APPLICATION OF THE "EXCLUSIONARY RULE" TO BAR USE OF ILLEGALLY SEIZED EVIDENCE IN CIVIL SCHOOL DISCIPLINARY PROCEEDINGS

INTRODUCTION

In *New Jersey v. T.L.O.*,[1] the Supreme Court granted certiorari to decide whether the exclusionary rule is an appropriate remedy for Fourth Amendment violations committed by school officials.[2] Ultimately, the Court's opinion did not address this question because the Court found the search at issue was constitutional. The Court expressly noted that its "determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule."[3] In *Thompson v. Carthage School District*,[4] the Eighth Circuit resolved the exclusionary rule issue left open in *T.L.O.*

1. 469 U.S. 325 (1985).

2. The exclusionary rule issue was the basis of the Supreme Court's interest in the *T.L.O.* case. *See id.* at 327 (stating that the Court granted certiorari "to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities").

3. *Id.* at 333 n.3 ("[W]e do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities.").

For a discussion of the shortcomings of *T.L.O.*, including its failure to discuss the exclusionary rule, see Brenda Jones Walts, New Jersey v. T.L.O.: *The Questions the Court Did Not Answer About School Searches*, 14 J.L. & EDUC. 421 (1985).

4. 87 F.3d 979 (8th Cir. 1996).

The exclusionary rule provides that where the government has obtained evidence illegally,[5] the unconstitutionally acquired evidence cannot be used at the trial against the defendant whose rights the government has violated.[6] The Constitution does not mandate the exclusionary rule.[7] The exclusionary rule was judicially created by the Supreme Court in 1914.[8] Since its creation, the announced justification underlying the exclusionary rule has evolved from a "principled" rationale based on a theory of limited governmental powers,[9] to a "deterrence" rationale based on pragmatic considerations.[10] Whatever the justification for the exclusionary rule, its effect is to exclude evidence obtained by the government in violation of a defendant's constitutional rights. Although the rule

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5. In *Thompson,* the evidence was obtained in violation of the Fourth Amendment. There are other types of exclusionary rules. For example, evidence obtained in violation of the Fifth or Sixth Amendments may also be excluded from criminal trials. *See, e.g., Malloy v. Hogan,* 378 U.S. 1 (1964) (Fifth Amendment); *Massiah v. United States,* 377 U.S. 201 (1964) (Sixth Amendment).

6. BLACK'S LAW DICTIONARY 564 (6th ed. 1990) ("Under this rule evidence which is obtained by an unreasonable search and seizure is excluded from admissibility under the Fourth Amendment....").

7. Like most other provisions of the Bill of Rights, the Fourth Amendment does not spell out the consequences if the right that it announces is violated. Unlike the Fifth Amendment, which by its own terms renders evidence falling within its prohibition against compelled self-incrimination inadmissible in criminal cases, the Fourth Amendment does not expressly preclude the admission of evidence obtained in an unreasonable search and seizure. *See* Bernard A. Nigro, Jr., Note, *The Exclusionary Rule in Administrative Proceedings,* 54 GEO. WASH. L. REV. 564, 564 (1986).

8. The Supreme Court created the exclusionary rule in *Weeks v. United States,* 232 U.S. 383 (1914). Prior to the creation of the exclusionary rule in *Weeks,* the fact that evidence had been obtained in violation of the Fourth Amendment was considered a "collateral matter" that did not affect the admissibility of the evidence. *See, e.g.,* Adams v. New York, 192 U.S. 585 (1904). Currently, the Court supports a two-part analysis to determine admissibility. *See T.L.O.,* 469 U.S. at 333 n.3 ("The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation.").

9. The "principled basis" for the exclusionary rule, relied on by the Court in *Weeks,* is primarily based on the concept of limited governmental powers. See *infra* Part III.A for a discussion of the "principled basis."

10. The "deterrence rationale" for the exclusionary rule, relied on by the Court in recent cases, is based on practical and pragmatic considerations rather than a specific view of governmental or judicial roles. See *infra* Part III.B for a discussion of the deterrence rationale for the exclusionary rule.

vindicates the defendant's rights, it often allows a demonstrably guilty individual to escape punishment.[11]

Thus, since its introduction, federal courts have continually cut back at the exclusionary principle's scope, and have created many exceptions to the rule.[12] This process of limitation reflects the fundamental redefinition of the character and purpose of the rule, a redefinition that can be traced to the changes in the announced justification of the rule. A recent decision of the Eighth Circuit Court of Appeals[13] rejecting the application of the exclusionary rule in school disciplinary hearings[14] is an example of the redefinition of the purpose and application of the exclusionary rule.

This Recent Development analyzes the *Thompson* decision and its effect on future civil disciplinary school proceedings. Part I discusses the history and development of the exclusionary rule. Part II explains the different and evolving justifications for the exclusionary rule. Part III describes how the exclusionary rule had gradually weakened as a result of a number of Supreme Court decisions. Finally, Part IV analyzes the *Thompson* decision.

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11. This is one of the biggest problems with using the exclusionary rule as a remedy for Fourth Amendment violations. "There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine 'the criminal is to go free because the constable has blundered.'" Mapp v. Ohio, 367 U.S. 643, 659 (1961) (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)). Although instances in which a criminal defendant "gets off on a technicality" elicit headlines and public outcry, such instances appear to be very infrequent. For Instance, Thomas Y. Davies has pointed out that the rule is less "costly" in this regard than it is often assumed. His authoritative 1983 study estimated that less than 2.35% of all felony arrests are "lost" at any stage in the arrest disposition process because of the rule's operation. *See* Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule*, 1983 AM. B. FOUND. RES. J. 611, 611 (1983), *cited in* United States v. Leon, 468 U.S. 897, 907 n.6 (1984).

12. The Supreme Court has itself upheld the admission of such evidence for other purposes. For example, illegally seized evidence may be admissible at trial to impeach a defendant's testimony. *See, e.g.*, United States v. Havens, 446 U.S. 620 (1980); Harris v. New York, 401 U.S. 222 (1971). Federal courts have also devised a number of exceptions to the application of the exclusionary rule, including the "good faith exception" to the Fourth Amendment's warrant requirement, announced in United States v. Leon, 468 U.S. 879 (1984).

13. Thompson v. Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996). See *infra* Part V for a discussion of the *Thompson* case.

14. The court expressed its holding negatively: "[W]e conclude that the exclusionary rule may not be applied to prevent school officials from disciplining students based upon the fruits of a search conducted on school grounds." *Thompson*, 87 F.3d at 982.

