THE EXCLUSIONARY RULE: WHO DOES IT PUNISH?

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I. INTRODUCTION

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

Nowhere in the Fourth Amendment is the exclusion of evidence,[2] which is the fruit of an illegal search and seizure, mentioned.[3] The Fourth

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[1]U.S. CONST. amend. IV.

[2]The exclusion of evidence from a defendant's trial is commonly referred to as the exclusionary rule. *See infra* note 4 defining the exclusionary rule.

[3]James Ranney, a former assistant district attorney frequently dealing with questions of criminal procedure, wrote of the exclusionary rule:

> I have long believed that the exclusionary rule is not *constitutionally* required. . . . I would merely note that the basic reason for my position on the constitutional question is quite simple: something (here, the exclusionary rule) that is not even desirable as a matter of simple legislative *policy*, can not possibly become a necessity of "due process." Of course, it will be argued that it is not a question of what we *want* to do, but what the constitution *commands*. While this argument would be compelling if the [F]ourth [A]mendment explicitly said, "P.S.: One remedy for violation of the Amendment is an exclusionary rule," such is not the case, and no amount of circumlocution or pretending to follow the dictates of the [F]ourth [A]mendment can hide this fact.

James T. Ranney, *The Exclusionary Rule — The Illusion vs. the Reality*, 46 MONT. L. REV. 289, 289-90 (1985). *See also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (asserting that the words of the Fourth Amendment "do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable"); John Apol, *The Fourth Amendment:*

Amendment exclusionary rule[4] was created by the United States Supreme Court in 1886 during a quasi-criminal forfeiture proceeding.[5] In 1914, the Court made this remedy applicable to the federal courts during a criminal proceeding,[6] and finally, in 1961, the exclusionary rule was thrust upon the state courts as well.[7]

The United States is one of the only countries to exclude reliable and relevant evidence on the ground that it has been unlawfully seized by government officials.[8] Furthermore, ever since the exclusionary rule was

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Historical Perspective, Warrantless Searches, and a Solution to the Exclusionary Rule Debate, 4 DET. C.L. REV. 1205, 1224 (1991) (noting that there is no record of the drafters contemplating an exclusionary rule "in a Fourth Amendment context"); Stephen K. Sharpe & John E. Fennelly, Massachusetts v. Sheppard*: When the Keeper Leads the Flock Astray — A Case of Good Faith or Harmless Error?*, 59 NOTRE DAME L. REV. 665, 667-68 (1984) ("Unlike the [F]ifth [A]mendment, the [F]ourth [A]mendment does not expressly provide for the exclusion of improperly seized evidence." (footnote omitted)); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1371 (1983) ("The congressional debates over the text of the [Fourth] [A]mendment shed no light on whether it was intended to require the exclusion of illegally obtained evidence, and the ratification debates are equally silent.").

[4]The exclusionary rule is a rule which commands that illegally seized evidence, obtained in violation of the Fourth Amendment protections against unreasonable searches and seizures, cannot be used at the defendant's trial. BLACK'S LAW DICTIONARY 564 (6th ed. 1990).

[5]Boyd v. United States, 116 U.S. 616 (1886). *See infra* notes 18-24 and accompanying text (discussing the facts and holding of *Boyd*). Prior to the *Boyd* decision, the leading treaty on evidence clearly proclaimed unlawfully obtained evidence admissible, and the caselaw leading up to *Boyd* was consistent with this view. Amar, *supra* note 3, at 786-87.

[6]Weeks v. United States, 232 U.S. 383 (1914). For a detailed discussion of *Weeks*, see *infra* notes 25-35 and accompanying text.

[7]Mapp v. Ohio, 367 U.S. 643 (1961). For an detailed discussion of *Mapp*, see *infra* notes 44-60 and accompanying text.

[8]Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. 310 (1993). As one scholar recognized: "[t]he Fourth Amendment exclusionary rule is unique to American jurisprudence. Few other countries exclude probative physical evidence of guilt on the basis of police error or misconduct in its seizure. Those that do exclude such evidence do so on a limited basis." *Id.* at 310. *See also* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) ("This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal

created to remedy Fourth Amendment wrongs, the Supreme Court has carved exceptions, both large and small, into the rule.[9] As a result, when determining whether to apply the rule, the Court now weighs society's interest in having defendants tried using all available evidence against society's interest in deterring misconduct of law enforcement officers.[10] With all of its modifications, it is questionable whether the existing rule is necessary. Presently, the sole rationale behind the rule, deterring police misconduct,[11] can certainly be accomplished without compromising the Court's truthfinding process and society's safety.[12]

This Comment will explore the history of the Fourth Amendment exclusionary rule,[13] including its supporting rationales,[14] exceptions, and limitations.[15] Also, this Comment will highlight the problems associated with the present-day exclusionary rule, providing a cost-benefit analysis.[16]

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systems are highly regarded, neither has adopted our rule." (citations omitted)).

[9]*See infra* notes 67-118 and accompanying text (discussing the major exceptions and limitations on the exclusionary rule).

[10]United States v. Calandra, 414 U.S. 338, 348-54 (1974). *See also* Christine L. Andreoli, Note, *Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings: Focusing on Motive to Determine Deterrence*, 51 FORDHAM L. REV. 1019, 1019-21 n.5 (1983) (asserting that, since *Calandra*, courts employ a balance of interests test to determine "whether the likely deterrent effect of exclusion outweighs the benefit to society of admitting the tainted evidence in a given situation").

[11]Andreoli, *supra* note 10, at 1019-20 ("The exclusionary rule, once premised on notions of personal right and judicial integrity, is now invoked primarily to deter government officials from committing [F]ourth [A]mendment violations." (footnotes omitted)).

[12]For a detailed explanation of alternatives capable of remedying Fourth Amendment violations without imposing a substantial cost on society, see *infra* notes 173-203 and accompanying text.

[13]*See infra* notes 18-66 and accompanying text (discussing the creation and development of the Fourth Amendment exclusionary rule).

[14]*See infra* notes 18-66, 119-63 and accompanying text (setting forth the exclusionary rule's supporting rationales and positing that all but one have been discarded).

[15]*See infra* notes 67-118 and accompanying text (analyzing the exclusionary rule's existing exceptions and additional limitations on the rule).

[16]*See infra* notes 165-73 and accompanying text (weighing the exclusionary rule's possible deterrent effect with it's various costs on society).

Finally, this Comment will discuss a number of alternative avenues of relief and explain why the present Fourth Amendment remedy of exclusion is inferior to these alternatives.[17]

II. THE HISTORY OF THE FOURTH AMENDMENT EXCLUSIONARY RULE IN THE UNITED STATES

In 1886, the remedy of an exclusionary rule as a means of dealing with Fourth Amendment violations was created in *Boyd v. United States*.[18] *Boyd* involved a forfeiture proceeding which was quasi-criminal in character.[19] Writing for the Court, Justice Bradley stated that allowing the admission of evidence, seized during an unlawful search and seizure,[20] effectively would

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[17]*See infra* notes 176-206 and accompanying text (outlining alternatives to the exclusionary rule and discussing the advantages and disadvantages of these alternate remedies).

[18]116 U.S. 616 (1886). *Boyd* involved the Government's seizure and forfeiture of thirty-five cases of plate glass under the federal customs revenue laws. *Id.* at 617. Defendants were charged with bringing the cases of plate glass into the United States without paying duties required by law. *Id.* at 617-18. The District Attorney obtained an order from a district judge compelling Defendants to produce an invoice for twenty-nine of the cases in question, and Defendants complied with this order. *Id.* at 618. At the forfeiture proceeding, Defendants objected to the invoice's admission into evidence on the ground that compelling evidence from Defendants to be used against them was unconstitutional. *Id.*

[19]*Id.* at 633-34. In *Boyd*, the Court noted that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in there nature criminal." *Id.* at 634. The information filed by the Government was a civil proceeding, however, due to it's criminal effect of imposing large fines and taking of property upon forfeiture, the proceeding was deemed quasi-criminal, and therefore, Fourth and Fifth Amendment protections were applicable. *Id.*

[20]A "search" consists of some exploratory investigation, invasion, or quest, whereas a seizure is the interference with a person's possessory interest in property. Karen M. Spano, Note, *Search and Seizure — A Warrantless Seizure of Nonthreatening Contraband During a Valid Frisk Is Reasonable if the Officer's Sense of Touch Makes It Immediately Apparent that the Object Is Contraband*, Minnesota v. Dickerson, 4 SETON HALL CONST. L.J. 787, 787 n.2 (1994). Generally, a search or seizure is deemed unlawful when a government official investigates or interfere's with a person's possessory interest in property without a warrant supported by probable cause. *See infra* note 151 (defining probable cause and stating the standard courts apply in determining whether sufficient probable cause exists to issue a search warrant). However, various exceptions to the warrant requirement of the Fourth Amendment exist, and warrantless searches in these

compel Defendant to incriminate himself.[21] Justice Bradley opined that compelling the production of a property owner's private papers, which the Government sought to be forfeited, was equivalent to an unlawful search and seizure and was therefore unconstitutional, violating both the Fourth and Fifth Amendments.[22] Continuing, the Court reasoned that because police almost always perform unreasonable searches and seizures for the purpose of compelling a defendant to give evidence against himself, both the Fourth Amendment's protection against unreasonable searches and seizures and the Fifth Amendment's protection against self-incrimination are intimately related.[23] Thus, the Court used the combination of both Amendments' privileges to justify its finding that the state's notice to produce the evidence and its admission in court were unconstitutional.[24]

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situations are not unlawful. For a discussion on permissible warrantless searches, see Apol, *supra* note 3 and accompanying text.

[21]*Boyd*, 116 U.S. at 633-35. Specifically, Justice Bradley reasoned:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment . . . .

Id. at 633.

[22]*Id.* at 634-35 (asserting that compulsory production of a property owner's papers and books for the purpose of forfeiture is effectively "compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the meaning of the Fourth Amendment").

[23]*Id.* at 633. In finding a nexus between the two amendments, Justice Bradley stated:

> Compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

Id.

[24]*Id.* at 638.

It was not until 1914, however, that this exclusionary rule was applied to criminal proceedings in federal courts.[25] In the landmark case of *Weeks v. United States*, the Supreme Court held that letters and private documents, seized by Federal Government officials in violation of the Fourth Amendment, could not be used in evidence at a criminal trial.[26] The Court explained that admitting such evidence would be equivalent to sanctioning conduct that defies the prohibitions of the United States Constitution.[27] In *Weeks*, police officers arrested Defendant outside his place of employment, while another group of officers entered and searched his house without a search warrant.[28] Police removed various papers and articles from the house and returned with a United States Marshall, who again searched Defendant's house without a warrant.[29] Defendant was charged with using the mails to transport lottery tickets in violation of state criminal law.[30] Subsequently, Defendant was convicted based on the illegally seized evidence and sentenced to a fine and imprisonment.[31]

In a unanimous decision, the Supreme Court determined that the admittance of illegally seized evidence was reversible error.[32] In so finding, the Court reasoned that the use of such evidence in the courts of the United States would amount to a sanction of conduct which violates the

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[25]Weeks v. United States, 232 U.S. 383 (1914) (holding a United States Marshall's search of Defendant's home without a warrant and the prosecution's use of papers and other articles found there to obtain Defendant's conviction for illegal sale of lottery tickets, violated the Fourth Amendment).

[26]*Id.* at 398.

[27]*Id.* at 392-94. The Supreme Court opined that the Fourth Amendment's protection against unreasonable government intrusions extended to the actions of the courts in that an unlawful intrusion by government officials would be affirmed if the court allowed the admittance of evidence resulting from the unlawful intrusion. *Id.* at 394.

