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# The United States' Criminal Justice System Divided\* : ...On the Connection between the Exclusionary Rule and Preserving Civil Liberties

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**The United States' Criminal Justice System Divided\*:**

**...On the Connection between the Exclusionary Rule and Preserving Civil Liberties**

By:

Alexandre Pomar

*In my opinion, it will not cease until a crisis shall have been reached and passed. "A house divided against itself cannot stand." I believe this government cannot endure, permanently, half slave and half free. I do not expect the [criminal justice system] to be dissolved; I do not expect the [system] to fall. But I do expect it will cease to be divided. It will become all one thing, or all the other...*

**Abraham Lincoln:** *House Divided\**, June 16, 1858

An undergraduate honors thesis submitted in partial fulfillment

Of

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Of

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In

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Thesis Adviser:

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Portland State University

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## **Abstract**

The injustice by professionals within the criminal justice system gives rise to societal opinion that purports that these respective agencies lack a clear perception of their professional conduct. This invidious neglect toward societal opinion preempts the divide among law enforcement agencies—most specifically—and the United States population. The impaired perception on professional conduct the criminal justice professionals suffer from nationwide owes itself to the misuse of authority and a subsequent lack of accountability for improper actions. Overtime, the dissolving of one's civil liberties has perpetuated in accord to the deference awarded to law enforcement agencies and the courts that allow this privilege; notwithstanding, this corruption continuum only dilutes into the nation's prison population. The exclusionary rule, as adopted by the Supreme Court in 1914, does not alone offer much substance in line with correcting this impaired perception among criminal justice professionals, however, the rules underlying principle in the rule of law could prove paramount. The purpose of this paper is to negate reasons favoring a suppression of the rule, and inspire research as to how this principle, modified into policy, can begin a movement toward closing the “revolving-door” that otherwise fuel the justice system in America, by doing so in jump-starting that system toward functioning systematically, not fraudulently.

*Keywords:* Civil Liberties, the exclusionary rule, rule-of-law

### **Research Question**

How can the exclusionary rule, as restored to its original function, be shaped through the rule-of-law perspective into legislation to achieve criminal justice system reform in totality?

## **Background**

The United States of America's criminal justice system is comprised of three branches-- law enforcement, judiciary, and corrections—and professionals in these fields are sworn under oath to lawfully carry out the administration of justice respective to their field. Criminal justice professionals' misuse of authority steadily increases as their public accountability declines, and this pattern has sparked a continuing debate over the changing conditions of the criminal justice system within the United States of America. This seeks to argue that, while many individuals strive to offer ways in which the U.S. may go about correcting the nation's damaged criminal justice system, most advocates, criminologists, policy makers, and researchers, tend to separate the three sectors that comprise the system. In order for any system to work effectively and properly, it is integral that all components interact harmoniously. Dividing those sectors into separate problem areas only hinders the possibility for the criminal justice system to work in unison. The current rise in animosity directed toward this misuse of authority—primarily directed at law enforcement officers and their lack of accountability—purports that police agencies lack a clear perception of the way society views their actions and behaviors. This neglect for societal opinion indicates the preeminence surrounding the divide between law enforcement and the nations' population, and the implications it creates for the system at large.

## **Methodology**

By examining United States case law on constitutional criminal procedures surrounding the application of the exclusionary rule, one can trace the progression of the rule and the subsequent decline of the rule in recent decades. Through doing so, this thesis was able to execute research through academic databases within the discipline of criminal justice in order to obtain scholarly articles that discuss the importance of the rule in connection to the criminal justice system. Through conducting a content analysis on theoretical scholarship, one can ultimately visualize the connections in the consistency by scholars in rendering the application of the exclusionary rule to be anything but what it was originally enacted for, in its use today by the American judicial system—with a strong emphasis on the Supreme Court.

After reading many articles in defense, and in opposition of continuance of the exclusionary rule, individuals can ascertain greater knowledge on the rules pertinence to criminal justice reform in America. The individual approaches to addressing the rule and its original function by academic scholars aligned with my belief that scholars fail to address the need of criminal justice reform on the basis that it reforms the entire system. The gaps in research show this trend. While some articles focused on the judiciary, some on law enforcement, and some even on the two together, most fail to consider the third branch, corrections.

In meeting this desire to address reform for the criminal justice system in the United States—as to connect the three branches that comprise the criminal justice system—one can execute additional research into the practical forms of restoring original function to the exclusionary rule. This thesis believes that, given the exclusionary rule is restored as well as, transformed to suit the needs of society today, it can prove paramount by ensuring the criminal justice system is reformed throughout its entirety and on a large-scale need.

## **Literature Review**

Criminal justice and legal scholars have studied the continuing decline in the application of the exclusionary rule during constitutional criminal procedure; many of those scholars believe strongly this trend needs reconsideration. Overtime, the avenues of redress proposed by scholars have increased in urgency in response to the paradigm shift engineered by the Burger and Rehnquist Court eras, as well as the influence of those Courts on the Roberts Court today (Jones, 2012). The purpose of the exclusionary rule, and the need for consistency in reviewing its application, aligns with the nation's large-scale need of criminal justice reform, with a strong emphasis placed on reforming the conduct of law enforcement officers. These same scholars believe that the exclusionary rule has lost its original purpose, and that it is even more likely that the rule invites complete abolishment (Tipton, 2009). While some scholars and legal professionals uniformly agree with the rules application, many differ in the approach sought to restore the purpose of the exclusionary rule for future constitutional criminal procedure

The judicial-made remedy of the exclusionary rule, when properly interpreted, should be found to enforce the protection of civil liberties on behalf of the criminally accused during constitutional criminal procedure. Moreover, through the effort by the American judicial system, the counter-remedy of the good-faith exception is unconstitutional for it sweeps afforded civil liberties under the rug and, furthers unprofessionalism by the American justice system altogether. The conventional wisdom of which enforces more protection over administering justice is wrong, because it fundamentally ignores the integrity behind the common law perspective in the rule-of-law.

