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INDEPENDENT AND ADEQUATE: MARYLAND'S STATE EXCLUSIONARY RULE FOR ILLEGALLY OBTAINED EVIDENCE

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Maryland residents' protection against unreasonable searches and seizures derives from two primary sources: the Fourth Amendment to the United States Constitution[1] and Article 26 of the Maryland Declaration of Rights,[2] which predates the federal provision.[3] The

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1. The Fourth Amendment states:

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

U.S. CONST. amend. IV. The Fourth Amendment prohibition against unreasonable searches and seizures constrains the actions of Maryland's state and local authorities because the United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment incorporates the Fourth Amendment and applies its protections to the states. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

2. Article 26 states, in pertinent part, "[t]hat all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive." MD. CONST., Declaration of Rights, art. 26.

3. The issuance and validity of search warrants in Maryland has also been governed by statute since 1939. *See* Act of May 11, 1939, ch. 749, 1939 Md. Laws 1606 (current version at MD. CODE ANN., CRIM. PROC. § 1-203(a)(1) (LexisNexis 2001 & Supp. 2007)). The current statute implements and supplements the provisions of Article 26, and provides that a judge may issue a search warrant whenever there is probable cause to believe that a crime is being committed or there is property subject to seizure under the criminal laws of the state. *See* MD. CODE ANN., CRIM. PROC. § 1-203(a)(1) (LexisNexis 2001 & Supp. 2007) (original version at MD. ANN. CODE art. 27, § 306 (1939)). The statute also provides that, if it later appears that there was no probable cause to issue the search warrant, the judge shall cause property taken under the search warrant to be returned to the person from whom it was taken. *Id.* § 1-

Fourth Amendment prohibits unreasonable searches and seizures and establishes a warrant requirement based upon probable cause.[4] In its literal terms, Article 26 contains only a warrant requirement, but Maryland courts have long interpreted it to prohibit unreasonable searches and seizures under the same circumstances as the Fourth Amendment.[5]

There has been a great deal of scholarly literature highlighting the differences between state constitutional law and federal constitutional law, particularly in the context of criminal procedure.[6] This Article seeks to provide one example of a state court, the Court of Appeals of Maryland, whose lockstep interpretation of one of its state constitutional provisions, Article 26 of the Declaration of Rights, in conjunction with its federal counterpart, the Fourth Amendment, resulted in Maryland's loss of its historically independent and adequate state law remedy for illegal searches and seizures.

In 1914, the United States Supreme Court held in *Weeks v. United States*[7] that articles seized in violation of the Fourth Amendment could not be admitted in evidence at trial.[8] In the wake of *Weeks,* a majority of state courts have adopted the view that their respective state constitutions' search-and-seizure provisions similarly prohibit the admission of illegally seized evidence.[9] The Court of Appeals of

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203(b)(1). If there was probable cause, the judge must order the property to be retained by the state. *Id.* § 1-203(b)(5).

4. U.S. CONST. amend. IV.
5. *See, e.g.*, Givner v. State, 210 Md. 484, 492–93, 124 A.2d 764, 768 (1956); Hubin v. State, 180 Md. 279, 287, 23 A.2d 706, 710–11 (1942); Miller v. State, 174 Md. 362, 371, 198 A. 710, 716 (1938).
6. *See, e.g.*, Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1750–51 (1992); Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653, 661–62 (1987).
7. 232 U.S. 383 (1914).
8. *Id.* at 398.
9. *See* Fitzgerald v. State, 384 Md. 484, 508, 864 A.2d 1006, 1020 (2004) ("Now, fourty-six [sic] states have an exclusionary rule for their state constitutions."); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.5(b) (3d ed. 1996) (citation omitted) ("When (as is occurring with greater frequency) a state court finds that a certain arrest or search passes muster under the Fourth Amendment but that it violates the comparable provision of the state constitution, there does not appear to be any dissent from the conclusion that the fruits thereof must be suppressed from evidence."); *see, e.g.*, Gore v. State, 218 P. 545 (Okla. Crim. App. 1923).

Maryland resisted this call in 1928 in a sharply divided opinion in *Meisinger v. State.*[10]

Since *Meisinger*, Maryland courts have often repeated, with great authority, that Maryland has no state exclusionary rule for illegally obtained evidence.[11] Oft-repeated though it may be, countercurrents in Maryland's case law call this claim into question.[12] The *Meisinger* court purported to uphold the traditional rule that competent evidence could not be attacked collaterally on the basis of the manner in which it was obtained,[13] but an opinion from the court of appeals dealing with the relationship between Articles 26 and 22[14] of the Maryland Declaration of Rights suggests that Maryland's common law had in fact established there was already an exclusionary rule for illegally seized evidence as a matter of Maryland's common law.[15] This rule was derived from Article 26's prohibition against warrantless searches and seizures as understood in light of Article 22's privilege against self-incrimination.[16] The court of appeals' decision in *Meisinger* not to "recognize" a state exclusionary remedy for illegally seized evidence was founded upon the faulty premise that Maryland did not already have one.[17]

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10. 155 Md. 195, 141 A. 536 (1928) (reaffirming the rule of Lawrence v. State, 103 Md. 17, 63 A. 96 (1906), even in the wake of *Weeks,* on the basis of stare decisis).
11. *See* Brown v. State, 397 Md. 89, 98, 916 A.2d 245, 251 (2007) ("Although the alleged conduct may also violate the Maryland Declaration of Rights, because there is no general exclusionary provision in Maryland for such violations, the conduct must violate the [F]ederal Constitution to be excluded."); Sugarman v. State, 173 Md. 52, 58, 195 A. 324, 326 (1937); Padilla v. State, 180 Md. App. 210, 232, 949 A.2d 68, 82 (Ct. Spec. App. 2008) ("[N]o exclusionary rule exists for a violation of Article 26."); Miller v. State, 151 Md. App. 235, 246, 824 A.2d 1017, 1023 (Ct. Spec. App. 2003); Anne Arundel County v. Chu, 69 Md. App. 523, 532, 518 A.2d 733, 737 (Ct. Spec. App. 1987) ("Maryland, for that matter, has no [e]xclusionary [r]ule of its own to this very day."); *see also* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 410 n.157 (2006); Irma S. Raker, *Fourth Amendment and Independent State Grounds,* 77 MISS. L.J. 401, 407–08 (2007).
12. *See* Parker v. State, 402 Md. 372, 394–96, 936 A.2d 862, 875–76 (2007) ("[T]his [c]ourt has adopted, as a matter of Maryland common law, an exclusionary rule in certain specific situations.").
13. *Meisinger*, 155 Md. at 197–99, 141 A. at 536–37.
14. Article 22 provides "[t]hat no man ought to be compelled to give evidence against himself in a criminal case." MD. CONST., Declaration of Rights, art. 22.
15. *See* Blum v. State, 94 Md. 375, 51 A. 26 (1902); *infra* notes 55–64 and accompanying text.
16. *See Blum*, 94 Md. at 382, 51 A. at 29 (1902).
17. *See infra* Part I.C.

While Maryland courts have historically interpreted Article 26 *in pari materia* with the Fourth Amendment, the *in pari materia* doctrine is descriptive, not normative, as the court of appeals has emphasized that:

> [O]ur cases clearly recognize the similarity between the Fourth Amendment . . . and our own older Declaration of Rights, Art. 26, which grew out of the same historical background. Because of this similarity the consistent position of this Court has been that "decisions of the Supreme Court on the kindred 4th Amendment are entitled to great respect." . . . [A]lthough a clause of the United States Constitution and one in our own Declaration of Rights may be "in pari materia," and thus "decisions applying one provision are persuasive authority in cases involving the other, we reiterate that each provision is independent, and a violation of one is not necessarily a violation of the other."[18]

Because the *in pari materia* doctrine is not normative, Maryland courts could interpret the protections of Article 26 more broadly than

18. Gahan v. State, 290 Md. 310, 321–22, 430 A.2d 49, 55 (1981) (citations omitted); *see also* Parker v. State, 402 Md. 372, 400–01, 936 A.2d 862, 879 (2007); Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 621, 805 A.2d 1061, 1071 (2002). The Oregon Supreme Court, well known for its independent state constitutionalism, began with a similar progression as Maryland, but ultimately decided to offer its citizens more rights under its state constitution. First, while acknowledging that the court *could* interpret Article 1, Section 9 of the Oregon Constitution differently than the Supreme Court interpreted the Fourth Amendment, the court declined to do so. *See* State v. Florance, 527 P.2d 1202, 1208–09 (Or. 1974) (overruling prior Oregon precedent and holding that Section 9 did not require that the scope of a search incident to arrest be reasonably related to the offense that prompted the arrest, based on the persuasive authority of United States v. Robinson, 414 U.S. 218 (1973), which held that warrantless searches incident to arrest were "reasonable," irrespective of their relationship to the offense of arrest). Only later did it actually do so. *See* State v. Caraher, 653 P.2d 942 (Or. 1982) (disagreeing with *Florance* and expanding the scope of Article 1, Section 9 of the Oregon Constitution beyond the scope of the Fourth Amendment's protections, and finding "that a valid custodial arrest does not alone give rise to a unique right to search," but "must be justified by the circumstances surrounding the arrest"); *see also* State v. Dixson, 766 P.2d 1015 (Or. 1988) (holding that, unlike the Fourth Amendment, Section 9 applied to the "open fields" beyond the curtilage of a residence); State v. Campbell, 759 P.2d 1040 (Or. 1988); State v. Tanner, 745 P.2d 757 (Or. 1987) (rejecting the Fourth Amendment's "reasonable expectation of privacy" test); State v. Galloway, 109 P.3d 388 (Or. Ct. App. 2005) (holding that, under the state constitution, the defendants retained a possessory interest in their garbage when it was at the curb awaiting collection).

the Supreme Court interprets the protections of the Fourth Amendment. While the privilege contained in Article 22 is generally construed *in pari materia* with its federal counterpart in the Fifth Amendment,[19] there are situations in which the privilege under Article 22 has been viewed more broadly than the privilege under the Fifth Amendment, and therefore the exclusionary rule for statements obtained in violation of Article 22 has been applied independently.[20] The Court of Appeals of Maryland has made clear, in cases like *Gahan v. State*,[21] that the state *in pari materia* doctrine is an empirical rather than a normative one, as it has explicitly stated that although Article 26 has been historically interpreted with reference to the persuasive authority of federal courts' interpretations of the Fourth Amendment, this does not mean that Maryland courts are bound to do the same in the future.[22] If Maryland courts chose to interpret the protections of Article 26 more broadly than the protections of the Fourth Amendment, Article 26 would be an independent state law ground on which Maryland courts could not only base jurisprudence, but from which they could also insulate their decisions, where they suppressed evidence on the ground that it was obtained in violation of Article 26, from Supreme Court review.[23]

