

CHAPTER

3

THE EXCLUSIONARY RULE

What are the consequences if the police violate the Fourth Amendment requirements for searches and seizures described in the prior chapter? Similarly, what are the consequences if the police violate other constitutional limits in investigations, such as interrogations that violate the privilege against self-incrimination (discussed in Chapter 4) or identification procedures that violate due process (discussed in Chapter 5)? The most important enforcement mechanism is the “exclusionary rule.” This is the rule that material obtained in violation of the Constitution cannot be introduced at trial against a criminal defendant.

This chapter focuses primarily on the exclusionary rule in Fourth Amendment cases. Its application to other investigative techniques, such as interrogations and identification procedures, is discussed in the following chapters. Section A considers whether the exclusionary rule is a desirable remedy for unconstitutional police behavior. Section B examines the cases that created the exclusionary rule and applied it to the states. Section C examines who can object to the introduction of illegal evidence and raise the exclusionary rule. Section D considers the exceptions to the exclusionary rule. Finally, Section E discusses the primary mechanism for raising the exclusionary rule: suppression hearings.

A. IS THE EXCLUSIONARY RULE A DESIRABLE REMEDY FOR UNCONSTITUTIONAL POLICE BEHAVIOR?

The exclusionary rule is defended as a key way of deterring police misconduct. Officers know that if they violate the Constitution, the fruits of their efforts will be excluded. Officers, who obviously desire that their work will lead to convictions, will thus refrain from violating the Constitution. The Supreme Court often has expressed deterrence as a key purpose of the exclusionary rule. For example, the Court has declared that the exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrence effect.” *United States v. Calandra*, 428 U.S. 465 (1976).

The exclusionary rule also is justified based on concerns for judicial integrity. The view is that courts are tainted if they convict people based on illegally obtained evidence. In some areas, the concern is that illegally obtained evidence

is unreliable and could lead to the conviction of innocent people. For example, involuntary confessions or suggestive police lineups are excluded, in part, for fear that the results are not trustworthy. On the other hand, this concern is not present when tangible evidence is gained as a result of an illegal search.

There also is a notion that the exclusionary rule sends a powerful message that the government cannot and will not benefit from wrongdoing by its officers. Justice Brennan argued that application of the exclusionary rule “assures the people — all potential victims of unlawful government conduct — that the government [will] not profit from its lawless behavior, thus minimizing the risk of seriously undermining public trust in the government.” *United States v. Calandra*, 414 U.S. 338 (1974) (Brennan, J., dissenting).

Critics of the exclusionary rule primarily focus on its cost in letting potentially guilty people go free. Justice Cardozo captured this in his famous lament that under the exclusionary rule, “[t]he criminal is to go free because the constable has blundered.” *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). Indeed, the existence of the exclusionary rule may make judges less likely to find a Fourth Amendment violation since they know that the outcome of the case might be determined by the loss of key evidence.

Critics also argue that the exclusionary rule is unnecessary. In a recent majority opinion, Justice Scalia advanced these criticisms. The case, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006),¹ involved the question of whether evidence must be excluded when police violate the requirement for “knocking” and “announcing” before executing a warrant to search a residence. The Court held that the exclusionary rule does not apply. In defending this conclusion, Justice Scalia’s majority opinion presents many of the traditional arguments against the exclusionary rule.

HUDSON v. MICHIGAN

126 S. Ct. 2159 (2006)

Justice SCALIA delivered the opinion of the Court.

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates “substantial social costs,” which sometimes include setting the guilty free and the dangerous at large. We have therefore been “cautio[us] against expanding” it, and “have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” We have rejected “[i]ndiscriminate application” of the rule, and have held it to be applicable only “where its remedial objectives are thought most efficaciously served,” — that is, “where its deterrence benefits outweigh its ‘substantial social costs.’” The exclusionary rule has never been applied except “where its deterrence benefits outweigh its ‘substantial social costs.’” The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (*viz.*, the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce

1. *Hudson* is discussed in more detail in Section D below, which considers the exceptions to the exclusionary rule and *Hudson*’s holding that the exclusionary rule does not apply if the police violate the requirements for knocking and announcing before searching a dwelling.

violation would generate a constant flood of alleged failures to observe the rule. The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that “[t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded.”

Another consequence of the incongruent remedy Hudson proposes would be police officers’ refraining from timely entry after knocking and announcing. As we have observed, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires — producing preventable violence against officers in some cases, and the destruction of evidence in many others. We deemed these consequences severe enough to produce our unanimous agreement that a mere “reasonable suspicion” that knocking and announcing “under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime,” will cause the requirement to yield.

Next to these “substantial social costs” we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. (It is not, of course, a sufficient condition: “[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.”) To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises — dangers which, if there is even “reasonable suspicion” of their existence, suspend the knock-and-announce requirement anyway. Massive deterrence is hardly required.

It seems to us not even true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all. Of course even if this assertion were accurate, it would not necessarily justify suppression. Assuming (as the assertion must) that civil suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly “undeterred.” When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only “effective deterrent”? And what, other than civil suit, is the “effective deterrent” of police violation of an already-confessed suspect’s Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one’s nightclothes — and yet nothing but “ineffective” civil suit is available as a deterrent. And the police incentive for those violations is arguably greater than the incentive for disregarding the knock-and-announce rule.

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and

inadequacies of a legal regime that existed almost half a century ago. *Dollree Mapp* could not turn to 42 U.S.C. § 1983 for meaningful relief; *Monroe v. Pape* (1961), which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities, *Monell v. New York City Dept. of Social Servs.*, (1978). Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens v. Six Unknown Fed. Narcotics Agents* (1971).

Hudson complains that "it would be very hard to find a lawyer to take a case such as this," but 42 U.S.C. § 1988(b) answers this objection. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." M. Avery, D. Rudovsky, & K. Blum, *Police Misconduct: Law and Litigation*, p. v (3d ed. 2005); see generally N. Aron, *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond* (1989) (describing the growth of public-interest law). The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.

Hudson points out that few published decisions to date announce huge awards for knock-and-announce violations. But this is an unhelpful statistic. Even if we thought that only large damages would deter police misconduct (and that police somehow are deterred by "damages" but indifferent to the prospect of large § 1988 attorney's fees), we do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury. It is clear, at least, that the lower courts are allowing colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity. As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to "assume" that unlawful police behavior would "be dealt with appropriately" by the authorities, but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers." Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There is also evidence that the increasing use of various forms of citizen review can enhance police accountability.

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal

to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

It is striking that Justice Scalia's arguments are not simply reasons for an exception to the exclusionary rule for knock and announce violations; they are arguments against the existence of the exclusionary rule. They prompted Justice Kennedy, who concurred in Justice Scalia's opinion, to declare: "[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." Yet, *Hudson* suggests that there may be four votes on the current Court—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—to eliminate the exclusionary rule and that it will continue to exist, and exceptions will be created, to the extent Justice Kennedy wishes.

Justice Scalia's majority opinion in *Hudson* argues that the costs of the exclusionary rule outweigh its benefits. The primary cost, of course, is allowing guilty people to go free. He argues that deterring police misconduct, the central benefit of the exclusionary rule, does not warrant its existence. He says that civil suits for damages against the police who violate the Fourth Amendment are an adequate deterrent. He also maintains that increased professionalization of police forces makes the exclusionary rule unnecessary.

There long has been a debate over whether money damages against police officers for Fourth Amendment violations are a sufficient deterrent. Those who take this view, like Justice Scalia in *Hudson*, argue that the ability to sue police officers makes the exclusionary rule unnecessary.²

Others argue that such suits have so little chance of success that there will be little deterrence without the exclusionary rule.³ Juries are unlikely to find against the police in favor of convicted criminals and if they did, any damages would be nominal. Justice Breyer, in dissent in *Hudson*, makes these points in response to the majority opinion:

What reason is there to believe that those remedies (such as private damages actions under 42 U.S.C. §1983), which the Court found inadequate in *Mapp*, can adequately deter unconstitutional police behavior here?

The cases reporting knock-and-announce violations are legion. Indeed, these cases of reported violations seem sufficiently frequent and serious as to indicate "a widespread pattern." Yet the majority, like Michigan and the United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation. Even Michigan concedes that, "in cases like the present one . . . , damages may be virtually non-existent." And Michigan's amici further concede that civil immunities prevent tort law from being an effective substitute for the exclusionary rule at this time.

2. See, e.g., Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 Univ. Ill. L. Rev. 363.

3. See, e.g., Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 Harv. J.L. & Pub. Pol'y 119, 126-129 (2003) (arguing that "five decades of post-*Weeks* 'freedom' from the inhibiting effect of the federal exclusionary rule failed to produce any meaningful alternative to the exclusionary rule in any jurisdiction" and that there is no evidence that "times have changed" post-*Mapp*).

As Justice Stewart, the author of a number of significant Fourth Amendment opinions, explained, the deterrent effect of damage actions “can hardly be said to be great,” as such actions are “expensive, time-consuming, not readily available, and rarely successful.” The upshot is that the need for deterrence—the critical factor driving this Court’s Fourth Amendment cases for close to a century—argues with at least comparable strength for evidentiary exclusion here.

There may be instances in the law where text or history or tradition leaves room for a judicial decision that rests upon little more than an unvarnished judicial instinct. But this is not one of them. Rather, our Fourth Amendment traditions place high value upon protecting privacy in the home. They emphasize the need to assure that its constitutional protections are effective, lest the Amendment “sound the word of promise to the ear but break it to the hope.” They include an exclusionary principle, which since *Weeks* has formed the centerpiece of the criminal law’s effort to ensure the practical reality of those promises. That is why the Court should assure itself that any departure from that principle is firmly grounded in logic, in history, in precedent, and in empirical fact. It has not done so. That is why, with respect, I dissent.

B. THE ORIGINS OF THE EXCLUSIONARY RULE

The Court first invoked the exclusionary rule as a remedy for Fourth Amendment violations in *Weeks v. United States* in 1914.

WEEKS v. UNITED STATES

232 U.S. 383 (1914)

Justice DAY delivered the opinion of the Court:

An indictment was returned against the defendant in the district court of the United States for the western district of Missouri, containing nine counts. The seventh count, upon which a conviction was had, charged the use of the mails for the purpose of transporting certain coupons or tickets representing chances or shares in a lottery or gift enterprise, in violation of § 213 of the Criminal Code. Sentence of fine and imprisonment was imposed.

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant’s room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant’s room and carried away certain letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officer had a search warrant.

After the jury had been sworn and before any evidence had been given, the defendant urged his petition for the return of his property, which was denied by

the court. Upon the introduction of such papers during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant, and by breaking open his home, in violation of the 4th and 5th Amendments to the Constitution of the United States, which objection was overruled by the court. Among the papers retained and put in evidence were a number of lottery tickets and statements with reference to the lottery, taken at the first visit of the police to the defendant's room, and a number of letters written to the defendant in respect to the lottery, taken by the marshal upon his search of defendant's room.

The defendant assigns error, among other things, in the court's refusal to grant his petition for the return of his property, and in permitting the papers to be used at the trial.

It is thus apparent that the question presented involves the determination of the duty of the court with reference to the motion made by the defendant for the return of certain letters, as well as other papers, taken from his room by the United States marshal, who, without authority of process, if any such could have been legally issued, visited the room of the defendant for the declared purpose of obtaining additional testimony to support the charge against the accused, and, having gained admission to the house, took from the drawer of a chiffonier there found certain letters written to the defendant, tending to show his guilt. These letters were placed in the control of the district attorney, and were subsequently produced by him and offered in evidence against the accused at the trial. The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the 4th and 5th Amendments to the Constitution of the United States. We shall deal with the 4th Amendment.

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

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 4th 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. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for

which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused.

The court before which the application was made in this case recognized the illegal character of the seizure, and ordered the return of property not in its judgment competent to be offered at the trial, but refused the application of the accused to turn over the letters, which were afterwards put in evidence on behalf of the government.

We therefore reach the conclusion that 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. 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. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court; under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies.

Weeks involves the application of the exclusionary rule to the federal government. The Court initially considered and rejected the application of the exclusionary rule to the states in *Wolf v. Colorado*, 338 U.S. 25 (1949). Although the Court in *Wolf* said that “[t]he security of one’s privacy against arbitrary intrusion by the police . . . is . . . implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause,” the Court held that the exclusionary rule is not enforceable against the States as “an essential ingredient of the right.” The Court concluded: “We hold, therefore, 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.” As explained in Chapter 1, *Wolf* was decided at a time when there was intense debate over whether the Bill of Rights should be applied to the states and when a majority of the Court was generally reluctant to apply Bill of Rights provisions to the states.

This changed with the Warren Court, which found almost all of the Bill of Rights to be incorporated and to apply to the states. In 1961, the Supreme Court overruled *Wolf* and held that the exclusionary rule applies to the states in the landmark decision of *Mapp v. Ohio*.

MAPP v. OHIO*367 U.S. 643 (1961)*

Justice CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code. As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home."

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home."

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf v. People of State of Colorado* (1949).

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.'" At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. 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. 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."

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effect, documents, etc.? We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles

of humanity and civil liberty (secured) . . . only after years of struggle.” They express “supplementing phases of the same constitutional purpose — to maintain inviolate large areas of personal privacy.” The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence — the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State’s attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.

In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State’s attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as *Rea* and *Schnettler*, each pointing up the hazardous uncertainties of our heretofore ambivalent approach.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. “However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.” Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of “working arrangements” whose results are equally tainted.

