10-1-1986

The Exclusionary Rule: Not the "Expressed Juice of the Woolly-Headed Thistle"

Keith A. Fabi

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview
Part of the Constitutional Law Commons, Criminal Procedure Commons, and the Evidence Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol35/iss3/4

This Comment is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
The Exclusionary Rule: Not the "Expressed Juice of the Woolly-Headed Thistle"¹

I. INTRODUCTION

In order to make the fourth amendment's² guarantees against unreasonable searches and seizures more than an empty promise, the Supreme Court adopted the exclusionary rule.³ This rule provides that evidence obtained in violation of the fourth amendment is inadmissible in criminal prosecutions.⁴

Since the adoption of the rule, the Court, fearing the ramifications of what it created, has restricted the extension of the rule as a fourth amendment remedy. The exclusionary rule has suffered as a result of the judicial creativity employed by the Court in its recent decisions respecting the rule. Through a process of meritless reasoning, the Court has undercut the legitimacy and effectiveness of the rule.

From its inception, the exclusionary rule has been under at-

1. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 677 (1970) (citing cure for cancer recommended in P. Smith, Modern American Cookery (1831)). The exclusionary rule is not a placebo or quack remedy for fourth amendment wrongs, as the woolly-headed thistle is for cancer.

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

U.S. Const. amend. IV.

3. This Comment will discuss only the rule requiring the exclusion of evidence obtained in violation of the fourth amendment. Other exclusionary rules exist but do not come within the purview of this Comment. For example, evidence obtained in violation of the fifth or sixth amendments must also be excluded from trial. See, e.g., Malloy v. Hogan, 378 U.S. 1 (1964) (fifth and fourteenth amendments); Massiah v. United States, 377 U.S. 201 (1964) (sixth amendment).

4. See cases cited infra note 17.
tack as having no legitimate theoretical foundation. The justification for the exclusion of legally relevant evidence has confounded many scholars. The Supreme Court has fared no better in finding a justification for the rule, though it has forwarded several grounds for the exclusion of evidence: that the Court can formulate rules to be applied in federal criminal prosecutions under its supervisory power over the administration of criminal justice; that the exclusionary rule is a remedy mandated by the United States Constitution; that the rule is essential to the preservation of judicial and governmental integrity; and, most recently, that exclusion as a means of deterring future police misconduct is a legitimate, if not the only, basis for the rule's continued existence. Each of the above-mentioned theories, postulated as legitimizing the exclusionary rule, has suffered from the undying criticism of the Court. Consequently, the rule has been stripped of much of its practical application by subsequent alterations and exceptions.

I will argue in this Comment that, by setting up the deterrence rationale as the sole justification for the continued existence of the exclusionary rule, the Supreme Court has created a


6. See Elkins v. United States, 364 U.S. 206, 217 (1960). For a discussion of how the Supreme Court's use of its supervisory power to create the exclusionary rule is unconstitutional, see Wilson, supra note 5, at 1089-90.


8. See Mapp, 367 U.S. at 659; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The theory is that contempt for the government will necessarily follow if the government disregards its own laws. Moreover, according to the theory, the government should not profit from its own illegality.


The Court has narrowed its use of the rule through a case-by-case inquiry into whether application of the rule serves its deterrent purpose. Necessarily involved in this inquiry is a balancing of the pros and cons of exclusion for both the criminal defendant and the state. By basing exclusion solely upon deterrence (and not seriously considering judicial and governmental integrity), the Court has dismantled the rule. Addition-

While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence. The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.

Id. at 485-86.

11. "Straw person" is a pejorative term used here to describe the Supreme Court's argument that the exclusionary rule exists merely to deter police recidivism in violation of the fourth amendment. In other words, this argument was created by the Court with the knowledge that it was, and the intent that it be, easily refutable, thereby justifying the eradication of the exclusionary remedy. Had the Court desired longevity for the exclusionary rule, it would have continued to base exclusion upon a legitimate social policy or refused to promulgate the myriad exceptions that have undermined the rule's deterrence capabilities.

I do not believe that deterrence should serve as the sole theoretical foundation for the exclusion of illegally seized evidence. The exclusionary rule accomplishes both the preservation of judicial and governmental integrity and the restoration of accused persons' substantive and procedural rights. Despite my belief in alternative theoretical foundations for the rule, this Comment is premised upon, and written within, the construct of deterrence as the only exoneration for exclusion.

Given the impending fruition of the Court's plan to abolish the exclusionary rule, it is imperative that the states institute an exclusionary remedy with few or no exceptions. The principal contention of this Comment is that the exclusionary rule would systemically deter police misconduct if it were uniformly and strictly applied. Such a harsh application of the rule would promote compliance with fourth amendment strictures and, consequently, would foster a greater respect for individual rights.

Not unlike the scarecrow in The Wizard of Oz (Metro-Goldwyn-Mayer 1939), the Supreme Court's straw person would be more useful "if [it] only had a brain." Unfortunately, a diploma will not serve as an efficacious restorative, as it did in the movie. The argument of deterrence as a justification for exclusion can work, however, if given the chance. Application of the rule, as suggested here, would provide sufficient data to test the deterrence hypothesis while simultaneously affording criminal defendants their constitutional guarantees. Should deterrence prove to be fallacious, the exclusionary rule should still be applied: it is an essential element of governmental integrity and civil rights.


ally, by arguing that application of the rule to the specific facts in each case would not, in balance, deter future police misconduct, the Court summarily concludes that the rule should not be used. The less the rule is applied, the less serious is its deterrent effect and, thus, the more the Court appears justified in creating further limitations, until the rule completely disappears. "By portraying the rule as a pragmatic social policy rather than a basic constitutional principle, its critics have shifted the scope of the debate from arguments about constitutional law and judicial integrity (where they lost) to arguments about the empirical data." 14

Because the exceptions to the exclusionary rule have undermined its deterrent effect, the states should adhere to a policy of uniformly applying the rule to nearly all cases involving fourth amendment violations. 15 The best mechanism for implementing this policy would be for the states to adopt statutory exclusionary rules. Such legislation mandating the exclusion of all illegally seized evidence would provide a clear "bright-line" rule and would minimize judicial discretion. 16 In the alternative, if state legislatures do not enact such statutes, state courts should liberally apply the exclusionary rule on independent state law grounds.


15. The exclusionary rule should be applied with few or no exceptions. There is no rational core of exclusionary rule cases in existing law, merely a collection of incoherent anomalies. Unfortunately, substituting state courts' and legislatures' decisions for Supreme Court rulings will not effectuate the parallel development of law with principles of justice, as there is no universal agreement as to what constitutes justice. However, I believe that strict application of the exclusionary rule through state mechanisms provides a greater opportunity for the attainment of a moral consensus and lessens the occurrence of individual excesses. Applying the rule as suggested would limit the use of discretion and balancing tests—setting forth a clear policy statement instead of shielding ethical judgments—and would function as the most effective safeguard for constitutional rights.

I do not argue that the exclusionary rule should be applied without exception. I recognize that, in very rare instances, police officers are justified in acting without a warrant. For example, if there is a very real danger that the only evidence in a case is threatened with imminent destruction, police officers in hot pursuit should be allowed to seize the evidence without a warrant. However, I would hold these officers to a very high burden of proof with regard to the seriousness and imminence of the particularized threat that the evidence was going to be destroyed. See infra text accompanying notes 44-46 for an example of a case that would not meet my stringent requirements. This exception is one of the few I will concede because of its direct effect on police performance in emergency situations. In most other situations, police officers have time to obtain a warrant without risking the failure of the arrest.

16. See infra text accompanying notes 74-79.
This strict application of the rule would insure greater procedural and substantive protection for criminal defendants.

