COMMENTS

JUDICIAL INTEGRITY RATIONALE FOR THE EXCLUSIONARY RULE REJECTED
United States v. Janis, 428 U.S. 433 (1976)

In *United States v. Janis*,[1] the United States Supreme Court refused to apply the exclusionary rule to suppress evidence unconstitutionally seized by state officials and subsequently used in federal court to sustain a civil tax assessment.

Pursuant to a search warrant, state officials investigating illegal gambling activities seized wagering records and cash from respondent's premises,[2] and notified the Internal Revenue Service of the seizure.[3] The IRS made an assessment against respondent for unpaid wagering taxes,[4] and levied upon the cash seized by the state officials in partial satisfaction of the assessment.[5] After a state court declared the warrant invalid and excluded the fruits of the unlawful search from state criminal proceedings,[6] respondent sued in federal district court to quash the tax assessment and obtain a refund of the cash held by the IRS.[7] The Government conceded that the tax assessment rested solely on the evidence obtained as a result of the illegal search.[8] After determining independently that the search warrant was invalid, the district court excluded the evidence, quashed the assessment, and ordered a refund of the seized cash.[9] The Court of Appeals for the Ninth Circuit affirmed;[10] the United States Supreme Court granted certiorari, reversed, and *held*: Evidence seized by state officials in violation of

1. 428 U.S. 433 (1976).
2. *Id.* at 434-36.
3. *Id.* at 436.
4. *Id.* at 437.
5. *Id.*
6. *Id.* at 438.
7. *Id.*
8. *Id.*
9. *Id.* at 439.
10. *Id.*

the fourth amendment is admissible in civil proceedings in federal courts.[11]

The fourth amendment to the United States Constitution protects citizens from unreasonable searches and seizures by public officials.[12] Evidence obtained in violation of the fourth amendment is generally inadmissible against the victim of the unlawful search.[13] The Supreme Court first invoked this exclusionary rule in the 1886 case of *Boyd v. United States*,[14] reversing a judgment[15] in a forfeiture proceeding based largely on evidence obtained in violation of the fourth and fifth amendments.[16] The Court expanded the rule to require the exclusion of the fruits of illegal searches and seizures in *Silverthorne Lumber Co. v. United States*,[17] which held that a grand jury could not consider evidence that the Government would not have discovered but for the unlawful seizure:[18] "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[19]

The rationale for the exclusionary rule has never been entirely clear.[20] The Warren Court based its significant expansion of the rule on two rationales. Of primary importance was the belief that excluding the products of unlawful searches would deter law enforcement officials from committing them in the future, "compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing

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11. *Id.* at 459-60.

12. U.S. CONST. amend. IV provides:

> 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 persons or things to be seized.

13. *See* Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886).

14. 116 U.S. 616 (1886).

15. *Id.* at 638.

16. *Id.* at 634.

17. 251 U.S. 385 (1920).

18. *Id.* at 390.

19. *Id.* at 392.

20. *See generally* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621.

the incentive to disregard it."[21] The Warren Court, however, also emphasized that the demands of judicial integrity justified the rule.[22] As early as 1942, the Court reasoned that the judiciary could not employ evidence obtained in violation of the Constitution without becoming "accomplices in wilful disobedience of law."[23]

The Burger Court has taken a more restrictive view of both rationales, and accordingly, of the value of the exclusionary rule. Although the Court has not completely rejected judicial integrity as a basis for the rule,[24] it has made it plain that the "prime purpose" of excluding illegally obtained evidence "is to deter future unlawful police conduct."[25] Moreover, the Burger Court has been far more skeptical of the deterrent value of the exclusionary rule than the Warren Court,[26] because of the lack of reliable studies demonstrating its efficacy.[27] This skepticism has emerged in the form of a balancing analysis, weighing the magnitude of the loss to society caused by exclusion of the evidence against the "marginal deterrence" to police misconduct by application of the rule.[28] In each case to which it has been applied, this "marginal deterrence"

21. Elkins v. United States, 362 U.S. 206, 217 (1960). *See* Terry v. Ohio, 392 U.S. 1 (1968); Linkletter v. Walker, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Rea v. United States, 350 U.S. 214 (1956); Wolf v. Colorado, 338 U.S. 25 (1949). *See generally* Geller, *supra* note 20, at 643-44.

