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Fixing the Constable's Blunder:
Can *One* Trial Judge in *One* County in *One* State Nudge
a Nation Beyond the Exclusionary Rule?

H. Mitchell Caldwell *

I. INTRODUCTION

The American Exclusionary Rule is like the weather; everybody talks about it but nobody does anything. Despite the rule's wholesale damnation,¹ its disproportionate windfall to the accused,² its disregard of

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1. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994). Amar argues,

The Fourth Amendment today is an embarrassment. Much of what the Supreme Court has said in the last half century—that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided. As a matter of text, history, and plain old common sense, these three pillars of modern Fourth Amendment case law are hard to support; in fact, today's Supreme Court does not really support them. Except when it does. Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so.

Id.

2. See Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1565 (1999) (“Perhaps the most well-known criminal windfall is the exclusionary rule. Under the modern interpretation of the Fourth Amendment, courts must exclude evidence obtained by an illegal search or seizure, regardless of how probative it may be of the defendant’s guilt” (footnote omitted)); NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 2* (1982) [hereinafter *NIJ STUDY*] (stating that 32.5% of all felony drug arrests cleared for prosecution in 1981 to the Los Angeles County Prosecutor’s Office were denied after an initial review because of violations to search and seizure requirements, and that about 46% of individuals freed in California in 1976 and 1977 as a result of the exclusionary rule went on to commit additional crimes within 24 months of their release); see also Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun’s Call To Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 50–51 (1994) (noting that defendants often use the exclusionary rule to make unmerited suppression motions that can wear down prosecutors and can even prove to be successful and that thus, defendants are encouraged to make these motions because the slight cost is minimal in comparison to the potential windfall if the motion proves to be successful).

probative and often compelling incriminatory evidence,³ and its wide variance from the goals that gave rise to its creation,⁴ the rule is now in its forty-fifth year.⁵ Even the United States Supreme Court has beaten and battered⁶ the rule out of frustration at its draconian and odious remedy. And yet, we still only talk about it. Associate Supreme Court Justice Harry Blackmun talked about the rule in his 1984 concurring opinion in *United States v. Leon*:

If a single principle may be drawn from this Court's exclusionary rule decisions, from *Weeks* through *Mapp v. Ohio*, to the decisions handed down here today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.⁷

Like the weather—everybody talks about it, but nobody does anything. The great irony of the American justice system is that we cling to a rule that we are at best uncertain of and pay a tremendous cost for the privilege.⁸ Small wonder all the talk.

Justice Blackmun prognosticated that the rule is “subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.”⁹ Has our understanding of the rule's effects therefore changed? Do we know more now than we did in 1961?¹⁰ Do we know more now than when Blackmun set forth his

3. See NIJ STUDY, *supra* note 2, at 10, 13. The study suggests that 4.8% of felony arrests were denied due to violations of search and seizure requirements. Limiting such prosecutions can preserve scarce financial resources, but suspected criminals are still freed without being charged or even tried for any offense; thus, the defendant benefits from the exclusionary rule before it is even applied to any evidence. *Id.*

4. See *infra* note 12.

5. *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the exclusionary rule to criminal cases in state courts).

6. See *infra* Part II.B.

7. 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

8. See Christopher Slobogin, *Reform: The Police: Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1037–60 (1996) (noting that police perjury in order to convict the guilty and avoid the consequences of the exclusionary rule has become so common that it has been named “testilying”). *Id.* at 1040. Prosecutors and judges often ignore such perjury because “they probably agree with the police that the end justifies the means.” *Id.* at 1047. In addition, one proposal to correct testilying includes eliminating the exclusionary rule. *Id.* at 1057. See also *supra* notes 2–3 and accompanying text for additional costs of the rule.

9. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).

10. See *infra* Part II.C; see also *Mapp*, 367 U.S. at 659. The *Mapp* Court argued that it cannot “lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement.” *Id.* Although the exclusionary rule does restrain law enforcement, the rule, despite its numerous exceptions, is still far too draconian, often allowing probative evidence to be thrown to the

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remarks in 1984?¹¹ Do we have a better grasp as to whether the rule fulfills the very goals for which it was created, most significantly, the goal of deterring violation of Fourth Amendment rights?¹²

We certainly know more now than we used to know. The empirical research has given us a clearer notion about “the effects of the rule outside the confines of the courtroom.”¹³ And as shall be set forth later in this Article, we have come to learn that the rule does not accomplish what it was meant to accomplish because police officers are generally not deterred by its operation.¹⁴ If, then, our “understanding” has

wayside. Furthermore, as more exceptions are continually being created, the initial perception of the rule’s “unfettering” effect has become dated. *Id.*

11. See L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for Civil Administrative Remedy To Partially Replace the Rule*, 83 IOWA L. REV. 669, 678 (1998). Since the decision in *Leon*, a number of studies concerning the effectiveness of the exclusionary rule have been conducted, including the following: William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311 (1991); Perrin et al., *supra*; Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions To Suppress and “Lost Cases”: The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034 (1991); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987). Some studies have praised the exclusionary rule while others have damned it. But, all of the empirical studies have added further perspective to the exclusionary rule in an effort to answer whether the rule deters illegal police misconduct. See *infra* Part II.C.

12. *Leon*, 468 U.S. at 905. The Court in *Leon* argued that [i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. *Id.* at 919 (quoting *U.S. v. Peltier*, 422 U.S. 531, 542 (1975) (internal quotation marks omitted)); see also *Illinois v. Gates*, 462 U.S. 213, 260–61 (1983) (White, J., concurring); *United States v. Janis*, 428 U.S. 433, 459 (1976); *Brown v. Illinois*, 422 U.S. 590, at 610–11 (1975) (Powell, J., concurring in part). The *Leon* Court further contended that

where the officer’s conduct is objectively reasonable, ‘excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.

Leon, 468 U.S. at 919–20 (quoting *Stone v. Powell*, 428 U.S. 465, 539–40 (1976) (White, J., dissenting)).

13. *Leon*, 468 U.S. at 928; see *infra* Part II.C.

14. See *infra* note 148 and accompanying text (stating that police officers occasionally lie in suppression hearings to avoid exclusion); see *infra* notes 154–78 and accompanying text for a summary of two studies that found that police are generally not deterred by the exclusionary rule. William Heffernan and Richard Lovely’s study found that fifteen percent of 500 surveyed law enforcement officers would still follow an illegal course of conduct in violation of Fourth Amendment rights despite being aware of the exclusionary rule. Perrin et al., *supra* note 11, at 721.

changed, and we are underwhelmed with the exclusionary rule, is it not time to heed Justice Blackmun's call and do something about it?

Most of those engaged in thoughtful reflection about the efficacy of the exclusionary rule would agree that the rule is far from the effective remedy first envisioned by the Warren Court in the early sixties.¹⁵ And there certainly has been no lack of alternatives bandied about in the literature.¹⁶ Why then does it still remain the primary vehicle for enforcing the Fourth Amendment?¹⁷ If the devil we know isn't working, aren't we bound to try something else, especially when the devil at play comes with such tremendous costs?¹⁸

This Article is not meant to be just another academic alternative to the exclusionary rule that would quickly be relegated to the junkyard of such proposals, but is meant to be a guideline for actually moving past the rule.¹⁹ This Essay argues that such movement is justified and that the state courts are the places to effectuate the change. It goes on to provide a blueprint for enabling *one* trial judge in *one* county in *one* state court to institute change and nudge a nation beyond the exclusionary rule.

The 1998 Perrin, Caldwell, and Chase study found that eighteen percent of 1144 law enforcement officers felt that suppression of evidence was either a minor concern or no concern at all. *Id.*

15. See *Mapp*, 367 U.S. at 660 (“[W]e can no longer permit [the Fourth Amendment] right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer, who in the name of law enforcement itself, chooses to suspend its enjoyment.”); see also *infra* Part II.A (explaining the origins and development of the exclusionary rule).

16. See Caldwell & Chase, *supra* note 2, at 56–66 (noting that there can be an international perspective in looking at alternatives to the exclusionary rule because the United Kingdom, Canada, Australia, and New Zealand have all taken different approaches in dealing with evidence obtained in violation of individual rights to privacy); Perrin et al., *supra* note 11, at 718, 736–43 (listing existing remedies to the rule as the good faith modification, tort actions, and civil rights, and other proposed remedies as an extension of the good faith exception and the Canadian tort remedy). Some additionally suggested alternatives to the rule include “criminal prosecution of the offending officer, internal discipline of the officer (including termination of employment and steps less than termination), payment of monetary damages by the officer after a lawsuit, or alternatively, after an administrative proceeding, and requiring the officer to participate in educational courses.” *Id.* at 718.

17. Although the Court has repeatedly limited the exclusionary rule's application, it has kept the rule so that the Fourth Amendment's protections do not remain an “empty promise.” *Mapp*, 367 U.S. at 660. In refusing to abolish the exclusionary rule, the Court has made it clear that the rule's primary purpose is to deter and that the rule should only be applied when it will achieve its deterrence goals. See *Leon*, 468 U.S. at 919; *Nix v. Williams*, 467 U.S. 431, 442–43 (1984); *Elkins v. United States*, 364 U.S. 206, 217 (1960).

18. See *supra* notes 2–3 and accompanying text.

19. See *supra* note 16.

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In this Article, I will track a hypothetical criminal case from illegal search and seizure through pretrial motions in which a trial prosecutor concedes that the fruits of the crime (a methamphetamine lab) were seized in violation of the Fourth Amendment. The hypothetical prosecutor maintains that exclusion of the evidence would be inappropriate both because it would prevent probative evidence from trial and because it would not further the deterrence goal of the exclusionary rule. The prosecutor then asserts that since the officer involved was already sanctioned and reeducated on the requirements of search and seizure, he will be less likely to err in the future, thus accomplishing the goal of the exclusionary rule in deterring the officer from future violations and negating the need to exclude the fruits of the illegal search.²⁰

The bulk of this Article will involve two exchanges. The first exchange involves the prosecutor, defense counsel, and trial judge at a pretrial suppression hearing during which the prosecutor succeeds in convincing the court that the exclusion of the evidence is not warranted in light of the remedial action that has already been taken. The second exchange occurs before an appellate court considering the writ taken by defense counsel following the trial court's innovative and bold action in refusing to exclude evidence of the methamphetamine lab despite the Fourth Amendment violation. The exchange between the advocates and the three judge appellate panel will explore the policy of the rule, the effects of the rule outside the courtroom, and the appropriateness of *one* trial judge in *one* county in *one* state court refusing exclusion of the probative and incriminating evidence because of police error.

Before exploring how movement beyond the exclusionary rule can be effectuated, however, it is necessary to show that such movement is justified. Part II of this Article, therefore, examines the genesis of and policy behind the exclusionary rule, the major limitations and exceptions that have been developed to avoid the rule's distasteful effects, and the studies and data that have been accumulated concerning the rule's success, or lack thereof, in reaching its policy goals. This Part demonstrates that the rule is not effective and change is justified. Part III

20. *Leon*, 468 U.S. at 919 ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975))); see also *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

discusses the propriety of using the state courts as laboratories for change and experimentation within the framework of the federal system. Part IV sets forth the hypothetical and follows the hypothetical trial prosecutor through her attempts to cast the first pebble in the brook that leads to a new course of Fourth Amendment protection. Part V concludes that movement beyond the exclusionary rule is not only justified but also possible, and that the state courts are the proper venue in which to make the change.

II. JUSTIFICATION FOR MOVING BEYOND THE EXCLUSIONARY RULE

Movement beyond the rule is justified by the exclusionary rule's limited success in achieving its policy goal of deterring police officer violations of the Fourth Amendment as well as the distasteful effects of the rule that courts have tried to mitigate through various limitations and exceptions to the rule. This Part first examines the genesis of and policy behind the exclusionary rule through *Weeks*,²¹ *Mapp*,²² and their predecessors and progeny. It then examines the major limitations and exceptions that have been developed in order to avoid the rule's distasteful effects. Finally, this Part summarizes the studies and the data that have accumulated over the past forty-five years, reflecting the success, or lack thereof, of the rule.

A. *Genesis and Policy of the Rule*

The contemporary understanding of the exclusionary rule, whereby probative evidence against a criminal defendant is excluded because of police error, did not suddenly emerge, fully developed. Instead, its origins can be traced back to a civil forfeiture case, *Boyd v. United States*, decided in 1886.²³ Between this beginning and the Court's articulation of the modern rule in its 1961 decision in *Mapp v. Ohio*,²⁴ the rule underwent many changes.

21. *Weeks v. United States*, 232 U.S. 383 (1914).

22. *Mapp*, 367 U.S. 643.

23. 116 U.S. 616 (1886). Although *Boyd* does not seem to fit perfectly into the exclusionary rule's history, it has been named as the beginning of the Court's move toward an exclusionary rule. See Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as a Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805, 811–12 (1997) (discussing how *Boyd* birthed the Fourth Amendment's exclusionary rule).

24. 367 U.S. 643.

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In *Boyd* the defendant was forced, pursuant to a government subpoena, to produce invoices that the prosecution intended to use against him.²⁵ Boyd produced the invoices but objected to their use at trial, claiming that their introduction violated his Fifth Amendment protection against self-incrimination.²⁶ The Supreme Court agreed and held that production of the invoices violated both the Fourth and Fifth Amendments.²⁷ The Court reasoned that

[a] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is 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—an unreasonable search and seizure—within the meaning of the Fourth Amendment.²⁸

Without discussion as to the policy served by exclusion, the Court held that admitting the invoices was improper.²⁹ By so holding, the Court in *Boyd* planted the first seeds that would mature into the exclusionary rule we follow today; however, the path to *Mapp* was not without its twists and turns.

In fact, in the 1904 case *Adams v. New York*,³⁰ decided eighteen years after *Boyd*, the Supreme Court took a step back from the broad principles it had enunciated in *Boyd*. Adams, convicted of possessing gambling paraphernalia following an illegal police raid on his residence, claimed that since his Fourth Amendment rights were violated, the evidence gathered from the raid should be excluded.³¹ The Court, in what amounted to dicta, explained that it saw no connection between the Fourth Amendment violation and the exclusion of evidence and that “the courts do not stop to inquire as to the means by which the evidence was obtained.”³² Furthermore, the Court noted,

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

26. *Id.*

27. *Id.* at 634–35, 638.

28. *Id.* at 634–35.

29. *Id.* at 638. In addition to holding that the invoices should not have been admitted, the Court also ruled that the entire action against the defendant was unconstitutional. *Id.* The Court relied heavily on the history of the Fourth Amendment and their belief that the Framers of the Amendment intended to restrain the government’s power to execute general warrants. *Id.*

30. 192 U.S. 585 (1904).

31. *Id.* at 594.

32. *Id.*

If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue³³

Thus, according to *Adams*, Fourth Amendment violations were the personal responsibility of the offending officer and no good purpose was served by exclusion of pertinent evidence, even that evidence obtained in violation of the Fourth Amendment.³⁴

Within a decade, however, the Court in *Weeks v. United States* initiated the exclusionary rule for use in the federal system.³⁵ In excluding probative evidence, the *Weeks* Court held that the Fourth Amendment puts federal officials “in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority.”³⁶ The Court emphasized the need to “forever secure the people . . . against all unreasonable searches and seizures under the guise of law,”³⁷ and reasoned that “[i]f 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 . . . is of no value.”³⁸ Concerned with the taint on judicial integrity, the Court held that “[t]he 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.”³⁹ Thus, in *Weeks*, judicial integrity emerged as the policy goal of evidence exclusion.

Following *Weeks*, analysis of the exclusionary rule laid relatively dormant until 1949 when the Court decided *Wolf v. Colorado*.⁴⁰ Suspecting Wolf of performing illegal abortions, Colorado police searched his office without a warrant and obtained incriminating

33. *Id.* at 595.

34. *Id.*

35. 232 U.S. 383, 398 (1914).

36. *Id.* at 391–92.

37. *Id.* at 392.

38. *Id.* at 393.

39. *Id.* at 392.

40. 338 U.S. 25 (1949).

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evidence.⁴¹ In *Wolf*, the Court took the long overdue step of incorporating the Fourth Amendment into the Due Process Clause of the Fourteenth Amendment and making it applicable to the states,⁴² however, the heart of its opinion focused on whether the federal rule of evidence exclusion would be extended to state prosecutions.⁴³ The Court, in refusing to extend the rule, voiced the following notion:

[I]n practice the exclusion of evidence may be an effective way of deterring unreasonable searches, [but] it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.⁴⁴

The Court also reasoned that there were "reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under state or local authority."⁴⁵ Specifically, "[t]he public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."⁴⁶

Based on the Court's commitment to the autonomy of the states,⁴⁷ its reliance on the approaches of other jurisdictions,⁴⁸ and the "less compelling reason" for excluding evidence in the case of state or local police,⁴⁹ the Court felt no need to extend the exclusionary rule to the states.⁵⁰ In fact, the Court even referred to the *Weeks* rule as one that

41. *Wolf v. People*, 187 P.2d 926, 927 (Colo. 1947), *aff'd sub nom. Wolf v. Colorado*, 338 U.S. 25 (1949).

42. *Wolf*, 338 U.S. at 27–28.

43. *Id.* at 25, 28–33. To decide this issue the Court focused much of its attention on whether the Due Process Clause forbade the introduction of illegally obtained evidence. After holding that it did not, the Court refused to apply the exclusionary rule to the states. *Id.* at 31–33.