This Comment will explore the historical and theoretical development of the exclusionary rule, trace its gradual erosion by the Supreme Court, and briefly examine some state responses to the rule. The defense of the exclusionary rule as the only viable remedy for fourth amendment wrongs is the leitmotif.

II. THE EVISCERATION OF THE EXCLUSIONARY RULE

The year 1961 marked the end of state discretion regarding the admissibility of illegally obtained evidence. With a five-to-four
vote, the Supreme Court, in *Mapp v. Ohio*, held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments," thus holding it to be law in every jurisdiction in the United States. "[W]ithout that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'" This case reaffirmed the earlier logic of *Boyd v. United States* and *Weeks v. United States* that the exclusionary rule has its origin in and is required by the Constitution, despite being judicially implied.

In the years since *Mapp v. Ohio*, however, the Supreme Court has reevaluated the application of the exclusionary rule as a vindication of fourth amendment rights in light of its apparent social costs and efficacy. The Court has bowed to the public misconception that unending application of the rule would result in the release of countless guilty defendants and would "impede unacceptably the truth-finding functions of judge and jury."
The post-*Mapp* era has been marked by a plethora of decisions curtailing the application of the exclusionary rule. Through less restrictive standards that now define what constitutes a fourth amendment violation, and through imposition of various limitations on the applicability of the rule itself, the Court has managed to encumber the vitality of the exclusionary remedy. What follows is a survey of the major cases responsible for the evisceration of the rule.

A. *Standing*

As a general rule, defendants who are not themselves the direct victims of an illegal search or seizure are not allowed to assert the exclusionary rule to bar the admission of evidence. The Court in *Alderman v. United States*,\(^2\) weighing the benefits of extending the exclusionary rule to coconspirators and codefendants against the incremental harm to society's interest in prosecution, ruled against extending protection under the fourth amendment to such persons. The Court held that fourth amendment rights whether the exclusionary sanction is an appropriate remedy given the particular facts of each case. As stated previously, the exclusionary rule is only applied by the Court when its deterrent purpose is served efficaciously. The Court is thus focusing its inquiry on the effects of the rule as a specific deterrent to the fourth amendment violator and not as a remedy for the particular defendant. This line of reasoning is completely devoid of any rational basis. An individual officer guilty of a fourth amendment wrong will not be deterred from future unconstitutional action regardless of whether or not the product of her or his search is admitted into evidence against the defendant. The defendant alone bears the risks or benefits conditioned upon the outcome. It is only in terms of a general or systemic deterrence that exclusion makes sense. Law enforcement agencies, ever hungry for higher conviction rates, will take appropriate measures to insure that the fourth amendment strictures are complied with by their employees in order to avoid the exclusion of relevant evidence and thereby realize their goal. The risk of setting free a guilty defendant should be much more palatable to society than the excessive governmental intrusion that inheres to a police state.


The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

*Id.* at 174-75.
are personal rights that may not be vicariously asserted. In other words, the exclusionary rule provided no protection because it was necessary that there be a personal right violated by the illegal search or seizure for standing to be granted.

In an effort to limit the class of persons who were entitled to raise a claim under the fourth amendment, the Supreme Court began to confine the definition of a personal right. Prior to Rakas v. Illinois, any person with a possessory interest in the premises searched or the items seized was thought to have automatic standing to challenge a search. In Rakas, the Court developed a one-step test for determining standing: whether the defendant had a "legitimate expectation of privacy" which was violated by the illegal search. This expectation must be vested in the premises searched or the items seized. In the absence of such expectation, no standing will be granted and all the evidence seized will be ruled admissible.

In cases involving crimes for which possession of the seized item was an essential element of the offense, the defendant was often faced with a "catch-22" situation. If the defendant denied possession of the item, standing would be withheld for lack of a legitimate privacy interest. If the defendant claimed possession, there would be a risk of self-incrimination should a motion to suppress the evidence be denied. The Court in Jones v. United States rectified this situation by granting defendants in such possessory cases automatic standing. If the defendants failed to prove an illegal search, they could still deny possession at trial. This doctrine was vacated by the Court in 1980 in United States v. Salvucci. Af-

26. Id. at 175.
30. 439 U.S. at 143 (construing Katz v. United States, 389 U.S. 347, 353 (1967)). A reasonable expectation of privacy is thought to exist only in places society is willing to recognize as reasonably giving rise to such an expectation. Id. at n.12.
31. Id. at 146, 147. See also Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) ("petitioner . . . bears the burden of proving not only that the search . . . was illegal, but also that he had a legitimate expectation of privacy in [the item seized].").
33. 448 U.S. 83 (1980). The Court believed that because Simmons v. United States, 390 U.S. 377 (1968), held that a defendant's testimony at a suppression hearing is not admissible at trial, there was no longer a no-win situation and thus no need for automatic standing. 448 U.S. at 95.
ter Salvucci, in order to have standing to challenge a search and move to suppress evidence, the individual must have both a possessory interest in the items seized and a legitimate expectation of privacy in the area searched.34

With this standing limitation in place, it is nearly impossible for third-party defendants to assert sufficient standing to invoke the exclusionary rule. For example, evidence obtained in violation of A's fourth amendment rights will not be suppressed in B's trial, despite the fact that the evidence incriminating B was seized illegally.35 This restriction on standing threatens to make the deterrent effect of exclusion a moot subject. Permitting the use of evidence obtained in violation of the rights of third parties allows law enforcement officials to subvert the fourth amendment.36 Therefore, it is incumbent upon the states to recognize, where the Supreme Court has not, that the exclusionary rule is more a constitutional principle than a procrustean procedural device. An individual's right to liberty is more compelling than what the Court, in its infinite wisdom, is willing to consider a legitimate expectation of privacy.

B. Derivative Evidence

The general rule against using illegally obtained evidence for the purpose of gaining other evidence was first elicited in Silverthorne Lumber Co. v. United States.37 The rule—a bar against the use of derivative evidence—is commonly called the "fruits of the poisonous tree" doctrine.38 Metaphorically, the "poisonous tree" is the original evidence that has been found through illegal means. The "fruit" is all the evidence that stems from the original

34. Id. at 85-86.
35. See, e.g., United States v. Payner, 447 U.S. 727 (1980). In Payner, a bank officer's briefcase was illegally seized by an Internal Revenue Service agent. Information in the briefcase led to the arrest of a customer of the bank. The Court refused to allow standing to the customer to assert violation of the bank officer's rights. Id. at 731-33.
37. 251 U.S. 385 (1920).
and is thus also inadmissible. Once a defendant makes a prima facie causal connection between the alleged fruit and the police misconduct, the government has three ways it can purge this evidence of its primary taint so that it will be admissible.\textsuperscript{39}

1. The Independent Source Exception. In \textit{Wong Sun v. United States},\textsuperscript{40} the Supreme Court developed a new standard for determining whether the evidence sought to be introduced was the fruit of the poisonous tree: Was the evidence "come at" by exploitation of the primary illegality?\textsuperscript{41} If the evidence was instead obtained by an "independent source," it was purged of its primary taint and was therefore admissible.\textsuperscript{42} This post-\textit{Mapp} alteration of the fruits of the poisonous tree doctrine has been labelled the "independent source" exception and has become increasingly important.\textsuperscript{43}

