ARTICLES

THE EXCLUSIONARY RULE AND THE MEANING OF SEPARATION OF POWERS

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I. INTRODUCTION

The exclusionary rule forbids the introduction of evidence that law enforcement officers obtain by means of an unreasonable search and seizure.[1] The rule has occasioned considerable and continuing debate of a sort that offers little hope of a permanent resolution. For more than sixty years, the prototypical arguments on both sides of this debate have presented the issue as one whose resolution requires the balancing of directly competing values, with the disagreement arising as to the proper balance between them. The following remarks are typical:

> On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.[2]
>
> We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.[3]
>
> Are we faced with a choice between police lawlessness and private lawlessness?[4]

Unfortunately, both the majority and the minority in the

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1. *See* U.S. CONST. amend. IV:

> 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.

2. People v. Defore, 242 N.Y. 13, 24-25, 150 N.E. 585, 589 (1926) (Cardozo, J.).
3. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).
4. Barrett, *Exclusion of Evidence Obtained by Illegal Searches: A Comment on* People vs. Cahan, 43 CALIF. L. REV. 565, 567 (1955).

most recent Supreme Court decision regarding the exclusionary rule, *James v. Illinois*,[5] continued in this same vein, their reasoning governed by the shared perception that their task in exclusionary rule cases is to strike the appropriate balance. The issue is framed as a problem of balancing the danger of letting guilty parties escape punishment against the danger of letting the government "get away with" unconstitutional invasions of personal privacy. Seen in this light, the question raised by the exclusionary rule is a particular example of a more general problem: the need to balance protection by government against protection from government, or more generally still, *the* problem of limited government.

I argue here that a proper understanding of constitutionally limited government *can* resolve the question of exclusion, but only if that question has been properly put. It is a mistake to view the question as a matter of determining where we ought to draw the line in limiting the conduct of the police and the prosecution in a criminal case. The question of exclusion is not one of defining what the constitutional limits are, but one of determining what ought to be done once those limits have been violated. In search and seizure law, line-drawing occurs when the courts define what constitutes an unreasonable search or seizure; in drawing that line, the claims of individual privacy must be weighed against the need for effective law enforcement. A balancing approach is perfectly appropriate when determining where the constitutional limit lies, and empirical studies of the costs and benefits of a particular determination may be highly dispositive of the question.

But there is no balancing involved when the issue is whether an admittedly unconstitutional search should be treated as valid by the courts. What ought the courts to do when confronted with unconstitutional executive action? This is the question raised by the controversy over the exclusionary rule. Here, the logic of "balancing" is inappropriate, and empirical studies are irrelevant. In fact, the exclusionary rule controversy illustrates the limits of an empirical approach to resolving constitutional questions.

5. 110 S. Ct. 648 (1990). *James* involved the impeachment exception to the exclusionary rule. The Court held that the prosecution cannot impeach the testimony of all defense witnesses with illegally obtained evidence; only the defendant's testimony may be impeached in this manner. *See id.* at 652, 656. *See also* Walder v. United States, 347 U.S. 62 (1954) (first case to recognize the impeachment exception).

I find guidance instead in a consideration of the meaning of limited government and particularly in the doctrine of separation of powers. The separation of executive from judicial power, like the separation of each from legislative power, is a means to enforce constitutional limits on government action. The rights of an accused person are safeguarded when the different branches of government must cooperate in the prosecution. Executive abuses can be checked by an independent judiciary, because the action of both branches is required to bring about an individual's punishment. If the courts treat the fruits of an unconstitutional search as valid, they allow the government as a whole to proceed against the individual in violation of the constitutional limits established by the Fourth Amendment. Thus, admission of unconstitutionally obtained evidence represents a failure of the separation of powers.

In this Article, I argue that the exclusionary rule as it applies to unreasonable searches and seizures is constitutionally required. In Part II, I outline the development of the four major positions on the exclusionary rule and their shifting impact on Supreme Court opinions. These positions are: (1) that the courts are constitutionally required to exclude unconstitutionally obtained evidence (the constitutional requirement rationale); (2) that exclusion is proper judicial policy because the courts ought not to be implicated in unconstitutional conduct (the judicial integrity rationale); (3) that exclusion is the only effective way for the courts to provide a remedy for the violation of the privacy rights of search victims (the deterrence rationale); and (4) that the courts are constitutionally required to admit unconstitutionally obtained evidence (the admissionist position). The history of the development of these positions shows how the Supreme Court has increasingly moved away from the constitutional requirement rationale toward the deterrence rationale. At the same time, the Court has increasingly undermined the logic of deterrence. Moreover, the deterrence rationale has kindled the false hope that empirical assessments of the effects of the rule on police behavior and criminal convictions can settle the question of whether the exclusionary rule ought to be retained. I argue that empirical research cannot settle the question, but a proper understanding of the role of the courts in the constitutional system can.

Consequently, in Part III, I consider two models of the role

of the courts, the fragmentary model and the unitary model.[6] The fragmentary model treats the proceedings of a trial court as constitutionally and morally separated from the actions of the executive in conducting a criminal prosecution. By contrast, under the unitary model, the judiciary is an integral part of the entire process of criminal prosecution and thus shares constitutional and moral responsibility for the government's conduct from start to finish. These models contain the premises of the four alternative positions on the exclusionary rule. I argue that the unitary model implies that the exclusionary rule is constitutionally required in three ways: by the Fourth Amendment directly, by the Constitution in a manner analogous to judicial review of unconstitutional legislative action, and as a requirement of due process.

In Part IV, I draw on the theory of separation of powers to argue that the unitary model correctly describes the role of the courts in a limited constitutional government, and that therefore the exclusionary rule is constitutionally required. In Part V, I apply this argument to the recently developed good faith exception to the exclusionary rule to show that the exception is not consistent with the constitutional mandate underlying the rule.

II. The Development of the Exclusionary Rule

A. *The Exclusionary Rule as a Constitutional Requirement*

The exclusionary rule in search and seizure was first announced in *Weeks v. United States*,[7] where the Supreme Court held that the defendant's Fourth Amendment rights had been violated by the failure to return unconstitutionally seized papers in response to his timely application for their return and by the use of the papers as evidence at trial.[8] The Court concluded that the Fourth Amendment limits the authority of the federal courts as well as that of the federal marshal; the Court made no distinction between the unconstitutionality of the seizure and the unconstitutionality of the use of the seized material.

The *Weeks* opinion provided two distinguishable constitu-

6. These models were first presented in Schrock & Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 254-60 (1974).

7. 232 U.S. 383 (1914).

8. *See Weeks*, 232 U.S. at 398.

tional requirement rationales for exclusion. First, *Weeks* asserted the defendant's personal Fourth Amendment right not to be convicted on the basis of unconstitutionally obtained evidence. Admission of the evidence would be a direct violation of the Fourth Amendment restriction on the means by which the government, including the courts, can bring the guilty to punishment.[9] The Fourth Amendment was applied directly to the judiciary as well as to the executive.

Second, the language of the *Weeks* opinion lends itself to a quite different interpretation of the status of exclusion, one that became increasingly important as the rule developed. The Court established that the judiciary has the constitutional duty to give "force and effect"[10] to the Fourth Amendment by excluding unconstitutionally seized evidence:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 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. . . . To sanction such proceedings [(the U.S. Marshal's unconstitutional search)] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[11]

Under this reasoning, the exclusionary rule becomes a means for the judiciary to enforce Fourth Amendment guarantees in the face of the executive violation that occurs at the time of the search. Without this remedy there would be no effective right; therefore, the remedy itself is constitutionally required.

