UIC Law Review

Volume 50 | Issue 2 Article 8

Winter 2017

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Nicholas J. Kamide

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THE BENEFITS OUTWEIGH THE COSTS: ILLINOIS SHOULD APPLY STATE EXCLUSIONARY RULE AS A REMEDY FOR ARTICLE I SECTION 6 VIOLATIONS

NICHOLAS J. KAMIDE

I. INTRODUCTION

"A man's house is his castle."[1] That was the point William Pitt[2] was making in his speech to Parliament in 1763 when he stated:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow; the storm may enter, the rain may enter, but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[3]

The development of the ideas embodied in the Fourth Amendment have rich historical background rooted in American and English experience, growing specifically from the events preceding the American Revolution.[4] The coupling of the fiction that a man's home is his castle together with the events of the Revolution spawned the Fourth Amendment.[5]

The repugnance towards unlawful searches and seizures is based in the interest in protecting a man's privacy and property.[6] Thus, when a man is in his home, his expectation of privacy is at its zenith.[7] While these lofty ideals ultimately became enshrined in the Fourth Amendment, little was said as to how they would be protected. American courts have historically been the guardians against constitutional abuses. However, in the Fourth Amendment arena, until the emergence of the exclusionary rule, there was no clear mechanism to protect the interests that were enshrined into the Fourth Amendment by our founding fathers.[8]

Starting in the early 1970s, The United States Supreme Court has chipped away at the protections provided by the Fourth Amendment.[9] The Supreme Court has accomplished this primarily

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1. Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 79, 80 (1999).

2. William Pitt was a Member of Parliament and a British statesman of the Whig group during the middle to late 18th century. *See* Arthur Burns, *History of government: Past Prime Ministers*, GOV. UK (Sept. 16, 2015) https://history.blog.gov.uk/2015/09/16/william-pitt-the-younger-whigtory-1783-1801-1804-1806.

3. *See* Levy, *supra* note 1, at 79; *See also* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1 (5th ed. 2015) (quoting William Pitt's Eloquent Remarks stating "they will never cease to be quoted.").

4. *See* LaFave, *supra* note 3, § 1.1 (quoting a leading Fourth Amendment scholar).

5. *Id.; see also* Weeks v. United States, 232 U.S. 383, 390 (1914) (noting that the maxim that every man's house is his castle is made part of the fourth amendment to our constitution in the clauses prohibiting unreasonable searches and seizures and has always been held to high value by the citizens of the U.S.)

6. See *generally* Katz v. United States, 389 U. S. 347 (1967) (explaining the goals of the Fourth Amendment); *See also* United States v. Jones, 132 S. Ct. 945,49-50 (2012) (stating the two interests protected by the Fourth Amendment).

7. *See generally Katz*, 389 U.S. 347 (one of the principal goals of the Fourth Amendment was historically to keep the government out of citizens' homes).

8. *See generally Weeks*, 232 U.S. at 383 (noting that federal exclusionary rule was not derived from the explicit requirements of the Fourth Amendment).

9. *See* Timothy P. O'Neill, *Fresh Look at Fourth Amendment exclusionary rule*

through adopting numerous exceptions to the exclusionary rule.[10] These exceptions were born out of the increasingly cramped analysis employed by the Supreme Court in determining when to apply the exclusionary rule. However, the fact that the Supreme Court has been trending this way does not necessitate that Illinois courts must follow suit on this particular issue.[11] This remains true despite Illinois courts considering themselves to be in "lockstep" with the Supreme Court's interpretation of the search and seizure clause of the Fourth Amendment.[12]

This comment will argue that Illinois courts (1) are not restricted by their own judicially imposed lockstep doctrine from applying the exclusionary rule based on Article I Section 6 ("state exclusionary rule" herein);[13] and (2) *should* specifically apply the state exclusionary rule as the remedy for Fourth Amendment violations (and Article I section 6 violations) instead of the exclusionary rule based on the language of the Fourth Amendment ("federal exclusionary rule" herein),[14] which currently offers Illinois residents, and specifically criminal defendants, less constitutional protection.[15]

Part II begins with the historical origins of the interests embodied in the Fourth Amendment. Part II then discusses Illinois' constitutional analogue to the Fourth Amendment currently embodied in Article I Section 6 of the Illinois constitution (state search and seizure provision). This discussion includes background on the emergence of Illinois' judicially imposed "lockstep doctrine" as a way to interpret Article I Section 6. Finally, Part II discusses the emergence and development of the federal exclusionary rule and the state exclusionary rule as remedies for Fourth Amendment and Article I Section 6 violations, respectively.[16]

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eyes two wrongs, 161 CHI. DAILY L. BULL. 107 (June 2, 2015) (noting exclusionary rule is on shaky grounds).

10. *See id.*(discussing history of U.S. Supreme Court exceptions to the Exclusionary rule).

11. *See generally* Timothy P. O'Neill, *"Stop Me Before I Get Reversed Again": The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions from United States Supreme Court Review*, 36 LOY. U. CHI. L.J. 893, 915 (2005).

12. *Id.*; *See also* Ill. Const. Art. II, § 6 (1870) (prior to 1970, the search and seizure clause was contained here).

13. *See generally* People v. Brocamp, 307 Ill. 448 (1923) (giving birth to the Illinois exclusionary rule based on the Illinois state constitutional provisions). The United States Supreme Court has consistently said that whether there was a constitutional violation and whether to apply the remedy are completely separate questions for the courts to decide. *Id.*

14. *See Weeks*, 232 U.S. at 393 (stating the federal exclusionary rule has its constitutional basis in the Fourth Amendment).

15. I will refer to the exclusionary rule that arises out of Article I section 6 as the state exclusionary rule. Similarly, I will refer to the exclusionary rule that arises out of the Fourth Amendment as the federal exclusionary rule. Despite the similarity in language, both provisions have distinct rationales for their application.

16. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961) (before the United States Supreme Court held that the Fourth Amendment applied to the states, states were

Part III starts by discussing the threshold question of whether Illinois' "limited lockstep" doctrine bars application of the state exclusionary rule. Part III will then consider the United States Supreme Court's current jurisprudential basis for applying the federal exclusionary rule. Then Part III will consider the jurisprudence of the state exclusionary rule. Specifically, the differing jurisprudential bases that Illinois courts have employed in determining the applicability of the state exclusionary rule, as compared to the federal exclusionary rule. The main result is that Illinois' state exclusionary rule is more broadly applicable to Article I Section 6 (and thus Fourth Amendment) violations than the federal exclusionary rule.

In Part IV, this comment will first propose that Illinois courts are not constrained to apply the analytical framework the Supreme Court applies in determining the applicability of the federal exclusionary rule when applying the state exclusionary rule. Second, part IV will propose that Illinois courts *should* specifically apply the more constitutionally protective state exclusionary rule as the remedy for Fourth Amendment and Article I Section 6 violations.

II. BACKGROUND

A. Pre-Constitutional Notions of Search and Seizure

Search and seizure by the government without good cause or reason was not always repudiated in England and in the American Colonies.[17] A cursory look into English history and the early years of the American Colonies regarding the government's use of general warrants and writs of assistance will help explain the notions that gave rise to the Fourth Amendment. Furthermore, the following paragraphs will expound on these events which aid in any

forced to rely on their own constitutional provisions to protect their citizens from unreasonable searches and seizures).

17. *See generally* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791, 27 (2009) (giving a historical account of the notion of search and seizure in England Prior to the American Revolution noting that prior to 1485 there were almost no limits on search and seizure and also that there was no concept of unreasonable search and seizure). The notion of search and seizure began to develop rapidly between 1485 and 1642. *Id*. During this time, the Crown began to authorize general searches to be used as a powerful weapon of social, political, economic, and intellectual control. *Id.* Everything from "the food an Englishman put into his mouth and the cap that he wore on his head to the thoughts circulating in his mind cam to furnish legal pretexts" for a general search warrant. *Id.* Thus, proprietors of the homes being searches began to perceive this proliferation of searches as excessive and began to formulate the concept of unreasonable searches and seizures. *Id.*

interpretation of what is meant by "unreasonable search and seizure."[18]

The use of general warrants in England began in the fifteenth century.[19] General warrants allowed the government, through its agents, to search or seize without specifying what was to be searched, or what was to be seized.[20] Under the authority of general warrants, any officer of the King, on the basis of mere suspicion, could search and seize wherever, whatever, and whomever they wanted.[21] These officers could do this in order to, for example, collect royal revenues or taxes.[22]

Writs of assistance were a form of general warrant authorized by English Parliament in 1662, and became applicable for use in the American Colonies in 1696.[23] These writs empowered a customs official to enter any house, shop, cellar, warehouse, room or other place and break open doors, chests, trunks and other packages to seize any uncustomed goods.[24] To make matters worse, the writ of assistance lasted for the life of the sovereign whom they were issued under.[25] As a result, they constituted a long-term license for custom officials, at their sole discretion, to search or seize anyone they thought to be smugglers.[26]

In the American Colonies, there was a turning point for acquiescence of writs of assistance in 1761, when the high court in Massachusetts heard arguments in the *Paxton* case.[27] That year, King George II died, and the writ of assistance issued under his rule

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18. *See generally* People v. Tisler, 469 N.E.2d. 147, 161 (Ward J., dissenting) (stating that the fundamental principle of constitutional construction is that effect must be given to the intent of the framers and people who adopted it and that all other principles of construction are only guideposts).

19. *See* CUDDIHY, *supra* note 17.

20. *See* ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 5 (2003) (noting that it was not necessary to designate a person or place in the warrant although it typically was done); *see also* CUDDIHY, *supra* note 17.

21. *Id.*

22. *See* Levy*, surpa* note 1 at 81 (stating what general warrants for used for, in general).

23. *See generally* BLOOM, *supra* note 20, at 5 (noting that the Navigation Act of 1662 authorized writs of assistance to search anywhere for uncustomed goods and that by 1696 an Act of William III made writs applicable to the Colonies).

24. James M. Farrell, *The Writs of Assistance and Public Memory: John Adams and the Legacy Of James Otis*, 79 THE NEW ENG. Q. 533, 535 (2006) (explaining that writs of assistance had been part of legal culture in the colonies since 1696 when parliament pasted the "Act for preventing Frauds and regulating Abused in the Plantation Trade" giving the custom agent the power to conduct a general search without first appearing before a magistrate to establish probable cause for illegality); *see also,* Levy *supra* note 1, at 85 (discussing history surrounding the *Paxton* case).

25. *See* Farrell, *supra* note 24, at 535

26. *See id.*

27. Paxton's Case, Quincy 51 (Mass. 1761); *see* Farrell, *supra* note 24, at 533; *see also* Illinois v. Krull*,* 480 U.S. 340, 363 (1987) (O'Connor J., dissenting) (quoting *Paxton* case).

expired.[28] Consequently, a new sovereign had to issue a new writ of assistance for the writ to remain valid.[29] Attorney James Otis appeared on behalf of the people of Boston to argue against their issuance.[30] In his argument to the court, Otis denounced writs as "an instrument of slavery…of arbitrary power, the most destructive of English liberty and of the fundamental principles of the constitution."[31] Otis further stated that these writs were so destructive to liberty because they placed "the liberty of every man in the hands of every petty officer."[32] Otis' ultimately lost his case and the new writs were issued;[33] his arguments however, proved to be on the winning side of history.[34]

Otis' arguments are recognized as a significant driving force behind the ideas ultimately enshrined in the Fourth Amendment.[35] The *Paxton* case, together with two other similar and important developments that followed the *Paxton* case, the *Wilkes* cases[36] and the *Carrington* Case,[37] form the conceptual basis of the Fourth Amendment.[38] Evidence of this is found in a memoir of John Adams,

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28. *See* CUDDIHY, *supra* note 17, at 379-81 (stating the controversy between two customs officers desire to obtain new writs after the King's death and the association of prominent merchants from Boston who opposed the issuance of the new writs giving rise to the Paxton case).

29. *See* Farrell, *supra* note 24, at 535 (stating that a 1702 law required that all writs issued under the name of the deceased sovereign had to be renewed within six months by his successor).

30. *See generally* Levy, *supra* note 1 (discussing James Otis and the historical relevance of the arguments that Otis made prior to the American Revolution). James Otis was an attorney in Boston in the late 1700's. *Id.*

31. *Id.*

32. *See* Boyd v. United States, 116 U.S. 616, 625 (1886) (discussing history of the developments that led to the framing of the Fourth Amendment); *see also* Levy, *supra* note 1 (noting that Otis was actually mischaracterizes the law in England but was doing it in order to make his point which apparently, was a common technique amongst lawyers at this time).

33. *See* Levy, *supra* note 1.

34. *See id*. (noting that the fact that Otis lost is negligible, since his arguments are what made history); *See also Krull*, 480 U.S. at 363 (quoting *Paxton'* Case ("I will to my dying day oppose with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villainy on the other, as this writ of assistance is.").

35. *Id.*

36. *See generally* Levy *supra* note 1, at 86-8. The *Wilkes* cases were published in newspapers from Boston to Charleston and all throughout the colonies and served as a personification of constitutional liberty. *Id.*

37. Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765); *See also Boyd*, 116 U.S. at 623-30 (1886) (noting this case was familiar to every American statesman during the revolutionary and formative period of the United States and considered "this monument of English freedom . . . [a] true and ultimate expression of constitutional law [that] may confidently [be] asserted that its propositions were in the minds of those who framed the fourth amendment . . . and were considered sufficiently explanatory of what was meant by unreasonable searches and seizures."); *accord* Levy, *supra* note 1.

38. *See* CUDDIHY, *supra* note 17.

one of the members who attended the *Paxton* proceedings.[39] In fact, Adams found Otis' arguments so significant, he declared "Otis was a flame of fire… then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain."[40] There is a direct progression from Otis' arguments in the *Paxton* case, to the framing of Article Fourteen of the Massachusetts declaration of rights of 1780 by John Adams.[41] Further, James Madison's introduction of the proposal that became the Fourth Amendment borrowed largely from John Adams' framing of Article Fourteen of the Massachusetts constitution.[42]

In 1776, the year the Declaration of Independence was signed, there was a monumental shift in legal opinion that resulted in the massive repudiation of general warrants.[43] The first example of this repudiation was in June of 1776 when Virginia adopted a declaration of rights in which Article 10 read:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence are grievous and oppressive, and ought not to be granted.[44]

Subsequently, Pennsylvania, Delaware, New Hampshire and Massachusetts adopted their own constitutional declaration of rights.[45] Notably, Massachusetts' declaration of rights established a newfound right for its citizens to be free from unreasonable searches and seizures.[46]

However, when the United States Constitution was signed at the Philadelphia Convention on September 17, 1787, it did not

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39. *See* Levy, *supra* note 1.

40. *Id.*

41. *Id.*

42. *Id.* at 90. This differed from the Act of 1696 which provided that writs of assistance would be issued from England's court of Exchequer. *Id.*

43. *See id.* at 90. For instance, law books began recommending specific warrants which were given to justices of the peace and there was a shift in rhetoric in the colonies. *Id.*

44. *Id.*

45. *See id.* Significantly, John Adams attended the *Paxton* trial, heard Otis' arguments, and then drafted article 14 of the Massachusetts bill of rights. *Id.*

46. *See id.* at 90-6 (giving a chronology of the bill of rights in various colonies). Not all states had constitutions however. *Id.* And the ones that did, even if they had search and seizures clauses, did not necessarily abide by them. *Id.* Connecticut, in particular, had no constitution but its highest court in 1787 held that general warrants, at least in cases involving theft, are clearly illegal thus giving rise to the notion of probable cause. *Id.* Rode Island and Connecticut did not have a state constitution by 1782. *Id.* New jersey had one, but did not have a search and seizure clause; Maryland, New York, North and South Carolina and Georgia still employed general searches specifically to enforce their impost laws. *Id.*; Frisbie v. Butler, 1 Kirby (Conn.) 231, 235 (1787) (theft case in which the complainant sought a general warrant to search all places of the accused for his lost pork meat and the court finding this to be void because it was not particular and also suggesting that there was no probable cause for to suspect that Frisbie took the meat).

include a Bill of Rights analogous to any of the state constitutions previously mentioned.[47] Thus, the people of the United States of America were not protected from unreasonable searches or seizures from the federal government. However, when congress met in June of 1789, proposals to add a bill of rights were considered.[48] James Madison compiled many recommendations from the state ratifying conventions for Congress to consider. Eventually, congress adopted 12 proposed amendments which were sent to the states, and then ultimately ratified.[49] One of the proposals sent out by Madison read:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.[50]

Once ratified by the states, this proposal became the Fourth Amendment to the United States Constitution.

In sum, the protections embodied in what ultimately became the Fourth Amendment arose to protect the citizenry against the use of general warrants and writs of assistance. Notably, however, the Framers did not include any specific mechanism within the Fourth Amendment to enforce violations of the rights contained therein.[51] It would be up to the American courts to decide the appropriate remedy for constitutional violations of the Fourth Amendment.

B. Illinois' Analogue to the Fourth Amendment

State constitutions serve as an independent basis for protecting the rights of the people from the state government.[52] However, unlike some of the several states before the formation of

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47. *See also* Levy, *supra* note 1, at 96 (noting which states had constitutions prior to signing of the constitution).

48. *Id.*

49. Chief Justice Thomas J. Moyer, *The Bill of Rights--Its Origins and Its Keepers*, 18 OHIO N.U. L. REV. 187 (1991). Madison compiled over 200 proposals from state ratifying conventions and congress ultimately adopted a proposed bill of rights containing 12 amendments. *Id.*

50. *See* U.S. CONST. amend. IV (this was the final expression of the committee which was proposed and ultimately adopted formally to become the Fourth Amendment to the United States Constitution in 1791).