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19. *See, e.g.*, Gray v. State, 368 Md. 529, 550, 796 A.2d 697, 709 (2002); Winder v. State, 362 Md. 275, 305–06, 765 A.2d 97, 113 (2001).
20. *See* Choi v. State, 316 Md. 529, 535 n.3, 560 A.2d 1108, 1111 n.3 (1989) (noting that, although Article 22 is generally construed *in pari materia* with the Fifth Amendment, the court of appeals has viewed Article 22 differently and more broadly in two situations). These two situations are the cases Allen v. State, 183 Md. 603, 39 A.2d 820 (1944) (holding that Article 22 prohibited a defendant on the witness stand from being asked at his trial to try on an item of clothing in order to establish his ownership of it to connect him with the crime) and Chesapeake Club of Annapolis v. State, 63 Md. 446 (1885) (holding that a witness's testimony about a particular subject did not preclude invocation of the privilege for other questions relating to the same matter). *Cf.* Rogers v. United States, 340 U.S. 367 (1951) (holding that a witness's answers to incriminating questions constituted a waiver of the Fifth Amendment privilege against compelled self-incrimination with regard to further disclosure on the same subject).
21. *Gahan*, 290 Md. 310, 430 A.2d 49.
22. *See id.* at 321–22, 430 A.2d at 55.
23. *Compare* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) ("[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."), *and* Delaware v. Prouse, 440 U.S. 648 (1979) (". . . we are satisfied that even if the state Constitution would have provided an adequate basis for the judgment, the Delaware Supreme Court did not intend to rest its decision independently on the State Constitution and that we have

In *Meisinger*, for example, the illegally obtained evidence at issue, alcohol, was seized pursuant to a warrant.[24] Although it was undisputed that the seizure of the alcohol was unlawful, the court of appeals refused to exclude the evidence used against Meisinger on the ground that it had been illegally obtained.[25] Essentially, the court applied an exception to the exclusionary remedy, such as one the Supreme Court would later embrace in *United States v. Leon.*[26] Under the prevailing view that Maryland does not have an independent exclusionary rule for violations of Article 26, however, Article 26 is not presently an adequate state ground upon which to sustain the suppression of illegally obtained evidence. Recognition of an independent exclusionary rule under Article 26 would permit the Maryland courts, in cases such as *Meisinger*, to expand their protection against unreasonable searches and seizures beyond what the Supreme Court requires.[27] The court of appeals has sometimes expressed a willingness to provide greater protections, as other state supreme courts have done,[28] but has not yet done so because it believes that such a remedy does not exist under state law.[29]

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jurisdiction of this case), *and* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is . . . adequate to support the judgment."), *with* Maryland v. Garrison, 480 U.S. 79, 83–84 (1987) (reversing a decision by the Court of Appeals of Maryland, which was based in part on Article 26 of the Maryland Declaration of Rights, because of prior Maryland opinions indicating that Article 26 was construed *in pari materia* with the Fourth Amendment).

24. Meisinger v. State, 155 Md. 195, 195–96, 141 A. 536, 536 (1928).
25. *Id.* at 199, 141 A. at 538.
26. 468 U.S. 897 (1984).
27. *See, e.g.*, Pringle v. State, 370 Md. 525, 805 A.2d 1016 (2002) (holding that police lacked probable cause to arrest Pringle for drug possession and that Pringle's confession was a direct result of his illegal arrest, requiring its suppression), *rev'd sub nom.* Maryland v. Pringle, 540 U.S. 366 (2003).
28. *See, e.g.*, State v. Hardaway, 36 P.3d 900, 910 (Mont. 2001) (noting that the range of warrantless searches permitted by Article II, Section 10 of the Montana Constitution is narrower than that permitted by the Fourth Amendment (citing State v. Elison, 14 P.3d 456 (Mont. 2000))); State v. McKinney, 60 P.3d 46, 48 (Wash. 2002) ("[T]he protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution." (citing City of Seattle v. McCready, 868 P.2d 134 (Wash. 1994))).
29. *See, e.g.*, Fitzgerald v. State, 384 Md. 484, 518, 864 A.2d 1006, 1026 (2004) (Greene, J., dissenting) ("In order to provide Maryland residents greater protection against random canine sniffing searches, I believe we should reach the state constitutional question and declare canine sniffs of dwellings conducted on less than probable cause presumptively unreasonable. In addition, Maryland should adopt its own exclusionary rule."); Pringle v. State, 370 Md. 525, 805 A.2d 1016 (2002) (holding that police

The incorporation of *Mapp v. Ohio*'s[30] exclusionary remedy to the states occurred in the midst of the Warren Court era of expansion of individual liberties.[31] With the passage of the Bouse Act[32] for misdemeanor cases, followed by the Supreme Court's decision in *Mapp* in 1961 and the Warren Court's expansion of the scope of Fourth Amendment protection,[33] Maryland courts wishing to protect against unreasonable searches and seizures came to rely exclusively on federal constitutional and state statutory remedies and, at least until 1973, had little need for a state constitutional exclusionary remedy.[34] During this same time period, the Supreme Court was *restricting* the scope of the Fifth Amendment privilege against self-incrimination,[35] while the court of appeals was *expanding* the scope of Article 22 and the common law prohibition against admission of

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lacked probable cause to arrest Pringle for drug possession and that Pringle's confession was a direct result of his illegal arrest, requiring its suppression) (reversed by Maryland v. Pringle, 540 U.S. 366 (2003); Everhart v. State, 274 Md. 459, 486, 337 A.2d 100, 115 (1975) ("Thus, although it might seem more nearly constitutionally accurate that inquiry be made as to whether the place . . . where the search and seizure was made . . . was within an area where Everhart had a reasonably 'legitimate expectation of privacy,' it would seem, a fortiori, that if there was an intrusion geographically within the curtilage it would be within such a protected area, notwithstanding that such . . . may have been within the officers' plain view.").

30. 367 U.S. 643 (1961).
31. *See* Robert Deichert, Note, *Honoring the Social Compact: Arguing for a State Duty of Protection Under the Connecticut Constitution*, 33 CONN. L. REV. 1069, 1072–73 (2001).
32. Bouse Act, ch. 194, 1929 Md. Laws 533 (codified at MD. ANN. CODE art. 35, §4A (Supp. 1929) (repealed 1973).
33. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (recognizing a Fourth Amendment interest whenever a search infringed on an individual's reasonable expectation of privacy); Camara v. Mun. Court of San Francisco, 387 U.S. 523 (1967); Jones v. United States, 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).
34. Several commentators have noted a pattern where states ceased to look to their own constitutions during the Warren Court era. *See* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW § 1.01[1] n.11 (4th ed. 2006) ("A generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of Warren Court decisions left state constitutional law in a condition of near atrophy in most states."); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976) ("During the activist Warren years, it was easy for state courts, especially in criminal cases, to fall into the drowsy habit of looking no further than federal constitutional law."); Slobogin, *supra* note 6, at 657, 661.
35. The Fifth Amendment states, in pertinent part, that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

involuntary confessions.[36] With the repeal of the Bouse Act in 1973 and the contraction of the federal exclusionary remedy, Maryland now finds itself in need of the same state exclusionary remedy that it so carelessly shed in 1928.[37]

Section I of this Article explores the doctrinal evidence that the *Meisinger* court misread historical precedents in deciding that Maryland did not have an independent exclusionary rule for suppressing evidence obtained in violation of Article 26 of the Declaration of Rights. It explores the origins and evolution of the exclusionary rule under the Fourth and Fifth Amendments to the United States Constitution. It traces the exclusionary rule of *Weeks* back to its precursor for simultaneous violations of the Fourth and Fifth Amendments under the "convergence theory" of the late nineteenth and early twentieth centuries. It argues that *Weeks* is best understood as the first application of the exclusionary remedy to violations of the Fourth Amendment alone. It explores the doctrinal evidence for the existence of a Maryland state exclusionary remedy for illegally seized evidence. It argues that, historically, Maryland had an exclusionary rule for evidence in violation of Articles 22 and 26 together, under the convergence theory, which should have been the precursor for an Article 26 exclusionary rule in the same way that the federal exclusionary rule for Fourth and Fifth Amendment violations was a precursor to the Fourth Amendment exclusionary rule recognized in *Weeks*. It argues that the *Meisinger* court misunderstood critical precedents from prior Court of Appeals of Maryland cases and the relationship between Articles 22 and 26 at common law, resulting in a "loss" of Maryland's independent exclusionary rule.

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36. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 497 (1977) [hereinafter Brennan, *State Constitutions*]; *see* discussion *infra* Part I.E.

37. *See* Brennan, *State Constitutions*, *supra* note 36, at 496–97 (discussing the contraction of the federal exclusionary remedy); discussion *infra* Part I.D (explaining the history of the Bouse Act). For further discussion on the interplay between state and federal constitutional doctrine in state courts, *see generally* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Bill of Rights*]; Brennan, *State Constitutions*, *supra* note 36; Stanley H. Friedelbaum, *Advances and Departures in the Criminal Law of the States: A Selective Critique*, 69 ALB. L. REV. 489 (2006); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Stanley Mosk, Introduction, *California Constitutional Symposium,* 17 HASTINGS CONST. L.Q. 1 (1989); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985).

Section II explores the historical evidence for the existence of a Maryland state exclusionary remedy for illegally seized evidence. It points to the language of the statute conferring upon the state the limited right to appeal certain rulings in a criminal case, pre-*Mapp* Maryland case law in which the courts appear to be excluding illegally obtained evidence on the basis of a Maryland common law exclusionary rule, and the development of court-created mechanisms for the pretrial return of illegally seized property as historical evidence that Maryland courts were suppressing evidence obtained in violation of Article 26 prior to the Supreme Court's decision in *Mapp*, and argues that such suppression would have to have been based upon state law independent of the Fourth Amendment.

The Conclusion discusses recent opinions by the Court of Appeals of Maryland in which the court declined to overrule *Meisinger* and argues that the recent contraction of Fourth Amendment protection by the United States Supreme Court gives rise to a need and an opportunity for Maryland courts to use a state exclusionary rule to give citizens of Maryland greater protection against unreasonable searches and seizures. It concludes that, rather than "creating" a state exclusionary rule for evidence seized in violation of Article 26, the Court of Appeals of Maryland should recognize that one existed prior to *Meisinger* and reanimate it.

I. MISREADING OF HISTORICAL CASES: DOCTRINAL EVIDENCE THAT *MEISINGER* WAS WRONGLY DECIDED

This Section argues that the *Meisinger* court misread Court of Appeals of Maryland precedents when it determined that the decision in *Lawrence v. State*[38] foreclosed the possibility of a state exclusionary remedy for illegally obtained evidence. Subsection A traces the creation, evolution, and disappearance of the convergence theory at the federal and Maryland levels—between the Fourth and Fifth Amendments to the United States Constitution and Articles 26 and 22 of the Maryland Declaration of Rights, respectively. These evolutionary paths were parallel up until the Supreme Court's decision in *Weeks* and the court of appeals' decision in *Meisinger*, where the jurisprudence of the two courts diverged.[39] Subsection B discusses the court of appeals' decision in *Lawrence* and demonstrates how *Lawrence* was a ruling on the admissibility of evidence rather than the existence of an exclusionary remedy for

38. 103 Md. 17, 63 A. 96 (1906).