### **I. The Purpose of Law**



The question of, what is the purpose of law, is loaded. It is easy for most individuals to believe the answer to that question is to ensure safety and governance over a society. However, most individuals also fail to consider whom the law protects, in addition to, seeking out a purpose. In conducting an analysis of three essays—*Leviathan* by Thomas Hobbes, *On Liberty* by John Stuart Mill, and *Law as Rhetoric, Rhetoric as Law* by James White—a more thorough investigation into the aforementioned questions may be explored. For example, *Leviathan* holds that the purpose of the law is to safeguard individuals from the “State of Nature” and ultimately work in effort toward a common good for a collective society (Hobbes, 1651). Mill’s *On Liberty*, proposes that law should only be employed when an individual’s actions elicit harm to another, and further hinders the harmed from achieving what they believe to be best for them (Mill, 1859). Lastly, White declares throughout *Law as Rhetoric, Rhetoric as Law*, that laws are dependent upon the fluidity of a community—to be created and constantly changed through means of ethics and justice—but is ultimately shaped by ways of culture and conversation (White, 1985).

When discussing the dangers within the “State of Nature,” Hobbes finds that the notions of justice and injustice are non-existent. Therefore, in the absence of justice and injustice within the “State of Nature”, Hobbes finds the phrase “All Men are Created Equal” problematic; all men have individualized strengths and with those strengths it is the power of the man to use that in pursuit of personal freedom (Hobbes, 1651). And through the unequal strengths of man, the “State of Nature” too is unequal. Insofar as the notion of personal strength is considered, for Hobbes justice is defined as, the performing of one’s own contract, through which laws are obeyed as given by the active “sovereign” power, or the Leviathan (Hobbes, 1651). In consequence, *Leviathan* posits that the only way one may risk being returned to the “State of

Nature” is through the breaking of those very contracts; life ultimately suggests it is everyman for himself.

Keeping to the theme focused on the individual, *On Liberty* suggests that the most important thing within a society is in fact the individual and their liberty to pursue their own good. Mill further suggests that to be true insofar as that individual does not elicit harm to others, or otherwise hinder their ability to pursue the same (Mill, 1859). Because of this, law must protect the overall liberty within a society. Thus, when one acts in accordance to personal interest, they must calculate the likelihood of “producing evil” to someone else; law then can create freedom through protecting and making possible the truth in liberty (Mill, 1859).

Through replacing an emphasis on the individual, White posits the importance through *Law as Rhetoric, Rhetoric as Law*, by drawing attention to the process of litigation, and the role of the attorney. He believes that laws are mechanical and the machines are, by default, policy choices and the techniques of implementation (White, 1985). White therefore holds that, the law is a rhetorical activity, which is constitutive of society (White, 1985). The essay highlights three aspects which helps define White’s primary notion behind law as rhetoric. First, it must be the point of view of those individuals that engage in the legal process, and as they learn to proceed in court. Law is always be specific upon the culture, for it starts with “an external empirically discoverable set of cultural resources” (White, 1985). Next, legal resources are made available through the culture by ways of speech and argument (White, 1985). Which leads to the last point that suggests law to be either ethical or communal in character—it is “socially constitutive nature” (White, 1985). In sum, White holds the belief that, law belongs not just to that of a bureaucracy, or to be defined solely as a set of rules; in turn, it is a community of speakers, a culture of argument that is perpetually remade by the participants within a society (White, 1985).

After one considers the aforementioned approaches to answer, what is the purpose of law, one can further analyze ways in which the three approaches negate one another's beliefs and the subsequent contention at play. It is important to note that Mill is at odds against Hobbes and White in his approach to the question, due to the autonomy of the individual being at the center of his argument. His notion posits that one is capable to achieve liberty, and in consequence, law is set to protect that. Hobbes, while focusing on the individual, as Mill very plainly did, believes that a collective society is at the center; which corresponds in part, with Whites firmness in community. However, White goes further, and places an additional emphasis on the importance of a specific individual, being the attorney. Thomas Hobbes is firm in the necessity of maintaining safety and stability through the implementation of law. To affirm that individuals within society abide by these standards, that society will be safe from the "State of Nature" (Hobbes, 1651). And that security is kept and maintained through working in congruence with the "common" good for society. Some may also suggest that Hobbes would refute the belief by Mill in that, the largest threat to liberty resides with the tyranny of the majority (Hobbes, 1651). However, between Mill and Hobbes, one can note a fundamental similarity in focusing on the role of the individual, notwithstanding, the actions of the individual render the similarity minimal in importance.

In deciding which avenue to take when personally addressing the question upon reading *Leviathan*, *On Liberty*, and *Law as Rhetoric, Rhetoric as Law*, one could suggest that John Stuart Mill's notion of liberty prevails in significance. The importance placed upon the freedom of the individual is paramount in distinguishing Mill from the beliefs of other legal and political theorists for many reasons. Human nature has shown that individuals desire personal satisfaction. As progressive beings, as noted by Mill, it is vital to reach that level of satisfaction through the

action of helping others achieve the same freedom. For one to possess complete liberty they must confront situations first by considering the possible consequences of their actions—whether good or bad, and regardless of personal desire—to then ultimately choose the action more ethically universal.

