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NOTE

LOSING YOUR *NAVIGATOR*: WHY THE EXCLUSIONARY RULE SHOULD NOT APPLY TO CIVIL ASSET FORFEITURE PROCEEDINGS

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ABSTRACT

With the dramatic increase in civil asset forfeiture cases in the last several decades, courts have struggled in their approach to the many due process concerns raised by them. Since civil forfeiture deals mainly with criminal acts, the Supreme Court has been willing to extend to respondents in civil forfeiture cases certain constitutional rights traditionally only offered to criminal defendants. However, the Court has not always been consistent in how it handles such cases.

In 1886, the Supreme Court, in Boyd v. United States, *recognized that the Fourth Amendment protection against unreasonable searches and seizures applies to civil forfeiture proceedings.* Boyd *would later supply the framework for the* Weeks v. United States *decision in 1914 which instituted the exclusionary rule as a remedy for Fourth Amendment violations in federal criminal proceedings. In 1965, a time when the Supreme Court was rapidly expanding its application of exclusionary rule, it officially extended its use to civil forfeiture proceedings in* One 1958 Plymouth Sedan v. Pennsylvania.

However, in the decades following the Plymouth Sedan *decision, the Supreme Court retreated from its expansive use of the exclusionary rule and limited it only to those situations where the rule's deterrent effect of preventing*

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unlawful searches and seizures outweigh the substantial societal costs of preventing courts from discovering truth. Sensing a change in the Supreme Court's exclusionary rule jurisprudence, the Supreme Court of Texas, in State v. One (1) 2004 Lincoln Navigator, *became the first and only state supreme court since* Plymouth Sedan *to hold that the exclusionary rule does not apply to asset forfeiture proceedings. Although there are questions as to the legitimacy of the* Lincoln Navigator *decision considering the fact that it stands in direct contradiction to Supreme Court precedent, there can be little doubt that the current Supreme Court would come to the same conclusion as Texas.*

That said, with the absence of the exclusionary rule's protections, are respondents in civil forfeiture cases adequately protected against unreasonable searches and seizures? Presumably, the answer is yes, because police officers should mainly be concerned with charging violations of criminal law, which has the protection of the exclusionary rule. However, neither Lincoln Navigator *nor* Plymouth Sedan *considered the potential effect of skewed police priorities due to direct profit motives in civil forfeiture cases. As the Supreme Court has recognized before, it is difficult for a court to fully understand the actual effect of the exclusionary rule on police conduct. Even so, it is quite probable that some law enforcement officers might take advantage of a court's refusal to apply the exclusionary rule by deliberately performing unreasonable searches because the police departments benefit directly from the proceeds of the seizure.*

Regardless of whether this actually does or might happen, the best solution to the problem, and many other legitimate concerns with civil forfeiture proceedings, is to legislatively prevent law enforcement agencies from directly profiting from their seizures. Removing the potential profit will remove any incentive such agencies may have to perform unlawful searches. However, should legislatures fail to remove the incentives, courts might consider applying the exclusionary rule only in the extreme cases where police officers, in bad faith, perform unreasonable searches or seizures because of a wrongful profit motive. Application of the exclusionary rule to civil forfeiture proceedings in any other circumstance fails to render any appreciable deterrence and exacts great costs upon the truth-seeking function of the judiciary.

I. INTRODUCTION

Over the past several decades, civil asset forfeiture has moved from relative obscurity to a position of prominence in many law enforcement agencies.[1] In 2014, the federal government alone collected over $4.5 billion in seized

1. DICK M. CARPENTER II ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 10 (2d ed. 2015), http://www.ij.org/report/policing-for-profit/.

assets.[2] This dramatic increase in the use of civil forfeiture is largely due to the War on Drugs.[3] As Angela Beavers, the Asset Forfeiture Chief of the Harris County District Attorney's Office, explained, the purpose of civil forfeiture is to "take the profit out of crime."[4] Many crimes, especially crimes like drug trafficking, are driven by a motive to make money. Civil forfeiture can be a substantially more effective method of combatting such crimes than mere enforcement of criminal laws because it deprives criminals of the benefit of their crimes.[5]

Despite these benefits, courts struggle in dealing with civil forfeiture proceedings. Because they involve in rem proceedings against a person's property, rather than civil or criminal proceedings against a person, it is difficult for courts and law enforcement to consistently avoid violations of property owners' constitutional rights. A clear example of this struggle is the application of the exclusionary rule to civil forfeiture proceedings. In 1965, a time when the Supreme Court was not quite as precise in its exclusionary rule jurisprudence as it is now, the Court held that the exclusionary rule applies to civil forfeiture proceedings.[6] Although several current Supreme Court exclusionary rule cases cast doubt on that ruling, few courts have questioned it, and none have challenged it until the Texas Supreme Court's decision in *State v. One (1) 2004 Lincoln Navigator*.[7] In this case, the court found that under the Supreme Court's current exclusionary rule framework, the rule does not apply to civil forfeiture proceedings.[8] The decision raises an important question: how will Fourth Amendment rights be guarded without the protection of the exclusionary rule in civil forfeiture proceedings? The way this question is answered will shape the way that the Supreme Court and other state courts will handle the issue.

II. HISTORICAL BACKGROUND

In order to fully understand the context of the issue at hand, one must have a basic understanding of the history of asset forfeiture and the history of the exclusionary rule. The history of asset forfeiture explains its unique

2. *Id.*

3. *Id.*

4. Personal Communication with Angela Beavers, Assistant District Attorney & Asset Forfeiture Division Chief, Harris County District Attorney's Office, in Houston, Tex. (May 29, 2017).

5. *Id.*

6. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

7. 494 S.W.3d 690 (2016).

8. *Id.*

place in American jurisprudence as a process that exists in a limbo state between criminal law and civil law. Understanding how the law developed also clarifies the Supreme Court's description of the proceeding as quasi-criminal in nature. Moreover, understanding the stages of development that the exclusionary rule underwent throughout the various ideological eras of the Supreme Court helps demonstrate why the Supreme Court applied the exclusionary rule to asset forfeiture and why the current Supreme Court would likely abandon that ruling.

A. Civil Asset Forfeiture

There are two main eras of the use of civil forfeiture, its early history and modern use. Although the proceedings in older cases are similar to modern forfeiture proceedings, their purpose and scope have changed substantially in recent years. However, both in modern times and in the earlier days, federal and state governments have abused these proceedings. Thus, the Supreme Court has recognized several due process restrictions on civil forfeiture.

1. Early History

Justice Thomas noted in a statement regarding the denial of certiorari in an asset forfeiture case that "[t]he Court has justified . . . unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding [of the United States]."[9] This historical practice started in America in the seventeenth century when England would seize ships and cargo for violations of the English Navigation and Trade Acts.[10] Soon, courts were using civil in rem proceedings to enforce other customs and duties acts, such as the Sugar Act and the Townsend Revenue Act.[11] By the time the Colonies declared their independence from England, English and Colonial courts were using in rem forfeiture proceedings to enforce illegal fishing laws and other maritime offenses.[12] As the use of in rem proceedings for seizure of property expanded,

9. Leonard v. Texas, 137 S. Ct. 847, 848 (2017).

10. Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1916 (1998).

11. *Id.* at 1916-17.

12. *Id.* at 1917.

American Colonists began to resent the practice.[13] In fact, some historians even consider this to be a cause of the American Revolution.[14]

After the United States won its independence, the newly formed government continued the practice of enforcing customs regulations with in rem forfeiture by statutes enacted by the First Congress under the Constitution.[15] In these and later statutes, Congress enacted laws permitting forfeiture of ships and cargo to enforce violations such as paying duties, smuggling contraband, and piracy.[16] Later, Congress allowed in rem forfeiture of property belonging to Confederate citizens during the Civil War if the property was used to help the Confederates.[17] Such proceedings were often necessary in these cases because the courts would have no in personam jurisdiction over defendants in cases involving customs, maritime offenses, and wartime criminals.[18]

2. Later Expansion

The expansion of civil forfeiture proceedings beyond its original constraints began in the era of Prohibition.[19] After the repeal of Prohibition, civil forfeiture largely faded into disuse in federal law.[20] However, with the advent of the War on Drugs in the 1980s, "the federal government began using it aggressively in the enforcement of laws prohibiting or regulating the possession or sale of controlled substances."[21]

From there, civil forfeiture has expanded not so much in scope, but in amount of use. In 1984, Congress created the Department of Justice's Assets Forfeiture Fund.[22] In 1986, the year after the "Fund was established, it took in . . . $93.7 million in deposits" of property seized by civil forfeiture.[23] As of 2014, annual deposits to the Fund reached $4.5 billion.[24] Because of incomplete data collection in many states on asset forfeiture proceeds, it is

13. *Id.* at 1917 n.22 (stating that "Parliament established juryless courts" as early as 1696 for these proceedings because Colonial juries would refuse to render "verdicts for the Crown").

14. *Id.*

15. *Id.* at 1917.

16. Herpel, *supra* note 10, at 1917.

17. *Id.* at 1917-18.

18. *Id.* at 1918.

19. *Id.* at 1922.

20. *Id.* at 1923.

