EXCLUDING THE EXCLUSIONARY RULE: NATURAL LAW VS. JUDICIAL PERSONAL POLICY PREFERENCES

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[U.S. Supreme Court Justice Benjamin Cardozo, commenting on the perversity of the exclusionary rule, contemptuously remarked—“The criminal is to go free because the constable has blundered.” Cardozo understood that “fidelity to law” meant having law practically apply to real life situations. In this article the author argues that in a post-9/11 world one can no longer consider legitimate law judicial activist decisions that separates law from morality—judicial ideas read into the US Constitution without any reliance to the original intent of the Framers of the Constitution, thus making a mockery of the rule of law (Miranda v. Arizona, et al.,). This is the centennial year since the first case that heralded the practice of judicial activism in constitutional law in modern times [Lochner v. New York (1905)]—a decision where the Courts in subsequent decades consciously, arrogantly, and systematically dispensed with finding judicial precedent (e.g., stare decisis) to base their opinion upon, and replaced the rule of law with their own personal policy preferences.]

The criminal is to go free because the constable has blundered.
- Justice Benjamin Cardozo[1]

To consider the judges as the ultimate arbiters of all constitutional questions, would place us under the despotism of an oligarchy.

- Thomas Jefferson[2]

I PROLOGUE AND HISTORICAL CONTEXT

The judge-made doctrine called, the “exclusionary rule”, prohibits the introduction at a criminal trial of evidence obtained in violation of a defendant's Fourth Amendment right against unreasonable searches and seizures,[3] the Fifth Amendment right to due process and the right against self incrimination, or the Sixth Amendment right to an attorney.[4] As we shall see in this Article, the exclusionary rule is a perfect example of the type of pseudo-constitutional doctrine that can evolve from a judicial activist Supreme Court with a radical political agenda. A radical political agenda that activist judges can impose into the marketplace of ideas not via the democratic process or by “We the People”, but by judges that cavalierly substitute constitutional jurisprudence with their own personal policy preferences. Proponents of the exclusionary rule claim that its rationale is to deter the government (primarily the police) from using illegally obtained evidence in securing an arrest which is in violation of a person's constitutional rights.[5] Interestingly, this reasoning was not offered in the opinion of the Court when they first invented this rule.[6]

Many liberal judges, jurists, and academic lawyers believe that the origins of the exclusionary rule to be both legitimately constitutional and necessary to prohibit the government from using illegally seized evidence against a suspect. The deductive reasoning is this: If the government is prohibited from using the evidence obtained in violation of a person's protected constitutional rights, the offending authority will be less prone to seek convictions in opposition of those rights. I plan to show in this Article that the logic behind the exclusionary rule is both irrational and unconstitutional because it largely ignores the moral assumptions that underlie the original intent of the Constitution as delineated in the numerous writings of the Founding Fathers and the constitutional Framers—a synthesis of legality and morality which is the foundation of America's legal system—Natural law.

II ASHORT HISTORY OF NATURAL LAW

What is natural law? Natural law theory holds to the idea that some laws are so basic and fundamental to human nature that they are discoverable by human reason without reference to specific laws or judicial decisions. On the other hand, positive law is law that is posited, man made, contingent to history, and subject to continuous change. The origins of natural law, dates back to the ancient Greeks, and had its most salient manifestation in Stoicism.[7] The Greeks understood that the basic moral precepts which are at the foundations of any legal system of a civilized society were reducible to the principles of natural law. In Roman legal theory this idea was further developed and codified as a common code that in essence became the common law or rule of law that controlled the conduct of all nations. Natural law existed concurrently with the various codes of specific places and times which were called natural rights. St. Thomas Aquinas (1225-1274) and other early Christian philosophers furthered this idea, believing that natural law was universal to all peoples—Christians and non-Christian alike–while holding to the idea that revealed law, or moral standards directly derived from the Bible, gave to Christians further guidance for their behavior.

In the middle ages, Hugo Grotius (1583-1645) formulated a natural law theory as the primary basis for the development of the theory of international law. Philosophers, Spinoza (1632-1677) and Leibniz (1646-1716), in the seventeenth century interpreted natural law as the foundation of ethics and morality; Jean Jacques Rousseau (1712-1778), in the eighteenth century, using the ideas of the Enlightenment Age, which reached its apotheosis during the French Revolution, formulated a natural law theory based on democratic and egalitarian principles. During the nineteenth century, the influence of natural law philosophy in American jurisprudence declined to a great degree as other secular-based philosophies became embraced by judges, lawyers, the academy and popular culture, e.g., Positivism, Empiricism, and Materialism.

In modern times, philosophers Jacques Maritain and O. F. von Gierke understood natural law as a necessary intellectual counter weight to totalitarian philosophies and regimes like Lenin, Stalin, Mussolini, Hitler, Mao Tse Tung, Pol Pot, that swept across the world in ignominious war throughout the twentieth century.[8]

III NATURAL RIGHTS

Related to natural law was the idea of natural rights, which is a political theory that holds to the

idea that men enter into society with certain basic rights so fundamental to human nature that no government can deny these rights. Natural rights theory was developed under Roman law, based on the idea of jus gentium [Latin. law of nations], the legal code that governed the relations of foreign residents of Rome. Natural rights in time developed into a general theory of natural law. During the Middle Ages, natural rights largely fell into disuse, however, beginning in the seventeenth century, natural rights theory reclaimed standing when it became an important aspect in the political philosophy and constitutional argument of the period, which received its most sublime expression in the writings of John Locke (1632-1704). Locke believed that men were by nature intrinsically rational and good, and that they brought with them into political society the same fundamental rights which they had use of at the beginning stages of society, paramount among them being the freedom to worship God according to the dictates of one's own conscience, the right to redress their grievances to their own government, and a regime of rights.

Rousseau tried to resolve the paradox of natural rights of the individual with the need for societal stability and collaboration through the idea of he referred to as the "social contract." A significant expansion of the idea of natural rights came in America's original Thirteen Colonies, however, where the writings of Thomas Jefferson, Samuel Adams, and Thomas Paine made natural rights theory a potent justification for revolution. The classic expressions of natural rights are the English Bill of Rights (1689), the American Declaration of Independence (1776),[9] the French Declaration of the Rights of Man and the Citizen (1789), and the first 10 amendments to the Constitution of the United States (Bill of Rights, 1791). Since the 20th century and the rise of totalitarian regimes which repudiated all ideas of the intrinsic dignity and value of individual rights and humanity, there has been a reassertion of natural rights theory, especially in the Universal Declaration of Hu-man Rights of the United Nations (1948).[10]

IV HISTORY OF THE EXCLUSIONARY RULE IN AMERICAN LAW

The history of the exclusionary rule dates back to the second decade of the twentieth century, however, the case that the rule essentially overruled dates back to 1886. In Boyd v. United States, the Court, considered the Fourth and Fifth Amendments as running "almost into each other," holding that:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments].[11]

Since the Boyd case was narrowly tailored to its facts and an exclusionary rule based on Fourth Amendment violations was rejected here and by the Court a few years later, with the Justices following the common law rule that evidence was admissible however acquired.[12] This common-sense, apolitical approach to interpreting the Constitution followed judicial precedent and the original understanding of America's earliest jurists like John Jay and John Marshall and sanctioned other Court decisions dating as far back as the earliest years of case law and jurisprudence in American legal history. The Boyd decision notwithstanding, it would soon face

a newly emerging liberal activist majority on the Supreme Court that held to a radically different interpretation of the Constitution, the separation of powers doc-trine and prior judicial precedents (stare decisis).