Almost three decades before *Weeks*, the Court had indicated that exclusion is required by the Fifth Amendment.[12] Justice Bradley, speaking for the Court in *Boyd v. United States*,[13] had implied that both the Fourth Amendment and the Fifth Amendment provide protection against personal incrimination:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For

9. *See id.* at 391-93, 398.
10. *Id.* at 392.
11. *Id.* at 393-94.
12. U.S. CONST. amend. V ("nor shall any person . . . be compelled in any criminal case to be a witness against himself").
13. 116 U.S. 616 (1886).

> the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[14]

At another point, the Court declared: "[T]he Fourth and Fifth Amendments run almost into each other."[15]

In *Olmstead v. United States*,[16] the Supreme Court separated the two amendments by distinguishing between unconstitutional seizure of evidence and its use. *Olmstead* raised the question of whether illegally obtained wiretap evidence should be excluded because it was obtained during an unconstitutional search. Justice Taft, writing for the majority, concluded that "[t]here is no room in the present case for applying the Fifth Amendment *unless* the Fourth Amendment was first violated."[17] If the wiretap did not constitute an unconstitutional search under the Fourth Amendment, the evidence could be admitted.[18] In dissent, Justice Brandeis argued that an unconstitutional search violates the Fourth Amendment, while the use in a criminal proceeding of the material thus secured violates the Fifth.[19] Under this line of reasoning, exclusion itself is detached from any constitutional foundation in the Fourth Amendment. Instead, the rule is a *response*, required by the Fifth Amendment, to the violation, at the time of the search, of Fourth Amendment rights. This accords with the second interpretation of the *Weeks* doctrine: that the courts give force and effect to the Fourth Amendment by excluding unconstitutionally obtained evidence. With the eventual rejection of the Fifth

14. *Boyd*, 116 U.S. at 633. The *Weeks* opinion quoted portions of *Boyd* but did not adopt this line of reasoning. The *Boyd* case involved a statute permitting a court order to be issued that required production of an invoice containing information that would support the government's allegation that the defendant had violated the revenue laws. The information could then be used as evidence in the government's case. If the defendant refused to produce the invoice, the allegations would be taken as confessed. The case could have been decided as a self-incrimination case without introducing the question whether the process provided by the statute was equivalent to a search or seizure.

15. *Id.* at 630.

16. 277 U.S. 438 (1928).

17. *Olmstead*, 277 U.S. at 462 (emphasis added).

18. *See id.* at 452.

19. *See id.* at 477-78 (Brandeis, J., dissenting).

Amendment argument, exclusion was in danger of losing its constitutional ground altogether.[20]

B. *The Judicial Integrity Rationale*

The Holmes and Brandeis dissents in the *Olmstead* case present often-quoted nonconstitutional grounds for excluding illegally obtained evidence. Their arguments are characteristic statements of the judicial integrity rationale for the exclusionary rule: The court must protect itself from contamination; the government should not foster the criminal acts of its agents; when the court accepts illegally obtained evidence, it ratifies the illegal seizure and fails in its duty to teach obedience to the law.[21]

Use of the judicial integrity rationale would have expanded the application of the exclusionary rule in the *Olmstead* case to include illegally, but not unconstitutionally, obtained evidence. This rationale, however, is weaker than the argument of *Weeks*, precisely because it detaches the rule from any constitutional underpinnings. Exclusion on the basis of judicial integrity becomes a matter of judicial policy, a policy that balances the goal of apprehending criminals against the need to preserve the integrity of the judicial process.[22]

C. *The Deterrence Rationale*

The final justification for the exclusionary rule is that exclusion of unconstitutionally obtained evidence is an effective remedy for Fourth Amendment violations, because it deters unconstitutional searches. This rationale for the rule was accepted by both the majority and the dissenters (with the exception of Justice Rutledge) in *Wolf v. Colorado*.[23] In *Wolf*, the Court, departing from *Weeks*, held that the Fourth Amendment

20. The use of the Fifth Amendment together with the Fourth to justify exclusion of unconstitutionally seized evidence was not long-lived. For criticisms of the approach, see Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 353-54 n.62 (1967); and Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 S. CAL. L. REV. 60 (1941). Justice Black raised the argument in his concurring opinion in Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (Black, J., concurring).

21. *See Olmstead*, 277 U.S. at 469-71 (1928) (Holmes, J., dissenting); *id.* at 479-85 (Brandeis, J., dissenting).

22. *See id.* at 470 (Holmes, J., dissenting).

23. 338 U.S. 25 (1949).

protection against unreasonable searches and seizures applies to the states through the Due Process Clause of the Fourteenth Amendment,[24] but also held that evidence obtained as the result of an unconstitutional search is admissible in a state criminal proceeding.[25] The Court reasoned that exclusion of evidence in federal criminal proceedings is not a constitutional requirement but is rather a "judicially created rule of evidence which Congress might negate."[26] The states were left free to enforce the constitutional guarantees as they saw fit.[27]

After *Wolf*, empirical considerations grew more important in the debate: How well does the rule deter and at what cost? Would other, alternative remedies work as well or better? On the one hand, if the rule is understood as a personal Fourth Amendment right to be free from conviction on the basis of unconstitutionally seized evidence, the existence of other effective remedies is irrelevant. On the other hand, if exclusion is constitutionally required or is sound judicial policy only because there is no other way to give force and effect to the guarantees of privacy, the availability of an effective alternative matters a great deal. Moreover, what would count as an alternative remedy depends upon whether the aim of exclusion is deterrence or whether exclusion is seen as a remedy for the injury done to the accused. Under the deterrence rationale, exclusion is the court's method of providing a remedy in the absence of effective action by the political branches.[28]

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24. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

25. *See Wolf*, 338 U.S. at 27-33. *Cf. Weeks*, 232 U.S. at 398:

> As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. . . . [T]he Fourth Amendment is not directed to individual misconduct of [state and local] officials. Its limitations reach the Federal Government and its agencies.

26. *Wolf*, 338 U.S. at 40 (Black, J., concurring).

27. The dissenting justices disagreed with this holding, because they believed that exclusion of evidence was the *only* effective method of deterrence. *See id.* at 40-41 (Douglas, J., dissenting); *id.* at 41-47 (Murphy, J., dissenting); *id.* at 47-48 (Rutledge, J., dissenting).

28. If the deterrence rationale is adopted, the issue of courts' authority to provide remedies of this kind is necessarily raised. *Cf. id.* at 33:

> [A] different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own.

See also United States v. Janis, 428 U.S. 433, 459 (1976):

> There comes a point at which courts, consistent with their duty to administer

D. *Which Rationale?: A History of Confusion and the Rise of the Deterrence Rationale*

In *Elkins v. United States*,[29] the Supreme Court relied on both the deterrence rationale and the judicial integrity rationale in ruling that evidence illegally obtained by state officials could not be used in a federal criminal trial. By so holding, the Court closed the loophole that had come to be known as the "silver-platter doctrine."[30] Because the *Wolf* ruling had limited exclusion to evidence seized under federal authority, state officers could still give federal prosecutors admissible evidence that would have been inadmissible had federal officials obtained the evidence, or that might be inadmissible in a state court under that state's exclusionary rule. In putting an end to the unseemly cooperation that resulted from the silver-platter doctrine, the Court relied on its "supervisory power over the administration of criminal justice in the federal courts . . . ."[31]

The Court eventually asserted a constitutional requirement rationale for exclusion. In *Mapp v. Ohio*,[32] the Court overruled *Wolf*, and the exclusionary rule became mandatory in state criminal proceedings. The central argument of the Court's opinion, authored by Justice Clark, was that, if the Constitution requires exclusion of evidence under the Fourth Amendment in federal trials, then the Constitution requires exclusion under the Fourteenth Amendment in state trials, because the Fourteenth Amendment includes the rights guaranteed by the Fourth.[33] The Court stated that the exclusionary rule was not a mere rule of evidence derived from the Court's supervisory

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the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative branches. We find ourselves at that point in this case.