21. *Id.*

22. CARPENTER, *supra* note 1, at 10.

23. *Id.*

24. *Id.*

not possible to acquire a reliable estimate of the amount collected by state agencies annually.[25] However, in 2012, twenty-six states and the District of Columbia collected over $254 million.[26]

3. Potential for Abuse

Because there is a large amount of profit to be made in asset forfeiture law, there is a strong potential for abuse. The fact that federal and most state asset forfeiture statutes allow law enforcement to keep all or most of the property seized only exacerbates this problem.[27] "[G]iving law enforcement a financial stake in civil forfeiture distorts law enforcement priorities" in that it incentivizes these agencies to focus more on seizing property to increase the budget rather than on seeking justice for the service and protection of Americans.[28]

In addition to the issue with strong law enforcement incentives, civil forfeiture proceedings do not guarantee the same due process rights that criminal cases do. For example, the government in civil forfeiture cases has the right to reciprocal discovery, just like a party in a civil case.[29] Also, respondents (or claimants) in asset forfeiture cases do not have the right to an attorney.[30] The legal costs in addition to several other requirements of civil forfeiture regimes cause many, if not most people whose property has been seized by asset forfeiture, to default on the case by neglecting to challenge the seizure.[31]

If a respondent can get past the initial hurdle of having to pay high legal fees, the civil nature of the proceeding presents several additional procedural hurdles before the respondent can reobtain his property. One of these hurdles is the standard of proof.[32] Where criminal cases always require that the government prove a defendant's guilt beyond reasonable doubt, federal and most state forfeiture statutes merely require that the government prove by a preponderance of the evidence that the property is connected to a crime.[33] In two states, Massachusetts and North Dakota, the standard of proof is merely

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25. *Id.* at 11.

26. *Id.*

27. *Id.*

28. CARPENTER, *supra* note 1, at 11.

29. Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, U.S. ATTORNEYS' BULL., Nov. 2007, at 8, 18-19.

30. CARPENTER, *supra* note 1, at 12.

31. *Id.*

32. Cassella, *supra* note 29, at 17.

33. *Id.*

probable cause, which is the standard of proof that a law enforcement officer would need to meet just to obtain a search warrant.[34] Consistent with a recent trend, the remaining states require either clear and convincing evidence, proof beyond reasonable doubt, or a criminal conviction for their forfeiture proceedings.[35]

Another hurdle for respondents to clear is the burden of an innocent owner defense.[36] Federal statutes and most state statutes put the burden of proof on the respondent if he or she claims to be an innocent owner of property that was wrongfully used.[37] Some states do not even provide for an innocent owner defense.[38] In addition, some states do not even grant the right to a jury trial for respondents.[39]

4. Due Process Restrictions

Even in the early stages of the development of civil forfeiture law, the Supreme Court began to take notice of certain due process concerns with proceedings against the property. In the 1886 case *Boyd v. United States*,[40] a United States district attorney filed suit for the retention of property seized pursuant to a customs revenue law.[41] Because the value of the property was especially relevant to the case, the judge ordered the claimants[42] to produce an invoice as evidence of the value.[43] The claimants complied with the order but challenged it on Fourth and Fifth Amendment grounds.[44] The Supreme Court held that "a compulsory production of a man's private papers to . . . forfeit his property[] is within the scope of the Fourth Amendment . . . in all cases in which a search and seizure would be, because it is a material ingredient[] and effects the sole object and purpose of search and seizure."[45]

According to the Court, one of the chief reasons for the enactment of the Fourth Amendment was the abuse of English government officials executing

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34. CARPENTER, *supra* note 1, at 16.

35. *Id.* at 16-17.

36. *Id.* at 18.

37. *Id.* at 20.

38. Leonard v. Texas, 137 S. Ct. 847, 847 (2017).

39. *Id.* at 847-48.

40. 116 U.S. 616 (1886).

41. *Id.* at 617.

42. The claimants, also called respondents, are the people claiming an interest in the property, typically, but not always, the people from whom the property was seized.

43. *Boyd*, 116 U.S. at 618.

44. *Id.* at 621.

45. *Id.* at 622.

general warrants to search personal property and private papers of citizens.[46] In light of this history, the Fourth Amendment must apply to civil forfeiture proceedings.[47] The case also implicated the Fifth Amendment because the seizure of the invoice violated the Fifth Amendment protection against self-incrimination.[48] The Court further reasoned that even though the proceedings against the property are "civil in form," they are criminal in nature because the penalty of seizure was "affixed to . . . criminal acts."[49] Waiving the option to charge the claimants criminally does not entitle the prosecutor to "deprive the claimants of their immunities as citizens[] and extort from them . . . private papers."[50] From this reasoning, the Court established a new rule:

> [S]uits for penalties and forfeitures incurred by the commission of offences against the law, are of [a] quasi-criminal nature [and should thus be considered] criminal proceedings for all the purposes of the Fourth Amendment . . . and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself . . .[51]

Thus, the Court found that even in civil forfeiture, the Constitution constrains the government from violating the rights of citizens.[52]

After the *Boyd* ruling, the Supreme Court did not do much to extend constitutional protections in criminal proceedings to civil forfeiture proceedings for over half a century. This is likely due to the fact that the use of asset forfeiture at the federal level did not become widespread until much later.[53] However, after its 1965 decision in *One 1958 Plymouth Sedan v.*

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46. *Id.* at 625-26.

47. *Id.* at 622.

48. *Id.* at 638.

49. *Boyd*, 116 U.S. at 634.

50. *Id.*

51. *Id.*

52. More recent authority from the Supreme Court has retreated from the position that private papers constitute self-incriminating evidence under the Fifth Amendment. However, the Court's basic holding—that the requirements of the Fourth Amendment and the right to avoid self-incrimination in the Fifth Amendment apply to civil forfeiture proceedings—has not been overturned by the Supreme Court. *See* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 301-02 (1976) (reasoning that the distinction between private papers and other property is irrational and arbitrary); Fisher v. United States, 425 U.S. 391, 407-08 (1976) (stating that the reasoning in *Boyd* has not stood the test of time as it relates to nontestimonial evidence).

53. *See supra* Section I.A.2.

Pennsylvania,[54] the Supreme Court began to recognize the need to apply due process protections in civil forfeiture cases. In these later cases, the Supreme Court held that several of the protections guaranteed by the Bill of Rights apply to civil forfeiture, such as the Fifth Amendment Due Process Clause,[55] the right to a speedy trial,[56] and the Eighth Amendment bar against excessive fines.[57]

That said, not all of the protections in the Bill of Rights apply to civil forfeiture, and due process rights do not protect against other apparent governmental oversteps. For example, the Supreme Court has held that due process does not protect innocent owners from seizure of their property used illegally by someone else.[58] It also held that the Fifth Amendment Double Jeopardy Clause does not apply to civil forfeiture either, since double jeopardy only applies to those "twice put in jeopardy of life or limb."[59] Overturning an old case that was decided the same year as *Boyd*, the Supreme Court held that neither double jeopardy nor collateral estoppel bars the government from instituting civil proceedings against someone who was acquitted of the underlying criminal charge.[60]

As Supreme Court jurisprudence on civil forfeiture expanded, it started to move away from the quasi-criminal language used in *Boyd* to describe civil forfeiture proceedings. An excellent example of this is *Austin v. United States*. In *Austin*, the government instituted a civil forfeiture proceeding to seize Austin's mobile home and his auto body shop because he stored and sold cocaine in both locations.[61] Austin challenged the proceeding on the ground that it was an excessive fine under the Eighth Amendment.[62] Rather than looking to *Boyd* to explain that the Eighth Amendment applies to civil forfeiture because of its quasi-criminal nature, the Court performed a closer

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54. 380 U.S. 693 (1965) (relying on *Boyd* to apply the exclusionary rule to civil forfeiture proceedings). For a fuller discussion on this case, see *infra* Sec. III.A.

55. United States v. James Daniel Good Real Prop., 510 U.S. 43, 46 (1993).

56. United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555, 564 (1983) (recognizing that the Fifth Amendment Due Process Clause guarantees a right to speedy trial in civil forfeiture cases).

57. Austin v. United States, 509 U.S. 602 (1993).

58. Bennis v. Michigan, 516 U.S. 442 (1996) (holding that the Fourth Amendment bar against unreasonable seizures and the Fifth Amendment Takings Clause do not preclude the seizure of property illegally used, but owned by an innocent person).

59. U.S. CONST. amend. V; United States v. Ursery, 518 U.S. 267 (1996).

60. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984) (disapproving Coffey v. United States, 116 U.S. 436 (1886)).

61. *Austin*, 509 U.S. at 604-05.

62. *Id.* at 605.

textual analysis of the Amendment.[63] The Court acknowledged that "[s]ome provisions of the Bill of Rights are expressly limited to criminal cases. . . . The Eighth Amendment includes no similar limitation."[64] The main purpose of the Eighth Amendment was not to limit criminal sanctions, but to limit punishments in general, whether they be criminal punishments or civil punishments.[65] Thus, as the Court stated, "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is [a] punishment."[66]

The Court then analyzed the history of asset forfeiture to determine if civil forfeiture was used as a punishment and found that it was, "at least in part," used as a punishment.[67] Further, the Court found that the statute in question was intended to be a punishment because, among other things, "Congress has chosen to tie forfeiture directly to the commission of drug offenses."[68] "[F]orfeiture of property is a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."[69] Thus, the Court found that the Eighth Amendment applies to civil forfeiture, not because it is quasi-criminal in nature, but because its goal is punishment as defined under the Amendment.[70]

B. Exclusionary Rule

Throughout the years, judges, justices, and law practitioners have disagreed about the basic purpose of the exclusionary rule. Because of this disagreement, the rule has undergone some minor changes. Originally, the purpose was not clearly spelled out. The Supreme Court gave many justifications for it, but until the late 1960s to mid 1970s, it did not clarify whether the exclusionary rule is an essential part of a citizen's Fourth Amendment rights or merely a tool for deterring future government misconduct. At the rule's inception, the Court seemed to indicate that it was a part of the Fourth Amendment, but as its scope expanded, the Court realized that it was hindering the administration of justice. Thus, the Court commenced a balancing test between the deterrence value of the rule and society's interest in justice.