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine “[t]he 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. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 1928: “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”

Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that “pragmatic evidence of a sort” to the contrary was not wanting.

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the

people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

Justice HARLAN, whom Justice FRANKFURTER and Justice WHITTAKER join, dissenting.

In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for stare decisis, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it.

Essential to the majority's argument against *Wolf* is the proposition that the rule of *Weeks v. United States* excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts. Although I entertain considerable doubt as to the soundness of this foundational proposition of the majority, I shall assume, for present purposes, that the *Weeks* rule "is of constitutional origin."

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of all illegal search and seizure is a "part and parcel" of the Fourth Amendment; (2) *Wolf* held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore "logically and constitutionally necessary" that the *Weeks* exclusionary rule should also be enforced against the States.

This reasoning ultimately rests on the unsound premise that because *Wolf* carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment, it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty," and as such are enforceable against the States. For me, this does not follow at all.

It cannot be too much emphasized that what was recognized in *Wolf* was not that the Fourth Amendment as such is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment which, as *Wolf* itself pointed out, has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment." It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments.

Thus, even in a case which presented simply the question of whether a particular search and seizure was constitutionally “unreasonable” — say in a tort action against state officers — we would not be true to the Fourteenth Amendment were we merely to stretch the general principle of individual privacy on a Procrustean bed of federal precedents under the Fourth Amendment. But in this instance more than that is involved, for here we are reviewing not a determination that what the state police did was Constitutionally permissible (since the state court quite evidently assumed that it was not), but a determination that appellant was properly found guilty of conduct which, for present purposes, it is to be assumed the State could Constitutionally punish. Since there is not the slightest suggestion that Ohio’s policy is “affirmatively to sanction . . . police incursion into privacy” what the Court is now doing is to impose upon the States not only federal substantive standards of “search and seizure” but also the basic federal remedy for violation of those standards. For I think it entirely clear that the *Weeks* exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on *Wolf* seem to me notably unconvincing. The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule.

A state conviction comes to us as the complete product of a sovereign judicial system. Typically a case will have been tried in a trial court, tested in some final appellate court, and will go no further. In the comparatively rare instance when a conviction is reviewed by us on due process grounds we deal then with a finished product in the creation of which we are allowed no hand, and our task, far from being one of over-all supervision, is, speaking generally, restricted to a determination of whether the prosecution was Constitutionally fair. The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. Of course, a court may use its procedures as an incidental means of pursuing other ends than the correct resolution of the controversies before it. Such indeed is the *Weeks* rule, but if a State does not

choose to use its courts in this way, I do not believe that this Court is empowered to impose this much-debated procedure on local courts, however efficacious we may consider the *Weeks* rule to be as a means of securing Constitutional rights.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

C. WHO CAN OBJECT TO THE INTRODUCTION OF EVIDENCE AND RAISE THE EXCLUSIONARY RULE?

In *Jones v. United States*, 362 U.S. 257 (1960), the Supreme Court took a broad view of who could object to the introduction of evidence and raise the exclusionary rule. The Court said that a person who “was aggrieved by an unlawful search or seizure” had standing to challenge it. The Court said that “[i]n order to qualify as a ‘person aggrieved by an unlawful search and seizure’ one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.” The Court concluded that “anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him.”

In *Rakas v. Illinois*, below, the Court changed the approach to determining who may raise the exclusionary rule. The Court held that only those whose Fourth Amendment rights were violated may raise the exclusionary rule. In other words, a person cannot raise the exclusionary rule just because he or she is “aggrieved” by an illegal search; to raise the exclusionary rule a person must show a violation of his or her Fourth Amendment rights.

RAKAS v. ILLINOIS

439 U.S. 128 (1978)

Justice REHNQUIST delivered the opinion of the Court.

Petitioners were convicted of armed robbery in the Circuit Court of Kankakee County, Ill., and their convictions were affirmed on appeal. At their trial, the prosecution offered into evidence a sawed-off rifle and rifle shells that had been seized by police during a search of an automobile in which petitioners had been passengers. Neither petitioner is the owner of the automobile and neither has ever asserted that he owned the rifle or shells seized. The Illinois Appellate Court held that petitioners lacked standing to object to the allegedly unlawful search and seizure and denied their motion to suppress the evidence.

I

Because we are not here concerned with the issue of probable cause, a brief description of the events leading to the search of the automobile will suffice. A police officer on a routine patrol received a radio call notifying him of a robbery of a clothing store in Bourbonnais, Ill., and describing the getaway car. Shortly thereafter, the officer spotted an automobile which he thought might be the getaway car. After following the car for some time and after the arrival of assistance, he and several other officers stopped the vehicle. The occupants of the automobile, petitioners and two female companions, were ordered out of the car and, after the occupants had left the car, two officers searched the interior of the vehicle. They discovered a box of rifle shells in the glove compartment, which had been locked, and a sawed-off rifle under the front passenger seat. After discovering the rifle and the shells, the officers took petitioners to the station and placed them under arrest.

Before trial petitioners moved to suppress the rifle and shells seized from the car on the ground that the search violated the Fourth and Fourteenth Amendments. They conceded that they did not own the automobile and were simply passengers; the owner of the car had been the driver of the vehicle at the time of the search. Nor did they assert that they owned the rifle or the shells seized. The prosecutor challenged petitioners' standing to object to the lawfulness of the search of the car because neither the car, the shells nor the rifle belonged to them. The trial court agreed that petitioners lacked standing and denied the motion to suppress the evidence. In view of this holding, the court did not determine whether there was probable cause for the search and seizure. On appeal after petitioners' conviction, the Appellate Court of Illinois, Third Judicial District, affirmed the trial court's denial of petitioners' motion to suppress because it held that "without a proprietary or other similar interest in an automobile, a mere passenger therein lacks standing to challenge the legality of the search of the vehicle."

We reject petitioners' suggestion. The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. The prosecutor argued that petitioners lacked standing to challenge the search because they did not own the rifle, the shells or the automobile. Petitioners did not contest the factual predicates of the prosecutor's argument and instead, simply stated that they were not required to prove ownership to object to the search. The prosecutor's argument gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden, and because of their failure to assert ownership, we must assume, for purposes of our review, that petitioners do not own the rifle or the shells.

II

Petitioners first urge us to relax or broaden the rule of standing enunciated in *Jones v. United States* (1960), so that any criminal defendant at whom a search was "directed" would have standing to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. Alternatively, petitioners argue that they have standing to object to the search under *Jones* because they were "legitimately on [the] premises" at the time of the search.

The concept of standing discussed in *Jones* focuses on whether the person seeking to challenge the legality of a search as a basis for suppressing evidence was himself the “victim” of the search or seizure. Adoption of the so-called “target” theory advanced by petitioners would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial. If we reject petitioners’ request for a broadened rule of standing such as this, and reaffirm the holding of *Jones* and other cases that Fourth Amendment rights are personal rights that may not be asserted vicariously, we will have occasion to re-examine the “standing” terminology emphasized in *Jones*. For we are not at all sure that the determination of a motion to suppress is materially aided by labeling the inquiry identified in *Jones* as one of standing, rather than simply recognizing it as one involving the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge.

A

We decline to extend the rule of standing in Fourth Amendment cases in the manner suggested by petitioners. As we stated in *Alderman v. United States* (1969), “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person’s premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule’s protections. There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, or seek redress under state law for invasion of privacy or trespass.

Conferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials. The Court’s opinion in *Alderman* counseled against such an extension of the exclusionary rule. Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.

B

Had we accepted petitioners’ request to allow persons other than those whose own Fourth Amendment rights were violated by a challenged search and seizure to suppress evidence obtained in the course of such police activity, it would be appropriate to retain *Jones*’ use of standing in Fourth Amendment analysis.

Under petitioners' target theory, a court could determine that a defendant had standing to invoke the exclusionary rule without having to inquire into the substantive question of whether the challenged search or seizure violated the Fourth Amendment rights of that particular defendant. However, having rejected petitioners' target theory and reaffirmed the principle that the "rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure," the question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim. We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement discussed in *Jones* and reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of "standing," will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.

Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. We are under no illusion that by dispensing with the rubric of standing used in *Jones* we have rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure. But by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing, we think the decision of this issue will rest on sounder logical footing.

C

Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched. It is unnecessary for us to decide here whether the same expectations of privacy are warranted in a car as would be justified in a dwelling place in analogous circumstances. We have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes. But here petitioners' claim is one which would fail even in an analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger qua passenger simply would not normally have a legitimate expectation of privacy.

Justice WHITE, with whom Justice BRENNAN, Justice MARSHALL, and Justice STEVENS join, dissenting.

The Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it. Though professing to acknowledge that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy—not property—the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts. Insofar as passengers are concerned, the Court's opinion today declares an "open season" on automobiles. However unlawful stopping and searching a car may be, absent a possessory or ownership interest, no "mere" passenger may object, regardless of his relationship to the owner. Because the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense, I must respectfully dissent. If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases.

Two intersecting doctrines long established in this Court's opinions control here. The first is the recognition of some cognizable level of privacy in the interior of an automobile. Though the reasonableness of the expectation of privacy in a vehicle may be somewhat weaker than that in a home, "[a] search even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search."

The second tenet is that when a person is legitimately present in a private place, his right to privacy is protected from unreasonable governmental interference even if he does not own the premises.

These two fundamental aspects of Fourth Amendment law demand that petitioners be permitted to challenge the search and seizure of the automobile in this case. It is of no significance that a car is different for Fourth Amendment purposes from a house, for if there is some protection for the privacy of an automobile then the only relevant analogy is between a person legitimately in someone else's vehicle and a person legitimately in someone else's home. If both strands of the Fourth Amendment doctrine adumbrated above are valid, the Court must reach a different result. Instead, it chooses to eviscerate the *Jones* principle, an action in which I am unwilling to participate.

It is true that the Court asserts that it is not limiting the Fourth Amendment bar against unreasonable searches to the protection of property rights, but in reality it is doing exactly that. Petitioners were in a private place with the permission of the owner, but the Court states that that is not sufficient to establish entitlement to a legitimate expectation of privacy. But if that is not sufficient, what would be? We are not told, and it is hard to imagine anything short of a property interest that would satisfy the majority. Insofar as the Court's rationale is concerned, no passenger in an automobile, without an ownership or possessory interest and regardless of his relationship to the owner, may claim Fourth Amendment protection against illegal stops and searches of the automobile in which he is rightfully present.

More importantly, how is the Court able to avoid answering the question why presence in a private place with the owner's permission is insufficient? If it is "tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary rule issues in criminal cases," then it surely must be tautological to decide that issue simply by unadorned fiat.

As a control on governmental power, the Fourth Amendment assures that some expectations of privacy are justified and will be protected from official intrusion. That should be true in this instance, for if protected zones of privacy can only be purchased or obtained by possession of property, then much of our daily lives will be unshielded from unreasonable governmental prying, and the reach of the Fourth Amendment will have been narrowed to protect chiefly those with possessory interests in real or personal property.

At most, one could say that perhaps the Constitution provides some degree less protection for the personal freedom from unreasonable governmental intrusion when one does not have a possessory interest in the invaded private place. But that would only change the extent of the protection; it would not free police to do the unreasonable, as does the decision today. And since the accused should be entitled to litigate the application of the Fourth Amendment where his privacy interest is merely arguable, the failure to allow such litigation here is the more incomprehensible.

The Court's holding is contrary not only to our past decisions and the logic of the Fourth Amendment but also to the everyday expectations of privacy that we all share. Because of that, it is unworkable in all the various situations that arise in real life. If the owner of the car had not only invited petitioners to join her but had said to them, "I give you a temporary possessory interest in my vehicle so that you will share the right to privacy that the Supreme Court says that I own," then apparently the majority would reverse. But people seldom say such things, though they may mean their invitation to encompass them if only they had thought of the problem. If the nonowner were the spouse or child of the owner, would the Court recognize a sufficient interest? If so, would distant relatives somehow have more of an expectation of privacy than close friends? What if the nonowner were driving with the owner's permission? Would nonowning drivers have more of an expectation of privacy than mere passengers? What about a passenger in a taxicab? *Katz* expressly recognized protection for such passengers. Why should Fourth Amendment rights be present when one pays a cabdriver for a ride but be absent when one is given a ride by a friend?

The distinctions the Court would draw are based on relationships between private parties, but the Fourth Amendment is concerned with the relationship of one of those parties to the government. Divorced as it is from the purpose of the Fourth Amendment, the Court's essentially property-based rationale can satisfactorily answer none of the questions posed above. That is reason enough to reject it. The *Jones* rule is relatively easily applied by police and courts; the rule announced today will not provide law enforcement officials with a bright line between the protected and the unprotected. Only rarely will police know whether one private party has or has not been granted a sufficient possessory or other interest by another private party. Surely in this case the officers had no

such knowledge. The Court's rule will ensnare defendants and police in needless litigation over factors that should not be determinative of Fourth Amendment rights.

More importantly, the ruling today undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified — the deterrence of bad-faith violations of the Fourth Amendment. This decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant. Should something be found, only the owner of the vehicle, or of the item, will have standing to seek suppression, and the evidence will presumably be usable against the other occupants. The danger of such bad faith is especially high in cases such as this one where the officers are only after the passengers and can usually infer accurately that the driver is the owner. The suppression remedy for those owners in whose vehicles something is found and who are charged with crime is small consolation for all those owners and occupants whose privacy will be needlessly invaded by officers following mistaken hunches not rising to the level of probable cause but operated on in the knowledge that someone in a crowded car will probably be unprotected if contraband or incriminating evidence happens to be found. After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person.