51. *See generally* United States v. Leon, 468 U.S. 897 (1984) (noting that the fourth amendment is a judicially created remedy designed to safe guard the fourth amendment rights through its deterrent effect and thus whether a violation of the fourth amendment happened and whether to apply the remedy for the violation are two separate questions).

52. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (stating that decisions of the U.S. Supreme Court "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.").

the United States Constitution, Illinois did not have a constitution until 1818, roughly 40 years after the United States Constitution was adopted.[53] Additionally, when Illinois finally adopted a constitution, the protections afforded to the people of Illinois were significantly less in the realm of search and seizure.[54] Furthermore, since the Fourth Amendment did not yet apply to the states, the people of Illinois were less protected from search and seizure by the state government.[55]

However, by 1870, a new constitution was adopted in Illinois. The search and seizure clause in this constitution was contained in Article II section 6. It read:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavits, particularly describing the place to be searched, and the person or things to be seized.[56]

Illinois' language was nearly identical to that of the Fourth Amendment save "supported by affidavits" in section 6 for "oath or affirmation" in the Fourth Amendment.

A century later, in 1970, Illinois adopted its current constitution.[57] The relevant search and seizure clause now contained in Article I Section 6 reads:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.[58]

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53. ANN M. LOUSIN, THE ILLINOIS STATE CONSTITUTION, A REFERENCE GUIDE 3 (2010) (giving background information on the first Illinois constitution). One of the requirements for forming a new state is that it have a constitution. *Id.* The original Illinois state constitution of 1818 did have a search and seizure clause and read:

> That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and that general warrants whereby an officer may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted.

Id.

54. See Ill. Const. art. VIII § 7 (1818) (Illinois's first state constitution).

55. See *id.* (clearly Illinois' original search and seizure clause lacked the force of the Fourth Amendment in that it uses the language "ought not" instead of "shall not.").

56. Ill. Const. art. II. § 6, (1870).

57. Ill. Const. art. I. § 6, (1970).

58. *Id.*

The new search and seizure clause added two new substantive rights not found in the Fourth Amendment or the prior 1870 constitution of Illinois:[59] (1) "invasions of privacy"[60] and (2) "interceptions of communications by eavesdropping devices or other means."

Despite the changes made to the search and seizure provision now contained in Article I Section 6 of the Illinois Constitution, again there was no mechanism for enforcing the constitutional provisions contained therein.[61] Furthermore, the changes it made in Article I Section 6 departed from the language of the Fourth Amendment and Article II section 6 of the 1870 constitution.[62] This gave rise to interpretative issues with regard to the Article I Section 6. The following section will discuss how Illinois courts dealt with these interpretative problems.[63]

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59. *See* Lousin, *supra* note 53. Regarding the first change from "effects to "other possessions" the committee notes state: "this is a clarifying amendment that gives expression to the effect of court decisions on the scope of the freedom from unreasonable search and seizure. *Id.*; *see also*, Record of Proceedings, Sixth Illinois Constitutional Convention, 30 (December 1970- September 1970) (this amendment to the search and seizure clause of the 1870 constitution was primarily to give effect to the scope of court decisions in Illinois that have defined effects as other possessions); *see also*, Lousin, *supra* note 53, at 48; *Accord*, ELMER GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS, 88 (Joseph P. Pisciotte ed., 1972).

60. *See* Lousin, *supra* note 53. The change to the search and seizure clause adds the words "invasions of privacy" to the clause creating the right to be free from unreasonable search and seizure. *Id.* The committee notes state: "the committee concluded that it was essential to the dignity and well-being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly person behavior were not subject to disclosure or review." *Id.* The committee reasons that it was doubtless that any person who chooses to enjoy the benefits of living in an organized society who enjoy the privacy he could enjoy if he were to live away from the institutions of government and therefore the committee inserted the right to privacy clause in order to protect individuals from government intrusion in the future with the development of new technology. *See* Record of Proceedings, *supra* note 59, at 31; *see also*, Gertz, *supra* note 59, at 168 (noting that the addition of the privacy clause has rebuked "Big Brother" which is important in an age when people are dwarfed, stifled, and made to fear by the intrusions in their personal lives Illinois has gone beyond any other constitution in strengthening the privacy of an individual).

61. Ill. Const. art. I § 6 (1970).

62. *See id.* (adding two substantive rights not contained in the Fourth Amendment).

63. *See, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983) (holding that whether probable cause is established under the Fourth Amendment by an informant's tip is determined by the totality of the circumstances). This case illustrates an example of an interpretative issue between the Fourth Amendment. *See id.* The issue is whether the Fourth Amendment has been violated for lack of probable cause. *Id.*

C. Emergence of the Illinois' "Limited Lockstep Doctrine" as a Way to Interpret Article I Section 6

The United States Constitution established a federalist form of government.[64] Accordingly, there are two layers of constitutional protection: state and federal.[65] Although seemingly counter-intuitive, two constitutions do not necessarily require two separate interpretations by the state or federal courts.[66] In fact, if a state is considered in "lockstep" with a particular federal constitutional provision, there will be no need to interpret the analogous state constitutional provision independently.[67]

Illinois, as of 2006, is considered to be in "limited lockstep" with the United States Supreme Court's interpretation of the Fourth Amendment.[68] In general, a lockstep doctrine asserts that where there is substantially similar language in a state constitutional provision, state judges must interpret their state constitutions based on the United States Supreme Court's interpretation of those analogous federal provisions.[69] However, there are different variations of lockstep, and Illinois has its own version that it applies in a specific way based on its own jurisprudence.[70]

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64. *See generally* U.S. Const.

65. *Compare*, U.S. Const. amend. IV *with*, Ill. Const. art. I § 6 (1970).

66. *See* Timothy P. O'Neill, *Escape from Freedom; Why " Limited Lockstep" Betrays Our System of Federalism*, 48 J. MARSHALL L. REV. 325, 329 (2014) ("freedom is enhanced by the creation of two governments, not one" and that each state is free to interpret their own constitution to go beyond the minimum guarantees of the federal constitution) (quoting *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011)).

67. *See* O'Neill, *supra* note 11 (describing lockstep as a state supreme court's determination that when its own state constitution contains a provision similar to one found in the federal constitution, it will interpret its state provision in the exact same manner as the United States Supreme Court interprets the federal provision).

68. People v. Caballes, 851 N.E. 2d 26 (2006).

69. *See generally* Honorable John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOYOLA U. CHI. L.J. 965, 66 (2013) (giving a brief background on what the lockstep doctrine posits).

70. *See* James K. Leven, *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63, 67 (2012) (stating Illinois is considered a "limited lockstep" state). In general, there are three basic analytical frameworks that have courts have employed in giving meaning to state constitutional provisions analogous to a federal constitutional provision. *Id.* These methods are: (1) the strict lockstep approach; (2) the interstitial approach; and (3) the primacy or primary approach. *Id.*; *see also Caballes,* 851 N.E. 2d 26 (noting there are three scenarios when considering the relationship between the state and federal constitution: (1) a provision may be unique to the state constitution and thus there is interpreted without reference to federal counterpart; (2) a provision in the state constitution is similar to that in the federal constitution in which case the language must be given effect; (3) the provision of the state constitution may be identical or synonymous with the federal counter part).

In Illinois, the adoption of the lockstep doctrine was unsettled for a long time. One of the first cases asserting that Illinois courts should be in lockstep with the United States Supreme Court's interpretation of the Fourth Amendment found that both provisions are "in effect the same…[and] are construed alike."[71] However, in 1970, the issue arose again with more force, since the 1970 Illinois constitution contained two additional substantive rights that the Fourth Amendment did not explicitly contain.[72]

The case addressing this issue was *People v. Rolfingmeyer*.[73] The issue in *Rolfingmeyer* was whether the Illinois Vehicle Code's implied consent section violated the self-incrimination provisions of the Illinois and Federal Constitutions.[74] In resolving this issue, the court was met with the choice of whether to continue to adhere to the "lockstep" doctrine under the new constitution.[75] In reaching its decision, the court relied primarily on the intent of the Illinois constitutional framers of the 1970 constitution, stating "[t]here is nothing in the proceedings of the constitutional convention [of Illinois] to indicate an intention to provide . . . protections against self-incrimination broader than those of the Constitution of the United States."[76] However, the majority was criticized for following the United States Supreme Court automatically merely because there is a comparable provision in the state constitution.[77]

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71. People v. Tillman, 1 Ill. 2d 525, 530 (1953). In *Tillman* the court based its holding on the provisions of Article II Section 6 of the 1870 Constitution. *Id.*; Ill. Const. art. II, § 6 (1870).;

72. Ill. Const. art I § 6, (1970). The new substantive rights arguably expanded the search and seizure clause of Article I Section 6. *See id.*

73. People v. Rolfingsmeyers, 101 Ill.2d 137 (1984); *see also*, Anderson, *supra* note 69 (giving analysis on the Lockstep issue discussed in Rolfingsmeyer).

74. *See generally Rolfingsmeyers*, 101 Ill.2d 137.

75. *Caballes*, 851 N.E. 2d 26 (giving history of lockstep doctrine); *see also Tillman,* 1 Ill. 2d 525, (noting that Illinois was in lockstep with the federal constitution).

76. *See Rolfingsmeyers,* 1 Ill. 2d 525 (stating in addition that there had been proposals to alter the language of the section but ultimately that the existing state of the law would remain unchanged).

77. *See id.* (Simon J., concurring) (noting also the instructions given to the delegates by Professor Paul Kauper "a state supreme court is free to give the freedoms recognized in the state constitution a reach that transcends interpretations given the fundamental rights by the United States supreme court…a state is free to develop its own higher standard."). Justice Simon also stated that in reaching their decision, the Majority presumed that the state constitution has the same content as the comparable provision in the federal constitution unless there is some indication to the content in the constitutional convention proceedings. *Id.* This is "an assumption which is incorrect and inverts the proper relationship between state and federal constitutions." *Id*. The sentiment of the concurrence was that the court is not bound to automatically follow the decisions of the United States Supreme Court when interpreting comparable provisions of the state and federal constitution. *Id.*

In *People v. Hoskins* the court came out with stronger language suggesting it was adamant about construing the Fourth Amendment and Article I Section 6 in similar fashion.[78] The court found that "any contention that it was intended that [Article I] section 6 of the Bill of Rights in our own constitution was to be interpreted differently the Supreme Courts interpretations of the… Fourth Amendment to the United states constitution cannot be supported."[79] Again the dissent criticized the majority for abdicating its obligation to independently interpret and give effect to its bill of rights.[80]

The seminal case on the issue of whether Illinois courts would be in lockstep with the United States Supreme Court's interpretation of the Fourth Amendment was *People v. Tisler*.[81] The issue in *Tisler* was whether as a matter of state constitutional law, Illinois should reject the United States Supreme Court's newly minted test for probable cause under the Fourth Amendment.[82] Resolving the issue squarely implicated whether Article I Section 6 offered the same protections as the Fourth Amendment, and if so, whether Illinois courts should be in lockstep with the Supreme Court's interpretation of the Fourth Amendment.[83]

In resolving the issue, the *Tisler* court focused on the intent of the framers of the 1970 Illinois constitutional convention.[84] The court found that "the convention manifested no intent to expand the nature of the protection afforded by the Fourth Amendment."[85] Thus, despite expanding the protections of Article I Section 6 to include a right to privacy, and right to be free from eavesdropping, this did not necessarily expand the search and seizure clause of Article I Section 6.[86] Further, the court found that prior cases on search and seizure had indicated that the Illinois search and seizure clause is measured by the same standards used in defining the

78. People v. Hoskins, 461 N.E.2d 941, 945 (Ill. 1984).

79. *Id.*; *See also Caballes*, 851 N.E.2d 26 (noting history of lockstep).

80. *Hoskins*, 461 N.E.2d at 954 (Simon, J., dissenting) ("[Illinois is not] bound to follow automatically the decisions of the United States Supreme Court interpreting the comparable provision contained in the Fourth Amendment.").

81. *Tisler*, 469 N.E.3d. 147.

82. *Id.*; *compare,* Illinois v. Gates, 462 U.S. 213 (1983) (rejecting the Agular-Spinelli Standard as basis for determining probable cause replacing it with the totality of circumstance test for probable cause thereby finding sufficient evidence to support a search warrant where police acted on an anonymous tip with corroborating circumstances), *with* People v. Gates*,* 423 N.E.2d 887 (Ill. 1981) (determining that under the Agular-Spinelli standard for determining probable cause, an anonymous letter sent to police department detailing proposed drug activities with corroborating evidence was insufficient to support a search warrant).

83. *Tisler*, 469 N.E.3d. 117.

84. *Id.*

85. *Id.* (the court was referring to the 1970 constitutional convention committee reports).

86. *See* Ill. Const. art. I, § 6 (1970) (adding new substantive rights); *see also*, Ill. Const. art. II, §6 (1870).

protections against unreasonable searches and seizures contained in the Fourth Amendment.[87]

The majority in *Tisler* proceeded to announce the following test for when it would depart from the United States Supreme Court's interpretation of the Fourth Amendment:

> When the language within our state and federal constitutions is nearly identical, departure from the United States Supreme Court's construction of the provision will generally be warranted only if we find in the language of our constitution, or in the debates and the committee reports of the constitutional convention, something which will indicate that the provisions of our constitution are intended to be construed differently than are similar provisions in the federal Constitution, after which they are patterned.[88]

Despite the announcement of the new test for departing from lockstep, the dissent and concurrence contended that the United States Supreme Court's decisions should be guides and not mandatory.[89] The dissent declared the lockstep doctrine dangerous, stating in effect that it is a self-imposed rule by the courts on interpreting their own constitution that restricts potential constitutional protections because the court essentially truncates its analysis.[90]

Following *Tisler*, the Illinois Supreme Court indicated that the lockstep doctrine was not quite settled, with one justice even claiming: "it appears that the lockstep doctrine is on its last leg."[91] In some cases that followed *Tisler*, the court reiterated its intent to not depart from the lockstep approach, stating in effect that Article I Section 6 provided the same level of protection as the Fourth Amendment.[92] However, other cases either provided exceptions to the lockstep doctrine, or seemingly did not follow it.[93]

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87. *See Tisler*, 469 N.E.3d. at 156; *But see* Leven*, supra* note 70 (regarding cases of lockstep where Illinois diverged).

88. *See Tisler*, 469 N.E.3d. at 156 (announcing the test for departing in interpretation of Article I Section 6 from the Fourth Amendment).

89. *Id.* at 161 (Ward J., concurring). Justice Ward stated, "a court, in interpreting a constitution, is to ascertain and give effect to the intent of the framers of it and the citizens who have adopted it" and " this is the polestar of [constitutional] construction, all other principles of construction are only rule or guides to aid in the determination of intention of the constitution's framers." *Id.* (Ward, J., concurring). Furthermore, Justice Ward stated article I section 6 is not more expansive than the fourth amendment: "it is interesting to note that the delegates did expand the search-and-seizure provisions in the proposed constitution to include a guarantee of free from unreasonable eavesdropping and invasions of privacy." *Id.*

90. *Id.* at 166 (Goldenhersh J., dissenting).

91. People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 881 (Ill. 1988) (Clark J., Concurring).

92. *See Caballes*, 851 N.E.2d at 26. *See, e.g.*, People v. Cox, 202 Ill. 2d 462 (2002); People v. Lampitok 207 Ill. 2d 231 (2003).

93. *See* People v. Krueger, 675 N.E.2d 604 (1996) (declining to follow the United States Supreme court decision in *Krull,* primarily based on United States Supreme Court Justice O'Connor's dissent in *Krull* which highlighted the flaws in the

Finally, in 2006, the Illinois Supreme Court reaffirmed in *People v. Caballes* that it would continue to adhere to the lockstep doctrine and employ the test set out in *Tisler*.[94] However, in *Caballes,* the court conceded that it was not in "strict lockstep" with the United States Supreme Court.[95] The court in *Caballes* instead stated that Illinois operates under what they declared a "limited lockstep approach."[96]

Under the "limited lockstep approach," Illinois courts will "assume the dominance of federal law and focus on the gap-filling potential of the state constitution."[97] In effect, this approach first looks at the federal constitution, and if the federal constitution provides no relief, then it turns to the state constitution.[98] In doing so, the court will determine whether a unique state history or state experience justifies departure from federal precedent.[99] In departing from lockstep, the court will consider both "state tradition" and "state values."[100] This potentially can include: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics.[101]

As a practical matter, in the realm of Article I Section 6, litigants must argue to the court that there was some intention by the framers of the 1970 Illinois constitution to depart in some way, from Fourth Amendment interpretation by the United States Supreme Court.[102] In addition, departure can also be justified by some state tradition or state value that would allow Illinois courts to act outside of the lockstep doctrine.[103] Thus, departure from lockstep will have to pass the test set out in *Tisler* and reaffirmed in *Caballes*.[104]

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reasoning of the majority's opinion in *Krull*); *see also Krull*, 480 U.S. at 349.

94. *Caballes,* 851 N.E.2d 26; *See also Tisler*, 469 N.E.3d. at 156 (stating the test for departure from the "lockstep doctrine" in Illinois).

