenting); see also

found the extension of the exclusionary rule to state cases "constitutionally necessary," and the exclusionary rule was thus an "essential part of the right to privacy."<sup>98</sup>

In *Mapp*, the Court once again based its decision on the relationship between the Fourth and Fifth Amendments.<sup>99</sup> According to Justice Clark's majority opinion, the two amendments required exclusion of unconstitutionally seized evidence to maintain the constitutional right to privacy.<sup>100</sup> The *Mapp* majority also found favor with the judicial integrity rationale for the exclusionary rule.<sup>101</sup> However, later cases did not support this rationale for the rule's existence.<sup>102</sup>

#### F. Deterrence As A Foundation For Exclusion

Immediately following *Mapp*, the Court's focus shifted from judicial integrity to deterrence. Stating that deterrence of police misconduct was the primary purpose for the exclusionary rule, the Court held in *Linkletter v. Walker*<sup>103</sup> that applying the *Mapp* rule retroactively would not serve this purpose.<sup>104</sup>

In *Alderman v. United States*,<sup>105</sup> the Court determined that only those whose rights were violated by an unconstitutional search have standing to suppress the evidence.<sup>106</sup> Because the benefit of deterring police conduct by extending the exclusionary rule to third parties would not outweigh the cost

Stewart, *supra* note 6, at 1367. According to Justice Stewart, when "the appellant's lawyer was asked [during oral argument] whether he was requesting the Court to overrule the *Wolf* case . . . , [h]e answered, quite candidly, that he had never heard of the *Wolf* case." Stewart, *supra* note 6, at 1367.

98. *Mapp*, 367 U.S. at 655-56. The Court referred to exclusion as a "constitutional privilege." *Id.* at 656.

99. *Id.* at 657.

100. *Id.* The majority contended the Fourth and Fifth Amendments had an "intimate relation" and complimented each other: "[T]ogether they assure . . . that no man is to be convicted on unconstitutional evidence." *Id.* Fifteen years later, the Court dismissed the theory that a seizure of incriminating materials is within the scope of the Fifth Amendment. *Andresen v. Maryland*, 427 U.S. 463, 473-74 (1976).

101. *Mapp*, 367 U.S. at 659; see *supra* note 59 and accompanying text.

102. For commentary regarding this issue, see Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 314-23 (1993); Steven K. Sharpe & John E. Fennelly, *Massachusetts v. Sheppard: When the Keeper Leads the Flock Astray—A Case of Good Faith or Harmless Error?*, 59 NOTRE DAME L. REV. 665, 671 (1984).

103. 381 U.S. 618 (1965).

104. *Id.* at 636-40. The Court noted that the "purpose [of deterrence] will not at this late date be served by the wholesale release of the guilty victims." *Id.* at 637.

105. 394 U.S. 165 (1969).

106. *Id.* at 171-72. The United States engaged in illegal electronic surveillance, and the petitioners were convicted on evidence gathered from that surveillance. *Id.* at 167-68.

of allowing more guilty criminals to go free, the Court refused to extend the rule.<sup>107</sup>

In *United States v. Calandra*,<sup>108</sup> the Court refused to extend the exclusionary rule to grand jury proceedings.<sup>109</sup> The Court summarily rejected the idea that the Constitution required exclusion and declared the exclusionary rule a "judicially created remedy."<sup>110</sup> Declining to recognize any rationale for the exclusionary rule except that of deterrence, the Court noted the rule should apply only when its application efficiently serves its remedial objectives.<sup>111</sup> Following the pattern of *Alderman*, the Court applied a cost-benefit analysis to determine that the deterrence of police misconduct did not warrant applying a rule that would unduly interfere with the role of the grand jury.<sup>112</sup>

The Court, in *Stone v. Powell*,<sup>113</sup> limited the ability of prisoners to receive habeas corpus relief based on a violation of the Fourth Amendment.<sup>114</sup> This decision dismissed the "judicial integrity" rationale for the exclusionary rule, finding deterrence the primary justification for the rule's existence.<sup>115</sup> According to the *Stone* majority, the benefits of preserving judicial integrity did not outweigh the costs of excluding relevant evidence.<sup>116</sup> The Court continued to use the cost-benefit analysis in later cases.<sup>117</sup>

107. *Id.* at 174-75; see also Stewart, *supra* note 6, at 1390.