[28]*Id.* at 386.

[29]*Id.*

[30]*Id.*

[31]*Id.* Defendant's case came before the Supreme Court on a writ of error after the District Court of the United States for the Western District of Missouri denied defendant's petition to return his unlawfully seized property and private papers. *Id.* at 384-86.

[32]*Id.* at 398.

Constitution, thus calling into question the integrity of the judiciary.[33] Yet, the Court did not cite deterrence as a rationale for the imposition of the exclusionary rule on the federal courts.[34] Furthermore, the *Weeks* Court failed to note any remedies other than exclusion, and the Court appeared to have assumed that exclusion of illegally seized evidence was required by the Fourth Amendment.[35]

Thirty-five years later, in *Wolf v. Colorado*,[36] the Supreme Court was considered whether the Fourth Amendment was applicable to the states through the Due Process Clause of the Fourteenth Amendment.[37] Additionally, the Court determined whether the exclusionary rule was required by the Fourth Amendment to remedy and protect against search and

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[33]In speaking of the conduct of the lower court in this case, the Supreme Court stated: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.* at 394. Justice Day further opined:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Id. at 392.

[34]Upon concluding its decision, the *Weeks* Court, referring to the state policemen's conduct, stated that "[t]he Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies." *Id.* at 398.

[35]Referring to its assumption that the exclusionary remedy was constitutionally required, the Supreme Court in *Weeks* 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.

Id. at 393.

[36]338 U.S. 25 (1949).

[37]*Id.* at 25-26 (upholding two state convictions obtained using evidence, illegally seized by state officials).

seizure violations. Citing *Palko v. Connecticut*,[38] the *Wolf* Court reaffirmed its rejection of a total incorporation approach to the Bill of Rights.[39] The Court, however, found that the Fourth Amendment's core value of privacy was "implicit in the concept of ordered liberty."[40] Thus, the Fourth Amendment was incorporated into the Due Process Clause of the Fourteenth Amendment and enforceable against the states.[41] The Court further reasoned that the exclusionary rule was not implicit in the "concept of ordered liberty" because other remedies existed which could protect state citizens' Fourth Amendment rights.[42] The *Wolf* Court, therefore,

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[38]302 U.S. 319 (1937). *Palko* was based on Defendant's claim that the State's appeal of his conviction and the new trial ordered by the appellate court violated Defendant's constitutional right against double jeopardy. *Id.* at 320-22. In the original trial, Defendant had been convicted of second degree murder and sentenced to life in prison. *Id.* at 320-21. The State appealed the conviction. *Id.* at 321. On appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial on the basis of multiple errors of law that were prejudicial to the State. *Id.* The Supreme Court opined that the Fifth Amendment's protection against putting a person "twice in jeopardy for the same offense" is not automatically embodied in the Fourteenth Amendment. *Id.* at 323. The Court found the protection not to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325 (citations omitted). In declining to incorporate this protection through the Fourteenth Amendment, the Court asserted that the state was entitled to a retrial due to prejudicial errors and was not merely bringing numerous suits against Defendant to wear him down. *Id.* at 328. Further, the Court reserved the question of whether the State is permitted to bring a second trial against an accused for the same offense if the first trial was errorless. *Id.*

[39]A total incorporation approach advocates applying the entire Bill of Rights of the United States Constitution to the states via the Fourteenth Amendment. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 772 (2nd ed. 1988). In Adamson v. California, 332 U.S. 46 (1947), the Supreme Court was only one vote away from holding that the protections and privileges of the Bill of Rights were guaranteed to state citizens through the Fourteenth Amendment. *Id.* A total incorporation approach, however, has never commanded a majority on the Court, but in giving life to the Fourteenth Amendment's Due Process Clause, "'the Court has looked increasingly to the Bill of Rights for guidance [to the point where] many of the rights guaranteed in the first eight Amendments' have been 'selectively' absorbed into the fourteenth." *Id.* (footnote omitted) (alterations in original).

[40]*Wolf*, 338 U.S. at 27. The Court based its finding on the notion that one's right to privacy against arbitrary police intrusion is the core element of the Fourth Amendment and is "basic to a free society." *Id.*

[41]*Id.*

[42]*Id.* at 30-31.

determined that the Fourteenth Amendment did not forbid the admission of unlawfully obtained evidence in state court proceedings.[43]

In 1961, the Supreme Court overruled the *Wolf* decision in *Mapp v. Ohio*,[44] and the exclusionary rule was made a mandatory Fourth Amendment remedy in state courts.[45] In *Mapp*,[46] the Court noted that because slightly more than half of the states had adopted the exclusionary rule in whole or in part, the exclusionary rule must be necessary to deter police misconduct.[47] Further, after reexamining the *Wolf* decision's

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[43]*Id.* at 25.

[44]367 U.S. 643 (1961).

[45]In overruling *Wolf*, the Supreme Court decided that when the Fourth Amendment's substantive protection against unreasonable searches and seizures was extended to the states, so too should the exclusionary remedy have been extended. *Id.* at 655-56. In making the exclusionary rule applicable to the states, the Court removed the double standard which had allowed evidence seized by state officers to be admitted at trial, while prohibiting the admission of evidence seized by federal officers. *Id.* at 657-58.

[46]The *Mapp* case stemmed from an illegal search of Dolree Mapp's house by state police officers acting on information that Defendant was harboring a person who may have been involved in a recent bombing. *Id.* at 644. Police knocked and announced their identity, but were denied access by Miss Mapp. *Id.* Upon the arrival of additional officers approximately three hours later, the police broke into the home and searched an upstairs bedroom. *Id.* at 644-45. Police seized "lewd and lascivious" books and photographs, which were subsequently used to convict Miss Mapp of knowingly possessing such obscene materials. *Id.* at 643. A warrant was allegedly shown to Miss Mapp before the search, however, no search warrant was produced at trial. *Id.* at 645.

[47]*Id.* at 651. Justice Clark, writing for the *Mapp* majority, stated:

> While in 1949, prior to the *Wolf* case, almost two-thirds of the states were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule.

Id. Justice Clark then noted that other remedies have failed to protect citizens' Fourth Amendment rights. *Id.* at 651-52. The Court, however, mentioned that "[l]ess than half of the States have any criminal provisions relating directly to unreasonable searches and seizures." *Id.* at 652 n.7. The existing remedies of twenty-three states mentioned by the courts were: "Criminal Liability of Affiant for Malicious Procurement of Search Warrant"; "Criminal Liability of Magistrate Issuing Warrant Without Supporting Affidavit"; "Criminal Liability of Officer Willfully Exceeding Authority of Search Warrant"; and "Criminal Liability of Officer for Search with Invalid Warrant or no

constitutional underpinnings,[48] the *Mapp* Court declared that the exclusionary rule was an essential part of the Fourth Amendment's privacy guarantee and it too must be applied to the states through the Due Process Clause of the Fourteenth Amendment.[49] The Court concluded, therefore, that evidence obtained in violation of the Fourth Amendment must be excluded by state courts.[50]

Throughout its decision, the Court discussed three major rationales supporting the exclusionary rule: (1) implicit constitutional privilege;[51]

Warrant." *Id.* There was no mention of any civil remedies in this list, and the type of punishment for the aforementioned offenses was not considered by the Court as well.

[48]It is noteworthy that this case was not brought on Fourth Amendment grounds and that neither party addressed the Fourth Amendment issue in any of the lower courts. *See* Stewart, *supra* note 3, at 1367. According to Justice Potter Stewart:

> The substantial federal question that prompted the Supreme Court to hear the appeal was whether the Ohio statute was vague and overbroad in violation of the [F]irst and [F]ourteenth [A]mendments' free press guarantee; the overwhelming portion of the briefs and virtually all of the oral argument were devoted to this issue.

Id. The case could have been decided on the issue briefed and argued by counsel, the First and Fourteenth Amendment freedom of the press issue. *Id.* at 1368. In recounting the writing of the *Mapp* opinion, Justice Stewart was shocked at seeing Justice Clark's proposed majority opinion, and Justice Stewart immediately responded to his fellow Justice via a note "expressing [his] surprise and questioning the wisdom of overruling an important doctrine in a case in which the issue was not briefed, argued, or discussed by the state courts, by parties' counsel, or at our conference following the oral argument." *Id.* The five Justices comprising the *Mapp* Court majority, however, chose to focus on Miss Mapp's Fourth Amendment rights as an opportunity to overrule *Wolf*. *Id.* Justice Stewart noted, "[t]he case of *Mapp v. Ohio* provides a significant insight into the judicial process and the evolution of law — a [F]irst [A]mendment controversy was transformed into perhaps one of the most important search-and-seizure decisions in history." *Id.*

[49]*Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961).

[50]*Id.* at 654-55.

[51]*Id.* at 656. The Court opined that, in applying the Fourth Amendment right to be secure against unreasonable searches and seizures to the states, the Court could not deny "[the Fourth Amendment's] most important constitutional privilege, namely the exclusion of evidence which an accused had been forced to give by reason of the unlawful seizure." *Id.*

(2) judicial integrity;[52] and (3) deterrence.[53] Writing for the Court, Justice Clark stated that an exclusionary rule was implied in the language of the Fourth Amendment and the absence of such a rule would reduce the Fourth Amendment to "a form of words."[54] In determining that the exclusionary rule was a constitutional privilege, Justice Clark asserted that the Fourth Amendment itself barred the use of illegally seized evidence in court.[55] This privilege, the Court explained, was part of the recently discovered privacy right incorporated in the Fourteenth Amendment as a result of the *Wolf* decision.[56]

Furthermore, Justice Clark opined that to admit illegally seized evidence would be an extended violation of the Fourth Amendment and, thus, would tarnish the integrity of the judiciary.[57] In so finding, the Justice reasoned that the courts must follow the dictates of the Constitution lest contempt be bred for the law.[58]

Finally, the Supreme Court determined that the exclusion of illegally seized evidence would deter police misconduct by taking away police

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[52]*Id.* at 660. Writing for the Court, Justice Clark stated that the Court's "decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." *Id.*

[53]*Id.* at 656. The Court further explained, "[o]nly last year the Court recognized that the purpose of the exclusionary rule 'is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.'" *Id.* (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

[54]*Id.* at 648.

[55]*Id.* (quoting Wolf v. Colorado, 338 U.S. 25, 28 (1949)). Justice Clark also quoted *Weeks* for the proposition that use of the illegally seized evidence involved "a denial of the constitutional rights of the accused." *Id.* (quoting Weeks v. United States, 232 U.S. 383, 398 (1914)).

[56]*Id.* at 656.

[57]*Id.* at 660. *See also* Crocker, *supra* note 8, at 315 (asserting that the concern for judicial integrity stems from the admission of illegally seized evidence appearing as an extension of the original wrongdoing, since the admission "furthers the purposes of the police officer who 'chooses to suspend the Fourth Amendment's enjoyment'" (footnote and citation omitted)).

[58]Mapp v. Ohio, 367 U.S. 643, 659 (1961).

officers' incentive to continue their Fourth Amendment violations.[59] Justice Clark recognized that the rule would impose adverse consequences for police misconduct, thereby making the police more respectful of the constitutional guarantee.[60]

The only supporting rationale to survive subsequent caselaw, however, was the supposed deterrent effect of the exclusionary rule on police misconduct.[61] For example, in *United States v. Calandra*,[62] the Court refused to extend the exclusionary rule to grand jury proceedings, noting simply that the rule's interference with such proceedings would outweigh any deterrent effect it might have.[63] The Court also stated that the exclusionary

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

[60]*Id.*

[61]Crocker, *supra* note 8, at 317 (1993). Mr. Crocker explained the Supreme Court's abandonment of the exclusionary rule's underpinnings as follows:

> The erosion of *Mapp* began almost at once. In *Linkletter v. Walker*, the Court declined to apply *Mapp* retroactively on the basis that such application would have no deterrent effect. This holding is flatly inconsistent with *Mapp's* theories that admission would compound the original violation and that exclusion was a personal privilege. . . . The single mindedly deterrent theory of *United States v. Calandra* was the death warrant for the first two *Mapp* arguments.