95. *Id.*

96. *Caballes*, 851 N.E.2d at 42-3. The Court's "limited lockstep" approach falls somewhere between strict lockstep and the interstitial approach. *See id.*

97. *Id.*

98. *See id.*

99. *Id.*

100. *Id.*

101. *See* Leven, *supra* note 70, at 115 (noting that the Illinois Supreme Court has a long-standing tradition of providing broader constitutional protection than the U.S. Supreme Court).

102. *See generally Tisler*, 469 N.E.3d. at 157 (setting out the test for departing from lockstep with the United States Supreme Court's decision interpreting the Fourth Amendment). An example of the framers of the constitution intent to depart might be the addition of two new substantive rights. *See* Ill. Const. Art. I §6 (1970). Another example that could justify departure is a state value. *See* Leven, *supra* note 70.

103. *See* Leven, *supra* note 70, at 115.

104. *See Tisler*, 469 N.E.3d. at 157 (setting out the test for departing from interpreting the state and federal constitutions in lockstep); *See also Caballes*, 851 N.E 2d 26 (reaffirming the test for departure from lockstep set out in *Tisler* and describing Illinois' version of Lockstep and "limited lockstep" as opposed to strict

D. Emergence of the Exclusionary Rule as the Remedy for Unlawful Searches and Seizures at Both the Federal and Illinois Level

The foregoing has discussed Illinois' courts approach to *interpreting* Article I Section 6 with respect to the Fourth Amendment: when the United States Supreme Court finds that certain government conduct constitutes a search or a seizure for Fourth Amendment purposes, Illinois courts will hold that same conduct also violates Article I Section 6.[105] However, whether exclusion of evidence is warranted for this constitutional violation is a separate question not specifically found in the language of either the Fourth Amendment or Article I Section 6.[106] The exclusionary rule analysis emerged in American court's jurisprudence roughly 100 years ago.

1. Mechanics of a Fourth Amendment Analysis

Before discussing the emergence of the exclusionary rule, it is worth briefly discussing how state and federal courts analyze a potential Fourth Amendment violation. The Fourth Amendment protects against two types of government activity: Searches and seizures.[107] In general, a search is defined as an impingement on one's reasonable expectation of privacy.[108] A seizure can take two forms: (1) a seizure of a person such as an arrest or (2) a seizure of someone's possessions.[109] A seizure of an individual is defined as a reasonable belief that a person does not feel they have the right to leave.[110] Similarly, a seizure of an individual's possessions is defined

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lockstep, thereby leaving room for departure from federal precedent).

105. *See generally Caballes*, 851 N.E.2d at 26 (re-affirming Illinois' adherence to lockstep).

106. *See* U.S. U.S. CONST. IV (nothing mandating exclusion of illegally seized evidence); *see also* Ill. Const. art. I, § 6 (1970) (nothing mandating exclusion of illegally seized evidence).

107. *See Katz,* 389 U.S. 347 (holding that the trespass doctrine is no longer the only controlling test to determine a search, and adopting the reasonable expectation of privacy test, and finding that the Fourth Amendment protects people and not places); *see also* United States v. Jones, 560 U.S. 400 (2012) (holding that the basic trespassory search test was still applicable in light of *Katz* so that government trespasses on a protected area that constitutes a search)

108. *See Katz*, 389 U.S. 347.; *See also Jones*, 560 U.S. at 404 (concluding that in light of the historical understanding of the Fourth Amendment that the text of the Fourth Amendment reflects a close connection to property and fourth amendment jurisprudence was tied to common-law trespass). A search has also been defined as a physical or trespassory intrusion on a person's property by the government. *Id.*

109. *See* United States v. Jacobsen, 466 U.S. 109, 113 (stating that the text of the Fourth Amendment protects two types of expectations one involving searches and the other seizures).

110. United States v. Mendenhall, 446 U.S. 544 (1980) (concluding that a person

as a meaningful interference with an individual's possessory interest in that property.[111] Accordingly, the threshold question to any Fourth Amendment analysis is to show that there has either been a search or seizure of some sort by the government.[112]

Showing a governmental search or seizure is only the first step in the analysis. In order for there to be an unconstitutional search or seizure, the second prong, and ultimate touchstone of the analysis, requires the search or seizure to be unreasonable.[113] The reasonableness requirement generally means that the police must obtain a search warrant, based on probable cause, that there is evidence of a crime in the place they seek to search.[114] However, there are many exceptions to the warrant requirement.[115] Similarly, if police wish to make an arrest (seizure of person) or seizure of

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has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surround the incident, a reasonable person would have believed that he was not free to leave). Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave would be: (1) threatening presence of multiple officers; (2) the display of a weapon by an officer; (3) some physical touching of the person; (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Id.*; *see*, *e.g.*, Terry v. Ohio, 392 U.S. 1, 19 (suspect was seized when the officer conducted a pat down for weapons).

111. *Jacobsen*, 466 U.S. at 113 (defining what constitutes a seizure of effects in general). Further, the court has held that seizure of personal property is generally per se unreasonable within the meaning of the fourth Amendment unless it is pursuant to a judicial warrant based upon probable cause and meets the particularity requirement of the fourth amendment. *See* United States v. Place, 462 U.S. 696 (1983) (holding that the police can justifiably conduct a limited seizure of effects without searching it but because the detention was 90 minutes long this exceeded the limited scope of the seizure making it unreasonable under the fourth amendment). However, there are certain limited exceptions such as exigent circumstances or the probable cause exception to terry stops of the person that are also applicable to effects. *See id*. at 702-3.

112. *See Jacobsen*, 466 U.S at 113 (stating that the text of the fourth amendment protects two types of expectations from an individual: one involving searches and one involving seizures).

113. Brigham City, Utah v. Stuart, 547 U.S. 389, 403 (2006); *see also* Pennsylvania v. Mimms, 434 U.S. 106 (1977) (observing that the touchstone of Fourth Amendment analysis is always the reasonableness in all the circumstances regarding the alleged search or search which constituted the alleged violation). The Fourth Amendment only protects against unreasonable search and seizures. *See id*.

114. New York v. Belton, 453 U.S. 454 (1981) (police may not conduct a search unless they first convince a neutral and detached magistrate that there is probable cause to do so); *but see* Payton v. New York, 445 U.S. 573, 586-87 (noting that it is well-settled that seizure of property or even a person in a public space where there is sufficient evidence to connect the person or property to the crime does not require a warrant due to the lack of expectation of privacy and exigency)

115. *See, e.g, Stuart*, 547 U.S. at 403 (noting the exceptions to the warrant requirement of the Fourth Amendment). One exception to the warrant requirement is if police witness the crime allegedly committed. If this happens, they can make an arrest without a warrant. *See generally id*.

property, they likewise must obtain an arrest warrant, based on probable cause, that the suspect committed the crime.[116]

2. Emergence and Development of the Federal Exclusionary Rule as the Remedy for Fourth Amendment Violations

Until 1914, there was no rule mandating that evidence must be excluded at trial due to a Fourth Amendment violation.[117] At the federal level, the exclusionary rule emerged in *Weeks v. United States*.[118] The issue in *Weeks* was whether evidence obtained in violation of the Fourth Amendment could be used against the defendant at trial.[119] The majority stated that the effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under certain limitations and restraints in the exercise of their power and authority.[120] In doing so, "the courts will forever secure the people, their persons, their houses and their papers and effects against all unreasonable searches and seizures under the guise of law."[121]

After discussing the purpose of the Fourth Amendment, the *Weeks* court declared the remedy for a violation thereof, and the rationale for the remedy.[122] Simply put, the remedy is to exclude the unlawfully seized evidence from the prosecutor's case.[123] The Court reasoned that allowing the unlawfully seized evidence against the accused at trial, would effectively render the Fourth Amendment "of no value…[and thus] might as well be stricken from the constitution."[124] The Court focused on giving life to the words of the

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116. California v. Hodari D, 499 U.S. 621, 624 (1991) (stating that an arrest is the quintessential seizure of person which is certainly accomplished by a physical touching but is not necessarily the only way to seize a person).

117. *See Weeks*, 232 U.S. 383 (holding the federal exclusionary rule applies to federal prosecutions); *See also* Wolf v. Colorado, 338 U.S. 25, 32 (1949) (holding that the federal exclusionary rule is not mandated in state prosecutions); *See also* U.S. CONST. amend. IV.

118. *Weeks*, 232 U.S 383.

119. *See id.* In *Weeks*, the defendant was arrested without a search warrant and the officers took possession of his papers and other possessions from to be used against him at trial. *See generally id.* (giving a background of the circumstances of the case and holding that the evidence must be excluded due to the constitutional violation).

120. *Id.*

121. *Id.*, at 392 (the court stated that to find otherwise would be destructive of the rights secured by the federal constitution and the courts should not sanction a contrary practice in their duty to uphold the Constitution.).

122. *Id.*; *but see Wolf*, 338 U.S. at 32 (holding that unlawfully seized evidence can be used in state prosecutions despite that same evidence being inadmissible in federal prosecutions).

123. *See Weeks,* 232 U.S. 383.

124. *Id.* (stating "conviction by unlawful seizure…should find no sanction in the judgment of the courts, which are charged at all time with the support of the Constitution, and which people of all conditions have right to appeal for the maintenance of such fundamental rights.").

Fourth Amendment and making sure the Court maintained its integrity by not allowing illegally seized evidence in at trial.[125]

However, *Weeks* only applied to federal courts until 1961 when *Mapp v. Ohio* selectively incorporated[126] the protections afforded by the Fourth Amendment to all the states by way of the Fourteenth Amendment's due process clause.[127] Accordingly, a Fourth Amendment violation by a state actor could trigger the federal exclusionary rule in a state criminal trial to suppress the illegally seized evidence.[128] Effectively, state constitutional provisions like Article I section 6 of the Illinois Constitution ceased to be the sole protections from unlawful searches and seizures.[129] Nevertheless, state courts were still free to find that exclusion was warranted based on their state constitutional provision protecting against illegal searches and seizures.[130]

Importantly, *Mapp's* holding reiterated the rationale for applying exclusionary rule first discussed at the federal level in *Weeks*.[131] In short, *Mapp* held that the purpose of the exclusionary rule was to (1) compel respect for the Fourth Amendment by state actors and (2) acknowledge the imperative of judicial integrity in administering justice.[132] The court stated "[i]f the criminal goes free, it is the law that sets him free because the government cannot 'fail to observe its own laws.'"[133] It was apparent that the general

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125. *See generally id.*

126. Selective incorporation is the idea that the constitutional rights set forth in the bill of rights are made applicable to the states over time by court decisions. *See* McDonald v. City of Chicago, Ill, 561 U.S. 742 (2010) (discussing selective incorporation theory and total incorporation theory).

127. *See Mapp*, 367 U.S at 658 (noting that the exclusionary rule is an essential part of the Fourth and Fourteenth Amendment). Accordingly, the Fourth Amendment protections are applied to state actors in addition to federal actors. *Id.*

128. *See id.*

129. *Compare Wolf,* 338 U.S. 25 (holding that in a prosecution is a state court for a state crime the fourteenth amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure), *with* Ill. Const. art. II, § 6 (1870) (the relevant search and seizure clause which was relied on for the Illinois courts holding in *Brocamp*).

130. *See* O'Neill, *supra* note 66, at 333 (noting that the dual sovereignty found in our federal system provides state courts with the freedom to resolve issues based on state constitutional provisions); *See also Mapp* 367 U.S. 643 (making the Fourth Amendment applicable to the states via the fourteenth amendment). Further, since the Fourth Amendment was made applicable to the states, it effectively became another source of protection. *See id.*

131. *Mapp*, 367 U.S. at 656 (holding in part that the remedy for Fourth Amendment violation is to exclude the illegally seized evidence because "to hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.").

132. *Id.* This removed the incentive by police to disregard the Fourth Amendment. *Id.* Furthermore, the Court acknowledged it would not condone using illegal evidence to convict someone. *Id.*

133. *See id.* at 659 (quoting Justice Brandeis) ("[o]ur 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

purpose of applying the exclusionary rule was to maintain the integrity of the judiciary, and at the same time, compel respect for the Fourth Amendment by removing any incentive to disregard it.[134] It was equally apparent that the federal exclusionary rule was an "essential part" of the Fourth Amendment, otherwise it could not be a constitutional mandate by which the states were bound.[135]

a. Unprecedented Introduction of the Cost-Benefit Analysis for Determining Applicability of the Federal Exclusionary Rule

Despite the holding in *Weeks* and broad dicta in *Mapp*, the Burger Court began to slowly erode the applicability of the federal exclusionary rule.[136] In a line of cases decided by the United States Supreme Court starting in the early 1970's, the Supreme Court chipped away at *Mapp's* holding. In doing so, the Court laid the jurisprudential basis for the "good-faith exception" to the federal exclusionary rule.[137]

In *United States v. Calandra*, the Court de-constitutionalized the federal exclusionary rule.[138] The court accomplished this by stating that the principal, "if not the sole" objective of the exclusionary rule, is to deter future unlawful police conduct.[139] Instead of applying the federal exclusionary rule primarily for the purpose of remedying a Fourth Amendment violation, the rule was to be applied to deter future unlawful police conduct.[140] Accordingly, the Court went on to hold that a witness called to testify before a grand jury may not refuse to testify on grounds that the questions are based on illegally seized evidence, since this would not accomplish deterrence.[141]

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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.").

134. *See id.* (acknowledging the Supreme Court would not condone using illegal evidence to convict someone).

135. *Id.*

136. *See* O'Neill, *supra* note 10 ("beginning in 1969, the Burger court began limiting the scope of the exclusionary rule.").

137. *See generally Leon*, 468 U.S. 897 (the good-faith exception is generally an exception to the exclusionary rule whereby a court finds that a police officer or other government agent or official, despite violating the Fourth Amendment, acted in good-faith and thus the exclusionary rule does not apply).

138. United States v. Calandra, 414 U.S. 338 (1974).; *See generally*, Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357 (2013) (making the point that the Fourth Amendment is constitutionally based as a right and not merely a remedy).

139. *See Leon*, 468 U.S. at 931 (Brennan J., dissenting) (noting that the idea that the exclusionary rule is merely a remedy was first brought up in *Wolf*, 338 U.S. 25).

140. *Calandra*, 414 U.S. 338.

141. *See generally Calandra,* 414 U.S. 338; *See also* LaFave, *supra* note 3 (noting purposes of the exclusionary rule).

In reaching its holding, the Court introduced the notion of a "balancing test," never mentioned in *Mapp,* or any case before, for determining the applicability of the federal exclusionary rule.[142] The specific balancing test in *Calandra* involved weighing "the potential injury to the historic role and function of the grand jury against the potential deterrence benefits of the exclusionary rule as applied in this context."[143] Specifically, the cost-benefit analysis weighed whether there were sufficient deterrence effects on police that would result from excluding evidence from a grand jury.[144] In turn, this dictated whether applying the exclusionary rule was warranted.[145] The Court held there were not sufficient deterrence benefits.[146]

Calandra dealt with application of the federal exclusionary rule prior to the start of a criminal trial.[147] Nevertheless, it laid the foundation for thinking of the exclusionary rule in terms of a cost-benefit analysis. Importantly, the introduction of the cost-benefit analysis in *Calandra* meant that the application of the exclusionary rule (i.e. excluding unlawfully seized evidence from the from prosecutors use against the defendant) itself was not sufficient to accomplish deterrence.[148] Rather, whether the exclusionary rule should be applied was conditioned upon whether the Court determined the deterrence benefits from applying the rule outweighed the costs.[149] Thus, the introduction of cost-benefits analysis made application of the exclusionary rule inherently more malleable.[150] Furthermore, the cases that followed only solidified the Court's reasoning in *Calandra,* and propounded police deterrence as the primary purpose of the applying the exclusionary rule.[151]

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142. *See* Bloom, *supra* note 20 (giving a background on the cost/benefit analysis employed by the court starting in the 1970s).

143. *Calandra*, 414 U.S. at. 349. The issue in *Calandra* was whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. *Id.* The Court found that it is unrealistic to assume that application of the exclusionary rule to grand jury proceedings would further the goal of deterrence. *Id.*

144. *See generally Calandra*, 414 U.S. 338.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.*; The holding in *Mapp* suggested that applying the exclusionary rule for a Fourth Amendment violation was also sufficient to accomplish deterrence. *See Mapp*, 367 U.S. 643 (discussing that the exclusionary rule required to command respect for constitution).

149. *See generally* Calandra, 414 U.S. 338

150. See Bloom, supra note 20, at 26.

151. *See, e.g.*, United States v. Janis, 428 U.S. 433 (1976) (holding that exclusionary rule in federal civil proceedings, where the United States is a party, has no applicability since the deterrence benefits of applying the rule would be marginal and not outweigh the costs); Stone v. Powell, 428 U.S. 465 (1976) (relying on the Calandra balancing test and holding that deterrence was the primary purpose of the exclusionary rule and therefore where the state has provided an opportunity for a

b. Leon's Application of the Cost-Benefit Analysis to the Criminal Trial

Despite the *Calandra* the line of cases, until 1984, the federal exclusionary rule undoubtedly applied to a defendant being criminally prosecuted, if the defendant made a showing that police conducted an unreasonable search or seizure.[152] However, in 1984 the United States Supreme Court decided *United States v. Leon*.[153] This case added a third prong to the analysis: even if there was a search or a seizure, and it was found to be unreasonable, if the state could make a showing that the police officers acted in "good-faith" on a facially valid warrant, the evidence would not be excluded.[154] Effectively, this prevented the federal exclusionary rule from applying despite there being a Fourth Amendment violation.[155] As a result, the unlawfully seized evidence could be admitted at a criminal trial, and used to convict the defendant.