39. *See* discussion *infra* Parts I.A, I.C.

evidence obtained in violation of the Maryland Declaration of Rights. Subsection C discusses the court of appeals' decision in *Meisinger* and explains how the majority misinterpreted its own precedent in determining that Maryland had no exclusionary remedy for evidence obtained in violation of Article 26. Subsection D traces the enactment and repeal of the Bouse Act in the wake of, and in reaction to, the court's decision in *Meisinger*. The Bouse Act was the primary vehicle for suppression of illegally seized evidence in Maryland for about thirty years until it was superseded by the exclusionary rule for Fourth Amendment violations incorporated to the states by *Mapp*.[40] Subsection E discusses the ongoing vitality and expansion of the Maryland common law exclusionary rule for evidence obtained in violation of Article 22 and argues that the court of appeals' Article 22 jurisprudence directly contradicts the *Meisinger* court's claim that its decision in *Lawrence* was inconsistent with an independent state exclusionary rule.

A. The Birth and Death of the Convergence Theory

Today, the Supreme Court interprets the Fifth Amendment privilege against self-incrimination as a limited right to remain silent, prohibiting only acts that compel testimonial communication by an accused—that is, other words, statements, expressive conduct, or testimony, compelled by police subjecting a suspect to interrogation against her will, investigators subpoenaing an accused for a pretrial deposition, or a prosecutor calling a defendant as a witness at trial.[41] In the past, courts interpreted the prohibition against self-incrimination to prohibit compulsion of a much wider range of conduct, such as forcing the production of inculpatory physical evidence by cross examination of a suspect.[42] During the period

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40. *See* Chu v. Anne Arundel County, 311 Md. 673, 679–81, 537 A.2d 250, 253–54 (1988); Everhart v. State, 274 Md. 459, 479–80, 337 A.2d 100, 112 (1975); Venner v. State, 30 Md. App. 599, 613, 354 A.2d 483, 491 (Ct. Spec. App. 1976), *aff'd*, 279 Md. 47, 367 A.2d 949 (1977).

41. *Compare* Pillsbury Co. v. Conboy, 459 U.S. 248, 256-57 (1983) ("[A] [d]istrict [c]ourt cannot compel [a witness] to answer deposition questions, over a valid assertion of his Fifth Amendment right . . . ."), *with* Andresen v. Maryland, 427 U.S. 463, 472–73 (1976) (holding that the Fifth Amendment did not prohibit Andresen's seized personal papers from being used against him at trial), *and* Schmerber v. California, 384 U.S. 757, 764 (1966) (holding that the privilege against self-incrimination is a bar against compelling "communications" or "testimony" from an accused, but not "real or physical evidence").

42. *See, e.g.*, Agnello v. United States, 269 U.S. 20 (1925) (holding that the seizure of contraband from Agnello in violation of the Fourth Amendment permitted Agnello to

when the privilege was interpreted to prohibit the compelled production of non-testimonial types of evidence, its protections overlapped a great deal with those of the prohibition against unreasonable searches and seizures.[43] Evidence obtained as a result of an unreasonable search or seizure was often derived directly from an accused in the absence of a warrant or probable cause, thereby violating the prohibition against compelled self-incrimination, as well.[44] This overlap between the historical protections of the Fourth and Fifth Amendments is often referred to as the "convergence theory."[45]

The convergence theory originated in Great Britain in *Entick v. Carrington*,[46] in which Lord Camden held illegal a search warrant issued for the home of a writer who was critical of the English government, holding so based upon the sanctity of property, the invasiveness of searches and seizures, and the right of individuals not to give evidence against themselves.[47] In *Carrington*, Lord Camden set forth an early formulation of the convergence between the right of privacy enshrined in the prohibition against unreasonable searches and seizures and the privilege against compelled self-incrimination: "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle."[48]

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invoke his privilege against self-incrimination under the Fifth Amendment to prevent the government from introducing the contraband against him at trial).

43. *See* Boyd v. United States, 116 U.S. 616, 630–33 (1886).

44. *See id.* at 633.

45. *See Andresen*, 427 U.S. at 472 n.6; State v. Earls, 805 P.2d 211, 226 (Wash. 1991); State v. Knapp, 700 N.W.2d 899, 917 (Wis. 2005); *see also* Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 524–25 (1986) (discussing the convergence theory under the Washington Constitution).

46. 19 Howell's St. Tr. 1029 (1765).

47. *See id.* at 1066, 1073. The English common law prohibition against self-incrimination was expressed as "*Nemo tenetur prodere seipsum* (No one should be required to betray himself)." Gray v. State, 368 Md. 529, 549, 796 A.2d 697, 708–09 (2002). *See generally* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (2nd ed. 1986), for a comprehensive account of the British origins of the American Fifth Amendment and the history of the writing of the first American bills of rights, including the Maryland Declaration of Rights.

48. *Carrington*, 19 Howell's St. Tr. at 1073.

The United States Supreme Court imported and adopted the convergence theory when it set forth the exclusionary remedy for evidence obtained in violation of the Fourth and Fifth Amendments in 1886 in *Boyd v. United States*,[49] which relied heavily upon *Carrington*.[50] Boyd was under investigation for violating a customs revenue statute by importing glass plates without paying the appropriate tariff.[51] The statute in question permitted the government to compel a suspect to produce documentary evidence—such as books, invoices, and papers—relating to the assessment and collection of customs duties, and, if the suspect refused to produce such evidence, permitted a court to infer guilt from the refusal.[52] The district attorney obtained a court order compelling Boyd to produce the invoice for the glass cases, and Boyd had to comply, thereby revealing guilt, and resulting in his conviction of customs duty evasion.[53]

On appeal, Boyd argued that the provisions of the customs revenue statute compelling production of evidence and inferring guilt from the failure to produce the requested evidence violated both the Fourth and Fifth Amendments.[54] The Supreme Court agreed, reversing Boyd's conviction.[55] The Court relied upon the convergence theory, saying:

> We have already noticed the intimate relation between the [Fourth and Fifth Amendments]. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the [F]ourth [A]mendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the [F]ifth [A]mendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the [F]ifth [A]mendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the [F]ourth [A]mendment.[56]

49. 116 U.S. 616.
50. *See id.* at 626–30.
51. *See id.* at 617–18.
52. *Id.* at 619–20.
53. *Id.* at 618.
54. *Id.* at 621–22.
55. *Id.* at 638.
56. *Id.* at 633.

During the convergence theory period, the Court of Appeals of Maryland interpreted its state constitutional provisions governing search and seizure and the privilege against self-incrimination largely in lockstep with the Supreme Court's interpretations of the corresponding federal constitutional amendments.[57] Specifically, the court of appeals recognized a convergence between Article 26 and Article 22 of the Declaration of Rights almost identical to the convergence between the Fourth and Fifth Amendments to the United States Constitution.[58] In the 1902 case *Blum v. State*, the Blum Brothers, who owned a grocery business, became the targets of a fraud and money laundering investigation.[59] The court appointed receivers to administer the business during the investigation, and one receiver turned over the business's books, ledgers, and files to the fraud investigators.[60] The State used the materials provided by the receiver to convict the Blums.[61] On appeal, the Blums argued that, in seizing the inculpatory documents, the receiver and investigators had violated both the warrant requirements of the Fourth Amendment and Article 26, and the prohibition against self-incrimination of the Fifth Amendment and Article 22.[62] Citing *Boyd* liberally, the court of appeals agreed, explaining that, while ordinarily the privilege against self-incrimination extends only to the refusal to answer an incriminating question or give testimony against oneself, the rights protected by Article 22 and the Fifth Amendment, and the rights protected by Article 26 and the Fourth Amendment, are "intimately related to each other and . . . throw great light on each other."[63] The significance of the court of appeals' adoption of the convergence theory is that, like federal courts interpreting the Fourth and Fifth Amendments, Maryland courts employed an exclusionary remedy for simultaneous violations of Articles 22 and 26, at least until the abandonment of the convergence doctrine.[64]

Conventional wisdom holds that the Supreme Court established the exclusionary remedy for Fourth Amendment violations in 1914 in

57. *See* Blum v. State, 94 Md. 375, 51 A. 26 (1902).
58. *See id.* at 382–85, 51 A. at 29–30.
59. *Id.* at 377, 51 A. at 27.
60. *Id.* at 379, 51 A. at 28.
61. *See id.* at 379–80, 51 A. at 28.
62. *See id.* at 380, 382–83, 51 A. at 28–29.
63. *See id.* at 382, 51 A. at 29.
64. *See id.* at 382–85, 51 A. at 29–30.

Weeks.[65] In that case, police officers entered Weeks's home, on two separate occasions without a search warrant, searched his room, and seized various articles therefrom, including papers, letters, and envelopes.[66] On the basis of the seized evidence, Weeks was charged with running an illegal mail lottery.[67] Prior to trial, Weeks filed a petition seeking the return of his private property on the ground, *inter alia*, that its warrantless seizure violated the Fourth and Fifth Amendments.[68] The trial court agreed that the search and seizure were illegal, but, while ordering the government to return to Weeks all property that was not competent as evidence at Weeks's trial, denied the petition with regard to all pertinent seized matters, ostensibly reasoning "that the [evidence] having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence."[69] On appeal of his conviction, relying heavily on *Boyd*, the Supreme Court held that the search of Weeks's home and seizure of his letters and private documents violated the Fourth Amendment, without addressing Weeks's Fifth Amendment claim.[70] The Court concluded that the district court had committed prejudicial error by permitting Weeks's seized letters to be used against him at trial, rather than ordering their pretrial return.[71] The significance of *Weeks*, therefore, is not that it established an exclusionary remedy for evidence obtained in violation of the Fourth Amendment, but rather, that it retained *Boyd*'s exclusionary remedy for evidence obtained in violation of the Fourth Amendment independent of the convergence theory and without requiring a simultaneous violation of the Fifth Amendment.[72]

B. Competency of Evidence

During the same time period in which the Supreme Court and the Court of Appeals of Maryland were developing their convergence

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65. *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949) (describing the *Weeks* decision as the establishment of the exclusionary rule).
66. Weeks v. United States, 232 U.S. 383, 386 (1914).
67. *See id.* at 386, 388–89.
68. *Id.* at 387.
69. *Id.* at 394.
70. *See id.* at 389–94, 398.
71. *Id.* at 398.
72. *See id.* at 389 ("The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the [Fourth] and [Fifth] Amendments to the Constitution of the United States. *We shall deal with the [Fourth] Amendment . . . .*") (emphasis added).