The Supreme Court stretched this exception to its conceptual extreme in \textit{United States v. Segura}.\textsuperscript{44} In that case the Court admitted that the police knew they needed a search warrant prior to their illegal warrantless entry of a home. This was supported by the fact that the officers had requested a warrant. Consequently, the fact that the police could have waited for the warrant and seized the same evidence gave them an "independent source" for that evidence.\textsuperscript{45} As a result of this logic, police officers are now given greater incentive to enter premises without a warrant and to seize evidence, despite lacking a particularized fear that such evidence will be destroyed before a warrant can be issued. Defend-

\begin{footnotesize}
\begin{enumerate}
\item See I W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 3.2(c), at 3-8.1 (1986).
\item 371 U.S. 471 (1963).
\item Id. at 488.
\item Id. at 487-88 (dismissing test established in \textit{Silverthorne} that but-for illegal search evidence would not have come to light).
\item See, e.g., \textit{United States v. Ceccolini}, 435 U.S. 268, 275-76 (1978) (illegally obtained evidence need not be excluded if government can show it would have obtained it even without illegal search).
\item 468 U.S. 796 (1984).
\item Id. at 805. In \textit{Segura}, the police entered the defendant's apartment prior to the issuance of the warrant they had requested. The Court suppressed all the evidence that had been in plain view before the police search because the initial entry was illegal. After the police had waited for some time in the defendant's apartment, the magistrate delivered the warrant and the police proceeded to search the area. The evidence turned up by this delayed search was ruled admissible because it was based upon the independent ground of the earlier probable cause the officers had initially relied upon to request the warrant. \textit{Id.} at 813-16.
\end{enumerate}
\end{footnotesize}
ants who argue that, absent the warrantless entry, they would have had time to destroy the evidence prior to the issuance of a valid search warrant would be in a weak position given the Court’s opinion that allowing such a defense would be tantamount to giving a “‘constitutional’ right to destroy evidence.”

This development of an exclusionary rule limitation can also be criticized for encouraging police lawlessness. The far easier and illegal source of gaining evidence can now be implemented so long as some legal source of acquiring the same information is also present. The Court has seen fit to reward the choice of least integrity.

2. *The Inevitable Discovery Exception.* The second exception to the fruits of the poisonous tree doctrine is the inevitable discovery exception. This exception allows for the introduction of illegally obtained evidence if such evidence would inevitably have been obtained by other legal law enforcement techniques. This inherently calls for speculation as to the probable success of uncovering the evidence in question. In *Nix v. Williams,* the Supreme Court applied the inevitable discovery exception with the asserted rationale that, if evidence would inevitably have been discovered by other legal techniques, admitting the evidence (even though illegally obtained) does not place the government in a better position than it would have been in absent the illegality. As does the independent source objection, this exception encourages the circumvention of the fourth amendment through the use of more expedient—though illegal—techniques of law enforcement. Police officers are given no disincentives for bad faith violations of suspects’ rights under this exception. This is reinforced by the fact that this doctrine does not require the absence of bad faith to be proved by the government.

3. *The Attenuation Exception.* The third exception to the fruits of the poisonous tree doctrine is the attenuation exception. This allows the government to show that the causal relation between the illegal search and the alleged fruit has “become so at-

---

46. *Id.* at 815.
48. *Id.* at 442-44. *See also* 1 W. Ringel, *supra* note 39, § 3.3(b), at 3-21 (noting the Supreme Court’s explicit recognition of validity of inevitable discovery doctrine in *Nix*).
tenuated as to dissipate the taint." In *Brown v. Illinois,* the Court laid out three factors to be weighed in the determination of whether the attenuation of the taint was sufficient to permit the use of the challenged evidence: (1) the length of time between the illegality and the seizure of evidence; (2) the presence of additional intervening factors; and (3) the degree and purpose of the official misconduct. The courts must look at the totality of the circumstances in each case and weigh them in light of the policy underlying the exclusionary remedy. The type of evidence challenged is also a consideration because "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness . . . ."

Aside from the exceptions listed above, which permit illegally obtained evidence to be used in the prosecution's case-in-chief, the question of whether to apply the exclusionary sanction in collateral contexts has also served to limit the scope of the rule.

C. Other Contexts for Application of the Exclusionary Rule

Prior to *Mapp,* the Supreme Court in *Walder v. United States* permitted illegally seized evidence to be admitted at trial for the purpose of impeaching a contradictory statement made by the defendant on direct examination. In 1980, the Court in *United States v. Havens* expanded the utility of illegally obtained evi-

51. 422 U.S. 590 (1975).
52. *Id.* at 603-04. See *United States v. Ceccolini,* 435 U.S. 268, 276-77 (1978). If there is a long period of time between the original taint and the discovery of derivative evidence, the enforcement officer allegedly will not be deterred by exclusion of the illegally obtained evidence. The same is true if the derivative evidence is attained after additional intervening factors have blurred the original taint. The Court also looks at the degree or purpose of the original misconduct. If, for example, the police made a small technical error while in pursuit of a murder suspect, suppression would not deter the same future course of action. See also 1 *W. Ringel,* *supra* note 39, § 3.3(c), at 3-24.8 (listing factors, enunciated in *Brown,* to be considered when determining whether there has been sufficient attenuation to dissipate the taint; noting arrest in *Brown* found to be made for investigatory purposes and not simply technical error).
56. 446 U.S. 620 (1980). *Contra Agnello v. United States,* 269 U.S. 20 (1925) (evidence of unlawful search and seizure could not be introduced against accused in rebuttal of
dence by allowing its use to impeach statements made by defendants during cross-examination. The evidence is admitted, in theory, only to impeach a defendant's credibility. Such evidence, however, once it is admitted against the defendant and presented before a jury, undoubtedly has a prejudicial effect that can not be redressed by a curative instruction. It would be difficult, if not impossible, for the jury to consider the evidence only with regard to credibility and not to guilt or innocence. The Court is removing what little deterrent effect the exclusionary rule still has. The more uses to which such illegally obtained evidence can be put, the less incentive there is to be mindful of the method by which it is obtained. There thus appears to be a shift back towards the common-law rule of admissibility of evidence regardless of the manner of procurement.

In United States v. Calandra, the Supreme Court refused to apply the exclusionary rule to grand jury proceedings due to the limited efficacy such application would have in furthering the rule's deterrent objective. Therefore, a grand jury witness cannot refuse to answer any questions by interposing the defense that the questions were derived from illegally obtained evidence.

Similarly, in United States v. Janis, the Court allowed evidence that had been illegally seized by state officials to be introduced in a federal civil proceeding. After balancing the social benefits of exclusion against its administrative costs, the Court concluded that the deterrent effect of exclusion was likely to be insignificant in comparison to the cost of losing the evidence.

Through the use of this balancing methodology, the Court has blinded itself to the normative need for exclusion: the protection of defendants' rights. As Professor Yale Kamisar so adeptly argues, society's concern for "efficient" law enforcement is not achieved by high conviction rates attained through the use of ille-

58. See, e.g., Olmstead v. United States, 277 U.S. 438 (1928). If the exceptions allowing the use of illegally obtained evidence in the prosecution's case-in-chief are coupled with the allowed collateral uses, there remains little incentive for law enforcement officials to utilize legal means.
60. 428 U.S. 433 (1976).
61. Id. at 454.
gal techniques. Rather, the exclusionary rule encompasses what is best for society. The rule assures more protection against unreasonable searches and seizures and, consequently, secures the privacy of one's home and person. A police force that honors individual rights is better for society than one concerned only with catching and convicting more criminals.\(^6\)

Using a balancing methodology, the Court in *Immigration and Naturalization Service v. Lopez-Mendoza*\(^6\) refused to apply the exclusionary sanction to deportation proceedings, despite the fact that the evidence offered was the fruit of an unlawful arrest. By refusing to extend the protection of the rule into the realm of civil proceedings, the Court has failed to take account of the fact that even a slight deterrent effect can operate to safeguard the guarantees of the fourth amendment. This limitation takes on added significance when viewed in light of the possible consequences of such proceedings. The imposition of deportation or probation can often amount to punishments as severe as, if not harsher than, many criminal sentences.

