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Lawrence Joseph Perrone

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## **CURING THE REAL PROBLEM: CLEANING UP FOURTH AMENDMENT JURISPRUDENCE BY ALTERING OUR CURRENT EXCLUSIONARY RULE TO CONFORM WITH AN INTERNATIONAL MODEL**

*Lawrence Joseph Perrone\**

### I. INTRODUCTION

The Exclusionary Rule is a judicially created mechanism aimed at giving the Fourth Amendment teeth. A violation of the Fourth Amendment thus is met with the bite of the Exclusionary Rule. However, recent Supreme Court case law has suggested that the teeth of the Fourth Amendment (the Exclusionary Rule) may be too sharp.<sup>1</sup> The Fourth Amendment's "sharp" teeth may have begun to be replaced with a new set of dull ones to ensure that its bite does not cut society too deeply.

The highly controversial automatic exclusionary has been called into doubt by many, and supported by others. But it is hard to dispute that many instances where evidence is excluded for extremely technical or unforeseeable Fourth Amendment violations seem perverse to our own sense of justice. When this occurs, the public does not feel more protected, they feel more unsafe. When this occurs, the public does not feel relieved, they feel uneasy. The rigid application of the American exclusionary rule has had the opposite effect of its intended design—less privacy protection for all of us.<sup>2</sup>

This article has three purposes. First and foremost is to submit a proposal into the academic realm advocating for the replacement of the automatic exclusionary rule with a discretionary exclusionary rule, solely in the Fourth

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\* Lawrence Joseph Perrone, J.D., William & Mary School of Law.

1. *See, e.g.,* Herring v. United States, 555 U.S. \_\_\_ (2009); Hudson v. Michigan, 547 U.S. 586 (2006).

2. Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003).

Amendment context.<sup>3</sup> The second purpose of this paper is to generate debate amongst those who advocate for the automatic exclusionary rule and those who call for its abrogation or replacement. Debates will hopefully center around the origins of the exclusionary rule, whether it is constitutionally justified, and whether it should be replaced with an alternative remedy. The final purpose of this paper is to stimulate interest in the criminal procedure jurisprudence of other nations. Too infrequently has our government ignored the practices and precedents of other nations in shaping our policies. International practices and precedents can provide valuable insights and guideposts in shaping future criminal procedure policies, especially since many of these nations have used our jurisprudence as learning tools in shaping their own.<sup>4</sup>

Presumably, this proposal will be resisted and challenged by those who argue that the only way to ensure individual privacy is the automatic exclusionary rule. On the other hand, some argue that the appropriate remedy is not the exclusion of evidence, but rather, punishing police officers and/or reducing prisoners' sentences.<sup>5</sup> In any event, those who support the exclusionary rule in its current form may be reluctant to replace an automatic rule with a discretionary one. But adopting a discretionary exclusionary rule is not an attempt to prosecute and jail more criminals. Rather, it is aimed at protecting more privacy. A discretionary exclusionary model is consistent with the Constitution and protects more privacy by curing the real problem.

The real problem is the complex morass of Fourth Amendment jurisprudence<sup>6</sup> that has resulted from judges avoiding the harsh consequences of the automatic exclusionary rule.<sup>7</sup> Avoidance of this harsh remedy has turned otherwise unreasonable searches into constitutionally protected police action because "courts keep expanding what is deemed a *reasonable* search or seizure."<sup>8</sup> The presence of the automatic remedy has resulted in the Supreme Court taking "a grudging view of what amounts to a 'search' or 'seizure' . . . and has taken a relaxed view of what constitutes consent to an otherwise illegal search or seizure; it has so softened the 'probable cause' requirement . . . and so

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3. This article does not address the application of the automatic exclusionary rule in the Fifth or Sixth Amendment context. Just as a note, I am in favor of an automatic exclusionary rule in these contexts due to the reliability problems associated with these types of constitutional violations. This article only addresses the reform of the automatic exclusionary rule in the Fourth Amendment context.

4. Other nations have worked out the kinks in rules that may not operate as efficiently or effectively as we may desire.

5. Calabresi, *supra* note 2, at 114-15.

6. Gregory D. Totten et al., *The Exclusionary Rule: Fix It, But Fix It Right*, 26 PEPP. L. REV. 887, 900-03 (1999).

7. Calabresi, *supra* note 2, at 112.

8. *Id.*

narrowed the thrust of the exclusionary rule that nowadays the criminal only 'goes free' if and when the constable has blundered *badly*."<sup>9</sup>

Freed from the chains of an automatic remedy, judges will be more likely to find constitutional violations. Over time, our Fourth Amendment jurisprudence will become clearer—with privacy more enshrined.<sup>10</sup> When judges are free to find a constitutional violation without fear of the automatic exclusionary rule, it is likely that many more violations will be found ultimately resulting in the transformation of the complex, exception-ridden Fourth Amendment jurisprudence into a set of clearly outlined rules. With clear rules our privacy will be more ensured.<sup>11</sup> Clear rules equal fewer violations, and thus, more privacy.<sup>12</sup>