44. *Id.* at 31. In support of its refusal to mandate the exclusionary rule to the states, the Court also examined ten jurisdictions in the United Kingdom and the British Commonwealth of Nations and found that "none has held evidence obtained by illegal search and seizure inadmissible." *Id.* at 30. Moreover, the Court hesitated to treat the remedy of exclusion as an essential part of the Fourth Amendment rights. This hesitation came after the majority found that "most of the English-speaking world [did] not regard as vital to such protection the exclusion of evidence thus obtained." *Id.* at 29.

45. *Id.* at 32.

46. *Id.* at 32–33.

47. *Id.* at 31–32.

48. *Id.* at 29–30.

49. *Id.* at 32.

50. *Id.* at 31–33.

“was not derived from the explicit requirements of the Fourth Amendment”⁵¹ but was created in *Weeks* through “judicial implication.”⁵² Particularly germane to this discussion is the fact that the *Wolf* decision clearly focused the debate about the propriety of evidence exclusion around the issue of exclusion as a means of deterring police misconduct.⁵³

Incidents of local and state police misconduct, however, continued to reverberate across the nation and just three years following *Wolf*, the Court was confronted with a particularly egregious case of police misconduct in *Rochin v. California*.⁵⁴ In *Rochin*, the police entered the suspect’s house without a warrant, forced themselves into his bedroom and, as he attempted to swallow capsules, struggled with him and then hustled him to a hospital to have his stomach pumped.⁵⁵ The resulting evidence from the illegal search and seizure was admitted at trial despite Rochin’s objections.⁵⁶

Although the Court in *Rochin* showed deference to the state’s power to define criminal conduct,⁵⁷ the Court noted that when a state conviction “offend[s] those canons of decency and fairness”⁵⁸ that are at the heart of the Due Process Clause of the Fourteenth Amendment, the state may not use the evidence at trial, and the defendant’s conviction may not stand.⁵⁹ The *Rochin* Court felt “compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience.”⁶⁰ While *Rochin* did not mandate exclusion under the Fourth Amendment, it cited the same policy concern from *Weeks* for permitting exclusion under the Fourteenth Amendment, namely that the integrity of the court should not be sullied with such ill begotten fruit.⁶¹

51. *Id.* at 28.

52. *Id.*

53. *See id.* at 31 (recognizing for the first time that “the exclusion of evidence may be an effective way of deterring unreasonable searches”).

54. 342 U.S. 165 (1952).

55. *Id.* at 166.

56. *Id.*

57. *Id.* at 168–69.

58. *Id.* at 169 (quoting *Malinski v. New York*, 324 U.S. 401, 416–17 (1945) (internal quotations omitted)).

59. *Id.* at 169, 173–74.

60. *Id.* at 172.

61. *See Weeks v. United States*, 232 U.S. 383, 392 (1914).

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Two years later in *Irvine v. California*, the Court affirmed a conviction despite its disgust with the conduct of the police.⁶² Unlike the circumstances in *Rochin*, the police conduct in *Irvine* “[did] not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping.”⁶³ *Irvine* is significant in that it recentered the exclusionary rule dialogue on police deterrence.⁶⁴ Writing for the Court, Justice Jackson noted that nearly two-thirds of the states refused to exclude illegally obtained evidence despite the Court’s adoption of a federal exclusionary rule some four decades earlier in *Weeks*.⁶⁵ Justice Jackson surmised that this less-than-ringing endorsement for an exclusionary rule was because “[t]here is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it.”⁶⁶ The Court acknowledged the perceived minimal deterrent effect of the exclusionary rule:

That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. 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. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court’s releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best. Some discretion is still left to the states in criminal cases, for which they are largely responsible, and we think it is for them to determine which rule best serves them.⁶⁷

62. 347 U.S. 128, 132, 137–38 (1954). Although the Supreme Court affirmed *Irvine*’s conviction, it suggested that the Attorney General look into the case for potential violations of federal law by the police. *Id.* at 137–38. The Supreme Court also directed the Clerk of the Court to forward a copy of the record and the opinion to the Attorney General. *Id.* at 138.

63. *Id.* at 133.

64. See *infra* notes 66–67 and accompanying text for the Court’s discussion of whether the federal exclusionary rule was actually deterring unreasonable searches and seizures by the police.

65. *Irvine*, 347 U.S. at 135.

66. *Id.* at 136.

67. *Id.* at 136–37.

Despite Justice Jackson's vehemence and distaste for the rule and the Court's reluctance to extend the rule to the states, the sea change that would be *Mapp v. Ohio* was a mere seven years away.⁶⁸

One year prior to *Mapp*, the Supreme Court, in *Elkins v. United States*, held "that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible . . . in a federal criminal trial."⁶⁹ This decision effectively put an end to the "silver platter" doctrine whereby state police officers would conduct the search and then hand the evidence over to the federal authorities for their use.⁷⁰ However, it is the Court's discussion of the policy goals of deterrence that merits particular attention here. Justice Stewart wrote that "[t]he [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."⁷¹ So it was that on the eve of *Mapp v. Ohio*, deterrence fully emerged as *the* rationale for the exclusionary rule.

Finally, in *Mapp v. Ohio*,⁷² the Court applied the exclusionary rule to the states.⁷³ The Court acknowledged, at least in part, that its past reluctance to impose the rule on the states was based largely on factual considerations.⁷⁴ Given that concern, *Mapp* was the perfect vehicle for imposing the exclusionary rule on the states because the police conduct

68. 367 U.S. 643 (1961).

69. 364 U.S. 206, 223 (1960).

70. *Id.* at 208. See *id.* at 208 n.2 for cases discussing the silver platter doctrine.

71. *Id.* at 217. Despite Justice Stewart's statement that the purpose of the exclusionary rule was to deter, he recognized that statistical evidence demonstrating the effectiveness, or lack thereof, of the rule was nearly impossible to come by. He stated,

Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule.

Id. at 218.

72. 367 U.S. 643.

73. *Id.* at 655.

74. *Id.* at 650–53. The *Mapp* Court did not specify exactly what "factual considerations" it was concerned with in previous cases where it refused to adopt the exclusionary rule for use in the states. However, given the Court's past hesitance to adopt the rule, it can be inferred that the facts in previous cases were not as egregious as those in *Mapp* and, therefore, the Court did not feel compelled to take strong action as they did in *Mapp*.

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in the case was particularly awful.⁷⁵ The police, without the authority of a warrant, raided Dollree Mapp's home, fought with her after she asked to see a warrant and then forcibly dragged her around the home while they conducted a thorough search.⁷⁶ The officers behavior was sufficiently shocking to compel the Court to "close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of [the right to privacy], reserved to all persons."⁷⁷

In *Mapp*, the Court took the final step in a seventy-five year line of cases dealing with the admissibility of illegally obtained evidence, and, after recognizing the "obvious futility of relegating the Fourth Amendment to the protection of other remedies,"⁷⁸ the Court removed the inconsistency between state and federal courts and created a rule that excluded illegally obtained evidence from *all* criminal trials.⁷⁹ The Court was rightfully concerned that without safeguards such as the exclusionary rule, the Fourth Amendment "might as well be stricken from the Constitution"⁸⁰ because it would be reduced to a "form of words."⁸¹ The Court believed that deciding *Mapp* any other way would protect a citizen's right against invasion of privacy "but . . . withhold its privilege and enjoyment."⁸² Justice Clark, writing for the Court, stated 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.'"⁸³

Although Justice Clark reiterated the Court's deterrence rationale from *Elkins*⁸⁴ and made brief mention to the preservation of judicial

75. The police went to Dollree Mapp's home to investigate a tip regarding a recent bombing and some information that a large amount of obscene materials was being kept in the home. After the police arrived at Mapp's home, she refused to let them in without a warrant. A few hours later, after keeping the home under surveillance, several police officers forced down Mapp's door and stormed into her home. They waved a piece of paper, claiming that it was a warrant and refused to allow Mapp's attorney, who had arrived on the scene, into the house. As if the police had not done enough to violate Mapp's rights, they continued by struggling with her after she grabbed the "warrant" and stuck it in her bosom. Following the struggle, Mapp was handcuffed and dragged around the house while the police conducted a widespread search. *Id.* at 644–45.

76. *Id.*

77. *Id.* at 654–55.

78. *Id.* at 652.

79. *Id.* at 655.

80. *Id.* at 648 (citing *Weeks v. United States*, 232 U.S. 383, 393 (1914)).

81. *Id.* at 655.

82. *Id.* at 656.

83. *Id.* (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

84. *See id.*

integrity as an additional rationale,⁸⁵ he included no extensive discussion of the policy goals for the exclusionary rule. Given the watershed significance of *Mapp*, it is curious that the opinion neither extensively detailed the deterrence benefits that would flow from the rule nor cited any authority showing that exclusion would accomplish these goals.⁸⁶ It is clear, however, that in *Mapp* the Court enforced the Fourth Amendment's right of privacy against the states "by the same sanction of exclusion as is used against the Federal Government."⁸⁷

The decisions from *Boyd* to *Mapp* demonstrate the Court's gradual shift from refusing to take notice of the process through which relevant evidence came to the notice of the authorities,⁸⁸ to creating an exclusionary rule within the federal system,⁸⁹ to incorporating the Fourth Amendment into the Due Process Clause and making it applicable to the states,⁹⁰ and finally to imposing the exclusionary rule on the states.⁹¹ The most controversial rule in criminal procedure thus emerged through eight cases decided over a seventy-five year span.

In the wake of *Mapp*, the question remains whether exclusion actually does deter police misconduct. Perhaps it was a testament to the Court's uncertainty in opting for evidence exclusion that in *Mapp* it did not preclude other methods of deterring police misconduct.⁹² That door has never been closed.

85. *See id.* At the end of its opinion the Court stated that its decision gives "to the courts[] that judicial integrity so necessary in the true administration of justice." *Id.* at 660. Given the Court's obvious concern with deliberate violations of constitutional rights and its recognition that something needed to be in place in order to protect those rights, one hardly can consider this brief mentioning of judicial integrity the primary reason for the imposition of the exclusionary rule on the states.

86. Instead of citing to authority for its decision, the Court focused on establishing a rule that would enforce the Fourth Amendment's protections. *See id.* at 660 ("[W]e can no longer permit [the Fourth Amendment] right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.").

87. *Id.* at 655.

88. *Adams v. New York*, 192 U.S. 585, 594-95 (1904).

89. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

90. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

91. *Mapp*, 367 U.S. at 655.

92. In his concurring opinion in *Mapp*, Justice Black stated that he agreed with the "plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." *Id.* at 661 (Black, J., concurring) (citing *Wolf*, 338 U.S. at 39-40). Furthermore, in *United States v. Calandra*, the Court held that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought

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B. Limitations and Exceptions

Given the harsh social consequences of a rule that disallows relevant evidence of crime, the post-*Mapp* retreat into the hills and valleys of exceptions and limitations comes as no surprise. The retreat has led the Court to bend and twist the application of the exclusionary rule itself, as well as the laws of search and seizure, in an attempt to avoid the odious consequences of exclusion. While it is beyond the scope of this Article to detail every exception, if indeed that is even possible, the most significant limitations are briefly set forth in this Section.

Foreshadowing the fits and starts that would come to be the hallmark of the American rules of search and seizure, the Supreme Court, less than two years after *Mapp*, acknowledged a limit to the application of the exclusionary rule when “the connection between the [illegal] arrest and the [resulting evidence] had ‘become so attenuated as to dissipate the taint.’”⁹³ In *Wong Sun*, a case in which the illegal arrest of one man led to evidence used to convict another person, the Court relied on a rule set forth in *Nardone v. United States*,⁹⁴ decided twenty-two years before *Mapp*, holding that the evidence was properly admitted because sufficient intervening circumstances had broken the causal chain between the initial illegal arrest and resulting evidence.⁹⁵ In setting forth the standard to be applied, the Court held that evidence was not automatically considered

“fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of

most efficaciously served.” 414 U.S. 338, 348 (1974). *See also* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (stating that “because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its ‘substantial social costs’” (citing *United States v. Leon*, 468 U.S. 897, 907 (1984))).

93. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

94. 308 U.S. at 341.

95. *Wong Sun*, 371 U.S. at 473–75, 491; *see id.* at 484–85 for the Court’s discussion of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), where the Court held that illegally obtained facts may be used if “knowledge of them is gained from an independent source.”

that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”⁹⁶

Thus, *Wong Sun* became the first case to recognize a limitation in the post-*Mapp* world, which limitation served to blunt the impact of the exclusionary rule.

After the attenuation exception in *Wong Sun*⁹⁷ came the grand jury limitation of *United States v. Calandra*.⁹⁸ In this 1974 decision, the Court held that a grand jury witness could not refuse to answer questions even though the questions were generated by illegally obtained evidence.⁹⁹ In *Calandra*, the Court once again acknowledged that “the [exclusionary] rule’s prime purpose is to deter future unlawful police conduct,”¹⁰⁰ but that the deterrent effect in this situation would be “uncertain at best.”¹⁰¹ This limitation is especially significant since it is based on a failure of the rule to achieve its primary purpose—deterrence. Once again police illegality and once again no evidence exclusion. The *Calandra* Court was indeed uncertain of the deterrent impact of excluding such evidence.¹⁰²

Four years later, in *Rakas v. Illinois*, the Court implemented its broadest limitation of the exclusionary rule in holding that “a mere passenger . . . lacks standing to challenge the legality of the search of [a] vehicle.”¹⁰³ In limiting the class of persons that could assert the exclusionary rule, the Court noted that Fourth Amendment rights are personal¹⁰⁴ and that “[c]onferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread

96. *Wong Sun*, 371 U.S. at 488 (internal citations omitted) (relying on *Nardone*, 308 U.S. at 338, 341 (1939)).

97. *Id.*

98. 414 U.S. 338 (1974).

99. *Id.* at 342, 354–55.

100. *Id.* at 347. The Court also quoted from the majority opinion in *Elkins v. United States*, 364 U.S. 206, 217 (1960), which held that “[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”

101. *Calandra*, 414 U.S. at 351. The Court further noted that “[w]hatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal.” *Id.*

102. *Id.*

103. 439 U.S. 128, 131 (1978) (refusing to recognize that passengers of a car have standing to object to an illegal search of the car).

104. *Id.* at 133 (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

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invocation of the exclusionary rule.”¹⁰⁵ In addition to limiting the rule’s “widespread invocation,” the *Rakas* decision provided the clearest evidence of the Court’s dissatisfaction with the marginal, even questionable, benefits of deterring police action measured against the substantial cost to the public of excluding incriminating evidence.¹⁰⁶ If exclusion is the best means of achieving deterrence, why not a blanket exclusion of all illegally seized evidence, regardless of who raises the claim?

Less than two years after the *Rakas* limitation, the Court in *United States v. Havens* further restricted application of the exclusionary rule by holding that illegally obtained evidence could be used to impeach a defendant’s testimony even though it could not be used in the prosecution’s case in chief.¹⁰⁷ The Court held that in the impeachment of testimony, the interest in the integrity of the fact-finding process was outweighed by the interest in having false testimony refuted.¹⁰⁸ Writing for the Court, Justice White emphasized “the importance of arriving at the truth in criminal trials.”¹⁰⁹ This language is ironic considering that highly probative and incriminating evidence is often precluded from these same criminal trials under the exclusionary rule.

The 1984 term produced two decisions that further contracted the breadth and scope of the rule. First, in *Nix v. Williams*, the defendant’s statements, taken in violation of the Sixth Amendment, led the police to the body of a girl he had murdered.¹¹⁰ However, during the suppression hearing, it was determined that the police, without the aid of the illegally obtained statements, would have found the body within a short time.¹¹¹ The Court refused to suppress the body as evidence, reasoning that “[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic,

105. *Id.* at 137.

106. *Id.* The Court was “not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.” *Id.* (quoting *Alderman*, 394 U.S. at 174–75).

107. 446 U.S. 620, 627–28 (1980).

108. *Id.* at 627.

109. *Id.* at 626.

110. 467 U.S. 431, 434–40 (1984).

111. *Id.* at 437–38.

experience, and common sense.”¹¹² Again, the Court demonstrated it was willing to limit the exclusionary rule when it was shown that the policy behind the rule was not met.

Less than a month later, the Court in *United States v. Leon* again refused to exclude illegal evidence, which in this case had been seized pursuant to a warrant that was later found to lack probable cause.¹¹³ The Court recognized that officers cannot be deterred when they have already acted as a reasonable officer should act in the same situation.¹¹⁴ Because of the officer’s reasonable good faith belief that the warrant was adequately supported, “the extreme sanction of exclusion [was] inappropriate.”¹¹⁵ The Court further acknowledged that evidence should be suppressed only “in those unusual cases in which exclusion will further the purposes of the exclusionary rule.”¹¹⁶ Such language would seem to require an examination of every instance of police illegality to assess the appropriateness of applying the exclusionary rule, implying that when the goal of deterrence is not served, exclusion is not required.

Justice Blackmun’s concurrence in *Leon* is particularly significant. He characterized *Leon* as “another chapter in the volume of Fourth Amendment law”¹¹⁷ and insisted that the Court must evaluate its past decisions with a discerning eye and consider its future decisions as an opportunity for change. He wrote, “What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone.”¹¹⁸

112. *Id.* at 444.

113. 468 U.S. 897, 926 (1984).

114. *Id.* at 919 (noting that when an officer has acted in complete good faith, “the deterrence rationale loses much of its force” (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975))). Furthermore, the Court went on to say that

[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

Id. at 926 (quoting *Peltier*, 422 U.S. at 542).