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63. *Id.* at 607-08.

64. *Id.*

65. *Id.* at 609-10.

66. *Id.* at 610.

67. *Austin*, 509 U.S. at 618.

68. *Id.* at 620.

69. *Id.* at 621 (alterations omitted) (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).

70. *Id.* at 622.

1. Origin

The oft-cited origin of the exclusionary rule as applied to the federal government was a 1914 criminal case in the Western District of Missouri.[71] In *Weeks v. United States*, two searches and seizures were at issue.[72] Weeks was convicted of participation in an illegal lottery enterprise upon the presentation of evidence seized in these searches.[73] After he was arrested, police officers went to Weeks' house, searched his room, and seized various items including some papers that were later used in his trial.[74] When police officers told a U.S. Marshal about the evidence they found, the marshal decided to search for additional evidence in the house that same day.[75] In his search, he discovered and seized several additional letters and envelopes.[76]

Before trial, Weeks petitioned the court to return the property that was wrongfully seized in violation of his federal and state constitutional rights, including alleged violations of the Fourth and Fifth Amendments to the Federal Constitution.[77] Upon this petition, the trial court found that each search violated its respective constitutional prohibitions, and the court ordered that all of the wrongfully seized property be returned to Weeks except that which the prosecutor was planning to use at trial.[78] At trial, the wrongfully seized evidence was used over Weeks' repeated objections.[79] He appealed his subsequent conviction to the Supreme Court.[80]

Largely ignoring the defendant's Fifth Amendment violation claim, the Court set out to uncover the historical purpose and application of the Fourth Amendment.[81] In doing this, the Court relied largely upon *Boyd*, which had already laid out the history of English abuses of authority with general warrants and seizure of private papers.[82] The Court explained the purpose for the Fourth Amendment in a direct quote from *Boyd*:

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71. Weeks v. United States, 232 U.S. 383 (1914).
72. *Id.* at 386.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Weeks*, 232 U.S. at 387.
78. *Id.* at 388.
79. *Id.*
80. *Id.* at 389.
81. *Id.* at 389-90.
82. *Id. See supra* Section II.A.4.

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence . . . .[83]

The Court went on to state that "[t]he effect of the Fourth Amendment is to" restrain authority and "to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law."[84]

In applying this purpose, the Court stated,

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[85]

Basically, the Fourth Amendment is useless if the Court has no means of enforcing it. However, the Court seemed to indicate that the exclusion of wrongfully seized evidence is implicitly a part of the Fourth Amendment's constitutional guarantees because justice is not aided by sacrificing the principles of the Fourth Amendment. Even so, it acknowledged the two competing interests inherent in the application of the exclusionary rule: punishing criminals and deterring violations of a fundamental constitutional right. However, the Court did not balance these interests; it merely stated that interest in seeking justice must necessarily give way to society's interest in ensuring a remedy for the victim of unlawful seizures.

In the case before the Court, the marshal had neglected to obtain a warrant, and blatantly violated the defendant's Fourth Amendment rights by seizing private property "under color of his office" as a federal agent.[86] Thus, the Court held that the letters and other papers seized by the marshal should have been returned to the defendant and excluded from the trial in order to

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83. *Weeks*, 232 U.S. at 391 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

84. *Id.* at 391-92 (quoting Bram v. United States, 168 U.S. 532, 544 (1897)).

85. *Id.* at 393.

86. *Id.*

enforce the requirements of the Fourth Amendment.[87] However, the property seized by local police officers could not be excluded under the Fourth Amendment because the Amendment's protections apply only to the federal government and its agents.[88] In this case, the Court established a rule that would have a weighty impact on Fourth Amendment jurisprudence for years to come. Moreover, the Court's reasoning implicitly acknowledged what would later become the focus of expansions and limitations of the rule: the competing interests of convicting criminals and deterring violations of the Fourth Amendment.

2. Expansion of the Exclusionary Rule

Not long after *Weeks*, the Court was confronted with other issues regarding the new rule. In one case, government agents seized books and papers of the defendant company without a warrant.[89] Upon the request of the defendant, the district court found that the evidence was wrongfully seized and ordered that all the books and papers be returned.[90] However, the court did not order the return of any copies of those wrongfully seized documents made by the government agents before they returned them to the defendant.[91] Reversing, the Supreme Court declared that the purpose for the exclusionary rule was completely defeated by allowing the prosecutor to use evidence that could be traced back to a wrongful seizure.[92] Such evidence may only be used if it is acquired from a source independent from the wrongful seizure.[93] Thus, the Court established what would later become known as the "fruit of the poisonous tree" doctrine.[94]

Nearly half a century after the *Weeks* decision, the Court had progressed in its jurisprudential justification of the exclusionary rule. Consistent with its progressive tendencies to expand civil rights, in 1961, the Warren Court announced its readiness to extend the rule to the states under the Fourteenth Amendment Due Process Clause. In *Mapp v. Ohio*, an Ohio state court convicted Ms. Mapp of an offense relating to certain wrongfully seized "lewd and lascivious books, pictures, and photographs."[95] In order to conduct a

87. *Id.* at 398.

88. *Id.*

89. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390 (1920).

90. *Id.* at 391.

91. *Id.*

92. *Id.* at 392.

93. *Id.*

94. Nardone v. United States, 308 U.S. 338, 341 (1939).

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

search of Mapp's home, police officers forced their way inside over her objections and demands to see a warrant.[96] The police officers presented to her a paper that they claimed to be a warrant but which they did not allow her to examine.[97] No warrant was ever produced in court.[98] The trial court admitted the wrongfully seized evidence, and the Ohio Supreme Court upheld the conviction.[99]

By this point, the Court recognized that the exclusionary rule was well-established in federal courts since the *Weeks* decision.[100] Although the Court had not yet held that the exclusionary rule applied to the states, it had previously acknowledged that the Fourteenth Amendment Due Process Clause incorporated the Fourth Amendment bar against unreasonable searches and seizures.[101] Even though the Court was unwilling in previous cases to extend the exclusionary rule to the states, it was ready in this case, essentially because the states had time to remedy unreasonable searches and seizures in different ways but had failed.[102] In separating the application of the Fourth Amendment to the states from the application of the exclusionary rule, the Court implied that the rule is not inherently part of the Fourth Amendment.

After supplying a simple explanation for the ruling, the Court supplemented the decision with rationale that was somewhat similar to that in *Weeks*.[103] In one sentence, hidden among other broader statements about the rule, the Court briefly restated the purpose of the exclusionary rule in clear terms: "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[104] Also, buried in practical reasons for applying the exclusionary rule to the states, the Court hinted at the competing interests in the rule: "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[105] The interests in

96. *Id.* at 644.

97. *Id.*

98. *Id.* at 645.

99. *Id.*

100. *Id.* at 648-49.

101. *Mapp*, 367 U.S. at 650-51; *see* Wolf v. Colorado, 338 U.S. 25 (1949).

102. *Mapp*, 367 U.S. at 651-53.

103. *Id.* at 655-56 (reasoning generally that the right to privacy mandates that Courts not allow admission of wrongfully seized evidence).

104. *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

105. *Id.* at 659.

conviction of the guilty and assurance of a government bound by law are were again at odds. At that time, however, the government's interest in convicting the guilty was still losing the battle because it was clear to the Court that society's interest in a government bound by law far exceeds its interest in convicting criminals.[106]

In the next several years, the Court continued to expand the areas protected by the exclusionary rule. In 1961, the same year as *Mapp*, the Court applied the rule to include listening devices used to hear what people are saying from a distance.[107] Of course, in 1965, the Court also extended the rule to asset forfeiture proceedings.[108] In these years, the Court treated the exclusionary rule as almost synonymous with the Fourth Amendment. Whenever the Court acknowledged a violation of the Amendment, it would necessarily exclude the evidence.[109] After these decisions, however, the Court began to shift in its understanding of the exclusionary rule, treating it with much less favor and separating it from certain instances of Fourth Amendment violations.

3. Retreat From Its Application

What had been an implicit acknowledgment in these cases became the Supreme Court's explicit focus for cases seeking to extend the application of the exclusionary rule. In 1974, the Court changed the way it analyzed exclusionary rule cases by establishing a balancing test to weigh the benefits of applying the rule against the burdens on society.[110] In *United States v. Calandra*, the trial court ruled that Calandra was not required to answer questions in a grand jury proceeding that were based on evidence wrongfully seized from his home.[111] In affirming the ruling, the Sixth Circuit held that the exclusionary rule applied to grand jury proceedings.[112] However, the

106. *See id.* ("If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.") (internal citations omitted).

107. Silverman v. United States, 365 U.S. 505 (1961).

108. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). For a fuller discussion on this case, see *infra* Section III.A.