22. *See* United States v. Calandra, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting); Terry v. Ohio, 392 U.S. 1, 12-13 (1968); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960). *See also* Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); *id.* at 471 (Brandeis, J., dissenting); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Weeks v. United States, 232 U.S. 383, 392 (1914). *See generally* Geller, *supra* note 20, at 644-46.

23. McNabb v. United States, 318 U.S. 332, 345 (1942).

24. *See* Brown v. Illinois, 422 U.S. 590, 599 (1975); United States v. Peltier, 422 U.S. 531, 536 (1975).

25. United States v. Calandra, 414 U.S. 338, 347 (1974); *accord*, Stone v. Powell, 428 U.S. 465 (1976); Brown v. Illinois, 422 U.S. 590 (1975).

26. *Compare* decisions of the Warren Court in Terry v. Ohio, 392 U.S. 1 (1968); Linkletter v. Walker, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960), *with* decisions of the Burger Court in Brown v. Illinois, 422 U.S. 590 (1975); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Calandra, 414 U.S. 338 (1974).

27. United States v. Janis, 428 U.S. 433, 450-51 n.22 (1976) (citing Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973); 47 NW. U.L. REV. 493 (1952)).

28. Stone v. Powell, 428 U.S. 465 (1976); Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Calandra, 414 U.S. 338 (1974).

analysis has resulted in a decision to admit the evidence.[29] This result is entirely consistent with the Burger Court's belief that a correct assessment of guilt or innocence is the primary purpose of the criminal trial.[30]

The degree to which the exclusionary rule applies to noncriminal proceedings is unclear. The Constitution probably does not require application of the rule in proceedings involving only private parties.[31] When the Government is party to the litigation, however, most courts exclude evidence illegally seized by government officials[32] in reliance upon the Supreme Court's holding in *Weeks v. United States*[33] that the fourth amendment's protection against illegal searches "reaches all [citizens] alike, whether accused of crime or not."[34] Lower courts have applied the deterrence rationale to civil as well as criminal actions,[35] reasoning that without an exclusionary rule, "the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences."[36] A few courts have reached a different result in post-trial criminal hearings

29. Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974).

30. *See* 1976 WASH. U.L.Q. 480, 482.

31. *See* Burdeau v. McDowell, 256 U.S. 465 (1921); Honeycutt v. Aetna Ins. Co., 510 F.2d 340 (7th Cir. 1975); Drew v. International Bhd. of Sulphite & Paper Mill Workers, 37 F.R.D. 446 (D.D.C. 1965); Diener v. Mid-Am. Coaches, Inc., 378 S.W.2d 509 (Mo. 1964); Sackler v. Sackler, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964); Walker v. Penner, 190 Or. 542, 227 P.2d 316 (1951). *Contra*, Del Presto v. Del Presto, 92 N.J. Super. 305, 223 A.2d 217 (Super. Ct. Ch. Div. 1966); Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (C.P. of Clermont County 1966).

32. *See* Knoll Assocs. v. FTC, 397 F.2d 530 (7th Cir. 1968) (FTC action for Clayton Act violation); Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966) (action to discharge civil service employee); Rogers v. United States, 97 F.2d 691 (1st Cir. 1938) (action to recover liquor import duties); Anderson v. Richardson, 354 F. Supp. 363 (S.D. Fla. 1973) (jeopardy assessment for unpaid income taxes); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd sub. nom.* Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969) (class action suit for anti-trust violation); United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal. 1967), *aff'd*, 405 F.2d 738 (9th Cir. 1968) (deficiency determination for income taxes); Suarez v. Commissioner, 58 T.C. 792 (1972) (deficiency determination for income taxes due); Carson v. State, 221 Ga. 299, 144 S.E.2d 384 (1965) (proceeding to abate gambling as a public nuisance); Finn's Liquor Shop, Inc. v. State Liquor Auth., 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584 (1969) (administrative proceeding for revocation of liquor license).

33. 232 U.S. 383 (1914).

34. *Id.* at 392.