Of course, most police officers will decline the Court's invitation and will continue to do their jobs as best they can in accord with the Fourth Amendment. But the very purpose of the Bill of Rights was to answer the justified fear that governmental agents cannot be left totally to their own devices, and the Bill of Rights is enforceable in the courts because human experience teaches that not all such officials will otherwise adhere to the stated precepts. Some policemen simply do act in bad faith, even if for understandable ends, and some deterrent is needed. In the rush to limit the applicability of the exclusionary rule somewhere, anywhere, the Court ignores precedent, logic, and common sense to exclude the rule's operation from situations in which, paradoxically, it is justified and needed.

Rakas, then, disavows the use of the term “standing,” and says instead that the focus in determining who can raise the exclusionary rule is on whether a person's Fourth Amendment rights were violated, which generally turns on whether a person has a reasonable expectation of privacy. For example, in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the Court held that a man could not raise the exclusionary rule when contraband belonging to him was found inside a woman's purse when he and the woman were visiting premises that were searched. The Court concluded that the man had no reasonable expectation of privacy under the circumstances and thus could not raise the exclusionary rule.

The Court has considered the application of *Rakas* in two situations that repeatedly occur: When can visitors in a person's home raise the exclusionary rule? When can passengers in a person's car raise the exclusionary rule? *Minnesota v. Carter* addresses the former and the recent decision in *Brendlin v. California* concerns the latter.

MINNESOTA v. CARTER*525 U.S. 83 (1998)*

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondents and the lessee of an apartment were sitting in one of its rooms, bagging cocaine. While so engaged they were observed by a police officer, who looked through a drawn window blind. The Supreme Court of Minnesota held that the officer's viewing was a search that violated respondents' Fourth Amendment rights. We hold that no such violation occurred.

James Thielen, a police officer in the Twin Cities' suburb of Eagan, Minnesota, went to an apartment building to investigate a tip from a confidential informant. The informant said that he had walked by the window of a ground-floor apartment and had seen people putting a white powder into bags. The officer looked in the same window through a gap in the closed blind and observed the bagging operation for several minutes. He then notified headquarters, which began preparing affidavits for a search warrant while he returned to the apartment building. When two men left the building in a previously identified Cadillac, the police stopped the car. Inside were respondents Carter and Johns. As the police opened the door of the car to let Johns out, they observed a black, zippered pouch and a handgun, later determined to be loaded, on the vehicle's floor. Carter and Johns were arrested, and a later police search of the vehicle the next day discovered pagers, a scale, and 47 grams of cocaine in plastic sandwich bags.

After seizing the car, the police returned to Apartment 103 and arrested the occupant, Kimberly Thompson, who is not a party to this appeal. A search of the apartment pursuant to a warrant revealed cocaine residue on the kitchen table and plastic baggies similar to those found in the Cadillac. Thielen identified Carter, Johns, and Thompson as the three people he had observed placing the powder into baggies. The police later learned that while Thompson was the lessee of the apartment, Carter and Johns lived in Chicago and had come to the apartment for the sole purpose of packaging the cocaine. Carter and Johns had never been to the apartment before and were only in the apartment for approximately 2 1/2 hours. In return for the use of the apartment, Carter and Johns had given Thompson one-eighth of an ounce of the cocaine.

Carter and Johns were charged with conspiracy to commit a controlled substance crime in the first degree and aiding and abetting in a controlled substance crime in the first degree, in violation of Minn. Stat. §§152.021. They moved to suppress all evidence obtained from the apartment and the Cadillac, as well as to suppress several postarrest incriminating statements they had made. They argued that Thielen's initial observation of their drug packaging activities was an unreasonable search in violation of the Fourth Amendment and that all evidence obtained as a result of this unreasonable search was inadmissible as fruit of the poisonous tree.

The Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of "standing" doctrine, an analysis that this Court expressly rejected 20 years ago in *Rakas*. The [Fourth] Amendment protects persons against unreasonable searches of "their persons [and] houses" and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual. *See Katz v. United States* (1967) ("[T]he Fourth Amendment protects people, not places"). But the extent to which the Fourth

Amendment protects people may depend upon where those people are. We have held that “capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.”

The text of the Amendment suggests that its protections extend only to people in “their” houses. But we have held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else. In *Minnesota v. Olson* (1990), for example, we decided that an overnight guest in a house had the sort of expectation of privacy that the Fourth Amendment protects.

In *Jones v. United States* (1960), the defendant seeking to exclude evidence resulting from a search of an apartment had been given the use of the apartment by a friend. He had clothing in the apartment, had slept there “maybe a night,” and at the time was the sole occupant of the apartment. But while the holding of *Jones*—that a search of the apartment violated the defendant’s Fourth Amendment rights—is still valid, its statement that “anyone legitimately on the premises where a search occurs may challenge its legality,” was expressly repudiated in *Rakas v. Illinois* (1978). Thus, an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.

Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with Thompson, or that there was any other purpose to their visit. Nor was there anything similar to the overnight guest relationship in *Olson* to suggest a degree of acceptance into the household. While the apartment was a dwelling place for Thompson, it was for these respondents simply a place to do business.

Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. “An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual’s home.” *New York v. Burger* (1987). And while it was a “home” in which respondents were present, it was not their home.

If we regard the overnight guest in *Minnesota v. Olson* as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely “legitimately on the premises” as typifying those who may not do so, the present case is obviously somewhere in between. But the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents’ situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights.

Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer’s observation constituted a “search.”

Justice KENNEDY, concurring.

I join the Court’s opinion, for its reasoning is consistent with my view that almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host’s home.

The Fourth Amendment protects “[t]he right of the people to be secure in their . . . houses,” and it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people. Security of the home must be guarded by the law in a world where privacy is diminished by enhanced surveillance and sophisticated communication systems. As is well established, however, Fourth Amendment protection, though dependent upon spatial definition, is in essence a personal right. Thus, as the Court held in *Rakas v. Illinois* (1978), there are limits on who may assert it.

In this case respondents have established nothing more than a fleeting and insubstantial connection with Thompson’s home. For all that appears in the record, respondents used Thompson’s house simply as a convenient processing station, their purpose involving nothing more than the mechanical act of chopping and packing a substance for distribution. There is no suggestion that respondents engaged in confidential communications with Thompson about their transaction. Respondents had not been to Thompson’s apartment before, and they left it even before their arrest.

If respondents here had been visiting 20 homes, each for a minute or two, to drop off a bag of cocaine and were apprehended by a policeman wrongfully present in the 19th home; or if they had left the goods at a home where they were not staying and the police had seized the goods in their absence, we would have said that *Rakas* compels rejection of any privacy interest respondents might assert. So it does here, given that respondents have established no meaningful tie or connection to the owner, the owner’s home, or the owner’s expectation of privacy.

We cannot remain faithful to the underlying principle in *Rakas* without reversing in this case, and I am not persuaded that we need depart from it to protect the homeowner’s own privacy interests. Respondents have made no persuasive argument that we need to fashion a per se rule of home protection, with an automatic right for all in the home to invoke the exclusionary rule, in order to protect homeowners and their guests from unlawful police intrusion. With these observations, I join the Court’s opinion.

Justice GINSBURG, with whom Justice STEVENS and Justice SOUTER join, dissenting.

The Court’s decision undermines not only the security of short-term guests, but also the security of the home resident herself. In my view, when a homeowner or lessee personally invites a guest into her home to share in a common endeavor, whether it be for conversation, to engage in leisure activities, or for business purposes licit or illicit, that guest should share his host’s shelter against unreasonable searches and seizures.

I do not here propose restoration of the “legitimately on the premises” criterion stated in *Jones v. United States* (1960), for the Court rejected that formulation in *Rakas v. Illinois* (1978), as it did the “automatic standing rule.” First, the disposition I would reach in this case responds to the unique importance of the home — the most essential bastion of privacy recognized by the law. Further, I would here decide only the case of the homeowner who chooses to share the privacy of her home and her company with a guest, and would not reach classroom hypotheticals like the milkman or pizza deliverer.

My concern centers on an individual’s choice to share her home and her associations there with persons she selects. Our decisions indicate that people have a reasonable expectation of privacy in their homes in part because they

have the prerogative to exclude others. The power to exclude implies the power to include. Our Fourth Amendment decisions should reflect these complementary prerogatives.

A homedweller places her own privacy at risk, the Court's approach indicates, when she opens her home to others, uncertain whether the duration of their stay, their purpose, and their "acceptance into the household" will earn protection. It remains textbook law that "[s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." The law in practice is less secure. Human frailty suggests that today's decision will tempt police to pry into private dwellings without warrant, to find evidence incriminating guests who do not rest there through the night.

Through the host's invitation, the guest gains a reasonable expectation of privacy in the home. *Minnesota v. Olson* (1990), so held with respect to an overnight guest. The logic of that decision extends to shorter term guests as well. One need not remain overnight to anticipate privacy in another's home, "a place where [the guest] and his possessions will not be disturbed by anyone but his host and those his host allows inside." In sum, when a homeowner chooses to share the privacy of her home and her company with a short-term guest, the twofold requirement "emerg[ing] from prior decisions" has been satisfied: Both host and guest "have exhibited an actual (subjective) expectation of privacy"; that "expectation [is] one [our] society is prepared to recognize as 'reasonable.'"

BRENDLIN v. CALIFORNIA

127 S. Ct. 2400 (2007)

Justice SOUTER delivered the opinion of the Court.

When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.

I

Early in the morning of November 27, 2001, Deputy Sheriff Robert Brokenbrough and his partner saw a parked Buick with expired registration tags. In his ensuing conversation with the police dispatcher, Brokenbrough learned that an application for renewal of registration was being processed. The officers saw the car again on the road, and this time Brokenbrough noticed its display of a temporary operating permit with the number "11," indicating it was legal to drive the car through November. The officers decided to pull the Buick over to verify that the permit matched the vehicle, even though, as Brokenbrough admitted later, there was nothing unusual about the permit or the way it was affixed. Brokenbrough asked the driver, Karen Simeroth, for her license and saw a passenger in the front seat, petitioner Bruce Brendlin, whom he recognized as "one of the Brendlin brothers." He recalled that either Scott or Bruce Brendlin had dropped out of parole supervision and asked Brendlin to identify himself.

Brokenbrough returned to his cruiser, called for backup, and verified that Brendlin was a parole violator with an outstanding no-bail warrant for his arrest. While he was in the patrol car, Brokenbrough saw Brendlin briefly open and then close the passenger door of the Buick. Once reinforcements arrived, Brokenbrough went to the passenger side of the Buick, ordered him out of the car at gunpoint, and declared him under arrest. When the police searched Brendlin incident to arrest, they found an orange syringe cap on his person. A patdown search of Simeroth revealed syringes and a plastic bag of a green leafy substance, and she was also formally arrested. Officers then searched the car and found tubing, a scale, and other things used to produce methamphetamine.

Brendlin was charged with possession and manufacture of methamphetamine, and he moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop. He did not assert that his Fourth Amendment rights were violated by the search of Simeroth's vehicle, *cf. Rakas v. Illinois* (1978), but claimed only that the traffic stop was an unlawful seizure of his person. The trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until Brokenbrough ordered him out of the car and formally arrested him. Brendlin pleaded guilty, subject to appeal on the suppression issue, and was sentenced to four years in prison.

We granted certiorari to decide whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure.

II

A

A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, "by means of physical force or show of authority," terminates or restrains his freedom of movement, "through means intentionally applied." Thus, an "unintended person . . . [may be] the object of the detention," so long as the detention is "willful" and not merely the consequence of "an unknowing act." A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.

When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall* (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Later on, the Court adopted Justice Stewart's touchstone, but added that when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."

The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver “even though the purpose of the stop is limited and the resulting detention quite brief.” *Delaware v. Prouse* (1979). And although we have not, until today, squarely answered the question whether a passenger is also seized, we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver.

B

The State concedes that the police had no adequate justification to pull the car over, but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop. We resolve this question by asking whether a reasonable person in Brendlin’s position when the car stopped would have believed himself free to “terminate the encounter” between the police and himself. We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on “privacy and personal security” does not normally (and did not here) distinguish between passenger and driver. An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.

C

The contrary conclusion drawn by the Supreme Court of California, that seizure came only with formal arrest, reflects three premises as to which we respectfully disagree. First, the State Supreme Court reasoned that Brendlin was not seized by the stop because Deputy Sheriff Brokenbrough only intended to investigate Simeroth and did not direct a show of authority toward Brendlin. The court saw Brokenbrough’s “flashing lights [as] directed at the driver,” and pointed to the lack of record evidence that Brokenbrough “was even aware [Brendlin] was in the car prior to the vehicle stop.” But that view of the facts ignores the objective *Mendenhall* test of what a reasonable passenger would understand. To the extent that there is anything ambiguous in the show of force (was it fairly seen as directed only at the driver or at the car and its occupants?), the test resolves the ambiguity, and here it leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority. The State Supreme Court’s approach, on the contrary, shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we

have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis.

Second, the Supreme Court of California assumed that Brendlin, “as the passenger, had no ability to submit to the deputy’s show of authority” because only the driver was in control of the moving vehicle. But what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside.

