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THE EXCLUSIONARY RULE AS A SYMBOL OF THE RULE OF LAW

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I. INTRODUCTION

THROUGHOUT South America, Southern and Eastern Europe, and East Asia, more than two dozen countries have transitioned to democracy since the 1980s.¹ A remarkable number of these have adopted an exclusionary rule (mandating that evidence obtained unlawfully by the government is generally inadmissible in criminal trials) as part of broader legal reforms. Democratizing countries have adopted exclusionary rules even though they are not required to do so by any international treaty and there is no indication that there is widespread popular demand for such rules. This has occurred at a time when the rule has been weakened in the United States, the country that is often looked to as a model on this question.²

What is it about transition to democracy that calls on these countries to introduce an exclusionary rule? It appears that experience with authoritarian rule has focused the new regimes on the danger of a powerful executive who exercises power arbitrarily. The exclusionary rule is adopted, at least in part, because it embodies the idea of restraining government power and promoting the rule of law.

This rule-of-law conception of the exclusionary rule, I would argue, is broader than the current understanding of the rule in the United States. Under U.S. Supreme Court jurisprudence, exclusion is justified only when it would deter police officers from violating constitutional rights in the future and when the benefits of deterrence outweigh costs to the enforcement of criminal law.³ Under the rule-of-law conception, by contrast, the exclusionary rule is justified as a means of holding the executive within the limits of the law and preventing government lawlessness from

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1. For graphs illustrating individual countries' transitions to democracy, see Monty G. Marshall, *Polity IV Project, Political Regime Characteristics and Transitions, 1800–2013*, <http://www.systemicpeace.org/polity/polity4.htm> (last visited Sept. 12, 2014).

2. See, e.g., TRACEY MACLIN, *THE SUPREME COURT AND THE EXCLUSIONARY RULE* 302–47 (2013).

3. *Herring v. United States*, 555 U.S. 135, 141 (2014); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

becoming rampant.⁴ In many countries transitioning to democracy, this concern about arbitrary rule is not just an abstract danger but rather a recent lived experience. Courts and legislators in these countries have often opted for strict exclusionary rules, despite the resulting costs on the enforcement of criminal law. In the United States, where experience with arbitrary regimes is more attenuated, and where the violent crime rate remains significant, concerns about enforcing the criminal law weigh more heavily in the balance.⁵ It remains to be seen whether some of the new democracies will over time move toward a weaker form of the exclusionary rule, as demands for law and order likewise press for a balancing of interests, or whether they will maintain a robust exclusionary rule as a symbol and instrument of the rule of law.

II. THE EXCLUSIONARY RULE AND THE RULE OF LAW ABROAD

In the 1980s, more than a dozen countries in Latin America and Southern Europe transitioned from military dictatorships to liberal democracies.⁶ Another wave of democratization occurred in the 1990s with the fall of communist regimes in Eastern Europe, authoritarian regimes in East Asia, and apartheid in South Africa.⁷ This trend continued through the early 2000s across parts of Eastern Europe.⁸ The political and legal reforms in these countries generally aimed to establish modern constitutional democracies, which not only provided for fair elections, but also constrained the power of governments through mechanisms such as the separation of powers, checks and balances, individual rights, and the rule of law.⁹

Criminal procedure reform was an important element of these transitions to liberal democracy. Constitutions and criminal procedure codes were amended to provide more robust rights for defendants in the crimi-

4. Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L. 393, 404 (2013); see also Hock Lai Ho, *The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence*, CRIM. L. & PHIL. 4 (2014), available at <http://link.springer.com/article/10.1007%2Fs11572-014-9304-7> (arguing that the exclusionary rule advances the rule of law by checking the executive in its bid to enforce the criminal law against the defendant).

5. See *Crime in the United States 2012*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2012/crime-in-the-u.s.-2012/violent-crime/violent-crime> (last visited Oct. 16, 2014) (follow "Table 1" hyperlink).

6. See Marshall, *supra* note 1.

7. See *id.*

8. See *id.*

9. See, e.g., Detlef Nolte & Almut Schilling-Vacaflor, *Introduction: The Times They Are a Changin': Constitutional Transformations in Latin America Since 1990s*, in NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISE AND PRACTICES 3, 15, 20-22 (Detlef Nolte & Almut Schilling-Vacaflor eds. 2012); Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 94 (2004); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 793-96, 836-50 (2012).