In 1914, even the plurality opinion had to accede that, "for the first time," the Court in Weeks v. United States and later in Silverthorne Lumber Company v. U.S. (1920) held that, "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure."[13] The Court in Weeks concluded:

> [T]hat the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. . .[14]

This was a radical opinion because the Court, without any controlling precedent, or legitimate case law to base its opinion on, cavalierly overruled over 135 years of Supreme Court case law and over 280 years of America's historical respect to the rule of law on the subjects of search and seizure in the face of criminal activity which dated back before the Constitution, the Articles of Confederation to the first landing of Pilgrims at Jamestown, Virginia in 1607 and the Puritans at Plymouth Rock, Massachusetts in 1619. It was the explicit integration of legality and morality that gave America its first constitution–The Mayflower Compact (1620) which in part reads:

In the name of God, Amen . . . Grace of God, . . . Defender of the Faith. Having undertaken for the Glory of God, and advancement of the Christian Faith, and the Honour of our King and Country. . .[15]

Although the Weeks Court narrowed its ruling to only apply in federal cases, in 1949, 35 years after Weeks was handed down, the Court in Wolf v. People of State of Colorado, held to no such judicial restraint and again for the first time, discussed the effect of the Fourth Amendment upon the states through the unconstitutional, judge-made “incorporation doctrine,” whereby the due process clause of the Fourteenth Amendment was applied to the states,[16] despite the fact that the original intent of the Framers in adding the Bill of Rights to the Constitution was dictated explicitly to Congress, not to the states, nor to “We the People.” The Court said: "[W]e have no hesitation in saying that where a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."[17] Here, for the first time, the Court in Wolf, offers its rationale to justify the exclusionary rule which proponents continue to parrot, namely to deter police misconduct. Although by 1949, when the Court ruled in Wolf, the exclusionary rule was already 35 years old. The only precedent that the Wolf Court could use to justify its ruling was the spurious judicial legislation of the Weeks case, but as I mentioned earlier, Weeks was only to be applied in federal cases. The Wolf Court was seemingly in a judicial quandary. How could the Court once again square the circle? No problem for an activist Court with a political, and public policy agenda, rather than interpreting the Constitution based

on the rule of law.

Since the Wolf Court was following in the judicial activist tradition of making law rather than interpreting the Constitution beginning with the infamous 1905 Lochner decision, it eventually expanded the scope of the exclusionary rule to apply to the states as well through the so-called incorporation doctrine, whereby the Bill of Rights are applied to the states via the Fourteenth Amendment.[18]

Courts of earlier generations were much less cavalier and overtly political in their interpretation of the Constitution than the Weeks and Wolf decisions. This fact became acute for in 1966, seventeen years after the Wolf decision, the Court gave us the now infamous Miranda v. Arizona decision.[19] In Miranda, the Court held that before a lawful arrest, the police have to read to the suspect "his rights" which is the following statement:

You have a right to remain silent. Anything that you say, can and will be used against you. You have a right to an attorney. If you can't afford an attorney, one will be provided for you, etc …

Violations of this purely judicially-made rule by the police in not giving the Miranda warnings could result in that evidence being inadmissible in court against the defendant. So blatantly unconstitutional and judicially illegitimate was the Miranda decision and the related case law developed from it, that the Supreme Court, a generation later and with a very different membership, was compelled to significantly narrow its scope.

In 1985, the Court in, Oregon v. Elstad, ruled that fruits derived from statements obtained in violation of Miranda might be admissible despite the exclusionary rule. The Elstad Court indicated that not all statements excluded by Miranda are "compelled" within the meaning of the Fifth Amendment, however, Miranda created a rebuttable presumption of compulsion.[20] As in many noted cases in the history or American jurisprudence, the Elstad majority opinion was developed from the strong dissent in Miranda and was the only constitutional voice crying out in the wilderness of the shamefully pseudo-constitutionalism as expressed by the bare five member Miranda majority. The dissent in Miranda voiced its appeal to stare decisis (judicial precedent) to preserve the verity the Constitution and its prior interpretations of the Bill of Rights when it stated:

> The Fifth Amendment, however, has never been thought to forbid all pressure to incriminate one's self in the situations covered by it. . . . the Court's unspoken assumption that any pressure violates the privilege is not sup-ported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.[21]

This reasoning was reminiscent of the Court's holding in the Boyd case. However, the logic proponents of the exclusionary rule uses is plausible, but ultimately constitutionally sophistic, for the paradigm drawn is this:

- illegally seized evidence = coercion

- coercion = involuntariness
- involuntariness = unreliability
- unreliability = inadmissibility
- inadmissibility = unconstitutional

The judicial reasoning here is neither logically consistent nor legally legitimate, since for over a hundred and thirty five years prior to Weeks, judicial precedent allowed for coerced or involuntary seized evidence as not necessarily a violation of the Constitution, but evidence the Court artfully called in the Boyd case an "aggravation within the condemnation" of the Fourth and Fifth Amendments. Other problems with the exclusionary rule are these: (1) It invites criminal exploitation of obvious loopholes in the law (what laymen frequently refer to as a defendant get-ting off on “a technicality”); (2) The rule severely weakens the effectiveness of the rule of law; (3) Undue focus (and its attendant penalties) are placed on police misconduct not on the initial criminal behavior that prompted the arrest in the first place; (4) The exclusionary rule severely hinders prosecuting blatant criminal conduct; (5) It potentially endangers public safety by allowing the guilty to go free; (6) The maxim: Two wrongs don't make a right (i.e., police misconduct (a wrong) + letting the criminal go free (a wrong) = justice (a right). However, police misconduct + punishment of police misconduct = a constitutional conviction of an obviously guilty suspect; (7) Police are forced to use more subtle means to avoid the exclusionary rule to secure convictions of guilty criminals; (8) The original intent of the Constitution makes no provisions for any exclusionary rule and would have been viewed by the Framers as so anathema to the rule of the law as to be considered tyrannical; (9) Judicial precedent or the doctrine of stare decisis recognized no such exclusionary rule since many legal scholars will concede that stare decisis is indeed a natural law principle of jurisprudence.