Third, the State Supreme Court shied away from the rule we apply today for fear that it “would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle’s submission to police authority.” But an occupant of a car who knows that he is stuck in traffic because another car has been pulled over (like the motorist who can’t even make out why the road is suddenly clogged) would not perceive a show of authority as directed at him or his car. Such incidental restrictions on freedom of movement would not tend to affect an individual’s “sense of security and privacy in traveling in an automobile.” Nor would the consequential blockage call for a precautionary rule to avoid the kind of “arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals” that the Fourth Amendment was intended to limit.⁴

Indeed, the consequence to worry about would not flow from our conclusion, but from the rule that almost all courts have rejected. Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal. The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of “roving patrols” that would still violate the driver’s Fourth Amendment right.

Brendlin was seized from the moment Simeroth’s car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest.

D. EXCEPTIONS TO THE EXCLUSIONARY RULE

There are several situations in which the Supreme Court has said that even though there is a Fourth Amendment violation, the exclusionary rule does not apply. In examining these exceptions, it is important to consider whether

4. California claims that, under today’s rule, “all taxi cab and bus passengers would be ‘seized’ under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light.” But the relationship between driver and passenger is not the same in a common carrier as it is in a private vehicle, and the expectations of police officers and passengers differ accordingly. In those cases, as here, the crucial question would be whether a reasonable person in the passenger’s position would feel free to take steps to terminate the encounter. [Footnote by the Court.]

they are justified or whether they unduly undercut the ability to achieve the purposes of the exclusionary rule.

1. *Independent Source*

Even if police obtain evidence in violation of the Fourth Amendment, it is still admissible if it is also obtained through a source independent of the police misconduct and untainted by the illegal actions of the police. In a footnote, in his dissenting opinion in *Murray v. United States*, below, Justice Marshall gives a clear illustration:

The clearest case for the application of the independent source exception is when a wholly separate line of investigation, shielded from information gathered in an illegal search, turns up the same evidence through a separate, lawful search. Under these circumstances, there is little doubt that the lawful search was not connected to the constitutional violation. The exclusion of such evidence would not significantly add to the deterrence facing the law enforcement officers conducting the illegal search, because they would have little reason to anticipate the separate investigation leading to the same evidence.

For example, in *Segura v. United States*, 468 U.S. 796 (1984), agents unlawfully entered the defendant's apartment and remained there until a search warrant was obtained. But the Court held that the evidence found for the first time during the execution of the valid and untainted search warrant was admissible because it was discovered pursuant to an "independent source."

Murray v. United States, below, is one of the Supreme Court's most detailed examinations of the independent source exception to the exclusionary rule.

MURRAY v. UNITED STATES

487 U.S. 533 (1988)

Justice SCALIA delivered the opinion of the Court.

In *Segura v. United States* (1984), we held that police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the initial entry. In these consolidated cases we are faced with the question whether, again assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed.

I

Both cases arise out of the conviction of petitioner Michael F. Murray, petitioner James D. Carter, and others for conspiracy to possess and distribute illegal drugs. Insofar as relevant for our purposes, the facts are as follows: Based on information received from informants, federal law enforcement agents had been

surveilling petitioner Murray and several of his co-conspirators. At about 1:45 P.M. on April 6, 1983, they observed Murray drive a truck and Carter drive a green camper, into a warehouse in South Boston. When the petitioners drove the vehicles out about 20 minutes later, the surveilling agents saw within the warehouse two individuals and a tractor-trailer rig bearing a long, dark container. Murray and Carter later turned over the truck and camper to other drivers, who were in turn followed and ultimately arrested, and the vehicles lawfully seized. Both vehicles were found to contain marijuana.

After receiving this information, several of the agents converged on the South Boston warehouse and forced entry. They found the warehouse unoccupied, but observed in plain view numerous burlap-wrapped bales that were later found to contain marijuana. They left without disturbing the bales, kept the warehouse under surveillance, and did not reenter it until they had a search warrant. In applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry. When the warrant was issued — at 10:40 P.M., approximately eight hours after the initial entry — the agents immediately reentered the warehouse and seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined.

Before trial, petitioners moved to suppress the evidence found in the warehouse. The District Court denied the motion, rejecting petitioners' arguments that the warrant was invalid because the agents did not inform the Magistrate about their prior warrantless entry, and that the warrant was tainted by that entry. The First Circuit affirmed, assuming for purposes of its decision that the first entry into the warehouse was unlawful.

II

The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful search. Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes “so attenuated as to dissipate the taint.”

Almost simultaneously with our development of the exclusionary rule, in the first quarter of this century, we also announced what has come to be known as the “independent source” doctrine. See *Silverthorne Lumber Co. v. United States* (1920). That doctrine, which has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations, has recently been described as follows: “[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.” *Nix v. Williams* (1984).

The dispute here is over the scope of this doctrine. Petitioners contend that it applies only to evidence obtained for the first time during an independent

lawful search. The Government argues that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. We think the Government's view has better support in both precedent and policy.

Our cases have used the concept of "independent source" in a more general and a more specific sense. The more general sense identifies all evidence acquired in a fashion untainted by the illegal evidence-gathering activity. Thus, where an unlawful entry has given investigators knowledge of facts x and y, but fact z has been learned by other means, fact z can be said to be admissible because derived from an "independent source." This is how we used the term in *Segura v. United States* (1984).

The original use of the term, however, and its more important use for purposes of these cases, was more specific. It was originally applied in the exclusionary rule context, by Justice Holmes, with reference to that particular category of evidence acquired by an untainted search which is identical to the evidence unlawfully acquired—that is, in the example just given, to knowledge of facts x and y derived from an independent source:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others.

Petitioners' asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry. We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. Nor would the officer without sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.

III

To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that

later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the same position they would have occupied if no violation occurred, but in a worse one.

The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant. On this point the Court of Appeals said the following: "[W]e can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of a warrant or to the discovery of the evidence during the lawful search that occurred pursuant to the warrant."

Although these statements can be read to provide emphatic support for the Government's position, it is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings. The District Court found that the agents did not reveal their warrantless entry to the Magistrate, and that they did not include in their application for a warrant any recitation of their observations in the warehouse. It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse. The Government concedes this in its brief. To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Accordingly, we vacate the judgment and remand these cases to the Court of Appeals with instructions that it remand to the District Court for determination whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described.

Justice MARSHALL, with whom Justice STEVENS and Justice O'CONNOR join, dissenting.

The Court today holds that the "independent source" exception to the exclusionary rule may justify admitting evidence discovered during an illegal warrantless search that is later "rediscovered" by the same team of investigators during a search pursuant to a warrant obtained immediately after the illegal search. I believe the Court's decision, by failing to provide sufficient guarantees that the subsequent search was, in fact, independent of the illegal search, emasculates the Warrant Clause and undermines the deterrence function of the exclusionary rule. I therefore dissent.

This Court has stated frequently that the exclusionary rule is principally designed to deter violations of the Fourth Amendment. By excluding evidence discovered in violation of the Fourth Amendment, the rule "compel[s] respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it." The Court has crafted exceptions to the exclusionary rule when the purposes of the rule are not furthered by the exclusion. As the Court today recognizes, the independent source exception to the

exclusionary rule “allows admission of evidence that has been discovered by means wholly independent of any constitutional violation.” The independent source exception, like the inevitable discovery exception, is primarily based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial. When the seizure of the evidence at issue is “wholly independent of” the constitutional violation, then exclusion arguably will have no effect on a law enforcement officer’s incentive to commit an unlawful search.

Under the circumstances of these cases, the admission of the evidence “re seized” during the second search severely undermines the deterrence function of the exclusionary rule. Indeed, admission in these cases affirmatively encourages illegal searches. The incentives for such illegal conduct are clear. Obtaining a warrant is inconvenient and time consuming. Even when officers have probable cause to support a warrant application, therefore, they have an incentive first to determine whether it is worthwhile to obtain a warrant. Probable cause is much less than certainty, and many “confirmatory” searches will result in the discovery that no evidence is present, thus saving the police the time and trouble of getting a warrant. If contraband is discovered, however, the officers may later seek a warrant to shield the evidence from the taint of the illegal search. The police thus know in advance that they have little to lose and much to gain by forgoing the bother of obtaining a warrant and undertaking an illegal search.

The Court, however, “see[s] the incentives differently.” Under the Court’s view, today’s decision does not provide an incentive for unlawful searches, because the officer undertaking the search would know that “his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers’ decision to seek a warrant or the magistrate’s decision to grant it.” The Court, however, provides no hint of why this risk would actually seem significant to the officers. Under the circumstances of these cases, the officers committing the illegal search have both knowledge and control of the factors central to the trial court’s determination.

The strong Fourth Amendment interest in eliminating these incentives for illegal entry should cause this Court to scrutinize closely the application of the independent source exception to evidence obtained under the circumstances of the instant cases; respect for the constitutional guarantee requires a rule that does not undermine the deterrence function of the exclusionary rule. When, as here, the same team of investigators is involved in both the first and second search, there is a significant danger that the “independence” of the source will in fact be illusory, and that the initial search will have affected the decision to obtain a warrant notwithstanding the officers’ subsequent assertions to the contrary. It is therefore crucial that the factual premise of the exception — complete independence — be clearly established before the exception can justify admission of the evidence. I believe the Court’s reliance on the intent of the law enforcement officers who conducted the warrantless search provides insufficient guarantees that the subsequent legal search was unaffected by the prior illegal search.

To ensure that the source of the evidence is genuinely independent, the basis for a finding that a search was untainted by a prior illegal search must focus, as

with the inevitable discovery doctrine, on “demonstrated historical facts capable of ready verification or impeachment.” In the instant cases, there are no “demonstrated historical facts” capable of supporting a finding that the subsequent warrant search was wholly unaffected by the prior illegal search. The same team of investigators was involved in both searches. The warrant was obtained immediately after the illegal search, and no effort was made to obtain a warrant prior to the discovery of the marijuana during the illegal search. The only evidence available that the warrant search was wholly independent is the testimony of the agents who conducted the illegal search. Under these circumstances, the threat that the subsequent search was tainted by the illegal search is too great to allow for the application of the independent source exception. The Court’s contrary holding lends itself to easy abuse, and offers an incentive to bypass the constitutional requirement that probable cause be assessed by a neutral and detached magistrate before the police invade an individual’s privacy.

In sum, under circumstances as are presented in these cases, when the very law enforcement officers who participate in an illegal search immediately thereafter obtain a warrant to search the same premises, I believe the evidence discovered during the initial illegal entry must be suppressed. Any other result emasculates the Warrant Clause and provides an intolerable incentive for warrantless searches. I respectfully dissent.

2. *Inevitable Discovery*

Closely related to the “independent source” exception is the “inevitable discovery” exception. If the police can demonstrate that they inevitably would have discovered the evidence, even without a violation of the Fourth Amendment, the exclusionary rule does not apply and the evidence is admissible. *Nix v. Williams* is the key case recognizing an “inevitable discovery” exception to the exclusionary rule.

NIX v. WILLIAMS

467 U.S. 431 (1984)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to consider whether, at respondent Williams’ second murder trial in state court, evidence pertaining to the discovery and condition of the victim’s body was properly admitted on the ground that it would ultimately or inevitably have been discovered even if no violation of any constitutional or statutory provision had taken place.

I

A

On December 24, 1968, 10-year-old Pamela Powers disappeared from a YMCA building in Des Moines, Iowa, where she had accompanied her parents to watch an athletic contest. Shortly after she disappeared, Williams was seen leaving the

YMCA carrying a large bundle wrapped in a blanket; a 14-year-old boy who had helped Williams open his car door reported that he had seen “two legs in it and they were skinny and white.”

Williams’ car was found the next day 160 miles east of Des Moines in Davenport, Iowa. Later several items of clothing belonging to the child, some of Williams’ clothing, and an army blanket like the one used to wrap the bundle that Williams carried out of the YMCA were found at a rest stop on Interstate 80 near Grinnell, between Des Moines and Davenport. A warrant was issued for Williams’ arrest.

Police surmised that Williams had left Pamela Powers or her body somewhere between Des Moines and the Grinnell rest stop where some of the young girl’s clothing had been found. On December 26, the Iowa Bureau of Criminal Investigation initiated a large-scale search. Two hundred volunteers divided into teams began the search 21 miles east of Grinnell, covering an area several miles to the north and south of Interstate 80. They moved westward from Poweshiek County, in which Grinnell was located, into Jasper County. Searchers were instructed to check all roads, abandoned farm buildings, ditches, culverts, and any other place in which the body of a small child could be hidden.

Meanwhile, Williams surrendered to local police in Davenport, where he was promptly arraigned. Williams contacted a Des Moines attorney who arranged for an attorney in Davenport to meet Williams at the Davenport police station. Des Moines police informed counsel they would pick Williams up in Davenport and return him to Des Moines without questioning him. Two Des Moines detectives then drove to Davenport, took Williams into custody, and proceeded to drive him back to Des Moines.

During the return trip, one of the policemen, Detective Leaming, began a conversation with Williams, saying: “I want to give you something to think about while we’re traveling down the road. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. . . . [A]fter a snow storm [we may not be] able to find it at all.”

Leaming told Williams he knew the body was in the area of Mitchellville — a town they would be passing on the way to Des Moines. He concluded the conversation by saying “I do not want you to answer me. . . . Just think about it. . . .” Later, as the police car approached Grinnell, Williams asked Leaming whether the police had found the young girl’s shoes. After Leaming replied that he was unsure, Williams directed the police to a point near a service station where he said he had left the shoes; they were not found. As they continued to drive to Des Moines, Williams asked whether the blanket had been found and then directed the officers to a rest area in Grinnell where he said he had disposed of the blanket; they did not find the blanket. At this point Leaming and his party were joined by the officers in charge of the search. As they approached Mitchellville, Williams, without any further conversation, agreed to direct the officers to the child’s body.