Leon made the categorical shift of applying the cost-benefit analysis to the criminal trial in order to determine whether the federal exclusionary rule was applicable.[156] In *Leon,* there was a facially valid search warrant issued by a state court judge, which lead to a search that produced a large amount of drugs.[157] The evidence was ultimately suppressed by the trial court based on a lack of probable cause contained in the affidavit for search warrant.

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full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal Habeas Corpus relief even on the grounds that evidence was obtained during an unconstitutional search or seizure); *compare Janis*, 428 U.S. 433, *and Powell*, 428 U.S. 485, *with* United States v. Havens, 446 U.S. 620 (1980) (making a categorical shift in the use of illegally seized evidence in holding that illegally seized evidence can be used by the government at a criminal trial for impeachment purposes despite it not being allowed in the government's case-in- chief) and Nix v. Williams, 467 U.S. 431 (1984) (adopting the inevitable discovery exception to the federal exclusionary rule thereby allowing illegally seized evidence in the state's case-in-chief if the court found that the police would have inevitably discovered it despite the unconstitutional search since the deterrent effect of applying the exclusionary rule was marginal).

152. See *Weeks*, 232 U.S. 383; See also *Leon*, 468 U.S. 897 (adopting the good-faith exception to the exclusionary rule); but *see generally Havens*, supra note 151 (allowing illegally seized evidence in at trial to impeach defendant's testimony). However, it is important to note that this case didn't allow this exception until 1980. *See id.*

153. *Leon*, 468 U.S. 897.

154. *See id.* However, under *Mapp*, evidence seized pursuant to a facially valid warrant, later declared invalid, would trigger the federal exclusionary rule and suppress the illegally seized evidence. *See generally Mapp*, 367 U.S. 643.

155. *See id.*

156. *See, e.g., Calandra*, 414 U.S. 338; *Williams*, 467 U.S. 431; *see also Leon*, 468 U.S. at 902 (Stevens, J., dissenting) (finding, for the first time, that unlawfully seized evidence can be used to convict)

157. *Leon*, 468 U.S. at 902.

The appellate court affirmed.[158] The critical issue raised on appeal was whether the federal exclusionary rule should apply when evidence is seized by police acting in reasonable, good-faith reliance, on a search warrant that is subsequently held to be invalid.[159]

Justice White, writing for the majority stated the exclusionary rule was neither "a necessary corollary of the Fourth amendment" nor "required by the conjunction of the Fourth and Fifth Amendments."[160] "The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands…."[161] Furthermore, the Court found that the use of the fruits of an illegal search or seizure works no new Fourth Amendment wrong.[162] Instead, the judicially created exclusionary rule is intended not to cure the invasions of defendant's rights, but rather, it operates so as to produce a deterrent effect from future violations.[163]

From these premises, the Court looked to prior decisions regarding application of the exclusionary rule. The Court found that whether the exclusionary rule should be applied in a criminal trial still requires weighing the costs of applying the rule to society, against the benefits of applying the rule in terms of deterring police from future constitutional violations.[164] The Court found that sacrificing reliable and relevant evidence produces substantial costs.[165] Further, the Court found the benefits of applying the rule would be marginal, since judges and magistrates cannot be deterred from committing Fourth Amendment violations.[166] The Court concluded that the proper scope for measuring potential deterrent benefits is limited to police officers.[167] Since the police officers in *Leon* could not be expected to challenge a facially valid warrant, the Court concluded that police officers behavior could not be altered in some meaningful way by applying the exclusionary rule.[168] As a result, there would be little to no deterrence benefit, and applying the rule was unwarranted.

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158. *Id.*

159. *Id.* at 905

160. *Id.*

161. *Id.*

162. *Id.* (quoting *Calandra*, 414 U.S. 338); but see *Leon*, 468 U.S. at 932 (Brennan J., dissenting) (stating that since seizures are executed to secure evidence, and evidence has utility in legal system only in the context of supervised trial, the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence because the judiciary becomes part of what is in fact a single governmental action).

163. *Leon*, 468 U.S. at 902.

164. *Id.*; *see, e.g., Calandra*, 414 U.S. 338; *Janis*, 428 U.S. 433.

165. *Leon*, 468 U.S. at 902

166. *But see Leon*, 468 U.S. at 932 (Brennan J., dissenting) (by admitting judges do in fact violate the Fourth Amendment since the Constitution applies to them).

167. *Leon*, 468 U.S. at 905.

168. *Id.*

3. Emergence of the State Exclusionary Rule as the Remedy for Article I Section 6 Violations

The foregoing discussed the application of the federal exclusionary rule based on a violation of the Fourth Amendment. Illinois has a distinct exclusionary rule protecting the provisions of Article I section 6.[169] At the Illinois level, the exclusionary rule emerged in 1923 when the Illinois Supreme Court decided *People v. Brocamp*.[170] The facts of *Brocamp* were similar to that in *Weeks*.[171] The issue at bar in *Brocamp* was whether the evidence obtained by police, which violated not only the Fourth Amendment, but also Article II Section 6 of the 1870 Illinois constitution, was required to be excluded at trial from prosecutor's case.[172]

In reaching its decision, the Illinois Supreme Court stated that it was the constitutional right of Illinois residents to be protected against unlawful searches and seizures.[173] Anything to the contrary would have the effect of declaring the constitutional guarantees "a mere nullity and our boasted rights of liberty…vain."[174] After making this finding the court stated that the guarantees afforded to the criminal defendant must, by necessity, have a remedy if they are violated.[175] Thus, the court held that the remedy for an unlawful search and seizure is *exclusion of that evidence* from trial. Most importantly, the *Brocamp* court based its decision on independent state constitutional grounds.[176] The court stated: "violation of our search and seizure clause requires exclusion."[177] The reason was clear: "anything to the contrary would render [Illinois'] constitutional guarantees a mere nullity."[178]

Illinois via *Brocamp* and the United States via *Weeks* adopted their respective exclusionary rules as the mechanism for enforcing Article I Section 6[179] and the Fourth Amendment.[180] From these two

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169. *See Brocamp*, 138 N.E. at 731 (creating state exclusionary rule remedy)

170. *Id.*

171. *Id.* In this case officers were investigating a burglary and found their way to defendant's house. *See id.* They searched through the defendant's premises and seized multiple items that they identified as stolen property without a warrant. *Id.* The court described this case as a clear constitutional violation. *See id.*, at 456 (finding that the exclusion of evidence at trial was warranted given the circumstances); *see also Weeks*, 232 U.S. 383 (dealing with a similar factual background that led to the federal exclusionary rule).

172. *See* Ill. Const. art. I, § 6 (1970) (search and seizure provision that was formerly contained in Ill. Const. art. II, § 6 (1870)).

173. *Brocamp*, 138 N.E. at 731.

174. *Id.*

175. *Accord*, Ill. Const. art. I, §12 (1970); *Cf.* Ill. Const. art. II, §19 (1870).

176. *See Brocamp*, 138 N.E. 728.

177. *See id.*; *see also* Ill. Const. art. II, § 6 (1870) (state constitutional search and seizure clause).

178. *Brocamp*, 138 N.E. 728.

179. *See* Ill. Const. art. I. § 6, (1970) (formerly Ill. Const. art. II, § 6 (1870)).

180. *See generally Weeks*, 232 U.S. 383; *See also Brocamp*, 138 N.E. 728 at 732

cases, the legal justification for applying the rule was very similar: so the respective constitutional provisions would not be merely a form of words.[181] Nevertheless, Illinois and the United States each have a distinct constitutional basis for reaching the decision that the exclusionary rule is applicable to the search and seizure provisions of their respective constitutions.[182]

III. ANALYSIS

A. Illinois' "Limited Lockstep Doctrine" Applied to Illinois' State Exclusionary Rule and the Issue It Presents

The Illinois Supreme Court has stated that It adheres to the "limited lockstep doctrine" when interpreting the search and seizure provision contained in Article I Section 6.[183] The "limited lockstep doctrine" will provide the answer to the question, for example, of what constitutes an unreasonable search or seizure under Article I Section 6.[184] When the United States Supreme Court holds that certain conduct violates the Fourth Amendment, Illinois courts will hold that same conduct also violates Article I Section 6.[185]

However, the issue this presents is whether Illinois' "limited lockstep doctrine" also controls whether the state exclusionary rule must be applied in accordance with the United State Supreme Court's application of the federal exclusionary rule?[186] According to *Caballes,* the answer hinges on whether application of the state exclusionary rule falls within a recognized exception to the "limited lockstep doctrine."[187] If it does, this would allow Illinois courts to

(stating that it is the duty of the court to exclude the evidence gathered in violation of the state constitution).

181. *See id.* (giving rise to state exclusionary rule); *see also Weeks*, 232 U.S. 383 (giving rise to federal exclusionary rule).

182. *Compare Weeks* (basing the decision to exclude illegally seized evidence on the dictates of the Fourth Amendment), *with Brocamp* (basing the decision to exclude illegally seized evidence on the dictates of the search and seizure provision of the state constitution). Each exclusionary rule has a distinct constitutional basis. *See id.*; *Compare* Ill. Const. art. II, § 6 (1870) (basis for *Brocamp* holding), *with* Ill. Const. art. I, § 6 (1970) (adding new substantive provisions).

183. *See Caballes*, 221 N.E. 2d. 26 (affirming the continued adherence to the lockstep doctrine in Illinois).

184. *See generally id.* (when the United States Supreme Court holds certain conduct violates the Fourth Amendment, that same conduct will violate Article I section 6).

185. *But, see id.* (litigants can make the argument that Article I Section 6 was intended to be construed more broadly by the framers of the 1970 constitution).

186. *See id.* (holding that Illinois would continue to adhere to the "limited lockstep doctrine" in interpreting and applying Ill. Const. art. I, § 6).

187. *See Caballes*, 221 N.E.2d at 44 (finding additional criteria for departure from lockstep includes state tradition and preexisting state law). The framers intent, or state value or tradition are examples. *Id.*; *see also*, Leven, supra note 70.

freely apply the state exclusionary rule without reference to the United States Supreme Court's application of the federal exclusionary rule.

In *Caballes,* the court stated that if there was a long-standing state tradition reflected in case law, departure from lockstep would be justified.[188] This leniency is precisely why Illinois is considered a "limited lockstep" state rather than a "strict lockstep" state.[189] In the realm of the state exclusionary rule, Illinois has a long-standing state tradition dating back to *Brocamp*, and reaffirmed in subsequent cases prior to the emergence of the "limited lockstep doctrine" set out in *Tisler*, of applying the state exclusionary rule as a remedy for Article I Section 6 violations.[190] Importantly, the Illinois Supreme Court decided in *Brocamp* that exclusion was necessary for Article I Section 6 violations long before the Fourth Amendment was made applicable to the states via the Fourteenth amendment, making it possible for Illinois courts to apply the federal exclusionary rule.[191] This demonstrates that the Illinois Supreme Court construed the Illinois constitution as providing Illinois residents with protection against unreasonable searches and seizures well before *Mapp* made the Fourth Amendment applicable to the states to provide that same protection.[192] *Brocamp* also demonstrates that the exclusionary rule arising out of Article I Section 6 is the appropriate state remedy for a violation of this Illinois constitutional provision.[193]

Further support for application of the state exclusionary rule as constituting a "state tradition" is found post adoption of the "limited lockstep doctrine."[194] For instance, in *People v. Kreugar*, the Illinois Supreme Court applied the state exclusionary rule in order to protect the provisions of Article I Section 6, despite the fact that the United States Supreme Court found the federal exclusionary rule inapplicable for same constitutional violation.[195]

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188. *See Caballes*, 221 N.E.2d. 26.

189. *See id.* (noting that Illinois is not in strict lockstep with the decisions of the U.S. Supreme Court on the same or similar issues).

190. *See generally Brocamp*, 138 N.E. 728 (applying exclusionary rule based on Illinois constitution Article II, § 6); *See also* City of Chicago v. Lord, 130 N.E. 2d 504, 505 (Ill. 1955) (applying state exclusionary rule based on Brocamp, 138 N.E. 728).

191. *Compare Brocamp*, 138 N.E. 728 (creating the state exclusionary rule and applying it to violations of Illinois state search and seizure clause contained in Ill. Const. art. II, § 6 (1870)), *with Mapp*, 367 U.S. 643 (holding that the federal exclusionary rule based on the Fourth Amendment is applicable to the states via the Fourteenth Amendment).

192. *See* Leven, *supra* note 70, at 77 (stating the Illinois Supreme Court provided broader constitutional protection based on Illinois' Constitution long before the U.S. Supreme Court extended analogous protections found in the U.S. Constitution to the states.).

193. *Id.*

194. *Krueger*, 675 N.E.2d 604.

195. *Id.*

If Illinois courts are free to apply the state exclusionary rule when they determine that the federal exclusionary rule does not protect the provisions of Article I Section 6 sufficiently, the next issue presented is whether Illinois Court's *should* apply the state exclusionary rule for Fourth Amendment (and thus Article I Section 6) violations? Since *Mapp* made the federal exclusionary rule applicable to the states, Illinois courts can either apply the federal exclusionary rule or the state exclusionary rule for Fourth Amendment violations.[196] Effectively, they both exclude the unlawfully seized evidence. The difference is in the scope of their application. This is relevant because in recent years the United States Supreme Court has limited the applicability of the federal exclusionary rule.

The Supreme Court has limited the application of the federal exclusionary rule by using the cost-benefit analysis in determining whether to exclude the unlawfully seized evidence. In turn, the use of the cost-benefit analysis has led to an extension of the good-faith exception. The result is that more Fourth Amendment violations occur without proper remedy.[197]

Another factor that makes this question relevant is that if Illinois courts specifically apply the state exclusionary rule, they are not bound by the analytical framework the United States Supreme Court applies when determining whether to apply the federal exclusionary rule.[198] The following will explore the applicability of the federal exclusionary rule. The focus will be on the courts use of the cost-benefit analysis and the problems with this framework. Then the applicability of the state exclusionary rule will be discussed and compared with that of the federal exclusionary rule.

B. Initial Problem with Leon's Introduction of the Cost-Benefit Analysis to the Criminal Trial

The United States Supreme Court in *Leon* introduced the cost-benefit analysis to determine whether to apply the federal exclusionary rule in the criminal trial setting. However, the Court never addressed a fundamental presumption in their opinion: that

196. *Compare Mapp*, 367 U.S. 643 (holding federal exclusionary rule is applicable to the states), *with Brocamp*, 138 N.E. 728 (creating exclusionary rule arising out of Article I section 6).

197. Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011) (stating that no other remedy is available to correct Fourth Amendment constitutional violations like the exclusionary rule); s*ee, e.g.*, Davis v. United States, 546 U.S. 229,131 (2011) (holding that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject the federal exclusionary rule); *see generally* LaFave, *supra* note 3 (criticizing the cost-benefit test as an unworkable).

198. *See generally* O'Neill, *supra* note 11 (stating that if Illinois courts specifically decide a case on state constitutional grounds, the decision is shielded from U.S. Supreme Court review).

the exclusionary rule is merely a judicially created remedy designed to safeguard the Fourth Amendment through its deterrent effect.[199]

If the federal exclusionary rule is inapplicable sometimes because the deterrence benefits do not outweigh the societal costs of applying the rule, then it seems less like a constitutional command.[200] This is problematic because of the Court's holding in *Mapp,* where the federal exclusionary rule was deemed part and parcel of the Fourth and Fourteenth Amendment.[201] That is precisely the reason that the states were required to follow the decision in *Mapp*, which held that the federal exclusionary rule was constitutionally mandated by the Fourth Amendment through the Fourteenth Amendment.[202] If the federal exclusionary rule was not an essential part of the Fourth and Fourteenth Amendment, then the states would not be bound to follow it.[203] However, *Mapp* clearly held that the states must apply the federal exclusionary rule when there is a Fourth Amendment violation.[204]

Leon's introduction of the cost-benefit analysis is also problematic because it is incongruous with other types of evidentiary exclusionary rules.[205] For instance, evidentiary privileges found in the federal rules of evidence at the time *Leon* was decided, required federal courts to exclude many categories of highly relevant and reliable evidence.[206] These categories of evidence have been deemed to protect societal values and promote certain societal goals.[207] Importantly, these rule do not require a

199. *See* LaFave, *supra* note 3, § 1.3.

200. *Id.*

201. *Mapp*, 367 U.S. at 656; *see also* LaFave, *supra* note 3, §1.3.

202. *See Leon*, 468 U.S. at 932 (Brennan J., dissenting); *see also* LaFave, *supra* note 3, § 1.3(b).

203. *Compare Mapp*, 367 U.S. 643 (finding due process requires unlawfully seized evidence excluded in state prosecutions) *with Wolf*, 338 U.S. 25 (holding due process does not require evidence seized in violation of the Fourth Amendment exclude from state prosecutions). If due process would not be violated when states admitted unlawfully seized evidence, the exclusionary rule would not be considered a fundamental right that due process would require the states to uphold via the 14th amendment. *See generally Mapp*, 387 U.S. 643.; *see also Leon,* 468 U.S. at 913 ("Exclusionary rule is not a corollary to the Fourth Amendment.")

204. *Mapp*, 367 U.S. at 665 ("all evidence obtained by searches in violation of the Constitution is, by that same authority, inadmissible in a state court.").

205. *See generally* State v. Guzman, 842 P.2d 660 (1992) (rejecting the U.S Supreme Court's precedent in *Leon* based on Idaho state constitution). The court in Guzman also rejected the good-faith exception based on the fact that it would be inconsistent with Idaho's evidentiary privileges. *Id.* at 673.