theory jurisprudence, Maryland was also developing its common law of evidence.[73] Maryland subscribed to the traditional view that the manner in which an item was obtained did not undermine its competency as evidence.[74] Unfortunately, these two previously unrelated strands of jurisprudence, one dealing with constitutionally required remedies for the illegal procurement of evidence, and the other dealing with the competency and admissibility of illegally procured items as evidence, would become indefinitely intertwined in the Court of Appeals of Maryland's *Meisinger* decision.[75] This intertwining occurred primarily because of the *Meisinger* court's misapplication of the precedent set by *Lawrence v. State*.[76]

Lawrence was a leading evidence case that dealt with a challenge to the admissibility of evidence obtained through an illegal search and seizure.[77] It was decided in 1906, just four years after the court's decision in *Blum*.[78] The State charged Lawrence with theft by false pretenses for selling a large quantity of relatively valueless stock for a large amount of money.[79] The State theorized that the stock sales were fraudulent because Lawrence knew the stock was worth far less than the price for which it was sold.[80] One of the State's key pieces of evidence to prove its theory was that Lawrence carried large numbers of the certificates around town in a satchel, rather than storing them in a secure location, like a bank or safe, as one would expect him to if he believed they were very valuable.[81] At trial, Lawrence objected to the State's evidence that he carried the stock certificates on his person, claiming the certificates were not competent evidence because the state illegally seized them from his

73. *See, e.g.*, Ziehm v. United Elec. Light & Power Co., 104 Md. 48, 64 A. 61 (1906).
74. *See* Meisinger v. State, 155 Md. 195, 197, 141 A. 536, 536–37 (1928); *see, e.g.*, 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254(a) (15th ed. 1892) ("[T]hough papers and other subjects of evidence may have been . . . unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."); 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2183 (3d ed. 1940) ("[T]he admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence." (emphasis removed)).
75. 155 Md. 195, 141 A. 536; *see infra* notes 94–107 and accompanying text.
76. *See infra* Part I.C.
77. Lawrence v. State, 103 Md. 17, 31–33, 63 A. 96, 102 (1906).
78. *Lawrence*, 103 Md. 17, 63 A. 96; Blum v. State, 94 Md. 375, 51 A. 26 (1902).
79. *See Lawrence*, 103 Md. at 18, 26–27, 63 A. at 97, 100.
80. *See id.* at 26, 63 A. at 100.
81. *See id.* at 31–32, 63 A. at 101–02.

person.[82] The trial court admitted the stock certificates over his objection as evidence that he knew their true value.[83] On appeal, the court of appeals affirmed Lawrence's conviction, concluding:

> [I]t would seem upon reason and the great preponderance of authority that the manner in which the [s]tate secured control of these articles did not make them inadmissible in evidence upon the ground [that they were taken in violation of Lawrence's constitutional right to security against unlawful search and seizure of his property].[84]

Lawrence is the primary authority Maryland courts cite to support the assertion that Maryland had no exclusionary rule of its own at common law, because Lawrence's challenge to the admissibility of the stock certificates and the manner of their seizure was based, at least in part, on their warrantless seizure.[85] Courts since *Meisinger* have misunderstood two things about the *Lawrence* case: first, that the evidence in *Lawrence* was legally seized without a warrant as a search incident to arrest, and, second, that the nature of Lawrence's challenge was *evidentiary*, meaning that he challenged the admissibility of the purportedly illegally obtained evidence not as a *remedy* for the violation of his constitutional rights, but rather on grounds that the evidence lacked competency because of the allegedly unconstitutional manner in which it was obtained.[86] While the *Lawrence* opinion is rather skeletal, the court of appeals interpreted Lawrence's evidentiary challenge as predicated on the manner in which the seized evidence was obtained, characterizing it as follows: "The incriminatory effect of the appellant having the articles in question in possession arose from the *relevancy* of this as evidence to prove the issue. The objection could only go to the manner of its production."[87] Lawrence's theory of inadmissibility, therefore, was more akin to a chain-of-custody or authenticity challenge than to a request that the court use its supervisory power to establish an *ex ante* incentive to discourage illegal law enforcement practices. In this sense, Lawrence's challenge to the evidence was

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82. *See id.* at 31–33, 63 A. at 102.
83. *See id.* at 31, 63 A. at 101–02.
84. *Id.* at 32–33, 63 A. at 102.
85. *See, e.g.*, Chu v. Anne Arundel County, 311 Md. 673, 676–77, 537 A.2d 250, 251–52 (1988); Padilla v. State, 180 Md. App. 210, 234–35, 949 A.2d 68, 83–84 (Ct. Spec. App. 2007).
86. *See Lawrence*, 103 Md. at 30–33, 63 A. at 101–02.
87. *Id.* at 33, 63 A. at 102 (emphasis added).

more like a motion *in limine*, or even a contemporaneous objection at trial, asking a court to rule that certain evidence is inadmissible on evidentiary grounds,[88] than a motion to suppress evidence on constitutional grounds,[89] if framed in modern procedural terminology.[90] The court of appeals rejected Lawrence's reliance on *Boyd* and *Blum*, finding those cases to be "dealing with a very different question from the one involved in the case at bar," and concluded "[e]vidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even an illegal, manner."[91]

C. *The Loss of the State Exclusionary Rule for Article 26 Violations*

Maryland lost its state exclusionary rule in *Meisinger*—specifically, in the *Meisinger* court's interpretation of the precedent of *Lawrence*.[92] Meisinger was convicted of illegal possession of alcohol, with intent to sell, in Cecil County, Maryland.[93] On appeal, Meisinger challenged the admission of alcohol seized from him pursuant to a search warrant that the State conceded was illegal because it was issued in a county where there was no statute for a search warrant of this character.[94] Conventional wisdom dictates that the narrowly divided court of appeals, in *Meisinger*, declined the Supreme Court's invitation in *Weeks* to "create" an independent exclusionary remedy for evidence obtained in violation of the state constitution.[95] In declining to reverse the denial of the motion to

88. *See* MD. R. 4-252(d); *cf.* OHIO R. CRIM. P. 12(B); *see, e.g.*, Myer v. State, 403 Md. 463, 467–68, 943 A.2d 615, 617 (2008).

89. *See* MD. R. 4-252(a)(3); *cf.* OHIO R. CRIM. P. 12(B)(3).

90. Procedurally, the distinction between a motion *in limine* to exclude evidence and a motion to suppress is that a motion *in limine* seeks a tentative, preliminary ruling where the movant must still object to the admission of evidence at trial, while a motion to suppress seeks a definitive ruling prior to trial, which does not require a contemporaneous objection. *See, e.g.*, Riojas v. State, 530 S.W.2d 298, 301 (Tex. Crim. App. 1975). Substantively, a motion to suppress is the proper vehicle for raising a constitutional challenge to evidence based upon an exclusionary rule, while a motion *in limine* is the proper vehicle for a preliminary ruling on evidence, as a movant, in order to avoid injecting prejudicial matters before the jury, asks a court for its anticipated ruling prior to trial on whether a party may offer a prospective item into evidence. *See* State v. French, 650 N.E.2d 887, 890 (Ohio 1995); BLACK'S LAW DICTIONARY 1038–39 (8th ed. 2004).

91. *Lawrence*, 103 Md. at 34–36, 63 A. at 103.

92. Meisinger v. State, 155 Md. 195, 197, 141 A. 536, 537 (1928).

93. *Id.* at 195–96, 141 A. at 536.

94. *See id.* at 196, 199, 141 A. at 536, 538.

95. *See id.* at 197–98, 141 A. at 537.

exclude the evidence, the court of appeals opined that its conclusion was compelled by *Lawrence*, which was "conclusive on the question, so far as this state is concerned."[96] The court concluded:

> If this case were the first in this court involving the question now under consideration, we would be at liberty to examine and comment upon the authorities and the reasons supporting them in other jurisdictions, but, it having been definitely decided by our predecessors that when evidence offered in a criminal trial is otherwise admissible, it will not be rejected because of the manner of its obtention [sic], we feel bound by that decision, and are entirely content to follow the reasoning therein employed, especially in that it is supported and fortified by the weight of authority elsewhere.[97]

In doing so, the court relied upon a doctrinal distinction between evidence illegally seized *from the person* of the accused and evidence illegally seized from another location.[98]

In dissent, Judge Parke argued:

> It is therefore strictly within the province of [the Court of Appeals] to examine its decision in Lawrence v. State to see whether it was decided that, if the citizen's domicile be unlawfully invaded for the purpose of learning if a misdemeanor has been committed upon his premises, the evidence so procured may be used against him in a subsequent criminal prosecution.[99]

Judge Parke distinguished the facts of *Meisinger* from those of *Lawrence* on the ground that the search and seizure at issue in *Lawrence* was legal.[100] He pointed out that Lawrence was under arrest and in police custody when his person was searched and evidence was seized therefrom, and that, therefore, no warrant was

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96. *Id.* at 197, 141 A. at 537.
97. *Id.* at 199, 141 A. at 537–38; *see generally* Townsend v. Bethlehem-Fairfield Shipyard, Inc., 186 Md. 406, 417, 47 A.2d 365, 370 (1946) (explaining that, under the doctrine of stare decisis, a court's previous decisions should not be lightly set aside).
98. *See Meisinger*, 155 Md. at 197–98, 141 A. at 537 (citing 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2264 (1st ed. 1904)).
99. *Id.* at 201, 142 A. 190, 191 (Parke, J., dissenting) (citation omitted).
100. *See id.* at 201–02, 142 A. at 191.

required to search him incident to that arrest.[101] Judge Parke explained:

> It follows that Lawrence v. State . . . is, *on its facts*, not an authority supporting the prevailing opinion in the instant case, because here the traverser was not charged with a crime, nor was he under arrest when his premises were searched. The owner was not committing a crime nor exposing contraband goods in the presence of an officer of the law, but, because the state's attorney thought he had probable cause to believe that the local liquor law was being violated, he procured an illegal search warrant whereby the sheriff unlawfully entered upon the traverser's premises for the sole purpose of discovering if a crime were being committed and of securing the evidence to convict the traverser, if his search and seizure proved successful. It, therefore, needs no argument to enforce the point that, because of wide and fundamental difference in facts, the decision in Lawrence v. State . . . is not controlling, unless because it contains the declaration of some applicable principle of law.[102]

Judge Parke also argued that the majority's holding that "the admissibility of evidence is not affected by the illegality of the means through which the party has been able to obtain the evidence," could not be reconciled with the court's Article 22 jurisprudence:

> Should this principle be sound with reference to documents, chattels, and testimony obtained by illegal search and seizure in violation of the Fourth Amendment of the Constitution of the United States and article 26 of the Bill of Rights, why should it not be sound with respect to self-criminatory evidence in the form of confessions obtained by unlawful or improper means from parties accused of crime in violation of the Fifth Amendment of the Constitution of the United States, and article 22 of the Bill of Rights of Maryland?
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> . . . .
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> . . . If the rule that the admissibility of evidence is not affected by the illegality of the means through which the

101. *See id.*

102. *Id.* at 202, 142 A. at 191.

