

TAKING BACK OUR STREETS: ATTEMPTS IN THE 104TH CONGRESS TO REFORM THE EXCLUSIONARY RULE

At five o'clock in the morning on April 25, 1995, Officer Richard Carroll, a ten year veteran of the New York Police Department, patrolled the intersection of 176th Street and Amsterdam, part of his regular beat in an area known as a "hub for the drug trade."¹ In the course of his duty, Officer Carroll observed a double-parked, rented car with Michigan license plates.² With his suspicions aroused, Officer Carroll looked closer and observed four males open the trunk of the car and throw in two black duffle bags.³ The individuals spotted the squad car and quickly scattered.⁴

The suspicious car then pulled away from the curb and headed for an entrance ramp to a highway.⁵ Officer Carroll, acting in apparent good faith on a belief that the situation produced reasonable suspicion, pulled the car over before it could merge onto the highway.⁶ While searching the car's trunk, Officer Carroll found ninety pounds of cocaine and heroin, estimated at a street value of four million dollars, in the black duffle bags.⁷ In a videotaped confession, the driver, Carol Bayless, admitted that she picked up the drugs to bring to her son in Detroit.⁸

Later, at a pre-trial hearing, Judge Harold Baer, Jr.—despite the out-of-state plates on a rented car, the fact that the car was double-parked, the time and the location of the incident and the fleeing of the four men at the mere sight of the squad car—ruled that Officer Carroll did not have the reasonable suspicion necessary to detain Ms. Bayless or the probable cause to search the car and bags.⁹ As a result, Judge Baer suppressed the ninety pounds of drugs and the videotaped confession from use at trial.¹⁰ The United States Attorney's office stated

¹ See Deborah Pines, *Drugs Suppressed Due to Improper Stop*, N.Y. L.J., Jan. 24, 1996, at 1; A.M. Rosenthal, *Arrogance of Judges Sabotage Safe Streets*, CHARLESTON GAZETTE, Jan. 31, 1996 at A4; *The Drug Judge*, WALL ST. J., Jan. 26, 1996 at A10.

² See Pines, *supra* note 1, at 1.

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ See Rosenthal, *supra* note 1, at A4.

⁸ See *id.*

⁹ See Pines, *supra* note 1, at 1.

¹⁰ See *The Drug Judge*, *supra* note 1, at A10. In ruling that Officer Carroll lacked probable

that, unless the appeals court reversed the ruling, the prosecution lacked sufficient evidence to continue to prosecute Bayless.¹¹

The exclusionary rule generally requires a court to exclude evidence obtained through illegal means from consideration at trial.¹² Over eighty years ago, in *Weeks v. United States*, the Supreme Court created this remedy as method of enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures.¹³ Courts continue to apply this doctrine today, although the Supreme Court has carved out numerous exceptions to the exclusionary rule's application.¹⁴ Because of its potential outcome-determinative effect as well as its alleged role as the keystone in the bulwark protecting civil liberties, many commentators view the exclusionary rule as the most crucial principle in constitutional criminal procedure.¹⁵

In the Bayless situation, Judge Baer relied on the exclusionary rule to prohibit the use of the drugs as evidence at trial because he determined that Officer Carroll's search violated the Fourth Amendment.¹⁶ Because Officer Carroll did not obtain a warrant, the judge must determine that there existed probable cause for his search to be proper.¹⁷ Since Judge Baer determined that probable cause did not exist, Officer Carroll did not obtain the drugs legally and thus the prosecution could not use them as evidence at trial.¹⁸

cause, Judge Baer reasoned that "[r]esidents in this neighborhood tend to regard police officers as corrupt, abusive and violent." *Id.* So, according to the court, "had the men *not* run when the cops began to stare at them it would have been unusual." *Id.* Commentators directed much criticism at Judge Baer's determination that Officer Carroll lacked probable cause to conduct the search. See Rosenthal, *supra* note 1, at A4; *The Drug Judge*, *supra* note 1, at A10. In the subsequent uproar, Senator Daniel Patrick Moynihan, who had recommended Baer for the federal bench, offered an interesting response—the judge should be sentenced to live a year in Washington Heights to see if he would run away whenever he saw police. Rosenthal, *supra* note 1, at A10. President Clinton rejected a request by Republicans in the House of Representatives to seek the resignation of Judge Baer, who Clinton had appointed. *Clinton Rebuffs G.O.P.'s Request on Judge*, N.Y. TIMES, Mar. 23, 1996 at A11. Clinton, however, indicated that he would request the Justice Department to appeal the decision. *Id.* Under this considerable pressure, Judge Baer ultimately reversed his ruling and admitted both the drugs and videotaped confession. *Judge Assailed Over Drug Case Issues Reversal and an Apology*, N.Y. TIMES, April 2, 1996 at A1.

¹¹ *The Drug Judge*, *supra* note 1, at A10.

¹² See *Weeks v. United States*, 232 U.S. 383, 393 (1914).

¹³ See *id.*

¹⁴ See generally *Arizona v. Evans*, 115 S. Ct. 1185 (1995).

¹⁵ Senator Biden, for example, was quoted as saying, "[I]f a bill were going to pass with either a limited death penalty or an attack on the exclusionary rule, I'd rather take out the weakening of the exclusionary rule . . ." Nat Hentoff, *Repealing the Fourth Amendment*, WASH. POST, Oct. 8, 1988, at A27.

¹⁶ See *Weeks*, 232 U.S. at 393.

¹⁷ See *Carroll v. United States*, 267 U.S. 132, 149 (1925). To conduct the intrusive search for reasons beyond ensuring Officer Carroll's safety, there must have existed probable cause. See *id.*

¹⁸ See *Pines*, *supra* note 1, at 1. In order to detain Bayless long enough to conduct an

The general public has consistently and resoundly criticized the exclusionary rule.¹⁹ Many people view the suppression of tainted evidence as a mere technicality that obstructs the pursuit of justice.²⁰ Interestingly, this issue eludes easy ideological labels as both liberals and conservatives can find themselves joining together on either side of the debate.²¹

The public concern with the exclusionary rule, as well as the existing crime problem, has not gone unnoticed by the courts.²² In the thirty years since the Supreme Court extended the exclusionary rule to state law enforcement, the Court has regularly reconsidered whether "the criminal should go free if the constable has blundered."²³ Such examinations have led to the creation of numerous exceptions to the exclusionary rule's application, one of the most significant being the creation of a "good faith" exception for searches under a warrant in *United States v. Leon*.²⁴

Congress, too, has noticed the public dissatisfaction with the exclusionary rule and, as a result, has often attempted to either replace it or sharply curtail its application.²⁵ These efforts result, in part, from an attempt to answer the call issued by Chief Justice Burger in his dissent in *Bivens v. Six Unnamed Agents* for Congress to replace the exclusionary rule with a more appropriate remedy.²⁶ An additional motivation undoubtedly derives from traditional political concerns with issues relating to crime.²⁷

investigation, Officer Carroll needed only reasonable suspicion. See *generally* *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁹ Senator Biden predicted that, if offered up for a vote, the Fourth Amendment would be rejected today. See *Federal Crime Control Priorities: Hearings of the Senate Judiciary Comm.*, 104th Cong. (1995) [hereinafter *Federal Crime Control*].

²⁰ See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

²¹ See Nat Hentoff, *Say Goodbye to the Fourth Amendment*, SACRAMENTO BEE, Feb. 6, 1995, at B6. Conservative Representative Henry Hyde and liberal Representative Barney Frank both recently voted to curtail the exclusionary rule's application. See *id.* Justice Clarence Thomas appears to be a stronger proponent of the exclusionary rule than do Justices Souter and Breyer. See *Clarence Thomas Supreme Court Nomination: Hearing of the Senate Judiciary Comm.*, FED. NEWS SERVICE, Sept. 12, 1991; *Hearing of the Senate Judiciary Comm.: Confirmation Hearing of Judge David Souter to the Supreme Court*, FED. NEWS SERVICE, Sept. 14, 1990; *Supreme Court Confirmation Hearing for Judge Stephen G. Breyer: Hearing of the Senate Judiciary Comm.*, FED. NEWS SERV., July 1, 1994.

²² See, e.g., *Evans*, 115 S. Ct. at 1193; *United States v. Leon*, 468 U.S. 897, 922 (1984).

²³ *People v. Defare*, 242 N.Y. 13, 21 (1926); see *infra* notes 80-153 and accompanying text.

²⁴ See 468 U.S. at 922.

²⁵ Measures to repeal or curtail the exclusionary rule have been introduced in the last five Congresses. See *infra* note 156 and accompanying text.

²⁶ 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

²⁷ See *infra* note 30 and accompanying text.