29. 364 U.S. 206 (1960).

30. *See* Lustig v. United States, 338 U.S. 74, 78-79 (1949) ("The crux of that doctrine is that a search is a search by a federal official if he had a hand in it: it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.").

31. *Elkins*, 364 U.S. at 216. For a criticism of the supervisory power doctrine as an illegitimate extension of judicial power when used to support more stringent limits on the executive than those set by constitution or statute, see Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969). For an explication of the connection between the supervisory power and the judicial integrity rationale, see Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1661-64 (1963).

32. 367 U.S. 643 (1961).

33. *See Mapp*, 367 U.S. at 655-57. This Fourth Amendment constitutional requirement rationale, however, did not have the support of a majority of the Court. *See id.* at 661-62 (Black, J., concurring); *id.* at 670 (Douglas, J., concurring).

power, but a constitutional guarantee.[34] Justice Clark wrote:

> In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.[35]

This argument resembles the second rationale of *Weeks*, that the judiciary has the constitutional duty to give force and effect to the Fourth Amendment by excluding unconstitutionally seized evidence. The Court in *Mapp*, though, combined the various rationales, as if adding them up would strengthen the foundation for exclusion. The result was a confused conception of the status of the rule. This is demonstrated by the Court's statement that directly follows the text quoted above: "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[36] Citing Justice Holmes's opinion in *Silverthorne Lumber Co. v. United States*,[37] the Court also referred to the exclusionary rule as a "command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.' "[38]

The Court confused the deterrence rationale with a constitutional requirement rationale because several distinctions were not maintained. *Weeks* presented two possible constitutional requirement rationales: (1) The courts are prohibited by the Fourth Amendment from obtaining a conviction on the basis of unconstitutionally obtained evidence; and (2) the courts must enforce and effectuate Fourth Amendment guarantees by excluding unconstitutionally obtained evidence.[39] This second ra-

34. *See id.* at 655-57. In his dissent, Justice Harlan pointed out that the *Mapp* ruling could not have been reached on supervisory power grounds because the Court does not have supervisory authority over the state courts. *See id.* at 678 (Harlan, J., dissenting).

35. *Id.* at 656.

36. *Id.* (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

37. 251 U.S. 385 (1920).

38. *Mapp*, 367 U.S. at 648 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

39. *See supra* notes 9-11 and accompanying text.

tionale is ambiguous, and the ambiguity allowed the Court to transform the meaning of exclusion without entirely losing touch with the original *Weeks* opinion. The rationale may mean that exclusion is the only way in principle to effectuate the Fourth Amendment rights of the defendant, or it may mean that admission of unconstitutional evidence would be an act of disrespect for the Constitution on the part of the courts that would render Fourth Amendment guarantees meaningless. These two alternative interpretations should be distinguished both from each other and from an understanding of exclusion as the only available and effective means of compelling law enforcement officials to respect the Constitution in their future activities.

After the *Mapp* ruling, the Court increasingly emphasized the deterrence rationale for the exclusionary rule. The question "Is the use of this evidence within the legitimate authority of the courts?" gave way to a balancing question: "Do the deterrent effects of exclusion outweigh the social costs in this case?" The answer to this latter question was frequently "no." The Court relied on the deterrence rationale in reaching the following holdings in subsequent cases: The *Mapp* decision could not be applied retroactively;[40] an accused does not have standing to introduce a motion to suppress evidence resulting from an illegal search unless his rights were violated by the search itself;[41] illegally obtained evidence can be admitted in grand jury proceedings;[42] evidence illegally obtained by state officials can be admitted in a federal civil proceeding;[43] and federal habeas corpus can be denied to prisoners, even though illegally obtained evidence was improperly used in a state trial, as long as the state allowed litigation of Fourth Amendment claims.[44] In limiting the application of the exclusionary rule, the Court has stated that the rule is not a personal constitutional right and that it is not meant to "redress the injury to the privacy of the search victim"[45] but instead is a deterrent remedy aimed at effectuating Fourth Amendment guarantees in the future.[46]

40. *See* Linkletter v. Walker, 381 U.S. 618 (1965).
41. *See* Alderman v. United States, 394 U.S. 165 (1969).
42. *See* United States v. Calandra, 414 U.S. 338 (1974).
43. *See* United States v. Janis, 428 U.S. 433 (1976).
44. *See* Stone v. Powell, 428 U.S. 465 (1976).
45. *Calandra*, 414 U.S. at 347-48.
46. *See id.*; *Stone*, 428 U.S. at 484-86.

Given this understanding of the rule, its application in new settings is dependent on whether the incremental deterrent effect can justify the impediments to law enforcement that may result.[47]

E. *The Good Faith Exception and the Admissionist Position*

This emphasis on the deterrence rationale eventually led the Supreme Court to adopt the "good faith" exception to the exclusionary rule. Because exclusion of evidence works as a deterrent only when police officers know that their conduct is illegal, there is no reason to exclude evidence obtained by an officer who believed "in good faith" that his search was legally valid. In *United States v. Leon*,[48] the Court ruled that evidence could be admitted if it had been obtained in objectively reasonable reliance on a search warrant that was later determined to be invalid. This exception was broadened in *Illinois v. Krull*[49] to allow admission of evidence obtained in objectively reasonable reliance on a statute that was later held to violate the Fourth Amendment. In both cases, the majority relied exclusively on the deterrence rationale, with the understanding that exclusion is a matter of judicial policy rather than a constitutional right.[50]

Justice White, writing for the majority in *Leon*, made it clear that the task of the court is to weigh the costs and benefits of invoking the exclusionary rule in any particular case. The cost is conceived not only in terms of allowing the guilty to escape punishment, but in terms of impairing the "criminal justice system's truth finding function."[51] This conception invokes the

47. *See Calandra*, 414 U.S. at 351. *See also* Harris v. New York, 401 U.S. 222 (1971); Walder v. United States, 347 U.S. 62 (1954).

48. 468 U.S. 897 (1984).

49. 480 U.S. 340 (1987).

50. The path to the good faith exception was cleared by Illinois v. Gates, 462 U.S. 213 (1983). Citing *Gates*, the Court in *Leon* denied that the exclusionary rule was a "necessary corollary of the Fourth Amendment," and stated that "[w]hether the exclusionary sanction is appropriately imposed in a particular case" is separable from the question of whether an individual defendant's Fourth Amendment rights were violated. *Leon*, 468 U.S. at 906. In *Krull*, the Court referred to the exclusionary rule as "judicially developed," "a remedial device" to be applied only when its deterrent purpose is advanced, and not every time a defendant's constitutional rights have been violated by an illegal search. *Krull*, 480 U.S. at 347.

51. *Leon*, 468 U.S. at 907. *See also* James v. Illinois, 110 S. Ct. 648 (1990), where Justice Brennan, writing for the Court, and Justice Stevens, concurring, endorsed the view that a court's truth-seeking function is to be balanced against the deterrent effects of exclusion when deciding whether to admit illegally obtained evidence. *See id.* at 651-52; *id.* at 656 (Stevens, J., concurring). The dissent used the same reasoning, though it struck the balance differently. *See id.* at 657-61 (Kennedy, J., dissenting).

most stringent critique of the exclusionary rule, best argued by John Henry Wigmore, who asserted that admission of unconstitutional evidence, far from abridging constitutional rights, fulfills the positive duty of the court.[52]

Wigmore argued that the rules of evidence can only be legitimately directed toward aiding the court in its proper function: determining the guilt or innocence of the accused. In general, according to Wigmore, admissibility is not affected by the illegality of the means of obtaining evidence. Whether evidence is secured illegally is a peripheral issue that is not relevant to the truth-seeking function of the court and thus cannot serve as legitimate grounds for suppression. Evidence secured through search and seizure can be distinguished from coerced confessions, for example, because the former is highly reliable.[53] When the court accepts unconstitutional evidence, it does not sanction the police officer's illegal act. Rather, the court simply ignores that act because it has no bearing on the only issue that commands the attention of the court: the presentation of all reliable evidence in an effort to determine the facts.