Id. (footnotes omitted). *See also* Andreoli, *supra* note 10, at 1019-20 ("The exclusionary rule, once premised on notions of personal right and judicial integrity, is now invoked primarily to deter government officials from committing [F]ourth [A]mendment violations." (footnotes omitted)); Sharpe & Fennelly, *supra* note 3, at 671 ("In recent years, the deterrence rationale has by far been the preeminent justification for invoking the exclusionary rule. Indeed, the Court has listed the deterrence rationale as the major reason for limiting the exclusionary rule's scope, refusing to apply the rule where its deterrent objectives are not served.").

[62]414 U.S. 338 (1974).

[63]*Id.* at 349-51. In *Calandra*, Defendant's place of business had been searched for gambling records and paraphernalia pursuant to a warrant naming these items. *Id.* at 340. The searching federal agents, however, were aware of an ongoing investigation regarding an alleged loansharking business by the same defendantl, and they seized such loansharking records. *Id.* at 340-41. Defendant was subpoenaed by a grand jury, which was called to investigate the loansharking business, and Defendant was questioned based on the illegally seized evidence. *Id.* at 341. Defendant refused to answer the questions and brought a motion to suppress the loansharking records. *Id.* The district court granted Defendant's motion to suppress. *Id.* at 342. The Court of Appeals for the Sixth Circuit affirmed and

rule's primary purpose is deterring police misconduct.[64] Writing for the Court, Justice Powell declared that grand jury questions based on unlawfully obtained evidence "work no new Fourth Amendment wrong."[65] Justice Powell further emphasized that the exclusionary rule is a judicially created remedy and not an aggrieved party's personal constitutional right.[66] In so holding, the Court summarily dismissed *Mapp's* judicial integrity and constitutional right rationales.

III. EXCEPTIONS AND LIMITATIONS TO THE RULE

Not only have the majority of rationales supporting the Fourth Amendment exclusionary rule been eliminated, but the rule itself has been narrowed through a number of exceptions.[67] Even before *Mapp* was decided, the Court carved out an impeachment exception to the exclusionary rule in *Walder v. United States*,[68] allowing the use of illegally seized evidence to impeach a defendant's testimony.[69] In *Walder*, Defendant was tried for participating in narcotics transactions.[70] On direct examination, Defendant testified that he had never possessed, purchased, or sold any

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held that the exclusionary rule could be invoked to bar grand jury questioning based on illegally seized evidence. *Id.*

[64]*Id.* at 347-48.

[65]*Id.* at 354.

[66]*Id.* at 348.

[67]Amar, *supra* note 3, at 785 (asserting that not only has the Supreme Court "concocted the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt, [the Court] has then tried to water down this awkward and embarrassing remedy in *ad hoc* ways").

[68]347 U.S. 62 (1954).

[69]*Id.* at 65. In *Walder*, Defendant had been previously indicted in May 1950, for possessing and purchasing a heroin capsule. *Id.* at 62. Defendant motioned to suppress the heroin capsule alleging that it was the result of an unlawful search and seizure. *Id.* Defendant's motion was granted, and the case was dismissed. *Id.* at 63. In January 1952, Defendant was again indicted for participating in four additional illicit narcotics transactions. *Id.*

[70]*Id.* at 63.

narcotics.[71] The Government, on cross-examination, questioned Defendant regarding drugs found in a previous unlawful search of Defendant's home.[72] The Government then had an officer testify who had participated in the original search.[73] The trial judge admitted the evidence with an instruction to the jury that the evidence was to be used "solely for the purpose of impeaching the defendant's credibility."[74]

Subsequently, the Supreme Court affirmed the trial court's decision to admit the evidence.[75] The *Walder* Court reasoned that to disallow the findings of a prior unlawful search and seizure into evidence in this situation would be a "perversion of the Fourth Amendment."[76] Thus, the exclusionary rule does not apply to illegally seized evidence used by the Government on cross-examination only to impeach a defendant who has perjured himself on direct examination.[77]

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[71]*Id.* The Government's case was principally based on "the testimony of two drug addicts who claimed to have procured the illicit stuff from [Defendant] under the direction of federal agents." *Id.* Defendant was the only defense witness and testified on direct examination that he had never participated in any narcotics transactions with the two government witnesses. *Id.*

[72]*Id.* at 64.

[73]*Id.*

[74]*Id.* Thereafter, Defendant was convicted, and he appealed to the Court of Appeals for the Eighth Circuit, which affirmed the trial court's decision. *Id.*

[75]*Id.* at 64-66.

[76]*Id.* at 65. Justice Frankfurter, writing for the Court, stated:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Id.

[77]*Id.* *See also* James v. Illinois, 493 U.S. 307 (1990) (refusing to extend the impeachment exception to allow the admission of illegally seized evidence to impeach all defense witnesses).

As early as 1939, the Supreme Court established the doctrine of attenuation. This exception, created in *Nardone v. United States*,[78] allows evidence to be admitted at trial where the connection between the police misconduct and the discovery of the evidence has "become so attenuated as to dissipate the taint."[79] Such tainted or secondary evidence, stemming from a primary illegal search and seizure, is commonly referred to as the "fruit of the poisonous tree."[80] For example, where a police search is conducted without a warrant, in a situation where a warrant is necessary, evidence may still be procured. Such evidence is tainted by the unlawful search, although the evidence may be sufficient to satisfy probable cause in obtaining a warrant for a second search. If a second search is undertaken using the tainted evidence, any evidence discovered in the second search is also considered the fruit of the poisonous tree. Thus, the original unlawful search taints any evidence which resulted, directly or indirectly, from that

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[78]308 U.S. 338 (1939).

[79]*Id.* at 341. *See* Brent D. Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139, 139-41 (1984) (explaining that the attenuation exception "permits the use of evidence discovered through the Government's misconduct if the connection between the misconduct and the discovery of the evidence is sufficiently weak" and arguing that the Supreme Court, in *Nardone v. United States*, only intended to restate the independent source exception to the rule, not to create a new exception (footnote omitted)).

[80]YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE, 747 (7th ed. 1990). Frequently, the evidence in question in a suppression hearing is "secondary" or "derivative" in character. *Id.* This may occur when, for example, subsequent to an illegal arrest, a confession is obtained or after an illegally obtained confession, evidence is located. *Id.* In such instances, it is necessary for courts to decide whether the secondary evidence was tainted by the prior illegality or, to use the language of Justice Frankfurter in *Nardone*, to decide whether the evidence is "the fruit of the poisonous tree." *Id. See also infra* note 102 and accompanying text (stating that the "fruit of the poisonous tree" doctrine has its origin in *Silverthorne Lumber Co. v. United States*).

The boundaries of the exclusionary rule, which include "fruits of the poisonous tree," were discussed in *Alderman v. United States*:

> The exclusionary rule fashioned in *Weeks v. United States*, and *Mapp v. Ohio*, excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well. Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression.

Alderman, 394 U.S. 165, 171 (1969) (citations omitted).

search.[81] This taint, however, can be washed away if the connection between the original unlawful act and the procurement of the evidence has been sufficiently weakened or attenuated by either the passage of time or some intervening event.[82]

It was not until 1975, in *Brown v. Illinois*,[83] that the Court established a clear, three-factor test for determining whether adequate attenuation had occurred to purge the evidence of its taint. These factors include: "(1) the length of time between the illegality and the seizure of evidence; (2) the presence of additional intervening factors; and (3) the degree and purpose of the official misconduct."[84] The factors must be considered and weighed in light of the totality of the circumstances, keeping in mind the exclusionary rule's underlying policies.[85]

Shortly after the Supreme Court decided *Mapp*, it made yet another divot in the exclusionary rule. In *Wong Sun v. United States*,[86] the Court stated that even when the police have committed a primary illegal search or seizure, if the evidence was discovered via an "independent source," such evidence is admissible.[87] Writing for the Court, Justice Brennan posited that the relevant question to ask is whether the evidence was acquired by exploitation of the primary illegality or instead by some means "sufficiently

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[81]Stratton, *supra* note 79, at 140 (asserting that the exclusionary rule "forbids the use of direct and indirect evidentiary fruits of the Government's misconduct").

[82]*See supra* notes 79-81 and accompanying text (discussing factors necessary to invoke the attenuation exception to the exclusionary rule).

[83]422 U.S. 590 (1975).

[84]Keith A. Fabi, *The Exclusionary Rule: Not the "Expressed Juice of the Woolly-Headed Thistle,"* 35 BUFF. L. REV. 937, 948 (1986) (citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).

[85]*Id.*

[86]371 U.S. 471 (1963).

[87]*Id.* at 487-88. Justice Brennan, writing for the Court, cited *Silverthorne* for the proposition that "the exclusionary rule has no application because the Government learned of the evidence 'from an independent source.'" *Id.* at 487 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). Justice Brennan, however, rejected *Silverthorne's* "but for" test, requiring the exclusion of evidence which would not have been discovered but for the primary police misconduct. *Id.* at 487-88. The Justice stated, "[w]e need not hold that all evidence is the 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Id.*

distinguishable to be purged of the primary taint."[88] An independent legal source, therefore, works to purge the evidence of its original taint such that the evidence will be admissible, despite the existence of a Fourth Amendment violation.

An exception similar to the independent source doctrine was created in 1984. In *Nix v. Williams*,[89] the Supreme Court adopted the inevitable or ultimate discovery exception.[90] This exception allows evidence that inevitably would have been discovered by legal means to be admitted, even though the evidence actually was discovered through police misconduct.[91] The *Nix* Court used a balancing test to weigh society's interest in deterring police misconduct against society's interest in having cases decided using all available, probative evidence.[92] In making its ultimate decision to adopt this exception, the Court determined that if the evidence sought to be excluded inevitably would have been discovered by lawful means, the use of the exclusionary rule would be of little deterrent value.[93] The Supreme

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[88]*Id.* at 488 (citation omitted).

[89]467 U.S. 431 (1984).

[90]*Id.* at 431. *See also* YALE KASIMAR ET AL., MODERN CRIMINAL PROCEDURE & BASIC CRIMINAL PROCEDURE, 749 (7th ed. Supp. 1993) ("[The inevitable discovery] doctrine differs from the 'independent source' exception in that the question is not whether the police *actually* acquired certain evidence by reliance upon an untainted source, but whether evidence in fact obtained illegally would inevitably or eventually or probably have been discovered lawfully.").

[91]*Nix*, 467 U.S. at 444.

[92]*Id.* at 443-44.

[93]*Id.* at 445-46. The Court further opined:

> "The concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct." (Opinion concurring in judgment.) On the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally — including the possibility of departmental discipline and civil liability — also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct.

Id. (citations omitted).