nal process and to limit government power to prosecute and punish.¹⁰ Many of the rights guaranteed as part of the reforms—the right to remain silent, the right to counsel, and the right to privacy—were included in international human rights conventions to which the democratizing states were parties.¹¹ But one particular legal reform, the introduction of an exclusionary rule for unlawfully obtained evidence, was also broadly implemented, even though it was not mandated by any international human rights convention.¹² Exclusionary rules were adopted by inquisitorial, adversarial, and mixed systems alike, suggesting an appeal that transcends differences in criminal procedure traditions.¹³ Strikingly, a number of these rules were categorical and sweeping, contrary to popular belief within the United States, including at the U.S. Supreme Court, that “the automatic exclusionary rule applied in our court is still ‘universally rejected’ by other countries.”¹⁴

In Latin America, democratic governments in Argentina, Brazil, Chile, Paraguay, Peru, and Uruguay all adopted relatively broad exclusionary rules, at least in part as a means of distancing themselves from previous repressive regimes.¹⁵ Argentina’s experience is illustrative. In the 1980s,

10. See, e.g., Jonathan H. Siegelbaum, *The Right Amount of Rights: Calibrating Criminal Law and Procedure in Post-Communist Central and Eastern Europe*, 20 B.U. INT’L L.J. 73, 90-96 (2002).

11. *Id.*; see also Stephen C. Thaman, *Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules*, 20 IUS GENTIUM 403, 405 (2013).

12. For the reluctance of the European Court of Human Rights to mandate exclusionary rules, see, for example, *Khan v. United Kingdom*, App. No. 35394/97, 31 Eur. Ct. H.R. 45, ¶ 34 (2000). Exclusion is required under international law only for evidence obtained through torture, and under some regional conventions, for evidence obtained through inhumane and degrading treatment or coercion. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15 (“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”); American Convention on Human Rights, art. 8(3) (“A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.”); *Gäfgen v. Germany*, 52 E.H.R.R. 1, 42 (2011). For a discussion of the case law by the Inter-American Court of Human Rights on excluding coerced confessions, see Federico Morgenstern, “Argumentos a favor de la relativización de la regla de exclusión de prueba ilegal,” in *TRATADO DE LOS DERECHOS CONSTITUCIONALES* *58–59 (forthcoming Abeledo Perrot Pubs 2014) (draft on file with author).

13. See, e.g., Stephen C. Thaman, *The Exclusionary Rule*, in *GENERAL REPORTS OF THE XVIIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW* 658–59 (Karen B. Brown & David V. Snyder eds. 2012); Mirjan Damaška, *Free Proof and Its Detractors*, 43 AM. J. COMP. L. 343, 348 (1995); Margaret K. Lewis, *Controlling Abuse To Maintain Control: The Exclusionary Rule in China*, 43 N.Y.U. J. INT’L L. & POL. 629, 646–49 (2011); Christopher Slobogin, A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases, in *Research Handbook on Comparative Criminal Procedure* (Jacqueline Ross & Stephen Thaman eds., forthcoming 2014).

14. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 (2006) (quoting Craig Bradley, *Mapp Goes Abroad*, 52 CASE RES. L. REV. 375, 399-400 (2001)).

15. CONSTITUCÃO FEDERAL [C.F.] [Constitution] art. 5 (Braz.) (providing that “evidence obtained through unlawful means is inadmissible in the proceedings”) (adopted in 1988, three years after the end of military dictatorship and transition to democracy in Brazil), translated in International Constitutional Law Project Information, at http://www.servat.unibe.ch/icl/br00000_.html; José Luis G. González, *La Policía en el Estado de Derecho Latinoamericano: El Caso Uruguay*, in *LA POLICÍA EN LOS ESTADOS DE DERECHO LATINOAMERICANOS* (Kai Ambos et al. eds. 2003), at <http://cedpal.uni-goettingen.de/data/inves>

as the reign of Argentina's military junta dictatorship ended, newly elected President Raúl Alfonsín's government began a process of democratization.¹⁶ This process included the initiation of comprehensive legal reforms to support constitutional democracy, as well as the replacement of judges who were seen as complicit with the military dictatorship.¹⁷

Reflecting these reforms, the Argentine Supreme Court revived an exclusionary rule as a means of safeguarding judicial independence and the rule of law. The Court had previously applied an exclusionary rule in 1891,¹⁸ but had then abandoned it "without much explanation."¹⁹ In the 1984 *Fiorentino* case, the Argentine Supreme Court held that the admission of unlawfully obtained evidence is "not only inconsistent with the rule of law, but . . . is also an impairment to the regular administration of justice."²⁰ Since then, the Court has consistently justified the exclusionary rule on grounds that it helps promote judicial integrity. The Court has explained that "courts should not allow the state to capitalize on illegal police conduct"²¹ because doing so "creates the fundamental contradiction of the legal system validating an illegal act."²²

