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THE UNRULY EXCLUSIONARY RULE: HEEDING JUSTICE BLACKMUN'S CALL TO EXAMINE THE RULE IN LIGHT OF CHANGING JUDICIAL UNDERSTANDING ABOUT ITS EFFECTS OUTSIDE THE COURTROOM

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I. INTRODUCTION

There is a war raging in the hearts and minds of most Americans over the efficacy of the American Criminal Justice system. Americans are concerned with rising crime and they sense that the criminal justice system is not adequately protecting them from crime or criminals. If pressed to identify a focal point of criticism of the justice system, many would name the Exclusionary Rule. The Rule is popularly believed to exclude even the most damning evidence for the slightest police error. Whether it is due to the disproportionality of the Rule's operation, or the fact that it simply does not work as originally intended, the judicially crafted Exclusionary Rule is under fire.

Does it make sense that "the criminal is to go free because the constable has blundered?"¹ Does it make sense to exclude evidence gathered against an accused if the police have engaged in an unreasonable search and seizure? Is this the necessary price society must pay to ensure the integrity of the Fourth Amendment's protection against unreasonable search and seizure?

This article will take a hard look at the American Exclusionary Rule and will address several questions. First, what costs does the Rule impose upon the American criminal justice system and citizens' Fourth Amendment rights? Second, is the Rule accomplishing what it was originally intended to accomplish, specifically, the deterrence of future illegal police conduct? Third, does the Rule need to be re-designed, or even

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1. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926), *cert. denied*, 270 U.S. 657 (1926).

replaced, to better meet the competing demands of protecting Fourth Amendment rights and convicting criminals?

This article first looks at the Exclusionary Rule, beginning with its inception in *Weeks v. U.S.*² and *Mapp v. Ohio*,³ through its most current applications. From that vantage point, the benefits and costs of the Rule are examined in light of its goal of deterring future illegal police activity. Then, with an eye toward not succumbing to the ethnocentricity of the American experience, the article looks outside the United States and examines the rules established in other common law countries regarding admissibility of evidence obtained in violation of the laws of those countries. Finally, drawing from the avowed purpose of the Rule and from an international perspective, this article will offer proposals to the American justice system for a better method to accomplish its goal of deterring future illegal government conduct while avoiding the tremendous social, political, and economic costs attributed to the present Exclusionary Rule.

II. THE AMERICAN APPROACH TO THE EXCLUSIONARY RULE

A. *The American Exclusionary Rule*

Between 1791 and 1914, the constitutionally guaranteed right of all citizens to be secure against unreasonable searches and seizures remained virtually unenforced by American courts. The Fourth Amendment had the words that warned the government not to engage in unreasonable searches and seizures, but lacked any means to restrain government officials from violating citizens' Fourth Amendment rights. Not until 1914 in *Weeks v. United States*,⁴ did the U.S. Supreme Court recognize that if evidence can be illegally obtained "and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."⁵ Thus, the United States faced the problem that, while the Fourth Amendment guaranteed protection against unreasonable searches and seizures, the judicial system, as the primary protector of constitutional rights, did nothing to deter or punish unreasonable searches and seizures.

To give value to the Fourth Amendment protection against unreasonable searches and seizures, the U.S. Supreme Court, in *Weeks*, held that

2. 232 U.S. 383 (1914).

3. 367 U.S. 643 (1961).

4. 232 U.S. 383 (1914).

5. *Id.* at 393.

the Federal government and its agencies could not use illegally obtained evidence against the accused at trial. In other words, the Court established an exclusionary rule that illegally obtained evidence is inadmissible at trial and applied it only to the Federal courts.⁶ The Court propounded two central rationales for its adoption of the Exclusionary Rule. First, there was the need to protect citizens' Fourth Amendment rights by deterring government conduct that violated those rights.⁷ Second, there was the need to preserve the integrity of the judicial system by refusing to sanction illegal police conduct: "To sanction such proceedings [where illegally obtained evidence is admitted] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."⁸

While *Weeks* represented a significant development in enforcing Fourth Amendment rights, its limitation to federal courts greatly restricted the Rule's ability to enforce those rights.

Four decades later, in *Mapp v. Ohio*,⁹ three police officers invaded Dollree Mapp's home. The officers knocked on her door and demanded entry. They suspected that someone they wanted to question was hiding inside. Mapp consulted her lawyer and refused to admit the officers. Later that day, four or more officers arrived at the home, which was still under surveillance by the original officers. The officers then finally and forcibly entered Mapp's home. About that time, Mapp's lawyer arrived at the home but was not permitted to see his client or to enter her house. Confronting the officers in her home, Mapp demanded to see their search warrant. After Mapp grabbed the purported warrant and placed it in her bosom, the officers forcibly recovered it from her. Mapp's arms were grabbed, twisted, forced into handcuffs, and she was dragged to her bedroom where she was forced to remain. The officers searched the entire floor, including Mapp's bedroom and the basement of her home. The officers found incriminating obscene materials and she was convicted of possession. Whether the officers had secured a warrant to search Mapp's home was subject to "considerable doubt," and no such warrant was produced at any subsequent legal proceeding.¹⁰ Given the particularly egregious nature of the police misconduct, the Supreme Court felt compelled to bestow teeth to the Fourth Amendment by mak-

6. *Id.* at 398 (where said rule only applies to federal courts).

7. *Id.* at 393.

8. *Id.* at 394.

9. 367 U.S. 643.

10. *Id.* at 645.

ing the Exclusionary Rule, first enunciated in *Weeks*, applicable to the states.

In holding the Exclusionary Rule applicable to both state and federal courts, the *Mapp* Court decided to "close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct."¹¹ As in *Weeks*, the *Mapp* Court reiterated that without the Exclusionary Rule, the use of illegally obtained evidence to convict criminal defendants "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."¹²

Mapp reiterated the dual rationales enunciated in *Weeks*: protection of citizens' Fourth Amendment rights, and preservation of judicial integrity.¹³ These dual rationales actually comprise only one justification behind The Exclusionary Rule: the recognition that allowing unrestricted use of illegally obtained evidence will not discourage violation of the constitutionally protected right. It is evident that the true aim of the Exclusionary Rule is to deter future police violation of constitutionally protected rights. Specifically, excluding evidence illegally obtained will chasten the government official to the extent that he or she will not engage in similar conduct in the future. It is implicit that if the offending government official would not be deterred from future illegality, then application of the Rule would be inappropriate. Indeed, in a series of cases after *Mapp*, the Supreme Court held the Rule's application inappropriate where the exclusion would not deter future Fourth Amendment violations.

In *United States v. Calandra*,¹⁴ the Court declined to allow grand jury witnesses to refuse to answer questions based upon evidence illegally seized because the "incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best."¹⁵ In *United States v. Janis*,¹⁶ the Court permitted the use of evidence seized illegally by state officials in federal civil proceedings because the illegal conduct was not likely to be deterred by exclusion in that setting.¹⁷ The Court cited two factors which made exclusion unnec-

11. *Id.* at 654-55.

12. *Id.* at 660.

13. *Id.*

14. 414 U.S. 338 (1974).

15. *Id.* at 351.

16. 428 U.S. 433 (1976).

17. *Id.* at 454.

essary in the *Janis* case.¹⁸ First, since the evidence was suppressed in the state criminal trial, the officer had already been “punished” for violating the Fourth Amendment.¹⁹ Second, since the evidence was also excludable at the federal criminal trial, the entire criminal enforcement process, which was the concern and duty of these officers, would be frustrated by the exclusion of the evidence in both proceedings.²⁰ Thus, the Exclusionary Rule accomplished its intended goal of deterrence in the criminal courts, and any further possible deterrent effect that exclusion from federal civil proceedings might cause would be outweighed by the societal costs imposed by the exclusion.²¹ More recently, in *United States v. Leon*,²² the Court found the Rule’s application inapplicable when police officers reasonably relied on a search warrant.²³ Since the constitutional error in *Leon* was made by the magistrate in approving the search warrant, there was no police illegality and hence nothing to deter.²⁴ Furthermore, the Court held that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the Exclusionary Rule.²⁵ *Leon* is a powerful mandate holding that judges should not exclude evidence unless exclusion would deter future illegal police conduct.

Therefore, it is beyond dispute that the Exclusionary Rule, and the focus of modern Supreme Court opinions construing the Exclusionary Rule, is the preservation of our constitutional rights through the deterrence of future police misconduct that violates those rights.