Court, therefore, determined that society's interest in truthfinding outweighs its interest in deterring police misconduct where the evidence would have been discovered notwithstanding a Fourth Amendment violation.[94]

Nix involved the murder of a ten-year old girl in Des Moines, Iowa.[95] Although the police acquired sufficient evidence to obtain an arrest warrant, they had not found the little girl's body.[96] A search party, comprised of over two hundred volunteers, scoured an area covering several miles.[97] During this time, Defendant turned himself in to the Davenport police.[98] While driving him back to Des Moines, the police spoke to Defendant about the missing body, and Defendant voluntarily led them to it.[99] At the time Defendant led the police to the body, the search party was only two and a

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[94]*Id.* at 444. Justice Burger, writing for the Court, stated:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means — here the volunteer's search — then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.

Id. (footnote omitted).

[95]*Id.* at 434.

[96]*Id.* at 434-35. Police surmised that the girl's body was located between Des Moines and a highway rest stop where the blanket Defendant had used to wrap the body was found. *Id.* at 435.

[97]*Id.* at 435.

[98]*Id.*

[99]*Id.* at 435. The police officers' statements to Defendant were as follows:

> I want to give you something to think about while we're traveling down the road . . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched from them on Christmas [E]ve and murdered . . . .

Id.

half miles away from it.[100] Although Defendant's statements were elicited in violation of his Sixth Amendment right to counsel,[101] making the body seized pursuant to those statements the "fruit of the poisonous tree,"[102] the Supreme Court found such evidence would be admissible if the prosecution could show that the search party would have inevitably discovered the body.[103]

Additionally, in 1984, the Court created a good faith exception to the exclusionary rule in *United States v. Leon*.[104] The good faith exception allows into evidence that which is seized by police in a sincere effort to follow the dictates of the Fourth Amendment. This exception embodies the Court's refusal to penalize honest mistakes of police officers and to allow criminals to be set free on technicalities.

In *Leon*, California police executed a warrant in good faith, which was later found to be invalid.[105] The police seized evidence pursuant to this warrant, and Defendants filed their respective motions to suppress.[106] In reviewing Defendants' case, the Supreme Court determined whether a good

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[100]*Id.* at 436.

[101]*Id.* at 437.

[102]*Id.* at 441. The Court, in discussing the "fruit of the poisonous tree" doctrine, stated that such doctrine has its roots in *Silverthorne*, holding that "the Exclusionary Rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence." *Id.* at 441 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)).

[103]*Id.* at 444.

[104]468 U.S. 897 (1984).

[105]*Id.* at 902-03. On the advice of a confidential informant, police began an investigation of two persons. *Id.* at 901. This investigation gave police reason to believe that Defendant Leon and others were involved in drug trafficking. *Id.* at 901-02. The federal officers filled out an affidavit that they believed established probable cause. *Id.* at 902. Shortly thereafter, a state superior court judge issued a facially valid warrant, and police searched Defendants' premises pursuant to the warrant, finding large quantities of narcotics. *Id.* At a hearing on Defendants' motions to suppress the evidence, the district court found that there was not sufficient information in the affidavit to establish probable cause, and the warrant, therefore, was invalid. *Id.* at 903. While the court did find that the searching officer acted in good faith, it rejected the Government's contention that the exclusionary rule should not be applied to evidence seized in "reasonable, good-faith reliance on a search warrant." *Id.* at 904.

[106]*Id.* at 903.

faith exception to the exclusionary rule should be recognized.[107] Writing for the Court, Justice White explained that if the exclusionary rule were applied too inflexibly, it would generate public disrespect for the law.[108] The Justice further opined that the exclusionary rule's purpose is to deter police misconduct, not to punish judges' mistakes in issuing warrants, and there was no indication that excluding evidence seized pursuant to a warrant in good faith would deter such conduct.[109] In concluding that the marginal benefits, if any, resulting from suppression of such evidence were not sufficient to justify exclusion's substantial costs on society, the Court adopted the good faith exception to the rule.[110]

Presently, an impeachment exception, an independent source exception, an inevitable discovery exception, and a good faith exception to the exclusionary rule exist.[111] Also, if the discovery of the evidence was sufficiently attenuated from the original illegal search and seizure, the evidence will be admissible.[112] The Supreme Court has recognized even further limitations on the exclusionary rule. For example, the Supreme Court has limited standing to suppress evidence to persons having a legitimate privacy expectation in the premises or property being searched.[113] Also, the exclusionary rule does not apply to grand jury

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[107]*Id.* at 900. Although the exclusionary rule was made a mandatory remedy in all states in *Mapp*, not all states recognize a good faith exception to the exclusionary rule. For example, the Supreme Court of New Jersey specifically rejected a good faith exception to the rule in *State v. Novembrino*, holding that an unmodified exclusionary rule is an "integral element of the state constitutional guarantee that search warrants will not issue without probable cause." *Novembrino*, 519 A.2d 820, 856 (N.J. 1987).

[108]*Leon, 468* U.S. at 908.

[109]*Id.* at 916-17.

[110]*Id.* at 922-23.

[111]Walder v. United States, 347 U.S. 62 (1954) (allowing admittance of illegally seized evidence for impeachment purposes); Wong Sun v. United States, 371 U.S. 471 (1963) (creating an independent source exception); Nix v. Williams, 467 U.S. 431 (1984) (creating an inevitable discovery exception); United States v. Leon, 468 U.S. 897 (1984) (creating a good faith exception).

[112]Nardone v. United States, 308 U.S. 338 (1939) (creating the attenuation doctrine).

[113]Rakas v. Illinois, 439 U.S. 128 (1978) (holding that a defendant will only have standing if he had a "legitimate privacy interest" in the area searched and items seized at the time of the illegal search). For a discussion on the history of the exclusionary rule's standing limitation, see Fabi, *supra* note 84, at 943-45; Arnold H. Lowey, *A Modest*

Proposal for Fighting Organized Crime: Stop Taking the Fourth Amendment So Seriously, 16 RUTGERS L.J. 831, 832-38 (1985) [hereinafter Lowey, *A Modest Proposal*]. The Supreme Court annunciated the Fourth Amendment exclusionary rule's standing limitation in Alderman v. United States, 394 U.S. 165 (1969) (plurality opinion). *Alderman* involved the Government's wiretapping of some Defendants' telephones, enabling the Government to establish whether a murder conspiracy was taking place. *Id.* at 167 (plurality opinion). Alderman himself did not have his telephone tapped nor did he participate in any of the monitored conversations; however, the conversations were incriminating to him. *Id.* at 167-68 n.1 (plurality opinion). In setting out the standard for determining whether any defendant has standing to bring a Fourth Amendment violation claim, the Court stated that suppression of the product of an unlawful search and seizure can only be employed successfully by "those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* at 171-72 (plurality opinion). The Court further opined that co-conspirators and co-defendants are accorded no special standing. *Id.* at 172 (plurality opinion). Justice White, writing for the plurality, cited *Jones v. United States* as the first case in which a person seeking to suppress evidence was required to have been the victim of an invasion of privacy himself. *Id.* at 173 (plurality opinion) (citations omitted).

The standing limitation on exclusion was further refined in four major subsequent cases. In *Rakas v. Illinois*, the Supreme Court refused to extend standing to the target of an unlawful search. *Rakas*, 439 U.S. 128 (1978). Justice Rehnquist, writing for the Court, stated that the standing requirement is merely the necessity of showing that the defendant's own Fourth Amendment privacy right has been violated. *Id.* at 139. The Justice further opined that Defendants, passengers in the automobile that was the target of the search, had no legitimate interest of privacy in the car and in evidence that they did not own or possess. *Id.* at 148. Moreover, the Court held that a passenger in an automobile with its owner's permission did not have a legitimate privacy interest in the automobile or its contents by virtue of the fact that he was legitimately in the automobile. *Id.* at 148-49. Thus, although the search may have been unlawful, the Court explained that Defendant-passengers have no standing to challenge this search. *Id.* at 148-50.

Two years later, *United States v. Salvucci* and *Rawlings v. Kentucky* were decided, making a possessory interest in property, seized as the result of an illegal search, no longer sufficient to establish standing under the Fourth Amendment. *Salvucci*, 448 U.S. 83 (1980); *Rawlings*, 448 U.S. 98 (1980). Justice Rehnquist, writing for the Court in *Salvucci*, asserted that "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation." *Salvucci*, 448 U.S. at 91. The Court held that the owner or possessor of the evidence in question must have had "a legitimate expectation of privacy in the area searched" if the exclusionary rule of the Fourth Amendment were to apply to him. *Id.* at 92. In *Salvucci*, Defendants claimed a possessory interest in stolen mail found by police in a search of one Defendant's mother's apartment. *Id.* at 85. Since Defendants had relied on their possessory interest in the evidence to give them automatic standing, the case was remanded allowing Defendants to show they had a legitimate expectation of privacy in the apartment where the evidence was found. *Id.* at 95.

In *Rawlings v. Kentucky*, Defendant claimed ownership of drugs found during a search of his friend's purse. *Rawlings*, 448 U.S. at 101. The Court found that Defendant had no legitimate expectation of privacy in the purse because Defendant himself admitted

proceedings,[114] federal civil proceedings,[115] or deportation proceedings.[116] Moreover, the Supreme Court has foreclosed federal review of state court exclusionary rule determinations by refusing to grant federal *habeas corpus*[117] relief on the grounds that illegally seized evidence was admitted at trial where the prisoner had been provided a "full and fair" opportunity to litigate his Fourth Amendment claim in state court.[118] These additional limitations, when combined with the plethora of existing exceptions, weaken the rule and diminish its deterrent value.

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that he did not believe that the purse was free from government intrusion. *Id.* at 105. Defendant stated that he had only known his friend a few days, he had no right to exclude others from the purse, and others did in fact have frequent access to the purse. *Id.* The Court also stressed that ownership alone is not sufficient to establish a legitimate expectation of privacy. *Id.* at 105-06.

Also decided in 1980, *United States v. Payner* considered whether a lower court could use its supervisory power to suppress evidence used against a defendant who did not have standing where the Government's misconduct had been egregious. *Payner*, 447 U.S. 727 (1980). The Court found that although the Government's conduct should not be condoned, the interest in deterring unlawful searches does not justify excluding tainted evidence "at the instance of a party who was not the victim of the challenged practices." *Id.* at 735 (citations omitted). Justice Powell, writing for the Court, stated that the district court erred in concluding that society's interest in deterring police misconduct outweighs society's interest in allowing the trier of fact to have all relevant evidence before him. *Id.* at 736-37. Therefore, the Supreme Court refused to allow courts to use their supervisory powers as a means of extending Fourth Amendment standing to defendants whose rights were not violated, even though the police misconduct was deliberate and egregious. *Id.* at 733-35.

[114]United States v. Calandra, 414 U.S. 338 (1974).

[115]United States v. Janis, 428 U.S. 433 (1976).

[116]Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[117]*Habeas corpus* is the term given to a number of writs having the purpose of bringing a party before the court or judge. BLACK'S LAW DICTIONARY 709 (6th ed. 1990). The primary function of *habeas corpus* relief is to release a party from unlawful imprisonment. *Id.*

[118]*Stone v. Powell*, 428 U.S. 465, 494 (1976) ("[W]here the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal *habeas corpus* relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." (footnotes omitted) (emphasis added)).