## **II. Unequal Access to Law**

When placing emphasis on law and policing—or in other words, street level law—one can suggest that the discretion employed by the state at this level bears a large consequence in line with the conduct by legal professionals administering justice. In turn, it is then important for one to consider two things before arriving at a conclusion on the effects of enforcement toward race, class, and gender roles through law. Those two questions being, *what is the purpose of the law* and *is access to the law equal*? And most people within the United States society would argue that law is not equal, and that the purpose of the law is to ensure that the law is, in fact, neutral and serving equally, all persons. Although this is an easy avenue to take in terms of addressing laws functionality within society, notwithstanding, it cannot be that easily distinguished, or can it?

To understand the role of litigation as influenced by law enforcement personnel, *Justice without Trial* by Jerome Skolnick discusses the tensions presented between law and order and the affects each facet has on another. In this, Skolnick (1966) purports that the two terms together are misleading; oftentimes the two are juxtaposed and thus not synonymous. In this belief, law is committed to a rule-of-law perspective, which posits that no man is above the law, especially those who enforce it. Additionally, order maintains social control (Skolnick, 1966). To affirm this, one can do so through the opinion of society today. The current rise in animosity directed toward misuse of authority—primarily directed at law enforcement officers and their lack of

accountability—purports that police agencies lack a clear perception of the way society views their actions and behaviors. This neglect for societal opinion indicates the preeminence surrounding the divide between law enforcement and the nations' population, and the implications it creates for the system at large. Again, the presentment of law enforcement officers by Skolnick ultimately affirms this. *Justice without Trial* places emphasis upon the actions by law enforcement in subsequence to their afforded discretion and ultimate lack of oversight—professionally and societally.

In contrast to Skolnick in *Justice without Trial*, Richard Leo argues in *Miranda's Revenge* that law ultimately influences how to maintain order in society (Leo, 1996). In this argument, Leo (1996) suggests foremost, law cannot directly affect street level compliance. In accord, law then only constrains behavior, it does not require or demand it per say. Thus, it is not possible for one to divorce the importance from law and order concurrently. Leo states that, law enforcement ultimately confirm this notion of law and order together given the professions tendency of inducing compliance by a suspect through an offered hope in a situation better than their current one but, insofar as the suspect is able to exchange to an officer, incriminating evidence (Leo, 1996). In recent transition, Leo (1996) posits importance in the administering of justice following the landmark ruling in *Miranda v. Arizona*. In course with the decision by the Court, there was a shift to manipulation and persuasion—moving from coercion and violence—due to the ability to stop the coercion. This shift in climate lead to profound effects on the legal system, in general but, police tactics more particularly.

In effort to address faults by law enforcement officers there are in fact, many ways police agencies could go about fixing these problems. First, it would be best to start by eliminating the policing code of silence, which oftentimes overrides moral questions among agencies (Louie,

2014). The code of silence offers to the public an obvious example of how severely police lack the proper perception of what the effects of their actions have on society. Secondly, if agencies were to decrease a supervisor's span of control, it could allow for more effective managing within a police department (Louie, 2014). When supervisors are responsible for overseeing too many officers, it becomes more difficult to ensure they are doing their job. Next, increasing police accountability could lead to an increase in police empathy (Louie, 2014). Because the span of control easily exceeds ten officers, typically, this makes it difficult to increase the accountability; however, an improvement by police departments can begin through systematically identifying unacceptable officer performances by implementing early intervention systems. Which brings in the final example of the disconnection between police and society. All of the salient issues and avenues of redress focus on the agencies as a whole and not on the individual officers (Louie, 2014). In order to ensure the administration of justice is carried out legally, and that the police are working toward correcting their image, one should look at what it takes to become an officer of the law.

When seeking to reform the criminal justice system, there are many policies designed in order to promote better standards of protection and to implement ways in which communities and certain societies may try to reduce their exceedingly high rates of crime. However, despite the countless approaches many have taken over the course of time, there are still, more often than not, failed approaches executed on a daily basis. Being that the criminal justice system is comprised of three vital sectors, most individuals ignore the other two sectors outside of the police agencies. Furthermore, if we, as a nation, were to correct any facet of the justice system it would most importantly have to begin with prosecutorial decision-making.

*Convictability and Discordant Locales* by Lisa Frohmann examines how race, class, and gender are made salient within the structure of organization and what logic is to be found in case convictability. In doing so, Frohmann (1997) places focus upon the actions of the prosecutors. This posits the belief that the prosecutor possesses enormous amount of discretion at the expense of the state they thereupon represent. This position of authority is integral to understanding how a code of silence is not, only internally enforceable among agencies but is also perpetuated by other branches within the justice system (Frohmann, 1997). Legal agents thus invoke and orient specific cases through categorizing places and persons; other actors specifically do this in the justice system, like law enforcement among other posts. For a prosecutor to succeed in the legal field, the conviction rate is germane to achieving that success, notwithstanding, it is not the evidence presented by prosecution that is necessarily ensuring of success for convictability. To ensure the conviction, the prosecution must rely on the jury through anticipating the defense argument and ultimately the juror's interpretation of the case facts (Frohmann, 1997). Therefore, the prosecutions ability to construct a dialogue for the jury and their ability to understand victims and their views is paramount in the success rate (Frohmann, 1997).