In 1995, both the Senate and the House of Representatives offered bills to amend or repeal the exclusionary rule.²⁸ These proposals represent, in part, Congress's response to the intolerable existing crime rate, the increasingly violent nature of modern crime and the almost universal agreement of the American public that the federal government should make this problem an absolute priority.²⁹ Because of the deep public concern with this situation, politicians on both sides of the aisle have attempted to take stronger stances on crime.³⁰

By analyzing the reforms to the exclusionary rule proposed in the 104th Congress, this Note will discuss the creation and expansion of that rule, the evolution of its underlying policies and the expansion of the good faith exception to the exclusionary rule. This Note proposes that Congress create an exception to the exclusionary rule for all searches, either with or without a warrant, carried out in objective good faith by federal law enforcement officials. Part I of this Note will examine the Court's creation of the exclusionary rule and the early evolution of its application and rationale.³¹ Part II will discuss the continuing evolution of the justifications for the exclusionary rule and the resulting cutbacks in its application.³² Part III will examine the various proposals offered in the 104th Congress pertaining to the

²⁸ See H.R. 666, 104th Cong. (1995); S. 3, 104th Cong. (1995); S. 54, 104th Cong. (1995); S. 1495, 104th Cong. (1995). In the 104th Congress, measures to limit or repeal the exclusionary rule were introduced by Representative McCollum of Florida in the House and Senators Robert Dole of Kansas, Strom Thurmond of South Carolina and Jon Kyl of Arizona in the Senate. *See id.*

²⁹ See *Federal Crime Control*, *supra* note 19. FBI Director Louis Freeh testified that from 1960 through 1993, the number of violent crimes reported in America increased 567%. *See id.* The number of violent crimes reported increased 51% in the period just from 1985 to 1995. *See id.* Although the crime rate dropped slightly in 1992 and 1993 by 3.1%, most commentators feel that this drop is only a minor fluctuation rather than any significant lasting downturn. *See id.* Such a position is bolstered by the 6% increase in the number of juveniles arrested for violent crimes. *See id.* Ominously, studies indicate that this group will be the fastest growing and largest age group by the year 2000 and, thus, the number of people involved in crime in this age group can be expected to increase if trends continue. *See Federal Crime Control*, *supra* note 19. Finally, Freeh testified that a survey showed that 93% of those polled felt that addressing America's crime problem should be an absolute priority of the federal government. *See id.*

³⁰ See Nancy Mathis, *GOP Launches Anti-Crime Package*, S.F. EXAMINER, Feb. 9, 1995 at A17. An attempt to expand the good faith exception to warrantless searches passed in the House of Representatives by an overwhelming margin of 289-142. *See id.* In addition, the House voted 297-132 to approve a bill that would restrict the number of federal death penalty appeals by convicted murderers to one. *See id.* Despite the constitutional issues raised by such measures, President Clinton focused his efforts on other matters in an attempt to ensure that Congress appropriated adequate funds to provide aid to the states for the purposes of funding 100,000 new local police officers. *See id.*

³¹ See *infra* notes 35-79 and accompanying text.

³² See *infra* notes 80-153 and accompanying text.

exclusionary rule.³³ Part IV will examine the need for correction of the exclusionary rule and offer a proposal for congressional reform.³⁴

I. THE ORIGINS AND EARLY DEVELOPMENT OF THE EXCLUSIONARY RULE

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

U.S. CONST. amend. IV.

The Fourth Amendment, incorporated to apply to the states by the Supreme Court's reading of the Fourteenth Amendment, limits government intrusions on individual privacy by requiring that all searches and seizures be reasonable.³⁵ A warrant issued upon probable cause most easily satisfies the reasonableness requirement.³⁶ Although it creates the right to be free from unreasonable searches and seizures, the Fourth Amendment offers no remedies for violations of its commands.³⁷ Thus, the Amendment differs greatly from the Fifth Amendment, which explicitly creates both a right and a remedy.³⁸ Despite the oddity of the notion of a right without a remedy, the Supreme Court on several occasions has recognized that the Constitution does not require the creation of a remedy for every constitutional wrong.³⁹

For more than the first one hundred years of our nation's history, federal courts did not require the exclusion of probative, though illegally obtained, evidence from trial.⁴⁰ Rather, courts simply did not

³³ See *infra* notes 154-225 and accompanying text.

³⁴ See *infra* notes 226-92 and accompanying text.

³⁵ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

³⁶ See *United States v. Leon*, 468 U.S. 897, 914 (1984).

³⁷ See *id.* at 906.

³⁸ U.S. CONST. amend. V. The Supreme Court has noted that the Fifth Amendment contains a direct command against the admission of compelled testimony, while the court determines the admissibility of evidence obtained in violation of the Fourth Amendment after, and apart from, ruling on a constitutional violation. See *United States v. Janis*, 428 U.S. 433, 443 (1976).

³⁹ See, e.g., *Teague v. Lane*, 489 U.S. 288, 306-07 (1989) (restriction on use of federal habeas corpus actions for purpose of making new law); *Leon*, 468 U.S. at 919-20 (no remedy for good faith errors in search warrant process); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (growth of qualified immunity doctrine). For more on this area, see *Exclusionary Rule Reform of H.R. 666: Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. (1995) (statement of Paul J. Larkin, Jr.).

⁴⁰ See WAYNE LAFAVE & JERROLD ISRAEL, *CRIMINAL PROCEDURE* 105 (3d. ed. 1992).

inquire into the means employed in obtaining evidence and thus did not engage in a Fourth Amendment analysis.⁴¹ In 1886, however, the United States Supreme Court in *Boyd v. United States* held that the forced disclosure of papers violated the Fourth Amendment, and such items therefore became inadmissible at judicial proceedings.⁴² In *Boyd*, the police, in the course of investigating smuggling, demanded and obtained the invoice of the goods in question.⁴³ Because the police request compelled the suspect to surrender private and incriminating documents, the Court analyzed the case by linking the Fourth Amendment to the Fifth Amendment, which contains an explicit exclusionary remedy.⁴⁴ Thus, the *Boyd* Court reasoned that the use of illegally obtained evidence did not differ from compelling witnesses to testify contrary to their interests.⁴⁵ For apparently the first time, therefore, the Court used the Fourth Amendment, in part, to exclude incriminating evidence from trial.⁴⁶

The Supreme Court soon thereafter, however, moved away from this approach and again declined to inquire into the means employed by law enforcement officers in obtaining evidence.⁴⁷ In 1904, in *Adams v. New York*, the Supreme Court held that courts, in determining admissibility, should examine the competency of the evidence rather than the method used to obtain the evidence.⁴⁸ In *Adams*, the police raided the suspect's apartment and seized illegal gambling slips.⁴⁹ The Court, holding the illegal seizure irrelevant for purposes of determining admissibility, permitted the admission of the gambling slips as evidence at trial.⁵⁰ The *Adams* Court, therefore, refused to exclude evidence when its seizure implicated only the Fourth Amendment.⁵¹

It was not until 1914, in *Weeks v. United States*, that the United States Supreme Court imposed the exclusionary rule on federal law enforcement by holding that the Fourth Amendment prohibited federal officials from submitting illegally obtained evidence at trial.⁵² In

⁴¹ See *id.*

⁴² 116 U.S. 616, 638 (1886).

⁴³ *Id.* at 617-18.

⁴⁴ *Id.* at 621.

⁴⁵ See *id.* at 621-22.

⁴⁶ See *id.*

⁴⁷ See *Adams v. New York*, 192 U.S. 585, 594 (1904).

⁴⁸ *Id.*

⁴⁹ *Id.* at 587.

⁵⁰ *Id.* at 594.

⁵¹ See *id.*

⁵² 232 U.S. 383, 398 (1914).

Weeks, local police officers entered the suspect's house without a warrant and seized personal papers.⁵³ Later that day, a United States Marshall, also without a warrant, entered the home and seized additional evidence.⁵⁴ The Court reasoned that providing a remedy for the invasion of the suspect's home required the exclusion of the illegally-obtained evidence.⁵⁵ In addition, the Court also stated that federal agents who committed constitutional violations "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."⁵⁶ The Supreme Court, thus, commanded the judiciary to avoid the taint that results from permitting the use of the fruits of an illegality.⁵⁷ This concept became known as "judicial integrity."⁵⁸ At the same time, the *Weeks* Court refused to apply this remedy to victims of state action, and thus admitted the evidence seized by the local police officers.⁵⁹ Following *Weeks*, therefore, in the federal law enforcement system, courts would suppress illegally seized evidence due to the dual justifications of preserving judicial integrity and remedying constitutional wrongs.⁶⁰

Because the Court based the exclusionary rule on the concept of judicial integrity as opposed to a specific Constitutional provision, the Court did not at first impose the exclusionary rule upon state law enforcement.⁶¹ It soon, therefore, became common practice for local officers to seize evidence employing methods forbidden to federal officials.⁶² These local officers would then turn such evidence over to federal officials "on a silver platter" to assist in the federal prosecution of a suspect.⁶³

In 1949, in *Wolf v. Colorado*, the United States Supreme Court had a chance to bring the "silver platter" practice to a halt by extending the exclusionary remedy to the states.⁶⁴ The Court in *Wolf*, while applying

⁵³ *Id.* at 386.

⁵⁴ *See id.*

⁵⁵ *See id.* at 393.

⁵⁶ *Id.* at 392.

⁵⁷ *See Weeks*, 232 U.S. at 392.

⁵⁸ *See Elkins v. United States*, 364 U.S. 206, 222 (1960).

⁵⁹ *Weeks*, 232 U.S. at 398.

⁶⁰ *See id.*

⁶¹ *See Elkins*, 364 U.S. at 216.

⁶² *See id.* at 207 n.1.

⁶³ *See id.*

⁶⁴ *See* 338 U.S. 25, 33 (1949).

the Fourth Amendment to the states, held that the states remained free to select their own method of enforcing the Fourth Amendment.⁶⁵ In *Wolf*, the Supreme Court reviewed the prosecution of a state crime conducted in a state court.⁶⁶ Because of these facts, combined with Article III limitations on the Court's supervisory power, the Supreme Court refrained from suppressing the evidence at issue.⁶⁷ The *Wolf* Court, therefore, limited the preservation of judicial integrity to the federal courts.⁶⁸ After *Wolf*, the Court thus applied the Fourth Amendment to the states but permitted the states to select their own method for enforcing it.⁶⁹

Following the decision in *Wolf*, the Supreme Court, with one exception, addressed few cases regarding the exclusionary rule.⁷⁰ In the one case that did involve tainted evidence, however, the Court added a third justification for applying the exclusionary rule: deterrence of illegal government activity.⁷¹ In *Elkins v. United States*, the Court barred federal courts from admitting evidence illegally obtained by state or local officers.⁷² In so ruling, the Court reasoned that permitting the use of such evidence would create an indefensible distinction between the Fourth and Fourteenth Amendments.⁷³ The Court, thus, put an end to the "silver platter" doctrine.⁷⁴ More importantly for purposes of precedent, the Court added deterrence to the policy reasons underlying the exclusionary rule.⁷⁵ After *Elkins*, therefore, the United States Supreme Court identified three justifications for the exclusionary rule—its remedial effect, its preservation of judicial integrity and its deterrent effect.

In 1961, in *Mapp v. Ohio*, one of the Warren Court's most important and controversial decisions, the United States Supreme Court held that the exclusionary rule extended to include state law enforcement activities.⁷⁶ In *Mapp*, police officers, searching for a bombing suspect,

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *id.* Article III limitations on the supervisory power prevent the Court from imposing on state courts evidentiary rules beyond those required by the Constitution. See *Elkins*, 364 U.S. at 216.