206. *See generally* FED. R. EVID. 501-02 (effective July 1st, 1975). Such rules included for instance, attorney-client privilege, doctor-patient privilege, marital privilege, etc. *See id.*

207. *Id.*

cost-benefit analysis when determining their application.[208] If they did, it would be practically impossible to so.[209]

Illinois Courts have similar evidentiary privileges.[210] Accordingly, when Illinois courts apply the federal exclusionary rule, similar concerns are raised with respect to Illinois' evidentiary privileges.[211] The main point is that if (1) the federal exclusionary rule protects the values embodied in the Fourth Amendment, and (2) if Illinois has evidentiary privilege rules, use of a cost-benefit analysis to determine whether to apply the federal exclusionary rule is also incongruous for Illinois courts.[212] Evidentiary privileges and the federal exclusionary rule both serve to effectuate important societal values, that are difficult to quantify, at the cost of reliable and relevant evidence.[213]

Despite these problems, *Leon* made a categorical shift into the criminal trial context, perhaps an unwarranted one.[214] Prior to *Leon*, the cost-benefit analysis was not used in the context of the criminal trial. Applying the exclusionary rule to exclude the unlawfully seized evidence was presumed to sufficiently deter Fourth Amendment violations.[215] Therefore, the deterrence benefits always outweighed the costs in the context of a criminal trial.[216] In contrast, outside the criminal trial setting, the presumption was that there was no significant increment of deterrence value if the Court were to exclude the unlawfully seized evidence.[217]

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208. *See Guzman*, 842 P.2d at 673 (finding that it would arguably be impossible to prove the cost-effectiveness of any given evidentiary privilege).

209. *Id.*; *see generally Guzman*, 842 P.2d 660.

210. *See* RALPH RUEBNER & KATARINA DURCOVA, ILLINOIS EVIDENCE: ILLINOIS RULES OF EVIDENCE, STATUTES, AND CONSTITUTION, A COMPENDIUM FOR CRIMINAL LITIGATION 112 (2006) (detailing all of evidentiary privileges that Illinois recognizes). Illinois recognizes many types of evidentiary privileges including: the Attorney-Client privilege; the Marital privilege (725 ILCS 5/115-16); Physician- Patient Privilege (735 ILCS 5/8-802); Therapist-Patient Privilege (740 ILCS 110/10); Clergy Privilege (735 ILCS 5/8-803); Informant's Privilege (735 ILCS 5/8-802.3). Importantly, "Illinois recognizes that certain social and professional relationships must be protected by the law. Confidential communications between certain persons must be shielded from disclosure to accomplish [these] societal goals[s]." *Id.*

211. *Id.*

212. *See, e.g., State v. Oaks*, 598 A.2d 119 (Vt. 1991).

213. *See Guzman*, 842 P.2d at 673 (finding that "[a]ll of the rules which limit the admission of relevant evidence, including the exclusionary rule, exist to protect values which are difficult to quantify, yet which are considered important by society.").

214. LaFave, *supra* note 3. The *Leon* majority argues that they are simply taking another step comparable to the cases such as *Calandra, Powell, or Janis*. The court states, "the balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us." *Leon*, 468 U.S. at 913. However, the Leon court did more than simply extend the cost-benefit analysis to the criminal trial. *Id.*

215. *Id.*

216. *Id.*

217. LaFave, *supra* note 3. This was arguably a fair assumption. *Id.*

However, specifically in the context of a criminal trial, if the state cannot use the illegally seized evidence, this almost always makes a conviction harder, if not impossible, to obtain.[218] Thus, the state has an interest in using the illegally obtained evidence to secure a conviction. Further, there is a direct and foreseeable consequence of obtaining evidence illegally.[219] Specifically, it predictably will not be admitted.[220] If the state knows it cannot use illegally seized evidence under any circumstance in order to secure a conviction, this would seem to make application of the exclusionary rule more significantly more potent than its use outside of a criminal trial. In turn, this added potency would then add to the potential deterrence benefits to be yielded from applying the exclusionary rule in the criminal trial context.[221]

Despite these legal problems, the cost-benefit analysis was applied to the criminal context in *Leon*. The result: (1) the exclusionary rule was inapplicable when police officer act pursuant to a facially valid, but ultimately invalid search warrant and (2) the "good-faith exception" to the exclusionary rule was born. The Supreme Court reasoned that there are marginal deterrence benefits to suppressing evidence seized pursuant to a facially valid, but ultimately invalid, search warrant.[222] Therefore, the Court held that the exclusionary rule should not be applied.[223]

The above detailed some of the legal problems with the cost-benefit analysis. However, the cost-benefit analysis is an inherently empirical test. It involves the court weighing the costs to society of applying the rule against the potential police deterrence to be yielded by applying the rule.[224] Accordingly, there should be a way to reliably measure these costs and benefits if the court is to propound this test as if it were a sound empirical proposition.[225] It seems however, there is only limited empirical support for the rule.[226]

For instance, how does the court measure compliance (i.e. the deterrence benefits) with the Fourth Amendment if compliance with the Fourth Amendment produces a non-event?[227] In other words,

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218. *Leon*, 468 U.S. at 932 (Brennan J., dissenting). An example would be that if the state illegally seized drugs, they cannot use those drugs to convict the defendant. *See id.* Without the use of drugs, a charge against the defendant could not be sustained. *See id.*

219. *Id.*

220. *Id.*

221. *See* LaFave, *supra* note 3.

222. *Leon*, 468 U.S. at 902.

223. *Id.*

224. *See id.*

225. *Id.* at 932 (Brennan J., dissenting)

226. *Oakes*, 598 A.2d at 126.

227. *Id.* It produces a non-event, because if there was no Fourth Amendment violation, the court would not be inquiring into the deterrence value of applying the rule. *See id.*

the cost-benefit analysis attempts to measure the deterrence benefits when those benefits can only be surmised, for instance, by whether police actually would have complied with the Fourth Amendment due to application of the exclusionary rule in a given situation.[228] This lack of certainty seems to make it easier to point to the cost side of the analysis, since the costs can be more definitively identified, rather than the benefits, which must be to a greater extent, surmised. This point is exemplified by the United States Supreme Court's decision in *Illinois v. Krull*[229] and *Arizona v. Evans*.[230] These cases demonstrate the Supreme Court's (1) propensity to overstate the costs using their cost-benefit analysis and (2) the narrow scope of the analysis. Before discussing *Krull* and *Evans*, consider the following result of applying the cost-benefit analysis, as illustrated by *Leon.*

The question before the court is whether to apply the exclusionary rule to evidence seized pursuant to an illegal search warrant. The costs of suppressing unlawful evidence obtained in good-faith pursuant to a facially valid (like *Leon*), but ultimately illegal search warrant is that this evidence cannot be used at trial. A dismissal is therefore much more likely.[231] Arguably, this is a heavier cost when weighed against the deterrence benefit of suppression here. In principle at least, police can be expected to unquestionably rely on warrants.[232] Thus, the costs outweigh the deterrence benefits, with some reasonable certainty, based on empirical evidence.

However, applying the cost-benefit analysis to extend the good-faith exception in other contexts cannot be done as accurately or reliably.[233] For instance, in *Krull* [234] the narrow scope of the cost-benefit analysis led to the United States Supreme Court broadening the good-faith exception to the exclusionary rule. The result was that the federal exclusionary rule is inapplicable to evidence seized pursuant to an unconstitutional statute.[235] The Court in *Krull* held that excluding the evidence gathered pursuant to an unconstitutional statute would not result in deterrence of

228. *Id.*

229. *Krull*, 480 U.S. at 349.

230. *Arizona v. Evans*, 514 U.S. 1 (1995)

231. *See generally Davis,* 564 U.S. 229 (noting substantial costs of excluding the relevant and reliable evidence).

232. *Leon*, 468 U.S. at 902.; *but see* LaFave, *supra* note 3, § 1.3(d) (noting that "under the pre-Leon version of the exclusionary rule police…developed in many localities the very sound practice of through the warrant-issuing process with the greatest care, often by having the affidavit reviewed by individuals other than the magistrate.").

233. *See* Massachusetts v. Sheppard, 486 U.S. 981 (1984) (justice Brennan characterizing the balancing test as follows: assessing the benefits and costs of the exclusionary rule in various contexts is a virtually impossible task for the judiciary to perform honestly and accurately).

234. *Krull*, 480 U.S. at 349.

235. *Id.*

constitutional violations by police.[236] The court reasoned that the "exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on an unconstitutional statute would have as little deterrent effect on the officer's actions as would exclusion of evidence when an officer [relies] on an [invalid] warrant."[237] In other words, the Court analogized the situation in *Krull* to that in *Leon*.[238]

However, the court did not address whether the legislatures and judges are really analogous in this context.[239] For instance, there is a cost in allowing legislatures to pass unconstitutional laws that apply to the defendant, and others who had their Fourth Amendment rights violated without remedy.[240] The cost to the system is that there are many people living under these unconstitutional statues having their constitutional rights being violated "with impunity."[241] Moreover, there is an incentive to promulgate unconstitutional statutes, if those statutes can still be used as mode for the state to secure convictions.[242] This seems even more likely when one considers that legislatures are subject to a great degree of political pressure to pass certain laws.[243]

Additionally, under *Krull*, the defendant has little incentive to challenge a statute, since he can still be convicted with the evidence seized, even if the statute that authorized the police act is found unconstitutional.[244] Thus, a criminal defendant is not only left without a remedy, but there is no real incentive to pursue a remedy by challenging the statute.[245] This can lead to the unconstitutional statute being in effect longer, obviously affecting more people. These are all "costs" in the broad sense, but do not factor into the Court's cost-benefit analysis. Rather, the Court focuses narrowly on the costs of applying the rule.[246]

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236. *Id.*

237. *Id.* Despite the differences between legislators and judicial officers, the court stated the main purpose of the exclusionary rule is to deter police misconduct. *Id.*

238. *See generally id.*

239. *Krull*, 480 U.S. at 355 (O'Connor J., dissenting).

240. *See* LaFave, *supra* note 3.

241. *Krull*, 480 U.S. at 355 (O'Connor J., dissenting)

242. *See id.* (stating that by making the exclusionary rule inapplicable in these situations, there is an incentive to pass unconstitutional statutes).

243. *See id.*

244. *Id.*

245. *See* Kerr, *supra* note 197, at 1096 (stating that civil suit seeking damages, injunctive relief, declaratory judgment or the possibility of criminal prosecution can provide the needed deterrent effect that the Fourth Amendment exclusionary rule provides). These Four alternative remedies cannot correct the constitutional error that injured the criminal defendant like the exclusionary rule does. *Id.*

246. *See generally Evans*, 514 U. S. 1 (where police acted on a stale warrant issued from courthouse database, the Supreme Court held that applying the exclusionary rule would have at best a marginal effect on the police officers). The Court in *Evans* effectively broadened the good-faith exception using the same cost-benefit rationale as the Court in *Krull. See id.*

Further, the result in *Evans* is a good example of the narrow scope of the potential deterrence benefits of applying the rule. The Supreme Court in *Evans* held that court employees cannot be deterred from committing Fourth Amendment violations.[247] Thus, when a court employee commits an error in record-keeping that results in issuance of an invalid arrest warrant, anything seized pursuant to that invalid arrest is not subject to the federal exclusionary rule.[248] This is true notwithstanding the Court's assertion that "the exclusionary rule operates as a judicially created remedy to safeguard against future violation of Fourth Amendment rights through the rules general deterrent effect."[249]

C. The Current Analytical Framework the Roberts Court Uses for Applying the Federal Exclusionary Rule and Its Problems

Leon, Krull, and Evans laid the foundation for the Supreme Court's current approach to applying the federal exclusionary Rule.[250] As discussed above, the cost-benefit analysis used by the Supreme Court is problematic for several reasons.[251] Nevertheless, employing the cost-benefit analysis is settled law.[252] Thus, *Leon, Krull, and Evans stand* for the proposition that (1) the primary purpose of applying the exclusionary rule to deter police from committing Fourth Amendment violations; (2) the Supreme Court's cost-benefit analysis is the only method for determining this; and (3) judges, legislators and other non-law enforcement agencies or agents are, by law, not capable of being deterred from committing Fourth Amendment violations.[253]

As legal scholar Wayne LaFave notes, arguably the "cost-benefit balancing [In *Leon, Krull and Evans*] was deemed appropriate because the fact that the person primarily responsible for the Fourth Amendment violation was not a law enforcement official."[254] This fact "changed the dynamics of the deterrence analysis" in such a way that the costs, categorically, would outweigh the deterrence benefits.[255] But what about when the cost-benefit analysis is applied to certain police conduct? This would seem to change the dynamics of the cost-benefit analysis by adding more

247. *See generally Evans*, 514 U. S. 1.
248. *Id*.
249. *Id.* at 10.
250. *Leon*, 468 U.S. 897; *Krull*, 480 U.S. 340, 349 (1987); *Evans,* 514 U.S. 1.
251. *Leon*, 468 U.S. 897; *Krull*, 480 U.S. 340; *Evans*, 514 U.S. 1; *Oaks*, 598 A.2d 119; LaFave, *supra* note 3; Kerr, *supra* note 197, at 1096.
252. *Davis,* 564 U.S. 229.
253. *See* Part III(B)
254. *See* LaFave, *supra* note 3, § 1.6
255. *Id*.

weight to potential deterrence benefits of applying the exclusionary rule.

The cost-benefit analysis prior to *Hudson v. Michigan*[256], was never applied to action taken exclusively by law enforcement officials that ended up violating the Fourth Amendment.[257] *Hudson v. Michigan, United States v. Herring and United States v. Davis* together represent the Supreme Court's most current version of the federal exclusionary rule.[258] When read together, these cases solidify the Supreme Court's persistent and unreliable use of the cost-benefit analysis. They also signal a further expansion of the good-faith exception, which continues to reduce the federal exclusionary rule to a shell of its former state, pre-*Leon*.

For Illinois courts, this is problematic. When the United States Supreme Court expands the good-faith exception to the federal exclusionary rule, despite the Fourth Amendment (and Article I Section 6) violation, the violation goes without remedy. If Illinois applies the federal exclusionary rule, then Article I Section 6 is also less strictly enforced. In essence then, Illinois courts acquiesce in two constitutional violations by allowing both to go without remedy: the Fourth Amendment violation that applies via the Fourteenth Amendment and the Article I section 6 violation. Further, the rationale the United States Supreme Court uses when applying the federal exclusionary rule, in recent years, has become more directly at odds with the rationale that Illinois courts use when applying the state exclusionary rule.[259]

Prior to *Hudson v. Michigan*, implicit in the police deterrence rationale propounded by the United States Supreme Court is that (1) where police do not rely on another authority (i.e. a judge, legislature, or otherwise) and (2) where police act either intentionally, recklessly or negligently, in effectuating a search and seizure, applying the exclusionary rule *would* yield deterrence benefits.[260] *Hudson* quashed this presumption.[261]

The issue in *Hudson* was whether a violation of the "knock and announce" requirement by police warranted suppression of the evidence found subsequent to that violation.[262] Unquestionably, police acted intentionally, and in violation of this Fourth Amendment requirement, so the potential deterrent effects to be yielded were high.[263] Nevertheless, the Court held the exclusionary

256. Hudson v. Michigan, 547 U.S. 586 (2006).

257. *See* LaFave, *supra* note 3, § 1.6.

258. Herring v. United States, 555 U.S. 135 (2009); *Davis,* 564 U.S. 229.

259. *Compare Herring*, 555 U.S. 135 (2009) *with Krueger*, 675 N.E.2d 604; *see also Carrera*, 783 N.E.2d 15.

260. *See generally Krull*, 480 U.S. 340 (1987) (legislatures cannot be deterred); *see also Evans,* 514 U.S. 1 (court employees cannot be deterred); *see also Leon*, 468 U.S. 897 (magistrates cannot be deterred).

261. *Hudson,* 547 U.S. 586.

262. *Id.*

263. *See id.* at 590 (stating that the state conceded to a violation of the knock and

rule was inapplicable.[264] The Court stated in support of Its holding that "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."[265] Accordingly, the Court found the costs of suppressing the evidence to outweigh any beneficial police deterrence that would result by applying the rule.[266]

Hudson's effect is fairly broad: (1) it categorically limits the use of the exclusionary rule on culpable police conduct if the court determines that the violation was negligible (such as violating the "knock and announce" requirement) and (2) that even if police intentionally violate the Fourth Amendment, the deterrence benefits still may not outweigh the costs.[267] Interestingly, the Court's enumeration of costs in *Hudson,* are those costs that are applicable to every application of the exclusionary rule[268]; any type of exclusionary rule will be at the cost of relevant and reliable evidence. The important part of the analysis is to weigh those obvious costs against the potential deterrence benefits. Nonetheless, the Court's cost-benefit analysis seemed unduly biased in favor of the costs to society, rather than a fair or accurate balancing of the costs and benefits of applying the exclusionary rule.[269]

The implication from the Court's analysis in *Hudson* is that the costs of applying the exclusionary rule vary with the crime allegedly committed; a novel introduction into the cost-benefit analysis.[270] The Court did not expound on this implication.[271] For instance, would there be a greater cost of applying the exclusionary rule if the police found more drugs, or if the exclusionary rule was being applied to someone with a longer criminal record versus a first-time offender? It appears these may be relevant costs to the Court's analysis after *Hudson*, but the Court's analysis leaves more questions than answer regarding the nature of the cost-benefit analysis.[272]

Herring expands the good-faith exception beyond its reach in *Hudson*. The Court in *Herring* created new bright-line rules for

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announce requirement)

264. *See generally id.* (exclusionary rule not applicable for violation of the knock- and - announce requirement of the Fourth Amendment).