It is hard to pinpoint an exact policy in which the judicial sector of the criminal justice system infringes upon, other than the overall sentencing phase and what those sentences are and what they include thereupon. Wrongful convictions are often viewed by society within the United States as far less conceivable than for one to have "beat the system" and to have gotten away with a crime. When one examines the justice system and especially the judicial system, it is evident that a majority of society believes it to be unjust and corrupt. On the other hand, there are the remainder of those in society who instill confidence in those apprehending and convicting "criminals" because they are declared professionals, insinuating that mistakes are rare and more

times than not, most defendants are appropriately sentenced. In course with those convicted unjustly, one can consider whether those implementing the proceedings are acting in a biased nature. In most instances, because of one's race, a mere involvement in a bad neighborhood and the nature of most "crimes" people are sentenced for allows most judiciaries to believe they can easily target the most culpable seeming individuals. In addition, more often than not, it seems as though these legal actors feel that, the quicker they can reach a verdict and conviction than the quicker these crimes can be "forgotten about."

Another perception explored through the judicial system and wrongful convictions is how prevalent capital punishment will always be. It is one thing for an individual to be sanctioned for a crime they did not commit; however, what if that individual received a sentence as drastic and callous as a death sentence? This is radically incomparable in terms of injustice, and more explicitly, how evident the criminal justice system oversteps their boundaries. Additionally, there are far too many risks and very few rewards, if any at all, for such a drastic form of punishment. Out of those thousands of individuals within the United States, who are currently sitting on death row, how many of them are there unjustly because of a wrongful and fractal charge.

In *Punishment, Power and Justice*, Patricia Ewick addresses the connection between punishment as power, and the bearing on the limitations of justice. In this, Ewick (1998) believes that justice can legitimize an exercise of power, but it can also impose limits on what that power may exercise. The criminal justice system negates that limitation, due to each facet comprising the justice system that allows for the code of silence to transfer over. Power thus recasts as a force that follows a rationale, logic, or a master plan that Ewick finds to be apparent failures and ineffectiveness in some process of the law (Ewick, 1998). Insofar as that is so, Ewick (1998) states, control is then promotive as opposed to reactive, voluntary rather than coercive, and more



depended upon the choice rather than the imposed constraint. Ultimately, criminal justice professionals consciously shape their legal practice around the means necessary to advance their individual success (Ewick, 1998).

The belief that the criminal justice system, in most cases, acts swiftly and fairly in terms of apprehending and sentencing is one of the biggest misconceptions. Prior to learning about policies throughout the system, many believe the most just of all components is, in fact, the judicial system. However, the defense, the prosecutor, the judge, the juries, and other legal personnel, prove to be equally, if not more skewed than law enforcement officers who target and arrest the most culpable individuals. The relationship that deserves the most attention belongs to that between the community and local law enforcement; therefore, prosecution must stop in lieu of lacking evidence and, more specifically the targeting of individuals based on race. These minor examples only prove to be significant when examining wrongful convictions and sentencing, thus leaving individuals more open-minded (and interrogative) in terms of the judicial system and what society upholds as just and unjust.

### **III. The Influence of Presidential Politics on Crime Policy**

In order to understand this radical shift in protection between the exclusionary rule and the good-faith exception, it is important to discern the influence of U.S. politics on crime policy in America. As early as Franklin Delano Roosevelt, American crime policy has been shaped and executed in accord with the federal government (Harmon, 2015). Today, this influence by the executive and legislative branches has profound effects that have perpetuated over the last forty years. In turn, this thesis seeks to show how the rule-of-law perspective, coupled with a statutory fine and imposed liability could be shaped into formidable legislation to aid in criminal justice system reform, in its entirety. Overall, this can ultimately start to bridge the gap between the

systems abandonment in upholding societies liberties; stripping away the necessity in a common good for the collective society.

Prior to the 1920's, the Executive Branch had little effect on crime, and crime policy in America (Harmon, 2015). The election of Franklin Delano Roosevelt began the usage, by the Executive Branch, of the criminal justice system in political agendas (Hagen, 2010). This particular age in United States politics is important, Hagen (2010) declares this is due to the provocation in a strong alteration of the electorate; fundamentally changing the role of government, which among other things, raised the power of the federal government altogether. In consequence, a new culture of shared and civil rights emerged subsequent to the Great Depression. This increase in social inequality brought on by the Roosevelt Administration during the depression, perpetuated a more conducive environment for the branch to follow over the last forty years (Harmon, 2015).

Setting the stage for the Reagan Administration was the birth of the southern strategy (Harmon, 2015). The Republican Party launched the southern strategy in effort to win elections through appealing to racism in the south; Barry Goldwater first adopted this in 1964 (Hagen, 2010). During his campaign, Goldwater unsuccessfully used "state's rights" at the front of his argument. However, by 1968, Richard Nixon successfully used the southern strategy to secure his post as president. In his campaign, Nixon united white, northern ethnics and white southerners in a single political movement based on perceived racial grievance (Hagen, 2010). In addition, despite Nixon's success under the strategy, he ultimately failed to change policies, Hagen states, "[a]lthough Richard Nixon is the figure that overlaps and connects the ages of Roosevelt and Reagan, his importance pales in comparison with Ronald Reagans." (Hagen, 2010).

Through creating the Presidential Commission on Crime, Ronald Reagan and his administration single-handedly changed the criminal justice system in the United States. In this effort by the Reagan Administration, they sought to demonstrate that violent crime was a problem; notwithstanding, this was already decided without the presentment of a crime report (Hagen, 2010). During Reagan's post, he enforced several long-standing reforms on the justice system. In 1984, the passage of the Bail Reform Act allowed pre-trial detention upon finding the defendant to be dangerous (Harmon, 2015). In the same year, the implementation of the Sentencing Reform Act ultimately drove the Federal Sentencing Guidelines. Moreover, by 1986, mandatory minimum sentences became enforceable for drug cases—with an emphasis on possession (Harmon, 2015). Furthermore, Ronald Reagan engineered the passage of another 23 “anti-crime” measures, including: the limiting of the insanity defense, oppressive forfeiture laws, abolishment of parole, ending access to federal programs for drug offenders, among many others (Hagen, 2010).