In response to the deterrence argument, Wigmore asserted that a court is derelict in its duty and uses the rules of evidence to pursue an incidental purpose when it indirectly punishes the police officer by letting the criminal escape punishment through exclusion of evidence. The calculus that weighs the loss of convictions against the deterrent effects of exclusion is simply misplaced. Instead, the erring police officer can be punished through tort remedies while the criminal is punished as well. According to Wigmore, there is no genuine balancing question when the values involved are protection of the right to

52. *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2183-2184 (J. McNaughton ed. 1961); Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479 (1922). *Cf.* Mapp v. Ohio, 367 U.S. 643, 681 (1961) (Harlan, J., dissenting); Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337 (1939).

53. The analogy to coerced confessions is often discussed in the literature on the exclusionary rule. *See, e.g.*, Geller, *Enforcing the Fourth Amendment: the Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621, 646-49; Schrock & Welsh, *supra* note 6, at 337-45. *See also* Mapp v. Ohio, 367 U.S. 643 (1961). Speaking for the Court in *Mapp*, Justice Clark maintained that evidence obtained both by unconstitutional search and by coerced confession should be excluded, because exclusion is directed at the means of obtaining evidence, regardless of reliability. *See id.* at 656-57. In his dissent, Justice Harlan argued that admission of a coerced confession constitutes self-incrimination and is therefore distinguishable from admission of unconstitutionally seized evidence. The latter, he argued, is not itself a violation of the defendant's rights. *See id.* at 683-85 (Harlan, J., dissenting).

privacy and protection of the fact-finding process. Fourth Amendment privacy rights are not infringed by admission of unconstitutionally seized evidence in a court of law.

In *Leon*, Justice White did not carry the argument to reach Wigmore's conclusions. Justice White simply found that the benefit of deterring future police misconduct does not outweigh the cost of "preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence. . . ."[54] He thus introduced the premise of the admissionist position at the same time that he made the invocation of the exclusionary rule an empirical question. But, as Justice Blackmun stated in his concurring opinion, "any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one."[55] A review of the empirical literature on the rule demonstrates how very true this is.

F. *Empirical Studies of Deterrence: A Critique*

Empirical studies cannot establish definitively the effects of the exclusionary rule. There are severe obstacles to devising a reliable study of the number of illegal searches that are prevented as the result of the exclusionary rule. Any such study is an attempt to measure a "*non-event* that is not observable."[56] Statistics on motions to suppress and arrest records are only rough indicia. No comparison can be made between states with and without the rule, because the *Mapp* ruling applies uniformly to all states. Moreover, no study has indicated what frequency of motions made or granted would be sufficient to indicate that the rule acts as a deterrent to unconstitutional law enforcement behavior.[57]

If the controversy were decided on empirical grounds, the party bearing the burden of proof would lose: It is impossible to prove that the rule does deter, and it is impossible to prove

54. *Leon*, 468 U.S. at 907.

55. *Id.* at 928 (Blackmun, J., concurring).

56. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 Nw. U.L. Rev. 740, 748 (1975) (emphasis in original).

57. *See* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681 (1974); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 Am. Pol. Q. 57 (1977); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Stud. 243 (1973).

that it does not.[58] The empirical studies indicate that the rule probably does not have a major impact either in deterring illegal searches or in releasing criminals who would otherwise be convicted and sentenced. The rule does not prevent the large number of illegal searches that are conducted for purposes of harassment and confiscation of contraband.[59] Moreover, while a successful motion to suppress almost always results in the release of the defendant, it cannot be assumed that the defendant would otherwise be incarcerated. The rule most often comes into play for possessory offenses for which sentences are light and often suspended, and where a motion to suppress may be a means of weeding out low-priority cases. Motions to suppress are significantly less numerous when prosecutors screen cases, and when they do not, such motions are disproportionately granted to young offenders. When the offense is serious and the case has a high prosecution priority, the exclusionary rule does seem to increase police legality, judges are less likely to grant a motion to suppress, and the case consequently goes to trial.[60]

The deterrence rationale rests on two assumptions: Convictions are a major objective of law enforcement officers, and the law is sufficiently clear and well-known to provide adequate guidance for law enforcement officers' conduct. There is reason to doubt the validity of both assumptions,[61] but this alone

58. *See* Critique, *supra* note 56, at 763-64. *Compare* Canon, *The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police?*, 62 JUDICATURE 398 (1979) *with* Schlesinger, *The Exclusionary Rule: Have Proponents Proven that It Is a Deterrent to Police?*, 62 JUDICATURE 404 (1979). *See* White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273 (1983).

59. *See* W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 183-99 (1967) [hereinafter DETECTION OF CRIME].

60. *See* Critique, *supra* note 56, at 774-76; W. LAFAVE, *supra* note 59, at 428; J. SKOLNICK, JUSTICE WITHOUT TRIAL 224-25 (1966); DETECTION OF CRIME, *supra* note 59, at 184. For assessments of the costs, see K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 18-19 (1979); Davies, *A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule: the NIJ Study and other studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611; Nardulli, *The Societal Cost of the Exclusionary Rule: an Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585; NATIONAL INSTITUTE OF JUSTICE, CRIMINAL JUSTICE RESEARCH REPORT—THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982); U.S. GENERAL ACCOUNTING OFFICE, COMPTROLLER GENERAL, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979).

61. *See* Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 160, 168-69 (1967); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 580-82 (1960); LaFave & Remington, *Controlling the Police: the Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 994, 1002-11

does not imply that the rule should be abolished. If the assumptions are invalid, the rule's deterrent effect can be enhanced by placing greater emphasis on convictions, relative to arrests, and improving law enforcement training.

Similarly, the availability of alternative remedies does not dictate abandonment of the rule without a showing that (1) the alternative is more effective and less costly and (2) the alternative is mutually exclusive of, rather than complementary to, the existing rule. For example, some have argued that to replace exclusion, rather than to supplement it, with a tort remedy, would make the law speak with two voices, punishing the errant officer but accepting the fruits of his misconduct.[62]

Clearly, if deterrence is *not* accepted as the basis for the rule, the assessment of costs and benefits undertaken in the studies is even less decisive. If deterrence is not the sole reason behind the rule, the "benefits" of exclusion include upholding constitutionally limited government and protecting individual rights, as well as deterring police misconduct. As with any equation, the results of Justice White's cost-benefit analysis will necessarily depend upon the values attributed to each variable.

In his dissenting opinion in *Leon*, Justice Stevens argued that exclusion is a constitutional right. He wrote that "it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency,"[63] and that the Constitution limits the courts to consideration of evidence obtained only in accordance with the Constitution. Relying on a constitutional requirement rationale for exclusion, Justice Stevens found empirical considerations concerning the deterrent effects of the rule to be immaterial.[64]

The confusion of rationales for the exclusionary rule found in the *Mapp* case has now been replaced with a clear debate. The Court's majority increasingly relies on the deterrence rationale, while the minority either asserts a constitutional right to exclusion, as in the *Leon* case, or invokes deterrence but with a different assessment of costs and benefits than that of the ma-

(1965); J. SKOLNICK, *supra* note 60, at 219-23, 227; Task Force on the Police, *Sources of External Control*, in WHO RULES THE POLICE? 1, 35-36 (L. Ruchelman ed. 1973).

62. *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an Empirical Proposition?*, 16 CREIGHTON L. REV. 565, 594 (1983).