The officers directing the search had called off the search at 3 P.M., when they left the Grinnell Police Department to join Leaming at the rest area. At that

time, one search team near the Jasper County-Polk County line was only two and one-half miles from where Williams soon guided Leaming and his party to the body. The child's body was found next to a culvert in a ditch beside a gravel road in Polk County, about two miles south of Interstate 80, and essentially within the area to be searched.

B

First Trial

In February 1969 Williams was indicted for first-degree murder. Before trial in the Iowa court, his counsel moved to suppress evidence of the body and all related evidence including the condition of the body as shown by the autopsy. The ground for the motion was that such evidence was the "fruit" or product of Williams' statements made during the automobile ride from Davenport to Des Moines and prompted by Leaming's statements. The motion to suppress was denied.

The jury found Williams guilty of first-degree murder; the judgment of conviction was affirmed by the Iowa Supreme Court. Williams then sought release on habeas corpus in the United States District Court for the Southern District of Iowa. That court concluded that the evidence in question had been wrongly admitted at Williams' trial; a divided panel of the Court of Appeals for the Eighth Circuit agreed.

We granted certiorari, and a divided Court affirmed, holding that Detective Leaming had obtained incriminating statements from Williams by what was viewed as interrogation in violation of his right to counsel.

Second Trial

At Williams' second trial in 1977 in the Iowa court, the prosecution did not offer Williams' statements into evidence, nor did it seek to show that Williams had directed the police to the child's body. However, evidence of the condition of her body as it was found, articles and photographs of her clothing, and the results of post mortem medical and chemical tests on the body were admitted. The trial court concluded that the State had proved by a preponderance of the evidence that, if the search had not been suspended and Williams had not led the police to the victim, her body would have been discovered "within a short time" in essentially the same condition as it was actually found. The trial court also ruled that if the police had not located the body, "the search would clearly have been taken up again where it left off, given the extreme circumstances of this case and the body would [have] been found in short order."

In finding that the body would have been discovered in essentially the same condition as it was actually found, the court noted that freezing temperatures had prevailed and tissue deterioration would have been suspended. The challenged evidence was admitted and the jury again found Williams guilty of first-degree murder; he was sentenced to life in prison.

II

A

The Iowa Supreme Court correctly stated that the "vast majority" of all courts, both state and federal, recognize an inevitable discovery exception to the

exclusionary rule. We are now urged to adopt and apply the so-called ultimate or inevitable discovery exception to the exclusionary rule.

Williams contends that evidence of the body's location and condition is "fruit of the poisonous tree," i.e., the "fruit" or product of Detective Leaming's plea to help the child's parents give her "a Christian burial," which this Court had already held equated to interrogation. He contends that admitting the challenged evidence violated the Sixth Amendment whether it would have been inevitably discovered or not. Williams also contends that, if the inevitable discovery doctrine is constitutionally permissible, it must include a threshold showing of police good faith.

B

The doctrine requiring courts to suppress evidence as the tainted "fruit" of unlawful governmental conduct had its genesis in *Silverthorne Lumber Co. v. United States* (1920); there, the Court held that the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence.

The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

By contrast, the derivative evidence analysis ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. That doctrine, although closely related to the inevitable discovery doctrine, does not apply here; Williams' statements to Leaming indeed led police to the child's body, but that is not the whole story. The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule.

If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means—here the volunteers' search—then the deterrence rationale has so

little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.

The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a worse position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach.

The Court of Appeals concluded, without analysis, that if an absence-of-bad-faith requirement were not imposed, "the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the Exclusionary Rule reduced too far." We reject that view. A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.

On the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.

The Court of Appeals did not find it necessary to consider whether the record fairly supported the finding that the volunteer search party would ultimately or inevitably have discovered the victim's body. However, three courts independently reviewing the evidence have found that the body of the child inevitably would have been found by the searchers.

Justice STEVENS, concurring in the judgment.

This litigation is exceptional for at least three reasons. The facts are unusually tragic; it involves an unusually clear violation of constitutional rights; and it graphically illustrates the societal costs that may be incurred when police officers decide to dispense with the requirements of law. Because the Court does not adequately discuss any of these aspects of the case, I am unable to join its opinion.

The constitutional violation that gave rise to the decision in *Williams I* is neither acknowledged nor fairly explained in the Court's opinion. Yet the propriety of admitting evidence relating to the victim's body can only be evaluated if that constitutional violation is properly identified.

Before he was taken into custody, Williams, as a recent escapee from a mental hospital who had just abducted and murdered a small child, posed a special threat to public safety. Acting on his lawyer's advice, Williams surrendered to the Davenport police. The lawyer notified the Des Moines police of Williams' imminent surrender, and police officials, in the presence of Detective Leaming, agreed that Williams would not be questioned while being brought back from Davenport. Williams was advised of this agreement by his attorney. After he was

arraigned in Davenport, Williams conferred with another lawyer who was acting as local counsel. This lawyer reminded Williams that he would not be questioned. When Detective Leaming arrived in Davenport, local counsel stressed that the agreement was to be carried out and that Williams was not to be questioned. Detective Leaming then took custody of respondent, and denied counsel's request to ride to Des Moines in the police car with Williams. The "Christian burial speech" occurred during the ensuing trip. As Justice Powell succinctly observed, this was a case "in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement."

The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process, rather than the *ex parte* investigation and determination by the prosecutor.

Once the constitutional violation is properly identified, the answers to the questions presented in this case follow readily. Admission of the victim's body, if it would have been discovered anyway, means that the trial in this case was not the product of an inquisitorial process; that process was untainted by illegality. The good or bad faith of Detective Leaming is therefore simply irrelevant. If the trial process was not tainted as a result of his conduct, this defendant received the type of trial that the Sixth Amendment envisions. Generalizations about the exclusionary rule employed by the majority simply do not address the primary question in the case.

The majority is correct to insist that any rule of exclusion not provide the authorities with an incentive to commit violations of the Constitution. If the inevitable discovery rule provided such an incentive by permitting the prosecution to avoid the uncertainties inherent in its search for evidence, it would undermine the constitutional guarantee itself, and therefore be inconsistent with the deterrent purposes of the exclusionary rule. But when the burden of proof on the inevitable discovery question is placed on the prosecution, it must bear the risk of error in the determination made necessary by its constitutional violation. The uncertainty as to whether the body would have been discovered can be resolved in its favor here only because, as the Court explains, petitioner adduced evidence demonstrating that at the time of the constitutional violation an investigation was already under way which, in the natural and probable course of events, would have soon discovered the body. This is not a case in which the prosecution can escape responsibility for a constitutional violation through speculation; to the extent uncertainty was created by the constitutional violation the prosecution was required to resolve that uncertainty through proof. Even if Detective Leaming acted in bad faith in the sense that he deliberately violated the Constitution in order to avoid the possibility that the body would not be discovered, the prosecution ultimately does not avoid that risk; its burden of proof forces it to assume the risk. The need to adduce proof sufficient to discharge its burden, and the difficulty in predicting whether such proof will be available or sufficient, means that the inevitable discovery rule does not permit state officials to avoid the uncertainty they would have faced but for the constitutional violation.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

To the extent that today's decision adopts this "inevitable discovery" exception to the exclusionary rule, it simply acknowledges a doctrine that is akin to the "independent source" exception recognized by the Court. In particular, the

Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred. As has every Federal Court of Appeals previously addressing this issue, I agree that in these circumstances the “inevitable discovery” exception to the exclusionary rule is consistent with the requirements of the Constitution.

In its zealous efforts to emasculate the exclusionary rule, however, the Court loses sight of the crucial difference between the “inevitable discovery” doctrine and the “independent source” exception from which it is derived. When properly applied, the “independent source” exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means. It therefore does no violence to the constitutional protections that the exclusionary rule is meant to enforce. The “inevitable discovery” exception is likewise compatible with the Constitution, though it differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed.

In my view, this distinction should require that the government satisfy a heightened burden of proof before it is allowed to use such evidence. The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule. To ensure that this hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence before concluding that the government had met its burden of proof on this issue. Increasing the burden of proof serves to impress the factfinder with the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted. Because the lower courts did not impose such a requirement, I would remand this case for application of this heightened burden of proof by the lower courts in the first instance. I am therefore unable to join either the Court’s opinion or its judgment.

3. *Inadequate Causal Connection—Attenuation of the Taint*

The exclusionary rule applies if there is a substantial causal connection between the illegal police behavior and the evidence. Indeed, the Supreme Court has made clear that all evidence that is the product of the illegal police activity—the “fruit of the poisonous tree”—must be excluded. Conversely, though, if the link between the illegal police act and the evidence is attenuated, then the evidence is admissible.

Wong Sun v. United States, 371 U.S. 471 (1963), illustrates this. Police illegally broke into Wong Sun’s laundry and adjacent apartment. The police handcuffed Wong Sun and held him at gunpoint. Wong Sun made incriminating statements. Wong Sun was arrested, charged, and released on his own recognizance. Subsequently, he was questioned by an agent who informed Wong Sun of his right to remain silent and to consult with counsel. Wong Sun again gave incriminating statements.

The Supreme Court held that Wong Sun's statements to the police at the time of his arrest had to be excluded as the fruits of his unlawful arrest. By contrast, though, the Court said that Wong Sun's later confession was admissible because the connection with the earlier illegal police activity "became so attenuated as to dissipate the taint."

Brown v. Illinois, below, is one of the most widely cited cases with regard to this exception to the exclusionary rule.

BROWN v. ILLINOIS

422 U.S. 590 (1975)

Justice BLACKMUN delivered the opinion of the Court.

This case lies at the crossroads of the Fourth and the Fifth Amendments. Petitioner was arrested without probable cause and without a warrant. He was given, in full, the warnings prescribed by *Miranda v. Arizona* (1966). Thereafter, while in custody, he made two inculpatory statements. The issue is whether evidence of those statements was properly admitted, or should have been excluded, in petitioner's subsequent trial for murder in state court. Expressed another way, the issue is whether the statements were to be excluded as the fruit of the illegal arrest, or were admissible because the giving of the *Miranda* warnings sufficiently attenuated the taint of the arrest. *See Wong Sun v. United States* (1963).

I

As petitioner Richard Brown was climbing the last of the stairs leading to the rear entrance of his Chicago apartment in the early evening of May 13, 1968, he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment. The man said: "Don't move, you are under arrest." Another man, also with a gun, came up behind Brown and repeated the statement that he was under arrest. It was about 7:45 P.M. The two men turned out to be Detectives William Nolan and William Lenz of the Chicago police force. It is not clear from the record exactly when they advised Brown of their identity, but it is not disputed that they broke into his apartment, searched it, and then arrested Brown, all without probable cause and without any warrant, when he arrived. They later testified that they made the arrest for the purpose of questioning Brown as part of their investigation of the murder of a man named Roger Corpus.

Corpus was murdered one week earlier, on May 6, with a .38-caliber revolver in his Chicago West Side second-floor apartment. Shortly thereafter, Detective Lenz obtained petitioners' name, among others, from Corpus' brother. Petitioner and the others were identified as acquaintances of the victim, not as suspects.

On the day of petitioner's arrest, Detectives Lenz and Nolan, armed with a photograph of Brown, and another officer arrived at petitioner's apartment about 5 P.M. While the third officer covered the front entrance downstairs, the two detectives broke into Brown's apartment and searched it. Lenz then

positioned himself near the rear door and watched through the adjacent window which opened onto the back porch. Nolan sat near the front door.

As both officers held him at gunpoint, the three entered the apartment. Brown was ordered to stand against the wall and was searched. No weapon was found. He was asked his name. When he denied being Richard Brown, Detective Lenz showed him the photograph, informed him that he was under arrest for the murder of Roger Corpus, handcuffed him, and escorted him to the squad car. The two detectives took petitioner to the Maxwell Street police station. During the 20-minute drive Nolan again asked Brown, who then was sitting with him in the back seat of the car, whether his name was Richard Brown and whether he owned a 1966 Oldsmobile. Brown alternately evaded these questions or answered them falsely. Upon arrival at the station house Brown was placed in the second-floor central interrogation room. The room was bare, except for a table and four chairs. He was left alone, apparently without handcuffs, for some minutes while the officers obtained the file on the Corpus homicide. They returned with the file, sat down at the table, one across from Brown and the other to his left, and spread the file on the table in front of him.

The officers warned Brown of his rights under *Miranda*. They then informed him that they knew of an incident that had occurred in a poolroom on May 5, when Brown, angry at having been cheated at dice, fired a shot from a revolver into the ceiling. Brown answered: "Oh, you know about that." Lenz informed him that a bullet had been obtained from the ceiling of the poolroom and had been taken to the crime laboratory to be compared with bullets taken from Corpus' body. Brown responded: "Oh, you know that, too." At this point—it was about 8:45 P.M.—Lenz asked Brown whether he wanted to talk about the Corpus homicide. Petitioner answered that he did. For the next 20 to 25 minutes Brown answered questions put to him by Nolan, as Lenz typed.

This questioning produced a two-page statement in which Brown acknowledged that he and a man named Jimmy Claggett visited Corpus on the evening of May 5; that the three for some time sat drinking and smoking marijuana; that Claggett ordered him at gunpoint to bind Corpus' hands and feet with cord from the headphone of a stereo set; and that Claggett, using a .38-caliber revolver sold to him by Brown, shot Corpus three times through a pillow. The statement was signed by Brown.