Part I of this article will describe the history and current state of the American Exclusionary Rule. Part II of this article, in contrast, will outline both Australia and Canada's discretionary approaches to the exclusionary rule. Part III will shift gears and set forth the current debate surrounding the highly controversial American automatic exclusionary rule by articulating the many divergent positions held by scholars and practitioners alike. Part IV will propose the adoption of a discretionary exclusionary rule to replace our current automatic exclusionary rule. This proposal provides a model statute or Restatement, as it were, borrowing concepts and rationale from both Australia and Canada's discretionary models. As will be demonstrated, a discretionary model will be effective in our jurisprudence so long as the factors to be weighed are consistent with our values (rather than factors other countries consider). While reforming the exclusionary rule may be an uphill battle, adding another comparative approach may help paint another picture against an already familiar landscape.

## II. THE AMERICAN EXCLUSIONARY RULE

The Supreme Court in *Weeks v. United States*, facing a blatant violation of the Fourth Amendment, adopted the exclusionary rule in federal courts.<sup>13</sup> The rule required unconstitutionally obtained evidence to be excluded from the proceedings against the accused. The Court gave two justifications for its newly

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9. Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 119, 133 (2003).

10. Replacing the automatic exclusionary rule will likely constrict the definition of "reasonable" thus protecting more privacy.

11. See Totten et al., *supra* note 6, at 900-03.

12. See *id.*

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

crafted rule: (1) to deter unconstitutional police conduct and (2) to preserve and ensure the integrity of the judicial system.<sup>14</sup>

The federal exclusionary rule was not extended to the States until almost five decades later in *Mapp v. Ohio*.<sup>15</sup> In another egregious Fourth Amendment violation, the police searched Mapp's home without a warrant<sup>16</sup> after being denied entry earlier the same day. The Court held that unconstitutionally procured evidence by state officials must be excluded because to hold otherwise "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."<sup>17</sup>

Individuals who support the exclusionary rule as articulated in *Mapp* typically quote *Mapp's* very strong language:

[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.<sup>18</sup>

....

[W]e can no longer permit it [the Fourth Amendment] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment.<sup>19</sup>

*Mapp* is not only important for extending the exclusionary rule to the States, but also for its emphatic command on courts to exclude unconstitutionally obtained evidence. It is also important because it clarified the rationale supporting the rule: "The initial justifications for the rule were to deter improper police conduct, and to protect judicial integrity in terms of evidence offered at trial. These dual reasons have given way to a single rationale for the rule, deterrence of improper police activity."<sup>20</sup>

It is clear that the touchstone of the modern exclusionary rule calls upon courts to ask whether excluding the evidence will deter future police

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14. *Id.* at 394 (stating, "[t]o sanction such proceedings [where unconstitutionally obtained evidence is admitted] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action").

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

16. *Id.* at 645 (production of a search warrant by the prosecution never occurred at trial and the court was in "considerable doubt" whether there was ever a search warrant).

17. *Id.* at 660.

18. *Id.* at 655.

19. *Id.* at 660 (addition to original).

20. Paul Marcus & Vicki Wayne, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. COMP. & INT'L L. 27, 58 (2004) (citing *United States v. Leon*, 468 U.S. 897, 926 (1984)).

misconduct.<sup>21</sup> In light of this inquiry, the Court has created limitations on the application of the exclusionary rule where exclusion would not serve to deter police misconduct. For example, the Court has refused to extend the exclusionary rule to grand jury proceedings<sup>22</sup> but has allowed illegally obtained evidence to be admitted in federal civil proceedings because the deterrent effect is aimed at criminal prosecutions of the accused.<sup>23</sup> In one controversial decision, the Court refused to exclude evidence where the police relied in good faith on a defective warrant issued by a magistrate.<sup>24</sup> Excluding the evidence would not deter police misconduct because the constitutional error was created by the magistrate, not the police.<sup>25</sup>

It seems that since *Mapp* the Supreme Court has incrementally chipped away at the exclusionary rule. However, academics, practitioners, and judges alike still classify the rule as mandatory or automatic. The fact that there are exceptions does not make it any less mandatory. Just two years ago, the Court took another slice out of the automatic exclusionary rule.

In *Hudson v. Michigan*, Justice Scalia writing for the majority stated that the “[s]uppression of evidence, however, has always been our last resort, not our first impulse.”<sup>26</sup> The exclusionary rule will only be applied “where its deterrence benefits outweigh its ‘substantial social costs.’”<sup>27</sup> In *Hudson*, the police were executing a validly executed search warrant. Arriving at *Hudson*’s door the police knocked, announced their presence and then forcibly entered the residence only three to five seconds after their knock and announce. It was stipulated that this was a violation of the Fourth Amendment’s knock-and-announce rule; thus, the only question was whether the Court should exclude the evidence. Scalia and the majority held that the evidence should not be excluded because the societal costs of excluding the evidence outweighed any deterrent effect the rule would have in this particular case where the police had a valid warrant and knocked and announced, but only waited three to five seconds.<sup>28</sup> It is thus clear that the automatic exclusionary rule is becoming less automatic.<sup>29</sup>

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21. See, e.g., *Herring v. United States*, 555 U.S. \_\_ (2009); *Hudson v. Michigan*, 547 U.S. 586 (2006).