35. *See* note 32 *supra.*

36. Pizzarello v. United States, 408 F.2d 579, 586 (2d Cir. 1969); *accord*, United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966).

on sentencing[37] and parole revocation,[38] and in employee discharge hearings.[39] The Sixth Circuit has allowed introduction of the fruits of an illegal search in a civil tax proceeding wholly unconnected with any criminal law violation.[40]

Courts have unanimously applied the exclusionary rule when the Government has attempted to use illegally seized evidence in a proceeding closely related to enforcing the criminal law.[41] The Supreme Court laid the groundwork for this practice in *Boyd*, a forfeiture proceeding for violation of the customs laws: "[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."[42] The Court reaffirmed and broadened this rule in *One 1958 Plymouth Sedan v. Pennsylvania*,[43] emphasizing that forfeiture often imposes a greater penalty than criminal conviction.[44] The rule developed in these cases and applied in the lower courts, then, looked to the substance rather than the form of the action.[45] If the purpose of the proceeding was to enforce the criminal laws, the exclusionary rule applied.[46] Because Congress unquestionably intended

37. *E.g.*, United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

38. *E.g.*, United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970).

39. *E.g.*, Governing Bd. v. Metcalf, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974). *Contra*, Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966).

40. Hinchcliff v. Clarke, 371 F.2d 697, 701 (6th Cir. 1967), *rev'g* 230 F. Supp. 91 (N.D. Ohio 1963).

41. *See* Hand v. United States, 441 F.2d 529 (5th Cir. 1971) (civil tax assessment for wagering taxes); Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969) (civil tax assessment for wagering taxes); Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965) (forfeiture proceeding for money to be used in violation of revenue laws); United States v. $5,608.30 in United States Coin and Currency, 326 F.2d 359 (7th Cir. 1964) (forfeiture proceeding for money to be used in violation of IRS laws); United States v. Physic, 175 F.2d 338 (2d Cir. 1949) (forfeiture of auto used to transport drugs); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966) (civil tax assessment for wagering excise taxes); United States v. Chase, 67-1 U.S. Tax Cas. 84,474 (D.D.C. 1966) (civil tax assessment for wagering taxes); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962) (civil tax assessment for wagering taxes); Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (C.P. of Clermont County 1966).

42. Boyd v. United States, 116 U.S. 616, 634 (1885).

43. 380 U.S. 693 (1965).

44. *Id.* at 700-01.

45. *Cf. In re* Gault, 387 U.S. 1 (1967) (juvenile hearing looks for substance over form).

46. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. United States, 116 U.S. 616 (1885); Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969); Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965); United States v.

the wagering excise tax to supplement state efforts to control organized gambling,[47] every court before *Janis* applied the exclusionary rule to cases in which the IRS sought to introduce illegally obtained evidence in support of a wagering tax assessment.[48]

Until 1949 neither the fourth amendment nor the exclusionary rule applied to the states.[49] A major consequence of this disparity between state and federal law was the "silver platter" doctrine: Unrestrained by the fourth amendment, state officials could legally conduct unreasonable searches and present the evidence so obtained on a "silver platter" to federal officials who themselves were constitutionally prohibited from making the searches.[50] Although *Wolf v. Colorado*[51]

$5,608.30 in United States Coin and Currency, 326 F.2d 359 (7th Cir. 1964); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966).

47. *See* United States v. Kahriger, 345 U.S. 22 (1953); H.R. REP. No. 586, 82d Cong., 1st Sess. 54 (1951); S. REP. No. 781, 82d Cong., 1st Sess. 112 (1951); SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, REPORTS ON CRIME INVESTIGATION, S. REP. No. 141, 307, 725, 82d Cong., 1st Sess. (1951); 97 CONG. REC. 6892, 12231 (1951); Caplin, *The Gambling Business and Federal Taxes*, 8 CRIME & DELINQUENCY 371 (1962); 20 BROOKLYN L. REV. 119 (1953); 15 GA. B.J. 234 (1952); 67 HARV. L. REV. 164 (1953); 52 MICH. L. REV. 150 (1953); 47 NW. U.L. REV. 705 (1952); 28 NOTRE DAME LAW. 550 (1953); 101 U. PA. L. REV. 877 (1953); 14 U. PITT. L. REV. 71 (1972); 76 YALE L. J. 839 (1967).

48. *See* Hand v. United States, 441 F.2d 529 (5th Cir. 1971); Pizzarello v. United States, 408 F.2d 579 (2d Cir. 1969); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966); United States v. Chase, 67-1 U.S. Tax Cas. 84,474 (D.D.C. 1966); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962).