108. 414 U.S. 338 (1974).

109. *Id.* at 354. A witness before the grand jury must answer questions based on evidence gathered in an illegal search. *Id.*

110. *Id.* at 348 ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."); see also Stewart, *supra* note 6, at 1390 ("With that one sentence [quoted above], the Court seemed to settle the question of the rule's constitutional basis.").

111. *Calandra*, 414 U.S. at 348.

112. *Id.* at 350-51. The Court said questioning witnesses based on illegally seized evidence is a "derivative use" of the evidence and is not a further violation of the Constitution. *Id.* at 354.

113. 428 U.S. 465 (1976).

114. *Id.* at 489-96.

[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

*Id.* at 482.

115. *Id.* at 485-86. This reasoning shows a shift in the Court's analysis which led to the good faith exceptions discussed in part III.G. of this note.

116. *Id.* at 485.

117. See, e.g., *United States v. Leon*, 468 U.S. 897, 913 (1984) ("[T]he balancing approach that has evolved during the years of experience with the rule provides strong support for the [creation of a good faith exception to the exclusionary rule].").

### G. The Good Faith Exceptions

Throughout the twentieth century, the Supreme Court created several exceptions to the exclusionary rule, including the impeachment,<sup>118</sup> attenuation,<sup>119</sup> independent source,<sup>120</sup> and inevitable discovery<sup>121</sup> exceptions. In the years following the *Mapp* decision, many commentators also advocated a good faith exception to the exclusionary rule.<sup>122</sup> The Court did not address the issue, however, until 1983, in *United States v. Leon*.<sup>123</sup>

In *Leon*, the Court found favor with the cost-benefit analysis of its prior post-*Mapp* cases such as *Alderman*.<sup>124</sup> In a six-to-three decision, the Court reversed the Ninth Circuit's decision to suppress drugs found in the execution of a facially valid search warrant.<sup>125</sup> If officers reasonably rely on a search warrant issued by a neutral magistrate, the Court found that prosecutors may use the evidence seized in the search even if the warrant subsequently is found unsupported by probable cause.<sup>126</sup>

118. In *Walder v. United States*, 347 U.S. 62 (1954), the Court held that prosecutors may use illegally seized evidence to attack the defendant's credibility.

119. *Nardone v. United States*, 308 U.S. 338, 341 (1939) (permitting courts to admit the evidence if the causal connection between the illegal search and the evidence is sufficiently "attenuated").

120. See *supra* note 66; but see *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) (ruling that narcotics discovered through statements made by an illegally arrested defendant did not fall under the independent source exception).

121. *Nix v. Williams*, 467 U.S. 431 (1984) (admitting evidence regarding the murder victim's body, despite the illegal questioning of the defendant which led to its discovery, because a search party would inevitably have discovered the body).

122. See, e.g., William A. Schroder, *Detering Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1412-21 (1981); Frederick A. Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51 (1980); Charles Alan Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

123. 468 U.S. 897 (1984). Prior to *Leon*, the Fifth Circuit adopted a "good faith" exception to the exclusionary rule. See *United States v. Williams*, 622 F.2d 830, 846-47 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981).

124. *Leon*, 468 U.S. at 913. The Court noted it must consider the "sometimes competing goals of . . . deterring official misconduct and removing inducements to unreasonable invasions of privacy and . . . establishing procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'" *Id.* at 900-01 (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)).

125. *Id.* at 902-05. The Burbank Police Department received information from a "confidential informant of unproven reliability" concerning possible illegal activities of the respondents. *Id.* at 901. Based on this information, the police began surveillance of the defendants' properties and subsequently applied for and received a search warrant. They found cocaine, in varying quantities, at all of the defendants' residences. *Id.* at 902. After determining that the informant was not credible and the warrants were not based upon probable cause, the Ninth Circuit suppressed the evidence. *Id.* at 904-05.

126. *Id.* at 927 (Blackmun, J., concurring).