The interpretation of the exclusionary rule as a means of preserving the rule of law and judicial integrity has endured until today. It has produced an exclusionary rule that is in many respects broader than the American

tigacion/grupales/Antiguos/PoliciaKaiAmbos.pdf#page=515 (discussing Uruguayan exclusionary rules); Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 SW. J. L. & TRADE AM. 323, 324–25, 355 (1998) (discussing Chile); María Victoria Rivas, Informe de Paraguay, Proyecto de Seguimiento de los Procesos de Reforma Judicial en América Latina (Centro de Estudios de Justicia de las Américas 2002) (discussing Paraguay); José Piscoya Silva, *Procedimiento de Exclusión de la Prueba Ilícita*, 5 DERECHO & CAMBIO SOCIAL (2005), at http://www.derechocambiosocial.com/revista005/prueba%20ilicita.htm#_ftn10 (discussing Peru); Stephen C. Thaman, "Fruits of the Poisonous Tree" in *Comparative Law*, 16 SW. J. INT'L L. 333, 342, 345–47 (2010) (discussing "absolute" exclusionary rules in Brazilian Criminal Procedure Code); see also Janeen Kerper, *Trial Advocacy Lessons from Latin America*, 74 TEMP. L. REV. 91, 99 (2001) (discussing her experience teaching trial advocacy in Argentina, Chile, Paraguay, and other Latin American countries; and noting that "Latin Americans, who far too often have experienced brutal excesses of police power, are careful to preserve some kind of exclusionary rule to preclude the admission of forced confessions or other evidence obtained 'in derogation of human rights'"). While experience with the previous oppressive regimes was a key shaping factor, a host of other influences were also at play. For an in-depth discussion, see Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007).

16. ALEJANDRO D. CARRIÓ, *THE CRIMINAL JUSTICE SYSTEM OF ARGENTINA* 90-91 (1989).

17. *Id.*

18. *Charles Hermanos*, 46 Fallos C.S.N. 36, cited in CARRIÓ, *supra* note 16, at 130 (justifying the rule "in the name of morality, security, and privacy").

19. CARRIÓ, *supra* note 16, at 130.

20. *Fiorentino*, Corte Suprema de Justicia de la Nación, 306 Fallos 1752 (1985), cited in CARRIÓ, *supra* note 16, at 135; see also *Rayford*, Corte Suprema de Justicia de la Nación, 13/5/1986, cited in AYA GRUBER ET AL., *PRACTICAL GLOBAL CRIMINAL PROCEDURE: UNITED STATES, ARGENTINA, AND THE NETHERLANDS* 217 (2012).

21. GRUBER ET AL., *supra* note 20, at 217.

22. *Id.* (citing *Montenegro*, Corte Suprema de Justicia de la Nación, 10/1/1981; *Rayford*, Corte Suprema de Justicia de la Nación, 13/5/1986).

rule.²³ Some commentators have criticized Argentine courts for retaining this expansive interpretation, even as the threat of return to arbitrary rule has subsided.²⁴ With constitutional democracy and respect for individual rights established, some have argued that Argentine courts ought to balance the benefits of excluding evidence against the interests in truth-seeking and enforcing the criminal law.²⁵ But this remains a minority position, and the abuses of the past are frequently referenced as a reason why Argentina should retain a categorical approach to exclusion.²⁶

Like Argentina, several Southern European countries—Spain, Portugal, Greece, and Turkey—also adopted or strengthened their exclusionary rules as part of a transition away from military dictatorship and to constitutional democracy.²⁷ In Spain, courts did not traditionally exclude evidence as a remedy for police violations of individual rights during the investigation.²⁸ In 1978, three years after the end of the Francoist regime, Spain adopted a new constitution that “placed the protection of human rights at the heart of the constitutional order.”²⁹ The emphasis on due process in the new constitution led the Spanish Supreme Court to adopt a broad and categorical exclusionary rule in 1984 in the name of protecting fundamental rights.³⁰ The following year, this exclusionary rule was codified in Section 11.1 of the Organic Law of the Judicial Power.³¹ These developments have been expressly characterized as “a reaction to the

23. *Id.* at 218; see also Alejandro D. Carrió & Alejandro M. Garro, *Argentina, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 3, 22–25 (Craig Bradley ed. 2d ed., 2007).

24. Morgenstern, *supra* note 12, at *1–2.

25. *Id.* at *2, 17–18.

26. *Id.* at *14–18, 27–43, 169; see also Alejandro Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?*, 31 COLUM. J. TRANSNAT'L L. 1, 42 (1993–1994) (“[I]n a country like Argentina where the balance of interests has traditionally weighed in favor of governmental power at the expense of individual rights, affirming the sanctity of the judicial process at this juncture of a transition to democracy, even at the cost of suppressing unquestionable evidence that could serve to convict a wrongdoer, would further the rule of law and foster a legal culture tied to procedural fairness.”).