I. HISTORY AND INCORPORATION OF EXCLUSIONARY RULE

A. Judicial Origin of the Exclusionary Rule

The Supreme Court created the exclusionary rule in *Weeks v. United States*.[15] Weeks was a defendant in a federal prosecution in which the Supreme Court prevented the government from using documents that were seized in a warrantless, unconstitutional search of Weeks' home.[16] The Supreme Court unanimously concluded that the search was "in direct violation of the constitutional rights of the defendant" and thus, the trial court's decision to allow the documents to be used in the defendant's trial was "a denial of the constitutional rights of the accused."[17] Reversing the conviction, the Supreme Court explained that a trial court could not admit evidence which was seized unconstitutionally.[18]

B. Application to States Through the Fourteenth Amendment

When the Court decided *Weeks*, the Bill of Rights functioned mainly to limit the powers of the federal government, not the states.[19] In fact, the *Weeks* decision explicitly stated that its rules did not apply to searches conducted by state officials.[20] Like most of the terms of

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15. 232 U.S. 383 (1914).

16. Weeks was employed by an express company at the Union Station in Kansas City, Missouri. State police officers and a United States Marshal arrested and searched him without a warrant, and Weeks was convicted of "[using] the mails for the purpose of transporting certain coupons or tickets representing chances or shares in a lottery or gift enterprise, in violation of § 213 of the Criminal Code." *Id.* at 386.

17. *Id.* at 398. The issue of whether the search violated the Fourth Amendment is separate, in theory, from the issue of what remedy is owed to the victim of the violation. *See supra* note 8. The *Weeks* Court applied the exclusionary rule to remedy such violations.

18. The novelty of the *Weeks* decision is that the Court stated the rule positively: "[T]he [trial] court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed." *Weeks*, 232 U.S. at 398.

19. Most of the provisions of the Bill of Rights, which is by its own terms applicable only to the federal government, have since been made applicable to the states through the view that they are "incorporated" into the Fourteenth Amendment. See *infra* notes 21-23 and accompanying text for a discussion of the incorporation of the Fourth Amendment's exclusionary rule.

20. Two statements in the decision limit the Fourth Amendment to the federal government

the Bill of Rights, the Fourth Amendment prohibition against unreasonable search and seizures—and the exclusionary rule—have since been held to be applicable to the states.[21] The Supreme Court's decision in *Mapp v. Ohio*[22] finalized the incorporation of Fourth Amendment protections into the Due Process Clause of the Fourteenth Amendment by extending the exclusionary rule to prosecutions in state courts.[23] Fourth Amendment violations by state officials are now a common source of constitutional litigation. Although the Court originally held in *Weeks* that the exclusionary rule applied only to unconstitutional searches conducted by federal actors, today many of the cases involving the application of the exclusionary rule involve state actors, such as the school officials whose conduct was at issue in *Thompson*.

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and its officers. First, the Court stated that "[a]s to the papers and property seized by the [state] policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures." *Weeks*, 232 U.S. at 398. Later the court reiterated the limitations of the Fourth Amendment, stating that "[w]hat remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies." *Id.*

21. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961). In *Mapp* the Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.

22. Dolly Mapp was "convicted of knowingly having had in her possession . . . certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code." *Id.* at 643. The Ohio Supreme Court upheld her conviction, despite the fact that the conviction was "based primarily upon the introduction in evidence of [material] . . . unlawfully seized during an unlawful search of defendant's home." *Id.* at 643.

23. The dictates of the Fourth Amendment itself had been incorporated into the Fourteenth Amendment (and thus applied to the states) since *Wolf v. Colorado*, 338 U.S. 25 (1949). However, the *Wolf* decision did not incorporate the exclusionary rule; rather, the *Wolf* Court expressly stated "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.* at 33. *Mapp* overturned *Wolf* in this respect. "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion used against the Federal Government." *Mapp*, 367 U.S. at 655.

II. EVOLVING JUSTIFICATION FOR THE EXCLUSIONARY RULE

A. "Principled" Basis for the Exclusionary Rule

Although the *Weeks* decision created the exclusionary rule, it shed little light on the rationale for the rule. Instead, the Supreme Court's opinion covered the history and basis of the Fourth Amendment, with little express rationale for the exclusionary rule as a separate consideration.[24] Some have suggested that the exclusionary rule is best viewed as a product of the constitutional concept of limited governmental power.[25]

The *Weeks* Court reasoned that an unconstitutional search was beyond the proper sphere of power of the government, including all of its branches.[26] If the government had no authority under the Constitution to seize the evidence, a government prosecutor could not rely on the evidence in a criminal trial, and a court could not admit

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24. *See Weeks*, 232 U.S. at 389-92 (discussing early cases including *Bram v. United States*, 168 U.S. 532 (1987); *Boyd v. United States*, 116 U.S. 616 (1886); *Ex parte Jackson*, 96 U.S. 727 (1877)). The *Weeks* Court considered the basis of the Fourth Amendment to be the maxim that "a man's house was his castle and not to be invaded by any general authority," a maxim which was "made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures." *Weeks*, 232 U.S. at 390. This rationale applies directly to the Fourth Amendment, and not to the exclusionary rule as a remedy.

25. The "limited governmental power" rationale receives support from the *Weeks* decision is use of language and from its reliance on the explicit dictates of the Constitution. The *Weeks* Court stated that "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints . . . ." *Weeks*, 232 U.S. at 391-92. The Court also stated that the U.S. Marshal's actions were outside of his authority and without sanction of law, and that "without sworn information and particular description, not even an order of court would have justified such procedure." *Id.* at 393-94. Thus, the Court considered the acts beyond the government's powers.

26. The Court reasoned that the Fourth Amendment is meaningless without the exclusionary rule, arguing that

> [i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id. at 393.

the evidence for use at a trial.[27] This analysis of the need for the exclusion of unconstitutionally seized evidence is known as the "principled" basis of the exclusionary rule.

However, the Supreme Court clouded the theoretical rationale for the exclusionary rule in later decisions such as *Mapp*.[28] Writing for the Court in *Mapp*, Justice Clark largely paralleled the principled rationale offered for the rule in *Weeks*.[29] However, his opinion also offered pragmatic reasons for extending the *Weeks* rule to the states, thereby weakening the "principled" basis.[30] A rule required for pragmatic reasons is less powerful than a rule required by the constitutional limits on the government's power.