> party has been enabled to obtain the evidence was intended by *Lawrence v. State* . . . to be unqualifiedly pronounced, then, if a gaoler, by threats, by putting in fear or by torture, induce a prisoner in custody to confess a crime, the incriminatory statement would be admissible in evidence.[103]

The split between the four-judge majority and three-judge dissent in *Meisinger* was fundamentally the result of a misunderstanding of historical precedent. The majority failed to grasp two issues when refusing to order suppression of the illegally obtained evidence: (1) Maryland already had an exclusionary rule for evidence obtained in violation of Article 26, under the convergence theory dating back at least to *Blum*,[104] and (2) as dissenting Judge Parke pointed out, the holding of *Lawrence* was based on evidentiary, not constitutional, principles.[105]

The Supreme Court and other state courts have recognized this distinction between evidentiary and constitutional challenges to seized evidence, which the *Meisinger* court missed.[106] Between *Boyd* and *Weeks*, the Supreme Court, in *Adams v. New York*,[107] reached the same result that the Court of Appeals of Maryland reached in *Lawrence* two years later.[108] The State of New York charged Adams with operating an illegal lottery.[109] Police officers obtained a warrant, searched Adams's office, and seized not only betting slips but also private, non-gambling related papers, for the purpose of conducting a handwriting comparison with the betting slips.[110] At trial, the State introduced the seized private papers in evidence over Adams's objection,[111] and on appeal, the Supreme Court held the evidence to be admissible.[112] Like the Court of Appeals of Maryland in *Lawrence*, the Supreme Court relied upon Greenleaf's evidentiary rule that the manner in which documents are seized does not affect

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103. *Id.* at 203–04, 142 A. at 192.
104. *See* Blum v. State, 94 Md. 375, 382–85, 57 A. 26, 29–30 (1902).
105. *Meisinger*, 155 Md. at 203–05, 142 A. at 193 (Parke, J., dissenting) ("It is not perceived how any constitutional right of the accused was invaded in the case of *Lawrence v. State* nor how it can be a precedent to stay the court in the instant case.").
106. *See* Weeks v. United States, 232 U.S. 383 (1914); Adams v. New York, 192 U.S. 585 (1904); *see, e.g.*, State v. Wills, 114 S.E. 261 (W. Va. 1922).
107. 192 U.S. 585.
108. For a discussion of *Lawrence*'s holding, *see supra* Part I.B.
109. *Adams*, 192 U.S. at 586, 588.
110. *Id.* at 588.
111. *Id.* at 587, 594.
112. *See id.* at 597–98.

their admissibility.[113] In doing so, the Supreme Court distinguished *Adams* from *Boyd*, as the papers in *Adams* were not illegally seized and Adams was not compelled to give evidence against himself, and the Court expressly declined to overrule *Boyd*.[114]

Nonetheless, ten years later, the Supreme Court issued its opinion in *Weeks*.[115] In *Weeks*, the Government relied upon *Adams*, arguing that Weeks's seized papers should not be returned to him because they were competent as evidence, and, therefore, the Court should not question how they were obtained.[116] The Court characterized *Adams*'s holding as "a court will not, in trying a criminal cause, permit a collateral issue to be raised as to the source of competent testimony."[117] The Court distinguished *Adams* and *Weeks* on the ground that *Adams* (like *Lawrence*) involved the incidental seizure of papers during the execution of a legal search warrant, while *Weeks* (like *Meisinger*) involved an application "in due season" for the return of evidence seized in violation of the Fourth Amendment.[118] The Court concluded that *Adams* "afford[ed] no authority for the action of the court in this case."[119] It is this distinction, between the evidentiary rulings in *Adams* and *Lawrence* and the constitutional rulings in *Boyd*, *Blum*, and *Weeks*, that the *Meisinger* court failed to appreciate, while other state courts recognized it.[120] In essence, the *Meisinger* majority treated as an issue of first impression an already long decided issue—the existence of a state exclusionary remedy for illegally obtained evidence.[121] As a result, the majority opinion,

113. *See id.* at 594–95; Lawrence v. State, 103 Md. 17, 33–34, 63 A. 96, 103 (1906); GREENLEAF, *supra* note 74, § 254(a).
114. *Adams*, 192 U.S. at 596–97.
115. 232 U.S. 383 (1914).
116. *Id.* at 394–96.
117. *See id.* at 395–96.
118. *See id.* at 396; *supra* notes 86, 94, 102–03 and accompanying text.
119. *Weeks*, 232 U.S. at 396.
120. *See, e.g.*, State v. Wills, 114 S.E. 261, 268 (W. Va. 1922) ("We subscribe to the general doctrine that the admissibility of evidence is not affected by the illegality of the means by which it is secured; but, where the evidence is secured by an illegal search or seizure in violation of the Constitution, the article so seized, as well as the information so illegally obtained, is inadmissible upon a trial of the accused."). *But see* Sugarman v. State, 175 Md. 52, 195 A. 324 (1937) (refusing Sugarman's motion to suppress and return to him seized evidence as the fruit of an illegal search, but nonetheless finding the seized evidence inadmissible).
121. *See* Blum v. State, 94 Md. 375, 382–85, 51 A. 26, 29–30 (1902).

which purported to be an exercise in stare decisis, in reality constituted a complete failure to understand and follow precedent.[122]

D. *The Legislative Fix*

In response to the *Meisinger* opinion, and in recognition of public objection to Prohibition Era law enforcement methods,[123] the Maryland General Assembly enacted the Bouse Act in 1929, which provided that in a misdemeanor trial, evidence was inadmissible if either procured by an illegal search or seizure or if it had the effect of compelling a defendant to give evidence against himself.[124] The

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122. *See supra* Part I.C. Thomas Davies has documented a similar phenomenon of loss with respect to the common law arrest standards in the late nineteenth century:

> The bottom line is that search-and-seizure history did not follow the steady path that the Framers expected. In contrast to the conventional account of doctrinal continuity, the authentic history of search-and-seizure doctrine is a story of lost meanings and substantial discontinuity. Indeed, the authentic history is a story of considerable irony: it appears that the Framers were content to simply invoke common-law arrest standards under the rubrics of "the law of the land" and "due process of law" because those standards seemed so settled that there was no reason to set them out explicitly. However, when later generations became increasingly ignorant of the common-law standards, the invocative character of the Framers' texts ultimately left once-settled arrest standards vulnerable to change and loss.

Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 13 (2007).

123. *See* CARL N. EVERSTINE, LEGISLATIVE COUNCIL OF MD., RESEARCH REPORT NO. 27, THE BOUSE ACT 24–25 (1948).

124. Bouse Act, ch. 194, 1929 Md. Laws 533 (codified at MD. ANN. CODE art. 35, §4A) (Supp. 1929) (repealed 1973). The Bouse Act, codified as part of the Maryland Evidence Code, read, in pertinent part, as follows:

> No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure *or* of any search and seizure prohibited by the Declaration of Rights of this State; *nor* shall any evidence in such cases be admissible if procured by, through or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case.

Id. (emphasis added).

When introduced as Senate Bill No. 237, the Bouse Act applied to all criminal cases, but the Senate Committee on Judicial Proceedings amended and restricted the Act to apply only to misdemeanors. JOURNAL OF PROCEEDINGS OF THE SENATE OF MD., S. 315, at 279, 556–57, 657 (1929); EVERSTINE, *supra* note 123, at 28.

Bouse Act forbade the admission of evidence arising from three categories of searches and seizures: (1) those that were illegal, (2) those that violated the Maryland Declaration of Rights, and (3) those that would result in a violation of the prohibition against compelled self-incrimination.[125] According to the Legislative Council of Maryland's 1948 analysis of the Bouse Act, the Act's exclusionary provisions referred to both Article 26 and Article 22 of the Maryland Declaration of Rights, and the "Act was passed in order to implement these constitutional provisions."[126] The Bouse Act was repealed in 1973 when the Evidence section of the Maryland Code was recodified,[127] and the General Assembly never enacted a replacement.[128]

E. *The Exclusionary Rule for Article 22 Violations*

The continued, and largely unquestioned, vitality of the exclusionary rule for evidence obtained in violation of Article 22 of the Maryland Declaration of Rights,[129] is perhaps the best historical evidence that the *Meisinger* court misunderstood the meaning and scope of *Lawrence*. In Maryland, in order to be admissible in evidence against an accused, a confession must be "voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution *and* Article 22 of the Maryland Declaration of Rights."[130] Maryland courts also recognize a common law prohibition against the admissibility of involuntary confessions,

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In Maryland, unlike some other jurisdictions, not all crimes punishable by imprisonment or death are felonies. Dutton v. State, 123 Md. 373, 378, 91 A. 417, 419–20 (1914). Only two classes of crimes in Maryland constitute felonies, irrelevant of the amount of imprisonment authorized upon conviction: those that were felonies at common law, and those that are explicitly designated as felonies by statute. *See id.*; EVERSTINE, *supra* note 123, at 7–8.

125. Bouse Act § 1.

126. EVERSTINE, *supra* note 123, at 1–2.

127. Act of Aug. 22, 1973, ch. 2, 1973 Md. Laws 4, 332.

128. *See* Parker v. State, 402 Md. 372, 393–94, 936 A.2d 862, 875 (2007) ("In 1973, as an initial part of the project to revise the Maryland Code, the Revisor of the statutory provisions submitted to the General Assembly a proposed 'Courts and Judicial Proceedings Article.' The proposed statute repealed the Bouse Act because, in the [erroneous] view of the Revisor at that time, the Bouse Act was 'unconstitutional' under *Mapp v. Ohio*.").

129. *See* Ball v. State, 347 Md. 156, 173–74, 699 A.2d 1170, 1178 (1997) (quoting Hof v. State, 337 Md. 581, 597–98, 655 A.2d 370, 378 (1995)).