22. *United States v. Calandra*, 414 U.S. 338 (1974).

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

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

25. *Id.* at 920-21.

26. *Hudson*, 547 U.S. at 591.

27. *Id.* at 586 (quoting *Penn. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 363 (1998)).

28. See generally *Hudson v. Michigan*, 547 U.S. 586 (2006).

29. *Herring v. United States*, 555 U.S. \_\_ (2009) (holding the exclusionary rule inapplicable when the constitutional error was caused by a police administrative clerk who negligently failed to remove a warrant from the defendant’s computer records and where imposition of the exclusionary rule would not serve its requisite deterrent effect); *Hudson v. Michigan*, 547 U.S. 586, 604 (2006)

The bottom line is that in case after case since *Mapp's* emphatic command courts are in disagreement over what is a reasonable search or seizure. If courts and judges cannot agree, how can a police officer on the beat be expected to apply these rules in the hectic practice of everyday police work?<sup>30</sup> The first step to curing the real problem is to examine the exclusionary rules of other nations, specifically Australia and Canada, in order to illuminate both the benefits and shortcomings of a discretionary exclusionary rule.

### III. AN INTERNATIONAL DISCRETIONARY MODEL OF THE EXCLUSIONARY RULE

#### A. Canada

Comparing our criminal procedure rules to other countries' rules frequently meets resistance. However, if there were ever a country that the United States should look to it should be Canada.<sup>31</sup> Canada has a written constitution in the form of the Canadian Charter containing provisions that "draw heavily upon the American Bill of Rights."<sup>32</sup> The Charter also has constitutional restrictions on police powers similar to the Fourth Amendment of the United States Constitution: "[e]veryone has the right to be secure against unreasonable search or seizure."<sup>33</sup> In addition, the Charter contains an express provision dealing with the exclusion of illegally obtained evidence. Canada's exclusionary rule is discretionary, however, not automatic.<sup>34</sup> The Canadian Charter states:

Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the

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("Even then, however, the Court would have to acknowledge that extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits our discretion in applying the exclusionary rule") (Kennedy, J., concurring).

30. See *Totten et al.*, *supra* note 6, at 901-03.

31. James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 81-82 (1999) (stating that

Canada and the United States share close geographic proximity, similar cultures, and a common language. Both nations have ethnically diverse populations forged from immigrant citizens who predominantly reside in concentrated urban areas. Both nations have prospered throughout the post-war era and share similar levels of economic development. Although differences definitely exist, it is arguable that no two nations share so many similarities).

32. *Id.* at 82.

33. Constitution Act, 1982 pt. I, § 8.

34. *Id.* § 24(2).

circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.<sup>35</sup>

The similarities of Canadian constitutional law with the United States and the clear restrictions placed on police search and seizure procedures suggest that “Canada has the most fully developed exclusionary law of any country studied outside of the United States.”<sup>36</sup> One very stark difference between the Canadian rationale for their exclusionary rule and the United States’ is that Canada’s adoption of the discretionary model was fueled by ensuring “the integrity of the judiciary and the legal system, not deterrence, that lead Canada to reconsider its position on illegally obtained evidence.”<sup>37</sup> Judicial integrity is the hallmark of Canada’s discretionary model and courts will consider “all the circumstances” to determine whether sanctioning the improper police action will bring “the administration of justice into disrepute.”<sup>38</sup>

During the first ten years of Canada’s adoption of the discretionary exclusionary rule, forty cases reached the Supreme Court of Canada in which nineteen cases completely excluded the evidence.<sup>39</sup> Canada’s model is effective and its emphasis on judicial integrity may be useful in reforming the American exclusionary rule. However, another international comparison is necessary.

#### *B. Australia*

Australia’s Constitution does not have a Fourth Amendment equivalent and most “[r]estrictions on police investigatory powers . . . [are] found in State statutes and in the common law.”<sup>40</sup> Traditionally, Australian courts followed the English model where judges could only exclude evidence that would ultimately result in unfairness to the defendant’s trial.<sup>41</sup> The English rule was replaced in 1978 by the High Court in *Bunning v. Cross*.<sup>42</sup> There, the Australian High Court established a multi-factor test designed at weighing individual liberties with the public interest in obtaining convictions for guilty criminals.<sup>43</sup> Judges have discretion when deciding whether unlawfully obtained evidence will be

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35. *Id.*

36. Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 382 (2001).

37. Stribopoulos, *supra* note 31, at 117.

38. *See id.*

39. F.L. Morton et al., *The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982-1992*, 5 NAT’L J. CONST. L. 1, 32 (1994).