IV. THE EXCLUSIONARY RULE'S DETERRENT EFFECT IS QUESTIONABLE

Despite the Court's subscription to the exclusionary rule as a means of deterring police misconduct, evidence of the rule's actual effect on law enforcement activity is lacking.[119] Further, although the exclusionary rule's imposition has been a catalyst for educating law enforcement officials about the Fourth Amendment's search and seizure requirements,[120] it has been this education, and not the rule itself, that has led to any post-*Mapp* deterrence.[121] The expansive training procedures prompted by the rule have been in place for over thirty years, thus making the proper search and seizure conduct ingrained in police officers' minds across the nation.[122] Abolishing the rule at this stage should not cause officers to ignore the numerous past years of training, and the alternatives to the rule proposed in Part VIII of this comment will serve as a sufficient impetus to continue such

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[119]Professor Arval A. Morris, a University of Washington Law Professor, in discussing the existing empirical research on the exclusionary rule, has stated:

> No research design yet conceived is capable of distinguishing between the number of nonoccurring illegal searches that can be attributed to police policies and the number of nonoccurrences correctly attributed solely to the effect of the exclusionary rule. . . . The actual research task is factually hopeless. In short, "[w]hen all factors are considered, there is virtually no likelihood that the Court is going to receive any 'relevant statistics' which objectively measure the 'practical efficacy' of the exclusionary rule."

Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 656 (1982) (footnote omitted). *See also* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970) (asserting that his current findings "fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule").

[120]Jim Driscoll, *Excluding Illegally Obtained Evidence in the United States*, 1987 CRIM. L. REV. 553, 556 ("Writing five years after *Mapp v. Ohio*, a former New York police commissioner stated[:] . . . 'I was immediately caught up in the entire problem of re-evaluating our procedures . . . retraining sessions had to be held from the top administrators down to each of the thousands of foot patrolmen and detectives.'" (citations omitted)).

[121]*Id.*

[122]*Id.* at 560 ("[T]he rule has functioned as a general or systemic deterrent influencing police policies, training[,] and attitudes.").

education.[123] Moreover, the rule's lack of deterrence on law enforcement officials stems from the fact that these officials have no personal stake in a trial that will take place months, or even years, after the evidence has been seized.[124] The rule does not punish the police officer's misconduct directly, but only acts as a general deterrent, if at all, on the judicial system.[125]

Some scholars have argued that the main flaw in the rule is not its lack of deterrence, but its "overdeterrence."[126] These scholars proposed that although law enforcement officers are part of the Government, it is their

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[123]If the rule were to be abolished and sufficient civil and criminal sanctions put in its place, police would still be compelled to learn about proper search and seizure procedures within the Fourth Amendment constraints to avoid such sanctions. Yale Law School Professor Akhil Reed Amar has suggested that instead of excluding reliable evidence:

> [W]hy not assess damages against the police department set at a level to achieve the same quantum of total deterrence, and use the money as a fund to educate the police and the citizenry about the Fourth Amendment, or to comfort victims of violent crime, or to build up neighborhoods that have borne the brunt of police brutality?

Amar, *supra* note 3, at 797.

[124]Courtenay Bass, *The Erosion of the Exclusionary Rule Under the Burger Court*, 33 BAYLOR L. REV. 363, 367 n. 32 (1981). Courtenay Bass illustrated this point in stating:

> Some research indicates that the officer considers his job completed when the evidence is delivered to the district attorney. . . .
>
> It is also argued that even if an officer becomes aware of the fact that evidence was excluded because of his actions, this knowledge probably will not affect his behavior. By the time the case has worked its way through the judicial process, months or possibly years, have passed since the actual search occurred.

Id. (citations omitted). Ms. Bass also recognized that most police conduct is geared toward the prevention of crime, not the prosecution of it, and therefore the exclusionary rule may be "overlooked." *Id.* at 367.

[125]Oaks, *supra* note 119, at 709-10 (1970) ("The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule.").

[126]Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638 (1982). According to Mr. Posner, from an economic standpoint the exclusionary rule "produces overdeterrence because the private (and social) cost imposed on the Government may greatly exceed the social cost of the misconduct." *Id.*

misconduct alone that is the target of the rule.[127] Yet, the impact of the rule is felt by prosecutors, the justice system, and society as a whole.[128] As a result, the rule is too far-reaching, with its costs outweighing its benefits. Nevertheless, although the rule extends beyond its intended scope, the rule is not enough of a deterrent to police misconduct at which the rule is supposedly aimed.[129] Therefore, the rule seems to be an overdeterrent in one sense and an underdeterrent in another. Surely this rule can be replaced with a narrowly-tailored remedy that deters the particular group of people who commit violations of citizens' Fourth Amendment protection against unreasonable searches and seizures.[130]

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[127]Posner, *supra* note 126, at 635 ("The Fourth Amendment, as is well known, forbids unreasonable searches and seizures by government officers."). As Chief Justice Burger posited in *Bivens*, however, "[t]he rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial." Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

[128]As Chief Justice Burger recognized while criticizing the exclusionary rule in his passionate *Bivens* dissent: "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another." *Bivens*, 403 U.S. at 413 (Burger, C.J., dissenting) (quoting Irvine v. California, 347 U.S. 128, 136 (1954)). Chief Justice Burger also recognized the rule's adverse effect on the prosecutor who has committed no violation, stating that "the prosecutor who loses his case because of police misconduct is not an official in the police department." *Id.* at 417 (Burger C.J. dissenting). Finally, the exclusionary rule's adverse impact on the justice system can be seen in its obstruction of truthfinding in what is supposed to be a truthfinding process, and the rule's influence on judges and police to narrow the rule and fabricate facts so that tainted evidence may be admitted. Ranney, *supra* note 3, at 297-98.

[129]*See supra* notes 122-25 and accompanying text (discussing the effect of the exclusionary rule on the justice system and the rule's lack of influence over the individual police officer's actions).

[130]For a detailed discussion of alternative avenues of relief from search and seizure violations, see *infra* 176-206 and accompanying text.

V. THE JUDICIAL INTEGRITY RATIONALE WAS BOUND TO FAIL

The judicial integrity rationale is based on the notion that a court admitting illegally seized evidence, in essence, condones the illegal conduct.[131] Thus, admitting the tainted evidence could be viewed as an "extended violation" of the Fourth Amendment.[132] This rationale would require any and all illegally seized evidence to be excluded so that the violation is not further extended.[133] The numerous exceptions and

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[131]Weeks v. United States, 232 U.S. 383, 392 (1914). The Supreme Court, in *Weeks*, alluded to this rationale, stating:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Id. Forty-seven years later, in *Mapp*, the Court stated, "[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Mapp v. Ohio, 376 U.S. 643, 659 (1961) (citing Olmstead v. United States, 277 U.S. 438, 485 (1928)). *See also* William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L. J. 1361, 1372 (1981) ("The phrase 'imperative of judicial integrity' encompasses a wide variety of justifications with one common theme — the law should not forbid conduct on the one hand and at the same time sanction participation in the forbidden conduct by allowing the acquisition and use of the resulting evidence." (footnote omitted)).

[132]Crocker, *supra* note 8, at 315 ("The idea is that if one is concerned about the integrity of the police, the prosecution, and the courts, then one cannot see the introduction of tainted evidence at trial as separate from the original search and seizure that gave the evidence that taint."). *See also* Bass, *supra* note 124, at 364 (asserting that preservation of judicial integrity is "premised on the idea that the trial court, in admitting such evidence, has become an accomplice in the violation of the constitutional rights it is sworn to uphold and protect").

[133]As recognized by Ms. Bass in her note on the erosion of the rule and its underlying rationales:

> A final flaw in the practical application of the judicial integrity theory was noted in the case of *Stone v. Powell*. In that case, the Court reasoned that if the exclusionary rule truly were based on the preservation of judicial integrity, the courts would have to exclude illegally obtained evidence regardless of whether an objection is made to it and even, if necessary, over the defendant's consent.

limitations on the rule, however, have been utilized by the courts to admit illegally seized evidence for many years.[134]

Further, suppressing evidence obstructs the courts' truthfinding role, thereby obstructing justice itself. The public has interpreted this result not as the preservation of judicial integrity, but rather the erosion of it.[135] If society views the exclusionary rule as a technicality by which criminals are set free, clearly there is no judicial integrity fostered by the rule.[136]

The rule itself has also encouraged conduct which tarnishes judicial integrity.[137] In attempts to avoid what many perceive to be harsh results of the rule, police are willing to perjure themselves so that evidence will be deemed admissible.[138] An example of possibly fabricated police testimony

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Bass, *supra* note 124, at 365-66 (footnote omitted).

[134]For a detailed discussion of the exclusionary rule's limitations and exceptions, see *supra* notes 67-118 and accompanying text.

[135]Bass, *supra* note 124, at 365 ("The public's view of judicial integrity is also an important consideration. While legal scholars and practitioners can envision the principles behind exclusion — primarily, the protection of constitutional rights — the public more often views it as an obstruction of justice." (footnote omitted)). *See also* Amar, *supra* note 3, at 792-93 ("[W]e must remember that integrity and fairness are also threatened by excluding evidence that will help the justice system to reach a true verdict.").

[136]*Bass*, *supra* note 124, at 365 ("With the legal profession divided on the propriety of suppressing evidence to preserve integrity, and the public seeing it as an example of a judicial hypertechnicality, it is arguable that judicial integrity might be served better through limitation or abolition of the exclusionary rule.").

[137]Professor Amar posited that the result of the Supreme Court's rulings regarding the Fourth Amendment "is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse." Amar, *supra* note 3, at 758. In elaborating on this effect, the Professor noted that "[c]riminals go free, while honest citizens are intruded upon in outrageous ways with little or no real remedy. If there are good reasons for these and countless other odd results, the Court has not provided them." *Id.*

[138]Oaks, *supra* note 119, at 699. In compiling data for his study of the exclusionary rule, Professor Dallin H. Oaks found that:

> [U]niform police have been fabricating grounds of arrest in narcotics cases in order to circumvent the requirements of *Mapp*. . . . Viewing the same phenomenon of the sharp increase after *Mapp* in the proportion of New York City police officers testifying that they had seen the defendant throw narcotics to the ground as the officer approached, both Richard Kuh and Irving Younger reached the same conclusion, that after the *Mapp* case there

is that of State Trooper Sean Ruane. Officer Ruane testified to searching Defendant serial-killer Joel Rifkin's vehicle only after smelling decaying flesh.[139] Mr. Rifkin was originally stopped for driving carelessly; but without the smell of decaying flesh, police would have had trouble showing probable cause to cut open the tarp in the back of Mr. Rifkin's truck.[140] If the evidence of the young woman's body found in Mr. Rifkin's truck had been suppressed, then other evidence stemming from the search, such as Mr.

> was an increase in police perjury designed to legalize an arrest and thus avoid the effect of the exclusionary rule.

Id. (footnotes omitted). *See also* Bass, *supra* note 124, at 365 ("In some cases, testifying officers may fabricate testimony concerning the factual situation surrounding the search in order to bring the search within constitutional boundaries." (footnote omitted)).

[139]As stated in the New York Times:

> Trooper Ruane said he had smelled decaying flesh once before in 1990.
>
> He said that he and another trooper, Andre Hannah, had smelled the body at the scene but that a Nassau County police officer whose name he could not recall, had slashed the tarp with a knife to reveal the body.

Rifkin's Lawyer Assails Actions of the Police, N.Y. TIMES, Nov. 9, 1993, B7.

[140]*See* United States v. Carroll, 267 U.S. 132 (1925) (holding the search of a movable automobile upon probable cause and without a search warrant to be permissible). *See also* Catherine A. Shepard, Comment, *Search and Seizure: From* Carroll *to* Ross, *the Odyssey of the Automobile Exception*, 32 Cath. U. L. Rev. 221, 221-22 (1982) (asserting that the automobile exception to the warrant requirement allows for warrantless searches of automobiles where there are exigent circumstances and the searching officer has probable cause to believe the vehicle contains incriminating evidence); Lowey, *A Modest Proposal*, *supra* note 113, at 842-43 (asserting that, although probable cause is necessary for police to conduct a warrantless search of an automobile, "probable cause means no more than 'fair probability,' and may mean no more than 'good faith belief' that there is a 'fair probability,' [and] some police officers may prefer not to worry about such legal niceties" (footnotes omitted)).