But the bigger blow to the "principled" rationale was Justice Black's opinion. Although Justice Clark's opinion in *Mapp* represented a five-justice majority in favor of applying the exclusionary rule to the states, it represented the views of only a four-justice plurality regarding the basis of the exclusionary rule itself.[31] Justice Black cast the deciding vote, applying the exclusionary rule to the states, but concluding that the rule was required only by the

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27. The Court stated that "to sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks*, 232 U.S. at 394.

28. *Mapp* incorporated the exclusionary rule into the Fourteenth Amendment as the remedy for violations of the Fourth Amendment, the substantive protections of which had been previously incorporated in *Wolf*. *See supra* notes 21-23 and accompanying text.

29. Clark described the rule as being required by the Fourth Amendment and stressed that without the rule the Fourth Amendment would be reduced, in Justice Oliver Wendell Holmes' words, "to a form of words." *Mapp*, 367 U.S. at 648 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)); *cf. Weeks*, 232 U.S. at 393 (stating that without the exclusionary rule, "[t]he protection of the Fourth Amendment . . . might as well be stricken from the Constitution").

30. See *infra* notes 33-35 and accompanying text for a discussion of the pragmatic reasons which appear in Clark's decision.

31. *Mapp* was a relatively splintered opinion. Most of the dissenters disagreed with the concept of incorporation. Thus, their opposition to incorporating the exclusionary rule had little to do with the rule's merits. However, Justice Harlan's dissenting opinion stated that he "would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on *Wolf* seem to me notably unconvincing." *Mapp*, 367 U.S. at 680 (Harlan, J., dissenting). Justice Stewart wrote a separate "memorandum" in which he "express[ed] no view as to the merits of the constitutional issue [facing] the Court [in *Mapp*]." *Id.* at 672 (Memorandum of Stewart, J.).

Fourth and Fifth Amendments in combination.[32] His unique and narrow view of the exclusionary rule meant that the "principled" basis of the rule failed to command a majority of the court, thus opening the door to other less compelling rationales.

B. "Deterrence" Rationale for the Exclusionary Rule

Although Justice Clark's opinion in *Mapp* largely followed the principled basis for the rule, analysis of the opinion shows that another rationale was also on his mind.[33] For example, at one point his opinion referred to the rule as a "deterrent safeguard."[34] Justice Clark also stated that pragmatic policy considerations favored applying the rule to the states, given the fact that states without exclusionary rules had not developed any effective alternative means of dealing with unreasonable police searches.[35] This concern for

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32. Justice Black argued that the exclusionary rule was not required by the Fourth Amendment standing alone, "[f]or the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence . . . ." *Id.* at 661-62 (Black, J., concurring). Justice Black considered the Fourth Amendment's lack of language barring admissibility to be crucial. *See supra* note 7. However, he stated that "when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Mapp*, 367 U.S. at 662.

33. Justice Clark's opinion grounded the exclusionary rule in the Constitution, but he also recognized that the principles governing the admissibility of evidence in federal criminal trials had not been restricted solely to constitutional ones. In particular, Justice Clark dealt with "factual considerations" which had led the *Wolf* Court to conclude that the exclusionary rule should not extend to the states. He did so only reluctantly: "While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment . . . we will consider the current validity of the factual grounds upon which *Wolf* is based." *Mapp*, 367 U.S. at 651.

34. *Id.* at 648.

35. The Court placed great emphasis on "the experience of California that such other remedies have been worthless and futile[, which was] buttressed by the experience of other states." *Id.* at 652. The *Mapp* court noted that many states were forced to adopt the exclusionary rule. California, for example, "according to its highest court, was 'compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . .'" *Id.* at 651 (quoting People v. Cahan, 282 P.2d 905, 911 (1955)).

The *Mapp* Court rejected the alternative of not applying the exclusionary rule to unreasonable searches and seizures by state officials, because to do so would create a double standard for the Fourth Amendment and render it "valueless." *Mapp*, 367 U.S. at 655. The search for alternatives to the exclusionary rule to serve as remedies for Fourth Amendment

pragmatism was meant to strengthen the exclusionary rule, as was Justice Clark's appeal that the exclusionary rule was appropriate because there were no other satisfactory alternatives. However, these arguments undercut the principled basis of the rule and its reliance on a view of limited government powers. Critics pointed out that the rule was not required by the Constitution, but was only a judge-made, instrumental policy aimed at deterring future police misconduct.[36]

After the *Mapp* decision, the exclusionary rule applied to state criminal cases and defendants.[37] The *Mapp* decision flushed the practical effects of the exclusionary rule out in the open, making them a target for criticism and testing.[38] Because the effect of the rule is usually to let a demonstrably guilty individual go free,[39] some critics claimed that the rule unfairly rewarded the guilty and punished police and prosecutors. In fact, many stated that the exclusionary rule was "handcuffing the police."[40] Testing the actual effects of the rule,

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violations has proved fruitless. *See infra* note 43 (discussing the search for alternatives).

36. This argument, while genuine, was a tactical decision. By divorcing the rule from its "principled" basis, this argument made the exclusionary rule less sacrosanct and more open to further criticism on its practical merits. If the rule was in fact constitutionally required, it would be difficult to either repeal or amend. If, however, the exclusionary rule was "only" a judge-made policy to deter unconstitutional searches, it could be more easily replaced.

37. Criminal law has traditionally been a concern for the individual states. Prior to the incorporation of the exclusionary rule, its application was limited to those few federal crimes of the early part of the century, such as tax evasion and certain other "white collar" crimes. The application of the exclusionary rule to the much more varied and visible world of state criminal defendants probably helped to force the issue to the forefront of academics and practice.

38. A number of judges and scholars have questioned the extent to which the exclusionary rule actually serves to deter unconstitutional searches. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). Many empirical studies have been conducted that show little deterrent effect. *See, e.g.*, Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (concluding that the exclusionary rule has no deterrent effect).

An endless cycle has emerged regarding criticism of the rule as a deterrent device, empirical testing of the rule's deterrent effects, and criticism of the testing as flawed. *See* United States v. Janis, 428 U.S. 433, 449-50 (1976) (stating that "although scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed").

39. *See supra* note 11 and accompanying text.