⁶⁸ See *Wolf*, 338 U.S. at 31.

⁶⁹ *Id.* at 33.

⁷⁰ See *Elkins*, 364 U.S. at 217.

⁷¹ *Id.*

⁷² *Id.* at 223.

⁷³ *Id.* at 215, 223.

⁷⁴ See *id.* at 223.

⁷⁵ *Elkins*, 364 U.S. at 217.

⁷⁶ 367 U.S. 643, 655 (1961).

broke into a suspect's home and seized personal items and papers.⁷⁷ A plurality desired to exclude the evidence on the grounds that the exclusionary rule actually constituted *part* of the Fourth Amendment and thus limited state activity.⁷⁸ Such an idea, however, never received the vote of a majority. Instead, the Court, in excluding the materials from trial, repeated the traditional triumvirate of justifications—the remedial effect, the deterrent effect and the preservation of judicial integrity—as the basis for excluding the illegally obtained evidence.⁷⁹ The *Mapp* decision would mark the high-water point of the exclusionary rule's application.

II. EVOLUTION OF THE EXCLUSIONARY RULE'S RATIONALE AND THE RESULTING CUTBACKS

Only four years after its historic holding, criticism of *Mapp* led the Supreme Court to curtail the application of the exclusionary rule.⁸⁰ The trio of justifications for the exclusionary rule slowly began to dissolve into a single justification—deterrence.⁸¹ By gradually reducing the exclusionary rule to the question of whether its application would prevent future wrongful police conduct, an increasingly conservative Court began to curtail the scope of the rule's application.⁸² Such limitations, in turn, soon justified further limitations in a self-perpetuating cycle.⁸³

The process of curtailing the application of the exclusionary rule began almost immediately after *Mapp*.⁸⁴ In 1965, in *Linkletter v. Walker*, the United States Supreme Court held that the decision in *Mapp* did not apply retroactively and went on to attack one of the justifications *Mapp* offered for the exclusionary rule—that courts must apply the exclusionary rule as a remedy for a constitutional wrong.⁸⁵ In *Linkletter*,

⁷⁷ *Id.* at 644–45.

⁷⁸ *Id.* at 657. Justice Clark wrote, "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." *Id.*

⁷⁹ *See id.* at 660.

⁸⁰ *See Linkletter v. Walker*, 381 U.S. 618, 640 (1965) (rejecting retroactivity of holding in *Mapp*).

⁸¹ *See United States v. Janis*, 428 U.S. 433, 458 n.35 (1976).

⁸² *See, e.g., Arizona v. Evans*, 115 S. Ct. 1185, 1193 (1995); *United States v. Leon*, 468 U.S. 897, 922 (1984).

⁸³ *See United States v. Calandra*, 414 U.S. 338, 348 (1974); *Linkletter*, 381 U.S. at 640.

⁸⁴ *See Linkletter*, 381 U.S. at 640.

⁸⁵ *See id.* at 637. Notably, Justice Clark, the author of this opinion, also wrote the plurality opinion in *Mapp*. Compare *id.* at 618 with *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

state police, acting prior to the ruling in *Mapp*, searched a suspect's home without a warrant after imprisoning the defendant.⁸⁶ The Court upheld the prosecution's use of the subsequently discovered evidence, reasoning that because the suppression of the evidence would not in any way restore the privacy disrupted by the governmental intrusion, suppression would result in only a negligible gain to the defendant's due process rights.⁸⁷ Therefore, shortly after the exclusionary rule had been imposed on the states, the *Linkletter* Court questioned one of the stated rationales for that rule.⁸⁸

Although the Court began to give less weight to remedial effects in deciding when to apply the exclusionary rule, it increased the importance of the deterrent effect as a justification for that rule.⁸⁹ For instance, in 1967, in *Alderman v. United States*, the United States Supreme Court limited standing in petitions for suppression of evidence to only those who were actual victims of an illegal search.⁹⁰ In *Alderman*, the Court refused to grant standing to third party victims of an illegal wiretap.⁹¹ The Court reached this result by emphasizing that further extension of the rule to third parties would produce only a minimal increase in deterrence of illegal police activity.⁹²

In addition to this increased reliance on the justification of deterrence, the Court also classified illegal searches as a lesser constitutional wrong.⁹³ In 1967, in *Chapman v. California*, the Supreme Court held that, in some instances, courts may declare the improper admission of illegally obtained evidence "harmless."⁹⁴ In *Chapman*, the Court excluded from trial evidence of a suspect's failure to testify, refusing to label such evidence as harmless.⁹⁵ In deciding to suppress this evidence, however, the Court distinguished between evidence obtained through certain violations of the Fifth Amendment, which must always result in suppression, with evidence obtained through Fourth Amendment violations, which need not be suppressed if the court deems the

⁸⁶ *Linkletter*, 381 U.S. at 621.

⁸⁷ *Id.* at 636-37.

⁸⁸ *See id.*

⁸⁹ *See Alderman v. United States*, 394 U.S. 165, 174-75 (1969).

⁹⁰ *Id.* at 175-76.

⁹¹ *Id.*

⁹² *Id.* at 174-75.

⁹³ *See Chapman v. California*, 386 U.S. 18, 23 (1967).

⁹⁴ *Id.*

⁹⁵ *Id.* at 19-20.

admission harmless.⁹⁶ The *Chapman* Court, therefore, indirectly began to soften the hard-and-fast rule established in *Mapp*.⁹⁷

Some federal courts of appeals, noticing the Supreme Court's increased emphasis on deterrence, used this opportunity to further limit the application of the exclusionary rule.⁹⁸ In *United States v. Schipani*, the United States Court of Appeals for the Second Circuit permitted the admission of illegally obtained evidence at sentencing hearings.⁹⁹ In *Schipani*, the sentencing judge based his sentence, in part, on information obtained from excluded wiretaps.¹⁰⁰ In upholding this sentence, the court reasoned that a second application of the exclusionary rule would not add in any significant way to the deterrent effect achieved by initially suppressing the evidence at trial.¹⁰¹ Similarly, in 1975, in *United States v. Vandemark*, the United States Court of Appeals for the Ninth Circuit applied this same reasoning to permit the admission of illegally obtained evidence at probation hearings.¹⁰² Both of these rulings resulted from the greater importance given to deterrence by the Supreme Court.¹⁰³

In 1974, the United States Supreme Court clearly rejected the argument that the Fourth Amendment mandates the suppression of illegally obtained evidence.¹⁰⁴ In *United States v. Calandra*, the Court upheld the constitutionality of admitting illegally obtained evidence at grand jury proceedings.¹⁰⁵ In *Calandra*, the prosecution sought to admit evidence seized in a search that exceeded the scope authorized by the warrant at a grand jury proceeding.¹⁰⁶ In permitting the admission of this evidence, the Court reasoned that the suppression of such evidence would not serve to deter illegal police activity.¹⁰⁷ In addition, the Court clearly stated that, contrary to the suggestion in *Mapp*, the

⁹⁶ *Id.* at 23 n.2. Thus, the Court noted that coerced confessions and violations of the right to counsel always result in suppression. *Id.*

⁹⁷ *Id.* at 23.

⁹⁸ See, e.g., *United States v. Vandemark*, 522 F.2d 1019, 1022 (9th Cir. 1975) (admission of illegally obtained evidence at probation hearings does not violate Fourth Amendment); *United States v. Schipani*, 435 F.2d 26, 28 (2d Cir. 1970) (admission of illegally obtained evidence at sentencing does not violate Fourth Amendment).

⁹⁹ 435 F.2d at 28.

¹⁰⁰ *Id.* at 27.

¹⁰¹ *Id.* at 28.

¹⁰² 522 F.2d at 1022.

¹⁰³ See *Alderman*, 394 U.S. at 174-75.

¹⁰⁴ See *Calandra*, 414 U.S. at 348.

¹⁰⁵ *Id.* at 354.

¹⁰⁶ *Id.* at 341.

¹⁰⁷ *Id.* at 351-52.

Fourth Amendment does not require the suppression of all illegally obtained evidence in every circumstance.¹⁰⁸ Instead, the *Calandra* court identified the exclusionary rule as a mere creation of the courts instead of a Constitutional constraint.¹⁰⁹ By rejecting the argument that the Fourth Amendment mandates the suppression of illegally obtained evidence, the Court limited the application of the exclusionary rule to its underlying justifications. The underlying policies behind the exclusionary rule, therefore, took on greater significance as they provided the sole basis for its application.¹¹⁰

The Court in *Calandra*, moreover, did not merely limit the application of the exclusionary rule to cases justified by the rule's underlying policy justifications.¹¹¹ The Court also confirmed that the *Linkletter* decision had rejected the use of the exclusionary rule for remedial purposes.¹¹² The *Calandra* Court reasoned that because any benefit produced by suppression comes too late to provide reparation, such a rationale could not justify the suppression of reliable evidence.¹¹³ Finally, the Court in *Calandra* also found that deterrence, rather than judicial integrity, should serve as the primary purpose for the application of the exclusionary rule.¹¹⁴ *Calandra*, therefore, marks a major development in the Court's view of the exclusionary rule.¹¹⁵ The Supreme Court not only determined that the exclusionary rule serves as a judicial creation, limited by its policy justifications, but also whittled the trio of justifications down to deterrence and judicial integrity, with deterrence regarded as the rule's primary purpose.¹¹⁶

Having reduced the justifications for the application of the exclusionary rule down to deterrence and judicial integrity, the Court then began to single out deterrence as the sole justification for the rule's application.¹¹⁷ In 1974, in *Michigan v. Tucker*, the United States Supreme Court permitted the admission of evidence obtained from a violation of the Fifth Amendment where the events at issue occurred prior to the Court's ruling in *Miranda*.¹¹⁸ In so holding, the Court

¹⁰⁸ *Id.* at 348.

¹⁰⁹ *Calandra*, 414 U.S. at 348.

¹¹⁰ *See id.* at 349.

¹¹¹ *See id.*

¹¹² *Id.* at 347.

¹¹³ *See id.* at 347-49.

¹¹⁴ *See Calandra*, 414 U.S. at 348.