130. *Id.* (emphasis added).

which originated in *Nicholson v. State*.[131] Despite the Bouse Act's repeal, Maryland courts apply an exclusionary remedy for violations of Article 22 or violations of the common law prohibition against involuntary confessions, as this remedy does not derive from the Bouse Act.[132]

An interesting aspect of *Lawrence* is that, had the evidence in *Lawrence* been illegally obtained, under the convergence theory it would have been obtained in violation not only of Article 26's prohibition against unreasonable and warrantless searches and seizures, but also in violation of Article 22's prohibition against compelled self-incrimination as it was understood at that time.[133] Nonetheless, *Lawrence* is only viewed as authority for the proposition that Maryland has no exclusionary remedy for evidence obtained in violation of Article 26, while it has never been cited as authority for the proposition that Maryland has no exclusionary remedy for evidence obtained in violation of Article 22.[134] The Court of Appeals of Maryland has continued to exclude not only illegally coerced confessions, but also the fruits thereof, under the authority of Article 22.[135] In simplest terms, this development begs the question:

131. 38 Md. 140, 153 (1873) (recognizing that confessions induced by threats or promises by officials should be excluded from evidence); *see* Pappaconstantinou v. State, 352 Md. 167, 174–77, 721 A.2d 241, 244–46 (1998) ("Maryland has followed the old common law rule, which has seemed to adopt a per se exclusion rule that *official* promises of leniency to a defendant in custody that induce a confession render the confession inadmissible." (quoting Reynolds v. State, 327 Md. 494, 507, 610 A.2d 782, 788 (1992))); Hoey v. State, 311 Md. 473, 483–84, 536 A.2d 622, 627 (1988); Stokes v. State, 289 Md. 155, 158, 423 A.2d 552, 554 (1980); Hillard v. State, 286 Md. 145, 151–53, 406 A.2d 415, 419–20 (1979); State v. Kidd, 281 Md. 32, 34–35, 375 A.2d 1105, 1107–08 (1977); Smith v. State, 189 Md. 596, 603–04, 56 A.2d 818, 821–22 (1948); McCleary v. State, 122 Md. 394, 406–09, 89 A. 1100, 1105–06 (1914); Green v. State, 96 Md. 384, 386, 54 A. 104, 104 (1903); Biscoe v. State, 67 Md. 6, 7–10, 8 A. 571, 571–72 (1887).

132. *See, e.g.*, *Ball*, 347 Md. at 173–74, 699 A.2d at 1178; Pappaconstantinou v. State, 118 Md. App. 668, 675–76, 703 A.2d 1295, 1298–99 (Ct. Spec. App. 1998).

133. *See* EVERSTINE, *supra* note 123, at 10 ("[T]he Court of Appeals accepted it as a compulsion upon Lawrence to give evidence against himself in a criminal prosecution.").

134. *See* cases cited *supra* notes 10–11, 131.

135. *See* Kidd v. State, 33 Md. App. 445, 469, 366 A.2d 761, 775 (Ct. Spec. App. 1977) (recognizing that "the massive and immemorial body of Maryland common law" was largely "grounded directly in Article 22 of the Declaration of Rights proscribing compelled self-incrimination" and the "parallel federal provisions"). An interesting question, beyond the scope of this Article, is why the exclusionary remedy for coerced confessions sometimes became categorized as a common law rule, rather than a constitutional rule, after *Nicholson*. This categorization is particularly interesting in light of the *Nicholson* court's recognition that the "rule of practice" excluding coerced

if *Lawrence* truly stands for the proposition that the manner in which evidence is obtained does not affect its competency, then how can the courts suppress illegally obtained confessions on the basis of the manner in which they were obtained (i.e., involuntarily)? The answer, as the Supreme Court has explained in the context of the Fifth Amendment exclusionary rule, is that there is a fundamental difference between the *inadmissibility* of evidence at trial and the *suppression* of evidence that has been illegally obtained: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[136] It is this distinction between *inadmissible* evidence and *suppressed* evidence that the Court of Appeals of Maryland recognizes in its Article 22 jurisprudence, even while the court continues to follow *Meisinger* and ignore this distinction in its Article 26 jurisprudence.

Allen v. State[137] provides a textbook example of the disconnection, in the wake of *Meisinger*'s misconstruction of *Lawrence*, between the evisceration of the Article 26 exclusionary rule and the continued expansion of the Article 22 exclusionary rule. Allen was charged with assault with intent to rape.[138] A hat was found at the crime scene, and the State produced evidence that Allen owned the hat.[139] Allen denied ownership of the hat, but, over his objection, he was required to try it on at trial, on the theory that if the hat fit, the jury could not acquit.[140] On appeal, the Court of Appeals of Maryland reversed Allen's conviction, holding that it was compelled self-incrimination in violation of Article 22 to require him to try on the hat:

> In passing upon these border-line cases, of which the one at bar is a striking illustration, the test is who furnished or produced the evidence? If the accused, especially if in open court and on the witness stand, is made to do so by

confessions in criminal cases did not apply in civil cases (generally a characteristic of *constitutional* rules of evidence), *see Nicholson*, 38 Md. 140, 157 (1873), and the Supreme Court's recognition that the Fifth Amendment exclusionary rule stemmed from the test that "has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness," Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

136. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).
137. 183 Md. 603, 39 A.2d 820 (1944).
138. *Id.* at 605, 39 A.2d at 821.
139. *Id.*
140. *Id.* at 605–06, 39 A.2d at 821.

> performing an act or experimentation which might aid in connecting him with the crime and establishing his guilt, it is inadmissible.[141]

Essentially, the court of appeals recognized a violation of Allen's privilege against self-incrimination through the unconstitutional *manner* in which the evidence relating to the hat was obtained, and therefore recognized that the evidence must be suppressed, even though there was no doubt about its competency.[142] In sum, Maryland courts' continued recognition of an exclusionary remedy for Article 22 violations is proof that the holding in *Lawrence* could not have stood for the proposition that the *Meisinger* court ascribed to it.

II. HISTORICAL EVIDENCE OF A STATE EXCLUSIONARY RULE FOR ILLEGALLY OBTAINED EVIDENCE PRIOR TO *MAPP*: *MEISINGER* WAS NOT ALWAYS FOLLOWED

Mapp v. Ohio[143] applied the federal exclusionary rule to the states rather late in the timeline of search and seizure jurisprudence.[144] The Supreme Court separately incorporated to the states, in a two-step process, the Fourth Amendment prohibition against unreasonable searches and seizures and the exclusionary remedy for violations of this prohibition.[145] In *Wolf v. Colorado*,[146] the Court applied to the states the Fourth Amendment prohibition against unreasonable searches and seizures, but expressly declined to incorporate the exclusionary rule of *Weeks*.[147] It was not until *Mapp*, in 1961, that the Court held that due process required the states to exclude evidence obtained in violation of the Fourth Amendment.[148] The significance of this chronology is that, if Maryland courts were applying an exclusionary remedy for evidence obtained from illegal searches and seizures prior to the Court's decision in *Mapp* in 1961,

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141. *Id.* at 611, 39 A.2d at 823.
142. *Id.* at 612–13, 39 A.2d at 824.
143. 367 U.S. 643 (1961).
144. *See supra* notes 65–72 and accompanying text (discussing the establishment of a federal exclusionary remedy in the 1914 *Weeks* decision).
145. *See Mapp*, 367 U.S. 643; Wolf v. Colorado, 338 U.S. 25 (1949).
146. 338 U.S. 25.
147. *Id.* at 27–28, 33.
148. *Mapp*, 367 U.S. at 655. In *Wong Sun v. United States*, 371 U.S. 471, 484–86 (1963), the Court extended the scope of the exclusionary rule to require suppression not only of evidence directly seized, but also evidence indirectly obtained as the fruit of police conduct infringing upon Fourth Amendment rights.

then any such remedy could not have derived from the federal constitution, but rather could have derived only from state law.

This Section discusses pre-*Mapp* vestiges, existing in statutes, case law, and court rules, of Maryland's common law exclusionary rule for evidence obtained in violation of Article 26. These vestiges represent codifications of the distinction, that the *Meisinger* court failed to appreciate, between evidence that is *inadmissible*, and evidence that is *suppressed* because of a constitutional violation.[149] This Section argues that these vestiges are historical evidence that there was a common law exclusionary rule for evidence obtained in violation of Article 26. Subsection A analyzes the Maryland statute governing the State's right of appeal in criminal cases and argues, based upon statutory construction principles, that the wording reflects a distinction between evidence that a trial court rules inadmissible and evidence that is suppressed as a remedy for a violation of the Maryland Declaration of Rights. Subsection B analyzes two pre-*Mapp* decisions by the Court of Appeals of Maryland in which the court seemed both to apply an exclusionary remedy for evidence obtained in violation of Article 26 and to understand said remedy as such. Subsection C discusses the process of codification of pretrial exclusionary rules into the modern court rules governing the return of a criminal defendant's illegally seized property after trial. This Subsection argues that these modern rules are vestiges of older rules permitting the return of a criminal defendant's property prior to trial, which effectively rendered the property unavailable for the State's prosecution without a determination that the evidence was necessarily inadmissible.

A. The State's Right of Appeal

The statutory language conferring upon the State the limited right to appeal a criminal case embodies the historical distinction between evidence excluded as inadmissible and evidence suppressed as a remedy for a constitutional violation.[150] The State's right of appeal in a criminal case is limited and wholly statutory.[151] A Maryland statute, originally codified in 1957 (four years prior to *Mapp*), confers upon the State a right, in certain circumstances, to appeal from a trial

149. *See* discussion *infra* Part II.A–C.

150. *See supra* notes 88–90 and accompanying text.

151. *See* Jones v. State, 298 Md. 634, 637, 471 A.2d 1055, 1057 (1984); State v. Bailey, 289 Md. 143, 147, 422 A.2d 1021, 1024 (1980); *see also* Sanabria v. United States, 437 U.S. 54, 77–78 (1978) (discussing federal statutory and constitutional limitations on the Government's right to appeal in a criminal case).

court's decision to grant a motion to suppress illegally seized evidence.[152] The statute provides, in pertinent part, that:

> In a criminal case . . . involving a crime of violence . . . [or a drug-trafficking offense], the State may appeal from a decision of a trial court that excludes evidence offered by the State *or requires the return of property* alleged to have been seized in violation of the Constitution of the United States, the Maryland Constitution, *or the Maryland Declaration of Rights.*[153]

It is the two uses of the word "or" in the statutory provision that are noteworthy. The first "or" separates the State's right to appeal a trial court's decision that the State's evidence is inadmissible, from the State's right to appeal a trial court's order returning evidence obtained unconstitutionally.[154] The second "or" separates a violation of the federal constitution from a violation of the state constitution.[155] The first "or" in section 12-302(c)(3)(i) implies a meaningful distinction between *inadmissible* evidence and *suppressed* evidence that is analogous to the difference between the inadmissibility at issue in *Lawrence* and the suppression at issue in *Meisinger.*[156] Namely, this distinction is between material the trial court has deemed inadmissible in evidence, and material the court has deemed admissible in evidence but has suppressed due to the unconstitutional manner in which it was obtained.[157] The second "or," by separating the United States Constitution from the Maryland Constitution and Maryland Declaration of Rights, implies that these are separate authorities upon which a trial court could suppress evidence.[158] The statute therefore permits the State to appeal the suppression of evidence allegedly seized in violation of the federal constitution *or* the state constitution, as if the two types of suppression were separate and independent of one another.