B. *The Costs of the Exclusionary Rule*

Let there be no question that the costs of the Exclusionary Rule are high. The costs run the gamut, from lost prosecutions, to public hostility directed at the entire criminal justice system, to monetary burdens due to the increased cost of litigation, to occasional police coverups for their misconduct, and finally to the prostituting impact the Rule has on the Fourth Amendment.

18. *Id.* at 448.

19. *Id.*

20. *Id.*

21. *Id.* at 454.

22. 468 U.S. 897 (1984).

23. *Id.*

24. *Id.* at 920-21.

25. *Id.* at 918.

1. Lost or Inefficient Prosecution

Operation of the Exclusionary Rule bestows an unwarranted and undesirable benefit upon persons engaged in allegedly criminal activity. One jurist, commenting upon the "perversity"²⁶ of the Exclusionary Rule because it punishes vigorous police work while it frees criminals, allowing them to continue their criminal activity, wrote:

It has been reported that since 1961, when [*Mapp* was decided,] . . . "the murder rate has doubled, rape has quadrupled and robbery has quintupled." While it would be foolish to blame the exclusionary rule [sic] for all of this alarming increase in violent crime, I believe it is equally foolish to pretend that the exclusionary rule, and the *zeitgeist* it has created, is to blame for none of it.²⁷

Although reliable empirical data concerning the effects of the Exclusionary Rule is sparse, a 1971 study by the General Accounting Office indicates that suppression motions based upon the Exclusionary Rule are filed in 10.5% of federal criminal cases, and that between 80 and 90% of those motions are denied.²⁸ The study further shows that the successfully excluded evidence under the Rule resulted in dismissals or acquittals in only about half of those cases.²⁹ Only 0.7% of federal criminal defendants are being freed as a result of the application of the Exclusionary Rule.³⁰ This statistic may lead one to conclude that the "cost" of the Exclusionary Rule, in terms of criminals going free, is not high. However, such a conclusion ignores the hidden costs of the Exclusionary Rule.

In addition to the 0.7% of all defendants who receive the ultimate windfall from the Exclusionary Rule, many more defendants receive less substantial but still significant benefits from the Exclusionary Rule. If eighty to ninety percent of all suppression motions are denied, there is a strong indication that too many meritless motions are being filed. This phenomena is a result of the defendant's strategic use of the Exclusionary Rule. These strategies may include the use of the motion as a bargaining chip in plea bargaining or the use of the motion to wear down

26. *United States v. Jefferson*, 906 F.2d 346 (8th Cir. 1990)(Bowman, J., concurring).

27. *Id.* (quoting *Crack, Murder and Miranda*, WALL ST. J., May 7, 1990 at A14)[citations omitted].

28. U.S. Comptroller Gen., U.S. Acct. Off. Report to Congress. *Impact of the Exclusionary Rule on Federal Criminal Prosecutions*, 8, 10 (1979)[hereinafter GAO Study]. This study was based upon data from 42 United States Attorneys Offices. *Id.* at 1.

29. *Id.* at 9-11.

30. *Id.*

the prosecution team. Further, the filing of these motions is encouraged because the cost to the defendant of doing so is slight compared to the huge windfall benefit to be gained if the motion succeeds. This creates an incentive to file even a motion that is unlikely to succeed. Thus, criminal defendants without viable claims under the Exclusionary Rule may benefit from strategic options available as a result of the Rule's existence. This is certainly an unwanted and costly effect of the Exclusionary Rule.

Similarly, another hidden cost of the Exclusionary Rule is the loss of prosecutions before formal charges are even filed because the prosecuting agency knows that a criminal investigation is tainted by a Fourth Amendment violation. Although the GAO Study suggested that only .4% of federal criminal cases studied were declined for prosecution due to search and seizure problems,³¹ another study conducted by the National Institute of Justice found that 4.8% of all felony arrests were rejected for prosecution because of search problems.³² However, that study also revealed that one prosecuting agency, the Los Angeles District Attorney's Office, rejected 32.5% of all felony narcotics cases due to search problems.³³ While this lack of prosecution may prevent the expenditure of scarce resources on doomed prosecutions, the result is again that suspected criminals are freed without being charged or tried for any offense. Again, the defendant benefits from the Rule before it is even applied to any evidence.

While the general public may or may not be aware of these indirect benefits that the Exclusionary Rule provides for defendants, the public seems to be extremely aware that the Exclusionary Rule frees some criminals. Regardless of the actual statistics, the public perceives the exclusion of evidence in criminal trials as a regular occurrence.³⁴

2. Public Hostility Towards the Criminal Justice System.

Many Americans reject the idea that "the criminal is to go free because the constable has blundered."³⁵ Public hostility arises from more than the fact that the Rule impedes the process of punishing some guilty

31. GAO Study, *supra* note 27, at 1.

32. National Institute of Justice, U.S. Dep't of Justice, *The Effects of the Exclusionary Rule: A Study in California* 1 (1982).

33. *Id.* at 2.

34. See, e.g., Diane Camper, *A Rule Police Can Live With*, *NEWSWEEK*, June 4, 1979, at 86.

35. Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 67 U. COLO. L. REV. 75, 77 (1992) (quoting *People v. Defore*, 150 N.E. 585, 587 (1926)).

people. The disparity in particular cases between the police error committed and the windfall received by the alleged criminal is an affront to popular ideas of justice. The public perceives the Rule as a device used by cunning defense lawyers to suppress evidence no matter how slight the police error and no matter how crucial the evidence is to the conviction of a criminal the public thinks is guilty of heinous crimes. Yet, the primary reason for the high price of the Rule is that, by definition, it operates only after obtaining incriminating evidence. As a result, it flaunts the public costs for Fourth Amendment guarantees, and in the eyes of the public, it makes a mockery of the American justice system.

3. Monetary Burdens on the Criminal Justice System.

Perhaps a more significant cost of the Exclusionary Rule is the increase in litigation expenses directly attributable to the motions to suppress—that, as stated above, are filed in 10.5% of criminal trials and that, in many cases, may be meritless.³⁶ These motions are supported by costly briefs from both sides, and followed by the suppression hearing, which is usually a full-blown evidentiary hearing that is costly in terms of court time, attorney time, and witness time. For example, the highly publicized O.J. Simpson pre-trial suppression hearing cost about \$4,483 per day.³⁷ Furthermore, the exclusion or inclusion of evidence frequently becomes an appellate issue that further takes up court time with briefs and oral arguments on these evidentiary issues. Thus, in terms of attorney and court costs to the criminal justice systems, the motions are costly regardless of their ultimate success.

4. Illegal Police Activity to Cover-up Illegal Police Activity

Police officers have an incentive to commit perjury or, at a minimum, to carefully tailor the description of their investigative activities in order to uphold the legality of their searches and seizures. In particular departments, officers of the court have observed patterns of pervasive police perjury that are intended to avoid the requirements of the Fourth Amendment, and have noted that “[d]ishonesty occurs in both the investigative process and the courtroom.”³⁸ Furthermore, judges themselves

36. See *supra* note 28 and accompanying text.

37. Telephone Interview with the Public Affairs Office of the Administratively Unified Courts of Los Angeles County (July 25, 1994). This figure includes the prosecutor's, the Judge's, court clerk's, and court reporter's salary, along with maintenance and supplies. Where defense counsel is appointed rather than retained, the defense attorney's salary would be an additional cost.

38. Orfield, *supra* note 35, at 82-83.

have been observed to “knowingly accept police perjury as truthful” in order to avoid applying the Exclusionary Rule.³⁹ In one important study in the early 1960’s, research showed that

*prior to Mapp’s extension of the exclusionary rule to the states, police allegations frequently described suspect behavior that would not warrant a stop or search. In the year after Mapp, police suddenly began describing suspect conduct warranting a search. In particular, police started reporting suspects dropping narcotics to the ground as the police approached. Thus . . . the New York City police, in the wake of Mapp, began to perjure themselves on a large scale to avoid the requirements of the Fourth Amendment.*⁴⁰

At best, it is ironic that police officers, who are the mechanism through which citizens’ Fourth Amendment rights are either upheld or discarded, break the law and lie in order to allow their constitutional violations to go unanswered as a result of a rule that is designed to deter illegal police conduct. Clearly, a rule designed to deter future Fourth Amendment violations must not inspire police officers to commit other illegal acts in order to cover up Fourth Amendment violations.