49. Weeks v. United States, 232 U.S. 383, 398 (1914).

50. Lustig v. United States, 338 U.S. 74 (1949) (Justice Frankfurter coined this phrase in *Lustig*); *see* Feldman v. United States, 322 U.S. 487 (1944); Gambino v. United States, 275 U.S. 310 (1927); Byars v. United States, 273 U.S. 28 (1927); Gilbert v. United States, 163 F.2d 325 (10th Cir. 1947); Rettich v. United States, 84 F.2d 118 (1st Cir. 1936); *In re* Milburne, 77 F.2d 310 (2d Cir. 1935); Fowler v. United States, 62 F.2d 656 (7th Cir. 1932); Miller v. United States, 50 F.2d 505 (3d Cir. 1931); Brown v. United States, 12 F.2d 926 (9th Cir. 1926); Elam v. United States, 7 F.2d 887 (8th Cir. 1925); Riggs v. United States, 299 F. 273 (4th Cir. 1924); Timonen v. United States, 286 F. 935 (6th Cir. 1923); Allen, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties*, 45 ILL. L. REV. 1 (1950); Galler, *The Exclusion of Illegal State Evidence in Federal Courts*, 49 J. CRIM. L.C. & P.S. 455 (1959); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U.L.Q. 229; Parsons, *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 42 CORNELL L.Q. 346 (1957); 57 COLUM. L. REV. 1159 (1957); 51 COLUM. L. REV. 128 (1951); 27 GEO. WASH. L. REV. 392 (1959); 6 U.C.L.A. L. REV. 703 (1959); 58 YALE L.J. 144 (1948); Annot., 50 A.L.R.2d 573 (1956).

51. 338 U.S. 25 (1949).

applied the fourth amendment to the states in 1949, lower courts continued to uphold the "silver platter" doctrine until 1960 when the Supreme Court explicitly overruled it in the case of *Elkins v. United States*.[52] As *Wolf* had held that unreasonable searches and seizures by state officials violated the Constitution, the court in *Elkins* was concerned with deterring illegal state action.[53] Justice Stewart's majority opinion also relied in part on the judicial integrity rationale,[54] however, as well as on the need to eradicate the pragmatic difficulties associated with the "silver platter" doctrine.[55] In 1961, when the Supreme Court's decision in *Mapp v. Ohio*[56] applied the exclusionary rule to the states, the source of the problem disappeared and the "silver platter" doctrine became an historical curiosity. Courts after *Mapp* no longer distinguished between state and federal officials in deciding whether to apply the exclusionary rule.[57]

Prior to *Janis*, five courts decided cases involving tax assessments based primarily on evidence illegally seized by state officials.[58] Four of these excluded the evidence entirely.[59] The Tax Court, in *Suarez v. Commissioner*,[60] applied the rule after a thorough discussion of the relevant case law. *Suarez* quoted the Supreme Court's admonition in *Weeks* that the fourth amendment applies to all persons, not only those accused of a crime,[61] and its injunction in *Silverthorne* against any use of illegally acquired evidence.[62] The court held that deterrence of state police misconduct and judicial integrity justified application of the rule,[63]

52. 364 U.S. 206 (1960); *see* Eichner, *The "Silver Platter"—No Longer for Serving Evidence in Federal Courts*, 13 U. FLA. L. REV. 311 (1960).

53. 364 U.S. 206 (1960).

54. *Id.* at 222-23.

55. *Id.* at 221-22.

56. 367 U.S. 643 (1961).

57. United States v. Chase, 67-1 U.S. Tax Cas. 84,474 (D.D.C. 1966). *See generally* notes 38 & 46 *supra*.

58. *See* Compton v. United States, 334 F.2d 212 (4th Cir. 1964); United States v. $5,608.30 in United States Coin and Currency, 326 F.2d 359 (7th Cir. 1964); Anderson v. Richardson, 354 F. Supp. 363 (S.D. Fla. 1973); United States v. Chase 67-1 U.S. Tax Cas. 84,474 (D.D.C. 1966); Suarez v. Commissioner, 58 T.C. 792 (1972).

59. *See* United States v. $5,608.30 in United States Coin and Currency, 326 F.2d 359 (7th Cir. 1964); Anderson v. Richardson, 354 F. Supp. 363 (S.D. Fla. 1973); United States v. Chase, 67-1 U.S. Tax Cas. 84,474 (D.D.C. 1966); Suarez v. Commissioner, 58 T.C. 792 (1972).

60. 58 T.C. 792 (1972).

61. *Id.* at 802.