115. *Id.* at 926.

116. *Id.* at 918.

117. *Id.* at 927 (Blackmun, J., concurring).

118. *Id.* at 928.

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Following the 1984 cases of *Nix* and *Leon*, the retreat from *Mapp* lay relatively dormant¹¹⁹ until 1998, when the Court held in *Pennsylvania Board of Probation and Parole v. Scott* that parole boards were not required to exclude illegally obtained evidence in parole revocation hearings.¹²⁰ The Court, as it had done in *Calandra*, *Nix*, and *Leon*,¹²¹ recognized the substantial costs imposed on society by the exclusionary rule and, consequently, reeled in its scope. The decision thereby allowed illegally obtained evidence to be admissible at parole revocation hearings on the basis that “the marginal deterrence benefits . . . would be minimal because the use of the exclusionary rule in criminal trials already deter[s] illegal searches.”¹²²

The latest chapter in the Supreme Court’s contraction of the exclusionary rule is *United States v. Patane*, decided in 2004.¹²³ As a result of a Fifth Amendment violation, the police were led to a gun used by the defendant.¹²⁴ In ruling that the gun could be allowed into evidence, the Court reasoned that the Fifth Amendment’s protections against self-incrimination were “not implicated by the admission into evidence of the physical fruit of a voluntary statement.”¹²⁵ The Court

119. Although the Court may not have established any “landmark” exceptions or limitations between 1984 and 1998, they did adopt some smaller, less known exceptions to the rule. *See, e.g.*, *Illinois v. Krull*, 480 U.S. 340 (1987) (holding that the exclusionary rule should not apply when an officer reasonably relies on a statute that is later deemed unconstitutional); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that the exclusionary rule would not apply to civil deportation proceedings).

120. 524 U.S. 357, 369 (1998).

121. *See United States v. Calandra*, 414 U.S. 338, 348 (1974) (recognizing that “the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served”). The Court in *Calandra* further noted that “[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best.” *Id.* at 351. *See also Nix v. Williams*, 467 U.S. 431, 444 (1984) (holding that “if the prosecution can establish . . . that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received”); *Leon*, 468 U.S. at 913 (noting that the Court’s “evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible”). The *Leon* Court also concluded that “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” *Id.* at 922.

122. *Pa. Bd. of Prob. & Parole*, 524 U.S. at 363. The Court’s decision also seemed to partially rest on its unwillingness to interfere with the traditional administration procedure of parole revocation hearings because “[t]he State . . . has an ‘overwhelming interest’ in ensuring that a parolee complies with [parole] requirements.” *Id.* at 365.

123. 542 U.S. 630 (2004).

124. *Id.* at 635.

125. *Id.* at 637.

saw no reason to require the exclusion of the physical evidence resulting from an unwarned statement because “unlike unreasonable searches . . . with respect to mere failures to warn, [there is] nothing to deter.”¹²⁶

These cases clearly demonstrate that rather than extending the exclusionary rule’s protections in the forty-five years since its *Mapp* decision, the Court has consistently reined in the rule. It has done so because the costs incurred by the public often do not outweigh the deterrence “benefit” that may result. However, despite the Court’s pullback, the rule continues to operate in a vast number of situations.

C. Studies and Data as to the Efficacy of the Rule

Is there really a deterrence “benefit” tradeoff? As of the writing of this Article, fifteen studies of various kinds have been conducted attempting to answer that very question.¹²⁷ Some of the studies involved surveys of police officers;¹²⁸ others surveyed persons other than police officers involved in the criminal justice system;¹²⁹ some analyzed statistics regarding arrests, convictions, and suppression motions;¹³⁰ and one study even attempted the direct observation of police officers in the field.¹³¹ Of the fifteen studies, three have attempted to ascertain directly from police officers whether the exclusionary rule deters them from engaging in searches and seizures in violation of the Fourth Amendment: the 1987 Orfield Study,¹³² the 1991 Heffernan and Lovely Study,¹³³ and

126. *Id.* at 642. The Court also relied on the fact that the Fifth Amendment already contained its own exclusionary rule because of its provision that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” *Id.* at 640 (citing U.S. CONST. amend. V). Based on this reasoning, the Court did not see any reason to extend the exclusionary rule’s reach to the Fifth Amendment.

127. See *supra* note 11; *infra* notes 132–36, 183–85.

128. See *infra* notes 137–78 and accompanying text for a summary of the three studies that have attempted to understand the rule’s effectiveness by questioning police officers.

129. See Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study, and the Implications*, 45 N.C. L. REV. 119 (1966), Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, and Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992), for the studies that have questioned others involved in the criminal justice system.

130. See *infra* note 136 for the eight studies that have examined the rule through the use of statistics rather than by questioning police officers or others involved in the criminal justice system.

131. See JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966). In this unique study, Jerome Skolnick has attempted to gauge the rule’s effectiveness by undertaking direct observation of police officers in the field.

132. Orfield, *supra* note 11.

133. Heffernan & Lovely, *supra* note 11.

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the 1998 Perrin, Caldwell, and Chase Study.¹³⁴ I have focused this inquiry on these latter three studies as they have attempted to gauge the “cognitive component of deterrence,”¹³⁵ specifically police officer motivation to avoid illegal searches and seizures. While the remaining studies that engage in statistical analysis and surveys certainly provide helpful data, they do not probe officer motivation to abide by the rules,¹³⁶ which is the overarching question of the deterrence rationale for the exclusionary rule.

1. The Orfield study

In conducting his study, Myron Orfield interviewed twenty-six police officers deployed in the Narcotics Section of the Chicago Police Department.¹³⁷ His findings are fascinating in that all of the officers he interviewed said they approved of the exclusionary rule, but when Orfield pushed them as to specifics concerning their approval, their responses generally belied their initial assessment.¹³⁸ For instance, more than half said the rule “frequently,” “reasonably often,” or “very frequently” kept them from making a search they thought they should

134. Perrin et al., *supra* note 11.

135. Heffernan & Lovely, *supra* note 11, at 321.

136. There have been numerous studies that attempt to understand the exclusionary rule's effects without questioning officers. For example, in 1963 Professor Stuart Nagel sent out 250 questionnaires to prosecuting attorneys, judges, police chiefs, defense attorneys, and ACLU officials in order to gain an understanding of the effects that the exclusionary rule was having. Nagel, *supra* note 129, at 283–84. Three years later, in 1966, Michael Katz attempted to study the rule by sending out over two hundred questionnaires to police chiefs, sheriffs, prosecuting attorneys, defense attorneys, and trial judges in North Carolina. Katz, *supra* note 129, at 131. More recently, in 1992 Myron Orfield conducted a study by interviewing public defenders, judges, state attorneys, and other prosecutors in Cook County, Chicago. Orfield, *supra* note 129, at 85–88. Eight studies have been conducted by analyzing arrest statistics, conviction statistics, return of seized property, and suppression motions. See NIJ STUDY, *supra* note 2, at 2; COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, GGD-79-45 (1979); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968) [hereinafter *Effect of Mapp v. Ohio*]; Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1973); Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels*, 5 AM. POL. Q. 57 (1977); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 715 (1970); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Uchida & Bynum, *supra* note 11. Finally, there has been one study that attempted direct observation of police officers in the field. See SKOLNICK, *supra* note 131, at 33–35.

137. Orfield, *supra* note 11, at 1024–25.

138. *Id.* at 1053.

make.¹³⁹ Further, fifty percent of the officers said the rule did a “moderate amount” of harm to police work.¹⁴⁰ Faint praise indeed. This seeming contradiction between approval of the rule and the rule’s negative effects on police work is best understood in a comparative sense: to the officers, the exclusionary rule is preferable to a system that would permit victims of illegal searches to sue them.¹⁴¹ The officers overwhelmingly believed that such a direct sanction would have a chilling effect on how they went about their jobs.¹⁴² A greater chilling effect than the exclusionary rule even? Consequently, even though the rule often kept them from doing their job and resulted in harm to police work, it was preferable to the direct sanctions that would otherwise be imposed against them.¹⁴³

Orfield, noting that the deterrence goal of the rule can occur only if the offending officers learn from their mistakes, also questioned the officers on whether the existence of the rule improves police knowledge of the rules of search and seizure.¹⁴⁴ Orfield found that eighty-five percent of the twenty-six responding officers said they were always informed when the evidence they seized had been suppressed and that they generally understood the basis for the suppressions.¹⁴⁵ While these findings, at first blush, would seem to support the deterrence rationale, they must be put in context. All of the twenty-six responding officers worked in the Narcotics Section and were aware of that section’s policy of demotion or transfer upon a second suppression.¹⁴⁶ It may well be that the threat of the more direct sanction pushed this small group of officers to better learn and comply with the intricacies of the Fourth Amendment.

Orfield’s study also addressed some of the costs of the exclusionary rule, specifically police perjury at suppression hearings. His interviews disclosed that almost all the officers admitted that police occasionally lie.¹⁴⁷ He found that approximately half of the responding officers stated

139. *Id.* at 1052–53.

140. *Id.* at 1053.

141. *Id.*

142. *Id.* at 1053–54. Nearly ninety-five percent of the officers surveyed believed a chilling effect would result if victims were allowed to sue the offending officer.

143. *Id.* at 1053.

144. *Id.* at 1033–34.

145. *Id.*

146. *Id.* at 1044–46.

147. *Id.* at 1049–50. According to his results, Orfield found that nineteen out of the twenty-two surveyed officers reported that occurrences in which a judge did not believe a police officer was “unusual, but not rare.” *Id.* at 1049. Additionally, two of the responding officers reported that judges

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that judges were “frequently correct” in disbelieving police testimony.¹⁴⁸ Perhaps even more alarming was that seventy-six percent stated that the police often “shade the facts” to establish probable cause.¹⁴⁹

From his mixed findings, Orfield surprisingly concluded that the rule does serve its deterrence goals.¹⁵⁰ He believed his findings supported the view that the police are knowledgeable in Fourth Amendment law, that they learn from their mistakes, and that they are positioned to comport their conduct to the law in the future.¹⁵¹

Several concerns arise in assessing the value of Orfield’s study in determining the effectiveness of the exclusionary rule. First, his conclusions are undermined by the scant number of officers involved. In addition, he surveyed narcotics officers who, because of their regular exposure to suppression motions, were more conversant in Fourth Amendment law than most other police officers.¹⁵² Further, his findings that officers unanimously approve of the exclusionary rule¹⁵³ were largely contradicted in his more focused follow-up inquiries and, in large part, may well be a function of the fear of more direct sanctions such as job terminations, job suspensions, or fines against offending police officers.

2. *The Heffernan and Lovely study*

The second significant study involving the direct questioning of the police was conducted in 1991 by Professors William Heffernan and Richard Lovely.¹⁵⁴ Heffernan and Lovely attempted to gauge the level of police understanding of search and seizure law, believing that police ignorance of the subject would undermine the deterrent effect of the

“commonly” disbelieve police testimony, while one officer reported that judges “never” disbelieve police testimony. *Id.* Of the responding officers, forty-eight percent stated that judges were “frequently correct” in disbelieving police testimony. *Id.* at 1049–50. Perhaps most alarming was that seventy-six percent of the responding officers stated that the police often “shade the facts” to establish probable cause. *Id.* at 1050.

148. See Caldwell & Chase, *supra* note 2, at 52–53 (arguing that because of the exclusionary rule’s effect, “officers have an incentive to commit perjury or . . . to carefully tailor the description of their investigative activities”). Thus, rather than deterring police misconduct as the rule was intended, it has motivated “officers to commit other illegal acts.” *Id.* at 53.

149. Orfield, *supra* note 11, at 1050.

150. *Id.* at 1054.

151. *Id.* at 1033–34, 1036.

152. Perrin et al., *supra* note 11, at 681.

153. Orfield, *supra* note 11, at 1051.

154. Heffernan & Lovely, *supra* note 11.

exclusionary rule.¹⁵⁵ Utilizing a far larger number of respondents than in Orfield's 1987 study, the authors administered a series of hypotheticals based on recent Supreme Court rulings involving warrantless police intrusion.¹⁵⁶ The authors also gave the same questions to groups of prosecutors and public defenders as well as college students enrolled in an introductory criminal justice course.¹⁵⁷ Predictably, of the three groups, the lawyers demonstrated the most thorough knowledge of search and seizure law (73.3%), the police followed (56.7%), and the college students brought up the rear (48%).¹⁵⁸ In addition to concluding that slightly more than half of police officers were knowledgeable with recent search and seizure decisions, the study showed that an alarming 34% of police officers believed it was legal to make a warrantless search when actual circumstances would render the action unconstitutional.¹⁵⁹ Even though Heffernan and Lovely concluded that the indirect sanction of evidence exclusion and perhaps lost prosecutions was sufficient to deter most officers from Fourth Amendment violations,¹⁶⁰ the poor performance by the officers regarding Fourth Amendment law seems to undermine that conclusion. There can be no deterrence in the absence of police understanding the law.

One other finding of this study merits attention. Heffernan and Lovely found that out of the more than 500 officers surveyed, 15% would intentionally follow an illegal course of conduct.¹⁶¹ Thus, nearly one in six would knowingly violate someone's Fourth Amendment rights. Such a number is significant in itself, but when one realizes that it is almost assuredly understated, it raises serious concerns about the effectiveness of the indirect sanction of the exclusionary rule.

3. *The Perrin, Caldwell, and Chase study*

The third study of significance that attempts to ascertain directly from officers the deterrent effects of the exclusionary rule was conducted

155. *Id.* at 311, 355.

156. *Id.* at 326–27. Orfield surveyed only twenty-six officers in one department while Heffernan and Lovely surveyed 547 officers in several different departments. *See id.* at 331; Orfield, *supra* note 11, at 1024–25.

157. Heffernan & Lovely, *supra* note 11, at 331.

158. *Id.* at 332–33.

159. *Id.* at 346, 355.

160. *Id.* at 361.

161. *Id.* at 345–52.

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by Professors Tim Perrin, Carol Chase, and me.¹⁶² In this study we sent out questionnaires to the 1144 law enforcement officers in Ventura County, California and received responses back from 411 of them. Additionally, we surveyed a group of officers from throughout California who had recently attended a continuing education seminar at which they received instruction on search and seizure law.¹⁶³ We used this latter group for comparative purposes to test the value and effect of continuing education. Also for comparative purposes, we administered the same hypothetical questions concerning search and seizure law (part of the questionnaire) to eighty first-year law students who had just completed a criminal procedure class. The questionnaire consisted of three sections: information concerning biographical information (rank, experience, and education); search and seizure law; and police interrogation practices.¹⁶⁴ The second and third sections were designed to provide information concerning the “cognitive component of deterrence,” “specific deterrence of offending officers,” the costs of the exclusionary rule, and alternatives to the rule.¹⁶⁵

When asked whether the threat of suppression of evidence influenced their conduct, the officers’ responses from both groups were not surprising. Nearly sixty percent believed suppression to be an important concern but not a primary concern.¹⁶⁶ What did surprise us was that over eighteen percent of the respondents felt the threat of suppression was only a minor concern or no concern at all.¹⁶⁷

Like Orfield, we were curious about the level of communication police officers received concerning suppression hearings, recognizing that if the rule is to have any specific deterrent effect, the offending

162. Perrin et al., *supra* note 11. This 1997 study was conducted by questionnaire that was sent to the Ventura County (California) Sheriff’s Department and each of the county’s five police departments: Oxnard, Port Hueneme, Santa Paula, Simi Valley, and Ventura. Of the 1144 law enforcement officers surveyed, 411 responded to the questionnaire. *Id.* at 712–13.

163. *Id.* at 713. The same questionnaire that was sent to Ventura County law enforcement officers was also sent to police officers throughout the state of California “who had recently attended a continuing education seminar at which they received instruction on search and seizure law and practice and police interrogation law and practice.” *Id.* The questionnaire received fifty-five responses out of a possible 270 officers, which is a twenty percent response rate. *Id.*

164. *Id.* at 713–14. To maximize officer participation, the survey was limited to “forty-five multiple-choice or fill-in-the-blank questions, requiring less than thirty minutes to complete.” *Id.* Also, in preparing the questions, input was solicited from “a broad cross-section of law enforcement officials and others in the criminal justice system.” *Id.*

165. *Id.* at 714–19.

166. *Id.* at 720.

167. *Id.* at 720–21.

officer must learn of the ruling and the reasons for it. Of all the officers surveyed, fifty-five percent admitted that on at least one occasion, evidence they had recovered had been excluded,¹⁶⁸ and more than two-thirds of the officers stated that they heard the ruling in court or were informed of the ruling by the prosecutor.¹⁶⁹ Following up on this point, we analyzed the responses to ascertain if the officers who admitted past violations scored differently on the search and seizure questions from those officers who claimed to have never had evidence excluded. We found no statistically significant difference in the questionnaire results of the two groups.¹⁷⁰ From this it could be concluded that there was no specific deterrent effect in terms of causing the officers to better understand the rules.

As to police officer knowledge of the law of search and seizure, we found a widespread inability among the officers to correctly respond to the hypothetical questions concerning search and seizure law.¹⁷¹ The average number of correct responses to the four search and seizure questions and the question about the purpose of the exclusionary rule was 2.6 out of five.¹⁷² While educational background, rank, and experience did not necessarily affect performance, search and seizure education and training appeared to positively affect performance in answering the hypothetical questions correctly.¹⁷³

We also surveyed the respondents concerning police perjury.¹⁷⁴ More than eighty percent of the study's participants indicated they had

168. *Id.* at 722.