5. The Prostituting Effect of the Exclusionary Rule on the Fourth Amendment

It is difficult to measure the Exclusionary Rule’s effect on Americans’ Fourth Amendment rights. Particularly in cases involving serious crimes, courts tend to strain the Fourth Amendment to avoid the suppression of reliable evidence. Not infrequently, this convoluted “logic” results in a court holding that suspect police conduct does not violate the Fourth Amendment, although logic and reason would suggest otherwise.⁴¹ For example, in *United States v. Dunn*,⁴² police officers entered the defendant’s property by crossing several fences, including two with barbed wire,⁴³ before reaching a barn on the defendant’s property. The

39. *Id.* at 83.

40. *Id.* at 97 (citing Comment, *The Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968); M. Ban, *Local Compliance with Mapp v. Ohio: The Power of the Supreme Court*, (1972 unpublished Ph.D. dissert., Harvard) (on file with the *University of Colorado Law Review*); Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959); Myron W. Orfield Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987)).

41. See George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 147 (1993).

42. 480 U.S. 294 (1987).

43. *Id.* at 297-98.

windowless barn had a six foot high door. An opening above the door was covered by a heavy mesh fabric that appeared opaque from a distance.⁴⁴ One officer crossed the fences, climbed upon the door, pressed his face into the mesh fabric, and saw a drug laboratory inside the barn.⁴⁵ The U.S. Supreme Court upheld the legality of the search, ruling that the officer's activity did not constitute a Fourth Amendment search because the defendant had not sufficiently manifested an expectation of privacy as to what was inside the barn.⁴⁶

The result of such interpretations of police conduct is a dilution of the individual rights guaranteed by the Fourth Amendment. While the courts are "saving" reliable evidence from suppression in individual cases, they are also chipping away at some of the protections provided by the Fourth Amendment. The effect on the individual case is short-lived, but the precedential effect of such decisions linger. After the *Dunn* decision, even extraordinary measures to exclude outsiders may not be viewed as sufficient manifestation of an expectation of privacy.⁴⁷ Thus, the Fourth Amendment may not apply to invasions of these areas. The narrowing of circumstances where an individual is said to manifest an expectation of privacy is a narrowing of the protections granted by the Fourth Amendment. This occurs because a police officer's invasion of an area to which an individual does not have a reasonable expectation of privacy does not constitute a search under the Fourth Amendment and, thus, the amendment's protections are inapplicable. It is ironic that constitutionally guaranteed rights may be reduced as a result of courts straining to avoid the rule they created to protect and enforce those very rights.

Regardless of one's view of the Exclusionary Rule, it must be clearly recognized that its costs are very dear indeed. Given its costs, attention must turn to whether the Rule even accomplishes its stated goal.

C. *Does the Exclusionary Rule Deter Police Misconduct?*

For the Exclusionary Rule to deter future police misconduct, the exclusion of the evidence must be communicated to the offending officer, the officer must learn why it was excluded, and he or she must be provided with some incentive to improve his or her future performance.

44. *Id.* at 298.

45. *Id.*

46. *Id.* at 300-03. The Court also found that the barn was not within the curtilage of the home and that the barn's contents were not protected from observation by those standing in open fields. *Id.* at 302-03.

47. *Id.* at 303-05.

Absent these steps, is there motivation for a police officer to conform his or her conduct to the dictates of the Fourth Amendment?

Deterrence from wrongful conduct will only occur if notice of that conduct is effectively communicated to the wrongdoer. However, despite this apparent common sense notion, the Exclusionary Rule contains no provision for any police "education." Indeed, whether the police officer who has violated a defendant's constitutional rights will ever learn that he or she has committed such a violation is, at best, uncertain.⁴⁸ For example, the most direct educational effect will be felt by those officers who attend the suppression hearing (perhaps because they must present evidence of their conduct) and actually hear the court's ruling on the motion. Even then, the basis of the ruling may not be clear to the officer, or she may feel that the result was the product of a misguided or even ill-conceived system, rather than the result of her misconduct. In any case, the offending officer often does not attend the suppression hearing, so no direct lesson is possible. Whether the police officer is made aware of his or her misconduct will then depend upon how effectively the prosecutor or police supervisors communicate with the involved officers. Thus any educational effect of the Exclusionary Rule is unpredictable and often left completely to chance.⁴⁹

An additional impediment to the educational aspect of deterrence of Fourth Amendment violations lies in the failure to file many potential prosecutions that result from constitutionally flawed investigations. A prosecutor, strongly believing that critical evidence is the product of illegal police activity, is not likely to even file the case. In these situations, whether the police officer learns that he or she illegally seized a piece of evidence will depend upon how well the prosecutor or police supervisor communicates with the offending officer. Again, any such communication is haphazard at best.

Prior to a case even reaching a prosecutor, as the Supreme Court observed, the Exclusionary Rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."⁵⁰ In other words, where police invade a citizen's Fourth Amendment rights, but do not prosecute that individual,

48. See Orfield, *supra* note 40, at 1046-49 (1987).

49. To be sure, some police departments do have policies that require violations to be brought to the offending officer(s) attention, but there is no such nationally mandated program. These programs are not in widespread national usage. See, e.g., Orfield, *supra* note 40, at 1046-49 (1987).

50. Terry v. Ohio, 392 U.S. 1, 14 (1968).

there is no outside review—such as by a prosecutor or judge—to inform the officer of the violation.

If the “educational” aspect of deterrence is too vague to reinforce the “right” and “wrong” ways to obtain evidence, among police officers, the “punitive” aspect of the Exclusionary Rule is even more questionable. This is because punishment for illegally obtaining evidence falls directly upon “the government” by forbidding the use of the illegally obtained evidence at trial. Such punishment does not fall upon the offending police officer and, subsequently, any punitive effect felt by the police officer will be fortuitous. The offending officer suffers no formal negative consequences for his or her illegal activity. To be sure, some police departments keep track of data involving illegal searches and seizures conducted by officers and may use the data in decisions concerning promotions, salary increases, and the like. In addition, officers who are found to have violated a defendant’s constitutional rights, and who are aware of this finding, may feel responsible for a failed prosecution, and may suffer from loss of stature in the eyes of their colleagues. But because the punitive effect of the Exclusionary Rule reaches the offending officers only indirectly, if at all, it seriously compromises the ability to deter police misconduct. A police officer who has violated a defendant’s rights is not held personally accountable for that violation. In fact, empirical studies support the view that the Rule has a minimal effect on the police officers’ on-the-street behavior. This is the ironic effect of the American Exclusionary Rule: In essence, the present rule lacks the power to deter, even though deterrence is the primary objective cited by the Supreme Court for implementing and then retaining the Exclusionary Rule.⁵¹

Alternatives to the Exclusionary Rule must be explored in view of the significant costs of the Exclusionary Rule and the serious questions with respect to whether the Rule even achieves its goal of deterring police misconduct.

III. INTERNATIONAL PERSPECTIVE

Any serious discussion of options in lieu of the present Rule should denude the ethnocentricity of the American experience and explore the treatment of tainted evidence in foreign jurisdictions. Indeed, problems of police misconduct and the admissibility of evidence derived from that misconduct are not exclusive to the American experience. Therefore in

51. See *supra* notes 13-14 and accompanying text.

examining alternatives and options this discussion examines the approaches taken in several other countries with judicial systems, like ours, based upon the Common Law.

A. *United Kingdom*

Since the United Kingdom does not have a written document proscribing violations of individual liberties—such as a Bill of Rights, the protection of citizens from illegal searches and seizures developed largely through judge-made rules. The English approach to illegally obtained evidence traditionally focused on courtroom procedures and maintenance of fair trial practices, rather than deterrence of police misconduct or the protection of individual liberties. English courts have struggled with the appropriate rules for maintaining civility in evidentiary searches and seizures while, at the same time, preserving the fairness of trials and the integrity of verdicts.⁵²

The bulk of evidence that English courts typically exclude is limited to involuntary confessions.⁵³ This follows from the premise of the English system that “[j]udges are not responsible for the bringing or abandonment of prosecutions and that save in the very rare situation . . . of an abuse of process of the court . . . the judge is concerned only with the conduct of the trial.”⁵⁴ Under this premise, involuntary confessions are excluded not because such evidence was unfairly obtained, but because “it is unfair to prosecute the accused” based on the involuntary confession.⁵⁵

However, there are circumstances under which other illegally obtained evidence is excluded by English courts. In *R v. Sang*,⁵⁶ it was held that the trial judge has the discretion to exclude evidence in a criminal trial, but only on a very limited basis.⁵⁷ Only evidence obtained *from* the accused *after* the commission of the crime may be excluded.⁵⁸ The judge should not consider the illegality of the police conduct, and in fact, the judge lacks discretion to exclude evidence based solely on that illegal-

52. See, generally, Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171.

53. Rosemary Pattenden, *The Exclusion of Unfairly Obtained Evidence in England, Canada and Australia*, 29 INT'L & COMP. L. Q. 664, 666 (1980).