D. A Good-Faith Exception

The most dramatic limitation placed upon the fourth amendment and the exclusionary rule by the Court is the good-faith exception.\(^6\) This exception, first enunciated by the Court in *United States v. Leon*,\(^6\) provides that evidence obtained by officers acting in reasonable reliance on a search warrant that is ultimately ruled invalid will not be excluded from use in the prosecution's case-in-chief. By endorsing this exception to the exclusionary rule in cases where the police have reasonable grounds to believe the

---


warrant they are acting under is properly issued, the Court has severely undermined the utility of the rule and threatened its very existence.

Through the methodology of balancing the costs and benefits of applying the exclusionary sanction to specific situations, the Court has determined that the rule's deterrent objective is not attained where police act in good faith, for then they are acting in a manner which should not be deterred. According to the Court, the key factor on the cost side of the scale is the fear that some guilty defendants may go free due to minor technicalities in the warrant.

Although this exception appears to be narrowly limited to an objectively reasonable belief by officers in cases where a warrant has been issued by a neutral and detached magistrate, the rationale of the Leon opinion serves as a springboard for further limits and exceptions to the rule.

By asserting that the exclusionary rule is not required by the fourth amendment of the Constitution, but rather that it is a judicially created remedy designed to safeguard the guarantees of that amendment, the Supreme Court has been able to implement many of the exceptions and limitations detailed above.

III. STATE RESPONSES TO THE EXCLUSIONARY RULE

As was previously argued, the Supreme Court has established for itself a "straw person" by basing suppression of evidence solely upon the efficacy of the exclusionary rule in deterring police recidivism against fourth amendment proscriptions. If extension of the rule would presumably fail to deter future police misconduct, the Court creates an exception, and the rule is not applied. There is thus a direct relationship between deterrence and application of the exclusionary rule: the less the rule deters, the less it is applied. Application of the rule in fewer and

---

68. See Leon, 468 U.S. at 913.
69. Id. at 931 (Brennan, J., dissenting).
71. See supra notes 17-24 and accompanying text.
72. See supra notes 11-14 and accompanying text.
fewer circumstances naturally lessens police perception of exclusion as a serious sanction. Consequently, officers have little incentive to follow fourth amendment strictures if they feel that they can violate them with impunity. The Court looks to the presence of this police recidivism as evidence that the exclusionary rule fails to deter. Imposition of further limitations on the rule thus ensues. Never has the Court stopped to realize that the lack of deterrence may be the result of the exceptions to the rule and not the cause of those exceptions.

Assuming, arguendo, that deterrence is the only justification for the existence of the exclusionary rule, what would be the result if the exclusionary rule were applied without myriad exceptions? What follows is a proposal for a statutory exclusionary rule to be adopted by the states and applied, with few or no exceptions, in every case involving a fourth amendment violation. If, in the alternative, such legislation proves politically impossible, state courts should begin to apply the exclusionary rule more liberally upon independent state grounds.

A. A Statutory Exclusionary Rule

The Supreme Court’s disillusionment with the exclusionary rule precludes its handing down a stricter standard. Application of an exclusionary rule on the state level is, therefore, the only alternative for preserving the rule’s protection of individual rights. Within the state realm, a statutory rule would best serve criminal defendants’ rights because it would bear the stamp of public legitimacy—something woefully lacking with today’s judicially created rule. Legislatures are perceived to possess greater information-gathering powers and to be more attuned to public opinion. Their policy decisions have more validity in the public eye than do those of the judiciary.

Aside from the advantage of a favorable public perception, there are many other advantages to implementing a legislative ex-

---

73. For a discussion of other justifications for exclusion, see supra notes 6-9 and accompanying text.

74. It is ironic and disheartening that federal law, which provided a safety net for constitutional rights, should now make way for a greater reliance upon state law and state courts. The danger to individual rights once associated with state law and state courts has dissipated due to the decisions rendered by an increasingly conservative majority of the Supreme Court. The states are now indispensable to the protection of individual rights.
clusionary rule. A state statute strictly mandating the use of the exclusionary rule with few or no exceptions could be interpreted by the courts of a state in only one way: The rule would be applied to bar all evidence obtained in violation of a state's constitutional provision against unreasonable searches and seizures. This eliminates judicial discretion pertaining to application of the rule. The only question that would still be open to judicial interpretation is what constitutes an unreasonable search or seizure. Adoption of a statutory exclusionary rule would encourage legislatures to go one step further and develop a comprehensive set of norms to govern police action in acquiring evidence. With a set conceptual framework as to what constitutes an illegal search or seizure, the courts would have less room to paddle through the "quagmire," and the police would have a greater understanding of what is permissible.

A strict exclusionary rule would not only deter but would serve as the source of a greater incentive to improve police performance by communicating more efficiently the laws of search and seizure. State legislatures have more channels of communication to their law enforcement agencies than does the Supreme Court. Thus, information can be relayed more accurately and transformed into appropriate action.

If statutory exclusionary rules could be enacted and applied with few exceptions in all the states, there could be no criticism voiced that such legislation would result in a lack of uniformity.

75. See LaFave, Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police, 30 Mo. L. Rev. 566, 569-70 (1965).

76. LaFave, Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire," 8 CRIM. LAW BULL. 9 (1972) ("quagmire" used to describe search and seizure law due to its confusing and uncertain nature).

77. Texas is an example of a state that does provide for a statutory exclusionary rule. Texas law expressly provides that no evidence obtained by an officer or other person in violation of state or federal law is admissible against an accused in a criminal trial. Tex. CRIM. PROC. CODE ANN. art. 38.23 (Vernon 1979). For a discussion of the Texas rule, see Dawson, State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience, 59 TEX. L. REV. 191 (1981).

In Florida, a judicially created exclusionary rule was adopted into written law and appeared in the last sentence of article I, section 12 of the Florida Constitution as follows: "Articles or information obtained in violation of this right [against unreasonable search and seizure] shall not be admissible in evidence." FLA. CONST. art. I, § 12 (1968, amended 1982). Additionally, the Florida courts had ruled that the state exclusionary sanction and the Florida Constitution were much more restrictive than the federal exclusionary rule. See Grubbs v. State, 373 So. 2d 905 (Fla. 1979).
There would be no crazy quilt of rules as now exists in the area of search and seizure law. Some might fear that such a harsh exclusionary rule would produce results that would eventually force legislatures and courts to retrench and adopt more lax requirements for searches and seizures in an effort to ease the burden on law enforcement. However, since empirical data reveals that the exclusionary rule has only a marginal cost to society in terms of cases lost or guilty defendants set free, this fear is unfounded. In

Unfortunately, after a general election in 1982, the Florida exclusionary rule was amended to read: "Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution." FLA. CONST. art. I, § 12 (1982). By its references to the fourth amendment and to the Supreme Court, this amendment effectively strips the Florida exclusionary rule of its restrictiveness and signals the erosion of the state courts' powers to rule on independent state grounds.

78. Using empirical data is always a dangerous game. Statistics can be manipulated to support any proposition. It is virtually impossible to isolate the impact of a stimulus upon society. The debate over the deterrent value of the exclusionary rule must be viewed with this caveat.

The leading studies alleging the exclusionary rule's lack of benefits focus on the prevalence of illegal searches and seizures ever since adoption of the rule. The hypothesis behind these studies was that, if the rule deterred, police misconduct would necessarily decrease. The empirical mechanism used to measure the frequency of police misconduct was the number of motions to suppress filed by defendants. If the exclusionary rule deters, illegal searches and seizures should decline, and motions to suppress should decrease. These studies reported a substantial increase in motions to suppress and concluded that the exclusionary rule was ineffective. See Oaks, supra note 1, at 681-89; Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. LEGAL STUD. 243, 246-47 (1973).