About 9:30 P.M. the two detectives and Brown left the station house to look for Claggett in an area of Chicago Brown knew him to frequent. They made a tour of that area but did not locate their quarry. They then went to police headquarters where they endeavored, without success, to obtain a photograph of Claggett. They resumed their search—it was now about 11 P.M.—and they finally observed Claggett crossing at an intersection. Lenz and Nolan arrested him. All four, the two detectives and the two arrested men, returned to the Maxwell Street station about 12:15 A.M.

Brown was again placed in the interrogation room. He was given coffee and was left alone, for the most part, until 2 A.M. when Assistant State's Attorney Crilly arrived.

Crilly, too, informed Brown of his *Miranda* rights. After a half hour's conversation, a court reporter appeared. Once again the *Miranda* warnings were given. Brown gave a second statement, providing a factual account of the murder substantially in accord with his first statement, but containing factual inaccuracies with respect to his personal background. When the statement was

completed, at about 3 A.M., Brown refused to sign it. An hour later he made a phone call to his mother. At 9:30 that morning, about 14 hours after his arrest, he was taken before a magistrate.

On June 20 Brown and Claggett were jointly indicated by a Cook County grand jury for Corpus' murder. Prior to trial, petitioner moved to suppress the two statements he had made. He alleged that his arrest and detention had been illegal and that the statements were taken from him in violation of his constitutional rights. After a hearing, the motion was denied.

The case proceeded to trial. The State introduced evidence of both statements. The jury found petitioner guilty of murder. He was sentenced to imprisonment for not less than 15 years nor more than 30 years. On appeal, the Supreme Court of Illinois affirmed the judgment of conviction.

II

In *Wong Sun*, the Court pronounced the principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded. [We stated:] "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

The exclusionary rule thus was applied in *Wong Sun* primarily to protect Fourth Amendment rights. Protection of the Fifth Amendment right against self-incrimination was not the Court's paramount concern there. To the extent that the question whether Toy's statement was voluntary was considered, it was only to judge whether it "was sufficiently an act of free will to purge the primary taint of the unlawful invasion."

III

The Illinois courts refrained from resolving the question, as apt here as it was in *Wong Sun*, whether Brown's statements were obtained by exploitation of the illegality of his arrest. They assumed that the *Miranda* warnings, by themselves, assured that the statements (verbal acts, as contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest. *Wong Sun*, of course, preceded *Miranda*.

Although, almost 90 years ago, the Court observed that the Fifth Amendment is in "intimate relation" with the Fourth, the *Miranda* warnings thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Frequently, as here, rights under the two Amendments may appear to coalesce since "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." The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures,

and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.

Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be “sufficiently an act of free will to purge the primary taint.” *Wong Sun* thus mandates consideration of a statement’s admissibility in light of the distinct policies and interests of the Fourth Amendment.

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or “investigation,” would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a “cure-all,” and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to “a form of words.”

It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.

While we therefore reject the per se rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative per se or “but for” rule. The petitioner himself professes not to demand so much. The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution.

IV

Although the Illinois courts failed to undertake the inquiry mandated by *Wong Sun* to evaluate the circumstances of this case in the light of the policy served by

the exclusionary rule, the trial resulted in a record of amply sufficient detail and depth from which the determination may be made. We conclude that the State failed to sustain the burden of showing that the evidence in question was admissible under *Wong Sun*.

Brown's first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever. In its essentials, his situation is remarkably like that of James Wah Toy in *Wong Sun*. We could hold Brown's first statement admissible only if we overrule *Wong Sun*. We decline to do so. And the second statement was clearly the result and the fruit of the first.

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was affected gives the appearance of having been calculated to cause surprise, fright, and confusion.

We emphasize that our holding is a limited one. We decide only that the Illinois courts were in error in assuming that the *Miranda* warnings, by themselves, under *Wong Sun* always purge the taint of an illegal arrest.

Justice POWELL, with whom Justice REHNQUIST joins, concurring in part.

I join the Court insofar as it holds that the per se rule adopted by the Illinois Supreme Court for determining the admissibility of petitioner's two statements inadequately accommodates the diverse interests underlying the Fourth Amendment exclusionary rule. I would, however, remand the case for reconsideration under the general standards articulated in the Court's opinion and elaborated herein.

On this record, I cannot conclude as readily as the Court that admission of the statements here at issue would constitute an effective overruling of *Wong Sun*.

The notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. Application of the *Wong Sun* doctrine will generate fact-specific cases bearing distinct differences as well as similarities, and the question of attenuation inevitably is largely a matter of degree. The Court today identifies the general factors that the trial court must consider in making this determination. I think it appropriate, however, to attempt to articulate the possible relationships to those factors in particular, broad categories of cases.

All Fourth Amendment violations are, by constitutional definition, "unreasonable." There are, however, significant practical differences that distinguish among violations, differences that measurably assist in identifying the kinds of cases in which disqualifying the evidence is likely to serve the deterrent purposes of the exclusionary rule. In my view, the point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of that taint.

Bearing these considerations in mind, and recognizing that the deterrent value of the Fourth Amendment exclusionary rule is limited to certain kinds of police conduct, the following general categories can be identified. Those most readily identifiable are on the extremes: the flagrantly abusive violation

of Fourth Amendment rights, on the one hand, and “technical” Fourth Amendment violations, on the other. In my view, these extremes call for significantly different judicial responses.

I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights. If, for example, the factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or if the evidence clearly suggested that the arrest was effectuated as a pretext for collateral objectives, or the physical circumstances of the arrest unnecessarily intrusive on personal privacy, I would consider the equalizing potential of *Miranda* warnings rarely sufficient to dissipate the taint. In such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity, most clearly demands that the fruits of official misconduct be denied. I thus would require some demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel or the accused’s presentation before a magistrate for a determination of probable cause, before the taint can be deemed removed.

At the opposite end of the spectrum lie “technical” violations of Fourth Amendment rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional. Absent aggravating circumstances, I would consider a statement given at the station house after one has been advised of *Miranda* rights to be sufficiently removed from the immediate circumstances of the illegal arrest to justify its admission at trial.

Between these extremes lies a wide range of situations that defy ready categorization, and I will not attempt to embellish on the factors set forth in the Court’s opinion other than to emphasize that the *Wong Sun* inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus. And, in view of the inevitably fact-specific nature of the inquiry, we must place primary reliance on the “learning, good sense, fairness and courage” of judges who must make the determination in the first instance.

C

On the facts of record as I view them, it is possible that the police may have believed reasonably that there was probable cause for petitioner’s arrest. I am not able to conclude on this record that the officers arrested petitioner solely for the purpose of questioning. To be sure, there is evidence suggesting, as the Court notes, an investigatory arrest. But the evidence is conflicting.

I would leave the question of admissibility of this statement to the lower Illinois courts. In any event, the question whether there was sufficient attenuation between the first and second statements to render the second admissible in spite of the inadmissibility of the first presents a factual issue which, like the factual issue underlying the possible admissibility of the first statement, has not been passed on by the state courts.

In other cases, the Supreme Court found that statements obtained after a Fourth Amendment violation did not have to be excluded because the taint

was sufficiently attenuated. For example, in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the defendant was illegally detained in his home while the police went to obtain a search warrant. Rawlings made incriminating statements during this time and the issue was whether they had to be excluded. The Court, in an opinion by Justice Rehnquist, said that the taint was sufficiently attenuated so as to allow the statements to be admitted. The Court pointed to the lack of flagrant misconduct by the police, the lack of a coercive atmosphere, and the fact that the statements were a spontaneous result of the discovery of evidence.

Similarly, in *New York v. Harris*, 495 U.S. 14 (1990), the Court found that a statement made by a suspect at the police station house was admissible, even though it followed an illegal search of the suspect's home. The Court explained that evidence from the warrantless home search would need to be excluded, but the subsequent statement to the police — at a different place and time from the search — was admissible.

These cases focus on when statements must be excluded when they follow a violation of the Fourth Amendment. The distinct, though obviously related, question of whether statements must be excluded when they follow illegal questioning is discussed below in Chapter 4, which considers interrogations.⁵

4. *The Good Faith Exception to the Exclusionary Rule*

In *United States v. Leon*, below, the Court held that the exclusionary rule does not apply if police reasonably rely on an invalid warrant to conduct a search or seizure. This is the most hotly disputed of the exceptions to the exclusionary rule and, not surprisingly, *Leon* provided the occasion for an important debate among the Justices as to the purposes of the exclusionary rule.

UNITED STATES v. LEON

468 U.S. 897 (1984)

Justice WHITE delivered the opinion of the Court.

This case presents the question whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. To resolve this question, we must consider once again the tension between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are "acquitted or convicted on the basis of all the evidence which exposes the truth."

5. Also discussed in Chapter 4 is the related question of whether physical evidence must be suppressed if it is the result of questioning without *Miranda* warnings in violation of the Fifth Amendment. In *United States v. Patane*, 542 U.S. 630 (2004), presented in Chapter 4, the Court held (5-4) that physical evidence gained in such circumstances need not be excluded.

I

In August 1981, a confidential informant of unproven reliability informed an officer of the Burbank Police Department that two persons known to him as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone from their residence at 620 Price Drive in Burbank, Cal. The informant also indicated that he had witnessed a sale of methaqualone by "Patsy" at the residence approximately five months earlier and had observed at that time a shoebox containing a large amount of cash that belonged to "Patsy." He further declared that "Armando" and "Patsy" generally kept only small quantities of drugs at their residence and stored the remainder at another location in Burbank.

On the basis of this information, the Burbank police initiated an extensive investigation focusing first on the Price Drive residence and later on two other residences as well. Cars parked at the Price Drive residence were determined to belong to respondents Armando Sanchez, who had previously been arrested for possession of marihuana, and Patsy Stewart, who had no criminal record. During the course of the investigation, officers observed an automobile belonging to respondent Ricardo Del Castillo, who had previously been arrested for possession of 50 pounds of marihuana, arrive at the Price Drive residence. The driver of that car entered the house, exited shortly thereafter carrying a small paper sack, and drove away. A check of Del Castillo's probation records led the officers to respondent Alberto Leon, whose telephone number Del Castillo had listed as his employer's. Leon had been arrested in 1980 on drug charges, and a companion had informed the police at that time that Leon was heavily involved in the importation of drugs into this country. Before the current investigation began, the Burbank officers had learned that an informant had told a Glendale police officer that Leon stored a large quantity of methaqualone at his residence in Glendale. During the course of this investigation, the Burbank officers learned that Leon was living at 716 South Sunset Canyon in Burbank.

Subsequently, the officers observed several persons, at least one of whom had prior drug involvement, arriving at the Price Drive residence and leaving with small packages; observed a variety of other material activity at the two residences as well as at a condominium at 7902 Via Magdalena; and witnessed a variety of relevant activity involving respondents' automobiles. The officers also observed respondents Sanchez and Stewart board separate flights for Miami. The pair later returned to Los Angeles together, consented to a search of their luggage that revealed only a small amount of marihuana, and left the airport. Based on these and other observations summarized in the affidavit, Officer Cyril Rombach of the Burbank Police Department, an experienced and well-trained narcotics investigator, prepared an application for a warrant to search 620 Price Drive, 716 South Sunset Canyon, 7902 Via Magdalena, and automobiles registered to each of the respondents for an extensive list of items believed to be related to respondents' drug-trafficking activities. Officer Rombach's extensive application was reviewed by several Deputy District Attorneys.

A facially valid search warrant was issued in September 1981 by a State Superior Court Judge. The ensuing searches produced large quantities of drugs at the Via Magdalena and Sunset Canyon addresses and a small quantity at the Price Drive residence. Other evidence was discovered at each of the residences and in Stewart's and Del Castillo's automobiles. Respondents were indicted by a

grand jury in the District Court for the Central District of California and charged with conspiracy to possess and distribute cocaine and a variety of substantive counts.

The respondents then filed motions to suppress the evidence seized pursuant to the warrant. The District Court held an evidentiary hearing and, while recognizing that the case was a close one, granted the motions to suppress in part. It concluded that the affidavit was insufficient to establish probable cause, but did not suppress all of the evidence as to all of the respondents because none of the respondents had standing to challenge all of the searches. In response to a request from the Government, the court made clear that Officer Rombach had acted in good faith, but it rejected the Government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable, good-faith reliance on a search warrant.

The Government's petition for certiorari expressly declined to seek review of the lower courts' determinations that the search warrant was unsupported by probable cause and presented only the question "[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." We granted certiorari to consider the propriety of such a modification. We have concluded that, in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions.

II

Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment, or that the rule is required by the conjunction of the Fourth and Fifth Amendments. These implications need not detain us long. The Fifth Amendment theory has not withstood critical analysis or the test of time, and the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."

A

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong." The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, *ibid.*, and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Only the former question is currently before us, and it must be resolved by weighing the costs and benefits of preventing the use

in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains.⁶ Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and administration of justice." Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

Many of these researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures. "[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 deterring official unlawfulness." Because we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case, we conclude that it cannot pay its way in those situations.

B

Close attention to those remedial objectives has characterized our recent decisions concerning the scope of the Fourth Amendment exclusionary rule. The Court has, to be sure, not seriously questioned, "in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate. . . ." Nevertheless, the balancing approach that has evolved in various contexts — including criminal trials — "forcefully suggest[s]

6. Researchers have only recently begun to study extensively the effects of the exclusionary rule on the disposition of felony arrests. One study suggests that the rule results in the nonprosecution or nonconviction of between 0.6% and 2.35% of individuals arrested for felonies. 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.Res.J. 611, 621. The estimates are higher for particular crimes the prosecution of which depends heavily on physical evidence. Thus, the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%. Davies' analysis of California data suggests that screening by police and prosecutors results in the release because of illegal searches or seizures of as many as 1.4% of all felony arrestees, *id.*, at 650, that 0.9% of felony arrestees are released, because of illegal searches or seizures, at the preliminary hearing or after trial, *id.*, at 653, and that roughly 0.5% of all felony arrestees benefit from reversals on appeal because of illegal searches. [Footnote by the Court.]

that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.”

As cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule’s deterrent value that “anything which deters illegal searches is thereby commanded by the Fourth Amendment.” In determining whether persons aggrieved solely by the introduction of damaging evidence unlawfully obtained from their co-conspirators or co-defendants could seek suppression, for example, we found that the additional benefits of such an extension of the exclusionary rule would not outweigh its costs. Standing to invoke the rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct. *Rakas v. Illinois* (1978).

Even defendants with standing to challenge the introduction in their criminal trials of unlawfully obtained evidence cannot prevent every conceivable use of such evidence. Evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution’s case in chief may be used to impeach a defendant’s direct testimony. *Walder v. United States* (1954). A similar assessment of the “incremental furthering” of the ends of the exclusionary rule led us to conclude in *United States v. Havens* (1980), that evidence inadmissible in the prosecution’s case in chief or otherwise as substantive evidence of guilt may be used to impeach statements made by a defendant in response to “proper cross-examination reasonably suggested by the defendant’s direct examination.”

When considering the use of evidence obtained in violation of the Fourth Amendment in the prosecution’s case in chief, moreover, we have declined to adopt a *per se* or “but for” rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest. We also have held that a witness’ testimony may be admitted even when his identity was discovered in an unconstitutional search. *United States v. Ceccolini* (1978). The perception underlying these decisions—that the connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial—is a product of considerations relating to the exclusionary rule and the constitutional principles it is designed to protect. In short, the “dissipation of the taint” concept that the Court has applied in deciding whether exclusion is appropriate in a particular case “attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.” Not surprisingly in view of this purpose, an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus.

As yet, we have not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule. But the balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us. As we discuss below, our evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution’s case in chief.

III

A

Because a search warrant “provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime,’ ” we have expressed a strong preference for warrants and declared that “in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.” Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according “great deference” to a magistrate’s determination.

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate’s finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to “perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.” A magistrate failing to “manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application” and who acts instead as “an adjunct law enforcement officer” cannot provide valid authorization for an otherwise unconstitutional search.

Third, reviewing courts will not defer to a warrant based on an affidavit that does not “provide the magistrate with a substantial basis for determining the existence of probable cause.” “Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.” Even if the warrant application was supported by more than a “bare bones” affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate’s probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

We adhere to this view and emphasize that nothing in this opinion is intended to suggest a lowering of the probable-cause standard. On the contrary, we deal here only with the remedy to be applied to a concededly unconstitutional search.

Only in the first of these three situations, however, has the Court set forth a rationale for suppressing evidence obtained pursuant to a search warrant; in the other areas, it has simply excluded such evidence without considering whether Fourth Amendment interests will be advanced. To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas, their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. Many of the

factors that indicate that the exclusionary rule cannot provide an effective “special” or “general” deterrent for individual offending law enforcement officers apply as well to judges or magistrates. And, to the extent that the rule is thought to operate as a “systemic” deterrent on a wider audience, it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers’ professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

B

If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or “magistrate shopping” and thus promotes the ends of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. We find such arguments speculative and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.

We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. “No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect. . . .” But even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity. In short, where the officer’s conduct is objectively reasonable,⁷ “excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.”

7. We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. “Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.” The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits. [Footnote by the Court.]

This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

C

We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness," for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role; in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant. The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.

IV

When the principles we have enunciated today are applied to the facts of this case, it is apparent that the judgment of the Court of Appeals cannot stand. The Court of Appeals applied the prevailing legal standards to Officer Rombach's warrant application and concluded that the application could not support the magistrate's probable-cause determination. Having determined that the warrant should not have issued, the Court of Appeals understandably declined to adopt a modification of the Fourth Amendment exclusionary rule that this Court had not previously sanctioned. Although the modification finds strong support in our previous cases, the Court of Appeals' commendable self-restraint is not to be criticized. We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances.

In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Ten years ago, I expressed the fear that the Court's decision "may signal that a majority of my colleagues have positioned themselves to reopen the door [to evidence secured by official lawlessness] still further and abandon altogether the exclusionary rule in search-and-seizure cases." Since then, in case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent the *pièce de résistance* of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been violated — a result that had previously been thought to be foreclosed.

The Court seeks to justify this result on the ground that the "costs" of adhering to the exclusionary rule in cases like those before us exceed the "benefits." But the language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the majority's result. When the Court's analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the "costs" of excluding illegally obtained evidence loom to exaggerated heights and where the "benefits" of such exclusion are made to disappear with a mere wave of the hand.

The majority ignores the fundamental constitutional importance of what is at stake here. While the machinery of law enforcement and indeed the nature of crime itself have changed dramatically since the Fourth Amendment became part of the Nation's fundamental law in 1791, what the Framers understood then remains true today — that the task of combating crime and convicting the guilty

will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms. In the constitutional scheme they ordained, the sometimes unpopular task of ensuring that the government's enforcement efforts remain within the strict boundaries fixed by the Fourth Amendment was entrusted to the courts.

A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale. But even if I were to accept the Court's chosen method of analyzing the question posed by these cases, I would still conclude that the Court's decision cannot be justified.

I

The Court holds that physical evidence seized by police officers reasonably relying upon a warrant issued by a detached and neutral magistrate is admissible in the prosecution's case in chief, even though a reviewing court has subsequently determined either that the warrant was defective, or that those officers failed to demonstrate when applying for the warrant that there was probable cause to conduct the search. I have no doubt that these decisions will prove in time to have been a grave mistake. But, as troubling and important as today's new doctrine may be for the administration of criminal justice in this country, the mode of analysis used to generate that doctrine also requires critical examination, for it may prove in the long run to pose the greater threat to our civil liberties.

At bottom, the Court's decision turns on the proposition that the exclusionary rule is merely a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right." The essence of this view, as expressed initially in the *Calandra* opinion and as reiterated today, is that the sole "purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong . . . is fully accomplished by the original search without probable cause." This reading of the Amendment implies that its proscriptions are directed solely at those government agents who may actually invade an individual's constitutionally protected privacy. The courts are not subject to any direct constitutional duty to exclude illegally obtained evidence, because the question of the admissibility of such evidence is not addressed by the Amendment. This view of the scope of the Amendment relegates the judiciary to the periphery. Because the only constitutionally cognizable injury has already been "fully accomplished" by the police by the time a case comes before the courts, the Constitution is not itself violated if the judge decides to admit the tainted evidence. Indeed, the most the judge can do is wring his hands and hope that perhaps by excluding such evidence he can deter future transgressions by the police.

Such a reading appears plausible, because, as critics of the exclusionary rule never tire of repeating, the Fourth Amendment makes no express provision for the exclusion of evidence secured in violation of its commands. A short answer to this claim, of course, is that many of the Constitution's most vital imperatives are stated in general terms and the task of giving meaning to these precepts is therefore left to subsequent judicial decisionmaking in the context of concrete cases.

A more direct answer may be supplied by recognizing that the Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.

When that fact is kept in mind, the role of the courts and their possible involvement in the concerns of the Fourth Amendment comes into sharper focus. Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment. Once that connection between the evidence-gathering role of the police and the evidence-admitting function of the courts is acknowledged, the plausibility of the Court's interpretation becomes more suspect. Certainly nothing in the language or history of the Fourth Amendment suggests that a recognition of this evidentiary link between the police and the courts was meant to be foreclosed. It is difficult to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements. The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained.

The Court evades this principle by drawing an artificial line between the constitutional rights and responsibilities that are engaged by actions of the police and those that are engaged when a defendant appears before the courts. According to the Court, the substantive protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual's privacy and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police.

I submit that such a crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. For my part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures. The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures.

From the foregoing, it is clear why the question whether the exclusion of evidence would deter future police misconduct was never considered a relevant

concern in the early cases from *Weeks* to *Olmstead*. In those formative decisions, the Court plainly understood that the exclusion of illegally obtained evidence was compelled not by judicially fashioned remedial purposes, but rather by a direct constitutional command.

Despite this clear pronouncement, however, the Court has gradually pressed the deterrence rationale for the rule back to center stage. The various arguments advanced by the Court in this campaign have only strengthened my conviction that the deterrence theory is both misguided and unworkable. First, the Court has frequently bewailed the “cost” of excluding reliable evidence. In large part, this criticism rests upon a refusal to acknowledge the function of the Fourth Amendment itself. If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the “price” our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free not, in Justice (then Judge) Cardozo’s misleading epigram, “because the constable has blundered,” but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals. Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself that has imposed this cost.

In addition, the Court’s decisions over the past decade have made plain that the entire enterprise of attempting to assess the benefits and costs of the exclusionary rule in various contexts is a virtually impossible task for the judiciary to perform honestly or accurately. Although the Court’s language in those cases suggests that some specific empirical basis may support its analyses, the reality is that the Court’s opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data. To the extent empirical data are available regarding the general costs and benefits of the exclusionary rule, such data have shown, on the one hand, as the Court acknowledges today, that the costs are not as substantial as critics have asserted in the past, and, on the other hand, that while the exclusionary rule may well have certain deterrent effects, it is extremely difficult to determine with any degree of precision whether the incidence of unlawful conduct by police is now lower than it was prior to *Mapp*. The Court has sought to turn this uncertainty to its advantage by casting the burden of proof upon proponents of the rule. “Obviously,” however, “the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative. [The] assignment of the burden is merely a way of announcing a predetermined conclusion.” By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics. The extent of this Court’s fidelity to Fourth Amendment requirements, however, should not turn on such statistical uncertainties.

What the Framers of the Bill of Rights sought to accomplish through the express requirements of the Fourth Amendment was to define precisely the

conditions under which government agents could search private property so that citizens would not have to depend solely upon the discretion and restraint of those agents for the protection of their privacy. Although the self-restraint and care exhibited by the officers in this case is commendable, that alone can never be a sufficient protection for constitutional liberties. I am convinced that it is not too much to ask that an attentive magistrate take those minimum steps necessary to ensure that every warrant he issues describes with particularity the things that his independent review of the warrant application convinces him are likely to be found in the premises. And I am equally convinced that it is not too much to ask that well-trained and experienced police officers take a moment to check that the warrant they have been issued at least describes those things for which they have sought leave to search. These convictions spring not from my own view of sound criminal law enforcement policy, but are instead compelled by the language of the Fourth Amendment and the history that led to its adoption.

III

Even if I were to accept the Court's general approach to the exclusionary rule, I could not agree with today's result. There is no question that in the hands of the present Court the deterrence rationale has proved to be a powerful tool for confining the scope of the rule.

Thus, in this bit of judicial stagecraft, while the sets sometimes change, the actors always have the same lines. Given this well-rehearsed pattern, one might have predicted with some assurance how the present case would unfold. First there is the ritual incantation of the "substantial social costs" exacted by the exclusionary rule, followed by the virtually foreordained conclusion that, given the marginal benefits, application of the rule in the circumstances of these cases is not warranted. Upon analysis, however, such a result cannot be justified even on the Court's own terms.

At the outset, the Court suggests that society has been asked to pay a high price—in terms either of setting guilty persons free or of impeding the proper functioning of trials—as a result of excluding relevant physical evidence in cases where the police, in conducting searches and seizing evidence, have made only an "objectively reasonable" mistake concerning the constitutionality of their actions. But what evidence is there to support such a claim?

Significantly, the Court points to none, and, indeed, as the Court acknowledges, recent studies have demonstrated that the "costs" of the exclusionary rule—calculated in terms of dropped prosecutions and lost convictions—are quite low. Contrary to the claims of the rule's critics that exclusion leads to "the release of countless guilty criminals," these studies have demonstrated that federal and state prosecutors very rarely drop cases because of potential search and seizure problems. For example, a 1979 study prepared at the request of Congress by the General Accounting Office reported that only 0.4% of all cases actually declined for prosecution by federal prosecutors were declined primarily because of illegal search problems. If the GAO data are restated as a percentage of all arrests, the study shows that only 0.2% of all felony arrests are declined for prosecution because of potential exclusionary rule problems. Of course, these data describe only the costs attributable to the exclusion of evidence in all cases;

the costs due to the exclusion of evidence in the narrower category of cases where police have made objectively reasonable mistakes must necessarily be even smaller. The Court, however, ignores this distinction and mistakenly weighs the aggregated costs of exclusion in all cases, irrespective of the circumstances that led to exclusion, against the potential benefits associated with only those cases in which evidence is excluded because police reasonably but mistakenly believe that their conduct does not violate the Fourth Amendment. When such faulty scales are used, it is little wonder that the balance tips in favor of restricting the application of the rule.