Under the doctrine of federalism, the Framers of the Constitution held to limited government with specifically enumerated powers in the three major branches of government: Legislative, Executive and Judiciary. Neither branch of government was to infringe upon the others expressly enumerated powers; to do so would be considered an expressed violation of the Constitution’s separation of powers doc-trine. Therefore, constitutionally speaking, the exclusionary rule appears to be no more than an unconstitutional violation of this separation of powers doctrine by an unelected judicial oligarchy of five over the legislative branch of government.[22]

V THE EXCLUSIONARY RULE AND ARREST STATISTICS

Extensive study of the effects of the exclusionary rule has only been conducted in the last twenty years. Researchers have explored the effects of the exclusionary rule and the impact it has had on the prosecution of felony arrests. One researcher's results for individuals arrested for felonies showed that the non-prosecution or non-conviction rate due to the exclusionary rule to be between 0.5% and 2.35%. These figures were slightly higher where there was an over reliance by the prosecution on demonstrative, physical evidence to secure a conviction. Therefore, the non-prosecution or non-conviction to suspects arrested on felony drug charges was within the range of 2.8% to 7.1%.[23] The California data that Davies' study analyses details

that as many as 1.4% of all felons arrested were released due to improperly seized evidence by the police,[24] 0.9% of felony arrestees are released because of illegal searches or seizures at the preliminary hearing or after trial,[25] and that roughly 0.5% of all felony arrestees benefit from reversals on appeal due to police misconduct by conducting illegal searches on their suspects.[26]

The conclusion that many of these researchers have arrived at in their studies is that the exclusionary rule's impact on the judicial system in releasing felons due to police misconduct from illegally seized evidence has a range from statically insignificant to insubstantial. However, the small percentages of these figures obscure the much larger number of felons who are released on the charges against them before their cases ever get to court due to a lack of demonstrable evidence to sustain a conviction against them because the incriminating evidence illegally seized by the police was deemed inadmissible by the exclusionary rule.

The United States Supreme Court has analyzed the empirical research and the criticisms of the exclusionary rule, and has stated that currently, no person or organization has been able to establish with assurance whether the exclusionary rule has the desired deterrent effect in situations where it is applied.[27] Accordingly, the Court has not based its opinion on purely empirical studies in formulating the exclusionary rule, but only on the Court’s own assumptions regarding human nature and the interrelationships between the various components of the law enforcement systems.[28] It was these types of results that the Court wanted to prevent in the future when in Illinois v. Gates it held that:

> [A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deter-ring official unlawfulness.[29]

In my analysis of Supreme Court decisions on the exclusionary rule cited in this Article, I found that this rule has no substantial connection or deterrent effect in the sorts of situations that the Court ruled in its decision. To date the exclusionary rule has proved ineffective in its stated premise of prohibiting police misconduct by not allowing illegally seized evidence to be used against a suspect. Since in my opinion the exclusionary rule is of dubious constitutional origin and validity, not only is it therefore inimical to the rule of law, but no longer effective in its goals, the exclusionary rule should be overruled as a needless impediment to police enforcement of the public’s expectations of the rule of law which is an expressed precept of the Constitution.

To really have an understanding of just what kind of inane judicial legislation is substituted for legitimate, sound jurisprudence, one need only read what Justice Stewart has stated in a law review article written during a period of Supreme Court history when activists judges held a fairly strong majority in the cases it handed down especially in religious rights, criminal law, and criminal procedure cases. Justice Stewart states that its not the exclusionary rule, as Cardozo believed, but the Fourth Amendment that is to blame if the criminal goes free. Justice Stewart writes:

> The exclusionary rule places no limitations on the actions of the police. The fourth amendment does. The inevitable result of the Constitution's prohibition against

> unreasonable searches and seizures and its requirements that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. . . . [T]hat is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, home, and property against unrestrained governmental power.[30]

However, one small fact that Justice Stewart leaves out in citing the Framers is that while they respected the Bill of Rights, they venerated natural law for without it they understood that no constitutional Republic could last. It would be considered tyrannical and immoral to the Framers to entertain the thought of letting an obviously guilty person go free because the Court misinterpreted the Fourth and Fifth Amendments. European humanists and philosophers did not understand that the inseparability of law and morality was the primary reason why the French Revolution descended into anarchy and tyranny while the American Revolution, a concur-rent movement, 228 years later stands as the oldest and strongest Republic in the history of mankind; emulated by budding republics and democracies around the world. Furthermore, atheists, liberals and secularists have never liked the religious origins of the Republic, nor the harsh effects of the rule of law against the law breaker.

In American legal history, the rule of law is deeply rooted in the Judeo-Christian concepts of judgment, the principle of reaping what you sow, and what Lon Fuller referred to as, “fidelity to law,” all of which are anathema to contemporary liberal-ism and the academic class.[31] Ideas that Judge Robert Bork referred to as “radical individualism” (the severe reduction of barriers to personal gratification and “radical egalitarianism” (the equality of results rather than opportunities),[32] therefore like Justice Stewart, and many other liberal judges and law academics, they saw no contradiction to the rule of law by letting the criminal go free; arrogantly justifying it in the name of the Fourth Amendment of the Constitution. This is beyond the pale.

The Court, in further defining the scope of the exclusionary rule, has so expanded the rule to not only prohibit illegally seized evidence due to police misconduct, but all other evidence that is the "fruit" from that original evidence. This has become known as the “Fruit of the Poisonous Tree Doctrine.” The rationale here is that generally not only must illegally obtained evidence be excluded, but also all evidence obtained or derived from exploitation of that evidence. The Supreme Court deems such evidence obtained as the “tainted fruit” of the poisonous tree.[33] For example, in the famous case, Taylor v. Alabama, the defendant was arrested without probable cause and brought to the police station. The police read the defendant his Miranda warnings three times and permitted the defendant to speak with two friends. The defendant confessed committing the crime to the police after being at the station for six hours when he was presented with evidence of his fingerprints at the crime scene.[34]

Despite all of these mitigating presumptions to the suspect’s constitutional rights, the Court's majority held that the confession must be excluded because it was the direct result of the unlawful arrest—if defendant had not been arrested illegally, he would not have been in custody and would not have confessed.[35] Ironically, in many instances, the fruit of the poisonous tree doctrine does not only prohibit illegally seized evidence from being presented, but it prohibits truthful evidence that could secure a conviction against an obviously guilty defendant from ever

being used against him. To emphasize this discrepancy there are a number of Supreme Court decisions that have tried to be bring constitutional verity and logic to this patently illogical, judge-made doctrine. It is these subsequent cases that have grown out of the unconstitutional exclusionary rule that I consider the fruit of the poisonous tree.

Ironically, if I were a criminal it would be to my advantage to be working during these times because radical liberalism in the Courts has gone to such an extreme degree that an obviously guilty criminal can't be arrested even after being given his Miranda warnings three times, talking to two friends about the crime, held for six hours at the police station, and voluntarily confessing to the crime to the police. The result—No conviction because a liberal activist majority on the Supreme Court that despises the rule of law and stare decisis, that favors their own personal policy preference, rather than following the original intent of the constitutional Framers, suffers the criminal to go free. Why? Because they have the power to do so—the original intent of the Framers be damned!