62. *Id.*

63. *Id.* at 805.

noting that the adverse consequences to society resulting from exclusion of evidence were far less serious in civil than in criminal proceedings.[64] The fifth case, *Compton v. United States*,[65] admitted the tainted evidence, but did so solely to impeach taxpayer's testimony, a recognized exception to the exclusionary rule.[66] The court in *Compton* did not consider the admissibility of such tainted evidence as part of the Government's case in chief.[67] Before *Janis*, therefore, courts uniformly applied the exclusionary rule in federal proceedings to enforce the gambling tax, regardless of whether state or federal officials had obtained the tainted evidence.[68]

In *United States v. Janis*,[69] the United States Supreme Court analyzed the exclusionary rule primarily in terms of deterrence. Justice Blackmun, writing for the majority, relegated judicial integrity to a single footnote,[70] arguing the doctrine meant only that "the courts must not commit or encourage violations of the Constitution."[71] The Court reasoned that if the exclusionary rule were actually a strong deterrent, its continued application in state and federal *criminal* proceedings would deter police misconduct; the additional marginal deterrence upon state officials by excluding from federal *civil* proceedings evidence illegally acquired by state officials would be minimal.[72] Conversely, if the rule had little deterrent value in criminal cases, there was no reason to extend it to civil proceedings.[73] In either event, the sanction—excluding evidence from federal civil proceedings—was too remote to deter state police misbehavior.

The Court distinguished prior case law in several ways. Justice Blackmun stressed that *Elkins* involved application of the exclusionary rule in a criminal proceeding; *Janis* was merely a civil tax assessment.[74] Excluding the tainted evidence from all criminal trials already substantially frustrates a primary concern of state police; any increased

64. *Id.*
65. 334 F.2d 212 (4th Cir. 1964).
66. *See* Walder v. United States, 347 U.S. 62 (1954).
67. 334 F.2d 212 (4th Cir. 1964).
68. *See* note 41 *supra.*
69. 428 U.S. 433 (1976).
70. *Id.* at 458-59 n.35.
71. *Id.*
72. *Id.* at 453-54.
73. *Id.* at 454.
74. *Id.* at 458.

deterrence from extending the rule to civil cases would be small.[75] The Court found cases applying the exclusionary rule in civil proceedings inapposite for two reasons. First, they had ignored the distinction between "inter- and intrasovereign" use of illegally acquired evidence.[76] Excluding evidence from a federal civil suit would have no more than a "highly attenuated" deterrent effect on state officers.[77] Second, while these cases had relied in part on judicial integrity as an independent rationale for excluding the evidence,[78] the *Janis* Court believed its deterrence analysis encompassed integrity.[79]

The Court also cited three cases admitting illegally acquired evidence in "proceedings other than strictly criminal prosecutions."[80] Two dealt with postconviction proceedings: *United States ex rel. Sperling v. Fitzpatrick*,[81] a parole revocation case, and *United States v. Schipani*,[82] a case in which the sentence was based largely on tainted evidence.[83] The third case, *Compton v. United States*,[84] was a civil tax assessment case "remarkably like" *Janis*.[85]

Justices Brennan and Marshall dissented, arguing that judicial integrity is a distinct and sound basis for excluding tainted evidence.[86] In a separate dissent, Justice Stewart contended that because the wagering tax was designed to assist the states in enforcing their gambling laws, the majority's civil-criminal distinction was irrelevant;[87] *Janis* was therefore indistinguishable from *Elkins*.

Janis breaks new ground in the Burger Court's continued war on the exclusionary rule. Although the Court had not previously addressed

75. *Id.* at 448.
76. *Id.* at 457-58.
77. *Id.*
78. *Id.* at 458-59 n.35.
79. *Id.*
80. *Id.* at 456.
81. 426 F.2d 1161 (2d Cir. 1970).
82. 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).
83. The Court evidently confused its terminology in characterizing *Sperling* as an "intrasovereign" case, and *Schipani* as an "intersovereign" case. The evidence used in federal court in *Sperling* had been illegally seized by state officials. 426 F.2d at 1162. In *Schipani*, federal officials acquired all of the tainted evidence used by the federal court. *See* United States v. Schipani, 315 F. Supp. 253, 255 (E.D.N.Y.), *aff'd*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); United States v. Schipani, 289 F. Supp. 43, 46 (E.D.N.Y. 1968).
84 334 F.2d 212 (4th Cir. 1964).
85. 428 U.S. at 456.
86. *Id.* at 460.
87. *Id.* at 461.