40. Stribopoulos, *supra* note 31, at 90-91.

41. *Id.*

42. *Bunning v. Cross* (1978) 141 C.L.R. 54.

43. *Id.* at 77-81.



excluded. The court "is required to balance the need to convict the guilty against the need to condemn police misconduct."<sup>44</sup> Factors the court may consider are:

- (1) Seriousness of the crime
- (2) Deliberateness of the police misconduct
- (3) Relationship between the illegality and the cogency of the evidence
- (4) The ease with which evidence could have been obtained if police had complied with the law
- (5) The policy underlying the relevant regulation.<sup>45</sup>

Because of the absence of a Fourth Amendment equivalent the "raison d'être is thus to facilitate police investigation rather than to protect individuals from undue interference."<sup>46</sup> The rules governing police conduct are made up of statutory grants of powers alongside statutory restrictions.<sup>47</sup> Examining the discretionary model, one scholar has recently tested the effectiveness of Australia's exclusionary rule.

Bram Presser reviewed a series of thirty-nine cases that reached the High Court in order to test the efficacy of Australian discretionary model.<sup>48</sup> After reviewing these cases Pressor concluded that Australian courts are very reluctant to exclude evidence after finding the police acted unlawfully.<sup>49</sup> Specifically, only six of the thirty-nine cases excluded evidence where an objection was made to the introduction of the evidence based on police misconduct.<sup>50</sup> Based on these empirical findings, Pressor drew five empirically supportable conclusions: (1) Judges had liberal attitudes to police misconduct; (2) Police were given extra latitude in drug-related cases; (3) Appellate courts were more likely to find police misconduct when it would not ultimately result in the exclusion of evidence; (4) Despite police misconduct, evidence not likely to be excluded in serious cases; (5) Evidence was more likely to be excluded when defendant was within a protected class.<sup>51</sup>

These findings are not surprising when looking at the factors Australian judges consider and when viewed in light of Australia not having a Fourth Amendment equivalent. The balance in Australia is tilted towards police

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44. Marcus & Wayne, *supra* note 20, at 41.

45. *Id.*

46. *Id.* at 38.

47. *Id.*

48. Bram Presser, *Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence*, 25 MELB. U. L. REV. 757 (2001).

49. *Id.* at 777.

50. *Id.* at 776.

51. *Id.* at 777-82.

investigation rather than protection of individual privacy.<sup>52</sup> While the findings are not surprising, these results are unacceptable in America. But there are many aspects of the Australian system that may be useful to our system.<sup>53</sup>

The problem in Australia is not the discretionary model. Rather, the problem with their system, if applied to ours, is the tilt towards criminal investigation and the factors that are weighed by the judges. Our Fourth Amendment requires that our system be tilted heavily toward the individual and different factors to be weighed. Before incorporating the international discretionary model into the American system, an in-depth examination of the debates surrounding our automatic exclusionary rule will serve to highlight some of the complaints and benefits of an automatic model.

#### IV. THE CURRENT DEBATE—TO EXCLUDE OR NOT TO EXCLUDE, THAT IS THE QUESTION

This section will outline the different positions held by scholars and their divergent justifications for either keeping our current exclusionary rule intact or reforming it with another proposal. Many of these scholars advocate that the automatic exclusionary rule is the only mechanism that can sufficiently protect Americans' privacy rights while others argue for its complete abrogation.

Scholars debating the exclusionary rule argue from all angles. One novel argument supporting the current exclusionary rule is that it is constitutionally justified and required under separation of powers principles.<sup>54</sup> Timothy Lynch argues that our system of "checks and balances" requires the judiciary to keep the executive branch in check by excluding evidence that violates the Constitution.<sup>55</sup> This constitutional justification stems from the judicial nature of the Fourth Amendment's plain language: "(1) the judicial nature of the warrant-issuing process; (2) the 'probable cause' requirement; (3) the 'Oath or affirmation' requirement; and (4) the particularity requirement."<sup>56</sup> Lynch's persuasive constitutional justification for the exclusionary rule on separation of powers principles compels the conclusion that the exclusionary rule is constitutionally justified. Thus, any reform that attempted to replace the exclusionary rule with other remedies—like civilian review boards<sup>57</sup> or constitutional tort litigation—would fall short of what our constitutional

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52. Marcus & Wayne, *supra* note 20, at 38.

53. See discussion *infra* Part IV.

54. Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 716 (2000).

55. *Id.* at 717.

56. *Id.* at 725.

57. See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 592-604 (1997).

structures requires. However, if Lynch's argument wins the day, separation of power principles would not preclude replacing the automatic exclusionary rule with a discretionary one. Under either, the judiciary is still performing its "check" on the executive, and the judicial branch is not admitting constitutionally infected evidence obtained by a coordinate branch of government.