27. PORTUG. CONST. art. 32(8) (“All evidence obtained by torture, coercion, infringement of personal physical or moral integrity, improper intrusion into personal life, the home, correspondence or telecommunications shall be deemed null and void.”) (adopted in 1976, two years after the end of military dictatorship and transition to democracy), *translation available at* http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf; Lorena Bachmaier Winter, *Spain: The Constitutional Court's Move from Categorical Exclusion to Limited Balancing*, 20 IUS GENTIUM 209, 232 (2013); Dimitrios Giannouloupoulos, *The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First*, 11 INT'L J. EVID. & PROOF 181, 208 (2007); Adem Sözüer & Öznur Sevdiren, *Turkey: The Move to Categorical Exclusion of Illegally Gathered Evidence*, 20 IUS GENTIUM 287, 288 (2013).

28. Winter, *supra* note 27, at 232 (“Although the 1882 Spanish CCP [Code of Criminal Procedure] established certain limits on the gathering of evidence, the general practice was to accept at trial any evidence which could contribute to the determination of the truth of the facts contained in the accusatory pleadings, regardless of how the evidence was gathered.”).

29. *Id.* at 232.

30. *Id.* at 215, 232.

31. *Id.* at 215 (citing Ley Orgánica del Poder Judicial § 11.1).

abuses of the Francoist police.”³²

Starting in the late 1990s, as the experience of arbitrary rule receded further into the past, Spanish courts began moving away from the categorical approach in some cases and balancing interests in deciding whether to exclude evidence.³³ But at least the initial unconditional embrace of exclusion appears to have been motivated by Spain’s experiences with an oppressive regime and a concern for the protection of individual rights.

Like several other European countries, such as Italy and France, Greece had a tradition of “nullities,” which considered void evidence obtained as a result of certain procedural violations.³⁴ But nullities applied to only a few specific violations of the Criminal Procedure Code and not more broadly to unlawfully obtained evidence.³⁵ Their practical significance was therefore limited.³⁶ More recently, Greece introduced a robust exclusionary rule in its 1995 Criminal Procedure Code.³⁷ Furthermore, case law from the 1990s interpreted exclusion as a constitutionally mandated remedy for certain violations, and the 2001 Constitution included an express provision to that effect.³⁸ The Greek exclusionary rule is automatic and “unusually wide” in its scope.³⁹ Its remarkable breadth has been linked at least in part to the “bitter, and not-too-distant, experience of rule by military junta.”⁴⁰ The rule has also been defended as a means of vindicating fundamental individual rights.⁴¹

In Turkey, the exclusionary rule was adopted during a period of democratization in the 1990s. Turkey had experienced three military coups in the 1960s, 1970s, and 1980s, respectively, all of which brought instability and human rights violations. After the 1980 military coup, mistreatment of suspects in custody became the subject of “vigorous criticism by both domestic and international human rights authorities.”⁴² The Turkish government took several steps to deflect this criticism. It accepted oversight by the European Court of Human Rights and liberalized the coun-

32. Thaman, *supra* note 13, at 441.

33. *Id.*

34. Georgios Triantafyllou, *Greece: From Statutory Nullities to a Categorical Statutory Exclusionary Rule*, 20 *IUS GENTIUM* 261, 261, 264 (2013) (tracing nullities to the initial 1951 version of the Criminal Procedure Code).

35. *Id.* at 261, 264–68.

36. The Greek Court of Cassation had also held in 1871 that exclusion was a possible remedy for certain unconstitutional searches of correspondence, but this holding was narrowly construed and exclusion hardly ever imposed. See Giannouloupolos, *supra* note 27, at 183.

37. *Id.* at 191.

38. *Id.* at 195, 198.

39. As Giannouloupolos explains, the rule applies to: (1) evidence obtained in violation of certain statutes and the Constitution; (2) all stages of criminal proceedings; (3) direct and derivative evidence; (4) evidence obtained by private actors and evidence obtained by state officials; and (5) cases in which a third party’s rights, not the defendant’s, were violated. *Id.* at 207.

40. *Id.* at 208.

41. *Id.* at 192, 207–08.