¹¹⁵ *See id.*

¹¹⁶ *Id.* at 347-48.

¹¹⁷ *See, e.g.,* *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976); *Michigan v. Tucker*, 417 U.S. 433, 450 n.25 (1974).

¹¹⁸ 417 U.S. at 450.

reasoned that preserving the integrity of the judiciary does not serve as an adequate independent ground for the exclusion of reliable evidence.¹¹⁹ Although the seizure of the evidence at issue in *Tucker* violated the Fifth Amendment rather than the Fourth Amendment, the Court analyzed the potential suppression of evidence in an analogous fashion.¹²⁰ Using this analysis, the Court determined that, because the suppression of the statements that resulted from this constitutional wrong would only produce a minimal deterrent effect, admission of the illegally obtained evidence did not violate the Constitution.¹²¹

Several years later, the Supreme Court completed its devolution of the rationale behind the exclusionary rule to a single policy—deterrence.¹²² In 1976, in *United States v. Janis*, the United States Supreme Court held that the exclusionary rule does not forbid one sovereign from using evidence in a civil proceeding illegally obtained by another sovereign.¹²³ In *Janis*, the Internal Revenue Service (“IRS”) assessed taxes on an individual based on information obtained illegally by the Los Angeles police.¹²⁴ The Court permitted the IRS’s use of this information for the purposes of its tax assessment.¹²⁵ In ruling in such a fashion, the Court, almost seventy years after it first introduced the rationale in *Weeks*, rejected the application of the exclusionary rule for the purpose of preserving the integrity of the judiciary.¹²⁶ The Supreme Court in *Janis*, thus, completed its paring of the trio of justifications for the exclusionary rule down to one—the deterrence of unlawful activity by law enforcement officers.¹²⁷

Having reduced the exclusionary rule down to a method of deterring illegal police activity, the Supreme Court also paved the way for further limitations on the rule’s application.¹²⁸ Courts, when deciding

¹¹⁹ *Id.* at 450 n.25.

¹²⁰ *Id.* at 446–47.

¹²¹ *Id.* at 450.

¹²² See *Janis*, 428 U.S. at 458 n.35.

¹²³ *Id.* at 454.

¹²⁴ *Id.* at 436–38.

¹²⁵ *Id.* at 454.

¹²⁶ *Id.* at 458 n.35.

¹²⁷ *Janis*, 428 U.S. at 446.

¹²⁸ See, e.g., *Evans*, 115 S. Ct. at 1193; *Illinois v. Krull*, 480 U.S. 340, 349 (1987); *United States v. Leon*, 468 U.S. 897, 926 (1984).

In addition to the evolution of the Supreme Court’s treatment of the exclusionary rule, the United States Court of Appeals for the Fifth Circuit also carved out an exception to the exclusionary rule. See generally *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). In *Williams*, the Fifth Circuit created a good faith exception to the exclusionary rule for warrantless searches. *Id.* at 840. The court, rehearing en banc, utilized the Supreme Court’s deterrence analysis and refused to suppress tainted evidence since the officer in question conducted his actions in good faith. *Id.* For the facts and further treatment, see *infra* notes 135–41 and accompanying text.

whether to apply the exclusionary rule, must now only weigh the likelihood of a sufficient deterrent effect against the societal cost of withholding reliable information from the trial process.¹²⁹ Reduced to this question, the Supreme Court has increasingly found that the costs of exclusion outweigh any deterrent benefit.¹³⁰

Using this cost-balancing approach, in 1984, in *United States v. Leon*, the United States Supreme Court significantly cut back on the application of the exclusionary rule by creating a good faith exception for searches conducted under the authority of a warrant.¹³¹ In *Leon*, the Court permitted the admission of evidence seized by officers acting in reasonable reliance on a warrant later ruled invalid.¹³² The police in *Leon* seized drugs from the defendant after obtaining a warrant.¹³³ The trial court later determined that the warrant lacked probable cause.¹³⁴ In permitting the admission of the drugs at trial, the Court limited the intended deterrent effect of the exclusionary rule to police misconduct rather than errors by magistrates.¹³⁵ Thus, because the officer in question acted in objective good faith, the Court reasoned, excluding this tainted evidence would not serve to deter future Fourth Amendment violations by the officer.¹³⁶ Therefore, the low deterrent effect, balanced against the high cost incurred by society upon excluding the evidence, led the *Leon* court to permit the admission of tainted evidence.¹³⁷

Several years later, in 1987, in *Illinois v. Krull*, the United States Supreme Court expanded the good faith exception created by *Leon* by refusing to suppress evidence obtained by an officer who acted in objectively reasonable reliance on a statute later invalidated.¹³⁸ In *Krull*, a police officer, while acting pursuant to a state statute that permitted the inspection of records of auto part dealerships, ascertained that the lot contained stolen automobiles.¹³⁹ The police seized the cars, but the court excluded the evidence from admission at trial.¹⁴⁰ The Court, basing its decision on the reasoning in *Leon*, upheld the admission of

¹²⁹ See *Evans*, 115 S. Ct. at 1191.

¹³⁰ See *supra* note 82 and accompanying text.

¹³¹ 468 U.S. at 926.

¹³² *Id.* at 903, 926.

¹³³ *Id.* at 902.

¹³⁴ See *id.* at 903.

¹³⁵ *Id.* at 917.

¹³⁶ *Leon*, 468 U.S. at 919-20.

¹³⁷ *Id.* at 926.

¹³⁸ 480 U.S. at 349-50.

¹³⁹ *Id.* at 343.

¹⁴⁰ See *id.* at 343-44.

this evidence.¹⁴¹ Justice Blackmun wrote that if an officer has acted in good faith when reasonably relying on a statute, suppressing the reliable evidence would produce, at most, a minimal deterrent effect, and thus, courts should admit such evidence.¹⁴² The Court limited this exception, however, to those instances where the statute does not immediately appear unconstitutional.¹⁴³ By limiting the justification of the exclusionary rule to deterrence, the Court once again created room to carve out an additional exception to the rule's application for situations where officers reasonably rely on a statute.¹⁴⁴

Finally, in 1995, in *Arizona v. Evans*, the most recent opinion on this topic, the United States Supreme Court again applied the reasoning set out in *Leon* to further cut back the applicability of the exclusionary rule.¹⁴⁵ In *Arizona v. Evans*, the Court held that the exclusionary rule does not require the suppression of evidence seized in violation of the Fourth Amendment when the illegal search resulted from a clerical error by a court employee.¹⁴⁶ The Court reasoned that suppression of this evidence would not produce a significant deterrent effect and thus the cost of suppressing this evidence clearly outweighed the minimal deterrent effect that would result from suppression.¹⁴⁷ In addition, the *Evans* Court, by distinguishing between an officer of the police and court employees, ended a simmering debate by limiting the intended deterrent effect of the exclusionary rule to police misconduct rather than the law enforcement system as a whole.¹⁴⁸ Thus, by further expanding this good faith exception, the Supreme Court in *Evans* cut back on the applicability of the exclusionary rule.¹⁴⁹

In sum, the gradual evolution of justifications behind the exclusionary rule has resulted in an increasing number of limitations on the rule's application.¹⁵⁰ By initially viewing the suppression of evidence as

¹⁴¹ *Id.* at 349-50.

¹⁴² *Id.*

¹⁴³ *Krull*, 480 U.S. at 349-50.

¹⁴⁴ *Id.* at 349.

¹⁴⁵ 115 S. Ct. at 1193.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *Evans*, 115 S. Ct. at 1193 (exclusionary rule not applicable to clerical errors); *Krull*, 480 U.S. at 349-50 (good faith exception to exclusionary rule for objective reliance on statute later declared unconstitutional); *Leon*, 468 U.S. at 926 (1984) (good faith exception to exclusionary rule for objective reliance on warrant later found to lack probable cause); *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (limitation on standing for challenges to exclusionary rule); *Janis*, 428 U.S. at 454 (sovereign may use evidence obtained illegally by another sovereign); *Calandra*, 414 U.S. at 351-52 (tainted evidence admissible in grand jury proceedings).

necessary to preserve the integrity of the judiciary, the Court could logically permit few, if any, exceptions to its application.¹⁵¹ As the purpose of deterring unlawful police activity took on increased importance, the Court freed its hands to admit tainted evidence whenever the costs of its exclusion outweighed the amount of deterrent effect that would result from suppression.¹⁵² In recent years, therefore, the Supreme Court has determined with increasing frequency that the cost of excluding reliable evidence outweighs the deterrent effect that suppression would produce.¹⁵³

III. EFFORTS OF THE 104TH CONGRESS TO CURTAIL OR REPEAL THE EXCLUSIONARY RULE

The actions of the 104th Congress, for analytical purposes, will probably take on added importance due to the historic significance of this particular Congress. The 1994 elections provided Republicans with control of both the House and the Senate for the first time since 1955.¹⁵⁴ As a result of this change, many proposals that leading Democrats have long blocked now face a much greater chance of passage into law.¹⁵⁵ For instance, Republicans have long desired to reform the exclusionary rule, and their takeover of the Congress may provide them with an opportunity to do so.

In the past, Congress did not sit idly by as the Court evolved in its treatment of the exclusionary rule.¹⁵⁶ With the historic increase in the crime rate and an even sharper increase in public apprehension of the crime problem, politicians from differing ideological back-

¹⁵¹ See *Weeks v. United States*, 232 U.S. 383, 392 (1914).

¹⁵² See *Evans*, 115 S. Ct. at 1193.

¹⁵³ See *id.*; *Krull*, 480 U.S. at 349; *Leon*, 468 U.S. at 926.

¹⁵⁴ See *When Was the Last Time?*, ST. PETERSBURG TIMES, Nov. 8, 1994, at A9.

¹⁵⁵ See *infra* note 160 and accompanying text.