#### **IV. Paradigm Shift in Political Climate on the Supreme Court**

In 1914, the exclusionary rule was adopted for use in *Weeks v. U.S.* during federal cases. Sundby (2013) presents an excerpt from the Court during this opinion in order to present the concern over long-term “risks” at stake in the event that the rule is overlooked. Sundby (2012) declared, “[t]he efforts of the courts...to bring the guilty to punishment...are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.” This shows the Courts intention on employing the application of the rule solely to ensure government agencies are abiding by the laws they otherwise enforce. From the opinion in *Weeks* to *Mapp*, the exclusionary rule was applicable under the belief that government employees were following

their professional duties, insofar as they were also complying with the laws. In this belief, Sundby (2013) stresses importance in the belief that “[t]he judiciary’s need to stand as a “guardian” to ensure that the other branches stayed within their constitutional mandates was a familiar refrain for the Court all the way through *Mapp*...” (Sundby, 2013). However, this trend would soon subside upon the ending of the Warren Court era.

Criminal justice and legal research analyzing the Supreme Court has continued trend toward limiting the exclusionary rule is abundant. The Warren Court era (1953—1969) was followed by the Burger Court (1969—1986), which began a shift toward an evolving conservative climate throughout the Supreme Court. By the time Chief Justice Burger retired, the birth of an even stronger conservative Rehnquist Court emerged and remained active until 2005. Upon Rehnquist’s retirement from the Court, the appointment of John Roberts as Chief Justice took place, and he remains in the post today. The Roberts Court has perpetuated the conservative climate.

The paradigm shifts in political climate leads to the question: *where does research place the exclusionary rule today?* Sundby (2013) suggests that the effects from the Burger and Rehnquist Courts in realigning the debate surrounding the rule as a deterrent has had a stronger influence than any legal analysis in support of the rule. This judicial trend by the Supreme Court has resulted in a major shift in the application of the rule. Jones (2012) raises a similar concern through pointing out that the rule appears solely as a tool used for “deterring flagrant and deliberate police behavior” (the preservation of the suspect’s privacy or the purity of the judicial process are not seen as important). It is believed that not only is this trend carried on by the Supreme Court, but also that the lower courts have moved in this direction with the rule, and continue to restrict the application. Call (2010) furthers this approach by drawing a connection

through patterns by the Roberts Court in police practices cases throughout the first three terms the Roberts Court was active. The connections made by Call (2010) link together the consistency in using the “retrenchment approach” demonstrated by the Rehnquist Court. This approach put simply means that the current Court is moving toward a continuance in narrowing the purpose of the rule. By taking this route, the Court affords more protection toward law enforcement officers through employing the rule as a safeguard against them in order to deter future overreaching of authority, which is provable.

*A. The Transformation of the Exclusionary Rule*

The Fourth Amendment declares: [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. This is ultimately in place to protect society’s right of privacy and liberty from over-stepping government action. In order to support the research question, *how can the exclusionary rule be shaped through the rule-of-law perspective into legislation to achieve criminal justice reform*, focuses upon unreasonable searches and seizures as made explicit in the Fourth Amendment.

In the first precedent Supreme Court case, *Weeks v. U.S.* 1914, the Court declared the first rule-of-law perspective on the usage and provocation of the exclusionary rule during constitutional criminal procedure. In this particular case, the White Court answered the question of the whether police violated the Fourth Amendment protection against unreasonable searches and seizures, by entering Weeks home and seizing documents showing illegal sending of lottery tickets by mail. In the unanimous decision, the White Court held that yes, the seizure and refusal

to return the documents on behalf of the law enforcement officers did violate the defendant's protections.

*Wolf v. Colorado* 1948 re-decided the use in a rule-of-law perspective surrounding the usage of the exclusionary rule. In this case, the Vison Court discussed whether the three men charged under Colorado law, would have resulted in a different holding given the three were tried separately. In a six to three decision, the Court held that the Fourteenth Amendment does not subject the system in separate states to other limitations, thus illegally obtained evidence does not warrant exclusion. Ultimately, the Court felt there were other ways in which states were to exclude evidence that did not fall below the utility in due process.

*Mapp v. Ohio* 1961 was the final precedent case in which the Supreme Court upheld the usage of the exclusionary rule during constitutional criminal procedure. In this case, the Warren Court held that the in order to exclude evidence, the motive must be to prevent harm from government over-reaching. In *Mapp*, the defendant refused to allow officers into her house, because she was harboring a fugitive. During the incident, law enforcement forged a warrant and forcefully entered the home. At the scene, officers collected alleged, obscene books and pictures and arrested the defendant—Mapp was convicted under a felony possession—and sentenced to prison for one to seven years.

#### B. *The Decline of the Exclusionary Rule*

After the end of the Warren Court era, a conservative voice began evolving throughout the Supreme Court. That conservative majority still remains today under the Roberts Court. However, legal ruling surrounding the Fourth Amendment and the exclusionary rule succeeding the Warren Court began issuing the legal remedy of the good faith exception. The most recent

Supreme Court cases that expand the favoritism of good faith justification are, *United States v. Calandra* 1974, *Hudson v. Michigan* 2006, and *Herring v. United States* 2009.