The *Leon* Court advanced three reasons courts should not apply the exclusionary rule to deter judicial misconduct.<sup>127</sup> The Court found no evidence that exclusion would deter unconstitutional judicial conduct.<sup>128</sup> The Court also saw no indication that judges and magistrates tended to disregard or violate the Fourth Amendment or that judicial misconduct was so pervasive as to warrant the "extreme sanction" of the exclusionary rule.<sup>129</sup> In addition, the rule was designed only to deter police misconduct.<sup>130</sup>

Although the Court found police misconduct rarely existed when an officer relied on a search warrant,<sup>131</sup> the majority listed some limits to its holding. If the judge abandoned his neutral status in issuing the warrant, the police officer could not rely reasonably on the warrant, and suppression would be the appropriate remedy.<sup>132</sup> The same is true if the officers intentionally or recklessly alleged false information in an affidavit in support of the warrant.<sup>133</sup> Finally, if the officers could not reasonably have believed that probable cause existed, the court may suppress the evidence.<sup>134</sup>

In the companion case of *Massachusetts v. Sheppard*,<sup>135</sup> the Court refused to exclude evidence collected in reliance on a search warrant later ruled invalid.<sup>136</sup> Since the *Leon* and *Sheppard* decisions, the courts have expanded the good faith exceptions.<sup>137</sup> *Arizona v. Evans* represents the most recent expansion.

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127. *Id.* at 916 (majority opinion).

128. *Id.* The Court noted "[j]udges and magistrates are not adjuncts to the law enforcement team" so they have no "stake" in the outcome of their proceedings. *Id.* at 917. Furthermore, the Court suggested that possible removal of the magistrates by the district courts is a more effective "remedy" for constitutional violations than exclusion of evidence. *Id.* at 917-18 n.18.

129. *Id.* at 916.

130. *Id.*

131. *Id.* at 921.

132. *Id.* at 923.

133. *Id.*

134. *Id.* at 926.

135. 468 U.S. 981 (1984).

136. *Id.* at 989-90. The warrant in *Sheppard* failed to specify the items sought. *Id.* at 987 n.2.

137. *See, e.g.,* Illinois v. Krull, 480 U.S. 340 (1987) (determining that an officer's reasonable reliance on a statute later deemed unconstitutional falls within the good faith exception); INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding fruits of INS agents' illegal searches admissible in deportation proceedings); *see also* United States v. Jackson, 825 F.2d 853 (5th Cir. 1987), *cert. denied sub nom* Browning v. United States, 484 U.S. 1019 (1988) (admitting evidence seized in reliance on a court decision later ruled unconstitutional).



## IV. REASONING OF THE COURT

After establishing jurisdiction over the case, Justice Rehnquist, writing for the majority, set the stage for a *Leon* cost-benefit analysis by noting that only the initial unlawful search violates the Fourth Amendment, so the use of illegally seized evidence is not a new violation.<sup>138</sup> Because the Constitution does not expressly forbid the use of evidence collected in an illegal search, the Court stated that the exclusionary rule does not apply to all Fourth Amendment violations.<sup>139</sup> The Court reasoned the exclusionary rule should apply only when its application would further a single objective—deterrence of police violations of the Fourth Amendment.<sup>140</sup>

Evans relied on *United States v. Hensley*<sup>141</sup> and *Whiteley v. Warden*<sup>142</sup> to argue that a Fourth Amendment violation required suppression of the evidence.<sup>143</sup> The Court stated the issue in *Hensley* was whether there was a Fourth Amendment violation at all, not whether the exclusionary rule should apply.<sup>144</sup> In addition, although the *Whiteley* Court indicated the exclusionary rule should apply to all Fourth Amendment violations, the

138. *Arizona v. Evans*, 115 S. Ct. 1185, 1191 (1995). The Court noted: "The wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself." *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)). With this quotation from *Calandra*, Justice Rehnquist showed the majority's support for deterrence as the foundation of the exclusionary rule. See *supra* note 110 and accompanying text.