VI EXCEPTIONS TO THE EXCLUSIONARY RULE

There are many so called exceptions to the exclusionary rule that can "break" the causal chain.[36] For example, under the fruit of the poisonous tree doctrine, the exclusionary rule was very broadly applied especially during the Warren Court Term (1954-1968) and the Burger Court Term (1969-1986). Recently, during the Rehnquist Court Term (1987-2005), the Court began to further narrow the scope of the rule by balancing the benefit (deterrence of government misconduct) against its costs (exclusion of probative evidence). Now, the Court generally will not apply the rule when it will not likely deter government misconduct. Thus, if there is a weak link between the government misconduct and the evidence (i.e., it is not likely that the misconduct caused the evidence to be obtained), the Court will probably not exclude the evidence. Although I welcome this abridgement of the exclusionary rule, by the Rehnquist court that has brought a degree of rationality to an ungainly, irredeemable Court rule, in order to maintain sound constitutional jurisprudence, the legislature and/or the Supreme Court must overrule the exclusionary rule, Miranda, and all of the cases that followed its judicial precedents. Despite a chipping away at the exclusionary rule, to date the Rehnquist Court hasn’t had the judicial will to overrule the case law that has created this intractable monstrosity called the exclusionary rule.

Exceptions to the exclusionary rule are many and complex. The following are the most frequently used exceptions by the Court to the exclusionary rule. (1) The Independent Source Rule. Evidence is admissible if the prosecution can show that it was obtained from a source independent of the original illegality; (2) The Intervening Act of Free Will Rule. An intervening act of free will by the original illegality and thus remove the taint. This narrowing of the exclusionary rule was achieved by the Court in the Wong Sun v. United States case; (3) The Inevitable Discovery Rule. If the prosecution can show that the police would have discovered the evidence it will be admissible;[37] (4) The In-court Identification Rule. The defendant may not exclude the witness's in-court identification on the ground that it is the fruit of an unlawful detention; (5) The Automobile Exception. Regarding this latter rule, Professor Marvin Zalman wrote the following prescient remarks:

The automobile, or vehicle, exception, has produced a large body of case law and a good deal of confusion. In Carroll v. United States (1925),[38] the Court upheld a warrantless search of an automobile traveling on the highway and the tearing up of its leather back seat, when the police had probable cause to believe it was transporting “bootleg” liquor. Obtaining a warrant would have been fruitless as the vehicle would quickly be beyond the officers’ reach and the contraband gone: California v. Carney (1985) added another rationale to the automobile warrantless search exception—the lesser expectation of privacy in vehicles due in part to their nature and in part to their high degree of regulation. In that case the fact that respondent lived in a mobile van capable of being driven away did not confer the protection of a home; a warrantless search was upheld. [39]

The exclusionary rule is also limited in two major areas, it is inapplicable to grand juries and in civil proceedings. For example, a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure, unless the evidence was obtained in violation of the federal wiretapping statute.[40]

VII TO WARRANT OR NOT TO WARRANT? THAT IS THE QUESTION

Constitutional law for the past 35 years has required the police to have probable cause before they can lawfully arrest a suspect. If the police goes to a suspect's home and improperly arrests him without a warrant, this is considered a violation of the Fourth Amendment, the exclusionary rule is activated, and all evidence seized subsequent to the arrest will not be admissible. On this point, in a 1980 case, Payton v. New York, the Court held:

> . . [T]hat the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, … prohibits the po-lice from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest.[41]

However, the original intent of the Fourth Amendment says nothing about the police necessarily required to have a warrant to secure entrance to a home the police suspect’s criminal activity is occurring, but when you do get a warrant, here are the constitutional criteria.42 Furthermore, if the suspect confesses at home, and the police then take him to the station, the suspect confesses again at the police station, the home confession must be excluded from evidence since it is the fruit of the illegal arrest, but the station house confession is admissible because it is not a fruit of the unlawful arrest. Because the police had probable cause to arrest the suspect, they did not gain anything from the unlawful arrest—they could have

lawfully arrested suspect the moment he stepped outside of his home and then brought him to the station for his confession.[43] Thus, this police misconduct was not a fruit of the poisonous tree due to the fact that suspect was arrested at home as opposed to somewhere else.[44] This case is a good example of if you ask the wrong question, you will get the wrong answer. Although I agree with the conclusion in this example, the silly and convoluted logic the Court uses to reach its decision makes a mockery of the Constitution and of prior Supreme Court precedent cases by applying the Bill of Rights to the Constitution in a manner that would have

been scarcely coherent to the Framers.

For example, if the police illegally search a warehouse and discover marijuana, but doesn't seize it, then the police later return to the warehouse with a valid warrant based on information totally unrelated to the illegal search. If police seize the marijuana pursuant to the warrant, the marijuana is admissible.[45] There is also the exception of the Intervening Act of Free Will. An intervening act of free will remove the taint. For example, the suspect was released on his own recognizance after an illegal arrest, but later returned to the station to confess. This voluntary act of free will removed any taint from the confession.

Another exception to the exclusionary rule is the Inevitable Discovery exception. This rule applies in the case of live witness testimony. An exception to the rule can be made if it is difficult for a suspect to have live witness testimony excluded as the fruit of illegal police conduct, or a more direct link between the unconstitutional police conduct and the testimony is required than for exclusion of other evidence. The factors a court must consider in determining whether a sufficiently direct link exists include the extent to which the witness is freely willing to testify and the extent to which excluding the witness's testimony would prevent future illegal conduct. This was the judicial reasoning used in the Boyd case as far back as 1886 by closely limiting its opinion to the facts, rather than to go down the slippery slope of crafting a multitude of bizarre scenarios and exceptions to the exclusionary rule. Thus an exclusionary rule based on Fourth Amendment violations was rejected by the Court a few years later the Court in Adams v. New York (1904) followed the common law rule that evidence was admissible however acquired.[46]

A conviction will not necessarily be overturned merely because improperly obtained evidence was admitted at trial; the harmless error test applies, so a conviction can be upheld if the conviction would have resulted despite the improper evidence. For example, the Court in Chapman v. California (1967)[47] and Milton v. Wainwright (1972),[48] held that the government bears the burden of showing beyond a reasonable doubt that the admission of the improperly obtained evidence was "harmless." Finally, in enforcing the exclusionary rule, the defendant has a right to hearing on motion to suppress. In Jackson v. Denno (1964) the Court held that the defendant was entitled to have the admissibility of evidence of a confession decided as a matter of law by a judge out of the hearing of the jury.[49] The Court in Lego v. Twomey (1972) held that it is permissible to let the jury reconsider the "admissibility" of the evidence if the judge finds it admissible, but there is no constitutional right to such a dual evaluation.[50] In the decision of LaValee v. Delle Rose (1973), the Court held that the defendant is not constitutionally entitled to have a specific finding of fact on each factual question. As in Lego v. Twomey, the Court held in Simmons v. U.S. (1968) that the government bears the burden of establishing admissibility by a preponderance of the evidence. The defendant has the right to testify at the suppression hearing without his testimony being admitted against him at trial on the issue of guilt.[51]

In U.S. v. Janis, the Court held that the exclusionary rule does not forbid one sovereign from using in civil proceedings evidence that was illegally seized by the agent of another sovereign.[52] Moreover, the Supreme Court would probably allow the sovereign that has seized the illegally obtained evidence to use it in a civil proceeding. The exclusionary rule does apply, however, to a proceeding for forfeiture of an article used in violation of the criminal law, when forfeiture is clearly a penalty for the criminal offense. For example, evidence that is inadmissible in a state

criminal trial because it was illegally seized by the police may be used by the I.R.S. The rule is inapplicable to internal agency rules. In United States v. Caceres, the Court held that the exclusionary rule applies only if there is a violation of the Constitution or federal law; it does not apply to a violation of only internal agency rules.[53] The exclusionary rule does not apply when the police act in good faith based on case law later changed by another judicial opinion,[54] or on a facially valid statute or ordinance as it then exists, even if the law is declared unconstitutional, is changed by a subsequent court decision, or when the police act in reliance in good faith on a defective search warrant.[55] The rationale is this: one of the main purposes of the exclusionary rule is to deter improper police conduct, and this purpose cannot be served where police are acting in good faith.[56]

The Court in U. S. v. Leon and Massachusetts v. Sheppard, suggested four exceptions to the good faith defense for reliance on a defective search warrant. A police officer cannot rely on a defective search warrant in good faith if: (1) The affidavit underlying the warrant is so lacking in probable cause that no reasonable police officer would have relied on it; (2) The warrant is defective on its face (it fails to state with particularity the place to be searched or the things to be seized); (3) The police officer or government official obtaining the warrant lied to, or misled, the magistrate; (4) The magistrate has "wholly abandoned his judicial role."