Another statistic cited by opponents of exclusion is that the nationwide crime rate rose exponentially after adoption of the rule. Critics attribute this increase in crime to the restrictions the Supreme Court has placed on police enforcement. See, e.g., W. PARKER, POLICE 120 (1957); Inbau, Public Safety v. Individual Civil Liberties: The Prosecutor's Stand, 53 J. CRIM. L. & CRIMINOLOGY 85 (1962). Such restrictions are epitomized in their view by the exclusionary sanction. It was postulated that, as criminals learned of the new safeguards, the acceleration in crime was a natural result. See W. PARKER, supra, at 120. One problem with this conclusion is that there is great disparity in the methods of crime reporting among the states. There are also too many factors affecting the occurrence of crime to make this conclusion valid. Even more telling evidence denouncing the attribution of a rise in crime to the exclusionary rule is that, prior to Mapp, the crime rate in jurisdictions that allowed illegal evidence to be admitted rose nearly 66% in the decades before 1960. See Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. CRIM. L. & CRIMINOLOGY 171, 185 (1962).

The methodology and design of these early studies by Oaks and Spiotto are highly flawed. First, they draw conclusions from too small a sample. They also make the erroneous assumption that the behavior studied (illegal search and seizure) would change or disappear immediately after introduction of the stimulus (the exclusionary rule). Due to the
light of these data, the government would have no legitimate cause to limit search and seizure rules.

Public opinion almost certainly will make passage of a statu-
tenuous communication and control mechanism between the Supreme Court and law enforcement agencies, all that could reasonably be expected was a slow change. See Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and A Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 698-700 (1974); Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 Judicature 398 (1979). For a discussion of the shortcomings of Spiotto's research, see Critique, *On The Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 Nw. U.L. REV. 740 (1974). This critique argues that police recidivism in violating the law of search and seizure fails to show that the exclusionary rule is not a deterrent. It notes that Spiotto failed to measure police recidivism prior to the rule. If the recidivism rate was higher before the rule, then the rule would prove an effective deterrent. *Id.* at 745-46.

After these early studies, it became clear that a substantial level of police noncompliance with the fourth amendment was the norm. It was therefore impossible to blame the rule for such a state of affairs. Measuring compliance with the fourth amendment thus offered the only alternative to test the rule's efficacy. Difficulties in gauging compliance (i.e., police not conducting illegal searches) shifted the focus of empirical studies to the societal cost of exclusion. *See id.* at 747-48.

Judicial decisions and public perception have defined the cost of the exclusionary rule as the release of guilty defendants and the excessive hindrance of law enforcement. The majority of empirical research, however, reveals that exclusion has marginal costs upon the administration of justice.

A 1979 study by the General Accounting Office concluded that in only 0.4% of all cases declined for prosecution by the United States Attorneys Offices were fourth amendment violations listed as the cause. *See Comptroller General, U.S. Gen. Acct. Off., Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (1979) (Rep. No. GGD-79-45); *see also National Inst. of Just., U.S. Dep't of Just., The Effects of the Exclusionary Rule: A Study in California* (1982) (state declined prosecution in only 4.8% of its felony cases due to fourth amendment violations). *But see Davies, A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 617-19 (claiming that National Institute of Justice study was "misleading and exaggerated" because data actually revealed prosecutors reject only 0.8% of felony arrests because of illegal searches).

tory exclusionary mandate difficult. However, through the spread of information and the observed benefits of such a rule, public fears could be allayed. The gravity of a statutory exclusionary rule and its perceived costs would necessarily create a greater incentive for law enforcement agencies to avoid its consequences by adhering to the fourth amendment. Such a per se application of the rule would create a general deterrent. This would preserve the fourth amendment's guarantees and redress the wrongs forced upon individual defendants. A general deterrent would also result in improved officer education and training, ultimately resulting in better performance. Better performance translates into greater police respect for individual rights. With the emergence of a police force that places individual rights above illegal arrests and convictions, society would be improved. Inevitably, the need for an exclusionary rule could conceivably wither away as search and seizure violations become the exception rather than the rule.

B. An Exclusionary Rule on Independent State Grounds

In view of the recent Supreme Court trend restricting the application of the exclusionary sanction, state courts should apply the exclusionary rule, with few exceptions, upon independent state grounds. This proposal for state court action is offered as an alternative method for revitalizing the exclusionary remedy in lieu of the refusal of state legislatures to enact statutory exclusionary rules. A state court could go beyond the federal floor of protection by deciding that a criminal defendant's underlying rights have been violated under the state's constitutional or statutory provision against illegal searches and seizures. The decision to then apply the exclusionary remedy, even where the Supreme Court would not, would thus be based upon an independent state ground, and Supreme Court review would be barred. The difficulty with this approach is that state courts commonly interpret state constitutional protections in the same manner the Supreme Court defines the analogous federal rights. "[S]tate cases going beyond the federal floor remain the exception rather than the rule."79


Statutory authority for the Supreme Court to review the decisions of state courts involv-
Because the Supreme Court uses deterrence as its sole criterion for resolving whether or not to apply the exclusionary rule, a state court should employ its own reasoning: "[To] the extent that the Court's analyses and conclusions rest upon no more than such speculative guesses [about deterrence] concerning critical matters [such as individual liberty], state tribunals should find in the Court's jurisprudence no relief from the state court's obligations to address the matters de novo." 80

The application of a stricter exclusionary standard by state courts would have a much greater likelihood of success. Once the highest court of each state adopts such a rule, the lower courts are bound to effectuate it. Because courts are less publicly accountable than are legislatures, the protest from the private sector is likely to be less profound.

The benefits flowing from state courts' application of a stricter exclusionary rule are similar to those associated with the statutory rule. The general deterrent effect emanating from such a policy would insure that officers and magistrates take care to assess technical accuracy in each stage of the criminal investigation. Strict application of the rule might not compensate innocent victims 81 for the wrongs visited upon them, but it would reduce

80. Dix, supra note 79, at 129.
81. Innocent victims also have recourse to other compensatory avenues, access to
the likelihood of such invasions happening again. Also, by concentrating their focus on the sole issue of whether or not there was an actual fourth amendment violation, the courts would be better guardians of constitutional rights.

C. A Survey of State Cases

To better place this theoretical discussion in a more factual framework, this Comment will now briefly examine how some states have actually responded to the Supreme Court's evisceration of the exclusionary rule. Implicit in this survey is the belief that, although such state court decisions do not represent a majority, they constitute a step in the right direction.

The New York Constitution extends to the people the right to be free from unreasonable searches and seizures. This state-created right is analogous to the fourth amendment of the United States Constitution. Unfortunately, because of this equivalence between state and federal constitutional provisions, the courts in New York have succumbed to the temptation of regarding "Supreme Court analyses and outcomes [in search and seizure cases] as at least presumptively appropriate." This has led to the parallel development and application of New York's exclusionary rule. New York courts have even accepted the Supreme Court's deterrence rationale as the sole criterion for resolving particular exclusionary issues.

In order to have standing to challenge the constitutionality of a search or seizure in New York, a defendant must have a reasonable expectation of privacy in the premises searched. This standing requirement is identical to that announced by the Supreme Court in Rakas v. Illinois. Where New York has failed, however,
other states have succeeded in providing more lenient standing requirements. For example, in State v. Culotta, Louisiana expanded its standing requirement to allow for vicarious assertions from third parties harmed by police misconduct. Thus, those whose rights have not been immediately violated can still challenge the constitutionality of a search or seizure under the state’s constitution.

In possessory cases, where automatic standing is no longer proffered by the Supreme Court, New York has chosen to follow suit. In an effort to insure a more effective check on law enforcement procedures, some states have reestablished automatic standing on state grounds. By so doing, these states are enabling more persons to challenge police action and are successfully affording greater protection to the right of privacy. They are also establishing an incentive for police to use legal means in obtaining evidence.