Some critics of the good faith exception argue that separating the right from the remedy allows courts to decide motions to suppress without determining whether a Fourth Amendment violation has occurred, thereby impeding the development of Fourth Amendment law. See, e.g., Joan G. Levenson, Comment, *The Good Faith Exception: Should It Enable Courts to Avoid Explication of Underlying Fourth Amendment Issues?*, 52 BROOK. L. REV. 799 (1986); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

139. *Evans*, 115 S. Ct. at 1191. The decision to apply the exclusionary rule is totally separate from the determination that a Fourth Amendment violation occurred. *Id.*

140. *Id.*

141. 469 U.S. 221 (1985).

142. 401 U.S. 560 (1971).

143. *Evans*, 115 S. Ct. at 1192. Comparing police reliance on an erroneous radio transmission, which demanded suppression in *Whiteley*, to reliance on a computer record in *Evans*, the respondent argued that law enforcement agencies are the only ones who have access to "criminal information systems" and thus have the responsibility for their accuracy. Brief of Respondent at 6-7, *Arizona v. Evans*, 115 S. Ct. 1185 (1995) (No. 93-1660).

Respondent also compared *Evans* with *Hensley*. *Id.* at 21-22. In *Hensley*, the arresting officers relied on another police department's wanted poster to arrest the defendant. The Court noted, because the flier was based on a reasonable suspicion, the arrest was valid; however, if the flier had not been supported by probable cause, the arrest would not have been valid. *Hensley*, 469 U.S. at 230. The *Hensley* Court stated that the admissibility of evidence collected during the arrest depends on whether probable cause for that arrest existed. *Id.* at 235.

144. *Evans*, 115 S. Ct. at 1192.

*Evans* majority rejected this contention and found the application of the rule dependent on its value as a deterrent.<sup>145</sup>

The majority then reaffirmed its *Leon* holding and analyzed the case according to the *Leon* framework.<sup>146</sup> It noted the exclusionary rule was created to deter misconduct of the police, not court employees.<sup>147</sup> Because the respondent did not offer evidence that court employees habitually violated the Fourth Amendment, the Court found the "extreme sanction" of the exclusionary rule unwarranted in this case.<sup>148</sup> Most importantly, the Court found no evidence that applying the exclusionary rule to a situation in which court employees were responsible for a computer error would deter future misconduct.<sup>149</sup> Concluding that the police officers who arrested *Evans* behaved reasonably,<sup>150</sup> the majority reasoned exclusion would deter no police misconduct in this case.<sup>151</sup>

Justice O'Connor, joined by Justices Souter and Breyer, concurred with the majority's opinion that courts should apply the exclusionary rule only

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145. *Id.* at 1192-93 (citing *Illinois v. Krull*, 480 U.S. 340 (1987); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984); *United States v. Calandra*, 414 U.S. 338 (1984)). These cases use a cost-benefit analysis, emphasizing the rule's deterrent power rather than its Constitutional basis. See parts III.F. and III.G. of this note for a discussion of the cost-benefit cases.

146. *Evans*, 115 S. Ct. at 1193. See *supra* notes 127-30 and accompanying text for a discussion of the *Leon* factors.

147. *Evans*, 115 S. Ct. at 1193. For commentary on deterring only police misconduct, see Donald Dripps, *Living With Leon*, 95 YALE L.J. 906 (1986).

148. *Evans*, 115 S. Ct. at 1193. For commentary on the cost-benefit analysis, see Wayne R. LaFave, *The Seductive Call of Expediency: United States v. Leon, Its Rationale and Ramifications*, U. ILL. L. REV. 1984, at 895, 903-11 (1984) (arguing that the *Leon* Court exaggerated the costs and diminished the benefits of the exclusionary rule); Albert W. Alschuler, "Close Enough For Government Work": *The Exclusionary Rule After Leon*, 7 SUP. CT. REV. 309, 346-51 (1984) (discussing the difficulty in weighing "tangible" costs against "speculative" benefits). Alschuler also criticized the exemption of "every magistrate, however lawless, from direct judicial review but [of] no police officer, however decent." *Id.* at 357. He contends that remedial measures that apply to police officers should also apply to others who authorize searches and seizures. *Id.* at 358.