Concerning point number one, as I have stated repeatedly in this article, it is an absurd and unconstitutional procedural requirement for the Court to require the police to get a warrant in the first place. The warrant requirement is another example of Court’s overreaching into the domain of the lawmaking branch of government by legislating from the bench instead of interpreting the Constitution. Are judges more adept than the police at catching criminals? It is ridiculous to require the police to come to a judge to get a warrant in order to enter a home where suspected criminal activity is in process despite the Court trying to nullify this paradox with a myriad of exceptions to the exclusionary rule. I am sure that there have been multitudes of criminals that have escaped the law because of the delay required to secure a warrant. In order for police to capture certain criminals, timing is every-thing. On the second point I ask: Are the police clairvoyant? A lot of times the police don't exactly know what type of criminal activity is going on at a residence, but they have a strong "hunch" or have been tipped off by a second-hand source, usually some anonymous citizen in the neighborhood, that a crime is being perpetrated at a certain place. On point number three, as I mentioned earlier, the original intent of the Constitution required no warrant in order for the police to enter a home suspected of criminal activity.

The Court decisions that support the warrant requirements are examples of judicial legislation from the bench. This type of case law is unconstitutionally illegitimate and all such cases should be promptly overruled by the Court as soon as the opportunity arises. Fourthly, the Court's critical language in Leon (“the majority has totally abandoned his judicial role”) can be interpreted to mean the judge didn't follow the unconstitutional rulings regarding the issuing of warrants, the exclusionary rule, therefore we will not give credence to the warrant issued nor the evidence based on the warrant to be used against the defendant. More than likely, the defendant will either go free or have the charges against him substantially reduced to the detriment of the prosecutor's case and to the denigration of the rule of law.

The Court will allow the use of excluded evidence for impeachment purposes for certain evidentiary purposes. Some illegally obtained evidence that is inadmissible in the state's case in chief may nevertheless be used to impeach the defendant's credibility if he takes the stand at trial. For example, an otherwise voluntary confession taken in violation of the Miranda requirements is admissible at trial for impeachment purposes. However, a truly involuntary confession is not admissible for any purpose.60 Secondly, regarding the fruit of illegal searches, the prosecution may use evidence obtained from an illegal search that is inadmissible in its direct case to impeach the defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination, but such illegally obtained evidence cannot be used to impeach the trial testimony of wit-nesses other than the defendant.

VIII CONCLUSION

What should be done regarding the exclusionary rule? The Supreme Court, as soon as an appropriate case is brought before them, should unanimously overrule Weeks v. United States and put an end to the absurd and unconstitutional exclusion-ary rule and all of the poisonous fruit cases that grew out of it (Wolf, Miranda, Mapp, Taylor, et al.).[57] The exclusionary rule has been the controlling legal author-ity for illegal searches and seizures for the past century. It has only put an unrea-sonable and unconstitutional burden upon the police to follow the exact letter of a judge-made law when performing their duties at peril of obtaining no conviction. Obviously the police should obey the law, but is it within the Supreme Court's expressly enumerated constitutional powers for them to write a police code of conduct? I think not. This is essentially what they have done by this judge-made invention of the exclusionary rule. As Justice Cardozo argued, certainly there is no justice or respect for the rule of law to allow an obviously guilty person to go free, “because the constable (i.e., police, prosecutor, judge) has blundered.”

Furthermore, in a post-9/11 world where technology and radical ideology has taken crime to an international level, authorities are grappling with notions of suspending constitutional doctrines has “habeas corpus” if “enemy combatants” are captured during time of “war”. On this point a student wrote in a Comment the following prescient remarks:

> Probably in light of this historical evidence, the Supreme Court has repeatedly held that the exclusionary rule is not a constitutional right and that “the governments’ use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. . . . In practice, a suspension of habeas corpus will result in a suspension of any rights of due process. . . . In sum, the historical evidence can undoubtedly be read to support a restriction of Fourth Amendment rights during wartime, or grave threats to public safety, and a fortiori a restriction on the Fourth Amendment remedy of the exclusionary rule. . . . While the Court may not wish to do away with all search and seizure protection for aliens, limiting the exclusionary rule to citizens would certainly bring the scope of those rights closer to the intent of the framers. . . . Even assuming the Court would find that aliens possess Fourth Amendment rights, which does not necessarily mean the exclusionary rule must be applied.[58]

Bluntly speaking, the exclusionary rule is insane jurisprudence as well as a patent example of liberal judicial activism of the most outrageous kind. What the Courts and the police departments should do when confronted by improper police conduct is not to let the guilty go free, which makes a mockery of justice and endangers the public, but as a separate issue, duly punish, reprimand, or fine the errant police officer(s).[59]

There are also many other avenues that a person can seek redress or obtain a remedy for deprivation of their constitutional rights due to improper police conduct including civil suits, injunctions, formal complaints, etc.60 Although I strongly desire that the Rehnquist Court have the judicial fortitude to overrule the exclusionary rule61 as soon as the proper case is brought before them seeing that many Justices over the past 25 years have expressed skepticism over the constitutional validity of the exclusionary rule.62 To continue to follow the tortured judicial logic of the exclusionary rule is to continue to make a mockery of the Constitution, the Bill of Rights and the rule of law.

For the Court to “legislate from the bench” follow this extreme from of radical leftist jurisprudence based on philosophical notions of radical egalitarianism, radical individualism, and placing judges personal policy preferences over the plain text of the Constitution, is to give our most dangerous and wanton criminals a key to their own jail cells to the peril of public safety and the erosion of the public's confidence in a civil society governed by the rule of law.

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accepted into many prestigious archives and collections including–Chambers Library of the Supreme Court of the United States, State Museum of Auschwitz-Birkenau, The Simon Wiesenthal Center, The U.S. Holocaust Memorial Museum, The Elie Wiesel Foundation for Humanity.
*Exceeding gratitude to my friend, attorney Che Ali Karega (a.k.a. “Machiavelli”) for his antagonism, advice, ideas, source materials, and inspiration. To Arthur LaBrew, musicologist and historian, founder Michigan Music Research Center (Detroit), for his prescient comments and attention to detail on earlier drafts of the Article. To C. James Newlan, publisher of the Journal, THE SOCIAL CRITIC, for being my friend, my first publisher, an intellectual, a visionary, and the first person to believe that I had ideas worthy to be published and read.