40. The phrase itself is of uncertain origin, but endures because of the paradoxical imagery it evokes. The *Mapp* Court did not use the language, but addressed this argument when it stated that "[n]or can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement." *Mapp*, 367 U.S. at 659.

however, proved far more difficult. Leading academics debated the effect of the rule. Proponents of the *Mapp* decision argued that "handcuffing the police" was a positive result because the rule forced police departments to train officers about the constitutional limits on searches.[41] In response critics argued that the rule in fact had no effect on the searches and behavior of police officers because the rule did not directly punish offending officers.[42] Thus, the focus of the academics' arguments was on the more pragmatic, deterrence rationale for the exclusionary rule. The rule's critics, in effect, argued that because the rule was a poor deterrent for police officers, it should be abandoned when another remedy for unconstitutional searches is found.[43]

III. WEAKENING OF THE RULE: THE *CALANDRA* DECISION

A. Adoption of the Deterrence Rationale and Framework

In *United States v. Calandra,*[44] the Supreme Court followed the shift in the academics' emphasis from principled arguments to deterrence arguments. In *Calandra*, the Court stated that the exclusionary rule did not apply to evidence offered in grand jury proceedings, holding that evidence is admissible before a grand jury even if it is obtained in an illegal unconstitutional search.[45] In terms

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41. *See, e.g.,* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983). Many empirical tests have in fact failed to resolve the issue. *See supra* note 38. *See also Janis*, 428 U.S. at 450 n.22.

42. *See, e.g.,* Oaks, *supra* note 38, at 756-57.

43. The search for alternative remedies for violation of the Fourth Amendment prohibition has proven as difficult and futile as the search for empirical evidence of the deterrent effect of the exclusionary rule. A ten year experiment in the states, conducted by the Supreme Court between the *Wolf* and *Mapp* decisions, failed to produce any acceptable alternative remedies. *See supra* notes 31-35 and accompanying text. The search for a better remedy continues. "[A]lternatives that would be less costly to societal interests have been the subject of extensive discussion and exploration." *Janis*, 428 U.S. at 449. The *Janis* Court listed a number of proposals, but did not announce any viable replacement for the rule. *See id.* at 450-52 n.22.

44. 414 U.S. 338 (1974).

45. *See id.* at 342. Federal agents searched Calandra's place of business under a warrant specifying that the object of the search was to discover and seize bookmaking records and

of broader implication, the *Calandra* ruling replaced the principled basis of the rule with the deterrence rationale.[46]

The *Calandra* decision represented a sharp break with the "limited governmental powers" view of the earliest exclusionary rule decisions. The Court allowed the grand jury to see the evidence even though the search was beyond the constitutional authority of the officers conducting the search. *Calandra* expressly rejected the argument that the rule was part of the Fourth Amendment right against search and seizure, and adopted a deterrence rationale, stating the "rule's prime purpose is to deter future unlawful police conduct."[47]

Most importantly, the *Calandra* opinion announced a framework for determining whether the exclusionary rule should or should not be applied to a given situation.[48] Because the Court adopted a deterrence rationale for the exclusionary rule, it held that the question

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wagering paraphernalia. *See id.* at 340. One of the agents discovered and seized a suspected record of "loansharking." *Id.* at 340-41. A grand jury subpoenaed Calandra to question him about the seized evidence, but he refused to testify. *See id.* at 341. The District Court granted a motion to suppress, on the grounds that the search unconstitutionally exceeded the scope of the warrant. *See id.* at 341-42. The Supreme Court reversed, holding that the exclusionary rule did not apply to bar the admission of unconstitutionally seized evidence in grand jury proceedings. *See id.* at 342. Note the distinction between remedies in *Calandra*, as opposed to cases such as *Mapp*. In *Calandra*, although the violation was clear, the exclusionary rule was *not* the proper remedy.

46. The Court's description of the rule is telling. The Court stated that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348.

47. *Id.* at 347. The rule's "'purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Id.* at 347 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). This philosophical swing is important because if the rule is only necessary as a means to deter, it may be discarded as other more effective or less costly means are discovered. *See supra* note 36.

48. The term "framework" is borrowed from *Thompson*, 87 F.3d at 981 ("The Court's 'framework' for deciding whether the exclusionary rule applies in a particular civil proceeding is to analyze whether the likely benefit of excluding illegally obtained evidence outweighs the societal costs of exclusion."), however, the Supreme Court itself has referred to the *Calandra/Janis* balancing test as a "framework." *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) ("In *United States v. Janis*, . . . this Court set forth a framework for deciding in what types of proceeding application of the exclusionary rule is appropriate."). This framework is a basic cost-benefit analysis and has been applied by federal courts in a wide variety of contexts.

of whether the rule should be applied in a given circumstance depends on the "deterrent benefits" and the "social costs" of applying the rule in that setting.[49] This balancing test or framework has opened the door to a series of holdings limiting the application of the exclusionary rule.

B. Extension of Calandra *by Federal Courts*

This new framework, based on the deterrent effect of the exclusionary rule, allowed the Court to sharply limit the scope of its application. The Court has used the balancing framework described in *Calandra* to reject the exclusionary rule and admit evidence seized unconstitutionally in civil tax cases[50] and in deportation hearings.[51] In both of these instances, the Court held that the proper framework for deciding whether the exclusionary rule applies in a particular civil proceeding is to weigh the benefit of excluding illegally obtained evidence against the societal costs of exclusion.[52]

The Court's consistency has allowed lower courts to apply the framework with confidence. Lower courts have used the framework to cut back the exclusionary rule in other civil hearings. Among the most recent of these cases is the Eighth Circuit's decision in *Thompson v. Carthage School District*.[53] In *Thompson*, the Eighth Circuit held that the exclusionary rule should not be applied to bar the use of unconstitutionally seized evidence in civil school

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49. The framework was given in terms of the immediate context:
"In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context." *Id.* at 349; *see also Lopez-Mendoza*, 468 U.S. at 1041 ("[T]he Court recognized in *Janis* that there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs.").

50. *See* United States v. Janis, 428 U.S. 433 (1976).

51. *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

52. *See Lopez-Mendoza*, 468 U.S. at 1040-1050 (applying the cost-benefit analysis to the INS deportation context); *Janis*, 428 U.S. at 447-460 (considering whether the exclusionary rule is a deterrent as a general proposition, and applying the *Calandra* cost-benefit analysis to grand jury context).