109. This is not to say that there were no limits to the exclusionary rule at this time. Some cases separated violations of the Fourth Amendment from application of the exclusionary rule, but they were limited and were usually justified on other grounds. *See, e.g.*, Alderman v. United States, 394 U.S. 165 (1969) (holding that defendants have standing to challenge the admissibility of wrongfully seized evidence only if they were the victim of the wrongful seizure).

110. United States v. Calandra, 414 U.S. 338, 349 (1974).

111. *Id.* at 341-42.

112. *Id.* at 342.

Supreme Court reversed, explaining that it "decline[d] to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury."[113]

The Court explained its reasoning by starting with the exclusionary rule's true purpose.[114] Throughout the opinion, it emphasized that the purpose of the rule is deterrence, not remedy.[115] In what would be quoted frequently in decisions for years to come, the Court stated the following:

> The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong, committed in this case, is fully accomplished by the original search without probable cause.[116]

The Court clearly stated that the government does not violate a person's Fourth Amendment rights by admitting wrongfully seized evidence against him in court.

With the deterrent purpose in mind, the Court continued balancing the burdens on grand jury proceedings against the benefits of deterring Fourth Amendment violations.[117] The Court recognized that grand jury proceedings are frequently less formal than trials, that they often are not bound by certain rules of evidence, and that their purpose is to expeditiously hear cases.[118] With this in mind, conducting suppression hearings for admission of evidence in grand jury proceedings would "unduly interfere with the effective and expeditious discharge of the grand jury's duties."[119] On the other hand, the Court found that the rule would not be a strong deterrent for wrongful seizures, especially since such evidence would be inadmissible in the trial.[120] Thus, the Court held that such evidence is admissible in grand jury proceedings.[121]

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113. *Id.* at 351-52.
114. *Id.* at 349.
115. *Id.* at 349-54.
116. *Calandra*, 414 U.S. at 354.
117. *Id.* at 349.
118. *Id.* at 349-50.
119. *Id.* at 350.
120. *Id.* at 351.
121. *Id.* at 354-55.

Justice Brennan stated in his dissent what would become his mantra in the exclusionary rule cases that followed *Calandra*: The exclusionary rule is "'an essential part of both the Fourth and Fourteenth Amendments,' that 'gives . . . to the police officer no less than that to which honest law enforcement is entitled.'"[122] He explained that the purpose of the rule was originally not deterrence, but a remedial tool for judges to enforce the exclusionary rule.[123] It declares to the world that the government is bound by law so that man is not invited "to become a law unto himself."[124] This view, however, would later fade into obscurity.

Since *Calandra*, the list of proceedings in which the exclusionary rule does not apply has been steadily growing. The list includes civil tax proceedings,[125] habeas corpus proceedings,[126] parole violation hearings,[127] and civil deportation hearings.[128] In each of these cases, the Court held that expanding the exclusionary rule would add little deterrence against Fourth Amendment violations but would unnecessarily hinder the interests of justice.[129] In addition, the Supreme Court has limited the use of the exclusionary rule even in criminal trials by adding exceptions. Most notably, the Court held that when a police officer reasonably, and in good faith, relies on a warrant issued by a proper magistrate, the evidence searched and seized pursuant to that warrant is admissible regardless of any defect in the warrant that might violate the Fourth Amendment.[130] In such cases, police officers would not be deterred by application of the rule because the magistrate issuing the warrant was at fault.[131] Similarly, the Court held that when an officer reasonably relies on court precedent in making a warrantless search or seizure, the subsequent overruling of precedent will not justify application of the exclusionary rule.[132]

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122. *Calandra*, 414 U.S. at 360 (Brennan, J., dissenting) (internal citations omitted) (quoting Mapp v. Ohio, 367 U.S. 643, 657, 660 (1961)).

123. *Id.* at 357.

124. *Id.* at 358 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928)).

125. United States v. Janis, 428 U.S. 433 (1976).

126. Stone v. Powell, 428 U.S. 465 (1976).

127. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998).

128. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

129. *Scott*, 524 U.S. at 369; *INS*, 468 U.S. at 1046; *Janis*, 428 U.S. at 454; *Stone*, 428 U.S. at 495.

130. United States v. Leon, 468 U.S. 897, 920-22 (1984).

131. *Id.* at 921.

132. Davis v. United States, 564 U.S. 229, 232 (2011).

Under the modern understanding of the rule, it has become increasingly difficult for defendants to exclude evidence because the Court has recognized that there are substantial costs involved in exclusion:

> Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.[133]

In recognizing these costs, the Court has recognized that two wrongs do not make a right. It is a terrible thing for government agents to violate the Fourth Amendment rights of a citizen, but it is also a tragedy for "[t]he criminal . . . to go free because the constable has blundered."[134]

III. Application of the Exclusionary Rule to Asset Forfeiture Proceedings

Shortly after the *Mapp* decision, the Supreme Court held that the exclusionary rule applies to civil forfeiture proceedings. This was shortly before the Court had changed its method of analyzing exclusionary rule cases. Thus, there was no mention of the balance between the deterrence value of the rule and the societal costs of its application. Over fifty years later, the Texas Supreme Court recognized that the law had since changed despite the fact that no other state court had ruled contrary to the Supreme Court's decision after it was made.

A. *Supreme Court Ruled that the Exclusionary Rule Applies to Asset Forfeiture Proceedings.*

In 1965, in *One 1958 Plymouth Sedan v. Pennsylvania*, the Supreme Court held that the exclusionary rule applies to asset forfeiture proceedings. This decision came only four years after the *Mapp* decision, when the Court was still treating the exclusionary rule as essentially synonymous with the Fourth Amendment.

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133. *Id.* at 237 (internal citations omitted).

134. *See* People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

As a 1958 Plymouth sedan made its way across the Benjamin Franklin Bridge from New Jersey into Pennsylvania, two officers of the Pennsylvania Liquor Control Board noticed that the trunk of the car was weighed down.[135] After the car crossed the bridge, the officers stopped it and questioned the driver, Mr. McGonigle.[136] The officers then searched the car, finding thirty-one cases of alcoholic beverages that did not have a required Pennsylvania tax seal.[137] Upon this discovery, the officers arrested McGonigle and seized the alcohol and the car.[138]

The Commonwealth of Pennsylvania subsequently filed a petition in state court to forfeit the vehicle pursuant to Pennsylvania Statute Title 47, section 6-601, which states in relevant part, "No property rights shall exist in any liquor . . . illegally . . . possessed . . . or in any . . . vehicle . . . used in the . . . illegal transportation of liquor, . . . and the same shall be deemed contraband . . . ."[139] McGonigle objected to the petition, seeking its dismissal and the return of his vehicle.[140] The trial court sustained the objection and held that the seizure of McGonigle's vehicle violated his Fourth Amendment rights because the officers did not have probable cause to search the vehicle.[141] The intermediate court of appeals reversed the decision.[142] The Supreme Court of Pennsylvania affirmed the appellate court holding that the exclusionary rule only applies to criminal proceedings, not forfeiture proceedings which are "civil in nature."[143]

The United States Supreme Court granted certiorari to decide one issue: whether the exclusionary rule applies to civil forfeiture proceedings.[144] Holding that it does apply, the Court reversed the decision of the Pennsylvania Supreme Court.[145]

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135. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 694 (1965).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 694, 694 n.2 (quoting 47 PA. STAT. AND CONS. STAT. ANN. § 6-601 (1964 Cum. Supp.)).

140. *Id.* at 694.

141. *Plymouth Sedan*, 380 U.S. at 695.

142. *Id.*

143. *Id.*

144. *Id.* at 696.

145. *Id.*

In explaining its decision, the Court stated that *Boyd* was controlling because it is the leading case on search and seizure and because it dealt with civil forfeiture.[146] The Court quoted *Boyd* at length:

> [P]roceedings . . . declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture . . . consists of certain acts of fraud committed against the public revenue . . . which are made criminal by the statute; and it is declared, that the offender shall be fined . . . and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them.[147]

The Court went on to say that *Boyd*'s holding controlled and that evidence obtained in violation of the Fourth Amendment cannot be used in a forfeiture proceeding.[148]

The Court also explained that this holding only applies to property that was seized not because it was inherently illegal but because it was used for illegal purposes.[149] "There is nothing even remotely criminal in possessing an automobile."[150] The seizure of other property that was inherently illegal, like the alcohol seized in this case, should not be returned to the owner because returning such property defeats the public policy that criminalized possession in the first place.[151]

The Court's final point was to emphasize the criminal nature of the offense.[152] In the case before it, McGonigle could have been fined for his offense criminally somewhere between $100 and $500.[153] In the forfeiture proceeding, he would suffer the loss of his car, approximately $1,000 in value, which is a penalty substantially greater than the criminal penalty.[154] "It would

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146. *Id.*

147. *Plymouth Sedan*, 380 U.S. at 697 (quoting Boyd v. United States, 116 U.S. 616, 634 (1886)).

148. *Id.* at 698. The concurring opinion in *Plymouth Sedan* disagreed with this statement of *Boyd*'s holding, stating that the exclusionary rule applies because the Fourth and Fifth Amendments in concert work to bar the evidence from the proceeding. *Id.* at 703-04 (Black, J., concurring).

149. *Id.* at 698-99 (majority opinion).

150. *Id.* at 699.

151. *Id.*

152. *Id.* at 700.

153. *Plymouth Sedan*, 380 U.S. at 700-01.