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1 Among the early critics of the exclusionary rule were Judge Cardozo, People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (the criminal will go free because the constable has blundered); and DEAN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE 2183-84 (3d ed. 1940). For extensive discussion of criticism and support, with citation to the literature, see WAYNE R. LAFAVE, SEARCH AND SEIZURE- A TREATISE ON THE FOURTH AMENDMENT Sec. 1.2 (2d ed. 1987). In contrast to Justice Cardozo’s prophetic remarks on the foolishness of the exclusionary rule, and its detrimental effects on the rule of law, Justice Clark, writing for the majority in 1961, in Mapp v. Ohio, held that:
There are those who say, as did Justice Cardozo, that under our constitutional exclusionary doctrine “the criminal is to go free because the constable has blundered.” . . . In some cases this will undoubtedly be the result. But, . . . there is another consideration – the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.
Here, Justice Clark begs the question by his phrase “failure to observe its own laws”. What legitimate law is he speaking of?—The judge-made exclusionary rule beginning with Weeks v. U.S.? A rule or legal doctrine that was unknown to the constitutional Framers. A law with no legitimate constitutional origins. It is ironic and paradoxical for a Justice to both criticize the Court for not upholding the “law” by failing to give legal credence to the exclusionary rule–a blatant distortion of the Constitution and an affront to the original Framers of the Constitution.
2 Thomas Jefferson, America’s third president, stated in regards to the first example of judicial activism in Marbury v. Madison, 1 Cranch 137 (1803). As quoted in ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: CONFLICT AND CONSTRUCTION 1800-1815, vol. III , 101, 144, n. 3 (1980). Jefferson to Jarvis, Sept. 28, 1820, Works: Ford, XII, 162. Yet, at the time when he was founding the Republican Party, Jefferson had written to a friend that “the laws of the land, administered by upright judges, would protect you from any exercise of power unauthorized by the Constitution of the United States.” (Jefferson to Rowan, Sept. 26, 1798, id. VIII, 448.)
3 State v. Fisher, 141 Ariz 227, 686 P2d 750, cert. den. 469 U.S. 1066, 83 L ed 2d 436, 105 S Ct 548, post-conviction proceeding, motion for new trial granted, remanded 152 Ariz 116, 730 2d 825, appeal after remand, remanded 176 Ariz 69, 859 2d 179, 147 Ariz Adv Rep 14; State v. Anderson, 286 Ark 58, 688 SW2d 947 (overruled on other grounds by Jackson v. State, 291 Ark 98, 722 SW2d 831); People v. Hamilton 666 P2d 152; State v. Johnson, 110 Idaho 516, 716

P2d 1288.
The law encyclopaedia, AMERICAN JURISPRUDENCE 2d, has the following procedural guidelines regard-ing search and seizure problems:
(1) Was there a search or seizure within the meaning of the Fourth Amendment?
–If yes, proceed to (2).
–If no, the evidence cannot be suppressed.
(2) Was a warrant required?
–If yes, proceed to (2).
–If no, proceed to (5).
(3) Was a warrant obtained?
–If yes, proceed to (4).
–If no, the evidence should be suppressed.
(4) Was the warrant valid?
–If yes, proceed to (6).
–If no, proceed to (5)
(5) Was there good-faith reliance on the warrant?
–If yes, proceed to (6).
–If no, the evidence should be suppressed.
(6) Was the search properly conducted?
–If yes, the evidence should not be suppressed.
–If no, the evidence should be suppressed.
See 29 Am Jur 2d § 602.
4 Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665 (1970); Bradley C. Canon, Is the Exclusionary Rule In Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 KY. L. J. 681 (1974); James E. Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. LEGAL STUD. 243 (1973); VAN DUZEND, SUTTON AND CARTER, THE SEARCH WARRANT PROCESS, PRECONCEPTIONS, PERCEPTIONS, PRACTICES (1985); Myron Orfield, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. CHI. L. REV. 1016 (1987).

5 Stone v. Powell, 428 U.S. 465 (1976) (exclusionary rule applied in a search, but federal habeas corpus challenges were limited); Elkins v. United States, 364 U.S. 206, 4 L Ed 2d 1669, 80 S Ct 1437; State v. Clark (La App 3d Cir) 467 So 2d 602.
6 See McKay, Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy, 15 ARIZ. L. REV. 327 (1973). Deterring overzealous police conduct was not the original intent of the exclusionary rule as cited in the Weeks v. U.S. case, as today are extremely rare. See Edwards, Criminal Liability for Unreason-able Searches and Seizures, 41 VA. L. REV. 621 (1955).
7 Theologian, Charles Ryrie, had the following prescient remarks about the ancient Greek school of philosophy called Stoicism—
The Stoics, who regarded Zeno (340-265 B.C.) as their founder and whose name came from Stoa Poikile (Painted Porch) where he taught in Athens, emphasized the rational over the emotional. They were pantheistic. Their ethics were characterized by moral earnestness and a high sense of duty, advocating conduct Aaccording to nature.
HOLY BIBLE, 1572 (Ryrie ed., 1978). As quoted in WASHINGTON, THE INSEPARABILITY OF LAW AND MORALITY, supra note *, at 431, n. 42.

8 JACQUES MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW (1949, 1963); O. F. VON GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY, 1500 TO 1800 (1957). See generally, DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION & RELIGION (1997); PHILLIP E. JOHNSON, DARWIN ON TRIAL (1993); DAVID M. ADAMS, PHILOSOPHICAL PROBLEMS IN THE LAW (1992); THE ANTI-FEDERALISTS: SELECTED WRITINGS AND SPEECHES (Joseph Sobran, ed. 1999); ALEXANDER HAMILTON, JAMES MADISON, JOHN JAY, THE FEDERALIST PAPERS (1998).

9 Jefferson's sublime words in the Declaration were: ". . . Life, Liberty and the pursuit of Happiness." Note the significance of these ideas and ideals to Jefferson by their capitalization. DECLARATION OF INDEPENDENCE (1776). (*N.B.: These ideas were to be pursued by the individual, not to be an undeserved gift of government largess).
10 THE ILLUSTRATED COLUMBIA ENCYCLOPEDIA, Vol. 14, 4317-18 (1969). See also CARL BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS (1932); A.L. HARDING, NATURAL LAW AND NATURAL RIGHTS (1955); LEO STRAUSS, NATURAL RIGHTS AND HISTORY (1956).
11 Boyd v. United States, 116 U.S. 616, 630 (1886) (Court found no Fourth Amendment violation of the police search and seizure of books and papers, but only requires defendant to produce them . . . if not, the produced allegations . . . are taken as confessed). The Court in Boyd further stated:
We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal 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. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. Id. at 633.
It was this utilization of the Fifth Amendment that clearly required exclusionary rule, rather than one implied from the Fourth Amendment, on which Justice Black relied and absent a Fifth Amendment self-incrimination violation he did not apply such a rule. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Coolidge v. New Hampshire, 403 U.S. 443, 493, 496-500 (1971) (dissenting opinion). The theory of a "convergence" of the two Amendments has now been disavowed by the Court. Ibid at 1225-26.
12 Adams v. New York, 192 U.S. 585 (1904) (Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers acting under color of legislative or judicial sanction). Since the case arose from a state court and concerned a search by state officers, it could have been decided simply by holding that the Fourth Amendment was inapplicable. See National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914) as quoted in, Enforcing the Fourth Amendment: The Exclusionary Rule, caselaw.lp.findlaw.com/data/constitution/amendment, n. 169.
13 See JAMES B. HADDAD, JAMES B. ZAGEL, GARY STARKMAN, WILLIAM J. BAUER, CRIMINAL PROCEDURE: CASES AND COMMENTS 469 (3rd ed, 1987), quoting Weeks v. United States, 232 U.S. 383 (1914) (evidence obtained in violation of the Fourth Amended by a