53. 87 F.3d 979 (8th Cir. 1996).

disciplinary hearings.[54]

IV. *THOMPSON V. CARTHAGE SCHOOL DISTRICT*

A. District Court Found "Wrongful Expulsion"

School officials at Carthage High School expelled Ramone Lea after finding crack cocaine in his pockets during a search for guns and knives reported to be on school grounds.[55] The district court[56] awarded $10,000 Lea in damages under section 1983 for "wrongful expulsion" because the search had violated his Fourth Amendment rights.[57] Although the district court did not explicitly address the question, its award of substantial damages for wrongful expulsion was necessarily based on the proposition that Lea could not be expelled on the basis of evidence discovered during an illegal search. In short, the district court determined that the exclusionary rule was applicable.[58] Neither party raised the issue on appeal, but the Eighth Circuit considered the exclusionary rule's applicability *sua sponte*.[59]

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54. *See id.* at 982. The court's statement of its holding is very straightforward: "[W]e conclude that the exclusionary rule may not be applied to prevent school officials from disciplining students based upon the fruits of a search conducted on school grounds." *Id.* The court did not mention that this was the exact issue the Supreme Court had left open in *T.L.O.* *See supra* note 3.

55. *See Thompson*, 87 F.3d at 980. Carthage is a small, rural school district. Upon suspicion that a student had a knife on a school bus, the school's principal decided to search all male students in grades 6 through 12. During the search, students told the principal that a gun was present at the school that day. Ramone Lea was a ninth grade student at Carthage. A search of his pockets produced a used book of matches, a match box, and a cigarette package, which were taken to the principal's office. The match box contained a white substance which tests revealed to be crack cocaine. Following a hearing, Lea was expelled for the remainder of the school year. *See id.*

56. Eastern District of Arkansas, Hon. Garnett T. Eisele, District Judge.

57. *See Thompson*, 87 F.3d at 980. The district court also granted Lea reasonable attorney fees and a declaratory judgment that the search had violated his Fourth Amendment rights. *See id.*

58. This is another example showing that the substantive Fourth Amendment violation issue is separate from the remedy. "[T]he district court awarded substantial damages for wrongful expulsion, based entirely on the proposition that Lea could not be expelled for possessing crack cocaine discovered during an illegal search." *Id.* at 981.

59. *See id.* "At the outset, we confront an issue ignored by the parties and the district court—whether the Fourth Amendment is exclusionary rule applies in school disciplinary

B. Eighth Circuit Applied Carthage *Framework*

After noting that the exclusionary rule is "judicially-created,"[60] the court stated that the exclusionary rule has "never" been applied by the Supreme Court to a civil proceeding.[61] The court cited the Supreme Court's holdings in *Janis* and *Lopez-Mendoza*, which had declined to apply the exclusionary rule.[62] The court then proceeded to analyze the application of the rule to school disciplinary hearings, using the "cost-benefit" framework announced in *Calandra*.[63]

1. Societal Costs of Exclusionary Rule

In applying the *Calandra* framework,[64] the Eighth Circuit held that the societal costs of applying the rule in school disciplinary proceedings are very high. For example, the court felt that the exclusionary rule might bar a high school from expelling a student who confessed to killing a classmate on campus if the confession was not preceded by *Miranda* warnings, and expressed doubt as to whether "any parent would compromise school safety in this fashion."[65]

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proceedings. At oral argument, we invited counsel to submit supplemental briefs addressing this issue, but neither side did so." *Id.*

60. The court opened its discussion with a definition of the "judicially-created" exclusionary rule. This language is technically correct, and has been so since the *Calandra* decision. *See supra* note 44 and accompanying text. However, its use foreshadowed the court's eventual holding, insofar as the opponents of the rule have long championed this position. *See supra* note 36 and accompanying text.

61. *See Thompson*, 87 F.3d at 981. "'In the complex and turbulent history of the rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state.'" *Id.* (quoting *Janis*, 428 U.S. at 447).

62. Both opinions consider the *Calandra* framework in declining to apply the exclusionary rule as the remedy for violations of the Fourth Amendment in specific contexts. *See supra* notes 48-49 and accompanying text.

63. The *Calandra* framework requires a determination of whether the likely benefit of excluding illegally obtained evidence in a particular context outweighs the societal costs of exclusion. *See supra* notes 48-49 and accompanying text.

64. The Eighth Circuit characterized the framework as requiring an analysis of "whether the likely benefit of excluding illegally obtained evidence outweighs the societal costs of exclusion." *Thompson*, 87 F.3d at 981 (citing *Lopez-Mendoza*, 468 U.S. at 1041).

65. *Id.* at 981. This example seems a bit extreme. Use of the exclusionary rule as a remedy imposes certain costs regardless of the context. *See, e.g., Lopez-Mendoza*, 468 U.S. at 1041

More generally, the court stated that to the extent the exclusionary rule prevents the disciplining of students who disrupt education or endanger other students, it frustrates the critical governmental function of educating and protecting children. Potential disruption of this critical government function raises the "societal costs" side of the balance and makes application of the exclusionary rule less likely.[66]

Moreover, the Eighth Circuit cited *New Jersey v. T.L.O.*,[67] for the proposition that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures."[68] The court reasoned that application of the exclusionary rule would require formal inquiries in the nature of suppression hearings, which would be inconsistent with the required flexibility of state officials involved in school discipline.[69] Thus, application of the exclusionary rule would take away this required flexibility, leaving officials unable to respond to the demands of school discipline and safety. This also raises the "societal costs" of the rule and lessens the likelihood of its use under the cost-benefit framework.

2. Likely Benefit of the Exclusionary Rule

The Eighth Circuit then examined the likely benefits of imposing the exclusionary rule in school disciplinary proceedings. The sole benefit that the court considered was the rule's deterrent effect.[70]

("On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs."). The *Thompson* court did not address these costs. *See also supra* note 11.

66. *See Thompson*, 87 F.3d at 981. This example seems to be right on target, and is context-specific, as the framework requires.

67. 469 U.S. 325 (1985).

68. *Id.* at 340. In *T.L.O.*, the Supreme Court used this reasoning to find that no violation of the Fourth Amendment had occurred. *See T.L.O.*, 469 U.S. at 341-347. More recently, the Supreme Court has applied similar reasoning to find that no violation of the Fourth Amendment had occurred in *Vernonia School District v. Acton*, 115 S. Ct. 2386 (1995). Neither of these cases addressed the exclusionary rule issue considered in *Thompson*.

69. The Eighth Circuit noted by way of analogy that the flexibility demands of school discipline had led the Supreme Court to impose only very limited due process requirements in *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975). *See also* Missouri v. Horowitz, 435 U.S. 78 (1978).