42. Sözüer & Sevdiren, *supra* note 27, at 288.

try's legal framework, emphasizing respect for human rights and the rule of law.⁴³ In the same vein, it codified an exclusionary rule as a signal to the international community that Turkey was taking measures to restrain police abuses.⁴⁴ The rule was subsequently linked to constitutional provisions affirming judicial review and the rule of law.⁴⁵ Despite some calls for a more balanced approach to exclusion, Turkish courts have so far applied a strict automatic rule on the grounds that it is more consistent with the rule of law and the protection of constitutional rights.⁴⁶

Like their Southern European neighbors, Eastern European countries such as Bulgaria, Croatia, the Czech Republic, Hungary, Romania, Russia, and Serbia have also introduced exclusionary rules during democratic reforms over the last two decades.⁴⁷ As elsewhere, this occurred as part of broader criminal procedure reforms aimed to strengthen individual rights and the rule of law. It was both a symbol of a break with the past and a legal tool intended to solidify the protection of individual rights and the rule of law. Not surprisingly, many of the rules adopted were, at least initially, quite strict and broad.⁴⁸

The introduction of the exclusionary rule in Russia illustrates this approach. The 1993 Russian Constitution provided for the inadmissibility of unlawfully obtained evidence, and the 2002 Code of Criminal Procedure included a categorical exclusionary rule.⁴⁹ The rule's adoption was part of a sweeping overhaul of the Russian criminal justice system, aiming to strengthen individual rights and subject government officials to the rule

43. *Id.* at 288–89.

44. *Id.*; see also A. Vahit Bicak, A Comparative Study of the Problem of the Admissibility of Improperly Obtained Evidence, PhD Dissertation, University of Nottingham 116–18 (1995), available at <http://etheses.nottingham.ac.uk/2354>.

45. Sözüer & Sevdiren, *supra* note 27, at 289.

46. *Id.* at 291, 291 n.17.

47. BULG. CRIM. PROC. CODE § 105(2) (“No objective forms of evidence shall be admitted, unless they have been collected or prepared in compliance with the terms and pursuant to the procedure herein specified.”) (English translation available at http://www.vks.bg/english/vksen_p04_03.htm#Chapter_eleven__); Bela Busch et al., *Criminal Law, the Law of Criminal Procedure, and the Law of Corrections in Hungary*, in *LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN* 233, 244, 251 (Stanisław Frankowski & Paul B. Stephan III eds., 1995); Zeljko Karas, *Exclusion of Illegal Police Evidence in Croatia*, 8 *VARSTVOSLOVJE* 283, 284 (2006); Bogdan Florin Micu, *Procedural Implications of the Illegal Administration of Evidence During a Criminal Trial*, *LEX & SCIENTIA INT'L J.* (2012), available at <http://www.ceeol.com> (discussing Romania's exclusionary rule); Snežana Brkić, *Serbia: Courts Struggle with a New Categorical Statutory Exclusionary Rule*, 20 *IUS GENTIUM* 309 (2013); The European Institute for Crime Prevention and Control, National Criminal Justice Profiles: Czech Republic 9, 35 (2002), at <http://www.heuni.fi/en/index/publications/nationalcriminaljusticeprofiles/czechrepublic.html> (discussing the Czech rule).

48. This was the case at least in Bulgaria, Croatia, Hungary, Russia, and Serbia. BULG. CRIM. PROC. CODE § 105(2); Busch et al., *supra* note 47, at 251; Karas, *supra* note 47, at 284; Brkić, *supra* note 47, at 309; Stephen C. Thaman, *Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth*, 61 *U. TORONTO L.J.* 691, 704 (2011).

49. Thaman, *supra* note 48, at 704 (citing KONSTITUSIA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 50(2) (Russ.)) (“In the administration of justice the use of evidence gathered in violation of federal law is not permitted.”).

of law.⁵⁰

The extent of the rule's enforcement in Russia remains unclear. Some commentators have suggested that "in general, Russian judges are suppressing evidence obtained via illegal searches and seizures in both the first instance and on appeal."⁵¹ While suppression rates in 30–70% of jury trial cases have been reported, the effects of suppression have often been short-lived.⁵² The Russian Supreme Court has reversed a number of acquittals by the juries "on the grounds that the trial judge had purportedly violated the rights of the prosecution by unlawfully excluding the evidence."⁵³ Moreover, maltreatment and coerced confessions in detention reportedly continue, suggesting that exclusion has not fully transformed police practices in Russia.⁵⁴ The feeble enforcement of the rule has, at least for the present time, undercut its power as a symbol of the rule of law.