By 1974, the Burger Court in *United States v. Calandra* held that grand juries can consider the evidence that was illegally obtained, if that reason was for questioning a witness in the case (Sundby, 2013). And by 1984, that same Court moved to rely on the “good faith doctrine”, which allowed evidence seized by law enforcement to be used, with, or without a warrant, seeing that those officers did so on “good faith” that something criminal was to transpire. Through the tenure of the Rehnquist Court, they also relied heavily on the use of the “good faith doctrine” in an effort to assist law enforcement, as opposed to individuals on trial in protection of their civil liberties (Sundby, 2013). After the retirement by Chief Justice Rehnquist and the appointment of John Roberts as Chief Justice took place, a continuance toward diminishing the exclusionary rules purpose in police practices cases assumed position.

In 2006, the Roberts Court held in *Hudson v. Michigan* that when law enforcement officers fail to “knock-and-announce” it is not required for the Court to suppress the evidence obtained during the search. Following that landmark decision was *Herring v. United States* of 2009. The Court extended further protection to law enforcement by holding that the exclusionary rule did not apply when evidence located illegally was on behalf of a government database, insofar as that officer seizing the evidence did so on the belief of the “good faith doctrine.” Again, with extreme caution, as of now, the Supreme Court is still moving in this direction toward limiting the use of the exclusionary rule (Sundby, 2013).

## **V. Reconsidering the Rule**

Researching a judicially enforced rule that protects against constitutional violations committed by government officials, proves to be rather difficult; the exclusionary rule remains

inexplicit within the Constitution of the United States. Because of that reason, it is uncertain to say what the future for the rule may be; nor is there a definite way to determine the most appropriate course for enforcing the rules application in the future. As applied today, the image of the exclusionary rule by criminal justice, legal, and political science scholars is definable as a deterrent. However, the current approach by the Supreme Court in the application of the rule for the future can transform in other ways.

A. *Liability Rule:*

Tipton (2010) proposes a liability rule, in place of the exclusionary rule, that would not target a single law enforcement officer, but instead would focus on the agencies as a whole. While it is important to ensure law enforcement officers are complying with their duties, Tipton suggests it is more important to ensure that the agency employing those officers is enforcing the necessary compliance and accountability. In this idea, Tipton (2010) suggests that to truly internalize those constitutional violations by law enforcement, the costs must be weighed against the benefit of society. This is important in implementing an adequate rule because it is the majority of society who suffer from broken law enforcement agencies with inadequate officers. Imposing a liability on law enforcement agencies could achieve this notion of stronger agency relations, (Tipton, 2010) thus leading to a (hopeful) increase in officer compliance.

B. *Integrity rationale:*

Bilz (2011) proposes that an integrity rationale would better support the original purpose of the exclusionary rule and should replace the current use of a deterrent rationale. The article argues that the integrity rationale would require exclusion when the evidence admitted during trial would negatively affect the court that used it. Therefore, Bilz (2011) suggests that such a



principle would propose exclusion whether or not it was to deter unconstitutional searches in the future.

*C. Rule-of-Law Perspective:*

Sundby (2013), through rethinking the rule-of-law perspective that the rule was originally adopted under, finds that this would be the best avenue of redress to take when courts decide to apply the rule. In this belief, Sundby (2013) notes that through this perspective, the rule remained critical for keeping the independent judiciary clean from illegally seized evidence admitted during trial. The rule of law most plainly observes there is no single individual who is above the law, including those who employed to enforce them. Therefore, people can view the rule as a “doctrine giving voice and substance to the rule of law in the context of law enforcement: the preservation of the principle that government actors must be strictly held accountable to the Constitution to protect the long-term values that underlay the rule of law.” (Sundby, 2013).

## **VI. Bridging the Gap in Research**

Through examining the articles by Tipton (2010), Bilz (2011), and Sundby (2013) I was able to follow their individual approaches to addressing the exclusionary rule and to render the practicality in those methods and apply it to my overarching goal. Many scholars address the necessity behind the exclusionary rule as it was adopted by the Supreme Court following *Weeks v. U.S.* in 1914. Moreover, through the rule-of-law perspective with an emphasis on an integrity rational for employing the rule, in addition to the enactment of a liability against law enforcement agencies, would ultimately safeguard those otherwise neglected civil liberties afforded to society, from overreaching government agencies.

Tipton (2010) placed emphasis on the need to address law enforcement agencies, as opposed to individual law enforcement officers; this is germane to the overall need in reforming

policing in America. If a law enforcement agency is targeted based on the whole department, it will showcase the necessity in implementing more training for individual law enforcement officers to uphold a stronger need for professional accountability and compliance. In addition, Tipton (2010) suggests a minimum statutory damage, introduced through a tax on society. It is also argued that while this would affect society through an additional taxation, in the end, it would ultimately allow law enforcement agencies throughout the U.S. to increase department budgets in order to implement further training necessary to upholding professional accountability and compliance.

The proposed liability with an additional statutory damage presented by Tipton (2010) is necessary to address (only) law enforcement officers through punishing entire agencies on their behalf, this again can only prove beneficial given another component was enabled to uphold the professionalism of the judicial system. Bilz (2011) while discussing the need for much more law enforcement officer compliance, went further and placed emphasis on the judicial system when evoking the exclusionary rule. In this Bilz (2011) discusses the importance behind an integrity rationale that would ensure the court conducting trial and planning to allow one to introduce evidence illegally obtained, has the option for an exclusion, thus freeing them from guilt in allowing that to proceed. This importance can be seen more clearly through the suggestion by Sundby (2013) in restoring the rule-of-law perspective when examining the exclusionary rule, this also professes an importance in “maintaining judicial integrity” (Sundby, 2013) just as Bilz (2011) had focused on.