¹⁵⁶ A list of proposals to reform or repeal the exclusionary rule over the last five Congresses includes: S. 77, 103d Cong. (1993) (proposal by Sen. Thurmond to create good faith exception for warrantless searches); H.R. 1400, 102d Cong. (1991) (provision by Rep. Michel in comprehensive crime bill to reform exclusionary rule); S. 1151, 102d Cong. (1991) (provision by Sen. Craig in comprehensive crime bill to reform exclusionary rule); S. 635, 102d Cong. (1991) (provision by Sen. Thurmond in comprehensive crime bill creating good faith exception for warrantless searches); S. 151, 102d Cong. (1991) (proposal by Sen. Thurmond creating good faith exception for warrantless searches); S. 379, 101st Cong. (1989) (proposal by Sen. Hatch to repeal exclusionary rule); S. 87, 101st Cong. (1989) (proposal by Sen. Thurmond to establish good faith exception for warrantless searches); H.R. 1334, 100th Cong. (1987) (proposal by Rep. Lungren to reform exclusionary rule); S. 326, 100th Cong. (1987) (proposal to replace exclusionary rule with tort remedy); S. 278, 100th Cong. (1987) (proposal by Sen. Thurmond to establish a good faith exception to exclusionary rule); S. 2302, 99th Cong. (1986) (proposal by Sen. Thurmond to establish a good faith exception to exclusionary rule); H.R. 1126, 99th Cong.

grounds have struggled to appear tough on crime.¹⁵⁷ Congress has frequently targeted the exclusionary rule in its attempt to wage a war on crime.¹⁵⁸ Members have introduced measures to either repeal or curtail the application of the exclusionary rule in the last five Congresses.¹⁵⁹ Such measures generally meet with success in the House but get tied up or rejected either in the Senate or in committee conferences.¹⁶⁰

The 104th Congress continued this trend by introducing measures pertaining to the exclusionary rule in both the House and the Senate.¹⁶¹ Generally, such measures have taken two possible forms—either an outright repeal of the exclusionary rule or a more moderate creation of a good faith exception for warrantless searches.¹⁶² Typically, the House of Representatives took quick and definitive action while the Senate has proceeded with a more deliberate pace.¹⁶³

*A. Efforts in the House of Representatives:
The Exclusionary Rule Reform Act of 1995*

During this past congressional session, Representative William McCollum of Florida introduced a measure, H.R. 666, entitled the Exclusionary Rule Reform Act of 1995 ("Exclusionary Rule Reform

(1986) (proposal by Rep. Lungren to reform exclusionary rule); S. 237, 99th Cong. (1985) (proposal by Sen. Thurmond to establish a good faith exception to exclusionary rule); S. 29, 99th Cong. (1985) (proposal by Sen. Hatch to eliminate exclusionary rule).

¹⁵⁷ See *supra* note 29 and accompanying text.

¹⁵⁸ See *supra* note 156 and accompanying text.

¹⁵⁹ See *supra* note 156 and accompanying text.

¹⁶⁰ See Ruth Marcus, *House Would Widen Use of Ill-Gotten Evidence*, WASH. POST, Sept. 17, 1986, at A16. For example, in 1986, the United States House of Representatives approved an amendment sponsored by Representative Lungren to create a good faith exception to the exclusionary rule for warrantless searches by a vote of 259–153. See *id.* Despite the overwhelming passage of this provision in the House, the amendment failed to survive in the House-Senate committee conferences. See 132 CONG. REC. H9,302–02 (daily ed. Oct. 7, 1986) (statement of Rep. Gekas). Senator Dole, a long-time advocate of reform of the exclusionary rule, noted that the conference committee repeatedly struck down reform of the exclusionary rule. 137 CONG. REC. S18,664–02 (daily ed. Nov. 27, 1991) (statement of Sen. Dole).

¹⁶¹ For example, Representative McCollum introduced the *Exclusionary Rule Reform Act* in the House. See H.R. 666, 104th Cong. (1995). In the Senate, Senator Dole offered the *Violent Crime Control and Law Enforcement Improvement Act of 1995*. See S. 3, 104th Cong. (1995). This proposal contained a section that repealed the exclusionary rule. *Id.* § 507. Senator Thurmond sponsored the *Exclusionary Rule Limitation Act of 1995*. See S. 54, 104th Cong. (1995). In addition, Sen. Kyl offered the *Crime Prevention Act of 1995*, which contained a proposal to reform the exclusionary rule. See S. 1495, 104th Cong., § 601 (1995).

¹⁶² Compare S. 3 (substituting tort remedy in place of exclusionary rule) with H.R. 666 (creating good faith exception for warrantless searches).

¹⁶³ The *Exclusionary Rule Reform Act*, sponsored by Representative William McCollum of Florida, passed the House of Representatives on Feb. 8, 1995. See 141 CONG. REC. H1,400 (1995).

Act").¹⁶⁴ This measure attempts to carve out a good faith exception for warrantless searches.¹⁶⁵ The Exclusionary Rule Reform Act provides that evidence resulting from a search or seizure that violates the Fourth Amendment shall nonetheless be admissible if the "search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the Fourth Amendment."¹⁶⁶ Under this provision, reviewing judges must admit evidence if they determine that the officer who seized the evidence could have reasonably believed his actions conformed with the Fourth Amendment.¹⁶⁷ Such a provision would extend much more deference to decisions made on the spot by police officers.¹⁶⁸ For example, in the introductory Bayless situation, if this proposal had existed at that time as law, Judge Baer would most likely have had to admit the ninety pounds of drugs as evidence because, although he ruled that they did not constitute reasonable suspicion, the facts appear to justify a basis for Officer Carroll to believe that he had reasonable suspicion.¹⁶⁹

The Exclusionary Rule Reform Act also carves out an exception for evidence seized in violation of a statute.¹⁷⁰ The measure provides that courts shall not exclude evidence on the grounds that the search or seizure violated a statute, administrative rule or procedural rule unless such a provision explicitly includes an exclusionary remedy.¹⁷¹ In addition, judges may nonetheless admit evidence seized in violation of a legislative enactment that provides for an exclusionary remedy if they determine that the officer had an objectively reasonable belief that the seizure conformed with the statute.¹⁷²

At the time of publication, this measure, as well as other related measures, awaited the recommendation and approval of the Senate Judiciary Committee. *See id.*

¹⁶⁴ H.R. 666.

¹⁶⁵ *See id.* § 2.

¹⁶⁶ H.R. 666, § 2, provides in relevant part:

Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the Fourth Amendment to the Constitution of the United States, if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment . . .

Id.

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See Pines, supra* note 1, at 1.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² H.R. 666, § 2 provides in relevant part:

(1) GENERALLY.- Evidence shall not be excluded in a proceeding in a court of

Interestingly, the Exclusionary Rule Reform Act does not extend this good faith exception to searches conducted by agents of the Alcohol, Tobacco and Firearms agency ("ATF") or the IRS.¹⁷³ By limiting the application of this exception, the Exclusionary Rule Reform Act provides greater Fourth Amendment protection to white-collar criminals and individuals under investigation for violations related to guns.¹⁷⁴ This limitation may have resulted from a growing disenchantment with the ATF, especially after the incidents at Waco and Ruby Ridge, as well as the more traditional distrust of the IRS.¹⁷⁵ Nevertheless, bipartisan leaders have frequently criticized this limitation to the application of a statutory good faith exception on the grounds that such exceptions lack consistency.¹⁷⁶

the United States on the ground that it was obtained in violation of a statute, an administrative rule or regulation, or a rule of procedure unless exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to statutory authority.

(2) SPECIAL RULE RELATING TO OBJECTIVELY REASONABLE SEARCHES AND SEIZURES.- Evidence which is otherwise excludable under paragraph (1) shall not be excluded if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that the search or seizure was in conformity with the statute, administrative rule or regulation, or rule of procedure, the violation of which occasioned its being excludable.

Id.

¹⁷³ See *id.* § 2(d)(e). On February 8, 1995, the House, by voice vote, agreed to a measure sponsored by Ohio Democrat Representative James Traficant that exempts searches or seizures carried out by, or under the authority of, the IRS from the relaxation of the exclusionary rule. See 141 CONG. REC. H1,393 (1995). In addition, the House, by a vote of 228-198, also agreed not to extend this exemption to the ATF. See 141 CONG. REC. H1,390 (1995). Ironically, Democratic members of the House sponsored this measure and provided most of its support. See *id.* The bill was one in a series of bills that, in an attempt by Democrats to weaken the reform, exempted federal agencies from the relaxing of the exclusionary rule. See *id.* Most of the other attempts, however, did not receive Republican support and thus failed. See 141 CONG. REC. H1,398 (1995). For instance, Democrat Representative Jose Serrano of New York sponsored a measure that would have exempted the Immigration and Naturalization Service from this reform. See *id.* This amendment, however, did not gain the support of a single Republican and thus failed by a vote of 102-330. See *id.*

¹⁷⁴ See H.R. 666, § 2.

¹⁷⁵ See *ATF Under Seige*, TIME, July 24, 1995, at 20. *Time* recently ran a cover story on the growing distrust of the ATF. See *id.* This article detailed the general distrust, especially in the South and Midwest, of the ATF as well as the growing movement calling for the elimination of the agency. *Id.*

¹⁷⁶ See *Federal Crime Control*, *supra* note 19 (testimony of Louis Freeh, FBI Director, Feb. 14, 1995). In congressional testimony, Senator Biden, although expressing opposition to the reform of the exclusionary rule, singled out this effort by the House denying the ATF and the IRS use of this good faith exception. See *id.* FBI Director Louis Freeh joined Senator Biden in opposing this inconsistent application and argued that the Senate should extend the good faith exception to include all federal law enforcement agencies. See *id.*

The Exclusionary Rule Reform Act passed in the House with resounding success, by a vote of 289-142, during the early part of 1995.¹⁷⁷ Having passed the House, this bill, along with a number of related provisions, now awaits the recommendation of the Senate Committee on the Judiciary.¹⁷⁸ Finally, due to President Clinton's concern with appearing tough on crime during an election year, commentators believe the President may sign this provision into law.¹⁷⁹ At the time of publishing, no action had yet been taken.