149. *Evans*, 115 S. Ct. at 1193. The Court reasoned that the possibility of exclusion would not deter these employees from keeping erroneous records, because the clerks responsible for the erroneous records were not involved in the arrest. *Id.* (citing *United States v. Leon*, 468 U.S. 897, 917 (1984)).

150. For excellent discussions of the objective good faith determination, see LaFave, *supra* note 148, and Alschuler, *supra* note 148, discussing the difficulty of determining reasonableness.

151. *Evans*, 115 S.Ct. at 1193-94. With one sentence, the majority dismissed the limitations found in the *Leon* decision: "There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record." *Id.* at 1194. See *supra* notes 132-34 and accompanying text, for a discussion of the limits of the *Leon* holding.

to deter police misconduct.<sup>152</sup> Nevertheless, the concurrence noted that police officers may be negligent in relying on a record keeping system that contains "no mechanism to ensure its accuracy over time."<sup>153</sup> Justice O'Connor compared the reliability of a computer system with that of police informants.<sup>154</sup> Just as information from an unreliable informant does not constitute probable cause for arrest, information from an unreliable record keeping system would not do so.<sup>155</sup> Therefore, according to Justice O'Connor, police may not rely "blindly" on a computerized record keeping system.<sup>156</sup>

Justice Stevens dissented from the holding of the majority.<sup>157</sup> He stated that the exclusionary rule, like the Fourth Amendment itself, protects individuals from all unlawful searches and seizures, not merely those conducted by the police.<sup>158</sup> The dissent further argued that the police department was "part of the chain of information" which resulted in Evans's illegal arrest, so applying the exclusionary rule in this case could encourage police departments to develop more effective procedures for communication with court employees.<sup>159</sup> Justice Stevens disagreed that preventing the prosecution of a crime was a greater "cost" to society than the "offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base."<sup>160</sup>

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152. *Evans*, 115 S. Ct. at 1194 (O'Connor, J., concurring).

153. *Id.* (O'Connor, J., concurring).

154. *Id.* (O'Connor, J., concurring). When the police rely on information from an informant to establish probable cause for an arrest or search, they must prove the credibility of the informant. *See generally* WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 508-22 (1978). Justice O'Connor noted, "where an informant provides information about certain criminal activities but does not specify the basis for his knowledge, a finding of probable cause based on that information will not be upheld unless the informant is 'known for [his] unusual reliability'" and stated that a record keeping system's reliability "deserves no less scrutiny than that of informants." *Evans*, 115 S. Ct. at 1194 (O'Connor, J., concurring) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

155. *Evans*, 115 S. Ct. at 1194 (O'Connor, J., concurring).

156. *Id.* (O'Connor, J., concurring).

157. *Id.* at 1195 (Stevens, J., dissenting). Justice Stevens also joined Justice Ginsburg's dissent, which advocated dismissal for lack of jurisdiction. *Id.* at 1197-98 (Ginsburg, J., dissenting).

158. *Id.* at 1195 (Stevens, J., dissenting).

159. *Id.* at 1196 (Stevens, J., dissenting).

160. *Id.* at 1197 (Stevens, J., dissenting).

## V. SIGNIFICANCE

In *Arizona v. Evans*, the majority opinion did not address the limiting factors of the *Leon* decision.<sup>161</sup> Instead, the Court made the issue of whether court employees could have been responsible for the computer error determinative of whether to apply the exclusionary rule.<sup>162</sup> The Court's analysis did not address the prime concern of the Supreme Court of Arizona—the notion that computer errors in police files could haunt even the average noncriminal citizen.<sup>163</sup>

Although Justice O'Connor suggests the *Evans* decision determined only whether a court must apply the exclusionary rule to deter judicial misconduct,<sup>164</sup> lower courts may use the decision to create a blanket exception allowing police officers to rely on erroneous computer files with no determination of whether this reliance is reasonable. In addition, the decision gave no guidance to the lower courts as to when reliance on a computer system may be unreasonable.<sup>165</sup>

The *Evans* decision also called into question the "fellow officer rule."<sup>166</sup> Under this rule, a police officer who receives information that another law enforcement agency has issued a warrant for the suspect's arrest may make a legal arrest based upon the authority of that warrant.<sup>167</sup> If a court later determines that the original warrant was not supported by probable cause,

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161. See *supra* notes 132-34, 151.