federal officer was excluded from evidence) [hereinafter HADDAD, CRIMINAL PROCEDURE]. See also Silverthorne Lumber Comp. v. United States 251 U.S. 385 (1920) (Court upheld the legality of the exclusionary rule after an overt challenge by the government).
14 MARVIN ZALMAN & LARRY SIEGEL, KEY CASES AND COMMENTS ON CRIMINAL PROCEDURE 11 (1994 ed.) quoting Weeks v. U.S. 232 U.S. 383 (1914) [hereinafter ZALMAN & SIEGEL, KEY CASES AND COMMENTS ON CRIMINAL PROCEDURE].

15 THE MAYFLOWER COMPACT, November 11, 1620, quoted in WASHINGTON, INSEPARABILITY OF LAW AND MORALITY, supra note *, at 124, also cited in WASHINGTON, id, at 124.
16 Wolf v. People of the State of Colorado, 338 U.S. 25 (1949) (the Court held that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure); Mapp v. Ohio, 367 U.S. 643 (1961) (applied the incorporation doctrine to apply the exclusionary rule to the Fourth, Firth, Sixth and Eighth Amend-ments).
17 On this point I am indebted to my mentor, Che Ali Karega (a.k.a. “Machiavelli”), for alerting me to the Court’s judicial restraint by flirting with, but ultimately refusing to extend the exclusionary rule to the states in Wolf, and of the Court overreaching in Mapp. Justice Hugo Black, concurring that that the Fourth Amendment was incorporated into the Fourteenth, “I agree that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.” See ZALMAN & SEIGEL, supra note 14, at 35, quoting Wolf v. Colorado. (italics mine).

18 ZALMAN & SIEGEL, supra note 14, at 12, Sec. [C], stated: “A strictly literal reading of the Constitution on this point [the Fourth Amendment warrant requirement] would make law enforcement impossible.”
19 Miranda v. Arizona, 384 U.S. 436 (1966). The decision made clear what law enforcement authorities could or could not do in trying to gain evidence for conviction. The Court said that once law officers had a suspect in custody and attempted to interrogate him, if the suspect "At any stage indicates that he wishes to consult with an attorney before speaking, there can be no questioning". (Paradoxically, Thur-good Marshall, then serving as President Lyndon Johnson’s solicitor general, argued in favor of defendant Miranda on behalf of the U.S. government). See Nancy Gibbs, The Supreme Court: Filing a Legal Giant’s Shoes, TIME MAGAZINE., July 8, 1991; THURGOOD MARSHALL, SUPREME JUSTICE: SPEECHES AND WRITINGS (J. Clay Smith, Jr., ed.. 2003); CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS, THE WORLD OF JUSTICE THURGOOD MARSHALL (1993).
20 HADDAD, CRIMINAL PROCEDURE, supra note 13, at 70, discussing Oregon v. Elstad, 470 U.S. 298 (1985).

21 HADDAD, CRIMINAL PROCEDURE, supra note 13, at 59-60 (italics mine). See Miranda v. Arizona, 384 U.S. 436 (1966).

22 Thomas Jefferson, America’s third president, stated in regards to the first example of judicial activism in Marbury v. Madison, 1 Cranch 137 (1803): “To consider the judges as the ultimate arbiters of all constitutional questions, would place us under the despotism of an oligarchy.” As quoted in ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: CONFLICT AND

CONSTRUCTION 1800-1815, vol. III, 101, 144 n. 3 (1980). Jefferson to Jarvis, Sept. 28, 1820, Works: Ford, XII, 162. Yet, at the time when he was founding the Democratic-Republican Party, Jefferson had written to a friend that “the laws of the land, administered by upright judges, would protect you from any exercise of power unauthorized by the Constitution of the United States.” (Jefferson to Rowan, Sept. 26, 1798, id. VIII, 448.)
23 Thomas Y. 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 A.B.F. Research Journal, 680.
24 Id, at 650.
25 Id, at 653.
26 Id, at 654. See also K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 16, 18-19 (1979); REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 10-11, 14 (1979); NARDULLI, THE SOCIETAL COST OF THE EXCLUSIONARY RULE: AN EMPIRICAL ASSESSMENT, 1983 A.B.F. Research Journal 585, 600 (1983). For notes 9-13, see also HADDAD, CRIMINAL PROCEDURE, supra note 13, at 564, note 2 (1987). See also Jeffrey Chudnow, Exclusionary Rule: Viability in 1997, 3-7, www.fdle.state.fl.us/fcjei/ SLP%20papers/ Chudnow.PDF.

76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh. den. 429 US 874, 50 L. Ed. 2d 158, 97 S Ct 196, 97 S Ct 197.
28 United States v. Janis, 428 US 433, 49 L Ed 2d 1046, 96 S Ct 3021, 76-2 USTC ¶ 16229, 38 AFTR 2d 76-5378, on remand (CA9) 540 F2d 1022, 77-1 USTC ¶ 16252, 39 AFTR 2d 77-1239 and reh den 429 US 874, 50 L. Ed. 2d 158, 97 S Ct 196, 97 S Ct 197.
29 Illinois v. Gates, 462 U.S. 213 (1983) (White, J., concurring in the judgment).

30 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, 1392-3 (1973).
31 Lon Fuller, The Problem of Interpretation: The Case of the Penumbra, Positivism and Fidelity to Law–A Reply to Professor Hart, 71 HARV. L. REV. 630, 661-69 (1958); The Natural Law Philosophy of Lon L. Fuller in Contrast to Roe v. Wade and Its Progeny, Natural Law Internet Encyclopedia of Philosophy, available at:

32 ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (back book cover) (1996) (arguing that the decline of modern culture is causally linked to the rise of modern liberalism).

33 Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963).
34 Taylor v. Alabama, 457 U.S. 687 (1982).
35 United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S Ct 3405, reh. den. 468 U.S. 1250, 82 L. Ed. 2d 942, 105 S. Ct 52 (recognizing good-faith exception); James v. Illinois, 493 U.S. 307, 107 L. Ed. 2d 676, 110 S. Ct. 648; Fletcher N. Baldwin, Due Process And The Exclusionary Rule: Integrity and Justification, 39 U. FLA. L. REV. 505 (1987); M. Giulia Fabi, The Exclusionary Rule: Not the “Expressed Juice Of The Wooly-Headed Thistle”, 35 BUFF. L.