54. *Id.* at 665 (quoting *Queen v. Sang*, 3 W.L.R. 263, 288 (1979)).

55. *Id.*

56. 1980 App. Cas. 402 (1980).

57. *Id.*

58. *Id.* at 437 (emphasis added). This type of evidence includes confessions and admissions, which, when obtained by illegal means, have little probative value due to their inherent unreliability.

ity.⁵⁹ The judge typically will exercise his or her discretion based upon the probative value of the evidence.⁶⁰ The judge will consider the probative weight of the evidence, balanced against any unfair prejudicial effect of that evidence. The judge has the discretion to exclude any evidence if the danger of unfair prejudice to the accused outweighs its probative value to the prosecution.

Following the *Sang* decision, Parliament codified evidentiary rules in criminal proceedings and promulgated the Police and Criminal Evidence Act of 1984 (PACE). Under PACE, judges have discretion to exclude evidence where any of the following grounds exist: where confessions are obtained "by oppression";⁶¹ where confessions are rendered "unreliable" by anything anyone says or does;⁶² where admission of evidence "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it";⁶³ and where pre-existing common law powers allowed the exclusion of evidence whose prejudicial effect outweighed its probative value.⁶⁴

One of PACE's significant departures from common law is that it "clearly direct[s] the judiciary to 'police the police.'" ⁶⁵ Previously, the English courts did not recognize deterrence of future illegal police conduct to be a goal of the country's limited exclusionary rules.⁶⁶ This change in English exclusionary policy has been attributed to the new authority given to the courts by PACE, as well as to the fact that since there is now a set of clear rules of permissible police conduct, the police can be expected to follow them.⁶⁷

The discretion given to British judges, requiring them to consider the probative weight of the evidence prior to ruling upon its admissibility, offers a distinct advantage over the American rule of *per se* exclusion: It avoids a result that is not proportional to the underlying wrong. Under the American Rule, the "smoking gun" may be excluded from a murder

59. *Id.* at 402. For example, evidence gained from an illegal search is not obtained from the accused and is, therefore, not within the judge's discretion to exclude.

60. Pattenden, *supra* note 53, at 666.

61. Police and Criminal Evidence Act 1984 at § 76(2) [hereinafter PACE].

62. *Id.*

63. *Id.* at § 78(1).

64. Bradley, *supra* note 52, at 190 (citing David Feldman, Regulating Treatment of Suspects in the Police Station: Judicial Interpretation of Detention Provisions in the Police Criminal Evidence Act 1984, 1990 CRIM. L. REV. 452 (1990)).

65. *Id.* at 187. For example, PACE includes confessions obtained "by oppression" as one of the grounds for exclusion of evidence. PACE, *supra* note 61, at § 76(2).

66. See Bradley, *supra* note 52, at 186.

67. *Id.* at 190 (citing Feldman, *supra* note 64, at 452).

trial, making conviction impossible, solely because a police officer has made a minor blunder with respect to Fourth Amendment law. Exclusion of such evidence in a proceeding involving a minor offense may seem like a satisfactory result. Similarly, exclusion of such evidence in a proceeding involving a serious offense may seem reasonable in light of truly egregious police misconduct. However, exclusion of highly probative evidence in a serious criminal case based upon a minor police error reveals one of the serious weaknesses in the American scheme: We lack the ability, unlike our British counterparts, to make the remedy proportional to the type of wrongful conduct involved and to the remedy's overall effect on the truth-finding process of the criminal justice system.

In addition to a judge's power to exclude evidence in order to deter future police misconduct, the English system provides disciplinary measures for police officers who do not comply with PACE (which sets forth a detailed and comprehensive code of conduct for police officers to follow when investigating a crime).⁶⁸ These measures include fines, pay cuts, undesirable transfers, and removal from the force.⁶⁹ Police can also be held liable as trespassers by victims of illegal police procedure.⁷⁰

Under English common law, the law of evidence is designed to assist the truth-finding process of a trial. The traditional—and probably still most substantial—purpose of the English exclusionary policy revolves around the integrity and legitimacy of the judicial process. However, it would seem that PACE has helped the English system to evolve into a system that no longer ignores illegal police activity.⁷¹ Another result of PACE is that England is undergoing a “criminal procedure revolution” at the hands of the Code's discretionary exclusionary law.⁷² It is strongly suggested that if by the English experience “the U.S. rules were clearly stated in statutory form, it would be possible to relax somewhat the mandatory exclusionary rule that has caused so much difficulty [in the U.S.]”⁷³

On the other hand, the English Codes of Practice (designed for police officers to follow during criminal investigations) and PACE (because of its incorporation of other statutory provisions) have been criticized as difficult to effectively follow and interpret because they are too com-

68. PACE, *supra* note 61, at § 67(8).

69. *Id.* See also Comment, Barry F. Shanks, *Comparative Analysis of the Exclusionary Rule and its Alternatives*, 52 TUL. L. REV. 648, 663 (1983).

70. Shanks, *supra* note 69, at 663.

71. Bradley, *supra* note 52, at 190.

72. *Id.*

73. *Id.*

plex.⁷⁴ The lesson to be gained is that while statutory delineation of police officer conduct and judicial discretion can aim to strike a more satisfactory balance between the rights of the criminal defendant and the public interest, an overly-complex scheme may be as unpredictable and difficult to administer as one that allows too much police or judicial discretion.⁷⁵

B. Canada

Canada's exclusionary policy developed similarly to England's. However, the Canadians broke from the English common law tradition with the advent of the Canadian Constitution in 1982.⁷⁶ Apparently influenced by the United States Constitution, the Canadian Charter of Rights and Freedoms (the Charter), provides that "everyone has the right to be secure against unreasonable search or seizure."⁷⁷

The Charter vests the courts with the discretion to exclude evidence that infringes upon its guaranteed fundamental rights.⁷⁸ Section 24 of the Charter states:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring administration of justice into disrepute.⁷⁹

74. *Id.* at 190-91.

75. *Id.*

76. Like England, the Canadian exclusionary rule evolved into a limited discretionary policy. The Canadian Supreme Court held in *Queen v. Wray* that a judge has limited discretion to exclude evidence "gravely prejudicial to the accused, the admissibility of which is tenuous and whose probative force in relation to the main issue before the court is trifling." *Queen v. Wray*, 11 D.L.R. 3d 673, 689-90 (Can. 1970). In *Wray*, the police obtained information concerning the whereabouts of a rifle after the accused made an involuntary confession. The Canadian Court went so far as to say that a judge does not have discretion to exclude unfairly obtained evidence. Thus, like the English court system, the emphasis is on fairness of the trial and not on the method of procuring evidence. *Wray* proves that the focus does not concern the accused, rather the court may only exclude evidence that has a high probability of unreliability. Regardless of the involuntary nature of the confession, the rifle itself was reliable and highly probative evidence. *Id.*

77. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter), § 8.

78. *Id.* at pt. I, § 24.

79. *Id.*

This guideline for the courts has resulted in a two-part test to determine whether to exclude the evidence. First, the court must determine if the evidence was obtained in a manner that violated the rights provided by the Constitution. Second, the court must determine whether admission of that evidence would bring disrepute to the administration of justice.⁸⁰ In *Queen v. Wray*,⁸¹ Canada's equivalent to *Mapp v. Ohio*,⁸² the Canadian Court held: "It is only the admission of evidence gravely prejudicial to the accused, the admissibility of which is tenuous and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly."⁸³ Thus, while the Constitution's language indicates that Canadian judges have the ability to potentially exclude a great deal of evidence, in practice the judge's discretion is exercised within tight parameters.⁸⁴

Similar to England's PACE Act, the Canadian Constitution directs judges to weigh all of the circumstances when making an exclusionary decision. The effects of the Canadian exclusionary rule on illegally obtained evidence are similar to those observed as result of England's rule: Generally, suspect testimonial or confessional evidence more likely violate the Constitution, while real—physical—evidence, because its *existence* does not depend upon a constitutional violation, retains a greater chance of admissibility.⁸⁵ In contrast to PACE, the Canadian Constitu-

80. See Scott C. Hutchinson & James C. Morton, *Search and Seizure Law in Canada* § 9(h)(119). The party that seeks to exclude the evidence has the burden of proving that both of these prongs are violated. See *Collins v. Queen*, 1 S.C.R. 265 (Can. 1987).