169. *Id.* at 722–23 (noting that 72.2% of the sheriff's department participants and 69.5% of the police officers stated that they heard the court's ruling in court or were informed of it by the prosecutor). "A total of 21 officers, just less than 5% of the total, answered that on at least one occasion they never learned of the court's ruling after they testified." *Id.*

170. *Id.* at 724–25.

The officers *without* prior exclusions had a mean score of 2.86 on the five search and seizure hypotheticals and the question about the purpose of the rule, and those *with* prior exclusions had a mean score of 2.94. The .08 difference between the two groups is not statistically significant. In the police interrogation hypotheticals, the officers *without* prior exclusions had a mean score of 4.44 out of the six police interrogation questions, and those *with* prior exclusions had a mean score of 4.30. Thus, those *with* prior violations actually performed *worse* than the officers who had never had their evidence excluded, suggesting that the exclusionary rule has no specific deterrent effect, at least in terms of causing the officers to better understand the application of the rules.

Id.

171. *Id.* at 727–32.

172. *Id.* at 728.

173. *Id.* at 730.

174. *Id.* at 725–27.

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no knowledge of any officer attempting to avoid suppression by misrepresenting the facts.¹⁷⁵ Such numbers may result from a reluctance to reveal such sensitive information, which is understandable. Further, to no surprise, those officers with more experience reported a greater number of perjury incidents than their less-experienced peers.¹⁷⁶

The survey's final area of inquiry concerned possible alternatives to the exclusionary rule. Not surprisingly, fifty-seven percent of the participants from both groups of officers indicated that the criminal justice system was well served by the current law.¹⁷⁷ The more direct the sanction, the less popular it was with the respondents.¹⁷⁸

4. Inherent weaknesses of exclusionary rule studies

As Dallin Oaks noted in his groundbreaking 1970 study, the greatest difficulty in measuring the exclusionary rule's deterrent effect is that studies attempting such measuring "all tend to oversimplify an enormously complex inquiry."¹⁷⁹ Oaks suggested that attempts to

175. *Id.* at 725.

176. *Id.*

[T]he officers with the lowest average number of known instances of perjury were those with less than one year of experience (reporting no known instances) and the officers with the highest average were the most experienced officers (reporting 1.1697 known instances per officer). Similarly, those with the rank of 'officer' reported the lowest average (.4556 per officer), and those with a rank above detective reported the highest average (.7987 per officer). This trend held true for three of the four perjury questions.

Id.

177. *Id.* at 732.

[T]he most popular suggested alternative remedy was a requirement that officers attend educational courses on search and seizure or police interrogation with more than one-third of the respondents choosing that option. The other options, which each involved significant adverse consequences to the police officer, were markedly less popular. In fact, their mere inclusion offended some of the officers and seemed unfair to others. About two out of ten officers were willing to entertain the possibility of implementing internal police discipline as a consequence of misconduct. The least popular option among the respondents was the criminal prosecution of an offending officer, including the possibility of incarceration. About one percent of the officers selected that option. A number of officers hedged their answers depending on the culpability of the officer, suggesting that stronger penalties were appropriate for intentional misconduct as opposed to good faith conduct.

Id.

178. *Id.*

179. *See* Oaks, *supra* note 136, at 715. Oaks examined the entire body of previous empirical work that had been done on the exclusionary rule. *Id.* at 678-709. Oaks also conducted his own original research after studying and analyzing arrest and conviction statistics from Cincinnati for a period of eleven years (five years before and six years after *Mapp*). Based on a significant drop in gambling convictions, Oaks concluded that, at least for gambling, there were "significant changes in

measure the effects of the rule involve “complicated inquiry into human motivation within a complex social model.”¹⁸⁰ He was pessimistic that definitive findings could ever be reached and felt that at best we can “nibble around the edges of the problem by small inquiries that illuminate areas of special importance.”¹⁸¹ While it is true that the motivation and intent of law enforcement personnel evades direct observation and constitutes an imposing barrier to the study of the rule,¹⁸² we cannot just throw up our hands in despair. Even in the face of Oaks’s pessimism, there are some definitive findings as well as meaningful and useful conclusions to be drawn from the studies concerning the efficacy of the rule.

5. Conclusions

The three studies examined do call into question the effectiveness of the exclusionary rule in deterring police illegality and provide some insights into police knowledge of search and seizure law and police motivations to abide by that law. The results of the Heffernan & Lovely study and the Perrin, Caldwell, and Chase study indicate that the police are not particularly well-versed in Fourth Amendment law,¹⁸³ which limits the amount of deterrence the rule can effectuate. As for the

police behavior, which may have included closer adherence to constitutional standards of search and seizure.” *Id.* at 691. However, based on statistics regarding the seizures of both weapons and narcotics, Oaks found no significant changes in police behavior in the periods before and after *Mapp*. *Id.* at 694.

180. *Id.* at 715. Measuring the effects of the exclusionary rule is an extremely difficult task because in addition to trying to determine the effect the rule is having on the subjective intent of officers, those who study the rule’s effects are impeded by the officer’s hesitance to be completely honest in his or her answers. For example, police officers are likely to be hesitant to admit that they have lied in a suppression hearing or that they have crafted their version of the facts to ensure that probable cause or reasonable suspicion was present when it really was not. Additionally, while officers may feel that the rule hampers their ability to function as law enforcement officials, the police still prefer the rule over any type of direct sanction that may be imposed on them.

181. *Id.* at 716.

182. *See id.* at 715 (discussing the “breadth and complexity of the motivation problem”). Oaks recognized that any effort to gauge the rule’s effectiveness as a deterrent is limited by several factors that affect the deterrent effects of any sanction, including the differences among men, varieties of threatened behavior, differences in the way the threat is communicated, individual perceptions of the applicability and credibility of the threat, variations in threatened consequences, and the moral quality of the threatened individual. *Id.* Furthermore, Oaks noted that ‘the police’ is not a ‘monolithic entity’ and that each individual within the department is going to be affected by his individual and unique assignment. *Id.* at 716.

183. *See Heffernan & Lovely, supra* note 11, at 332–33; Perrin et al., *supra* note 11, at 727–32.

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motivation to follow the rules, the results from all these studies are muddier still. While the police overwhelmingly endorse the idea of the rule, they believe that it cuts into their effectiveness because it has a chilling impact on their performance.¹⁸⁴ Finally, the incidence of police perjury to avoid evidence exclusion is more than a minimum consideration.¹⁸⁵

III. USING THE STATES AS LABORATORIES

Because the exclusionary rule is not a constitutional question, change need not necessarily come from on high. Certainly the Supreme Court could further limit the scope of the rule or, for that matter, completely abandon the rule in favor of some new direction.¹⁸⁶ But these options are not the only means of effectuating change. For example, Congress could step in and implement some new direction,¹⁸⁷ or change could spring forth from more modest pedestals. Over seventy years ago, in the final paragraph of his dissent in *New State Ice Co. v. Liebmann*,¹⁸⁸ Justice Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹⁸⁹ While *Liebmann* concerned the constitutionality of a state statute that prohibited the manufacture, sale, and distribution of ice without a license,¹⁹⁰ Brandeis viewed the issue on

184. Orfield, *supra* note 11, at 1053–54.

185. *Id.* at 1049–50; Perrin et al., *supra* note 11, at 725–27.

186. *See supra* Part II.B. The Supreme Court has already limited the scope of the rule in many ways; undoubtedly it could continue on this path. Furthermore, the Supreme Court has never indicated that exclusion is the only way to protect the Fourth Amendment. *See supra* note 92; *see also infra* notes 250–52.

187. *See Mapp v. Ohio*, 367 U.S. 643, 661 (1961) (Black, J., concurring).

I agree with the conclusion of the Court that the Fourth Amendment's prohibition of "unreasonable searches and seizures" is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited "unreasonable searches and seizures," but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.

Id. (quoting *Wolf v. Colorado*, 338 U.S. 25, 39–40 (1949) (Black, J., concurring)).

188. 285 U.S. 262 (1932).

189. *Id.* at 311 (Brandeis, J., dissenting).

190. *Id.* at 271. New State Ice Company manufactured, sold, and distributed ice under a license issued by the Corporation Commission of Oklahoma. The Oklahoma legislature set forth an act that required such a license and the New State Ice Company brought this suit to enjoin Liebmann

a much broader scale—one that spoke to the genius of America’s federal system. He observed that “[t]here must be power in the States and the Nation to remould [sic], through experimentation, our economic practices and institutions to meet changing social and economic needs.”¹⁹¹ The Constitution Brandeis envisioned was “surely a ‘garment’ rather an ‘iron strait-jacket,’”¹⁹² and he believed that experimentation was a “means of uncovering the truth, and . . . that humans had the power to alter their destiny rather than simply being fated to endure it.”¹⁹³

Brandeis’s observation built on the work of Alexis De Tocqueville, another influential observer of the American experiment nearly a century earlier.¹⁹⁴ In his seminal work *Democracy in America*,¹⁹⁵ De Tocqueville wrote that “[i]n large centralized nations the lawgiver is bound to give the laws a uniform character which does not fit the diversity of places and of mores.”¹⁹⁶ It has also been said that “the history of American federal law in every era has reflected the adoption of the best—and occasionally the worst—of experiments first implemented

from manufacturing, selling, or distributing ice in Oklahoma City without first obtaining the required license. *Id.*

191. *Id.* at 311 (Brandeis, J., dissenting).

192. G. Edward White, *Biographies of Titans: Holmes, Brandeis, and Other Obsessions: The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 603 (1995). White suggests that the *Liebmann* dissent revealed two facets of Brandeis’ judicial perspective: (1) the ability to see legal issues as social and economic realities, and (2) the belief that humans had the capacity “to alter purportedly inexorable external forces in a nation’s history. If economic difficulties existed because of ‘evils’ that had become embedded in the structure of American industry, those evils could be corrected.” *Id.*

193. *Id.* For Brandeis, the concept of experimentation demonstrated “his enthusiasm for empirical research—personified by economics and the physical sciences.” *Id.*

194. ANDREW J. CONSENTINO, A PASSION FOR LIBERTY: ALEXIS DE TOCQUEVILLE ON DEMOCRACY AND REVOLUTION (1989), *excerpts available at* <http://www.tocqueville.org/chap1.htm>. Tocqueville was “[a]n aristocratic Frenchman who came to the U.S. in 1831—when he was only 25 years old—and later wrote *Democracy in America*, a two-volume study of the American people and their political institutions. The book is frequently quoted by journalists and politicians.” *Id.*

195. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (George Lawrence trans., spec. ed., First Perennial Library 1988) (1835).

196. *Id.* at 161.

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in the laboratory of the states.”¹⁹⁷ Indeed, a diversity of thought and experiences has been a hallmark of American history.¹⁹⁸

The notion of smaller units serving as laboratories for larger units predates the American Constitution. In many ways, the American Constitution itself was a product of that notion as it was built upon lessons learned from the constitutions of the original states.¹⁹⁹ In seeking support for a national constitution, Alexander Hamilton stressed to his fellow New Yorkers that the proposed federal constitution would closely resemble New York’s state constitution.²⁰⁰

This idea of state courts serving as laboratories for federal courts resurfaced most recently in Justice O’Connor’s dissent in *Gonzales v. Raich*.²⁰¹ In *Gonzales*, the Court held that Congress had authority to regulate production of marijuana for medical use even after such use was deemed legal under California law.²⁰² O’Connor’s dissent delved into the nature of state powers as well as overreaching federalism:

This case exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. . . . Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes [California’s] experiment. . . . [T]he Court announces a rule that gives Congress a perverse incentive to legislate broadly . . . nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision.²⁰³

197. Frederick A.O. Schwartz, Jr., *States and Cities as Laboratories of Democracy*, Address at The Association of The Bar of the City of New York’s Conference: From the Ground Up: Local Lessons for National Reform (Nov. 9, 1988), in 54 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 157, 160 (1994).

198. *Id.* Schwartz added that “[f]rom the birth of our most fundamental freedoms to the victims’ rights and environmental reforms of recent decades, the federal government frequently has followed in the footsteps of trailblazing states and cities.” *Id.*

199. *Id.*

200. *Id.*

201. 125 S. Ct. 2195, 2220–21 (2005) (O’Connor, J. dissenting). In his majority opinion, Justice Stevens stated,

The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution “[t]o make all Laws which shall be necessary and proper for carrying into Execution” its authority to “regulate Commerce with foreign Nations, and among the several States” includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

Id. at 2198–99 (majority opinion).

202. *Id.*

203. *Id.* at 2221 (O’Connor, J., dissenting) (citations omitted).

While echoing Brandeis' call for experimentation, O'Connor expounded upon his concern with overreaching judicial power. Brandeis' dissent in *Liebmann* "cautioned courts to resist interfering with the process of experimentation"²⁰⁴ and recognized that "[j]udges have a 'grave responsibility' when they exercise the power they have 'to prevent an experiment.'"²⁰⁵ Brandeis warned that "[d]enial of the right to experiment may be fraught with serious consequences to the Nation."²⁰⁶

Brandeis's "states-as-laboratories" metaphor has not been without criticism.²⁰⁷ Critics argue that "state policy experimentation is produced individually, haphazardly, and under circumstances that are unlikely to yield information suitable for use by other states."²⁰⁸ Brandeis acknowledged those concerns, recognizing that experimentation had risks and required a process of "trial and error."²⁰⁹ He maintained,

204. Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1751 (2004). Althouse opines that there are vanguard states and laggard states, and that each have affected the Court's federalism doctrine in different ways. Brandeis believed in vanguard states that protected federalism through state autonomy and the ability to experiment with new ideas.

205. *Id.*

206. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

207. James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996). Since first appearing in 1932, Brandeis's states-as-laboratories metaphor has been used in numerous court opinions and law review articles. Consequently, Gardner believes that the metaphor "deserves a skeptical reexamination" because its users have lost sight of its original meaning. *Id.* at 475.

208. *Id.* at 481–82. Gardner uses a hypothetical example, stating the following:

Suppose a state adopts a constitutional policy that protects personal privacy at the expense of apprehending criminals by strengthening its exclusionary rule. How ought judges in another state evaluate the success of such a policy? Even if it were possible to calculate the increase in crime directly attributable to an expanded exclusionary rule, how should judges weigh the marginally increased risk of crime against the marginal increase in personal freedom? Whether such a tradeoff has improved the quality of life in the state—that is, whether the "experiment" has succeeded—is the kind of judgment that only the people of that state are competent to make.

The subjectivity of state policy experimentation, and thus the irrelevance to other states of the information obtained through policy experiments, is only increased to the extent that, as is so often claimed, each state is unique. If the people of the different states have unique characters or values, for example, or if they live their lives under conditions different enough to affect the content of constitutional doctrine, then the usefulness of policy experimentation is to the same extent confined to the state's borders. If life in Texas is really fundamentally different from life in California, it is hard to see how either state can learn much from the experiences of the other.

Id. (citations omitted).

209. *Liebmann*, 285 U.S. at 310 (Brandeis, J., dissenting). Brandeis saw experimentation as a process of trial and error. In his dissenting opinion, he used air travel as an example to further the notion that skepticism towards new ideas can be overcome through experimentation: "There are

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however, that such experimentation confined the risks to just one state.²¹⁰ When one state serves as a laboratory, it can experiment with new policies, “producing evidence about the effectiveness and workability of new programs, to be followed, improved upon, or avoided by the rest of the states, who can look upon [that] one state’s experiment and learn.”²¹¹ History is replete with examples such as “[u]nemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibitions against discrimination in housing and employment, all [of which] originated in state legislatures.”²¹² Some proved to be successful national prototypes while others were found wanting.²¹³

many men now living who were in the habit of using the age-old expression: ‘It is as impossible as flying.’ The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error.” *Id.*

210. *Id.* at 311 (Brandeis, J., dissenting); see also Althouse, *supra* note 204, at 1745–46.

Justice Louis Brandeis famously characterized the states as laboratories of democracy. The most appealing reason for courts to enforce limits on Congress and to preserve the role of autonomous states is the prediction that states will in fact experiment with new policies, looking for new ways to serve the public good, putting new ideas into practice, and producing evidence about the effectiveness and workability of new programs, to be followed, improved upon, or avoided by the rest of the states, who can look upon one state’s experiment and learn.

Id.

211. Althouse, *supra* note 204, at 1746.

212. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9 (1988).

Both the language and history of the guarantee clause support the conclusion that the clause prohibits the federal government from interfering with state sovereignty in a manner that would destroy republican government in the states. . . . [T]he guarantee clause produces a workable concept of federalism—one that preserves the values of independent state governments without denying the federal government the power to address compelling national concerns.

Id. at 36.

213. *Id.* While unemployment compensation, minimum-wage laws, public financing of political campaigns, and prohibitions against discrimination in housing and employment have all been implemented on a national level, no-fault insurance and hospital cost containment are two examples of state-tested policies that have not been adopted nationally.