The prosecutor in the Rifkin case, Fred Klein, claimed that the probable cause consisted of Mr. Rifkin's reckless driving, and he added, "the odor from the corpse also provided grounds for the search." *Rifkin's Lawyer*, *supra* note 139, at B7. The defense attorney, on the other hand, argued that "because Mr. Rifkin was handcuffed in the back of a police cruiser when the search took place, no emergency existed and the officers had ample time to obtain a search warrant." *Id.*

Rifkin's confession to killing seventeen women,[141] would also have been suppressed unless shown to be adequately attenuated from the original illegal search.[142]

Yet, assume the police pulled Mr. Rifkin over for a minor violation, smelled nothing, and just cut open the tarp on a hunch or for purposes of harassment. Would anyone want Mr. Rifkin, who had murdered seventeen women already, to walk back into society because his Fourth Amendment privacy rights were violated?[143] It is this result, made possible by the exclusionary rule, that prevents judicial integrity from being a logical rationale.

Further evidence that the rule cannot be premised on judicial integrity is the judiciary's own reaction to the rule in many instances.[144] The courts

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[141]*Rifkin's Lawyer*, *supra* note 139, at B7 ("A lawyer for Joel Rifkin, the former landscaper who confessed to killing 17 women, claimed, at a pretrial hearing today, that the police acted illegally when they searched his pickup truck in June and discovered a body in the back.").

[142]Defense attorney Michael Soshnick stated that if the search were unlawful, he would argue to the court "that everything that flowed from that decision [to search the vehicle] points to the fruits of the poisonous tree and therefore would be subject to suppression." *Id.*

[143]Bass, *supra* note 124, at 365 n.19 (asserting that another opposing argument to the judicial integrity rationale is "the exclusionary rule's seemingly anomalous protection of the guilty without a corresponding protection for the innocent victims. One author noted that the exclusionary rule only comes into play when reliable evidence is used to convict someone of a crime he committed."). In discussing the judicial integrity rationale, Judge Bork stated:

> [One of the reasons] sometimes given [in support of the exclusionary rule] is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been convinced by that argument because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society.

Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 1-2 (1987) [hereinafter Kamisar, *Comparative Reprehensibility*] (quoting McGuigan, *An Interview with Judge Robert H. Bork*, JUD. NOTICE, June 1986, at 1, 6).

[144]Professor Amar recognized the Judiciary's reaction as follows: "[t]he exclusionary rule renders the Fourth Amendment contemptible in the eyes of judges and citizens. Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated." Amar, *supra* note 3, at 799.

have tried to bend and stretch the rule, sometimes beyond permissible limits,[145] to allow evidence into a trial, as evidenced in O.J. Simpson's[146] pretrial hearing.[147] In the Simpson case, police scaled the walls outside

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[145]Law professors, George C. Thomas III and Barry S. Pollack, took note of this occurrence:

> Current Fourth Amendment doctrine is less than satisfying because the usual remedy for a violation simultaneously creates too much and too little protection. Overly intrusive searches and seizures can offend the underlying protection offered by the Fourth Amendment, forcing courts to exclude reliable evidence of guilt, and resulting in acquittals that offend society. The possibility of these "erroneous acquittals" may cause courts to twist the facts and doctrine to avoid finding Fourth Amendment violations.

George C. Thomas III and Barry S. Pollack, *Saving Rights From A Remedy: A Societal View Of The Fourth Amendment*, 73 B. U. L. REV. 147, 147 (1993).

[146]Orenthal James Simpson, frequently referred to as O.J. Simpson, was a football running back who led the University of California to two rose bowls and, during his senior year, "won the Heisman trophy, given annually to the best player in college football." Steven V. Roberts, *Simpson and Sudden Death*, U.S. NEWS & WORLD REPORT, June 27, 1994, at 28. Mr. Simpson became a running back for the Buffalo Bills, breaking many NFL records, and was inducted into the football Hall of Fame in 1985. *Id.* Mr. Simpson is also recognized as a spokesman for Hertz rental car company as well as for his acting career, during which he appeared in movies such as *Naked Gun* and its sequels. *Id.* Mr. Simpson was charged with the murder of his ex-wife, Nicole Brown Simpson, and Ronald L. Goldman, occurring the night of June 12, 1994. B. Drummond Ayers Jr., *Simpson Ordered to Stand Trial in Slaying of Ex-Wife and Friend*, N.Y. TIMES, July 9, 1994, at A1.

[147]A judge decides defense motions to suppress evidence, allegedly illegally seized, at a pretrial proceeding called a suppression hearing. BLACK'S LAW DICTIONARY 1440 (6th ed. 1990). The ruling of the judge in the suppression hearing then prevails at the defendant's trial. *Id.*

Prior to the ruling in the Simpson suppression hearing, allowing admittance of evidence found in Mr. Simpson's house resulting from a warrantless search, legal scholars and practitioners made these predictions:

> Mr. Wiley [a law professor at the University of California in Los Angeles] and other legal experts are almost certain that Judge Kathleen Kennedy-Powell will deny the defense motion, chiefly because municipal court judges generally leave rulings on evidence to a higher court. Further, Blair Bernholz, a criminal defense lawyer and expert on evidence, said that courts across the country have shown a tendency in recent years not to grant motions to suppress evidence, largely on the notion that law enforcement agencies should not lose their cases because of minor errors or technical

Mr. Simpson's house the morning after his ex-wife was murdered, after finding only a red speck on the door handle of Mr. Simpson's white Ford Bronco.[148] The police officers remained on Mr. Simpson's premises for six hours before obtaining a search warrant.[149] During this time, the police managed to find and seize a bloody glove matching one found at the murder scene.[150] Although the blood speck would not likely be sufficient to establish probable cause[151] for a search warrant, police could have secured the premises while attempting to obtain one. Instead, the police engaged in the questionable conduct of scaling a wall and searching Mr. Simpson's private premises for several hours before filling out an affidavit for a warrant.[152]

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mistakes.

Michael Janofsky, *Was Evidence Obtained Properly?*, N.Y. TIMES, July 5, 1994, at A8 [hereinafter Janofsky, *Was Evidence Obtained Properly?*].

[148]In defending the search, Detective Philip L. Vannatter stated: "I observed what I thought was blood. . . . It was a small spot, an eighth or a quarter of an inch. . . . I think seeing the blood was the trigger that caused me to make the decision to go over the fence." B. Drummond Ayres Jr., *Detectives in Simpson Case Defend Search*, N.Y. TIMES, July 7, 1994, at A17.

[149]Betsy Streisand, *A Courtroom Classic*, U.S. NEWS & WORLD REPORT, July 11, 1994, at 26 ("Judge Kathleen Kennedy-Powell will rule this week on whether Los Angeles detectives blew it when they scaled the fence at Simpson's house the morning after the murders and searched the ground without a warrant. (They got one six hours later).").

[150]The police report describing evidence obtained at the Simpson house included a bloody glove "similar to a glove that investigators say they recovered near the body of Mr. Goldman outside Mrs. Simpson's home." Michael Janofsky, *Simpson Lawyers Seek to Exclude Bloody Evidence Found at Home*, N.Y. TIMES, July 1, 1994, at A1, A20.

[151]BLACK'S LAW DICTIONARY defines probable cause as "[r]easonable cause; having more evidence for than against. A reasonable ground for belief in certain alleged facts." BLACK'S LAW DICTIONARY 1201 (6th ed. 1990). In *Illinois v. Gates*, the Supreme Court adopted a "totality of the circumstances" approach to determining probable cause. *Gates*, 462 U.S. 213 (1983). The Court proffered that the magistrate's task in issuing a warrant "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 214.

[152]Janofsky, *Was Evidence Obtained Properly?*, *supra* note 147, at A8. In his coverage of the Simpson pretrial proceedings, Mr. Janofsky observed:

> The basis of defense arguments, experts say, will be a three-page affidavit that supported the detectives' request for a warrant. The affidavit, the only

Judge Kathleen Kennedy-Powell found that the warrantless search fell within the exigency exception[153] to the warrant requirement of the Fourth Amendment. The exigency exception allows police to search private residences without a warrant only in emergency situations; for example, when evidence is about to be destroyed or a person's life is in danger.[154] This refusal to suppress, in a situation appearing to be a blatant violation of an individual's Fourth Amendment rights, is indicative of a court's willingness to stretch the exclusionary rule's exceptions to their outer limits to avoid exclusion of probative evidence. Even the courts' specious actions in suppression hearings lead to the conclusion that the exclusionary rule does not promote judicial integrity.

> official version of nearly six hours of activity at Mr. Simpson's home the morning of June 13, was written by Detective Philip Vannatter, using sparse language that is typical of police officers in describing their actions. . . . The search warrant was obtained at 10:45 A.M., almost six hours after detectives first went to the Simpson home to notify him of his former wife's death.

Id.

[153]Johnson v. United States, 333 U.S. 10, 14-15 (1948) (holding that a search without a warrant can be reasonable if there exists "exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that the a magistrate's warrant for search may be dispensed with"). *See also* Amy B. Beller, United States v. MacDonald: *The Exigent Circumstances Exception and the Erosion of the Fourth Amendment*, 20 HOFSTRA L. REV. 407, 409 (1991) (asserting that the exigent circumstances exception, created to address situations in which delay by police officers poses a risk of imminent destruction of evidence or physical harm, has been "liberally and perhaps unconstitutionally applied, particularly in narcotics cases, to ward off defendants' suppression of evidence motions in situations where there was no real exigency prior to police action"); Jacqueline Bryks, *Exigent Circumstances and Warrantless Home Entries:* United States v. MacDonald, 57 BROOK. L. REV. 307 (1991) (establishing that where defendants are suspected of crimes involving narcotics, the Second Circuit has shown a lack of sensitivity to Fourth Amendment privacy values).

[154]*Excerpts from Judge's Ruling on Admissibility of Evidence in Simpson Case*, N.Y. TIMES, July 8, 1994, A14 ("The court finds that [the detectives] were, in fact, acting for a benevolent purpose in light of the brutal attack and that they reasonably believed that a further delay could have resulted in the unnecessary loss of life.").

VI. THE LANGUAGE OF THE FOURTH AMENDMENT DOES NOT CREATE A CONSTITUTIONAL PRIVILEGE, OR RIGHT, TO EXCLUDE EVIDENCE

In *Mapp*, the Court claimed that the exclusion of evidence was a "constitutional privilege."[155] As previously stated, however, the Fourth Amendment does not refer to the exclusion of evidence as a possible remedy to unreasonable searches and seizures, much less a constitutionally required privilege.[156] Thus, the exclusionary rule, which was not created until 1886,[157] is not an explicit constitutional privilege.[158] Further, even the argument of the exclusionary rule's existence as an implicit constitutional privilege fails because the Fourth Amendment does not reveal any special concern for defendants in criminal actions.[159] Yet, the rule only protects

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[155]Justice Clark, writing for the Court, stated, "[i]n short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure." Mapp v. Ohio, 367 U.S. 643, 656 (1961).

Privilege is initially defined by BLACK'S LAW DICTIONARY as "[a] particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens." BLACK'S LAW DICTIONARY 1197 (6th ed. 1990).

[156]*See supra* note 3 and accompanying text (discussing the absence of any contemplation by the Constitution's framers regarding exclusionary relief for Fourth Amendment violations).

[157]Boyd v. United States, 116 U.S. 616 (1886).