81. 11 D.L.R. 673.

82. 367 U.S. 643 (1961).

83. *Wray*, 11 D.L.R. at 689-90.

84. Shanks, *supra* note 69, at 663-65.

85. See *Collins v. Queen*, 1 S.C.R. 265, 284 (Can. 1987). In deciding whether real evidence is unfair to the accused or whether it will bring disrepute to the administration of justice, the Canadian Supreme Court has stated:

One factor to consider in assessing the fairness of a trial is whether an accused is forced to assist the Crown to build the case against himself or herself. The common law has recognized that it is up to the Crown to prove the case entirely, and that it is unfair to conscript accused persons against themselves. In this case, the appellant seeks to have real evidence excluded. The evidence was not created by the breach of a *Charter* right, nor was it found by forcing the appellant to participate in the illegal search or to identify the objects seized in the search. On the facts of this case, I do not think that the admission of the evidence would have an unfair effect on the trial.

Queen v. Genest, 1 S.C.R. 59, 83 (Can. 1989). It would seem that the court, after this case, would find that the evidence obtained in *Wray* would not pass constitutional muster because the accused helped the police with their search based on an involuntary confession.

In *Collins*, the court held that where real (physical) evidence is concerned, the exclusionary rule should "rarely" be applied. Bradley, *supra* note 52, at 199 (citing 38 D.L.R. 4th 508 (Can. 1987)).

tion expressly gives a court the right to exclude evidence for infringement of individual liberties if such an encroachment would have an ill effect on the judicial process. As a result, the Canadian system allows judges broader exclusionary discretion than that enjoyed by English judges.

Canadian policy generally views a criminal proceeding as independent and separate from the process of disciplining and deterring police misconduct. Hence, Canada employs alternative methods of criminal prosecution and civil tort liability to deter police misconduct.⁸⁶ These remedies are limited because, for example, if an officer acts in good faith, he or she will not be held liable regardless of the validity of the applicable warrant.⁸⁷ However, an officer will generally be held liable if he or she lacks good faith and improperly executes a warrant, or exceeds the authority stated on the face of the warrant.⁸⁸

In practice, matters such as search warrant requirements are spelled out in the Canadian codes.⁸⁹ As a result, the Canadian system can be viewed as a hybrid of the United States' almost entirely judge-made rules of criminal procedure and the primarily code driven system currently in place in England.⁹⁰ Such a hybrid, it has been observed, results in a unique system where "a code is the proper way to make rules . . . and that a discretionary, but frequently applied, exclusionary rule is the appropriate check on police misbehavior."⁹¹

Although the Canadian Exclusionary Rule appears to be closer to the American Exclusionary Rule than to the English approach, judicial discretion is more likely to lead to English-oriented results. The limits upon the judges' exercise of their discretion, as stated in *Wray*,⁹² make it very unlikely that crucial evidence will be excluded at trial. Additionally, unlike the United States, Canada does not rely upon its discretionary exclusionary rule to deter police misconduct. Instead, it relies upon independent civil or criminal proceedings, where the offending officer's state of mind is the central issue. The proceedings deter wrongful police conduct by holding officers personally liable for their wrongful conduct.

Canadian courts are strict when it comes to interrogation requirements, but more willing to admit illegally obtained physical evidence. *Id.* at 199-200.

86. Shanks, *supra* note 69, at 657.

87. *Id.*

88. *Id.*

89. Bradley, *supra* note 52, at 195-202.

90. *Id.*

91. *Id.* at 202-03.

92. See *supra* notes 84-87 and accompanying text.

C. Australia

Australia's exclusionary policy relies upon policy considerations similar to those of the United Kingdom and Canada. In *Bunning v. Cross*,⁹³ the seminal Australian exclusionary case, the Australian High Court held that a judge has the discretion to exclude improperly obtained evidence.⁹⁴ However, the Court rejected the English notion that a fair trial is the only consideration the court must heed in exercising its discretion. The *Bunning* Court held that "it is by reference to large matters of public policy rather than solely to considerations of fairness to the accused that the discretion here in question is to be exercised."⁹⁵ Furthermore, the Court provided that: "On the one hand there is the public need to bring to conviction those who commit criminal offenses. On the other hand, there is the public interest in the protection of the individual from unlawful and unfair treatment."⁹⁶

Pursuant to these broad policy goals, the *Bunning* Court laid down several factors for the trial court to employ when determining whether to exclude illegally obtained evidence. Five of these factors are as follows:

[F]irst, was there any deliberate disregard of the law by the police, or were they merely mistaken as to the proper extent of the law; second, did the nature of the illegality affect the cogency of the evidence; third, how easily could the law have been complied with by the police—was there a deliberate "cutting of corners"; fourth, what was the nature of the offense charged; and last, did the relevant legislation give any hints as to how strictly to control police powers?⁹⁷

The trial judge has broad discretion to decide whether the evidence should be admitted or excluded based on these factors.⁹⁸

93. 111 D.L.R. 673 (1990); 141 C.L.R. 54 (Austl. 1978). In *Bunning*, the police obtained a breath specimen from the accused without first performing a roadside test for intoxication. *Id.* at 57.

94. *Id.* at 72-74.

95. *Id.* at 77.

96. *Id.* at 72. See also Pattenden, *supra* note 53, at 673. Pattenden logically writes: There may well be cases where the harm to society which the accused threatened was so great and the situation so urgent that even deliberate illegality must be tolerated. Equally there may be cases where it would be unreasonable to deprive the prosecution of evidence because of some minor and unintentional invasion of the accused's rights.

Id.

97. Pattenden, *supra* note 53, at 674.

98. See Robert M. Bloom, *Judicial Integrity: A Call for its Re-emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 493-94 (1993).

The Australian system does consider the deliberateness of police misconduct when deciding whether to exclude evidence. This is based on the rationale that society has a right to "insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired."⁹⁹ But, as with the English and Canadian systems, police misconduct does not automatically result in exclusion of evidence.

Australia's approach guides the judge's process of discretionary balancing by setting out specific types of police conduct that are particularly suspect, as does England's PACE. As in England, yet in contrast to Canada, Australia does consider deterrence of police misconduct as a purpose behind its rule allowing exclusion of evidence.

This system may seem like a logical and appropriate approach to excluding evidence in a criminal trial, but it is not without its drawbacks. The burden of proof in a court's application of its discretion to exclude illegally obtained evidence lies with the person seeking exclusion: the accused.¹⁰⁰ The accused faces a formidable task when calling on judicial exclusionary discretion.

The Australian judge's decision as to whose rights deserve protection is exercised on a case-by-case basis.¹⁰¹ This results in protection of not only the rights of the accused, but also the rights of the victim and the public at large. The rights of the latter two are not even considered under the American Exclusionary Rule.

Of the English common law countries, Australia's approach may provide the greatest protection for the integrity of the judicial system. However, it suffers from some shortcomings. It imposes the burden of proof on the defendant, who may be unlikely to have the information or the resources to successfully carry that burden. Furthermore, although its focus upon the deliberateness of the police misconduct suggests that deterrence of such misconduct is a primary purpose behind Australia's exclusionary practices, the fact that the court may use other factors to justify admitting even maliciously seized evidence seems to completely undercut any possible deterrent effect, which, as noted in the discussion of the American Exclusionary Rule, would be speculative at best.

99. *Bunning*, 141 C.L.R. at 75.

100. *See, e.g.*, Meng Heong Yeo, *Inclusionary Discretion Over Unfairly Obtained Evidence*, 31 INT'L & COMP. L.Q. 392 (1982).

101. *See* Pattenden, *supra* note 53, at 671-75 (explaining Australia's practice of basing exclusionary decisions on a balancing of the degree to which the factors are implicated in any given case).