152. *See* MD. CODE ANN., CTS. & JUD. PROC. § 12-302 (c)(3)(i) (LexisNexis 2006) (original version at MD. ANN. CODE art. 5, § 14 (1957)). Art. 5, § 14 replaced MD. ANN. CODE art. 5, § 86 (1951), which had afforded a general right of appeal to all parties to a criminal case. *See* State v. Green, 367 Md. 61, 74 n.8, 785 A.2d 1275, 1282 n.8 (2001); Cardinell v. State, 335 Md. 381, 405, 644 A.2d 11, 22–23 (1994) (Eldridge, J., dissenting).

153. CTS. & JUD. PROC. § 12-302 (c)(3)(i) (emphasis added).

154. *See id.*

155. *See id.*

156. *See id.*; *supra* notes 86–91, 97–107 and accompanying text.

157. *See supra* notes 88–90 and accompanying text.

158. *See* CTS. & JUD. PROC. § 12-302 (c)(3)(i).

B. Case Law

Two post-*Meisinger*, pre-*Mapp* cases from the Court of Appeals of Maryland provide possible evidence of the existence of a state exclusionary remedy for evidence obtained in violation of Article 26.[159] One is the 1954 case *Gattus v. State*,[160] in which the Baltimore City Police Department investigated a suspected illegal gambling operation occurring in a vehicle parked in a vacant lot in Baltimore City.[161] The police obtained a search warrant authorizing them to search the vehicle and seize any evidence of illegal gambling, as well as search and arrest any individuals found inside the vehicle engaged in said gambling.[162] While the police watched for the suspect vehicle, preparing to execute the warrants, Gattus drove next to their car, and then immediately drove away when the police called him to stop.[163] The police followed him out of Baltimore City into Baltimore County,[164] where they acted pursuant to the Baltimore City warrants in stopping his vehicle, seizing illegal gambling slips, and arresting him.[165] It was undisputed that the Baltimore City warrants were invalid in Baltimore County.[166] Because the police executed the warrants outside their territorial jurisdiction, Gattus moved the court, prior to trial, to quash the search warrant and to order inadmissible the evidence obtained therefrom.[167] The trial court denied the motions, but the Court of Appeals of Maryland reversed.[168] The court held as follows: "Finding that the search was invalid; that the motion to quash the search warrant should have been granted and the articles seized thereunder were not admissible in evidence . . . the judgment will be reversed."[169]

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159. *See* Gattus v. State, 204 Md. 589, 105 A.2d 661 (1954); Dail v. Price, 184 Md. 140, 40 A.2d 334 (1944).
160. 204 Md. 589, 105 A.2d 661.
161. *See id.* at 592, 105 A.2d at 662.
162. *See id.* at 593, 105 A.2d at 662.
163. *See id.* at 593–94, 105 A.2d at 662–63.
164. Baltimore City and Baltimore County are two entirely separate political subdivisions within the state of Maryland. *See* Maryland Association of Counties, About the Counties/Overview, http://www.mdcounties.org/counties/ (last visited Sept. 30, 2008).
165. *See Gattus*, 204 Md. at 594, 105 A.2d at 663.
166. *See id.* at 594, 105 A.2d at 663; *see also* MD. CODE ANN., CRIM. PROC. § 1-203(a)(1)(i) (LexisNexis 2001) (authorizing judges to issue search warrants only for crimes being committed "within the territorial jurisdiction of the judge").
167. *See Gattus*, 204 Md. at 594–95, 105 A.2d at 663–64.
168. *See id.* at 601, 105 A.2d at 666.
169. *Id.*

The second case providing possible evidence of a state exclusionary remedy for Article 26 violations, is the 1944 case *Dail v. Price*.[170] *Dail*'s procedural posture is somewhat convoluted, as it was a civil suit by Dail that arose from a criminal suit in which Dail was a defendant.[171] Pursuant to a search warrant, the Dorchester County Police Department seized a large quantity of alcohol from Dail.[172] On the basis of the seized evidence, the grand jury indicted Dail on two charges: unlawful possession of alcohol without a license, and unlawful sale of alcohol without a license.[173] Prior to trial, Dail filed a motion to quash the search warrant, on the ground that the motion was issued without probable cause, and sought the return of the seized alcohol.[174] The trial court granted Dail's motion to quash the search warrant, but did not rule on the motion to return the alcohol.[175] While the case proceeded to trial on the unlawful sale charge, and Dail was convicted, the State appealed the quashing of the search warrant in the possession-with-intent-to-distribute case.[176] The State's appeal in this latter case was dismissed because there was not yet a final judgment in the case, and there was no trial court ruling on record that the court of appeals could consider.[177]

In the meantime, Dail filed a petition, initiating a separate civil action against the Dorchester County Police Department, seeking the return of the seized alcohol.[178] The Police Department answered the petition and argued that the trial court's quashing of the search warrant was not a final judgment but rather "merely a ruling on evidence."[179] Perhaps unfortunately for the sake of procedural clarity, the civil trial court denied Dail's petition for the return of the alcohol on the ground that the search warrant was validly issued; Dail subsequently appealed.[180]

The court of appeals dismissed Dails's appeal, characterizing it as a collateral attack of a preliminary ruling in a pending criminal case.[181] More importantly to this Article's thesis, the court characterized Dail's pretrial motion to return his seized property as nonevidentiary

170. 184 Md. 140, 40 A.2d 334 (1944).
171. *See id.* at 141–42, 40 A.2d at 335.
172. *See id.* at 141, 40 A.2d at 335.
173. *See id.*
174. *Id.*
175. *See id.*
176. *Id.*
177. *Id.*; *see* State v. Jones, 182 Md. 368, 369–70, 34 A.2d 775, 776 (1943).
178. *See Dail*, 184 Md. at 141, 40 A.2d at 335.
179. *Id.* at 142, 40 A.2d at 335.
180. *Id.* at 142–43, 40 A.2d at 335–36.
181. *Id.* at 143, 40 A.2d at 336.

in nature, even though the motion's granting would have resulted in exclusion of the evidence and a likely dismissal of the charges:

> The appellant . . . is, in effect, making a collateral attack upon that judgment, by seeking a review of a ruling that was preliminary to a criminal proceeding then pending. Such a ruling is not technically a ruling upon evidence, but it may be conclusive as to the admissibility in evidence of the articles seized . . . .
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> . . . .
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> . . . While the judge is directed [in exercising criminal jurisdiction] to cause the property to be returned if he finds the warrant invalid for want of probable cause, and this would ordinarily be the end of the case, [the motion] was not designed as a substitute for an action in replevin . . . for the determination of the right to possession of property after it has served its purpose as real evidence in a criminal case.[182]

Both *Gattus* and *Dail* involved misdemeanors, so it is possible that the exclusionary remedy applied in both cases derived from the Bouse Act, although neither case cited the Bouse Act as authority. Similarly, many Article 22 and common law confession cases from the same time period did not rely upon the Bouse Act as authority for the suppression of statements taken in violation of the prohibition against compelled self-incrimination.[183] Additionally, the court of appeals in *Dail* drew a distinction between Dail's pretrial motion to quash the search warrant and return his seized property and a motion seeking a "ruling upon evidence."[184] It is precisely this distinction that the court failed to appreciate in *Meisinger*—namely, the distinction between a motion to suppress (like the motions in *Blum* and *Gattus*) and a motion *in limine* seeking a ruling that evidence is inadmissible (like the motion that was rejected in *Lawrence*).

C. *Pretrial Return of Seized Evidence*

While the exclusionary rule for illegally obtained evidence existed as a remedy for violations of Articles 26 and 22, it was a creation of the common law.[185] Common law exclusionary remedies may have

182. *Id.* at 143–44, 40 A.2d at 336 (citation omitted).

183. *See supra* notes 128–32 and accompanying text.

184. *See Dail*, 184 Md. at 143, 40 A.2d at 336.

185. *See supra* text accompanying notes 55–64.

been widespread among the states prior to *Mapp*. The Federal Rules of Criminal Procedure, which largely codified the common law rules of procedure that preexisted them, permit a defendant to move for the return of illegally seized evidence.[186] As a practical matter, these motions are generally made after trial, since the rule precludes return of the evidence in a manner that would render it unavailable for admission at trial.[187] The Advisory Committee Notes to Rule 41 strongly suggest the rule was originally a codification of the *Weeks* exclusionary remedy, and only recently became a mechanism to return property to a defendant without suppressing it at trial.[188] The Notes to the adoption of the rule in 1944 state, in pertinent part:

> This rule is a restatement of existing law and practice, . . . Weeks v. United States, [with the exception that, w]hile under existing law a motion to suppress evidence or to compel return of property obtained by an illegal search and seizure may be made . . . before a commissioner . . . the rule provides that such motion be made only before the court.[189]

However, the Advisory Committee Notes for the 1989 Amendments to Rule 41(e), the precedent rule to current Rule 41(g), state the following, in pertinent part:

> The amendment deletes language dating from 1944 stating that evidence shall not be admissible at a hearing or at a trial if the court grants the motion to return property under Rule 41(e). This language has not kept pace with the development of the exclusionary rule doctrine . . . .
>
> . . . .
>
> Rule 41(e) is not intended to deny the United States the use of evidence permitted by the [F]ourth [A]mendment and federal statutes, even if the evidence might have been unlawfully seized.[190]

186. *See* FED. R. CRIM. P. 41(g) (Supp. 2008) ("Motion to Return Property. A person aggrieved by an unlawful search and seizure of property . . . may move for the property's return. . . . If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings." (emphasis omitted)).
187. *See id.*; *see, e.g.*, Stevens v. United States, 530 F.3d 502, 503 (7th Cir. 2008).
188. *See* FED. R. CRIM. P. 41 advisory committee's note; FED. R. CRIM. P. 41 advisory committee's note to 1989 amendment.
189. FED. R. CRIM. P. 41 advisory committee's note (citations omitted).
190. FED. R. CRIM. P. 41 advisory committee's note to 1989 amendment.

This interplay, overlap, and confusion between suppression of evidence, which, in a criminal trial, is often contraband, as a remedy for a constitutional violation under *Weeks* and a replevin-like mechanism for return of property after its use at trial, is reminiscent of the confusion by the Court of Appeals of Maryland in *Meisinger* about the interplay and overlap between the suppression mechanism of *Blum* and *Weeks* and the traditional evidentiary rule adopted in *Lawrence.*[191]

III. CONCLUSION

The federal exclusionary rule recognized in *Boyd* and *Weeks* was an entirely judicially created remedy, which presents an obvious question: Why is it necessary to prove the historical existence at common law of an exclusionary remedy for Article 26 violations when the Court of Appeals of Maryland could simply create one as part of its inherent power to interpret the Maryland Declaration of Rights? The doctrinal answer is that evidence for the existence of an historical exclusionary remedy at common law is *not* necessary,[192] although, under the principle of stare decisis, proof of a remedy's prior existence might strengthen the argument for its current recognition.[193] The practical answer is quite simply this: the Court of Appeals of Maryland has been repeatedly asked to create a judicial remedy for violations of Article 26 of the Maryland Declaration of Rights that is independent from the federal remedy for violations of the Fourth Amendment.[194] So far, except in a few limited

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191. *See supra* Part I.C.