162. *Evans*, 115 S.Ct. at 1194 (O'Connor, J., concurring) ("[T]he Court limits itself to the question whether a court employee's [error] . . . is the kind of error to which the exclusionary rule should apply.").

163. The Arizona Supreme Court called this the "potential for Orwellian mischief." *State v. Evans*, 866 P.2d 869, 872 (Ariz. 1994); see *supra* notes 27-28 and accompanying text.

164. See *supra* note 162.

165. See *People v. Downing*, 33 Cal. App. 4th 1641 (1995). An officer conducted a warrantless search of Downing's apartment because the police department's computer showed he was subject to a Fourth Amendment search waiver. *Id.* at 179. The officer found a pipe bomb and "various parts for making pipe bombs." *Id.* The waiver had, in fact, expired, but the San Diego Superior Court had not updated the computer records. *Id.* at 180. The court relied on *Evans* and refused to exclude the evidence. *Id.* at 187 ("[I]n this fast-paced, computerized society, it is absurd to require a police officer to exhaust all avenues of investigation and corroboration when he has no objective reason to question facially valid computer data produced by other than the collective law enforcement department in front of him."). However, the court did note, without elaboration, that reliance on a computer system that the police department knows is flawed may be unreasonable. *Id.* at 187 n.26.

166. *Evans*, 115 S. Ct. at 1192. The Court questioned the *Whiteley v. Warden* holding which created the rule by stating: "In *Whiteley*, the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation. . . . Subsequent case law has rejected this reflexive application of the exclusionary rule." *Id.* (citing *Whiteley v. Warden*, 401 U.S. 560 (1971)). For an excellent discussion of *Whiteley*, see LAFAVE, *supra* note 154, at 622-31.

167. LAFAVE, *supra* note 154, at 623-24.

the arrest is invalid and evidence discovered incident to the arrest is suppressed.<sup>168</sup> Because *Evans* clearly found fault with the automatic exclusion of evidence discovered in an illegal arrest, lower courts may read the decision as creating a "good faith" exception to the fellow officer rule.<sup>169</sup>

Like *Leon*, this opinion may place a "premium on police ignorance,"<sup>170</sup> encouraging police to remain wilfully ignorant of the quality of their computer systems. If the officers do not know whether the system is accurate, they cannot be accused of acting in bad faith. Furthermore, this ruling may encourage police departments to turn over their record keeping to court employees to avoid suppression of evidence in the event of an erroneous record.

Finally, the *Evans* decision brings to the forefront an issue that both proponents and opponents of the exclusionary rule must address—what is the remedy, other than exclusion, for a Fourth Amendment violation? For the prohibitions of the Fourth Amendment to have meaning, there must be some remedy for a violation.<sup>171</sup> Some scholars suggest allowing civil actions against the government for violations.<sup>172</sup> Others note, however, that new remedies requiring legislative action would have their own set of accompanying problems.<sup>173</sup> Legislatures are political animals and may not be willing to create new remedies for illegal searches and seizures.<sup>174</sup> Juries

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168. LAFAVE, *supra* note 154, at 624, 626 n.35 and accompanying text.

169. See *State v. Mayorga*, 901 S.W.2d 943, 945 (Tex. Crim. App. 1995) (citing *Evans* for the proposition that the exclusionary rule "does not apply in cases in which an arresting officer is reasonably acting upon information provided to him which is later found to be erroneous"). But see *State v. White*, 660 So. 2d 664 (Fla. 1995). During a computer check on a routine traffic stop, the arresting officers' computer indicated an outstanding arrest warrant for White. *Id.* at 665. The officers arrested White and discovered contraband during a search incident to that arrest. *Id.* Because the warrant had been quashed four days prior to the arrest, the trial court suppressed the evidence. *Id.* The Florida Supreme Court affirmed, distinguishing *Evans* by charging the arresting officers with knowledge that the warrant had been quashed under the "fellow officer" rule. *Id.* at 667.