these precise facts, the principles of *Boyd, Elkins,* and *Plymouth Sedan* required application of the exclusionary rule. In the context of a criminal case, *Elkins* had rejected the majority's critical distinction between intersovereign and intrasovereign violations.[88] The Court neither discussed nor refuted the reasoning in that case. Instead, the majority sought to escape its force by characterizing *Janis* as a civil case. That distinction, however, flies in the face of the longstanding *Boyd-Plymouth Sedan* line of cases applying the exclusionary rule to such civil actions as wagering tax assessments, designed primarily to supplement criminal proceedings.[89]

Sperling, Schipani, and *Compton* provide little support for the majority result. Contrary to the majority's assertion, *Schipani* involved no "intersovereign" use of illegally acquired evidence: federal officials seized the evidence that later appeared in a presentence report in federal court.[90] *Sperling* did involve an "intersovereign" use of tainted evidence. The United States Board of Parole revoked a parole on the basis of evidence illegally acquired by state officials. Neither the parole board nor the reviewing courts, however, thought the intersovereign nature of the use was of any importance.[91] The court in *Compton* admitted the tainted evidence solely to impeach the taxpayer's testimony and explicitly declined to rule on its admissibility as part of the Government's case in chief.[92] *Compton* did sustain an assessment based solely on illegally acquired evidence. That result, however, rested on the court's resolution of an intricate burden of proof issue,[93] a resolution that the *Janis* Court explicitly assumed to be incorrect.[94] Prior case law, then, provided no support for the majority result.

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88. 364 U.S. 206, 223-24 (1960). *See* notes 52-55 *supra* and accompanying text.

89. *See* note 47 *supra.*

90. *See* United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y. 1970), *aff'd,* 435 F.2d 26 (2d Cir. 1970), *cert. denied,* 401 U.S. 983 (1971). *See also* United States v. Schipani, 289 F. Supp. 43, 46 (E.D.N.Y. 1968).

91. United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970).

92. Compton v. United States, 334 F.2d 212, 217 (4th Cir. 1964).

93. *Id.* at 215-16.

94. 428 U.S. at 441-43. Whether the taxpayer challenges the Commissioner's assessment in the Tax Court or pays the tax and seeks a refund in federal district court, the assessment is presumed correct and the taxpayer bears the burden of proof. Compton v. United States, 334 F.2d 212, 216 (4th Cir. 1964); 9 J. MERTENS, FEDERAL INCOME TAX § 50.71 (1971). If the assessment is utterly without foundation, however, the presumption does not apply. Helvering v. Taylor, 293 U.S. 507, 514-15 (1935). Whether an assessment is utterly without foundation if it rests on evidence inadmissible under the exclusionary rule is an open question. *Compare* Pizzarello v. United States, 408

The majority's view of the probable deterrent effect of applying the exclusionary rule in these circumstances is equally suspect. The wagering excise tax was designed primarily to assist state officials in enforcing state laws against organized gambling.[95] In effect, the tax operates as a fine on illegal gambling. Accordingly, state officials can substantially accomplish their objective—increasing the effective risk of illegal gambling—by ignoring the constitutional limits on search and seizure and presenting the fruits of their misconduct to the IRS for use in federal tax proceedings. For searches and seizures aimed at illegal gamblers, the deterrent effect of the exclusionary rule virtually disappears.

On a more fundamental level, the court's framework of analysis is an unsatisfactory means to determine the merits of the exclusionary rule. The Burger Court has attacked the exclusionary rule in part, because deterrence, its major justification, is a nebulous concept that has proved incapable of measurement. "Marginal" deterrence is a still more elusive concept, however; the marginal benefit of the exclusionary rule is thus necessarily intangible. By contrast, the cost of imposing an exclusionary rule—ignoring highly relevant and often conclusive evidence—is immediate and apparent. A balancing process that weighs the intangible and abstract against the concrete and obvious is inherently biased in favor of the latter,[96] particularly when the court itself is so inclined. The marginal deterrence technique is therefore an outcome determinative method of analysis in all but the most unusual circumstances.