Brandeis challenged both states and judges to be “bold.”²¹⁴ His dissent argued for “trusting government experimenters with their ‘novel’ ideas and refraining from serving mere ‘prejudices’—as opposed to true ‘principles’—which the ‘high power’ of review judges have designed for themselves.”²¹⁵ He urged courts to allow the “single courageous State”²¹⁶ to experiment rather than being complacent with their own preconceived principles.²¹⁷

Yet state courts are still hesitant to “experiment” because they are often unsure of the limits placed on their power.²¹⁸ State court judges often conform their role to the federal model thinking that it provides *the* proper guideline.²¹⁹ Helen Hershkoff argues, however, that “state systems should take an independent and pragmatic approach to judicial authority in order to facilitate and support their integral and vibrant role in state governance.”²²⁰ State courts abide by a national law when they are uncertain if they have the power to experiment,²²¹ and perhaps, in

214. *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting). In his dissenting opinion, Brandeis concluded,

This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have the power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Id.

215. *Id.*; see also Althouse, *supra* note 204, at 1751–52.

216. *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

217. *Id.*; see also Althouse, *supra* note 204, at 1751–52.

218. See Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001). Hershkoff addresses justiciability and, more specifically, the interplay between federal judges and state courts. *Id.* Hershkoff recognizes the trepidation of state courts and suggests that the federal judiciary maintains a “posture of judicial restraint.” *Id.* at 1898. She goes on to observe that “[b]y staying its hand, the Court affords states and localities the space necessary to remedy constitutional violations through ‘the political process established by the citizens of the State’ rather than ‘by judicial decree mandated by Federal Government and invoked by the private citizen.’” *Id.* at 1899 (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)). State courts provide citizens with an avenue to influence the laws that govern and benefit society as whole. *Id.* at 1899–1900.

219. *Id.* at 1875–76. State courts can accord greater protection to individual rights, but they cannot lessen the protection provided by the United States Constitution. Consequently, state judges often look to the federal model for guidance even when federal law is not applicable. Hershkoff recognized that “many state court judges conform their role to Article III limits, on the view that the federal model reflects the proper measure of the adjudicative function.” *Id.*

220. *Id.* at 1941.

221. *Id.* at 1875–76.

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part, it is that uncertainty that accounts for the lack of state-driven innovation regarding the exclusionary rule. Ironically, however, the Court has left the door ajar with regard to this particular remedy. Justice Rehnquist, writing for the majority in the 1995 case *Arizona v. Evans* said, “[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands.”²²² Rehnquist viewed the exclusionary rule’s remedy and Fourth Amendment rights as “separate” issues.²²³ The exclusionary rule, he wrote, was “designed to safeguard against future violations of Fourth Amendment rights through its deterrent effects.”²²⁴ It was never intended to be an absolute mandate.²²⁵ Instead, “[a]s with any remedial device, the rule’s application has been restricted to those instances where its remedial objectives are thought most efficaciously served. Where ‘the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted.’”²²⁶ This is nothing short of a plea for something else, something better. What better time and what better tool than the state laboratories to experiment, to try something new and beyond the current approach.

Justice Brandeis was hopeful that state-court laboratories could spark change where change was needed.²²⁷ His words serve as a challenge to the courts and the country to embrace change rather than reject it: “It is one of the happy incidents of the federal system that a single courageous

222. *Arizona v. Evans*, 514 U.S. 1, 10 (1995). The Supreme Court in *United States v. Leon* noted that “[t]he wrong condemned by the Amendment is ‘fully accomplished’ by the unlawful search or seizure itself.” 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)). The Court goes on to say that “the use of the fruits of a past unlawful search or seizure ‘[works] no new Fourth Amendment wrong.’” *Id.* (quoting *Calandra*, 414 U.S. at 354).

223. *Evans*, 514 U.S. at 10; see also *Illinois v. Gates*, 462 U.S. 213, 223 (1983) (“The question whether the exclusionary rule’s remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.”).

224. *Evans*, 514 U.S. at 11; see also *Leon*, 468 U.S. at 906; *Calandra*, 414 U.S. at 348.

225. *Evans*, 514 U.S. at 11; see also *Leon*, 468 U.S. at 927 (Blackmun, J., dissenting) (“Because I share the view that the exclusionary rule is not a constitutionally compelled corollary of the Fourth Amendment itself . . . I see no way to avoid making an empirical judgment of this sort, and I am satisfied that the Court has made the correct one on the information before it.”). See *supra* note 92, *infra* notes 247, and 291–92 and accompanying text for more language from the Court indicating that the rule is not a constitutional corollary.

226. *Evans*, 514 U.S. at 11 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)); see also *Leon*, 468 U.S. at 908; *Calandra*, 414 U.S. at 348.

227. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

State may, if its citizens choose, serve as a laboratory; and try novel social economic experiments without risk to the rest of the country.”²²⁸

IV. BLUEPRINT FOR CHANGE

What then of this change? How might it be initiated? The purpose of this Part is to offer a guide for how *one* prosecutor in *one* state court reviewing the actions of *one* police officer might begin to effectuate much-needed movement away from the exclusionary rule. First, Section A introduces the facts of the fictional case and the consequences to the offending officer. Section B then goes through a fictional suppression hearing based on the case, demonstrating the arguments that can be made at pretrial for nonapplication of the exclusionary rule. Finally, Section C demonstrates how a prosecutor, successful at the trial level, can defend the trial court’s decision at the appellate level.

A. *The Investigation and Search*

Detective Todrick,²²⁹ chief narcotics investigator for the Alpine County Sheriff’s Department,²³⁰ received an anonymous call that two people were operating a methamphetamine lab from a residence in Markleeville, California.²³¹ The caller specified the street address of the house but hung up before providing any further information including the names of the people or how the caller had come into possession of this information.

Detective Todrick and his partner, Senior Deputy Weaver, undertook a records check of the specified house and learned that it was purchased by Robert and Laurel Johnson two years earlier, that Robert Johnson had previously served ninety days in jail for being under the influence of heroin,²³² and that he had successfully completed three years of

228. *Id.* at 311 (Brandeis, J., dissenting).

229. All references in this hypothetical criminal investigation, suppression hearing, and appellate hearing are fictional.

230. Alpine County is a small, sparsely populated area located in Northern California along the crest of the central Sierra Nevada. The county consists of snow-covered mountain peaks, high alpine meadows, and forests. In 2004, Alpine County had a population of 1190, which is generally concentrated in a few small communities. Most residents of Alpine County enjoy a rural lifestyle, but the major cities of San Francisco, Sacramento, and Reno are all less than four hours away.

231. Markleeville is the county seat of Alpine County, California.

232. *See* CAL. HEALTH & SAFETY CODE § 11550(a) (Deering 2005) (“No person shall use, or be under the influence of any controlled substance Any person convicted of violating this subdivision is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days or more than one year in a county jail.”).

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probation. No further criminal involvement was reported on either individual and there were no outstanding warrants. A vehicle check revealed an older model Chevy truck registered to Robert Johnson and a 2005 Saturn registered to both Robert and Laurel Johnson.

Todrick and Weaver interviewed several neighbors living on the same residential block as the Johnsons and learned that the Johnsons primarily kept to themselves and had little interaction with their neighbors. The investigators also learned that Laurel Johnson left each weekday morning and appeared to be employed. Robert Johnson did not leave the house often and did not appear to have outside employment. Two twenty-four hour stakeouts revealed no unusual activity and after several days the investigation gave way to more pressing matters.

Two months later, Detective Todrick received another anonymous call and he recognized the voice as the same person who had made the original call reporting the Johnsons. In an agitated voice, the speaker said, "Bobby is cooking the hell out of that stuff, and you guys are doing nothing."

Todrick asked, "Who is this? How do you know that?"

The caller responded, "All you need to know is that I know these people, and I know what they are doing, and I don't want this happening in my neighborhood." He then hung up.

Three days later, Todrick, having finished other business and finding himself in the vicinity of the Johnson neighborhood, opted to drive to the Johnson residence. He approached the house and knocked on the door. After getting no response, he knocked again but still received no response. Todrick walked to the side of the house near the detached garage and began to hear sounds emanating from the garage. Todrick called out, "Police. Come out." Hearing no response he called out again in a loud voice, but received no response. He opened the six-foot side gate abutting the garage and entered the fully fenced side and backyard where he peered through a partially covered window in the side door of the garage. Through the window, Detective Todrick saw a man (later identified as Johnson) pouring a clear liquid from one container to another. Todrick observed that the rear hatch of a truck parked in the garage was open and he recognized that it was a mobile methamphetamine lab.²³³ Todrick pushed open the door and ordered

233. California Attorney General Bill Lockyer, *Meth Labs: California's Hidden Danger* (May 2001), available at <http://safestate.org/index-print.cfm?navid=240> ("Meth labs have been found in hotels, motels, self-storage units, boats, nice homes, shabby homes, in the back of pickup trucks, picnic baskets, ice chests, in parks, by the road and in many other places.").

Johnson to lie on the floor. Johnson was taken into custody and all items in the garage associated with the manufacture of methamphetamine were seized.²³⁴

Alpine County Deputy District Attorney Sarah Alper reviewed Todrick's report concerning the Johnson arrest and seizure of the meth lab and determined that Todrick's actions violated the Fourth Amendment. She believed the case against Johnson would not survive a suppression motion,²³⁵ however, after weighing the societal costs of allowing a methamphetamine bootlegger to be freed and, most likely, go on about his business, versus the nature of the Fourth Amendment violation, Alper was reluctant to reject the case for criminal prosecution.²³⁶ She requested that Detective Todrick come to her office to better determine the circumstances of the search and seizure and to assess the detective's mindset as he entered the side yard and looked through the garage window.

From her interview with Todrick, Alper learned that Todrick felt justified in entering the side yard because he had received two anonymous phone calls accusing Johnson of maintaining a meth lab, he had verified that Johnson had a previous narcotics conviction, he had confirmed that Johnson did not appear to be employed outside of his home, and because he heard noise coming from the garage but received no response when he had announced that a police officer was present. Todrick thought that he had probable cause to believe that there was contraband in Johnson's garage and that this was sufficient to get him into the garage without a warrant. Todrick also told Alper that once he saw the mobile lab located in the truck he was concerned that the incriminating evidence may well be gone prior to his opportunity to

234. *Id.* (indicating that evidence of a meth lab includes "laboratory equipment (glass tubes, beakers, Bunsen Burners), funnels, [e]vidence of large quantities of cold medications or non-prescription weight loss products, [a] [l]arge number of discarded blister packages or plastic bottles with the bottoms cut out, [c]hemical cans or drums in the yard . . . [and] [f]ortifications on houses or outbuildings, such as heavily barred windows or doors.").

235. *See* CAL. PENAL CODE § 1538.5(a)(1)(A) (Deering 2005) ("A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on . . . the following grounds: The search or seizure without a warrant was unreasonable.").

236. In California, unlike a number of other jurisdictions, all cases are presented by the involved police agency to the prosecutor's office. Following the presentation, the prosecutor's office decides whether to file charges against the suspect.

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secure a search warrant.²³⁷ After further questioning, however, it was clear that Todrick had no reason to believe Johnson planned to leave.

Based on her interview, D.D.A. Alper concluded that Todrick's actions were unintentional violations of the Fourth Amendment.²³⁸ Furthermore, she believed that a reasonable police officer in Todrick's position would have known that simple probable cause was not enough to get into a suspect's garage without a warrant. Alper contacted the Alpine County Sheriff's Department and reported her conclusions that Todrick had violated Johnson's Fourth Amendment rights and may benefit from additional search and seizure training. As a result of her recommendation, the sheriff's department suspended Todrick for two days without pay, required him both to complete twenty hours of search and seizure training on his own time and to successfully complete a search and seizure examination. Todrick completed his course hours and examination within the month.

In light of the department's actions in sanctioning Todrick and convinced that his errors had been unintentional, Alper felt confident that Todrick, as a result of his sanction and additional training, would better conform his future actions to the laws of search and seizure. Reasoning that exclusion would serve no additional deterrent benefit, she filed felony drug charges against Robert Johnson despite the Fourth Amendment violations.

B. The Suppression Hearing

In response to Alper's drug charges, Johnson's privately retained defense counsel, Gene Bishop, filed a motion to suppress everything seized from the Johnson garage. He supported his motion with prevailing search and seizure law.

237. The Supreme Court has consistently held that there is a decreased expectation of privacy in vehicles and that because of the mobility of vehicles, police are entitled to conduct an immediate search of a vehicle as long as there is probable cause to believe contraband is in the vehicle. Furthermore, unlike the search incident to lawful arrest, there is no contemporaneous requirement for a vehicle search. *See Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925); *see also California v. Acevedo*, 500 U.S. 565 (1991) (holding that police officers may search containers within a car as long as their search is supported by probable cause).

238. Although Todrick's actions were unintentional violations of the Fourth Amendment, Alper was convinced that the case did not fall under the *Leon* good-faith exception because a reasonable officer in Todrick's position would have known that more than simple probable cause was needed to get inside Johnson's garage. Rather than being mistaken regarding the facts, Todrick was mistaken regarding the law in this case, and his mistaken belief was not a reasonable one.

D.D.A. Alper filed a response to the motion, conceding that Detective Todrick had violated Johnson's Fourth Amendment rights by entering the side yard and looking into the garage without first obtaining a search warrant.²³⁹ But, Alper argued, it would be inappropriate under the circumstances of this case to exclude the contraband since the offending officer had already been sanctioned, retrained, and presumably deterred from any future violations of the Fourth Amendment. Alper's brief included an affidavit from Todrick in which he admitted that he was mistaken in entering the Johnson's yard and further that he erred in proceeding with the search and seizure of Johnson's garage. Additionally, in his affidavit Todrick described his suspension and confirmed that prior to reinstatement, he had completed twenty hours of search and seizure training and a search and seizure examination. Todrick further swore that as a result of the departmental sanctions, he felt better prepared and better able to comply with the laws of search and seizure. Alper also included an affidavit from Todrick's superior officer, which indicated that Todrick had, in fact, received a nonreimbursed suspension and had successfully completed the search and seizure training and examination.

Superior Court Judge Miles Slaughter presided at the suppression hearing.²⁴⁰

239. Detective Todrick's actions were a violation of the Fourth Amendment because mere probable cause is not enough to allow officers to legally enter a suspect's home. *See Payton v. New York*, 445 U.S. 573 (1980) (explaining that the Fourth and Fourteenth Amendments prohibit police officers from making warrantless and nonconsensual entries into a suspect's home in order to make a felony arrest). Instead, the police must either have a warrant, consent, or exigent circumstances in order to get into someone's home. Exigent circumstances include hot pursuit, probable cause to believe contraband is in the house and that the evidence is in the process of being destroyed, protective sweep, and imminent threat to human life. *See also Illinois v. McArthur*, 531 U.S. 326 (2001) (explaining that police officers may detain a suspect for a reasonable amount of time until a search warrant is obtained); *Segura v. United States*, 468 U.S. 796 (1984) (explaining that police officers may enter only to freeze a premises until a search warrant is obtained). Here, none of the exigent circumstances were present when Detective Todrick decided to unlawfully enter the side yard and look into Mr. Johnson's garage.

240. B.E. WITKIN & NORMAN L. EPSTEIN, 4 CALIFORNIA CRIMINAL LAW: ILLEGALLY OBTAINED EVIDENCE § 360 (3d ed. 2000).

The judge or magistrate is required to receive evidence on any issue of fact necessary to determine the motion. (P.C. 1538.5(c).) The defendant has the initial burden of producing evidence to make out a prima facie case of an illegal search or seizure The burden is on the prosecution to establish by a preponderance of evidence the facts justifying a warrantless search. . . . It is defendant's initial burden to raise a Fourth Amendment issue, which is done by a suppression motion. Usually, the law imposes the burden of proof on the party bringing a motion. That burden is satisfied in a suppression motion by showing that the search was conducted without a warrant. A warrantless

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Judge Slaughter: Let the record reflect that we are on the record in the matter of the *People v. Robert Johnson*. Mr. Johnson is present in court and represented by Mr. Bishop. The People are represented by Ms. Alper. Ms. Alper, I read your response to the 1538.5 motion.²⁴¹ Am I correct in assuming that you are conceding that the evidence against Mr. Johnson was illegally obtained?

Prosecutor Alper: That's correct, your Honor, but for the reasons I set forth in my response to defense counsel's motion I don't believe that exclusion of the evidence in this case is appropriate. If I might explain . . .

Judge Slaughter: Hold on for a moment. I need to make certain I fully appreciate what you are asking this Court to do. Now correct me if I'm wrong. Is it your position that despite the fact that the government is conceding that all the evidence against the accused was the direct fruit of an illegal search and seizure, you believe the evidence should survive a suppression hearing?

Prosecutor: That is my position as well as the position of my office.

Defense Counsel Bishop: May I be heard?

Judge: Of course.

Defense Counsel: Judge, as you are well aware, the prosecutor's position flies in the face of two generations of law.²⁴² No less authority than the United States Supreme Court has flat out told us that when a Fourth Amendment violation occurs, the fruits of that violation should be excluded.²⁴³ What the government is seeking is unprecedented and unwarranted.

Judge: I will agree with you that the prosecutor's position is unprecedented, but I'm not so certain it is unwarranted. Refusing to exclude an entire methamphetamine lab because a detective walked into the defendant's yard and looked in a garage window does not necessarily strike me as unwarranted. But, be that as it may, I'm still stuck on unprecedented. Ms. Alper speak to that.

search is presumptively unreasonable; hence, the burden of justification [shifts to] the prosecution. But . . . [i]t is not enough to assert the search was without a warrant; defendant also must show that it was unreasonable.

Id.

241. *See supra* note 239 and accompanying text.

242. The Supreme Court adopted the exclusionary rule for use in state courts in 1961. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *see also supra* Part II.A.