265. *Id.* at 596.

266. *Id.*

267. *See id.*; *see also* LaFave*, supra* note 3, §1.6(h).

268. *See Hudson*, 547 U.S. at 605 (Breyer J., dissenting); *see also* LaFave, *supra* note 3, § 1.6.

269. *See generally Hudson*, 547 U.S. 586 (Justice Scalia notes that application of the exclusionary rule in this instance would amount to a "get-out-of-jail-free card.").

270. *Id.*

271. *Id.*

272. *See id.*; *see also* LaFave, *supra* note 3.

determining whether the federal exclusionary rule applies.[273] These rules purport to guide the Court in Its cost-benefit analysis. However, the line demarcating when the federal exclusionary rule is applicable using the cost-benefit analysis was only further blurred with these new rules.[274]

In *Herring*, the Court had to decide whether an invalid arrest warrant that erroneously appeared on a law enforcement data base, that led to the defendant's arrest, and which uncovered possession of drugs, should trigger the application of the exclusionary rule.[275] Significantly, the police were in complete control of their record keeping system for warrants.[276] Nevertheless, the police failed to remove a five month old warrant that was no longer outstanding.[277] The issue presented was whether negligent record keeping of a police database maintained and controlled by police provided a basis for suppressing evidence found pursuant to the erroneous arrest warrant.[278]

Initially, the facts in *Herring* seemed to weigh in favor of suppression, even in light of the Court's ruling in *Hudson,* that certain culpable conduct is nevertheless negligible and therefore the costs still outweigh the benefits. In *Herring,* there appeared to be more potential and substantial deterrence benefits in applying the exclusionary rule: the police were (1) in control of their own data bases for warrants; (2) the deterrence benefits to be yielded were high considering police can better monitor their system for valid warrants, and (3) erroneous warrant record keeping by police can foreseeably affect the constitutional rights of hundreds or thousands of individuals.[279] Despite all of this in favor of applying the exclusionary rule, the Court found in favor of the state, holding "the exclusionary rule does not apply to police record keeping errors."[280]

Significantly, the Court reached this result by applying the broad principle that "to trigger the exclusionary rule, police conduct

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273. *Herring,* 555 U.S. 135.

274. LaFave, *supra* note 3.

275. *See id.*; *see also* O'Neill, supra note 10 (discussing U.S. Supreme Court's recent jurisprudence on exclusionary rule); *compare Evans*, 514 U. S. 1 (error arising from county clerk's database), *with Herring*, 555 U.S. 135 (error arising from law-enforcement database).

276. *Herring*, 555 U.S. 135.

277. *Id.*

278.*Id.* Here that a police investigator learned that the defendant Herring went to retrieve something from his impounded car. *Id.* A police officer who knew who Herring was decided to check with the county's warrant clerk for an outstanding warrant on Herring. *Id.* Nothing was found. *Id.* However, a cursory check of the neighboring county found an outstanding arrest warrant. *Id.* Acting on the outstanding warrant in the neighboring county, the investigator arrested defendant and found incident to arrest, drugs and a gun. *Id.* Minutes later the investigator learned that the warrant was invalid as it was recalled 5 months earlier. *Id.*

279. *See id.*

280. *Id.*

must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[281] Furthermore, the Court makes clear that the benefits *must* outweigh the costs.[282] The Court explained that the deterrence benefit to be derived varies with the degrees of culpability in the conduct.[283] Accordingly, the court makes clear that isolated negligence is outside the reach of the Fourth Amendment.[284] Instead, in order to yield deterrence benefits, the conduct by law enforcement must be "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or system negligence."[285]

The police conduct in *Herring* seemingly rose only to isolated negligence.[286] However, as the Dissent stressed, the Majority's opinion in *Herring* rejects a fundamental theory of tort law: when any entity is liable for lack of due care, this creates an incentive to act with greater care next time.[287] More broadly stated, the Supreme Court's current version of the federal exclusionary rule altogether rejects this fundamental premise of tort law.[288] Nevertheless, the Majority concluded that isolated negligence by police officers does not yield sufficient deterrence benefits to warrant application of the exclusionary rule.[289]

In all of the preceding cases, arguably, there was some form of actual reliance by the police on the some external, seemingly immutable, authority.[290] This seemed to be a major factor that led the Supreme Court to conclude that when police are doing their job of fettering out crime, acting in good-faith, applying the exclusionary rule in these somewhat atypical cases, would not accomplish its purpose of police deterrence.[291] Thus, prior to *Davis*, the good-faith cases seemed to be limited to either: (a) non-

281. *Id.*; *see also* LaFave, *supra* note 3.
282.*Herring*, 555 U.S. at 145.
283. *Id.*
284. *See* LaFave, *supra* note 3.
285. *Herring*, 555 U.S. at 145.
286. *Id.*
287. *Herring*, 555 U.S. at 153 (Ginsburg J., dissenting).
288. *See id.*
289. *See id.*
290. *See, e.g., Leon*, 468 U.S. 897 (later-invalidated warrant issued by magistrate); *Sheppard*, 468 U.S. at 990 (exclusionary rule inapplicable when warrant is invalid due to judicial clerical error); *Krull,* 480 U.S. 340 (subsequently overturned statute); *Davis,* 131 S.Ct. 2419 (later-reversed binding appellate precedent); *Evans,* 514 U.S. 1 (undiscovered error in court-maintained database); *Herring,* 555 U.S. 135 (undiscovered error in police-maintained database); s*ee also* LaFave, *supra* note 3, § 1.3 (noting actual reliance by a police officer as a necessary condition for application of the "good-faith" exception to the exclusionary rule).
291. *Id.*

deterrable, isolated mistakes[292], or (b) cases in which a police officer relies upon a neutral third-party's authorization.[293]

The Court's opinion in *Davis* is significant because it has the potential to quickly expand the reach of the good-faith exception beyond the somewhat atypical cases[294], and into the more common Fourth Amendment violations.[295] *Davis*, viewed together with the prior good-faith cases[296], can arguably support a "more general and broader good-faith exception to the federal exclusionary rule.[297] In effect, the good-faith exception could reach instances of Fourth Amendment violations beyond those covered individually by any of the preceding cases.[298]

In *Davis*, a police officer stopped and arrested the driver of a vehicle for DUI.[299] The defendant, a passenger, was then arrested for giving police a false name.[300] Ostensibly, acting under the precedent interpreting *New York v. Belton*, police officers searched the driver's car after both the driver and defendant were handcuffed, and the scene was fully secured.[301] In the car, police found a revolver in defendant's jacket, and charged the defendant with possession of a firearm by a felon.[302] While the defendant's case was pending, the Supreme Court reversed the *Belton* decision, in *Arizona v. Gant*.[303] The *Gant* decision thereby made the police officer's search of the car and seizure of the gun unconstitutional.[304] The defendant moved to suppress the seizure of the revolver because the search was unlawful.[305] His motion was denied.[306]

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292. *See, e.g., Leon*, 468 U.S. 897, *Krull* 480 U.S. 340.

293. United States v. Katzin, 769 F.3d 163, 190 (2014) (Greenaway Jr. J., dissenting).

294. *Davis*, 564 U.S. at 258 (Brennan J., dissenting). Arguably, *Leon, Krull, Evans* and even *Hudson* and *Herring* are not as common. *See id.* The situation in *Davis* would seem to arise with more frequency. *Id.*

295. *Id.* (arguing that the courts version of the exclusionary rule has the potential to rapidly expand the good-faith exception). The dissent also notes how often motions to suppress are filed. *Id.* This means that potentially the good-faith exception will prevent defendant's from obtaining redress for their constitutional violation. *Id.*; *see also Katzin*, 769 F.3d at 190 (Greenaway Jr. J., dissenting) (stating that it was the Framers intent that the ultimate decision-making not be in the hands of law enforcement officials).

296. *See, e.g.*, *Krull*, 480 U.S. 340; *Evans*, 514 U.S. 1; *Herring*, 555 U.S. 135.

297. LaFave, *supra* note 3.

298. *Id.*

299. *Davis*, 564 U.S. at 235-36.

300. *Id.*

301. *Id.*; *see also* New York v. Belton, 453 U.S. 454 (1981) (holding that incident to a custodial arrest of an occupant of a motor vehicle, the police officer may search the passenger compartment of the automobile).

302. *Davis*, 131 S.Ct. 2419

303. *See* Arizona v. Gant, 556 U.S. 332 (2009).

304. *Id.*

305. *Davis*, 564 U.S. at 236

306. *Id.*

The critical issue on appeal was whether the federal exclusionary rule applied when officers acted reasonably on binding appellate precedent, later held unconstitutional.[307] The Supreme Court held, even though the search by police was ultimately unconstitutional, the benefits of applying the exclusionary rule would not be most efficaciously served.[308] The Court reiterated that police action must be deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system, in order for exclusion to be warranted.[309]

The issue with *Davis*, is not necessarily the result, but the exclusionary rule precedent that the Supreme Court created. Given the facts of the defendant's case, and how the Court applied the good-faith exception, the first question is what constitutes binding-appellate precedent?[310] Binding appellate precedent often requires the court to resolve complex legal questions of degree.[311] For instance, imagine an officer acted consistent with the language of a Fourth Amendment rule that a court of appeals announced.[312] However, suppose the facts before the officer were clearly distinguishable from the case that announced the Fourth Amendment rule, and therefore a court would likely hold that specific rule does not apply.[313] Consequently, the officer's conduct would be in violation of the Fourth Amendment. So, would the good-faith exception apply? *Davis* seems to suggest the exclusionary rule would not apply if the officer objectively acted in good-faith under this scenario.

The above is only one example where good-faith can be found based on *Davis*. However, suppose another commons scenario: a court of appeals creates precedent by ruling on a case with highly analogous facts.[314] If an officer, in good-faith, thought (but was ultimately wrong) he was acting pursuant to precedent because he in good-faith thought his actions were analogous to the precedent, would good-faith be extended to this scenario?[315] Based on *Davis*, it is possible.

Another issue with *Davis* is whether actual reliance on appellate precedent by the police is required.[316] The Supreme Court did not indicate whether the officer in *Davis* actually relied on, or just that a reasonable officer could have relied on, the precedent of

307. *Id.* at 231.
308. *Id.* at 237.
309. *Id.* at 240.
310. *Id.* at 255 (Brennan J., dissenting).
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *See, e.g., Leflore*, 32 N.E.3d 1043. Further, suppose a Fourth Amendment rule is followed in all other jurisdictions except the defendant's jurisdiction.
316. *See* LaFave, *supra* note 3.

New York v. Belton.[317] Objective reliance by police is self-evident with a warrant.[318] But what about when police do not have a neutral third party, like they did not in *Davis*? It is not clear whether the state could proffer evidence that a hypothetical objectively reasonable officer could have relied on the appellate precedent, and consequently avoid having the exclusionary rule applied.

All of these issues demonstrate the potential breadth of circumstances that police conduct can be deemed non-culpable under the holding in *Davis*.[319] The Supreme Court's holding requires sufficient deliberateness and culpability to warrant suppression.[320] Deliberateness goes to the Courts requirements of intentional, or willful conduct by police in order to warrant applying the exclusionary rule.[321] The second requirement for applying the exclusionary rule is that the police conduct must be sufficiently culpable. However, culpability in the context of *Davis* suggests something different than what it meant in past cases, where police actually relied on a warrant, or even a statute, for their actions, and the warrant or statue was later found erroneously issued or passed.[322]

In *Davis*, the Court held police were not culpable despite acting without a warrant.[323] Very often, police act without a warrant.[324] This tends to suggest that in other instances where police are acting without a warrant, they can also be found not culpable thereby making the exclusionary rule inapplicable.[325]

For example, what is the difference between (1) an officer who conducts a search without a warrant that he believe complies with the Fourth Amendment, but which ends up ultimately falling just outside the bounds of the Fourth Amendment and (2) an officer who follows erroneous binding precedent, like in *Davis*?[326] Worse, what about an officer acting pursuant to suggestive precedent, as opposed to binding precedent?[327] Indeed, the Court's opinion seems to

317. *Id.*

318. *Id.*

319. *Davis*, 564 U.S. at 255 (Brennan J., dissenting); *see, e.g., Katzin*, 769 F.3d at 190 (Greenaway Jr. J., dissenting); *Leflore*, 32 N.E.3d at 1066-67 (Burke J., dissenting);

320. *Davis*, 564 U.S. at 255 (Brennan J., dissenting)

321. *Id.*

322. *See, e.g.*, *Herring*, 555 U.S. 135.

323. *Id.*

324. *Id.*

325. *Leflore*, 32 N.E.3d at 1066-67 (Burke J., dissenting) (stating the court opens up a general good-faith inquiry with its current holding).

326. *Davis*, 564 U.S. at 258 (Brennan J., dissenting); *see, e.g.*, State v. Johnson 22 N.E.3d 1061 (Oh. 2014) (holding that good-faith exception applied since the officer who attached a GPS device to a defendant's vehicle, had an objectively reasonable belief that he did not need to obtain a warrant before doing so).

327. *Davis*, 564 U.S. at 258 (Brennan J., dissenting); *see also Katzin*, 769 F.3d at 190 (Greenaway Jr. J., dissenting) (stating that police made a deliberate decision implicating constitutional principles on the basis of a 3-1 Circuit split, absent any

suggest that an officer is not more culpable when he is acting pursuant to persuasive or suggestive precedent, as opposed to binding precedent.[328]

The fact is that in most scenarios, police officers are acting in objective good faith, when faced with the facts before them.[329] Importantly, however, police officers are likely not exactly sure, in most instances, how the Fourth Amendment applies to the facts before them.[330] Therefore, it follows that in a significant number of these cases, a court will find that police were wrong.[331] When a court finds police acted unconstitutionally, most of the time, the exclusionary rule will be applied.[332] However, *Davis'* holding seems to suggest that the federal exclusionary rule will only apply to those unlawful searches and seizures that are "egregiously unreasonable."[333] This is especially problematic when one considers the frequency with which Fourth Amendment suppression motions are filed.[334] While the holding in *Davis* is likely to cause complex legal argument, and police force confusion, at the end of the day, it will be the defendant who loses, since his constitutional rights will be violation, and he will be left without remedy.[335]

Between *Hudson*, *Herring* and *Davis*, the good-faith exception has the potential to swallow the exclusionary rule.[336] Further, these cases, *Davis* in particular, seems to create a categorical bar to obtaining redress for defendants in every case pending when precedent is overturned.[337] Illinois Courts are not constrained by

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authorization for their conduct); *Leflore*, 32 N.E.3d at 1066-67 (Burke J., dissenting) (stating the majority's alternative holding was based on a broad reading of *dicta* in *Davis,* 564 U.S. 229 and it also invites lower courts to conduct a general "good-faith" inquiry, not limited by the facts or circumstances in *Davis* or any other Supreme Court case). In *Leflore*, the dissent argued that the precedent that officers relied upon was not binding, that the police could not have reasonably relied upon it. *Id.* at 1073. The dissent also argued that the precedent that the officers ostensibly relied upon, did not authorize the specific acts that the officers did. *Id.* Rather, it authorized similar, but distinct act. *Id.*

328. *Davis*, 564 U.S. at 257-58 (Brennan J., dissenting); *see also Katzin*, 769 F.3d at 190 (Greenaway Jr. J., dissenting); *see also Leflore*, 32 N.E.3d at 1066-67 (Burke J., dissenting) (lower courts interpreting *Davis,* 564 U.S. 229, are not limited by the facts or circumstances in *Davis* or any other Supreme Court case).

329. *Davis*, 564 U.S. at 257-58 (Brennan J., dissenting)

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*; *Katzin*, 769 F.3d at 196 (Greenaway Jr. J., dissenting) (arguing the majority's good-faith analysis is flawed because it finds that, where the law is unsettled, police may act in a constitutionally reckless way and still reap the benefits of the good-faith exception).

334. *Davis*, 564 U.S. at 258 (Brennan J., dissenting).

335. *See id.*

336. *Id.*; s*ee also Leflore*, 32 N.E.3d at 1063 (Burke J., dissenting) (arguing that the majority's holding, pursuant to Supreme Court's holding in *Davis*, 563 U.S. 229, has the potential result in "the erosion, and possible destruction of the exclusionary rule. . . .").

337. *Id.*

the analytical framework used by the United States Supreme Court.[338] So the next question is: where does the United States Supreme Court's position on the federal exclusionary rule leave Illinois courts with the state exclusionary rule?

D. The Federal Exclusionary Rule Rationale Juxtaposed with Illinois' State Exclusionary Rule Rationale

The federal exclusionary rule currently is applied using the framework laid out in *Herring* and *Davis*.[339] Accordingly, the cost-benefit analysis is (1) narrow in scope with police deterrence as its primary objective, with an emphasis on societal costs[340]; (2) ostensibly does not require police to actually rely[341] on a neutral third-party authority (i.e. search warrant issued by judge or statute authorizing a police act)[342] to effectuate a search and seizure; and, (3) requires a high level of police culpability (intent, conscious disregard, or systemic negligence), in order to justify application of the rule.[343] The clear result of the United States Supreme Court's cost-benefit analysis framework is: the "good-faith exception" to the exclusionary rule is exponentially broadening, such that more Fourth Amendment violations fall within the purview of the good-faith exception.[344] In the words of Justice Scalia, the federal exclusionary rule is truly becoming the Court's "last resort."[345]

Illinois Courts have in some instances applied the federal exclusionary rule via the Fourteenth Amendment.[346] However, in other instances, they have explicitly applied the state exclusionary rule arising out of Article I Section 6.[347] As it turns out, the analysis Illinois courts have employed in determining the applicability of the state exclusionary rule is (1) not as narrow in scope and (2) is not

338. *See* O'Neill, *supra* note 66.