70. *See Thompson*, 87 F.3d at 981. The court stated that "[t]he benefit of the exclusionary

Attempting to weigh the deterrent effect, the court took note of the fact that school officials both conducted the search and imposed the student discipline.[71] The court reasoned that "knowing that evidence they illegally seize will be excluded at any subsequent disciplinary proceeding would likely have a strong deterrent effect"[72] on school officials. Thus, the court found that in this regard the case was similar to *Lopez-Mendoza*.[73] Although this factor is not dispositive, it cuts in favor of a deterrent effect by increasing the "likely benefit" of applying the exclusionary rule.[74]

However, the *Thompson* court went on to point out "important differences between school discipline and the deportation proceeding at issue in *Lopez-Mendoza*."[75] The court analyzed these differences, and concluded that they worked to lower the deterrent effect that imposing the exclusionary rule in school disciplinary proceedings would have on school officials. First, the court noted that school officials are not law enforcement officers, and thus do not occupy a role whose mission is closely analogous to that of police officers.[76] The court opined that school officials distinct mission of school officials lowers the deterrent effect of the rule's application to school disciplinary proceedings.[77]

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rule depends upon whether it would effectively deter Fourth Amendment violations." *Id.* This is consistent with the Supreme Court's consideration of the framework. *See Lopez-Mendoza*, 468 U.S. at 1041 (stating that the primary purpose of the exclusionary rule is deterring future misconduct).

71. *See Thompson*, 87 F.3d at 981.

72. *Id.* (citing *Lopez-Mendoza*, 468 U.S. at 1042-43).

73. *See id* at 981.

74. Indeed, the *Lopez-Mendoza* Court noted this fact, and its positive effect on the potential deterrent value of the rule, but eventually decided against applying the exclusionary rule. *See id.*

75. *Id.*

76. *See id.* The court considered this alternate role to be less susceptible to the rule's deterrent effect. Specifically, the court stated: "School officials, on the other hand, are not law enforcement officers. They do not have an adversarial relationship with students. 'Instead, there is a commonality of interests between teachers and their pupils . . . .'" *Id.* (quoting *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring)).

77. *See Thompson*, 87 F.3d at 981-82.

3. Other Considerations

The *Thompson* court also considered substantive Fourth Amendment law in the school context.[78] Noting that children have limited expectations of privacy at school, the court reasoned that although the Fourth Amendment did apply to searches by school officials, the reasonableness standard as applied to school searches falls short of probable cause.[79] The opinion did not, however, explain the link between the lower reasonableness standard and the lower probability of benefits from the exclusionary rule.

The court's opinion concluded that, under the circumstances, there was little need for the exclusionary rule and its possible deterrent effect.[80] In fact, the court stated that it saw some risk that the exclusionary rule, if applied, would paradoxically deter educators from undertaking disciplinary proceedings that are needed to keep the schools safe.[81] The court further concluded that even if the exclusionary rule did not have such a paradoxical effect, any deterrence benefit would not begin to outweigh the high societal costs of imposing the rule."[82]

C. Thompson *and the School Context Precedent*

1. Footnote One of *Thompson*

The Eighth Circuit did not explicitly base its holding on any precedent applying the *Calandra* framework to the school disciplinary setting. The court did imply, however, that its decision was in line with virtually all the relevant case law.[83] In footnote one,

78. *See id.* at 981.

79. *See id.* (citing *T.L.O.*, 469 U.S. at 341).

80. *See id.*

81. *See id.* at 981-82. The court stated that it saw "some risk that application of the rule would deter educators from undertaking disciplinary proceedings that are needed to keep the schools safe and to control student misbehavior." *Id.*

82. *Id.* at 982.

83. *See id.* The court's opinion asserts that in declining to apply the exclusionary rule, its holding is "like [that of] most district courts that have published opinions applying *Janis* and *Lopez-Mendoza* . . . ." *Id.*

the Eighth Circuit cited four district courts that have published opinions considering the application of the exclusionary rule to the school disciplinary context.[84]

Specifically, the footnote includes *James v. Unified School District No. 512*,[85] *Morale v. Grigel*,[86] and *Ekelund v. Secretary of Commerce*,[87] which the court cited as consistent with its decision. The court also referred to *Jones v. Latexo Independent School District*,[88] which the *Thompson* court cited as contrary to its holding.[89] The court's characterization of the available district court precedent is open to some question, however, because the *Thompson* decision represented more of a departure from precedent than its opinion suggests.[90]

2. Cases Declining to Apply the Exclusionary Rule

In *James*,[91] the district court stated that the fruits of an

84. *See Thompson*, 87 F.3d at 982 n.1.

85. 899 F. Supp. 530, 533-34 (D. Kan. 1995).

86. 422 F. Supp. 988, 999-1001 (D.N.H. 1976).

87. 418 F. Supp. 102, 106 (E.D.N.Y. 1976).

88. 499 F. Supp. 223, 238-39 (E.D. Tex. 1980).

89. *See Thompson*, 87 F.3d at 982 n.1.

90. Most commentators have not found the case law to be as uniform as the Eighth Circuit suggests in *Thompson*. *See, e.g.*, Kathleen K. Bach, Note, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After* New Jersey v. T.L.O., 37 HASTINGS L.J. 1133, 1157 (1986).

Those commentators that have found the case law to point in a specific direction have generally reached the opposite conclusion of *Thompson*. *See, e.g.*, Charles W. Hardin, Jr., Comment, *Searching Public Schools:* T.L.O. *and the Exclusionary Rule*, 47 OHIO ST. L.J. 1099, 1108 (1986) ("An apparent majority of courts, by contrast, have adopted the position that the exclusionary rule requires the suppression of evidence unlawfully seized from students by school authorities"). *See also id.* at 1108 n.129 (citing *Jones* and *Smyth* as two well-written opinions on the issue). The *Thompson* opinion lists *Jones* as contrary to its position and does not refer to the *Smyth* case. *See Thompson*, 87 F.3d at 982 n.1.

91. 899 F. Supp. 530 (D. Kan. 1995). School officials received an anonymous tip that James, a sophomore at Shawnee Mission Northwest High School, had a gun on school premises. The following day, the school officials confronted James and searched his vehicle, which was parked on school property. The parties disagreed as to whether James consented to the search. Following notice and a hearing, he was expelled for the remainder of the school year. *See id.*

unconstitutional search may be used in school disciplinary hearings.[92] But the court did not rely on the cost-benefit framework in reaching this decision.[93] The *Morale* court's decision also was not based on the cost-benefit framework.[94] By contrast, the stated rationale of the *Thompson* case is based on the straightforward application of the balancing framework. For these reasons, *James* and *Morale* shed very little light on the issues involved in the *Thompson* case.