On the other hand, Justice Blackmun stated in *United States v. Leon* 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."<sup>58</sup> Taken at face value, this statement implies that the exclusionary rule truly is not commanded by the Fourth Amendment; rather it is merely "the best remedy at hand" to protect privacy.<sup>59</sup>

Heeding Justice Blackmun's call, Caldwell and Chase argue that the American exclusionary rule should be reformed and that, in its current form, the exclusionary rule (1) does not deter police misconduct; (2) generates public hostility towards the criminal justice system; (3) places substantial financial burdens on the criminal justice system; (4) provides an incentive to and encourages police cover-ups and perjury; (5) decreases individuals' privacy rights; and (6) results in inefficient prosecutions.<sup>60</sup>

Their proposal argues that the automatic exclusionary rule should be replaced with a tri-partite mechanism. First, after a court finds a constitutional violation there must be some affirmative duty on the courts or the police to educate officers of their mistakes, and according to Caldwell and Chase, there currently is no education system in place to correct future police action.<sup>61</sup> Second, there must be a punishment imposed on police officers that violate the Fourth Amendment, including a sliding scale where "innocent" mistakes may only require mandatory attendance to training classes whereas intentional violations may be punished by fines, suspensions, or community service.<sup>62</sup> Finally, there must be an incentive for the defendant to raise constitutional violations, and because the exclusion of evidence would no longer be available, the incentive would be a reduced sentence (assuming the defendant is convicted).<sup>63</sup>

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

59. Henry 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, 66 (1994).

60. *Id.* at 49-56.

61. *Id.* at 68-69.

62. *Id.* at 69-70.

63. *Id.* at 70-72.

Similar proposals have been mentioned by other esteemed individuals, garnering much attention. Second Circuit Court of Appeal Judge Guido Calabresi proposed replacing the exclusionary rule with a similarly novel system.<sup>64</sup> In his model, defendants could only raise questions concerning the propriety of evidence after the trial was over.<sup>65</sup> If a violation is found, the defendant gets a reduction on his sentencing points.<sup>66</sup> The more egregious the police conduct, the more of a reduction in sentencing guideline points.<sup>67</sup> Thus, an egregious violation paired with a relatively minor criminal defense may result in the defendant going free, or in more serious cases, the defendant may get several years reduced from the sentence.<sup>68</sup> The second part of his model imposes direct punishment upon the violating officers (similar to Caldwell and Chase's proposal).<sup>69</sup> The more egregious or willful the conduct, the harsher the punishment (which may include criminal punishment under Calabresi's proposal).

Yale Kamisar responded to Calabresi's proposal by calling it "disappointing" and concluding that the punishment component of Calabresi's model, assuming the police officer's superiors would be the one making the punishment decision, would "likely have no impact on the police at all."<sup>70</sup> Moreover, the defendant would be convicted on the basis of constitutionally infected evidence even when the police conduct was willful, intentional, or reckless.<sup>71</sup> Additionally, Kamisar notes the likelihood of adopting such an approach seems impracticable because it may be political suicide for politicians to advocate imposing direct punishment on police officers for violating a defendant's Fourth Amendment rights.<sup>72</sup>

Defending the exclusionary rule, Kamisar points out that critics often assume "that the criminal defendant who benefits from the application of the search and seizure exclusionary rule will often be a murderer or rapist."<sup>73</sup> Kamisar cites a study performed by Thomas Davies concluding that the exclusion of evidence in murder, rape, and other serious violent cases are

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64. Calabresi, *supra* note 2, at 116-18.

65. *Id.* at 116.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 116-17.

70. Kamisar, *supra* note 9, at 135-36.

71. *Id.*

72. *Id.* at 127.

73. *Id.* at 131 (footnote omitted).

“exceedingly rare.”<sup>74</sup> Kamisar provides an effective defense of the exclusionary rule, poking holes in many of the arguments advocating for its reform. However, Kamisar may tell everyone else why they are wrong, but his article fails to clearly state why he is right.

Conversely, Totten et al., have proposed a balancing test that considers the following factors:

- (1) The magnitude of the illegality,
- (2) The good faith of the officers,
- (3) The importance and probative value of the evidence,
- (4) The degree to which the admissibility of the evidence is likely to effect the integrity and validity of the fact finding process,
- (5) The seriousness of charged offenses,
- (6) The likely effect on public safety of inadmissibility,
- (7) The extent to which a serious injustice would result from admissibility,
- (8) Clarity of the law,
- (9) The extent to which the officers should have known at the time of their conduct that it was illegal,
- (10) The extent to which the officers’ conduct was an invasion of personal privacy and the magnitude of that invasion,
- (11) The extent to which good faith consideration of public safety and officer safety influenced their decision.<sup>75</sup>

Fundamentally, a balancing test is not very different than a discretionary model that weighs factors. The balancing test is a good idea, but the factors set forth by Totten and company are both deficient and redundant. A new proposal is in order if the proper balance between privacy and government interference is to be struck.