339. See, e.g., Davis, 564 U.S. 229 (discussing the cost-benefit analysis in determining whether to apply federal exclusionary rule).

340. *See Hudson*, 547 U.S. 586; *see also Herring*, 555 U.S. 135.

341. *Hudson*, 547 U.S. 586; *see also Herring*, 555 U.S. 135.

342. *Hudson*, 547 U.S. 586; *see also Herring*, 555 U.S. 135.

343. *Hudson*, 547 U.S. 586; *see also Herring*, 555 U.S. 135.

344. Davis, 564 U.S. at 258 (Brennan J., dissenting).; *Leflore,* 32 N.E.3d 1043.

345. *Hudson*, 547 U.S. at 591 ("suppression of evidence, however, has always been our last resort, not our first impulse").

346. *See, e.g.,* People v. Morgan, 901 N.E.2d 252 (Ill. App. Ct. 4th Dist. 2009) (applying federal exclusionary rule); *see also* People v. Boyer 713 N.E.2d 655 (Ill. App. Ct. 3d Dist 1999) (applying federal exclusionary rule).; *see also* People v. Holmes, 45 N.E.3d 326 (1st App. Dist. 2015) (applying state exclusionary rule); *see also* People v. Horton, No. 1-14-2019, 2017 WL 1274307, at *8 (1st App. Dist. 2017) (applying state exclusionary rule).

347. *Krueger*, 175 Ill. 2d 60 (1996); People v. Wright, 697 N.E. 2d 693, 697 (Ill. 1998) (affirming that the exclusionary rule arising from Article I section 6 provides greater protection than the exclusionary rule arising from the Fourth Amendment).

limited in its purpose to solely police deterrence.[348] Therefore, the state exclusionary rule is more broadly applicable to Fourth Amendment (and Article I Section 6) violations.

In *People v. Stewart*, the Illinois Supreme Court adopted the good-faith exception to the state exclusionary rule pursuant to Article I Section 6.[349] However, the Illinois Supreme Court did not provide a reason for adopting the *Leon* good-faith exception.[350] Furthermore, the court did not explicitly state that the Supreme Court's cost-benefit analysis was the mode for determining the application of the *Leon* good-faith exception for Article I Section 6 purposes.[351] Rather, the Illinois Supreme Court stated that the good-faith exception, as it was applied in *Leon*, accorded with the dictates of the Illinois Constitution.[352]

However, unlike the United States Supreme Court in *Krull*, the Illinois Supreme Court did not extend the good-faith exception to statutes later-declared unconstitutional.[353] Instead, the court found that the state exclusionary rule applied to suppress evidence gathered pursuant to an unconstitutional statute.[354] Accordingly, *People v. Krueger* marked a point of departure for Illinois in terms of the rationale used by the court in determining when to apply the state exclusionary rule.[355]

In *People v. Krueger* the Illinois Supreme Court explicitly rejected the United States Supreme Court's holding in *Krull*.[356] The

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348. *See Krueger*, 175 Ill. 2d 60 (1996).

349. People v. Stewart, 473 N.E.2d 1227 (1984); *accord*, People v. Bohan, 511 N.E.2d. 1384 (1984): *see also* 725 ILCS 5/114-12 (codifying *Leon*).

350. *See Stewart*, 471 N.E.2d at 1233 (stating "the agents reasonable and good-faith belief, although a possibly mistaken one, that the searches were authorized under the warrants, insulated the searches from a motion to suppress."). The court in *Stewart* however only cited to the *Leon* case, and never stated that if this was the rule under Article I section 6. *Id.*

351. *Stewart*, 471 N.E.2d at 1233

352. *Id.*

353. *Krueger*, 175 Ill. 2d 60.

354. *Id.*

355. *Id.* (the majority adopted justice O'Connor's rationale in *Krull*, 480 U.S. 340).

356. *Krueger*, 175 Ill. 2d 60. In this case the majority relied heavily on Justice O'Connor's dissent in *Krull,* 480 U.S. 340. *Id.* The court first determined that the statute purporting to allow police to enter without knocking was unconstitutional. *Id.* The next issue was whether the good-faith exception applied so as to prevent the evidence from being excluded at trial. *Id.* The court stated: "Justice O'Connor's dissent revealed several serious flaws in the majority's decision. She pointed out that this newly created exception to the fourth amendment exclusionary rule provides a grace period for unconstitutional search and seizure legislation, during which time the State is permitted to violate constitutional requirements with impunity." Further, Justice O'Connor did not find the majority's extension of the good-faith exception to be supported by *Leon* 's rationale. *Id.* She persuasively distinguished *Leon* on the following grounds. *Id.* First, there is a "powerful historical basis for the exclusion of evidence gathered pursuant to an unconstitutional statute. *Id.* Not only were such statutes "the core concern of the Framers of the Fourth Amendment," the exclusionary rule had regularly been applied to suppress evidence gathered under

issue in *Kruger* was whether a "no-knock" statute was valid.[357] In part I of its holding the court ruled that the statute was unconstitutional.[358] The Court found the statute violated the reasonableness requirement set out in the Fourth Amendment and Article I Section 6 because it allowed police to enter without knocking based solely on an occupant's prior possession of firearms.[359] The court decided that the statute was unconstitutional because it was unreasonable under both Article I Section 6 and the Fourth Amendment.[360]

In part II of its holing the Court turned to the ultimate issue of whether to apply the state exclusionary rule to suppress the evidence that was gathered pursuant to a statute that violated both Article I Section 6 and the Fourth Amendment.[361] The court began by characterizing the case as one about remedies and not interpretation.[362] Therefore, *Krull* was only controlling as to the exclusionary rule arising out of the Fourth Amendment, the federal exclusionary rule.[363] Despite construing Article I Section 6 and the Fourth Amendment in "lockstep" fashion, the court was able to employ an independent analysis regarding whether exclusion was permissible under the Illinois constitution.[364] The Illinois Supreme Court held "we are not willing to recognize an exception to our state exclusionary rule that will provide a grace period for unconstitutional searches and seizure…during which time our citizens prized constitutional rights can be violated with impunity."[365]

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unconstitutional statutes. *Id*. Second, Justice O'Connor found this history illustrative of the fact that the relevant state actors in *Krull*—legislators—often pose a serious threat to fourth amendment values." *Id.* "[T]he judicial role is particularized, fact-specific and nonpolitical. Legislative acts sweep broadly and affect whole classes of searches." *Id.*

357. *Krueger*, 675 N.E.2d. 605 (the unconstitutional statutes allowed police to enter a person's house on less than probable cause). The court stated that they would construe both constitutions as offering the same level of protection, apparently acknowledging the lockstep test and when it would be permissible to depart on the basis of interpretation. *Id.*

358. *Id.*

359. *Id.* The court said that this was unconstitutional because it did not create any exigent circumstances and thus it was unreasonable not to announce entry. *Id.* Unless the officers have a reasonable belief that an occupant will use a firearm against them if they proceed with the ordinary announcements will not announcing be constitutional. *Id.*

360. *Id.*

361. *Id.* The Court adhered to the "limited lockstep" doctrine on interpreting the issue of whether the statute violated the Fourth Amendment and thus Article I section 6. *Id.*

362. *Id.*

363. *Id. Krull* was only controlling as to the federal constitution exclusionary rule. *Compare Krueger*, 675 N.E.2d 604 *with Krull*, 480 U.S. 340.

364. *Krueger*, 675 N.E.2d 604. Under the federal exclusionary rule, the good-faith exception would have applied. *See Krull*, 480 U.S. 340.

365. *Krueger*, 675 N.E. 2d. 604; *see also* People v. Carrera, 783 N.E 2d 15 (Ill.

The court justified its holding on three separate grounds.[366] First, the court relied on the distinction between a judge and a legislature.[367] Judges actions typically affect only one person at a time, while legislatures actions affect thousands, if not millions, of people at a time.[368] Thus, this scenario was distinct from the scenario in *Leon* where a judge issued a warrant that was based on less than probable cause.[369]

The court's second rationale was the fact that there would be no effective remedy for the defendant convicted as the result of the constitutional violation.[370] This would leave no incentive for the aggrieved defendant to challenge a statute as unconstitutional if he would still be convicted upon it.[371] Finally, the court was persuaded by the powerful historical basis for excluding evidence gathered pursuant to a search authorized by an unconstitutional statute.[372] The court found that it was precisely these statutes that were the "core concern of the Framers of the Fourth Amendment."[373] Moreover, the court noted that the exclusionary rule had regularly been applied to suppress evidence gathered under unconstitutional statutes.[374]

In reaching their holding, the *Krueger* court importantly rested It's decision on state constitutional grounds.[375] The court also distinctly noted the state test that determines whether to apply the state exclusionary rule.[376] The court stated that for purposes of the state exclusionary rule, in evaluating whether to apply the state exclusionary rule Illinois courts must "carefully balance the legitimate aims of law enforcement against the right of our citizens to be free from unreasonable government intrusion."[377] The court specifically distinguished the state balancing test from the cost-benefit test the Supreme Court used in *Leon* and *Krull*.[378] In doing

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2002).

366. *Id.*

367. *Id.*

368. *See id.*; *see also Krull*, 480 U.S. at 365 (O'Connor J., dissenting) ("A judicial officer's unreasonable authorization of a search warrant affects one person at a time; a legislature's unreasonable authorization of searches may affect thousands or millions and will almost always affect more than one.").

369. *Id.*; *see also* LaFave, *supra* note 3.

370. *See Krueger*, 675 N.E. 2d. 604; *see also Davis*, 564 U.S. at 258 (Brennan J., dissenting).

371. *See id.*; *see also Gersch*, 553 N.E.2d at 287.

372. *Krueger*, 675 N.E. 2d at 610; *See also* Krull (O'Connor J., dissenting)

373. *Krueger*, 675 N.E. 2d at 610; *See also* Krull (O'Connor J., dissenting)

374. *Krueger*, 675 N.E. 2d at 610. The court also found that the exception to the good-faith exception laid out in *Krull,* 480 U.S. 340 was unrealistic and hard to apply. *Id.*

375. *Id.*

376. *Krueger*, 675 N.E. 2d at 610*; but cf. Davis*, 564 U.S. 229 (using the cost-benefit approach in determining whether to apply the exclusionary rule).

377. *Krueger*, 675 N.E. 2d at 610.

378. *Id.*(comparing the balancing test from *Tisler,* (state test) to that in *Leon* and *Krull* (federal test)).

so, the court found that the price was too high for letting unconstitutional search and seizure legislation violate the citizens' rights with impunity.[379] Thus, the court applied the state exclusionary rule as the remedy.[380]

The significance of this Court's test is that it is distinctly broader than the test for the applicability of the federal exclusionary rule.[381] Recall that the test in *Herring* is (1) Benefits must outweigh the costs and (2) there must be sufficient culpability of police conduct to make it "worth it" to apply the federal exclusionary rule.[382] Conversely, Illinois courts employ more of a broad balancing test, with no rigid requirements, in determining whether to apply the state exclusionary rule arising out of Article I section 6.[383]

Importantly, the balancing test the court employs does not recognize government reliance on an unconstitutional statute as a basis for the good-faith exception.[384] The benefit of the balancing test for determining the applicability of the Illinois state exclusionary rule is that it is not bound by a set of tightly circumscribed rules governing its application.[385] Thus, it balances

379. *Krueger*, 675 N.E.2d at 610.

380. *Id.* The court applied the state exclusionary rule because the federal exclusionary rule did not apply. *See Krull,* 480 U.S. 340 (applying the good-faith exception to the federal exclusionary rule). It did not apply because in *Krull*, pursuant to the cost-benefit analysis by the Supreme Court, the benefits of applying the rule did not outweigh the costs. *Id.*

381. *Id.*; *see also Carrera*, 783 N.E.2d 15 (rejecting the good-faith exception to the state exclusionary rule when officers effectuated an extraterritorial arrest pursuant to a statute that was later declared unconstitutional). Importantly, in *Carrera*, the court relied on the fact that if It applied the good-faith exception to the exclusionary rule, It would effectively "resurrect the [unconstitutional] amendment and provide a grace period [of four years] during which our citizens would have been subject to extraterritorial arrests without proper authorization." *Id.* at 24. In so holding, the court in *Carrera* used expansive language stating that the void *ab initio* doctrine "applies equally to legislative acts which are unconstitutional because they violate substantive constitutional guarantees and those that are unconstitutional because they are adopted in violation of the single subject clause of our constitution." *Id.* at 22; *see also Holmes*, 45 N.E. at 333 (concluding that applying the good-faith exception to the state exclusionary rule would run counter to Illinois' void *ab inito* jurisprudence and the void *ab initio* doctrine precludes the good-faith exception's application in this state). The court in *Holmes* also noted the expansive language the Illinois Supreme Court used in *Carrera* in stating that the void *ab initio* doctrine applied to both substantive and procedural guarantees by the Illinois Constitution. *See id.*

382. *Herring,* 555 U.S. 135.

383. *See, e.g., Krueger*, 675 N.E.2d 604 (employing a balancing test different from the United States Supreme Court's cost-benefits test); *see also Tisler,* 469 N.E.2d. at 161.

384. *Krueger*, 675 N.E.2d 604; Carrera, 783 N.E.2d 15;

385. *Compare Davis*, 564 U.S. 229 (finding that the test in determining whether the exclusionary rule applies is whether the police were sufficiently culpable and acted in a sufficiently deliberate way in order to justify exclusion) *with Kreuger,* 675 N.E.2d 604 (finding that the goal of the court is to balance legitimate aims with the right to be free from unreasonable government intrusion).

both the "costs" of applying the rule and the "costs" of not applying the rule.[386]

Additionally, Illinois courts still recognize judicial integrity as a valid purpose of the state exclusionary rule.[387] Accordingly, the state exclusionary rule is also broader in this respect.[388] Illinois courts have found that the exclusionary rule is designed to promote individual and institutional compliance at all branches of government with the constitutional mandate against unreasonable government invasions of privacy in order to vindicate individual rights.[389] This important purpose makes up part of the balance of interests Illinois considers when determining whether to apply the state exclusionary rule.[390]

The jurisprudence of the state exclusionary rule is distinct from that of the federal exclusionary rule.[391] Therefore, consider the scenarios in *Evans, Hudson, Herring*, and *Davis*, applying the state exclusionary rule, instead of the federal exclusionary rule. The court in *Krueger* stated that the fact that legislators can affect many people's constitutional rights with impunity was a major factor in deciding whether to apply the state exclusionary rule.[392] The court reasoned that the balance of interests weighed in favor of applying the exclusionary rule since many people potentially could have their constitutional rights violated.[393] This seems to suggest that in a situation like *Evans* and *Herring*, where erroneous record keeping by either the county clerk, or the police lead to a defendant's false arrest, Illinois courts, considering the state exclusionary rule would be more inclined to find that the state exclusionary rule applies.

Additionally, the result in *Davis* would likely be different if an Illinois court applied the state exclusionary rule.[394] In *Davis* police were acting pursuant to binding appellate precedent that was later found unconstitutional when the defendant was arrested.[395] Similar to *Krull,* the unconstitutional precedent could affect thousands,

386. *Krueger*, 675 N.E.2d 604.

387. People v. McGee, 644 N.E.2d 439 (Ill. App. 3d Dist. 1994).

388. *Id.*

389. *Id.*

390. *Leflore,* 32 N.E.3d at 1066-67 (Burke J., dissenting) (stating the balance of interests Illinois courts use when determining whether to prohibit the extension of the good-faith exception which include (1) the number of people affected (2) the effective remedy for the aggrieved defendant and (2) the historical basis for exclusion).

391. *See generally Krueger*, 675 N.E.2d 604; *accord Wright*, 697 N.E.2d 693; *see also Leflore*, 32 N.E.3d at 1066-67 (Burke J., dissenting).

392. *Krueger*, 675 N.E.2d 604; *see also Carrera*, 783 N.E.2d 15; *see also Holmes*, 45 N.E.3d 326; *accord Horton*, 2017 WL 1274307, *7 (holding that the void *ab initio* doctrine preclude application of the good-faith exception).

393. *Krueger*, 675 N.E.2d 604.

394. *See Leflore*, 32 N.E.3d at 1066-67 (Burke J., dissenting) (stating the same concerns that the Illinois Supreme Court found in Krull, are also present in Davis).

395. *Davis*, 564 U.S. 229.

even millions, of people.[396] Further, it allows police, not a third party neutral, to violate citizen's rights.[397] When police search or seize someone or something without a warrant, they take the risk of being wrong, and in violation of the core of Article I Section 6 protections.[398] The state exclusionary rule is well tailored to hold law enforcement accountable for their mistakes in this regard.[399] Thus, the balance of interests would also likely tip in favor of applying the state exclusionary rule. The state exclusionary rule has the potential to protect these constitutional violations where the federal exclusionary rule would not.[400]

IV. PROPOSAL

The foregoing analysis has explored the differing rationales for applying the federal exclusionary rule and the state exclusionary rule. Particularly, the United States Supreme Court's use of the cost-benefit analysis to narrow the scope of the federal exclusionary rule as well as the Court's abandonment of the original purposes for applying the exclusionary rule.[401] Illinois courts have a distinct rationale for applying the state exclusionary rule that make it more broadly applicable than the federal exclusionary rule. The recent stark change in federal law provides an impetus for Illinois courts to apply their state exclusionary rule.[402]

For Illinois courts, when there is a Fourth Amendment (and thus a corresponding Article I Section 6) violation, the court is not encumbered by the "limited lockstep doctrine" in applying the state exclusionary rule.[403] Nevertheless, if the court chooses to apply the federal exclusionary rule, or rather, does not decide the case specifically stating they are relying on the state exclusionary rule, then the United States Supreme Court will have jurisdiction to hear the case.[404] However, if Illinois courts explicitly choose to apply the state exclusionary rule, this prevents the United States Supreme Court from reversing an Illinois court's application of the state

396. *See Leflore*, 32 N.E.3d at 1066-67 (Burke J., dissenting).