243. *Mapp*, 367 U.S. at 655.

Prosecutor: Your Honor, going back and examining *Mapp v. Ohio*, it seems fairly clear that the Supreme Court felt compelled to take strong action in light of the particularly egregious police conduct in that case.²⁴⁴ As this Court is well aware, the overriding policy in *Mapp* was deterrence from future illegal police conduct.²⁴⁵ The thinking was that excluding the evidence found as a result of police error would compel officers to conform their future conduct to the law.²⁴⁶ However, the *Mapp* Court never mandated that exclusion be the sole means to that end.²⁴⁷

Judge: Is it your suggestion, Counselor, that there is some flexibility in how courts go about enforcing the Fourth Amendment?

Prosecutor: Judge, the goal is police deterrence. If we can deter future violations in some way that doesn't have the extreme consequences of exclusion, shouldn't we try?

244. *See id.* at 644 (describing the officers as being in “defiance of the law”). The Court also went into an extensive discussion of the facts surrounding Ms. Mapp’s arrest, something the Court did not do in *Wolf v. Colorado*, 338 U.S. 25 (1949) when it refused to apply the exclusionary rule to the states. *See Mapp*, 367 U.S. at 644–45. Moreover, the Court noted that the government, which is charged with enforcing the law, should not be allowed to become a lawbreaker. *Id.* at 659. In concluding its decision, the Court refused to permit the Fourth Amendment’s protections to “remain an empty promise.” *Id.* at 660.

245. *Id.* at 656 (noting that the “purpose of the . . . rule ‘is to deter’” (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))). Furthermore, the Court said that the federal exclusionary rule was designed to be a “deterrent safeguard.” *Id.* at 648.

246. *Id.* at 656 (stating that the exclusionary rule was meant “to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it” (quoting *Elkins*, 364 U.S. at 217)). The Court believed that officers had an incentive to violate constitutional rights and that this disregard for personal liberties could be prevented through the use of the exclusionary rule because nothing else seemed to be working. *Id.* at 652–53.

247. In *Mapp*, the Court never stated that the use of an exclusionary rule was the only method states could use to deter violations of the Fourth Amendment. The *Mapp* Court merely believed, without the support of any reliable statistical evidence, that it was the only effective deterrent. *Id.* at 651–52. Furthermore, in his concurring opinion Justice Black reiterated his belief “that the Federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.” *Id.* at 661 (Black, J., concurring). Justice Black had previously expressed this view in his concurring opinion in *Wolf*, 338 U.S. at 39–40 (Black, J., concurring). Furthermore, in the majority opinion of *Wolf*, the Court seemed to be suggesting that Congress should take action regarding the exclusionary rule. *See id.* at 33. For example, the Court’s opinion ends with the following curious statement: “And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine.” *Id.*

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Defense Counsel: By what authority? Since *Mapp*, every trial court in every state has excluded the fruit of bad searches,²⁴⁸ and here this prosecutor is asking this Court to go directly against, what, forty, forty-five years of precedent. Judge, this is ludicrous and should be rejected out of hand.

Prosecutor: May I?

Judge: Go ahead.

Prosecutor: Thank you. If I might, I would like to step back. Justice Blackmun in his concurring opinion in the *Leon* case in 1984 suggested that “the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.”²⁴⁹ I want to suggest . . .

Judge: Ms. Alper, excuse me, but is that a call you want me to make? Isn't that more appropriately decided at the appellate level?

Prosecutor: With all due respect, Your Honor, the appellate courts need something to work with. Why not this case? We don't have egregious police conduct, we have unintentional error. The effects of exclusion would work a grave hardship on justice if this defendant, a man engaged in the wholesale manufacture and distribution of a dangerous and illegal drug, is allowed to walk away from his conduct, free to set up shop in some other neighborhood.

Judge: Well, without getting into the nature of the police misconduct, I will suggest that excluding evidence probative of a crime is something I have always been loath to do. But I still come back to the same basic question: what authority does a lone trial judge, sitting in a small, rural, northern California county, have to break with the U.S. Supreme Court?

Prosecutor: The Supreme Court has never mandated exclusion as the sole remedy.²⁵⁰ What the Court has stated is that law enforcement

248. Defense Counsel Bishop's statement here is not completely correct. While the Court has kept the exclusionary rule since 1961, it has varied considerably regarding the situations in which the rule will apply. *See supra* Part II.B.

249. *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

250. *See supra* note 92 and *infra* note 262; *see also Leon*, 468 U.S. at 905.

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure “[works] no new Fourth Amendment wrong.” *United States v. Calandra*, 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed.2d 561 (1974). The wrong condemned by the Amendment is “fully accomplished” by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to “cure the invasion of the defendant's rights which he has already suffered.” *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 3048, 49 L.Ed.2d

officials need to be deterred from future violations.²⁵¹ That is the essence of *Mapp*, and I am suggesting that in this case, you can accomplish that goal without resorting to exclusion.

Defense Counsel: Your Honor, *Mapp* created a level of individual protection and the prosecutor's proposal falls below that minimal level of protection guaranteed by the Due Process Clause of the Fourteenth Amendment.²⁵²

Prosecutor: Counsel misinterprets the nature of the exclusionary rule. The rule is simply a remedy, not a right or a liberty.²⁵³ The affected right or liberty is freedom from unreasonable searches and seizures; there is no right to have evidence excluded.²⁵⁴

Judge: Moving back to the question of whether a trial court has the authority to do as you propose, shouldn't such a departure from the accepted practice come from the Supreme Court itself or through legislative channels?

Prosecutor: Taking the questions in turn. As I've already suggested, the Supreme Court never mandated exclusion as the sole remedy.²⁵⁵ Should this Court find that the deterrence policy of *Mapp* was met, the Court has fulfilled its obligation under *Mapp*.²⁵⁶ As for legislation, the

1067 (1976). The rule thus operates as 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. *United States v. Calandra, supra*, 414 U.S., at 348, 94 S.Ct., at 620.

Id. at 906.

251. See *supra* notes 72–87 and accompanying text for a summary of the Court's rationale in *Mapp*.

252. The Defense Counsel is incorrect in assuming that *Mapp* created an individual level of protection guaranteed by the Due Process Clause because the exclusionary rule is not a constitutional right. The rule is merely a remedy designed to deter the violation of individual constitutional rights. See *Calandra*, 414 U.S. at 348 ("Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.")

253. *Id.*

254. *Id.*; see also U.S. CONST. amend. IV.

255. See *supra* note 92 and *infra* note 262.

256. *United States v. Leon*, 468 U.S. 897, 918 (1984). The Court states that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* Furthermore, the Court continued by stating that

[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

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exclusionary rule was a judicial creation and, as suggested by Justice Blackman, it “is subject to change in light of changing judicial understanding.”²⁵⁷

Judge Slaughter, we know a lot more than we did in 1961 about whether this bold exclusion experiment would deter the police. And what we have learned is that because of the indirect nature of the sanction, it is largely ineffectual as a deterrent.²⁵⁸

Defense Counsel: Judge, I took the liberty, in preparation for this hearing, to read some of the studies discussed in the People’s brief, and I am unconvinced that we have evidence that the exclusionary rule has failed to deter police misconduct.²⁵⁹ Several authors of the various studies were candid and remarked that determining human motivations in such a complex endeavor is difficult and uncertain.²⁶⁰

Prosecutor: Your Honor, Mr. Bishop has it half right. Testing is difficult, but the studies, while not completely conclusive, do not support the idea that the exclusionary rule accomplishes the goal of future police deterrence.²⁶¹ Because the rule does nothing to directly sanction police officers, it does not seem to accomplish what the Court had hoped for, and yet the criminal justice system is left holding the bag when probative and incriminating evidence of guilt is blocked from trial. Judge, the

Id. at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)); *see also Arizona v. Evans*, 514 U.S. 1, 11 (1995) (citing *Janis*, 428 U.S. at 454); *United States v. Janis*, 428 U.S. 433, 454 (1976) (“If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted.”).

257. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).

258. *See supra* Part II.C. Some of the studies actually found that instead of deterring police misconduct, the rule works to encourage police perjury in order to avoid suppression of valuable evidence. Furthermore, because the rule’s harsh effects fall mainly on the prosecutor, one study found that eighteen percent of officers surveyed believed the rule was a minimal concern or no concern at all. *See Perrin et al., supra* note 11, at 721.

259. *See Orfield, supra* note 11, at 1033–34. *See also supra* note 169 and accompanying text for findings indicating that officers do learn when evidence they have seized is excluded and that they generally understand the basis for such suppression. *See also Orfield, supra* note 11, at 1017, 1039 (stating that the exclusionary rule “has educated police officers in the requirements of the fourth amendment”); *Effect of Mapp v. Ohio, supra* note 136, at 102 (noting that police departments increased their post-academy training efforts).

260. *See supra* notes 179–82 and accompanying text for a discussion of the difficulties surrounding any study that attempts to gauge the effectiveness of the exclusionary rule.

261. *See Perrin et al., supra* note 11, at 710–11 (stating that most of the studies “strongly undermine support for the exclusionary rule as a cost-effective deterrent for police misconduct”); *see also Heffernan & Lovely, supra* note 11, at 345–50 (citing a high percentage of officers who would violate Fourth Amendment law).

victim here is society because the defendant will be free to go back into the community and once again go about his awful business.

Judge: Moving back to the central question, what message am I sending to law enforcement if I turn a blind eye to the officer's illegal conduct?

Defense Counsel: That's exactly right judge, if courts don't exclude this tainted evidence there is no sanction for police misconduct. The Fourth Amendment is, once again, left unprotected just as it was prior to *Mapp*, and, once again, the police will be free to trample the rights of citizens.

I am required to point out that what the prosecutor is asking this Court to do is unprecedented and should be rejected out of hand.

Prosecutor: Why should my proposal be rejected out of hand? Aren't we dealing with serious enough issues that merit thoughtful dialogue? Before this Court excludes evidence of an entire methamphetamine lab, isn't it worth several moments of everyone's time to see if there is some better way to protect Fourth Amendment guarantees than such an odious and extreme approach?

I would like to turn back to a question Your Honor proposed about what kind of message this Court would be sending to law enforcement if you did not exclude this evidence. First of all, you would not be turning a blind eye to police misconduct. If anything, judges like you would become integral to a process whereby we actually *do* something to remediate police behavior so that they will, in fact, comport their conduct to the law. Instead of excluding evidence, which as we all know works only in the most indirect way against the involved officers, this Court would examine what direct actions have been taken against the officer to better ensure that there will be compliance in the future. For instance, in this case the officer was suspended without pay. Additionally, his department mandated he engage in twenty hours of search and seizure law training on his own time and then successfully complete an exam on search and seizure before he was allowed to resume his duties. Your Honor, these are direct consequences of the officer's behavior. These sanctions provide a real incentive for him to act according to the law in the future. If, on the other hand, the Court feels the officer's department has not done enough to ensure future compliance from the offending officer, you reserve the power to suggest further sanctions or to simply exclude the evidence on a case-by-case basis.

Let's compare this scenario with the "typical" case where the officer testifies at the suppression hearing, the evidence is excluded and

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everyone goes on about their business. The offending officer may or may not even learn of the ruling, and even if he does, he most likely will shrug it off as just another instance of the screwed up criminal justice system. Judge, you can make a difference.

Judge: I must say I am impressed by the actions of the department in this case. It shows a commitment to the rule of law and I agree with you, Ms. Alper, that there is a very real disincentive for this officer to engage in this type of behavior in the future.

Defense Counsel: Excuse me, Judge, but I couldn't disagree more. Is that the response to police misconduct—whenever there is a threat of losing evidence let's just give the officer some days off and save the case? How disingenuous is that? Is the Fourth Amendment to be trifled with?

Prosecutor: Judge, under *Mapp* as it stands, it is for you to determine whether the remedial actions of the involved department are genuine. If you determine that there is no departmental commitment to better train and discipline officers, exclusion is always your prerogative. What I suggest is that under this approach, law enforcement agencies will feel that they are directly accountable for their officer's actions, and the departments themselves will now have a greater incentive for their officers to do the job right.

Judge: So under your scheme, trial judges are put in the position of determining whether departmental sanctions against offending officers are sufficient to induce officers to comply with the law?

Prosecutor: Yes, Your Honor. The goal here is to ensure officer compliance. What better way than to bring the involved police agencies into the equation? If the agency has done a poor job of hiring or training its officers, that agency must bear the brunt of public criticism. When a judge, convinced that an officer and his department are not committed to following the law, is forced to exclude evidence, public criticism and public pressure will focus on the police agency instead of the judge. We are creating an environment where those in the best position to ensure lawful police conduct are held accountable.

Judge: Speaking for myself and other judges who are occasionally in the difficult position of having to exclude relevant and probative evidence, I appreciate shifting the responsibility for proper police behavior from the courts, who can have only an indirect impact, to the law enforcement agencies, who can directly impact officer behavior.

Defense Counsel: So under this scheme, the court is going to become the *de facto* supervisor of the police departments?

Prosecutor: Not at all. During the hearing, the court would first determine if the proffered evidence was obtained as a result of Fourth Amendment violation. If it was, the judge will receive evidence as to what, if any, remedial action has been instituted to ensure future compliance. If the judge is satisfied, the evidence is not excluded. If the judge is not satisfied, he or she can exclude and point the finger of responsibility directly to the involved agency.

Judge: I am still troubled by the fact that the approach you are suggesting would apply the exclusionary rule to only certain instances of police misconduct, but not all instances.

Prosecutor: Your Honor, the Supreme Court has drawn such distinctions. As you recall from the *Leon* case, the Court looked at the nature of the error and determined that reasonable good faith error should not result in exclusion.²⁶²

Judge: But as I also recall from *Leon*, the Court determined that the judge authorizing the search warrant erred, not the police.²⁶³

Prosecutor: You are absolutely right, Judge. Consequently, in *Leon* the evidence was not excluded because exclusion would have in no way deterred the police because it was the judge who erred.²⁶⁴

Judge: But you are not suggesting that Detective Todrick made a good faith error here are you?

Prosecutor: No.

Judge: Rather you are suggesting here that since police misconduct in this case was not intentional but was unreasonable, your proposed remedy would be appropriate. Why draw distinctions between the types

262. See *Leon*, 468 U.S. at 907–08.

Particularly when law enforcement officers have acted in objective good faith . . . the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. *Stone v. Powell*, 428 U.S., at 490, 96 S.Ct., at 3051. Indiscriminate application of the exclusionary rule, therefore, may well “generat[e] disrespect for the law and administration of justice.” *Id.* at 491, 96 S.Ct., at 3051. Accordingly, “[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” *United States v. Calandra*, *supra*, 414 U.S., at 348, 94 S.Ct., at 670; see *Stone v. Powell*, *supra*, 428 U.S., at 486–487, 96 S.Ct., at 3048–3049; *United States v. Janis*, 428 U.S. 433, 447, 96 S.Ct. 3021, 3028, 49 L.Ed.2d 1046 (1976).

Id. at 908. The *Leon* court goes on to suggest that “the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.” *Id.* at 909 (quoting *Illinois v. Gates*, 462 U.S. 213, 255 (1983) (White, J., concurring)).

263. See *id.* at 903.

264. See *id.* at 921 (“Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”).

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of police misconduct? Isn't Fourth Amendment error Fourth Amendment error?

Prosecutor: Your question goes to the central issue here—the issue of deterrence. I am suggesting that officers who have unintentionally violated a suspect's Fourth Amendment rights would appear to be better candidates to learn from their mistakes and conform their conduct to the Fourth Amendment than those officers who intentionally engage in misconduct. It could be that direct intradepartment sanctions and reeducation could remediate both those who unintentionally and intentionally err. But that is not an issue we need to resolve in this case because I believe Detective Todrick unreasonably thought that, under the circumstances, he was justified in stepping into the side yard and looking through the window.

The goal of the exclusionary rule is to give teeth to the Fourth Amendment by deterring police misconduct. Detective Todrick suffered direct sanctions and he is now deterred from future mistakes. He is on notice, as are the rest of the officers in his department, that violations will be met with significant sanctions. The entire department has a real incentive to do it right the next time around. Judge, the Fourth Amendment is in fact better protected in this case than under the old, tried, and failed approach of *Mapp*.

Defense Counsel: Your Honor, may I be heard?

Judge: Mr. Bishop, I'm pretty sure I know what you are going to say but my mind is made up. I am going to do something that may well draw rebuke from my colleagues at the appellate level. I am denying the defense motion to suppress the evidence despite the Fourth Amendment violations that led to that evidence.

Defense Counsel: Your Honor is forcing me to take a writ.²⁶⁵

265. WITKIN & EPSTEIN, *supra* note 240, § 378(1).

If the motion [to suppress evidence] is denied after a special hearing requested by the defendant, the defendant may obtain pretrial review by petitioning for a writ of mandamus

. . . .

In felony cases, the appellate court reviews the action of the superior court at the special hearing, rather than that of the magistrate at the preliminary examination. Thus, the defendant, in seeking review by writ, should furnish the appellate court with a transcript of the evidence presented at the special hearing and advise the court of the motion and the grounds on which it was made.

Id. (internal citations omitted). However, this requirement is not applied where "(a) the motion was submitted on the basis of the preliminary examination transcript (which had furnished the basis for the P.C. 1538.5 motion at the special hearing), and (b) the defendant specifically described the illegally seized evidence." *Id.*

Judge: I am fully aware of that, Mr. Bishop. You must do what you must do.