## V. FOCUSING ON SOLUTIONS

### *A. Proposed Discretionary Exclusionary Rule*

The privacy rights of Americans would be protected to a higher degree if we adopted a discretionary model of the Exclusionary Rule. In our system,

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74. *Id.* (citing Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES. J. 611, 640, 645.

75. Totten et al., *supra* note 6, at 914-15.

judges do not have discretion to exclude evidence for constitutional violations. This is in stark contrast to both the Australian and Canadian systems that allows judges to first determine whether the government's actions were unlawful and then permits the court, despite the existence of unlawful police conduct, to use its discretion in deciding whether to exclude the evidence or not.

Admittedly, there are more significant and intolerable problems with the Australian exclusionary rule than the Canadian model. For example, one factor Australian courts may consider is the seriousness of the crime.<sup>76</sup> Under my proposal, see *infra*, judges would not be permitted to consider the seriousness of the crime. Preventing judges from considering this factor would ensure that judges were not merely excluding evidence in cases where minor crimes were committed. By disallowing this factor, hopefully, it will cure the troubling empirical finding that Bram Presser found in his study of Australian courts.<sup>77</sup> The focus should be on an objective view of police conduct. A violation of the Constitution is identical whether it occurs in seizing marijuana or in arresting a murderer. The only instance where the seriousness of the crime would be relevant would be in discussing whether an exception to the warrant requirement was present (e.g., exigent circumstances).

The Canadian model has fewer problems, but the factors our courts consider must reflect our jurisprudence and our values. The emphasis on ensuring judicial integrity is borrowed from the Canadian model. The Canadian rationale is to maintain a just public perception of the judiciary. Our need to ensure judicial integrity would be more based on separation of powers principles than public perception.

The following proposal will cure the deficiencies of our current automatic exclusionary rule while maintaining our emphatic demand that privacy be protected from government invasion. It does so by adopting the overall discretionary model of Australia and Canada by simultaneously addressing their shortcomings and incorporating certain respective aspects in outlining the factors for American courts to consider—factors that reflect our Constitution, our jurisprudence, and our values.

### **The Exclusion Of Evidence § 1: Discretionary Exclusionary Rule.**

In all instances where it is found that the government has violated the Fourth Amendment rights of any person, a court may, in its sound discretion, exclude the unlawfully obtained evidence. Factors the court must consider are: (1) the place of the violation, (2) whether the violation was in good faith, negligent, grossly negligent, reckless, or willful considering the clarity of the law, (3) whether other means were

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76. Marcus & Wayne, *supra* note 20, at 41.

77. Presser, *supra* note 48.

available to gather the evidence without violating the Constitution, (4) whether exclusion would serve to deter future constitutional violations and (5) whether refusing to exclude evidence would call into doubt judicial integrity. The court must not consider such factors such as (1) the seriousness of the underlying criminal offense, (2) the degree of necessity of the evidence to the government's case, or (3) the availability of remedies other than the exclusion of evidence to the defendant.

#### Comments

**(a) Burden of Proof, A Heavy Presumption.** After a constitutional violation is first found, the government has the heavy burden in persuading the court to exercise its discretion to exclude the evidence. The exclusionary rule is heavily presumed to be proper in the case of *any* Fourth Amendment violation. If the court determines the exclusionary rule is improper in a given case, it must set forth its reasoning as to each factor considered, the weight given to each factor, and the legal justification for its conclusion.

**(b) Standard of Review.** All decisions of the trial court excluding evidence are to be reviewed on appeal for an abuse of discretion standard of review. All decisions of the trial court refusing to exclude evidence are to be reviewed *de novo*.

**(c) Purpose.** The purpose of the discretionary exclusionary rule is threefold: (1) to protect the privacy of individual citizens, (2) to present a "check" upon the executive branch in executing their police powers, and (3) to deter unconstitutional acts committed by the government. In applying the discretionary exclusionary rule, courts should keep in mind that the Fourth Amendment commands that individual liberty be placed above the need to facilitate criminal investigation or to procure convictions.<sup>78</sup> Courts no longer are required to exclude evidence in Fourth Amendment violation instances, but rather may exercise their discretion in deciding whether to exclude evidence taking into consideration the factors outlined in the statute, the burden of proof, and the heavy presumptions found in section (a). The intent of this rule is not to reduce the current levels of excluded evidence. The ultimate aim is for the court to decide the Fourth Amendment violation issue free of a mandatory exclusionary rule in order to revamp current Fourth Amendment jurisprudence into clear standards. These clear standards are necessary for the

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78. U.S. CONST. amend. IV.

government to know precisely when they are acting within the parameters of the Fourth Amendment.

**(d) Factors.**

(1) *The place of the violation.* The first factor to weigh in considering whether evidence should be excluded after finding a violation of the Fourth Amendment is where the violation occurred. If the constitutional violation involved a residence, there is a strong presumption that exclusion is proper.<sup>79</sup> The presumption would be weaker if the violation involved a vehicle or an open field.