New York recognizes the Supreme Court’s “fruits of the poisonous tree” doctrine, which makes all derivative evidence inadmissible if the original evidence was found through illegal means. Regrettably, New York has also thought it prudent to adopt the three exceptions to the doctrine whereby, if there is a

87. 343 So. 2d 977 (La. 1976); see also Kaplan v. Superior Court, 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971) (en banc) (criminal objection to illegally seized third party evidence not vacated by section 351 of California evidence rules).

88. See Culotta, 343 So. 2d at 981-82 (vicarious standing allowed under art. I § 5 of the Louisiana Constitution); see also People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (evidence obtained in violation of rights of third party ruled inadmissible). See generally A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 102.2 (1975) (advocating vicarious standing if evidence is seized from third party who is in fiduciary relationship with moving party).

89. See supra text accompanying notes 32-34.


92. See supra text accompanying notes 37-39.


94. See supra text accompanying notes 40-54; see, e.g., People v. Arnau, 58 N.Y.2d 27, 444 N.E.2d 13, 457 N.Y.S.2d 763 (1982) (application of independent source exception); People v. Pacifico, 95 A.D.2d 215, 465 N.Y.S.2d 718 (1st Dep't 1983) (application of inevitable discovery or inadvertent discovery exception); People v. Figeuroa, 122 Misc. 2d 631,
tenuous causal connection between the illegal police action and the subsequent seizure of evidence, the evidence is not subject to the per se rule of exclusion due to the dissipation of the primary taint. While the majority of jurisdictions have acquiesced and allowed for the continued use of illegal evidence, this does not rule out a more restrictive grant of such exceptions on state grounds.\(^{95}\)

It is essential that the states reverse the trend presently destroying the fourth amendment and the exclusionary rule. One way to initiate this revolt is by barring the use of all illegally obtained evidence in collateral proceedings. New York has chosen to diverge from the federal pattern of increasingly allowing such use, as evidenced by its willingness to apply the exclusionary sanction to administrative,\(^ {96}\) as well as civil,\(^ {97}\) proceedings. This extension of the rule to other hearings provides greater protection for the privacy rights of individuals through a stricter application, which thereby evokes a more general deterrent.\(^ {98}\)

\(^{471}\) N.Y.S.2d 986 (Sup. Ct. 1984) (application of attenuation exception).

\(^{95}\) See, e.g., City of Rolling Meadows v. Kohlberg, 83 Ill. App. 3d 10, 403 N.E.2d 1040 (1980). Kohlberg was charged with violating the city's obscenity ordinance by exhibiting an allegedly obscene film. The film was seized by police officers pursuant to a warrant obtained with perjurious statements. The defendant's motion to suppress the evidence was granted, the film was returned, and the city's motion to produce the film at trial was denied. The prosecution demanded the production of the film by arguing that the illegality of the initial seizure was irrelevant due to the fact the police had an independent source. The police officers involved in the seizure had paid admission and viewed the film prior to its seizure and thus had an independent source for probable cause and the subsequent seizure. The court rejected this line of reasoning. But see State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (1984) (en banc). In Bolt, the Arizona court accepted the independent source exception upon state and not federal grounds. What appeared to be a move toward greater state independence proved to be for naught, however, as the court refused to exclude the evidence in the case for the sake of uniformity with the federal rule of exclusion. The court reasoned that because there was no suitable alternative against police nonobservance of the state constitutional requirement for reasonable searches and seizures, it would be best to follow the federal rule. Id. at 268-69, 689 P.2d at 527-28.


\(^{97}\) See, e.g., Ryan v. Manhattan and Bronx Surface Transit Operating Auth., 120 Misc. 2d 524, 466 N.Y.S.2d 879 (Sup. Ct. 1983) (evidence illegally or unconstitutionally seized for purpose of criminal investigation may not be used in subsequent civil proceeding).

\(^{98}\) In People v. Belleci, 24 Cal. 3d 879, 598 P.2d 473, 157 Cal. Rptr. 503 (1979), the court held that illegally obtained evidence that had been excluded from a previous trial could not be admitted against the defendant at any trial or other hearing. The court ruled that the evidence of the defendant's drug possession could not be used against him at his sentencing proceeding because it fell within the meaning of "hearing" as found in the penal code. See id. at 883, 598 P.2d at 476, 157 Cal. Rptr. at 506; CAL PENAL CODE §
Perhaps the most obvious way a state can show opposition to the Supreme Court's utter disregard for criminal procedural rights is by rejecting the good-faith exception to the exclusionary rule. To date, New York, New Jersey, Massachusetts, and Mississippi have refused to adopt the exception—it being repugnant to their state constitutions.

While expanding the scope of the exclusionary rule on state grounds is the most effective means of assuring compliance with the strictures of the fourth amendment, constraining the definition of what constitutes a reasonable search or seizure is also a valid, desirable technique.

Another opportunity for state courts to reject federal precedent and extend the scope of the exclusionary rule is in the area of searches and seizures by private individuals. While New York has refused to do so, see, e.g., People v. Gleeson, 36 N.Y.2d 462, 330 N.E.2d 72, 369 N.Y.S.2d 113 (1975), other states have held that evidence seized by a private citizen in violation of another's constitutional right is inadmissible. See People v. Zelinski, 24 Cal. 3d 257, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979) (exclusionary rule applied to illegal seizure by private security guard); State v. Nelson, 354 So. 2d 540 (La. 1978) (intrusive search by private individual acting under statutory authority to use reasonable force to detain held unconstitutional).

99. See supra text accompanying notes 64-71. Because the good-faith exception to the exclusionary rule is the Court's most obvious condemnation of the rule as a remedy for fourth amendment wrongs, any state which refuses to adopt this exception would be playing a major role in reversing the slow death accelerated by the Court's endorsement of the exception.


The decision in Leon represents a serious curtailment of the Fourth Amendment rights of the individual. . . . The admission of [illegally obtained] evidence would not only violate N.J. Const. (1947), Art. I, ¶ 7, but would violate the integrity of the court and the State's long tradition of providing a meaningful remedy to redress constitutional violations.

Id. at 244, 491 A.2d at 46; see also Stringer v. State, 491 So. 2d 837, 841-51 (Miss. 1986) (Robertson, J., concurring) (arguing that probable cause requirements should be taken seriously and that good-faith exception would amount to abandonment of exclusionary rule without equally effective alternative). "The fundamental error in Leon is its failure to perceive that its new 'insight'—that, in the type of cases we are concerned with, it is the issuing magistrate who violates the accused's Fourth Amendment rights, not the police officer—suggests a greater need for the exclusionary rule, not a lesser one." Id. at 849; see also People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985) (rejecting the good-faith exception in New York); Commonwealth v. Sheppard, 394 Mass. 381, 476 N.E.2d 541 (1985) (rejecting the good-faith exception in Massachusetts).

101. One device to insure more protection of individual rights is for state courts to
bleness translates into less justification for police behavior and greater application of the exclusionary rule.