As Sundby (2013) declares, “the need for Fourth Amendment enforcement mechanisms to bring law enforcement practices into the open may never have been greater.” In such, the need for criminal justice reform as well, has never been greater. In that regard, the enforcement of the

exclusionary rule is there to “serve as a means for upholding the rule-of-law and those constitutional constraints are maintained for the future, an objective that cuts across all political viewpoints...” (Sundby, 2013). Through this perspective, the costs of employing an exclusionary rule no longer relies on the degree of criminal being set free into society, rather, the costs rest solely on the government agency allowing other government officials to remain above the law, at the expense of one’s civil liberties.

In sum, by combining the rule-of-law perspective by Sundby (2013), the integrity rational by Bilz (2011), and a proposed liability with statutory damages by Tipton (2010), scholars can further execute research as to how the exclusionary rule, restored and modified, can ultimately lead to long term success in criminal justice reform. In proposing such an ambitious claim, one can continue to investigate additional trends in the connections between the War on Drugs and the U.S. prison-population sentenced on behalf of non-violent, drug related incidents. This is also important in connecting the overall influence a proper implementation of an exclusionary rule could have to help curtail the continuing neglect of societal opinion and civil liberties by law enforcement agencies, and the court system that affords them this abundance of power.

## Conclusion

*“Did we brave all then to falter now? —now—when that same enemy is wavering, dissevered and belligerent? The result is not doubtful...if we stand firm, we shall not fail.”*

**Abraham Lincoln:** *House Divided*, June 16, 1858

When considering the historical framework of the United States’ legal system, it is necessary to in turn question, *what does access to law infer*, and *is that access to law equal throughout society*? First, one could suggest that to understand the law, one needs to understand what it takes to become a professional within the legal field. Through examining the article, *Legal Education and the Reproduction of Hierarchy* by Duncan Kennedy, one can gain insight with regard to how attorneys cultivate their customs and practice skills in litigation. Additional insight into the aforementioned questions can be found through *Defending White-Collar Crime* by Kenneth Mann, in the attempt to distinguish litigation efforts between street crime and white-collar crime. After ascertaining the requirements for becoming an attorney, coupled with a comprehension of litigation trends between certain crime types, one is much more close to arriving at the mere understanding of what access to law actually means. To bridge the gap consider Marc Galanter’s article, *Why the ‘Haves’ Come Out Ahead*, where one can see that the hierarchy posited by Kennedy exceeds far beyond the law student’s classroom; hierarchy employed in one’s career further hinders the possibility of equality in the access to law.

Everything about the educational process surrounding law school is reinforced through hierarchies, and in retrospect, this has a profound effect on laws accessibility. Kennedy’s *Legal Education and the Reproduction of Hierarchy* declares that what is taught throughout law school is grounded in legal rules and reasoning as opposed to, law and policy decisions—what ultimately drives litigation (Kennedy, 1983). In turn, this sets the graduates up to form a dependency upon whichever firms employ them. This shows how little law schools truly teach

and prepare future legal professionals in line with this hierarchical transition to their subsequent careers. Access to the law is selective in accessibility due to one's resources, or in other words, whom one knows. Kennedy (1983) suggests that, one will be a "successful" attorney given they attended a high-ranking law school. In one's attendance at a high ranked law school, a hierarchical structure assumes position through to one's future as an attorney (Kennedy, 1983). Access is also minimal due to the formation of law school curriculum being minimal. If one is taught, legal rules and reasoning as opposed to litigation practice then ultimately they will be hindered in their ability to succeed as an attorney (Kennedy, 1983). Thus, access is then narrow in all facets of the law, insofar as one does not have adequate connections.

Court proceedings are often thought to deal with criminal cases, disregarding the juxtaposition of outcomes in other crime litigation much like, white-collar crime. *Defending White-Collar Crime* examines the differences between "street crime" and "white collar crime" and Mann (1985) discerns the inadequate performances by the attorney in street crime proceedings. This understanding is germane to the overarching goal to answer the question of what access to law means. When it comes to dealing with street or white-collar crime, there are two approaches taken in court. First, there is a substantive defense, (Mann, 1985) which is usually employed in street crime proceedings. Secondly, an information control (Mann, 1985) is used during litigation around white-collar crime. An information control is divided further between advisory or managerial. Advisory allows one's attorney to control government's usage of evidence, where a managerial allows one to control the government's usage of evidence altogether (Mann, 1985). By controlling one's access to the law when distinguishing crime types, it is ultimately possible to keep control out of the hands of the government. In criminal cases, a

defendant is appointed an attorney only after a charge has been made. In a white-collar case an attorney is appointed before an investigation has even begun.

Despite the legal hierarchy beginning during one's time spent in law school, *Why the 'Haves' Come Out Ahead* follows the course by highlighting the continuance of hierarchies in one's career. In doing so, Galanter (2001) looks at the legal system as rules, courts, lawyers, and parties which can aid one in bridging the gap for what access to law means and whether it is equal or not. Access to law is the way in which one can learn and thus shape the law into a way that is beneficial to them. By drawing a line between two different groups of individuals, Galanter (2001) is able to show the trends in access to law and why it is more successful for certain people. First, the one-shotters are those that do not interact with the legal system often, or ever at all (Galanter, 2001). For the one-shotters, the stakes for success in litigation are either very high, or very low. Second, the repeat-players are those that engage in similar litigations overtime (Galanter, 2001). The repeat-players usually have resources for the long-term interests at stake. However, the repeat-players have low stakes in outcomes of any one case.