*B. Measures Introduced in the Senate to Reform or
Repeal the Exclusionary Rule*

1. The Violent Crime Control and Law Enforcement Improvement Act of 1995

In the 104th Congress, Senator Robert Dole of Kansas introduced a bill, S.3, intended to continue the war on crime.¹⁸⁰ This extensive 150-page document contains a variety of constitutional reforms, such as a reduction in the number of federal death penalty appeals, mandatory restitution for victims of violent crime and habeas corpus reform.¹⁸¹ This bill also contains a proposal to repeal the exclusionary rule and replace it with the creation of a remedy in tort.¹⁸² At the time of publication, the bill awaits the recommendation of the Senate Committee on the Judiciary.¹⁸³

Section 507 of the Violent Crime Control and Law Enforcement Improvement Act of 1995 ("Violent Crime Control Act") provides that courts shall not exclude otherwise admissible evidence on the grounds that a search or seizure violated the Fourth Amendment.¹⁸⁴ In addition,

¹⁷⁷ See 141 CONG. REC. S2,399-401 (1995).

¹⁷⁸ See 141 CONG. REC. S2,399 (1995).

¹⁷⁹ See Nat Hentoff, *Say Goodbye to the Fourth Amendment*, SACRAMENTO BEE, Feb. 6, 1995, at B6; Mathis, *supra* note 30, at A17. Commentators have argued that President Clinton's concern lies with the number of new police officers authorized by the bill rather than its reform of the exclusionary rule. See, e.g., Hentoff, *supra*; Mathis, *supra* note 30, at A17.

¹⁸⁰ S. 3, 104th Cong. (1995).

¹⁸¹ *Id.* §§ 501-510.

¹⁸² *Id.* § 507.

¹⁸³ See 141 CONG. REC. D936 (1995).

¹⁸⁴ Section 507(b)(1)(a) provides in relevant part:

(a) EVIDENCE OBTAINED BY OBJECTIVELY REASONABLE SEARCH OR SEIZURE.—Evidence obtained as a result of a search or seizure that is otherwise admissible in a Federal criminal proceeding shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution.

unless an enactment explicitly creates an exclusionary remedy, Senator Dole's bill provides that courts shall not exclude evidence on the grounds that officials obtained the evidence in violation of a statute, administrative rule or rule of court procedure.¹⁸⁵ The provision concludes that the section shall not be construed as requiring the exclusion of evidence.¹⁸⁶ This provision applies to all evidence introduced in federal criminal proceedings regardless of whether a state or federal officer seized the evidence.¹⁸⁷ As a consequence of this Act, unless a state statute prohibits such conduct, a local officer would probably be able to conduct his searches with less restraint if the prosecution is brought in federal court.¹⁸⁸

Senator Dole's proposal differs from the measure passed by the House in a number of ways. Rather than carving out an exception to the application of the exclusionary rule, the measure simply eliminates the exclusionary rule.¹⁸⁹ On this point, therefore, the Senate version goes much further than its House counterpart. In addition, the measures differ on the suppression of evidence based on violations of statutes.¹⁹⁰ Both measures require a statute to provide explicitly for exclusion before a judge must suppress the evidence on the grounds of a statutory violation.¹⁹¹ The House version, goes further, however, by also creating a good faith exception for evidence seized in violation of a statute even if the statute provides an exclusionary remedy.¹⁹² Finally, the Violent Crime Control Act permits the admission of tainted evidence only in criminal proceedings whereas the exception created by the House applies to all judicial proceedings.¹⁹³

Having provided for the admission of tainted evidence in a criminal proceeding, the Violent Crime Control Act creates a fairly elabo-

¹⁸⁵ S. 3, § 507(b)(1)(b) provides in relevant part:

(b) EVIDENCE NOT EXCLUDABLE BY STATUTE OR RULE.—Evidence shall not be excluded in a proceeding in a court of the United States on the ground that it was obtained in violation of a statute, an administrative rule, or a rule of court procedure unless exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to chapter 131 of title 28.

Id.

¹⁸⁶ *Id.* § 507(b)(1)(c).

¹⁸⁷ *See id.* § 507(b)(1)(b).

¹⁸⁸ *See id.*

¹⁸⁹ Compare S. 3, § 507(b)(1)(a) with H.R. 666, 104th Cong. § 2 (1995).

¹⁹⁰ Compare S. 3 § 507(b)(1)(b) (violation of statute immaterial) with H.R. 666, § 2 (good faith exception for violation of statute).

¹⁹¹ Compare S. 3, § 507(b)(1)(b) (violation of statute immaterial) with H.R. 666, § 2 (good faith exception for violation of statute).

¹⁹² H.R. 666, § 2.

¹⁹³ Compare S. 3, § 507(b)(1)(a) with H.R. 666, § 2.

rate tort system in an effort to deter illegal police conduct.¹⁹⁴ In particular, the Act proposes a bifurcated procedure—creating a method of recovery for the violated party and permitting sanctions against the officer.¹⁹⁵ As created, the system applies to federal, state and local officials if the case is prosecuted in federal court.¹⁹⁶

By the Violent Crime Control Act's imposition of liability on the United States, a victim of an illegal search may recover the full amount of actual damages.¹⁹⁷ The court, after a trial, determines the amount of damages to award.¹⁹⁸ The Act places no limitation on the amount awarded for actual damages.¹⁹⁹

In addition to actual damages, the Act proposes that a court in some instances might also impose punitive damages.²⁰⁰ The court, however, may award such damages only to those parties not convicted by the tainted evidence.²⁰¹ Furthermore, the statute caps punitive damages at \$10,000 and directs the courts to weigh a number of factors in setting the award.²⁰² In addition, Senator Dole's proposal would prohibit courts from providing an award exceeding \$30,000 unless the actual damage inflicted exceeded \$30,000.²⁰³ Within a certain range, therefore, the cap on punitive damages would slide downward as the amount of actual damages increases.²⁰⁴ Thus, once actual damages exceed \$20,000, the amount of punitive damages that a court

¹⁹⁴ See S. 3, § 507(c).

¹⁹⁵ *Id.*

¹⁹⁶ See *id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *id.*

¹⁹⁹ S. 3, § 507(c).

²⁰⁰ *Id.* This bill provides six factors to be considered by the court in determining whether to award punitive damages:

- (1) the extent of the investigative or law enforcement officer's deviation from permissible conduct;
- (2) the extent to which the violation was willful, reckless, or grossly negligent;
- (3) the extent to which the aggrieved person's privacy was invaded;
- (4) the extent of the aggrieved person's physical, mental, and emotional injury;
- (5) the extent of any property damage; and
- (6) the effect that making an award of punitive damages would have in preventing future violations of the fourth amendment to the Constitution.

Id.

²⁰¹ See *id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See S. 3, § 507(c).

could award decreases to zero when actual damages are \$30,000 or greater.²⁰⁵

To further deter illegal conduct, the Violent Crime Control Act also empowers the employing agency to discipline officers who violate a person's Fourth Amendment rights.²⁰⁶ Agencies, after providing notice and a hearing, may employ their discretion in determining the punishment.²⁰⁷ Agencies may not impose sanctions on officers who conducted a search in good faith.²⁰⁸

Returning to the introductory Bayless incident, if the Violent Crime Control Act had existed as contemporaneous law, it would have required Judge Baer to admit the drugs as evidence at trial.²⁰⁹ Carol Bayless, however, could bring a tort action for actual damages against the United States.²¹⁰ The proposed Act would permit this cause of action, even though a local officer conducted the search, because the prosecution introduced the evidence in a federal proceeding.²¹¹ In addition, as long as the use of the evidence did not result in her conviction, Ms. Bayless could also seek punitive damages up to \$10,000.²¹² Finally, the New York Police Department, after providing notice and a hearing, could take action to discipline Officer Carroll if the department determined that the officer had not conducted the search in good faith.²¹³

2. Exclusionary Rule Limitation Act of 1995

In 1995, Senator Strom Thurmond of South Carolina sponsored a measure, the Exclusionary Rule Limitation Act of 1995, that would curtail, rather than repeal, applications of the exclusionary rule.²¹⁴ This bill represents a more moderate response to criticisms of the exclusionary remedy.²¹⁵ The limitation, however, applies in all judicial proceedings as opposed to only criminal proceedings.²¹⁶ Senator Thur-

²⁰⁵ *See id.*

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *See id.*

²⁰⁹ *See* S. 3, § 507(c).

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *See id.*

²¹³ *See id.*

²¹⁴ S. 54, 104th Cong. (1995).

²¹⁵ *Compare id.* § 2 (good faith exception to exclusionary rule) *with* S. 3, § 507(b)(1)(6) (replace exclusionary rule with tort remedy).

²¹⁶ *See* S. 54, § 2.

mond's bill currently awaits the consideration and approval of the Senate Committee on the Judiciary at the time of publication.²¹⁷

The Exclusionary Rule Limitation Act maintains the current exclusionary remedy but limits the instances in which courts could apply it. The bill provides that courts should not suppress evidence on the grounds that the search or seizure violated the Fourth Amendment if the investigating officers undertook the search with an objectively reasonable belief that their conduct conformed with constitutional requirements.²¹⁸ In addition, the use of a warrant, unless obtained through intentional misrepresentation, would constitute *prima facie* evidence of such a reasonable belief.²¹⁹ Furthermore, the Exclusionary Rule Limitation Act, in a fashion similar to the Violent Crime Control Act, provides that judges should not exclude evidence from any judicial proceeding on the grounds that the seizure violated a statute unless the statute explicitly requires suppression.²²⁰ The measure, however, does not extend a good faith exception to searches conducted in violation of statutes that do explicitly provide for suppression.²²¹ Senator Thurmond's measure, therefore, differs on this point from the version passed by the House of Representatives.²²²

3. Crime Prevention Act of 1995

Finally, in 1995, Senator Jon Kyl offered an extensive bill, the Crime Prevention Act of 1995, which proposed legislative efforts intended to combat crime.²²³ The Crime Prevention Act contains a measure creating a good faith exception to the exclusionary rule for war-

²¹⁷ See 141 CONG. REC. S173-S201 (1995).

²¹⁸ S. 54, § 2. The proposed legislation provides in relevant part:

Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the fourth amendment . . .

Id.