A few Asian countries, including Indonesia, South Korea, Taiwan, and Thailand, have likewise adopted exclusion as part of broader transitions to constitutional democracy.⁵⁵ In Taiwan, the judiciary introduced an exclusionary rule in 1998, which was subsequently codified by the legislature as part of a broader effort to break with the legacy of a decade-long authoritarian regime. As Maggie Lewis notes, "the exclusionary rule in Taiwan came about at a time that the new government was distancing itself from the previous government's perceived abuse of power. . . . [T]he post-martial-law government made a definitive statement that 'we are not

50. Leonard Orland, *A Russian Legal Revolution: The 2002 Criminal Procedure Code*, 18 CONN. J. INT'L L. 133, 133 (2002) ("Russia's new Code of Criminal Procedure is remarkable given Russia's long history of the use of criminal law as the primary instrument of oppression, a condition freely acknowledged by the current reformers."); see also *id.* at 151–52 ("Russia is in need of bringing the constitutional rule of law to bear on police abuses. . . . Russia has made some progress in this area. Russia's Constitutional and Code provisions create an exclusionary rule, a *Miranda* type warning system and rudiments of a right to counsel during interrogation."); *id.* at 152–53 ("Russia's long history and ongoing practice of police abuse of criminal suspects coupled with the ghastly conditions of pre-trial confinement make imperative the need for a broader and sharper instrument for dealing with police misconduct.").

51. Catherine Newcombe, *Russia*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 397, 432 (Craig Bradley ed., 2d ed. 2007).

52. See *id.*

53. Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581, 606 (2001).

54. E.g., Lewis, *supra* note 13, at 647; Newcombe, *supra* note 51, at 437 (noting that various factors, including the low quality of defense counsel, explain why the Code's guarantees are not being fully realized); William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33 REV. CENT. & E. EUR. L. 1, 55–57 (2008) (noting the difficulties of effectively "excluding" evidence in non-jury trials in Russia, given the continued use of the dossier system).

55. Kuk Cho, *The 2007 Revision of the Korean Criminal Procedure Code*, 8 J. KOREAN L. 1, 17 (2008); Lewis, *supra* note 13, at 648 (discussing Taiwan); Robert R. Strang, "More Adversarial, but Not Completely Adversarial:" *Reformasi of the Indonesian Criminal Procedure Code*, 32 FORDHAM INT'L L.J. 188, 217, 221 (2008); Siriphon Kusonsinwut, *A Comparative Study of Confession Law: The Lesson for Thailand Regarding the Exclusionary Rule and Confession Admissibility Standard* (unpublished J.S.D. Dissertation, University of Illinois Law School) (on file with University of Illinois at Urbana Champaign).

them.’”⁵⁶

This cursory overview of the recent wave of exclusionary rule adoptions suggests that these rules are commonly introduced as part of modern criminal procedure reforms during transitions to democracy. They are frequently justified in terms broader than the need to discipline police forces and are used to signal a commitment to the rule of law and individual rights. In countries where the law (particularly criminal law) had been used as a means to repress dissent and where government officials had been perceived to be outside the reach of the law, the exclusionary rule is a powerful symbol of a new beginning. It is seen as a sign that courts will enforce the law impartially to citizens and government agents alike and will protect individual rights in the criminal process.

III. THE EXCLUSIONARY RULE AND THE RULE OF LAW IN THE UNITED STATES

Ironically, the exclusionary rule is spreading globally at the same time that it is on the retreat in the United States. Over the last fifty years, the U.S. Supreme Court has continually restricted the scope of the rule and rejected the notion that exclusion can be justified on the grounds that it protects individual rights or judicial integrity.⁵⁷ Under current doctrine, exclusion should be imposed only when it deters police misconduct and when its benefits (deterring constitutional violations) outweigh its social costs (hindering the search for truth and the effective enforcement of criminal law).⁵⁸

Looking back in time, one sees a more “majestic” conception of the U.S. exclusionary rule, focused on the protection of constitutional rights and the integrity of the judicial system.⁵⁹ This view of the rule was prominent from the late nineteenth century, when the Court decided *Boyd v. United States*,⁶⁰ to the early 1960s, when the Court applied the rule to the states in *Mapp v. Ohio*.⁶¹ The Court’s decisions of that era emphasized the critical role of the exclusionary rule in giving meaning to constitutional rights. Without exclusion, provisions that protect rights guaranteed in the Fourth, Fifth, and Sixth Amendments would be reduced to “a form

56. Lewis, *supra* note 13, at 648; see also Yu-Jie Chen, *One Problem, Two Paths: A Taiwanese Perspective on the Exclusionary Rule in China*, 43 N.Y.U. J. INT’L L. & POL. 713, 719–20 (2011) (noting that the Taiwanese judiciary adopted the exclusionary rule in an effort to assert its independence and to gain legitimacy by protecting human rights).

57. See, e.g., *Herring v. United States*, 555 U.S. 135, 141 (2009) (“[T]he exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’”) (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)); Sundby, *supra* note 4, at 395–96.

58. *Herring*, 555 U.S. at 141; *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

59. See *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting). Although this conception of the rule has been abandoned at the federal level, it persists in a number of state jurisdictions. See Robert M. Bloom & David H. Fentin, “A More Majestic Conception”: *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 47–49 (2010).

60. 116 U.S. 616 (1886).