154. *Id.* at 701.

be anomalous indeed," said the Court, "to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible."[155] Thus, for those reasons, civil forfeiture proceedings must be treated like criminal proceedings, and the exclusionary rule must apply.[156]

B. *Texas Distinguished its Civil Forfeiture Statute from the One in Plymouth Sedan.*

Since the *Plymouth Sedan* holding, nearly every state court that has ruled on the issue has decided consistently with it, applying the exclusionary rule to civil forfeiture proceedings.[157] However, in its 2016 case *State v. One (1)*

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155. *Id.*

156. *Id.* at 702.

157. *See, e.g.*, Nicaud v. State *ex rel.* Hendrix, 401 So. 2d 43, 45 (Ala. 1981); Resek v. State, 706 P.2d 288, 295 (Alaska 1985) (Compton, J., dissenting); State v. $19,238 in U.S. Currency, 755 P.2d 1166, 1171 (Ariz. Ct. App. 1987); Kaiser v. State, 752 S.W.2d 271, 272 (Ark. 1988); People v. $11,200.00 U.S. Currency, 316 P.3d 1, 2 (Colo. App. 2011), *rev'd*, 313 P.3d 554 (Colo. 2013) (reversed on other grounds); *In re* One 1987 Toyota, 621 A.2d 796, 799 (Del. Super. Ct. 1992); *In re* Forfeiture of $62,200 in U.S. Currency, 531 So. 2d 352, 354 (Fla. Dist. Ct. App. 1988); Pitts v. State, 428 S.E.2d 650 (Ga. Ct. App. 1993); Lum v. Donohue, 70 P.3d 648, 656 (Haw. Ct. App. 2003); Idaho Dep't of Law Enf't v. $34,000 U.S. Currency, 824 P.2d 142, 145 (Idaho Ct. App. 1991); People v. Mota, 327 N.E.2d 419, 420 (Ill. App. Ct. 1975); Caudill v. State, 613 N.E.2d 433, 439 (Ind. Ct. App. 1993); *In re* Flowers, 474 N.W.2d 546, 546-47 (Iowa 1991); State v. 1990 Lincoln Town Car, 145 P.3d 921, 924 (Kan. Ct. App. 2006); State v. 1971 Green GMC Van, 354 So. 2d 479, 485 (La. 1977); State v. One Uzi Semi-Automatic 9mm Gun, 589 A.2d 31, 33 (Me. 1991); One 1995 Corvette v. Mayor of Baltimore, 724 A.2d 680 (Md. 1999); Commonwealth v. $992, 422 N.E.2d 767, 769 n.2 (Mass. 1981); *In re* Forfeiture of $176,598, 505 N.W.2d 201 (Mich. 1993); Garcia-Mendoza v. 2003 Chevy Tahoe, 852 N.W.2d 659 (Minn. 2014); Riche v. Dir. of Revenue, 987 S.W.2d 331, 334-35 (Mo. 1999); State v. 1993 Chevrolet Pickup, 116 P.3d 800, 802 (Mont. 2005); State v. One 1987 Toyota Pickup, 447 N.W.2d 243, 248 (Neb. 1989); A 1983 Volkswagen v. County of Washoe, 699 P.2d 108, 109 (Nev. 1985); *In re* $207,523.46 in U.S. Currency, 536 A.2d 1270, 1272 (N.H. 1987); Farley v. $168,400.97, 259 A.2d 201, 210 (N.J. 1969); *In re* Forfeiture of $14,639 in U.S. Currency, 902 P.2d 563 (N.M. Ct. App. 1995); People v. One 1965 Fiat Convertible Vehicle, 326 N.Y.S.2d 833 (Sup. Ct. 1971) (trial level); State v. One 1990 Chevrolet Pickup, 523 N.W.2d 389, 394 (N.D. 1994); *In re* $75,000.00 U.S. Currency, 101 N.E.3d 1209, 1216 (Ohio Ct. App. Dec. 21, 2017); State Forester v. Umpqua River Navigation Co., 478 P.2d 631, 634 (Or. 1970); Commonwealth v. 605 Univ. Drive, 104 A.3d 411, 418 (Pa. 2014); Bd. of License Comm'rs of Tiverton v. Pastore, 463 A.2d 161, 163 (R.I. 1983); State v. 192 Coin-Operated Video Game Machs., 525 S.E.2d 872, 882 (S.C. 2000); State v. $1,010.00 in Am. Currency, 722 N.W.2d 92, 97 (S.D. 2006); Basden v. Lawson, No. 01-A-019111CH00435, 1992 WL 58501, at *3, *5 (Tenn. Ct. App. Mar. 27, 1992); Sims v. Collection Div. of Utah State Tax Comm'n, 841 P.2d 6, 13 (Utah 1992); State v. Lussier, 757 A.2d 1017, 1026 (Vt. 2000); One 1963 Chevrolet Pickup Truck v.

2004 Lincoln Navigator the Supreme Court of Texas distinguished the state's forfeiture statute from that in *Plymouth Sedan* and found that the exclusionary rule does not apply in Texas because of that distinction.[158]

Agent West of the Texas Department of Public Safety received information from a confidential informant that a Hispanic male driving a shiny-rimmed SUV agreed to sell drugs to the informant at a local pool hall.[159] Although the informant was a criminal defendant himself and West had not known or relied on the informant before, West believed him.[160] West did so because he observed the informant make the deal either by phone or text.[161] When West and other agents went to the pool hall, they observed Herrera, a Hispanic man, drive into the parking lot in a Lincoln Navigator with shiny rims.[162] Once the informant identified the driver as the man he had agreed to buy drugs from, West considered the informant's story corroborated, and four officers approached the Lincoln Navigator.[163] After they reached the vehicle, they removed Herrera from the vehicle and searched him and the driver's area of the vehicle for weapons.[164] Finding a gun in the driver's area, the officers arrested Herrera and conducted a more thorough search of the vehicle.[165] In that search, they found cocaine, pills, and gun ammunition.[166]

The State of Texas subsequently filed a forfeiture petition under Chapter 59 of the Texas Code of Criminal Procedure to forfeit the Lincoln Navigator Herrera had driven.[167] The statute states in relevant part that "contraband

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Commonwealth, 158 S.E.2d 755, 757 (Va. 1968); Deeter v. Smith, 721 P.2d 519 (Wash. 1986); *see also* People v. One 1960 Cadillac Coupe, 396 P.2d 706 (Cal. 1964) (decided before *Plymouth Sedan*); One 1948 Pontiac Automobile v. State, 72 So. 2d 692, 696 (Miss. 1954) (decided before *Plymouth Sedan*); One 1949 Pickup Truck v. State *ex rel.* Rhoads, 240 P.2d 1107, 1009 (Okla. 1952) (decided before *Plymouth Sedan*). *But see* State v. Davidson, 15 P.2d 404 (Kan. 1932) (holding that the exclusionary rule does not apply to forfeiture proceedings before *Plymouth Sedan*); One 1995 Corvette v. Mayor & of Baltimore, 706 A.2d 43 (Md. Ct. Spec. App. 1998), *rev'd*, 724 A.2d 680 (Md. 1999) (The Maryland Court of Special Appeals held that the exclusionary rule does not apply to civil forfeiture proceedings but was reversed by the Maryland Court of Appeals).

158. State v. One (1) 2004 Lincoln Navigator, 494 S.W.3d 690, 697-98 (Tex. 2016).

159. *Id.* at 704 (Devine, J., concurring).

160. *Id.*

161. *Id.* at 704-05.

162. *Id.* at 705.

163. *Id.*

164. *Lincoln Navigator*, 494 S.W.3d at 705 (Devine, J., concurring).

165. *Id.*

166. *Id.*

167. *Id.* at 692 (majority opinion).

subject to forfeiture . . . include[s] any property used or intended to be used in the commission of any felony under the Texas Controlled Substances Act."[168] The trial court found that the search of the vehicle was illegal and dismissed the case.[169] The court of appeals agreed, holding that the seizure was wrongful because the police officers did not have reasonable suspicion that a crime had been committed when they stopped Herrera and that another provision in Chapter 59 does not allow the use of wrongfully seized property in forfeiture proceedings.[170]

The Supreme Court of Texas reversed the court of appeals, holding that the court of appeals wrongly interpreted Chapter 59 and that neither the Texas statutory exclusionary rule nor the Fourth Amendment required exclusion in civil forfeiture cases.[171] Using the modern framework for deciding whether to expand the use of the exclusionary rule, the Supreme Court of Texas balanced the interests of courts in discovering truth against the deterrent effect of the rule.[172] Quoting *United States v. Leon*,[173] *Pennsylvania Board of Probation & Parole v. Scott*,[174] and *Davis v. United States*,[175] the court explained that since the wrong proscribed by the Fourth Amendment is "fully accomplished" by the initial violation of rights, the only purpose the rule serves is deterrence of wrongful police conduct.[176] In fact, the court quoted *Davis* at length, explaining that the exclusionary rule is a "last resort" because of the "heavy toll" exacted on "the judicial system and society at large."[177] Because of this, the Supreme Court has refused to apply the rule in "proceedings other than criminal trials."[178]

The court went on to explain that law enforcement officers already suffer the effects of the exclusionary rule in the criminal law context.[179] Since police

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168. *Id.* at 692 n.1 (quoting TEX. CODE CRIM. PROC. art. 59.01(2)(B)(i)) (internal quotation marks and alterations omitted).

169. *Id.* at 692.

170. *Lincoln Navigator*, 494 S.W.3d at 692.

171. *Id.* at 694, 702-03.

172. *Id.* at 695.