²¹⁹ See *id.*

²²⁰ *Id.* The bill provides in relevant part:

Except as specifically provided by statute or rule of procedure, evidence which is otherwise admissible shall not be excluded in a proceeding in a court of the United States on the ground that the evidence was obtained in violation of a statute or rule of procedure, or of a regulation issued pursuant thereto.

Id.

²²¹ *Id.*

²²² Compare *id.* with H.R. 666, 104th Cong. § 2 (1995).

²²³ S. 1495, 104th Cong. (1995).

rantless searches.²²⁴ This exception duplicates the version passed by the House of Representatives, the Exclusionary Rule Reform Act of 1995, but also extends its application to cover the IRS and the ATF.²²⁵ At the time of publication, this provision awaited the review of the Senate Committee on the Judiciary.

IV. ANALYSIS OF THE PROPOSALS CURRENTLY IN CONGRESS

Despite, or due to, the Supreme Court's evolution in its treatment of constitutional criminal procedure, the crime rate in the United States has surged in the past decade.²²⁶ Public opinion polls indicate general dissatisfaction with the current crime situation.²²⁷ As such, the reforms of the exclusionary rule currently proposed in Congress provide an appropriate response to this public concern. The inherent weaknesses of the exclusionary remedy justify these proposed reforms. The exclusionary rule, however, retains some merit and Congress, therefore, should not wholly discard it. Rather, Congress should create a good faith exception to warrantless searches, similar to the one that already exists in the Fifth Circuit.²²⁸ Such a proposal would be constitutional and justified by policy concerns.²²⁹ In addition, because the Supreme Court has not yet expanded the good faith exception created in *Leon*, Congress should create such an exception by passing the Exclusionary Rule Reform Act.

Based on an analysis of the evolution of the exclusionary rule, the United States Supreme Court would probably uphold the current proposals to reform the exclusionary rule.²³⁰ The Supreme Court, in *United States v. Calandra*, recognized that the Fourth Amendment does not mandate the suppression of tainted evidence.²³¹ Because the Constitution does not mandate the suppression of tainted evidence, Con-

²²⁴ *Id.* § 601.

²²⁵ *See id.*

²²⁶ *See supra* note 29 and accompanying text. For an extensive compilation of crime statistics, see FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (1994) [hereinafter CRIME IN THE UNITED STATES].

²²⁷ A recent study indicated that 93% of Americans polled believe that addressing the crime problem should be an absolute priority of the federal government. *Federal Crime Control, supra* note 19 (testimony of Louis Freeh, FBI Director, Apr. 14, 1995).

²²⁸ *See United States v. Williams*, 622 F.2d 830, 840 (5th Cir. 1980).

²²⁹ *See Arizona v. Evans*, 115 S. Ct. 1185, 1191 (1995); *United States v. Leon*, 468 U.S. 897, 906-07 (1984); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

²³⁰ *See Leon*, 468 U.S. at 906-08; *United States v. Janis*, 428 U.S. 433, 453-54 (1976); *Calandra*, 414 U.S. at 348.

²³¹ 414 U.S. at 348.

gress possesses the power to curtail or repeal the exclusionary remedy by passing legislation.²³² In addition, the Supreme Court, in *United States v. Janis*, identified deterrence of illegal police activity as the sole justification for the application of the exclusionary rule.²³³ If Congress, therefore, determines that the suppression of tainted evidence does not adequately deter such illegal conduct, or if Congress determines that an alternative method more effectively deters such conduct, curtailing or repealing the exclusionary rule would not only be constitutional but also appropriate.

Noting this evolution of the exclusionary rule's rationale, the United States Court of Appeals for the Fifth Circuit in *United States v. Williams* determined that the Constitution permits the creation of a good faith exception to the exclusionary rule for warrantless searches.²³⁴ Recognizing deterrence as the justification for the exclusionary rule, the Fifth Circuit held that courts should not suppress evidence discovered by officers in the course of actions taken in good faith and based on a reasonable, though mistaken, belief that their actions complied with constitutional requirements.²³⁵ In *Williams*, a Drug Enforcement Agent ("DEA") officer, who had previously arrested the defendant for possession of heroin, arrested the defendant for violating a condition of her release order.²³⁶ The officer conducted a search incident to the arrest and discovered a packet of heroin in her possession.²³⁷ At trial, the district court suppressed the heroin because the arresting officer, a DEA officer, violated his statutory authority by arresting a party for violation of a release order.²³⁸ The Court of Appeals for the Fifth Circuit reversed this decision, reasoning that the arresting officer acted on a reasonable belief in the propriety of his actions and thus permitted the admission of evidence relating to drug possession.²³⁹ As a result, the *Williams* court declined to suppress the tainted evidence because it indicated that suppression would not serve to deter illegal activity on the part of the officer in the future.²⁴⁰ In the

²³² See *id.*

²³³ 428 U.S. at 458 n.3.

²³⁴ 622 F.2d at 840.

²³⁵ *Id.*

²³⁶ *Id.* at 834. Ironically, the officer, working on unrelated matters, accidentally spotted the defendant at an airport. See *id.*

²³⁷ See *id.*

²³⁸ See *id.* at 835.

²³⁹ *Williams*, 622 F.2d at 840.

²⁴⁰ *Id.*

Fifth Circuit, therefore, a good faith exception to the exclusionary rule for warrantless searches currently exists.²⁴¹

The ruling in *Williams* both identifies the need for an exception and provides a model for the federalization of such an exception.²⁴² Because the arresting officer believed that his actions conformed with existing law, the exclusion of the heroin would not serve to deter the officer from committing similar actions in the future.²⁴³ The suppression of such evidence, however, would result in the release of a party obviously guilty of both possessing an illegal drug and violating a release order.²⁴⁴ Suppressing the evidence in this instance, therefore, would have produced little or no societal benefit at a tremendous cost.²⁴⁵

As seen by the *Williams* example, mechanistic application of the exclusionary remedy may produce unjust results. In instances where the cost of exclusion clearly outweighs its benefits, therefore, courts should refrain from suppressing tainted evidence. The increasingly violent nature of crime combined with predictions that such trends will continue suggest that the cost of exclusion will frequently outweigh the benefits, justifying the efforts of the 104th Congress to extend the exclusionary rule's good faith exception to include warrantless searches.

The current high level of crime in the United States, even with a recent downturn, calls for the reform of the exclusionary rule.²⁴⁶ For the period from 1990 to 1994, the incidence of crime in relation to the population decreased 10%.²⁴⁷ This recent downturn, however, provides faint hope of a lasting decline in levels of crime. The total crime rate still lingers at a level 13% higher than that in 1985.²⁴⁸ During this same ten year period, the violent crime rate soared by 29%.²⁴⁹ In addition, the arrest rate among juveniles, the fastest growing segment of the population, increased by 6%, suggesting that a new crime wave may result in the near future.²⁵⁰

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See *Leon*, 468 U.S. at 918-19.

²⁴⁴ See *Williams*, 622 U.S. at 835.

²⁴⁵ See *Evans*, 115 S. Ct. at 1193.

²⁴⁶ See *id.*

²⁴⁷ See CRIME IN THE UNITED STATES, *supra* note 226, at 6.

²⁴⁸ See *id.*

²⁴⁹ See *id.* at 11.

²⁵⁰ See *Federal Crime Control*, *supra* note 19 (testimony of Louis Freeh, FBI Director, Apr. 14, 1995).

Even if this expected increase in crime never arrives, the current level, despite the recent downturn, is unacceptable. Of those polled, 93% of United States citizens believed that the federal government should make addressing the crime problem an absolute priority.²⁵¹ Some defenders of the present application of the exclusionary rule argue that the public exaggerates the problem due to the more recent introduction of crime, especially violent crime, to suburbia and smaller cities.²⁵² Such arguments overlook the role of a representative democracy—to respond to the demands of the voting public.

In addition, recent studies of the current level of crime justify an increased concern with the crime rate. In 1994, almost fourteen million incidents triggered the FBI's crime index.²⁵³ During this year, a crime index offense occurred in the United States at a rate of one every two seconds.²⁵⁴ Property crimes occurred at a rate of one every three seconds.²⁵⁵ As a result of these incidents, it is estimated that \$15.6 billion in property was stolen in 1994.²⁵⁶ This cost to society does not include the secondary costs of crime, such as the cost of attempting to prevent theft. In addition, during the same year, one violent crime occurred every seventeen seconds.²⁵⁷ This rate resulted in almost two million incidents of violent crime across the nation.²⁵⁸ Finally, law enforcement agencies recorded only a 21% clearance rate for collective crime index offenses.²⁵⁹ In sum, the American public may find such statistics unacceptable and demand increased action.

The current limitations of the exclusionary rule hinder the effectiveness of any increased law enforcement action. Numerous criticisms of the exclusionary rule have developed over the decades since its

²⁵¹ See *id.*

²⁵² See, e.g., Casey Combs, *Crime Rates in Mid-Sized Cities Surpassing Big-City Rates*, YORK DAILY REC., Apr. 28, 1996, at 7; Christopher Ringwald, *Forecast for Crime in Suburbs is Foggy*, TIMES UNION, Oct. 6, 1996, at C1.

²⁵³ See CRIME IN THE UNITED STATES, *supra* note 226, at 5. The Crime Index is composed of selective offenses used to gauge fluctuations in the overall volume and rate of crime reported to law enforcement. The offenses included are the violent crimes of murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assaults and the property crimes of burglary, larceny-theft, motor-vehicle theft, and arson. See *id.*

²⁵⁴ See *id.* at 4.

²⁵⁵ See *id.*

²⁵⁶ See *id.* at 6.

²⁵⁷ See *id.* at 4.

²⁵⁸ See CRIME IN THE UNITED STATES, *supra* note 226, at 10.