61. *Mapp v. Ohio*, 367 U.S. 643 (1961).

of words”⁶² such that they “might as well be stricken from the Constitution.”⁶³

This early conception also viewed the exclusionary rule as a central element in protecting judicial integrity and the rule of law. Although definitions of the rule of law vary, at the core of the concept is the idea that “the state and its officials are limited by law” and that the law applies to government officials in the same way that it does to everyone else.⁶⁴ As originally conceived, the exclusionary rule advances the rule of law in several ways. First, when courts exclude evidence, they restrain the executive to investigate and prosecute within the limits of the law. The rule is therefore part of the system of checks and balances that helps stop government lawlessness in its tracks and prevents degeneration into arbitrary rule.⁶⁵ As the Supreme Court reasoned in *Mapp v. Ohio*, “[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”⁶⁶ The exclusionary rule stands in the way of such destruction and protects the ideal of a republic of laws rather than of men.⁶⁷

The exclusionary rule also bolsters the rule of law through the message it conveys to the public—that the Constitution applies equally to government agents and citizens and that “those who use the law in their exercise of power [are also made] subject to it.”⁶⁸ Over the long term, the rule arguably protects judicial integrity by showing that courts will condemn official lawlessness when it occurs.⁶⁹ Finally, by demonstrating that government agents will be held accountable for violations of the law, even

62. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

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

64. See generally BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91, 113-14 (2004) (discussing various formal and substantive theories of the rule of law).

65. See *Mapp*, 367 U.S. at 660 (“The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.”); see also *Ex parte Turner*, 792 So. 2d 1141, 1151 (Ala. 2000) (emphasizing that suppression of evidence obtained in violation of constitutional mandates is necessary “to preserve the rule of law itself”); Sundby, *supra* note 4, at 404.

66. *Mapp*, 367 U.S. at 659; see also *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.”); *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting) (“[I]t [is] a less evil that some criminals should escape than that the Government should play an ignoble part.”).

67. Sundby, *supra* note 4, at 399.

68. Ho, *supra* note 4, at n.53 (quoting Gerald J. Postema, Law’s Rule: Reflexivity, Mutual Accountability, and the Rule of Law, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294632); *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting); *People v. Goldston*, 682 N.W.2d 479, 504 (Mich. 2004) (Cavanagh, J., dissenting) (“I believe our citizens expect the government to follow the law, just as they are required to do. . . . [L]aw enforcement officers are not given a free pass merely because they are cloaked with governmental authority.”).

69. *United States v. Calandra*, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting) (quoting *Elkins v. United States*, 364 U.S. 206, 223 (1960)) (“When judges appear to become ‘accomplices in the willful disobedience of a Constitution they are sworn to uphold,’ we imperil the very foundation of our people’s trust in their Government on which our democ-

when this imposes serious costs, courts teach citizens about the importance of following the law. Justice Brandeis emphasized this educational function of the exclusionary rule in his dissent in *Olmstead v. United States*: “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”⁷⁰

An important critique of this conception of the exclusionary rule is that letting guilty criminals go free also undermines the rule of law.⁷¹ Citizens, too, must obey the law, and when no consequences are imposed on those who have committed a crime, this also impairs the integrity of the justice system.

While this is true, it can be argued that lawlessness by the government is uniquely worrisome. When a person is released because of the exclusionary rule, this is done according to clear and preexisting rules and a reasoned decision by a court. Such decisions are still constrained by the law and are therefore relatively rare and predictable. By contrast, when government agents are not held accountable for violations of the law, this opens the door to the exercise of arbitrary discretion by the executive, not constrained by reasons, precedent, or preexisting rules. Executive discretion—when unconstrained by law—is easily subject to abuse, often on a grander scale than violations of the law by private individuals. It is therefore more injurious to the rule of law than an exclusionary rule that hinders the state’s inability to convict guilty defendants only in cases where a court concludes, in a reasoned decision bound by precedent, that key evidence was obtained unlawfully.

IV. THE EXCLUSIONARY RULE AND THE STRONG RULE-OF-LAW CONCEPTION

The embrace of the exclusionary rule by democratizing countries as a symbol of the rule of law is striking. It has occurred in states with diverse criminal procedure traditions and in the absence of any mandate by international human rights law. It has happened despite the rule’s potential unpopularity and tension with majoritarianism. And it has come at the same time that the exclusionary rule has been weakened in the United States.⁷²

To understand these developments, it is helpful to understand two aspects of the rule of law, which come into conflict with one another when courts consider whether to exclude evidence. On the one hand, the rule

racy rests.”); *Olmstead*, 277 U.S. at 484–85 (Brandeis, J., dissenting); *State v. Handy*, 18 A.3d 179, 182 (N.J. 2011).

70. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

71. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 792–93 (1994); Morgenstern, *supra* note 12, at 61.

72. See MACLIN, *supra* note 2, at 303–11.

of law requires individuals to abide by the law. When individuals break the law, the legal system imposes consequences for the breach; if the breach is sufficiently serious, the consequences may include criminal sanctions. On the other hand, in a rule-of-law state, the government must also follow the law. When government agents violate the law in obtaining evidence for a criminal prosecution, they must suffer consequences just as ordinary citizens do. Exclusion is a common sanction for such violations because it is regarded by many as the most effective means to ensure compliance and the most direct way to convey to the public that government lawlessness will be restrained and punished. While the exclusionary rule advances these latter, broader rule-of-law values, it often does so at the expense of the effective enforcement of the criminal law against the defendant. When exclusion results in the acquittal of guilty persons, this contravenes the first requirement of the rule of law—that all citizens must be held accountable for violating the law.

Under the cost-benefit model currently used in the United States, courts are increasingly sensitive to the burdens that exclusion imposes on the enforcement of criminal law.⁷³ These weigh against the need to deter police misconduct. This is especially the case when the deterrent benefits are arguably lower—when officers are merely negligent or when they are acting in good faith and relying on acts by other government agents that are subsequently found to be unlawful.⁷⁴

Under the strong rule-of-law conception, which was originally used to justify the exclusionary rule in the United States and is now popular in new democracies, the danger from government illegality is seen as a much more serious threat and as a potential precursor to widespread arbitrary rule. As noted earlier, when courts release a defendant on account of the exclusionary rule, this is a limited, regulated, and reasoned affair. The costs to the rule of law are therefore arguably small and contained. By contrast, when courts fail to constrain lawlessness by the executive, this leaves virtually boundless discretion to government agents and can result in serious abuses of individual rights. Particularly when arbitrary rule is a fact of recent history, as it is for many democratizing countries that have adopted the rule-of-law model of exclusion, courts and legislators are likely to take more seriously the need to restrain government illegality. It is therefore not surprising that we see a number of democratizing states adopting broad and categorical exclusionary rules.

V. CONCLUSION

A host of new democracies around the world have embraced the exclusionary rule since the 1980s. Countries have adopted the rule not because they are required by international law or because the rule is popular. An important reason for the strong appeal of the exclusionary rule is that it

73. See *supra* notes 2, 57, 58 and accompanying text.

74. See *United States v. Leon*, 468 U.S. 897 (1984); *Herring v. United States*, 555 U.S. 135, 141 (2009).

symbolizes the rule of law and is seen as an effective mechanism to restrain executive power in criminal prosecutions. In countries with a recent history of powerful and abusive executives, a strong rule-of-law vision of the exclusionary rule reflects lived experience.

The question for the future is whether the rule-of-law conception of the exclusionary rule will remain robust in these new democracies. In Spain, as the abuses of the Francoist regime have receded further into the past, courts have become more open to balancing competing interests in deciding whether to exclude evidence.⁷⁵ Some commentators have argued that Argentine courts should do the same, as Argentina's democracy has solidified and the return to an oppressive regime appears unlikely.⁷⁶ These examples suggest that in at least some of the new democracies, as the memories of arbitrary rule fade and concerns about crime become more prominent, courts may become more open to balancing interests in applying the exclusionary rule.

One might also ask the question in reverse: might the adoption of categorical exclusionary rules in new democracies encourage more established democracies, such as the United States, to consider rule-of-law concerns more carefully in their application of the exclusionary rule? A strong rule-of-law approach might, for example, cause U.S. courts to change their approach to "good faith" violations by law enforcement officers. Where an officer relies in good faith on the action of another government agent—be it a magistrate, a legislator, a court clerk, or another police department employee—the deterrence-oriented, cost-benefit approach views exclusion as unwarranted.⁷⁷ Under a rule-of-law approach, by contrast, cases like these implicate lawlessness by a government actor that must be restrained.

Such a fundamental change in American legal doctrine, however, appears unlikely in the foreseeable future. As our experience with widespread government lawlessness remains distant, and our crime rates remain high, the interest in enforcing criminal law weighs more heavily in the balance than the more abstract concern about promoting the rule of law. In established democracies like the United States, just as in emerging ones, historical experiences and political circumstances help shape the exclusionary rule and its connection to the rule of law.

75. *See supra* note 33 and accompanying text.

76. *See supra* note 25 and accompanying text.

77. *Leon*, 468 U.S. at 897; *Illinois v. Krull*, 480 U.S. 340, 347 (1987); *Arizona v. Evans*, 514 U.S. 1, 11 (1995); *Herring*, 555 U.S. at 141.