D. New Zealand

New Zealand, another English common law country, approaches the exclusion of illegally obtained evidence without a codified exclusionary rule. The country's approach to exclusion is judge-made:¹⁰²

The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters at issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. . . . No doubt in criminal cases the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused.¹⁰³

The New Zealand appellate courts read "unfairness" broadly and, as time progresses, seem more willing to examine how any police misconduct affects the accused.¹⁰⁴ To determine what is unfair, a judge weighs the consequences of the police officer's conduct against the "importance of convicting the guilty."¹⁰⁵ The exercise of judicial discretion in New Zealand has resulted in the exclusion of fruits of illegal searches and seizures.¹⁰⁶

In practice, however, the New Zealand courts do not exclude as much evidence as is indicated in their doctrinal language.¹⁰⁷ Illegally seized physical evidence has never been excluded in New Zealand, and such exclusion is only possible where "a wholly unwarranted and lengthy detection involving a wholly unwarranted search of a person and/or places" occurred.¹⁰⁸ This is unlikely to ever occur because, under applicable law, an investigation that turns up evidence of crime cannot be "wholly unwarranted."¹⁰⁹ Thus, a gap is left between the theory and practice of New Zealand criminal procedure.¹¹⁰

In general, the philosophy behind the New Zealand system seems to be that the country's judiciary "[is] not looking for an isolated slip-up but a compounding of errors and improprieties, an improper course of conduct which, taken as a whole, indicates unfair police practices."¹¹¹

102. J. B. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 INT'L. & COMP. L.Q. 513, 541 (1982).

103. *Id.* at 534 (quoting *Kuruma v. R.*, A.C. 197, 203-4 (1955)).

104. *Id.* at 541.

105. *Id.*

106. *Id.*

107. *Id.* at 542.

108. *Id.* at 541 (quoting *Queen v. Lee*, 1 N. Z. L. R. 481, 482 (P.C. 1978)).

109. *Id.* at 541.

110. *Id.* at 542.

111. *Id.*

A comparison between New Zealand's practice and the American Exclusionary Rule does not provide much helpful guidance in determining the propriety of the American consequence of Fourth Amendment violations. This is because the underlying right in New Zealand has been construed much more narrowly. A rule in America that would exclude illegally seized evidence, but would legalize all searches and seizures that turn up evidence of a crime, would effectively eviscerate the underlying Fourth Amendment right to be free from unreasonable searches and seizures.

IV. A NEW PROPOSAL

Drawing from the international perspective and acknowledging both the failure to accomplish the intended purpose and the associated costs of the American Rule, it is important to heed the words of Justice Blackmun in his concurring opinion in *United States v. Leon*:

If a single principle may be drawn from this Court's exclusionary rule decisions, from *Weeks* through *Mapp v. Ohio*,¹¹² to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.¹¹³

Indeed, Justice Blackmun's pointed remark reflects the Supreme Court's long held notion that the Exclusionary Rule is not necessarily sacrosanct, but rather the best remedy at hand to ensure the integrity of the Fourth Amendment when the Rule was created. It seems implicit that if another remedy surfaced that better protected the Fourth Amendment without the costly baggage of the Exclusionary Rule, the Court, or perhaps even Congress,¹¹⁴ would seriously entertain that option.

112. 367 U.S. 643.

113. *United States v. Leon*, 468 U.S. 897, 928 (1984).

114. In his 1991 crime bill, President Bush proposed limitations on the operation of the Exclusionary Rule in federal courts. Michael K. Frisby, *Congress Passes Key Bills at Wire; Crime Plan Fails in Rush to Adjourn*, BOSTON GLOBE, Nov. 28, 1991, at 1. The bill sought to expand the good-faith exception used in searches conducted under the authority of a flawed search warrant where the police officer had an "objectively reasonable 'good-faith' belief" that there was probable cause to justify a search. Charley Roberts, *New Crime Bill Seen Unlikely in Election Year*, L.A. DAILY J., Dec. 5, 1991, at 1, 13. The bill failed at the hands of a Senate filibuster unrelated to the Exclusionary Rule issue. Frisby, *supra* at 1. The inclusion of Exclusionary Rule reform in the President's crime bill evidences the executive and legislative concern over the problems surrounding the Rule.

A. Requirements of Exclusionary Rule Reform

In order to effectively deter future police misconduct, two things must happen: The police officer engaging in misconduct must be educated as to the wrongful nature of his or her conduct,¹¹⁵ and the offending officer must suffer some negative consequence as a direct result of the misconduct.¹¹⁶ As already stated, the problem with the Exclusionary Rule is that, in actual application, it fails both as an educational tool and as a punishment.¹¹⁷ Despite the numerous critics of the Exclusionary Rule, few, if any, would advocate abandoning the Rule without adopting, in its place, some scheme that preserves the integrity of the judicial system and acts as a deterrent to future violations of a criminal defend-

115. See, e.g., Orfield, *supra* note 35, at 91-94. The article states that, "the exclusionary rule deters illegal police behavior by educating police officers in the law of search and seizure." *Id.* at 91.

See also Orfield, *supra* note 40, at 1033-42. ("[c]ritics maintain that the officers often do not understand the reasons for suppression. They cannot understand the judge's ruling; the prosecutor does not explain it to them; and no other official or institution ensures that the police understand." *Id.* at 1033); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 730-32 (1970). "[The search and seizure rules] 'would not deter or enlighten a policeman . . . with a Ph.D. who was going to law school at night.'" *Id.* at 731 (quoting Robert E. Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80, 100 (1969)); Wayne R. LaFave & Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1005 (1965) (The authors state that "the trial judge seldom explains his decision in a way likely to be understood by the police officer, and the prosecutor assigned to the case rarely assumes it to be his duty to inform the police department of the meaning of the decision or of its intended impact upon current police practice." *Id.*; see generally Wayne R. LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practice*, 30 MO. L. REV. 391, 415-21 (1965).

116. See, e.g., *Report to the Attorney General: The Search and Seizure Exclusionary Rule* 25 (1986) ([c]ommentators have observed that "the exclusionary rule has a negligible deterrent effect on the transgressing officer because it does not punish him directly"); Dallin H. Oaks, *supra* note 115, at 709-10.

Other commentators have noted that the exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule. An officer may of course experience disappointment at seeing evidence suppressed and an offender go free, and that experience may affect his future behavior. If the officer also had to suffer departmental discipline or forfeit promotion, prestige, or other advantages because of the application of the exclusionary rule to his cases, then this could give the exclusionary rule an important special deterrent effect.

Oaks, *supra* note 115, at 709-10. STEVEN R. SCHLESINGER, *EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE* 71 (1977) ("Discussion of alternatives to the exclusionary rule must begin with the objectives to be achieved through their use. These [include] the deterrence of police misbehavior through identification and discipline of offending official(s)").

117. See *supra* part II. B-C.

ant's Fourth Amendment rights. Clearly, whether to respect those Fourth Amendment rights that were considered sufficiently valuable to include in the Bill of Rights is a decision too valuable to be left to the government employee's discretion. The ideal solution is one that will not only deter future violations of the Fourth Amendment by means of education, punishment, and police department regulatory reform, but also provide an incentive for criminal defendants to raise the Fourth Amendment issue.

1. Deterring Fourth Amendment Violations

As suggested above, successful deterrence of Fourth Amendment violations depends on two things: 1) educating the offending governmental agent/agency as to how the conduct violated the defendant's Fourth Amendment rights and how such violations can be avoided, and 2) providing appropriate negative consequences for those who actually violate, or suborn violation of Fourth Amendment rights.¹¹⁸

a. Educating the Offending Officers

Under the present system, there is no mechanism guaranteeing that any useful information reaches the offending officer/agency concerning how the acts of the police officer violated a person's Fourth Amendment rights or, most importantly, how to avoid such violations in the future. Indeed, there is not even a mechanism to ensure that the offending officer is informed that his conduct was violative of someone's Fourth Amendment rights. Unfortunately, any educational "benefits" that might occur under the existing format are frequently happenstance: the officer was in court when the judge made his ruling; the prosecutor sought out the officer to explain the problem; or the police agency was informed of the problem and sought out to inform and counsel the officer. Given the practicalities of the American criminal justice system, the educational benefits will likely not occur absent some systematic approach directed at both informing and educating the officer.

Therefore, any scheme designed to better promote the sanctity of the Fourth Amendment must begin with some systemized method of informing the offending officer of his or her failure. It would seem that the most efficient manner of informing the officer would be placing the onus

118. But, as we have argued, the deterrent effect of the present Exclusionary Rule is dubious at best. *See supra* part II. C. We do not suggest that the offending agents or agencies will be deterred from future violations of the Fourth Amendment merely by the possibility of a defendant receiving a reduced prison term.

on the prosecuting agency, or the court rendering the ruling, to inform both the officer and the officer's department. That responsibility must be squarely placed so that the information is dispensed as a matter of course.