[158]Lawrence Crocker, discussing the constitutional privilege rationale for the rule, opined:

> I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could be properly inferred from nothing more than the basic command against unreasonable searches and seizures.

Crocker, *supra* note 8, at 317.

[159]*Id.* at 314 n.17.

those specific individuals and does not apply to the law-abiding majority at whom the Fourth Amendment was aimed.[160]

Some scholars have gone so far as to argue that the exclusionary rule is a personal right.[161] The Supreme Court, however, rejected this rationale in *United States v. Calandra*.[162] Moreover, one author has implied that, although not a constitutional right, the exclusionary rule is necessary to remedy Fourth Amendment wrongs and, therefore, has a constitutional ground via an implicit "enforcement principle."[163] Nevertheless, this author is well aware that the exclusionary rule is not the only remedy that

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[160]*Id.* (stating that a search of a law-abiding citizen's home is more likely to be found unreasonable, however, the privilege of exclusion does not apply in that situation, and "[i]t would be odd indeed to find that the chief constitutional privilege of the Fourth Amendment is one that does not apply to that citizen").

[161]Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 907 (1989) (asserting that exclusion of illegally seized evidence can be justified on the theory that "the Constitution guarantees the defendant a procedural right to exclude the evidence").

[162]414 U.S. 338, 348 (1974) (holding that the exclusionary rule is merely a judicially created remedy, "rather than a personal constitutional right of the party aggrieved"). See U.S. CONST. amend. IV; *supra* note 3 and accompanying text. *See also* Crocker, *supra* note 8, at 317 (stating that the purpose of the rule, as set out in *Calandra*, "is not to redress the injury to the privacy of the search victim. . . . Instead, the rule's prime purpose is to deter future unlawful police misconduct. . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved" (footnote omitted)); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 250 (1988) (stating that although some view the exclusionary rule as a personal right, "recent Supreme Court decisions have clearly rejected this position").

[163]Lawrence Crocker proposed the following constitutional rationale for the rule:

> Suppose that there is an implicit "enforcement principle" that is a necessary corollary of the Fourth Amendment. An enforcement principle would, in effect, create an affirmative duty upon the federal courts to take reasonable steps to insure that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Crocker, *supra* note 8, at 327.

can be implied to enforce the Fourth Amendment's protections.[164] It is for these reasons that the constitutional right or privilege rationale must also fail as support for the rule.

VII. A COST-BENEFIT ANALYSIS OF THE EXCLUSIONARY RULE

As previously stated, the exclusionary rule has been useful in motivating the education of law enforcement officers regarding search and seizure methods permissible under the Fourth Amendment.[165] In this respect, the rule has had an indirect deterrent effect on police behavior. The rule by its very nature, however, also imposes great costs on society.[166] First, the rule allows criminals back into society through either nonprosecution or nonconviction because of the suppression of evidence.[167]

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[164]In concluding his article, Lawrence Crocker stated that although many may be shocked by the replacement of the exclusionary rule, on reflection, "its replaceability by a superior cost-benefit approach is a defining virtue of a utilitarian rule, and the Court has been telling us at least since *Calandra* that this is just what the exclusionary rule is." *Id.* at 351.

[165]Former assistant district attorney, James Ranney, explained, "[m]ost police are schooled in the law of search and seizure, and not inconsiderable efforts are made to follow the dictates of the [F]ourth [A]mendment in order to avoid suppression of evidence, all of which apparently did not occur, at least to this extent, prior to *Mapp v. Ohio.*" Ranney, *supra* note 3, at 292-93.

[166]Discussing legislative reform as a possible solution to the rule, one commentator asserted:

> Certainly the exclusionary rule has its proponents, but none of them has ever suggested the exclusionary rule is without cost. Often phrases such as "small price to pay" are used when attempting to justify the exclusionary rule. Explicit in such an expression is the fact that there *is* a price, and that price is often that a wrongdoer goes unwhipped.

Apol, *supra* note 3, at 1224. *See also* Schroeder, *supra* note 131, at 1382 ("In contrast to the uncertain and, at best, limited deterrent effects of exclusion, the costs of exclusion are clear and substantial.").

[167]In discussing the rule's disadvantages, Mr. Ranney stated:

> The first and most obvious disadvantage of the exclusionary rule is that it frees the guilty. . . . [A] not insignificant consequence of freeing the guilty is that some of the individuals who are freed because of the exclusionary rule are going to commit serious crimes, including *killing people.*

This consequence is often viewed by law-abiding citizens as too high a price to pay for the possible deterrence of occasional police misconduct.[168] Second, the rule itself compromises the integrity of the courts by suppressing not only evidence, but truth.[169] When courts close their eyes to the guilt of defendants, both society and the victims of the crime are left with a feeling of injustice caused through no fault of their own.[170] Third, the rule

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> Thus . . . there should be no doubt in any of our minds but that numerous lives throughout this country have been forfeited because of the operation of the [F]ourth [A]mendment exclusionary rule.

Ranney, *supra* note 3, at 294-95. *See also* Schroeder, *supra* note 131, at 1382 (asserting that the rule frequently frees the guilty because "unlike the exclusion of confessions, the exclusion of illegally obtained evidence frequently results in an immediate end to the prosecution" (footnote omitted)).

[168]Recognizing the adverse public opinion of the rule, one author has stated:

> In the final analysis, public perception that the exclusionary rule releases guilty defendants is more important than the statistics underlying this perception. Indeed, this perception is partly responsible for the rule's greatest cost — a loss of public respect for the judiciary and for the law itself. Professor Kaplan refers to this as "the political price of the rule," and explains that because the rule operates only after the discovery of incriminating evidence, its political price is necessarily high. . . . Finally, the exclusionary rule affords a guilty defendant a windfall that seems contrary to popular notions of justice.

Schroeder, *supra* note 131, at 1384.

[169]*Id.* at 1382-83 ("[T]he exclusionary rule often prevents the factfinder from considering probative and reliable evidence and thereby distorts the factfinding process. The rule also shifts the focus of the trial by diverting attention from 'the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.'" (footnotes omitted)). *See also* Bass, *supra* note 124, at 365 ("To some, the 'suppression of the truth in the search for the truth' seems contradictory." (footnotes omitted)).

[170]After having spoken to citizens concerning their view of the exclusionary rule, Mr. Ranney observed:

> [D]espite all the efforts made to justify it, the general public does not believe in the exclusionary rule. . . . When the victim in a rape case sees the person who raped her walk free because of the operation of the exclusionary rule, it violates the victim's sense of justice. Quite simply, two wrongs do not make a right. The public's sense of injustice in such cases may lead (and, according to anecdotal stories it has led) to private retribution.

causes court delays and monetary costs, incurred through compelling the extra step of a suppression hearing before many criminal trials.[171] These diverted resources could be better utilized in the search for truth and justice.[172] Finally, the rule breeds the contempt of many law-abiding citizens because it is no remedy for them, but is only a remedy to those who are guilty of a crime, those having evidence against them to be

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Ranney, *supra* note 3, at 295-96.

[171]Mr. Ranney, himself, suggested:

> Incredible amounts of litigation are generated by the exclusionary rule, from pretrial suppression motions to appeals and state and federal collateral attacks. . . . With the additional cost of defense counsel, judges, courtrooms, and their staff, the cost each year is enormous. . . .
>
> Likewise, the exclusionary rule is obviously a substantial contributor to one of the most significant problems in our legal system today, that of court delay.

Id. at 296. *See also* Schroeder, *supra* note 131, at 1383 (asserting that the exclusionary rule "consumes valuable judicial resources, and contributes to court delays. As a result, some dangerous individuals are released for long periods pending trial and some innocent defendants languish in jail 'while the criminal argues'").

[172]Ranney, *supra* note 3, at 296 ("My own experience as an assistant district attorney in Philadelphia in the early 1970's was that upwards of 70% of our time was spent litigating issues that had absolutely nothing to do with the question of guilt or innocence, with perhaps 50% of our total time being spent on nothing but [F]ourth [A]mendment exclusionary rule questions.").

suppressed.[173] These four inherent flaws, taken together, tip the scales against the rule's only plausible benefit, deterrence.

VIII. VIABLE ALTERNATIVES TO THE PRESENT REMEDY OF EXCLUSION

The exclusionary rule has been in place in the federal courts for eighty years,[174] and in the state courts for thirty-three.[175] Therefore, it is imperative that a remedy with an adequate deterrent effect be found before the present, longstanding rule is discarded.[176] This alternative remedy must

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[173]In rejecting the contention that the exclusionary rule is an important privilege of the Fourth Amendment, Mr. Crocker noted:

> The Fourth Amendment does not, however, reflect any special concern for criminal defendants. It is chiefly a protection for those innocent of any wrongdoing. Those innocent of serious crimes are, after all, more numerous than the guilty. . . . It would be odd indeed to find that the chief constitutional privilege of the Fourth Amendment is one that does not apply to that citizen.

Crocker, *supra* note 8, at 314 n.17. Also, as Mr. Ranney asserted:

> The point remains that the exclusionary rule does not provide any direct relief to those innocent persons aggrieved by unreasonable searches and seizures. This departure from the normal remedial operation of the law is only one small aspect of an even larger problem, however.
>
> One cannot escape the conclusion that the exclusionary rule violates our sense of justice.

Ranney, *supra* note 3, at 295.

[174]Weeks v. United States, 232 U.S. 383 (1914) (applying the exclusionary rule to federal criminal cases).

[175]Mapp v. Ohio 367 U.S. 643 (1961) (making the exclusionary rule a mandatory Fourth Amendment remedy in all states).

[176]Chief Justice Burger acknowledged the necessity of a viable alternative to the exclusionary rule:

> I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. . . . Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed — that an open season on

not only be able to deter police misconduct, but it must avoid frightening law enforcement officials from performing their jobs. This is a delicate balance. Ultimately, Congress and the states will be responsible for determining which of the following remedies best strikes this balance.[177]

A. IMPROVED CIVIL SANCTIONS

To best deter police misconduct, the remedy against Fourth Amendment violations must ultimately affect law enforcement officials. In *Bivens v. Six Unknown Federal Narcotics Agents*, the Supreme Court held that a Fourth Amendment violation committed by a federal officer, acting in his capacity as a government agent, gives rise to a tort action for damages.[178] Although *Bivens* created a cause of action in tort against the individual federal officer, it did not address the obstacle of the officer's qualified immunity[179] against such liability. Under the qualified immunity doctrine, if the federal officer's search is found to be a discretionary function and one that is not clearly established as unconstitutional, the plaintiff's tort action will be dismissed.[180]

The qualified immunity doctrine, however, does serve as protection against overdeterrence respecting police performance. If a substantial fine were placed on both federal and state officials for their Fourth Amendment

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"criminals" had been declared.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting).

[177]*Id.* at 421 ("Reasonable and effective substitutes can be formulated if Congress would just take the lead, as it did for example in 1946 in the Federal Tort Claims Act.").

[178]*Id.* at 389. Writing for the majority, Justice Brennan wrote, "[i]n Bell v. Hood, 327 U.S. 678 (1946), we reserved the question whether violation of that [Fourth Amendment] command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does." *Bivens*, 403 U.S. at 389. A cause of action in tort against state officials, based on Fourth Amendment violations, was created in 1961 under 42 U.S.C. § 1983 of the Civil Rights Act. 42 U.S.C. § 1981-1988 (1982).