170. See Leigh A. Morrissey, Note, *State Courts Reject Leon on State Constitutional Grounds: A Defense of Reactive Rulings*, 47 VAND. L. REV. 917, 930 (1994) (noting that *Leon* places a "premium on police ignorance of the law because evidence seized under an invalid warrant generally will be admissible," so police can rely on the judge's determination instead of deciding whether the law allows the search). See also *Leon*, 468 U.S. at 955 (Brennan, J., dissenting) (predicting that "police departments will be encouraged to train officers that if a warrant has simply been signed, it is reasonable, without more, to rely on it").

171. Stewart, *supra* note 6, at 1397.

172. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 812-14 (1994) (advocating strict liability on behalf of the government for the actions of its officers).

173. See, e.g., Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

174. *Id.* at 848-49. See also Anthony G. Amsterdam, *Perspectives On The Fourth*

may also be unwilling to award sufficient monetary damages to deter unconstitutional searches and seizures.<sup>175</sup>

Even the Office of Legal Policy's recent Report to the Attorney General, which advocates doing away with the rule altogether, according to commentators, fails to suggest an existing remedy as an adequate substitute for the exclusionary rule.<sup>176</sup> The report suggests criminal prosecutions as an alternative remedy while acknowledging they would be ineffective as a deterrent because most police officers who commit constitutional violations are not criminally culpable.<sup>177</sup> The report also suggests establishing review boards to discipline police officers who violate the constitution but admits that the officers could raise their good faith as an affirmative defense.<sup>178</sup>

During a discussion of the existing options for civil damage suits against those who execute an unlawful search, the report notes that none offer a satisfactory system for remedying violations.<sup>179</sup> Acting in good faith is a defense to all civil damage remedies, and, with the Supreme Court's expansion of the good faith exceptions to the exclusionary rule, good faith is also becoming a defense to exclusion.<sup>180</sup> The use of good faith as a

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*Amendment*, 58 MINN. L. REV. 349, 378-79 (1974) (stating that the "mounting hysteria" about increasing crime rates means that "[l]egislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police").

175. Steiker, *supra* note 173, at 850 ("[P]ublic support for unrestrained police power not only makes the passage of remedial legislation extremely unlikely, it also suggests that, even if such legislation were to be passed, popular juries would be unwilling to find much police conduct 'unreasonable.'"). Steiker attributes much of this public support to the fact that the average citizen is always more afraid of the "robbers" than the "cops." Steiker, *supra* note 173, at 850.

176. OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE (1986), reprinted in *Truth in Criminal Justice Series*, 22 U. MICH. J.L. REF. 573, 635 (1989). See Schroeder, *supra* note 122, at 1386-1412 (commenting on the limitations of existing remedies other than exclusion).

177. See REPORT TO THE ATTORNEY GENERAL, *supra* note 176, at 621. Most violations "appear to involve mistakes of law or fact, rather than willful or malicious conduct, on the part of law enforcement officers." REPORT TO THE ATTORNEY GENERAL, *supra* note 176, at 621. It is likely that willful or malicious violations would not be made in good faith in the first place, so they might result in exclusion under the current legal scheme.

178. REPORT TO THE ATTORNEY GENERAL, *supra* note 176, at 624.

179. REPORT TO THE ATTORNEY GENERAL, *supra* note 176, at 625-31 (discussing the limitations of *Bivens* actions, Federal Tort Claims Act Suits, 18 U.S.C. § 2520 claims, and 42 U.S.C. § 1983 suits).

180. REPORT TO THE ATTORNEY GENERAL, *supra* note 176, at 648. The report offered this statement as a reason to abolish the exclusionary rule, because, with further good faith exceptions, the remedies will overlap.

defense leaves defendants such as Isaac Evans without a remedy.<sup>181</sup> Thus, the *Evans* decision may force the United States Supreme Court, or lower courts, to create other remedies for Fourth Amendment violations.

*Elisa Masterson White*

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181. See, e.g., Stewart, *supra* note 6, at 1397 (stating that all violations of the Constitution must have a remedy, even if the violation was committed in good faith).