REV. 937 (1986); Fletcher N. Bradley, Present At The Creation? A Critical Guide To Weeks v. United States And Its Progeny, 30 ST. LOUIS U. L. J. 1031 (1986).

36 Nix v. Williams, 467 U.S. 431 (1984).
37 United States v. Crews, 445 U.S. 463 (1980).
38 Carroll v. United States, 267 U.S. 132 (1925) (Court upheld a warrantless search of an automobile traveling on the highway). See also ZALMAN & SIEGEL, KEY CASES ON CRIMINAL PROCEDURE, supra note 14, at 226.

39 California v. Carney, 471 U.S. 386 (1985) (Court held that law enforcement agents not violate the Fourth Amendment when they conducted a warrantless search, based on probable cause, of a fully mobile “motor home” located in a public place).
40 United States v. Calandra, 414 U.S. 338 (1974); Gelbard v. United States, 408 U.S. 41 (1972); Congressional intent sought to codify all existing search and seizure laws. See Senate Report No. 1097, accompanying P. L. 90-351; 29 Am Jur 2d § 610.
41 Payton v. New York, 445 U.S. 573 (1980).
42 Fourth Amendment:
The right of the people to be secure in their persons, houses, papers, and effects, against un-reasonable 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.
BILL OF RIGHTS, FOURTH AMENDMENT (1790).

43 New York v. Harris, 495 U.S. 14 (1990).
44 Murray v. United States, 419 U.S. 942 (1998).
45 Wong Sun v. U.S. 371 U.S. 471 (1963).
46 Adams v. New York, 192 U.S. 585 (1904). Since this case arose from a state court and concerned a search by state officers, it could have been decided simply by holding that the Fourth Amendment was inapplicable. See National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914) as quoted in: Enforcing the Fourth Amendment: The Exclusionary Rule, , 2, n. 169.
47 Chapman v. California, 386 U.S. 282 (1967).

48 Milton v. Wainwright, 407 U.S. 371 (1972).
49 Jackson v. Denno, 378, U.S. 368 (1964).
50 Lego v. Twomey, 404 U.S. 477 (1972).
51 Simmons v. U.S., 390 U.S. 377 (1968).
52 United States v. Janis, 428 U.S. 433 (1976).
53 United States v. Caceres, 440 U.S. 741 (1979).
54 United States v. Peltier, 422 U.S. 531 (1975).
55 Michigan v. deFillippo, 433 U.S. 31 (1976); United States v. Leon, 486 U.S. 897 (1984); Massachu-setts v. Sheppard, 468 U.S. 891, 82 L Ed 2d 737, 104 S Ct 3424, on remand 394 Mass 381, 476 NE2d 541 (1984).
56 United States v. Savoca, (CA6 Ohio) 761 F2d 292, cert. den. 474 US 852, 88 L Ed 2d 126, 106 S Ct 153; United States v. Leary, (CA10 Colo) 846 F2d 592.

57 United States v. Havens, 446 U.S. 620 (1980).

58 Recently there has been much discussion in the news about several states overturning the Miranda warning requirement when the police initiate the arrest of a suspect. The case in question is a Virginia case, U.S. vs. Dickerson, 528 U.S. 1045 (1999). This anti-Miranda movement originated from the legal research of a University of Utah law professor and his re-discovery of Title 18 Section 3501 which was the original federal statute upon which the Miranda case was based. Admissibility of Confessions:
(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (3) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.
(c) In any criminal prosecution by the United States or by the district of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.
(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
(e) As used in this section, the term “confession” means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.
(Added Pub. L. 90-351, title II, sec 701(a), June 19, 1968, 82 Stat. 210, and amended Publ. L. 90-578, title III, sec 301(a)(3), Oct. 17, 1968, 82 Stat. 1115.) United States Code, 1988 Ed. U.S.

Government Printing Office, Washington, D.C. 1989, pp. 500-01.

59 Matt J. O'Laughlin, Comment: Exigent Circumstances: Circumscribing the Exclusionary Rule In Response to 9/11, 70 UMKC. L. REV. 707, 707 (2002).
60 In modern times, a person who has been arrested illegally will usually have an opportunity to file a tort action against the offending officer. See Harvey A. Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 MICH. L. REV. 1123 (1967).
61 E.g., Stone v. Powell 428 U.S. 465, 496 (1976) (Chief Justice Burger: rule ought to be discarded now, rather than wait for a replacement as he argued earlier); id. at 536 (Justice White: modify rule to admit evidence seized illegally, but in good faith); Schneckloth v. Bustamonte 412 U.S. 218, 261 (1973) (Justice Powell); Brown v. Illinois 422 U.S. 590, 609 (1975) (Justice Powell); Robbins v. California 453 U.S. 420, 437 (1981) (Justice Rehnquist); California v. Minjares 443 U.S. 916 (1979) (Justice Rehnquist joined by Chief Justice Burger); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Justice Blackmun joining Justice Black's dissent that "the Fourth Amendment supports no exclusionary rule").
62 Professor Zalman wrote the following prescient analysis in the abstract of his article on Chaves v. Martinez regarding the Courts latest attempts to mend, not end the exclusionary rule:
On December 4, 2002 the United States Supreme Court heard oral argument in Chavez v. Martinez on the issue of whether police officers have qualified immunity against liability in a civil rights suit under 42 U.S.C. § 1983 based on a violation of Fifth or Fourteenth amendment rights arising from the interrogation of a suspect. . . assumes that the Court will decide that even an abusive interrogation in itself violates no right guaranteed by the privilege against self-incrimination or by the due process voluntariness test. The Court will declare that the Fifth Amendment privilege and the Fourteenth Amendment voluntariness test are trial rights that come into play as exclusionary rules in criminal cases. The implication of this predicted ruling will be profound. It will relegate suits for abusive interrogation and torture to state actions or to the high threshold of the substantive due process "shocks the conscience" doctrine. More importantly, it will make it clear that despite a good deal of judicial rhetoric to the contrary, Miranda does not create rules that police must obey. This could open the door to a highly suspect practice of interrogation "outside Miranda" in some cases, although such a ruling will call into question cases that allow the introduction of Miranda- violated statements for purposes of impeachment and evidence derived from Miranda-violated statements.
Marvin Zalman, The Coming Paradigm Shift on Miranda: The Impact of Chavez v. Martinez, 39(3) CRIM. L. BULLETIN 334 (2003); Martinez v. City of Oxnard, 270 F. 3d 852 (9th Cir. 2001), cert. granted, 122 S. Ct. 2326, 153 L. Ed. 2d 158, 535 U.S. 1111 (2003).
Justice Thomas, writing for the majority in Chavez held:
In deciding whether an officer is entitled to qualified immunity, we must first determine whether the officer's alleged conduct violated a constitutional right. See Katz, 533 U.S., at 201. If not, the officer is entitled to qualified immunity, and we need not consider whether the asserted right was "clearly established." Id. We conclude that Martinez's allegations fail to state a violation of his constitutional rights.

During one of our many discussions of the exclusionary rule, attorney Che Karega had the idea of the Court allowing states and local municipalities tie illegal search and seizures as a

detriment to police promotions.