The third case relied on in the footnote, *Ekelund*,[95] is also of very little precedential value to *Thompson*. The district court in *Ekelund* initially held that the search at issue was constitutional,[96] and appeared to rely on this determination in its abbreviated discussion of the exclusionary rule.[97] The *Ekelund* analysis is also quite different than the approach used in the *Thompson* decision, which considered the issue quite separate from the constitutionality of the search and resolved the issue independently. Thus, *Ekelund* provides little

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92. *See id.* at 533. The court clearly separated the violation from the remedy. "Assuming the plaintiff's Fourth and Fifth Amendment rights were violated, case law does not prohibit using the fruits of that violation in school disciplinary hearings." *Id.*

93. *See id.* at 532-33. The district court's rationale is not entirely clear. The *Calandra* framework is discussed, but is never applied. *See id.* Additionally, the opinion relies on a distinction used "prior to the *Lopez-Mendoza* decision," which turned on whether the civil proceeding is "quasi-criminal." *Id.* at 533-34. Thus, the opinion is based on the proposition that school disciplinary hearings are not quasi-criminal proceedings, an analysis that is not part of the *Calandra* framework.

94. 422 F. Supp. 988 (D.N.H. 1976). *Morale* is less similar on its facts to *Thompson* than *James*. Morale was a student at a state technical institute, where he lived in the men's dorm. His room was subjected to an unconstitutional search, which led to the discovery of marijuana in his dorm room. Following a hearing, Morale was suspended for possession of marijuana. *See id.* at 992.

95. 418 F. Supp. 102 (E.D.N.Y. 1976). Ekelund was a member of the U.S. Merchant Marine Academy. His room was subjected to search, which resulted in the discovery of marijuana. He was disciplined for the possession of the controlled substance. *See id.* at 103.

96. *See id.* at 105. "The use in evidence of the product of the search of Ekelund's room was not an invasion of his constitutional rights. . . . The search, therefore, was not an unreasonable search and the seizure . . . did not invade plaintiff Ekelund's constitutional rights." *Id.*

97. *See id.* at 106. The court mentioned *Janis*, but did not apply the cost-benefit framework. Instead the court appeared to rely on the fact that the expulsion was not criminal or quasi-criminal, an inquiry not used since *Lopez-Mendoza*. The court stated that "[t]he consequences of the proceeding are grave, but it is not a criminal proceeding, and in no true sense is the proceeding punitive or vindictive, nor is it a forfeiture proceeding." *Id.* at 106.

persuasive precedential support for *Thompson*.

3. Cases Applying Exclusionary Rule

The Eighth Circuit opinion also analyzed cases on the other side of the equation. The Court listed the *Jones*[98] case as contrary to its holding, but did not indicate that it was the only district court case it cited that applied the *Calandra* framework to the school disciplinary hearing context.[99] Applying the framework, the *Jones* court reached the opposite conclusion than the *Thompson* court and held that the exclusionary rule was applicable to school disciplinary hearings.[100]

Additionally, the *Jones* court cited as persuasive *Smyth v. Lubbers*,[101] a case comparable on its facts to *Jones*.[102] The Eighth Circuit completely omitted *Smyth* from its list of district court cases considering the exclusionary rule in school disciplinary hearings.[103] This omission is somewhat surprising, considering that the *Smyth*

98. 499 F. Supp. 223 (E.D. Tex. 1980). The facts of *Jones* are more similar to the search at issue in *Thompson*. In *Jones*, authorities used drug-sniffing dogs to find drugs on school students and on-campus vehicles. The dogs were trained to detect the odor of marijuana and other narcotics. The plaintiffs in *Jones* were students suspended from school for possession of drug paraphernalia on campus as a result of the drug-dog search.

99. The *Jones* decision cites the cost-benefit framework from *Janis* and applies the factors in relation to the school context. *See id.* at 238-39. None of the other cases cited in footnote 1 of *Thompson* apply the framework or consider its peculiar application in the school context. *See supra* notes 90-97 and accompanying text.

100. The *Jones* court weighed the deterrent effect and found that because the school officials who suspended the plaintiffs on the basis of the unlawfully obtained evidence were the very same individuals who planned and implemented the searches, "[e]xcluding the use of such evidence from school disciplinary proceedings will directly and effectively deter unconstitutional conduct by these officials, in the manner contemplated by the Supreme Court in *Mapp*." *Jones*, 499 F. Supp. at 239.

101. 398 F. Supp. 777 (E.D. Mich. 1975). The *Smyth* case involved a student residing in a state dorm, subjected to a warrantless search. The search resulted in the discovery of marijuana and disciplinary action on the basis of the seized evidence. *See id.* at 782-83.

102. *See Jones*, 499 F. Supp. at 238. "In a case comparable on its facts to this one . . . the Western District of Michigan refused to allow a state college to rely on the fruits of an unlawful search . . . to discipline those students occupying rooms where contraband was found." *Id.* The rationale in both cases was explicitly based on deterrence: "If there were no exclusionary rule in this case, [school] authorities would have no incentive to respect the privacy of students." *Id.* (quoting *Smyth*, 398 F. Supp. at 794).

103. *See Thompson*, 87 F.3d at 982 n.1.

case is one of only a handful of cases dealing directly with this issue. Moreover, *Smyth* should have been readily apparent to the court as it was cited by both *Jones* and *Morale*.[104] The reason for the omission may simply be that *Smyth* is contrary to the Eighth Circuit decision in *Thompson*.[105]

In short, a closer inspection shows that the district courts that have applied the *Calandra* framework to the disciplinary hearing context have not held the exclusionary rule inapplicable with the regularity that *Thompson* suggests.[106] This fact should have been noted not only because of lower federal court uncertainty on the issue but also because of the intersection of the student rights at issue and the qualified immunity doctrine.

D. Thompson, *Precedent, and Qualifed Immunity*

The Eighth Circuit should have acknowledged that the *Thompson* decision was a greater departure from precedent than it suggested.[107] This is especially important in light of the fact that no other Court of Appeals had addressed this issue, and that the Supreme Court had expressly left this issue open in *T.L.O.*[108] The district courts that have addressed this issue have lacked uniformity of approach and outcome. The Eighth Circuit's opinion in *Thompson* could help

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104. *See Jones*, 499 F. Supp. at 237; *Morale*, 422 F. Supp. at 1001.