[179]Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. Rev. 337, 354 (1989). A federal officer is entitled to have a civil tort action against him dismissed if he was performing a discretionary function and his conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[180]*Id.*

violations, with no immunity permitted for these officials, it would directly deter their misconduct.[181] Such sanction, however, would also deter much of their lawful conduct.[182] Police officers probably would not risk such monetary loss, having only a modest means to pay, and would therefore become hesitant in performing their necessary duties.[183] This problem of overdeterrence can be overcome by immunizing law enforcement officers from tort liability and, instead, holding police departments liable for the violations of their officers.[184]

Presently, both the Federal Government and state governments are protected from damage suits by victims of illegal searches under the doctrine of sovereign immunity.[185] This type of immunity, however, can be

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[181]As Judge Posner suggested:

> [I]n truth the tort approach has its own problem of overdeterrence. Police and other law-enforcement personnel are compensated on a salaried rather than piece-rate basis, so that even if they perform their duties with extraordinary zeal and effectiveness they do not receive financial rewards commensurate with their performance. . . . There is thus an imbalance: zealous police officers bear the full social costs of their mistakes through the tort system but do not receive the full social benefits of their successes through the compensation system.

Posner, *supra* note 126, at 640.

[182]*Id.*

[183]Bass, *supra* note 124, at 377 ("In allowing recovery against a law enforcement officer, a practical problem arises in balancing the citizen's need for protection against the officer's need for freedom in executing his duties. If officers are plagued with the continuing threat of damage suits, it could inhibit their official actions.").

[184]Posner, *supra* note 126, at 641. Judge Posner stated:

> We can fix this problem by immunizing police officers from tort liability, thereby externalizing some costs in order to eliminate a disincentive for the police to produce external benefits. But can we do this without underdeterring police misconduct? We can — by ensuring that an officer's immunity for misconduct (committed in good faith) is not extended to the agency employing him.

Id.

[185]The doctrine of sovereign immunity is a judicial doctrine founded in English common law which "precludes bringing suit against the [G]overnment without its consent." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990). Sovereign immunity was accorded to

overcome by a waiver of sovereign immunity by Congress on behalf of both state governments and the Federal Government.[186] If Congress chooses to discard the exclusionary rule and, in its place, create a meaningful remedy to unreasonable government searches and seizures, it will have to waive sovereign immunity for both state governments and the Federal Government.[187] For where the judge and jury know the Government will be financially responsible for the acts of its employees, which would be the effect of a sovereign immunity waiver, these factfinders will more likely find defendants guilty and impose substantial fines where the facts warrant such a verdict.[188] Moreover, the doctrine of *respondeat superior*[189] could be applied to the Federal Government and state governments, making the police department liable for an officer's Fourth Amendment violations. Thus, the doctrine would create an incentive for the police department to prevent such misconduct through continued education and discipline.[190]

A recognized problem in judicial proceedings against police officers is that juries are usually unsympathetic to the plaintiff whom they know to be guilty of a crime, thus making damage awards few and insubstantial.[191]

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the states under the Eleventh Amendment of the United States Constitution. Rosen, *supra* note 178, at 361.

[186]Rosen, *supra* note 178, at 362. State sovereign immunity may be waived by an act of Congress or by the states themselves. *Id.* A waiver of sovereign immunity, however, must be express. *Id.*

[187]By waiving sovereign immunity, Congress will allow plaintiffs a realistic opportunity to be compensated for Fourth Amendment violations against them. Rosen, *supra* note 178, at 348. As one scholar stated, "judges and juries are extremely reluctant to render judgments causing federal employees personally to pay thousands of dollars for actions taken pursuant to their government employment." *Id.* at 347.

[188]*Id.* at 348.

[189]The *respondeat superior* doctrine holds an employer liable for the wrongful acts of his employee done within the scope of the employee's employment. BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990).

[190]Judge Posner suggested using the *respondeat superior* doctrine in holding the agency liable for its officers' misconduct. Posner, *supra* note 126, at 641. The Judge also stated that "[t]his rule would give the agency an incentive to prevent misconduct by its officers." *Id.* (footnote omitted).

[191]Bass, *supra* note 124, at 378 ("The juries regret to punish an officer who was attempting to perform his duty, especially if the opposing party is a convicted criminal." (footnote omitted)); Oaks, *supra* note 119, at 673 ("[T]ort liability enforced by the

This dilemma can be remedied by prohibiting a jury trial and instead creating a quasi-judicial tribunal to adjudicate such matters.[192] A tribunal comprised of attorneys, judges, and lay persons would less likely be moved by the fact that the plaintiff is a criminal or that the defendant is a police officer.[193] Moreover, the award should be more reasonably tailored to the damage incurred by the victim and the punishment warranted by the defendant's acts if it is determined by such a tribunal.

This remedy would be separate from the defendant's trial, and therefore, no available, reliable evidence would be suppressed.[194] The defendant would have his day in court and be compensated for the infringement upon his rights. The defendant, however, would still receive a fair trial using all available evidence against him and, if found guilty, would have to suffer the consequences of his wrongdoings. Further, the civil suit remedy is more satisfactory than exclusion because it recognizes that a criminal is no less guilty because his rights have been violated;[195] whereas under the exclusionary rule, the criminal's misdeeds are ignored. Moreover, the remedy does not overdeter by punishing the entire justice system for the misconduct of only one branch.[196] The remedy impacts only on law enforcement officials thereby giving the departments incentive to train and

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aggrieved plaintiff is not thought to be an effective control because juries will be unwilling to find significant damages against police officers, especially in favor of a plaintiff who was an accused or convicted criminal.").

[192]In *Bivens*, Chief Justice Burger also suggested that "the creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims" to handle these Fourth Amendment tort claims. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 423 (1971) (Burger, C.J., dissenting).

[193]*Id.* at 423.

[194]By treating the defendant's claim of a Fourth Amendment violation separate from the trial on his own guilt, the justice system would avoid the dilemma of treating the guilty as innocent in response to a violation of the guilty person's rights. No more will it be said that "[t]he criminal is to go free because the constable has blundered." People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

[195]*See* Amar, *supra* note 3, at 793 ("[T]he courts best affirm their integrity and fairness not by closing their eyes to truthful evidence, but by opening their doors to any civil suit brought against wayward government officials, even one brought by a convict.").

[196]*See supra* notes 127-29 and accompanying text (discussing the adverse effect of the exclusionary rule on actors of the justice system who have committed no Fourth Amendment violation).

discipline their officers[197] and, in turn, giving the officers incentive not to violate citizens' Fourth Amendment rights.

B. DISCIPLINARY BOARDS

The next possible alternative to exclusion is a disciplinary review board.[198] All complaints of violations would go to this board, consisting of members of different fields, including law enforcement, the general public, and the legal community.[199] This board would be used in conjunction with present civil sanctions, and the board would have the power to hear issues regarding the search and seizure in question and recommend appropriate disciplinary measures, if any.[200] It should only recommend suspension or dismissal of an officer in the most egregious instances or where the officer repeatedly violates citizens' Fourth Amendment protections. If harsh sentences were imposed for anything less serious, the board would effectively work as an overdeterrent.

C. CRIMINAL SANCTIONS FOR EGREGIOUS VIOLATIONS

The third remedy is probably better described as a supplement to the civil remedy proposed above. There are already several criminal statutes in place, subjecting law enforcement officers to criminal sanctions for "willful violations with a specific intent to deprive another of his [F]ourth [A]mendment rights,"[201] willfully exceeding official authority in executing

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[197]*See supra* note 189 and accompanying text (suggesting that where an agency is held liable for its employees' acts, the agency will be obliged to train its employees in order to prevent further unacceptable acts).

[198]Ranney, *supra* note 3, at 303. *See also* Schroeder, *supra* note 131, at 1399-1400 (discussing the advantages and disadvantages of review boards as a remedy to Fourth Amendment violations).

[199]Bass, *supra* note 124, at 378. *See also* Schroeder, *supra* note 131, at 1400 (suggesting that the most effective type of review board would be an independent one, comprised of "citizens, judges, law officers, and others, including persons who have experience with search and seizure problems" (footnotes omitted)).

[200]Bass, *supra* note 124, at 378 ("A legislative grant of power to the review board, similar to an administrative agency, would allow the board to enforce its rulings.").

[201]*Id.* at 376 (citing 18 U.S.C.A. § 242 (1976)).

a warrant,[202] maliciously procuring a warrant without probable cause,[203] and maliciously searching premises without a warrant or probable cause.[204] Imposing criminal liability will deter those officers who blatantly defy the dictates of the Fourth Amendment without putting officers who act in good faith in fear of performing their job. Therefore, the present criminal sanctions seem to strike the right balance between the needs of law enforcement to be free from intimidation while performing their job and society's need to be safe from unlawful searches and seizures. Further, those whose rights are violated in good faith will still be compensated through civil remedies for their injuries.

IX. CONCLUSION

Considering the exclusionary rule's crumbling foundation, its structure riddled with exceptions, and its high costs in terms of both its effect on the justice system and on society's perception of this system, it is time to bid the rule farewell. This plea for the exclusionary rule's abandonment comes at a time when our cities are plagued with crime and where public sentiment encourages a "tough on crime" approach by the justice system. The exclusionary rule punishes society by allowing criminals back into our communities. The rule also punishes the justice system by acting to suppress truth in a trial that is intended to be a truthfinding process, thereby tarnishing the integrity of the judiciary in the public's eyes. Moreover, the exclusionary rule does not adequately punish or affect the officers who commit unlawful searches and seizures.

Although the Supreme Court does not seem likely to abandon this controversial remedy,[205] Congress has the right and the power to take this step, putting adequate Fourth Amendment relief in its place. This right is based on recent decisions of the Supreme Court stating that the rule is, in essence, a judicial remedy established to deter unreasonable searches and

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[202]*Id.* (citing 18 U.S.C.A. § 2234 (1976)).

[203]*Id.* (citing 18 U.S.C.A. § 2235 (1976)).

[204]*Id.* (citing 18 U.S.C.A. § 2236 (1976)).

[205]Even Chief Justice Burger, dissenting in *Bivens*, believed that the exclusionary rule should not be abandoned unless a meaningful alternative is developed to replace it as a remedy for Fourth Amendment violations. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 420 (1971) (Burger, C.J., dissenting).

seizures.[206] Thus, the only criteria Congress must meet is that the replacement remedy deter unlawful searches and seizures.

The exclusionary rule's replacement should give police departments the incentive to train their officers in Fourth Amendment search and seizure restraints and to punish their officers where willful violations of the Amendment occur. In addition, the new remedy should provide adequate relief to citizens — both innocent and guilty of crime — whose Fourth Amendment privacy rights have been violated. A combination of the remedies proposed in Part VIII of this Comment will meet the above criteria without jeopardizing society's safety, and Congress should deem these a proper replacement for the exclusionary rule.

Furthermore, because the exclusionary rule has not been held to be a constitutional right, the states are presently free to abolish and replace the rule on their own initiative.[207] The exclusionary rule's replacement is long overdue. Public tolerance for both crime and the exclusionary rule is at a low point.[208] Moreover, the Supreme Court's distaste for the rule has become more apparent with every decision striking down a rationale for the rule or adding a new exception. The Supreme Court's refusal to abolish the rule completely has put the Fourth Amendment relief ball in Congress's and the states' court, and for society's sake, they must play it.

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[206]United States v. Calandra, 414 U.S. 338, 348 (1974) (declaring that exclusionary rule is merely a judicially created remedy, not a constitutional right).

[207]*See* Fabi, *supra* note 84, at 938-39 (arguing that "the Supreme Court has created a 'straw person'" by making the deterrence rationale the "sole justification for the continued existence of the exclusionary rule" (footnotes omitted)).

[208]One example of this lack of tolerance for crime is the declaration of a "war on drugs" in this country where drug use is among "the most serious domestic problems plaguing the nation." Bryks, *supra* note 153, at 307.