173. 468 U.S. 897 (1984) (recognizing an exception to the exclusionary rule in cases where officers rely in good-faith on wrongfully issued warrants).

174. 524 U.S. 357 (1988) (holding that the exclusionary rule does not apply to parole violation hearings).

175. 564 U.S. 229 (2011) (recognizing an exception to the exclusionary rule when an officer reasonably relies on then-valid court precedent).

176. *Lincoln Navigator*, 494 S.W.3d at 695.

177. *Id.* (quoting *Davis*, 564 U.S. at 237).

178. *Id.* at 696 (quoting *Scott*, 524 U.S. at 363). *See supra* Section II.B.3.

179. *Lincoln Navigator,* 494 S.W.3d at 696.

officers are already deterred from performing these wrongful seizures in the criminal case, applying the rule to the civil case would likely have only a marginal effect on police conduct.[180] Moreover, the court noted several other modes of deterrence, including internal police discipline and civil liability, especially when punitive damages may be granted.[181] Thus, in civil forfeiture cases, the slight benefits of the rule's deterrent effect are substantially outweighed by the costs to the judicial system.[182]

Next, the court distinguished *Lincoln Navigator* from *Plymouth Sedan* by pointing out that the *Plymouth Sedan* holding was limited to statutes that were criminal in nature.[183] In *Plymouth Sedan*, the statute "required the determination that the criminal law had been violated."[184] The court supported this understanding of *Plymouth Sedan* by noting that in *United States v. Janis*,[185] the Supreme Court had stated that it had never applied the rule "to exclude evidence from a civil proceeding."[186] The *Janis* Court, however, did mention that *Plymouth Sedan*, the only exception to that general statement, was different only because the forfeiture was a penalty for a criminal offense.[187] That being said, civil forfeiture is not a penalty in Texas, so the *Plymouth Sedan* holding does not apply directly to Chapter 59.[188]

Moreover, the court recognized that Chapter 59's purpose is non-punitive.[189] "It is the intention of the legislature that asset forfeiture is remedial in nature and not a form of punishment."[190] Also, since the statute requires only that the property forfeited be contraband and not that a crime has been committed, it is not a quasi-criminal proceeding.[191]

Interestingly, the court unanimously agreed that the case should be reversed but failed to agree on the reason. In one concurring opinion, rather

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180. *Id.* at 697.

181. *Id.* at 697 n.7.

182. *Id.* at 697.

183. *Id.*

184. *Id.* (quoting *Plymouth Sedan*, 380 U.S. at 701) (alterations omitted).

185. 428 U.S. 433 (1976) (holding that the exclusionary rule does not apply to civil tax proceedings).

186. *Lincoln Navigator*, 494 S.W.3d at 697 (quoting *Janis*, 428 U.S. at 447).

187. *Id.* (quoting *Janis*, 428 U.S. at 447 n.17).

188. *Id.* (quoting United States v. Ursery, 518 U.S. 267, 293 (1996) (Kennedy, J., concurring)).

189. *Id.* at 698.

190. *Id.* (quoting TEX. CODE CRIM. PROC. art. 59.05(e)).

191. *Id.*

than challenging the majority's reasoning, several justices avoided the issue entirely by deciding that the warrantless search was reasonable.[192]

Therefore, according to the court, *Plymouth Sedan* is not controlling because it deals with a statute that is criminal in nature and because the Texas statute is civil and remedial in nature rather than punitive.[193] Moreover, the arguably marginal deterrent effect of the exclusionary rule as applied to civil forfeiture does not outweigh the substantial costs of its use.[194]

C. *Texas Recognized a Change in Law but Failed to Adequately Distinguish its Case from Plymouth Sedan.*

In order to conclude that the exclusionary rule does not apply to civil forfeiture proceedings, the Texas Supreme Court had to overcome one major problem: the *Plymouth Sedan* decision. However, the court's attempt to distinguish its case from *Plymouth Sedan* was feeble. The two cases and the statutes involved in each were too similar to distinguish. Instead, the court should have realized that the Supreme Court has already implicitly overruled *Plymouth Sedan*. Nonetheless, the Texas court provided an excellent analysis of the exclusionary rule issue according to the modern framework.

1. The Implicit Overruling of *Plymouth Sedan*

Although the *Lincoln Navigator* decision appropriately applies the Supreme Court's framework for expansion of the exclusionary rule, not every part of the Texas court's analysis deserves praise. By obligation, the court addressed the biggest objection to its decision, *Plymouth Sedan*. And although the *Plymouth Sedan* Court characterized *all* civil forfeiture proceedings as criminal in nature,[195] the Texas court stated that the *Plymouth Sedan* holding only applies to statutes *that are* criminal in nature.[196]

The court put special weight on the fact that the statute in *Plymouth Sedan* required that criminal law be violated.[197] As the *Plymouth Sedan* Court stated, "It would be anomalous indeed . . . to hold that in the criminal proceeding

192. *Lincoln Navigator*, 494 S.W.3d at 704 (Devine, J., concurring).

193. *Id.* at 698 (majority opinion).

194. *Id.*

195. "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 697 (1965) (quoting Boyd v. United States, 116 U.S. 616, 632-33 (1886)).

196. State v. One (1) 2004 Lincoln Navigator, 494 S.W.3d 690, 697 (2016).

197. *Id.* (citing *Plymouth Sedan*, 380 U.S. at 701).

the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible."[198] However, the court failed to mention that the Texas statute and the statute in *Plymouth Sedan* were substantially the same.[199]

There appears to be only one relevant distinction between the two statutes that the court might have relied upon when it implied that the Texas statute does not require a determination that criminal law be violated. The Texas statute allows seizure of property that is merely intended to be used for a crime, whereas the *Plymouth Sedan* statute requires that the property actually be used illegally.[200] However, this difference is quite minor for two main reasons. First, many, if not most, actual civil forfeiture cases require proof that the criminal law has been violated because most asset forfeiture seizures come from the proceeds of drug deals or the instrumentalities used for such deals. In fact, the *Lincoln Navigator* case involved transportation and attempted distribution of illegal drugs, which is an actual crime that would need to be proven in the civil forfeiture case.[201] Second, even in those cases that require only intent to commit a crime, there must be evidence of such intent. Since intent is generally proven by people's actions, any proof of intent to commit a crime would likely involve proof of actions sufficient to qualify as a lesser crime or some inchoate form of the crime, such as attempted distribution of controlled substances or conspiracy to manufacture and distribute methamphetamines.

Further, the court stated that the statute in *Plymouth Sedan* could result in penalties greater than criminal penalties for the same crime.[202] The court, however, made no attempt to state that this was not true of the Texas statute, probably because it is in fact true of the Texas statute. Chapter 59 of the Texas Code of Criminal Procedure allows the seizure of property used or intended to be used in the commission of offenses as minor as Class A and B

198. *Plymouth Sedan*, 380 U.S. at 701.

199. The statute in *Plymouth Sedan* reads, "No property rights shall exist in any liquor . . . illegally . . . possessed . . . or in any . . . vehicle . . . used in the . . . illegal transportation of liquor, . . . and the same shall be deemed contraband . . . ." *Plymouth Sedan*, 380 U.S. at 694 n.2 (quoting 47 PA. STAT. AND CONS. STAT. ANN. § 6-601 (1964 Cum. Supp.)). The Texas statute reads, "contraband subject to forfeiture . . . include[s] any property used or intended to be used in the commission of any felony under the Texas Controlled Substances Act." *Lincoln Navigator*, 494 S.W.3d at 692 n.1 (quoting TEX. CODE CRIM. PROC. art. 59.01(2)(B)(i)) (internal quotation marks and alterations omitted).

200. *See supra* note 200.

201. *Lincoln Navigator*, 494 S.W.3d at 692-93.

202. *Id.* at 697.

misdemeanors in some cases.[203] For a Class A misdemeanor, punishment is limited to a fine of not more than $4,000 and a jail term of not more than a year.[204] However, for some Class A misdemeanors included as contraband under Chapter 59, the forfeiture penalties could be substantially greater than a mere $4,000.[205] For example, one Class A Misdemeanor included in Chapter 59 is unlawful transfer of a weapon.[206] The forfeiture case involving the transfer of a weapon is limited only by the value of the instrumentalities and the funds used for the transfer.[207] If a person decided to sell handguns out of his Lamborghini, he might end up forfeiting his half-a-million dollar car, which is a substantially greater punishment than the criminal penalty.

The court also noted that the legislature intended civil forfeiture to be a non-punitive remedy: "it is the intention of the legislature that asset forfeiture is *remedial* in nature and *not* a form of punishment."[208] This is a classic substance over form issue. The legislature may say whatever it wants about what it intends a penalty to be, but the judiciary has a responsibility to look beyond the words of the legislature to ensure that it is not using artful language as an excuse to infringe on civil rights. The court said nothing in support of the legislature's statement; it merely accepted the statement as true. It supplied no explanation regarding a need for a remedy. Remedies are supposed to make an injured party whole, but neither the court nor the legislature made any mention of an injured party or explanation as to how such a party would be made whole. The injury that is remedied by civil forfeiture is suffered by society as a whole, the same party that is injured by violations of criminal law. The truth is that civil forfeiture is a penalty meant to deprive criminals of the benefit to their crimes and to deter future violations of criminal law.[209] Civil forfeiture provides a remedy to the same

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203. *See* TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(B) (West 2015).