63. United States v. Leon, 468 U.S. 897, 980 (1984) (Stevens, J., dissenting).

64. *See id.*

jority, as in *James v. Illinois*.[65] Yet at the same time that deterrence has become the rule's dominant rationale for the Court, the logic tying deterrence to the Constitution has been significantly weakened. Because of this weakened linkage to the Constitution, the Court's position on exclusion has come under increasing attack from both admissionists and exclusionists;[66] it is no longer clear what, and whose, rights are being vindicated by excluding evidence for the purpose of deterrence.

The majority of the present Court views exclusion as the only available effective response to the violation of privacy rights that occurs at the time of the unconstitutional search. Viewed as a deterrent remedy, though, the exclusionary rule is not a direct vindication of a personal right of the accused; it is an indirect, general, and future-oriented remedy. The rule indirectly protects all innocent citizens by deterring the police from engaging in unconstitutional searches in the future.[67]

This produces a rather odd result, of course. When an individual's privacy rights *are* violated, a "remedy" is provided that is intended to protect someone else's rights. The privacy rights of the accused do not receive any protection. Moreover, the indirect sense in which the rule provides a remedy for protecting the privacy rights of others is totally unsatisfactory to a criminally innocent victim of an unconstitutional search from which the police are not effectively deterred. Indeed, such a "deterrent remedy" can be said to be tied only ambiguously to the "rights-remedy" relationship that we desire under the Constitution. This remedy has become something much closer to policy instead.[68]

The development of the exclusionary rule has left the rule on a precarious footing and left the controversy apparently incapable of resolution. The empirical evidence that is dispositive of the question for deterrence-rationale exclusionists is irrelevant

65. 110 S. Ct. 648 (1990).

66. *See, e.g.*, Kamisar, *supra* note 62, at 565; Nelson, *The Paradox of the Exclusionary Rule*, 96 PUB. INTEREST 113 (1989); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978).

67. *See* Illinois v. Krull, 480 U.S. 340, 368 (1987) (O'Connor, J., dissenting) ("No effective remedy is to be provided in the very case in which the statute at issue was held unconstitutional."); Elkins v. United States, 364 U.S. 206, 217-18 (1960).

68. As the exclusionary rule is defended more and more as a matter of judicial policy and less and less as a constitutional command, the justification for the authority of the federal courts to impose it on the states begins to disappear. *See supra* notes 28, 34 and accompanying text.

to admissionists and constitutional-rationale exclusionists. The contestants compete on the basis of fundamentally different premises: Either the Fourth Amendment violation extends only to the invasion of privacy involved in an unconstitutional search and seizure, which leads one to the deterrence rationale or an admissionist position, or the Fourth Amendment is also violated by the court's admission of unconstitutionally obtained evidence. How are we to decide among these alternative views?

III. Two Models of Judicial Responsibility

A. *A New Taxonomy*

Each of the major justifications for the exclusionary rule, as well as the major admissionist argument, has as its premise either the fragmentary or unitary model of judicial responsibility. Consequently, these models are extremely useful in clarifying the issues at stake in the exclusionary rule debate. The two models were first described by Professors Thomas Schrock and Robert Welsh in an article that influenced Justice Brennan's dissent in the *Leon* case.[69] According to the fragmentary model, the executive and judicial branches each bear the responsibility for distinct and specific functions; each is only concerned with doing its own job well. The fragmentary model is so called because "a trial is understood . . . as an inquiry constitutionally and morally unrelated to the governmental conduct that preceded it . . . ."[70] Consequently, according to the fragmentary view, "there are only two constitutional wrongs possible within the search and seizure context—judicial violation of a person's fair trial rights, or police violation of his privacy."[71] Admission does not violate fair trial rights, because it does not prejudice the determination of guilt or innocence. The fair trial doctrine is the basis of the admissionist position argued by Wigmore:

69. *See* Schrock & Welsh, *supra* note 6, at 289-307. Alternative models have been suggested but are less useful. *See* H. Packer, The Limits of the Criminal Sanction (1968) (articulating "Due Process" and "Crime Control" models). For a critique of the Packer approach, see Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 Yale L.J. 359, 364 (1970). Professor Anthony Amsterdam offers two models of the Fourth Amendment, one protecting isolated spheres of interest of individual citizens and the other regulating government conduct. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 367-69, 430-37 (1974). The Fourth Amendment clearly achieves the objectives of both of these models, and either model provides grounds for the exclusionary rule.

70. Schrock & Welsh, *supra* note 6, at 256.

71. *Id.*

The sole duty of the court is to hold a fair trial. Exclusion can only be "a means contrived by the judges to stop some *other* agency—the police—from violating *its* constitutional duty to respect the right of privacy."[72] Both the Wigmore admissionist position and the deterrence rationale are based on the fragmentary premise: Use of unconstitutionally seized evidence does not in any way implicate the court in the impropriety of the seizure. The court and the police inhabit distinct moral spheres.

According to the unitary model, by contrast, those spheres overlap:

> The trial is a part of the whole prosecution, just as the court is a part of the whole government that is investigating, charging, judging, and sentencing the individual. There is in the unitary model an incipient "fair prosecution" doctrine that is meant to challenge the responsibility-limiting "fair trial" doctrine of the fragmentary model.[73]

The judiciary shares responsibility for the conduct of the government as a whole in the prosecution of an individual. The unitary model assumes that the court cannot absolve itself of responsibility for the manner in which evidence is obtained. Exclusion is the way in which the court "refrains from doing a wrong itself. And by its forbearance the court stops the entire government, of which it is a part, from consummating a wrongful course of conduct—a course of conduct begun but by no means ended when the police invade the defendant's privacy."[74] The unitary model supports both the constitutional requirement rationale for the exclusionary rule and the judicial integrity rationale.[75]

There are clearly some difficulties with the taxonomy as Schrock and Welsh describe it. The judicial integrity rationale accepts the unitary model's premise that admission of unconstitutional evidence would implicate the court in the government's unconstitutional conduct, but the rationale demands that the court remain aloof. The court is concerned with keeping itself untainted rather than with maintaining any responsibility either to the injured party or to enforce constitutional

72. *Id.* at 256-57 (emphasis in original).
73. *Id.* at 258.
74. *Id.* at 257.
75. *See* United States v. Leon, 468 U.S. 897, 937-38 (1984) (Brennan, J., dissenting); Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

limits against the executive.[76] The judicial integrity rationale does not follow the full implications of its premise. If the court commits a wrong in admitting unconstitutional evidence, is it not a wrong done to the defendant? And if admission violates the defendant's rights, doesn't exclusion become a constitutional requirement rather than judicial policy? The logical consequence of adhering to a unitary premise is not a judicial integrity rationale, but a constitutional requirement rationale.

Similar difficulties arise with the deterrence rationale. The deterrence rationale accepts the fragmentary model's premise that admission would not involve the court in the government's wrongdoing, but it asserts the court's responsibility to regulate the police. In this respect, the deterrence rationale seems closer to the unitary model than does the judicial integrity rationale. But if it is in no way improper for the court to admit unconstitutionally obtained evidence, and if admission causes no violation of the defendant's rights, by what authority does the court exclude evidence for the purpose of influencing police behavior in the future? The deterrence rationale contains no convincing justification of the court's authority to exclude probative evidence. The logical consequence of adhering strictly to the fragmentary premise is not deterrence but the Wigmore admissionist view. Thus, neither the judicial integrity rationale nor the deterrence rationale is consistent and convincing.