After considering the aforementioned articles by Kennedy, Mann, and Galanter, it can be suggested that access to law in relation to the American legal system is, if anything at all, biased and unequal. Through Kennedy's (1983) focus on legal education and subsequent hierarchy, Mann's (1985) juxtaposition of street and white-collar crimes, and how Galanter (2001) discusses individuals engaged in litigation, one can only understand the legal practice ingrained in access to law. In order to develop a richer understanding of the justice system and the inaccessibility of law, one needs to also consider what brings one to court in the first place; the initial stop, and consequential charging of a crime by law enforcement. By connecting those two

facets of the justice system, a deeper understanding into the perpetuating limited access and equality of law can be made clearer.

As Kennedy (1983) posited, the commonalities between the hierarchy of law school and its subsequent transfer to the law student's career are influential. First, each law student involved in the hierarchy possess different capacities in legal abilities (Kennedy, 1983). If one attends a top tier law school then the odds of one receiving, a more formidable education is inevitable. In that belief, each individual is thrust into differing roles that require different duties compatible to one's specialty. When a law school graduate from a top institution receives employment in a prestigious law firm, those outside of the legal spectrum assume their academic performance won the position (Kennedy, 1983). However, it is not confirmed that just because one attends Harvard Law, they are the ideal candidate for the duties and position. Additionally, when speaking of production, participants in the legal field need to play different roles, which result in them receiving unequal rewards (Kennedy, 1983). If an individual excels academically in a lower-tiered law school, it is almost certain that they would be afforded the same opportunities than the latter law school attendee. This ultimately purports an exercise of unequal degrees of power. In such, both hierarchies operate within a cultural framework, but realistically it can be argued that the first hierarchy only strengthens in sequence through a legal career (Kennedy, 1983).

By discussing the phases of trial for both crime types, Mann (1985) shows many specific elements that are presented in laws accessibility when discerning what access means. Ultimately, there is a huge structural difference between when an attorney is employed in criminal procedure surrounding street crime than that of white-collar litigations (Mann, 1985). In the pre-charge phase, a client is not yet charged. For a white-collar defendant, this is the most important part of

the trial because it allows the attorney to begin damage control (Mann, 1985). The pre-trial phase is where a street crime defendant's attorney devotes most of their time. In this, the negotiation power is the strongest for making a plea bargain that ultimately concludes the process. Insofar as this is true, it is evident that access to law for street crime is minimal if anything at all. The trial is when most find it to be easy to meet a client, in which a client may then be better at understanding the legal principles necessary for testimony (Mann, 1985). Lastly, and the second most important phase for white-collar crime is sentencing. This is important because it allows the defendants attorney to employ a substantive legal argument (Mann, 1985). The white-collar litigations are able to prepare for trial through limiting governmental access to inculpatory facts, for the white collar attorney is employed in the legal process much sooner.

For Galanter (2001), in litigation, the position bearing an advantage is left to the repeat players. This is possible because of the repeat players' advantage with intelligence and developed expertise. In this, these individuals establish informal relations that allow them to build and maintain credibility as a combatant (Galanter, 2001). Ultimately, they play the odds through the ability to abide by legal rules for immediate gains in litigation. This position of advantage by the repeat player over the one-shotter is one of the more important ways which legal systems are formally neutral between the haves and have-nots (Galanter, 2001). This can perpetuate and augment the advantages of the former.

Access to law within the United States is not equal, and is ultimately afforded only when an individual has the resources to do so. If access to law were equal, then it would be impossible to point out the millions of individuals within society who routinely fall victim to the consistent dismantling of their afforded liberties in legal procedure. When thinking of a broken justice



system and in consequence asking, *where the flaws arise from*, one can easily suggest the turmoil is internal; the problem is not with society, but is rather with the system itself.

In response for the need in upholding those core values explicit within the Fourth Amendment, the establishment of the exclusionary rule took place. This rule was a judicial remedy, shaped through a rule-of-law perspective, which insists no man is above the law, even those employed in enforcing those laws (Sundby, 2013). In the Supreme Court case, *Weeks v. U.S.* 1914 held, unconstitutionally obtained evidence introduced at trial calls for exclusion (Sundby, 2013). However, this was only applicable to federal cases. Following that case in 1948, the Supreme Court held in *Wolf v. Colorado*, the Fourth Amendment exclusionary rule was partially extended to the state courts, although the states were to find other means to rule out illegally obtain evidence. The Warren Court in *Mapp v. Ohio* reconsidered this decision in 1961. This case extended the exclusion of evidence at trial for the state level. The *Mapp* decision was key to the exclusionary rule debate for it moved the emphasis on protection from property to privacy. In later years, a shift in political climate would alter the Supreme Court decisions that employ the exclusionary rule in a drastic way in order to move in a direction to dismantle the rules purpose (Sundby, 2013). The Supreme Court felt the rule was necessary and proper for enforcing professionalism and accountability on behalf of government agencies; more specifically, those within the criminal justice system—law enforcement officers, and the judiciary.

The United States government has been established and transformed throughout its course, although one fundamental principle remains static: the protection of civil liberties for the U.S. society. The Bill of Rights originally placed limitations on the federal government; notwithstanding, it was the ratifying of the Fourteenth Amendment that applied the same

limitations on the state governments. Insofar as this is apparent, then so should the fundamental protection of society's civil liberties. When considering whether the nation's criminal justice system affirms this, one can argue that they in fact do not. More often than not, it is the integrity in upholding one's professionalism—on the basis that it protects the professional—rather than have a suspect given the opportunity to show innocence in the trial setting. This is more evident when litigating against criminal charges based solely on the possession of drugs and the consequential utilization of the good faith exception as judicial remedy.

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