397. *Id.*

398. *See Leflore*, 32 N.E.3d at 1074 (Burke J., dissenting) ("Where state courts are silent on the constitutionality of a particular police practice, law enforcement officers who engage in that practice without first obtaining a search warrant from a neutral magistrate must knowingly accept the risk that their conduct will be found unconstitutional.").

399. *Katzin*, 769 F.3d at 190 (Greenaway Jr. J., dissenting).

400. *See generally Leflore*, 32 N.E.3d at 1066 (Burke J., dissenting).

401. *Compare Weeks*, 232 U.S. 383 and *Mapp,* 367 U.S. 643 *with Davis*, 564 U.S. 229.

402. *See Guzman*, 842 P.2 660.

403. *See generally Krueger*, 675 N.E.2d 604.

404. *See* O'Neill, *supra* note 11 (making the point that if Illinois courts rely strictly on a state constitutional provision, and make it explicit in the opinion, the United State Supreme Court will not have jurisdiction to hear the case thereby insulating the Illinois court's decision from being reversed by the Supreme Court).

exclusionary rule, and instead, applying the federal exclusionary rule.[405]

I propose that when Illinois courts find that there is a constitutional violation of the Fourth Amendment (and thus Article I Section 6) Illinois courts *should specifically* apply the state exclusionary rule that arises out of Article I Section 6 of the Illinois constitution.[406] In applying the state exclusionary rule as a remedy for Article I Section 6 constitutional violations, Illinois courts can (1) avoid engaging in the unworkable cost-benefit analysis that the United States Supreme Court employs in determining the applicability of the federal exclusionary rule while simultaneously promoting their own judicial independence; (2) better protect the constitutional rights of Illinois residents by providing an effective remedy for Article I Section 6 violations (and Fourth Amendment violations); (3) better promote institutional compliance with the Article I section 6 (and the Fourth Amendment); (4) comport more closely with the language of the Illinois constitution;[407] and (5) comport more closely with the original justification, and Illinois precedent, for applying the state exclusionary rule.[408]

First, by applying the state exclusionary rule explicitly, Illinois courts can altogether avoid engaging in the current cost-benefit analysis employed by the Supreme Court.[409] The cost-benefit analysis is currently very malleable and inconsistent in its application.[410] This allows the Supreme Court to continually limit the effect of the federal exclusionary rule.[411] Further, the federal exclusionary rule is not being applied in a principled fashion.[412]

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405. *See* O'Neill, *supra* note 11.

406. *See Herring*, 555 U.S. 135 (Ginsberg J., dissenting) (stating that the exclusionary rule is a remedy necessary to ensure that the Fourth Amendment's prohibitions are observed in fact).

407. *See* Ill. Const. art. I, § 12, (1970) ("every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.").

408. *See generally Brocamp*, 138 N.E. 728; *see also* Leven, *supra* note 70.

409. *See, e.g.*, *Davis*, 564 U.S. at 238 (stating that in order for the federal exclusionary rule to apply, police action must be sufficiently deliberate as well as sufficiently culpable).

410. *See, e.g.*, *Katzin*, 769 F.3d at 196 (Smith J., dissenting) ("If what the majority is suggesting is that law enforcement officers may rely not just on holding, which are truly the stuff of precedent, but also on appellate court rationale, I find such a suggestion both troubling and impractical.").

411. *Id.*

412. *See Leon*, 468 U.S. at 940 (Brennan J., dissenting) (finding that it is an impossible task to balance the costs and benefits of the exclusionary rule in an honest and accurate way and ultimately the court acts on its unstable intuition, hunches, and occasional pieces of partial and often inconclusive data); *see also Oakes*, 598 A.2d at 126 (stating the federal exclusionary rule's cost-benefit analysis is of no value because the costs and benefits the court purports to weigh cannot reliably be balanced with an precision). There is not enough empirical data for the costs and benefits for a good-faith exception to be accurately and honestly assessed. *Id.* One of

Illinois courts can avoid this by applying the state exclusionary rule. The state exclusionary rule has been applied in a more principled way, primarily because Illinois uses a broader balancing test that considers more than the limited cost-benefit analysis considers.[413] Another benefit of applying the state exclusionary rule is that Illinois courts will avoid being reversed by the United States Supreme Court, due to an alleged misapplication of the federal exclusionary rule.[414] As a result, Illinois courts will be more judicially independent and autonomous.[415] At the same time, Illinois courts can avoid the problems with the Supreme Court's current version of the cost-benefit analysis.[416]

Second, by applying the state exclusionary rule Illinois courts can avoid situations where the defendant is effectively left without a remedy, despite having his constitutional rights violated.[417] Currently, the federal exclusionary rule does not apply to exclude evidence that was gathered pursuant to an unconstitutional statute, or to record-keeping errors by police or the county clerks, or pursuant to an officer acting pursuant to binding appellate precedent that is later held unconstitutional.[418] It is settled law that Illinois state exclusionary rule does not recognize a good-faith

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the reasons the benefits of the exclusionary rule is hard to measure is because it consists of non-events. *Id.* In other words, if police comply with the Fourth Amendment produces a non- event because there is no illegal search. *Id.; see Katzin*, 769 F.3d at 196 (Smith J., dissenting). Justice Smith stated that the majority's framework, ostensibly allowing police to rely on appellate court rationale, provided not limiting principle for the court and was therefore troubling. *Id.*

413. *See Krueger*, 675 N.E.2d 604; *see also Carrera*, 783 N.E.2d 15; *see also Holmes*, 45 N.E.3d 326; *Accord Horton*, 2017 WL 1274307, *7 (holding that the void *ab initio* doctrine preclude application of the good-faith exception).

414. O'Neill, *supra* note 11.

415. *See generally* Leven, *supra* note 70.

416. See *Katzin*, 769 F.3d at 196 (Smith J., dissenting).

417. *See Davis*, 564 U.S. at 258 (Brennan J., dissenting) (arguing that when the exclusionary rule does not apply to precedent later-declared unconstitutional, defendant effectively has not remedy for the constitutional violation); *see also* Kerr, *supra* 197, at 1096 (stating the exclusionary rule is the only remedy that can address the constitutional violation to the defendant in a criminal case and the civil remedies are not sufficient or likely); *see also* People v. Gersch, 553 N.E.2d 281, 287 (Ill. 1990) (stating that "[t]o hold a judicial decision that declares a statute unconstitutional is not retroactive would forever prevent those injured under the unconstitutional legislative act from receiving a remedy for the deprivation of a guaranteed right."). If a judicial decision that declared a statute unconstitutional was not retroactive, this would clearly offend all sense of due process under for the Federal and State constitutions. *Id.* This rationale would seem to apply to preclude application of the good-faith exception to the state exclusionary rule for unconstitutional acts by police, since acts by police that violate a defendant's constitutional rights, if the good-faith exception applies, effectively leave the defendant without a remedy for the constitutional violation. *See generally id*. The good-faith exception allows a defendant to be prosecuted with evidence gathered under an unconstitutional act. *Id*.

418. *See, e.g., Davis*, 564 U.S. 229 (federal exclusionary rule does not apply to statutes later-declared unconstitutional); *Krull*, 480 U.S. 340 (federal exclusionary rule does not apply to statutes later-declared unconstitutional).

exception when police obtain evidence pursuant to an unconstitutional statute.[419] Many of these same concerns are present when a police officer acts pursuant to appellate precedent later declared unconstitutional.[420] Thus, the state exclusionary rule should also be applied when police officers are acting pursuant to unconstitutional precedent.[421] By applying the state exclusionary rule instead of the federal exclusionary rule, Illinois courts will vindicate individual rights.[422]

Third, applying the state exclusionary rule will better promote institutional compliance with the dictates of Article I Section 6 (and the Fourth Amendment).[423] A liberal application of the exclusionary rule as the vehicle for enforcing Fourth Amendment and Article I Section 6 violations has a tendency to promote institutional compliance with the Fourth Amendment's requirements, especially on the part of law enforcement agencies.[424] Thus, the overall benefit would be more thorough police work, more vigilant judges in issuing warrants, and more thorough legislators in promulgating constitutional laws.[425] The Supreme Court's current version of the exclusionary rule has a tendency to embolden law enforcement because they can rely on the good-faith exception to "extricate them from nearly any evidentiary conundrum."[426] This however is at the

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419. *Krueger*, 675 N.E.2d 604; *Wright*, 697 N.E. 2d 693; *see also Carrera*, 783 N.E.2d 15.

420. *Leflore*, 32 N.E.3d at 1066-67 (Burke J., dissenting).

421. *But see Leflore*, 32 N.E.3d at 1043 (applying the federal exclusionary rule).

422. *McGee*, 644 N.E.2d at 447 (finding the exclusionary rule vindicates individual rights). The court here also found that the exclusionary rule encourages compliance by the legislative and executive branches of government. *Id.* Further, it induces scrutiny and guidance from the judicial branch of Illinois. *Id.* Importantly, the exclusionary rule "permits courts to honor the Constitution other than to merely note its breach." *Id.*

423. *Id.* ("The exclusionary rule is not intended to punish, but it is designed to promote both individual and institutional compliance with the constitutional mandate against unreasonable government invasions of privacy."). The state exclusionary rule encourages the legislature to enact constitutional laws, the executive to uphold its oath to support the Illinois constitution, and induces scrutiny and guidance from the judicial branch in Illinois. *Id.*

424. *See generally Guzman*, 842 P.2 660 (noting that the Supreme Court's cost/benefit analysis only captures on comparatively minor element of the generally acknowledge purposes of the exclusionary rule); *See also Herring,* 555 U.S. at 148 (Ginsberg J., dissenting) (finding that not applying the exclusionary rule generally rejects a foundations premise of tort law which is that liability for negligence creates a incentive to act with greater care). Just as *respondent superior* liability encourages employers to supervise their employees, this theory would encourage policy makers and systems managers to monitor the performance of the systems they install. *See id.*

425. *See generally Guzman,* 842 P.2 660 (finding that in general the good-faith exception to the exclusionary rule underestimates the benefits of the rule and overstates the costs and also that the exception in general creates sloppier magistrate and police work, making the state less inclined to follow the directives of the Fourth Amendment).

426. *Katzin*, 769 F.3d at 188 (Greenaway Jr. J., dissenting).

cost of citizens constitutional rights. Applying the state exclusionary rule can help avoid this consequence, and encourage law enforcement officials to "err on the side of constitutional behavior," especially in the face of unsettled or equivocal Fourth Amendment law.[427]

Fourth, applying the state exclusionary rule will comport more closely with other provisions of the Illinois' Constitution. Specifically, Article I Section 12, which states "every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation.[428] He shall obtain justice by law, freely, completely, and promptly."[429] Accordingly, applying the state exclusionary rule will more effectively comport with Article I Section 12 in providing a prompt remedy to those who have had their constitutional rights injured by an unreasonable government search or seizure.[430] In contrast, the United States Supreme Court's rationale for applying the exclusionary rule has effectively left some people with practically no remedy.[431] Additionally, application of the state exclusionary rule will avoid Illinois courts allowing two constitutional violations to go without remedy: the Fourth Amendment and Article I Section 6. Ultimately, the state exclusionary rule will better protect both constitutional provisions, as well as comport more closely with the philosophy expressed in Article I section 12.

Fifth, by applying the state exclusionary rule, Illinois courts will be adhering more closely to their own precedent for its application, as well as another important purpose for its application: to see that judicial integrity is maintained and to prevent the further violation of constitutional rights. When the Illinois Supreme Court first stated that it would exclude illegally seized evidence, the court explained that this was necessary unless the constitution guaranteeing these rights was to be made "a mere nullity and our boasted rights of liberty…vain."[432] The clear implication was that the state exclusionary rule was a mandatory remedy.

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427. *Davis*, 564 U.S at 251 (Sotomayor J., concurring); *see also Leflore*, 32 N.E.3d at 1073 (Burke J., dissenting).

428. Ill. Const. art. I, § 12 (1970); *see also Gersch*, 553 N.E.2d at 287.

429. Ill. Const. art. I, § 12 (1970).

430. *Davis*, 564 U.S. at 258 (Brennan J., dissenting) ("defendant has no effective redress when good-faith is applied").

431. *See Hudson*, 547 U.S. at 604 (Ginsberg J., dissenting) (finding that the not applying the exclusionary rule under certain circumstances effectively leaves the defendant was no remedy whatsoever for the constitutional violation because of the high unlikelihood that there would be any civil remedy, in tort or otherwise).

432. *See Brocamp*, 138 N.E. at 731-32. In addition, the court in *Brocamp* then agreed with the defendant that "the constitutional guarantees the rights of the defendant in criminal case . . . [and for violations thereof] there must, of necessity, be a remedy." *Id.*

Further, the rule was necessary to preserve the integrity of our constitution and courts. Since it is the duty of our courts to faithfully uphold the constitution, it was necessarily the courts' duty to see that illegally seized evidence was not used to convict a defendant.[433] Otherwise, the courts would be effectively acquiescing in illegality, and thereby not upholding the constitution it was sworn to uphold. The rationale for excluding unlawfully seized evidence started as a matter of judicial integrity, and at the same time, it served to deter police and government agents from committing constitutional violations.[434] The Illinois exclusionary rule has never been limited to solely police deterrence.[435]

V. CONCLUSION

The Fourth Amendment is a one of the most important rights contained in our Constitution. It prevents the government from arbitrarily invading our privacy, our possessions, and our person. The exclusionary rule is necessary for the Fourth Amendment to be observed "in fact."[436] The United States Supreme Court has created the cost-benefit analysis for determining when to apply the federal exclusionary rule.[437] So far, this analysis has allowed the state to introduce evidence that was seized pursuant to: invalid warrants, unconstitutional statutes, erroneous precedent, police errors, clerk errors, or otherwise unreasonable searches and seizures that violate the Fourth Amendment.[438] These cases are merely illustrations of good faith, not limitations on the expansion of the good-faith doctrine. Thus, the good-faith exception to the federal exclusionary rule can, and likely will, continue to expand.

It is the Fourth Amendment that puts the restraints on police work and government action in general. The exclusionary rule is the vehicle for ensuring these protections are honored. Accordingly, it is surprising that the Supreme Court considers the federal exclusionary rule "a last resort."[439] Further, if the exclusionary rule

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433. *See* People v. Horton, No. 1-14-2019, 2017 IL App (1st) 142019 (2017) ("We cannot sidestep or disregard instruction from both the United States and Illinois Supreme Courts to achieve a specific outcome."); *see also Brocamp*, 138 N.E. 728.

434. *See generally McGee*, 644 N.E.2d 439 (finding that even if the state exclusionary rule is merely a remedy, the court would have an obligation to ensure that the remedy effectuates the state constitutional right to privacy). The Court found that an important purpose of the exclusionary rule was to preserve judicial integrity because the judiciary cannot tolerate evidence gathering practices that violate the constitution. *Id.*

435. *Id.*; *see generally* Part III.

436. *See Herring,* 555 U.S. at 152 (Ginsberg J., dissenting)

437. *See generally* Part III.

438. *Id.*

439. *See* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1392 (1983) (finding that much of the criticism leveled at the exclusionary rule is misdirected and that it is more properly directed at the Fourth

is the only the vehicle for effectuating the protections of the Fourth Amendment so they are observed "in fact," what the court is really saying is that the Fourth Amendment does not always apply."[440]

Illinois courts do not have to follow suit. The "limited lockstep" doctrine does not bar application of the state exclusionary rule. Further, applying the state exclusionary rule means that Illinois courts do not need to engage in the Supreme Court's cost-benefit analysis. Importantly, the state exclusionary rule provides greater protection than the federal exclusionary rule. It is equally important that the protections afforded under Article I Section 6 not be diminished by a permanently pervading adoption of the good-faith exception to the federal exclusionary rule.[441] Therefore, rather than following the Supreme Court's jurisprudence on the federal exclusionary rule, Illinois courts should apply the state exclusionary rule for Article I Section 6 violations. This will allow Illinois courts to honor the Constitution, rather than merely note its breach.[442]

Amendment itself). The exclusionary rule places no limitations on the actions of the police but rather the Fourth Amendment does. *Id.* Furthermore, the fact that officers who obey the prohibitions of the fourth amendment will invariably catch more criminals is a price the framers anticipated and were willing to pay to ensure the sanctity of the person, home, and property against unrestrained governmental power. *Id.*; *see also Hudson*, 547 U.S. 586. (finding that the exclusionary rule is an extreme remedy that in some instances amount to a get out of jail free card and therefore is only justified under very limited circumstances).

440. *See generally id.*

441. *Guzman*, 842 P.2 at 668.

442. *McGee*, 644 N.E. 2d 439. It is the Fourth Amendment which limits the government in gathering evidence of a crime, not the exclusionary rule. *Id.*