I will make the following factual findings to assist in appellate review. I find based on the sworn affidavit of Detective Todrick that his errors in entering the side yard of Mr. Johnson's residence, looking through the garage window, and then entering the garage were unintentionally violative of the Fourth Amendment. Further, I find the sanctions imposed by Detective Todrick's department, which included suspension without pay, twenty hours of search and seizure training, and a requirement that Detective Todrick successfully complete a search and seizure examination, convince me that Detective Todrick and others in his department are less likely to engage in conduct that violates the Fourth Amendment in the future.

Therefore I am denying the defense motion to exclude the materials taken from the garage and order that a time be set for trial.

C. The Appellate Argument

The Third California Appellate District. Justice E.A. Harris presiding, with Justices Anthony McPeak and Edith May.

Clerk: *The People of the State of California v. Robert Johnson*, on a writ brought by Robert Johnson.

Justice Harris: Mr. Bishop, welcome and good morning. I understand we have a rather intriguing question before us today.

Defense Counsel Bishop: "Intriguing" is certainly one view of this matter, Your Honor. However, from my perspective there is no legitimate question before this court. As I have set forth in my brief, the trial judge erred in agreeing with the prosecutor's unprecedented notion that evidence seized in direct violation of the Fourth Amendment should not be suppressed.

Justice Harris: I'm well aware of the question before this court, Mr. Bishop, and I must confess that when I first read the briefs I was very skeptical of the actions of the trial court. On further reflection, however, I believe it is a question certainly worthy of further discussion.

Defense Counsel: I appreciate the Court's intrigue and respectfully suggest that the sophistry suggested by the prosecutor be aired out in academic pieces and law review articles.²⁶⁶ We are in the real world, and

266. In addition to those scholars who use academic pieces and law review articles to criticize the exclusionary rule, a number of scholars also defend the rule. One of those most notable scholars

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in the real world, the fruits of illegal searches and seizures are excluded.²⁶⁷ The Supreme Court set it forth in *Mapp v. Ohio* and has not varied from its course for four decades.²⁶⁸

Justice Harris: Counsel, this Court deals in the real world every day. This Court makes difficult decisions every day. Often times these decisions have significant effects on the lives of the people before this Court. I consider the actions of the trial judge in this instance to be carefully considered, and his actions will be scrutinized with care. So, I suggest that we turn to a thoughtful discussion of this serious question. First of all, Mr. Bishop, the Supreme Court has varied regarding the exclusionary rule's application, a fact of which you should be well aware. Now, as we begin our discussion of this important issue, Mr. Bishop, isn't the state correct in asserting that the purpose of the exclusionary rule is to deter police misconduct²⁶⁹ and, in this case, given the direct sanctions and re-education of the erring officer, won't he be motivated to perform better in the future?

Defense Counsel: The *Mapp* Court imposed the exclusionary rule on state courts not only to deter police violations of the Fourth Amendment but also to preserve judicial integrity.²⁷⁰ This latter goal would be completely sacrificed if illegally obtained evidence is allowed in a court of law.

Justice McPeak: You've picked an interesting place to begin your argument, Counsel. Are you suggesting that judicial integrity is a foundational cornerstone of the exclusionary rule? Because from my reading of *Mapp*, it appears to be on the periphery, while the focus is squarely on police deterrence.²⁷¹

Defense Counsel: Your Honor, allowing ill-begotten evidence to be admitted into court taints and sullies our system of justice.

is Yale Kamisar. See Yale Kamisar, *Law and Truth: Debate: Exclusionary Rules: In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119 (2003).

267. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

268. See *supra* Part II.B. Defense Counsel Bishop's statement here is not completely correct. While the Supreme Court has kept the exclusionary rule since 1961, it has varied considerably regarding the situations in which it will apply.

269. See *supra* Part II.A.

270. See *Mapp*, 367 U.S. at 660 (stating that the Court's decision gives "to the courts . . . that judicial integrity so necessary in the true administration of justice"). However, given the Court's concern with the police violating Fourth Amendment rights, it is clear that the main focus of the *Mapp* opinion was that something was needed in order to deter future violations of the Fourth Amendment by the police. See discussion *supra* Part II.A.

271. *Mapp*, 367 U.S. at 660. See *supra* notes 72–87 and accompanying text for a summary of the Court's decision in *Mapp*.

Justice McPeak: Counsel, some might suggest that excluding highly incriminating and probative evidence of a defendant's guilt taints and sullies our justice system. Be that as it may, let me ask again: is it your position that judicial integrity is the primary goal of the exclusionary rule?

Defense Counsel: Judicial integrity was certainly an important consideration . . .

Justice McPeak: I sense you are hedging, Counsel. Wouldn't you agree that the Supreme Court's prime motivation for ordering exclusion in *Mapp* was to deter police from search and seizure violations?

Defense Counsel: I would agree that deterrence was the prime motivation but that the concern about judicial integrity was significant as well.

Justice McPeak: Thank you, Counsel. Let's talk about deterrence. One of the time-honored criticisms of the exclusionary rule is that it does not impose direct sanctions against the offending officer and, thus, there is no great disincentive for police noncompliance.²⁷² How do you respond to that criticism?

Defense Counsel: It has been said that the police are advocates in the criminal justice system and are very much concerned in seeing that the people they arrest are convicted.²⁷³ There is an "us against them" mentality. Given that adversarial role, having evidence excluded is hurtful to their position and thus creates a very real incentive to comply with the dictates of the Fourth Amendment to avoid losing that evidence and ultimately the conviction.²⁷⁴

Justice May: You make a good argument, Counsel. It is a real slap in the face of law enforcement to lose convictions. Oftentimes officers have put themselves at risk to secure the very evidence that is later being excluded. However, wouldn't you also agree that there may be instances where the police simply want to get drugs or weapons off the street?

272. Perrin et al., *supra* note 11 at 675–76 (discussing how the sanction of exclusion "falls most directly on the prosecutor" instead of the offending officer).

273. See *United States v. Chadwick*, 433 U.S. 1, 9 (1977) ("The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948))).

274. Perrin et al., *supra* note 11 at 679–80 (noting that the police officers in Orfield's study felt a personal sense of disappointment at the loss of a potential conviction). The responses of the officers in Orfield's study are significant in that, if sincere, they demonstrate an incentive for the police to comply with the Fourth Amendment.

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Defense Counsel: There may be instances in which officers have a stronger incentive to get the contraband off the street, but I'm hard-pressed to believe that officers who work hard to gain evidence, sometimes even at the risk of their own safety, are disinterested in securing convictions. They very much care, and when a court throws out hard-earned, incriminating evidence, they feel it both personally and professionally.

Justice McPeak: Your observations sound anecdotal, Counsel. Nonetheless, you would agree that exclusion is not a direct sanction against the offending officers, and while they may be chagrined at having evidence excluded and perhaps losing convictions, they suffer no direct professional consequences. It seems to me that direct sanctions would create a better incentive to comply with the law.

Defense Counsel: I would agree with your proposition that direct sanctions would be a strong motivator. However, as I set forth in my brief, direct sanctions will not work because they would have a chilling effect on law enforcement.²⁷⁵ If an officer is concerned that even unintentional error may result in fines, suspension, or even termination, the officer may be reluctant to do the job he or she was hired to do.

Your Honors, the exclusionary rule strikes a delicate balance. On the one hand, it provides an incentive for law enforcement to obey the law by threatening the convictions they seek and care a great deal about. On the other hand, the potential sanction is not so severe that it might impede an officer's ability to do his or her job.

Justice McPeak: Mr. Bishop, according to some of the empirical studies cited in opposing counsel's brief, there is little to suggest that exclusion of evidence really works a disincentive on law enforcement. In fact, the studies tend to indicate that on occasion the offending officer doesn't even learn that his conduct was found wanting and that the evidence was excluded. If that's the case, how does the rule deter?

Defense Counsel: The People have put great stock in some of the studies they rely on. I would like to point out that the majority of the authors of those studies cautioned specifically that definitive conclusions in evaluating the human motivation in such complex settings are very difficult and uncertain.²⁷⁶ Furthermore, two of the three studies cited by

275. See Perrin, et al., *supra* note 11, at 681 ("Ninety-five percent of the responding officers said that if victims could sue officers, it would have a chilling effect on the officers' ability to do their job.").

276. See Oaks, *supra* note 136, for one author's remarks concerning the difficulties in understanding the effectiveness of the exclusionary rule as a deterrent. See also *Elkins v. United*

the prosecutor found that the exclusionary rule does in fact deter officers from illegal conduct.²⁷⁷ That being said, I don't know how much faith we can put in these studies. In my considerable experience, the police are very aware when evidence is suppressed. And, I might add, they are always upset.

Justice Harris: Once again, Mr. Bishop, while this court appreciates your considerable experience, your observations are anecdotal, bordering on gratuitous. I would like to turn your attention to another problem that I see with the exclusionary rule. In fact, it is a problem that has surfaced in the very case before us today. The problem is disproportionality.²⁷⁸ In this case the officer's error was walking into the defendant's backyard and looking through a garage window, which was in clear violation of Mr. Johnson's Fourth Amendment rights. The sanction is the lost prosecution of a person allegedly engaged in the manufacture of illegal, highly addictive, and dangerous drugs. Would exclusion of the methamphetamine lab and all the contraband found in that lab be disproportionate to the nature of the police error?²⁷⁹

Defense Counsel: The violation of the sanctity of the home constitutes a serious breach of the Fourth Amendment. The home and those places just outside the home where the family engages in intimate

States, 364 U.S. 206, 218 (1960) ("Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule.").

277. See Orfield, *supra* note 11, at 1054; Heffernan & Lovely, *supra* note 11, at 358 (noting that the exclusionary rule has a weak deterrent effect).

278. See Lawrence Buser, *Drug Bust Is Erased by Judge—Says Suspect With 33 Pounds of Cocaine Not Nervous Enough*, COM. APPEAL, May 21, 2005, at B1. Buser cited a recent case in which an officer pulled over a car for speeding, noticed that the driver seemed unusually nervous, requested and obtained written permission to search his car, and then discovered thirty-three pounds of cocaine. However, the judge, after watching the dashboard video of the incident, ruled that the cocaine was inadmissible because the suspect was not "nervous enough to become a suspicious character worthy of further investigation" and that the officer's "detention was a process designed to exploit the underlying traffic stop." *Id.*

279. See Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987). Some critics argue,

When proponents of the proportionality approach (or "inadvertent" police error exception) complain that rigid application of the exclusionary rule offends the idea of proportionality, they have in mind those instances when an "honest" or "inadvertent" police blunder affords a guilty defendant—any guilty defendant—an unacceptable windfall. These critics of the exclusionary rule point to the disparity or disproportion between the police error and the "drastic" remedy of exclusion.

Id. at 7 (emphasis added); see also *infra* notes 281–83 and accompanying text.

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activities are among the most protected and private areas imaginable.²⁸⁰ Surely the court is not suggesting that Detective Todrick's violation was merely of a technical nature.

Justice Harris: Bear with me, Counsel. Would you agree with me that illegal police behavior can be characterized on different levels of fault? For instance, in the *Mapp* case the police fully recognized that they needed a search warrant to enter Mapp's home, but they entered without a warrant anyway.²⁸¹ Then, while engaged in their illegal and invasive search of her home, they compounded their error by denying Mapp access to her attorney who was present but kept from her.²⁸² As a result of the illegal police conduct, they found several allegedly pornographic pictures.²⁸³ So it seems we had terrible, perhaps even egregious police conduct resulting in the seizure of some dirty pictures. I've often wondered in the *Mapp* case itself, if the evidence found had involved a murder or rape instead of dirty pictures, would the Court have suppressed that evidence. Extreme police conduct, minimal offense. In the case before us here today, Detective Todrick incorrectly, but unintentionally thought he was justified in entering through the gate, looking into the garage, and then entering the garage. As a result he discovered an entire methamphetamine lab. While his conduct violated Johnson's expectation of privacy, it was nowhere near the extreme or knowingly violative misconduct in *Mapp*. In addition to nonegregious police misconduct, we have here a very serious crime. Would it be disproportionate, Mr. Bishop, to exclude an entire methamphetamine lab because on this error?

Defense Counsel: The Fourth Amendment prohibits unreasonable search and seizures. It does not distinguish between more unreasonable as opposed to less unreasonable search and seizures but prohibits them completely.

280. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that aiming a thermal-imaging device, that was not in general public use, at the home constituted a search within the meaning of the Fourth Amendment). In protecting the home as a sanctuary, Justice Scalia, writing for the Court, stated that "[t]o be sure, the homeowner has a reasonable expectation of privacy concerning what takes place within the home, and the Fourth Amendment's protection against physical invasions of the home should apply to their functional equivalent." *Id.* at 44.

281. See *Mapp v. Ohio*, 367 U.S. 643, 644 (1961). When the officers arrived at Dollree Mapp's house they demanded entry, but were refused because they did not have a warrant. Because the police did not have Mapp's consent and there were no exigent circumstances that would justify entry into her home without a warrant, they undertook surveillance of the home. After waiting a few more hours, the police forced their way into Mapp's home, this time claiming to have a warrant. *Id.*

282. *Id.*

283. *Id.* at 645.

Justice Harris: Precisely. There is no gradation. Rather, it is a one-size-fits-all approach. So regardless of the level of police misconduct, the same remedy is applied. Wouldn't you agree that this approach can and does lead to disproportionality?

Defense Counsel: Are we now to distinguish between greater or lesser unreasonable searches? I'm not at all certain the Framers of the Bill of Rights or the *Mapp* Court had that in mind. The police conduct is either violative of the Fourth Amendment or it is not, and, if it is, the fruits of that violation should be excluded.

Justice Harris: It seems to me though, that there clearly are gradations of police misconduct and that excluding an entire meth lab because of unintentional, nonegregious error, such as we have before us here, seems disproportionate to the nature of the error.

Justice McPeak: Excuse me, Mr. Bishop, but I want to follow-up on Justice Harris' question. It has been set forth in the state's brief that officers whose error is unintentional, as compared to those whose conduct is knowingly violative, would be good candidates for additional search and seizure training, and that once the training is completed, they would perform better the next time around. Conversely, an officer who knows he or she is violating a suspect's Fourth Amendment rights and does so with impunity most likely will not benefit from further training. If this proposition is true, shouldn't we look more closely at the nature of the police conduct?

Defense Counsel: Your Honor, I'm not willing to concede that we can distinguish between levels of police misconduct or that additional search and seizure training will deter misconduct. Furthermore, if we attempt to determine whether an officer knowingly violated the Fourth Amendment, how would we go about it? Wouldn't we be forced to probe the subjective intent of the officer?²⁸⁴ That would seem to open up a whole series of problems including a motivation for officers to perjure themselves in order to avoid the type of direct sanction the state is suggesting.²⁸⁵

284. The Supreme Court has struggled with whether it is appropriate, or even possible, to probe the subjective intent of an officer's mind. *Compare* *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that pretextual traffic stops are acceptable because courts cannot probe an officer's subjective intent), *with* *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976) (holding that an impounded vehicle may be inventoried as long as it is done according to routine administrative caretaking functions so that the police cannot use the inventory as a way around the probable cause requirements).

285. *See* Orfield, *supra* note 11, at 1050 (stating that almost all officers surveyed admitted that police occasionally lie in suppression hearings). Thus, if officers lie now to avoid the indirect

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Justice May: You make a good point, Counsel. The two significant problems I see with the state's proposition are an increased incentive for the police to commit perjury to protect themselves from direct sanction and the chilling effect on police officers as they go about their jobs.

Defense Counsel: Precisely. Part of the rationale for this radical proposal suggested by the state is that the exclusionary rule creates an incentive for the police to commit perjury in order to avoid exclusion of evidence. Yet by going to these more direct sanctions, the motivation for officers to lie is tremendously enhanced. If, indeed, police perjury is currently a concern, it will be a full-blown problem if we radically increase the incentive to lie. An officer faced with the threat of losing a week's pay, or, worse yet, his job, will really be backed into a corner. Under such circumstances we are creating a compelling incentive for perjury. For this reason alone, the state's proposal should be rejected.

I would also like to follow up on Justice May's observation about the chilling effect this proposal would have on law enforcement. Officers would most likely go about their jobs differently if concerned with the possibility of suspension or termination. There would be second-guessing and equivocation. I am suggesting to this court that an officer concerned about such external matters will be dramatically less effective in the field.

Justice Harris: Don't we want officers to be more thoughtful and even protective of individual liberties as they go about their jobs?

Defense Counsel: Of course we do, but we don't want officers so overly concerned with personal sanction that they become virtually ineffective in going about their jobs.

Justice Harris: That is certainly a question worthy of asking opposing counsel. I see we are almost out of time so let me turn to a last area of inquiry. Given the studies as well as pronouncements from individual Supreme Court Justices suggesting there is scant evidence that the rule deters the police,²⁸⁶ shouldn't we look at other approaches? Aren't we obligated to try something else?

sanction of exclusion they will undoubtedly be more likely to lie if a direct sanction were imposed upon them. *See also* Perrin et al., *supra* note 11, at 725 (stating that many officers minimized the extent of police perjury that they had witnessed, while a few officers claimed to have heard of police perjury as many as ten, twenty, or even fifty times).

286. *See supra* Part II.C for a summary of the lack of evidence that the exclusionary rule actually deters police misconduct. *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) (noting that there is "no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials").