²⁵⁹ See *id.* at 6. Crimes can be cleared by arrest or by exceptional means when some element beyond law enforcement control precludes the placing of formal charges against the offender. See *id.*

inception.²⁶⁰ Such criticisms, due to their accuracy, deserve brief mention. First, the exclusionary rule lacks any degree of proportionality.²⁶¹ Application of the exclusionary rule leads to the same result regardless of whether the officer committed a serious violation or a minor indiscretion.²⁶² As Justice Powell noted in his dissent in *Stone v. Powell*, "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."²⁶³ Second, the exclusionary rule, because its application comes in a court procedure well after the arrest, punishes the prosecutor rather than the offending officer.²⁶⁴ Third, under the current application of the exclusionary rule, only criminals benefit while innocent victims of police violations are left without a remedy.²⁶⁵ The only benefit produced by the exclusionary rule, suppression of evidence at criminal trial, offers no recompense to those parties against whom the prosecution does not bring charges.²⁶⁶ As Justice Potter Stewart recognized, "[I]nnocent victims of illegal searches and seizures can derive no benefit from the exclusionary rule."²⁶⁷ Finally, suppression of tainted evidence probably does not even deter police illegalities but rather results only in the acquittal of guilty defendants.²⁶⁸ Police officers may conduct an illegal search for the purpose of confiscating contraband, and as long as no charges are brought, the violated party has little recourse.²⁶⁹ The exclusion of tainted evidence, thus, offers little deterrence of such searches.

Both the Exclusionary Rule Reform Act and the Violent Crime Control Act attempt to answer many of the recurring criticisms of the exclusionary rule.²⁷⁰ At the same time, the effectiveness of the exclu-

²⁶⁰ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting). For an excellent critique of the exclusionary rule, see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

²⁶¹ See *Stone v. Powell*, 428 U.S. 465, 490 (1976).

²⁶² See *id.*

²⁶³ *Id.*

²⁶⁴ See *Bivens*, 403 U.S. at 416 (Burger, C.J., dissenting). With rare exceptions, law enforcement agencies do not impose sanctions on the offending officer. See Oaks, *supra* note 260, at 725-27. Nothing in the application of the exclusionary rule encourages this practice to change. See *id.*

²⁶⁵ See *Bivens*, 403 U.S. at 415-16 (Burger, C.J., dissenting).

²⁶⁶ See *id.* (Burger, C.J., dissenting).

²⁶⁷ See Stewart, *supra* note 20, at 1396.

²⁶⁸ See Oaks, *supra* note 260, at 667, 678-709.

²⁶⁹ See *id.*

²⁷⁰ See H.R. 666, 104th Cong. § 2 (1995); S. 3, 104th Cong. § 507 (1995).

sionary rule as a deterrent should determine whether Congress should replace the remedy or merely curtail its application. If the exclusionary rule does deter some illegal police activity, then it retains value and Congress should not repeal it. If the exclusionary rule offers no real deterrent value, however, then Congress should discard the measure.²⁷¹ The problem, as noted by Justice Blackmun in *United States v. Janis*, lies in the difficulties of measuring the exclusionary rule's deterrent value.²⁷²

The exclusionary rule reforms contained in the Violent Crime Control Act most effectively respond to traditional criticisms of the exclusionary rule.²⁷³ The substitution of a tort remedy for the suppression of tainted evidence offers a remedy for both guilty and innocent victims of illegal searches.²⁷⁴ In addition, by requiring agencies to sanction violating officers after a hearing, this reform punishes the true wrong-doer rather than the prosecutor who lacks authority over the conduct of police officers.²⁷⁵

Furthermore, since this reform would subject violating officers to sanctions, it serves as a more effective deterrent of illegal police activity.²⁷⁶ Law enforcement officials could no longer conduct violative searches knowing that the subject of the searches possesses no remedy if the case does not go to trial.²⁷⁷ Finally, the awarding of damages, both actual and punitive, would offer a much more proportionate response than the mechanistic suppression of any tainted evidence.²⁷⁸

Despite these attractions, the Violent Crime Control Act also contains several potential flaws. The deterrence obtained by such a reform would only result from the regular imposition of sanctions upon offending officers combined with fair and adequate compensation to victims for their illegal acts.²⁷⁹ If judges or juries will not look past the unattractiveness of the complainant and show a willingness to punish law enforcement officials and compensate even convicted parties, then such a proposal offers no real deterrence.²⁸⁰ Currently, however, judges effectively exclude tainted evidence from trial, knowing that the sup-

²⁷¹ See *Janis*, 428 U.S. at 458 n.35.

²⁷² See *id.* at 449-50.

²⁷³ See S. 3, § 507.

²⁷⁴ See *id.* It should be noted, however, that the act severely restricts the remedy available to a convicted party by permitting the recovery of only actual damages. See *id.*

²⁷⁵ See *id.*

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See S. 3, § 507.

²⁷⁹ See Stewart, *supra* note 20, at 1387.

²⁸⁰ See *id.*

pression of this evidence may result in the release of a guilty party.²⁸¹ Nothing suggests, therefore, that judges could not be entrusted with the power to award actual damages to an accused while permitting the prosecution to continue. In fact, such a reform might more effectively deter illegal conduct as judges would be more inclined to provide compensation than exclude the reliable evidence because such a ruling would not result in the release of an apparently guilty party.

The issue of sanctioning offending officers, however, poses greater problems. The Violent Crime Control Act entrusts the agency that employs the offending officer with the power to determine an appropriate punishment.²⁸² The notion of an agency, especially in a competitive area such as law enforcement, disciplining overzealous officers produces a fair amount of skepticism, and rightfully so. Trials by jury, an alternative proposal, are unlikely to result in the more frequent punishment of guilty officers.²⁸³ An additional alternative, punishments determined by an administrative judge or magistrate, might result in more frequent punishments but also raises budgetary concerns, perhaps even including the creation of an additional federal agency.²⁸⁴

The imposition of increased liability on the United States produces a final problem with Senator Dole's proposal. Increasing the liability of the federal government would result in moderate to large payments by the federal government to violated parties. Although such an increase in expenditures by the federal government for this purpose might merely represent the cost of waging the war on crime, taking on additional liability nonetheless appears imprudent, especially during times of a budgetary crisis.

Due to the problems that may result from the passage of the Violent Crime Control Act, Congress should pass, with some modifications, the Exclusionary Rule Reform Act and thus create a good faith exception to the exclusionary rule for warrantless searches.²⁸⁵ Although such a reform would not necessarily answer the criticisms of the exclusionary rule as effectively as the Violent Crime Control Act, it also would not produce as many new concerns.²⁸⁶ Therefore, the Exclusionary Rule Reform Act represents an intermediate step, permitting the conviction of criminals by the admission of unintentionally

²⁸¹ See *Evans*, 115 S. Ct. at 1193.

²⁸² S. 3, § 507.

²⁸³ See *Stewart*, *supra* note 20, at 1387-88.

²⁸⁴ See S. 3, § 507.

²⁸⁵ See H.R. 666, 104th Cong. (1995).

²⁸⁶ See *id.*

tainted evidence while still deterring illegal police conduct without increasing federal expenditures.²⁸⁷

Because it applies only to acts conducted in good faith, this exception preserves the current deterrent value of the exclusionary rule.²⁸⁸ The prosecution may admit evidence at trial only if the seizing officer believed his actions complied with the Fourth Amendment and that belief was reasonable.²⁸⁹ Because a judge will not admit evidence that results from searches that the officer knew, or should have known, violated the Constitution, such a reform does not produce any increased incentive for an officer to engage in illegal activity.²⁹⁰ The exclusionary rule, therefore, would still serve to deter illegal police conduct without increasing the financial burden of the federal government.

Although the Exclusionary Rule Reform Act does not respond to the criticisms of the exclusionary rule as effectively as the Violent Crime Control Act, it does answer the most important criticisms. Still, this proposal does not resolve many of the problems of the exclusionary rule. For instance, this reform still provides no remedy for innocent subjects of illegal searches beyond those provided for under a § 1983 suit. Under this reform, however, criminals no longer benefit from innocent, although illegal, searches.²⁹¹ This proposal, thus, reforms the most damaging flaw of the current application of the exclusionary rule.

Despite the appropriateness of this reform, Congress must modify the Exclusionary Rule Reform Act before its final passage. As it currently exists, the proposed Act does not extend the good faith exception for warrantless searches to the ATF or the IRS.²⁹² Other than election politics, there lacks a justification for this distinction between federal agencies.²⁹³ Before its final passage, therefore, Congress should extend the good faith exception to all federal agencies as well as to local agencies who obtain evidence for use in federal court.

V. CONCLUSION

In conclusion, Congress should follow through on promised reform of the exclusionary rule. The exclusionary rule continues to

²⁸⁷ Compare H.R. 666 with S.3, § 507.

²⁸⁸ See *Leon*, 468 U.S. at 919-20.

²⁸⁹ See H.R. 666, § 2(a).

²⁹⁰ See *id.*

²⁹¹ *Id.*

²⁹² *Id.* § 2(d), (e).

²⁹³ See *supra* note 175 and accompanying text.

deter some illegal police activity and, therefore, Congress should not repeal the doctrine entirely.²⁹⁴ Blanket application of this mechanistic remedy, however, too frequently produces unjust results, and Congress must reform its flaws.²⁹⁵ The Exclusionary Rule Reform Act most effectively remedies the problems inherent in this imperfect doctrine; thus, with minor modification, Congress should approve this bill.

The Supreme Court will probably uphold these proposed corrective measures under the Exclusionary Rule Reform Act because they would not result in a reduced deterrent effect.²⁹⁶ The Supreme Court recognized over two decades ago that the Fourth Amendment does not mandate suppression of tainted evidence in all instances.²⁹⁷ In subsequent decisions, the Supreme Court has reduced the policies behind this doctrine to a single justification: deterrence of illegal police activity.²⁹⁸ The proposed congressional reforms would not further encourage such activities; thus, the Supreme Court would probably uphold these modifications as constitutional and consistent with the protections afforded by the Fourth Amendment.²⁹⁹

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²⁹⁴ See *Arizona v. Evans*, 115 S. Ct. 1185, 1193 (1995).

²⁹⁵ See *supra* notes 226-68 and accompanying text.

²⁹⁶ See *Evans*, 115 S. Ct. at 1193.

²⁹⁷ *United States v. Calandra*, 414 U.S. 338, 348 (1974).

²⁹⁸ See *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976); *Michigan v. Tucker*, 417 U.S. 433, 450 n.25 (1974); *Calandra*, 414 U.S. at 347.

²⁹⁹ See *Evans*, 115 S. Ct. at 1193.