The implications of *Janis* for the future of the exclusionary rule are not entirely clear. The resurrection of the "silver platter" doctrine casts doubt on the continued vitality of *Elkins*. Although the Court relied in part on the civil-criminal distinction, that rationale cannot withstand analysis.[97] Suits to enforce the wagering tax, although civil in form, are part and parcel of the joint federal-state criminal scheme to combat

F.2d 579, 586 (2d Cir. 1969) (assessment based on tainted evidence is invalid), *with Compton*, 334 F.2d at 218 (even if assessment is invalid, plaintiff must shoulder burden of proving proper amount of refund). *Compton* held in effect that illegal acquisition of the evidence on which the assessment rested did not affect the presumption of validity. Taxpayer's testimony in an attempt to meet her burden was effectively impeached by the tainted evidence, leaving intact the presumption of validity. 334 F.2d at 218. The *Janis* Court, however, explicitly assumed that the taxpayer must prevail if the IRS could not present the evidence seized by state officers. 428 U.S. at 441-43. In short, *Janis* relied on *Compton* after explicitly assuming that it was wrongly decided.

95. *See* note 47 *supra* and accompanying text.

96. *See* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1361-62 (1971).

97. *See* notes 88-89 *supra* and accompanying text.

organized gambling.[98] The heart of the *Janis* opinion—the Court's distinction between intersovereign and intrasovereign violations—has ominous implications for *Elkins*. To be sure, the Court's marginal deterrence analysis did presume illegally acquired evidence would be excluded from all criminal proceedings, federal or state.[99] The emphasis in *Janis* on the "highly attenuated" deterrent effect of closing the courts of one sovereign to the policemen of another[100] is, however, a direct attack on the *Elkins* reasoning. Should the Court employ marginal deterrence analysis in a re-examination of *Elkins*, the "silver platter" doctrine might well reappear in its original form.

Janis apparently has also resolved the future of the judicial integrity rationale as an independent basis for the exclusionary rule. *Janis* holds that judicial integrity is unimpaired so long as courts do not encourage constitutional violations.[101] If the exclusionary rule has no deterrent value in a particular setting, however, admitting illegally obtained evidence will not encourage illegal conduct and accordingly will not jeopardize the courts' integrity no matter how egregious the conduct of the police. Although previous cases had minimized its value,[102] judicial integrity has become, under *Janis*, no more than a variant method of stating the deterrence rationale.[103]

If the Court did mean to reject completely the integrity of the judiciary as an independent basis for the exclusionary rule, the decision was unfortunate. Properly stated, the integrity rationale asserts that courts are degraded—in their own eyes and in the eyes of the public—by hearing tainted evidence, regardless of the extent to which refusing to do so will deter future constitutional violations.[104] The cases excluding evidence obtained by methods that shock the conscience of the court were explicitly based on the concept of judicial integrity.[105] Surely

98. *See* note 47 *supra* and accompanying text.

99. 428 U.S. at 448.

100. *Id.* at 457-58.

101. *Id.* at 458-59 n.35.

102. Stone v. Powell, 428 U.S. 465 (1976); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Calandra, 414 U.S. 338 (1974).

103. The Court apparently realized this fact. *See* 428 U.S. at 458-59 n.35 ("this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose").

104. *See* Elkins v. United States, 364 U.S. 206, 222-23 (1960).

105. *E.g.*, Rochin v. California, 342 U.S. 165 (1952). Justice Frankfurter for the Court stated:

> Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned

the *Janis* Court did not mean to permit introduction of evidence acquired through physical coercion unless the defendant could demonstrate a measurable deterrent effect from exclusion.

Moreover, discarding the judicial integrity rationale may have deprived the Court of a principled basis for limiting the exclusionary rule to cases in which the police acted in bad faith, a restriction at which the Court has hinted several times.[106] The validity of the deterrence rationale is no more capable of empirical verification in the bad faith situation than in other cases. A proper statement of the judicial integrity rationale, however, provides a sound reason for distinguishing between good and bad faith police misconduct: The judiciary has indeed degraded itself—both in its own eyes and in the eyes of the public—if it shares in the fruits of deliberate constitutional violations. If the Court eventually does elect to apply an exclusionary rule only in cases of bad faith police action, judicial integrity is the most easily defensible rationale.

In holding the exclusionary rule inapplicable to tainted evidence acquired by state officials and used in federal civil proceedings, *United States v. Janis* constitutes a clear break from prior case law. The decision abandons judicial integrity as a rationale for the exclusionary rule and paves the way for complete reinstatement of the "silver platter" doctrine. Whether the Court will follow these logical implications of its decision remains to be seen.

> by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

Id. at 173-74.

106. Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., concurring); United States v. Peltier, 422 U.S. 531, 537-42 (1975). *Cf.* Michigan v. Tucker, 417 U.S. 433, 446-50 & n.25 (1974) (*Miranda* warnings).