105. The *Smyth* case itself is not mysterious or difficult to find. Many commentators have listed *Smyth* in string cites concerning the exclusionary rule. *See, e.g.*, Christine L. Andreoli, Note, *Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings: Focusing on Motive to Determine Deterrence*, 51 FORDHAM L. REV. 1019, 1021 n.6 (citing *Jones* and *Smyth* as holding evidence inadmissible in a high school and a college disciplinary hearing, respectively, based on the *Calandra* framework). See also *supra* note 90 for other citations to *Smyth*.

106. Commentators have not only differed with the *Thompson* court on its reading of the case law, but most commentators have also argued that the exclusionary rule should apply to the school disciplinary context in certain circumstances. *See* Ronald L. Vance, Comment, *School Search—The Supreme Court's Adoption of a "Reasonable Suspicion" Standard in* New Jersey v. T.L.O. *and the Heightened Need for Extension of the Exclusionary Rule to School Search Cases*, 1985 S. ILL. U. L.J. 263, 274-81. *See also supra* note 90.

107. *See supra* notes 90, 83-105 and accompanying text.

108. *See supra* note 3 and accompanying text.

rectify this problem.[109]

Moreover, a clear acknowledgment that the *Thompson* decision is a new development would be of great practical importance to school officials in light of their qualified immunity.[110] The current formulation of the qualified immunity doctrine is wholly objective and depends on the current state of the law.[111] Thus, school officials are entitled to qualified immunity from suit for violations of students' constitutional rights[112] if they do not violate clearly established law of which a reasonable official would have known.[113]

The *Thompson* decision substantially clarifies the law regarding the application of the exclusionary rule in school disciplinary proceedings. The Eighth Circuit clearly held that the exclusionary rule is not a proper remedy for Fourth Amendment violations in civil school disciplinary hearings. In this respect, the opinion will be welcomed by school administrators and officials.[114]

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109. *See supra* note 90.

110. Qualified immunity is an "[a]ffirmative defense which shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." BLACK'S LAW DICTIONARY 752 (6th ed. 1990).

111. The Supreme Court first established the qualified immunity doctrine in *Wood v. Strickland*, 420 U.S. 308 (1975). *Wood* involved the due process rights of students in a school disciplinary hearing. The Court held that school officials are immune from liability unless the officials acted to violate rights of which they knew or should have known, or unless the officials acted with malicious intent toward the students. *See id.* at 322.

For a history and application of qualified immunity, see Stephen J. Shapiro, *Public Officials' Qualified Immunity in Section 1983 Actions under* Harlow v. Fitzgerald *and its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REF. 249 (1989).

112. There are two avenues for such suits: suits under 42 U.S.C. § 1983 and so-called *Bivens* actions. *Bivens* actions are based on the Supreme Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), which allowed an implied private cause of action based on violation of a constitutional right against federal officials. *See also supra* note 38.

113. *See* Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982) (holding that if the official's conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known, the official may be held personally liable). Under this standard, school officials are not immune when they knew or should have known that their actions would violate a student's constitutional rights. *See id.*

114. The holding defines evidence that may properly be used in disciplinary proceedings. Under *Thompson*, school officials in student disciplinary hearings can admit and consider evidence which was seized in violation of the student's Fourth Amendment rights. As *Thompson* makes clear, students have no right to exclude such evidence from their disciplinary

The *Thompson* decision, however, substantially clarifies the law with regard to remedies only, not the substantive protections of the Fourth Amendment.[115] *Thompson* makes unconstitutionally seized evidence admissible in school disciplinary hearings. This fact may raise the concern that school officials will trample on the substantive rights of students under the Fourth Amendment, knowing that even evidence which is seized illegally can be admitted to suspend or expel a student. Are such concerns legitimate? Or would such an official lose his qualified immunity for such an intentional violation of student rights?[116] A full treatment of the qualified immunity doctrine is beyond the scope of this Recent Development, but it is clear that the Eighth Circuit's decision in *Thompson* has altered the landscape with respect to these important constitutional issues.

CONCLUSION

The exclusionary rule bars the use of unconstitutionally seized evidence against the person whose rights were violated by the search. The rule, originally conceived as part of the constitutional right against illegal searches and seizures, was later viewed as a mere judicial construct designed to deter constitutional violations. Since the adoption of this rationale, federal courts have reduced the scope

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hearings. Hence, school officials are immune from suits challenging the admission of such evidence on Constitutional due process grounds.

115. The Court in *Thompson* ultimately held that the underlying search was not a violation of the Fourth Amendment. *See supra* notes 57-59. However, that ruling was secondary to the court's independent conclusion that the exclusionary rule should not be applied. This Recent Development has focused on *Thompson's* primary importance, its holding regarding the exclusionary rule. *See supra* notes 8, 17-18, 57-59 and accompanying text (discussing the distinction between violations of Fourth Amendment Rights and the proper remedy for such a violation).

116. Under the current formulation of the qualified immunity doctrine, it appears that the school official's subjective intent to violate the student's rights might be irrelevant. Commentators have noted that the current objective test is a pure legal question. *See, e.g.*, Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1502 (1996) ("Qualified immunity determinations, like Rule 11 determinations, focus on the determinacy or indeterminacy of the law, not the defendants' states of mind."). The rationale for this view of qualified immunity is to allow the determinations to be made by judges at the summary judgment stage, rather than involving difficult factual issues of state of mind. *See id.*

of the exclusionary rule. The Eighth Circuit's recent decision in *Thompson v. Carthage School District* represents a continuation of this trend.

The *Thompson* decision, holding that the exclusionary rule should not be applied to exclude evidence in civil school disciplinary hearings, is a straightforward application of the Supreme Court's framework in *Calandra*. *Thompson*, however, represents a different approach, and a different outcome, from much of the existing district court cases that have considered the issue.

Indeed, the result is a greater break from precedent and commentary than the Eighth Circuit acknowledged in its opinion. This is an important observation, in light of the intersection between the constitutional rights of students and the doctrine of qualified immunity for school officials. *Thompson* allows school officials to discipline a student on the basis of evidence that has been seized in violation of the student's rights. Under *Thompson* such action is now protected by the qualified immunity. But *Thompson* could raise some important questions of qualified immunity for intentional violations of student's substantive Fourth Amendment rights.

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