204. TEX. PENAL CODE ANN. § 12.21 (West 2017).

205. *See* TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(B) (West 2015).

206. *See* TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(B)(x) (West 2015); TEX. PENAL CODE ANN. § 46.06 (West 2017).

207. This is not to say that the Eighth Amendment does not limit such seizures as decided by *Austin v. United States* but merely that the Texas statute does not limit the value of property seized.

208. State v. One (1) 2004 Lincoln Navigator, 494 S.W.3d 690, 698 (2016) (quoting TEX. CODE CRIM. PROC. art. 59.05(e)) (alterations omitted).

209. *See* Austin v. United States, 509 U.S. 602, 618 (1993) ("[F]orfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."). The *Austin* Court found that civil forfeiture is intended to be a punishment, basing its conclusion on features of a federal forfeiture statute that has striking similarities to

extent that a criminal proceeding relating to the same crime provides a remedy. Thus, in actuality, civil forfeiture is non-punitive to the same extent that criminal proceedings are non-punitive.

The court's final distinction was that civil forfeiture "'is an *in rem* proceeding against *contraband*,' not a quasi-criminal proceeding against a person."[210] This characterization of civil forfeiture is a legal fiction used for the purposes of streamlining the process of depriving people of the benefit of their crimes.[211] It should not be used as an excuse to deprive people of their civil rights by merely declaring property contraband. The property is contraband, and thus subject to forfeiture, because of the *person's* crimes, not the crimes of their property. As the *Plymouth Sedan* Court stated, "There is nothing even remotely criminal in possessing an automobile."[212]

Even so, the court did point out one important thing: the underpinnings of the *Plymouth Sedan* decision have been substantially weakened since it was decided, as the Supreme Court has since clarified its position on the exclusionary rule.[213] "[T]he Court has 'abandoned the old, "reflexive" application of the doctrine, and [has] imposed a more rigorous weighing of its costs and deterrence benefits.'"[214] The *Janis* Court even stated that the Supreme Court "never has applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state," noting that *Plymouth Sedan* relied on the fact that the forfeiture was a criminal penalty.[215] The *Lincoln Navigator* court rightly took this to mean that the *Plymouth Sedan* decision should be read narrowly.[216] However, the *Janis* Court went on to say, "To the extent that [courts do] not focus on the deterrent purpose of the exclusionary rule, the law has since been clarified."[217] This suggests that even in 1976, when *Janis* was decided, the Supreme Court was willing to completely reconsider the *Plymouth Sedan* decision because it not only failed

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Texas' Chapter 59, including the tying of forfeiture to drug offenses and the provision of an innocent-owner defense. *Id.* at 619-22.

210. *Lincoln Navigator*, 494 S.W.3d at 698 (quoting State v. Silver Chevrolet Pickup, 140 S.W.3d 691, 692 (Tex. 2004)).

211. *See Austin*, 509 U.S. at 615 n.9 (1993) ("[F]orfeiture proceedings historically have been understood as imposing punishment despite their *in rem* nature."); Leonard v. Texas, 137 S. Ct. 847, 849 (2017) ("These early statutes permitted the government to proceed *in rem* under the fiction that the thing itself, rather than the owner, was guilty of the crime.").

212. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965).

213. *Lincoln Navigator*, 494 S.W.3d at 698.

214. *Id.* (quoting Davis v. United States, 564 U.S. 229, 238 (2011)).

215. United States v. Janis, 428 U.S. 433, 447, 447 n.17 (1976).

216. *Lincoln Navigator*, 494 S.W.3d at 697.

217. *Janis*, 428 U.S. at 457.

to focus on deterrence, but it also failed to even mention deterrence at all. Presumably, the reason the Supreme Court has not already overturned *Plymouth Sedan* is that it has not yet considered a case since *Plymouth Sedan* where it would be appropriate to consider the issue.

2. The Texas Supreme Court's Exclusionary Rule Analysis

Mirroring several modern Supreme Court cases on expansion of the exclusionary rule, the Texas Supreme Court expertly analyzed the application of the rule by balancing the deterrent effect against the judiciary's truth-seeking functions.[218] After citing a series of rules from major Supreme Court rulings on the expansion of the exclusionary rule, the court explained why the costs of the rule's application to civil forfeiture proceedings are high and the deterrence value is low.[219]

First, the court pointed out that the evidence seized from the vehicle and the vehicle itself was "indisputably relevant" to the case.[220] The vehicle was the object of the forfeiture, and the evidence in the vehicle, the drugs, was direct evidence relevant to proving that the vehicle was used or intended to be used in the commission of the crime, as required by Chapter 59.[221] As the court stated, "the 'evidence sought to be excluded is reliable and the most probative information bearing' on the case; it 'in no way has been rendered untrustworthy by the means of its seizure.'"[222] Furthermore, the exclusionary rule "would likely have the undesirable effect of politely handing such vehicles . . . back to those who might put them to criminal use."[223] Thus, excluding the evidence would likely render the trial court powerless to discover the truth in the case, and it could prolong criminal activity.[224]

Next, the court described the deterrence value of the rule in civil forfeiture cases as "marginal at best."[225] This is because police officers are "already 'punished' by the exclusion of illegally obtained evidence in both state and federal criminal trials, so that the entire criminal enforcement process, which is the concern and duty of these officers, is frustrated."[226] If the exclusionary rule has such a strong deterrence value in criminal cases, the deterrent effect

218. *Id.* at 694-97.

219. *Id.* at 696.

220. *Id.*

221. *Lincoln Navigator*, 494 S.W.3d at 696.

222. *Id.* (quoting Stone v. Powell, 428 U.S. 465, 490 (1976)) (alterations omitted).

223. *Id.* at 696 n.5.

224. *Id.* at 696.

225. *Id.*

226. *Id.* (quoting United States v. Janis, 428 U.S. 433 (1976)) (alterations omitted).

in criminal proceedings should be sufficient, thus obviating the necessity for its use in civil forfeiture cases.[227] Adding civil forfeiture to the list of areas in which the exclusionary rule applies will likely not add much deterrence.[228]

The Court made an important point when it discussed that the main concern of police officers is the enforcement of criminal law. As the *Janis* Court said about tax proceedings, "It falls outside the offending officer's zone of primary interests."[229] If police officers are mainly focused on the enforcement of criminal law, which is their primary responsibility, frustration of the criminal trial should be deterrence enough. Usually, forfeiture proceedings are separate civil actions brought by a government to deprive people of the benefit of their criminal activities. However, respondents in civil forfeiture cases can be, and often are, charged with a crime for the same conduct that is the subject of the forfeiture proceeding. Thus, if police officers are already punished, there is no reason to expand the exclusionary rule to the civil proceeding, especially considering the substantial societal costs of doing so.

3. Police Profit Motive

One consideration was conspicuously absent from the court's analysis: police profit motive. The fact that many police agencies receive most or all of the profits from their own seizures in civil forfeiture cases has been cited as a major contributor to abuses of civil forfeiture proceedings.[230] As stated by a report by the Institute for Justice, "In allowing agencies to keep some or all of what they forfeit, civil forfeiture laws permit, if not encourage, law enforcement to police for profit."[231] Presumably, this profit motive is largely responsible for the dramatic increase in the use of civil forfeiture proceedings in recent years.[232]

Even considering this, the vast majority of law enforcement agencies focus mainly on criminal law, using civil forfeiture for the purpose of furthering justice rather than monetary gain. However, even law enforcement officers with utmost integrity may be tempted to focus more heavily on work that will bring the department monetary gain. Moreover, even the appearance of corruption or greedy motivations in a police agency can be detrimental to its reputation.

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227. *Lincoln Navigator*, 494 S.W.3d at 697 (quoting *Janis*, 482 U.S. at 453).

228. *Id.* at 697 (quoting *Janis*, 482 U.S. at 453-54).

229. *Janis*, 428 U.S. at 458.

230. *See* CARPENTER, *supra* note 1, at 10; *see also supra* Section II.A.3.

231. CARPENTER, *supra* note 1, at 10.

232. *Id.*

In Texas, the police agency that seizes the property in civil forfeiture generally receives seventy percent of the profits from the seizure.[233] Justice Thomas noted that these profit motives lead to abuses. In fact, he recounted an instance in a Texas town where the police collaborated with the district attorney to seize property and obtain waivers of property rights from drivers passing through the town.[234]

One could easily see the danger of wholesale rejecting the use of the exclusionary rule in civil forfeiture cases in instances where law enforcement, because of skewed profit motives, make civil forfeiture the priority. If that were to happen, removing the exclusionary rule's deterrent effect could incentivize police officers to perform more searches without probable cause or without search warrants in order to obtain money or valuable property that they suspect the search may uncover.

However, several Supreme Court cases have indicated that the mere possibility of a deterrent effect is not a sufficient reason to expand the exclusionary rule.[235] In fact, some cases have even questioned the actual deterrent effect of the rule in criminal trials because there are no reliable empirical studies showing the effect of the rule; these cases cite this lack of data as a reason to refrain from expanding the rule.[236] The same could easily be said of civil forfeiture. No reliable studies show that applying the exclusionary rule to civil forfeiture actually deters wrongful police conduct. Even so, because of the police profit motive, it would be difficult for anyone

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233. *Id.* at 132.