192. *See* Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 460, 456 A.2d 894, 903 (1983) (pointing out that Maryland's "common law is not static," but is rather subject to modification by judicial decision).

193. *See* Townsend v. Bethlehem-Fairfield Shipyard, 186 Md. 406, 417, 47 A.2d 365, 370 (1946) (recognizing that "it is sometimes advisable to correct a decision . . . wrongly made in the first instance, if it is found that the decision is clearly wrong and contrary to other established principles"); Greenwood v. Greenwood, 28 Md. 369, 381 (1868) ("Previous decisions of this court should not be disturbed . . . *unless* it is plainly seen that . . . some egregious blunder [has been] committed." (emphasis added)); *see, e.g.*, State v. Green, 367 Md. 61, 79, 785 A.2d 1275, 1285 (2001) (overruling *Cardinell v. State*, 335 Md. 381, 785 A.2d 1275 (1994) because it "was wrongly decided").

194. Several commentators, not to mention the Supreme Court in *Weeks*, have invited state supreme courts to create independent state remedies for constitutional violations. On November 18, 1986, for example, Justice William J. Brennan, Jr. delivered a lecture at New York University School of Law about the revival of state constitutions as guardians of individual rights. Brennan, *Bill of Rights*, *supra* note 36. In his lecture, Justice Brennan lamented what he observed as a trend, in the years since 1969, towards a contraction of the scope of federal rights. He approvingly noted examples

circumstances, the court has declined to do so.[195] What the court of

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of state courts that interpreted their state constitutions in a more protective manner of individual rights than the Supreme Court's interpretations of analogous federal constitutional provisions, and called upon the state courts to continue to play a role in protecting individual rights through revival of their state constitutions. *See id.*; *see also* Brennan, *State Constitutions*, *supra* note 36 (urging state courts to turn to their own constitutions to buffer the impact of the federal conservative revolution); Jerome B. Falk, Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

195. *See* Parker v. State, 402 Md. 372, 394–96, 399, 936 A.2d 862, 875–76, 878 (2007); Fitzgerald v. State, 384 Md. 484, 506–12, 864 A.2d 1006, 1019–23 (2004); Chu v. Anne Arundel County, 311 Md. 673, 674–75, 680 n.2, 686, 537 A.2d 250, 250–51, 253 n.2, 256 (1988) (declining to apply an exclusionary rule to civil actions for the return of property taken pursuant to a search warrant, but also declining to hold that a state exclusionary rule would not apply in other contexts). *But cf.* Sheetz v. Mayor of Baltimore, 315 Md. 208, 214–16, 553 A.2d 1281, 1284–85 (1989) (stating that, although under Maryland common law the exclusionary rule was generally inapplicable in civil administrative employee discharge hearings, the court was unwilling to hold that illegally seized evidence was "always admissible"); Chase v. State, 309 Md. 224, 251–56, 522 A.2d 1348, 1362–64 (1987) (holding that, even though the exclusionary rule was ordinarily inapplicable to the admission of illegally seized evidence in probation revocation proceedings, the Maryland common law doctrine of fundamental fairness dictated that "when the officer has acted in bad faith . . . the evidence should, in any event, be suppressed.").

In response to the most recent request for a state exclusionary remedy, the sole dissenting judge in *Parker v. State* noted that the majority went to great lengths to recognize a case-specific exclusionary rule based on the procedural posture of the appeal at issue, rather than simply answering the petitioner's call to create a state remedy for illegally obtained evidence. *See Parker*, 402 Md. at 411–12, 936 A.2d at 885–86 (Raker, J., dissenting) ("Unless this Court is prepared to state explicitly that the Court decides this case on Article 26 of the Maryland Declaration of Rights and that the Court deviates from Fourth Amendment jurisprudence . . . the judgment . . . should be affirmed based on *Hudson v. Michigan* . . . . I do not believe that 'the peculiar circumstances of a case' should be the source of an exclusionary rule . . . ." (citations omitted)).

Baltimore City police officers obtained "no-knock" search warrants for three residences, and upon execution found Parker inside one of the residences. *Id.* at 376, 936 A.2d at 864–65 (majority opinion). The search of various places in the residence revealed cocaine, marijuana, a large quantity of hidden cash, a handgun, and ammunition. *Id.* at 376–77, 936 A.2d at 865. Parker was charged with various drug and weapons related offenses, including possession of a regulated firearm and possession with intent to distribute a controlled dangerous substance. *Id.* at 377, 936 A.2d at 865. He moved to suppress the evidence seized during the search, and the trial court found that while the "no-knock" portion of the warrant was unnecessary, Parker's motion should be denied based on the good faith exception to the exclusionary rule. *Id.* at 377–78, 936 A.2d at 865. Parker appealed to the Court of

Special Appeals of Maryland, arguing, *inter alia*, that the trial court erred in denying his motion to suppress. *Id.* at 378, 936 A.2d at 866.

When Parker made his motion to suppress, the Court of Special Appeals of Maryland had recently decided *Davis v. State*, 144 Md. App. 144, 797 A.2d 84 (Ct. Spec. App. 2002), *rev'd*, 383 Md. 394, 859 A.2d 1112 (2004). *Davis* discussed "no-knock" entries in light of *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997), in which the Supreme Court held, "in order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence . . . would be dangerous or futile, or that it would inhibit the effective investigation of the crime." *Davis*, 144 Md. App. at 152–54, 797 A.2d at 89–90. The *Davis* court explained that, while the law enforcement officers in *Richards* "did not have no-knock authorization in the search warrant," the *Richards* holding also authorized a "no-knock" search warrant where the warrant application established a reasonable suspicion of exigent circumstances. *See id.*

While Parker's appeal was pending in the Court of Special Appeals of Maryland, the Court of Appeals of Maryland reversed *Davis*, holding that "Maryland does not statutorily authorize its judicial officers to issue 'no-knock' warrants." Davis v. State, 383 Md. 394, 387, 409, 859 A.2d 1112, 1113–14, 1121 (2004), *superseded by statute*, Act of May 26, 2005, ch. 560, 2005 Md. Laws 3212 (codified at MD. CODE ANN., CRIM. PROC. § 1-203(a) (LexisNexis Supp. 2007)). On appeal, Parker argued that the trial court's reliance upon the good faith exception for "no-knock" warrants was erroneous in light of the new *Davis* decision, and that the "no-knock" entry violated both the Fourth Amendment and Article 26. *Parker*, 402 Md. at 387, 936 A.2d at 871. The State argued that the entry and search were constitutional because there were exigent circumstances, at the time of entry, that justified the officers' failure to knock and announce. *See id.* at 387–88, 936 A.2d at 871. The Court of Special Appeals of Maryland agreed with neither party, and remanded the case for a determination on whether, in light of *Davis*, the good faith exception to the exclusionary rule applied. *Id.* at 388, 936 A.2d at 871–72.

Parker filed a petition for a writ of certiorari with the court of appeals, raising two issues with respect to the "no-knock" entry: (1) whether the trial court should conduct a new suppression hearing to determine whether exigent circumstances existed to justify the "no-knock" entry and, if not, whether the good faith exception applied and (2) whether the "no-knock" entry violated either the Fourth Amendment or Maryland law, requiring suppression of its fruits. *Id.* at 388–89, 936 A.2d at 872. Instead of filing a cross-petition for a writ of certiorari, the State filed an answer, arguing that the intermediate appellate court's judgment was correct because the "no-knock" entry was constitutional. *See id.* at 389, 936 A.2d at 872.

The day after the court of appeals granted Parker's petition, the United States Supreme Court decided *Hudson v. Michigan*, 547 U.S. 586 (2006), "holding that the Fourth Amendment's exclusionary rule was inapplicable to 'knock and announce' violations." *Parker*, 402 Md. at 389, 936 A.2d at 872. Before the court of appeals, Parker relied on *Davis* in arguing that "'exclusion [wa]s the appropriate remedy for evidence obtained as the result of an entry made in violation of the knock and announce requirements of Article 26 and Maryland common law.'" *Parker*, 402 Md. at 389–90, 936 A.2d at 872. The State responded that *Hudson* was dispositive to the suppression issue because Article 26 was construed *in pari materia* with the Fourth Amendment, and further that Article 26 did not have its own exclusionary remedy.

appeals has been willing to do in recent years is reach back into Maryland's judicial history and reanimate common law doctrines thought to be lost. In the case of *Skok v. State*,[196] for example, the court held that the common law writ of *coram nobis* was not preempted by Maryland's postconviction statute.[197] The court further held that the remedy was even broader than at common law, and was available to Skok to challenge the collateral immigration consequences of his state drug possession conviction.[198]

In sum, what this article urges the Court of Appeals of Maryland to do is recognize the empirical and doctrinal mistake made by its predecessors in *Meisenger*, reverse course, and bring back to life the state exclusionary rule for evidence obtained in violation of Article 26. An independent state exclusionary rule is worth developing.

See id. at 390, 936 A.2d at 872–73. Rather than address the issue of whether to adopt an exclusionary rule under Article 26 or the Maryland common law of evidence, the court of appeals instead found as follows: (1) the State failed to preserve the exclusionary rule issue for appellate review because the State failed to address the assumption in the lower court opinions that an exclusionary rule was applicable, and (2) *Hudson* should not be applied retroactively to reverse a judgment to a criminal defendant's detriment. *See id.* at 396–98, 401–05, 936 A.2d at 876–77, 879-82. The court held

> [W]e shall assume *arguendo* that, under federal law, *Hudson v. Michigan* controls the Fourth Amendment issue in this case, and that the Fourth Amendment's exclusionary rule is inapplicable to any violations of the "knock and announce" principle that may have occurred in the case at bar. We shall decide, however, that, *under the peculiar circumstances of this case*, the evidence is excludable if there is a violation of Maryland's "knock and announce" principle. This is a very limited decision based *exclusively* upon Maryland non-constitutional law and procedure.
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> Consequently, if there was a violation of Maryland's common law "knock and announce" principle in this case, the evidence is inadmissible *under the particular circumstances here.* Whether such an exclusionary rule should be applied when there are violations of the Maryland "knock and announce" principle in other cases, or in cases arising after the effective date of [Maryland's "no-knock" warrant statute], are matters which we leave for another day.

Id. at 399, 406, 936 A.2d at 878, 882 (additional emphasis added).

196. 361 Md. 52, 760 A.2d 647 (2000).

197. Uniform Postconviction Procedure Act, MD.CODE ANN., CRIM. PROC. §§ 7-101 to -109 (LexisNexis 2001). *See Skok*, 361 Md. at 63–66, 760 A.2d at 653–54.

198. *See Skok*, 361 Md. at 61–77, 760 A.2d at 651–60.