The states' tendencies to adhere to Supreme Court reasoning and dicta as highly relevant to, if not dispositive of, exclusionary issues have vast implications on criminal defendants' procedural rights. While uniformity in the criminal processes of the states is a

impose stricter warrant requirements. In Franks v. Delaware, 438 U.S. 154 (1978), the United States Supreme Court limited defendants' challenges to the veracity of search warrant affidavits by requiring them to prove that the statements made were either knowingly false or recklessly made without regard to truth or falsity. The Court forbade challenges when the misstatements were negligent and not intentional. If intentional and deliberate lies are found, that portion of the affidavit containing such lies would be excised and the remainder used to test for probable cause. If the altered affidavit supported a finding of probable cause, the search would be valid and the evidence seized would be admissible. In People v. Cook, 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978), the California Supreme Court held that even negligent mistakes in a search warrant affidavit should be excised. If intentional falsehoods exist, the entire affidavit is presumed false, the warrant is quashed, and the evidence excluded. The court reasoned that such a harsh remedy is needed to remove the incentive for police perjury, as it noted that the present remedy of criminal prosecution of officers for perjury is not a viable alternative sanction. Unfortunately, this policy is no longer followed in California after the adoption of Article I, section 28(d) of the California Constitution. The remove and retest standard of Franks is now followed. See People v. Truer, 168 Cal. App. 3d 437, 441-43, 214 Cal. Rptr. 869, 871-73 (1985). However, other states have refused to resort to such a feeble policy of excision and quash search warrants based on intentional or reckless misrepresentations by the police. See, e.g., State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974) (permitting defendant to inquire into truth of representations on which search warrant issued upon preliminary showing police intentionally made false or untrue statements); State v. Spero, 117 N.H. 199, 204-05, 371 A.2d 1155, 1158 (1977) (evidence obtained in execution of search warrant based on affidavit containing intentional or reckless misrepresentations by police officer suppressed); Commonwealth v. D'Angelo, 437 Pa. 331, 337, 263 A.2d 441, 444 (1970) (permitting police to exaggerate or to expand on facts given to magistrate merely for purpose of meeting probable cause requirement would preclude detached and objective determination).


In United States v. Robinson, 414 U.S. 218 (1973), the Supreme Court concluded that searches incident to arrest are reasonable per se. Several jurisdictions have curtailed this judicial fiat by holding that searches incident to arrest can be no broader in scope than is necessary under the circumstances. See, e.g., Zehrung v. State, 569 P.2d 189, 195-200 (Alaska 1977), modified on rehearing, 573 P.2d 858 (Alaska 1978); Reeves v. State, 599 P.2d 727 (Alaska 1979); People v. Maher, 17 Cal. 3d 196, 550 P.2d 1044, 130 Cal. Rptr. 508 (1976); People v. Brisendine, 23 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (en banc); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); People v. Clyne, 189 Colo. 412, 541 P.2d 71 (1975); State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982) (en banc).
desirable goal, the protection of the rights of the people against unreasonable searches and seizures is paramount.

IV. ALTERNATIVES TO EXCLUSION

The desirability of excluding relevant evidence as a remedy for fourth amendment violations is seriously being questioned by today's Court. As a result, it is necessary to evaluate possible alternative remedies. Before the present rule can be discarded, the substitute remedy must be efficacious in insuring government compliance with fourth amendment proscriptions. In any event, there must be an effective mechanism in place to prevent the fourth amendment from being reduced to a mere "form of words."102

A. Other Remedies

The exclusionary rule is not the only remedy currently in use against illegal searches and seizures. However, as this Section will demonstrate, it is the only effective remedy and, therefore, it should be retained.

1. A Civil Tort Remedy. This alternative would provide the victim of an illegal search and seizure with a civil action for tort damages against a state or the federal government. Civil action against a state can be brought in either state or federal court pursuant to federal law.103 Action against the federal government can be brought directly under the fourth amendment.104 Tort actions can also be maintained against the particular officers responsible for the constitutional violation or against the government law enforcement agency employing them.

In form, the civil remedy appears to overcome one of the strongest criticisms lodged against the exclusionary rule, namely, that exclusion benefits the person actually incriminated by illegally obtained evidence but does nothing to rectify the injuries inflicted upon innocent victims.105 In substance, however, while

102. Stewart, supra note 5, at 1385 (citing Mapp v. Ohio, 367 U.S. 643, 648 (1961) and Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).
105. See Oaks, supra note 1, at 736. Innocent victims are those who have suffered
the civil remedy is a necessary supplement, it is not a viable alternative to exclusion. In many states, conviction is either a complete defense to a claim of false arrest and illegal search and seizure or a full suspension of a defendant's civil right to sue. Thus, the government is allowed to use illegally seized evidence against defendants to secure their convictions and, in the process, to deny them access to any compensatory remedy.

In states where conviction is not a bar to civil action, or when defendants are acquitted despite the admission of illegal evidence, the civil remedy still has serious shortcomings. Juries are unwilling to award any significant amount of damages to the criminal or noncriminal plaintiff because they are inclined to believe the testimony of police officers. Another weakness in this remedy is that police officers who are found to have acted in good faith are immune from paying damages. Such actions against police officers, if strictly enforced with liberal awards, would serve as a specific deterrent against future violations. However, where liability is so meagerly distributed and awards so insignificant, the civil tort remedy is not a desirable sanction.

Similarly insufficient are the damage actions that can be brought against the government law enforcement agencies employing the officers who violate the fourth amendment. Liability for such agencies will only be found where the constitutional invasion results from a policy of the agency. This approach focuses from police intrusion in the form of illegal seizures without being involved in any criminal activity. Such intrusions stem from police efforts to attain derivative evidence against a suspect or can result from technical errors in the warrant. Innocent victims receive no redress from the exclusionary rule because they are never brought to trial and thus have no need to have evidence excluded.

107. See supra note 5, at 1387.
108. Id.
109. The Utah state legislature has passed the Fourth Amendment Enforcement Act of 1982. This act supplants the exclusionary rule as the sole remedy for fourth amendment violations; it allows for the imposition of civil liability upon government entities and law enforcement officers for most fourth amendment violations. Officers and their employing agencies are jointly and severally liable for damages if the violation is negligent. The officer alone is liable if the "violation [is] substantial, grossly negligent, willful, or malicious . . . unless the violation [is] the result of a general order of the agency." Utah Code Ann. § 78-16-7 (1982) (quoted in Comment, Utah's Alternative to the Exclusionary Rule, 9 J. Contemp. L. 171, 184 (1983) (authored by M. Gale Lemmon)).
110. See Polk County v. Dodson, 454 U.S. 312 (1981) (policy of state agency must give
on illegal law enforcement techniques endorsed by the agency. By so limiting agency liability for the wrongs of its employees, the courts have lost touch with the notion of individual rights.

2. Criminal Prosecution. A second alternative to the exclusionary rule is prosecuting violators of the fourth amendment in criminal courts. To be subjected to the criminal process, police officers must willfully violate the fourth amendment. Thus, this remedy is only enforced against those officers whose conduct rises to the level of a statutory crime. This is a wholly inadequate substitute for the exclusionary rule because it fails to take into account negligent or reckless violations and would deter only a negligible portion of a broad range of illegal conduct by police. Furthermore, this sanction against bad-faith violators is weakened by jury sentiment towards law officers, which results in an inordinately small number of prosecutions.

Criminal prosecution of officers does have certain advantages to exclusion in that it is free from some of the criticism typically associated with the exclusionary sanction. One commentator has argued that the exclusionary rule forces false testimony by the police in order to prevent suppression; that it vests in the police the power to immunize a criminal from prosecution through deliberate violation of the fourth amendment; and that it leads to increased police harassment and aggression because of their need to compensate for the stringency of the rule. While these criticisms appear quite grave, they are best directed towards our criminal justice system and law enforcement personnel. Criminal prosecutions of officers as a substitute for the exclusionary rule would rise to constitutional violation: Rizzo v. Goode, 423 U.S. 362 (1976) (action for federal injunction).