(2) *Whether the violation was in good faith, negligent, grossly negligent, reckless, or willful considering the clarity of the law.* This factor requires addressing whether the police officer knew or should have known that their actions were unconstitutional. If a police department has failed to adequately train<sup>80</sup> their officers or otherwise failed to adequately inform them of new developments in Fourth Amendment law, a heavy presumption of exclusion will rise. Police departments should be presumed to be as informed as a court on the state of Fourth Amendment law. Assuming officers are trained adequately, the level of scienter of the violating police officer should be a factor in determining whether exclusion is proper. This factor is also inextricably linked to whether excluding the evidence would deter the government's action.

(3) *Whether other means were available to gather the evidence without violating the Constitution.* If the police could have used other legal means to procure the unconstitutionally obtained

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79. *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (“[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people”); *Wilson v. Layne*, 526 U.S. 603, 604 (1999) (adhering to the “centuries-old principles of respect for the privacy of the home . . .”); see also JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE* ix (2d ed. 1991).

The raw power held by a police officer conducting a search is enormous. An officer wielding a search warrant has the authority of the law to forcibly enter one's home and search for evidence. The officer can enter at night and wake you from your sleep, roust you from bed, rummage in your drawers and papers, and upend your entire home. Even though the particularity clause of the warrant defines the scope of the search, the search, as a practical matter, will be as intense as the officer chooses to make it.

*Id.*

80. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).



evidence, there is a rebuttable presumption that the evidence should be excluded. This factor has been borrowed from both Australia<sup>81</sup> and Canada's model. This is only a rebuttable presumption rather than a strong presumption because most of the time the police could have used alternative legal means to procure the evidence. If the evidence could not have been obtained *but for* the illegal action the government will likely not be able to rebut the presumption.

(4) *Whether exclusion would serve to deter future constitutional violations.* This factor is drawn directly from the American exclusionary rule and is intended to import the analysis already used by American courts. Specifically, courts weigh the deterrent benefits of excluding the evidence versus the societal costs of not excluding the evidence.<sup>82</sup>

(5) *Whether refusing to exclude evidence would call into doubt judicial integrity.* This factor is the hallmark of the Canadian system and was initially one of the justifications for the American rule. Judicial integrity must resurface<sup>83</sup> as a factor to consider in this proposed rule.<sup>84</sup> Using Canada's standard, if admitting the evidence would bring "the administration of justice into disrepute" a court should exclude the evidence. Moreover, courts must keep in mind that they are the "check" upon the executive in our system resting upon separation of powers.<sup>85</sup>

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81. Marcus & Wayne, *supra* note 20, at 41 (citing factor four: "ease with which evidence could have been obtained if police had complied with the law").

82. *Hudson v. Michigan*, 547 U.S. 586, 587 (2006).

83. *Elkins v. United States*, 364 U.S. 206, 222 (1960) (speaking of the "imperative of judicial integrity" in the exclusionary rule context).

84. *See Olmstead v. United States*, 277 U.S. 438, 485 (Brandeis, J., dissenting)

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against this pernicious doctrine this court should resolutely set its face.

*Id.*

85. *See Lynch, supra* note 54.

These five factors, borrowing the discretionary model from both Australia and Canada would be a constitutionally permissible and more effective replacement to our current exclusionary rule. As is obvious, the factors, burdens of proof, presumptions, and circumstances that are not permitted to be considered are all strongly weighted toward protecting individual privacy.

*B. Factors the Court May Not Consider*

The court may not consider factors such as (1) the seriousness of the underlying criminal offense, (2) the degree of necessity of the evidence to the government's case, or (3) the availability of remedies other than the exclusion of evidence to the defendant. First, the seriousness of the crime underlying the criminal offense may not be taken into consideration because, if it were, a court would have an incentive to not exclude evidence even in the case of an egregious constitutional violation. Australian courts weigh this factor and it has contributed to unacceptable results.<sup>86</sup> This is a prime example of how Australian factors are unacceptable to American jurisprudence. But Australia's overall discretionary model can still be borrowed.

Second, courts may not consider the necessity of the evidence to the government's case. Whether the evidence constitutes a part of or all of the government's case is simply irrelevant to whether evidence should be excluded. To allow this factor to be weighed police would have an incentive to violate an individual's privacy rights in situations where obtaining the incriminating evidence could not be effectuated by lawful means.<sup>87</sup>

Third, judges should not be allowed to consider the availability of other remedies to the defendant. Of course, disallowing this factor is in contradiction to the Supreme Court's recent decision in *Hudson v. Michigan*.<sup>88</sup> After considering the factor outlined above, if the court finds the government has met their burdens and overcome the heavy presumptions weighted against them, then the court may use its discretion to exclude the evidence. Giving courts a mental safety net ("the defendant can always file a lawsuit") detracts from the dispositive issue: has the evidence been unconstitutionally infected to the extent that refusal to exclude it is inconsistent with the purposes of the rule?

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86. See Presser, *supra* note 48, at 780.