Defense Counsel: If these studies are to be taken at face value—and, as I’ve already said, I do not subscribe to those conclusions—but if they are to be taken at face value, and we do need to rethink how we as a society enforce the Fourth Amendment, then let us go about it in a more deliberative and thoughtful manner than suggested by the prosecutor. Instead of some half-baked response because we face the exclusion of some serious evidence in this one case, let’s allow our legislators to take action or let’s allow our Supreme Court to strike out on some new course. Not like this.

Justice Harris: Thank you, Counsel.

Defense Counsel: May I conclude?

Justice Harris: I’m sorry Mr. Bishop, you are out of time. We would like to hear from the state.

Ms. Alper, good morning. You and your office have undertaken quite a challenge. The exclusionary rule has been one of the mainstays of the criminal justice system for nearly a century.²⁸⁷ Its operation is a virtual given: the police err and the evidence is out.²⁸⁸ It seems settled and fixed. While there may be instances when the rule exacts a painful cost, isn’t it for the most part reasonably effective at keeping law enforcement in line? Is this something that we can, or even should, go back and recast?

Prosecutor Alper: Justice Harris, I’m glad you choose to start here. We need to acknowledge that the exclusionary rule has become part of the fixed universe of the criminal justice system. Two generations of lawyers have been educated on the inviolate nature of exclusion in the event of police error.²⁸⁹ There is typically no discussion of whether any particular exclusion works to society’s benefit—we simply argue at suppression hearing whether there was police error and if so the fruits of the error are simply out. It is a knee-jerk reaction. What I would like this court to do is think long and hard about the exclusionary rule, why we instituted it in the first place, and whether it does what it was supposed to do.

I realize this is bold and very unusual, but I also know that any long held maxim should be able to withstand rigorous scrutiny and

287. *See supra* Part II. The Court adopted the federal exclusionary rule in 1914, over 90 years ago. Furthermore, the Court adopted the federal rule for use in state courts in 1961. Therefore, the exclusionary rule, whether used in federal courts only or in both federal and state courts, has been part of the criminal justice system for 92 years.

288. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

289. *See supra* note 242 and accompanying text.

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examination. Your Honor, I do not believe the exclusionary rule can withstand such scrutiny.

Justice Harris: Well before we even get to a scrutiny of the viability of the rule, it seems to me there is the threshold question of whether this court and the trial court are even proper venues for what you are seeking. After all, it seems to me that you are asking us to depart from the United States Supreme Court in its *Mapp* opinion.

Prosecutor: Neither in *Mapp* nor in any subsequent opinion exploring the parameters of *Mapp* has the Supreme Court ever mandated that the sole or exclusive remedy for police error was exclusion of the evidence that was the byproduct of that error.²⁹⁰ In fact, in his concurring opinion Justice Black states that he agrees with the majority's implication "that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."²⁹¹ Furthermore, in adopting the good faith exception in *Leon*, the Court stated that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands."²⁹² I believe *Mapp* is a case where the Court, exasperated with the police continually and knowingly running roughshod over the rights of citizens, took the best course of action they could identify at the time.²⁹³ Over the forty-five years since that decision, we have had calls from members of the Court to consider reexamination of the rule if evidence exclusion was not accomplishing the goal of police deterrence.²⁹⁴

290. See *supra* notes 92, 250, 252, and 256.

291. *Mapp*, 367 U.S. at 661 (Black, J., concurring) (quoting *Wolf v. Colorado*, 338 U.S. 25, 39–40 (1949)).

292. *United States v. Leon*, 468 U.S. 897, 906 (1984).

293. See *supra* notes 72–87 and accompanying text for a summary of the Court's opinion in *Mapp*.

294. See *Leon*, 468 U.S. at 928 (Blackmun, J., concurring) (noting a gradual trend in Supreme Court decisions to admit illegally seized evidence); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting) ("If an effective alternative remedy is available, concern for official observance of the law *does not require* adherence to the exclusionary rule.") (emphasis added). Chief Justice Burger also implied that he would be willing to consider another approach when he stated that he "would hesitate to abandon [the exclusionary rule] until some meaningful substitute is developed." *Id.* at 415. The Chief Justice also suggested that perhaps, if the Court would not take action, Congress should step in. *Id.* at 421 ("Reasonable and effective substitutes can be formulated if Congress would take the lead . . ."); see also *Irvine v. California*, 347 U.S. 128, 136 (1954) ("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. It protects one against

Justice McPeak: But shouldn't that decision come from the legislature?

Prosecutor: The exclusionary rule was a creation of the judiciary. Can't the judiciary change or modify what it wrought?

Justice McPeak: We are a state appellate court, and yet you are suggesting that we can overrule a decision of the United States Supreme Court.

Prosecutor: It would be foolish and fruitless to suggest that. Rather, I am suggesting that to follow the course I've outlined in my brief in no way overrules *Mapp*. *Mapp* has never been absolute. If the reason for the existence of the exclusionary rule does not reflect the realities of the criminal justice system, then courts have the power to so find.

If this court in this instance believes that because Detective Todrick was sanctioned and reeducated he will be deterred from future Fourth Amendment violations, then we have accomplished everything the Court in *Mapp* sought to accomplish without excluding the probative incriminating evidence.

Justice May: Can you cite to any other instances where a lower court broke from long standing Supreme Court precedent because the lower court determined that the policy was wrong?

Prosecutor: I think we have a very good example in the Supreme Court's *Nix v. Williams* decision. In *Nix* the Court recognized, without any prompting from higher courts, that "the 'vast majority' of all courts, both state and federal, recognize[d] an inevitable discovery exception to the exclusionary rule."²⁹⁵ Local courts, on their own initiative, carved out an exception. They broke from *Mapp* because they did not feel that the goals of *Mapp* would be served.²⁹⁶

If I might, I would like to turn to the rationale that gave rise to the exclusionary rule. As I've set forth in my brief, our society pays a tremendous price for the rule—this price mandates that the reason behind the rule be sound. Now, despite the protestations of Mr. Bishop, the

whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.").

295. *Nix v. Williams*, 467 U.S. 431, 440 (1984).

296. *See United States v. Seohnlein*, 423 F.2d 1051, 1053 (4th Cir. 1970) (holding that illegally obtained evidence was properly admitted because the police would have learned of the information regardless of the illegality); *Wayne v. United States*, 318 F.2d 205, 209 (D.C. Cir. 1963) (relying on the Court's attenuation of the taint doctrine in *Wong Sun v. United States*, 371 U.S. 471 (1963), and the fact that the evidence would have inevitably been discovered in holding that the exclusionary rule's application was not warranted).

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reason for the exclusionary rule is, and has always been, to deter the police from future violations of the Fourth Amendment.

Justice May: That's correct, Counsel, and for the police—these advocates of law and order—to have evidence of guilt excluded is a great disincentive to violate the rules of search and seizure.

Prosecutor: With all due respect, Justice May, I disagree. I will acknowledge, however, that the police are advocates in the criminal justice system and that they rightfully see themselves pitted against criminals.²⁹⁷ Moreover, one of the ways to succeed in that struggle is not only to make arrests but also obtain convictions. I believe, however, that there is a serious disconnect between arrest and conviction. From my understanding of police behavior, it appears that once the police make an arrest and gather evidence they feel their job is done.²⁹⁸ From that point forward they feel powerless, and if evidence is excluded or convictions are not forthcoming, they feel that is due to the vagaries of the rules of search and seizure, as well as the actions of the lawyers and judges involved.²⁹⁹ This feeling of powerlessness is exacerbated because often the officers that are involved are not even informed whether evidence has been suppressed.³⁰⁰ Because of that disconnect, the operation of the rule works only in an indirect way on the police.

297. See *supra* notes 273–74 and accompanying text.

298. See *Irvine v. California*, 347 U.S. 128, 137 (1954) (“The case is made, so far as the police are concerned, when they announce that they have arrested their man.”).

299. *Id.* at 147 (Frankfurter, J., dissenting). Police feel powerless because they do not have a mechanical process by which to adhere. Rather, police arrests often depend upon the actions of judges and lawyers and how they interpret the rules of search and seizure on a case-by-case basis. Frankfurter stated the following:

Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable. But that is a very different thing from conceiving the results as *ad hoc* decisions in the opprobrious sense of *ad hoc*. Empiricism implies judgment upon variant situations by the wisdom of experience. *Ad hocness* in adjudication means treating a particular case by itself and not in relation to the meaning of a course of decisions and the guides they serve for the future. There is all the difference in the world between disposing of a case as though it were a discrete instance and recognizing it as part of the process of judgment, taking its place in relation to what went before and further cutting a channel for what is to come.

Id.

300. See *Perrin et al.*, *supra* note 11, at 722–25 (“If the exclusionary rule is to have any specific deterrent effect, the offending officers must be apprised of the ruling and the reasons for it.”). As evidenced by the Ventura County study, police officers rarely received any formal communication concerning the outcome of the suppression hearing and “instead frequently learned of the ruling only if the officer happened to be in court when the ruling was announced.” *Id.*

Justice May: Excuse me, Counsel, but I noted your reference to various studies in your brief, and I am skeptical that anyone can produce definitive information about whether officers do or do not care about evidence being excluded and convictions being lost. My common sense tells me that it does matter, that the officers do care what happens. And if they do care, and evidence is excluded and perhaps an otherwise guilty person walks free, that will be a reason for the officer to better perform his job the next time around.

Prosecutor: Justice May, the empirical data does not support your conclusion. While acknowledging that testing in such a complex arena is difficult and may well have a subjective component, it is the best evidence we have for evaluating the effects of the rule. But as I was about to say, for the police to be truly motivated to not violate the laws of search and seizure, there must be a more direct method of getting their attention and requiring them to do their jobs within the law.³⁰¹

Justice May: Counsel, I am very concerned with relying on the “findings” of these studies that by your own account contain a level of subjectiveness. But let’s agree to disagree on that and turn to this business of direct sanctions. I’m worried about the chilling effect this would have on our officers. Wouldn’t we be creating a situation where police officers, concerned that they may be fined, suspended, or even fired, will be less effective in how they go about their jobs?

Prosecutor: There is no question in my mind that if an officer faces the possibility of being monetarily sanctioned, he will have a greater incentive to do his job within the law. But I will not agree that he will be compromised or somehow less effective in going about his job. Let’s step back a moment. Being a police officer in our complicated society is a demanding job. It requires courage as well as knowledge. We demand a lot of our cops, but we do not demand more than what they are capable of. We hire men and women who we believe will be courageous, and we train them so that they will be knowledgeable. All we are asking is that they do the job they were hired and trained to do.

301. See Perrin et al., *supra* note 11, at 683. Heffernan and Lovely believed that “direct sanctions against offending officers would trigger doubts about police intrusions that were *legal*, thus inhibiting vigorous law enforcement and bringing about uncertainty and inaction on the part of the police.” *Id.* Thus, they concluded that indirect sanctions were sufficient to deter illegal police misconduct; “[h]owever, despite the authors’ conclusions, the large number of unwitting violators (34%) shows the extent to which the rule can not operate as a deterrent. There can be no deterrence in the absence of police understanding the law.” *Id.*

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Justice May: What if they are in a difficult position and the path or correct course of conduct is not readily apparent? Given the possibility of sanction, won't they be more likely to step back instead of going ahead and doing their job?

Prosecutor: If the course of conduct is not clear, perhaps we are better served if they step back. I don't see that as compromising; I see that as an officer doing his job right.

Justice Harris: Following along the same lines, the problem I see with direct sanctions is policy perjury. Some of the studies you rely on mention that police perjury is a problem under the current rule, which you maintain offers only an indirect sanction. If we institute a more direct sanction aren't we opening the door to even more police perjury?

Prosecutor: I, too, am concerned about police perjury; and yes, I agree with your concern that this more direct sanction may well increase the instances of perjury.

Justice May: Are you conceding that police perjury will become more prevalent with more direct sanction?

Prosecutor: It may, although I have no way of knowing. Intuitively it seems that may be an adverse result. But I do know that we already have some police perjury—none of us can know to what extent—and what I also know is that it would be far better to stomach some additional instances of police perjury rather than continuing to exclude highly probative and incriminating evidence of guilt.

Justice May: Ms. Alper, your comment begs the question and introduces some gratuitous grandstanding into the argument.

Prosecutor: I am willing to concede that one of the consequences of my position may be more police perjury, but I disagree that my comment was gratuitous. What this court must do is weigh the competing advantages and disadvantages of either staying the course and resorting once again to the tried and failed exclusion approach or setting forth on an alternative path that may well deter the police from future violations while admitting probative evidence of guilt.

Justice Brandeis praised our federal system of government because it allowed the states autonomy within the larger system to experiment with new ideas. This states-as-laboratories idea has been successful in implementing unemployment compensation, minimum-wage laws, public financing of political campaigns, and prohibitions against discrimination in housing and employment.³⁰² Why not here? Are we so

302. See *supra* note 213.

taken with the exclusionary rule that we won't even consider some other way of enforcing and protecting the Fourth Amendment.

The proposal I set forth may create more police perjury, prove to have too much of a chilling effect on the police, or have other unforeseen consequences. None of us will know until we try it.

Justice May: Counsel, your comments suggest to me that you are willing to open a Pandora's Box of both foreseeable and unforeseeable potential problems. Given the uncertainties, would it even be responsible to take the action you propose?

Prosecutor: Justice May, I don't pretend to have all the answers. I do know that the detective in this case will be in a better position to follow the Fourth Amendment the next time he is confronted with a search and seizure situation. I also know that excluding the evidence of Mr. Johnson's meth lab will serve no purpose whatsoever except to allow a dope manufacturer and dealer to be returned to the streets to go about his illegal business.

Justice McPeak: I suspect you are right about *this* detective in *this* case, but I am disturbed that in the next case, or the one after that, in an attempt to avoid exclusion the effected police agency may discipline its offending officer simply to get around exclusion. What I mean to say is that the department is not really interested in deterrence but only in avoiding exclusion of the evidence. I'm concerned about police agency manipulation.

Prosecutor: That's why it is necessary that the judge at the suppression hearing be convinced that the efforts undertaken by the agency are genuine and undertaken with deterrence as the goal before admitting the evidence.

Justice McPeak: Well, then aren't we putting tremendous power in the hands of the judge to evaluate departmental policy?

Prosecutor: Only as it relates to the actions undertaken with regard to the involved officers.

Justice McPeak: I foresee potential problems when a police agency brings pressure to bear on a judge in a particularly volatile case.

Prosecutor: I would suggest that a judge forced to exclude highly incriminating evidence because of police error is already under tremendous pressure under the current rule.

Justice Harris: Ms. Alper, one of the time honored criticisms of the exclusionary rule is that these persons whose Fourth Amendment rights were violated, but whose cases were never filed, have no practical redress. Does your proposal affect those cases?

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Prosecutor: No it does not. Although in preparing for my argument here today, I have come across a number of thoughtful and practical approaches that address your concern. However, unlike what I propose in this instance, those approaches would require legislative action. One proposal in particular set forth a civil administrative remedy modeled after the California Fair Employment and Housing Act, which creates civil administrative remedies for discriminatory housing or employment practices.³⁰³

But, again, that would require legislative action and is far beyond what I am seeking from this court in this case.

Justice Harris: I see your time has expired, Ms. Alper, but I can't get over my lingering concern that what you are seeking is beyond our authority. The exclusionary rule was a creation of the United States Supreme Court; who are we to act in defiance?

Prosecutor: May I respond?

Justice Harris: Go ahead.

Prosecutor: Far from acting in defiance, I believe this court would be acting in accord with Supreme Court precedent. First, the Court has never said exclusion was the sole remedy.³⁰⁴ Second, just as the Court in the recent *Patane* opinion ruled that exclusion was not appropriate when the violation stemmed from Fifth Amendment error, exclusion is only appropriate when it fulfills the goal of deterrence from Fourth Amendment violation.³⁰⁵ In this instance there is no reason to exclude this evidence.

Thank you for your time.

Justice Harris: Well, on behalf of Justice May and Justice McPeak, I would like to thank both Defense Counsel Bishop and Prosecutor Alper for arguments well made. There are timeliness issues with this case, so you can expect our opinion within the week.

V. CONCLUSION

The arguments have been made. The lines have been carefully drawn. The prosecutor's bold proposal that exclusion is not necessary

303. See Perrin et al., *supra* note 11, at 743–55 (proposing that the exclusionary rule be limited in scope to apply only to evidence obtained because of intentional or willful police misconduct, and that those individuals who have evidence seized as a result of reckless, negligent, or innocent conduct have access to a civil administrative process that would include the availability of monetary recovery from the offending officers or their employer).

304. See *supra* notes 92, 250, and 252.

305. See *supra* notes 126 and 252.

even in the face of clear Fourth Amendment error has been examined from every side. Will it prevail?

Is this such a far fetched scenario? The Court has indeed left the door open. And if we are convinced that this very costly exclusionary rule is not accomplishing what it was designed for, can we not move beyond it? Perhaps a bold and innovative prosecutor supported by her office can push her initiative on a trial judge. Perhaps a trial judge, running the risk of appellate rebuke, can pick up the challenge and carry it forward. Is it not time to push past the tried and frustrating course that continues to carve out exception after exception in order to avoid the rule's draconian effect? Is it not time to heed Justice Blackmun's words and recognize that "the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom"?³⁰⁶ Is it not time to put into action Brandeis' theory "that a single courageous State may, if its citizen's choose, serve as a laboratory; and try novel social and economic experiments"?³⁰⁷ Is it not time?

306. *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

307. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

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