The taxonomic problems with the Schrock and Welsh models can be overcome by incorporating a broader understanding of responsibility into the fragmentary-unitary dichotomy. Responsibility means not only moral implication in wrongdoing, but also authority to remedy the wrong. Taking this into account, we have a new taxonomy: Wigmore's admissionist position is a consistent fragmentary position. The court has no direct responsibility in either sense for the actions of the police. The deterrence rationale is an inconsistent position, because it combines the fragmentary view of responsibility for the wrongs done with a unitary view of responsibility for the remedy. The

76. Professors Schrock and Welsh recognize this point: "[J]udicial integrity seems a bootless and rarified essence." Schrock & Welsh, *supra* note 6, at 265 n.44. They also observe: "Instead of concern for the defendant's right to have the government proceed constitutionally throughout the whole prosecution, we find concern for the court's own integrity. 'The Court protects itself' . . . ." *Id.* at 367 (quoting *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting)).

judicial integrity rationale rests on a unitary premise with respect to the wrongs involved but responds in a fragmentary manner, and thus is also inconsistent. The only exclusionist position that is fully consistent with the premises of the unitary model is the constitutional requirement argument. The real contest over the exclusionary rule, then, is between Wigmore's admissionism on the one hand, and constitutionally required exclusion on the other. Stated differently, the issue is whether or not admission of unconstitutionally obtained evidence is wrong and unconstitutional because the admitting court furthers an unconstitutional course of government conduct. This is the moral-constitutional question at the heart of the exclusionary controversy.

B. *Three Constitutional Rights to Exclusion*

What is the argument that exclusion is constitutionally required? There are, in fact, three distinct positions, two argued by Schrock and Welsh and one argued by Professor Lane Sunderland.[77] Schrock and Welsh argue persuasively that the unitary model of judicial responsibility implies two distinct constitutional rights to exclusion: one drawn from the Fourth Amendment, the other from the role of the court.[78] First, they argue that there is a personal Fourth Amendment right to exclusion of unconstitutionally obtained evidence. Their argument draws on the opinion of the Court in *Weeks v. United States* and corresponds to what I referred to above as a right to be free from conviction on the basis of unconstitutional evidence. Their position rests on a unitary interpretation of the Fourth Amendment and can be described briefly as follows: The Fourth Amendment applies to the judiciary as well as to the executive;[79] the searches prohibited by that Amendment are almost always made for the purpose of seizing items to be used

77. *See* Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978) [hereinafter *Constitutional Principle*]; Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343 (1980). *See also* Kamisar, *supra* note 62, at 623.

78. *See* Schrock & Welsh, *supra* note 6.

79. Incidental support for this view might be drawn from the order of the Bill of Rights, which appears to correspond to the order of constitutional articles: legislature (First Amendment), executive (Second and Third Amendments), and judiciary (Fourth through Eighth Amendments). Following this analysis, the Fourth Amendment may correspond either to the executive or the judiciary, but the inclusion of the warrant requirement, the relation between unreasonable and warrantless searches, and the colonial experience with writs of assistance all indicate that the Fourth Amendment ad-

as evidence;[80] and whenever the court is confronted with unconstitutionally seized evidence, it takes one step in an evidentiary transaction that begins at the time of the search or with instructions to the police.[81]

Under this line of reasoning, *search, seizure,* and *use* are entirely interdependent in their meaning, and the Fourth Amendment prohibition against unreasonable searches and seizures includes a prohibition against the *use* of unreasonably seized materials by the court. This unitary, transactional interpretation of the Amendment contrasts with the fragmentary interpretation of invasion of privacy articulated by Justice Powell in *Calandra.*[82] The contrasting interpretations correspond directly to the two distinct views that, on the one hand, introduction of unconstitutional evidence is an independent violation of the rights of the accused and, on the other hand, the only violation of personal rights is the invasion of privacy at the time of the search. As noted earlier, this distinction is critical to differentiating among the premises of the various rationales for exclusion.[83]

In addition to this Fourth Amendment exclusionary right, Schrock and Welsh argue that there is a second personal constitutional exclusionary requirement that is implicit in the unitary model of the role of the courts but not dependent upon the unitary interpretation of the Fourth Amendment. Here, they argue that the Fourth Amendment may be understood as addressed solely to the executive, but the courts nonetheless have a general duty to treat as invalid governmental violations of constitutional commands, a duty that corresponds to a personal right to due process and protection from unlawful government conduct. In this sense, exclusion can be described as an act of judicial review:[84]

> Exclusion as judicial review is the court's affirmation of the

dresses the judiciary at least in limiting the power of the magistracy to authorize searches and seizures.

80. "Evidentiary use is the end for which evidentiary search and seizure is the means." Schrock & Welsh, *supra* note 6, at 306.

81. "[T]here is no honest way to give the court a moral release for wrongful conduct on the part of the executive in a prosecution made possible only by the participation of both the court and the executive." *Id.* at 262.

82. *See id.* at 289-302.

83. *See supra* notes 9-28 and accompanying text.

84. *See* Schrock & Welsh, *supra* note 6, at 325-26, 335-72. Schrock and Welsh maintain that most judicial integrity arguments are truncated versions of the judicial review interpretation.

> defendant's personal due process right to have *this* rule of recognition—the fourth amendment—observed in his case. . . . If the court cannot ignore the manner in which the evidence has been obtained . . . then it is faced with the alternative of excluding the evidence and thereby rendering the fourth amendment meaningful as a "rule of recognition," or making it meaningless by admission. That is, it is faced with the alternative of respecting or violating the defendant's "due process" right to have the "law" of the fourth amendment observed in the government's prosecution of him.[85]

The judicial review interpretation of exclusion is thus compatible with the "force and effect" language contained in the *Weeks* opinion. The court effectuates the Amendment by its refusal to admit unconstitutional evidence. This presents an alternative to the interpretation of the *Weeks* language as requiring the courts to enforce Fourth Amendment guarantees against the executive by providing an effective remedy for their violation.[86] Whether exclusion is understood as a direct Fourth Amendment duty of the court, or as an instance of the court's lack of authority to sanction invalid government acts, it is clearly not about redress or deterrence. In other words, there are two distinguishable, if indistinctly articulated, rights in the *Weeks* opinion. And the second is not a right to a remedy; it is simply a right required by constitutionalism and the rule of law.[87]

A similar argument, elaborated by Professor Lane Sunderland, derives a right to exclusion directly from the Due Process Clause. Drawing on the history of due process, Sunderland maintains that Fifth Amendment protection means, among other things, that a person may not be deprived of life, liberty,

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85. Schrock & Welsh, *supra* note 6, at 325-26 (emphasis in original). For a discussion of rules of recognition, see *id.* at 350-66. The due process right is emphatically not a right to a fair trial. The trial is the time at which the right to a fair *prosecution*, including judicial invalidation of unconstitutional behavior on the part of the executive, is invoked. *See id.* at 339-43.

86. *See id.* at 309-12, 314-16.

87. *See* Baldwin, *Due Process and the Exclusionary Rule: Integrity and Justification*, 39 U. FLA. L. REV. 505 (1988); Cann & Egbert, *The Exclusionary Rule: Its Necessity in a Constitutional Democracy*, 23 How. L.J. 299 (1980); Ervin, *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283; Kamisar, *supra* note 62; Mertens & Wasserstrom, *The Good Faith Exception and the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); 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 (1983); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

or property as a result of unconstitutional government action.[88] "Due process of law" includes the fundamental law, the Constitution. This argument portrays the Due Process Clause as a statement of the unitary model: The clause commands the government as a whole to proceed constitutionally whenever it threatens an individual with loss of life, liberty, or property. Admission of unconstitutionally obtained evidence violates that command.

IV. Separation of Powers and the Unitary Model

Does constitutional doctrine imply the unitary model, which in turn supports the defense of exclusion as constitutionally required? Or is the fragmentary model that grounds Wigmore admissionism equally appropriate to a limited government? In choosing one model over the other, one also chooses a position on the exclusionary rule, because the alternative positions on the rule rest on the premises of the alternative models. We must find "some nonarbitrary vantage point from which the two models or institutional premises can be judged."[89]

It is my contention that a proper understanding of separation of powers in a constitutionally limited government supplies that nonarbitrary vantage point. These models represent nothing other than alternative ways of understanding the relation between the executive and judicial branches. How ought that relation to be understood? The doctrine of separation of powers supports the unitary model's view of that relation and, consequently, supports the constitutional requirement rationale for exclusion.