113. See Comment, supra note 106, at 677.
114. Officers will sometimes twist the facts about the circumstances of arrest, search, and seizure in order to prevent suppression of evidence and the release of a person they know is guilty. Oaks, supra note 1, at 739-42.
115. It is feared that application of the exclusionary rule to evidence that is essential to the prosecution will lead to conscious illegal arrests or seizures by "crooked" officers who wish either to grant immunity to a criminal or to seize contraband. Id. at 749-50.
116. The concern is that police frustration at being required to follow Mapp may lead police to become too aggressive or to initiate early arrests so that a search incident to arrest can be made and the evidence seized. This could lead to charges of police harassment. Id. at 750-52.
be free from the above criticisms because each involves an intentional fourth amendment violation that could easily be handled by a criminal court. However true this might be, criminal prosecutions falter in that they fail to redress the wrongs suffered by the victims of police misconduct. Once the product of the police infraction is admitted into evidence in a criminal trial, the harm done to the defendant is fully accomplished—and cannot be compensated for by the subsequent prosecution of the violator. The same holds true for the noncriminal victims: their fourth amendment rights remain abridged regardless of subsequent criminal prosecution.

3. Administrative Sanctions. A third alternative to the exclusionary rule is for law enforcement agencies to pay closer heed to internal discipline. This would entail the application of punitive sanctions for misconduct and would encourage the increased training of officers on fourth amendment rights and procedures. The problem with this alternative is departmental reluctance to impose sanctions for any but the most flagrant violations of constitutional rights. These sanctions "do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice. For those violations . . . [t]here is only one such remedy—the exclusion of illegally obtained evidence."[118]

B. In Defense of Exclusion

Establishing the absence of any deterrent effect or remedial impact in the existing alternatives does not itself establish the value of the exclusionary rule. "That there is no alternative cure for cancer does not prove the effectiveness of treatment by the 'expressed juice of the woolly-headed thistle.' "[119]

One of the most ardent criticisms of the exclusionary rule is that it "serve[s] neither to protect the victim nor to punish the offender but rather to compensate the guilty victim by acquittal

117. Officials are often reluctant to impose disciplinary sanctions against police officers who commit minor or good faith violations of the fourth amendment, in order to prevent creation of poor morale and to avoid interference with performance in the field. Comment, supra note 106, at 676.
118. Stewart, supra note 5, at 1389.
and to punish the public by unloosing the criminal in their midst . . . ."120 This criticism seems persuasive, yet it only demonstrates that the rule is not completely sufficient; it does not address whether or not the rule is necessary.121 Moreover, this charge is refuted by empirical evidence, which shows that very rarely does the rule have an adverse impact on the outcome of criminal prosecutions by suppressing evidence122—evidence that, it should be remembered, would never have been found in the first place had the fourth amendment been complied with. Therefore, this criticism, no matter how misguided, is best reserved for the fourth amendment itself, rather than its remedy.123

A frequent argument by opponents of the exclusionary rule is that the educational and disciplinary effect of excluding relevant evidence is so indirect as to be, at best, mild. Once evidence is submitted to the district attorney, the argument goes, the individual officer considers his or her job completed. With this lack of concern for the technicalities of prosecution, subsequent knowledge that evidence was suppressed will have a minimal effect on police behavior.124 Put another way, the exclusionary rule is not a specific deterrent against fourth amendment violations.

Empirical studies on the effects of exclusion have proved inconclusive with regard to its value as a specific deterrent. However, most studies unequivocally show a general deterrent impact.125 The byproduct of the exclusionary rule is tighter government control over the search and seizure policies of law enforcement units.126 The deterrence "straw person" set up to extinguish the exclusionary rule goes up in flames when confronted with empirical data exonerating exclusion as a successful

---

120. Id. at 736 (quoting 8 Wigmore on Evidence § 2184, at 51-52 (McNaughton ed. 1961)).
121. See Stewart, supra note 5, at 1396.
122. See id. at 1394.
123. Id.
124. See Wright, Must the Criminal Go Free if the Constable Blunders?, 50 Tex. L. Rev. 736, 740 (1972).
125. See supra note 78.
126. In the four years subsequent to the Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961), the FBI intensified training in the area of search and seizure. They have held over 600 schools for state and local police officers on that subject and published a training document entitled "The Federal Law on Search and Seizure." See Edwards, Law Enforcement Training in the United States, 3 Am. Crim. L.Q. 89, 90 (1965).
The recent debate over the exclusionary rule's effectiveness as a deterrent has, unfortunately, forced a shift in focus that is opposed to reason. The rule initially surfaced as a response to police overzealousness. With the failure of the search warrant requirement to provide adequate fourth amendment protection to individuals, a rule mandating exclusion is essential. The exclusionary sanction prevents conviction of defendants through illegal means. It preserves governmental and judicial integrity by refusing to allow the state to take on the guise of a criminal for the sake of conviction. As Justice Brandeis eloquently asserted in his dissent in *Olmstead v. United States*:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

127. The Supreme Court's imposition of deterrence as the sole peg on which to hang the exclusionary rule was a "straw person." See *supra* notes 11-14 and accompanying text. For further support of this conviction, it should be noted that, prior to *Wolf v. Colorado*, 338 U.S. 25 (1949), there was no judicial mention of the exclusionary rule as a remedy. Nor was there any attempt to discern the effectiveness of exclusion vis-a-vis other remedies. Most telling is the fact that there was no language in any case prior to *Wolf* expressly mentioning the notion of deterrence. See Kamisar, *supra* note 62, at 598; Cann & Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 How. L.J. 299, 302-07 (1980); McKay, Mapp v. Ohio, *The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327, 330 (1973).

128. See Kamisar, *supra* note 62, at 569-70. The search warrant requirement fails to provide adequate protection because the exceptions to the rule that warrantless searches are per se unreasonable are "neither well-delineated nor few." *Id.* at 569. Therefore, the only meaningful opportunity to decide the illegality of a search or seizure is after the fact. *Id.* at 570.

129. 277 U.S. 438 (1928).

130. *Id.* at 485 (Brandeis, J., dissenting). Justice Holmes echoed this sentiment when he wrote:

> It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the
Implicit in this concern for the lawful administration of justice is the notion that our legal system is based on righting past wrongs. In light of this premise, the exclusionary rule serves the necessary function of compensating victims of government lawlessness.

Therefore, if the government invades an individual's privacy, exclusion of any evidence obtained as a result is not only appropriate but constitutionally required, not because exclusion might deter future wrongs, but because it is the only approach that can fairly and appropriately rectify the wrong accomplished. Deterrence of future violations may be a byproduct of exclusion of illegally obtained evidence, but it is not the goal.\textsuperscript{131}

V. SUMMARY AND CONCLUSION

The Supreme Court introduced the exclusionary rule in 1914 when it ruled that evidence seized by federal officers could not be used at trial if the manner in which it was obtained violated the fourth amendment.\textsuperscript{132} In 1961, in \textit{Mapp v. Ohio},\textsuperscript{133} the rule was extended to the states as a necessary constitutional remedy implicit in the fourth amendment's guarantees. Subsequent Court decisions have refused to find the rule constitutionally mandated and have instead characterized it as a judicially created sanction that has deterrence of police misconduct as its sole function.\textsuperscript{134} As a result of this reclassification, the Court has been able to make its numerous modifications and exceptions appear inevitable and logically compelled. Consequently, there is no real protective mechanism against fourth amendment violations, thus rendering the amendment meaningless.

If the fourth amendment is to remain viable, it is imperative that the individual states provide more protections against illegal

---


\textsuperscript{132} Weeks v. United States, 232 U.S. 383 (1914).

\textsuperscript{133} 367 U.S. 643 (1961).

searches and seizures, through either a statutory exclusionary rule or through judicial rulings based upon independent state grounds. Applying the exclusionary rule with but few exceptions is the prescription for what ails the fourth amendment. It is often the most bitter medicine that proves the most effective.

Keith A. Fabi