Once so informed, the officer must be educated both as to the nature of the error and how to properly engage herself or himself in the future. A way to achieve this kind of education is to institute a class for those police officers who are found to have violated the Fourth Amendment. When officers violate a person's Fourth Amendment rights, they would be required to spend time in a class learning (or re-learning) the constitutional limitations of searches and seizures.

Although the primary function of the Fourth Amendment classes would be educational, the classes could also be structured to carry a "punitive" aspect, such as requiring officers to attend during "off-duty" time and/or not paying the officer for the time spent attending the class. The educational aspect of such classes could also be furthered by publishing regular bulletins for all law enforcement agencies describing the type of conduct found to violate the Fourth Amendment. The bulletins should be used in the classes and disseminated to all active officers.

b. Punishing the Offending Officers

While education will help police officers avoid Fourth Amendment violations by keeping them up-to-date on appropriate conduct during investigations, punitive measures may be needed to (1) reinforce the importance of respecting citizens' Fourth Amendment rights and (2) to ensure that the offending conduct is taken seriously by the officer. Any system of punishment must recognize, however, that certain actions taken by a police officer that are later found to violate the Fourth Amendment may be the product of an innocent misunderstanding of a very confusing area of law.

The degree of punishment should vary according to the officer's offending conduct. An "innocent" mistake, one that is the product, for example, of ambiguous legal standards being applied in the heat of an investigation, may need no more punitive measures than merely requiring the offending officers to attend a Fourth Amendment class. The knowing, willful, or intentional disregard of a person's Fourth Amendment rights may warrant the imposition of a more punitive measure to accomplish the desired deterrence. Thus, such conduct may warrant a "community service" requirement, a fine, a suspension from work, a re-

assignment to less desirable duties, or other action deemed appropriate according to the nature of the violation.¹¹⁹

The goal would be to ensure that, when punishment for wrongful conduct is warranted, the punishment must land squarely on those whose conduct has violated the law, rather than result in the indirect "punishment" of the current Exclusionary Rule.

2. Providing an Incentive

As mentioned above, there must be some incentive for the criminal defendant to raise the Fourth Amendment violation issue. Under existing law, the Exclusionary Rule provides a remarkable, if not a frequently equitable incentive. For reasons already set forth, exclusion of evidence is often too great a windfall and does not further the goal of deterring future illegal police conduct. Nonetheless, the existence of an incentive is crucial. If the criminal defendant does not have an incentive to raise the exclusionary issue, it is likely that the violation will go unnoticed. Certainly, the offending government agency will not bring it to the court's attention. As noted above, officers have even committed perjury to cover up such transgressions. The courts are not usually in a position to raise the issue of Fourth Amendment violations, because unless the pertinent facts are brought to the attention of the courts, a court will not have sufficient information upon which it can identify Fourth Amendment violations. Even where violations are apparent, the overburdened courts may be reluctant to raise these issues *sua sponte* because of judicial resources that are both scarce and expensive. The defendant remains the only person who has an interest in raising the issue. While there is the concern that the Exclusionary Rule devalues Fourth Amendment rights because courts strain to avoid excluding evidence, the protection of even these devalued rights would be lost if criminal defendants did not raise the issue. Therefore, any scheme that might replace the current Exclusionary Rule must provide the criminal defendant with some benefit sufficient to act as an incentive to bring the Fourth Amendment violation to the attention of the appropriate tribunal.

A possible alternative method that provides a suitable incentive would admit the evidence allegedly seized in violation of the defendant's

119. It may be preferable to leave the development of appropriate punitive measures to local authorities, rather than having a nationally-mandated punitive scheme, so long as there is some mechanism (such as federal funding provisions) for ensuring the adoption of appropriate punitive measures.

Fourth Amendment right at trial,¹²⁰ but reward the defendant whose rights have been violated by a reduction in his or her sentence.¹²¹ The reduction in the prison sentence must be significant enough to provide an incentive to a criminal defendant to challenge a search or seizure. For example, a defendant may receive a percentage reduction in his prison sentence for successfully establishing that evidence used to convict was seized in violation of Fourth Amendment rights.¹²² Under this scheme, it would be appropriate to delay the challenge until after sentencing so that the sentencing judge would not be influenced by the possibility of a later reduction in jail time.¹²³

Providing the defendant's incentive to raise Fourth Amendment violations through a sentence reduction rather than through otherwise competent evidence exclusion is preferable to the Exclusionary Rule. It will still bring to light police misconduct while still protecting the integrity of the criminal justice system by allowing it to convict those who have violated criminal laws. Although convicted criminals will face reduced punishment, they will still carry their criminal convictions, which trigger myriad legal consequences, including limitations on the ability to own firearms, the ability to hold certain types of employment, and the application of repeat offender statutes—such as “three strikes” laws. Moreover, the problem of a defendant receiving a windfall disproportionate to the violation of his or her Fourth Amendment rights, which exists under the current Exclusionary Rule, will be somewhat abrogated.

120. This assumes, of course, that the unlawfully seized evidence is reliable. Evidence that is seized in a way that brings into question the reliability of its probative value in determining guilt or innocence should remain excludable at trial. These situations, however, will be rare.

121. While some may argue that this does not provide an incentive to those whose rights have been violated but, nonetheless, are acquitted of a crime (because no sentence is imposed and, therefore, no sentence can be reduced), this concern does not justify rejection of the proposed change. Even under existing law, the standing rules prevent persons other than criminal defendants whose privacy or possessory interests have been violated from invoking the Exclusionary Rule. Furthermore, persons who have been injured by the violation of their civil rights may bring actions against the government for compensation, irrespective of whether they are convicted of, or even charged with a crime.

122. The effect of establishing a Fourth Amendment violation will be less drastic than under the present Exclusionary Rule—because it admits evidence that will lead to conviction. Therefore, it may be sensible to expand the standing rules so that a defendant can raise the violation of a third party's Fourth Amendment rights that produced evidence against the defendant.

123. Some courts will see the issue coming as a result of the proceedings at trial. However, mandatory or recommended sentencing guidelines should act as a check on those judges who hand down an unusually harsh sentence to “compensate” in advance for the possibility of a defendant's successful motion to reduce his or her sentence based on a Fourth Amendment violation.

A legitimate concern with using sentence reduction as an incentive to raising the violation is that the trial judge may negate the sentence reduction by imposing a harsher penalty on conviction. While acknowledging that this concern presupposes a judge acting in bad faith, several approaches could be undertaken to avoid such an impropriety or even the appearance of such impropriety. For example, the Fourth Amendment issue could be raised after sentencing is complete, the case could simply be reassigned to a different judge, or perhaps the justice system could have independent judges who hear only Fourth Amendment issues. Additionally, mandatory sentencing guidelines, which curb judicial discretion, limit the ability of a judge to hand down unduly harsh sentences. With these or any other appropriate measures in place, the prospect of judges increasing criminal sentences as "insurance" against any penalty reduction is minimal.

3. The Mechanics

a. Raising the Issue

Having discussed the need to give a criminal defendant an incentive to raise the issue of a Fourth Amendment violation, and the need to deter future violations by educating and punishing the offending officers or agencies, it is next important to examine the mechanics necessary to institute such a scheme.

As noted above, if the incentive to raise the Fourth Amendment violation is provided by possible sentence reduction, the search and seizure is best raised after imposing the sentence. This prevents courts from compensating in advance for a reduced sentence by imposing a harsher penalty where they suspect a Fourth Amendment violation.

There remains the question of with whom to raise the issue. The judge who is most familiar with the case may be in the best position to evaluate the allegedly offensive conduct, but may also be influenced by a desire to see his or her sentences carried out as imposed and, therefore, may not be sufficiently impartial to decide the issue. However, the current prevalence of mandatory sentencing will likely diminish these concerns as time goes on.