234. Leonard v. Texas, 137 S. Ct. 847, 848 (2017).

235. *See* Davis v. United States, 564 U.S. 229, 237 (2011) ("Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one.") (quoting Hudson v. Michigan, 547 U.S. 586, 596 (2006)); United States v. Calandra, 414 U.S. 338, 351 (1974) ("Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best."); United States v. Janis, 428 U.S. 433, 449-53 (1976); United States v. Leon, 468 U.S. 897, 918-19 (1984).

236. *See* Elkins v. United States, 346 U.S. 206, 218 (1960) ("Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled."); *Janis*, 428 U.S. at 449-53 ("[A]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed."); *Leon*, 468 U.S. at 918 ("We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.").

to say that there is "no basis . . . for believing that the exclusion of evidence . . . will have a significant deterrent effect . . . ."[237]

Even if the Texas Supreme Court, or even the United States Supreme Court, had considered the effect of the profit motive, it would likely have still found that the societal costs outweigh the deterrent effect. Although the government should certainly not incentivize corruption, courts should not make rulings based simply on the assumption that some police officers are corrupt. The exclusionary rule is not a cure for corruption, but a tool for deterrence. There is no reason to punish all law enforcement officers by applying the exclusionary rule when only a few actually intentionally abuse their authority. Moreover, the fact that the vast majority of civil forfeiture cases are concluded by default judgment, never being challenged by property owners, suggests that wrongful seizures would likely not be challenged very frequently.[238] Thus, even considering the profit motive, there is little to suggest that as a whole, deterrence of wrongful seizures will increase substantially with the application of the exclusionary rule. Applying the rule to all civil forfeiture cases would, therefore, exact not just high societal costs, but unnecessary ones.

IV. SOLUTIONS

Knowing that the societal costs are too high for the use of the exclusionary rule in civil forfeiture proceedings, one question remains for those who understand the danger of law enforcement profit motives: how will Fourth Amendment rights be protected from government officials merely seeking profit? Presumably, the vast majority of police officers are already deterred by the exclusionary rule's sanction in criminal cases, but there is still a danger of abuse by profit seekers. The short solution is that courts can always consider applying the exclusionary rule on a case-by-case basis. Although the Supreme Court has not done this in most cases when it refrained from expanding the exclusionary rule, it has demonstrated its willingness to engage in case-by-case analysis before.[239] Ideally, however, the problem of wrongful police motives should be wholly eliminated legislatively.

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237. *Leon*, 468 U.S. at 916 (stating that there is "no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.").

238. CARPENTER, *supra* note 1, at 12.

239. *See Leon,* 468 U.S. at 918 ("[S]uppression 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.").

A. *Courts Should Consider Applying the Exclusionary Rule on a Case-by-Case Basis Considering the Purpose of the Exclusionary Rule.*

In his concurring opinion in *Leon*, Justice Blackmun indicated that the Supreme Court would be willing to restrict or expand the exclusionary rule according to data it may later receive regarding the rule's effect on police conduct.[240] "If a single principle may be drawn from this Court's exclusionary rule decisions . . ., 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."[241] This means that law enforcement officers have the ability to influence change in the Court's treatment of the exclusionary rule by their conduct.[242]

Therefore, should a court be confronted with a situation where it finds that law enforcement officers wrongfully searched or seized property intentionally because of a profit motive, it may apply the exclusionary rule. The *Davis* Court explained this principle:

> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "vary with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way."[243]

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240. *Id.* at 928 (Blackmun, J., concurring) ("What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.").

241. *Id.*

242. *Id.* ("It is incumbent on the Nation's law enforcement officers, who must continue to observe the *Fourth Amendment* in the wake of today's decisions, to recognize the double-edged nature of that principle.").

243. Davis v. United States, 564 U.S. 229, 238 (2011) (internal citations and alterations omitted).

It has been generally understood since *Leon* that the exclusionary rule does little to deter unintentional or accidental misconduct.[244] This is mainly because law enforcement must act in accordance with their reasonable understanding of what the law is at the time of the search or seizure.[245] If anything, excluding evidence obtained in such a search would make the officer "less willing to do his duty."[246]

Ironically, in a civil forfeiture case, the same profit motive that would motivate a corrupt officer to violate the Fourth Amendment might motivate the same officer to abide by the Fourth Amendment if the exclusionary rule were applied. This is because the profit will be lost in the majority of cases where evidence was excluded because of Fourth Amendment violations.

However, the ultimate victims of the exclusionary rule, even in those few cases where it would be applied, are not the police officers but society and the taxpayers. Since taxpayers hire the police to serve their interests by protecting communities, wasting police resources and returning wrongfully used property to criminals harms the taxpayers and the members of American communities more than anyone else. Because of these societal costs, courts should tread lightly, only applying the rule in extreme cases.

B. Legislatures Should Disincentivize Law Enforcement Abuse of Civil Forfeiture by Removing the Profit Motive.

The costs of the exclusionary rule's use in civil forfeiture cases suggest a need for a better solution. If police officers can be deterred in some manner other than the use of the exclusionary rule, courts may be willing to allow legislatures to apply the alternative. Thus, the state and federal governments should legislatively remove the profit incentive for police officers. Once the profit motive is removed, a court may reasonably say that there is "no basis . . . for believing that the exclusion of evidence . . . will have a significant deterrent effect . . . ."[247] This legislative action would serve the same purpose as the exclusionary rule: deterring Fourth Amendment violations by "removing the incentive to disregard it."[248] Although some states have already removed the incentives,[249] none of them have yet recognized that the removal

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244. *See id.*

245. *Leon*, 468 U.S. at 919-20.

246. *Id.* at 920 (quoting Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).

247. *Id.* at 916.

248. Mapp v. Ohio, 367 U.S. 643, 656 (1961) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

249. *See* CARPENTER, *supra* note 1, at 14.

of profit incentives is sufficient reason to abandon the exclusionary rule in civil forfeiture cases, probably because their courts feel bound by the *Plymouth Sedan* decision.

This proposal begs the question of whether the Supreme Court would accept legislative alternatives, such as removing the profit incentive, as a legitimate reason to retreat from the application of the exclusionary rule. Language from a few Supreme Court decisions suggests a resounding yes.[250] In *Alderman v. United States*, the Supreme Court decided that the exclusionary rule's protection does not extend to those whose rights were not violated by the seizure.[251] In making this decision, the Court relied in part on the fact that the government officers in the case were already substantially deterred from using unauthorized wiretaps (the police conduct at issue) by threat of severe criminal sanctions imposed by statute.[252] In *INS v. Lopez-Mendoza*, the Supreme Court cited an internal "comprehensive scheme for deterring Fourth Amendment violations" of the Immigration and Naturalization Service as the most important factor in reducing the deterrent value of the rule in deportation hearings.[253] Thus, the existence of a statute or regulation has been cited as a reason for not extending the exclusionary rule. Moreover, the *Mapp* Court suggested that it had not previously applied the exclusionary rule to the states in order to give the states an opportunity to find an alternative.[254] Although it held that no state had found an alternative, the Court never indicated that potential alternatives were not feasible.[255] Such statutory solutions can provide the benefits of the exclusionary rule without the societal costs.

Another benefit to solving the problem legislatively is that taking away the profit motive in civil forfeiture would also reduce the likelihood of other civil rights violations. When police agencies are no longer financially interested parties to forfeitures, they can take a more objective approach to seizing property. Instead of looking forward to an increase in the budget, they can properly prioritize the primary purpose of their jobs.

It is the responsibility of state legislatures and Congress, as well as the courts, to protect the civil rights of their citizens. Ideally, every state would

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250. *See* Alderman v. United States, 394 U.S. 165, 175 (1969); INS v. Lopez-Mendoza, 468 U.S. 1032, 1044-45 (1984).

251. *Alderman*, 394 U.S. at 171-72.

252. *Id.* at 175 ("Without experience showing the contrary, we should not assume that this new statute will be cavalierly disregarded or will not be enforced against transgressors.").

253. *INS*, 468 U.S. at 1044-45.

254. Mapp v. Ohio, 367 U.S. 643, 654 (1961).

255. *Id.* at 654-55.

take measures to implement standards for civil forfeiture that protect the rights of citizens, but that is not likely to happen. As the *Mapp* decision made clear, however, it is also the federal government's responsibility to protect people from state violations of civil rights should the states fail to adequately protect such rights. Under the Enforcement Clause of the Fourteenth Amendment, Congress may implement legislation regulating state treatment of civil rights.[256] Although it would be preferable for states to implement their own standards, Congress could mandate that certain standards be met in civil forfeiture cases, including the removal of profit incentives.[257]

V. CONCLUSION

As the Supreme Court has made clear in the past several decades, the exclusionary rule is an extreme sanction that should only be used in circumstances where its deterrence value outweighs the substantial societal costs that it exacts. Although the Court has applied the rule to civil forfeiture proceedings, more recent cases have abandoned the old approach to expanding the rule. The only justification for the exclusionary rule's continued use in civil forfeiture is the fact that law enforcement agencies may violate people's Fourth Amendment rights when they wrongfully prioritize civil forfeiture because of a profit motive in the property seized. However, this profit motive can only justify the application of the exclusionary rule when a court finds that law enforcement officers intentionally violated a person's rights. In the vast majority of cases, police officers are sufficiently deterred by the application of the rule in criminal trials. Ideally, to protect the Fourth Amendment and other civil rights of citizens, Congress and state legislatures should remove the profit motive of police agencies entirely.

256. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

257. Although some might argue that the Enforcement Clause does not permit Congress to infringe on lawful state activities, the Supreme Court has taken a broader approach in its interpretation of the Clause: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).