At first glance, a unitary view seems to conflict with the doctrine that the powers of government should be carefully separated.[90] It might be said that separation of powers is a device for limiting government by dividing its functions and restricting each branch of the government to its own proper concerns: a legislature occupied exclusively with legislative functions, a president with exclusively executive functions, and a judiciary with exclusively judicial functions.[91] The government is delib-

88. *See Constitutional Principle*, *supra* note 77.

89. Schrock & Welsh, *supra* note 6, at 262.

90. This issue is taken up briefly by Schrock and Welsh. *See id.* at 261 n.33.

91. Professor Vile identifies a pure doctrine of separation of powers that resembles this. *See* M. Vile, Constitutionalism and the Separation of Powers 13 (1967).

erately fragmented.

But this would be a misunderstanding, the very misunderstanding that Madison sought to dispel when he wrote *The Federalist Number 47* and *Number 48*. Antifederalist critics of the proposed Constitution had attacked its dangerous and improper mixture of the functions of government. For example, the functions shared by the President and the Senate seemed especially likely to be abused. For security against government abuses of constitutionally delegated power, the antifederalists wanted to rely on the traditional alternatives: elections, where leaders could be held accountable, and a mixed constitution incorporating the proper balance of aristocratic and democratic elements in the government.[92] The Federalists considered popular elections a necessary, but not sufficient, security.[93] But in the American situation, there was no option to supply additional security through a balance of aristocratic and democratic social orders. America simply did not have a true aristocracy to include in the balance.[94]

It was Madison's contention that the separation of powers itself could serve to maintain the constitutional limits on the government as a whole, even in an entirely popular government. This was a genuine theoretical innovation. In order for the institutional mechanism to work, Madison argued, each department must have a partial agency in the business of the others. Unless they are "so far connected and blended as to give each a constitutional control over the others, the degree of separation . . . essential to a free government" cannot be truly maintained.[95] For example, the executive veto gives the presi-

92. *See* Brutus, *Essays, XVI*, *reprinted in* THE ANTI-FEDERALIST 187-91 (H. Storing ed. 1985); Centinel, *Letter I*, *reprinted in* THE ANTI-FEDERALIST, *supra*, at 13-22; Henry, *Speeches in the Virginia State Ratifying Convention*, *reprinted in* THE ANTI-FEDERALIST, *supra*, at 293-327; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*, *reprinted in* THE ANTI-FEDERALIST, *supra*, at 201-23. *See also* H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 53-63 (1981).

93. *See* THE FEDERALIST No. 51, at 322 (J. Madison) (C. Rossiter ed. 1961) (urging the necessity of "auxiliary precautions").

94. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 310 (M. Farrand ed. 1966).

95. THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961). *See also* Letter from James Madison to Caleb Wallace (Aug. 23, 1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 169 (G. Hunt ed. 1906); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 77 (M. Farrand ed. 1966); Speeches by James Wilson, *reprinted in* 2 THE DEBATES OF THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 433-34 (J. Elliott ed. 1863).

dent a share in the legislative function primarily, though not exclusively, for the sake of preventing the legislature from overreaching the limits of its constitutionally delegated powers. The executive veto is not an improper blend of legislative and executive functions, but a necessary blend to maintain the constitutional limits on legislative power. The system of checks and balances is combined with the institutional separation of powers to preserve limited government.

The separation of the powers of government is not absolute, because it is not an end in itself. It is a means for allowing the government to watch itself so that citizens need not be so watchful.[96] Separation of powers is an institutional solution to the problem of protecting citizens from government abuse. While the doctrine of separation of powers has many variations and a complex history, it has always been understood as an indispensable basis for the rule of law and the maintenance of legal, including constitutional, limits on the powers of government.[97]

If the fragmentary model were correct, the separation of powers between executive and judiciary would not operate as a means toward this end. By concentrating on their narrowly defined judicial duty, the courts would allow the government to proceed against the defendant in violation of constitutional limitations. This is a version of the antifederalist error, the error that was rejected with the adoption of the Constitution.[98] Separation of powers doctrine cannot support the view that the sole duty of the court is to seek the truth and to hold a fair trial. Those who argue in this way, Wigmore admissionists included, neglect the duty of judges to uphold the Constitution, as well.

The separation of governmental powers serves as the precondition for cooperation by the distinct branches in pursuit of the designated ends of government. Liberty is maintained in a

96. Madison's famous argument in *The Federalist Number 51* presents the separation of powers as an alternative to popular conventions as a device for controlling the government. *See also* THE FEDERALIST Nos. 49, 50 (J. Madison).

97. *See* W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (Tulane Studies in Political Science No. 9, 1965); M. VILE, *supra* note 91. For a collection of additional primary source material, see 1 THE FOUNDER'S CONSTITUTION 311-35 (P. Kurland & R. Lerner eds. 1987).

98. *See supra* note 92 and accompanying text. Many opponents of the Constitution mistakenly believed that separation of powers required "that the legislative, executive, and judiciary departments should be wholly unconnected with each other." THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961).

government of separated powers only when the cooperation of the several branches is required. When one branch exceeds its constitutional bounds, the others can check the proceedings before the government as a whole acts unconstitutionally. The judiciary performs this function when it excludes evidence that was obtained as the result of unconstitutional executive action. The unitary model presupposes that each participant in the proceedings is responsible for the constitutionality of the entire proceeding. The unitary model of judicial responsibility thus accords with the understanding of separation of powers as the means by which limits on government action can be maintained.

This line of argument directly opposes Gerard Bradley's vigorous attack on principled basis rationales for the exclusionary rule.[99] Professor Bradley argues that Schrock and Welsh's interpretation of the Fourth Amendment, by effectively substituting "unreasonable evidentiary transactions" for "unreasonable searches and seizures," threatens to eliminate separation of powers restrictions, bringing under judicial scrutiny all types of executive actions in gathering evidence and in prosecuting accused persons. Schrock and Welsh, however, always tie the right to exclusion to a prior determination that an "unreasonable search and seizure" has occurred; the court's responsibility for reviewing executive actions is thus limited to those circumstances where the executive has violated the Fourth Amendment. Even in its strongest form, Bradley's critique is applicable only to the conception of the right of exclusion as a personal Fourth Amendment right; his critique is inapposite to the judicial review conception of the right of exclusion.

According to Bradley, the government is deliberately fragmented. Conflict is possible among any of the branches, as in the cases of impoundment of funds, presidential failure to commit troops after a congressional declaration of war, or prosecutorial discretion in enforcing criminal statutes.[100] But no proponent of exclusion would deny that the government is fragmented in this sense. Indeed, exclusion itself is superficially similar to Bradley's examples. By invoking the exclusionary

99. *See* Bradley, *Present at the Creation? A Critical Guide to* Weeks v. United States *and Its Progeny*, 30 ST. LOUIS U.L.J. 1031, 1052-57 (1986). The thrust of Professor Bradley's argument is that *Weeks* offers no support to principled basis rationales, and, indeed, that they are unsupportable.

100. *See id.* at 1057.

rule, the judiciary chooses not to accept into evidence the fruits of prior executive action. The question is rather what fragmentation means, or, more aptly stated, why governmental powers are separated.