What then supports the Court's insistence that this evidence be admitted? Apparently, the Court's only answer is that even though the costs of exclusion are not very substantial, the potential deterrent effect in these circumstances is so marginal that exclusion cannot be justified. The key to the Court's conclusion in this respect is its belief that the prospective deterrent effect of the exclusionary rule operates only in those situations in which police officers, when deciding whether to go forward with some particular search, have reason to know that their planned conduct will violate the requirements of the Fourth Amendment. If these officers in fact understand (or reasonably should understand because the law is well settled) that their proposed conduct will offend the Fourth Amendment and that, consequently, any evidence they seize will be suppressed in court, they will refrain from conducting the planned search. In those circumstances, the incentive system created by the exclusionary rule will have the hoped-for deterrent effect. But in situations where police officers reasonably (but mistakenly) believe that their planned conduct satisfies Fourth Amendment requirements—presumably either (a) because they are acting on the basis of an apparently valid warrant, or (b) because their conduct is only later determined to be invalid as a result of a subsequent change in the law or the resolution of an unsettled question of law—then such officers will have no reason to refrain from conducting the search and the exclusionary rule will have no effect.

At first blush, there is some logic to this position. Undoubtedly, in the situation hypothesized by the Court, the existence of the exclusionary rule cannot be expected to have any deterrent effect on the particular officers at the moment they are deciding whether to go forward with the search. Indeed, the subsequent exclusion of any evidence seized under such circumstances appears somehow “unfair” to the particular officers involved. As the Court suggests, these officers have acted in what they thought was an appropriate and constitutionally authorized manner, but then the fruit of their efforts is nullified by the application of the exclusionary rule.

The flaw in the Court's argument, however, is that its logic captures only one comparatively minor element of the generally acknowledged deterrent purposes of the exclusionary rule. To be sure, the rule operates to some extent to deter future misconduct by individual officers who have had evidence suppressed in their own cases. But what the Court overlooks is that the deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of “punishment” of individual police officers for their failures to obey the restraints imposed by the Fourth Amendment. Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally. Thus, as the Court has previously recognized, “over the long term,

[the] demonstration [provided by the exclusionary rule] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.” It is only through such an institutionwide mechanism that information concerning Fourth Amendment standards can be effectively communicated to rank-and-file officers.

If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual police officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements.

After today’s decisions, however, that institutional incentive will be lost. Indeed, the Court’s “reasonable mistake” exception to the exclusionary rule will tend to put a premium on police ignorance of the law. Armed with the assurance provided by today’s decisions that evidence will always be admissible whenever an officer has “reasonably” relied upon a warrant, police departments will be encouraged to train officers that if a warrant has simply been signed, it is reasonable, without more, to rely on it. Since in close cases there will no longer be any incentive to err on the side of constitutional behavior, police would have every reason to adopt a “let’s-wait-until-it’s-decided” approach in situations in which there is a question about a warrant’s validity or the basis for its issuance.

Although the Court brushes these concerns aside, a host of grave consequences can be expected to result from its decision to carve this new exception out of the exclusionary rule. A chief consequence of today’s decisions will be to convey a clear and unambiguous message to magistrates that their decisions to issue warrants are now insulated from subsequent judicial review. Creation of this new exception for good-faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will from now on have virtually no consequence: If their decision to issue a warrant was correct, the evidence will be admitted; if their decision was incorrect but the police relied in good faith on the warrant, the evidence will also be admitted. Inevitably, the care and attention devoted to such an inconsequential chore will dwindle. Although the Court is correct to note that magistrates do not share the same stake in the outcome of a criminal case as the police, they nevertheless need to appreciate that their role is of some moment in order to continue performing the important task of carefully reviewing warrant applications. Today’s decisions effectively remove that incentive.

After today’s decisions, there will be little reason for reviewing courts to conduct such a conscientious review; rather, these courts will be more likely to focus simply on the question of police good faith. Despite the Court’s confident prediction that such review will continue to be conducted, it is difficult to believe

that busy courts faced with heavy dockets will take the time to render essentially advisory opinions concerning the constitutionality of the magistrate's decision before considering the officer's good faith.

Moreover, the good-faith exception will encourage police to provide only the bare minimum of information in future warrant applications. The police will now know that if they can secure a warrant, so long as the circumstances of its issuance are not "entirely unreasonable," all police conduct pursuant to that warrant will be protected from further judicial review. The clear incentive that operated in the past to establish probable cause adequately because reviewing courts would examine the magistrate's judgment carefully, has now been so completely vitiated that the police need only show that it was not "entirely unreasonable" under the circumstances of a particular case for them to believe that the warrant they were issued was valid. The long-run effect unquestionably will be to undermine the integrity of the warrant process.

Justice STEVENS, dissenting.

The Court assumes that the searches in these cases violated the Fourth Amendment, yet refuses to apply the exclusionary rule because the Court concludes that it was "reasonable" for the police to conduct them. In my opinion an official search and seizure cannot be both "unreasonable" and "reasonable" at the same time. The doctrinal vice in the Court's holding is its failure to consider the separate purposes of the two prohibitory Clauses in the Fourth Amendment. The first Clause prohibits unreasonable searches and seizures and the second prohibits the issuance of warrants that are not supported by probable cause or that do not particularly describe the place to be searched and the persons or things to be seized. We have, of course, repeatedly held that warrantless searches are presumptively unreasonable, and that there are only a few carefully delineated exceptions to that basic presumption. But when such an exception has been recognized, analytically we have necessarily concluded that the warrantless activity was not "unreasonable" within the meaning of the first Clause. Thus, any Fourth Amendment case may present two separate questions: whether the search was conducted pursuant to a warrant issued in accordance with the second Clause, and, if not, whether it was nevertheless "reasonable" within the meaning of the first. On these questions, the constitutional text requires that we speak with one voice. We cannot intelligibly assume, *arguendo*, that a search was constitutionally unreasonable but that the seized evidence is admissible because the same search was reasonable.

Thus, if the majority's assumption is correct, that even after paying heavy deference to the magistrate's finding and resolving all doubt in its favor, there is no probable cause here, then by definition—as a matter of constitutional law—the officers' conduct was unreasonable. The Court's own hypothesis is that there was no fair likelihood that the officers would find evidence of a crime, and hence there was no reasonable law enforcement justification for their conduct.

The majority's contrary conclusion rests on the notion that it must be reasonable for a police officer to rely on a magistrate's finding. Until today that has plainly not been the law; it has been well settled that even when a magistrate issues a warrant there is no guarantee that the ensuing search and seizure is constitutionally reasonable. Law enforcement officers have long been on notice that despite the magistrate's decision a warrant will be invalidated if the officers

did not provide sufficient facts to enable the magistrate to evaluate the existence of probable cause responsibly and independently. Reviewing courts have always inquired into whether the magistrate acted properly in issuing the warrant — not merely whether the officers acted properly in executing it. Thus, under our cases it has never been “reasonable” for the police to rely on the mere fact that a warrant has issued; the police have always known that if they fail to supply the magistrate with sufficient information, the warrant will be held invalid and its fruits excluded.

Today’s decisions do grave damage to that deterrent function. Under the majority’s new rule, even when the police know their warrant application is probably insufficient, they retain an incentive to submit it to a magistrate, on the chance that he may take the bait. No longer must they hesitate and seek additional evidence in doubtful cases.

The Court is of course correct that the exclusionary rule cannot deter when the authorities have no reason to know that their conduct is unconstitutional. But when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution. The Court’s approach — which, in effect, encourages the police to seek a warrant even if they know the existence of probable cause is doubtful — can only lead to an increased number of constitutional violations.

Thus, the Court’s creation of a double standard of reasonableness inevitably must erode the deterrence rationale that still supports the exclusionary rule. But we should not ignore the way it tarnishes the role of the judiciary in enforcing the Constitution.

It is of course true that the exclusionary rule exerts a high price — the loss of probative evidence of guilt. But that price is one courts have often been required to pay to serve important social goals. That price is also one the Fourth Amendment requires us to pay, assuming as we must that the Framers intended that its strictures “shall not be violated.” For in all such cases, as Justice Stewart has observed, “the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place.”

We could, of course, facilitate the process of administering justice to those who violate the criminal laws by ignoring the commands of the Fourth Amendment — indeed, by ignoring the entire Bill of Rights — but it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency. In a just society those who govern, as well as those who are governed, must obey the law.

The same day it decided *United States v. Leon*, the Court also handed down *Massachusetts v. Sheppard*, 468 U.S. 961 (1984). Police investigating a murder obtained a warrant to search Sheppard’s residence. The officers used a pre-printed warrant form which listed “controlled substances” as the items to be seized. The judge said that he would make changes in the warrant, but the final version continued to list controlled substances as the items to be searched for and seized. Sheppard moved to suppress the evidence. The Supreme Court,

however, said that the evidence did not need to be excluded because the officers reasonably relied on the warrant.⁸

Justice White, writing for the Court, said:

Having already decided that the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid, the sole issue before us in this case is whether the officers reasonably believed that the search they conducted was authorized by a valid warrant. There is no dispute that the officers believed that the warrant authorized the search that they conducted. Thus, the only question is whether there was an objectively reasonable basis for the officers' mistaken belief. Both the trial court, and a majority of the Supreme Judicial Court, concluded that there was. We agree.

Ultimately, the disagreement over whether there should be a good faith exception is about whether there should be an exclusionary rule, what purposes the exclusionary rule serves, and what is the best way to achieve them.

5. *The Exception for Violations of the Requirement for "Knocking and Announcing"*

As explained in Chapter 2, the Supreme Court has held that absent exigent circumstances, the police must knock and announce their presence before searching a residence. In *Hudson v. Michigan*, 126 S. Ct. 2159 (2006), the Court held that the exclusionary rule does not apply if police violate this Fourth Amendment requirement. As explained at the beginning of this chapter, Justice Scalia's majority opinion in the 5-4 decision stressed the costs of the exclusionary rule as compared with its benefits. He also discussed the problems with applying the exclusionary rule to the knock and announce context:

The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule, and claims that any asserted *Richards* justification for a no-knock entry, had inadequate support. The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that "[t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded." Unlike the warrant or *Miranda* requirements, compliance with which is readily determined (either there was or was not a warrant; either the *Miranda* warning was given, or it was not), what constituted a "reasonable wait time" in a particular case (or, for that matter, how many seconds the police in fact waited), or whether there was "reasonable suspicion" of the sort that would invoke the exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review.

8. The Court did not deny that there was a Fourth Amendment violation. In fact, in a subsequent case, *Groh v. Ramirez*, 540 U.S. 551 (2004), the Court held that the Fourth Amendment is violated if the warrant fails to list the specifics of what is to be searched for and seized, even if that information is in an affidavit supporting the warrant. *Groh*, though, was a civil suit for money damages for violation of the Fourth Amendment and not an attempt to exclude evidence from use in a criminal prosecution.

Another consequence of the incongruent remedy Hudson proposes would be police officers' refraining from timely entry after knocking and announcing. As we have observed, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others. We deemed these consequences severe enough to produce our unanimous agreement that a mere “reasonable suspicion” that knocking and announcing “under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime,” will cause the requirement to yield.

Next to these “substantial social costs” we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. (It is not, of course, a sufficient condition: “[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.”) To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even “reasonable suspicion” of their existence, suspend the knock-and-announce requirement anyway. Massive deterrence is hardly required.

Justice Breyer, writing for the four dissenters, began his opinion by stating:

In *Wilson v. Arkansas* (1995), a unanimous Court held that the Fourth Amendment normally requires law enforcement officers to knock and announce their presence before entering a dwelling. Today's opinion holds that evidence seized from a home following a violation of this requirement need not be suppressed.

As a result, the Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks v. United States* (1914).

Today's opinion is thus doubly troubling. It represents a significant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection.

The question after *Hudson* is whether police will have a sufficient incentive to comply with the knock and announce requirement knowing that evidence gained will not be excluded, and if not, whether this exception is justified by the benefits of the evidence being introduced. This, of course, is the same underlying question as to whether there should be an exclusionary rule and if so, for which exceptions should be created.

E. SUPPRESSION HEARINGS

The primary mechanism for raising the exclusionary rule is via a “suppression hearing.” Generally, these occur before trial and it is the occasion for the trial

court's hearing the defendant's motion that evidence was illegally obtained and should be excluded.⁹ In fact, many jurisdictions require that such motions be made before trial and bar a defendant from doing so later unless there is good cause for the failure to do so.¹⁰

A defendant seeking to challenge the truthfulness of statements made in warrant applications must make a showing that the officers who prepared the warrant engaged in deliberate falsification or reckless disregard for the truth. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Court stated:

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

The Court in *Franks* went on to emphasize that even if these requirements are met, no hearing is required if there is sufficient other content in the warrant application to support its issuance. The Court explained:

Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

The suppression motion occurs outside the presence of the jury. The ordinary rules of evidence do not apply at suppression hearings. In *United States v. Matlock*, 415 U.S. 164 (1974), the Court held that judges can rely on hearsay evidence at suppression hearings. The Court declared: "[I]n proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable, and the judge should receive the evidence and give it such weight as his judgment and experience counsel."

Many have raised concerns that police officers sometimes do not tell the truth at suppression hearings, instead saying what is necessary to make their conduct seem lawful and to gain use of the illegally obtained evidence. See Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 Colo. L. Rev. 1037 (1996); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 Am. Crim. L. Rev. 1 (2001). Often the only witnesses to the police violation are the

9. Defendants also can raise Fourth Amendment violations by bringing a motion for the return of illegally obtained evidence.

10. For example, Federal Rule of Criminal Procedure 12(h)(3)(c) provides that motions to suppress must be made before trial unless there is good cause.

defendant and the officers, and the concern is that officers sometimes lie to avoid the exclusionary rule. When it is the officer's word against a criminal defendant caught with contraband, courts tend to believe the officer. The concern is that officers violate the Fourth Amendment and then lie in court to ensure that the fruit of their illegal search is admitted. There is, of course, no agreement as to how often this occurs, or, if it is a problem, what to do about it.