87. One of the factors courts must consider under my proposal is "whether other means were available to gather the evidence without violating the Constitution." Presumably this factor would protect against the government arguing the unlawfully obtained evidence is necessary to their case if the evidence could not have been obtained "but for" the unlawful act. However, not allowing courts to even consider this argument is likely a more effective method for preventing courts from entertaining such arguments.

88. *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

The factors judges may consider, and those that they may not, represent our values and jurisprudence and ultimately will cure the real problem with our jurisprudence.

#### VI. CURING THE REAL PROBLEM.

Reforming exclusionary jurisprudence in this manner provides a solution to the real problem. The real problem is not the harshness or reflexive application of the exclusionary rule. The real problem is that our current Fourth Amendment jurisprudence is a morass of confusing, complex, and subtle legal niceties nearly impossible to master by lawyers, let alone police officers.<sup>89</sup> For example, the California Peace Officers Legal Sourcebook has more than two hundred pages addressing fifty different topics.<sup>90</sup> Police officers are not the only ones confused. Legal academia, judges, and lawyers “cannot predict with accuracy the application of exclusionary rules in a particular hearing.”<sup>91</sup>

One of the best examples of how confusing and unclear Fourth Amendment jurisprudence has become is an experiment conducted by New York Supreme Court Judge Harold Rothwax. Judge Rothwax distributed two fact patterns of then recently reported Supreme Court opinions to a set of appellate justices.<sup>92</sup> He then asked the appellate justices to decide the suppression issue.<sup>93</sup> More than half the appellate justices decided the case differently than a majority of the Supreme Court.<sup>94</sup>

One commentator has put it nicely: “Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course—yet most scholarship contents itself with rearranging the deck chairs.”<sup>95</sup> The complex morass of Fourth Amendment jurisprudence<sup>96</sup> has resulted from judges avoiding the harsh consequences of the automatic exclusionary rule.<sup>97</sup> Avoidance of the harsh remedy has turned otherwise unreasonable searches into constitutionally

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89. Totten et al., *supra* note 6, at 900-03.

90. Joel Carey, California Dep't of Justice, California Peace Officer's Legal Sourcebook (1998).

91. MACKLIN FLEMING, OF CRIMES AND RIGHTS: THE PENAL CODE VIEWED AS A BILL OF RIGHTS 156 (Norton & Co. 1978).

92. HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 58 (Random House 1996).

93. *Id.*

94. *Id.* at 58-59.

95. Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

96. *See id.* at 800-03.

97. *See Calabresi, supra* note 2, at 111-12.

protected police action because “courts keep expanding what is deemed a *reasonable* search or seizure.”<sup>98</sup>

In our system judges frequently stretch, contort, and expand the definition of what constitutes a reasonable search.<sup>99</sup> Presumably, judges do not want blood on their hands if they release a dangerous criminal back into society only to kill, rape, or rob again. Moreover, though judges have taken the oath (external oath), to serve the law rather than their own sense of justice or morals (internal oath), it is unclear whether these two oaths are in reality severable. The end result is an interpretation of the Fourth Amendment’s “reasonable search and seizure” requirement that permits many searches and seizures that should be considered unreasonable.

For some, a discretionary model may be too radical a departure from an automatic model. However, in a sense, the manner in which judges “choose” to interpret the word “reasonable” is no different than allowing them “discretion” in applying a rule of exclusion. In the Fourth Amendment context, if judges are required to consider the totality of the circumstances and they may place certain weight on some facts and diminish the value of other facts, how is this different from requiring judges to consider certain factors and permitting them to use their discretion in deciding whether to apply a legal rule? Certainly, when weighing the factors judges will “choose” what weight to give each respective factor just like a judge may give certain weight to particular facts in determining what is reasonable. Likewise, in differing situations different facts may weigh more heavily than others. Similarly, in different situations, in a discretionary-weigh-the-factors-model judges may assign different weight to different factors.<sup>100</sup>

While this analysis is based on logic, experience drives the need for reform. Our experience tells us that Fourth Amendment jurisprudence must be reformed. “The life of the law has not been logic; it has been experience.”<sup>101</sup>

## VII. CONCLUSION

A discretionary-weigh-the-factors-model would result in courts finding more constitutional violations when relieved of the pressures of a harsh automatic exclusionary rule. By allowing courts to more freely find

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98. *Id.* at 112.

99. *Id.*

100. Assume the results of a discretionary model exclude the same amount of evidence as the automatic rule. If this is true, then some may say, “Why change?” The reason why the change should occur is that by making the rule discretionary, judges can find more constitutional violations and clean up the mess of Fourth Amendment jurisprudence.

101. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown, & Co. 1881), available at [http://www.law.harvard.edu/library/collections/special/online-collections/common\\_law/Lecture01.php](http://www.law.harvard.edu/library/collections/special/online-collections/common_law/Lecture01.php).

constitutional violations the law will become more certain, ultimately informing police more clearly on what they may and may not do.