One alternative might be to have a separate tribunal, independent from the litigating parties and the sentencing court, charged with hearing these issues.

b. *Reducing the Sentence*

When a Fourth Amendment violation is found, the judge should reduce a defendant's sentence by a certain percentage based on the gravity of the violation.¹²⁴ Since the reduction will be used to give the defendant an incentive to raise the Fourth Amendment issue, the more egregious the police officer's conduct, the more society wants that conduct to be brought to light and the offending officer to pay for the violation. Thus, the more egregious the Fourth Amendment violation suffered by the defendant, the greater the sentence reduction should be.¹²⁵

In reducing a defendant's sentence, the most important factor should be the extent of the invasion of the defendant's privacy. Did the officers, as in *Mapp v. Ohio*,¹²⁶ forcibly enter the defendant's home without a warrant, handcuff the defendant, and search every room of her house? Or, as in *United States v. Leon*,¹²⁷ did the officers conduct an extensive investigation and seize evidence under the color of a facially valid search warrant that only later turned out to lack probable cause? Did the officer subject the defendant to a body cavity search without a warrant or probable cause, or did the officer perform an outer clothing pat-down of defendant's person under a good faith belief that he or she had reasonable suspicion, but a judge later decided the officer did not? Since the Fourth Amendment guarantees a citizen's right to be secure in his or her person, house, papers, and effects,¹²⁸ the government's invasions of these securities is the crucial wrong that must be accounted for by the government. Thus, the most weight in sentence reductions should be given to

124. There are, however, problems with the percentage reduction scheme. First, in death penalty cases there is no real way to decrease a death sentence. To deal with this problem, the authors suggest that death sentences could be reduced to life sentences, or the existence of a Fourth Amendment violation could be included in the statutory factors used by juries to determine whether a defendant will be sentenced to death or to life in prison without the possibility of parole. See CAL. PENAL CODE § 190 *et seq.* (West 1994). Second, where a defendant is sentenced to consecutive life sentences, a reduction in his or her sentence from three to two life terms would not be an effective incentive to raise the Fourth Amendment issue. The authors suggest that consecutive life sentences be reduced to life in prison with possibility of parole. That way, while the defendant may still spend the rest of his or her life in jail, the possibility of parole may provide an incentive to raise the issue. For both of these problems, the authors acknowledge their inability to define solutions and invite the legislature or other criminal justice experts to study the issue.

125. The actual percentages by which sentences should be reduced is a question best left to the legislature. Just as the legislature determines the amount of time a defendant serves for a particular offense, it should determine the defendant's sentence percentage reduction upon violation of their Fourth Amendment rights.

126. 367 U.S. 643 (1961).

127. 468 U.S. 897 (1984).

128. U.S. CONST. amend. IV.

the invasion of privacy suffered by the defendant in order to ensure that this type of illegal activity is brought to the courts' attention.

Another similar and important consideration in sentence reduction is the extent of any physical or psychological harm suffered by the defendant during the course of an illegal search or seizure. Did the officer drag the defendant out of his car, force him onto the ground, handcuff his arms and legs, and then drag him back to and throw him into the police car without probable cause to arrest him? Or did the officer merely search the defendant's car without probable cause?

Any public humiliation suffered by the defendant in violation of his or her Fourth Amendment rights should also be taken into account in a sentence reduction. An officer may publicly humiliate a defendant in a number of ways. For example, an ethnic minority may be improperly singled out as a criminal in a white neighborhood or school. A woman may be sexually harassed by an officer during arrest procedures in front of another police officer. An officer may improperly seize evidence from a suspect at his or her place of business in front of the suspect's colleagues when the evidence could have easily been seized in private. Again, these kinds of considerations go to the gravity of the Fourth Amendment violation suffered by a defendant.

The sentence reduction scheme should thus center around the particular circumstances of the Fourth Amendment violation suffered by each defendant, just as the defendant's conviction and sentence are tailored to the particular circumstances of his or her criminal activity.

c. Communication and Education

Currently, one of the problems with the Exclusionary Rule is that police officers and departments are not always aware of the reasons behind the exclusion of evidence. Under a sentence reduction scheme such as the one proposed, a judge's findings of illegal police conduct would have to be communicated to the offending officer and department, along with the rationale for those findings. This could be done by directly issuing written judicial opinions to the offending officer and his or her superior after each sentence reduction decision. These opinions would lay out the reasons that particular conduct violated the Fourth Amendment as well as the reasons behind a judge's particular percentage reduction. That way, not only would officers be aware of a violation, but they would be aware of why particular conduct was illegal and the serious consequences of such conduct.

From this point, officers who violate the Fourth Amendment should be required to attend Fourth Amendment classes as discussed above.

Armed with an explanation of why their conduct violated the Fourth Amendment, offending officers attending Fourth Amendment class would be able to understand how to go about searches and seizures without committing similar violations in the future. As a result, officers would be able to alter their behavior to conform to the Fourth Amendment in a more informed manner than if they, as is presently the case, just happened to be made aware of the violation.

d. Punishment

If police officers are to be punished for their illegal behavior, their punishment must be proportionate to the violation, just as it is for the apprehended criminals. In other words, each officer's conduct must be examined in light of the circumstances surrounding the particular Fourth Amendment violation, any history the officer has of Fourth Amendment violations, and his or her department's Fourth Amendment record. As a result, a police officer who makes a good faith mistake for the first time will not suffer the same punishment as an officer who, for the fifth time, intentionally breaks into a defendant's house and rummages through his or her drawers at four in the morning.

The first and most important consideration in determining an offending officer's punishment is the circumstances surrounding the Fourth Amendment violation at issue. The egregiousness of the police officer's behavior toward the defendant is the key consideration. Did the officer intentionally harass the defendant? Did the officer harass the defendant because of the defendant's race, ethnicity, or sex? Did the officer intentionally disregard department search and seizure procedures when he or she should have known that doing so would violate the suspect's Fourth Amendment rights? Or, did the officer, while in hot pursuit, make a close judgment call that was later held unconstitutional? Behavior that is clearly offensive and smacks of intentional illegal conduct is intolerable, and officers exhibiting that behavior should be severely punished as a result. On the other hand, a good faith mistake should be recognized by the offending officer as an error, but an educational remedy, as opposed to punishment, would suffice.

Another significant consideration in determining the appropriate degree of education and punishment would be the officer's history vis-à-vis Fourth Amendment violations. A pattern of violations by a particular officer would suggest anything from a lack of understanding of proper police conduct to an intentional disregard for a suspect's rights. Whatever the case may be, in order to deter future illegal conduct successfully, the officer's punishment should be tailored to address the moti-

vations behind an officer's pattern of behavior. If it appears to a judge that an officer continually violates the Fourth Amendment even though he or she knows exactly why their conduct is illegal, then a penalty focusing on punishment rather than education is appropriate. An officer who conducts his or her second illegal search or seizure because of a second good faith mistake may need no more than another Fourth Amendment training class. Essentially, the message that must be communicated is that illegal searches and seizures violate the law and that further intentional violations of the law are punishable.

Finally, it is important to examine the policies and practices of the offending officer's department as a whole. The recurrence of illegal searches and seizures throughout a particular department may evidence problems with departmental leadership, regulations, training practices, or search and seizure procedures. In such a case, the offending officer may have simply been following departmental regulations or custom. It is necessary to address these institutional deficiencies in particular police departments. This may mean requiring policy reform, or training programs, or even holding the supervisors or chiefs of offending officers responsible, targeting them for appropriate punitive measures. Again, the primary consideration is to tailor and proportion the punishments so that they will have the greatest remedial impact on the offending officer or department.

The types of punishments that may be appropriate for offending officers would vary in severity according to the factors outlined above. Some possible punitive measures include mandatory attendance at a Fourth Amendment training program, a "public service" requirement, temporary suspension, reassignment to less attractive duty, demotion, termination of employment and traditional criminal sanctions such as fines or incarceration.

V. CONCLUSION

With only minor modifications, adjustments, or even some U.S. Supreme Court repositioning, the American Exclusionary Rule has survived virtually unscathed since 1961. The survival has occurred despite clear evidence that the Rule does not accomplish that for which it was intended. The rule does not deter future illegal police misconduct. The original premise, that by excluding evidence the police will be sufficiently censured and thereby comply with the law next time, has simply not been the experience. Yet the rule remains the law of land, propelled by a vacuous mission.

Justice Blackmun taught us that the Rule is subject to change in light of changing judicial understandings about the impact of the Rule.¹²⁹ We now understand that the impact of the Rule is different from that envisioned in 1961; we must now get on with the serious business of change to bring the intent and purpose of the Rule in line with reality.

The Rule is about keeping or, in some cases, bringing police conduct into line with the Fourth Amendment. This article has set forth specific proposals to accomplish that end. It is readily recognized that it has not contemplated every scenario nor fully developed every notion. However, the authors acknowledge the dialogue initiated several years ago by our colleagues, and by these proposals, hope to further that dialogue. The integrity of the Fourth Amendment is at stake. Intellectual integrity aside, given the public clamor generated by unparalleled levels of crime and the general dissatisfaction with the American criminal justice system, we will be hard pressed to defend an indefensible rule.

129. *Leon*, 468 U.S. at 928.