Separation of powers is a method to limit the means by which the power of government can be directed toward certain limited ends. In this respect, it is similar to the concept of due process as applied to a judicial proceeding. The government may achieve its legitimate purposes only by following specified procedures designed to maintain limits and secure impartiality. The requirement of the concurrence of several distinct departments for the completion of government action provides checks on unlawful courses of conduct. From the point of view of the individual, there is no protection of liberty in a limited government of separated powers if each of those powers can operate autonomously, unchecked by the need for the concurrence of the others.

With respect to searches and seizures, the Fourth Amendment prohibition is a limitation on the means by which the government may apprehend criminals. If this end can be reached by exceeding the limitation on the means, the limitation is truly meaningless. The government will not in fact be limited by the constitutional command. The separation of powers will have failed.

V. The Good Faith Exception

If exclusion of illegally obtained evidence is a constitutional requirement, can an exception be made for cases in which a police officer acted in good faith, and the illegality was technical in nature? Recall that the good faith exception was originally grounded in the deterrence rationale, while the opposition to it rested on a constitutional requirement rationale.[101] Professor Sunderland, in a unique version of a constitutional requirement rationale, argues that exceptions may be permitted if the exclusionary rule is understood to be based on the Due Process Clause. In Sunderland's view, history, case

101. For additional critiques of the good faith exception, see Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith"*, 36 Vand. L. Rev. 1511 (1983); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307 (1982); LaFave, *The Seductive Call of Expediency:* United States v. Leon*—Its Rationale and Ramifications*, 1984 U. Ill. L. Rev. 895; and McMillian, *Is There Anything Left of the Fourth Amendment?*, 24 St. Louis U.L.J. 1 (1979).

law, and the purpose of due process protection all indicate that that protection is meant to guard against flagrant, willful violations of fundamental rights rather than technical violations of those rights.[102]

A court's determination that illegal police action is sufficient to constitute a violation of the Due Process Clause, however, is significantly different from a court's determination that although an illegal search is serious enough to be considered an unconstitutional violation of the Fourth Amendment, it is not sufficiently unconstitutional to require exclusion of evidence. The latter is equivalent to saying that the police officer's action was both constitutional and unconstitutional.[103] The proper analogy to judicial determination of what constitutes a violation of due process would be judicial determination of what constitutes an unreasonable search or seizure. Sunderland himself acknowledges that, in principle, a revision of search and seizure law might be an acceptable alternative to the good faith exception to the rule.[104] The good faith exception and the constitutional requirement to exclude unconstitutionally obtained evidence cannot be reconciled.

The good faith exception is appealing because it allows us to have our constitutional cake and eat it, too. But there are dangers to the exception as well—dangers made evident in *Illinois v. Krull*.[105] In that case, evidence obtained in accordance with a statute establishing procedures for warrantless administrative searches and later held to be unconstitutional was ruled admissible in court because the police acted in good faith reliance on what they believed to be legitimate statutory authority. In her dissent, Justice O'Connor stated that the statute in question resembled the general writs of assistance that the Fourth Amendment was designed to prevent.[106] The statute affected the public generally, and the Court, by allowing the fruits of such unconstitutional legislation to be admitted, created a grace period for unconstitutional action and an incentive for legislatures to promulgate unconstitutional laws.[107] The dissenters

102. *See Constitutional Principle*, *supra* note 77, at 150-58.

103. *See* United States v. Leon, 468 U.S. 897, 960 (1984) (Stevens, J., dissenting); Jochum, *I Come Not to Praise the Exclusionary Rule But to Bury It*, 18 CREIGHTON L. REV. 819 (1985).

104. *See Constitutional Principle*, *supra* note 77, at 158 n.136.

105. 480 U.S. 340 (1987).

106. *See Krull*, 480 U.S. at 362-63 (O'Connor, J., dissenting).

107. *See id.* at 366 (O'Connor, J., dissenting).

would have denied the exception on deterrence grounds. Sunderland's due process logic probably would have allowed the exception. But there can be no exceptions to an exclusionary rule grounded either in a direct Fourth Amendment requirement or in the constitutional duty of the judiciary to refuse to recognize unconstitutional action on the part of the other branches of government.

VI. Conclusions

Both the Schrock and Welsh right-to-exclusion argument and the Wigmore duty-to-admit argument have a certain appeal, because they simplify the problem of the admissibility of illegally obtained evidence. According to Wigmore, the court's duty to admit is not conditional. According to Schrock and Welsh (and Sunderland, for that matter) any single constitutional exclusionary right is sufficient to justify the rule. Furthermore, neither position relies upon an assessment of the practical effects of exclusion or admission. Exclusion is not the balancing question it appeared to be at the outset.

The balancing approach to exclusion has been fostered by the Supreme Court's increasing emphasis on the deterrence rationale. That rationale holds out the vain hope that an empirical test will finally resolve the issue. But a definitive empirical test is impossible in practice and irrelevant in principle. Moreover, the deterrence rationale serves only to muddy our understanding of the rights involved in the Fourth Amendment area and of the role of the courts in effectuating constitutional guarantees.

It is too often forgotten in the debate over the exclusionary rule that it is not the rule itself that handcuffs the police. Abandoning the exclusionary rule would not ease the legal restrictions on police behavior, nor does the existence of the rule increase those restrictions.[108] It is the Fourth Amendment itself that places limits on law enforcement.

One might expect vigorous, healthy debate between liberals and conservatives on the question of what those limits ought to

108. *See, e.g.*, Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. Crim. L. Criminology & Police Sci. 255, 255 (1961) ("The exclusionary evidence rule says nothing about the content of the law governing the police. . . . [T]he rule merely states the consequences of a breach of whatever principles might be adopted to control law enforcement officers."). *See also* Oaks, *supra* note 57, at 665; People v. Cahan, 44 Cal. 2d 434, 444, 282 P.2d 905, 911 (1955).

be—that is, of how to define unreasonable searches and seizures. Answering this question does require balancing the need for effective law enforcement against the need to protect "the right of the people to be secure in their persons, houses, papers and effects . . . ." Ironically, liberals and conservatives have instead been sharply divided over a question about which one might expect unanimity: whether the constitutional prohibition against unreasonable searches and seizures can be circumvented by the government in a criminal prosecution.

Constitutional government is limited government only insofar as the principle is maintained that "*against the Laws there can be no Authority*."[109] As John Locke went on to explain:

> [It] is plain in the Case of him, that has the King's Writ to Arrest a Man . . . and yet he that has it cannot break open a Man's House to do it, nor execute this Command of the King upon certain Days, nor in certain Places, though this Commission have no such exception in it, but they are the Limitations of the Law, which if anyone transgress, the King's Commission excuses him not.[110]

For a court of law to incarcerate a person on the basis of the unauthorized use of the power of government is to make "parchment barriers"[111] of the protections afforded by the Constitution.

In this Article, I have not considered how Fourth Amendment restrictions are to be defined, but only whether government actions that are recognized as violations of those restrictions should be treated as valid by the courts. This is a matter that can be resolved only on the basis of the principles of constitutionalism. The analysis undertaken here has identified the opposing positions that directly address the issue of exclusion as a matter of constitutional principle. There is either a constitutional duty to admit or a constitutional duty to exclude unconstitutionally obtained evidence. At the least, one would hope that a serious consideration of the confrontation between these positions will replace the utilitarian calculus fostered by the deterrence rationale that has dominated much of the debate. At best, one would hope that the Court will resolve

109. J. LOCKE, TWO TREATISES OF GOVERNMENT 403 (P. Laslett rev. ed. 1988) (3d ed. 1698) (emphasis in original).

110. *Id.*

111. THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961).

the contest by reasserting the proper constitutional grounds for a right to exclusion of unconstitutionally obtained evidence.

As Justice Stevens remarked in *Leon*:

> Today, for the first time, the Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding. In my judgment, the Constitution requires more.[112]

I concur.

112. United States v. Leon, 468 U.S. 897, 977-78 (1984) (Stevens, J., dissenting).